

Trial Witness Statements—Lessons from *Mackenzie v Rosenblatt Solicitors*

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In *Mackenzie v Rosenblatt Solicitors (a firm) and another* [2023] EWHC 331 (Ch), the High Court has criticised a number of trial witness statements for noncompliance with CPR Practice Direction (“PD”) 57AC and found that the content of witness statements was unreliable.

The case is a good reminder that the rules are intended to “*eradicate the improper use of witness statements as vehicles for narrative, commentary and argument*” (*Mansion Place Limited v Fox Industrial Services Limited* (2021) EWHC 2747 (TCC)) and have led to greater judicial scrutiny of witness statements that appear over-lawyered and/or fail to reflect the witness’s evidence.

In *Mackenzie v Rosenblatt Solicitors*, the Court raised a number of issues with the Defendants’ witness statements for failure to comply with the rules. These concerns included:

- Failure to identify the documents from which they had refreshed their memory, or at which they had otherwise looked at in the course of preparing their statements;
- The inclusion of passages arguing the Defendant’s case; and
- Statements which failed to make clear how well the witnesses could recall certain matters.

These criticisms were not fatal to the Defendant’s evidence but serve as a good reminder that the courts are becoming increasingly vigilant in monitoring compliance with PD 57AC.

The Court was also highly critical of the Claimant’s witness statements, which resulted in more serious conclusions that the content of the witness statements could not be relied on. At the heart of the criticisms was the concern that the statements had been carefully crafted by the lawyers but failed to reflect the witnesses’ own evidence. The

Court observed that the “true voice of the individual witness d[id] not emerge from their witness statement”.

Mr Justice Fancourt noted that “[h]aving seen all four witnesses give evidence, it is clear to me that none of the four statements are written using the witness’s own words. The four witnesses were different personalities and had very different levels of recall of events (and, indeed, willingness to engage with the facts), but the four witness statements are of a uniform style and tone, giving the impression of a person with a clear overview of events, if not their detail, and a clear picture of the case to be advanced on behalf of BM.”

The conclusions reached on the Claimant’s witness evidence should be a lesson for all practitioners in ensuring that witness statements are not only written in the witness’s own words but fairly reflect the level of recall or detail that a witness can speak to. The Claimant’s witness evidence came unstuck when the recollection of the witnesses while giving oral evidence did not match the impression given by their witness statements that they had a clear recollection of events. The statements may have been carefully crafted to support the Claimant’s case based on contemporaneous documents, but if the court is “left as a result with real doubt about the reliability of the content of these witness statements”, then the written statements are not worth the paper they are written on.

Finally, a word of warning for the increasingly common use of training courses that intend to familiarise witnesses with giving evidence in the English courts. The Court noted that it was clear that the Claimant’s witnesses had undergone witness training but that certain witnesses’ performance “went far beyond the rather wooden and stilted presentation, or requests for questions to be repeated, that is typical of those who have undergone such training.” In this case, the Court noted that “there was evasiveness and unwillingness to engage with the questions in a straightforward way, rather than just a careful attempt to answer precisely the question that was asked.”

While there can be real value in ensuring that a witness feels comfortable with the process of giving evidence, witnesses should be reminded that their role is not to try to outwit the cross-examiner but simply to listen to the questions and answer clearly and honestly to the best of their recollection.



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