

Witness Statements: Caution from the Courts

5 February 2021

The tail end of 2020 saw the Courts hand down a number of decisions giving guidance on the approach to be taken to witness statements, and condemning the use of witness evidence for the purpose of arguing a party's case.

The start of this year has seen a flurry of cases involving similar criticism.

- In *YJB Port Ltd v M&A Pharmachem Ltd & Anor* [2021] EWHC 42 (Ch), Mr Stephen Houseman QC, sitting as a Deputy Judge of the High Court, criticised the evidence of both the witnesses of fact and the experts. The claim arose out of a manufacturing and distribution agreement, pursuant to which the claimant, YJB, was to supply, and the first defendant, M&A, was to distribute a medical thickening compound. The claims comprised (i) a claim for damages for M&A's breaches of the agreement and (ii) a claim for injunctive relief to restrain the defendants' use or disclosure of certain confidential information.
- The Court noted, at paragraph 53 of its judgment, that there were "*no material disputes of fact at [that] stage.*" It referred also to the expert evidence which had been adduced in respect of "*asset valuation in the pharmaceutical/quasi-pharmaceutical market.*" Nevertheless, the Court found, none of that evidence ultimately assisted it in determining the key issue, which was whether the breaches in question were an effective cause of the loss claimed to have been suffered.
- Specifically, the Court referred to the fact that one of the defendant's witness statements, "*ran to 69 paragraphs and contained a great deal of analysis, submission and commentary on documents*", whilst having "*little to contribute*".
- The expert evidence in particular was (and had to be) premised on the breaches in question being an effective cause of any loss, and could therefore not assist in the determination of whether that was so, which the Court found to be a "*question of fact or at any rate a matter outside the scope of their expertise.*"

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- Similar criticisms were made of the solicitors' witness statements adduced in *Philipp v Barclays Bank UK Plc* [2021] EWHC 10 (Comm), in relation to the defendant's application for strike out and/or summary judgment. In that case, the claimant, Mrs Philipp, alleged a breach of duty by Barclays Bank in its failure to protect her from the "*financially devastating consequences*" of having made two payments which, ultimately, she had been deceived into making by a third-party fraudster.

The judgment focuses in particular on the witness statement of the claimant's solicitor, which the defendant objected to on the grounds that it "*strayed into inadmissible argument, engaged in a protracted commentary on the documents, and sought to adduce expert evidence by reference to 'expert evidence'*" which was exhibited to the solicitor's witness statement, despite permission to adduce expert evidence not having been granted. In the event, the Court ruled that the proper course was to consider the report on a provisional basis, recognising the Bank's objections to it and the possibility, raised by the claimant, of there being a real prospect of permission being granted to rely upon it in due course, in the context of a full trial.

- Finally, the Court noted, in the context of a breach of contract claim, in *Ceviz v Frawley & Anor* [2021] EWHC 8 (Ch), Judge Keyser QC criticised both the written and oral evidence of the witnesses of fact. In relation to the witness statement of the first defendant, which the Court found did "*not reflect adversely on Mr Frawley but on whoever was responsible for drafting his witness statement*", attention was drawn to the fact that "*it was 22 pages long, comprised 111 paragraphs and contained a great deal of comment and commentary that has no proper place in a witness statement.*"

In what is becoming a familiar adage, the Court noted that "*witness statements are for the giving of evidence, not for arguing the case, making points against the opponent or providing commentary on documents.*"

On a related topic, the Commercial Court's Witness Evidence Working Group, chaired by Baker J, proposed a draft Practice Direction 57AC and Appendix to apply to trial witness statements in the Business and Property Courts. That Practice Direction has been published as part of the 127th update to the CPR, and will come into force on 6 April 2021. That will give rise to sweeping changes in how witness statements are prepared. Our analysis of the final form Practice Direction 57AC will be addressed in a separate Debevoise article.

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