IN THE HIGH COURT OF JUSTICE No. HT-2020-000165

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

TECHNOLOGY & CONSTRUCTION COURT (QBD)

[2022] EWHC 2785 (TCC)

Rolls Building
Fetter Lane
Holborn
London, EC4A 1NL

Thursday, 28 July 2022

Before:

MRS JUSTICE JEFFORD

B E T W E E N :

VAINKER & Anor. Claimants

- and -

(1) MARBANK CONSTRUCTION LIMITED
(2) MERCER & MILLER (A FIRM)
(3) SCD ARCHITECTS LIMITED

Defendants

MR D. CROWLEY appeared on behalf of the Claimants.

MR R. CLAY appeared on behalf of the First Defendant.

THE SECOND DEFENDANT did not appear and was not represented.

MR B. FOWLER appeared on behalf of the Third Defendant.

J U D G M E N T

(Transcript prepared without access to documentation)

MRS JUSTICE JEFFORD:

The application: general principles

1 This part of the application is made to strike out passages of the defendant, Marbank's, witness statements or to require them to serve witness statements that are compliant with Practice Direction 57AC, which, on the claimants' case, would necessitate the removal of substantial passages in those statements.

2 The purpose of the Practice Direction 57AC was to improve the quality of witness statements and reduce attendant costs, and was not to generate satellite litigation at significant cost in itself.

3 I have been referred to the decisions of O'Farrell J in *Mansion Place v Fox Industrial Services* [2021] EWHC 2747 (TCC); HHJ Davies in *Blue Manchester v Bug-Alu Technic* [2021] EWHC 3095 (TCC); and Fancourt J in Greencastle v Payne [2022] EWHC 438 (IPEC). In the interests of time, I do not propose to quote any of the passages that have been referred to me, but they reiterate the purposes of the Practice Direction, and provide, particularly in the *Blue Manchester* case, some clear examples of the application of the Practice Direction and guidance on its application. I note that in those cases the application of the nature which is made today by the claimants was made well before trial, and dealt with by the judge by addressing individual passages of the witness statements rather than by some general excision of substantial parts of the witness statements.

4 It is obviously open to a party who considers that a witness statement of another party does not comply with the Practice Direction to make an application for some relief or remedy. That is made clear, if it needed to be, by paragraph 5.1 of the Practice Direction, which sets out both that the court's full case management powers are retained and that there are specific sanctions available, which include the sanctions which the claimants seek today.

5 It is not, however, in accordance with the intent of the Practice Direction for an application to be made to strike out part or all of a multitude of witness statements where non-compliance is a matter that could and should more pragmatically and proportionately be dealt with by the trial judge and reflected in costs - one of the sanctions contemplated by the Practice Direction. That is more likely to be the case where the application is made close to trial. I will return to that point.

Procedural background

6 In this case, the witness statements were all served in early March 2022. This application was not issued until 23 June 2022. There was some correspondence, which I have seen, raising issues in relation to the content of the witness statements, starting with the claimants' solicitors' letter on 4 April. But the longer this was left before an application was made, the closer the trial came. The application was issued approximately two weeks before the pre-trial review. It could not be accommodated on the pre-trial review and it was listed before me today with a half-day time estimate, together with three other applications, albeit at least, one of them has been consented to.

7 The statements that are in issue run to 129 pages. It is no exaggeration to say that on virtually every page there is some passage which has been highlighted and annotated with the claimants' objection and the respect in which they say that the statement does not comply with the Practice Direction. I should say that that exercise has been extremely helpful to the court in understanding the nature of this application, which otherwise involved looking at a list of paragraph numbers.

8 It is simply not possible to go through those statements on a line-by-line or passage-by-passage basis in an application such as this, and there is in reality no time to do so prior to the trial, which is scheduled to start on 4 October. The only way it could be done would be for the court to reserve judgment, and undertake a very substantial exercise outside court, and on paper. The time that would take would bring the trial closer and closer, and it can readily be seen that that would be of no benefit to either of the parties.

The claimants' approach to the application

9 Mr Crowley on behalf of the claimants submits, however, that there is no need for me to do that, for one or both of two reasons. Either, he says, the flaws are so clear and shocking that I can make an order without going through the statements line by line – that would be the court simply accepting the criticisms that are made by the claimants. Alternatively, he submits that I could make an unless order requiring the first defendant to serve compliant statements by a date to be fixed, failing which the non-compliant witness statement is struck out or not to be relied upon.

10 Before I return to those two options, it is right to say that there are a number of themes to the claimants' complaints about the statements. Firstly, in respect of many paragraphs, the complaint is that the statement is not within the knowledge of the maker of the statement. Mr Clay submits that that is the most common complaint that is made, and, having read the statements, although not counted the objections, I have no difficulty in accepting that submission as broadly right. There are occasions, and Mr Crowley has drawn my attention to one or two, where the criticism is also plainly right, but in many cases it is not <u>plainly</u> right. In some cases, the sentence or paragraph complained about provides context to what is to follow, and, in far more cases, it is not at all obvious that something is not within the maker's own knowledge. That is something that I could not resolve on an interlocutory basis, and it is not realistic, pragmatic or proportionate for me, shortly before trial, to require the defendants to preface every statement with a discrete indication of whether the statement that is being made is indeed within the maker's knowledge or not.

11 A second theme is that some parts of the statements make negative comments about the first claimant, Mrs Vainker, and her conduct. These are objected to on the basis that they are irrelevant. They are also objected to on the basis that they are commentary made to impugn the claimant. Those are general questions of admissibility of evidence rather than a specific issue raised by the Practice Direction. I entirely understand why the claimant, Mrs Vainker, may be upset by some of the things that are said about her. However, it does seem to me, as I put to Mr Crowley in argument, that the relationships between individuals during the course of the works may be relevant to what happened on the project, may be relevant to credibility, and may be relevant to the weight to be attached to Mrs Vainker's evidence. That is something on which the trial judge will have to form a view. It is not something on which on an interlocutory basis I can form a view and I simply cannot say, on an interlocutory basis, that that evidence is irrelevant and objectionable for that reason.

12 Thirdly, in the annotated statements, objection is also taken to some passages because they are said not to be in the witness's own words. A particular example is the repeated use of the expression "*In an attempt to appease Mrs Vainker*". This is a matter of fact and degree. If that is what the witnesses saw themselves as doing at the time, and was something that they discussed, they may well have all used, or now become accustomed to using, the same or a similar phrase. It does not in itself demonstrate that the statements are not in their own words and to delete these words from repeated paragraphs would in any event achieve nothing.

13 I alighted upon one particular example in my reading of the statements from Mr Brown's statement at paragraph 24, and Mr Woods' statement at paragraph 19. I do not propose to read them out. However, the claimants' position is that they say the same thing and are, therefore, to be inferred not to be in the witnesses' own words. They do not say the same thing, and the point is not well made. That seems to me to illustrate why this application could only fairly be dealt with by going through each passage that is objected to and why my taking broad-brush objections, and excising passages on that basis, is not an appropriate course.

14 Another theme is that the witness statements contain opinion evidence. Mr Crowley is plainly right about that in some instances. For example, Mr Brown at paragraph 31 recites, in relation to the green roof, his own knowledge of Mrs Vainker making a complaint. He says Mr Dow contacted the relevant subcontractor who attended site and remedied the issue. That is said not to be within his own knowledge. It may or may not be. I cannot possibly tell. But then he concludes:

> "However with the benefit of hindsight, this was clearly a maintenance issue, which was Mrs Vainker's responsibility, and we should have added this cost to our final account".

That is opinion. It is also almost certainly irrelevant opinion.

15 There are other similar passages. I take a simple example from Mr Woods' statement at paragraph 26:

> "Since July 2017, either directly or through our solicitors, Healys LLP, we have made repeated offers to replace the glass panels in dispute with toughened and laminated panels. We made it clear that our specialist sub-contractor would require access to The Croft to carry out their surveys, and then access for a five day period to carry out the replacement works. However, despite extensive correspondence between Mrs Vainker and [the solicitors], Mrs Vainker repeatedly refused to provide access to carry out the replacement works."

16 That is said to be argument, commentary, and submission. I agree. The passage that Mr Crowley took me to in argument at paragraph 64 of Mr Woods' statement, which comments on an email, is again commentary on documents and argument and submission.

17 It is apparent from what I have just said that I do not dispute that Mr Crowley is right in his submission that there are non-compliant passages in these statements. The question, however, is what I should do about them.

The approach of the court

18 There are a number of points to bear in mind. Firstly, as I have said, it is simply not practicable or proportionate, at this stage in this litigation, for the court to go through these statements on a line-by-line or passage-by-passage basis. Secondly, by and large, the passages that are complained of are not particularly lengthy passages. Thirdly, they are, as Mr Clay submits, frequently not concerned with the key issues in the case in terms of the major defects to which the major monetary claims attach, and to that extent they are of far less significance than the expert evidence. Fourthly, the trial judge will be able to decide what weight to give them, even if they are not the subject of cross-examination. Where there is a particularly obvious failure to comply with the Practice Direction, such as the passages that I have just referred to, it is equally obvious that the judge will readily give them little, if any, weight. That brings me back to the question of what I should do this afternoon. Do I strike some of these paragraphs out now - for example the ones that I have referred to in the course of this ruling? Or do I leave all these matters to be dealt with by the trial judge?

19 To deal with this application, as I have repeatedly said, on a paragraph-by-paragraph basis at this stage of the proceedings would be disproportionate. I accept the submission that the appropriate course would be to leave this to be dealt with by the trial judge.

20 I add two things. Firstly, I have not ignored Mr Crowley's alternative approach, which is the making of an unless order. However, that does not seem to me to be a sensible way forward. The dispute between the parties as to which passages are non-compliant is significant, and it seems to me inevitable that if I were to make such an unless order, even though there may be some purpose in it in causing the defendants to serve revised statements with some passages removed, there would inevitably be a further dispute. There would then inevitably have to be a further hearing which would have to take place before the start of October. It is frankly difficult to see how that would happen and it would serve very little purpose.

21 Secondly, leaving these matters to be dealt with by the trial judge does not mean that this entire application will have to be rerun before the trial judge; nor is it the case, as Mr Crowley submits, that this would all need to be "disentangled" at trial, or that cross-examination will have to be extended, within what is already a very tight timetable, because every objectionable passage will have to be cross-examined on, or every passage taken apart, to determine whether it is a reflection of the witness's own recollection or not or in his own words or not, and so on.

22 This submission ignores the role and contribution of the judge in weighing evidence, and it does not reflect the manner in which cases are commonly and efficiently conducted in this court. It is rarely, if ever, the case that a witness is cross-examined on every passage of every statement; nor does the judge assume that, because an individual has not been cross-examined on a particular passage, it is accepted to be true. In the examples that I have given of commentary on documents, there is simply nothing for the judge to accept as being true; it is simply commentary. The submission that a statement has not been cross-examined on may be significant if that evidence was itself significant, but all that goes to the weight that the judge will attach to the evidence. That weighing of the significance of the evidence or absence of cross-examination is something that judges commonly do. Expressions of

personal opinion may carry very little weight and commentary may carry very little weight. That is not something that will be unfamiliar to the trial judge.

Conclusions

23 With one exception, therefore, it seems to me far more efficient in the circumstances of this case to leave these matters to be dealt with by the trial judge. I emphasise that that is not to say that I am accepting that there is no non-compliance with the Practice Direction in these statements, nor that that non-compliance is irrelevant, and may not at a later stage be visited on the first defendants in costs, but to strike out parts now is not proportionate and not efficient.

24 I said there was one exception, and that is the statement of Mr Haffenden. Mr Haffenden is a quantity surveyor who put the final account together. As I read his statement, he was simply setting out what he had relied upon in putting the first defendant's final account together. So far as that goes, and if that is indeed what he is saying, then that is unobjectionable. However, what he has done throughout his statement is express his opinions or provide, in effect, a commentary on the documents that he relied on in order to create the final account. He necessarily had to rely on documents because he did not become involved until 2017 after the project was, at least on the first defendant's case, completed. His statement in one sense, therefore, is of little relevance in this litigation, not least because the first defendant will rely on the evidence of their quantum expert to support the final account, although at the same time that expert's evidence will undoubtedly have been informed by what he has been told by Mr Haffenden that he did when putting the final account together.

25 There is a balancing act here. In one sense it would be helpful for the statement of Mr Haffenden to be in play because it provides that commentary on how the final account was put together. On the other hand, it seems to me that Mr Crowley's submission is right when he says, firstly, that it is in effect entirely commentary on documents of which Mr Haffenden has no personal knowledge, and, secondly, that if this statement, which is to that extent contrary to the Practice Direction, remains in play, it potentially expands the scope of the cross-examination in a wholly unnecessary way.

26 I am not going to take the step of striking out that statement in whole because there may still be aspects of it which can properly be adduced in compliance with the Practice Direction, but it seems to me to involve a very different exercise than the line-by-line consideration of witness statements which I have referred to in relation to the balance. Therefore, in respect of the statement of Mr Haffenden, I will make the unless order that Mr Crowley seeks, but I will not do so in respect of any other statements.

LATER

Costs

27 So far as the first application is concerned, that is the application to serve and rely on revised witness statements of the claimants' witnesses, that application has, in the event, been consented to. But the very fact that it had to be made flowed, as Mr Clay and Mr Fowler have submitted, from the fact that the claimants' statements did not in the first place comply with Practice Direction 57AC. Whilst the claimants are to be commended for attempting at least to comply with the Practice Direction, and serving revised statements accordingly, it is clearly right that there is no reason why the costs related to that exercise

should be borne by anyone other than the claimants, and that the sort of costs to which Mr Fowler alluded in correspondence relating to the witness statements and consideration of the revised statements and so on should be paid by the claimants to the defendants.

28 So far as the application itself is concerned, in my view an application would have had to be made in any event even if all the defendants had indicated their consent to the filing of revised witness statements. It seems to me that there was a legitimate concern on the part of some at least of the defendants that simply consenting would in any event imply that they accepted that the witness statements now complied with the Practice Direction. I have made it clear, without going into detail, that I do not accept that they do fully comply, and I understand entirely the reservation of the defendants in accepting that they do. Ms Waters, a solicitor for the claimants, has now made clear that the claimants would not seek to preclude any such argument on the part of the defendants, but it does not seem to me to have been unreasonable for the defendants to adopt that position.

29 Further, as Mr Fowler points out, at all times, the only proposal made by the claimants was that costs of any application should be in the case, and that there is no reason why the defendant should have borne the risk, as it would in those circumstances, of any application brought about by a failure of the claimants to comply with the Practice Directions in the first place.

30 For those reasons in my judgment the appropriate order is, as Mr Fowler submits, that the claimants should pay the defendants' costs of and occasioned by the amendments (that is the first and third defendants, not the second defendant, with whom they have already reached an agreement) and that the same should apply to the costs of the application. Although a different arrangement was reached with the second defendant, it is not in my judgment unreasonable for the third defendant to have attended to deal with the issue of costs, and indeed I have been assisted by the submissions that Mr Fowler has made on that matter. So, the claimants are to pay the first and third defendants' costs of and occasioned by the amendments and the claimants are to pay the first and third defendants' costs of the application to file and serve and rely on the revised witness statements.

31 So far as the application in relation to the first defendant's witness statements is concerned, that has largely but not wholly been unsuccessful. Mr Crowley submits that in light of the partial success, he should have his costs on that application. Mr Clay submits the complete opposite, namely that he should have his costs. There is a level of partial success on the claimants' part, and so far as they have not succeeded, I have, although refusing the bulk of their application, made it clear that I do so on the basis that these are matters to be resolved by the trial judge determining what weight to give to evidence that is not in compliance with the Practice Direction. That is a matter which can be visited in costs.

32 Although that is discrete from this application itself, it seems to me that the appropriate order is one of costs reserved. It may be that the trial judge forms the view, having considered this matter in far more detail than it is possible to do on this interlocutory basis, that the claimants had far greater justification for making this application than the outcome might suggest, and it seems to me that costs reserved is the just order.

33 So far as the identification numbers application is concerned, it was possible to deal with that, once it was properly discussed, relatively shortly and, frankly, although no doubt a lot of ink has been spilt on the subject, it seems to me to have been a sledgehammer to crack a nut, and I am going to make no order as to costs on that part of the application.

34 Lastly, so far as the disclosure application is concerned, the overarching position taken by Mr Clay was that no order should be made pursuant to paragraph17 of PD51U unless I was satisfied that there had not been an adequate search. In most of the individual instances I did not take the view that there was any evidence before me that there had not been, or may not have been, an adequate search, and in the alternative I concluded that it was not reasonable and proportionate to order that any further search be carried out. Nonetheless, in a small number of instances where a more focussed search could be carried out, I have made an order in the claimants' favour.

35 Mr Clay submits that balancing those two out, the appropriate order would be no order for costs. Mr Crowley asks for his costs because of partial success or, in the alternative, submits that costs should be in the case. In this instance, doing the best I can between these two parties, it seems to me the appropriate order is indeed costs in the case. The outcome and whether these documents have an impact will be something that plays out in the course of the trial. Given the partial success only, that seems to me the best and fairest approach to take.

36 Given that there are, therefore, a variety of costs orders, and that the costs schedules do not distinguish between individual costs, save in the case of the third defendant, I decline to undertake any form of summary assessment.

37 In relation to the third defendant, the position is different, because they were only concerned with one aspect of this application. They seek a total of £6,780 including VAT. I query whether the third defendant is not VAT registered.

LATER

Summary assessment

38 I do consider the time taken on the witness statement to have been surprisingly long, particularly if, as appears to be the case, Mr Prince, in particular, has been dealing with this matter throughout, and was well familiar with it, which is reflected in the other items on the schedule. It does not seem to me to have been unreasonable for Mr Fowler to have attended for the entirety of this hearing. It would not have been possible to deal with costs in a partial way as we went along, and he could not have known in advance whether we were going to deal with each application individually or whether all decisions would be left until the end, so he has had little option other than to attend.

39 I am going to summarily assess the third defendant's costs in the round sum of £4,500, subject to confirmation of the VAT position. If the third defendant is not VAT registered, that figure is to be reflected in the order as "plus VAT". If the third defendant is VAT registered, the order is not to include any additional amount for VAT. That can be sorted out between counsel, and once further instructions can be taken, and when the order is drawn up.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.