

## WITNESS STATEMENTS: A MATTER OF INTERPRETATION AND PRACTICE DIRECTION 57AC

### CIVIL WATCH – PRACTICE NOTE

***As part of Goldsmith Chambers' Civil Watch series, David Giles, Head of the Civil Team at Goldsmith Chambers, explains what happened during a trial when a witness required an interpreter when it did not appear that any of their documents or statements had been translated before they signed them, and how Practice Direction 57AC will impact this situation from 6<sup>th</sup> April 2021.***



### WITNESS EVIDENCE AT TRIAL

1. I recently appeared as counsel in a trial where one witness gave their oral evidence through an interpreter, which was most surprising because the witness had previously signed statements of truth to several witness statements, including their trial witness statement, and statements of case without any hint of the documents having been translated. The witness statements did not include the date of translation or state that it was prepared through an interpreter (See 32PD17.2 (6) and 32PD18.1(5)).
2. At the pre-trial review, the witness's legal representative asked that the witness be permitted to give their oral evidence through an interpreter because, it was said on their behalf, the witness's English was limited.
3. The witness's witness statement for use at trial should be the witness's own language. The witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including cross examination) if required and is not confined to the witness's first or native language. So potentially, even though English is not the witness's first language, the witness statement may be written in English if they have sufficient fluency in English. However, here the witness claimed to require an interpreter to give their oral evidence, so the witness was not sufficiently fluent in English to give oral evidence, raising the issue of why the witness's trial witness statement was written in English?
4. I drew the court's attention to 32PD17.2 (6) and 32PD18.1(5) and to 32PD18.1 and 32PD20 which require the witness statement to be, if practicable, in the witness's own words and in any event drafted in their own language and to contain a statement in the witness's own language that they believe the facts are true, none of which had seemingly been complied with.

5. The court, partially at my invitation, decided to treat at “face value” the request for the witness to give evidence through an interpreter and permitted the witness to use an interpreter at trial.
6. The difficulty faced by the witness at the trial caused by them giving oral evidence through an interpreter in these circumstances was all too predictable.
7. In this particular case, the witness’s witness statement was written in English in a way that was difficult to reconcile with the witness having limited English. The witness statement may have initially been written in the witness’s own words in the witness’s own language and then translated into English, but the witness statement did not explain that was the process by which it had been prepared and no other evidence was led to explain the origins of the witness’s witness statement.
8. Given that the witness’s witness statement was intended to be the equivalent of the oral evidence which that witness would, if called, give in evidence, the question was whether their witness statement was actually their evidence?
9. Where a witness’s first language is not English, it can sometimes be difficult for a legal representative to accurately assess a witness’s command of English. The witness may be able to communicate with the legal representative in spoken English. The witness may give the impression that they can read and write in English. The witness may come across as being a confident English speaker. However, the witness is probably completely unaware of the technical requirements surrounding the preparation and signing of witness statements and statements of case and, where the witness’s understanding of English is limited, the potential pitfalls into which they may fall if they fail to comply with the requirements. The legal representative may mistakenly conclude the witness does not require the assistance of an interpreter to present their case and evidence to the court, that the witness can sign statements of truth to documents written in English without the need for a translation, and an interpreter is not required to prepare their witness statements.
10. Therefore, the legal representative has to sensitively and realistically judge whether the witness for whom English is not their first language would require interpreter and translation services or, even if the witness has a basic level of ability in English, they should be supported by professional interpretation and translation so they may give their best evidence to the court. The judgment to be made is whether the witness is sufficiently fluent in English to give oral evidence (including under cross examination) if required.
11. On the other hand, there are occasions where, although English is not the witness’s first language, they have a reasonable level of competence and comprehension. In those circumstances, I believe there are advantages to the witness not using an interpreter if they would be able to read documents and understand and answer questions put to them in English. If the witness, whose

first language is not English, makes a witness statement in English without the involvement of an interpreter and a translation, and at trial gives their oral evidence in English, great care must be taken by the legal representative to ensure that the witness statement evidence is the authentic voice of the witness.

12. The need for great care from witnesses and legal representatives in the preparation of trial witness statements for use in the Business and Property Courts, will be accentuated from 6 April 2021 when Practice Direction 57AC comes into force. The complete Practice Direction and its Appendix, which contains a statement of best practice, must be read and digested to have a full understanding of its meaning and implications for witnesses and legal representatives. However, for present purposes it will suffice to refer to the confirmation and certificate of compliance which trial witness statements must contain in proceedings to which the Practice Direction applies unless the court otherwise gives permission.

13. For the witness, paragraph 4.1 of Practice Direction 57AC will provide:

*A trial witness statement must be verified by a statement of truth as required by rule 22.1(c) and paragraph 20.2 of Practice Direction 32 and, unless the court otherwise orders, must also include the following confirmation, signed by the witness: “ I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge.*

*I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case. This witness statement sets out only my personal knowledge and recollection, in my own words.*

*On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.*

*I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge.*

14. For the legal representative, paragraph 4.3 of Practice Direction 57AC will provide:

*A trial witness statement must be endorsed with a certificate of compliance in the following form, signed by the relevant legal representative, unless the statement is signed when the relevant party is a litigant in person or the court orders otherwise:*



*"I hereby certify that:*

*1. I am the relevant legal representative within the meaning of Practice Direction 57AC.*

*2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].*

*3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.*

*Name: .....*

*Position: .....*

*Date: ....."*

15. As Gordon Exall, in his Civil Litigation Brief for 8 March 2021, warns, serious consequences may follow for the legal representative who had not prepared the witness statement in accordance with the Practice Direction and guidance but who signs the confirmatory certificate.

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**12/03/2021**

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