Why witness statements are not always the place for literary flourish

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Andrew Smith J in his recent judgment in *Kaupthing Singer & Friedlander Ltd (in administration) v. UBS AG* [2014] EWHC 2450 (Comm) is not the first judge to complain of overly long witness statements. High Court judges have been heard to remark on witness statements which have been lovingly crafted like novels by lawyers (sometimes on a *War and Peace* scale) rather than being factual narratives in the witness's own words. Nonetheless, the Judge's comments must have made uncomfortable reading both for KSF's legal team and its witnesses.

The substance of the dispute in the KSF case is set out in more detail in our note *65 Million Reasons Never to Suffer in Silence*. However, one of KSF's significant difficulties was that the Judge rejected much of its factual evidence.

Drafting of witness statements

Unusually, the Judge refused to accept the witness statement of KSF's key witness, one of its administrators, as his evidence in chief, holding that not only was it too long but it contained so much argument that it presented UBS with an unfair dilemma about what should be challenged in cross-examination. KSF's legal team therefore prepared an amended version of the statement, with what the Judge described as "a good part of the more offensive comments" removed. The purpose of these amendments was, it appears, to remove the witness's commentary from the statement.

However, on cross-examination, the Judge formed the view that the statement was still not "careful", in that it still included matters of which the witness had no real knowledge.

It is impossible to know why that happened in this case and it does not perhaps matter for anyone other than KSF. However, it does raise two issues in relation to the drafting of witness statements that are worthy of note for lawyers and witnesses alike:

- witness statements which argue a party's case; and
- witness statements which overreach the true extent of a witness's knowledge.

Submissions in witness statements

As the Judge commented, it is by no means a unique occurrence for a witness statement to contain too much argument, and that is something for which both lawyers and witnesses should take responsibility. It is doubtless sometimes the case that lawyers become overly enthusiastic to put forward and argue their client's case in every written document they produce. Similarly, there will always be witnesses who feel strongly that "their side" is in the right, and who want to articulate its position as forcefully as possible. The Judge's comments in this case are a salutary reminder that it is positively unhelpful for a witness statement to overstep its proper boundaries.

It is true, of course, that parties adduce witness evidence in order to help present their case, and there will be a natural tendency in the drafting of witness statements to accentuate the positive and draw the sting from the negative aspects of the party's case. The distinction between that and an argumentative statement must be in terms of whether primacy is given to the facts (which are allowed to speak themselves for the merits of the case), or to the case itself (around which the facts are fitted).

Witness statements which go beyond the witness's own knowledge

This is potentially a trap for witnesses who give evidence on behalf of large companies or institutions in particular. It is often the case that rather than presenting a number of brief, incoherent statements from each individual who dealt with a particular aspect of a transaction, one (usually senior) witness, gives what is effectively the company's evidence. Statements which do this are usually prefaced by an explanation that the witness gives evidence of facts within his own knowledge save where he or she indicates otherwise, and that in those cases where he or she does not have personal knowledge of the facts stated, those facts derive from a source which is indicated.

From that point, it is a matter of discipline as between the witness and the lawyers drafting the statement to make sure that every assertion has been supported by a factual enquiry, and that the source of the eventual confirmation for the statement made is provided. For example, lawyers may have interviewed or corresponded with employees or members of an organisation other than the witness and used the resulting information in drafting the witness's statement. This should be made clear to the witness, and if it is not, he or she should ask. Similarly, lawyers may often want a witness to confirm whether he or she is content to make a particular factual statement.

Ultimately, the answer must be a successful collaboration between witness and legal team. Lawyers should not, of course, be cavalier in putting words in witnesses' mouths, recognising that it is the witness who is directly accountable to the court for any inaccuracies. However, assuming that accountability to have been properly explained, it is also for witnesses to take responsibility for what they say, and it is probably the experience of most lawyers who draft witness statements on a regular basis that some witnesses are naturally much more careful than others.

Choosing witnesses

KSF was also unfortunate in suffering from the witness evidence it did not adduce, as well as that which it did. The Judge drew the inference from its failure to produce a particular witness that KSF felt that his evidence might well be unhelpful (applying the guidance in Wisniewski v. Manchester Health Authority [1998] Lloyd's LR Medical 223), although he made it clear that this was not a key part of his conclusions.

Again, the reasons why KSF did not adduce evidence from that particular witness are unknown and irrelevant other than to its own case. The circumstances, however, will be very familiar to any organisation which has (or has had) a relatively high turnover of staff and which then becomes involved in litigation.

This issue is particularly common with banks that undertook substantial redundancy programmes during the financial crisis. They may well find themselves, five or more years later, involved in litigation in relation to transactions carried out or managed by employees, few or none of whom remain.

Where that is the case, and where it appears that the evidence of such former employees would be useful, the bank or organisation may want to make efforts to locate them and document its efforts to do so. Such efforts could take a number of forms, including contacting HR and former colleagues or friends of the individual in question.