WITNESS STATEMENTS:

THEIR USE AND MISUSE

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"The passage in the witness statement is wholly untrue... (The facts) lead to a finding on the First Defendant's credibility. He has none. In my view, he is a barefaced liar prepared to say anything to serve his immediate purpose"[1]

INTRODUCTION

1. The use of witness statements in employment tribunal litigation, as well as in general civil litigation, is well - established in England and Wales. That is not routinely the case in Northern Ireland. However, it would appear that they are being ordered with increasing frequency in the Industrial and Fair tribunals in Northern Ireland. In discrimination cases, it is understood that witness statements are usually ordered absent compelling reasons not to do so.

2. A key distinction is that in England and Wales, exchanges are usually simultaneous. The Northern Ireland tribunals regularly order sequential exchange, with the Claimant often going first. It is suggested that it is instructive and helpful in considering the use of witness statements in Northern Ireland to consider the approach to, and the experience of, the civil courts in England and Wales. Assistance might be derived from such study even though not directly applicable to the Northern Ireland tribunal. It is unlikely that a less rigorous approach would be acceptable.

3. There are many advantages, in terms of procedure and saving of tribunal time, attached to the use of witness statements. However,

[1] Garland J commenting on the evidence of an ex - employee accused of breach of confidentiality and post termination restrictive covenants in **M3 consultants v Tillman and another** [1998] (unreported).

there are also some pitfalls and traps for the unwary as well as the potential for abuse, not always intended, of the proper purpose and function of witness statements.

4. This paper will seek to outline:-

4.1. the proper nature and purpose of a witness statement;

4.2. what a witness statement should not contain;

4.3. the approach to crafting a witness statement;

4.4. what the finished product should contain and look like.

The paper will conclude by highlighting specific problems and offering the writer's views on the value or otherwise of having witness statements.

I. WHAT IS A WITNESS STATEMENT?

5. The answer to this question may seem, at first blush, to be blindingly obvious. In the experience of many judges, at least in England and Wales, many lawyers do not seem to know, or do not demonstrably show that they do know, the answer to this basic question. That this is so can be gleaned by reference to the notes to the Civil Procedure Rules (England and Wales), at paragraph 32.4.5 which contains this tersely expressed observation:-

"Unfortunately, rules, practice directions and guidance as to the content of witness statements appear to be habitually ignored by practitioners. Periodically, the Court of Appeal and individual trial judges have criticised lawyers for overloading witness statements with material that should not be included. The problem and, in particular, the effect that unnecessary prolixity can have on increasing costs, were examined in the *Review of Civil Litigation Costs: Final Report* (December 2009)[2]

[2] The Jackson Report

(Ch.38 paras 2.1 to 2.3, pp.376 to 379) where recommendations for case management and costs sanctions reforms designed to deal with it were made."

6. A witness statement is intended to replace oral testimony but not the oral testimony of anything the witness is desirous of saying, or, more often, what the lawyers might like the witness to say.

7. According to the Civil Procedure Rules (E&W)[3]:

"A witness statement is a written statement signed by a person which contains the evidence which that person <u>would be allowed to give orally</u>" (emphasis added).

8. The witness statement is there for the witness to speak to, in his/her own words, the facts that are relevant to the case before the court or tribunal.

9. Part **H1.1(i)** of the Commercial Court Guide (England and Wales) provides this guidance:-

"...the function of a witness statement is to set out in writing the evidence in chief of the witness; as far as possible, therefore, the statement should be in the witness's own words".

10. Taking up that concern, Toulson J. observed in **<u>Aquarius Financial Enterprises Inc. v. Various Underwriters at Lloyd's</u> 2 LL Rep 542:**

"46. It cannot be too strongly emphasised that this means the words which the witness wants to use and not the words which the person taking the statement would like him to use."

Ideally therefore, every word in the witness statement should be the words of the witness.

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[3] CPR 32.4.1

11. The evidence contained in a witness statement should not be partial. A clear warning was given by Peter Smith J. in **A & E Television Networks LLC v. Discovery Communications Europe [2015] EWHC 309 (England and Wales)**. The Judge spoke against the "finessing" of statements to present the evidence in a favourable light. The lawyers preparing the witness statement should, said the Judge, "curb their enthusiasm" in seeking to obtain the best for their clients. To do so may result in unfairness to the witness who might be required to justify a witness statement when its true effect is not understood.

12. Put another way, the witness statement should contain the truth, the whole truth and nothing but the truth[4]. The regard that must be had to the dimension of the evidence being the "whole truth" is not always understood or respected.

13. If the matters deposed to are not within the witness's own knowledge, that should be made clear and the source of the words which are matters of information or belief should be explained.

14. A good witness statement should make it easy for the Judge to get to the salient facts. Doing so can only assist you in persuading the tribunal to find in your favour.

15. Judicious use of headings and sub - headings can assist navigation through a lengthy and complex witness statement.

16. In **Smith v. J&M Morris (Electrical Contractors) Limited** [2009] EWHC 0025 HHJ Oliver-Jones QC remarked that non-lawyers can sometimes do better than the professionals:

"It is not infrequently the case that witness statements prepared by litigants-in-person are superior in form and

[4] See e.g. Court Guides in England and Wales, Chancery Guide, Appendix 9, paragraph 6 and Queen's Bench Guide, paragraph 7.10.4(1).

substance to those prepared by solicitors.... It is often the case that witness statements, drafted by solicitors or their agents in good faith (I exclude, of course, any case of deliberate intent to deceive by a witness or drafter), are signed or otherwise accepted by witnesses without any or any proper consideration of their accuracy, completeness or even truth."

II. WHAT A WITNESS STATEMENT SHOULD NOT CONTAIN

Not a vehicle for submissions

17. Judges frequently refer to the unhelpful nature of such an approach. In **E.D. & F. Mann Liquid Products Limited v. Patel [2002] 1706 EWHC (QB)**, His Honour Judge Dean QC criticised the size and content of a witness statement submitted in the case. Consider this exchange with counsel at the end of the case concerning costs:

"JUDGE DEAN: Matters of that sort should not be in any witness statement, and I do not think there is any encouragement to make submissions in witness statements in the Commercial Court or in any other court.

COUNSEL: Whether it is in the witness statement or in my skeleton argument, that cost has to be incurred.

JUDGE DEAN: I have to read it twice and it wastes time, and it is inappropriate in a witness statement. He should not make submissions and neither should he make excessive reference to documents. A witness statement is a written statement signed by a person who gives evidence, and only evidence –

COUNSEL: My Lord, there is a distinction though between witness statements for the purposes of what used to be called interlocutory proceedings.

JUDGE DEAN: Witness statements are not the place for argument. It means you have to read everything twice. I am going to go through this statement. Paragraph 8 simply summarises what is in the documents. Paragraph 10 is a pure advocacy point. No witness would be allowed to say that in evidence. A lot of it is tendentious comment which is bound up with fact. I think that witness statement is an example of what a witness statement should not be whether in the Commercial Court or anywhere else. It is a tendentious

advocate's document. I am minded to disallow the costs of it actually."

18. Warming to his theme, the Judge went on to comment as follows:-

"JUDGE DEAN: Look how long it goes on for. It goes on for 41 paragraphs. That is just a solicitor giving information on what his client has said. He expresses a reference to his client's belief which is not only irrelevant but inadmissible. I think that is a statement of an enthusiastic solicitor who wishes he was an advocate. I am going to cut quite a lot off this. I do not think that is a proper statement at all. If you say that is legitimate under the Commercial Court's practice, you show me the rules of the Commercial Court which say that is so. There is far too much of this. It adds to the time of the hearing and it adds to the time of preparation. Here we have the Commercial Court practice which says that witness statements must comply with the rules. They should be as concise as the circumstances allow. They should not contain lengthy quotations from documents. They should not engage in argument. They must indicate which statements are made from the witness's own knowledge and which are from other sources and state what is the source of the information and belief. It must contain a statement of truth."

19. Worse still, it can actually disadvantage a party. Consider the hapless defendant in **Alex Lawrie Factors Limited v. Morgan [2001] C.B. Rep. 2**. In support of a defence of "**Non est factum**", her affidavit waxed lyrically about the effect of the relevant case law. Her protestation that she had not fully understood the document that she had signed appeared to the Trial Judge to be at odds with one so familiar with the case law and she therefore lost. In the Court of Appeal, the very limited role she had actually played in drafting her statement became obvious. This led to the view expressed by Brooke L.J.:-

"The case is a very good warning of the grave dangers which may occur when lawyers put into witnesses' mouths, in the affidavits which they settle for them, a sophisticated legal argument which in effect represents the lawyer's arguments in the case to which the witnesses themselves would not be readily able to speak if cross-examined on their affidavits. Affidavits are there for the witness to say in his or her own

words what the relevant evidence is and are not to be used as a vehicle for complex legal argument. Those considerations apply just as much to statements of truth under the Civil Procedure Rules as they do to affidavits."

20. In a recent case in the Industrial Tribunal (NI), the Claimant's witness statement contained an exposition of the principles of Natural justice and of its application to his own case. It included specific reference to the Latin tag "**nemo iudex in causa sua**".

21. That was not the only Latin reference in the witness statement. It also complained of an "egregious" breach of natural law (sic). It was also largely cut and paste from the IT1. The reader can draw his/her own conclusions from those facts. However, it leads us to another drafting "sin".

No cutting and pasting

22. A series of overly consistent witness statements which are evidently the product of over enthusiastic use of the cut and paste tool might seem superficially attractive. After all, time is saved and at least the witnesses are all saying the same thing. So where is the harm?

23. If the witness's actual recollection of events is not as clear and consistent as the witness statements appear to demonstrate, this is likely to be exposed in cross-examination. Credibility will risk being adversely affected if the witness is prepared to simply put his/her name to a document which contains factual material with which he may not fully agree or even recall. It is an unnecessary risk to take.

24. Cross-examination is not the time for the witness to realise that he either does not have the direct knowledge of certain events or facts or even that he does not fully understand the words contained in his witness statement.

25. In one example in an English ET, a senior employee replicated a series of factual errors in his witness statement that were also contained in the witness statements of others. The context was a PHR on the issue of territorial jurisdiction in the Employment Tribunal. The admission that he had simply accepted and adopted the words of others without knowing whether they were true, or their provenance, irretrievably damaged his credibility. When it was suggested in cross-examination that, effectively, a line could be put through a particular passage in his witness statement, the witness actually took a pen out and did just that. He was to make 12 further corrections and removals during the remainder of his cross-examination.

26. The words *"my lawyer told me to put that in"* must surely qualify for the phrase an advocate would least like to hear when his/her witness is being cross-examined. Although the phrase *"my lawyer told me not to put that in"* is also a noble contender for that prize[5].

No opinions

27. Unless giving expert evidence, it is to be avoided. It can, albeit unintentionally, tend to usurp the function of the decision maker. A preferable course is for the witness to set out the facts that lay behind an opinion and leave the conclusion to be drawn from those facts for submission at the appropriate time.

28. In **Rock Nominees v. RCO Holdings [2004] B.C.C. 466**, Peter Smith J. had this to say:-

> **"81 It is not being unfair to Mr Wilson to say that it is about the only clear part of his evidence. Before he actually gave evidence we had the somewhat surprising spectacle of finding something like 75 per cent of the witness statement being struck out, as Mr Potts QC conceded in effect the material**

[5] This would, of course, tend to show a witness statement to be partial and not one which contains the "whole truth".

there, consisting largely of assertions, expressions of opinion and usurpation of my role, should never have been there in the first place."

29. Care should be taken when referring to documents in a witness statement. This can easily deteriorate into an impermissible commentary, and the giving of an opinion, on what the documents demonstrate. Sir Terence Etherton C. proffered these words in **JD Wetherspoon v. Jason Harris [2013] 1 WLR 3296:**

"39 Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. These points are made clear in paragraph 7 of Appendix 9 to the *Chancery Guide* 7th ed (2013), which is as follows:

"A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they may arise in the course of the trial.""

No repetition of contents of documents

30. The last quotation also highlights the need to avoid setting out large parts of documents that the tribunal will inevitably have to read carefully in any event. For example, in Unfair Dismissal cases, the temptation to replicate large chunks of the dismissal letter is all too rarely resisted. In a case which is very document heavy, the concern that significant documents may be lost, swamped or overlooked can be met by producing a small core bundle. This is preferable to overloading what might be an already lengthy witness statement.

Hearsay evidence

31. Even though admissible, it is undesirable where there is a primary source for the relevant evidence. Primary evidence will undoubtedly carry greater weight where it is available and should be sought out.

32. If not readily available or its production disproportionately expensive, it would be wise to approach such evidence in line with CPR 32 PD 18.2 (England and Wales). The statement should accordingly contain:

- The source of the information
- The time/date/event and context in which the information was conveyed
- What was actually said and demeanour if relevant
- An explanation as to why it was not possible to obtain primary evidence.

Avoid jargon/acronyms

33. Concepts well-understood in one industry may need explaining to a tribunal. In one ET case in which Microsoft was the Respondent, the witness statements, and indeed the oral testimony of the Respondents and the litigant in person, made substantial reference to technical matters well-understood by all involved. All, that is, except the Tribunal and the Respondent's advocate. Addressing such matters in the witness statement could have avoided much tribunal time being taken up with explanations. Even better, a separate glossary would avoid clogging up the statement.

34. Acronyms can also be very confusing even when seemingly well-known to those in a particular field e.g. "TSH" in the medical field can have more than one meaning. Avoid or explain.[6]

No guesswork

35. Another candidate for a totally obvious matter to exclude. However, a witness may feel embarrassed or concerned that he/she has little or no recollection of a seemingly significant event or exchange. An honest witness trying to assist might be tempted to venture a version of events that he/she cannot genuinely recall. *"I don't know"* or *"I can't remember"* is the answer to give in genuine instances of ignorance or forgetfulness. Encourage your witness to be comfortable with those answers.

36. It may be necessary to place the witness's inability to give evidence about a particular matter in some context. Was the event/matter one of many similar situations with which the witness has dealt since the occasion in question? Was the witness perhaps preoccupied with other matters at the material time? If the lapse looks odd, some explanation for it can only assist.

III. DRAFTING/CRAFTING A WITNESS STATEMENT

PROFESSIONAL DUTIES

37. This is an area which should not strike fear or trepidation in the heart of the lawyer charged with the task. Nonetheless, it can cause concern and there are considerations of professional conduct which might arise.

[6] Consider a medical report which says that the patient **"Has had TSH"**. This could be "Thyroid stimulating hormone" or "thoughts of self-harm" depending on the context

ENGLAND AND WALES

38. In England and Wales there are specific rules governing both solicitors and barristers in this regard.

Solicitors

39. Relevant provisions are contained in the **SRA Code of Conduct 2011.**

The following "outcomes" apply:

"You must achieve these outcomes:

O(5.1) you do not attempt to deceive or knowingly or recklessly mislead the court;

O(5.2) you are not complicit in another person deceiving or misleading the court;"

The following "Indicative Behaviours "apply:

Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the Principles:

IB (5.7) constructing facts supporting your client's case or drafting any documents relating to any proceedings containing:

(a) any contention which you do not consider to be properly arguable; or

(b) any allegation of fraud, unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud;

.....

IB(5.9) calling a witness whose evidence you know is untrue;

IB(5.10) attempting to influence a witness, when taking a statement from that witness, with regard to the contents of their statement;

IB(5.11) tampering with evidence or seeking to persuade a witness to change their evidence;

40. Solicitors (and witnesses) must take "the greatest care" to ensure that witness statements are accurate. Lightman J said this in **ZYK Music GmbH v. King** [1995] 3 All E.R.:

40. Before I turn so the evidence of the witnesses, I should first say that in this case the modern procedure designed to shorten the length of trial was adopted of exchanging witness statements and of those witness statements standing as the evidence-in-chief of those witnesses. This procedure requires of all participating in the process of the preparation and making of such statements (solicitors and witnesses alike) the obligation to take the greatest care to ensure that the statements contain the truth, the whole truth and nothing but the truth."

Barristers

41. The comprehensive Bar Council Document "**Guidance on Witness Preparation**" has been replaced since January 2014 by the BSB code of conduct. The key rules are:

"NOT MISLEADING THE COURT

rC6 Your duty not to mislead the court or to permit the court to be misled will include the following

.1 .....

.2 you must not call witnesses to give evidence or put affidavits or witness statements to the court

which you know, or are instructed, are untrue or misleading, unless you make clear to the court the true position as known by or instructed to you.

...

HONESTY, INTEGRITY AND INDEPENDENCE

rC8 You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).

rC9 Your duty to act with honesty and integrity under CD3 includes the following requirements:

.1 you must not knowingly or recklessly mislead or attempt to mislead anyone;

.2 you must not draft any statement of case, witness statement, affidavit or other document containing:

.a any statement of fact or contention which is not supported by your client or by your instructions;

.b any contention which you do not consider to be properly arguable;

.c any allegation of fraud, unless you have clear instructions to allege fraud and you have

reasonably credible material which establishes an arguable case of fraud;

.d (in the case of a witness statement or affidavit) any statement of fact other than the evidence which you reasonably believe the witness would give if the witness were giving evidence orally;

.3 you must not encourage a witness to give evidence which is misleading or untruthful;"

NORTHERN IRELAND

Solicitors

42. There are no obvious provisions in **The Solicitors Practice Regulations 1987(as amended and accurate as at 25 June 2013)** that seem to be directly in point[7].

[7] Regulation 8(1) requires a solicitor to " ... **at all times carry out his work and conduct his practice to the highest professional standards**"

43. Regulation 3 appears to adopt :

(a) the **Code of Conduct for European Lawyers 1988 (as amended) "CCBE";** it is attached as Appendix 1; and

(b) the **International Code of Ethics of the International Bar Association "IBA";** this is attached as Appendix 2 but doesn't appear to assist here.

44. The **CCBE** code provides at 4.4:

"A lawyer shall never knowingly give false or misleading information to the court".

Barristers

45. The Code of Conduct for the Bar of Northern Ireland states the position with regard to the taking of statements in stark terms at paragraph 16.10:

"A barrister must not take a formal or signed statement from a prospective witness in any proceedings or be present when such a statement is taken whether or not he is briefed in those proceedings[8]

46. Section 35 of the Code of Conduct for the Bar of Northern Ireland also refers to the **CCBE** code.

47. Anecdotally, it would seem that barristers in Northern Ireland are called on to "settle" witness statements once drafted. That practice would seem to be in line with the former Bar Council Guidance (England and Wales) at paragraph 9(ix). That Guidance suggests that whilst it is not appropriate for a barrister with conduct of the

[8] Other provisions as to the duties of a barrister may also be relevant here. For example paragraph 4.01 "**A barrister has an overriding duty to the court to ensure the proper administration of justice**" and see also paragraph 4.05 **"In all his work in court for the professional lay client and in all his dealings with the public a barrister must conduct himself with honour and integrity as befits the high standing of his profession".**

case to take witness statements (save in exceptional circumstances), settling statements prepared by others is not discouraged.

FIRST PROOF OF EVIDENCE

48. Four key objectives can be identified:

- The gathering of material evidence to support your case as close in time to the events as possible;
- the proof should be able to form the foundation of the witness statement;
- the proof should stand as a record of what the witness has said at an early stage in the proceedings; and
- the proof will give the lawyer an opportunity to assess the strength and weakness of the case at an early stage, so as to inform any views on settlement.

49. It will usually be appropriate to have at least a two-stage process. An initial proof being taken and a further interview, perhaps with the assistance of, and reference to, any List of Issues that has been prepared. The first stage need not always require an interview as the witness might simply be asked to set down their recollection of relevant events.

50. If the first proof is taken at an interview, the circumstances and environment in which the proof is obtained can also be important. It would assist if the environment is one in which the witness is familiar and/or comfortable. In some instances, this could be the workplace. In others, it may be precisely where the witness is not comfortable as superiors or colleagues may be present.

PREPARING TO INTERVIEW THE WITNESS/LIST OF ISSUES

51. A List of Issues can be a very helpful tool. It might form the outline basis of a witness statement as it will, if properly drafted, reflect the issues of fact and law that the Tribunal will be called upon to determine.

52. Consider whether it is advisable, in an appropriate case, to seek an advice on evidence. Newman J lamented the decline in this approach in **Chase International Express Ltd v McRae** [2004] P.I.Q.R. P21 at paragraph 31:

> **"It may be that the days of a formal advice on evidence are long gone but the need which such advice fulfil remains. Someone on each side in litigation such as this, with sufficient skill to do so, must, at some timely stage before trial, draw up a list of the issues which remain contentious and then consider whether or not there is evidence available to meet those issues. ..... There is a need for evidence and there is a need for an analysis of such evidence; then the judge can make findings of fact by drawing inferences and doing the best he can, but on the evidence which is available."**

53. In complex cases, a matrix, or a Scott Schedule, may assist in identifying whether all the relevant issues have been covered. The columns might include:

- the elements of each specific claim or disputed issue;
- the identity of the witnesses covering that issue;
- a précis of the parties' competing cases;
- documents in support;
- where appropriate, whether a grievance has been made, identifying the document;

- any additional evidence that might be required to be sought in respect of the specific issue.

54. The document is a "living" one and can be added to as the case progresses and other evidence emerges. It will also assist in drawing up a chronology of key events.

55. In the absence of a List of Issues, schedule or advice on evidence, consider at the very least subject areas, if not specific questions, to be asked of each witness and how that witness's evidence will assist in proving your case or disproving your opponent's case.

AT THE INTERVIEW

Leading questions

56. It is good practice to avoid asking leading questions. The use of open questions will promote accurate evidence untainted by the witness's perception of what the interviewer wants to hear or the witness's notion of "good" and "bad" evidence. This will also serve to eliminate what is sometimes referred to as "confirmation bias", that is seeking or providing evidence to support a particular view to the exclusion of other relevant evidence.

The truth and all of it

57. Emphasise that it is the truth that is being sought; it is not a question of the evidence being right or wrong. As full and detailed an account as possible should be sought. The consequences of a failure to adopt this approach were starkly illustrated in the recent case of **Kellie & Kellie v. Wheatly & Lloyd Architects [2014] EWHC 2866 (DCC)**. The witness statement of a planning officer in a professional negligence case appeared to support the Claimant's

case. However at trial, the witness's rather fuller testimony supported the Defendant's case.

58. The Defendant, in seeking indemnity costs, suggested that:-

> **"The inescapable inference was that the claimants either deliberately put forward a selective version of the evidence that Mr Thomas would give or failed adequately to explore the true nature of his evidence despite being asked to do so. Either way, the reliance placed on Mr Thomas's evidence was unreasonable in a high degree."**

The Judge declined to award indemnity costs but made this observation:

> **"It is important to remember that Mr Thomas did not have any specific recollection of the Property or his communications with the defendant. This meant that the contents of the witness statement depended, to a greater degree than might normally be the case, on the angle of approach and the focus of the enquiry. The statement also was in the nature of a response to the factual case of Mr Wheatley, whose oral evidence added materially to the account of how Mr Thomas's advice was elicited in the relevant conversation. *The result of all of this was that a statement that responded in perhaps a rather literal way to the defendant's evidence proved not to have explored avenues of enquiry which, when followed at trial, were damaging to the claimants' case.* .... I do not at all think that the statement obtained from Mr Thomas by the claimants' solicitors was drafted with a view to being misleading, and it seems to me that it was not unreasonable of them to rely on it, *although the loss of the case at trial might possibly have been avoided if they had explored the issues more widely and intensively with Mr Thomas."***

(Emphasis added)

Collusion/contamination

59. Witnesses should be interviewed separately to avoid allegations of, or the risk of actual, collusion. Other risks include the fact that senior members of staff might, even if not deliberately, influence more junior staff members. Discussion amongst the witnesses

about their respective accounts should be avoided at the early stages of preparing the evidence therefore. It is all too easy for a witness to begin to believe that an event, which they could not initially recall, occurred in the manner described by others.

Evidence not argument

60. There is often a perception in the mind of a witness that they have to argue the case for their side. It should be emphasised that their role is no more than as a conduit for the facts which are in their possession. This is equally true when giving oral testimony. The witness is not the advocate.

61. It is also somewhat liberating for a witness to feel that they are not carrying the burden of arguing and winning the case. Just recounting the facts is what is required. If the witness understands that, any fear or anxiety about what the witness thinks he should say or seek to omit is considerably lessened.

62. It is for the legal team to persuade and argue. The witness should not feel that he has to do their job.

Documents: disclosing/probing and over-reliance

63. "**Do we really have to disclose that?**" is a phrase sometimes heard from a witness. The witness needs to have the importance of proper and adequate disclosure explained so that all relevant documents are provided. The witness should be disabused of any notion that a disclosable document, however harmful, need go no further than the lawyers. The potential harm of late disclosure when a document only emerges at trial should not be underestimated.

64. Equally, it should be explained that a contemporaneous document, even a manuscript note made to oneself and not shown to anyone

at the time, might prove to be a valuable piece of corroborative evidence. Witnesses should be asked, and probed to consider, whether any such documents exist.

65. That is different to the process of taking a statement by prompting by reference to documents, especially if not seen by the witness at the material time. The dangers of a witness statement being taken in circumstances where there has been heavy reliance on showing the witness documents at the same time were noted by Leggat J. in **Gestmin v. Credit Suisse and Another [2013] EWHC 3560:**

> **"20 Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does or does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."**

THE FINAL VERSION

66. When all the statements are in, they will need to be revisited to deal with any discrepancies and disagreements that might arise. These will need to be explored, not in an effort to produce entirely homogenous statements, but to seek to explain the basis for any contradicting views.

67. Problem areas should be frontally approached and explained where possible. It is a mistake to avoid addressing bad facts or difficult areas. The process is not unlike the old drafting technique of "confession and avoidance" and should be to the fore.

68. It is equally necessary that the witness must be given time to read and approve the statement. The witness needs to appreciate that he or she is taking ownership of the document and be prepared to stand by every word in due course. This will help to avoid:-

- putting forward a statement with which the witness may not be completely content;
- suggestions that the lawyers are responsible for the content;
- any potential issues of compliance with professional obligations.

It is worth repeating that the time for correction and elucidation is not during cross-examination.

WHAT THE FINISHED WITNESS STATEMENT SHOULD CONTAIN

69. What will the finished article look like? Having avoided all the potential dangers outlined earlier in this paper, the witness statement you have been working on for your client will:[9]

- give the witness's account in chronological order and cover all relevant issues to which the witness can speak;

[9] The points made here derive substantially from the Chancery Guidelines on Witness Statements in England and Wales – Appendix 9.

- be expressed in the witness's own words save where the witness is not fluent in English:[10]
- be as concise as possible;
- be written in consecutive numbered paragraphs;
- deploy the use of appropriate heading and sub-headings;
- be signed by the witness and contain a statement that he/she believes the facts stated to be true;
- identify which statements are from the witnesses own knowledge;
- identify which statements are not from the witness's own knowledge, identifying the source of the information or basis for the belief;
- exclude irrelevant or inadmissible material;
- contain the truth, the whole truth and nothing but the truth;
- only cover the issues on which the party serving the statement wishes the witness to give as evidence in-chief;
- carefully identify any relevant documents, citing page references where possible, without providing unnecessary commentary or opinion thereon;
- avoid direct speech unless there is a good basis for asserting that the account is verbatim;

[10] If English is not the witness's first language, and if the case warrants the expenditure, consider production in the witness's own language and then have it professionally translated. Expert translation is to be recommended as a nuance can change the very sense of the language.

- be cast in temperate language;
- exclude opinion;
- exclude argument;
- exclude legal submission;
- explain, in a structured manner, the thought process that led to a particular decision or course of action.

70. Whilst adherence to all these strictures may seem like a counsel of perfection, that is not a reason not to attempt to do so. The gratitude of the Bench will provide ample reward.

71. The collapse of the **"Farepak"** litigation (Director's Disqualification proceedings) in 2012 in the English High Court caused the Trial Judge (Peter Smith J, again) to take the unusual step of issuing a 128 paragraph statement about the circumstances leading to the case ending. He said this at paragraph 47, in case it needed saying again:-

> **"47. The courts have regularly reminded parties that the purpose of witness statements is to replace oral testimony. It is not to rehearse arguments, it is not to set out a case and whilst it necessarily has to be drafted with the collaboration of lawyers, it should not be a document created in the language of lawyers by the lawyers, because the lawyers do not go into the witness box and defend it. This is unfair to defendants, as this case showed. It is also unfair to the witnesses."**

Those engaged in drafting witness statements would do well to have those words firmly in mind when going about the task.

MISCELLANEOUS PROBLEMS

Waiving privilege

72. The need to avoid the inclusion of legal submissions has been explored above. Equally important is the need to avoid mentioning legal advice for fear of waiving privilege. The line is crossed not when a witness refers to the fact that he has received advice or to the timing of that advice, but when the witness statement seeks to deploy the content of the advice to derive some advantage.

73. That was the case in **Mid East Sales v. Engineering and Trading [2014] EWHC 892**. In seeking to set aside a default judgment, witness statement evidence made reference to the fact that the Defendant was acting on legal advice when responding to the claim as it did. By doing so, the court held that the Defendant was relying on it, or deploying it, as a factor going to the court's discretion. In the circumstances fairness dictated that the Claimant should see the advice. The Court emphasised that the test was always one of "fairness".

74. In one case before the Industrial Tribunal in Northern Ireland, the Claimant applied to have sight of the advice of an in-house solicitor who had provided legal materials to a decision maker dealing with a grievance that involved complex legal issues. The witness had referred to the fact that the applicable legislation and legal writings had been given to the witness. It was suggested that, in those circumstances, privilege had been waived. The application was unsuccessful.

The limit of judicial proceedings immunity

75. In a claim originally brought for race discrimination, the Claimant sought to amend her claim to include a claim for constructive unfair

dismissal. The Claimant relied on, amongst other matters, what she claimed was undue pressure on a colleague to produce what the Claimant alleged was a false and inaccurate witness statement in the discrimination claims – **Singh v. Reading Borough Council [2013] 1 WLR 3052**.

76. It is important to note that the Claimant's complaint was not directed to the content of the witness statement as such, rather that it was the placing of undue pressure on the witness that caused a breach of the implied mutual term of trust and confidence.

77. In those circumstances, the EAT (England and Wales) declined to allow the Claimant to amend her claim to include that matter because judicial proceedings immunity covered the local authority's activities in gathering evidence to defend the race claim.

78. The Court of Appeal disagreed and allowed the amendment. The Court of Appeal made the distinction above set out between content and process, notably the means by which the local authority procured the witness to give the statement.

79. Albeit in very specific circumstances, this means that a Tribunal may be called upon to examine precisely how, and in what circumstances, a witness statement was obtained. You have been warned.

No property in a witness

80. The other side may seek to interview your witness. It is not at all unusual that a witness will have ceased to be an employee of the Respondent by the time of trial. He/she may have left under a cloud, been made redundant or otherwise be disaffected.

81. It is good practice not to discuss with the witness from whom you are taking a statement anything that you would not wish the other side to know. Any weaknesses or lacunae in your case, for example. It is best not to have to resort to and rely on privilege or judicial proceedings immunity, as the cases demonstrate.

Confidentiality/Privilege does not justify misleading the Court

82. The very recent case of **Brett v Solicitors Regulatory Authority** [2014] EWHC 2974 – (11 September 2014) gave the Divisional Court the opportunity to restate the position.

83. Mr Brett, the former in house lawyer for the Times newspaper found himself facing disciplinary proceedings when he allowed a witness statement to be used in resisting an injunction. The statement gave a misleading impression as to how a journalist had discovered the identity of a secret blogger. It described how the identity could be revealed by recourse to legal methods but omitted to say that it had actually been discovered by illegal hacking of an email account. That fact had been communicated to Mr Brett on an occasion of confidentiality, legal professional privilege.

84. As Wilkie J explained :

> **"In my judgment that duty, not knowingly to mislead the court or not to take the risk that the court might be misled, is not incompatible with the duty of confidentiality owed to a person who has disclosed material on an occasion of legal professional privilege. Mr Brett was, like any other lawyer, always in a position to avoid misleading the court or to remove the risk of the court being misled without breaking that privilege."**
>
> The Judge went on to outline a number of options which did not include misleading the court.

Open justice

85. The common law principle that justice should be open has long been recognised in case law[11]. In England and Wales, the 2013 ET rules of procedure enshrine the practice previously followed regarding access to witness statements by members of the public. Witness statements are made available at the back of the Tribunal room.

New Rule 44 provides:

" INSPECTION OF WITNESS STATEMENTS

Subject to rules 50 and 94, any witness statement which stands as evidence in chief shall be available for inspection during the course of the hearing by members of the public attending the hearing unless the Tribunal decides that all or any part of the statement is not to be admitted as evidence, in which case the statement or that part shall not be available for inspection."

86. The public, and indeed the Press, are not entitled to copies but are to be put in the same position as if the evidence had been given live.

87. What about documents referred to in the witness statement? Can the public require access to those?[12] In **R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2012] EWCA Civ 420,** Toulson LJ took the view that ordinarily they should:

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[11] See e.g. **Scott v Scott** [1913] AC 417 described by Maurice Kay LJ as a "beacon of the Common Law" in **Global Torch Ltd V Apex Global Management** [2013] 1 WLR 2993.

[12] On a related topic, is there a case for arguing that the pleadings should be routinely made available, whether or not specifically referred to? **CPR** (E&W) 5.4C allows non - parties to access Statements of Case. In E &W, the ET1 and ET3 used to be available for inspection at the National Archive, along with judgments.

"[85] In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong"

He went on to hold that the Court had to carry out a "proportionality exercise" which would always be fact specific.

CONCLUSION

88. As a practitioner both in England and Wales and Northern Ireland the writer is only too well aware that the jury is still out in Northern Ireland, and, it is understood, in the Republic of Ireland, on the use of witness statements. One leading silk in the Republic of Ireland reacted with horror at the prospect of the routine ordering of witness statements. It would, in the opinion of that practitioner, upset the natural order of things and impede the proper pursuit of justice. That is one view.

89. Another view is to embrace the sheer practicality of tribunals having witness statements which can be read in advance, whilst recognising their limitations. Inconsistent, inaccurate or even deceitful evidence should be exposed in cross-examination. Cross-examination itself will be sharper, more focused and directed if the cross-examiner has had the time to prepare his questions in advance, rather than having to deal with the witness's evidence on the hoof. There is a limit to what can be gleaned from the pleaded case and/or the answers to requests for information or disclosure. In one case in the IT in which the writer was involved, the precise nature of the basis for claiming unfair dismissal only became clear on day 3 of the Hearing.

90. The final report produced by Lord Justice Jackson on the review of civil litigation costs in England and Wales considered the use of witness statements. In Section 38, the report came down broadly in

favour of witness statements. They served a number of purposes including:

(a) reducing the length of the trial (by largely doing away with the need for anything more than short examination in-chief);

(b) enabling the parties to know in advance of the trial what the factual issues are;

(c) enabling opposing parties to prepare in advance of cross-examination; and

(d) encouraging the early settlement of actions.

91. There was also an additional objective identified, namely providing useful and relevant information to the court to enable it to adjudicate upon the case in an efficient manner[13].

92. Lord Justice Jackson identified what he considered to be the real issue with witness statements:-

"The problem is primarily one of unnecessary length, rather than whether a witness statement should be used at all in civil litigation. One reason for unnecessary length is that many witness statements contain extensive argument. Such evidence is inadmissible and adds to the costs."

93. The two primary measures that the report identified as the ones that should be deployed to ensure that witness statements are not unnecessarily prolix were firstly, case management and secondly, costs sanctions. Whilst the latter is not usually available in the Tribunal, the first self-evidently is. Although even in the Tribunal

[13] Those who sit in a judicial capacity, particularly where there are no stenographers or other recording methods routinely available, will ordinarily welcome their use as obviating the need for time consuming note taking.

setting, recourse might be had to the costs powers of the Tribunal on the basis that the statement was deployed in an "unreasonable" manner.

94. Perhaps the last word should go to the trial Judge in the **Gestmin** case (op cit) when he stated his conclusion in terms that might be considered surprising. Having addressed the process of taking a witness statement[14], Leggat J continued:-

> **"22 In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on the witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."**

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[14] See Paragraph 20 of the judgment above set out at Paragraph 65 herein.

ACKNOWLEDGEMENTS

In preparing this paper the writer is indebted to, and acknowledges the considerable assistance derived from:

(a) his chambers colleagues Paul Epstein Q.C. and Olivia-Faith Dobbie who prepared a comprehensive practical guide to witness evidence in a paper which was presented to the Employment Lawyers Association AGM in 2013; and

(b) the excellent blog entitled "Civil Litigation Brief" produced by Gordon Exall of Zenith Chambers, 10 Park Square, Leeds.