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Claim No. HT-2020-CDF-000007

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

1 June 2022

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

Between:

ANGELA DENISE CURTISS and others

Claimants

-and-

(1) ZURICH INSURANCE PLC
(2) EAST WEST INSURANCE COMPANY LIMITED

Defendants

Mr Thomas Grant QC and **Mr Ryan James Turner** (instructed by **Walker Morris LLP**) for the **Claimants**

Ms Fiona Sinclair QC and **Mr Tom Asquith** (instructed by **Clyde & Co LLP**) for the **First Defendant**

JUDGMENT

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JUDGE KEYSER QC:

1. This is the application of the first defendant ("Zurich"), by notice dated 13 May 2022, for an order under CPR Practice Direction 57AC striking out the entirety of four witness statements served on behalf of the claimants and parts of other such witness statements on the grounds that they do not comply with the provisions of the Practice Direction and the *Statement of Best Practice in Relation to Trial Witness Statements* that is appended to the Practice Direction.

2. The Practice Direction applies to trial witness statements signed after 5 April 2021 in the Business and Property Courts. The following provisions are particularly relevant for present purposes.

> "2.1 The purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement."
>
> "3.1 A trial witness statement must contain only – (1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and (2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.
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> 3.2 A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list 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.
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> 3.3 A trial witness statement must comply with paragraphs 18.1 and 18.2 of Practice Direction 32 ….
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> (Paragraph 18.1 of Practice Direction 32 requires a trial witness statement to be in the witness's own words, if practicable, and to be drafted in the witness's own language and in the first person; paragraphs 18.1(1) to (5) and 18.2 set out further requirements; …)
>
> 3.4 Trial witness statements should be prepared in accordance with – (1) the Statement of Best Practice contained in the Appendix to this Practice Direction, and (2) any relevant court guide, for which purpose, in the event of any inconsistency, the Statement of Best Practice takes precedence over any court guide."
>
> "5.1 The court retains its full powers of case management and the full range of sanctions available to it and nothing in paragraph 5.2 or paragraph 5.3 below confines either.

> 5.2 If a party fails to comply with any part of this Practice Direction, the court may, upon application by any other party or of its own motion, do one or more of the following – (1) refuse to give or withdraw permission to rely on, or strike out, part or all of a trial witness statement, (2) order that a trial witness statement be re-drafted in accordance with this Practice Direction or as may be directed by the court, (3) make an adverse costs order against the non-complying party, (4) order a witness to give some or all of their evidence in chief orally."

For brevity's sake I shall not recite relevant passages in the *Statement of Best Practice*, though I have them in mind.

3. The Practice Direction resulted from the concern, among others, that in many cases very long witness statements were being produced that included a great deal of argument rather than evidence, or expressions of personal opinion rather than of factual evidence, or recitals of the contents of documents that were themselves in evidence before the court. It had become increasingly common for witness statements to have the appearance of professionally prepared forensic tools rather than authentic expressions of witnesses' own evidence.

4. There are already numerous decided cases explaining the operation of the Practice Direction, among them the following: *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) (O'Farrell J); *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC) (Fancourt J); *Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd* [2022] EWHC 708 (Ch) (Bacon J); and *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2022] EWHC 1244 (Ch) (Mellor J). I shall refer to just a few passages in the judgments in those cases. In the *Mansion Place* case, O'Farrell J said at [37]:

> The purpose of the new Practice Direction is not to change the law as to the admissibility of evidence at trial: per Sir Michael Burton GBE, sitting as a Judge of the High Court in *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm), [2021] 1 WLR 5294 (at [9]); rather it is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument."

In the *Lifestyle Equities* case, at [11], Mellor J picked out two particular matters appearing from the *Mansion Place* case and from the judgment of HHJ Stephen Davies in *Blue Manchester Ltd v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC) to the effect (i) that parties who use the Practice Direction as a means of indulging in unnecessary trench warfare are liable to be criticised and penalised in costs and (ii) "that whilst the court will be astute to strike out offending parts of a trial witness statement it will not do so where that is not reasonably necessary." To similar effect, in the *Anan Kasei* case Bacon J referred to the requirements of the Practice Direction and continued at [14]:

> "Breach of these requirements may lead the court (among other sanctions) to strike out part or all of a witness statement, or order that a witness statement be redrafted. In other cases, however, the appropriate course will be for the court to place less (or no) weight on witness evidence or parts of that evidence which fails to comply with the requirements of the Practice Direction."

Finally, I mention three passages in the judgments that say something about the approach a party might take if it considers that the opponent has failed to comply with the Practice Direction. First, in the *Mansion Place* case, O'Farrell J said:

> [49] 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, the 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.
>
> [50] In this case, these contested applications have taken a full day's hearing in court. The trial next week has a duration of three days. No criticism is made of the parties in this case in bringing this matter before the court, as it has highlighted the new Practice Direction and enabled the court to provide some guidance on the re-stated approach to witness statements. However, in future cases, serious consideration should be given to finding a more efficient and cost-effective way forward."

Second, in the *Greencastle* case Fancourt J said at [122]:

> "It is not, in my judgment, convenient or appropriate to leave the dispute to sort itself out at trial. The whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination. The purpose is to limit factual evidence to admissible and relevant evidence of facts within the witness's own knowledge (including correctly identified hearsay evidence) that a witness can properly give in relation to disputed issues of fact."

Third, In the *Lifestyle Equities* case Mellor J said at [98]:

> "[I]n my view, before an application is brought seeking to strike out passages in a witness statement based on PD57AC, careful consideration should be given as to proportionality and whether such an application is really necessary. Indeed, in my view, an application is warranted only where there is a substantial breach of PD57AC (as, for example, in *Greencastle*). If there really is a substantial breach of PD57AC, it should be readily apparent and capable of being dealt with on the papers. That might provide a mechanism for dealing with objections in an efficient and cost-effective manner."

5. Proper compliance with the Practice Direction is important. Improperly prepared trial witness statements are liable to add to the length and expense of the trial and to divert

attention away from the real issues in the case. However, when assessing how to respond to a perceived failure to comply with the Practice Direction a party must exercise common sense and sound judgment, having regard to the seriousness of the breach and to the importance of proportionality. The dicta that I have cited were all made in the context of particular cases with their own facts; they do not lay down hard and fast rules as to how to proceed. In some cases, the matters may adequately be addressed by suitable cross-examination or submissions at trial; trivial instances of non-compliance may even be ignored. In other cases, such as *Greencastle*, it will be sensible or even necessary to address matters in advance of trial. An application to address a failure to comply with the Practice Direction may in some cases need to be dealt with at a hearing, as O'Farrell J recognised. Mellor J's dictum in the *Lifestyle Equities* case does not establish any rule to the contrary, though (with respect) I think that it provides guidance that all parties considering these matters would be wise to pay heed to. For present purposes, I emphasise only two related points. First, applications for the imposition of sanctions for breach of the practice direction must not be used as litigation weapons. Second, when assessing how to respond to a breach or a perceived breach of the Practice Direction a party must exercise common sense and have regard to proportionality. The Practice Direction is not to be taken as an encouragement to go through witness statements with a fine-tooth comb for the purpose of identifying as many instances of non-compliance as possible for use in trench warfare.

6. I turn now to the context of the present application. There are about 150 claimants, owners of leases of flats in the Meridian Quay development in central Swansea, who claim against Zurich damages for deceit in respect of what is said to have been the issue of cover notes containing or implying representations that were and were known to be false in respect of inspections carried out in the course of the construction of the development and, consequently, in respect of the condition of the building containing the flats. A trial of issues concerning certain sample claimants is listed to begin on 11 July 2022; 24 days of court time have been allocated to the trial. The pre-trial review was heard yesterday. The witness statements to which the application relates were served on 26 January 2022; a total of 49 witness statements were served, of which I understand 39 are or may be relevant to the issues that fall to be considered at the forthcoming trial. The total length of the text of the witness statements is several hundred pages.

7. In a letter on 8 February 2022 Zurich's solicitors, Clyde & Co, intimated to the claimant's solicitors, Walker Morris, that they would be writing separately in respect of compliance with the Practice Direction. The promised letter was dated 8 April 2022: two months later. The second paragraph of that letter said, "We have now completed our review of your client's witness statements and are able to set out the numerous breaches we have identified." The letter was 16 pages long and appended a 109-page schedule that identified 300 or so instances of alleged non-compliance with the Practice Direction. In the witness statement in support of the application, Zurich's solicitor stated that the analysis of the witness statements for compliance was "a substantial task"; that is obvious. The final paragraph of the letter said that a reply was required by 22 April 2022, which gave a fortnight that included Good Friday and the Easter Bank Holiday.

8. After sending a holding response Walker Morris sent a more detailed letter of response on 6 May 2022. It responded to the complaints thematically rather than by itemised reference to the schedule, although the letter of response was by no means perfunctory. Paragraph 1.1.3 of the letter said:

> "The practice direction was not intended to encourage a party to perform a line by line analysis of a witness statement with a metaphorical scalpel in hand ready to object to or excise a sentence in a witness statement that might stray beyond the bounds of the practice direction, that would be inconsistent with the overriding objective for it would generate satellite litigation and cause the parties to incur unnecessary cost in protractive pre-trial skirmishing. That is particularly so in a case such as this where there is an inequality in the financial resources of the parties."

9. The present application was filed on 13 May 2022. The application notice sought a one-day hearing. It appended a revised version of the original schedule and was supported by the third witness statement of Mr Richard James Edwards a solicitor at Clyde & Co. That is a substantial statement in its own right, with an exhibit of several hundred pages. There is a witness statement in response from Mr Martin Leslie Scott, a partner in Walker Morris.

10. When the application was brought to my attention, I took the view (for good or ill) that the convenient course was to list the application for hearing immediately after the pre-trial review. A day was allocated for the hearing. In their skeleton argument counsel for Zurich suggested that five hours would be required for pre-reading. The claimants' counsel suggested that three days was more like it, if the court were to have a proper understanding of the issues. I have done as much reading as was possible, although I did not have five available hours. At least the pre-trial review was fresh in my mind.

11. Each side has filed a costs schedule in respect of this application. Inclusive of VAT, Zurich's costs for this application alone are said to come to £184,667.60. The claimants' schedule comes to something in the region of £125,000 plus VAT. I appreciate that the aggregate of the individual claims in this case is potentially a large figure and that the trial is expected to be lengthy. Even so, in my judgment it is appalling that an application concerned with the efficient and proper management of the evidence at trial should have generated over £330,000 of costs inclusive of VAT. I simply cannot accept that this is an acceptable state of affairs.

12. In the course of the hearing it became clear that Zurich had anticipated that I would reserve judgment on the application and that accordingly the submissions would not address the details of the schedule but rather would be thematic, and that I would then either make rulings on specimen allegations or go through the schedule entering my conclusions one by one. However, I made it clear that I would not do that. I do not wish to appear churlish. But it is up to the court to decide how much time is properly to be devoted to any particular matter. Having looked in general over the whole of the schedule and in detail at a fair bit of it, I took the view that a day was enough time to devote to this application, given the other calls on the court's time. So I was not prepared to reserve judgment.

13. Yesterday evening, after the pre-trial review, Ms Sinclair QC and Mr Asquith, who appear for Zurich, very helpfully reduced the scope of the application (though not the objections themselves, as to which they reserve their position for trial) so as to focus on five matters. That has enabled us to address a number of issues in the course of the hearing. I am grateful to them.

14. For reasons that I shall explain, I shall impose certain sanctions in respect of some failures to comply with the Practice Direction. However, I shall say frankly that I do not think this application was worth the candle. I impose sanctions because it seems to me, given where we are, that it is convenient to make certain orders. But in my view that does not justify the application. I say this having spent a not inconsiderable amount of time going through the detail of the schedule, starting at the first entry but not getting to the end. I rapidly formed the view that, if the approach adopted in this case by Zurich to the analysis of witness statements for compliance with the Practice Direction were to be regarded as acceptable, it would be ruinous for the Business and Property Courts. Happily, I am confident that it will not become the norm.

15. With all of that said, I turn to the points that I am now asked to rule on.

Statements of the Licensed Conveyancers

16. The first matter concerns the witness statements of two licensed conveyancers who were not involved in the relevant transactions. The first is Miss Nerys Sanders, a partner in the conveyancing practice that was established by her father, Mr David Sanders, who did act in the transactions. The second is Ms Helen Hutchison, who is a partner in a firm in which the conveyancing solicitor, Mr Derby acted. Both Mr Sanders and Mr Derby have given witness statements but, on grounds of age and infirmity, neither of them is keen to give evidence at trial.

17. The nature of the statements of Nerys Sanders and Helen Hutchison respectively is to the effect that they had a certain understanding and practice regarding conveyancing transactions (in the case of Nerys Sanders, that she had acquired this understanding and practice in the course of her training and subsequent practice in her father's firm and initially under her father's guidance), that they would have dealt with things in a certain way and with a certain understanding, and that they are of the judgment that the solicitor or conveyancer (as the case may be) who did act in the transactions would have had substantially the same understanding as they had and followed the same practice as they did.

18. It seems to me that this evidence is positively unhelpful. The nub of the evidence from Helen Hutchison is to the effect that she would have thought and done such-and-such and, as she has no reason to believe that Mr Derby was not a competent solicitor, she believes that he would have thought and done such-and-such too. As for Nerys Sanders, she simply gives her own understanding of the transactions, including the all-important cover note, with the implication that her father would have had the same understanding. Neither witness can speak to the primary facts of the transactions, which anyway is something that will appear largely from the documents. Insofar as the critical questions are to do with the understanding of Mr David Sanders and Mr Derby, the evidence of Miss Sanders and Ms Hutchison is of no assistance. For that reason, it is positively unhelpful evidence, because it is a distraction from the central facts. (I might say that I have a strong suspicion that most of the primary facts in this case fall within a very narrow compass and ought not to require a great deal of factual evidence, even if the implications of the facts are quite large.)

19. As I say, both Mr Sanders and Mr Derby have given witness statements. Mr Sanders has given reasons why he cannot give evidence. I am sceptical of these, because he gave evidence before me a little more than six weeks ago and did so perfectly well; there was nothing observably wrong with him. He may well have personal reasons for not wishing

to give evidence but that is a slightly different matter. As for Mr Derby, it is not clear what the problem is, but I do not at present see any reason why Mr Derby cannot give evidence remotely if there is some reason why he cannot attend at court in person. Alternatively, of course, hearsay notices could be served. A different problem is that Mr Sanders' witness statement has been written in terms that he has seen his daughter's statement and agrees with it. The best course in the circumstances is that within a fortnight Mr Sanders should make a new witness statement. It can be brief, because any point to which it will go—that is, which is not dealt with by the documents—will be very narrow.

20. Accordingly, I shall strike out the trial witness statements of Miss Sanders and Ms Hutchison and I shall give permission for service of a further statement from Mr Sanders within a fortnight.

Statements of the Lenders

21. The next, related point concerns witness statements from two lenders: Mr Elson, who works for Lloyds Bank; and Mr Ford, who works for the Principality Building Society. Neither of these men was involved in the transactions; indeed, at the material time, neither man worked in the relevant area of business.

22. I do not see that their evidence of fact goes to any matter that requires to be proved by virtue of their own evidence. The gist of their evidence is that, although they were not involved in the relevant transactions, the practice is now and would have been at the time to require confirmation from the purchasers'/mortgagors' solicitors that the lender's requirements had been satisfied, and that those requirements included the receipt by the solicitors of the relevant cover notes; the lenders would not themselves see the contracts and the cover notes but would rely on the solicitors' confirmation. In other words, they say that the lender would have proceeded with the transaction provided the solicitor confirmed that the lender's requirements had been satisfied. If the lender did not proceed, the purchaser would not get a mortgage advance and (though this is strictly a matter for the purchaser, not the lender) the purchaser would not have completed the transaction.

23. None of this requires evidence of the lenders. The lender's requirements are the requirements that the lender sets out to the solicitor who acts for it as well as for the purchaser. The causal chain is obvious, in as much as if the solicitor is not in a position to confirm that the transaction is ready to proceed then it will not proceed. But those points do not concern sight of the cover notes (which the lender would not see) or any subjective understanding held by those involved in the transactions. The case can well do without these witness statements and I shall strike them out.

Statement of the Developer's Solicitor

24. Numerous objections are taken to the witness statement of Mr Adrian Myles Davies, a solicitor with Gabb & Co, who acted for the developer and was therefore on the other side of the transactions with the claimants. I shall strike out parts of the statement and shall mention in turn the paragraphs to which objection is taken. Page references are to the hearing bundle.

    - Paragraph 16 might perhaps be redundant, but Mr Grant submitted that it was "real world" background material. I agree and shall not strike it out.

- Paragraph 17: from the words "I have been shown a copy" (line 5) until the end of the paragraph shall be deleted. It is not relevant evidence.

- Paragraphs 18 to 23 inclusive shall be struck out. Much of it is no more than anodyne commentary, but it is precisely the sort of thing that we can do without. The later paragraphs include a deal of opinion as to the obligations imposed on Zurich; I do not need the witness to address those matters and it is not helpful that he should do so.

- Paragraph 27 (page 291): from the words "In my view this represented to the purchaser" until the end of the paragraph shall be deleted, because it is an immaterial and unhelpful comment.

- Paragraph 28, with some slight misgiving, I will allow to remain. I am not convinced that it is strictly compliant with the Practice Direction. But it shows the way that the developer's solicitor, who had to serve the notices to complete, approached the contract.

- Paragraph 33 (top of page 293) oversteps the mark. From the words "Mr Scott has shown me an article" to the end of the paragraph shall be deleted, as it is neither relevant nor useful.

- Paragraph 34: the opening two sentences are unobjectionable. However, from the words "Basically without this the conveyancer advising a purchaser would be potentially negligent" until the end of the paragraph the text is immaterial, irrelevant, inappropriate and speculative and I shall strike it out.

- Paragraph 35: the first half of the paragraph, until but not including the sentence commencing "My main concern", constitutes unhelpful comment and will be struck out.

- Paragraph 36 will be struck out as being irrelevant, save for the final sentence, which may also be irrelevant but at least has the merit of being factual and can be allowed to remain.

- Paragraphs 37 to 41: This entire passage constitutes commentary, comment and argument and ought not to be included. As no objection has been taken to paragraph 38, I shall permit that paragraph to remain. Otherwise, all of these paragraphs will be struck out.

<u>"Stock phrases" in multiple statements</u>

25. The next complaint relates to the presence in the witness statements of "stock phrases", in the sense of the use of identical or almost identical words when addressing the same point in multiple witness statements. Examples are set out in paragraphs 47 to 52 of Zurich's skeleton argument.

26. I agree that the use of these stock phrases is unsatisfactory. Although I accept that (for example), if several witnesses are being asked what they would have done if such-and-such had or had not happened, answers may have a tendency to become formulaic, nevertheless the examples identified by Zurich do seem to me to indicate that it is

implausible to regard the witness statements as consistently representing the very words of the witnesses.

27. However, this is precisely the sort of point that can be dealt with by cross-examination or, indeed, by requiring the witnesses to give oral evidence in chief on specific matters. The parties might wish to consider how best to deal with the evidence at trial. I shall not take any action in respect of the stock phrases.

Statement of Mr Dummer

28. The final point concerns the evidence of Mr Dummer, Zurich's surveyor. His witness statement, which is of considerable importance, has been the subject of many objections. I devoted a fair bit of time in pre-reading to considering the objections in the schedule. However, the specific matter that is now pursued is more focused and is directed to the complaint that significant parts of the witness statement are to the following effect: I have been shown photographs, or I have read inspection reports, or I have been given oral information, that indicate that there are significant defects at the development; and I can say for a fact that, if I had carried out an inspection, I could not have failed to observe these defects; and therefore it follows that I did not carry out inspections. Zurich objects that, in these circumstances, the witness statement does not contain primary evidence of what the witness did or did not do (such as, "I did not inspect on that date, because I was abroad / in hospital / on another site on that date") but rather sets out what purports to be factual evidence merely by way of deduction from information provided to the witness subsequently.

29. Although I see the nature of the problem, I am not currently persuaded that this feature of Mr Dummer's witness statement indicates or constitutes a breach of the Practice Direction. It might indicate a deficiency in or limitation of his evidence, but it makes plain the basis on which he makes any assertions regarding what he did or did not inspect. I am not persuaded at the moment that there is anything fundamentally wrong in putting a document to a witness and asking him, "If the facts are as stated there, what if any conclusion do you draw as to what you did or did not do?" The basis on which any evidence is given in those circumstances is clear, provided the process of inference is set out clearly, as it is in Mr Dummer's witness statement. In the present case, we are where we are. Mr Dummer can be cross-examined on his witness statement. It may (or may not) be that less weight or no weight is to be put on his evidence because he has reached invalid conclusions and has no relevant memory and can give no reliable factual evidence. But I do not think that anything is to be gained by requiring Mr Dummer (as I am invited to require him) to make a further witness statement specifying what he can or cannot say, other than as a matter of inference, regarding inspections on each particular occasion. I draw a line at this point.

This transcript has been approved by the Judge