



# **THE ROLE OF AFFIDAVITS/WITNESS STATEMENTS AS EVIDENCE**

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## Affidavit or Witness Statement?

### Affidavits

- Statutory basis for such evidence: **Civil Evidence (Scotland) Act 1988, s2(1)(b)**.
- **RCS36.8** provides for the lodging of *inter alia* affidavit evidence
- The Court has no discretion to refuse to admit such affidavit evidence: **Glaser v Glaser 1997 SLT 456** (as is now reflected in the terms of **RCS36.8** – **but** such affidavit evidence is not appropriate where the witness is speaking to critical matters in dispute: **Ebrahem v Ebrahem 1989 SLT 808, 809**).
- Affidavit evidence of little weight because it cannot be cross-examined: **Smith v Alexander Baird Ltd 1993 SCLR 563, 564**; e.g. if Court is faced with conflict of affidavit evidence no finding can be made if there is no other evidence one way or the other: **D v D 2002 SC 33, 37**.
- Copy documents not admissible under **s2**: **Japan Leasing (Europe) plv v Weir's Trs (No 2) 1998 SC 543**.



## Witness Statements

- Two rules which touch upon the use of witness statements: **RCS47.11(1)(viii)** and **RCS47.12(2)(c)-(d)** - the invariable practice of the Commercial Court now is to order the lodging of witness statements.
- The background and history to introduction of witness statements was discussed by the Inner House in **Luminar Lava Ignite Ltd v MAMA Group plc 2010 SC 310, 326, paras [70]-[74]**.
  - › Used in “appropriate cases”
  - › Witness given opportunity to correct any errors and to amplify matters in light of other evidence and to answer further questions
  - › Not permissible to show any witness the statement of another witness before his own statement has been finalised, lodged and intimated (*cf* **Watson v Student Loans Co Ltd [2005] CSOH 134, paras [3]-[8]**).
  - › However, when taking witness statement it is permissible for a party’s solicitor to precognosce the witness in the normal manner “*which includes asking questions in the light of what the solicitor knows from other statements he has obtained*” but not appropriate to show such statements to the witness until they have been lodged with the court.



## **Luminar Lava Ignite Ltd v MAMA Group plc 2010 SC 310 (ctd)**

- The use of witness statements is a “move away from ‘trial by ambush’ and allows a witness to give a considered response to points which may be made against him and the evidence given by others...”
- Where a party proffers an initial witness statement of a witness after the exchange of witness statements of other witnesses, the solicitor tendering the witness statement should certify by letter to the court that the witness has not seen or been informed of the evidence of others or, if he has, should specify the statements which the witness has seen or been told about and the circumstances in which that occurred.
- Such an approach “*consistent with our traditions in relation to the giving of evidence in court*”.



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges**

- Published in March 2012 – remains in force.
- By then, the use of witness statements in commercial actions was described as “*fairly well established*”.
- The guidance was produced in light of the observations in **Luminar Lava Ignite** with a view to developing “*further improvements in practice*”.
- The guidance uses the term “statements” to refer to both affidavits and signed witness statements.
- Purpose of statements is to “*assist the court to hear cases expeditiously*”
- Further benefits identified: shorter diets; less delay in fixing diets; net financial saving from shorter diets; and “*a benefit to parties in knowing sooner rather than later the evidence likely to be adduced by the other side, since it enables them more confidently to assess the likelihood of success or failure and thereby facilitates settlement*”.



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges (ctd)**

- Generally desirable that a witness should give evidence after having had an opportunity to consider documents which he saw at the relevant time and to re-read the statement before giving evidence.
- So far as the role of parole evidence in chief is concerned, the guidance states:
  - › *“We recognise that controversial issues within a witness’s evidence, where issues of credibility and reliability arise, will usually have to be addressed in oral evidence in chief as well as in the statement. This assists the judge to form a view of the witness in the more relaxed circumstance of evidence in chief and also when under the stress of cross-examination.*
  - › *“We do not intend to have all evidence in chief presented solely in written form. In some cases, where significant cross-examination is foreseen, it may not be appropriate to have a witness adopt his statement and be subjected immediately to cross-examination...in many cases it may be necessary to take an early witness through his evidence in some detail to introduce the court to the relevant documentary evidence...Otherwise, it is intended that the substance of a witness’s evidence be contained in witness statement...and extensive evidence in chief be avoided...”*



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges (ctd)**

- Content of the statement: *“The following principle must be respected: the statement should be the evidence of the witness and should cover only those matters to which he can properly speak.”*
- That is both elementary and critically important – as we shall see.



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges (ctd)**

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



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges (ctd)**

### Role of the legal advisers (ctd)

- › *“What the court is looking for is the actual evidence of the witness in written form. It seems the best approach is for the witness to give a precognition in the normal way. As the statement has a different role from a precognition, it is likely that the legal advisers will want to consider the draft statement carefully”.*
- › *“The legal advisers, including – where appropriate – counsel, can consider the draft statement to ensure that the witness has covered the relevant matters to which he can speak. They can also seek to clarify ambiguous statements within his evidence when his statement is in draft, and seek his comments on documents and other material which might appear to raise questions about the accuracy of his recollection. Where there are matters, which the legal advisers think he might be able to address, they can properly ask him whether he can give evidence on those subjects. They can show him documents which he might have seen at the time, and if he had seen them ask for his comment on them. Where the witness comments on documents which had not seen at the relevant time, the fact that he had not seen them should be made clear in his statement.”*



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges (ctd)**

### Role of the legal advisers (ctd)

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

### Exchange of witness statements

- General aim is to avoid witness’s evidence being influenced by the evidence of other witnesses.
- Statements may be shown to witnesses after exchange of witness statements – supplementary witness statements may expand or qualify previous statement in light of other witness statements.



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges (ctd)**

### Procedure

- At start of evidence, witness should identify the witness statement as his. Witness statement should include a declaration that the evidence is true, to the best of the witness's knowledge and belief.
- Witness should confirm in the witness box (i) that the statement is his; (ii) that after giving the statement, he has considered the terms of the written statement and signed it; and (iii) that he adopts it as his evidence, with the result that the statement becomes part of the witness's sworn testimony.
- Notwithstanding the **1988, s2**, the statement will not normally be admitted if the witness is not made available for cross-examination.



## **Guidance on use of signed witness statements or affidavits – Guidance by the Commercial Judges (ctd)**

### Procedure

- Un-cooperative witnesses – any issues in this respect should be explained at a by order hearing, and produce vouching of the request and the witness’s lack of cooperation.

### Conclusions on guidance

- Generally clear, sensible, helpful and unobjectionable.
- Issues remain about the extent to which additional evidence in chief will be permitted.
- Witness statement is the evidence of the witness – should be addressed to those factual issues forming part of the *facta probanda* to which, and only to which, the witness can properly speak.



## The English experience – Berezovsky v Abramovich [2012] EWHC 2463 (Comm)

- Litigation between two Russian oligarchs – trial lasted approximately 11 weeks; plaintiff represented by two silks and seven juniors; the respondent by three silks (including Jonathan Sumption QC in his last case, the Supreme Court having to await its conclusion) and four juniors.
- The over-arching importance of the principle that the evidence must be the witness's evidence, and the need for restraint on the part of the lawyers, was made clear by the trial judge, Gloster J:
  - › *“...no evidential stone was left unturned, unaddressed or unpolished. Those features, not surprisingly, resulted in shifts or changes in the parties' evidence or cases, as the lawyers microscopically examined each aspect of the evidence and acquired a greater in-depth understanding of the facts. It also led to some scepticism on the court's part as to whether the lengthy witness statements reflected more the industrious work product of the lawyers, than the actual evidence of the witnesses.”*



## **The English experience (ctd)**

- This is common sense – the Scottish guidance already reflects this type of concern.
- Nevertheless, seeing witness statements that have been “lawyered” must be a common experience for all practitioners.
- The essential point is that such an approach is actually counter-productive.



## The English experience (ctd) – JD Wetherspoon plc v Harris and others [2013] 1 WLR 3296

- It is also worth noting what was said Sir Terence Etherton C in this case, concerning the proper scope of witness evidence:
  - › “[The witness] would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. These points are made clear...[in] the Chancery Guide...:
    - ‘A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they may arise in the course of the trial.’
  - › “Nor would [the witness] be permitted to give expert opinion evidence at the trial. A witness of fact may sometimes be able opinion evidence as part of his or her account of admissible factual evidence in order to provide a full and coherent account...[but a witness cannot give such evidence on matters] of which he cannot give direct evidence. In that respect he is purporting act exactly like an expert witness giving opinion evidence...”



## Conclusions

- Work out what the issues in dispute are which require to be spoken to by witnesses.
- Identify which witnesses can speak to which facts and, overall, ensure that all matters which require to be proved are spoken to by witness evidence (or otherwise proved/agreed by joint minute).
- The witness statement is the witness's evidence – it is imperative that the witness should not be coached and that the witness is actually able to give direct/first-hand evidence of the matters spoken to in the statement.
- The statement must not be “over-lawyered”
- Ultimately, it is a matter of common-sense.



**Questions?**