

Witness Statements

The new rules in the BPCs

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Agenda

1. **Looking Back: what went wrong?**
2. **Requirements of PD57AC**
3. **Sanctions and Strategy**
4. **Q&A**



Looking Back What went wrong?

Hugh Sims QC

Witness Evidence Working Group

- Genesis: Commercial Court Users Meeting in March 2018 ... Concern among judges that statements ineffective at giving “*best evidence at proportionate cost*”
- Result = Working Group chaired by Andrew Baker J
- Working Group Final Report published Dec 2019
- Implementation Report 31 July 2020, available at: <https://www.judiciary.uk/announcements/the-witness-evidence-working-group/>

The value of witness evidence

Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor **[2013] EWHC 3560 (Comm)**

[21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

[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.
(emphasis added)

BUT ... be careful with *Gestmin*

***Kogan v Martin* [2019] EWCA Civ 1645**

- IPEC judge criticised for effectively junking witness evidence in reliance upon *Gestmin*.
- *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.
- Context is key.

Drafting statements in a witness's own words

Uthyavel v Ravivrai [2021] EWHC 501 (Ch)

[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.

Commentary on the documents

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

[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.

[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 are 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...

Cases which turn on questions of law

Gladman Developments Ltd v SoS for Housing, Communities and Local Government [2020] EWHC 518 (Admin)

[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)

Cases which turn on questions of law

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

[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... There is considerable force in these points.

[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)

Looking Forward

Practice Direction 57AC and the Statement of Best Practice

Charlotte Mallin-Martin

What's new?

- 1. Applicability of PD 57AC**
- 2. New requirements**
- 3. Statement of Best Practice**

1. Applicability of PD 57AC

- **When will the PD apply?**
 - Witness statements for use at *trials* in the BPC (paras 1.1 and 1.2).
 - The witness statement must be signed on or after 6 April 2021 (para 1.1).
 - Includes supplemental or reply witness statements where allowed by the court (para 1.2).

1. Applicability of PD 57AC

- **When will the PD not apply?**
 - Affidavit evidence.
 - Witness statements other than a trial witness statement.
 - Admiralty claims commenced under CPR Part 61.
 - Certain trials listed in para 1.3, unless the court at any stage directs that it is to apply.

2. New Requirements

A. List of Documents

See paragraph 3.2 of PD 57AC:

“...Identify by list 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.”

- Producing an index (and not exhibit) of documents (see para 3.5 of the SBP).
- Identifying privileged documents.

2. New Requirements

A. List of Documents (contd.)

- Witness Evidence Working Group:
 - Perceived benefits and shortcomings of the new requirement.
 - Outcome of the Working Group's 'Test Drive'.

2. New Requirements

B. Confirmation of compliance

- i. Witness's individual confirmation (para 4.1).
- ii. Legal representative's certificate of compliance (para 4.3).

n.b. limited scope to apply for dispensation from the above requirements (per paras 4.1 and 4.3).

2. New Requirements.

Individual Confirmation (para 4.1).

“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. New Requirements

Legal Representative's Certificate of Compliance (para 4.3).

"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..."

3. Statement of Best Practice

Preparing witness statements:

- Interviewing witnesses (paras 3.10, 3.11, 3.12 of the SBP).
- Matters of which the witness has personal knowledge (paras 2,3, 2.4, of the SBP).
- Limiting the number of drafts of the statement (para 3.8 of the SBP).
- n.b. para 3.3 PD 57AC on drafting a statement in a witness's own language.

3. Statement of Best Practice

Dealing with documentary evidence:

- Providing witness evidence which adds nothing of substance to the disclosed documents (para 2.2 of the SBP).
- Referring to documents in a statement (paras 3.4 and 3.7 of the SBP).
- Commentary on documents (para 3.6 of the SBP).

Sanctions and Strategy

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1. Strike out and Redrafting

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

MMT criticised ICI's evidence, stating it *'would not know which witness was the correct person to ask about particular points during cross-examination.'*

[137] *'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.'*

2. Costs sanctions

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

‘[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.’

3. Trials collapsing

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

- High profile case
- Numerous issues with evidence
- E.g Witness exhibited 700-page document
- Witness did not understand document
- Defendants did not understand its purpose
- Judge directed SoS to identify relevant passages
- Collapsed spectacularly

PD57AC, paragraph 5

- 5.1: Court retains full case managements powers
- 5.2: Courts may apply one or more of the following:
 1. Refuse/withdraw permission to rely on, or strike out statement (in whole or in part).
 2. Order statement be re-drafted per PD or as may be directed by the court.
 3. Make an adverse costs order against the non-complying party.
 4. Order a witness to give some or all of their EIC orally.

Sanctions

Existing Sanctions

- Strike out
- Redraft
- Adverse Cost
- Ineffective Trial

PD57AC Sanctions

- Refuse/withdraw permission
- Strike out statement
- Order Redrafting
- Adverse Costs
- Oral EIC

Strategy and Tips

Avoid sanctions!

Use sanctions as a sword

Timetabling

Think settlement

Provide another roadmap for trial

Be mindful of r.32.19

Roadmaps for Trial

1. Pre-trial Statement of Facts

- Proposed by Working Group
- Not adopted (see Implementation Report para 7)

2. Skeleton Arguments

3. Do you want to *signpost*?

CPR r.32.19

1. r.32.19(1): Taken to admit document authenticity unless serve a notice.
2. r.32.19(2): By *latest* of
 - a) date for serving WS or
 - b) within 7 days of disclosure.
3. Options
 - a) Address pre-emptively (in directions or statements)
 - b) Address reactively (e.g supplemental statements)