Trial Witness Statement Rules under Practice Direction 57AC—First Published Case to Address the Revised Regime

29 July 2021

Mad Atelier International BV v Manes [2021] EWHC 1899 (Comm) ("*Mad Atelier*") is the first published judgment addressing the revised trial witness statement regime under Practice Direction 57AC ("PD57AC"),[1] and confirms that PD57AC does not change the rules on admissibility of opinion evidence.

How Did the Judgment Arise?

In *Mad Atelier*, the Defendant brought an application during a pre-trial review of the claim to strike out passages of witness statements served on behalf of the Claimant, all of which dealt with questions of quantum. The application was made pursuant to paragraph 5.2 of the new PD57AC, and sought to strike out what was said to be opinion evidence given by lay witnesses.

Background to Dispute

The dispute in *Mad Atelier* arose out of a 2015 joint venture agreement (the "JVA"), by which the parties agreed to develop an international franchise of restaurants. The Claimant alleged that the Defendant fraudulently induced it into transactions leading to the termination of the JVA. Those transactions allegedly resulted in the transfer of the Claimant's interest in the company MAD Atelier SA at an undervalue, and the loss of profits the Claimant would otherwise have gained from the joint venture. These two issues led to questions as to the appropriate quantum of damages. As Sir Michael Burton, sitting as a Judge of the High Court, noted, both issues were intertwined, and required an assessment as to the "*hypothetical profits that were likely otherwise to have been made*" but for the conduct of the Defendant.[2]

---

1 The revised rules apply to trial witness statements signed on or after 6 April 2021. See our client update dated 23 February 2021 for information on the new regime under PD57AC.

2 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [4].

In order to prove the profits that were likely to have been made, the Claimant put forward witnesses who had worked for the Claimant group of companies and been involved in the joint venture; their evidence relied on their relevant experience in the business in order to project the restaurants that would have been operated pursuant to the JVA in various locations in London and Dubai. The Defendant did not put forward any evidence as to what profits he had made following the impugned transactions. The parties' respective expert witnesses relied in part on the evidence of the Claimant's witnesses.

The Defendant sought to strike out portions of the Claimant's witness statements on the basis of paragraph 5.2 of PD57AC, which provides:

> "*If a party fails to comply with any part of this Practice Direction, the court may, upon application by any other party or of its own motion, do one or more of the following – (1) refuse to give or withdraw permission to rely on, or strike out, part or all of a trial witness statement…*"[3]

The Defendant alleged that the relevant parts of the Claimant's witness statements were contrary to paragraphs 3.1(1), 3.4 and 4.1 of PD57AC, and the Statement of Best Practice contained in the Appendix to the Practice Direction (the "Appendix"), which provide that:

- A trial witness statement must contain only evidence as to matters of fact that need to be proved at trial (paragraph 3.1(1));
- Trial witness statements should be prepared in accordance with the Statement of Best Practice contained in the Appendix (paragraph 3.4);
- Trial witness statements must include a confirmation by the witness that they understand it is not their function to argue the case (paragraph 4.1); and
- Trial witness statements should not include commentary on other evidence in the case (either documents or the evidence of other witnesses) (paragraph 3.6(4) of the Appendix).

The evidence in question was said to be contrary to these provisions by virtue of being opinion evidence of lay witnesses.

---

[3] *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [3].

Reasoning

In support of its application, the Defendant relied on the case of *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296 in which certain opinion evidence was held to be inadmissible. However, in *Wetherspoon*, this was on the basis that the witness had expressed opinions on "*market practice by way of commentary on facts of which he has no direct knowledge and in which he cannot give direct evidence*".[4]

The Defendant also relied on the case of *Buckingham Homes Ltd v Rutter* [2018] EWHC 3917 (Ch), which followed *Wetherspoon*. Sir Michael Burton noted that in *Buckingham Homes* (partly citing Mr John Kimbell QC sitting as a Deputy High Court Judge in that case):

> "*… no provision had been made for independent expert evidence … the witness statement was 'self-evidently an expert's report' and given by someone who could not give evidence of any primary facts in issue and was … 'an independent third-party who has been asked to look at the documents … and to provide commentary on them'*".[5]

The Claimant argued that the opinion evidence was admissible and not contrary to the provisions of PD57AC because:

- *Wetherspoon* is non-prescriptive and is authority that the judicial approach to opinion evidence of a lay witness is flexible, and that there are exceptions to the practice of its being impermissible.[6]

- Section 3(2) of the Civil Evidence Act 1972 confirms that there is no blanket rule that witnesses who are not independent experts cannot give opinion evidence. It reads: "*… where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived*".[7]

- Paragraph 3.1(2) of PD57AC (which the Defendant did not refer to) makes it clear that in addition to matters of fact the witness statement may include evidence which

---

4 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [6], citing Sir Terence Etherton C in *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296 at [39]–[41].

5 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [7], citing Mr John Kimbell QC sitting as a Deputy High Court Judge in the Chancery Division in *Buckingham Homes Ltd v Rutter* [2018] EWHC 3917 (Ch) at [30].

6 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [8], citing *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296 at [40] and [41].

7 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [11].

a witness "*would be allowed to give in evidence in chief if they were called to give oral evidence at trial*".[8]

- PD57AC does not overrule the directions given by previous authorities as to what may be given in evidence (which were summarised by Sir Michael Burton, as set out below), nor does it change the law as to admissibility of evidence.[9]

The Defendant argued that those previous authorities cited by the Claimant "*antedated the new Practice Direction*" and should be "*read in the light of it*".[10]

Sir Michael Burton noted that those authorities, including Court of Appeal authorities, showed, among other things, that:

> "*… witnesses of fact may be able to give opinion evidence which relates to the factual evidence which they give, particularly if they have relevant experience or knowledge. Such witnesses are not independent, and to that extent such evidence would need to be tested by reference to cogency and weight…*[11] *This is particularly so where the evidence given is as to a hypothetical situation as to what would or could have happened*".[12]

Drawing on those authorities, he also considered that the view that "*hypothetical evidence is evidence of fact … extends, provided that the witness can give evidence by reference to personal knowledge and involvement, to what would or could have happened in the counterfactual or hypothetical circumstances. This is particularly so in relation to quantum*".[13]

---

8 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [9].

9 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [9].

10 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [8].

11 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [11], citing *ES (By her mother and litigation friend DS) v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284 esp at [31], [32] and [41]; *DN (By his father and litigation friend RN) v London Borough of Greenwich* [2004] EWCA Civ 1659 esp at [25] and [26].

12 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [11], citing *Kirkman v Euro Exide Corporation (CMP Batteries Ltd)* [2007] EWCA Civ 66 esp at [13] and [16]–[20]; *Rogers v Hoyle* [2015] QB 265 esp at [61] and [62] (upheld in the CA); *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712 CA at [92].

13 *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [11], citing *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas* [2012] EWCA Civ 1417 at [80]; *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC) at [671] and [672]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712 CA at [92]; *Rogers v Hoyle* [2015] QB 265 at [64]; *Parabola investments Ltd v Browallia Cal Ltd* [2011] QB 477 CA at [23].

What Did the Judge Decide?

Sir Michael Burton therefore held that:

> *"the new Practice Direction does not change the law as to admissibility of evidence or overrule the directions given by the previous authorities … as to what may be given in evidence. In particular:*
>
> *(i) There is support in those authorities… for such hypothetical evidence as to what would or could have happened itself being evidence as to matters of fact, hence falling within paragraph 3.1(1) of the Practice Direction;*
>
> *(ii) … paragraph 3.1(2)* [of PD57AC] *… makes it clear that in addition to matters of fact the witness statement may include evidence which a witness 'would be allowed to give in evidence in chief if they were called to give oral evidence at trial'. Hence the test is one of admissibility at trial.*
>
> *(iii) Reference in witness statements to documents does not necessarily amount to 'commentary', because paragraph 3.2 of the Practice Direction requires identification of documents to which the witness has been referred for the purpose of giving his statement.*
>
> *(iv) The 'sanction' in paragraph 5.2 is in any event discretionary."*[14]

He therefore did not regard the authorities cited by the Claimant's counsel "*as overtaken by the new Practice Direction …* [and PD57AC] *was not in* [his] *judgment intended to affect the issue of admissibility.*"[15]

Sir Michael Burton also noted section 3(2) of the Civil Evidence Act 1972 (referred to by Claimant's counsel) which provides that "*there is no blanket rule that witnesses who are not independent experts cannot give opinion evidence*".[16]

In concluding that the Claimant's witness evidence should be admissible, Sir Michael Burton stated further:

- The Claimant would inevitably have given instructions to its expert as to what it considers would have happened, which would have been addressed in the expert report. If that same information is in the witness statements, it provides greater

[14] *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [9].
[15] *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [10].
[16] *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [11].

transparency and allows for cross-examination of those facts—it allows the expert evidence to be better tested.

- Even if the witness statement passages were struck out, the instructions to the Claimant's experts "*to the same effect would still be before the experts*".

- If there had been "*documents setting out projections or forecasts*", those would have been admissible. There is no difference in hearing the information as oral evidence, subject "*only to the inevitable criticism that oral evidence to the same effect may be less reliable*".

- If available, the experts would have looked at comparables by way of what the Defendant went on to do in Dubai, or may have done; but the comparables were not available.[17]

The relevant witness evidence was therefore admissible as "*either factual evidence or evidence of opinion given by those with knowledge of the facts and by reference to the factual evidence which they each give…*"[18]

Commentary

In respect of the purpose and benefit of PD57AC, Sir Michael Burton noted that while it does not change the position on admissibility of opinion evidence, PD57AC "*is obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it*".[19]

PD57AC does, however, introduce many important changes to the trial witness statement procedure.

While this case offers welcome confirmation that the position on admissibility of opinion evidence has not changed in light of PD57AC, the rules under that practice direction do impose many new requirements concerning trial witness statements. Practitioners should ensure that they are familiar with the rules of evidence, and particularly with the limitations placed on the admissibility of opinion evidence.

* * *

[17] *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [12].
[18] *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [13].
[19] *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [10].

Please do not hesitate to contact us with any questions.

LONDON

Christopher Boyne
cboyne@debevoise.com

Hannah Bohm-Duchen
hbohmduchen@debevoise.com

Emma Laurie-Rhodes
elaurierhodes@debevoise.com