Witness Statements & Pleadings – Inability to Read or Sign a Document to verified by a Statement of Truth

Adam Swirsky

It is not unusual to find that a party to proceedings or a witness is unable to read or write in English. The question then has to be asked, what should be done about signing the statement of truth?

The CPR provides assistance in the practice direction to Part 22. This says that *where a document containing a statement of truth is to be signed by a person who is unable to read or sign the document, it must contain a certificate by an authorised person*. Unfortunately, this requirement is frequently overlooked by both the parties and the court.

As far as drafting a witness statement is concerned, great care should be taken. In **Re. Phoneer [2002] 2 BCLC 241** HHJ Kaye QC said that *a witness statement must comply with the relevant Practice Direction: see Rule 32.8. The relevant Practice Direction to Part 32 of the Civil Procedure Rules requires that a witness statement must, if practicable, be in the witness's own word …. The obvious consequence is that, if the witness does not speak English, the witness statement will be in that person's own language, which must then be translated and the translation filed and verified in accordance with paragraph 23*. Once drafted, the statement must be read to the person signing it and a suitable declaration provided. If this process is not followed and if, for example, the declaration is in the wrong form, then the court may not allow a witness to give evidence. This is what happened in a county court case in Doncaster where the District Judge struck out the claim as a result of the Claimant's failure to comply with PD 22.3A (Mohammed v Bay, 22nd. May 2014).

For reasons that are not at all clear, the sanctions in respect of a failure to comply with PD 22.3A in respect of a statement of case will be less severe. The statement of case will still be valid unless it is struck out but a party will not be permitted to rely on its contents as evidence (22PD.4). On an application to strike it out, the pleading will only be struck out if it is not verified within the time allowed by the order. The moral of this is that great care should be taken when your client does not speak or read English because the consequences of a failure to comply with the practice direction can be fatal to the claim.

Employment: The Territorial Reach of the Whistleblowing Claims: Bamieh v EULEX Kosovo et al, EAT, 19 January 2018

Barbara Zeitler

Sections 47B(1A) and 48(1A) Employment Rights Act 1996 gives a right to a worker to bring a whistleblowing claim against a co-worker who has subjected her to a detriment because she has made a protected disclosure – provided territorial jurisdiction is made out.

The Facts

Ms Bamieh was employed by the Foreign and Commonwealth Office ('FCO') on a series of contracts, governed under English law, and seconded as a prosecutor to EULEX, a Rule of Law Mission, in Kosovo Her last contract was not renewed, and Ms Bamieh argued that this was because of protected disclosures she had made. The FCO contended that the non-renewal was due to the Mission shrinking. Ms Bamieh brought a whistleblowing complaint against the FCO, EULEX and co-workers, two of whom had also been seconded by the FCO to Kosovo. Ms Bamieh alleged one

of the FCO employees had commenced a series of investigations into her conduct and the other had recommended her suspension without investigation.

Extraterritorial jurisdiction was accepted by the FCO, but not by the other Respondents. At a preliminary hearing, the ET agreed with the other Respondents. In relation to the FCO employees the ET held that they did not live in the UK and were not based there for work purposes.

The EAT Judgment

Simler J overturned the ET's conclusion in relation to the two FCO employees (but not EULEX and another Respondent). Building on the principles set out in *Lawson v Serco Ltd* [2006] ICR 250 and *Duncombe v Secretary of State for Children Schools and Families (No. 2)* [2011] ICR 495, territorial jurisdiction was made out on the facts. The territorial reach issue (normally applied to Claimants, but applied here by analogy to Respondents) required an assessment of the extent and sufficiency of the co-workers' connection with Great Britain. Relevant to this assessment was the fact that their employment was with and they were representatives of the UK Government; they were employed under contracts governed by English law; they were treated differently from locally employed members of staff and were under the authority of the FCO. Just like Ms Bamieh's, her co-workers were employed by the UK Government to discharge the UK's obligations on the Mission.

Property: *Recent Developments in Pre-Action Disclosure*

Graeme Kirk

The Court's power to order pre-action disclosure is embodied in SCA81 s.33(2) and CCA84 s.52(2) and procedurally by CPR31.16. It is draconian since it may be brought against someone who is only a *potential* defendant.

CPR31.16 establishes a threshold; whether the parties are likely to be parties to proceedings, whether the respondent would have had to give the disclosure were such a claim issued, and whether disclosure may assist in dispute resolution and reduce cost. If the applicant can satisfy these the court then considers the exercise of its discretion.

In ECU Group v HSBC and others [2017] EWHC 3011 (Comm), HHJ Waksman noted that the jurisdictional threshold was not high, but the real question was the exercise of discretion which depends on the facts of the case. Underlying merit was one element of that exercise.
Roche Diagnostics v Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 (TCC) found a failed procurement bidder contemplating a claim to challenge the fairness of the tendering process. Coulson J observed: *"applications such as this must be decided by balancing, on the one hand, the claiming party's lack of knowledge of what actually happened (and thus the importance of the prompt provision of all relevant information and documentation relating to that process) with, on the other, the need to guard against such an application being used simply as a fishing exercise..."*.

However disclosure was not ordered in a recent tendering case CEMEX UK Ops v Network Rail [2017] EWHC 2392 (TCC), given that the compromise of confidentiality was disproportionate where the claimant had enough information to plead. Similarly an application for early disclosure in a procurement claim was found to be misconceived and unnecessary in Gem Environmental Building Services v Tower Hamlets [2016] EWHC 3045 (TCC).

ED&F Man v Obex Securities [2017] EWHC 2965 (Ch) decided that a 'claim' includes an application under CPR6.2(c), such that the Court could order service of an application out of the jurisdiction.

The Court declined to order disclosure in Peel Port Shareholder Finance v Dornoch [2017 EWHC 865 (TCC) since there was specific legislation governing insurance claims that were relevant to that relationship.

In Howell v South London Church Fund (2017) unreported 27/07/17 (QB), HHJ Moloney QC considered an application for pre-action disclosure of an email by which the Fund had alerted a lettings agency that the proposed holiday letting of a property rented by Mr Howell was contrary to the terms of his tenancy. Although the Court granted the application as it would assist early resolution, it declined to grant an injunction against further defamatory remarks given the lack of underlying merit. Nevertheless the absence of merit was not fatal to the disclosure application.

Personal Injury: Budana v Leeds Teaching Hospitals NHS Trust [2017] EWCA Civ 1980

Napier Miles

In Budana the Court of Appeal have ruled that it was possible to transfer an "old style" CFA to a different solicitor after 1 April 2013. The Law Society intervened in the case estimating that there could be "tens of thousands" of clients affected by the decision and because there have been a number of conflicting first-instance judgements.

Ms Budana fell whilst visiting the defendant hospital and suffered injury. She instructed Baker Rees (BR) on a CFA. On 22 March 2013 i.e. 8 days before the LASPO changes took effect, BR wrote to her that her they were no longer going to do PI but proposing a transfer to Neil Hudgell (NH), stating that there would be automatic transfer on 25 March 2013 unless they heard from her. NH contacted Ms Budana on 31 March, went on the record on 1 April and on 10 April C wrote confirming her agreement. Liability was later admitted and the case settled for some £4k. On detailed assessment and then in the ensuing litigation the Defendant argued that the claimant could recover only her base costs under the NH CFA, and not any costs or success fee under the BR CFA. On the defendant's case, the BR CFA was terminated following the 22 March letter; alternatively, even if the BR CFA had survived, it could not have been transferred to NH by assignment but, instead, could only have been novated after 1 April 2013. The novated contract was therefore a new contract entered into post-LASPO, and thus it fell foul of section 44 of LASPO and articles 4 and 5 of the related CFA Order. Accordingly, the defendant contended that the only enforceable contract under which NH supplied legal services and in respect of which the claimant could recover costs was the NH CFA i.e. on the "new- style" CFA

The Judge at first instance found that the BR agreement has been terminated by the 22 March 2013 letter and so there was no agreement left to transfer. The Court of Appeal allowed the appeal but, by a majority, on the basis that there had been a novation not a transfer but a novation, in the circumstances, was enough. As Gloster LJ said: In my judgment, the issues which fall for determination in this case have to be approached with an appreciation of the economic environment in which personal injury litigation is conduct