

## WITNESS STATEMENTS OF WITNESSES OF FACT

### PRACTICE NOTE

*(With gratitude - and apologies - to Jane Austen)*

#### INTRODUCTION

1. A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally (CPR 32.4). 32PD.20 states that a 'witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence;'
2. Simple, isn't it? But many painful and embarrassing experiences show it isn't that simple.
3. This note is intended as a guide and offers advice to witnesses and lawyers responsible for writing and drafting witness statements of fact for use in civil proceedings. Also, the procedural law relating to witness statements covers a very wide range of civil proceedings. This note will generally be geared towards witness statements for use at trial. So, I begin with the very basics.

#### FORM OF THE WITNESS STATEMENT

4. A witness statement must comply with the requirements set out in PD32.
5. So, to the heading of the witness statement. The witness statement's heading should look like this:

**Party:**  
**Name:**  
**Number:**  
**Exhibit:**  
**Dated:**  
**(from 6 April 2020**  
**Date of translation:)**

**IN THE [Court details]**

**Case No:**

**BETWEEN**

**[Full name]**

**Claimant**

and

[Full name]

Defendant

WITNESS STATEMENT OF.....

6. The party(s) full name(s) – see 16PD.2.6 for what is meant by the full name of a party - should appear in the witness statement heading. For example, the full name and title of say Elizabeth Bennett as a claimant could be;

**Miss ELIZABETH MANSFIELD BENNET**

Claimant

7. And the full name and title of say Fitzwilliam Darcy as a defendant could be:

**Mr FITZWILLIAM AUSTEN DARCY**

Defendant

8. In proceedings between several parties with the same status, it is sufficient, for the purpose of the witness statement's heading, to identify the parties as follows:

**Party:  
Name:  
Number:  
Exhibit:  
Dated:  
(from 6 April 2020  
Date of translation:)**

IN THE [Court details]

Case No:

**BETWEEN**

**Miss ELIZABETH MANSFIELD BENNET (and others)**

Claimants/Applicants  
(as appropriate)

and

**Mr FITZWILLIAM AUSTEN DARCY (and others)**

Defendants/Respondents  
(as appropriate)

**WITNESS STATEMENT OF.....**

9. In the witness statement heading, the section:

**Party:  
Name:  
Number:  
Exhibit:  
Dated:  
(from 6 April 2020  
Date of translation:)**

means, for example, that if the witness statement is on behalf of the Defendant, is made by Mr Darcy, is Mr Darcy's first witness statement, Mr Darcy is going to refer in his witness statement to exhibited documents, is made by him on 2 January 2020, and from 6 April 2020, if Mr Darcy had to make his witness statement in his own – foreign- language, the date of any translation the section would look like this:

**Party: Defendant  
Name: F A Darcy  
Number: 1  
Exhibit: FAD 1  
Dated: 02/01/20  
(from 6 April 2020  
Date of translation:)**

10. If Mr Darcy's witness statement did indeed have an exhibit FAD 1, a separate 'Coversheet' for the exhibit should be created which will look like this:

**Party: Defendant  
Name: F A Darcy  
Number: 1  
Exhibit: FAD 1  
Dated: 02/01/20  
(from 6 April 2020  
Date of translation:)**

**IN THE [Court details]**

**Case No:**

**BETWEEN**

**Miss ELIZABETH MANSFIELD BENNET**

**Claimant**

and

Mr FITZWILLIAM AUSTEN DARCY

Defendant

COVERSHEET

EXHIBIT FAD 1

11. Behind the 'Coversheet', the documents which Mr Darcy exhibits should appear and be numbered consecutively. I prefer one exhibit per witness statement if possible, but there are occasions when it is better to have more than one exhibit per witness statement. So, for example, exhibit FAD1 may comprise of 20 documents running to 40 pages. Exhibit FAD1 will therefore have a Coversheet, behind which will be 40 pages numbered 1 to 40.
12. If Mr Darcy has two exhibits to his first witness statement, the witness statement heading may look like this:

**Party: Defendant**  
**Name: F A Darcy**  
**Number: 1**  
**Exhibits: FAD 1, FAD 2**  
**Dated: 02/01/20**  
**(from 6 April 2020**  
**Date of translation:)**

IN THE [Court details]

Case No:

**BETWEEN**

Miss ELIZABETH MANSFIELD BENNET

Claimant

and

Mr FITZWILLIAM AUSTEN DARCY

Defendant

1<sup>st</sup> WITNESS STATEMENT OF Mr FITZWILLIAM AUSTEN DARCY

13. Where a witness makes more than one witness statement to which there are exhibits, in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each witness statement.
14. For example, if on 1 February 2020 Mr Darcy makes a second witness statement which has an exhibit to it (i.e. his third exhibit), the witness statement heading would look like this:

**Party: Defendant**  
**Name: F A Darcy**  
**Number: 2**  
**Exhibit: FAD 3**  
**Dated: 01/02/20**  
**(from 6 April 2020**  
**Date of translation:)**

**IN THE [Court details]**

**Case No:**

**BETWEEN**

**Miss ELIZABETH MANSFIELD BENNET**

**Claimant**

**and**

**Mr FITZWILLIAM AUSTEN DARCY**

**Defendant**

**2<sup>nd</sup> WITNESS STATEMENT OF Mr FITZWILLIAM AUSTEN DARCY**

15. If Mr Darcy's second witness statement did indeed have an exhibit FAD 3, a separate 'Coversheet' for the exhibit should be created which will look like this:

**Party: Defendant**  
**Name: F A Darcy**  
**Number: 2**  
**Exhibit: FAD 3**  
**Dated: 01/02/20**  
**(from 6 April 2020**  
**Date of translation:)**

**IN THE [Court details]**

**Case No:**

**BETWEEN**

**Miss ELIZABETH MANSFIELD BENNET**

**Claimant**

**and**

**Mr FITZWILLIAM AUSTEN DARCY**

**Defendant**

**COVERSHEET**

**EXHIBIT FAD 3**

16. Behind the coversheet will appear the exhibited documents page numbered consecutively e.g. 1 to 40.
17. 32PD.18.5 says that paragraphs 11.3 to 15.4 (detailed provisions relating to the manner of exhibiting documents to affidavits) apply similarly to witness statements. Those paragraphs seem to me to be more honoured in the breach than the observance in respect to witness statement exhibits, but I would say that 32PD.13.3 sets out very good practice.

**THE BODY OF THE WITNESS STATEMENT**

18. Next, to the body of the witness statement.
19. A witness statement must, if practicable, be in the intended witness's own words, (and, from 6 April 2020, must in any event be drafted in their own language); the statement should be expressed in the first person and should also state:
  - a. the full name of the witness,
  - b. his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,
  - c. his occupation, or if he has none, his description, and

- d. the fact that he is a party to the proceedings or is the employee of such a party if it be the case, and
- e. from 6 April 2020, the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter.

20. A witness statement must indicate:

- a. which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and
- b. the source for any matters of information or belief.
- c. Where a witness refers to an exhibit or exhibits, he should state 'I refer to the (description of exhibit) marked '...'".

(See 32PD.18)

21. However, I would like to deal firstly with the requirement that the witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence and it must include a statement by the intended witness that he believes the facts stated in it are true.

## THE STATEMENT OF TRUTH

- 22. It is critical for the maker of a witness statement and the party's legal representative to understand and appreciate the seriousness of making a witness statement.
- 23. Legal representatives and witnesses must take the greatest care to ensure that the witness statement contains the truth.
- 24. To repeat, a witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness that he believes the facts in it are true.
- 25. That means that, when the witness is called to give his evidence to the court (which will usually be during a trial), after the witness has been sworn in and, normally, after the witness has stated his name and address, the witness will be asked to refer to his witness statement and be asked if he believes it to be true.
- 26. I have seen this procedure carried out in a number of ways. But most commonly, after the witness is sworn in and has stated their name and address, the witness is asked if he has recently read his witness statement and the witness says 'yes'. Then the witness may be asked if he wants to correct any fact which is stated in it. Sometimes the witness does want to correct a fact stated in the witness statement. Usually, if the witness wants to correct a fact,

it is relatively insignificant fact and they genuinely may have only noticed the error when they re-read their witness statement that morning.

27. After correction of any, hopefully, unimportant, fact in the witness statement, the witness is asked whether, apart from the corrected fact, he believes that the facts stated in the witness statement are true and, hopefully, in reply the witness says 'yes'.
28. Therefore, having gone through that rigmarole with the witness, CPR 32.5 (2) provides that unless the court orders otherwise his witness statement shall stand as his evidence in chief.
29. It is polite to ask the trial judge if the witness's witness statement may stand as his evidence in chief? I have yet to hear a judge refuse that courteous request.
30. The court's permission is required if the witness wants to amplify his evidence and give evidence in relation to new matters which have arisen since the witness statement was served. If you ask the court for permission, the court will only give permission if there is good reason not to confine the witness's evidence to the content of his witness statement.
31. As to the court's discretion to permit the witness to amplify their evidence and give evidence as to new matters, there is guidance in the White Book Volume 1 in the commentary to CPR 32.5.
32. However, for present purposes the point I make is that you have to imagine that the witness has spoken to the court under oath the words in his witness statement and what he has spoken is his sworn evidence in chief to the court.
33. To return to the body of the witness statement, to verify a witness statement the statement of truth was (22PD. 2.2):

**I believe that the facts stated in this witness statement are true.**

34. From 6 April 2020, 22PD.2.2 and 32PD.20 is changed so that the statement of truth to a witness statement must be in the language of the witness statement. The statement of truth itself is changed so that the statement of truth will state:

**I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.**

35. The general practice is that statement of truth appears at the end of the witness statement. The statement of truth is a statement that the maker of the witness statement believes that the facts stated in it true (CPR 22.1 (4)). 32PD 20.1 formerly provided that a witness statement must contain a statement by the



maker that he believes the facts in it are true. Consistent with other changes to the Practice Direction and also Practice Direction 22, from 6 April 2020 32PD 20.1 is amended to state the witness statement must include a statement by the intended witness “in their own language that they believe” the facts in it are true. The statement of truth to a witness statement must be signed by the maker of the witness statement (CPR 22.1 (6)). The normal practice is that the maker of the witness statement signs their name beneath the statement of truth, thereby verifying their belief as to the truth of the facts stated in it, and dates their signature. Formerly, there was no express requirement in relation to dating the statement of truth. From 6 April 2020, 22PD.2.4 provides that the statement of truth must be in the witness’s own language and 22PD. 2.5 requires the statement of truth be dated with the date on which it was signed.

36. Where, perhaps unusually, the statement of truth is contained in a separate document, the document containing the statement of truth must be headed with the title of the proceedings and the claim number. The witness statement being verified should be identified in the statement of truth as ‘the witness statement filed on [date] or served on [party] on [date]’.
37. Personally, I abhor silly variations on the form of the statement of truth. Not infrequently, I see the statement of truth written as:

**I believe that the facts stated in this witness statement are true to best of my knowledge and belief.**

Which of course is not how the statement of truth should be written and is not compliant with the CPR.

38. If a witness statement is not verified by a statement of truth, the court may rule it inadmissible evidence (CPR 22.3).
39. The Queen’s Bench Guide underlines and reinforces the serious nature of a witness statement signed by its maker with a statement of truth. The Guide states, among other things, that:

**‘A witness statement must contain the truth, the whole truth and nothing but the truth.’**

and:

**‘If a party discovers that a witness statement which they have served is incorrect they must inform the other parties immediately.’**

40. The Chancery Guide similarly states that witness statement must contain the truth, the whole truth and nothing but the truth.
41. The importance of the witness statement being the witness’s truthful evidence cannot be too strongly emphasised.

42. It is a contempt of court to engage in any conduct which involves interference with the due administration of justice in a particular case. Therefore, proceedings for contempt of court may be brought against a person if he makes or causes to be made a false statement in a witness statement verified by a statement of truth without an honest belief in its truth (CPR 32.14). The punishment for contempt of court in this form of contempt liability is often an immediate term of imprisonment running to several months or even years.
43. Therefore, it is improper and potentially a contempt of court to pressurise a witness to give anything other than their own account of the matters with which their witness statement deals.
44. The Chancery Guide warns that no pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence and that it is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true.
45. The Chancery Guide advises that the party's 'professional advisor' may be obliged to check where practicable the truth of the facts stated in the witness statement if they are on enquiry as to their truth.
46. For that reason, it is vital that the witness statement be in the maker's own words and limited to matters to which the witness could easily speak if he was cross examined.

#### SOME ANECDOTAL EVIDENCE

47. Quite often, I read witness statements verified with the statement of truth which plainly are not in the witness's own words. They are in the words of either his solicitor or some well-intentioned friend or relative who has put words into the witness's mouth. Apart from exposing the witness to the risk of contempt proceedings, the effect of putting words the meaning of which the witness does not understand into his mouth is that the witness does not understand his witness statement and he does not understand his evidence in chief. The witness's credibility can be seriously undermined unless:
  - a. he understands his witness statement's words and language
  - b. he can be cross examined on the content of his witness statement and
  - c. be able to answer the questions because
  - d. he understands the content of his witness statement.
48. You may not be surprised that I've seen many witnesses who did not understand their own witness statement. The following exchange occurred during a cross examination of my witness:

**Witness statement paragraph 2: 'My car was stationary.'**

**Question:** 'What do you mean when you say your car was stationary?'

**Answer:** 'I don't know'.

**Question:** 'what does stationary mean?'

**Answer:** 'I don't know.'

**Question:** 'do you know what the word stationary means?'

**Answer:** 'No. Close to a station?'

49. I've had to ask my own witness if he understands what the word 'stationary' means and sometimes they honestly had no idea what their witness statement meant. What the witness wanted to say in their witness statement, and understand they were saying, was simply that; 'My car was stopped and was not moving'. Or; 'My car was not moving.'
50. The same goes for the grammar and sentence construction found in witness statements. Grammar and sentence construction is not my strong point. As you may have noticed. Lawyers must know their limitations. So I try to write in simple sentences. Denning was brilliant at writing and speaking in simple, easily understood sentences. Not because he had poor grammar or could not write complicated sentences. He was blessed with a brilliant legal mind and could explain complicated legal concepts and his reasoning in simple sentences. Sadly for me, I'm no Denning. The witness statement need not be literary masterpiece. It is meant to contain what the witness would have said orally to the court.
51. But, I've spoken with clients and questioned witnesses who have signed statements of truth to witness statements that could have been written by a Man Booker prize winner or even by the great Jane Austen. Unfortunately, the witnesses were not past winners of the Man Booker prize and Jane Austen died many years ago. The witness statements read brilliantly. Elegantly created, compound-complex sentences. Very persuasive. Suspenseful. A real page turner. Un-put-down-able. Read it in one sitting then read it again. The problem was that the witness could not read their own witness statement. Not because they could not ordinarily read, write and speak English because they could. The witness statement's sentence structure was way above the witness's level of English and, because of that, they did not understand their own witness statement. Result, misery.
52. You may also not be surprised that I have encountered witnesses who, while they can speak English, are unable to read English yet they have signed (or at least applied their mark to) the statement of truth to a witness statement written in English without any suggestion that they were unable to read it. When I ask the witness how in those circumstances they came to make the witness statement and sign it, the typical answer is it was read to them by a friend or a relative. If the party is legally represented, and either the party or the party's witness has signed the statement of truth to a witness statement when they are unable to read the witness statement without adhering to the procedure laid down by 22PD.3A, in my book that is hard to forgive. The legal representative is responsible for ensuring that such situations do not arise. I have seen judges who simply exclude or attach no weight the witness' witness statement signed in those circumstances.

53. I have alluded to witnesses who are unable to read the witness statement or sign it. In this situation, special provision is made in paragraphs 3A1 to 3A4 PD22. These special provisions are:

**3A.1** 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 made by an authorised person.

**3A.2** An authorised person is a person able to administer oaths and take affidavits but need not be independent of the parties or their representatives.

**3A.3** The authorised person must certify:

(1) that the document has been read to the person signing it;

(2) that that person appeared to understand it and approved its content as accurate;

(3) that the declaration of truth has been read to that person;

(4) that that person appeared to understand the declaration and the consequences of making a false declaration; and

(5) that that person signed or made his mark in the presence of the authorised person.

**3A.4** The form of the certificate is set out at Annex 1 to this Practice Direction'

54. The form of the certificate to be used where a person is unable to read or sign a document to be verified by a statement of truth, is:

'I certify that I [name and address of authorised person] have read over the contents of this document and the declaration of truth to the person signing the document [if there are exhibits, add 'and explained the nature and effect of the exhibits referred to in it'] who appeared to understand (a) the document and approved its content as accurate and (b) the declaration of truth and the consequences of making a false declaration, and made his mark in my presence.'

55. From 6 April 2020, 22PD 3A.1 is amended to make clear that the paragraph applies where the person is unable to read or sign the document containing the statement of truth for reasons “other than by reason of language alone”.
56. However, witness statements are often drafted by the party’s legal representative. That is acceptable provided the legal representative endeavours to always speak to the witness first and, so far as practicable, puts down their evidence in their own words. If the party’s solicitor delegates the responsibility for taking the witness statement to a junior member of staff, the solicitor must ensure that that person can be relied on to exercise the same standards as would apply if the solicitor took the witness statement. If the witness is going to write their own witness statement it is advisable that they should be invited to only use their own words, and the proper scope of a witness statement explained to them.
57. The proper scope of a witness statement has been explained by the Court of Appeal and trial judges many times when criticising lawyers for overloading witness statements with material that should not be included. It has been stressed that witness statements:
- a. Should only contain evidence that the maker would be allowed to give orally
  - b. should cover those issues, but only those issues, on which the party serving the witness statement wished the witness to give evidence in chief
  - c. should not provide a commentary on the documents in the trial bundle,
  - d. should not contain expert evidence

(see *JD Wetherspoon Plc v Harris (Practice Note)* [2013] EWHC 1088 (Ch))

## BACK TO THE BODY

58. To return to the body of the witness statement. The start of the body of Mr Darcy’s first witness statement could look like this:
- ‘1. **My name is Fitzwilliam Austen Darcy. My place of residence is Pemberley, Derbyshire, England. I have no occupation. I am a landowner with an enormous annual private income from my feudal tenants and various investments and speculations. I am the defendant in these proceedings. My statements in this witness statement are made from my own knowledge unless I say otherwise in which case they are matters of information and belief and I will state the source of any matters of information and belief. (From 6 April 2020, Mr Darcy’s witness statement must also state the process by which it has been prepared.)**

2. **I refer to page 1 of my exhibit FAD1 which is a copy of a letter written to me by the claimant. I was at home at Pemberley on Midsummer's day 2019 having returned from my usual morning swim when my servant handed me the letter.'**
59. In this example, I'm assuming that Mr Darcy is a literate, educated and quite sophisticated person. Therefore, when Mr Darcy states that his statement is made from his own knowledge unless he says otherwise, in which case they are matters of information and belief and he will state the source of any matters of information and belief, he understands what he is saying.
60. Not every witness will understand the concept of knowledge as distinct from matters of information and belief and not every witness will understand what the word 'source' means in this context.
61. So, if you are drafting a witness's witness statement, take care not to use formulaic, stock phrases the meaning of which you understand but which your witness may not really have a clue about.
62. The Practice Direction does not require the witness statement to include the words '*My statements in this witness statement are made from my own knowledge unless I say otherwise in which case they are matters of information and belief and I will state the source of any matters of information and belief.*' or similar stock and somewhat hackneyed phrases. The important point is that the witness statement indicates which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and the source for any matters of information or belief.
63. Therefore, in addition to the witness statement making statements of fact from the witness's own knowledge, because a witness statement should be confined to evidence which the person would be allowed to give orally, the witness statement may include hearsay because hearsay is generally admissible in civil proceedings.
64. Effectively, if a party or a witness wishes to give hearsay evidence, the party gives notice of their intention to adduce hearsay evidence by serving the witness's witness statement which contains the hearsay as directed by the court.
65. However, to comply with the requirement that the witness statement must indicate which of the matters are matters of information or belief and the source for any matters of information and belief, if the witness statement does include hearsay the witness statement must make it clear that it is hearsay and the source of the hearsay.
66. For example, if Mr Darcy wanted to give hearsay evidence in his witness statement, it could look like this:

- ‘2. After I had read the letter from the claimant, I asked my servant, who I call Smithers, who had delivered the letter? Smithers told me that the claimant herself had personally hand delivered the letter to Pemberley earlier that morning. Smithers told me that at about 8.00am he heard someone knocking at the entrance door to Pemberley and he opened the door and the claimant was standing there and gave him the letter and asked him to make sure the letter was given to me. I do not know whether Smithers is my servant’s first or second name or frankly even if it really is his name but it is the name which I use to call him and speak to him and he has always answered to that name.’
67. You will have noticed that Mr Darcy’s witness statement is being divided into consecutive numbered paragraphs. That is in accordance with 32PD.19.1(5). I recommend you checking paragraph 19.1 to PD32 generally for how the witness statement must be formatted.
68. Very usefully, 32PD.19.2 says:
- ‘It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with, each paragraph of a witness statement should as far as possible be confined to a distinct portion of the subject.’
69. That is helpful guidance. Which brings me to the next point that I want to make about witness statements.

## THE PURPOSE OF THE WITNESS STATEMENT

70. Many years ago, before the CPR was invented and before witness statements were used in civil proceedings, I was asked by my pupillage supervisor (Pupil Master as they were then called) what I thought the purpose of an affidavit was? I answered that it was to argue the party’s case. My dull headed answer ended what little hope I had of extending my short career in those particular chambers.
71. The purpose of the witness statement is to give evidence, not argue a party’s case. The question arising is what evidence can and should the witness be giving? I can only say that in my view the evidence should be directed to the issues in the claim. The issues in the claim are, or should be, defined by the statements of case. Generally, the witness statement is not a substitute for a properly set out statement of case. The witness statement of, for example, a claimant should contain the evidence which the claimant can properly give to the court to prove the case that he has set out in his statement of case. This simple rule is often overlooked by the maker of the witness statement and the parties’ legal representatives.
72. For example, the claimant’s case is that he was induced to enter into a contract because he relied on a misrepresentation made by the defendant. The claimant’s witness statement should contain his evidence on what the

representation was, when and how it was made and who made it, why he says it was false, when and why and how he relied on the statement being true and, if he claims to have suffered damage in consequence, his evidence on what that damage was. I'm not here attempting to set out all the necessary ingredients of a cause of action based on misrepresentation, or how to prove the claim as a matter of evidence, but only illustrating my point that the evidence which a witness gives in his witness statement needs to be focused on the issues in the case.

73. To give another example, the claimant's statement of case is that in consequence of the defendant's breach of contract, he has suffered loss and damage because he had to spend and did spend £10,000 on repairing the defendant's substandard workmanship. The claimant's witness statement should contain the evidence which the claimant can give to prove that case both as to the breach of contract and the damages which he claims to have suffered in consequence of that breach. If it does not contain that evidence, when the claimant comes to give his oral evidence at the trial, you may be in the embarrassing position of having to ask the court for permission to amplify his evidence when, in reality, you need the court's permission to lead further evidence in chief fundamental to the claimant's claim and which ought to have been included within the claimant's witness statement.

#### ENGLISH NOT THE WITNESS'S FIRST LANGUAGE

74. There may be occasions when the witness is not sufficiently fluent in English to give his or her evidence in English. This situation is not necessarily the same as where the witness is unable to read or sign the witness statement.
75. In circumstances where the witness is not sufficiently fluent in English to give his or her evidence in English, an appropriate direction should be sought. As to what the appropriate direction would be, The Chancery Guide contains the following very useful guidance at paragraph 19.13:

**'If a witness is not sufficiently fluent in English to give his or her evidence in English, the witness statement should be in the witness's own language and a translation provided. If a witness is not fluent in English but can make him or herself understood in broken English and can understand written English, the statement need not be in his or her own words provided that these matters are indicated in the statement itself. It must however be written so as to express as accurately as possible the substance of his or her evidence.'**

76. The case of *Frenkel v Lyampert* [2017] EWHC 2223 (Ch), is an illustration of what a legal representative should do when they know that their witness is not sufficiently fluent in English to give his or her evidence in English. The correct course of action in those circumstances is to apply for a direction that the witness statement of the oral evidence the witness intends to rely on be filed (and served) in their own language pursuant to 32PD.23. In *Frenkel*, the



defendant's legal representatives were criticised for not taking that course and the credibility of the defendant's evidence suffered in consequence. PD32.23 formerly provided:

**'23.1 If the court directs that a witness statement is to be filed, it must be filed in the court or Division, or Office or Registry of the court or Division where the action in which it was or is to be used, is proceeding or will proceed.**

**23.2 Where the court has directed that a witness statement in a foreign language is to be filed:**

**(1) the party wishing to rely on it must –**

**(a) have it translated, and**

**(b) file the foreign language witness statement with the court, and**

**(2) the translator must make and file with the court an affidavit verifying the translation and exhibiting both the translation and a copy of the foreign language witness statement.'**

77. If, in addition to the witness not being sufficiently fluent in English to give his or her evidence in English, the witness is unable to read or sign the witness statement in their own language, the certificate required by 22PD.3A should also be applied to the witness statement made in the witness's own language.
78. The guidance in paragraph 19.13 of the Chancery Guide may be useful in those circumstances where the witness has broken English but can make themselves understood and can understand written English. It may be possible for the witness statement to be in English and not in the witness's own words, provided the witness statement makes clear that the words used are not his own words, because his English is broken, but he can make himself understood, does understand written English and the words in his witness statement set out his evidence as accurately as possible.
79. I have yet to read a witness statement made by a witness who acknowledges that they speak broken English and that the words in the witness statement are not his words but they do as accurately as possible set out the substance of his evidence. If a witness does fall into that category of witnesses, and it is intended that witness will make a witness statement in accordance with paragraph 19.13 of the Chancery Guide, you probably will have to make an application for permission to file and serve a witness statement in that form. As I say, I have not experienced an application being made for those reasons. It must be a

matter of judgment whether to risk making the witness statement in English or to apply for directions pursuant to paragraph 19.13 of the Chancery Guide.

80. Mindful no doubt of the particular problems which can arise where the witness's own language is not English, as illustrated by the *Frenkel* case, from 6 April 2020 the rules are tightened up. The MoJ explains the reasons for the rule changes thus:

**'together these amendments represent a package of changes to address the issue of cases where a witness statement is presented in English but where, notwithstanding signature of the statement, the witness cannot speak English and the statement is not necessarily "in their own words". The changes aim to make it possible for such cases to be identified much earlier in the process.'**

81. As I have already referred to earlier in this Note, Practice Direction 22 and 32 is amended with effect from 6 April 2020. In an attempt to summarise the effect of the changes, it seems to me that that with effect from 6 April 2020:

- a. the statement of truth must be provided in the language of the witness statement
- b. the witness statement must contain a statement by the intended witness in their own language that that they believe the facts in it are true
- c. the statement of truth is; 'I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.'
- d. the statement of truth must be in the witness's own language
- e. 22PD.3A1 is clarified to make clear it applies to the 'Inability of persons, other than by reason of language alone, to read or sign documents to be verified by a statement of truth'
- f. the heading of the witness statement will include the date of any translation
- g. the witness statement must in any event be drafted in the witness's own language
- h. the witness statement must state 'the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter'
- i. 32PD23.2 is amended to provide that

'Where a witness statement is in a foreign language—

(a) the party wishing to rely on it must—

(i) have it translated; and

(ii) file the foreign language witness statement with the court; and (b) the translator must sign the original statement and must certify that the translation is accurate.'

82. Therefore, it seems that the best course of action to take in relation to an intended witness who cannot speak English, is to
- a. ensure that the witness's witness statement is first drafted in the witness's own language,
  - b. use that foreign language draft to prepare the witness statement in the intended witness's own language, (ensuring so far as practicable that the witness statement is in the witness's own words)
  - c. ensure the witness statement contains the statement of truth: 'I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.'
  - d. ensure the statement of truth in the foreign language witness statement is in the witness' own language which should be the same language as the witness statement,
  - e. ensure the foreign language witness statement includes a statement as to the process by which it has been prepared,
  - f. ensure the witness understands the statement of truth in his or her foreign language witness statement and understands the consequences of not having an honest belief in the truth of his or her witness statement,
  - g. make sure so far as you can that the witness fully fact checks the witness statement to ensure it contains the truth the whole truth and nothing but the truth and is accurate, and
  - h. once the statement of truth to the foreign language statement has been signed and dated by the witness, have the witness statement translated into English, and
  - i. insert the date of translation in the foreign language witness statement, (and the English translation, presumably)

- j. file that foreign language statement with court, and
  - k. have the translator sign the original foreign language statement and also
  - l. have the translator certify that the translation into English is accurate.
83. Of course, if a witness is unable to give their oral evidence in English, in addition to the above procedures being followed, a suitably qualified interpreter should be booked to attend the trial to enable the witness to give their oral evidence to the court with the interpreter's assistance.
84. Finally, on this subject, special rules apply where the trial takes place in Wales. Under the Welsh Language Act 1993, parties and witnesses have the right to give their oral evidence in the Welsh language. Where it is possible that the right may be exercised, the parties or their legal representatives should inform the court so that appropriate arrangements can be made. However, the entire hearing can be conducted in the Welsh language without prior notice where all parties and witnesses directly involved at the time give their consent to the proceedings being so conducted.

#### THE FUTURE OF THE WITNESS STATEMENT

85. The vexed subject of witness statements is under scrutiny. In March 2018, a discussion paper was circulated to the Commercial Court User's Group about the ability of witness statements to provide best evidence. The discussion paper led to the creation of a Working Group to consist of Commercial Court Judges, practitioners and members of the business sector. The Working Group was expanded to include witness statements being used in the Business and Property Courts. On 6 December 2019, it issued its report. The identified advantages of witness statements were that they were conducive to the cards on the table approach to litigation and assisting effective case management. However, the best evidence is often secured through oral examination in chief. The identified disadvantages included the following. Witness statements could be too polished and not properly reflective of the evidence the witness could give at trial. Just the preparation of witness statements could corrupt the witness's memory. Because oral examination in chief is rare in civil proceedings, advocates and judges had forgotten the proper scope of examination in chief. As a result of losing track of what was the proper scope of the witness statement, witness statements were unnecessarily lengthy. Lengthier witness statements meant that cross examination was unnecessarily similarly lengthened i.e. challenging the witness statement rather than exploring and testing those critical aspects of the witness's evidence.
86. The Working Group made a number of recommendations in response to the identified disadvantages of witness statements. These included, that there should be an authoritative statement of best practice; the statement of truth should be expanded to include confirmation that they knew and understood the objective of a witness statement and the appropriate practices in relation to its drafting; the solicitor in charge of drafting the witness statements should sign a

certificate of compliance with the CPR and the relevant Court Guide; there could be the requirement for a pre-trial statement of facts setting out the parties factual case and at the CMC consideration should be given to requiring oral examination in chief on specific issues, which could be covered in a witness statement. In this Note, I have probably not done full justice the Working Group's Report. I recommend you read the Report (Factual Witness Evidence in Trials before the Business and Property Courts – Report of the Witness Evidence Working Group (Report)).

## POSTSCRIPT

87. I draw a veil of discretion over the unfortunate misunderstanding which lead to the case of Bennet v Darcy. I have no knowledge of the outcome of the proceedings but I do hope it was a happy ending. As for Smithers, he remains Mr Darcy's loyal, long suffering servant and has refused all media requests for interviews.

**D GILES**  
**Goldsmith Chambers**  
**Temple**  
**6 April 2020**