

Neutral Citation Number: [2022] EWHC 2361 (Ch)

Case No: BL-2020-000715

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES**

**BUSINESS LIST (ChD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20 September 2022

**Before :**

**Richard Farnhill**  
**(sitting as a Deputy Judge of the Chancery Division)**

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**Between :**

**McKinney Plant & Safety Ltd**

**Claimant**

**- and -**

**The Construction Industry Training Board**

**Defendant**

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**Mr Sam Neaman** (instructed by **Doyle Clayton**) for the **Claimant**  
**Ms Claire Packman KC** (instructed by **DAC Beachcroft LLP**) for the **Defendant**

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**Approved Judgment**

**Richard Farnhill (Sitting as a Deputy High Court Judge of the Chancery Division):****Background**

1. This judgment arises out of an issue I raised at the PTR in these proceedings regarding the supplemental witness statement of Mr Michael McKinney (**McKinney 2**), dated 8 April 2022. The issue is a discrete one, regarding the compliance or otherwise of McKinney 2 with PD 57AC.
2. In a letter dated 7 June 2022 the Defendant had argued that McKinney 2, and a number of the Claimant's other witness statements, failed to comply in a number of ways with PD 57AC. The Defendant responded on 22 July 2022, stating:
 

*Whilst we accept that, in a case in which dozens of pages of witness evidence have been filed on behalf of our client, it is possible that at some points that evidence may have strayed the wrong side of the strict wording PD57AC, we respectfully suggest that your criticisms do, largely, fall into the category of nit-picking. We are certainly unable to distill [sic] any criticisms that would actually cause your clients any specific substantive prejudice if left to be dealt with at trial.*
3. The PTR was held on 27 July 2022. In her skeleton argument for the PTR, on the basis of the decision of HHJ Keyser KC in *Curtiss & Ors v Zurich Insurance Plc & Anor (Costs)* [2022] EWHC 1514 (TCC), Ms Packman KC stated that the Claimant was prepared to deal with the Defendant's allegations of non-compliance at trial. By contrast, Mr Neaman's skeleton indicated a willingness to grapple with the issues at the PTR to the extent the court wished to do so. At the hearing of the PTR the parties informed me that these were matters that they were both content to have addressed by the trial judge.
4. In preparing for the hearing this had seemed to me a potentially live issue and I had reviewed the relevant statements, and in particular McKinney 2. I had significant concerns of my own with how McKinney 2 could be said to be compliant with PD 57AC. I was further concerned that debates on McKinney 2 could impact what was an already tight trial timetable. As the Chancery Guide makes clear, the time estimate for trial is a point of particular focus for the PTR judge.
5. I am mindful of the concerns over satellite litigation raised by HHJ Keyser KC in *Curtiss*. Those concerns do not give carte blanche to non-compliance with the rules, however. As Fancourt J emphasised in *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC) at [22], the very purpose of PD 57AC is to avoid the situation where the trial judge has to sift the procedural wheat from the chaff of witness evidence following extensive cross-examination.
6. Accordingly, pursuant to CPR 3.3 I raised the point at the PTR. Given that a certificate of compliance had been served by Mr Anderson, the relevant legal representative at Doyle Clayton, the Claimant's solicitors, it seemed to me that the process should largely be one of Mr Anderson articulating why he considered McKinney 2 complied with PD 57AC. While I was content to address the question at the PTR, and gave numerous examples of my concerns

to Mr Neaman, and while Mr Neaman's skeleton had indicated that he was also willing to do so, further to his submissions at the PTR I ordered an exchange of written submissions with a view to dealing with the issue on the papers. This seemed to me to reflect the guidance given by Mellor J noted in *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2022] EWHC 1244 (Ch) at [98] on how a judge might address apparently serious non-compliance with PD 57AC, an approach specifically endorsed by HHJ Keyser KC in *Curtiss*.

7. In accordance with that Order, the Claimant served submissions addressing how McKinney 2 was or was not compliant with PD 57AC. In those submissions, the Claimant acknowledged significant non-compliance with PD 57AC and stated that it would make an application for relief from sanctions so as to file a revised witness statement. The Defendant served short reply submissions. The Claimant did not file rejoinder submissions, as it was permitted to do, nor did it make an application for relief from sanctions. Instead, it purported to serve an amended statement from Mr McKinney (**McKinney 2.1**), which reflected its earlier submissions.

### **The procedural requirements for trial witness statements**

8. The Order made following the CCMC provided that:
  7. *Each party serve on every other party the witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial, those statements and any notices of intention to rely on hearsay evidence to be exchanged by 4.00pm on Tuesday 14 September 2021.*
  8. *By 4.00pm on Tuesday 12 October 2021 the parties may file and serve responsive supplementary statements of witnesses of fact.*
  9. *Oral evidence will not be permitted at trial whose statement has not been served in accordance with this order or has been served late, except with permission from the Court.*
9. Self-evidently, the reference to witness statements in that Order is to statements that comply with the relevant procedural rules. In particular, they must comply with PD 57AC. That requires, so far as is relevant, that:
  - i) Statements must contain only evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to a matter in issue (paragraph 3.1(1)).
  - ii) Witness statements must set out only matters of fact of which the witness has personal knowledge and must identify by list both those documents the witness has referred to and those that he or she has been referred to in providing his or her evidence (paragraph 3.2).

- iii) Where the witness statement does refer to a document it should give a reference enabling it to be identified by the other party (Appendix to PD 57AC, paragraph 3.4).
- iv) The statement must contain a confirmation of compliance with PD 57AC signed by the witness; where a party is represented, it must be endorsed with a certificate of compliance signed by the relevant legal representative (paragraphs 4.1 and 4.3).
- v) A trial witness statement should not seek to argue the case, set out a narrative derived from the documents in the case or include commentary on other evidence, either documents or the evidence of other witnesses (Appendix to PD 57AC, paragraph 3.6).

### **The apparent issues with McKinney 2**

- 10. While it has, to an extent, been superseded by McKinney 2.1 it is important to note that there were a number of apparent issues with McKinney 2:
  - i) There was, at least on its face, extensive commentary giving Mr McKinney's views on other evidence that was not available to Mr McKinney at the time of the events giving rise to this dispute.
  - ii) There were comments or conclusions drawn from material that may have been available to Mr McKinney at the time, but seemed principally to be narrative commentary on those documents.
  - iii) Often as part of the commentary noted above, the statement contained extensive submissions.
  - iv) Mr McKinney criticised the Defendant's witnesses, alleged shortcomings in its disclosure and suggested that further disclosure would be sought.
  - v) Documents were frequently not identified with any specificity. No lists of documents referred to or reviewed by Mr McKinney in preparing his statement were provided.
  - vi) The confirmations of compliance with PD 57AC from Mr McKinney and the relevant legal representative were only given on 22 April, two weeks after the statement was signed.
- 11. In *Greencastle* at [24], Fancourt J made the following observation on the witness statement before him:

*The impression it gives is that the chief executive officer of the Claimant was very upset about the conduct of the Defendants and is determined to have his say about what they did and why he considers that it was wrong. It is replete with comment and argument that goes well beyond the disputed facts that are known to Mr Quinlan personally.*

12. That observation sums up my initial impression of McKinney 2, almost every paragraph of which appeared to demonstrate one or more of the issues identified above.

### **The parties' submissions**

13. The Claimant's submissions comprised a paragraph-by-paragraph analysis of McKinney 2, indicating which paragraphs it accepted were noncompliant, which needed amendment and which it considered to be compliant. Only seven out of 102 paragraphs survived unscathed. The Claimant indicated an intention to apply for relief from sanctions and serve an amended statement.
14. The Defendant's submissions were much shorter, and made essentially five points:
- i) The proposed changes still involved significant commentary, in breach of PD 57AC.
  - ii) The Claimant had made no application for relief from sanctions.
  - iii) Issues remained with the other witness statements served on behalf of the Claimant.
  - iv) McKinney 2.1 was not properly cross-referenced to the documents to which it was said to refer.
  - v) Separately, none of the witness statements set out the documents to which each witness was referred in refreshing his or her recollection.
15. The Defendant also sought its costs on the indemnity basis.

### **McKinney 2.1**

16. The revisions proposed in the Claimant's submissions and reflected in McKinney 2.1 are very significant. That does not, of course, necessarily mean that all concerns have been addressed. As I have noted, the Defendant raises further issues in its submissions. Principally, the objection now is that Mr McKinney is still offering commentary on aspects of or other evidence in the case. I see why that criticism is made but to assess whether it is correct would require an analysis of McKinney 2.1 by reference to the other evidence. Applying the approach suggested by Mellor J in *Lifestyle Equities*, to the extent there is non-compliance it is not "*readily apparent*" such that it is capable sensibly of being dealt with on the papers. The trial judge will necessarily be taken through much of the evidence and so is better placed than am I to undertake an assessment of whether, and if so how, a statement in the form of McKinney 2.1 fails to comply with PD 57AC.
17. Turning to the question of relief from sanctions, plainly under the terms of the Order made following the CCMC the Claimant had no right to file further evidence in the absence of further Order from the court. That does not mean this is automatically a relief from sanction case, however. Typically in these cases it is a party that makes an application to exclude or limit evidence said not

to comply with PD 57AC and, as part of its Order determining that application, the court will decide on the procedural steps required to remedy any breach. No separate application for relief from sanctions is required.

18. In light of the parties' submissions I would have ordered the filing of a revised witness statement reflecting the Claimant's proposed changes subject to an additional requirement, which I address below. While the Claimant ought properly to have waited for that Order, I do not see that the outcome changes simply because it has acted prematurely.
19. The Defendant suggests that there remain issues with other witness statements. The only statement that was part of this process was McKinney 2. I reviewed those other statements in preparing for the PTR but saw no basis for adopting a similar approach for them. Similarly, the Claimant did not suggest that I should (to the contrary, the Claimant was content for all of these issues on all of the witness statements to go to the trial judge). Nothing has changed in the interim.
20. That is subject to one caveat. I understand that the lists of documents used to refresh each witness' recollection remain outstanding in respect of all of the witness statements. This was a matter that was raised at the PTR and I stressed the importance of those lists then. To be entirely clear, as I believe I was at the PTR, it is no answer to say that the Claimant can identify which documents are being referenced from the text of the witness statement itself because:
  - i) It is not, in fact, always possible to do so, certainly in respect of McKinney 2.1, given that documents are at times referred to by Mr McKinney in broad terms; and
  - ii) A witness may not refer, in their statement, to every document they have seen in preparing it.
21. As to the first issue, McKinney 2.1 makes numerous references to documents and the Claimant has provided an extensive bundle of supporting material. As paragraph 3.4 of the Appendix to PD 57AC makes clear, typically a witness statement will make only limited reference to documents. Where a document is referenced it must be specifically identified. McKinney 2.1 does not do so. Permission to serve a revised statement is conditional upon that fault being corrected. As I have noted, the material has already been assembled by the Claimant, so this should be a straightforward task. To the extent that a point is not cross-referenced to a document, the inference will be that Mr McKinney is not relying on any supporting evidence and is, instead, asserting that his recollection is unaided and unsupported.
22. As regards statements other than McKinney 2.1, the second issue is, if anything, a breach of the Order already made at the CCMC. Obviously there are steps that the Defendant can take in response to any such breach, but no application is before me in respect of it. McKinney 2.1 is slightly different because no further evidence can be served without permission. Again, that permission is subject to a compliant list of documents seen by Mr McKinney in preparing his statement being served.

## Costs

23. The Claimant suggests that I should leave the question of costs to be dealt with by the trial judge. I disagree. This was a freestanding issue, and my objective in having it addressed now was to avoid the need for the trial judge to have to do so.
24. For its part the Defendant seeks costs on the indemnity basis, to be summarily assessed in the sum of £9,910.50 plus VAT.
25. It seems to me that the following factors are relevant:
  - i) The breach of PD 57AC was a serious one. The Claimant now accepts, in my view rightly, that the overwhelming majority of McKinney 2 needed to be deleted or amended.
  - ii) The Defendant set out its concerns in considerable detail by, at the latest, early June. The Claimant failed to engage until 22 July, a matter of days before the PTR. That effectively precluded any meaningful discussion of the issues.
  - iii) The position was aggravated by the Claimant's dismissive approach. Given the scale of the ultimate changes, the Claimant's suggestion that the Defendant was "*nit-picking*" was plainly wrong.
  - iv) It was further aggravated by the Claimant's attempt to suggest that it did not understand the Defendant's concerns. In their 22 July letter, Doyle Clayton required that the Defendant "*set out the precise contravention, cross referencing it to an accurate quotation of the part of PD57AC relied upon*". That request was baseless. After I raised the issue at the PTR, with no further guidance the Claimant and its legal advisors were able to identify necessary changes and deletions to 95 of the 102 paragraphs of McKinney 2.
  - v) Set against that is the fact that this was a point ultimately taken by me rather than the Defendant. That seems to me a minor point. Faced with a flat refusal by the Claimant to engage, delivered shortly before the PTR, the fact that the Defendant elected not to pursue the issue is of limited significance.
26. In my view the seriousness of the breach and the Claimant's refusal to engage with it until I raised the point does take this case well outside the norm and does merit an award of indemnity costs.
27. The Defendant has provided a summary assessment of its costs. I note that Ms Packman KC has apportioned her time for attending the PTR hearing to reflect the fact that only part of it was spent addressing this issue. However, her instructing solicitors do not seem to have reduced their costs. Applying the same apportionment results in a discount of £322.50, for a total of £9,588. I consider the costs otherwise to be reasonable.

## Form of Order

28. The Order should accordingly provide that:
- i) The Claimant has permission to file on or before 21 September 2022 an amended Supplemental Witness Statement of Michael McKinney in the form of McKinney 2.1 subject to (a) it being cross-referenced to all documents on which Mr McKinney relies in giving that statement and (b) a list being provided of any further documents to which Mr McKinney has been referred in preparing it.
  - ii) At the same time that it serves any such statement, the Claimant shall provide to the Defendant a comparison between McKinney 2 and the statement as served and that comparison is to be included in the trial bundle.
  - iii) The Claimant is to pay the Defendant's costs of this process on the indemnity basis in the amount of £9,588 plus VAT.