

MUST A FACTUAL WITNESS KEEP THEIR OPINIONS TO THEMSELVES?

18 NOVEMBER 2021 • ARTICLE



Can a witness of fact also give opinion evidence? This was the question addressed in the recent Commercial Court case of *Mad Atelier International BV v Manes*¹, in which the defendant, relying on the provisions of new Practice Direction 57AC ("PD57AC"), sought to strike out parts of the claimant's witness statements on the basis that they contained impermissible opinion evidence. The defendant's application was dismissed. However, the case, which is the first to be reported where a party applied to strike out parts of another party's witness statements under PD57AC, nonetheless provides useful clarification on the application of the new rules, and their interaction with the law on admissibility of evidence.

"Trial witness statements were, more often than not, too long and over-lawyered, and therefore "ineffective in performing their core function in achieving best evidence as proportionate cost"."

PD57AC – TRIAL WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS

PD57AC, which came into effect on 6 April 2021, was introduced following the recommendations of the Witness Evidence Working Group in their 2019 Implementation Report. One of the main criticisms cited in the report was that trial witness statements were, more often than not, too long and over-lawyered, and therefore "ineffective in performing their core function in achieving best evidence as proportionate cost".

PD57AC sought to correct this by setting out new rules concerning the purpose and proper contents of trial witness statements, as well as proper practice in relation to their preparation. Briefly, witness statements falling under PD57AC should contain only matters of fact that need to be proved at trial and of which the witness has personal knowledge and that are relevant to the case. The witness statement should

also identify a list of documents which the witness has been referred to for the purpose of providing the evidence in their statement and should contain a signed statement that best practice has been followed, as set out in the appendix to PD57AC.

BACKGROUND

MAD Atelier International BV, the claimant, and Manes, the defendant, agreed to enter a joint venture to develop an international franchise of restaurants under the brand “L’Atelier de Joel Robuchon”. The claimant alleged that it suffered losses as a result of fraud by the defendant.

Proceedings were issued in the Commercial Court and witness evidence was filed and served by each party. However, the defendant took exception to parts of the claimant’s witness evidence and applied to strike out passages dealing with hypothetical profits of the projected restaurants on the basis that they contained inadmissible opinion evidence and were contrary to new PD57AC.

In support of its arguments, the defendant relied upon (among other things):

- paragraph 3.1(1) of PD57AC, which provides that trial witness statements must only contain evidence as to matters of fact; and
- the appendix to PD57AC, which provides that trial witness statements must not set out commentary on other evidence in the case by setting out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence.

DECISION

The defendant’s application was dismissed. The judge, Sir Michael Burton GBE, in considering PD57AC and the law on the admissibility of evidence, found that the test to be applied was whether the evidence would be admissible at trial. The new Practice Direction was not intended to change the law on admissibility of evidence or overrule the directions given by past authorities on witness statements. Paragraph 3.1(2) of PD57AC makes it clear that a party can give evidence in their statement which they would be allowed to give in evidence in chief if they were called to give oral evidence at trial.

The judge went on to cite previous authorities where witnesses have given opinion evidence relating to their factual evidence². In certain circumstances, such opinion evidence may be given if the witness has relevant experience or knowledge (although where the witness is not independent then this evidence will, of course, be tested by reference to cogency and weight). Evidence given by factual witnesses as to a hypothetical situation may also be allowed³. The judge cited *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*⁴, which notes that in the Technology and Construction Court (“TCC”), technical and expert opinions are frequently expressed by factual witnesses during their narrative evidence in suitable cases without objection. Although such opinion evidence does not have the same standing as the evidence of independent experts, it is nonetheless usually valuable and often leads to considerable saving of costs. This approach is not confined to TCC cases and has been endorsed in various other cases before the Commercial Court and the Court of Appeal⁵. The judge was fortified in his decision because it would allow greater transparency in the proceedings since the defendant would be able to cross examine the claimant’s witnesses on the opinions given “and seek to challenge or destroy their reliability rather than getting at it indirectly through the expert”. Accordingly, it was held that the claimant’s opinion evidence should not be struck out.

COMMENT

WATSON FARLEY & WILLIAMS

This decision confirms that PD57AC does not affect the precedent law on admissibility of opinion evidence from witnesses of fact in relevant cases. It also serves as a useful reminder that, in appropriate cases, witnesses can give evidence by reference to their own personal knowledge and involvement as to what would or could have happened in counterfactual or hypothetical circumstances.

Trainee Jude Boateng also contributed to this article.

[1] [2021] EWHC 1899 (Comm)

[2] (ES (By her mother and litigation friend DS) v Chesterfield and North Derbyshire Royal Hospital NHS Trust) [2003] EWCA Civ 1284

[3] Kirkman v Euro Exide Corporation (CMP Batteries Ltd) [2007] EWCA Civ 66

[4] [2008] EWHC 2220 (TCC)

[5] See for example: Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396; Rogers v Hoyle [2014] EWCA Civ 257; and, Parabola investments Ltd v Browallia Cal Ltd [2010] EWCA Civ 486

KEY CONTACTS

ANDREW WARD

PARTNER • LONDON

T: +44 20 7863 8950

award@wfw.com

DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.