FACTUAL WITNESS EVIDENCE IN TRIALS BEFORE THE BUSINESS & PROPERTY COURTS

IMPLEMENTATION REPORT OF THE
WITNESS EVIDENCE WORKING GROUP

A. INTRODUCTION

1. The Witness Evidence Working Group was born out of a concern on the part of the judges of the Commercial Court that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost in Commercial Court trials. It was set up under the auspices of the Commercial Court Users' Committee at its meeting in March 2018. The project evolved to encompass all of the BPC jurisdictions. The members of the Working Group include judges, barristers and solicitors working in the BPCs, and a nominee from GC100 representing lay client users.

2. The Working Group's Final Report, prepared in July 2019, was considered by the BPC Board in November 2019. Its recommendations were endorsed in principle and the Working Group was directed to work on how they might best be implemented. The BPC Board decision, with a link to the Final Report, was published in early December 2019: www.judiciary.uk/publications/report-of-the-witness-evidence-working-group/

3. An implementation sub-group was formed and worked on the questions arising during March, April and May 2020. The full Working Group met to consider and debate the sub-group's conclusions and drafting work in late June and early July 2020. This Implementation Report now presents for the BPC Board the conclusions and recommendations arising out of that work. It is accompanied by a range of documents, all of which should be read (time permitting), as this Report does not descend to their level of detail or attempt to summarise their entire content.

4. One early conclusion of the implementation sub-group was that the Working Group's primary recommendations should be implemented, if possible, by the introduction of a new Practice Direction 57AC. Contact was established with relevant MoJ Legal and MoJ Policy representatives, who were kept informed about the Working Group's implementation work. They were invited to join the Working Group's June-July meeting, and Alasdair Wallace (MoJ Legal) did so.

5. All this work has culminated in the final drafts for a proposed PD57AC and Appendix (Statement of Best Practice) that accompany this Implementation Report. They have the unanimous support of the Working Group, subject to three points, marked by highlighting within the drafts:

   (a) We have not stated a commencement date for the proposed new CPR PD57AC (see draft PD57AC, para 1.1). Were the proposal for the new Practice Direction and Appendix to find favour with the Civil Procedure

Rules Committee ("CPRC"), and were that to come to fruition in Michaelmas Term 2020, the suggestion would be for a commencement date of **1 April 2021**. A substantial 'lead time' during which litigants and their advisors can be made aware of the reform will be desirable.

(b) There is still 'fine tuning' required to define with precision certain types of proceedings that it is proposed should be excluded from the operation of the new Practice Direction unless an order is made for it to apply in an individual case (see draft PD 57AC, para 1.3). That work will be done before the BPC Board is asked to consider this Report in October 2020, and an Addendum to this Report will be provided.

(c) One provision in the draft Practice Direction split the Working Group (see the highlighting in draft PD57AC, para 3.2 and draft Appendix, para 3.4). There was a majority in favour, but a substantial minority against. This Report summarises the arguments for and against that have been aired. It also describes one further piece of work being undertaken in relation to part of that debate.

6. One of the Working Group's recommendations was that there be harmonisation of the main court guides (the Commercial Court Guide, the TCC Guide and the Chancery Guide) in what they say about factual witness statements for trials. It is a corollary of the implementation recommendation now made that there be a new PD57AC (with Appendix) that the court guides could be harmonised each to say very little, if anything, more than PD57AC applies. The draft PD57AC does not include any page limit per statement, subject to permission for greater length, such as appears in the Commercial Court Guide, para H1.1(h). The Working Group recommends that there be no such page limit, and that it be removed from the next Edition of the Commercial Court Guide.

7. Another of the Working Group's recommendations was that the individual BPC jurisdictions give consideration to the introduction of a requirement for detailed pre-trial statements of fact, for service alongside factual witness statements, as a means of assisting parties to keep the factual witness evidence itself within appropriate bounds. In the light of the proposed content for new PD57AC (with Appendix), the Working Group has reconsidered, and no longer supports, that possible reform. It does though note that the underlying idea remains sound; it may be better pursued as part of considering how trial hearings are conducted, rather than as part of any reform relating to factual witness statements for trial.

8. The BPC Board is now invited to consider:

(a) whether to endorse the Working Group's recommendation that there be a new PD57AC (with Appendix) and support its adoption by the CPRC;

(b) whether, if so, the proposed PD57AC should include the requirement (part of para 3.2 as presently drafted) that a trial witness statement must identify any documents the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement;

(c) when it should be proposed that any new PD57AC come into effect; and

(d) whether to endorse the Working Group's recommendation that the court guides be harmonised, replacing provisions concerning factual witness statements for trial with a simple reference to the new PD57AC (with Appendix), and in the case of the Commercial Court dropping the per statement page limit presently found in the Commercial Court Guide at para H1.1(h).

9. The rest of this report has four parts. **Part B** explains why the Working Group proposes a new PD57AC (with Appendix) to address the current realities of litigation in the BPC jurisdictions. **Part C** outlines the implementation work undertaken by the Working Group. **Part D** summarises the debate over the proposed document identification requirement (paragraph 8(b) above). Finally, **Part E** concludes with a reiteration of the implementation recommendations now made by the Working Group.

B. A BPC SOLUTION

10. At the heart of the Final Report, and the founding concern that led to the creation of the Working Group, is the phenomenon of the over-long, over-lawyered trial witness statement. Experience of such statements and how they neither reflect the evidence in chief that the factual witnesses in question realistically would have given nor operate fairly to witnesses or the court at trial is a staple for the judges trying cases in the Commercial Court, TCC and Chancery Division. The problem is endemic in the litigation of well-funded, document-heavy, business disputes that is the core function of those three parts of the High Court. The judges of the Commercial Court and TCC do not see the same when sitting in other parts of the work of the Queen's Bench Division.

11. It is important to emphasise that the Working Group (including in particular its judicial members) does not take the view that the problem is one of conscious abuse of the process, although most judges will have seen examples that may have been that. The problem is not that parties, those advising them, or their witnesses are providing witness statements they believe to be inappropriate. But that makes it harder to tackle without systemic reform.

12. What has been lost, in cases conducted in the BPC jurisdictions, is a discipline in the application by parties of the core principles created by or reflected in CPR 32.1, 32.2, 32.4 and 32.5: firstly, that factual witness evidence should be adduced at trial only on matters on which such evidence is required on disputed issues that stand to be resolved at the trial; secondly, that a factual witness statement for trial should contain only the evidence in chief the witness could and would be allowed to give at trial if the witness statement were not being taken as their evidence in chief.

13. In relation to Part 8 Claims in the BPC jurisdictions, too often the fact that the witness statements served with the Claim Form, then in response and in reply, are (or should be) factual witness testimony only, as they would (or should) be if served pursuant to a case management direction made under CPR 32.4 in a Part 7 Claim, is ignored or overlooked. Lengthy written submissions are served

in the guise of witness statements. The critical distinction between (i) limited and formal factual evidence needed just to put documentary material into evidence (including to authenticate it, if required), (ii) genuine factual witness testimony adding to the documentary record, and (iii) comment upon the documents or what the court should make of them, that is to say argument, is lost or obscured.

14. Furthermore, in the working generation since it became standard for there to be factual witness statements in advance to stand as evidence in chief at trial, the nature and volume of documents generated by ordinary commercial activity has changed out of all recognition. The need for and importance of factual witness evidence at trial in business disputes correspondingly should have diminished, for most if not all issues in most cases. The chronological narrative of material factual events is documented, generally speaking, in such a comprehensive and detailed fashion that carefully considered advice on the evidence required for a trial should be identifying that there is far less need for factual witness evidence than is reflected in current trial practice.

15. None of this is to say that some true factual witness evidence may not be very important in any given case. But what is seen too often in practice is not focused witness evidence reflecting a careful analysis of where witness testimony is sensibly apt to add to the documentary record. Rather, what are seen routinely are attempts to set out a full narrative history of material events that are demonstrable (or not, as the case may be) from the documentary disclosure.

16. The result, all too often, is a long, detailed record of factual events reconstructed from the documents that, having gone through or been taken through the documents, the witness is happy to say they believe to be true. The reconstruction of events from the documents may be a reasonable one, and the witness's belief that it is an accurate narrative may be honest; but that does not make it factual witness testimony properly to be presented through a witness statement. Its credibility, if disputed, will generally be a matter for submission by reference to the documents, not for extensive cross-examination on the reconstructed narrative to which the witness has been happy (it may be acting perfectly honestly) to put their name; but the latter is the inevitable result, if only through an understandable, defensive, concern that it not be said that matters verified on oath in chief were not challenged.

17. Thus, witnesses are too often asked to sign off by way of witness statement a detailed factual narrative that does not resemble the evidence in chief they could or would give, if required to do so without providing a witness statement first, and on which they are therefore exposed to lengthy, detailed cross-examination. This is not fair on the witnesses. Nor is it an efficient or helpful proxy for simple argument as to disputed elements of the factual narrative, by reference to the documents, where in reality the dispute is or should be one for argument and not for witness testimony.

18. The Working Group's conclusion is clear that intervention is needed to foster a necessary change of culture, and to modernise the practice relating to factual witness statements for trial in the BPC jurisdictions so it remains fit for purpose in a commercial world now dominated by the contemporaneous documenting

of the vast majority of what is done or said, in one electronic form or another, that might later prove material if a dispute arises upon which litigation ensues. Although in principle the court has ample power to limit the scope of factual witness evidence through case management directions, it is not often well placed to make a sufficiently detailed assessment about that prior to disclosure, and introducing a routine additional case management hearing after disclosure would not be desirable.

19. We also note (and embrace) the possible consequence that causing factual witness evidence to be far more limited, as generally it can and should be in BPC trials than is presently the case, may require more time to be taken up, when opening trials and/or in closing argument, introducing contemporaneous documents to the court and debating their import. That ought to be outweighed by the saving of cross-examination time to be achieved, in comparison to the present, and it should also render the trial process much fairer to and realistic for those factual witnesses required to attend to give oral evidence.

C. THE IMPLEMENTATION PROJECT

Working Group Composition

20. As the Final Report was receiving its endorsement in principle from the BPC Board, Popplewell LJ had recently been elevated to the Court of Appeal. He stepped down from this project and Andrew Baker J succeeded him in chairing the Working Group.

21. In March 2020, Andrew Baker J had with him a JA with law reform experience from a year at the Law Commission (Joshua Griffin, Hardwicke Chambers). He assisted in the initial research and drafting effort, and agreed to continue to participate in the work of the Working Group after the end of his JA placement. In view of their ongoing work on revising the Chancery Guide, Ch Master Kaye and Maura McIntosh (Herbert Smith Freehills) were also co-opted, and were invited to be part of the implementation sub-group.

22. In its final form for the implementation phase of its work, the Working Group therefore comprised the following (* for implementation sub-group members):

    (a) Mr Justice Andrew Baker (Commercial Court) (Chair) *
    (b) Mr Justice Fancourt (Chancery Division)
    (c) Mr Justice Waksman (Commercial Court and Technology and Construction Court; formerly London Circuit Commercial Court)
    (d) Ch Master Kaye (Chancery Division) *
    (e) Andrew George QC (Blackstone Chambers)
    (f) Ian Clarke QC (Selborne Chambers)
    (g) Joe Smouha QC (Essex Court Chambers) *
    (h) John Kimbell QC (Quadrant Chambers) *
    (i) Joshua Griffin (Hardwicke Chambers, JA to Andrew Baker J in March 2020) *
    (j) Audley Sheppard QC (Clifford Chance)
    (k) Chris Bushell (Herbert Smith Freehills) *
    (l) Maura McIntosh (Herbert Smith Freehills) *

(m) Jon Turnbull (Clyde & Co)
(n) Ted Greeno (Quinn Emanuel Urquhart & Sullivan)
(o) Richard Blann (GC100, Lloyds Banking Group)

23. The work undertaken was ably supported by Andrea Dowsett and Olivia Blunn (Judicial Office, both members of the Chancellor's private office). The MoJ was represented by Alasdair Wallace (MoJ Legal Advisers – Civil, Family, Courts and Tribunals) and David Parkin (MoJ Policy – Deputy Director for Civil Justice and Law Policy). We were privileged to have input from Prof Adrian Zuckerman, Professor of Civil Procedure at the University of Oxford.

Implementation Sub-Group

24. The work of the implementation sub-group is described in the Implementation Note dated 2 June 2020 prepared by way of report for the full Working Group, and by reference to which the Agenda for the Working Group's June-July meeting was set. A copy of both the Implementation Note and the Working Group Agenda accompany this Report; the detail is not repeated here, but the following overview summarises the upshot.

25. The primary Working Group recommendations endorsed in principle by the BPC Board were that there be an authoritative **statement of best practice** on preparation of witness statements, a more developed **statement of truth** for factual witnesses in BPC trials whereby the witness confirms that they have had explained to them and understand the objective of a witness statement and appropriate practices in relation to its drafting, and for represented parties a **certificate of compliance** signed by the legal representatives. The sub-group focused on those primary recommendations, for the reasons given in the Implementation Note.

26. The work of the sub-group began in earnest in February 2020, following the BPC Annual Conference on 3 February 2020, at which the work of the Working Group was one of the items on the Agenda.

27. During the course of the sub-group's work, the 113th update to the CPR came into effect from 1 April 2020. As a result:

(a) By amendment to PD22, the statement of truth for factual witness statements has been strengthened by this addition: "*I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.*" The further addition proposed for trial witness statements in the BPCs, designed to tackle issues particular to trials in those jurisdictions, will complement that existing improvement.

(b) By amendment to PD32, a trial witness statement is now required to state, "*the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter*". Elements of what is now proposed build on that welcome addition, as it applies particularly in the BPC jurisdictions, given its recognition in principle that the process by which written evidence has been obtained that will

stand as evidence in chief is material to an assessment of the value of that evidence by a trial judge.

28. The sub-group met on 4 March 2020 and 11 May 2020. Minutes accompany this Report. The sub-group concluded that the preferred implementation method for the primary recommendations was a new Practice Direction for trials in the BPC, with an Appendix containing the best practice statement, and worked by way of reviews of existing material, drafting and discussion, to prepare drafts for consideration by the full Working Group.

29. The draft PD 57AC (with Appendix) was thus prepared after considering, and with a view to building on:

- Existing CPR and PDs, especially CPR 32.2, 32.4, 32.5 and PD32.
- The law on what is allowed and not allowed in evidence in chief, if a trial witness statement does not stand as evidence in chief under CPR 32.5.
- The Working Group's Final Report, and its description and assessment of the problems sought to be addressed by the primary recommendations.
- The regulatory requirements of the SRA and BSB in relation to contact with and proofing of factual witnesses.
- What trainee solicitors and barristers are taught on the LPC and BPTC respectively concerning the proper content of evidence in chief and trial witness statements, or concerning contact with and proofing of factual witnesses.

30. Contact was established with, and input received from, Prof Zuckerman and Messrs Wallace and Parkin (MoJ Legal and MoJ Policy), as already noted.

Working Group Implementation Meeting

31. In the event, this key meeting spread over two dates, 25 June 2020 and 10 July 2020, with further drafting work and discussion via email between the two dates. A single set of meeting minutes covering both sessions accompanies this Report.

32. The outcome was unanimous support for the implementation sub-group's work and the final drafts for proposed new PD57AC and its Appendix that accompany this Report, save only for the proposal that divided opinion, namely that a trial witness statement in the BPC must identify the documents the witness has referred to or been referred to for the purpose of providing the statement. That particular proposal is addressed further in **Part D**, immediately below.

CPR PD57AC

33. It is the Working Group's hope that the draft PD57AC, including the Appendix, largely speaks for itself. We draw attention here to a few main points.

34. Firstly, as noted already, there is work still in progress over how more precisely to define certain categories of proceedings to which PD57AC would not automatically apply. In general, as drafted, PD57AC would apply to all trial hearings in Part 7 and Part 8 Claims. The thought behind PD57AC para 1.3 was that there may be some particular species of Part 8 Claim in which PD57AC would not be a good fit. The different thought, that PD57AC should not clash with any rule or PD requirement specifying that a witness statement that would fall within our definition of a 'trial witness statement' must include certain content, is catered for by PD57AC para 1.4(3). That has allowed the list of exclusions in para 1.3 to be short.

35. It might be noted that consideration was given to Admiralty Claims under CPR Part 61 and Arbitration Claims under CPR Part 62.

36. The conclusion in relation to Admiralty Claims is that they would not be covered by PD57AC, as we have drafted it, because they are commenced by bespoke Claim Forms under neither Part 7 nor Part 8, and so no issue arises of whether Admiralty Claims should be excluded. There is a real question whether Admiralty Claims should be covered, however, and if they should be it is suggested that the way to achieve that is to amend PD61 to apply PD57AC to Admiralty Claims, with consideration given to how exactly that might most appropriately be articulated. The issue will be raised with the Admiralty Court Users Committee on 30 September 2020.

37. The conclusion in relation to Arbitration Claims is that they would be covered by PD57AC, as we have drafted it, since the Arbitration Claim Form under CPR Part 62 is a species of Part 8 Claim form. The further conclusion was that they indeed should be covered, and not included in the list of excepted proceedings. It is important that PD57AC and the Appendix apply to the substantive witness statement evidence in claims under s.67 and s.68 Arbitration Act 1996. There is nothing in PD57AC or the Appendix, as drafted, to undermine the particular requirements for s.69 appeals under the 1996 Act limiting parties' entitlement to serve witness evidence at all to certain particular cases.

38. Secondly, draft PD57AC itself has been kept as short as possible while ensuring it seeks to achieve the key aims of tackling the endemic difficulty experienced with trial witness statements in the BPC jurisdictions, implementing the enhanced statement of truth and certificate of compliance recommendations from the Final Report, and giving force to the statement of best practice in the Appendix so as to make it authoritative as again recommended in the Final Report. It is designed to complement and spell out the implications for BPC cases of the existing requirements of CPR Part 32 and PD18, to render them the more effective in view of the difficulties the Working Group has been seeking to address.

39. Thirdly, the Appendix seeks to distinguish between the principles applicable to evidence in chief that ought to inform the content of any trial witness statement, and the process by which any such statement is put together, dealt with paragraph 2 of the Appendix, and matters of best practice, bearing those principles in mind, set out in paragraph 3 of the Appendix. Paragraph 3 distinguishes between general matters of best practice that should apply to all

litigants and particular points on which it is recognised that a party being legally represented involves the legal representatives having a responsibility to apply their knowledge and expertise in appropriate fashion so as to assist the witness and the court.

D. DOCUMENTS REFERRED TO BY WITNESSES

40. That naturally brings this Implementation Report to the one point on which the Working Group did not achieve a consensus. By a majority, the Working Group supports the inclusion within a new PD57AC of a requirement that trial witness statements be informative as to the extent to which they have been put together from, or influenced by, the contemporaneous documents, including documents the witness did not see at the time. But the articulation of any such requirement is not the easiest of drafting exercises; and the substantial minority opinion that is against including any such requirement raises concerns both of principle and of practicability.

41. The proposed requirement, if there is to be a requirement, is articulated in these terms in the drafts the BPC Board is asked to consider:

(a) In draft PD57AC, para 3.2 is in these terms:

"A trial witness statement must state only that which the witness claims personally to recollect about matters addressed in the statement, and must identify 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. The requirement to identify documents the witness has referred to or been referred to does not affect any privilege that may exist in relation to any of those documents."

The controversy concerns the highlighted text. The issue is whether to include the second half of the first sentence, the second sentence being a recommended addition for the avoidance of doubt required only if the second half of the first sentence is included.

(b) The Appendix makes one necessary cross-reference to the requirement to list documents that would simply be removed if there were no such requirement. Thus, para 3.4 of the draft Appendix is in these terms (with the relevant wording highlighted):

"A trial witness statement should refer to documents, if at all, only where necessary. It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2 of Practice Direction 57AC, unless …"

The Argument of Principle

<u>The View For</u>

42. Those in favour of the proposed requirement take the view that it is desirable for the court to know 'up front', and that it is a cumbersome process unfair to the witness to leave it to cross-examination to explore, the extent to which what

is presented as factual witness testimony in chief has been or may have been stimulated or influenced by going through the documents in the case. It should be routine, when obtaining from a prospective witness a note or record of the evidence they are in a position to give, to ascertain what, if any, documents they have reviewed for themselves for that purpose and to make a record of what, if any, documents they have been asked to review for that purpose. It should be a matter to which careful thought is given because it may affect the weight to be given to what the witness will claim as recollection to have an understanding of the extent to which it was spontaneous, recollection refreshed from documents the witness saw at the time, or testimony prompted by reviewing documents the witness did not see at the time.

43. It is unrealistic to suppose that witnesses will never be shown, or choose to look at, documents they did not see at the time; but doing so does amount to 'leading the witness', or the witness leading themselves, using documents they could not be taken to as part of an oral examination in chief without agreement or the permission of the trial judge. The complex, fragile and malleable nature of human memory has been increasingly recognised in recent case-law. It follows that factual witnesses and their claimed recollections should be treated with kid gloves in any process between their being identified as possible witnesses in a case and their signing a trial witness statement setting out what they would say on oath that they claim to recollect.

44. A key concern the Working Group is seeking to address is that of the process of obtaining the account that finds its way into a signed trial witness statement rendering that account less reliable in ways that are not apparent to the court, all in the context of trying to encourage a focus upon limiting the areas on which factual witness evidence is adduced at all, given the extent to which, typically in the BPC jurisdictions, the primary factual narrative can and should be taken from the documents. For those in favour of the proposed requirement, it is a particular concern that in practice factual witnesses may be being shown lots of documents, unfamiliar to them contemporaneously, and being led by that in providing what will then be presented to the court by a trial witness statement as their testimony; in their view it is essential that the court is made aware, if it be the case, that that has or may have happened.

45. Those in favour also believe that having such a requirement should serve to protect factual witnesses, from the need to try to remember what documents they looked at for the purpose of providing their statement (because the statement will list them), from criticism if they struggle to remember that (in the absence of such a list), and from criticism if a document causes them to modify or doubt some element of their testimony only emerges, so far as they are concerned, during cross-examination. The possibility that a document seen after a statement has been signed may cause a witness to change or add to their testimony is neither new nor a problem; and it is to the credit of a witness to acknowledge that where it happens. It is thus in the interests of witnesses, and therefore in the interests of the parties calling them, that a careful record be kept of what documents they have reviewed for the purpose of providing their evidence in chief. Since it may be of significant value in assessing the weight to attach to that evidence, that record ought not to be kept hidden.

46. There is a related point of best practice stated in the draft Appendix, at para 3.6. That has a narrow focus, recommending as best practice that, if practicable, trial witness statements should 'show the working' on important disputed matters of fact. That will not inform the court of the degree to which more generally the witness has looked at or been shown material apt to have influenced what is presented as their testimony.

47. There is room for the quality and reliability of a witness's recollection to be explored as part of any 'proofing' process, by reference to what appear to be the facts of the case based on the documents, for example so as to inform advice to be given on the merits or a decision whether to serve evidence from that witness. But if that is to be done, it needs to be done sensitively and carefully; and if the documents in question are not documents the witness saw at the time, and the point is of any real importance, *prima facie* it should be done without showing the witness the documents. Those in favour of the proposed requirement take the view that it will encourage discipline in the out-of-court handling of factual witnesses, and reveal, where it be the case, that they have reviewed, whereby their testimony may have been influenced by, large numbers of documents they did not see at the time. As throughout, the important parts of a factual witness's testimony will be those parts that are not covered, or are incompletely covered, by the documentary evidence, together with any parts that appear to conflict with the documentary evidence. That makes it all the more important that, if practicable and within reason, the court has as much information as possible on what may have influenced the testimony that is given when a witness statement is verified on oath and becomes the witness's evidence in chief at trial.

<u>The View Against</u>

48. Those against the proposed requirement take the view that it will rarely, if ever, add value, and/or that it is unnecessary, or adds nothing, both generally and given the inclusion of para 3.6 of the Appendix as part of the proposed authoritative statement as to best practice. They conclude that the perceived benefits the proposed requirement might have in a relatively small number of cases that go to trial will be significantly outweighed by the costs of giving effect to it in all cases, most of which are settled. Over the years there has been a recurring theme from users that commercial litigation gets ever more complex and expensive and that much of the additional cost or additional front-loading of cost nowadays has grown out of the number of rules and practices required to be followed, including many intended when introduced to cut costs but that have regrettably had an opposite effect.

49. There is concern at the possibility of adverse inferences being drawn if a trial witness statement document list indicates that a witness has been shown large numbers of documents. The suggestion is that in most commercial cases there will be no reason to think that that process has altered the witness's recollection in a problematic way. Since the important aspects of the witness's evidence are likely to be those aspects which are not (or not adequately) covered by the documents, reviewing documents whether or not seen by the witness at the time may be important to remind the witness of the surrounding circumstances, in order to draw their mind back to the relevant events, and can prompt recollection that goes beyond the documents and is not simply derived from them.

50. It is thus feared by those against the proposed requirement that there may be a reluctance to show witnesses relevant background documents, leading to: (i) time-consuming exercises to determine what documents should/should not be shown to the witness, rather than simply providing obviously relevant background; (ii) legal representatives exploring or testing a witness's recollection by reference to the content of documents but without showing the witness the documents, so that they will not have to be listed; (iii) situations where a witness is shown documents after providing their trial witness statement and wishes to change or supplement their evidence, leading to additional time/costs.

51. The view is also taken that the requirement to identify privileged documents (since the material reviewed by some witnesses as part of any 'proofing' process may include privileged material) is fraught with difficulty, including the question of whether the documents need to be identified individually or only by category, and if the latter how general or specific those categories must be.

The Argument as to Practicability

52. There are two aspects to concerns as to practicability: firstly, whether in practice it will be possible, and if so how easy or difficult it will be, to apply the proposed requirement, as drafted, so as to create the document list called for in any given instance; secondly, how much of an additional burden, with related increase in cost, compliance with the proposed requirement would generate. The second concern is more subtle than simply asking how much time (and associated cost) would be added by the proposed requirement to what happens now, since one of the aims of the requirement, even on its own and on any view as part of the proposed PD57AC with Appendix as a package, is to re-focus the whole pre-trial factual witness effort.

53. As to the first concern, how real or substantial it is may vary from witness to witness. In particular, those against the proposed requirement take the view that there will be substantial difficulties in identifying the relevant documents for a witness who is also a client – for example, will it mean trying to identify documents they have seen during the process of instructing the lawyers, perhaps over many months/years, or only when they came to give a witness statement? Any difficulty over what to do about privileged documents would be acute for such a witness. Or again, even if they are not the client, the key witnesses in complex commercial disputes may well be individuals who have 'lived with' the dispute and the litigation process, not merely people who witnessed whatever they witnessed at the time and were then asked to make a statement about it later.

54. Those in favour of the proposed requirement take the view that it ought to be practicable to comply with it, since it should be part of the process anyway to assess what documents the witness has considered for the purpose of providing their trial witness statement; and that individual cases, such as the 'client witness', where significant effort may be required to identify what documents should be listed, are likely to be cases where it is most important that the job is done and done with care because the risk is greatest that familiarity with the

dispute and the documents will affect the value of the witness's testimony as evidence additional to or independent of those documents.

The 'Test Drive' Exercise

55. The Working Group is undertaking a 'test drive' exercise, with the generous assistance of volunteer firms contacted via the London Solicitors Litigation Association. It is hoped that the feedback provided will be informative as to the extent to which the concerns of practicability have substance. It should be possible to view a copy of the form of questionnaire by which that feedback will be provided via this hyperlink: updated. Corrrespondents have been asked to report back using the form by 2 October 2020. The proposed Addendum to this Implementation Report referred to in paragraph 5(b) above will include a report on the test drive results.

F. CONCLUSION AND RECOMMENDATIONS

56. The Working Group commends for adoption (ultimately by the CPRC) a new PD57AC with Appendix, in line with the drafts accompanying this Report, as a solution to the modern realities of litigating trials in the BPC jurisdictions, to complement existing rules and Practice Directions relating to factual witness statements so as to give full effect to them and the principles underlying them for cases in the BPC.

57. The Working Group recommends in the first instance that the BPC Board:

(a) endorse the Working Group's recommendation that there be a new PD57AC (with Appendix) and support its adoption by the CPRC;

(b) take a view whether, if so, the proposed new PD57AC to be promoted before the CPRC should require that a trial witness statement identify documents the witness has referred to or been referred to for the purpose of providing the evidence set out in the statement;

(c) decide when it should be proposed that any new PD57AC come into effect; and

(d) endorse the Working Group's recommendation that the court guides be harmonised, replacing provisions concerning factual witness statements for trial with a simple reference to the new PD57AC (with Appendix), and in the case of the Commercial Court dropping the per statement page limit presently found in the Commercial Court Guide at para H1.1(h).

Mr Justice Andrew Baker
31 July 2020