

# How Effective are the Legal Reforms in the Management of Witness Evidence for Business and Property Courts of England and Wales?

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**Abstract** - This study focuses on a critical examination into the extent in which the new PD57AC has been effective in the management of the witness evidence in the Business and Property Court of England and Wales. In particular, the study has determined that the new Practice Direction has somewhat performed in the regulation of the wording of the witness statements, references to witness statements in preparation, applications for objections to the witness statements, and the option of the court where drafters of the witness statements are non-compliant. Yet the thesis has also found out that despite the far-reaching reforms on the management of witness evidence under this Practice Direction, there are more areas that need improvement. This includes addressing inconsistencies in the conditions under which a witness statement could be struck out in the cross-examinations and trials at the BPCs.

**Keywords** - Witness; Evidence; Witness Statements; Legal Reforms; Business and Property Courts.

## 1 Introduction and Background

This study aims at analyzing the extent in which legal reforms in the management of witness Evidence in the Business and Property Courts (Hereinafter “BPCs”) of England and Wales is effective. An early establishment of the Woolf Reforms and the Civil Procedure Rules (hereinafter “CPR”) in England and Wales granted a primary duty of setting witness factual evidence in civil litigation upon witness statements, replacing the oral-evidence-in-chief [1]. As such, the intention of the judiciary was to foster a “cards on the table” strategy where the evidential case of parties could be established earlier in proceedings [2]. Theoretically, it was hoped that such an approach would abolish the evidence-in-chief of witnesses, bolster earlier settlement of cases, foster higher quality of expert evidence, and bolster cross-examination efficiency. However, the overly-increasing length, argumentative rather than factual content, and the issue of “over-lawyering” of witness statements under the new CPR regime- raised questions over whether witness statements were in practice, an optimal approach to foster ‘best evidence’ for the courts. It is such concerns that led to a creation of the Witness Evidence Working Group (hereinafter “Working Group”), with the primary aim of investigating the appropriate methods of dealing with lengthy, inefficient, time-consuming, and over-lawyered witness statements in the BPCs. Through a Working Group Report from the Law Commission [3], specific problems/inefficiencies in the current CPR practice on the management of evidence in the BPCs

were highlighted. In particular, the Working Group findings concurred with the judicial questions raised upon the CPR by the courts earlier on [4]. The Working Group Report would later form the basis for an enactment of the Practice Direction 57 AC (Hereinafter “PD57AC”), guiding the BPCs on the preparation of witness statements evidence to deal with problems identified from the Working Group findings. PD57AC applies to trial witness statements signed on or after 6th April 2021 [5]. Two years after the enactment of PD57AC, this study finds out that little research has been conducted on its effectiveness in the preparation and management of witness statements in BPCs. This forms the primary focus of this study. In particular, the study aims at critically analyzing the key elements introduced by this PD57AC; to examine its efficiency in the preparation of witness statements in BPCs. This will be followed by succinct recommendations on improvements that can further PD57AC’s efficiency in the BPCs evidence practice. This section contains several sections. In particular, section 1.1 will present the problem study for this thesis. Section 1.2 provides the key study aims for this paper. Section 1.3 will articulate the research questions for the study. Section 1.4 will demonstrate the relevance of this thesis to the wider academia. Section 1.5 articulates the research methodology to be used in this paper. Finally, section 1.7 will highlight the overall organization of the remaining sections for this thesis.

### **1.1 Problem Statement**

Despite an imposition of witness statements as the key mode of witness evidence in civil litigation through CPR and the Woolfe Reforms, this witness evidence was blamed by the judiciary and the Working Group Report findings for its several shortcomings. These include (1) there was an ever-rising length of the evidence contrary to the initial expectations, (2) evidence was more argumentative rather than factual as expected, and (3) it supported ‘over-lawyering’ of evidence. All these concerns would ultimately lead to the enactment of the PD57AC in April 2021. Since PD57AC was enacted to rectify shortcomings of the previous Practice Direction in the management and preparation of witness statements, it would be imperative that a post-enactment evaluation of PD57AC is conducted to determine if it has straightened the challenges identified earlier on. However, this study finds out that little or no substantial research has been conducted over PD57AC’s effectiveness remedying the challenges identified by the Working Group report, two years later. This study is therefore, concerned with examining PD57AC to identify its key elements and the extent in which it has performed its core mandate in fostering best evidence for BPCs trials in England and Wales. In particular, the study will evaluate if PD57AC fostered conciseness, lowered argumentative connotation, and whether it eliminated over-lawyering as initially intended in its enactment. To examine the successes (or failures) of PD57AC, this study will start by highlighting the key challenges that fueled its enactment. Afterwards, it will identify key procedural elements introduced by PD57AC to promote best evidence in BPCs’ trials. Later, the study will assess the successes/failures of this PD57AC to evaluate the extent in which it performed its mandate on fostering best evidence. Finally, the study provides recommendations to improve PD57AC’s effectiveness as a guidance for best evidence in the BPCs.

### **1.2 Research Aim**

This study aims examining the extent in which the PD57AC has successfully fostered a management of witness evidence in BPCs trial processes. In particular, the study will begin by highlighting the key challenges on witness statements that hard-pressed an enactment of the PD57AC. The study will then assess a performance of PD57AC in amending the earlier challenges on witness statements’ evidence as identified by the Working Group’s report. Finally, this study provides recommendations that could potentially improve the performance of PD57AC as it guides the management of witness statements evidence in civil litigation.

### **1.3 Research Questions**

To achieve the aims identified above (Section 1.2), this study aims at addressing the following research questions: (1). What are the key drawbacks on the management of the witness evidence prior to PD57AC’s enactment, and how did this fuel an enactment of PD57AC? (2). What key legal milestones/elements were introduced by PD57AC to improve a management of witness statements in

the BPCs trials? How did these milestone amend/change from the previous Practice Directions before PD57AC? (3). How well did the PD57AC perform in addressing the initial challenges identified by the Working Group Report towards in the management of witness evidence on BPCs? (4). Are there potential areas for improvements on PD57AC to bolster its effectiveness in the management of witness evidence on BPC trials in England and Wales?

#### 1.4 Significance of the Study

The present study is significant because it addresses a pressing judicial issue that could affect a dispensation of justice in the BPCs. In civil litigation, there are three crucial aspects that influence proceedings, that is, the evidence/facts, relevant law applied on the facts, and tactics of a case [6]. Of these, Durney notes that witness evidence is the most important since only few cases have been won without a strong witness evidence. In England and Wales, the civil claims process is governed by a set of CPR rules. The CPR is known to contain complex rules on witness evidence that are not only hard to follow, but also difficult to apply. While CPRs are periodically updated/amended for civil litigation in England and Wales, it is important to understand how effective they are in bolstering a provision of best evidence to the courts, and subsequent justice on disputing parties. PD57AC was enacted to remedy a series of shortcomings from previous Practice Directions on witness evidence in BPCs. Two years in operation, this study finds out that little or no research has been conducted to assess and examine a performance of PD57AC. Not even the Working Group has examined the successes or failures of PD57AC so far and therefore, it would be difficult to determine if this practice direction has streamlined a management of witness evidence as initially intended. It would also be difficult, in the absence of post-enactment research, to determine if more reforms on commercial disputes CPR are needed to foster best evidence. It is for this reason that the present study aims at examining the extent in which PD57AC has been effective in the management of BPCs' witness evidence. This study will therefore inform the Working Group and the judiciary on whether the efforts from the 2019 Working Group reports over the witness evidence challenges are bearing any fruits. Therefore, this study could also inform the government and the Law Commission over the effectiveness of their procedural laws on the judiciary. This study will also inform the government on the need for more or less funding into the judicial CPR reforms. Additionally, this study will inform the legal scholars on how responsive the judicial system is, to the potential CPR reforms.

#### 1.5 Organization

In this study, section one will introduce the thesis statement and the issues that are being addressed in the whole thesis. section 2 will introduce the background of the Practice Direction 57AC and the key challenges that fueled its formulation and enactment based on the Working Group Report. section three introduces the key provisions in the PD57AC. This will be followed by an assessment in the performance of this Practice Direction to address the procedural challenges in the management and preparation of the witness evidence. section five concludes the thesis through an identification of the key findings. It is still in this section that the potential recommendations on the improvement of the PD57AC are provided.

## 2 The Practice Direction 57AC

### 2.1 Background

This section introduces the background of PD57AC in its aim of achieving best witness evidence for BPCs. As such, this section critically analyses drawbacks/challenges that influenced an enactment of PD57AC based on the findings by the Working Group Report. This section introduces the reader to overall thesis, wherein to understand the effectiveness of PD57AC in witness evidence management, they will first understand factors that led to its rise. PD57AC was meant to introduce far-reaching reforms in the preparation and management of trial witness statements presented before BPCs. Prior to its introduction, there were several burning issues on trial witness statements that raised complaints from lawyers and judges on whether this evidence was an optimal option for best evidence. From the Working Group report (2019) [3], it was opined that "there were concerns that judicial witness

statements were often ineffective in performing their core mandate of achieving best evidence at reasonable costs in the trials.”[7] It is such judicial issues that formed the basis for a development and enactment of PD57AC. This section aims at analyzing key issues/challenges from the Working Group Report that fueled an enactment of PD57AC.

## **2.2 Drawbacks on the Previous Practice Direction on Witness Statements**

### **2.2.1 Preparation of the Witness Statement**

The first concern with the witness statement is that this evidence was not achieving best evidence to be used in BPC trials. In particular, this challenge was more exemplified where third parties (including but not limited to representative lawyers) prepared the witness statement [8]. Studies have also compared oral evidence with written witness statements. For example, oral evidence involves a presentation of evidence using one’s words thereby offering a genuine recollection of events [9]. Primarily, Haughney [8] asserts that an oral evidence-in-chief evidence submission is more reliable compared to written evidence where witnesses are given a sign-in document, written by a third party to sign. In support of Haughney’s argument, Mattison et al [10] indicate that the process of preparing witness statement is disadvantaged where complex cases are involved since numerous documents and iterations must be prepared. This often leads to a diluted witness evidence that is far from the witnesses’ actual experience. On the other hand, Leitch [11] laments that witness statements are considered as advantageous for an early resolution of a case. However, a nuanced account of the witnesses’ experience in written form often assumes an inaccurate occurrence of events leading to what Steele [3] terms as ‘an illusional evidence’ at trial. A difference between written witness evidence and the real witness events’ recollection had also been identified by scholars as an impediment to the admissibility of evidence in support of the Working Group findings. This was also explained in *Frenkel v Lyampert* [12] where the judge noted that a preparation of witness statements in a language that is different from a witness’s as provided by PD 18 (Par.18.1) [13] often diluted the real events experienced. Arguably, a disconnect between the contents of a witness statements sign-up in the pre-trial stage may often lead to a contradictory account of events thereby distorting evidence available for BPC trials. This study finds out that a weakness of witness nuances had a great contribution to the push for an enactment of PD57CA.

### **2.2.2 Time Limitation in Evidential Cross Examination**

Witness statements evidence has been blamed for time inefficiency in cross-examination of witnesses at the BPC trials. Research by Giret [14] provides that throwing a witness into a sporadic cross-examination was a common occurrence in evidence presentation at the trials. This has several drawbacks; (1) it deprived witnesses the opportunity to provide an optimal impression in the evidence-in-chief, (2) encourages over-lawyering thereby lengthening the witness statements unnecessarily, and (3) it puts the witness on the defensive from the word go and therefore witnesses do not provide a truthful recollection of evidence. In other words, it can be argued that a straightaway witness cross-examination hampers a recollection of events using their own words. Therefore, a skillful cross examiner is likely to corner such witnesses through framing leading questions that only provide binary answers, to the detriment of the courts seeking to attain the best evidence at trial. On the other hand, the time pressure on BPC trials often led to a cut-off of the cross-examination time leading to skewed witness evidence which is quite undesirable in the Court’s quest to attain best evidence [3]. Arguably, it can be corroborated that cutting the litigants’ time in cross-examination may often leave out important facts that would build their case before the court. This is an important finding from the Working Group Report in which time-limitations from previous CPR provisions prejudiced the litigants’ ability to submit all their witness evidence. To a great extent, this challenge pushed for the enactment of PD57CA based on the Working Group Report.

### **2.2.3 Legal Arguments and Jargons**

A use of legal arguments/jargons on witness statements was described as a stumbling block to the submission of witness evidence before BPCs. As such, lawyers may often use their legal know-how

to draft witness statements that are overly complex thereby hampering a recollection of real witness evidence [15]. This was referred by the Working Group report as 'over-lawyering' and was also observed in several case laws. In *Alex Lawrie Ltd v Morgan*[16], the court observed that a complex legal argument in a witness statement was retrogressive to a provision of best evidence. The court determined later that the defendant in this case had challenges with basic literacy. Based on these revelations, the judge opined that, "written evidence prepared by lawyers must be simple if all it will forward best evidence." [17] In another case *Rock Ltd v RCO Holdings Ltd* [18], it was opined that murkier omissions in evidence were a result of complex submissions in the witness statement prepared by the defendant. The court also asserted that witnesses would certainly be unable to differentiate between facts and opinion where complex arguments are presented in the witness statements. Clearly, it can be argued from the two cases that using complex arguments in witness statements hampers a provision of best evidence. In fact, it is also arguable that a witness statement should use a simple language that will offer a clear recollection of evidence to courts. Therefore, a use of complex arguments in witness statements as found by the Working Group Report coupled with case law had a great contribution in pushing for an enactment of the PD57AC.

#### 2.2.4 A misuse of Expert Opinion

From the Working Group Report, it was also found out that the witness statements were often used as a gateway for unwanted expert opinion. Previously, the BPC courts had pronounced themselves severely on this matter. In *New Media Distribution Co Ltd v Kabalevsky*[19], the claimant successfully convinced the court to exclude certain provisions in the defendant's witness statements on the basis that they were explicitly expert evidence pertaining Ukrainian and New York laws [20]. Accordingly, the judge noted that "witnesses can only properly address matters which they are dully competent to address in a witness statement." The court also noted that it was not right that parties were fond of circumventing CPR 35 [See Paragraph 35.1 of Practice Direction 35] by including expert evidence in the statements of facts. Arguably, it can be corroborated that the previous Practice Direction was not properly pronounced on an inclusion of an incompetent expert statement in the witness statements. Later, the Working Group would also determine that the misuse of expert evidence in the previous Practice Direction was detrimental to the BPC's desire to attain best evidence. Arguably, it can be seen that although expert evidence is crucial to attain best evidence, the previous Practice Directions allowed litigants to misuse expert evidence and therefore, the working Group used this assertion to push for the enactment of the PD57AC. This section analyses the drawbacks/challenges on the witness statements from the previous practice directions that pushed for an enactment of PD57AC as a legal reform to BPC's witness evidence. Among the drawbacks identified in this section include; (1) challenges in the preparation of witness statements which hampered best evidence for the BPCs, (2) Time limitations on evidential cross-examination which would close out important facts in the BPC trials, (3) the use of legal arguments and jargons in the witness statements leading to over-lawyering of evidence, (4) a misuse of the expert opinion, and (5) Time and cost limitations due to the first four challenges identified in the section. This section has prepared the reader for the next section which analyses the extent in which PD57CA has performed its core mandate of submitting best evidence before the BPC trials.

### 3 The Practice Direction 57 and its Application in Practice

This section introduces provisions under the new PD57AC that are relevant to the study thesis. As such, this section illustrates the extent in which PD57AC has remedied the challenges/drawbacks on witness statements as discussed in section 2 (2.2) above. Such provisions involve areas on; the accuracy of the recollection of the events/evidence by witnesses, the language of witness statements, and the role of legal representatives in the preparation of witness statements evidence. The final section of this section critically analyses an applicability of PD57AC to foster best practices on preparation and management of witness statements. As such, this section has identified key areas of the strengths as well as the weakness of PD57AC provisions in fostering best evidence in BPC trials.

### **3.1 Relevant Provisions under the New PD57AC**

PD57AC contains five sections and an Appendix highlighting a 'System of Best Practice' for trial witness evidence. The Appendix also contains five sections that only apply to trial witness evidence. For example, PD57AC does not apply to affidavits and special proceedings that are provided under CPR 64. As stated by Heley [15], much of PD57AC and its appendix involve a consolidation of pre-existing rules of best evidence practice. As such, section 2 & 3 of the PD57AC primarily re-emphasize on the requirements of witness statements under CPR 32 and the PD32. These two provisions re-iterated that the purpose of a witness statement is to provide an evidence-in-chief in writing, that would similarly be given by a witness of fact while submitting oral evidence before trials. Clearly corroborated in CPR32 [See the Civil Procedural Rules 32] and PD32 [See the Practice Direction 32] is that a witness statement must not contain legal arguments and general commentaries on the evidence. PD57AC also recognizes that witness statements must be prepared in the witness's language. In particular, section 3 of the PD57AC signposts the current provision as at paragraph 18.1, 18.2, and of the PD32 [21]. This emphasizes that a witness statement must be drafted based on the witnesses' own language while parties relying on the same may file a translation. On the other hand, there are several significant changes in the PD57AC and the Appendix that are of great relevance to witness trial statements and this thesis. As such, PD57AC is more preoccupied with the fallibility of human memory and the ease in which a witness may subconsciously ascribe to using matters that are their 'own language' when in reality, they are not. In particular, paragraph 1.3 of the Appendix [See the Appendix of the PD57AC] provides that witness statements, when assessing evidence before the BPC trial court, should note that human memory is; (1) not a simple mental record, (2) malleable and fluid state of perception, and (3) is vulnerable to a range of influences. Additionally, paragraph 2.3(1) of the Appendix asserts that matters are deemed as witnessed personally by a witness only if they were experienced through primary senses of sight, hearing, touch, smell, or taste. On the recollection of witness memory, section 3 of the Appendix [22] provides that any trial witness statement must be prepared with care to avoid influencing or altering a recollection of the events. This is further exemplified in par. 3.4 of the PD57AC which states that "caution must always be exercised to ensure that witnesses are given documents that reflect issues that are fresh in their minds." Paragraph 3.2 also asserts that witness statement evidence must list all the documents that were potentially used in preparing trial evidence. This is summed up by a recommendation that a witness statement should focus on recording the fewest documents possible to avoid corrupting a witnesses' recollection of events. Finally, section 3 of the Appendix guides legal representatives on drafting the legal documents. The legal representatives under section 3 are obligated to; (1) always explain the purpose and content of their witness statements, (2) ensure that witness statements are obtained through an evidence-in-chief interviews, (3) always avoid using leading questions, and (4) provide a full record of questions and answers from witnesses. Section 4 also reinforces section 3 where it requires that a witness must sign a confirmation that; (1) they understand the purpose of witness statement, (2) they have recollected their memory correctly, and (3) they have not been influenced/coerced to add anything that is not their own account of the events they experienced.

### **3.2 The Application and Implication of PD57AC**

Two years after an enactment of PD57AC, the Commercial Courts of England and Wales have explicitly pronounced themselves on the applicability of this Practice Direction in preparation of witness statements evidence. As such, this sub-section critically analyses a previous applicability of PD57AC to remedy the witness evidence drawbacks discussed in section 2 above. Key case law in England and Wales from on/or after 6th April 2021 will be used in this analysis.

#### **3.2.1 Wording of the Witness Statements**

One of PD57AC's goals was to push for a thorough preparation of witness statements to foster best evidence for BPC trials. Provisions such as par. 3.3 [See Paragraph 3.3 of the PD57AC] guide the "wording of witness statements evidence." Arguably, an application of par. 3.3 by the courts shows how the practice direction has successfully bolstered a flawless preparation of witness statements, while still calling for more reforms. In particular, a guidance on the wording of witness statements

under par. 3.7(2) [9] aims at preventing a distortion of a witnesses' events recollection. In Blue Manchester case [23], Judge Stephen Davis noted that "it was very difficult to see a compliance of witness statements where such evidence contained identical/similar statements on the issues before trial." This would mean that witness statements containing similar words contravened PD57AC's requirement that such statements should strictly be a witnesses' own recollection of events. This also implies that parties preparing these statements should desist from copying extracts from previous witness statements into their own to save time and costs before the trial courts. It can therefore be seen that the courts of England and Wales are already using PD57AC's provisions on the "wording of the witness statements" to reprimand inconsistencies in the preparation of evidence presented before the BPCs. Similarly, PD57AC streamlined witness evidence by expanding the provision that such statement must be in the witnesses' first language [See Paragraph 3.3 of the PD57AC]. This reminisces with Mattison's [10] assertion that it would be sufficient to have an introductory paragraph in witness statement providing that, "contents of statement are based upon the witnesses' own language and in the first- . . . ." At this point, it is arguable that PD57AC has somewhat remedied the drawbacks on improper, untidy, and lengthy witness statements; which was a great challenge in the management of evidence for BPCs before April 2021. Although courts have pronounced themselves on the importance of wording witness statements based on the provisions of PD57AC, this is "easier said than done." Arguably, an assertion by Judge David in Blue Manchester that, "it was very difficult to see a compliance of witness statements where such evidence contained identical/very similar statements on the issues before the trial" may unfairly prejudice witness statements that are correct/true as a matter of fact. In other words, courts may make unconscious mistakes of flagging witness statements for containing 'similar or identical words' while in reality, such words were anchored on the truthful nature of the witness's recollection [24]. Perhaps, this explains why a use of 'similar/identical words' in a witness statement may not be sufficient in judging the accuracy of witnesses' recollection. While the PD75AC's requirements on the wording of witness statements is somewhat essential to determine whether such evidence fosters an accurate recollection of witness's events, this might also wrongly prejudice and inaccurately flag truthful recollection of events. This may call for an amendment of par 3.3 of PD57AC to include specific circumstances under which 'similar words' on witness statements may distort the requirements that 'such statements must reflect a witness's own recollection of events'[See Paragraph 3.2 of the PD57AC]. This will ensure that witness statement evidence is more aligned to fewer and clear pages fostering a clarity of the trial. While PD57AC has successfully pushed for a meticulous preparation of witness statements through a guidance on the wording, it fails to specify the parameters that could be used by the court to determine "similar wordage" that could jeopardize a witness's own recollection of events. This has therefore, pushed a need for an amendment of sections such as Par 3.3 for specificity.

### 3.2.2 Witnesses' References to other Documents

To remedy the challenges of time and cost wastage at the cross-examination stage, PD57AC guides on documents that are relevant, allowable, and admissible in the submission of witness statements [Paragraph 3.3 of the PD57AC provides that: "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."]. As such, Judge Stephen David opined that while the preparation of witness statements may involve a consultation of many documents, drafters are under an obligation to only use documents that are relevant to the trial evidence as required under par 3.4 (1) [23]. This was also supported by Sir Michael Burton in Atalier case [25] where he opined that, "lawyers must be praised away from introducing unnecessary correspondence while preparing witness statements as this would most certainly infer to inadmissibility at trial." This shows that the documentary evidence required in witness statements must be sufficient to the extent that it doesn't waste the court's time through unnecessary disclosures and comments. Additionally, it would be argued that this would solve the challenge of lawyers using unnecessary jargons and legal arguments in statements as identified by the Working Group. These sentiments were also echoed

in the Mansion Place [26] where both the claimant and the defendants were ordered to redact some subjective comments in their witness documents for irrelevance to the trial. The two cases, that is Blue Manchester and Atalier postulate the PD57AC has been somewhat successful in pushing for lesser time and costs in the preparation as well as a submission of the witness statements where numerous documents are involved. However, the 'relevance of documents' requirements under par 3.4(1) would foster higher equality and fairness if PD57AC is amended to specify the parameters of relevance. In particular, the 'relevance' provision may close in on party's witness documents that would be significantly important for their case. Such amendments, in the argument of this study will lower a court's discretion on determining a relevance of the listed documents, thereby fostering higher levels of natural justice for both sides of litigating parties. This will also save on time since lawyers will have less cross-examination questions regarding the relevance of witness evidence documents from the opposite litigation side. In addition to the relevance of the documents used in the preparation of witness statements, par. 3.5 [See Paragraph 3.2 of the pd57AC] of the PD57AC requires that a statement must expressly list all the documents that evidence has referred to. In particular, judge O'Farrell clarified that the primary purpose of the document list requirement is to provide sufficient transparency on materials that were used to reflect the witness' memory; for the benefit of the court, as well as the opposing side of a litigation. Although this provision does not require the witness statement to exhaustively list all the documents used during the proceedings, judge O'Farrell advised the witnesses to keep a contemporaneous record of all the documents at trial just in case a clarification was needed at the cross-examination. In Primavera Associates [27], the court echoed O'Farrell's assertion noting that a refreshment of witnesses' recollection of events is crucial to the interests of natural justice and therefore must be accompanied by the documents used. In this case, several sections of the defendant's witness statements were stricken out since their referenced documents were not listed while in *Curtiss & Ors v Council* [28], an entire witness statement was scrapped for non-compliance with the PD57 AC [See Par 3.5 of PD57AC]. However, several scholars feel that while PD57AC saves time and cost by limiting the amount of documents used in preparing the statements, it could be used to 'banter the opposition'[This means that the lawyers would use it to raise more unnecessary questions to the other litigation side, thereby wasting the court's time more.] thereby consuming more time. As such, it is imminent that as parties challenge the witness statements for lacking an exhaustive document reference, a miscarriage of justice at trial is imminent. This was well-corroborated in the case *James Haskell* [29] where the claimant was given one week to redraft their witness evidence and update the relevant documents in the list to make it compliant under par 3.5 [See Paragraph 3.2 of the PD57AC]. Given that it had taken lawyers months to prepare the initial witness evidence which was struck out in entirety by the court, it would be arguable that PD57AC is to some extent fighting its own goal of saving on time and costs in the 'documents list' requirements. It would therefore be prudent that an amendment on par 3.5 of PD57AC is introduced to specify the full contemporaneous documents must be presented to the court by the litigants for witness evidence. Not only will this foster a standardization of witness evidence, it will also save the court's cross-examination time.

### **3.2.3 Applications for Objections/Non-Compliance under the PD57AC**

PD57AC also focused on streamlining the procedure for applying to report any evidence mis-compliance and cross-examinations by litigants on trial. This is through its provisions on "applications for non-compliance on witness evidence" in BPC trials [See Paragraph 5.1 of the PD57AC]. The courts in England and Wales have not shied from applying the 'application' Clause. In particular, judge O'Farrell noted that an aggrieved party must first raise their concern with the other side in an attempt to reach an agreement before moving to court. However, the court noted that the attempt to reach the other party should be conducted 'as early as possible.' In *Prime London* [30], the judge criticized the claimant for "not identifying an objection on a witness statement earlier enough for an agreement with the defendant's side on a revised version of the witness statement." As such, the judge was unimpressed by the Prime London's delay in meeting the other party to declare their discontent with their witness evidence referencing the absences of the Christmas period. In *Greencastle* [31] the court agreed that it would be willing to hear applications on non-compliance with PD57AC at the early stages since it was undesirable to leave them to be sorted at the trial. In particular, the judge



noted that the whole purpose of par 5.1 [See Paragraph 5.1 of the PD57AC] was to avoid situations where witness statements' queries are protracted at cross-examination in trials, and therefore, such queries ought to be solved at the early stages. This would also solve a challenge on a misuse of expert opinion since, if reported early, judges would have sufficient time to determine if expert opinion was in deed misused. The court's discretion on 'early stages' is an ambiguity in PD57AC that should be corrected. In particular, par. 5.3 [See Paragraph 5.3 of PD57AC] should be amended to state the specific time-frames, upon which an objection should be applied by an aggrieved party to the court. In most applications such as *Blue Manchester* [23], it would be seen that although courts were in principle considerate on the schedules of objections, they were also conserved on these objections. A good example is in the case *Zurich Insurance* [28] where the court provided that although the solicitors had prepared a schedule of objections of 49 pages from a possible 109, most of the schedules were 'petty, pointless, and a wastage of time and effort, to say least.' Additionally, the court dismissed an applicant's application to have two witness statements struck out for an alleged failure to comply with PD57AC. The judge noted that there were minor infractions on the defendant's witness statements forming a basis of dismissing the claimant's application. This raised an important question over a court's consistency in approving schedules of objections under PD57AC. This was also observed in the cases *Zurich* and *Primavera* where, despite the intensity of objections being similar in wordage and context, the former was completely stricken out while the latter was allowed to redraft some sections. As noted by *Devoboise* [24], a success of an application process for an objection schedule is majorly subject to the court's discretion which would potentially promote judicial prejudice in the passing/objecting of these schedules. Therefore, there is a need for amendments on PD57AC to provide a standardized parameter that should be used by the court to determine if an objection will be accepted or not. This will also save time as aggrieved parties can easily determine if their objection meets the pass criterion or not, deterring parties from irrelevant and petty applications to objections on witness statements.

### 3.2.4 Options of the Court in Considering the Applications under PD57AC

A few years after the enactment of PD57AC, business courts in England and Wales have pronounced themselves over the powers at their disposal in ruling for non-compliant/objection applications on witness statements. This sub-section analyses the impact and implications of the courts' powers and exercises in resolving Schedules of Objections in the witness statements under PD57AC.

### 3.2.5 Strike out the witness Statement fully/partially

In resolving the non-compliant claims under the PD57AC, the courts may decide to fully or partly strike out an application or the witness statements themselves. This depends on the changing backgrounds of the cases in application. In *Blue Manchester* [23], Judge Stephen Davies provided that, "where an application is made, striking out the witness statements is a significant sanction to be saved only for serious cases. . ." However, the judge proceeded to state that, "where the witness statements are not particularly egregious in the non-compliance, then they should not be struck out." This was also corroborated in the case *Primavera* [27], and *James Haskell* [29] where a sections of witness statements subject to an application for non-compliant were partially struck out [This was based on Para. 5.11 of the PD57AC]. The same case applied in *Zurich Insurance* [28], where the court struck out witness statements from four witnesses out of a gross twenty. However, an inconsistency in the court's discretion has raised questions over a plausibility of objection applications in the interests of natural justice. For example, the case *Greencastle* [31] postulated some significant inconsistencies based on other cases such as *Primavera* and *Haskell*. Despite the judge stating that that the offending witness statement, "was a clear case failure and non-compliance with the para. 5.3 of the PD57AC," the defendant was allowed to refile a replacement and make changes on overall statements. In particular, it is arguable that although the PD57AC intended to foster consistency in non-compliance applications on witness statements, there are still practical inconsistencies based on rulings such as *Greencastle*. This inconsistency per se, opens rooms for a greater discretion of judges in determining non-compliance and this may differ on a case-by-case basis. Arguably, the PD57AC provides a greater room for parties to register their dissatisfaction with the non-compliance with the witness statement,

yet still there is an urgent need to address the increased inconsistencies in the judge's discretion towards the oncoming applications.

This section has critically analyzed a performance of PD57AC in the preparation of witness statements. The first application of PD57AC was on the wording of the witness statements. It has been found that although sections of PD57AC such as par. 3.3 & 3.7 (2) guide the courts and litigants on the required wording of statements to prevent a distortion of evidence and to offer an accurate recollection of events, there is a need to standardize parameters used by courts to identify 'similar words' that could waste the courts time. In particular, the study recommends amendments on par 3.3 stating specific circumstances under which the wordage of statements may lead to a dismissal of evidence to save on time and costs of trials from cross-examination. A witnesses' reference to other documents was the second application of PD57AC. It was found that par 3.4(1) fosters a use of documents that are only relevant to the case, deterring lawyers from using unnecessary jargons and legal arguments that would waste the courts' time. However, it was observed that the 'relevance' on documents under par 3.4(1) should be amended thereby introducing specific parameters of 'relevance'. This will lower the court's discretion on determining what documents and content is relevant to the case thereby saving more time and costs on a trial. Second, was on the requirements of a 'document list' provision where the study identified that although par 3.5 requires a listing of all documents used in the preparation of witness statement, there was a legal niche over the contemporaneous list that may be needed in trial. Therefore, the study ascertained a need for amendment on par 3.5 to specify and standardize the full list requirements, lowering time wastage as litigants seek to prepare more documents under objectionable court orders. The third application of PD57AC was on the application for objections on witness statement evidence. A critical analysis found that par 5.1 indirectly pushes applicants for evidence objections to make applications in a timely manner so that such complaints are not protracted to trials as this would consume more trial time. However, the study noted that although par 5.1 enabled courts to save time, there were case law inconsistencies over the 'early-stage applications.' As such, it was recommended that par 5.1 should be amended to include specific time frames that aggrieved parties should be obligated to apply for an objection. Finally, the options of the courts in determining objectionable applications under PD57AC were analyzed. It was found that although the courts provide higher opportunities for aggrieved parties to register for dissatisfaction with witness statements, there was a need to standardize specific issues that foster lead to a partial or a full struck out of objectionable applications under par 5.3.

#### **4 Conclusion & Recommendations**

The focus of this study was to critically examine the extent in which PD57AC legal reform is effective in the management of witness evidence in BPCs of England and Wales. While it is obvious that PD57AC was preceded by other Practice Directions such as the PD32, it was also obvious in this research that the previous Practice Directions posed several inefficiencies/challenges/drawbacks in the management of witness statement evidence. It was for this reason that this study began by analyzing the key drawbacks posed by the previous Practice Directions in management of witness evidence to understand how PD57AC came into being. Although other secondary sources were used in highlighting these drawbacks in the current study, the Working Group report was the primary source of this information. The drawbacks in the management of witness statement evidence as identified in this study include: (1) Challenges on the preparation of witness statements. The study found out that a preparation of witness statements requires many documents, iterations, and legal arguments thereby distorting a witness's recollection of events. (2) Time Limitations on evidential cross examination. The study identified that the witness statements in pre-PD57AC practice directions wasted more time through sporadic cross-examination denying witnesses sufficient time to testify. Additionally, the study noted that the witness statements promoted leading questions thereby denying the courts best evidence from the lawyers (3) Unnecessary jargons and Legal arguments in the witness statements. Lawyers preparing witness statements used this opportunity to introduce legal jargons leading to 'over-lawyering' of the statements, thereby waste more court's time. The study referenced Alex Lawrie v Morgan case law to illustrate how jargons in the previous PD wasted the courts time and costs of litigation. (4) A blatant misuse of expert opinion in the witness statements. A legal niche in PD32 allowed litigants to misuse a use of expert opinion in the evidence. From the study, it was found that all

these drawbacks triggered a series of judicial questions from lawyers and judges over the ability of the previous practice directions in bolstering best evidence for BPC courts in England and Wales. It was the subsequent findings on these drawbacks that called for a Working Group Report recommendation towards an enactment of PD57AC, which came into force in 6th April, 2021. Upon a critical analysis of PD57AC's performance in the management of witness statement evidence, it was found to have somewhat performed well, yet there are still challenges to be addressed. The study identified that the first application of PD57AC was on the wording of witness statements. Although some sections of PD57AC such as par. 3.3 & 3.7 (2) guide the courts and litigants on the required wording of statements to prevent a distortion of evidence and to offer an accurate recollection of events, there is a need to standardize parameters used by courts to identify 'similar words' that could waste the courts time. In particular, the study recommends amendments on par 3.3 stating specific circumstances under which the wordage of statements may lead to a dismissal of evidential objections to save on time and costs of trials from cross-examination. A witnesses' reference to other documents was the second application of PD57AC. It was found in the current study that par 3.4(1) fosters a use of documents that are only relevant to the case, deterring lawyers from using unnecessary jargons and legal arguments that would waste the courts' time. However, it was observed that the 'relevance' on documents under par 3.4(1) should be amended thereby introducing specific parameters of 'relevance'. This will lower the court's discretion on determining what documents and content is relevant to the case thereby saving more time and costs on a trial. Second, was on the requirements of a 'document list' provision where the study identified that although par 3.5 requires a listing of all documents used in the preparation of witness statement, there was a legal niche over the contemporaneous list that may be needed in trial. It is for this reason that the study ascertained a need for amendment on par 3.5 to specify and standardize the full list requirements, lowering time wastage as litigants seek to prepare more documents under objectionable court orders. The third application of PD57AC was on the application for objections on witness statement evidence. A critical analysis found that par 5.1 indirectly pushes applicants for evidence objections to make applications in a timely manner so that such complaints are not protracted to trials as this would consume more trial time. However, the study noted that although par 5.1 enabled courts to save time, there were case law inconsistencies over the 'early-stage applications.' As such, it was recommended that par 5.1 should be amended and harmonized to include specific time frames that aggrieved parties should be obligated to apply for an objection. Finally, the options of the courts in determining objectionable applications under PD57AC were analyzed. It was found that although the courts provide higher opportunities for aggrieved parties to register for dissatisfaction with witness statements, there was a need to standardize specific issues that foster lead to a partial or a full struck out of objectionable applications under par 5.3. This study also found out that the PD57AC has provided a clear procedure for applications on objections by the litigating parties under paragraphs and 5.1. In particular, the study found out that the courts especially in the case Prime London were affirmative that applications should be made sufficiently to save the court's time in cross-examinations and trials. This was seen as a crucial step in solving the drawback of time and costs from the previous Practice Direction. However, the study noted that their inconsistencies on what might be 'deemed' as a timely application for the schedule of objections. It was the opinion of this study that this inconsistency induced higher discretion on judges which might lead to bias and prejudice thereby potentially fostering a miscarriage of justice to some litigants in the BPCs. For future research, this study notes that more studies should be conducted to determine how the current PD57AC should be upgraded to seal the legal niches and inconsistencies in the procedural management of witness statement evidence.

## References

- [1] Vorrasi, Kenneth M. "England's reform to alleviate the problems of civil process: a comparison of judicial case management in England and the United States." *J. Legis.* 30 (2003): 361.
- [2] Turnbull, Robert D., and Doug Jones AO. "Memorials and Witness Statements: The Need for Reform." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 88, no. 3 (2022).
- [3] Steele, Mark J. "Report of the witness evidence working group in the UK." *Bar News: The Journal of the NSW Bar Association* Winter2020 (2020): 16–18.
- [4] Macgregor, Lucilla, Charlotte Peacey, and Georgina Ridsdale. *Civil Litigation*. Oxford University Press, 2021.

- [5] Stowe, Hugh. "The uncertain ethical frontiers of expert witness preparation." *Precedent (Sydney, NSW)* 172 (2022): 16–23.
- [6] Durney, Peter M., and Julianne C. Fitzpatrick. "Retaining and disclosing expert witnesses: a global perspective." *Def. Counsel J.* 83 (2016): 17.
- [7] Justice. PRACTICE DIRECTION 57AC – TRIAL WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS. <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-57a-business-and-property-courts/practice-direction-57ac-trial-witness-statements-in-the-business-and-property-courts>
- [8] Haughney, Georgia. "Witness statement rules." *Solic. J.* 164 (2021): 56.
- [9] Lampert, Michael A. "Is It Time to Modernize Witness Statements in Arbitration?" *Alternatives to the High Cost of Litigation* 39, no. 7 (2021): 109–111.
- [10] Mattison, Michelle, and Penny Cooper. "Witness statements for employment tribunals in England and Wales: what are the 'Issues'?" *The International Journal of Evidence & Proof* 25, no. 4 (2021): 286–306.
- [11] Leitch, A. Practice Direction 57AC: Combatting 'Over-Lawyered' Witness Statements (2022).
- [12] *Frenkel v Lyampert & Ors* — [2017] EWHC 2223 (Ch).
- [13] Justice. PRACTICE DIRECTION 18 – FURTHER INFORMATION. [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part18/pd\\_part18](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part18/pd_part18)
- [14] Giret, J. Truth Matters – Enhanced Measures for the Taking and making of Witness Statements for use at Trial.
- [15] Heley, Susanna. "A Heavier Burden: Certificates of Compliance." *Solic. J.* 164 (2021): 62.
- [16] *Alex Lawrie Factors Ltd v Morgan* [2001] C.P. Rep. 2, CA.
- [17] Tapper, Colin. *Cross & Tapper on evidence*. Oxford University Press, USA, 2010.
- [18] *Rock Ltd v RCO (Holdings) Ltd* [2004] 1 BCLC 439 CA.
- [19] *New Media Distribution Co SEZC Ltd v Kagalovsky* [2018] EWHC 2742 (Ch).
- [20] Browne, Kevin. *Civil Litigation 2021/2022*. College of Law Publishing, 2021.
- [21] PRACTICE DIRECTION 32. [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd\\_part32](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32)
- [22] See Section 3 of the Appendix. <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-57a-business-and-property-courts/practice-direction-57ac-trial-witness-statements-in-the-business-and-property-courts>
- [23] *Blue Manchester Ltd v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC) at [25].
- [24] Deveboise & Plimpton. Trial Witness Statements under CPR Practice Direction 57AC—Where Are We Now? (2022).
- [25] *MAD Atelier International BV v Axel Manes* [2021] EWHC 1899 (Comm) at [10].
- [26] *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC).
- [27] *Primavera Associates Ltd v Hertsmere Borough Council* [2022] EWHC 1240 (Ch) [61] and [62].
- [28] *Curtiss & Ors v Zurich Insurance Plc* — [2022] EWHC 1749.
- [29] *James Haskell* [2022] EWHC 438 (IPEC).
- [30] *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd* [2022] EWHC 79 (Ch).
- [31] *Greencastle MM LLP v Payne & Ors* — [2022] EWHC 438.