**Trial witness statements in the Business and Property Courts**

This element introduces the rules that apply to the preparation and presentation of trial witness statements in the Business and Property Courts.

“The approach of the court is that human memory… is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but… is a fluid and malleable state of perception concerning an individual’s past experiences, and therefore… is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration” (57AC PD Appendix 1.3)

**The problem**

You may recall that the general rule (CPR 32.2(1)(a)) is that any fact which needs to be proved by the evidence of witnesses at trial will be by oral evidence (although the evidence can be given by video link (CPR 32.3)).

A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally (CPR 32.4(1)). A witness statement is therefore exchanged with the other parties: this saves time and costs at trial and helps to facilitate settlement because the parties are able to evaluate the merits of their respective cases.

The CPR provide that:

*'A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally'* (CPR 32.4(1)).

*'The court will order a party to serve on the other parties any witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial'* (CPR 32.4(2))

*'The witness statement must, if practicable, be in the intended witness’s own words'* (CPR 32 PD 18.1).

The courts have been concerned for several years that a significant number of litigants, including some with legal representation, serve witness statements which arguably fail to comply with these rules or fail to allow the witness to perform their proper function.

In particular, the courts have been troubled by:

• ‘over-lawyered statements’ – witness statements which do not reflect the witness’s evidence; and

• statements that are too long, argumentative or contain irrelevant material such as extensive quotations from documents.

**Example:** The next page gives an extract from a witness statement. Turn to that extract and consider whether it complies with the rules.

[start of extract]

[header omitted]

I am the Managing Director of the Claimant whose registered office is 58 Smith Street, Almsford, Givington, G09 7YT. I have prepared this statement by way of telephone communication with the Claimant's solicitor.

The matters set out within this witness statement are from my own knowledge unless otherwise stated. Where I refer to matters of which I have been told by others, those matters are true to the best of my knowledge and the source of the information appears.

There is now produced and shown to me a paginated bundle of documents marked "EA1". All references to documents in this statement are to Exhibit EA1 unless otherwise indicated.

[paragraphs omitted]

As a result of the Defendant's failure to deliver the goods, the Claimant was at risk of suffering serious losses. I telephoned the Managing Director of the Defendant. She explained to me that it would be at least 3 weeks before the Defendant would be able to deliver the goods [this sentence is permissible and important evidence, assuming it is relevant]. I attach at page 6 of Exhibit 1 my note of that conversation which I made immediately after the conversation. In light of that information, the Claimant decided to make enquiries of alternative suppliers.

I attach at pages 7 to 8 of Exhibit 1 the email from the Claimant's accounts manager making enquiries of alternative suppliers. I attach at pages 15 to 19 of Exhibit 1 the various replies the Claimant's accounts manager received. [This paragraph is not evidence which a witness would be allowed to give orally. It is presenting a narrative based on documents – witness evidence is not needed to present such a narrative, and it should be contained elsewhere, for example in a skeleton argument].

The Claimant's accounts manager relayed the position with regard to alternative suppliers to me. Those replies show that the only reasonable course of action available to the Claimant was to instruct one of the suppliers to supply the goods instead of the Defendant. [This sentence is not evidence. It is argument, and should not be included in a witness statement]. I took the decision to do that. I attach at page 14 of Exhibit 1 the email from me to the supplier conveying that instruction.

[paragraphs omitted][This witness statement does not give the impression of being written in the witness's own words].

**[Statement of Truth]**

[end of extract]

**The problem – continued**

A second, and connected, concern, is that witnesses' evidence is being tainted or compromised by the process by which a witness statement is put together. The approach of the court is that human memory:

*'(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but*

*(2) is a fluid and malleable state of perception concerning an individual’s past experiences, and therefore*

*(3) is vulnerable to being altered by a range of influences , such that the individual may or may not be conscious of the alteration'*

*(*57AC PD Appendix 1.3)

In this context, the way in which a potential witness is interviewed and presented with documents to review could have an undesirable impact on how they recollect matters (presumably inadvertently in the vast majority of cases). This is not an area that the CPR regulates to any significant extent, save in the rules explained in this element.

**Practice Direction 57AC**

In the face of these difficulties, a new Practice Direction 57AC came into force on 6 April 2021. For cases within its scope (scope is addressed later in this element) it:

**- Repeated and emphasised existing principles** relating to the preparation of witness evidence, and introduced new **mechanisms to encourage / enforce compliance** with those principles;

**- Introduced some significant changes** and new rules relating to such preparation.

These are summarised in this element.

In addition to 57AC PD, witness statements must also comply with the general rules on witness statements in CPR 32 and its practice direction (as explored earlier in your studies), and the court guides. In the event of inconsistency between the 57AC PD and any other practice direction / specialist court guide, the provisions of 57AC PD prevail (57AC PD 1.5 and 3.4).

57AC PD has an appendix called ‘the Statement of Best Practice in relation to Trial Witness Statements’. In this element, references to paragraphs of this appendix are given in the format '57AC PD Appendix 5' for a reference to paragraph 5 of the appendix, for example.

**Which witness statements does 57AC PD apply to?**

57AC PD only applies to:

- Witness statements (not affidavits)…

- …for trial (not for interim applications)…

- …where the trial is in the Business and Property Courts…

- …where the witness statement was signed on or after 6 April 2021 (57AC PD 1.1 and 1.2).

Some particular types of case are excluded from the new provisions but you are not required to know these exclusions.

**Purpose of witness statements**

57AC PD reasserts that the purpose of trial witness statements is to:

Put**in writing…**

**…in advance of trial**

what would **otherwise be presented orally** as evidence at trial

This promotes the overriding objective, in particular by saving time at trial and promoting settlement in advance of trial (57AC PD 2).

**Content of witness statements**

57AC PD provides that witness statements should:

- Include evidence as to matters of fact (which need to be proved at trial by witness evidence).

- On important matters, state:

a. How well the witness recalls the matters.

b. Whether, and if so how and when, the witness's recollection has been refreshed by documents.

- Be as concise as possible (without omitting anything of significance)

**Content of witness statements (continued)**

57AC PD provides that witness statements should not:

- Include evidence of matters of which the witness has no personal knowledge. A witness has personal knowledge of matters sensed by one of their five senses and of matters internal to their mind, such as why they made a particular decision.

- Argue the case, either generally or on particular points.

- Take the court through documents, set out a narrative derived from the documents, nor quote at any length from any documents referred to.

- Be concerned with matters that are common ground…

- …or matters in relation to which witness evidence adds nothing of substance to the documents.

- Set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of other evidence in the case.

(see generally 57AC PD 3, 4.1, Appendix 2.2, Appendix 2.3, Appendix 3.6, Appendix 3.7 )

**Documents**

Perhaps one of the most distinctly 'new' areas of rules introduced relates to documents.

There are three key principles, set out on this page and the two that follow

**1. Limit the documents shown to witnesses**

It is clear from 57AC PD (and its appendix) that the court is concerned that the witness's memory can be influenced by documents. Accordingly, it is implied that to avoid altering / influencing a witness's memory, as far as possible a witness should only be shown documents '*if the witness created or saw the document while the facts evidenced by or referred to in the document were still fresh in their mind, so that they would have known if they were accurate or inaccurate*' (57AC PD Appendix 2.6).

**2. State the documents referred to**

A trial witness statement must:

*…identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement* (57AC PD 3.2)

Note that this relates only to documents provided / used by a witness **for the purpose of providing evidence**, not to every document the witness has seen.

In addition to this general requirement, in relation to points thought to be important to the case, a witness must also explain whether their memory has been refreshed by considering documents, if so how and when (57AC PD 4.1).

These requirements mean that a legal representative is going to need to keep a record of which documents were provided to a witness for the purpose of providing evidence, and when and also ask the witness to keep a similar record of any documents they choose to look at themselves.

**3. Limit references to documents in statements**

Save as set out above, references to documents should not generally be necessary (57AC PD Appendix 3.4).

Where documents are referred to, they should simply be identified (perhaps by reference to a numbered disclosure list) rather than exhibited.

**Confirmation of compliance**

Unless the court orders otherwise, **in addition** to a statement of truth, the witness must sign the following confirmation:

*“ I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.*

*This witness statement sets out only my personal knowledge and recollection, in my own words.*

*On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.*

*I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge”*

57AC PD 4.1

**Certificate of compliance**

Unless the court orders otherwise, the legal representative responsible for advising the witness in relation to the preparation of the statement (see 57AC PD 1.2) must sign a certificate in the following terms:

*“I hereby certify that: 1.I am the relevant legal representative within the meaning of Practice Direction 57AC.*

*2.I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].*

*3.I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.*

*[name][position][date]"*

57AC PD 4.3

**Example:** Consider the extracts from a draft witness statement on the next page, which illustrates how the evidence in the example earlier in this element should be presented to comply with 57AC PD.

[start of extract]

[header omitted]

I am the Managing Director of the Claimant whose registered office is 58 Smith Street, Almsford, Givington, G09 7YT. The matters set out within this witness statement are from my own knowledge unless otherwise stated. I have prepared this statement by way of telephone communication with the Claimant's solicitor.

The matters set out within this witness statement are from my own knowledge unless otherwise stated. Where I refer to matters of which I have been told by others, those matters are true to the best of my knowledge and the source of the information appears.

**Documents**

There is now produced and shown to me a paginated bundle of documents marked 'EA1'.

a. References to documents beginning 'EA' are references to Exhibit EA1.

b. Where documents referred to have already been disclosed, they are not exhibited and they are instead identified by their number on the Claimant's or Defendant's disclosure list eg 'C5' or 'D8'. [Note: - Only documents not disclosed previously are exhibited to the statement – this should be rare as trial witness statements follow disclosure. Documents previously disclosed are described by reference to the parties' disclosure lists. On the whole fewer documents are referred to in the witness statement]

The documents that I referred to or was referred to for the purpose of providing the evidence in this statement are detailed in Appendix 1 to this witness statement. [Note: This is required by 57AC PD 3.2 and Appendix 3.5. Note that privileged documents would be described in this list in general terms, and privilege in those documents is not waived by doing this]

[paragraphs omitted]

I telephoned the Managing Director of the Defendant. She explained to me that it would be at least 3 weeks before the Defendant would be able to deliver the goods. I recall with confidence that this was the key message communicated by the Managing Director of the Defendant, but I do not recall the precise words exchanged. My recollection of this conversation was refreshed in the 2 weeks prior to signing this witness statement by use of my note of that conversation (Document C45) which I made immediately after the conversation. [Note: In relaying a conversation, the witness is explaining something of which he has personal knowledge – something he sensed (in this case, heard). In relation to points thought to be important to the case, the witness has explained how well he recalls matters and whether his memory has been refreshed by considering documents, and if so, how and when.] In light of that information, the Claimant decided to make enquiries of alternative suppliers.

Shortly afterwards, the Claimant's accounts manager showed me an exchange of emails with potential alternative suppliers of the goods (Documents C49-54). The view I reached on the basis of those emails was that the most reasonable course of action for the Claimant to take was to instruct one of those suppliers to supply the goods instead of the Defendant. I took the decision to do that. [Note: Documents are referred to here not in order to create a narrative with those documents, but in order that the witness can explain his decision at the time: a matter 'internal to his mind' and therefore something within his personal knowledge. The witness is explaining his decision-making process. This is permissible. This can be contrasted with constructing an argument based on the documents that there was only one reasonable course of action open to the Claimant – this would not be permissible].

[paragraphs omitted]

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**[Statement of Truth]**

**[Confirmation of compliance](see earlier in this element)** [Note the additional confirmation of compliance that must be signed by the witness, and the certificate of compliance to be signed by the relevant legal representative.]

**[Certificate of compliance](see earlier in this element)**

[end of extract]

**Process**

57AC PD, and in particular the appendix at paragraphs 3.8 to 3.13, sets out principles in relation to the preparation of witness evidence:

*Before interview*

The witness should be helped to understand the rules governing statements and the confirmation of compliance (see above) before the witness is interviewed and before work on the witness statement commences.

*During interview*

- A legal representative should base a witness statement on a record / notes of evidence obtained from the witness during an interview, if possible (whether face to face or otherwise).

- The interview should use open questions as much as possible, generally avoiding leading questions (certainly in relation to important matters) and limiting closed questions to requests for clarification of or additional detail about prior answers.

*After interview*

- A witness statement should involve as few drafts as possible;

- Legal representative should assist as to the structure, layout and scope of the statement. A legal representative may take primary responsibility for drafting a statement, in which case the content of the draft should be taken from, and should not go beyond, the content of the record or notes of the interview referred to above.

**Sanctions**

Should a party fail to comply with the rules set out in this element, the full range of case management powers and sanctions are available to the court to address this. Relatively obvious potential sanctions include those relating to costs, striking out all / part of a witness statement or requiring a witness statement to be redrafted (57AC PD 5).

The court also has the power to order a witness to give some or all of their **evidence in chief orally**, which used as a sanction is a relatively novel idea (57AC PD 5). Evidence in chief, if given orally rather than using a witness statement, is given without using leading questions, unless the court permits otherwise (57AC PD Annex 2.5).

**Telling the full story**

Excluding argument and narrative from witness statements allows true evidence to be identified and considered.

However, argument and narrative do have an important role. The use of witness statements to explain the documents probably arose because if a party discloses a large number of complex documents without explaining the story that those documents tell, it will fail to convey the true nature of its case. It will not promote settlement in the same way that a more complete narrative might.

The prohibition on using witness statements to give this narrative means that the narrative should be told another way. Options include presenting the narrative:

- Informally in correspondence (particularly if settlement is the main concern).

- In a skeleton argument (although this is typically very late in the process, and there is some judicial resistance to very long skeletons).

- By asking for a direction (separate to exchange of witness statements) for the exchange of a document / documents presenting this narrative – this might be particularly appropriate if the narrative is required not just to help settlement but also to properly convey the dispute at trial.

**Summary**

- Trial witness statements in the Business and Property Courts (like other witness statements) should not include argument nor take the court through documents.

- As far as possible, a witness should only be shown documents if the witness created or saw the document while the facts evidenced by or referred to in the documents were fresh in their mind.

- The witness should list all the documents that they referred to for the purpose of preparing the evidence, and in relation to important points, explain how and when their memory has been refreshed by consideration of documents.

- The witness needs to sign an extended 'confirmation of compliance' in relation to these rules, and the legal representative must certify their belief that the rules have been followed.

- The witness statement should be based on an interview with the witness, conducted using open questions and avoiding leading questions.