PD 57AC – further guidance and sanctions

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Since PD 57AC came into force there has been a trickle of cases coming through the courts giving guidance on how parties can comply with the new Practice Direction. You can read our previous blog posts on PD 57AC: How is Practice Direction 57AC bedding down: reform or revolution?; Practice Direction 57AC in practice; and Practice Direction 57AC: Case update.
Greencastle MM LLP v Payne [2022] EWHC 438 (IPEC) is the latest in this developing line of cases. The High Court has now issued a judgment in which the judge said it was the *"clearest case of failure to comply"* with PD57AC that he had seen. The decision provides learning points and warnings for all practitioners.

Background
Mr Justice Fancourt considered two applications made by the Defendants in relation to the witness evidence filed on behalf of the Claimant at the pre-trial review ("PTR"). The case was going to trial in the Intellectual Property List in the Chancery Division.
It concerns rights to a podcast called 'House of Rugby' presented by broadcaster Alex Payne and former England players Mike Tindall and James Haskell. Mr John Quinlan is the Claimant's only witness and both applications concerned his witness evidence, namely his first and second witness statements.

Decision
The hearing took place on 13 January 2022. The judge held that the Claimant's witness statements did not comply with PD57AC and that the appropriate sanction (short of strike-out) was to withdraw the permission which had previously been granted (at [35]). The trial was due to begin in one month and so permission was granted for the Claimant to prepare a fully compliant replacement statement by the date on which other outstanding evidence was due (namely 19 January 2022).
As is clear from the order, the Claimant had very little time (less than a week from the PTR) to put the witness evidence right – the judgment is a warning to comply with PD 57AC or face consequences.

The reasons for Fancourt J's decision were as follows. (i) It was an *"egregious case of serious non-compliance"* with the Practice Direction (at [36]). (ii) In Fancourt J's view there was still adequate time to prepare a compliant statement and this was preferable to Mr Quinlan giving evidence in chief at the trial (at [36]). (iii) The burden of non-compliance should be placed at the door of the Claimant, not the Defendant or court in terms of resources (at [37]). He added that the Claimant could, of course, expect that the replacement statement, if served, would be scrutinised by the Defendants for compliance with the Practice Direction.

Further, helpfully at [13]-[17], Fancourt J set out extracts from specific passages in Mr Quinlan's witness statement and explained why they were non-compliant. Like the judgment of His Honour Judge Stephen Davies in *Blue Manchester Ltd v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC), these paragraphs provide further practical examples to practitioners on how PD 57AC operates in practice.

Key takeaways:
The decision highlights several important points:

- Adhere to the fundamentals: Fancourt J said he had *"real doubt"* as to whether the witness or the partner at the firm who certified compliance of the witness statement with PD 57AC had read the Practice Direction or, if they had, whether they understood the effect and purpose of it (at [9]). The witness statement had fallen foul of the core requirements of PD 57AC, namely: (i) it referred to matters that were not within the knowledge of the witness; (ii) commented on documents that have been disclosed; and (iii) presented argument in support of a party's case (at [9]). Fancourt J emphasised that PD 57AC was designed *"exactly"* to prevent witness statements doing this.
- Practise restraint: Litigation, by its nature, is often stressful for witnesses and clients alike. However, the witness statements cannot be the place for such stress to manifest itself. Fancourt J described the breaches of PD 57AC in this case in trenchant terms. He said: *"as a whole [this] is the clearest case of failure to comply with Practice Direction 57AC that I have seen since [the practice] direction came into force in April 2021"* (at [24]). Interestingly, Fancourt J added that *"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"*. The learning point is that witness statements are not the appropriate place for parties to 'have their say' in this sense. This should properly be left to submissions and skeleton arguments.
- The importance of the PTR: These applications were considered at the PTR. In the new world of PD 57AC the role of the PTR is going to be increasingly important. It is sensible for parties to be proactive. As Fancourt J said at [22]: *"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 message is clear – do not leave it until trial to deal with deficiencies in the witness evidence. Indeed, where possible, it would be prudent to seek to resolve disputes about compliance with PD57AC in advance of the PTR, particularly if there are prior case management hearings. However, the PTR provides a convenient long-stop.

Conclusions
The judgment in *Greencastle v Payne* serves as a reminder for all parties that in appropriate cases the court is willing to sanction parties for non-compliance with PD 57AC. Practitioners and witnesses need to make sure they have read and understood the requirements of PD 57AC and the Statement of Best Practice. Where parties fail to do so, the court will be keen to ensure that the burden and costs of ensuring that witness evidence is compliant rests, insofar as possible, with the offending party and not with the court or other party. Compliant drafting in the first instance and, failing that, proactive case management are the keys to avoiding being named and shamed.

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