# FACTUAL WITNESS EVIDENCE IN TRIALS BEFORE THE BUSINESS & PROPERTY COURTS

ADDENDUM TO THE IMPLEMENTATION REPORT OF THE WITNESS EVIDENCE WORKING GROUP

## A. INTRODUCTION

1. This Addendum aims to update the BPC Board on the three matters referred to at paragraph 5 of the main Implementation Note dated 31 July 2020:

   (a) Making practitioners aware of the proposed reform.

   (b) The 'fine tuning' on defining types of proceedings to exclude from the operation of the proposed new Practice Direction absent an order for it to apply in an individual case (draft PD 57AC, para 1.3).

   (c) The 'Test Drive' exercise concerning draft PD57AC, para 3.2.

## B. AWARENESS

2. With the agreement of the Chancellor, as Chairman of the BPC Board, the draft PD57AC (including Appendix) was made available as part of the materials for the Commercial Court 125th Anniversary seminar on 7 September 2020, at which the work of the Working Group featured. The Implementation Report has subsequently been provided too. The seminar generated this opinion piece in the *Law Society Gazette* (https://www.lawgazette.co.uk/commentary-and-opinion/witness-evidence-and-the-malleability-of-memory/5105927.article); and some contact with the undersigned as Chairman of the Working Group or with Cockerill J as judge in charge of the Commercial Court indicating an interest in having an opportunity for the professions to comment upon the proposed requirements whilst they are still in draft.

3. The question arises for the BPC Board whether such an opportunity should be provided, and if so how and by whom that should be managed, prior to or in parallel with any submission of the draft PD to the CPRC for consideration.

## C. EXCLUSIONS

4. The 'fine tuning' of draft PD57AC, para.1.3, undertaken by Fancourt J for the Working Group (in consultation with Snowden J), proposes that it is desirable that the requirements of the PD and Appendix should apply to unfair prejudice petitions (Companies Act 2006, s.994) and 'just and equitable' winding up petitions (Insolvency Act 1986, s.122(1)(g)) though they are not Part 7 or Part 8 Claims, and has produced a finalized proposed wording for para.1.3.

5. The proposed amended wording for paras.1.2 and 1.3 is set out at the end of this Addendum; and this Addendum is accompanied by an updated draft PD57AC with that wording incorporated.

## D. TEST DRIVE

6. The Questionnaire by reference to which the test drive exercise was conducted is at WEWG Questionnaire. Through the LSLA Committee, two firms (Reynolds Porter Chamberlain and PCB Litigation volunteered to undertake the test drive. Their four Questionnaire responses are collected in a spreadsheet accompanying this Addendum. All four test drives related to Part 7 trials in the Commercial Court, two related to a witness who was also the client, one related to a major witness who was not the client, and one to a minor witness.

7. It may be noted that:

   (a) In three of the four examples, the time found to be required to comply with the proposed 'list the documents' requirement was insignificant, relative to the time spent on the witness statement generally: 1.5 hrs. x 3, vs. 94.6 hrs., 170.9 hrs., and 75.9 hrs.; and 7.5 hrs. vs. 55 hrs.

   (b) In each case, it was estimated that compliance would have taken only half as long if the need to comply had been present when the statements were being prepared: 45 mins. x 3; and 3.5 hrs.

   (c) The document list was, in the three simpler instances, 'entirely or almost entirely' created from material generated in any event and, in the more complex example, 'mostly' so.

   (d) Two contradictory comments are made about the possible impact of the requirement, if introduced, namely that:

      i. it may cause more time to be incurred, to focus on and identify what documents each witness needs to be shown as part of the proofing exercise. In my view, that would be a good thing, even if it could limit the net costs benefit of the proofing exercise itself (time spent with the witness or drafting the statement) being more confined. The proper confinement of the proofing exercise by reference to considered advice on evidence is the bigger prize;

      ii. that it might cause witnesses to be shown more documents than are reasonably required, for fear of criticism at trial that a witness had not been shown something. In my view, that fear should be misplaced, since it is not a reasonable interpretation of the Appendix (Statement of Best Practice) to think that it favours the showing of more rather than fewer documents to witnesses.

**Mr Justice Andrew Baker**
19 October 2020

**CPR PD57AC paras.1.2-1.3 (updated)**

1.2 In this Practice Direction (including the Appendix) –

…

"trial" means a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings (except as provided in paragraph 1.3 below) in any of the Business and Property Courts under CPR Part 7 or Part 8 or upon an unfair prejudice petition under section 994 of the Companies Act 2006 or a just and equitable winding up petition under section 122(1)(g) of the Insolvency Act 1986,

"trial witness statement" means a witness statement that is served pursuant to an order made under rule 32.4(2), or pursuant to rule 8.5 or an order made under rule 8.6(1)(b), or that is prepared for the trial of an unfair prejudice petition or a just and equitable winding up petition, including supplemental or reply witness statements where allowed by the court, and

…

1.3 This Practice Direction does not apply to the following proceedings, unless the court at any stage directs that it is to apply:

(1) an application under Part VII of the Financial Service and Markets Act 2000 for an order sanctioning an insurance business transfer scheme, a banking business transfer scheme, a reclaim fund business transfer scheme or a ring-fencing transfer scheme;

(2) an application under Part XXV of the Financial Services and Markets Act 2000 for an injunction or restitution in connection with contravention of relevant requirements, as defined in that Act;

(3) an application for an order under the Insolvency Act 1986, other than a just and equitable winding up petition under s.122(1)(g) of that Act, under the Insolvency (England and Wales) Rules 2016, under any enactment or statutory instrument providing for a special insolvency or administration regime, and under Schedule 2 to The Cross-Border Insolvency Regulations 2006;

(4) a claim made under the Companies Act 2006 listed in Part II of Practice Direction 49A of the Civil Procedure Rules (whether in relation to limited

companies or limited liability partnerships), an application for an order under Part 26A of that Act, a claim to restore a company to the register under section 1029 of that Act and a claim under Council Regulation (EC) No 2157/2001 listed in Part III of Practice Direction 49A;

(5) an application under Part II of The Companies (Cross-Border Mergers) Regulations 2007;

…

[ previous sub-paras.(4)-(7) become sub-paras (6)-(9)].