

High Court Orders Indemnity Costs for Noncompliant Witness Statement

13 January 2023

Key Takeaways:

- The High Court has confirmed its willingness to intervene in cases concerning significant noncompliance with the requirements of Practice Direction (“PD”) 57AC.
- In this case, the claimant’s dismissive approach to its noncompliant witness statement compounded the significant breach of PD 57AC and led to an award of indemnity costs being made against it.

Background. *McKinney Plant & Safety Ltd v The Construction Industry Training Board* [2022] EWHC 2361 (Ch) concerned issues regarding a supplemental witness statement served by the claimant in the proceedings (“McKinney 2”) and in particular, McKinney 2’s noncompliance with PD 57AC. The defendant first flagged its concerns about McKinney 2’s noncompliance with PD 57AC to the claimant in writing. The claimant responded, dismissing criticisms raised by the defendant as “nit-picking”. At the Pre-Trial Review, Richard Farnhill, sitting as a deputy judge, ordered the parties to file written submissions on the issue.

Having analysed McKinney 2 in depth, the claimant indicated (i) which paragraphs of the statement it accepted were noncompliant, (ii) which paragraphs needed amending and (iii) which paragraphs it considered to be compliant with PD 57AC. Notably, the claimant concluded that only seven out of 102 paragraphs of McKinney 2 did not require modification. In written submissions, the claimant indicated its intention to make an application for relief from sanctions and to serve a revised witness statement. The claimant did not make such an application but served an amended version of McKinney 2 (“McKinney 2.1”) in any event. The defendant submitted that McKinney 2.1 was still in breach of PD 57AC and sought its costs on the indemnity basis.

The deputy judge had to consider two issues: (i) whether the claimant should be granted permission to file an amended witness statement to replace McKinney 2 and (ii) whether an award of indemnity costs was justified.

The Decision. The judge observed that McKinney 2 was in substantial breach of PD 57AC and noted the following issues:

- McKinney 2 gave “*extensive commentary*” on evidence that was not available to Mr McKinney at the time of the events in question;
- McKinney 2 contained comments or conclusions from documents that may have been available to Mr McKinney at the time of the events in question, but seemed principally to be narrative commentary on those documents;
- McKinney 2 contained “*extensive submissions*”, criticised the defendant’s witnesses and criticised the defendant’s approach to disclosure;
- Documents were frequently not identified with sufficient clarity and lists of documents that Mr McKinney referred to, or reviewed for the preparation of the witness statement, were not filed; and
- The confirmations of compliance with PD 57AC were only provided two weeks after McKinney 2 was signed.

Although the claimant overhauled McKinney 2, the defendant maintained that McKinney 2.1 still contained unnecessary commentary in breach of PD 57AC. The deputy judge observed that he could understand why this criticism of McKinney 2.1 was raised, but that the alleged noncompliance was not “*readily apparent*” and therefore an assessment of whether McKinney 2.1 was compliant with PD 57AC would need to be made by reference to other evidence. The deputy judge considered that the trial judge would be “*better placed*” for this task rather than it being dealt with on the papers.

The deputy judge also held that the claimant did not have any right to file McKinney 2.1 in the absence of an order from the court, but that no separate application for relief from sanctions was required. The deputy judge noted that in these scenarios, a party (*i.e.*, the defendant in this instance) would typically make an application to the court to exclude or limit evidence that was said to be noncompliant with PD 57AC, and then as part of its order, the court will decide on the procedural steps required to remedy any breach. He held that although the claimant should have waited for such an order to be made before filing McKinney 2.1, the outcome would not have changed.

The deputy judge also addressed a further issue raised by the defendant that was apparent in both McKinney 2 and the revised McKinney 2.1 statement; the claimant had not provided a list of documents that were referred to or reviewed for the purposes of preparing the witness statements. The deputy judge held that where a document was

referenced it must be specifically identified. Consequently, he gave the claimant permission to file a revised statement on the condition that this fault would be rectified.

Indemnity Costs. In response to the defendant's request for indemnity costs to be awarded, the deputy judge considered the following circumstances in making his decision:

- the breach of PD 57AC was serious as the “*overwhelming majority*” of McKinney 2 had to be altered;
- the claimant had failed to engage with the issues raised by the defendant in a timely manner; and
- when the claimant did respond, its response was dismissive and uncooperative.

The deputy judge ordered the claimant to pay the defendant's costs on the indemnity basis, holding that “*the seriousness of the breach and the Claimant's refusal to engage with it until I raised the point does take this case well outside the norm and does merit an award of indemnity costs.*”

Comment. This case serves as an important reminder to parties to take care that trial witness statements are drafted in a manner that is compliant with PD 57AC. Where concerns are raised by opponents about potential noncompliance, parties need to ensure that such concerns are considered and addressed in a cooperative manner.

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Please do not hesitate to contact us with any questions.

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