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Giving evidence as a witness of fact in the civil courts: the perils and the pitfalls

Introduction

1 I start from what I hope will be common ground: that giving evidence as a witness of fact in court is difficult and rarely an enjoyable experience, which may be equated to something like trial by ordeal, albeit without the boiling oil, red hot ploughshares or blind trust in Providence.

2 We can look at two prominent case over the last few months that illustrate what can go wrong with witness evidence and turn an ordeal into a nightmare:

Walter Lilly & Company Limited v Giles Mackay and DMW Developments Ltd[1]

2.1 Mr Justice Akenhead had this to say about the first defendant:

> *"From my observations, I have formed the view that he has lost nearly all sense of objectivity in relation to this development …*
>
> *His evidence that he could not remember issuing a direction to G&T not to issue further valuation recommendations was expressly countered by the documentary evidence with which he had personally been involved at the time. …*
>
> *I found him a most unconvincing witness. His objectivity having gone, I think that he has now convinced himself of the truth of certain matters such as those relating to the ABW issues such that, although he believes that he is right, he is obviously not."*

Berezovsky v Abramovich[2]

2.2 Mrs Justice Gloster DBE has this to say about the claimant:

> *"On my analysis of the entirety of the evidence, I found Mr Berezovsky an unimpressive, and inherently unreliable, witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes, …*
>
> *At times the evidence which he gave was deliberately dishonest; sometimes he was clearly making his evidence up as he went along in response to the perceived difficulty in answering the questions in a manner consistent with his case.*
>
> *At other times, I gained the impression that he was not necessarily being deliberately dishonest, but had deluded himself into believing his own version of events. On occasions he tried to avoid answering questions by making long and irrelevant speeches, or by professing to have forgotten facts which he had been happy to record in his pleadings or witness statements."*

3 Of course these are extreme examples. More mundane judgments will be handed down in the courts on a daily basis in which a Judge may politely say that he or

1. [2012] EWHC 1773 (TCC) Judgement dated 11 July 2012
2. [2012] EWHC 2463 (Comm) Judgement dated 31 August 2012

she has not thought it proper to take into account the evidence of Mr Smith or has not considered the evidence of Mrs Jones to be 100% reliable. Notwithstanding this delicate form of expression, for Mr Smith and Mrs Jones these few sentences will almost certainly have rendered worthless a large amount of time, effort and anxiety in the run up to trial.

4 This paper discusses some of the challenges facing ordinary members of the public who are called to give evidence in the Civil Courts and will I hope provide some guidance and encouragement to those witnesses facing the "ordeal" of the witness box.

The basics

Legal principles

5 One of the basic principles of our civil justice system is that the admissibility of the evidence of witnesses of fact is dependent upon the witness making himself or herself available to answer questions at the trial of the dispute. See CPR Part 32.2

> *(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –*
>
> *(a) at trial, by their oral evidence given in public; . . .*

6 CPR Part 32.4 requires that the evidence of witnesses of fact must be set out in a written statement and Part 32.5 provides that if a party has served a witness statement and wishes to rely at trial on the evidence of the witness who made the statement, the party must call the witness to give oral evidence.

7 So in summary, the witness must first prepare a written statement of his or her honest recollection of the facts and then be prepared to truthfully answer questions on the statement.

The procedure

8 The usual chain of events is as follows:

8.1 The witness will receive a telephone call from a solicitor or perhaps a line manager or former manager explaining that court proceedings are on foot concerning events that he or she has some experience of;

8.2 Assuming the witness agrees to get involved, (and to their credit most witnesses who are cold called in this manner do agree, however much the temptation will be to hang up) the witness will then meet with or speak with the solicitor about his or her recollection of events;

8.3 The witness will be provided with copies of contemporaneous documents in order to assist with his or her recollection;

8.4 The solicitor will prepare a first draft statement (and subsequent drafts) and invite the witness to provide comments upon the draft;

8.5 Once the draft is finalised to the witness' satisfaction it will be signed and dated and then exchanged with the statements prepared by the other side's witnesses of fact;

8.6 The witness may be asked to prepare a supplemental statement dealing with additional points of fact. Steps 8.2-5 will be repeated in relation to the supplemental statement; and,

8.7 Unless the case settles, the day will come when the witness has to travel to Court. He or she will at some point be asked to sit in the in the witness box surrounded by a copy of the trial bundle and armed only with a copy of his or her witness statement, will be asked questions about the factual matters in dispute.

9 The witness will usually be required to answer questions, in the following sequence:

9.1 Questions from Counsel for the party who called the witness: (examination – in – chief);

9.2 Questions from Counsel for the other side or sides: (cross-examination);

9.3 Further questions from Counsel for the party who called the witness, limited to the evidence given in cross-examination : (re-examination);

9.4 Questions from the Judge;

9.5 Further questions from Counsel for each side on the points raised by the Judge.

10 The fundamental objective when giving evidence in Court or any similar tribunal is to tell the truth so that the Court may establish the relevant facts and thereby go on to determine the disputes. So, the witness has read the documents, committed his or her recollection to writing and need do no more than tell the truth when being questioned by the nice barristers and judge? What could possibly go wrong? Unfortunately the answer is, "Plenty".

Why is it so difficult?

11 There are several factors that make the process of giving factual evidence difficult. In my view the main reasons are:

11.1 The forum;

11.2 The system;

11.3 The inherent difficulty of recollection; and,

11.4 Reliance upon documents.

12 Looking at these in turn:

The forum

13 For most people who work outside of the law, a courtroom can be an intimidating venue with the Royal Crest, the exposed witness stand, the gowns and wigs and the towering stacks of files. For many for whom giving evidence is a one-off event and not an experience they would like to repeat, this will be an alien atmosphere. There are no 'professional' witnesses" of fact[3], in contrast to expert witnesses who may appear in court regularly and get to "know the ropes".

3. Professional witnesses did exist in earlier times, usually paid by the Crown to give evidence against defendants in treason cases.

14 The witness is often very much the outsider and some feel that as such they are treated with little sympathy by the more regular users of the Court. To take a recent example, on 15 November 2012 the Law Society Gazette included a story on a successful businessman who was "utterly frightened" when he walked into Manchester High Court and was reduced to asking for assistance in the Court canteen.

15 The witness will not be afforded any special sympathy by the Court because he or she has taken the trouble to produce a detailed witness statement and made himself or herself available for cross-examination. The court needs to know the facts and the evidence of the witnesses of fact must be tested.

16 A sense of trepidation or at the very least discomfort is unlikely to make giving evidence any easier.

The procedure

17 I think we can start with the general proposition that the majority of people do not enjoy speaking in public. Go to any wedding and those delivering the speeches always appear to be more relaxed after they have sat down. And of course the Best Man is unlikely to be cross examined upon the contents of his speech unless he mentions something about the groom that the bride was previously unaware of.

18 Giving evidence does not just involve speaking in public but also requires the witness to answer searching questions in compliance with what appears to be an arcane procedure – a view no doubt reinforced by the horsehair wigs and gowns – but a procedure that is nonetheless full of traps for the novice.

19 Our civil court system is adversarial. Both sides will have their own arguments and both sides will submit evidence in support of those arguments. Thus for example a contracts manager may give evidence to how the works were delayed and a QS could give evidence as to how the payment machinery broke down. The witnesses will focus on the points in dispute with the result that the witness evidence will also be somewhat polarised on some if not all of the material issues. Hence it follows that the primary objective of cross-examination is to undermine the evidence of the opposition by challenging the witness' version of events. This is the main reason why giving evidence becomes something of an ordeal. Typically, cross-examination will take up at least 70% of the time spent in the witness box with the questions being posed by the other side's counsel who is entitled and expected to be entirely partisan.

20 It may be considered telling that the process is referred to as an "examination". The idea is indeed to test the evidence but the witness will often feel that the process is more personal, verging on character assassination and general vilification. It should come as no surprise that the vast majority of witnesses of fact step down from the witness box with as sense of palpable relief.

The inherent difficulty of recollection

21 Litigation is by its nature retrospective. The Court looks at the evidence of past events and even when efficiently managed, the trial at which the witness gives evidence will often take place one or two years after the relevant events occurred, sometime after the elapse of a much longer period of time.

22 If I asked everyone here to jot down in words what they were doing and thinking on 29 November 2007 even the most assiduous diarist might find this something of a challenge. Some people have better memories than others but most would face difficulty, given the passage of time, to offer a precise recollection of even recent events. I think it can be stated as a principle that if four individuals attended a meeting on Monday, by Friday, each would have a slightly different view of what was said at the meeting. These divergences will be magnified by the passage of time.

23 We can take one example from modern history. During 1954 a group of men - "The Committee of 22" - met in Algeria to plan the start of the war of independence against the French colonial authorities. Notwithstanding the momentous nature of the meeting, some years later the surviving attendees could not even agree upon the date of the meeting save that it was in "*July, possibly June*".[4] This issue could have been resolved had some minutes of the meeting been taken or if these gentlemen had subsequently written a letter to the French authorities saying that we met on such and such a date and have now agreed to start our war of independence. In the circumstances of course neither of these options would have been prudent but only a small number of disputes will attract the attention of the Deuxième Bureau so there is no reason to not make a contemporaneous note. I consider the role of documents in the next section.

Reliance upon documents

24 Where memory fails then contemporaneous documents can help fill in the gaps. The amount of gap filling available will depend upon the amount of contemporary material that was created <u>and</u> remains available. I shall not in this paper dwell upon the permutations as regard disclosure save to state that in civil proceedings, all relevant documents (which includes all electronic media material) will be discloseable *per se*. As such, all relevant documents should be available for review by both sides meaning that:

24.1 The witness can refer to and rely upon contemporaneous documents to jog his or her memory and use these documents to support the evidence set out in the witness statement; and,

24.2 The other side may refer to and rely upon contemporaneous documents to challenge the evidence set out in the witness statement. (One of the principal tasks of counsel and solicitors when reviewing witness statements is to compare the same against the contemporaneous material available on disclosure in order to identify any inconsistencies or ambiguities that can be highlighted to prejudicial effect during cross examination.)

25 From the point of view of the witness of fact, the impact of documents will be variable, depending upon how much contemporary material is available:

25.1 Even a simple transaction like buying and selling a car may give rise a number of contentious issues that will only really crystallise once a dispute arises, say if the vehicle turns out to be something rather different to what was represented by the dealer in a sheepskin coat and trilby. Even so, the purchase of a car is unlikely to generate much paperwork and in some cases not even a receipt if you bump into the "my word is my bond" type of trader. Even if there is a receipt there will be few

4. See *A Savage War of Peace* by Alistair Horne MacMillan 1977

contemporaneous documents that record the parties' understanding of the facts pertinent to the purchase, maybe a brochure for the car or an advertisement on the internet showing mileage, one previous careful lady owner etc. Thus when it comes to establishing the facts there will not be a great deal of material for a witness to build his or her statement upon.

25.2 The situation in construction disputes will usually be rather different. If based upon a standard form the contract will be a lengthy and detailed document and the contemporaneous documents will be voluminous, spread across diverse categories to include, correspondence, e-mails, site diaries, drawings, contractual certificates, meeting minutes, instructions, valuations, RFIs, etc. At one level this large volume of contemporaneous documents – a vast accumulation of memory jogging material - will help the witness reconstruct his or her recollection of events. However, in most construction disputes witnesses of fact will find that the huge amount of documentation becomes something of a millstone around their necks. This is because the documents will be also read by the other side who will scour the documents for potentially prejudicial points to raise with the witness during cross-examination. Putting it crudely, the greater the volume of documentation, then the more chance that potentially prejudicial points can be found.

26 In construction disputes large volumes of contemporaneous documents can therefore be a blessing and a curse for the witness of fact:

26.1 The documents will be a blessing as they will assist a witness in compiling his/her own recollection of the facts; but,

26.2 The documents will be a curse as they may make the job of giving evidence all the more difficult. On a big construction project once can perhaps sum up the role of a witness of fact by reference to the following helpful words of advice:

> *"You will be required to go into the witness box and be cross-examined by a specialist counsel who will have spent the preceding four months poring over every single bit of paper you produced and/or saw during your five years as project manager. You will need to re-familiarise yourself with each and every word you produced and read during that five year period between now and the time you go into the witness box in order to provide the court with a proper recollection of the facts as you saw them on this project. If you are not fully familiar with this paperwork then bear in mind that cross-examining counsel will be and you may find yourself embarrassed. Off you go"*

27 Very often the sheer weight of material in a construction dispute will be overwhelming. If the person giving evidence is a key individual within the company who was closely involved in the dispute then the task facing that individual i.e. to re-read and familiarise himself or herself with everything that he or she wrote during the project, and everything that he/she had sight of during the project, will be daunting. Here is one example:

27.1 A couple of years ago I acted for a Japanese company in an ICC Arbitration. The main witness of fact on our side was a chemical engineer who had been a senior client representative during the construction of a chemical plant. This individual was closely involved on the project from inception during the late 1990s to commissioning, design and completion during early 2004.

27.2 Arbitration proceedings commenced in 2004 and this individual gave evidence as a witness of fact at hearings in October 2005 and October 2006. (Albeit an arbitration, the dispute ran along similar lines to Court proceedings.)

27.3 The project documentation began from around 1997 and accumulated exponentially during the construction period up to 2004. Over this seven year period there was very little documentation that our chemical engineer had not seen and therefore he needed to review around 90% of the disclosed material when preparing his witness statement and supplemental witness statement, both of which came in at around 300 pages.

28 This individual was effectively seconded to the arbitration and his career development was placed on hold pending completion of the proceedings. I should say that this preparation paid off and his evidence was fully vindicated by the Tribunal but this example should give some idea of the level of commitment required when it comes to preparing a witness statement.

29 Incidentally, as regards the length of witness statements then proportionality is important because of the need to comply with the overriding objective in CPR Part 1 and from the point of view of what the witness might bring to the dispute. To return to the example of the evidence concerning the dodgy car salesman in paragraph 25.1 of this paper, then a 50 page statement is simply not going to be necessary to deal with all of the contentious factual issues surrounding the sale of a second hand Ford Sierra. Conversely, in disputes over a large construction project, witness statements of Tolstoyan length will be the norm and will not be disproportionate or unreasonable *per se* simply because they run to some 500 pages. The guiding criteria is that the statement should address all of the material issues in dispute from the witness's point of view and it does not matter if that takes 10 pages or 200 pages.

Typical pitfalls and other banana skins

30 Bearing in mind the difficulties I have described above then my presumption is that when giving evidence as a witness of fact, it is easier to get it "wrong" than it is to get it "right". I would therefore hope that we can all learn from the mistakes made by others, some of which are described below, and I will apologise in advance for the sense of *schadenfreude* underpinning the balance of this paper.

31 At the outset, I should draw your attention to an important qualification. Those of you who are fans of the Carry On films may recall a scene in "Carry on Loving", in which Kenneth Williams, playing a marriage guidance counsellor called Percival Snooper, is trying to help a couple who "Can't find the time to do it"[5]. The husband walks out when he discovers that Williams' character is unmarried. My important qualification is therefore that like the unmarried marriage guidance counsellor, I have never given evidence as a witness of fact and the comments set out below are based upon observation only.

Problems with the witness statement

32 In almost all major construction disputes the sheer volume of written text required in a statement will be beyond even the most zealous witness so the bulk of the drafting will be done by solicitors. It is very rare that a witness statement is

5. Go on holiday that is.

produced from scratch by an individual witness and even where witnesses display an uncommon degree of enthusiasm for finalising the statement, a skeleton of the statement will still usually have been prepared in draft by the solicitors and issued with some guidance for completing same.

Drafting slip ups

33 For the solicitors doing the drafting the best course is to interview the witness at length, time permitting, and replicate as much of the witness's actual words in the draft statement. However, where the witness statement will be physically produced by the solicitors it must be acknowledged that a significant proportion of the actual words used will have first been formed in the mind of the solicitor drafting the statement and not the witness.[6] This can lead to potential banana skins:

Inappropriate language

33.1 The witness statement of a Clerk of Works included a comment that the approach of the architect was "most draconian". Under cross-examination, the Clerk of Works admitted that he had no idea what the word "draconian" meant but he helpfully explained that this had been "put in by his solicitor".

Exclusive reliance upon correspondence

33.2 Another potential area for embarrassment is where the solicitor drafts the statement on the basis of a chronological review of the contemporaneous correspondence, without addressing in detail what the witness' actual experience and recollection might be. A witness statement based solely on correspondence passing between the parties may not be reliable where internal documentation, made available through disclosure, is inconsistent with what was said in open correspondence.

Failure to check the draft

33.3 A 400+ page witness statement was based almost entirely on the contemporaneous correspondence. Unfortunately where the statement repeatedly referred to the correspondence the solicitors and the witness failed to notice that in some paragraphs, the witness referred to himself in the third person because that is what was said in the correspondence.

34 The first example above is apocryphal - I have heard it from several barristers but second and third examples actually happened in an arbitration I was involved in a couple of years ago. As to the third example, during cross examination the witness explained that the solicitors had drafted one vast omnibus statement based almost entirely on contemporaneous correspondence and then divvied up the resulting epic between various witnesses. It seems that neither the solicitors nor the witness read the statement thoroughly to realise that the witness appeared to have adopted a Napoleon complex by referring to himself in the third person.

35 It should be immediately obvious that in all three examples the Court might reasonably conclude that what was set out in writing in the witness statement did not accurately reflected the witness' own recollection of events.

6. Appendix 1 to this paper comprises the guidance notes I usually issue to witnesses of fact in the hope that they will take on board the point about the language of the statement being their own.

The contents of the witness statement

36 Preparing a witness statement is normally a two way process primarily founded upon questions from the solicitor and answers from the witness which in turn should form the basis of the written statement. It is obviously very important that there is a strong degree of trust between solicitor and witness and that the witness answers all of the questions honestly and to the best of his or her recollection, as he or she should do when being cross-examined.

37 However, it is equally important that the solicitor asks the right questions and stresses to the witness the importance of giving frank and full answers. Most witnesses will be savvy enough to know what is good or bad for their company's case and it is only human nature perhaps to play down the significance of the bad points. The solicitor asking the questions should be clear that the bad points need to be fully explored. If the witness statement unreasonably glosses over the bad points then this may be a weakness to be exploited by the other side during cross-examination. If the bad points are not mentioned at all then this could be fatal to overall credibility. Some examples:

Sins of omission

37.1 I was involved in an arbitration during the mid 1990s in which the issue concerned the accuracy of an undersea measuring device. Our client's position was this device had never gone wrong in 20 years and this was a line that was maintained rigorously by all of the witnesses of fact that our client put forward. During cross-examination, one of our lead witnesses was asked to comment upon the project that preceded the one presently in dispute. The exchange went something like this:

Counsel: You were involved in the project in Guinea immediately before this project, were you not?

Witness: Yes

Counsel: And was the same measuring device used in that project?

Witness: Yes

Counsel: And on that project were the measurements taken accurate?

Witness: No.

37.2 When the full explanation emerged, there was a good (and innocent) reason why the measuring device had not produced accurate results on the project in Guinea. However, since the witnesses on our side had all signed statements to the effect that the measuring device was infallible, the entire credibility of our factual case was tainted and we lost heavily.

37.3 I discussed the position with the witness afterwards in the pub and he told me that his managers had told him not to mention the Guinea project for fear it would undermine our case. This is a dilemma that witnesses sometimes face i.e. when solicitors say please tell me the good and the bad but the senior management say tell only the good. The witness will be placed in a difficult position and of course

it is not the senior manager who has to go into the witness box and run the risk of exposure if the bad news comes to light under cross-examination in a squirmingly embarrassing manner.

37.4 In that situation the solicitor needs to reinforce to the witness and to the management that all the relevant facts need to be disclosed at this point because the repercussions of skeletons in the closet emerging during cross examination, as in the above example, could be potentially catastrophic.

Never say never

38 It is important to avoid filling the witness statement full of absolute statements.

39 For the reasons given above, very few witness can be absolutely sure of what happened some years ago, so the statement should frequently qualify the comments by including phrases, such as "to the best of my recollection" or "I believe". Saying "I don't think this happened" conveys the same message as "This never happened" but without the risk of embarrassment if the memory proves a little faulty.

Unmentionable documents

40 It is important to "pin" the statement on the documents. The documents exist as a contemporaneous and permanent record. If there are any documents in the trial bundle that may be problematical for the witness then my view is that these should be addressed head on. If the documents are not addressed then one can usually expect cross-examining counsel to say something like:

> *"Can you explain why you have not mentioned in your statement this rather important document at page 220 of Bundle 3.B?"*

41 Conversely, problems may occur if an attempt is made to put a gloss on the document that cannot be justified. The following is an extract from the judgment in *The Trustees of Ampleforth Abbey Trust v Turner and Townsend Project Management Limited* [7].

> *It was at about this time that Mr Bullen cut down significantly on his residual role with the H5 works, having already handed over day to day management of the project to another of TTPM's project managers, Mr James Mell. Mr Mell was recently qualified, having graduated in 2001. In early December 2003 Mr Bullen sent an email to one of his colleagues, in which he expressed reservations about Mr Mell:*
>
> > *"Have been thinking about Ampleforth … I don't think the replacement PM is up to the job!!! Have not decided how to play this with Jim Fletcher as yet because I do not want to prolong my involvement with the project—I'll let you know how it goes."*
>
> *At the trial, Mr Bullen said that those remarks should be attributed to his own arrogance and his very positive experiences of working with the Trust and Mr Bryan. He insisted that Mr Mell was sufficiently experienced to deal with the project and that there were no issues concerning his technical competence; such concerns as he had related more to the fact that Mr Mell*

7. [2012] EWHC 2137 (TCC) – Judgment dated 27 July 2012.

was a quieter character than he and, consequently, to Mr Mell's ability to maintain the good relationship with the Trust.

42 My reading of this passage is that in 2003 the witness put in writing a statement that the new project manager was not up to the job whereas when giving evidence in 2012, he sought to say what he meant was the new project manager was up to the job!

43 Problems may also arise if the contemporaneous documents contain comments or statements that with the benefit of hindsight may have been better left unwritten. Some documents will be embarrassing *per se*. My partner Dr Julian Critchlow has talked about the judgment in *Walter Lilly and Company Limited v Giles Mackay and DMW Developments Limited*. Albeit that this judgment concerns several important legal principles for construction claims, it is unusual in that some of the evidence made its way into the popular press largely due to the nature of the witness evidence. One of the witnesses had committed to writing a number of trenchant and forthright views upon members of the professional team. With these e-mails before the Court, it was difficult for the witness to create a positive impression and in the event, the Judge found that he had lost his objectivity as noted in paragraph 2.1 of this paper.

44 When confronted with this sort of detrimental evidence you cannot simply rewrite the past and airbrush these documents out of existence. Hence, in my view it is better to address them head on in the witness statement. In extreme cases it may be necessary to consider whether or not the witness should be called at all if the negative repercussions from cross-examination on the basis of such material are likely to outweigh the witness' otherwise positive contribution to the case.

Problems when giving oral evidence

45 If the witness statement suffers from any of the flaws highlighted above then the witness is likely to find giving oral evidence in Court something of a trial (no pun intended).

46 The witness should be reasonably forearmed for the ordeal of cross-examination if the witness statement is well prepared, covers all of the relevant issues and refers to all of the relevant documents (both good and bad). However, even in this ideal world problems may occur due to the character of the individual giving evidence.

Errare humanum est

47 As discussed below, then witness familiarisation does to some extent "break the spell" but my own view is that giving evidence in Court is one of those things that no amount of training can properly prepare you for.

48 I think it is safe to say that you cannot really tell how a witness will perform until you have seen them give evidence in Court. Witnesses who appear to be steady and sure when preparing the witness statements and talking to the evidence may appear a little flaky when giving evidence in the box. This cuts both ways. It is sometimes the witness who one has concerns about who produces the most convincing and credible performance. Some people have a character that is better disposed to giving evidence and some do not. However, whatever the individual characteristics, there is no substitute for effective preparation.

The talkative witness

49 The usual advice given to witnesses when giving oral evidence is that they should keep their answers short and to the point wherever possible.

50 One obvious pitfall for witnesses is the tendency to verbosity. Ordinarily, the solicitor should have picked up in advance that a witness may be prone to be garrulousness and equally, that witness should be encouraged to contain himself or herself when giving evidence. There are a number of reasons why succinct answers should be encouraged:

50.1 Firstly there is the simple issue of time. The Court will usually be running a tight timetable for the trial and cannot afford time to be wasted through witnesses going off at tangents.

50.2 Secondly, there is also a risk that the witness may stray into issues and areas that cause prejudice to the case he or she has been called upon to support.

51 Of course, for some, no end of encouragement to keep answers short can overcome a natural tendency to verbosity. Set out below is an extract from a transcript in an arbitration I participated in during 1994. We had recognised in advance that one of the witnesses – Mr Norman Stanley Fletcher[8] - had a tendency to ramble and "fill any silences" so we stressed to him *ad nauseum* the need to be brief. With this entreaty ringing in his ears, he entered the witness box and answered the very first question put to him as follows:

Q. Your name is Norman Stanley Fletcher?
A: Yes. That is my name, Norman Stanley Fletcher. That's the name my parents gave me when I was born.

52 Therefore instead of using one word, "Yes", the witness used 19 words. Cross-examining counsel immediately realised that the witness was talkative and exploited this abhorrence of silence. In that instance counsel did not immediately respond when an answer was given and would pretend to be looking through his papers. When this happened it did not take long for the witness to start talking again in order to fill the silence.

Over confidence

53 Bearing in mind that most witnesses approach giving evidence with a degree of trepidation then it is unusual to encounter over-confidence but it does happen. Any witness who projects an air of bravado should be encouraged to calm down. The Court is unlikely to approve of a point scoring approach and in my experience, attempts by witnesses to spar with the cross-examining counsel usually end in embarrassment.

54 As noted above with the talkative witness, it should be remembered that cross-examining counsel are usually very good at picking up from the witness any weak points that might be exploited. Give some witnesses enough rope and they will indeed hang themselves. I once acted a case in Cardiff in which the witness was gently and subtlety encouraged to ventilate his prejudices and concluded by stating that the dispute was a product of the actuality that everyone involved was, "out to get him". During cross-examination this witness was lead to say that the

8. I have not used the real name for obvious reasons.

large group of people "out to get him" included the Judge and the Court Clerk so the credibility of this witness' evidence suffered accordingly.

55 That being said I have seen a couple of instances where the witness has given the impression of beating counsel at their own game. In both cases, the witness in question was well prepared, confident and erudite and was able to exploit what was not necessarily the best line in cross examination. Even in these limited examples, there was a fine line between success and failure because a witness who appears to be getting the better of counsel and who consequently adopts a gloating or triumphant tone will not gain much sympathy from the Judge. The purpose of giving evidence is to establish the facts for the benefit of the court and not to engage in any ego boosting exercise.

Witness familiarisation

56 Solicitors are not permitted to "coach witnesses": that is to tell the witness what the answers should be to anticipated questions on cross-examination, with the objective of gaining advantage for the party's case. It will be obvious that a witness' credibility will suffer if he merely parrots what he was told to say rather than what he actually thinks or can remember.

57 Although coaching is not permitted something called witness familiarisation is allowed. The principal aims of witness familiarisation are normally as follows:

57.1 To give the witness some idea of how the evidence will be presented in terms of for example the lay out of the Court and the procedure for examination in chief, cross-examination and re-examination; and,

57.2 To give the witness some tips and guidance on how to give evidence effectively.

58 Typically, witness familiarisation will also include a role playing exercise. This exercise will be based upon a hypothetical case and will have no connection whatsoever with the facts upon which the witness will be called to give evidence.

59 My own opinion is that witness familiarisation is helpful. I base that view upon feedback received from witnesses I have worked with who have undergone the witness familiarisation process. Most of these witnesses have told me that the familiarisation course helped them give evidence primarily because it gave them a far better idea of what to expect in the box, so that the mystery of the court process was diluted to their own benefit.

60 At best witness familiarisation can calm the nerves and improve the "technique" of giving evidence. However, witness familiarisation cannot make bad evidence good, so if the witness statement or the witness is vulnerable to attack for any of the reasons set out in this paper, then I strongly doubt if witness familiarisation will assist. I therefore find it a little optimistic for a well known witness familiarisation company to suggest, as it has done in its publicity material, that it was in part responsible for Mr Abramovich's victory in the proceedings mentioned in paragraph 2.2 of this paper. (This was where Mr Abramovich had participated in one of their witness familiarisation courses but where Mr Berezovsky had not.)

Conclusion

61 It is in the nature of our adversarial civil court system that factual witnesses assume something of an Aunt Sally role. If we start with the presumption that giving evidence is going to be something of an ordeal, then we need to consider how best to temper the experience. The key requirement is preparation. This means as follows:

61.1 Preparation by the witness. The witness needs to be willing to take the time and to be allowed sufficient time to read all of the relevant paperwork, form his or her recollection and commit this to writing in a witness statement.

61.2 The solicitor who will ordinarily assist the witness in preparing a statement also needs sufficient time to prepare in order to identify the pertinent paperwork, clarify the issues that the witness needs to address and ensure that the witness statement, when finalised, addresses all material points (including if possible, spiking the guns of any potentially prejudicial documents).

61.3 Both of these points feed into a third requirement which concerns the client. The client must be prepared to allow the witness sufficient time to prepare a statement even if this means deploying a valuable resource to a less lucrative assignment. Likewise the client must be prepared to stomach the cost of having the solicitor take the time and incur the fees in order to achieve the second objective.

62 In closing I will wish good luck to those of you who may be called to give evidence as witnesses of fact at some point in the future. I hope that you will now have a better chance of avoiding some of the pitfalls outlined in this paper.

Ted Lowery
Fenwick Elliott LLP
November 2012

Fenwick Elliott

The construction & energy law specialists

Appendix 1

Guidance note for completion of witness statements

Dear Mr Fletcher

1 You will now have received a draft witness statement for your review.

2 This has been prepared with reference to the comments provided by you previously and with reference to some of the contemporaneous documents. Where appropriate the draft statement refers to contemporary documents produced by you or seen by you during the course of the works.

3 As in this case, the usual practice is that that the first draft of a witness statement is prepared by the solicitors. However, it is of fundamental importance that the contents of the final, signed version of the statement are 100% your own, comprising your recollection of events to the best of your own knowledge.

4 Hence, please bear in mind the following important points when reviewing this draft:

4.1 Although I have produced the first draft, the statement is intended to be a written expression of your own recollection of events. Therefore the statement must reflect your normal manner of speech and your usual vocabulary. If there is anything in the draft which prompts you to think, "*I would not have said that* …", or "*I would not have put it that way* … ", then please feel free to change the draft to wording that you are comfortable with.

4.2 To labour the point, you should change everything and anything in the draft you are not happy with.

4.3 The statement must not include any comments which may appear to have been influenced by me to support your company's case. Again, if you think any such comments have been included and you are not happy with them, simply strike them out.

4.4 Where I have asked for more comment in the draft, prefixed with the word [query: …] please provide as much information as possible. It may be that you will provide some comments that you consider are irrelevant but it is far more likely that any comments you provide will be relevant and of importance.

4.5 If you think anything important/relevant to the issues in dispute has been left out, in particular if there are any "skeletons in the closet", please let me know.

4.6 The statement should stick to the established facts. If any opinions are included, it must be made clear that these are opinions, to be qualified with, *"In my opinion …"* or, *"in my view …"* or, *"I believe …"*.

5 I will be happy to discuss with you any questions you may have.