Guidance on use signed witness statements or affidavits

Guidance by the Commercial Judges

The use of signed witness statements or affidavits in commercial actions

The use of signed witness statements or affidavits in commercial actions is now fairly well established. The First Division in *Luminar Lava Ignite Ltd* v *Mama Group plc* 2010 SC 310 (at paragraphs [70]–[75]) has recognised the practice. Since that decision we have considered further improvements in practice and have discussed the use of such statements with the Consultative Committee on Commercial Actions.

We are aware that some practitioners are uncertain about best practice in the preparation of witness statements and that they would welcome some guidance on their use. This note, which we have discussed with the Consultative Committee, is intended to give that guidance.

In this note we use the term “statements” to cover both affidavits and signed witness statements which are adopted as part of a witness’s evidence; also “he” includes “she”.

The purpose of signed witness statements or affidavits

The purpose of the statements is to assist the court to hear cases expeditiously. It is our experience that the use of statements has helped parties to complete hearings within the times allocated to them, which are often shorter than would be the case without statements being used. If the diet fixed for a case is shorter, this in turn has a beneficial effect on the ability of the court to fix cases without undue delay. While we acknowledge the work that has to go into the preparation of statements, it is hoped that there will be a net financial saving to the parties from shortening the length of the court hearing.

There is also, we think, a benefit in parties knowing sooner rather than later the

evidence likely to be adduced by the other side, since it enables them more confidently to assess the likelihood of success or failure and thereby facilitates settlement.

We are of the view that it is generally desirable that a witness, who is speaking to events which occurred some time previously, should give his evidence after he has had an opportunity to consider documents which he had seen at the relevant time. He should also have had the opportunity to re-read his statement shortly before he gives oral evidence. We consider that it is consistent with justice that a witness is placed in a position to give truthful evidence to the best of his ability.

Supplementing statements by oral evidence in chief

We recognise that controversial issues within a witness's evidence, where issues of credibility and reliability arise, will usually have to be addressed in oral evidence in chief as well as in the statement. This assists the judge to form a view of the witness in the more relaxed circumstance of evidence in chief and also when under the stress of cross-examination.

We do not intend to have all evidence in chief presented solely in written form. In some cases, where significant cross-examination is foreseen, it may not be appropriate to have a witness adopt his statement and be subjected immediately to cross-examination. Counsel leading a witness can, for example, clarify matters in his statement which appear to be in controversy or, where it is relevant and appropriate to do so, ask him to comment on points raised in the statements of other witnesses.

In many cases it may be necessary to take an early witness through his evidence in some detail to introduce the court to the relevant documentary evidence. Later witnesses may have to introduce further documents or be asked about points which have arisen in the evidence of earlier witnesses. Otherwise, it is intended that the substance of a witness's evidence be contained in the witness statement or affidavit and extensive and prolonged evidence in chief be avoided.[1] Counsel should use their professional judgement in deciding how much oral evidence in chief is needed

in the particular case, though the judge must be free to intervene if he feels that this is tending to subvert the purpose behind the use of statements.

The content of the affidavit or witness statement

The following principle must be respected: the statement should be the evidence of the witness and should cover only those matters to which he can properly speak.

The role of legal advisers or other parties in the preparation of the statements

The purpose of a statement is to record the evidence of a witness. The court does not expect to receive a document which is in large measure framed by lawyers and which uses language which the witness would not use. Words should not be put into a witness's mouth. If a party produces such a document as the evidence of the witness, it is likely that it will receive little weight from the court and it may in some circumstances significantly damage a party's case. Equally, if it appears that a witness has been improperly tutored in his evidence,[2] the court is likely to discount his evidence. In preparing such statements, legal advisers should bear in mind that a witness may have to justify on cross-examination things contained in his statement.

What the court is looking for is the actual evidence of the witness in written form. It seems that the best approach is for the witness to give a precognition in the normal way. As the statement has a different role from a precognition, it is likely that the legal advisers will want to consider the draft statement carefully.

The legal advisers, including - where appropriate - counsel, can consider the draft statement to ensure that the witness has covered the relevant matters to which he can speak. They can also seek to clarify ambiguous statements within his evidence when his statement is in draft, and seek his comments on documents and other materials which might appear to raise questions about the accuracy of his recollection. Where there are matters, which the legal advisers think he might be

able to address, they can properly ask him whether he can give evidence on those subjects. They can show him documents which he might have seen at the time, and if he had seen them, ask for his comments on them.[3] Where the witness comments on documents which he had not seen at the relevant time, the fact that he had not seen them then should be made clear in his statement.

We recognise that the process of taking a precognition means that the product involves input from the precognoscer. We expect that care will be taken to ensure that the witness's testimony is accurately represented. He is also to be given the opportunity to consider carefully what the draft statement says and to confirm its terms or instruct its amendment before he is asked to sign the statement. The legal advisers should also inform him that he may be cross-examined on his statement in court.

When the statements should be prepared and exchanged

We will normally order parties to exchange the documents on which they wish to found at proof at a date not less than two weeks before they are appointed to lodge and exchange statements. Often, if time permits, we will allow four weeks. This is to give the legal advisers an opportunity to peruse the documents and identify any matters which they need to raise with a witness before he finalises the statement.

Legal advisers or other people involved in taking evidence from a witness to prepare his statement should finalise the statement without showing the witness the other statements which are being obtained for their client. By fixing a date on which the parties are to exchange their statements, the court seeks to prevent a witness's initial statement from being influenced by the evidence of the witnesses put forward by another party.

Where, exceptionally, a witness finalises a statement (other than a supplementary statement) after the exchange of statements of other witnesses, the solicitor tendering the statement should write a letter to the court either (i) certifying that the witness has not seen or been informed of the evidence of others, or (ii) if he has, specifying the statements which the witness has seen or been told about and the circumstances in which that occurred.[4]

The statements of a party's other witnesses or of another party's witnesses may be disclosed to a witness after the exchange of statements between the parties. If in the light of that information a witness needs to expand or qualify the evidence which he has already given in written form, a supplementary statement may be lodged. The court will normally allow for this in the timetable which it fixes.[5] The purpose of the supplementary statement is to correct or qualify what the witness has already stated. It is not intended that the witness should lodge a supplementary statement to comment on or rebut the evidence of other witnesses.

A court order which fixes a proof diet may therefore set out a four-stage timetable.[6] First, it will fix a date for the exchange of the documents which parties intend to rely on at the proof. Secondly, it will specify a date for the parties to exchange and lodge in process their statements. The date for that exchange should be fixed to allow parties' advisers time to analyse the documents exchanged under the first stage before they have to finalise the statements. Thirdly, it will specify a date for the exchange and lodging of supplementary statements. Finally, it will fix a By Order hearing at which parties can give notice of any issues of the admissibility of the written evidence or other pertinent matters.[7]

Signature and adoption of statements

A witness is to swear an affidavit in normal way. At the start of his evidence from the witness box, he should identify the affidavit as his.

A witness statement which is not an affidavit should include a declaration that the evidence is true to the best of the witness's knowledge and belief and the witness should sign the statement. The witness should confirm in witness box (i) that the statement is his, (ii) that after giving a statement, he has considered the terms of the written statement and signed it, and (iii) that he adopts it as his evidence. Thus the statement will become part of his sworn testimony.

Whether statements are evidence if the witness is not called to give oral evidence

As is well known, the Civil Evidence (Scotland) Act 1988, section 2(1)(b) allows a person's statement, including a written statement, to be admitted as evidence of any matter of which direct oral evidence by that person would be admissible.[8] But when the court orders the preparation of a statement as a witness's evidence in chief in a case on the Commercial Roll, it will normally not admit the statement in evidence if the witness is not made available for cross-examination. In such circumstances the court will admit the statement only if (i) parties agree the evidence, or agree to its admission as the evidence of the witness, or (ii) a party makes an application by motion for the evidence to be admitted and the court assents to that motion.

Where a witness does not co-operate in giving a witness statement

If a witness whom a party wishes to call does not co-operate with solicitors in producing a signed witness statement or affidavit, the solicitors should explain the problem at a by order hearing and produce the correspondence to vouch the request and the witness's non-co-operation.

Expert witnesses

The court does not expect an expert witness to produce a signed witness statement if he has set out his evidence in a report.

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Notes

[1] See Timeshare Management Services Ltd v Loch Rannoch Highland Club [2011] CSOH 23, Lord Glennie at para 130.
[2] See Watson v Student Loans Co Ltd [2005] CSOH 134: it is improper practice to

brief or coach a witness with a view to his altering his evidence.

[3] If a witness statement containing references to documents is finalised before a joint bundle of documents is prepared, it would be help the court if a copy of the statement with the relevant page references from the joint bundle were produced later.

[4] See Luminar Lava Ignite Ltd at paragraph [74].

[5] Alternatively the witness can explain his position in oral evidence in chief.

[6] The practice is generally to fix this timetable by working back from the allocated proof diet, but there may be occasions (particularly where there is thought to be an opportunity of bringing the case forward if other cases settle) where it is more sensible to fix the timetable working forward from the procedural hearing.

[7] Notice should be given of fundamental issues of admissibility which may affect a party's case. Less important issues of admissibility can be covered at the start of the proof diet by the preparation and lodging of a note of objections to the evidence in the witness statements.

[8] A statement which is made in a precognition is not admissible: Civil Evidence (Scotland) Act 1988 s.9; See Walker & Walker on Evidence (3rd ed.) para 8.7.1 and the cases cited there.