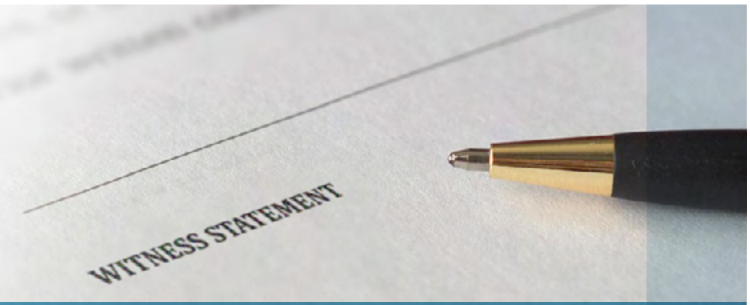
Julian Dobson SOLICITORS

Insolvency Lawyers



Witness Statements and Insolvency Practitioners

A recent case involving a claim brought by liquidators in respect of an alleged transaction at an undervalue and for misfeasance, highlighted the care that insolvency practitioners must take when making witness statements.

In **Hellard v Graiseley Investments Limited [2018] EWHC 2664 (Ch)** the liquidators' claims came to trial and at the outset the Judge directed that a witness statement of one of the liquidators be excluded from evidence. The application proceeded by way of pleadings and the witness statement of the first liquidator dealt with the points of claim and correctly stated that:

> *"it would not be appropriate for me to comment on these claims"*

This was because the liquidator was not a witness as to fact and could not give any factual evidence on any of the pleaded issues.

Liquidator's witness statement excluded

The second liquidator filed a witness statement which the Judge ruled should be excluded. The Judge reasoned that the liquidator could not give any direct factual evidence on the issues pleaded as the events in question occurred over five years prior to the liquidator's appointment. The liquidator's statement did not contain any evidence of any specific investigative work which she had carried out herself. The liquidator described her role as:

> *"enquiries made by staff under my direct supervision, material supplied to me by various third parties, documents located on files obtained by my solicitors.., enquiries made by my solicitors pursuant to my instruction and… documentation disclosed by the Respondents in the course of these proceedings."*

It was at this point that the Judge referred to the Chancery Guide.

Witness statements – the Rules

The rules relating to witness statements can be found in the Civil Procedure Rules Part 32, the Practice Direction and the Chancery Guide.

Paragraph 32.2 CPR provides that:

(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; and

    (b) at any other hearing, by their evidence in writing.

The requirement to serve witness statements for use at trial is contained at CPR 32.4 which provides:

(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.

(2) The court will order a party to serve on the other parties any witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial.

This can be contrasted with the following:

CPR 32.6 Evidence in proceedings other than at trial

(1) Subject to paragraph (2), the general rule is that evidence at hearings other than the trial is to be by witness statement unless the court, a practice direction or any other enactment requires otherwise.

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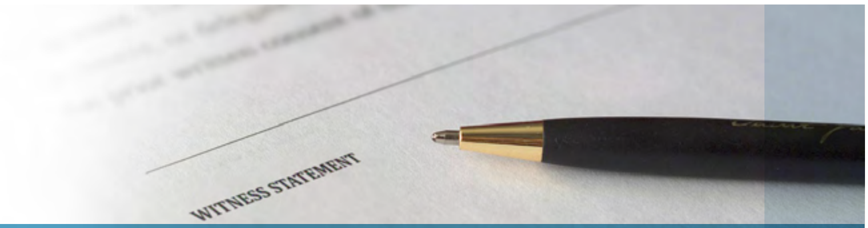
2



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The Practice Direction Paragraph 18.2 states:

"A witness statement must indicate:

(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(2) the source for any matters of information or belief."

The Chancery Guide Paragraph 19 states that a witness statement should be confined to facts of which the witness can give evidence. It continues:

> *"It is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument, expressions of opinion or submissions about the issues, nor to make observations about the evidence of other witnesses."*

The Chancery Guide at Paragraph 19.4 confirms the longstanding principle that a witness statement must state:

> *"which of the statements made are made from the witness's own knowledge and which are made on information and belief, giving the source of the information or basis for the belief."*

Note the use of the word "indicate". This may be used to cover appropriate situations where the identity of the source cannot be revealed for confidentiality or other reasons.

Liquidator's opinion not required

In **Hellard v Graiseley Investments Limited**, the second liquidator's statement contained the liquidator's own interpretation of documents which was a matter of her opinion only. Further it contained factual assertions for which no source of knowledge had been provided. The witness statement also contained allegations which were beyond the issues raised in the points of claim.

Distinction between Trial and Application Notice

ICC Judge Barber referred to the custom or practice of permitting an officeholder to put in a statement or report for the assistance of the court. That custom applies in cases where an officeholder's application proceeds by way of an application notice and supporting witness statements. In such cases the filing of one or more witness statements by the officeholder is the norm.

The Judge noted the distinction between cases commenced by Application Notice and the circumstances in the Hellard case which proceeded by way of pleadings and trial. In trial cases officeholders should refrain from filing witness statements which do little more than set out their own views on given documents. The rejection of the second liquidator's witness statement is a reminder to officeholders as to what is required in the contents of their witness statement.

How to prepare a witness statement

Part 32 CPR and the Practice Direction 32 contain the detailed provisions that parties must comply with when preparing and filing witness statements.

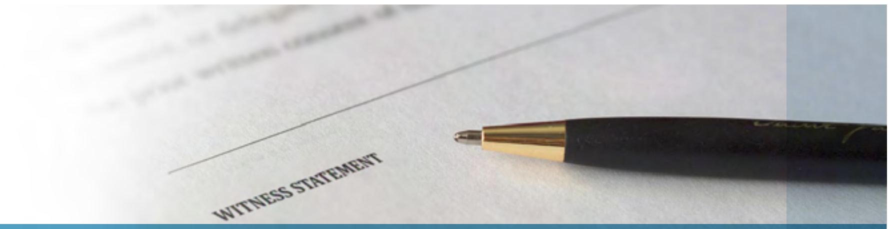
Where an officeholder does provide a witness statement they should adhere to the following guidance:

(1) they should ensure that the witness statement clearly distinguishes between the witness's own knowledge and information received from other sources;

(2) they should identify the source of the knowledge information or belief;

(3) when detailing the source of knowledge, information or belief, they should do so in a way which allows the other party to understand and identify that source.

3



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Let the facts speak for themselves

Officeholders are sometimes tempted to express in witness statements their view as to matters such as insolvency. Rather than expressing an opinion the officeholder should be prepared to rely on the evidence which may be in the form of statutory demands, County Court judgments, company accounts, valuations and if, where it is necessary, expert evidence.

It is a common feature that where officeholders are involved in litigation, they do not necessarily have direct knowledge of the facts upon which the claim relies. This presents officeholders with real issues when it comes to the nature of evidence that they are able to provide at trial either orally or in the form of a witness statement. This situation is often made more complex by the fact that often the investigation work will have been carried out by other members of the liquidator's team, resulting in a situation where the officeholder has little direct knowledge or experience of the enquiries that have been undertaken.

In **Hellard v Graiseley ICC** Judge Barber concluded by expressing concern at the way in which the case had been prepared:

> *"A liquidator conducting an investigation into a contentious issue arising in a company's affairs should strive to gather and review all readily available evidence on that issue on an impartial basis. He should be alive to the possibility of conjecture and unsubstantiated opinion. He should re-evaluate evidence as the investigation progresses."*

Conclusion

The preparation of an officeholder's case in proceedings whether at trial or in support of an application notice will involve witness statements. The contents and use of witness statements are subject to detailed rules which must be complied with. Any temptation to go beyond the rules on contents should be resisted. Witness statements that do not comply with the rules risk being struck out and may lead to the dismissal of the claim as occurred in **Hellard v Graiseley**.

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