



PD57AC: A NEW DAWN FOR WITNESS EVIDENCE?

On 6 April 2021 Practice Direction 57AC (“the PD”) will come into force as part of the 127th update to the Civil Procedure Rules. It makes significant changes to the approach parties will need to take in preparing witness evidence for use at trials in the Business and Property Courts and so is essential reading for practitioners operating in any of the fields under the purview of the Business and Property Courts.

In this article I explain the background to the PD, what significant changes it introduces and what impact the PD is likely to have on those practising in the Business and Property Courts.

The background to the introduction of the PD

The Witness Evidence Working Group (“WEWG”) was set up to consider ways in which the current practice in relation to factual witness evidence could be improved in the Business and Property Courts and it produced two reports, a final report setting out its findings and recommendations in July 2019¹ and an implementation report in July 2020².

In its final report, WEWG identified various disadvantages with the current practice regarding use of witness statements, including:

- ◆ There were concerns it did not always achieve the best evidence, as criminal practice and pre-CPR civil practice suggested that the best evidence was often obtained via examination in chief.
- ◆ The fact the vast majority of practitioners and most judges had little or no experience of trying commercial disputes with oral evidence in chief at trial meant that the proper and sensible scope of evidence in chief was no longer the stock-in-trade knowledge of those responsible for proofing witnesses and helping them draw up their statements.

- ◆ Witness statements frequently strayed far beyond any evidence the witness would in fact give if asked proper questions in chief, often covering matters of marginal importance and/or straying into comment and ‘spin’, even if blatant argument was avoided.
- ◆ Time and cost savings of the current practice were somewhat illusory, as cross-examination took much longer at trial and in preparation because of the ground cross-examiners felt (or feared) they needed to cover. In substance it had become a process of challenging the content of the witness statements rather than a process of exploring and testing only the critical evidence of the witness.
- ◆ The witness statement phase of the pre-trial process had become very time-consuming, increasing cost and lengthening the pre-trial timetable.

1 <https://www.judiciary.uk/wpcontent/uploads/2019/12/Witness-statement-working-group-Final-Report-.pdf>.

2 <https://www.judiciary.uk/wp-content/uploads/2020/10/Working-Group-Implementation-Report.pdf>.

In light of these disadvantages, a range of potential proposals for reform were canvassed, and in its final report WEWG made the following recommendations:

1. An authoritative statement of the best practice regarding the preparation of witness statements should be formulated;
2. Witness statements should contain a more developed statement of truth;
3. The solicitor in charge of drafting the witness statement should be required to sign a solicitor's certificate of compliance with the rules and the relevant court guide;
4. Individual courts within the Business and Property Courts should give further consideration to the introduction of a requirement for parties to produce a pre-trial statement of facts setting out their factual case (in addition to witness statements);
5. Examination in chief on specific issues/topics should be available as an option, to be considered at the CMC and ordered as appropriate;
6. Extensions of the page limit for a witness statement should rarely be granted unless judges have had the opportunity to scrutinise their contents. Applications should generally be considered at PTRs;
7. Courts should more readily apply costs sanctions and express criticism of non-compliance; and
8. There should be harmonisation of the guides of the Commercial Court, Chancery Division and TCC insofar as they address the general principles as to the content and drafting of witness statements.

It is against this background that the PD is being introduced and should be considered.

³ 'Trial witness statement' is defined in paragraph 1.2 as 'a witness statement that is served pursuant to an order made under rule 32.4(2), or pursuant to rule 8.5 or an order made under rule 8.6(1)(b), or that is prepared for the trial of an unfair prejudice petition or a contributory's just and equitable winding up petition, including supplemental or reply witness statements where allowed by the court'.

The scope of the Practice Direction

The first point to note is that the PD applies to new and existing proceedings, but will only apply to trial witness statements signed on or after 6 April 2021. As paragraph 1 makes clear, it does not affect affidavit evidence, evidence in a witness statement for purposes other than a trial³, or the general powers of the court in CPR 32.1 with regard to witness evidence.

The second point to note is that the PD's application is specifically excluded in the case of certain proceedings. Paragraph 1.3 states, subject to the court directing to the contrary, that these are:

1. Applications under Part VII of the Financial Services and Markets Act 2000 ("FSMA 2000") for orders sanctioning insurance business transfer schemes, banking business transfer schemes, reclaim fund business transfer schemes or ring-fencing transfer schemes;
2. Applications under Part XXV FSMA 2000 for injunctions or restitution in connection with contraventions of relevant requirements;
3. Applications for orders under the Insolvency Act 1986 ("IA 1986) other than contributory winding up petitions on the just and equitable ground under s.122(1)(g) IA 1986, under the Insolvency (England and Wales) Rules 2016, under any enactment or statutory instrument providing for a special insolvency or administration regime, and under schedule 2 of the Cross-Border Insolvency Regulations 2006;
4. Claims made under the Companies Act 2006 ("CA 2006") listed in Part II of CPR Practice Direction 49A, applications for orders under Part 26A CA 2006, claims to restore companies to the register under s.1029 CA 2006 and claims under Council Regulation (EC) No 2157/2001 listed in Part III of CPR Practice Direction 49A;
5. Applications under Part II of The Companies (Cross-Border Mergers) Regulations 2007;
6. Proceedings under CPR Parts 57 and 64;

7. Proceedings in the Intellectual Property Enterprise Court falling within Section V of CPR Practice Direction 63; and
8. Proceedings in the Technology and Construction Court relating to adjudication awards under section 9 of the TCC Guide.

As such, the PD does not apply to some of the more specialised work that falls within the jurisdiction of the Business and Property Courts.

Key changes

1. The need for the witnesses to identify documents referred to

Paragraph 3.2 of the PD provides that:

'A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must 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. The requirement to identify documents the witness has referred to or been referred to does not affect any privilege that may exist in relation to any of those documents.'

This is likely to be controversial because it could have significant consequences for the treatment of that evidence by a judge in the form of inferences and/or for the approach taken in cross-examination. If, for example, a witness identifies a large number of documents, there could be a tendency to question that witness's recollection on the basis the position in the statement might reflect the documents he or she had been shown rather than the witness's actual recollection of events.

As identified by the WEWG implementation report, this requirement is likely to make the proofing process significantly more time consuming for practitioners (and therefore costly to clients). There are obvious risks that an

overly conservative approach might mean that a witness is not shown documents that could legitimately be shown to them to remind them of the surrounding circumstances, while an insufficiently robust approach could constitute a breach of the PD and undermine the witness's utility to the court.

2. The requirement for a witness to confirm compliance

Paragraph 4.1 requires a witness statement for trial to be verified by both the statement of truth prescribed by CPR Part 22 and include the following confirmation by the witness:

'I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge.'

I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.'

This witness statement sets out only my personal knowledge and recollection, in my own words.'

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

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

Paragraph 4.2 provides that there can be an application for permission to vary or depart from the need to include the above statement, though it is unclear what circumstances would be appropriate for such an application or what criteria the court would apply in considering it.

3. The requirement for legal representatives to provide a certificate of compliance

Paragraph 4.3 of the PD requires a legal representative to provide an endorsement to the witness statement in the following terms:

'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.'

Similarly to the witness's confirmation of compliance, there is provision in paragraph 4.4 for applications to be made to dispense with the need for the certificate of compliance or to obtain permission to vary or depart from its form. There is again no indication of what circumstances would be appropriate for an application or what criteria a court would apply.

4. The introduction of a statement of best practice

This is a novel concept and appears to have been included to force home the point that the witness statement should be limited to the evidence in chief that the witness would give at trial. Particular points are that:

- ◆ The fact that there is or may be an issue concerning what disclosed documents mean does not in itself mean that witness evidence is required.

- ◆ Practitioners should prepare witness statements in such a way as to avoid in so far as possible any practice which might alter or influence the witness's recollection other than by refreshment of memory as might be done during oral evidence given at trial.
- ◆ It will not generally be necessary for witness statements to refer to documents, other than the list required under paragraph 3.2 of the PD or where it is required to:
 - ◆ Prove or disprove the content, date or authenticity of the document;
 - ◆ 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
 - ◆ Confirm that the witness saw or did not see the document at the relevant time.
- ◆ Connected with the above, 'particular caution' should be exercised before or when showing a witness a document they did not create or see while the facts evidenced by or referred to in the document were fresh in their mind.
- ◆ Trial witness statements should not seek to argue the case, take the court through documents in the case, set out a narrative derived from those documents or include commentary on other evidence.
- ◆ When witnesses are interviewed with a view to obtaining evidence, leading questions should be avoided and should not be used in relation to important contentious matters

Although this reflects the way that witness statements should be proofed generally not simply when they are for use at trial, there is a degree of uncertainty regarding the need to take particular caution when showing witnesses documents they have no prior knowledge of.

As indicated above in the context of the need to list the documents shown to a witness, this inevitably requires practitioners to exercise their own judgment which is bound, at least in the short term, to lead to a divergence of approach in terms of how witness statements are prepared.

The future

Although it is expressly limited in scope, the PD's effect is likely to be felt beyond its specified parameters, either as a result of judges having it in mind when making case management directions in relation to cases generally, or conceivably as a result of judges taking advantage of the provision in paragraph to apply the PD to the exclusions listed.

There is also the possibility that it will need to be followed where there is a degree of ambiguity as to whether it should apply, for example when an application is made by a trustee in bankruptcy by reference to s.14 of the Trusts of Land and Appointment of Trustees Act 1996. It is also possible that in time it could be incorporated into the CPR proper so as to apply to all proceedings, not simply those before the Business and Property Courts. As such, all practitioners should have it in mind when preparing witness evidence.

Not all of the recommendations set out in the WEWG final report were adopted in the PD, for example the need for parties to produce pre-trial statements of facts. These recommendations are indicators of what steps might be taken in the near future.

Conclusion

The PD is the strongest indication yet of the judiciary's attempts to deal with the common occurrence of witness evidence that consists of argument and commentary and which does not reflect what the witness would actually provide had they given oral evidence in chief at trial. It is to be welcomed and should in time ensure that witness evidence is better prepared (in the sense that the witness's memory of events is preserved as well as possible) and that trials themselves and preparation for them can become more streamlined, as witness statements will cease to be used as an opportunity to argue a case in advance of the provision of a skeleton argument.

However, there are some points of uncertainty that are unlikely to be resolved until the PD has been in force for a sufficient time for a standardised practice to develop, particularly regarding the listing of documents in the witness statement that the witness has been provided. It is to be hoped that judges will be reluctant to draw inferences in circumstances when the provision of documents to a witness is as likely to reflect matters of the professional judgment of legal advisers than the recollection (or lack thereof) of a witness.

For the present time practitioners will need to tread carefully so as to comply with the PD.

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