CPR WITNESS STATEMENTS - *LOST IN TRANSLATION?*

A Commentary on CPR 32.PD.18.1

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1. An appeal was recently heard by, Mr Justice Freedman, about whether the preparation of a witness statement in English by a multilingual Claimant was CPR compliant or, in breach of Practice direction, 32.PD.18.1. The case is now reported as *Afzal v UK Insurance Ltd (2023) EWHC 1730 KB.*

2. In short, the court had to decide what the meaning of 32.PD.18.1 was, namely,

> "*The witness statement must, if practicable, be in the intended witness's own words and* ***must in any event be drafted in their own language.****"* (my emphasis)

3. Why on earth does that need interpreting, one asks? If the witness is multilingual, as was the position in *Afzal*, can the witness use English for their statement or do they have to use their own/mother tongue?

4. Freedman J decided that the meaning of the Practice direction should be understood in the context of the persuasive guidance of the Business and Property Courts Guide, from April 2021, which states at para.3.3,

> "*A trial witness statement must comply with paras 18.1 and 18.2 of Practice Direction 32,* ***and for that purpose a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross-examination) if required****, and is not limited to a witness's first or native language."* (my emphasis)

5. At paragraphs 43 - 44 of the judgment, the High Court found that the circuit judge had fallen into error by understanding the Practice direction to mean <u>only</u> the witness's own or native language was required to be used under the rules. Since Mr Afzal asserted that he could understand English sufficiently and did not need a translator, he was not in breach of the Practice direction.

6. As the Practice direction makes clear at 32.PD.25.1, breach does not render the witness statement automatically inadmissible in the proceedings. The Court has a

discretion to exercise and guidance upon exercising that discretion is found in the recent decision of *Correia v Williams (2022) EWHC 2824 KB.*

7. In *Afzal,* the Court explained between paragraphs 84 – 86 that the lower court should have exercised its discretion pursuant to 32.PD.25.1, in any event, to allow Mr Afzal to rely upon his witness statement for the purposes of the trial.

Overview

8. So why does the wording of the Practice Direction 32.PD.18.1 require a gloss? In my view, the appeal court was particularly alive to the wider access to justice point of what may now be described as a 'new' cohort of vulnerable court users pursuant to Practice direction 1A.

9. At paragraph 42 of *Afzal*, Freedman J said this,

> "*My attention was particularly drawn to the fact that there may be millions of people in England and Wales who are sufficiently fluent in English but have a different mother tongue or first language. There may be repercussions for access to justice, and indeed other considerations, in the event, that they were required, notwithstanding their sufficiency in English, to provide a witness statement in their mother tongue."*

10. This access to justice point and 'vulnerability' during court proceedings appears to be the same rational underpinning the recent Court of Appeal decision in *Santigo v MIB (2023) EWCA Civ 838* which distinguished *Aldred v Cham (2019) EWCA Civ 1780* and allowed the recoverability of an interpreter's fee as a disbursement in a fixed costs claim pursuant to CPR 45.29.I(h).

11. At paragraph 60, of *Santiago*, Stuart-Smith LJ, put it this way,

> "*I would therefore hold that an interpretation of sub-paragraph (h) that precluded the recoverability of reasonably incurred interpreter's fees in a case such as the present would not be in accordance with the overriding objective because it would tend to hinder access to justice by preventing a vulnerable*

party or witness from participating fully in proceedings and giving their best evidence. I would go further and say that it would not be in accordance with the objective of ensuring that the parties are on an equal footing for essentially the same reasons.".

12. Readers will be aware that express provision has now been made under the new fixed costs regime of 1st October 2023 for interpreter's fees to be recovered as a disbursement in Section VI (Fast Track) claims or, in Section VII (Intermediate Track) claims, if it is a reasonably incurred disbursement.

13. As an aside, in my view, all future arguments about the interpretation of any fixed costs regime in general will have to be considered (or reconsidered) in the light of PD.1A and the decision in *Santiago*.

14. Before drawing the threads together, it is perhaps worthwhile pointing out that many courts still use standard draft directions orders for most Fast track litigation. Some directions in relation to witness evidence appear not to have been updated as the rules have changed. For example, in the *Afzal* case, the directions order had this provision within it,

> "3.C. *If a witness is unable to read the statement in the form produced to the court, the statement must include a certificate that it has been read or interpreted to the witness by a suitably qualified person……"*.

15. This is incorrect. **Either** the witness is sufficiently fluent to give oral evidence and undergo cross examination in English **or** his statement should have been taken in his own/native language and then translated into English pursuant to 32PD.23,

> "*32PD.23.2 Where a witness statement is in a foreign language –*
>
> *a.The party wishing to rely upon it must-*
>
> *(i) have it translated; and*
>
> *(ii) file the foreign language witness statement with the court.*"

Practitioners would be most unwise to rely upon a standard direction to excuse compliance with the actual rules and Practice directions.

Thoughts

16. Freedman J's decision in *Afzal* is to be welcomed since it provides clarity for millions of potential multilingual litigants or witnesses. However, looking to the future, solicitors should now be able to recover the cost of interpretation fees following *Santiago* and there should no longer be any reluctance to go down the route and costs of translation in borderline cases where English language ability may or may not be quite sufficient for the purposes of oral evidence.

17. .Post *Afzal*, a witness has a choice but they must now subjectively assess whether they think their English skills are sufficient for the giving of oral evidence at court (when they have most likely never been subject to the pressure of court proceedings previously) and their solicitor (who has probably not attended a Fast track trial previously) will be unlikely to be able to provide them with much reassurance about the testing environment of cross examination. Can we say that each witness would be giving their best evidence to the Court, if they choose 'sufficient English' over their own/native language? I doubt it.

18. Under the new post October 2023 fixed costs regime, the recoverability of interpretation fees is clear.

19. What then of the Claimant who tells their solicitor that their English is sufficient but when giving evidence, the trial process reveals otherwise? All is not lost since the Court will have to exercise its discretion pursuant to the guidance in *Correia* but the witness will still run the risk of having their evidence excluded. So why take the chance of using English?

Two steps forward one step back?

20. To recap, 32.PD.18.1 was amended into its current form in 2020. Its amendment was welcomed by many since it tried to bring clarity as to how a witness should prepare a

statement for use at court, "*…must in any event be drafted in their own language.*" appeared straight forward.

21. As identified by HHJ Evans, at first instance in *Afzal*, such clarity brought certainty,

> *"…. the ability to commit a witness for contempt for a false witness statement is one of the most important powers that the court has in terms of ensuring that justice is properly done and in deterring and, if necessary, dealing with fraudulent claims. The interests of justice are not served if a witness, for example, in answer to a complaint that his witness statement is untrue in committal proceedings can say, "Well, I didn't quite understand the nature of that paragraph because it's not in my own language and I misunderstood the tenor of it….."."*.

22. Issues concerning fundamental dishonesty and fraud are regularly put before the courts for resolution. It would appear that a sophisticated fraudster exercising their choice following *Afzal* could use 'sufficient English' rather than their own/native language to escape a potential finding of contempt to the criminal standard of proof.

Conclusion

23. For the overwhelming majority of multilingual litigants and witnesses, the decision in *Afzal* is to be welcomed. Yet, in my view, the increased recoverability of interpreter fees in fast track litigation will likely mean fewer parties and witnesses will take a chance on declaring their English skills being 'sufficient' for court purposes, therefore, rendering the practical choice under 32.PD.18.1 rather academic save for the clearest of cases.

Andrew Lawson was instructed to appear on behalf of the Respondent in *Afzal v UK Insurance Ltd* by Clyde & Co, Birmingham.

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