

Witness Statements: A Firm Reminder from the Commercial Court of the Importance of Meeting Deadlines

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Introduction. In the recent matter of *Various Airfinance Leasing Companies and others v Saudi Arabian Airlines Corporation* [2021] EWHC 3509 (Comm), the Commercial Court was asked (and ultimately agreed) to grant an extension of time for the defendant to serve witness statements.

The Civil Procedure rules include strict consequences of failure to serve a witness statement in time. CPR 32.10 provides that if a witness statement for use at trial is not served in respect of an intended witness within the time specified by the court, then that witness may not be called to give oral evidence unless the court gives permission.

In determining whether to grant an extension of time, the Court provided helpful guidance on the evidence needed to support an application for an extension of time.

Background. The application for an extension of time arose in the context of seven previous extensions of time that had been agreed and ordered for the defendant to file witness evidence.

The defendant relied on a number of factors that it said justified the need for an extension of time to serve witness statements, including:

- Travel restrictions remained in place, which imposed significant restrictions on who could travel to meet with witnesses in Saudi Arabia;
- There is a mismatch of working weeks between the United Kingdom and Saudi Arabia; and
- Two of the associates acting for the defendant were working with junior counsel in a two-week trial on another matter.

Extension of Time. The Court accepted that the rules relating to the conduct of commercial litigation in the Commercial Court provide for close case management at an early stage. Parties are expected to prepare rigorously for the case management

conference (the “CMC”), and the expectation of all parties is that the orders made at the CMC set the timetable for progress to a trial and are to be complied with unless there is a change of circumstances. In considering whether to grant an extension, HHJ Pelling QC stated that:

“the starting point wherever an application for an extension is sought, is that it requires justification by reference to unanticipated developments usually occurring after the CMC.”

The Court rejected the arguments put forward by the defendant as justifying an extension of time to serve witness statements for the following reasons:

- Travel restrictions and a mismatched work week in the Middle East should have been known to all the parties at the time when the CMC orders were made;
- The availability of associates was also not a reason to justify an extension of time, particularly when global law firms are involved in the process; and
- The process of preparing witness statements has been simplified by the Practice Direction, which confines witness’s statements to statements that contain the witness’ own personal recollections and prohibits commentary on documents or the like.

In summary, HHJ Pelling QC said:

“Overall, I have to say I have come very close to refusing this application at this stage. It is simply not acceptable that commercial litigation should be conducted in this way...”

Notwithstanding this, the Court did allow a short extension of time to serve witness statements. However, the decision was made subject to “the very firmest of conditions” concerning what was to happen if the order was not complied with. If no witness statements were served by the deadline, then the witness would not be able to give oral evidence at trial (giving express effect to CPR 32.10) and the claimants were given permission to apply to strike out the defendant’s pleadings, or to strike out parts of the defendant’s pleadings having regard to the contents of the witness statements that were in fact served.

Costs. Although the defendant was technically successful on its application to obtain an extension of time to serve witness statements, the Court ordered costs in favour of the claimants and on an indemnity basis. HHJ Pelling QC considered that costs in favour of the claimants were justified because the defendant only had to apply for the extension because of “serial non compliance with the order made originally and the various extensions that followed”.

Indemnity costs were ordered on the basis that the litigation in question was of high value and being conducted by global full-service law firms and highly experienced counsel. High standards of compliance were therefore legitimately to be expected, and the defendant had fallen substantially short of that expectation by not complying with the seven previous extensions.

Going Forward. Achievable deadlines should be considered when the directions for the service of evidence are set at a CMC.

Issues such as witness availability, travel restrictions, time zones and the competing demands of a legal team should be considered in advance of proposing a timetable to progress a case to trial.

There are serious consequences of failure to serve witness evidence in time in that a party may be debarred from adducing evidence from any witness whose statement has not been provided by the required date and time. Further, a party that fails to meet multiple deadlines that have been extended by agreement may be subject to an award for indemnity costs.

The Commercial Court places high expectations on parties involved in large commercial litigation and represented by global law firms to prepare rigorously for the CMC and comply with the timetable set to progress a case to trial.

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