



Neutral Citation Number: [2022] EWHC 79 (Ch)

Case No: PT-2020-000942

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 18/01/2022

Before :

MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

Between :

PRIME LONDON HOLDINGS 11 LIMITED **Claimant**

- and -

THURLOE LODGE LIMITED **Defendant**

Mr John de Waal QC (instructed by Dentons UK and Middle East LLP) for the **Claimant**
Mr Mark Warwick QC (instructed by Kennedys Law LLP)
for the **Defendant**

Hearing date: 14 January 2022

Approved Judgment in relation to Applications

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Mr Nicholas Thompsell :

Background

1. This judgment deals with two applications made in relation to a witness statement that has been produced for the purposes of a trial in the matter of Prime London Holdings 11 Ltd v. Thurloe Lodge Limited. The trial relates to a claim by Prime London Holdings 11 Ltd ("**the Claimant**") against Thurloe Lodge Limited ("**the Defendant**") for the Claimant to have access to the Defendant's land in order to make repairs to a wall at the edge of the Claimant's property, which the Claimant argues require such access. The claim is made under section 1 of the Access to Neighbouring Land Act 1992.
2. The Claimant's request for such access has been hotly resisted by the Defendant. The parties are not on good terms at present, although this has not always been the case. As is sometimes the case with disputes between neighbours, each side is insisting on its strict legal rights as it sees them to be.
3. Shortly before the commencement of the trial on 14 January 2022, the Claimant lodged an application ("**the Claimant's Application**"). The application was for the Court to rule that a witness statement that had been produced for the purpose of the trial be declared inadmissible on the grounds that it does not comply with the requirements of Practice Direction 57AC of the Civil Procedure Rules ("**PD 57AC**" or "**the Practice Direction**"). The witness statement in question was the Fourth Witness Statement of Alan Sharrocks, dated 17th December 2021 ("**the Relevant Witness Statement**").
4. At about the same time the Defendant lodged its own application ("**the Defendant's Application**"). The Defendant served with its application, a revised version of the Relevant Witness Statement ("**the Revised Witness Statement**") and asked for:

"An order that the Defendant be granted relief from sanctions to the extent that the revised version of the Fourth Witness Statement of A. Sharrocks dated 17 December 2021 be admitted into evidence."
5. There was no time for this matter to be considered before the trial - indeed I had not seen the two applications before the trial – so some time was taken on the first day of the trial to deal with this point.

6. Counsel for both sides agreed that the two applications should be considered together.

Does the Relevant Witness Statement comply with the Practice Statement?

7. There is no doubt in my mind that the Relevant Witness Statement, as originally drafted ("the **Original Witness Statement**") failed to comply with the requirements of PD 57 AC.
8. PD 57 AC clearly applies in this case since the Relevant Witness Statement was prepared for use in a trial in the Business and Property Courts. The Practice Direction is relatively new – it applies to trial witness statements signed on or after 6 April 2021. However, it applies to witness statements signed after that date, as was the case here, even where the proceedings were in train prior to that date. The proceedings for which it was prepared are not any of the proceedings where its application is excused from application under the terms of paragraph 1.3 of the Practice Direction.
9. In broad terms, the purpose of the Practice Direction is to ensure that Witness Statements are focused on the purpose of witness statements, which is explained at paragraph 2.1 of the Practice Direction. This purpose is to set out in writing the evidence-in-chief that a witness of fact would give if the witness were allowed to give oral evidence at trial without having provided a statement. The Practice Direction was introduced to deal with a mischief that witness statements were being used for purposes other than this – as a vehicle for argument and for conveying hearsay evidence and opinion, rather than for conveying facts within the knowledge of the witness. Comments made by Andrew Baker J in *Exportadora de Sal S.A. de C.V. v Corretaje Maritimo Sud-Americano Inc.* [2018] EWHC 224 (Comm) illustrate the concerns of the courts had led to its introduction. (Andrew Baker J, went on to chair the working group that developed the Practice Direction.)
10. The Original Witness Statement is in breach of the Practice Direction in two ways:
 - a) **Formalities.**

The Original Witness Statement does not comply with the formal requirements of a witness statement.

First, it did not include the confirmation required by paragraph 4.1 of the Practice Direction. This requires the witness to confirm various things. These include his or her understanding of the purpose of the witness statement; that it sets out only the witness's personal knowledge and recollection, in the witness's own words, and that the witness has not been encouraged by anyone to include in the statement anything that is not the witness's own account or recollection.

Secondly, it does not include the required Certificate of Compliance signed by a relevant legal representative confirming that the proper content of trial witness statements and proper practice in relation to their preparation have been discussed with the witness and that the legal representative considers that relevant requirements of the Practice Direction, and of Practice Direction 32, have been followed.

b) Content.

The Original Witness Statement breaches requirements within paragraph 3 of the Practice Direction. These requirements limit the contents of a witness statement and require witness statements be prepared in accordance with the Statement of Best Practice contained in the Appendix 2 the Practice Direction and (in this case) the Chancery Guide. The extent to which it included matters which breached these limitations is disputed, but it is clear, and I think has now been accepted by the Defendant, that at least some of the statements within the Original Witness Statement breached these requirements.

How this matter developed

11. The history of this issue is as follows.
12. On 17 December 2021, the Defendant's solicitors served the Original Witness Statement, along with an attached exhibit on behalf of our client. This was in time for the Defendant to meet its obligations under the Consent Order which determined the timetable for the proceedings.
13. On 4 January 2022, the solicitors for the Claimant wrote to the court asking the court not to read the Original Witness Statement on the grounds of its non-compliance with the

Practice Directive, although they did not explain or enumerate the ways in which they considered it to be non-compliant. On that date, they also wrote separately to the solicitors for the Defendant explaining that they would be asking this of the court.

14. On 7 January 2022, the solicitors for the Defendant responded, complaining that this procedural point was being taken only very shortly before the trial. (Although the trial ultimately commenced on 14 January 2022, was in a trial window such that it could have commenced on 11 January 2022.) They were not clear in saying whether or not they agreed that the Original Witness Statement was non-compliant with the Practice Direction. They said only that:

"The statement has been written by Mr Sharrock in his own words. Your client does not stand to suffer any prejudice as a result of its inclusion as part of the evidence at trial.

Our client's position is reserved accordingly."

15. On 10 January 2022, the Claimant's solicitors served the Claimant's Application, asking the Court to make a preliminary ruling that the Original Witness Statement was inadmissible.
16. Later on 10 January 2022 the Defendant solicitors acknowledged receipt of the draft application and order noted that this did not contain any details of the concerns and pointed out that under the principles in *Mansion Place* (considered further below) the sensible course of action is to raise that concern with the other side and attempt to reach agreement on the issue. They asked that the Claimant detail its concerns.
17. At lunchtime on 11 January 2022, the Claimant's solicitors responded, recommending that the Defendant's solicitors should review the Practice Direction and pointing out some specific paragraphs of the Practice Direction. Other than mentioning that the statement of truth did not follow paragraph 4.1 of the Practice Direction and that there was no Certificate of Compliance in accordance with paragraph 4.3 of the Practice Direction, they did not itemise which paragraphs of the Original Witness Statement they considered not to be compliant.

18. Early on 13 January 2022, the Defendant's solicitors wrote to the Claimant's solicitors saying that they had reviewed the Defendant's concerns and inviting the Claimant to consent to the substitution of the Revised Witness Statement for the Original Witness Statement.
19. Later the same morning the Claimant's solicitors replied saying that they were not opposed to Mr Sharrock's evidence at paragraphs 1 – 17 of his substituted statement. However, they continued to take issue with the paragraphs after that as they considered that these paragraphs "*continue to provide commentary and argument and do not therefore comply with Practice Direction 57 AC.*" This position has been maintained by the Claimant at trial.
20. On the same date, the Defendant's solicitors filed the Defendant's Application.
21. To summarise the foregoing, both parties accept that the Original Witness Statement should not be admitted but it may be replaced by a revised witness statement. The Claimant has indicated that it is prepared to accept the Revised Witness Statement, provided that the information in it after paragraph 17 is redacted from it. The Defendant asks the court to accept the whole of the Revised Witness Statement, which it maintains is now in compliance with the Practice Statement.

The approach to be taken

22. Under paragraph 5 of the Practice Direction, where a party fails to comply with any part of the Practice Direction, the court retains its full powers of case management. Paragraph 5.2 emphasises that the court's powers include, in particular, the power to strike out part or all of the witness statement; to order that the witness statement be redrafted in accordance with the Practice Direction or as may be directed by the court; or to order the witness to give some or all of their evidence in chief orally. In addition the court may make an adverse costs order against the non-compliant party.
23. In argument, Mr de Waal on behalf of the Claimant suggested that the way I should approach this was in two stages. The first was to find that the Original Witness Statement should be struck out and then secondly to apply the *Denton* criteria to decide whether to give relief to the Defendant which he argued should be limited to the relief which the

Claimant was prepared (by way of concession) to allow, which would be to accept paragraphs 1 to 13 of the Revised Witness statement, but not the remainder of it. In mentioning the *Denton* criteria, Mr De Waal was referring to the well-known three stage approach in *Denton v TH White* [2014] EWCA Civ 906 ("**Denton**").

24. Given the breadth of powers the court has under the Practice Direction, this is not the only way of approaching the matter. It is open to the court to decide that the appropriate sanction for the original failure to comply with the Practice Direction was for the court to order that the witness statement be redrafted as may be directed by the court. To the extent that the court orders this, and this position was acceptable to the Defendant, there may be no occasion for the Defendant's application for relief and technically the *Denton* criteria may not apply.
25. The approach to be taken by the court and by the parties in a case where the Practice Direction has not been followed was considered in two recent cases: *Mansion Place Limited v Box Industrial Services Ltd* [2021] EWHC 2747 (TCC) ("**Mansion Place**") and *Blue Manchester Ltd v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC) ("**Blue Manchester**").
26. In her decision in *Mansion Place*, O'Farrell J sets out a useful summary of the relevant rules for trial witness statements, the history and purposes giving rise to the Practice Statement and the requirements of the Practice Statement. She states at [49] that:

"Where a party is concerned that another party has not complied with the Practice Direction in any particular respect, the sensible course of action is to raise that concern with the other side and attempt to reach agreement on the issue. Where that is not possible, parties should seek the assistance of the court, by application for a determination on the documents or at a hearing. However, this should be done at a time and in a manner that does not cause disruption to trial preparation or unnecessary costs. The court does not wish to encourage the parties to engage in satellite litigation that is disproportionate to the size and complexity of the dispute. Often, the judge will be best placed to determine specific issues of admissibility of evidence at the trial when the full bundles and skeletons are before the court."

27. In *Mansion Place* both parties were requesting redactions to certain witness statements put forward by the other party on the grounds that these included information contrary to the Practice Direction. The judge ordered various redactions to the witness statements in question but refrained from ordering other redactions suggested by the party opposing the party putting forward the witness statement.

28. The decision in *Mansion Place* was referred to, and followed, in the decision in *Blue Manchester*, which was given by HHJ Stephen Davies sitting as a High Court Judge. The learned judge went on to provide some further useful guidance on how to approach various aspects of the Practice Direction. In the particular case before him, he did not consider that the incidents of non-compliance justified the striking out of the witness statements. He described this as:

"a very significant sanction which should be saved for the most serious cases. There is a sufficient core of compliant material in each witness statement and it is true as ... That they are not particularly lengthy witness statements which are particularly egregious in their non-compliance."

29. Instead, he annotated the witness statement with a series of amendments which he required to be made to the witness statement for it to be in accordance with the Practice Direction.

30. It is notable that in both cases the judge approached the matter by considering how to sanction the original non-compliance with the Practice Direction, rather than by applying the sanction of striking it out and then considering under the principles in *Denton* whether to grant relief.

Analysis

31. Considering this matter in the light of the decisions in *Mansion Place* and *Blue Manchester*, I find fault on both sides in how they dealt with this matter.

32. Certainly, the initial fault was with the Defendant, who is extremely well represented and really has no excuse for failing to ensure that the Relevant Witness Statement complied

with the Practice Direction. There has been no real explanation why this was the case, certainly in relation to the failure to meet the formal requirements of the Practice Directions.

33. As regards the inclusion of content that is contrary to the Practice Direction, Mr Warwick, on behalf of Defendant, explained that this came about partly as a result of the terms of the Consent Order sealed on 20 December 2021 (but available in draft before that date) which set out instructions for the exchange of evidence. One of the paragraphs of this order allowed the parties to file supplemental statements and reports setting out in full their reasoning on areas of disagreement following the production of a joint report by the expert witnesses setting out what issues remain between them. This appeared to envisage that witnesses on behalf of each party would indeed set out their reasons for disagreeing with the other side's expert, and that this in the words of Mr Warwick, on behalf of the Defendant, laid

"the seeds of the problem which your Lordship is now grappling with, because what this is seemingly inviting the lay witnesses to do is to file supplemental statements setting out in full the reasoning on the areas of disagreement"

and that as a result

"both sides had some degree of misunderstanding as to exactly how they ought to approach the further lay evidence from the witnesses".

34. This is not much of an excuse for failing to comply with the Practice Direction. The instructions in an order of the court should not be taken as ousting any element of the Practice Direction, perhaps not ever, but certainly not unless the intention to do this is very clear on the face of the court order. Nevertheless, I accept that the application of the Practice Direction should be read in the light of this instruction and that the witness was allowed to use matters within his own knowledge to explain if assumptions made by one of the experts to which he was responding, appear to him to be wrongly based.

35. The Defendant's initial reaction in brushing off the concerns raised by the Claimant and its failure to apologise for the oversight also do it no credit in this matter.

36. Whilst the primary fault was with the Defendant, the Claimant is also at fault for not identifying earlier its objections to be Relevant Witness Statement and explaining these in detail to the Defendant with a view to agreeing a revised version of the witness statement that could be substituted. Since the decisions in *Mansion Place* and *Blue Manchester* parties to litigation, and certainly those who are professionally advised, should understand that the court expects and requires this approach of the parties and that failure of a party to do this can be expected to influence how the court approaches an application to strike out a witness statement.
37. Some explanation as to the reasons for the delay is given in the Witness Statement of Leanne Norton, a senior associate at Dentons UK and Middle East LLP ("**Dentons**"), the Claimant's firm of solicitors. Her explanation was essentially based on absences from the office on her behalf which coincided unfortunately with Counsel's leave of absence during the Christmas break, so that the defects in the Original Witness Statement were not identified until New Year's Eve, resulting in the delay in raising the point until 4 January 2021. I do not consider this to be much mitigation for the delay – a well-resourced firm like Dentons should have been able to arrange cover so that the matter was spotted and dealt with earlier.
38. The explanation also does not provide any excuse for failure of the Claimant to identify in detail matters complained of in the Original Witness Statement.
39. As a result of these faults on both sides this matter came to court and took up valuable court time (and has required me to take considerable part of my weekend to review all of the circumstances and case law to put together this decision).

Decision

40. Taking all of this together, I think I should follow the lead of the learned judges in *Mansion Place* and *Blue Manchester* and respond to the breach of the Practice Direction by ordering the replacement of the Original Witness Statement with a compliant one. I agree with HHJ Stephen Davies that the striking out of a witness statement is "*a very significant sanction which should be saved for the most serious cases*".

41. I therefore propose, in response to the Claimant's Application, not to grant the Claimant the order that it has applied for. Instead, I will make an order that the Original Witness Statement should be replaced with a version of the Revised Witness Statement, after some further amendment which I will describe and which, in my view, is necessary for this witness statement to comply with the Practice Direction. This to my mind is the best way of doing justice to the parties and otherwise reflecting the overriding objective set out in CPR rule 1.1.
42. In particular, I consider that, as with the circumstances in *Blue Manchester*, the version of the Relevant Witness Statement that I propose to approve includes a useful core of compliant material and that the failures by the Defendant in relation to the content of the Original Witness Statement were not particularly egregious in their non-compliance.
43. It was not clear from the wording of the Defendant's Application what sanction it was from which it was requesting relief. I take it that primarily it was asking for relief from the sanction that the Claimant had at that point said it would be applying for – the striking out of the Relevant Witness Statement. If that is the case, then there is no need to consider that application further as that sanction has not been imposed and therefore cannot be relieved. On this basis the *Denton* approach is not engaged since I am not considering ordering any relief from a sanction imposed by the court, I am merely choosing a lesser sanction than the Claimant has requested.
44. I do not think that the Defendant's Application should be considered to be any wider than this and be regarded as asking for relief from the sanction that I have imposed, i.e. ordering the substitution of the Original Witness Statement with the Revised Witness Statement but subject to redactions. However to the extent that it could be considered to be doing so, it scarcely requires the application of the *Denton* approach to determine that the court will refuse such an application. I have found that there are paragraphs that need to be redacted if the witness statement is not to breach the requirements of the Practice Statement. Having found this, it would be perverse if I nevertheless ordered that these paragraphs be included. However, for the record I have considered the factors considered important in *Denton* in reaching the decision that I have reached. A failure to meet the requirements of the Practice Direction as to the content of a witness statement must be considered sufficiently serious

and significant to warrant the consideration of the sanction of excising that content. There is no good reason to excuse this default and nothing in the conduct of the Defendant that mitigates it. The overriding objective is clearly best served in refusing the application to the extent that it does need to be read in that way.

45. My decision in this case should not be seen as providing any *carte blanche* to parties to play fast and loose with the Practice Direction, and to leave it to the court to produce a compliant witness statement. However, in all the circumstances described above, particularly having regard to the failures on both sides to act constructively in agreeing a way forward, this seems the correct approach to me.
46. This approach should, however, be accompanied by sanctions against the Defendant, as the party most at fault, in costs. The Defendant has already accepted in court that it would be appropriate for a costs order to be made against it, given its role in this matter coming before the court. I will hear both sides further on this question, but the Defendant should be warned that I am minded to award costs in relation to this particular matter on an indemnity basis to mark the court's disapproval relating to the original breach of the Practice Direction.

Form of Approved Witness Statement.

47. The form of approved witness statement that I will approve is the Revised Witness Statement subject to the following redactions:
- a) deletion of paragraph 18;
 - b) deletion of paragraph 19;
 - c) deletion of the second sentence of paragraph 24;
 - d) deletion of paragraphs 27 to 29;
 - e) deletion of paragraph 32;
 - f) deletion of paragraphs 35 – 37;
 - g) deletion of paragraph 39; and
 - h) deletion of paragraph 49.

48. I would ask the parties to agree a form of order for me to make based on the draft order attached to the Defendant's Application, but referring to the Claimant's application as well as the Defendant's Application and otherwise suitably revised to deal with this judgment.