CHANGES ARE COMING IN TRIAL WITNESS STATEMENTS IN THE UK BUSINESS AND PROPERTY COURTS

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UK Litigation and Dispute Resolution Alert

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In just over a month, major changes will be introduced to the way trial witness statements are to be prepared in the Business and Property Courts. In this alert, we consider the rationale for these changes brought in by Practice Direction 57AC, their scope and some practical implications.

RATIONALE FOR THE CHANGES

There has been significant and increasing judicial criticism of witness statements in recent years. The courts have disapproved of witness statements crafted by lawyers that too often contain storytelling narratives, extensive references to documents, and blur factual evidence with argument. There is also increasing judicial recognition that human memory is fallible, easily altered, influenced, and ever-changing. The new Practice Direction 57AC is the product of the Witness Evidence Working Group, set up to tackle these issues.

APPLICABILITY OF PRACTICE DIRECTION 57AC

The new Practice Direction 57AC applies to witness statements signed on or after 6 April 2021 for use at trials in the Business and Property Courts, regardless of when a claim was issued. It does not apply to affidavits, or witness statements for interlocutory applications, and there is a list of certain types of proceedings in paragraph 1.3 of the Practice Direction to which it shall not apply unless the Court directs otherwise.

A trial is defined in Practice Direction 57AC as a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings in the Business and Property Courts. Practice Direction 57AC also applies to unfair prejudice petitions under section 994 of the Companies Act 2006 and winding-up petitions under section 122(1)(g) of the Insolvency Act 1986.

THE KEY REQUIREMENTS

Trial witness statements must be prepared in accordance with Practice Direction 57AC and its Appendix, which is a “Statement of Best Practice.” The key requirements include:

Pre-drafting Stage

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- Legal representatives should explain to a witness (a) the purpose of a witness statement, (b) the proper content of a witness statement, and (c) the proper practice in relation to the preparation of a witness statement in accordance with Practice Direction 57AC and its Appendix.
- The statement should be prepared based “upon a record or notes” taken during an interview or interviews with the witness, rather than, for example, an initial draft prepared by a legal representative based on documents.
- During the interview(s), the legal representative should use open questions and avoid leading questions, and record the interview as fully and accurately as possible.

Content of the Witness Statement

- Witnesses should only adduce evidence about matters of which they have personal knowledge, including recollecting matters they “witnessed personally”, and should do so in their own words, concisely, as they would if they were giving oral evidence in chief.
- The draft statement should not go beyond the content of the record or notes taken in the witness interview(s), involving as few drafts as possible. If further information is required, it should be obtained using open questions in another interview, rather than a legal representative drafting additional wording into the statement for subsequent review by the witness.
- If the witness provides information otherwise than by interview, then that should be stated at the beginning of the witness statement, and the process should be described (to the extent possible without waiving privilege).
- If facts are common ground between the parties, a witness statement should not deal with them. The statement should be limited to the witness's own personal knowledge of the facts that are in dispute. A statement should not argue the case, offer opinions, or commentate on other evidence.
- If the witness's evidence adds nothing of substance to what is already set out in disclosed documents, then the statement need not deal with those facts.
- The statement should identify how well the witness recalls the matters addressed, and whether his or her recollection has been refreshed by reference to documents (see further below).

Documents

- Significantly, the witness statement must identify, by list (not exhibited), the documents the witness has been referred to when preparing the statement, even if those documents are not expressly referred to in the statement.
- Documents provided to the witness to recollect matters should be limited to those that the witness created or saw at the time.
- The witness statement should not be a narrative of the documents and should not refer to or explain documents simply because there is an issue between the parties as to what the document means or shows. Such a dispute should be properly resolved by way of submissions.

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- Statements should not quote the contents of documents.

Confirmation of Compliance

- In addition to a Statement of Truth, and regardless of whether a party is legally represented, the witness must sign a prescribed form of Confirmation of Compliance with Practice Direction 57AC, including that they understand the purpose of the statement (to set out matters of fact of which the witness has personal knowledge) and that it is not their function to argue the case.

Certificate of Compliance

- Where a party is legally represented at the time of signing the witness statement, the witness statement must be endorsed with a prescribed form of Certificate of Compliance signed by the legal representative, including that they believe the witness statement complies with Practice Direction 57AC (including the appended Statement of Best Practice) and paragraphs 18.2 and 18.2 of Practice Direction 32.

WHAT ARE THE SANCTIONS FOR NON-COMPLIANCE?

The court retains its full powers of case management and sanctions. In addition, Practice Direction 57AC provides that, if a party fails to comply with any part of it, the court can: (a) refuse permission to rely on, or strike out, some or all of the witness statement; (b) order that the witness statement be re-drafted; (c) make an adverse costs order; or (d) order a witness to give some or all of their evidence in chief orally.

POTENTIAL PRACTICAL IMPLICATIONS

So what might the changes mean in practice for clients and their legal representatives? Likely implications include the following:

- Earlier engagement with witnesses and planning of evidence is going to be required, including more detailed discussion over who will be providing witness statements and briefing them on Practice Direction 57AC and Appendix.
- Careful consideration will need to be given to any documents to be referred to the witnesses (and therefore included in the list of documents to accompany the witness statement) and which documents are within which witnesses' knowledge.
- More witnesses may be required to address individual elements of a case (rather than a main witness covering and summarizing the majority of the evidence and documents).
- There is likely to be a greater emphasis and importance placed on witness interviews, the records of those interviews, and the strength of a witness's mental recollections.
- It is likely that more witness involvement in the text of their witness statements will be required, and there may be more explanation given in or around witness statements, to identify the method of their preparation.
- Witness statements may be shorter and greater in number, though the impact on the time and cost of evidence preparation remains to be seen.

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- Parties will still want to get across their case-theory narrative arising from the background facts and the key contemporaneous documents. If not in their witness statements, they may do so in more detailed pleadings and/or skeleton arguments.

It will be interesting to see how the new Practice Direction 57AC affects the practice in the Business and Property Courts, whether it results in increased challenges by parties to the propriety or admissibility of their opponents' evidence or interrogations of witnesses' lists of documents, whether there is judicial appetite for imposing sanctions (and which ones—a reversion to oral evidence in chief could be particularly interesting), whether it serves the interests of delivering justice at an accessible cost, whether it results in more satellite litigation, and if the changes are ultimately implemented beyond the Business and Property Courts.

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