# Trial Witness Statements under CPR Practice Direction 57AC—Where Are We Now?

**30 June 2022**

## Introduction

CPR Practice Direction ("PD") 57AC introduced significant reforms to the preparation of trial witness statements in the Business and Property Courts. Prior to its introduction, there were "*concerns on the part of the judiciary that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost in trials.*"[1] The Report of the Witness Evidence Working Group (2019) noted that "*the two main problems are over-lawyered statements which do not reflect the witness's evidence; and statements that are too long, argumentative or contain irrelevant material such as the extensive recitation of documents.*"[2]

To rectify these issues, PD 57AC introduced various conditions that witness statements had to comply with; namely, that they had to: (i) state, if practicable, the strength of the witness's recollection of the matters addressed and whether their recollection had been refreshed by reference to documents; (ii) be prepared using as few drafts as practicable and be based upon a record or notes made by the relevant party's legal representatives of evidence they obtained from the witness; (iii) include a confirmation of compliance with PD 57AC; and (iv) identify by list any documents the witness has referred to, or been referred to, for the purpose of providing their witness statement evidence. For an in-depth discussion of the reforms, see our article *Witness Statement Reforms from 6 April 2021*.

One year on, the English courts have issued a number of judgments addressing the revised regime under PD 57AC. We have looked at these cases and summarised the court's approach as it stands today on the following topics:

- How to ensure witness statements comply with PD 57AC;

---

1 *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) at [27].

2 Factual Witness Evidence in Trials before the Business & Property Courts: Report of the Witness Evidence Working Group at [57].

- How to make an application where you believe the other side's witness statement does not comply with PD 57AC;
- The court's options when considering an application under PD 57AC; and
- The costs implications of a PD 57AC application.

## Complying with PD 57AC

### Wording in a Witness Statement Identical or Similar to Wording in Another Is Likely to Suggest Non-Compliance with the Rules

HHJ Stephen Davies in *Blue Manchester* noted that it was "*difficult to see*" how a statement could be compliant with PD 57AC if "*a number of the witness statements contain identical or very similar statements in respect of particular issues.*"[3]

Witness statements that contain identical or very similar statements suggest that the statements have not been prepared in accordance with the requirements of PD 57AC and are not, in fact, the witness's own evidence. Parties should therefore avoid repeating extracts from previous witness statements as a time and cost-saving exercise.

### Witness Statements Must Be Expressed in the First Person and Make Clear Whether Statements Are Based on Information and Belief (in which case the source must be identified) or on a Witness's Own Personal Knowledge

To comply with this aspect of PD 57 AC, it is sufficient for the witness to include an introductory paragraph explaining "*that the contents of his witness statement are all based on a combination of his personal recollection of events*[,] … *stating in general terms how well he recalled events overall, together with a re-reading of the contemporaneous documents.*"[4] Compliance "*does not … mean that every section of every witness statement must contain a separate introduction, confirming whether it is made from personal knowledge or based on information or belief and, if so, stating the source, as well as stating whether it is made by reference to unaided recollection (and, if so, how good is the recollection) or by being referred to documents and, if so, identifying each one and when and how it was referred to.*"[5]

---

3 *Blue Manchester Ltd v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC) at [25].

4 *Blue Manchester* at [31].

5 *Blue Manchester* at [30].

## Witnesses Should Not Make Unnecessary References to Other Documents

While "*it may be necessary to refer to a document or documents in order to explain other evidence … this should be no more than is necessary*."[6] This means that witness statements should not refer "*at some length to a narrative derived from documents*" merely "*because at some point … the witness said something which was given context by the narrative*."[7]

HHJ Stephen Davies in *Blue Manchester* went on to note that "*lawyers need*[] *to be prised away from the comfort blanket of feeling the necessity of having a witness confirm a thread of correspondence, because otherwise it might in some way disappear into the ether or be ruled inadmissible at trial*."[8] This echoes the point made by Sir Michael Burton CBE (sitting as a Judge of the High Court) in *MAD Atelier* that PD 57AC was "*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*."[9] This principle could be seen in action in *Mansion Place*, where both parties had to redact sections of statements that included subjective comment on allegation and on documents and matters that could not be within a witness's knowledge.[10]

## PD57AC Does Not Change the Rules on Admissibility of Opinion Evidence

Sir Michael Burton CBE in *MAD Atelier* held that PD57AC does not change the law as to the admissibility of evidence or overrule previous authority as to what may be given in evidence. For example, he found 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]

---

6 *Blue Manchester* at [37].

7 *Blue Manchester* at [37].

8 *Blue Manchester* at [38].

9 *MAD Atelier International BV v Axel Manes* [2021] EWHC 1899 (Comm) at [10]. For more detail on this case, see our full analysis here.

10 *Mansion Place*.

11 *Mad Atelier* 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* 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].

## The Witness Statement Must Identify by List What Documents the Witness Has Referred to or Been Referred to for the Purpose of Providing the Evidence

One of the reforms introduced by PD 57AC requires that a trial witness statement must identify by list what documents the witness has referred to or been referred to for the purposes of providing their evidence set out in their trial witness statement (paragraph 3.2 of the PD).

O'Farrell J in *Mansion Place* clarified that the purpose of the requirement to list documents is to provide transparency in respect of documents used to refresh the memory of the witness, for the benefit of the court and the other side. This "*does not require the witness statement to list every document which the witness has looked at during the proceedings*." She further noted that witnesses could be cross-examined at trial about what documents they had seen if there was any uncertainty.[13] Witnesses may therefore find it useful to keep a contemporaneous record of key documents they have had sight of in order to comply with this rule.

HHJ Paul Matthews (sitting as a Judge of the High Court) in *Primavera Associates* noted that the requirement that witnesses should state whether and, if so, how their recollection has been refreshed "*does not apply generally*", but only to "*important disputed matters of fact*". He went on to state that "*in circumstances where the defendant has not identified the "important disputed matters" where the obligation might have attached,* [the judge will] *not … take the lead in searching the witness statement for them, and assessing their importance*."[14]

## Lawyers Drafting a Statement Should Do So in an Open Way, Using the Words of the Witness

HHJ Paul Matthews in *Primavera Associates* stated that where lawyers draft witness statements, "*they must prepare for it in an open way, ie by interview, and asking open and not leading questions … and they must draft it using the language and, if practicable, the words of the witness*".[15] On this latter point, he noted that "*it would be doubly wrong for a lawyer to draft a witness statement for a witness in a foreign language which he or she could not understand (or could not understand well enough), and moreover to draft it in a legal or formal style, including the use of technical legal expressions, which the witness would never employ.*"[16] Parties should therefore consider using translators where a witness' first language is not English, to comply with PD 57AC.

---

13 *Mansion Place* at [59].

14 *Primavera Associates Ltd v Hertsmere Borough Council* [2022] EWHC 1240 (Ch) [61] and [62].

15 *Primavera Associates* at [26].

16 *Primavera Associates* at [27].

### It Is Not Advisable for a Non-Solicitor Witness to Prepare the Statement of Another Witness

In *Mansion Place*, one of the Defendant's witnesses, a non-lawyer, took the first draft statement of another witness. The Court found that while this was not prohibited, it was "*inadvisable*" in a case where "*the credibility and reliability of their factual accounts* [was] *critical*". This was such a case, as "*the key issue turn*[ed] *on what was, or was not, said by two individuals in a telephone call*". The Court noted that the Claimant's concern regarding whether the drafter "*could remain independent and impartial when drafting*" the statement was justified, as it would "*be difficult for him to record* [the witness'] *evidence without viewing it through the lens of his formed opinion*." Despite this, O'Farrell J. did not order the Defendant's legal representative to re-draft the certificate of compliance on the basis that adequate safeguards were in place to prevent the risk of tainted evidence. Namely: (i) the statement of the witness who had had it drafted for them was revised before service to set out the exact words he had used, rather than paraphrasing; and (ii) the fact that both witnesses would be cross-examined at trial. Parties should therefore always keep in mind any current or future safeguards they can implement to prevent witness evidence from being tainted or to rectify evidence where there is a risk that it has been tainted.[17]

## Making an Application under PD 57AC

### Procedure

In *Mansion Place*, O'Farrell J. helpfully summarised the procedure a party should follow when it believes another party has not complied with PD 57AC. She noted that the party should first raise the concern with the other side and attempt to reach agreement on the issue. This should be done as soon as possible. In *Prime London*, Thompsell J. criticised the claimant "*for not identifying earlier its objections to [the] Relevant Witness Statement and explaining these in detail to the Defendant with a view to agreeing a revised version of the witness statement that could be substituted*" noting "*that failure of a party to do this can be expected to influence how the court approaches an application to strike out a witness statement.*"[18] He was unimpressed by Prime London's attempts to excuse the delay by reference to absences over the Christmas period.[19] Parties should therefore heed O'Farrell J.'s words and raise any concerns as soon as they arise.

---

17 *Mansion Place* at [47].

18 *Prime London Holdings 11 Ltd. v Thurloe Lodge Ltd* [2022] EWHC 79 (Ch) at [36]. For more detail on this case, see our full analysis here.

19 *Prime London* at [37].

It is only if an attempt to reach agreement fails that "*the parties should seek the assistance of the court … at a time and in a manner that does not cause disruption to trial preparation or unnecessary costs.*" O'Farrell J. noted that this may be "*at the trial when the full bundles and skeletons are before the court.*"[20]

Fancourt J. in *Greencastle*[21] also accepted that the courts would be willing to hear applications concerning compliance with PD57AC at an early stage, and it is not convenient or appropriate to leave disputes concerning the compliance of trial witness statements to sort themselves out at trial. He noted that "*the whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination. The purpose is to limit factual evidence to admissible and relevant evidence of facts within the witness's own knowledge (including correctly identified hearsay evidence) that a witness can properly give in relation to disputed issues of fact.*"

In several cases, we have seen parties preparing detailed schedules of objections giving particulars of non-compliance. *Blue Manchester* demonstrates that the courts are willing in principle to consider schedules of objections. However, parties should be mindful of the critical remarks made in *Zurich Insurance* where Zurich's solicitors had prepared a 109-page schedule, itemising issues with the 49 witness statements filed in the proceedings. HHJ Keyser QC concluded that the schedules "*[seem] to me to have been a waste of time and effort*" and many of the itemised complaints were "*petty or pointless*".[22] As such, schedules should only be provided where they serve a genuinely useful purpose to improve witness statements for use at trial.

## An Application Should Only Be Brought Where There Is a Substantial Breach of PD57AC

In *Lifestyle Equities*, the claimants applied to strike out substantial portions from two witness statements served on behalf of the defendants that related to "trade evidence" for alleged failure to comply with PD 57AC. Although the defendants' witness statements contained "*minor infractions*", Mellor J. dismissed the application on the basis that an application to edit or exclude a witness statement "*is warranted only where there is a substantial breach of PD57AC*". The Court found that "*PD57AC should not be taken as a weapon with which to fillet from a witness statement either two or three words at*

---

[20] *Mansion Place* at [49].

[21] *Greencastle MM LLP v Payne & Ors* [2022] EWHC 438 (IPEC).

[22] *Curtiss & Ors v Zurich Insurance plc & Ors* [2022] EWHC 1514 (TCC).

*various points or essentially insignificant failures to comply with PD57AC in a witness statement*."[23]

O'Farrell J. in *Mansion Place* had noted that "*serious consideration should be given to finding a more efficient and cost-effective way forward*" to PD 57AC applications, as the one before her had taken a full day to argue, when the trial was due to only have a duration of three days.[24] In answer to this, Mellor J. noted that in cases where "*there really is a substantial breach of PD57AC, it should be readily apparent and capable of being dealt with on the papers*" and "*that might provide a mechanism for dealing with objections in an efficient and cost-effective manner*."[25]

In *Zurich Insurance*, HHJ Keyser QC also cautioned that "*[f]irst, applications for the imposition of sanctions for breach of the Practice Direction should not be used as a weapon for the purpose of battering the opposition. Second, when assessing how to respond to a failure to comply with the Practice Direction, a party must use common sense and have regard to proportionality*".[26]

### The Burden Is on the Person Making the Application to Show that the Witness Statement Is Non-Compliant

HHJ Paul Matthews in *Primavera Associates* noted that "*merely calling the specified paragraphs "examples" does not somehow mean that the burden is thereby cast on the* [other party] *in relation to the non-specified paragraphs.*"[27] The person making the application must actually prove that the other party's witness statement is non-compliant.

## The Court's Options When Considering an Application Under PD 57AC

In *Prime London* and *Greencastle*,[28] the Court outlined the various powers it had to deal with PD 57AC non-compliant witness statements and the factors it would consider in deciding which power to exercise:

- **Strike out all or part of the witness statement.** In Blue Manchester, HHJ Stephen Davies made it clear that "*striking out the witness statements … is a very significant sanction which should be saved for the most serious cases*." Where "*[t]here is a sufficient*

---

23 *Lifestyle Equities CV & Anor v Royal County of Berkshire Polo Club Ltd & Ors* [2022] EWHC 1244 (Ch) at [97] and [98].

24 *Mansion Place Ltd* at [50]. This was endorsed in *Blue Manchester Ltd* at [9].

25 *Lifestyle Equities* at [98].

26 *Zurich Insurance* at [19].

27 *Primavera Associates* at [23].

28 *Prime London* at [22]; and *Greencastle* at [32].

*core of compliant material*" in the witness statement and the statement is not "*particularly egregious in [its] non-compliance*", the witness statement should not be struck out.[29] Even in Greencastle, where Fancourt J. found that the offending statement was "*the clearest case of failure to comply with Practice Direction 57AC that I have seen since it direction came into force in April 2021 … replete with comment and argument that goes well beyond the disputed facts that are known to [the witness] personally*", the court withdrew permission for the witness statements and gave the claimant permission to refile a replacement, compliant statement.[30]

In *Zurich Insurance,* HHJ Keyser QC struck out the statements of four witnesses because "*they contained no relevant evidence from the personal knowledge and observations of the makers but tended to introduce opinion evidence on matters on which I had refused to permit expert evidence. Various parts of* [one] *lengthy witness statement … was also struck out, because they contained commentary or opinion on documents or on matters that I did not consider fell properly within the scope of the maker's evidence.*[31]

- **Withdraw permission for all or part of the witness statement**. The relevant party would then have "*to apply for permission to adduce a further witness statement, which of course would have to be on the basis of an application for relief against sanctions*."[32] HHJ Paul Matthews in Primavera Associates noted that this sanction (or even strike out in more serious cases) would be appropriate where a legally represented party had already redrafted a witness statement once for non-compliance, and the redrafted statement still failed to comply with PD 57 AC.[33]

- **Excise the non-compliant passages from the witness statement.** The English courts have made it clear that they will only excise parts where necessary. In *Mansion Place*, O'Farrell J. refused to strike out a sentence on the basis that it was a "*very brief reference to background matters and the court does not consider it necessary to strike it out*".[34] By contrast, she redacted "*disclosed correspondence*" that was not part of "*direct evidence*" and an argument on a point in the case .[35] In *Greencastle*, the Court made clear that it would not do this if it "*would take further considerable time that is not available before trial*" or would "*create problems of incoherence in the*

---

29 *Blue Manchester* at [44]. This was cited and followed in *Prime London* at [28] and [42].

30 *Greencastle* at [24].

31 *Zurich Insurance plc* at [7].

32 *Greencastle* at [32].

33 *Primavera Associates* at [35].

34 *Mansion Place* at [51].

35 *Mansion Place* at [53] and [54]. This approach was endorsed in *Blue Manchester* at [11].

*remaining parts of the statement and make its contents less compelling, which would potentially be unfair to the claimant.*" [36]

- **Order that all of part of the witness statement be redrafted either in accordance with PD 57AC or as directed by the court**. In *Greencastle*, the court made clear that it would pursue this course of action where: (i) it "*is an egregious case of serious non-compliance with*" PD 57AC; (ii) the claimant was still entitled to put in further evidence within the timescale indicated for refiling, meaning the process of preparing factual evidence had not yet been concluded; (iii) there was adequate time for the claimant to prepare a replacement statement for the trial; (iv) the work involved in refiling was not that extensive; and (v) refiling would not provide an opportunity for the claimant to seek to put in further unheralded evidence, save to the extent permitted at that stage by the existing orders. [37]

- **Order the witness to give some or all of their evidence in chief orally at the trial**. The court will likely not make this order if it means that only one party will give all its evidence orally, as this may "*create a potentially unfair imbalance between the two parties.*"[38]

- **Do nothing and let the matter go on to trial and make an adverse costs order against the non-compliant party**. In *Greencastle*, the Court indicated that this would be a "*most unsatisfactory*" course of action if there had been a serious breach of PD 57AC [39] and could be contrary to the "*whole purpose*" of PD 57AC, which "*is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination.*"[40]

---

[36] *Greencastle* at [34] and [36].
[37] *Greencastle* at [36].
[38] *Greencastle* at [35].
[39] *Greencastle* at [33].
[40] *Greencastle* at [22].

## Costs

### A Failure to Comply with PD 57AC May Result in Serious Costs Consequences

In *Prime London*, Thompsell J. noted that he was "*minded to award costs in relation to this particular matter on an indemnity basis to mark the court's disapproval relating to the original breach of the Practice Direction.*"[41]

### Unnecessary Applications Will Be Penalised with Costs

In *Mansion Place*, O'Farrell J noted that "[t]*he court does not wish to encourage the parties to engage in satellite litigation that is disproportionate to the size and complexity of the dispute.*"[42] Similarly, in *Blue Manchester*, HHJ Stephen Davies noted that "[p]*arties in the Business and Property Courts who indulge in unnecessary trench warfare in such cases can expect to be criticised and penalised in costs.*"[43] In line with this, in *Lifestyle Equities*, Mellor J. dismissed the claimant's application with costs.

As such, "*before an application is brought seeking to strike out passages in a witness statement based on PD57AC, careful consideration should be given as to proportionality and whether such an application is really necessary.*"[44]

### Parties Should Be Wary of Incurring Significant Costs by Going Through Witness Statements with a Fine-Tooth Comb to Identify Minor Breaches

In *Zurich Insurance*, HHJ Keyser QC expressed "*dismay*" that the costs incurred by both sides on an application concerning compliance with PD 57AC exceeded £275,000.[45] He found that "*…in my view, there is no rational world in which this sort of expenditure can have been justified on an application such as this*", and he rejected submissions that "*the bulk of these costs would have been incurred anyway in the litigation process*". He explained that "*there is a big difference between examining witness statements for the purpose of preparing cross-examination and submissions on the evidence and going through them with a fine-tooth comb for the purpose of identifying breaches of the Practice Direction*." HHJ Keyser QC ordered Zurich to pay 75% of the claimant's costs on an indemnity basis for the reason that, although some witness statements and some parts of other witness statements did not accord with the requirements of the Practice Direction, Zurich's application was "*disproportionate*" and "*oppressive*", resulting in quite unnecessary costs.

---

41 *Prime London* at [46].

42 *Mansion Place* at [49].

43 *Blue Manchester* at [10].

44 *Lifestyle Equities* at [98].

45 *Zurich Insurance* at [10].

## Key Takeaways

The reforms to trial witness statements introduced by PD 57AC are wide-ranging and there have been a number of questions surrounding its application since it was introduced in April 2021. These questions have included whether parties need to keep a record of every document shown to a witness over the lifetime of proceedings (which, for witnesses who also have conduct of the litigation, could be onerous), and the court's expectations concerning compliance, including when and in what circumstances it is appropriate to make an application under the PD. These cases have clarified some of this uncertainty, providing welcome guidance on the application of the PD.

It is perhaps still too early to tell whether the Courts are satisfied that PD 57AC is having the desired effect of improving trial witness statements. Yet, it is worth noting that the Courts are enforcing compliance with the PD at an early stage of proceedings and making orders (at the more severe end) to strike out a statement in part or in entirety, or (in more cases) orders that statements be redrafted in accordance with the PD. The Courts have stressed using PD 57AC as a pragmatic and collaborative tool to improve the content of non-compliant witness statements, rather than as a means to punish non-compliance. To this end, it is further notable that the Courts have taken a dim view of any attempt to use PD 57AC as a weapon to attack the other side for minor infractions or as a vehicle for overly technical arguments. The Courts have shown that they are ready to penalise parties taking this course of action with indemnity costs.

Finally, the overarching aim of the Courts seems to be to put compliance with the PD in the parties' hands. This is demonstrated by O'Farrell J.'s comments in *Mansion Place* that parties should seek the assistance of the Court only after first raising any concerns about non-compliance with the other side and attempting to reach agreement on the issue. As practitioners become more familiar with PD 57 AC, it is clear that the Courts expect disputes between parties to decline over time. It remains to be seen whether this goal will be achieved.

* * *

Please do not hesitate to contact us with any questions.

## LONDON

Christopher Boyne
cboyne@debevoise.com

Patrick Swain
pswain@debevoise.com

Julia Caldwell
jcaldwell@debevoise.com

Olivia Collin (Trainee Associate)
ocollin@debevoise.com