THE NEW RULES ON WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS

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1 April 2021

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1. Key Points

1.1. Below is a summary of the new Practice Direction 57AC (Witness Evidence at Trial)[1]:

(a) The new PD concerns witness statements for use at trials in the Business and Property Courts ("BPCs") and applies to new and existing proceedings. It only applies to trial witness statements signed on or after 6 April 2021 (para 1.1). Witness and reply evidence must also comply with the new PD (*Ibid*).

(b) Certain types of proceedings, notably including most types of insolvency proceedings, are excluded, unless the court directs otherwise (para 1.3). This also includes Admiralty claims commenced under Part 61 CPR.

(c) Nothing in the PD affects affidavit evidence, evidence in a witness statement other than a trial statement, the application to a trial witness statement of any provision of a rule or other PD that prescribes in any respect what must be stated in a witness statement, or the court's powers under rule 32.1 to control, exclude or limit factual witness evidence (para 1.4).

(d) The PD re-iterates, in very clear terms, that the purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would be allowed to give if they were called to give oral evidence at trial without having to provide the statement (para 2.1).

(e) A trial witness statement must state only that which the witness claims personally to recollect about matters addressed in the statement, and must identify what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement (para 3.2).

(f) A trial witness statement must comply with paragraphs 18.1 and 18.2 of PD 32. 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 (para 3.3).

[1] Link to PD 57 AC and the Appendix to PD 57 AC is here: https://www.justice.gov.uk/courts/procedure-rules/civil/127-cpr-update.pdf. See at pages 63 to 74 (accessed 15 March 2021).

(g) Trial witness statements should be prepared in accordance with the Statement of Best Practice ("SBP") appended to this new PD, and any relevant court guide. The SBP will, however, take precedence over any court guide (para 3.4).

(h) The individual witness must sign a confirmation of compliance (see para 4.1). This will sit alongside the witness's Statement of Truth.

(i) A trial witness statement must now also be endorsed with a certificate of compliance, signed by the relevant legal representative, unless the statement is signed when the relevant party is a litigant person (or if the court orders otherwise) (see para 4.3).

(j) The courts will be increasingly likely to visit publicity, and wasted costs orders, on parties where the new rules have not been complied with (see paras 5.1 to 5.3).

2. Practice Direction 57AC

Applicability of the PD

2.1. PD 57AC will apply to witness statements for use at trials in the BPCs. The witness statement must be signed on or after 6 April 2021, and it does not matter when the claim was issued.

2.2. Trial is defined as "*a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings… in any of the Business and Property Courts under CPR Part 7 or Part 8 or upon an unfair prejudice petition under section 994 of the Companies Act 2006 or a contributory's just and equitable winding up petition under section 122(1)(g) of the Insolvency Act 1986*" (para 1.2).

2.3. The PD does not apply to the following proceedings unless the court at any stage directs that it is to apply (see para 1.3):

(a) Application under Part VII of the Financial Services and Markets Act ("FSMA") 2000 for an order sanctioning an insurance business transfer scheme, a banking business transfer scheme, a reclaim fund business transfer scheme or a ring-fencing transfer scheme.

(b) An application under Part XXV of FSMA 2000 for an injunction or restitution in connection with contravention of relevant requirements.

(c) An application for an order under the Insolvency Act ("IA") 1986 (other than a just and equitable winding up petition made under s122(1)(g) IA 1986) under the Insolvency Rules ("IR") 2016, under any enactment or statutory instrument providing for a special insolvency or administration regime, and under Schedule 2 to the Cross-Border Insolvency Regulations 2006.

(d) A claim made under the Companies Act ("CA") 2006 listed in Part II of PD49A of the CPR, an application for an order under Part 26A of CA 2006, a claim to restore a company to the register under section 1029 CA 2006, and a claim under Council Regulation (EC) 2157/2001 listed in Part III of PD49A.

(e) An application under Part II of the Companies (Cross-Border Mergers) Regulations 2007.

(f) Proceedings falling with CPR Part 57, which applies to probate claims, claims for the rectification of wills, claims to substitute or remove a personal representative, and claims under the Inheritance (Provision for Family Dependants) Act 1975, the Presumption of Death Act 2013, and the Guardianship (Missing Persons) Act 2017.

(g) Proceedings in the Intellectual Property Enterprise Court ("IPEC") falling within Section V of PD63.

(h) Proceedings under CPR Part 64, which applies to certain claims relating to the administration of estates of deceased persons or trusts and to charity proceedings.

(i) Proceedings in the TCC relating to adjudication awards under Section 9 of the TCC Guide.

2.4. The PD also will not apply to Admiralty claims as they are commenced by means of a bespoke claim form under CPR Part 61.

New Requirements

2.5. PD 57AC imposes two new requirements on parties preparing trial witness statements:

(a) Appending to the statement a list of documents to which the witness has been referred.

(b) The twofold confirmation of compliance.

2.6. **List of documents**. In order to help achieve the restated objective contained in the PD, the witness is required to set out in their witness statement a list of what documents, if any, they have been referred to for the purposes of complying with that objective.

2.7. The introduction of a requirement to set out - in a list - the documents that the witness has referred to or been referred to for the purpose of providing the statement was a proposal that initially divided opinions within the Working Group. On this, see the Working Group's Implementation Report dated 31 July 2020[2].

2.8. The requirement is designed to inform parties and the court of the extent to which trial witness statements have been put together from, or influenced by, the contemporaneous

[2] Working Group Implementation Report, paragraph 32. Link to the report is here: https://www.judiciary.uk/wp-content/uploads/2020/10/Working-Group-Implementation-Report.pdf (accessed 15 March 2021).

documents, including documents the witness did not see at the time[3]. Proponents of this new requirement say the following[4]:

> *"[I]t is a matter to which careful thought must be given because it may affect the weight to be given to what the witness will claim as recollection to have an understanding of the extent to which it was spontaneous, recollection refreshed from documents the witness saw at the time, or testimony prompted by reviewing documents the witness did not see at the time."*

2.9. Equally, such a requirement should, it is believed, protect factual witnesses from (among other things) criticism if they struggle to remember what documents they looked at for the purposes of preparing their statement[5].

2.10. In the Addendum Report of the Working Group dated 19 October 2020, the results of the Working Group's 'Test Drive' exercise were published. This test drive was conducted through the London Solicitors' Litigation Association ("LSLA") Committee, and two firms volunteered to undertake the test drive. Four questionnaire responses were provided, all of which related to Part 7 trials in the Commercial Court. In three out of the four examples, the time taken to comply with the 'list of documents' requirement was "*insignificant*" when compared to the time spent on the witness statement generally[6]. The list of documents was "'*entirely or almost entirely' created from material generated in any event*" in the three simpler witness statements drafted, and "*mostly*" created from "*material generated in any event*" in the case which involved drafting a more complex statement[7].

2.11. On this analysis, it was concluded that the requirement to produce a list of documents would not be as time-consuming and costly as one may think.

2.12. **Confirmation of compliance**. The confirmation of compliance takes two forms. First, at the end of a witness statement, the witness's signature will attest to not only the statement of truth – the wording for which was updated on 6 April 2020 - but also the new confirmation. This signed confirmation will take the following form:

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[3] *Ibid*, paragraph 40.
[4] *Ibid*, paragraph 42.
[5] *Ibid*, paragraph 45.
[6] Working Group Implementation Report – Addendum, paragraphs 6 and 7. Link to report is here: https://www.judiciary.uk/wp-content/uploads/2020/10/Working-Group-Implementation-Report-Addendum.pdf (accessed 15 March 2021).
[7] *Ibid*, paragraph 7(c).

"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."

2.13. Secondly, the legal representative who drafted the trial witness statement – assuming that a lawyer was involved in the drafting process - must endorse the statement with a certificate of compliance. This certificate of compliance must take the following form:

"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, have been have discussed with and explained to [name of witness].

3. I believe this trial witness statement complies with CPR 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 CPR Practice Direction 57AC.

Name: ……

Position: ……

Date: ……"

2.14. While it is theoretically possible for parties to apply to the court for dispensation from these two requirements (see paras 4.2 and 4.4), it is difficult to envisage circumstances where any such application would be granted. In any event, an application may – and generally should – be made without notice and for determination on the papers.

2.15. Note also that where a statement is not endorsed with a certificate of compliance in the terms set out at para 5.1 / para 4.3 of the PD, then the court may, upon application by any other party or of its own motion, strike out a trial statement if there is reason to consider that the

relevant party was acting in person when it was signed in order to avoid the application of para 4.3 to the statement (para 5.3).

Statement of Best Practice

2.16. Those drafting trial witness statements are expected to comply with the SBP appended to the new PD 57AC, albeit the requirements contained in the Statement itself are not, it seems, novel. The Statement contains extremely useful guidelines, much of which is set out below:

- In trials in the BPCs, often many matters of fact do not require witness evidence, either because they are common ground or because witness testimony adds nothing of substance to the disclosed documents. The fact that there is or may be an issue concerning what the disclosed documents mean or show does not, without more, mean that witness evidence is required (see para 2.2 of the SBP).

- Factual witnesses give evidence at trials to provide the court with testimony as to matters of which they have personal knowledge, including their recollection of matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial (see para 2.3 of the SBP).

- It is improper to put pressure of any kind on a witness to give anything other than their own account, to the best of their ability and recollection, of the matters about which the witness is asked to give evidence (see para 2.4 of the SBP).

- A trial witness statement should refer to documents, if at all, only where necessary. It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2 of Practice Direction 57AC, unless paragraph 3.7 below applies or the witness's evidence is required to: **(1)** prove or disprove the content, date or authenticity of the document; **(2)** explain that the witness understood a document, or particular words or phrases, in a certain way when sending, receiving or otherwise encountering a document in the past; or **(3)** confirm that the witness saw or did not see the document at the relevant time; but in the case of (1) to (3) above if (and only if) such evidence is relevant. Particular caution should be exercised before or when showing a witness any document they did not create or see while the facts evidenced by or referred to in the document were fresh in their mind (See para 3.4 of the SBP).

- The document list to comply with paragraph 3.2 of Practice Direction 57AC should identify or describe the documents in such a way that they may be located easily at trial. Documents disclosed in the proceedings may be listed by disclosure reference. Privileged documents may be identified by category or general description (see para 3.5 of the SBP).

- Trial witness statements should not – **(1)** quote at any length from any document to which reference is made, **(2)** seek to argue the case, either generally or on particular points, **(3)** take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or **(4)** include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say, set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4) (see para 3.6 of the SBP).

- On important disputed matters of fact, a trial witness statement should, if practicable – **(1)** state in the witness's own words how well they recall the matters addressed, **(2)** state whether, and if so how and when, the witness's recollection in relation to those matters has been refreshed by reference to documents, identifying those documents (see para 3.7 of the SBP).

- Wherever practicable – **(1)** a trial witness statement should be based upon a record or notes made by the relevant party's legal representatives of evidence they obtained from the witness, **(2)** any such record or notes should be made from, and if possible during, an interview or interviews (using any convenient format, for example, face to face meeting, video or telephone call or conference, webchat or instant messaging). If a trial witness statement is based upon evidence obtained from the witness by other means (for example, by written answers to a questionnaire or the exchange of emails or other forms of correspondence, or by the witness preparing their own draft statement), the guidance set out in this Appendix should still be followed, so far as possible and modified as necessary (see para 3.10 of the SBP).

- If a trial witness statement is not based upon evidence obtained by means of an interview or interviews, that should be stated at the beginning of the statement, and the process used instead should be described (to the extent possible without waiver of privilege) (see para 3.12 of the SBP).

- The legal representatives of the relevant party should assist the witness as to the structure, layout and scope of the statement and may take primary responsibility for drafting it, but in that case, the content should be taken from, and should not go beyond, the content of the record or notes referred to in paragraph 3.10(1) where such a record or such notes exists or exist. If the legal representatives wish to indicate in a draft for a trial witness statement that further evidence is sought from the witness to clarify or complete the statement, that should be done by non-leading questions for the witness to answer in their own words and not by proposing content for approval, amendment or rejection by the witness (see para 3.13 of the SBP).

Sanctions

2.17. Failure to comply with any part of the new PD may lead to the court doing one or more of the following (see paras 5.2):

(i) Refuse to give, withdraw permission to rely on, or strike out, part or all of a trial witness statement;

(ii) Order that a trial witness statement be re-drafted in accordance with this PD or as may be directed by the court;

(iii) Make an adverse costs order against the non-complying party; and

(iv) Order a witness to give some or all of their evidence in chief orally.

2.18. In any event, the court retains its full powers of case management and the full range of sanctions available to it (para 5.1).

3. Strategy and tips

3.1. We set out below some strategic steps that parties may wish to bear in mind during the litigation process:

Avoid sanctions

3.2. The new PD and SBP is intended to ensure a change of culture, and whilst there is no dramatic change to the existing rules, it is to be expected that the courts will consider applying sanctions more often than has previously been the case. Ensuring that you comply with the substance of the rules contained in the PD and the SBP is all the more important to ensure you avoid strike out applications and/or censure from the court and hostile applications from the other parties to the litigation.

Use sanctions as a sword

3.3. In cases where the other party has arguably not complied with the PD, consider whether you might wish to apply to the court for an order under para 5.2 of the PD.

Timetabling

3.4. Previously, witness statements could do much of the 'heavy lifting' for parties when it came to providing the trial judge with a narrative on the documents ahead of the trial commencing. That will no longer be the case. Witness evidence (both in chief and cross-examination) will likely take up less of the Court's time. Instead, there will be a greater emphasis on judicial pre-reading time. The parties will need to factor this in to allow the judge sufficient time to digest the documents. Equally, solicitors and counsel will likely need additional time for opening and closing submissions in order to provide some colour to the documentary evidence and ensure the judge is with them.

Settlement negotiations

3.5. Witness statements are often used as a vehicle through which to push parties towards settlement. In that respect, the new rules deprive trial statements of much of their utility in that they may be said to push the parties to only say the "bare essentials" – to be "as concise as possible", albeit "without omitting anything of significance" (para 3.3 SBP). Consider whether commentary on documentary evidence can be put to other parties in a different form ahead of trial. This may take the form of open or WP correspondence.

Provide another roadmap for trial

3.6. As stated at paragraph 3.4 above, parties will need to offer judges an alternative route in to the factual material relevant to the issue(s) determined at the final hearing. This may take the form of one or more of the following documents:

(a) A reading list and chronology, whether agreed or not.

(b) Pre-trial skeleton arguments prepared by counsel.

(c) An agreed statement of facts. In addition, parties may want to seek permission from the court at the CMC/CCMC or PTR stage to produce a Pre-Trial Statement of Facts ahead of the trial. While the Witness Evidence Working Group proposed introducing such a document, ultimately, it was not adopted in the PD. It remains an option, however, if the judge so directs or on a voluntary basis.

Be mindful of CPR r32.19

3.7. One matter which appears not to have been considered when implementing PD57AC is the effect of r.32.19. Parties are taken to admit the authenticity of a document unless they serve a notice to challenge its authenticity (r32.19(1)). That notice should be served either within seven days of disclosure or by the date for serving witness statements (whichever is later) (r32.19(2)). Accordingly, at the point of exchanging statements a party may not know if document authenticity is in issue.

3.8. Parties are permitted to refer to a document in trial witness statements in order to challenge its authenticity (para 3.4(1) of the SBP). To avoid a situation where, upon simultaneous exchange of witness statements, one party discovers that the other party is challenging the authenticity of a document, consider the following two options:

(a) Address this risk pre-emptively: a party may wish to address this in correspondence with the other party or by seeking permission from the court at the CMC stage for an order that any notice under CPR r32.19(1) be served before statement exchange. Alternatively, if there is reason to do so, it be pre-emptively addressed in the initial witness statement.

(b) Address this risk reactively, by seeking permission to to file a reply or supplemental statement.

4. Cases to Note

Uthyavel v Raviraj [2021] EWHC 501 (Ch)

4.1. **Case summary**. This was a trial of preliminary issues in a claim concerning the ownership of the business and freehold sites of two convenience shops in South London. Master Clark considered (among other things) whether the parties traded in partnership in respect of two business enterprises, and whether certain freeholds were partnership assets.

4.2. **Judge's comments on witness statements**. Master Clark said that this was a trial characterised by high levels of emotion and acrimony (para 1). In her judgment, Master Clark also criticised the lawyers drafting the parties' statements:

> *12. All of the witnesses in this claim were born in Sri Lanka, and spoke Tamil as their first language. None of them were fully fluent in English. It was clear that the statements of the non-professional witnesses had not been drafted in their own words (contrary to the guidance in para 19.2 of the Chancery Guide). This was very unsatisfactory and increased the difficulty of evaluating the weight to be given to their evidence.*

4.3. **Comment**. Courts will face problems with determining the weight to give to evidence when parties do not follow the guidance that a witness statement should be in the witness's own words. This point is made not only in Chapter 19 of the Chancery Guide, but also in paragraph 18.2 of PD 32.

4.4. Para 18.1 of PD 32 says that a witness statement must, if practicable, be in the intended witness's own words and must, in any event, be drafted in their own language. As part of the changes to the CPR, which came into effect on 6 April 2020, witness statements are now to be drafted in the witness's own language (PD 32, para 19.1(8)). Where a foreign language statement is relied upon, the party adducing the statement must have it translated. They must file both the foreign language witness statement and the translation with the court, and then secure certification from the translator of its accuracy (PD32, para 23.2) and the date on which it was translated (PD 32, para 17.2(6)). The statement of truth must also be in the witness's own language (PD 22, para 2.4).

Ceviz v Frawley & Anor [2021] EWHC 8 (Ch)

4.5. **Case summary**. The Claimant claimed an order for specific performance of a written agreement or alternatively damages for breach of that agreement. The written agreement was for "what might loosely be called a joint business venture" (para 2) between the parties and concerned the running of a pizzeria restaurant.

4.6. **Judge's comments on witness statements**. HHJ Keyser QC expressed his dissatisfaction with the way in which D1's witness statement had been drafted:

> *10. A further observation does not reflect adversely on Mr Frawley but on whoever was responsible for drafting his witness statement. It was 22 pages long, comprised 111 paragraphs and contained a great deal of comment and commentary that has no proper place in a witness statement. Witness statements are for the giving of evidence, not for arguing the case, making points against the opponent, or providing commentary on documents.*

4.7. **Comment**. Note that the new confirmation – which will sit alongside a witness's statement of truth – will say, "*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 is it not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case*". Para 3.6 of the Appendix to the PD emphasises that witness statements should not "*seek to argue the case, either generally or on particular points*" nor "*take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument,"* and "*include commentary on other evidence in the case*".

Philipp v Barclays Bank UK Plc [2021] EWHC 10 (Comm)

4.8. **Case summary**. D applied to strike out, or for summary judgment on, C's claim that it had breached its duty to protect her from the consequences of an authorised push payment fraud. The application centred on the scope of a bank's duty to act in accordance with a customer's mandate and to exercise reasonable care and skill in executing a customer's instructions, and also on issues of causation.

4.9. **Judge's comments on witness statements**. HHJ Russen QC saw the force in D's objections to parts of the witness statement served by C in order to oppose D's application:

> *14. The Bank had objected to much of Mr Squire's statement on the grounds that it strayed into inadmissible argument, engaged in a protracted commentary on the documents and sought to give expert evidence by reference to "expert evidence" from Mr Nigel Brigden whose report (" the Brigden Report ") was exhibited to Mr Squire's witness statement even though the court had not granted permission for expert evidence. There is considerable force in these points. Counsel for the Bank, Ms Knight, cited the decision of Mr John Kimbell QC in Cathay Pacific Airlines Ltd v Lufthansa Technik AC [2019] 1 WLR 5057, [4]-[7], where the deputy judge commented upon the desire of the Business and Property Courts to eliminate the service of witness statements which stray into argument and a commentary upon the documents.*
>
> *15. Reading Mr Squire's witness statement certainly reinforces the impression that the outcome of his client's claim really turns upon questions of law.* (emphasis added)

4.10. **Comment**. Where the outcome of a trial turns primarily upon questions of law, parties will need to think carefully about the utility of serving witness statements that go into the argument in any detail. That said, it should be noted the statement was for an interim application, not a trial, and it is likely to be helpful for statements served by solicitors to identify some of the key points arising in order to avoid a later argument about being taken by surprise. Both parties in the case had adduced witness statements from solicitors, who were not primary witnesses of fact, and the court accepted the evidence from both sides for the purposes of identifying the issues and documents of relevance. This case also contains some interesting commentary about the extent to which permission to adduce expert evidence may be required on an interim application.

YJB Port Ltd v M&A Pharmachem Ltd & Anor [2021] EWHC 42 (Ch)

4.11. **Case summary**. The case concerned an anti-competition clause that was contained in an exclusive manufacturing and distribution agreement between C and D1. Having found that D1 was liable for breaching the anti-competition cause, Stephen Houseman QC (sitting as a Deputy Judge of the High Court) was dealing with the issue of quantum and whether C had suffered any diminution in the value of its business as a result of D1's breach.

4.12. **Judge's comments on witness statements**.

> *57. The Defendants called one witness of fact: Mr Benjamin Miller. Mr Miller is a qualified solicitor, described as a consultant solicitor with Setfords Solicitors, the law firm on the record for the Defendants in these proceedings. He also became CEO of both companies in February 2020. His involvement in their commercial and operational activities stretches back over a decade. His witness statement ran to 69 paragraphs and contained a great deal of analysis, submission and commentary on documents.*
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> *58. In terms of meaningful factual evidence, Mr Miller had little to contribute save to confirm that the parlous state of the Defendants' current business makes it highly improbable that they will market or launch ST.* (emphasis added)

4.13. **Comment**. Parties will attract criticism where they file and serve witness statements which are of limited value to determining factual issues in dispute.

4.14. **Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2020] EWHC 518 (Admin)**

4.15. **Case summary**. The parties were challenging the proper interpretation of paragraph 11(d)(ii) of the National Planning Policy Framework (issued in February 2019).

4.16. **Judge's comments on witness statements**. The proper interpretation of paragraph 11(d)(ii) was, ultimately, an objective question of law, and it was not said to be affected by the fact that a substantial number of decision-makers have followed a particular approach (para 66). The witness statement of Mr Waters (for C) was, therefore, "essentially irrelevant" (para 66):

> *67. Parties should not seek to file evidence of this kind in future challenges, whether they be a claimant or a defendant. This practice is objectionable for several reasons. First, costs are incurred unnecessarily, not only by a claimant but also by a defendant in having to consider whether to respond to the material. Second, court time may be taken in up considering the material needlessly. Third, a defendant may be placed in the awkward position of having to decide whether or not they should respond to the material, particularly if it contains material*

which is partly admissible and partly inadmissible, worse still if those two categories are intertwined.

…

70. Even where written evidence filed in proceedings refers solely to relevant material, it should be borne in mind that witness statements and expert reports may not make submissions to the court. Sir Terence Etherton in JD Wetherspoon plc v Harris [2013] 1 WLR 3296 stated at [39] that it is generally not the function of a witness statement to provide a commentary on the documents in a trial bundle or to make points which are essentially matters for legal argument or submission. (emphasis added)

4.17. **Comment**. It is important to consider the utility of the witness statement evidence. In this case, the statement was unhelpful because it was not going to help the court to decide what was, ultimately, a question of law.

Kogan v Martin [2019] EWCA Civ 1645

4.18. **Case summary**. This case concerns an Intellectual Property dispute about the authorship of a screenplay. Kogan was the Defendant and alleged joint author. The judge characterised a scene-by-scene analysis of the screenplay by D as "vague and rambling", and dismissed it, relying instead upon documentary evidence. Ground 6 of D's appeal was that the judge was wrong to ignore D's evidence. The Court of Appeal agreed.

4.19. **Judge's comments on the value of witness evidence**. Floyd LJ delivered the judgment of the court. At paragraph 88 of his judgment, he made clear that the utility of *Gestmin* (see ***Gestmin SGPS SA v Credit Suisse (UK) & Anor* [2013] EWHC 3560**, discussed below) should not be overstated:

We think that there is real substance in this ground of appeal. We start by recalling that the judge read Leggatt J's statements in Gestmin v Credit Suisse and Blue v Ashley as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in CBX v North West Anglia NHS Trust [2019] 7 WLUK 57, Gestmin is not to be taken as laying down any general principle for the

assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.

4.20. **Comment.** The Court of Appeal found that the Judge's approach left the reader of judgment with no idea of what interaction there had been between the parties. Courts still need to make findings on all of the evidence in spite of the fact that the human memory is fallible. There will be cases where it is inherently unlikely that matters will be carefully recorded, and in those cases, the documents will not be of primary importance (on this, see the illuminating judgment of Males LJ as to the essential building blocks of judicial reasoning in ***Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors*** **[2019] EWCA Civ 1413**).

Cathay Pacific Airlines Ltd v Lufthansa Technik AC [2019] EWHC 715 (Ch)

4.21. **Case summary**. This hearing was listed to determine D's costs and consequential matters following its success when opposing C's application for summary judgment.

4.22. **Judge's comments on witness statements**. One of the consequential matters under consideration was case management directions. John Kimbell QC (sitting as a Deputy Judge of the High Court) was asked to reconsider whether to order the parties to identify in their pleadings the extent to which they propose to rely on witness evidence. In ordering the parties to identify the facts which they intended to prove by means of witness evidence - pursuant to CPR rr3.1(2)(m) and 32.1 (see para 10 of the judgment) – he made the following observations:

5. One of the reasons why reforms are under consideration at all is because experience has shown that witness statements in the Business and Property Courts often stray into argument and commentary on documents. An extreme case of this

type came before the Chancellor in J D Wetherspoon plc v Jason Harris [2013] EWHC 1088 (Ch). Dealing with an application to strike out a witness statement which contained a large amount of inadmissible material, the Chancellor said this (in paragraph 33 of his Judgment):

> *"The vast majority of Mr Goldberger's witness statement contained a recitation of facts based on documents, commentary on those documents, argument, submissions and expressions of opinion, particularly on aspects of the commercial property market. In all those respects Mr Goldberger's witness statement is an abuse. The abusive parts should be struck out."*

6. The danger of long witness statements being served which contain a large amount of commentary on documents appears to be particularly acute when (i) the sums at stake a large (ii) the events in issue lie some considerable time in the past and/or are spread out over a lengthy period of time (iii) and there is a lot of documentation. In these circumstances, the temptation to argue the case through the witness statements by providing a running commentary on the contemporaneous documents often seems to be irresistible.

7. Given that the relationship between the parties in this case lasted ten years, the large sums at stake and the likely volume of documentation evidencing meetings and decisions over that period, there is, in my judgment, a real risk of witness statements being served which contain a large amount of commentary on documents.

8. The practice of requiring parties to state in their pleadings what, if any, facts they intend to prove by means of witness evidence found favour with Lord Justice Jackson when carrying out his review into the costs of civil litigation. In paragraph 2.6 of Chapter 38 of his Final Report [1] , referring to the practice by its German name ("Relationsmethode"), he said this:

> *"The aspect of the "Relationsmethode" which I believe can and should be adopted in civil litigation in England and Wales is the identification of proposed witnesses by reference to the pleadings. If in any given case the court so directs, each party should identify the factual witnesses whom it intends to call and which of the pleaded facts the various witnesses will prove. This is a*

task which the parties will be doing internally anyway so hopefully it will not add unduly to costs. The filing of such a document which might possibly be a copy of the pleadings with annotations or footnotes or an extra column will be necessary groundwork for any case management conference at which the judge is going to give effective case management directions for the purpose of limiting and focussing factual evidence, in order to save costs."

9. It is implicit in this passage, that Jackson LJ considered that the power to make such orders in appropriate cases already exists in the courts broad case management powers. The two most obvious sources of the power to make such a direction are: CPR 3.1(2)(m) and CPR 32.1(1). In a case such as the present one where the parties have already exchanged a significant volume of documents and evidence under CPR Part 8 and have made submissions as to the extent to which the case of either party can be proved by documents alone, it ought to be all the more straightforward to identify the areas in which oral witness evidence will really be needed.

4.23. **Comment**. The procedural background to this litigation likely influenced the judge's decision to order parties to identify which facts will be proved by witness evidence. The case was commenced under Part 8 CPR, so the parties would have been required to provide the written evidence upon which they intended to rely when serving their claim form or acknowledgement of service (see CPR r8.5). After hearing C's summary judgment application, John Kimbell QC had held that that case should continue as if it had been commenced under Part 7.

Estera Trust (Jersey) Ltd & Anor v Singh and Ors [2018] EWHC 1715 (Ch)

4.24. **Case summary**. At the centre of this unfair prejudice petition was a company which owns, develops and runs hotels, many of which are in London. One of the questions Fancourt J had to consider was whether there was a quasi-partnership. There were also allegations of breach of fiduciary duty, and further unfairly prejudicial conduct relating to the removal of Mr Herinder Singh (the First Petitioner) as a director and employee of the Company.

4.25. **Judge's comments on witness statements**. The witness statements, in this case, filled two lever arch files without exhibits (para 19). Fancourt J, however, found the witness statements to be of limited utility by the time the factual witness had completed their evidence:

The witness statements prepared for the main witnesses (HS, JS, Mr Machan and Mr Christensen) were very long. They traversed and commented upon a range of events – in the case of HS and JS, their family lives from an early stage and the history of the Company from 1977. It is clear to me that they are the products of careful reconstruction of events and states of mind, based on a meticulous examination of all the documents in the case by the large teams of lawyers involved. The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements. As was demonstrated repeatedly in cross-examination, the statements mostly present considered argument and assertion in the guise of factual evidence and often with a slant that favours the case of the witness. In many instances, it emerged that this was without any real recollection on the part of the witness of the events or circumstances being described, but with a belief that the witness "would have" done or said something for superficially plausible reasons that are now advanced with the benefit of hindsight.

That is not to be taken as suggesting that, as part of this process, the witnesses have been deliberately dishonest about parts of their evidence. Rather, it seems to me that the process of creating the written statements has infected or distorted the true evidence that the witness was capable of giving. The written statement then, in turn, affects the witness's memory of events when he or she comes to court to give oral evidence, having studied carefully his or her written statement in the days before doing so. It took skilful and painstaking work by counsel to remove the varnish that had been applied and identify what the witness could fairly recall and that of which he or she had no real memory at all.

The result is that, in my judgment, these principal witness statements are not of much greater value as evidence of the matters in dispute than detailed statements of case (largely duplicating the already lengthy and detailed statements of case that were previously prepared). In other words, an inordinate amount of time and costs have been expended in preparing statements that are of limited value in resolving the factual disputes in this case. While I take account of the contents of all the statements, and draw on particular passages where material, I am cautious about relying on factual assertions in the statements where these are not either

supported by contemporaneous documents, or confirmed by the account that the witness gave of the matter when cross-examined or by the credible evidence of other witnesses. (emphasis added)

4.26. **Comment**. The judge's comments might suggest that trials become unnecessarily long when parties file and serve witness statements which contain factual matters on which the witness, realistically, has no personal knowledge. See also para 2.2 of PD 57AC, which says, "*trial witness statements are important in informing the parties and the court of the evidence a party intends to rely on at trial. Their use promotes the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate costs, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial*".

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

4.27. **Case summary**. Fraser J's judgment on the issue of quantum in this long-running litigation concerned works performed at a paint manufacturing facility in the North of England between 2012 and early 2015. C entered into an agreement with D to supply pipework for use in a soon-to-be-built paint manufacturing factory. That agreement was executed as a deed. While C was found to have been in repudiatory breach of contract following an adjudication, it was nonetheless found (in the case on liability) the C was still entitled to recover overpayments from D paid out as a result of findings in the adjudication.

4.28. **Judge's comments on witness statements**. Large parts of D's witness evidence were struck out at the pre-trial review for this hearing on quantum. Fraser J set out his reasons for doing this in his judgment. In doing so, he also commented on the (undesirable) oddities of D's witness statements, as filed for the trial on liability:

136. … Both of these witnesses served very lengthy witness statements. Upon analysis, it was realised that they were, for considerable passages, simply the same text, with the first person having been changed to the third person where necessary grammatically, and vice versa. These were the only differences for over one hundred paragraphs. This was unusual, but was particularly notable as being almost the converse to the unusual situation that had occurred concerning Mr Wells' and Mr McGrady's witness statements for the liability trial. For that trial, MMT had three witnesses, Messrs Wells, McGrady and Conn. Each of the witness

statements of Mr McGrady and Mr Conn [prepared for the trial on liability] *were curiously worded and extraordinarily brief. Mr McGrady had simply stated in his paragraph 5 that he had read Mr Wells' statement and agreed with everything Mr Wells had said. Mr Conn stated that he too agreed with what Mr Wells had said, but identified certain passages in respect of which he had no knowledge of his own, and therefore which he could not corroborate. ...*

137. The peculiar approach to witness statements for the quantum trial may therefore have been adopted as a rather misguided attempt at avoiding what had occurred for the liability trial, but still failed to grasp the essential point that written witness evidence is supposed to be in a witness' own words. ICI therefore issued an application to strike out large parts of the witness evidence served by MMT for the quantum trial on the basis of this wholesale duplication. This was heard by me on 15 March 2018 at the Pre-Trial Review. One submission made by Mr Bowdery for ICI on that application was that MMT's approach to their witness statements for the quantum trial was verging on contemptuous (whether in a grammatical, or technical, sense) given the history of the MMT witness statements for the first trial. Presenting the evidence in this way also raised practical trial-management difficulties for ICI, as Mr Bowdery would not know which witness was the correct person to ask about particular points during cross-examination. I ordered MMT to re-serve the witness statements of Mr Wells and Mr McGrady striking out the duplication, so that ICI would know which witness was giving evidence about which events. This was done on 27 March 2018, shortly after the order was made.

138. I do not know why this approach to witness evidence was taken by those at MMT, or by those advising MMT, but the reasons behind it do not matter. The rules concerning witness statements are clear; they are included at CPR Part 32 and are available to be consulted by all litigants and their advisers. At Part 32.4.5 guidance is given on "preparation and content of witness statements". Modern litigation depends upon witnesses setting out (with the necessary degree of assistance) their factual evidence in writing, served on the other parties in the litigation in advance. Much time and costs should be saved by doing this. It avoids what is now seen as the old-fashioned approach in civil cases, where a witness would give their evidence in chief orally, which takes some time. Indeed, I am

firmly of the view that the specialist courts could not conduct the number of trials they currently do without the use of witness statements; I doubt judicial resources could be stretched to accommodate the extra court time that would be required for oral evidence in chief. Somewhat presciently so far as this case is concerned, the notes to CPR Part 32.4.5 state "Unfortunately, rules, practice directions and guidance as to the content of witness statements appear to be habitually ignored by practitioners". I would draw the attention of practitioners in the specialist courts in particular to the requirements in the rules for such documents. Statements are not supposed to be drafted by those who equate length with substance, and regardless of expertise with the copy and paste functions of word processing programmes, witness statements must be drafted in accordance with the Civil Procedure Rules. Nor should such documents include lengthy quotations from contemporary documents. Inevitably, judges are, notwithstanding these clear rules, regularly confronted with lengthy statements that do exactly that. It may be that this is done in an attempt to impress the other side in adversarial proceedings with the weight of evidence in party's favour. Not only is this usually counter-productive, it is also wholly wasteful in terms of legal costs, but importantly also judicial resources. These documents are invariably read by the court prior to the witness being called. There is absolutely no good reason, in any case, for the regular and continuing failure to pay attention to the rules concerning witness statements. Attention is also drawn to the likely consequences if such rules are ignored, and to the Review of Civil Litigation Costs: Final Report (December 2009) by Jackson LJ (as he then was) Chapter 38. (emphasis added)

4.29. **Comment**. The judge's comments stress the pitfalls of preparing unhelpful witness statements, which can be both too long and too short. A statement drafted to simply repeat, or alternatively to confirm without more, factual matters / commentary / analysis contained in another statement will be met with opprobrium (and possibly an interim application to strike out parts of the evidence).

Nicholls v Ladbrokes Betting & Gaming Limited [2013] EWCA Civ 1963

4.30. **Case summary**. Although the subject matter of this case concerns allegations of D breaching its statutory duty to protect the health and safety of its employees, CPR Part 44 (and in particular CPR r44.2) is nonetheless in issue on applications for costs before the BPC. In

Nicholls, D was successful on appeal, but it was deprived of 20% of its costs up to and including trial.

4.31. Judge's comments on the witness evidence. Jackson LJ made the following comments on D's approach to witness evidence:

> *'[69]… It is inappropriate to serve witness statements which refute every allegation, whether right or wrong…*
>
> *'[70]… As my Lords rightly say, the criticisms of the claimant's conduct during the robbery were not pursued at trial. The fact remains, however, that the vast majority of personal injury actions settle before trial on the basis of the written evidence served. Therefore the written evidence matters, even if a party knows that it will abandon certain points in the event of a trial.'*

4.32. **Comment**. It is undoubtedly clear, following *Nicholls*, that parties which go too far with trial witness evidence risk failing to recover their own costs for witness statements, even if they are successful at trial.

Gestmin SGPS SA v Credit Suisse (UK) Limited and Anor [2013] EWHC 3560 (Comm)

4.33. **Case summary**. C claimed damages for loss arising out of alleged negligent financial advice that it received from D2 in 2005. Of particular note is the fact that C's misrepresentation claim depended entirely on C's recollection eight years after the relevant events, in respect of which there was no contemporaneous supporting documentation.

4.34. **Judge's comments on *the value of* witness evidence**. Leggatt J (as he then was) commented on the relationship between witness and documentary evidence, and considered why it is preferable to base factual findings on inferences drawn from the documents:

> *22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality,*

> *motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.* (emphasis added)

4.35. **Comment**. There is a long discussion from Leggatt J on the fallibility of human memory. He is not saying that witnesses are inherently dishonest, but rather that memories are fluid, or malleable, especially when it comes to past beliefs. Parties are susceptible to interference where their current beliefs colour their memory of past beliefs. Undoubtedly this is made worse by the litigation process.

4.36. For Leggatt J, the documents are the key starting point. Cross-examination is more about testing the witness's personality, motives and working practices, and less about what they do and do not remember.

Statement of Peter Smith J, 21 June 2012, on the Re Farepak litigation

4.37. **Summary**. Mr Justice Peter Smith published a written statement following the collapse of the trial which he was presiding over and in which the Secretary of State pursued claims against the former directors of the Farepak group under the Company Directors Disqualifications Act 1986. The trial was abandoned by the Secretary of State at the close of its case owing (among other things) to the significant concessions which the Secretary of State's witnesses had made during the course of cross-examination.

4.38. **Judge's comments on the witness evidence**.

> *47. The courts have regularly reminded parties that the purpose of witness statements is to replace oral testimony. It is not to rehearse arguments, it is not to set out a case and whilst it necessarily has to be drafted with the collaboration of lawyers, it should not be a document created in the language of lawyers by the lawyers, because the lawyers do not go into the witness box and defend it. This is unfair to defendants, as this case showed. It is also unfair to the witnesses.*

4.39. **Comment**. This was a very high-profile case in which the Secretary of State faced numerous problems with its own witness evidence. A matter which caused Peter Smith J particular concern was that the Secretary of State's key witness had exhibited to their statement a 700-

page document which they clearly did not understand. Indeed, this was something that became eminently clear during cross-examination.