

Witness Statements: Overlong and Over-lawyered?

As many legal commentators including the author have noted recently: long, complex and detailed statements served particularly on behalf of lay witnesses, but written by their legal teams, can be more of a hindrance than of assistance. Straightforward cross-examinations of such witnesses will frequently prove effective in at the very least exciting the suspicion of a court as to the reliability of such lay evidence, or worse, in some cases causing questions to be asked as to their credibility when the inevitable rhetorical question is asked in closing as to whether such a person ever really could have had a reasonable belief in the veracity of what the statement contained.

The new approach by the courts is likely to be tougher and less tolerant of this status quo. Following recent guidance and recommendations, judges are liable to require the re-drafting and amendment of witness statements which stray too far from the facts of what a particular witness can actually and properly know and say. This is liable to give rise to adverse costs orders against such defaulting parties, potentially wasted costs orders against their lawyers, and in cases of non-compliance, applications to strike out claims. In each scenario the spectre of conflict as between client and solicitor would exist and claims of professional negligence may follow.

This is thus an area which all litigators should carefully consider, and the possibility for repercussions is something the professional negligence practitioner may do well to closely observe.

Recent Judicial grumbling and Working Group recommendations

This is by no means a new issue. Various judgments over the last few years have made reference to judicial lamentation as to the utility of such witness statements.

The Deputy High Court Judge, Mr S Monty QC, in *Moore v Moore* [2016] EWHC 2202 (Ch) made specific reference to witness statements in the trial of a proprietary estoppel claim. These ran (respectively) to 70, 100 and 136 pages long. He considered these were not only too long, and often too repetitive and too argumentative, but that they also contained quantities of inadmissible opinion evidence and commentary. The Court made it clear that it was not assisted by such verbosity and that it disregarded: *“those parts of the evidence ... which are either comment or opinion evidence”* and, perhaps encoring the appropriate action of parties objecting to such evidence, referred to these having been *“highlighted as objectionable by [counsel] by placing a red line next to the relevant passages”* and whilst the Court had read them, it was held that *“they have no place in statements of witnesses of fact”*. In this trial at least one of the lay witnesses was held not to be reliable by reason of her uncertain and evasive oral evidence as to how actually her statement was prepared when she was cross-examined on the degree of involvement of her solicitors.

This is not an uncommon conclusion, indeed the same conclusion was reached by HHJ Melissa Clarke, in a recent case where the author appeared for the successful defendant, as to crucial evidence provided by the claimant party in a clinical negligence claim: *Docherty v*

Oxford University Hospitals NHS Foundation Trust (see case note at <https://bit.ly/2QNwTBh> and judgment at <https://bit.ly/2xniiWm>).

In *Palizban v Protech (UK) Ltd* [2019] EWHC 3090 (QB), Master Thornett urged the reduction in length of witness statements made by solicitors in support of interlocutory applications, having been presented with a statement which with exhibits, ran to more than 400 pages. He held the same *“style of presentation is not uncommon in solicitors’ witness statement but, in my judgment, often quite unnecessary”* and said that judges were *“quite able”* to interpret most solicitors’ correspondence without requiring each to be afforded an introductory paragraph within a statement. The Master suggested in any event that this could *“sufficiently be described in the narrative of the witness statement”* which *“should then, as above, provide general submissions in support of the deponent’s position. Significant letters can still, of course, be highlighted by way of reference to the relevant page within the paginated correspondence exhibit.”*

A report published in December 2019 by a Commercial Court Witness Evidence Working Group chaired by Lord Justice Popplewell, concluded witness statements are often *“over-lawyered”*, too long, too argumentative, frequently contained irrelevancies and unnecessarily extensive recitation of documents, often failed to reflect a particular witness’s own evidence, and were rarely subjected to existing judicial controls. It concluded (taking account of the 932 responses to a consultation which showed *“little enthusiasm for radical reform”*) that it did *“not propose any such radical change”*.

Instead, the Group recommended some ‘best practice’ guidance emphasising that a witness statement should be confined to the evidence that the witness would give if properly examined-in-chief, must use the witness’s own words, and be based on their own recollection with *“revisions limited to aiding brevity and clarity without changing meaning or emphasis”*.

The Group further recommended considering wider use of examination-in-chief which could be considered as a case management direction, and posited whether the Chancery Division and Technology and Construction Court may *“usefully consider”* following the lead of the Commercial Court in limiting witness statements to 30 pages, unless a dispensation is granted at an interlocutory stage.

The Group recommended that judges should be more ready to sanction with costs and be prepared to criticise a non-compliant party.

The new reality?

Mr Justice Waksman who sat on the Commercial Court’s Working Group has clearly taken its recommendations seriously. Undertaking the pre-trial review in *PCP Capital Partners LLP & Anor v Barclays Bank Plc* [2020] EWHC 646 (Comm), he considered witness statements contained unnecessary material, suggesting that the drafter of the statement may have *“got somewhat carried away or have forgotten what the role of the witness statement is”*!

In a pithy written judgment which is worthy of note, the Judge considered that questions as to the form and content of witness statements should not be left to trial to be determined and held:

“1. ...that if there are problems with anyone's witness statements in terms of material that should not be there and which is likely to prove a distraction at trial, or increase the time spent on that statement, either by the judge or by counsel or anyone else, or which could increase the cross-examination unnecessarily, it is my job, as the judge who will be trying this case, to seek to do something about it.

2. I do not consider... that there is simply a binary choice here; that is to say, unless the witness statement is riddled with inappropriate content, I should leave it alone, or, on the other hand, if there is inappropriate content, then I should simply prevent it from coming in and instruct the relevant party to start all over again. There is a middle ground and one which is proportionate in this case.

3. There are definitely elements of Mr Varley's witness statement which should not be there, in particular because, in truth, they are no more than arguments or simply bringing into the witness statement contents of the documents and nothing more than that, documents to which Mr Varley was not a party.

8. ...if there is the odd sentence here or there that is non-conforming, the court is not going to get too excited about it because the time spent would be disproportionate ...

11. The course that I am going to take here is to require both sides to go back to those witness statements and, within 14 days, remove the paragraphs that I consider have been offending for the reasons that I have given. ...

12. I am not going to say that Mr Varley's witness statement should be reduced to 30 pages. Ms Staveley's is a lot more than 30 pages and I'm not impressed by the point that apparently, no-one objected to it at the time. The question is what is a proper length of a witness statement in a very substantial case, with allegations of fraud, where it doesn't surprise me at all that these key witnesses would need more than 30 pages.

13. That's what the parties are going to do. I would hope that, after that period of pruning, both parties will live with the results. If one of them still says that there is something seriously wrong, they can make an application to me on paper and I will deal with it on paper.”

If Waksman J's approach is indicative of the new conventional approach to witness evidence at the PTR stage of cases, parties upon whom potentially objectionable statements have been served may consider there to be some advantage to them in raising such criticism with their opponent and then the court.

It is likely that should a court agree with any such objection, or indeed seek to make such an order of its own volition, it will order that such a statement should be shortened and/or amended, and such an order is likely to be accompanied with an adverse costs order. Such

costs may not only include the cost of the application itself, but those occasioned by the time wasted in reading, considering and taking instructions on the unlamented statement, which may also have been considered by experts whose time is also likely to have been unnecessarily and expensively taken up.

Particularly in cases where the prospect of being able to enforce costs is remote, such a party may also seek to make an application for wasted costs on the basis that the default was brought about by the unreasonable, negligent or improper actions of their opponent's solicitors in drafting such a statement and/or recommending or allowing it to be served.

In some cases, non-compliance or imperfect compliance is likely to lead to opponents seeking further sanctions. In the more extreme of cases, it is perfectly foreseeable that good claims will face being struck out by judges newly intolerant of default, perhaps given that the underlying mischief is liable to be seen as wholly due to a litigant's failure to follow pre-existing and largely trite guidance.

Any litigator should be alive to this issue in respect of the presentation of their own cases, and also as to the litigation advantage which could be obtained from taking this point. Too aggressive a stance is however unlikely to be sensible. The court in *PCP* explicitly recognised that in the circumstances of a particular case a statement may necessarily and reasonably still be very extensive. The litigator would do well to consider the nature, value and issues within a case before objecting to a statement just because it is over 30 pages for example.

From the perspective of the professional indemnity practitioner, they too would be well-advised to maintain some vigilance for potential negligence. The repercussions which may flow from judicial sanction of improperly-drafted statements are potentially extensive and legion. At the very least there are likely to be tensions in relation to responsibility for costs both of their own lawyers and in respect to any adverse costs orders. In certain cases, solicitors are likely to face claims of mishandled litigation where a (former) client's case was damaged or worse struck out due to alleged default.

Case note by Thomas Crockett, Hailsham Chambers

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