

Second bites at the cherry, defective witness statements and sanction: a practical view from the Bar

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In his monthly column, James Bickford Smith discusses the Court of Appeal's recent guidance on communications with judges after draft judgments are circulated, some interesting judicial observations on defective witness statements, and the Commercial Court's important relief from sanctions decision in *Re C (A Child) [2014] EWCA Civ 70*.

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Second bites at the cherry

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Second bites at the cherry

As is well-known, the circulation of draft judgments electronically can lead some parties or their advisors to attempt to re-litigate the case. One reason this has become more frequent lies in the unwise observations of the Court of Appeal in *Re A and L (Children) [2011] EWCA Civ 1205*. This case suggested that it was the advocate's duty to bring obvious deficiencies in the substance of a draft judgment to the court's attention. Elementary analysis would suggest that this puts advisers in the impossible position of having to decide whether a finding they disagree with is merely one they disagree with or substantively defective. Faced with this situation some may take the view that once a judge is against you the more errors in the judgment the better, but others do attempt to correct errors. One consequence of that, of course, can be that a judge changes their mind. That in turn leads, almost inevitably, to an appeal by the much-aggrieved party who felt they had prevailed.

In *Re C (A Child) [2014] EWCA Civ 70* the Court of Appeal has in robust terms sought to discourage such attempts to have a second bite at the cherry, and especially attempts to do so without fully copying other parties into such exchanges with the judge (see [Legal update, Permission to appeal placement order granted due to procedural irregularity \(Court of Appeal\)](#)). The facts of the case are not material for present purposes save that after a district judge in the Principal Registry of the Family Decision circulated a draft judgment:

"10. Counsel for the local authority e-mailed the district judge timed at 3.33 am on 25 February seeking to "clear misunderstandings" as to the thrust of her closing submissions which had apparently not been accepted. The district judge responded at 9.07 in short order restating the pertinent bases of the decision reached and indicating that the order would

follow. Remarkably, and with great temerity in my view, Counsel then responded “with the greatest of respect, I do not agree with your analysis”. Having re-iterated shortly the basis of his decision the district judge quite properly made clear that he was “not prepared and [would] not deal with this matter in e-mail correspondence.”

Macur LJ was highly critical of this approach:

”11. Whilst other advocates were copied into the second e-mail and the first e-mails disclosed to them subsequently, apparently have made no complaint and may well regard it to be orthodox procedure, I regard this to be an entirely inappropriate, unacceptable and unsatisfactory practice. Not only was this an unwarranted ex parte approach by unconventional medium but it is a practice that lends itself to accusations of taint, bias, closed door justice and “stitch up” in the absence of an adequate and reliable method of recording what transpired. In the circumstances, the district judge was extraordinarily restrained in his responses.”

The President of the Queen’s Bench Division made the following additional observations:

”Having seen the judgments in draft, [Counsel] has expressed concern about the comments at paragraphs 10-11 of Macur LJ and paragraph 36 of Aikens LJ dealing with the e-mail exchanges subsequent to the hearing. She observes that “it is by no means unusual for practitioners in the Principal Registry to e mail district judges directly seeking clarification of matters raised in a hearing”. It is one thing, if invited, to make submissions in relation to the terms of an order provided that every communication is copied to every party; it is another to express dissent and seek to engage in further argument. If that is not unusual, it is important that the problems which it generates should be recognised and that the practice should cease. First, it suggests (even if it is not the case) that advocates can go behind the scenes to resolve issues in favour of their clients and, as Macur LJ observes, will give rise to allegations of ‘stitch up’. Secondly, it will encourage litigants in person (who do not have the same understanding of the law or practice) to adopt a similar approach thereby disrupting the finality of the judgment of the court and generating continued uncertainty.”
(*Re C (A Child) [2014] EWCA Civ 70, paragraph 38.*)

These observations will, especially if coupled with those of the Court of Appeal in the earlier case of *Brewer v Mann and others [2012] EWCA Civ 246*, be of some use to parties faced with opponents seeking to re-argue cases while draft judgments are circulated (see [Legal update, Amended judgments: Court of Appeal reviews authorities](#)).

Defective Witness Statements

Two recent cases have returned to the thorny issue of technically defective witness statements. The differing approach the judges in those cases took to ensuing problems highlights the continued uncertainty as to how strict a line judges will take towards non-compliance with the CPR and official guidance on witness statements.

In *Otkritie International Investment Management Ltd and others v Urumov and others [2014] EWHC 191 (Comm)*, a substantial Commercial Court case heard over some 46 hearing days, the claimants’ lead witness was

the subject of sustained attack by the defendants not simply because he was unwilling to enter the jurisdiction to give evidence for fear of arrest but also because his witness statement had been settled in English despite him not being a fluent English speaker. That was a practice that had been dealt with severely by Arnold J in *Force India Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD and others* [2012] EWHC 616 (Ch), discussed in my June 2012 column, *Artice, Translated witness statements, Part 36 offers and track allocation: a practical view from the Bar* (see also, *Legal update, High Court gives judgment in Formula One confidentiality and copyright infringement case*). Eder J limited his observations as follows:

”I also agree that his written statements were most unsatisfactory. In particular, §H1.4 of the Commercial Court Guide expressly provides that if a witness is not sufficiently fluent in English to give his evidence in English, the witness statement should be in the witness’s own language and a translation should be provided. However, although Mr Kondratyuk’s statement was in the English language, it was plain when he gave evidence that he was not fluent in English.” (*Otkritie International Investment Management Ltd and others v Urumov and others* [2014] EWHC 191 (Comm), paragraph 17.)

Significantly, these defects did not lead Eder J to rule the statements inadmissible as evidence, nor did they stop him from accepting substantial parts of the witness’ evidence as true (albeit with a caution doubtless heightened among other things by the witness having served a term of imprisonment related to matters arising in the claim). That pragmatic approach of making criticisms of non-compliance but getting on with determining the substance of the dispute is of course one which most practitioners would expect to see.

Nevertheless, in *Brownlie v Four Seasons Holdings Incorporated* [2014] EWHC 273 (QB), Tugendhat J made an interesting observation and called into question whether that laid back approach is the right one (see *Legal update, Dealing with defective witness statements (High Court)*). He had the following to say of the defendant’s statements:

”31. In his statement dated 15 May 2013 Mr Newman identifies himself as the solicitor acting for the Defendant. The substantive part of his statement reads as follows:

7. The first defendant will contend as follows:(a) That they are a British Columbia registered company based in Canada.(b) They are a management company and do not own either the Park Lane [London] or Cairo Hotels.(c) Both the Cairo Hotel and Park Lane Hotel are owned by different owners and in the case of the Cairo Hotel, this a company referred to on the claim form, Nova Cairo Park SAE.(d) The owners of the Hotel enter into various agreements with a number of Four Seasons entities depending on the jurisdiction. These agreements will cover licensing, management and advisory issues.(e) Four Seasons Holdings Inc is not a party to any agreement in place with the Cairo Hotel.

32. This statement plainly does not comply with the Practice Direction. He does not state that he is speaking from his own knowledge (I assume he was not), nor does he state the source of his information or belief. Although the witness statement contains a statement of truth, the drafting of paragraph 7 is designed not to be a statement of fact at all, but a

submission ("the first defendant will contend..."). Mr Newman does not state that the contentions to be put forward are themselves true, nor that he believes them to be true. As a statement of what the First Defendant intends to submit to the court on some future unspecified occasion, it could in principle be true. But if the First Defendant were to contend that it was true, it would have also to put before the court the facts relied on in support of these contentions. There are no facts put in evidence.

33. The witness statement of Mr McManus dated 1 July 2013 is also defective. It is less defective than that of Mr Newman. However, that is not to the credit of Mr McManus. He referred to Mr Newman's statement, and identified Mr Newman as his assistant, but did not [sic] nothing to correct or explain the obvious defects of Mr Newman's statement. He stated:

2. ... In so far as the matters contend [sic] within this statement are within my own knowledge I believe them to be true and insofar as these matters are not within my own knowledge I believe them to be true [sic] based on my investigations and instructions from the First Defendant.

34. Mr McManus does not give any specific source for the information, and in particular does not identify any individual from whom he has received instructions. Nor does he state what investigations he made, on the basis of which he formed his belief.

35. Mr McManus does go on to give some evidence of fact, but it is irrelevant because he expressed himself in the present tense (referring to July 2013):

5. I can confirm the First Defendants do not own either the Four Seasons Hotel at Nil Plaza, Cairo ("the Cairo Hotel") or the Four Seasons Hotel at Park Lane ("the London Hotel").

6. The First Defendants do not operate either the Cairo or London Hotels, nor do they employ any of the staff working at these hotels, or have any representatives there.

36. Neither party made an application to the court, under the Practice Direction para 25 (ie that the court should refuse to admit the Defendants' witness statements as evidence, or for permission to file defective witness statements)."

In treating the substance of the statements, Tugendhat J took an uncompromising approach to such defects, going so far as to hold that the master who had relied on them had made an error of law by relying on key elements of them. That approach is, of course, at variance with the one taken by Eder J. Interestingly, Tugendhat J's substantive conclusion was that "it might have been better for everyone if the court had simply refused to admit the witness statements pursuant to the (much underused) power in the paragraph 25.1 of Practice Direction 32 (paragraph 30 above)." That approach suggests that an application to bar out a statement might not be as forlorn as might commonly be anticipated.

Relief from sanctions: the latest instalment

I have deliberately left relief from sanction issues until the end of this column given previous discussions of them. Three cases in this month's wave do, however, stand out. Two of these can be mentioned quite briefly: *Clarke v Barclays Bank and another* [2014] EWHC 505 (Ch) contains a lucid and astute discussion of relief from sanctions by Robin Hollington QC sitting as a deputy judge of the Chancery Division. His decision in the case was to refuse permission to a claimant to serve a further expert report shortly before trial in circumstances where the claimant had failed to disclose to the court or the other parties the fact the previous expert had retired and did not wish to give evidence. That decision was plainly correct. So, in my view, was the analysis in the judgment of Andrew Smith J's decision in *Associated Electrical Industries Ltd v Alstom UK* [2014] EWHC 430 (Comm).

Associated Electrical Industries Ltd is a good illustration of the dangers of the Court of Appeal making criticisms of judges without hearing the parties to the case (see [Legal update, Claim struck out for late service of particulars \(High Court\)](#)). In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, the Court of Appeal had criticised the approach of Smith J in granting relief from sanction in the case of *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc and others* [2013] EWHC 2696 (Comm) (see [Legal update, Mitchell appeal dismissed by Court of Appeal](#)). Accordingly, in *Associated Electrical Industries Ltd*, Smith J refused relief despite it being plain that his sympathies (rightly) lay with the party seeking relief. I am doubtful as to whether *Associated Electrical Industries Ltd* was correctly decided; were the case to proceed to the Court of Appeal it would be interesting to see how the court dealt with a mess partly of its own making.

As interesting as those cases may be, there can be little doubt that the most significant recent case on relief from sanctions is *Summit Navigation Ltd and another v Generali Romania Asigurare Reasigurare SA and another* [2014] EWHC 398 (Comm) in which Leggatt J awarded costs against a party who had pressed an argument that given short delay by the opposing party the case had been automatically stayed and no relief from sanction should be granted (see [Legal update, A strong warning against tactical use of Mitchell \(Commercial Court\)](#)). That approach chimes with the warning given in last month's column about the approach specialist courts are taking to overly aggressive pursuit of Mitchell arguments (see [Article, February Round-Up: a practical view from the Bar](#)). Leggatt J's overview of the situation was as follows:

"1. The decision of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2013] 6 Costs LR 1008, on the effect of the new CPR 3.9, has rightly been described as a "game changer": see *Michael Wilson & Partners Ltd v Sinclair* [2013] EWCA Civ 1732, per Lewison LJ. It is important for litigants to understand, however, how the rules of the game have been changed and how they have not. The defendants in this case have sought to rely on *Mitchell* to turn to their tactical advantage a short delay by the claimants in providing security for costs which in itself had no material impact on the efficient conduct of the litigation. They have argued that the consequence of the claimants'

default should be that the action remains permanently stayed.

2. Unlike the claimants' default itself, the defendants' response to it has had a very serious impact on the litigation. The whole timetable for the proceedings has been derailed, significant costs have been incurred and court time has been wasted to the detriment of other court users. In other words, the reliance placed on Mitchell in this case has had the very consequences which the new approach enunciated by the Court of Appeal in *Mitchell* is intended to avoid.

3. In the hope of discouraging other litigants from making similar arguments to those made by the defendants in this case, with similar disruptive consequences, I said at the end of the hearing that I would put in writing my reasons for the orders which I then made. This judgment gives those reasons."

For those readers seeking a good argument to advance against opposition taking an obdurate line on a relief application, Summit Navigation is clearly a very useful authority to have up one's sleeve. That is particularly true of the sting in the tail of the judgment, contained at paragraph 63:

"Save for the costs incurred by the claimants in issuing their application, which were necessitated by their default, I also ordered the defendants to pay the claimants' costs of both applications. The defendants seem to have viewed their opposition to the stay being lifted as a potentially free ride whereby, if successful, they would obtain a fortuitous dismissal of the claim without a trial and, if unsuccessful, would still have their costs paid by the claimants as the defaulting party. It is important to discourage that approach. Quite apart from the fact that the claimants are the successful party, I think it right that the order for costs should reflect the defendants' unreasonable conduct in refusing to agree to the stay being lifted and the waste of time and money which that entailed."

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