

The logo consists of the letters 'M', 'F', and 'B' in a white, bold, sans-serif font, centered on a dark blue square background.

A short summary of recent guidance on witness evidence in maritime-related proceedings in England: “stick to the point” and other useful tips

Speed Read

Practice Direction 57AC of the English Civil Procedure Rules (the “PD”) now applies to Admiralty (maritime) claims. Parties must produce limited witness statements that focus on the factual issues in dispute. Statements must be in a witness’s own words and witnesses must state how well they recall the matters they are describing and to what extent they have relied on, or have been influenced by, documents. Parties are required to certify that the PD has been complied with and failure to do so invites a range of possible penalties being imposed by the court.

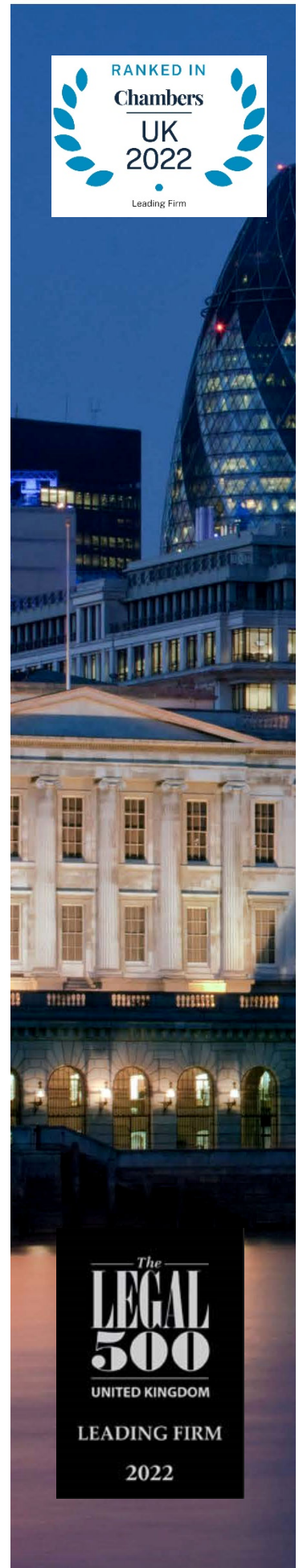
There has been some consideration of the PD by the courts since it came into force but none in a maritime context. Recent cases suggest that: (i) the courts are likely to be slow to impose penalties where statements have been prepared in the spirit of the PD; and (ii) the PD does not change the law on the admissibility of evidence (for example, witness evidence as to hypothetical situations may be admissible if it is factual evidence, as may opinion evidence given by those with knowledge of the facts if it is based on the factual evidence that they are giving).

The above said, for cases in the Admiralty Court, the Admiralty Judge, Mr Justice Andrew Baker, has issued guidance in the form of a Practice Note recognising that allowances may need to be made where first-hand accounts are collected at the time of, or immediately after, a maritime casualty or incident where there may have been language or other difficulties, stressful conditions and/or significant time pressure.

What the PD says

The PD came into force on 6 April 2021 in response to a growing concern that trial witness statements were becoming over-long and over-lawyered. It has applied to maritime claims since 1 October 2021.

It was previously common to have a witness “tell the story” of what took place, for the benefit of the judge. This is no longer the case. The PD limits witness statements to evidence on: (i) matters that need to be proved in relation to one or more of the issues of fact to be decided at trial; and (ii) matters about which the witness would be asked to give (and allowed to give) evidence, if they were called to give oral evidence at trial.



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There are three other important requirements in the PD:-

1. witnesses must identify what documents (if any) they have referred to (or been referred to) for the purpose of providing the evidence set out in their statement; the intention is to let the court know “up front” what testimony has been (or may have been) stimulated or influenced by documents;
2. witness statements must be in the witness’s own words and in any language in which they are sufficiently fluent to give oral evidence at trial (whether or not that is their first language); and
3. all witness statements must be verified by a statement of truth and a Certificate of Compliance must be included in the statement confirming that it has been prepared in accordance with the PD. Importantly, the statement of truth requires the witness to confirm that: (i) they understand that the purpose of their witness statement is to set out matters of fact of which they have personal knowledge; (ii) it is not their function to argue the case (either generally or on particular points) or to take the court through documents in the case; (iii) their statement sets out their personal knowledge and recollection in their own words; (iv) they have stated honestly how well they recall matters and whether their memory has been refreshed by considering documents (and if so, how and when); and (v) they have not been asked or encouraged by anyone to include anything that is not their own account of the events witnessed or the matters of which they have personal knowledge.

Failure to comply with the PD leads to a range of possible penalties, including an order that the statement be re-drafted so that is compliant, an adverse costs order against the non-complying party or strike-out of all or part of any non-compliant statements.

Guidance from the courts on the PD

Some useful guidance on the effect of the PD has been provided, albeit in non-maritime cases.

A recent decision in the Technology and Construction Court (*Blue Manchester Limited v (1) Bug-Alu Technic GmbH & (2) Simpsonhaugh Architects Limited*) saw the court order non-compliant sections of witness statements to be revised, which demonstrates that the courts are serious about imposing penalties where the PD has not been complied with. The court also provided a helpful summary of the new rules.

The courts have, however, not been rigid in their application of the PD. In *Mansion Place Ltd v Fox Industrial Services Ltd*, the Claimant applied for an order requiring the Defendant’s legal representative to re-draft the Certificate of Compliance in circumstances where it was common ground that the Defendant’s solicitor was aware of the PD when the witness statements were being prepared but admitted his lack of awareness regarding the listing and cross-referencing of documents. The court concluded that, despite the Defendant’s non-compliance, witness statements were prepared with the PD in mind and it therefore rejected the



application. The Claimant also applied for elements of the Defendant's witness statements to be struck out. The court made it clear that, in circumstances where one party is concerned that another party has not complied with the PD, the sensible course of action is to raise the 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 in a way that does not cause disruption and/or unnecessary costs. The judge's remarks suggest that, while brief references in witness statements to the underlying dispute may be permitted, more extensive references and/or comments on documents forming part of the narrative (rather than the matters that need to be proved by way of factual evidence) could be struck out.

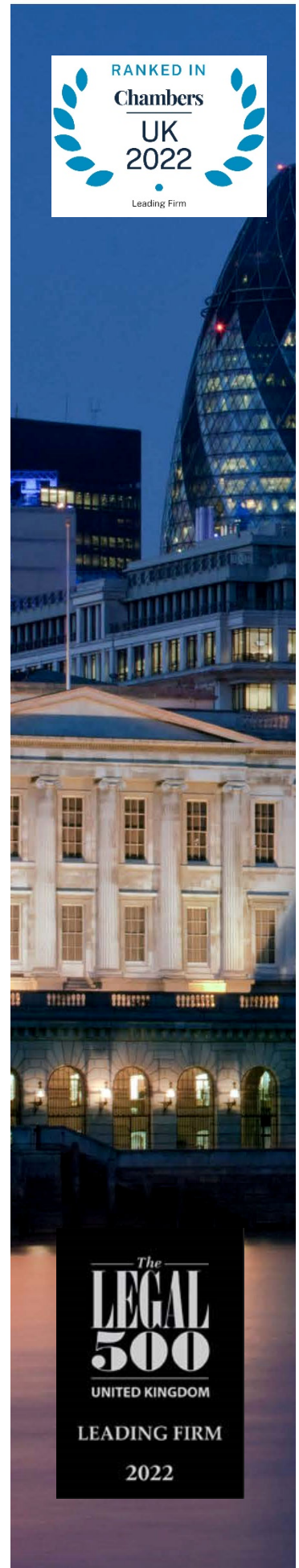
In another case, *MAD Atelier International BV v Mr Axel Manes*, the Defendant applied to strike out: (i) passages of witness statements served on behalf of the Claimant that, it was alleged, did not comply with the PD; and (ii) parts of an expert report that relied on that witness evidence. The Defendant based the application on the PD's requirements to: (a) ensure that witness statements only contain evidence as to matters of fact that need to be proved at trial in relation to one or more of the issues of fact to be decided at trial; and (b) not include commentary on other evidence in the case (either documents or the evidence of other witnesses). The judge found that the PD did not alter the law regarding the admissibility of evidence. In addition to matters of fact, witnesses may include any evidence that they would be allowed to give if they were called to give oral evidence at trial. The Court also found that references in witness statements to documents do not necessarily amount to "commentary" because the PD requires identification of documents to which the witness has been referred for the purpose of giving their statement (and the judge reinforced the point that the penalties are in any event, discretionary).

Guidance from the Admiralty Judge on evidence collection following a maritime casualty or incident

In a Practice Note on the applicability of the PD to Admiralty proceedings, the Admiralty Judge addressed a request for clarification from the Admiralty Court Users Committee regarding applying the PD to certain witness evidence, including first-hand accounts collected at the time of or immediately after a maritime casualty or incident taken from the ship's crew where there may have been language or other difficulties, stressful conditions and/or significant time pressure. The Admiralty Judge stated that Admiralty Court litigants and their advisers could proceed on the basis that the Court is familiar with the realities of collecting evidence concerning a maritime casualty or incident and suggested that such evidence will be apt for dispensation under paragraph 4.2 or 4.4 of the PD (which allow parties to apply to vary or depart from the PD's strict requirements) to allow it to be used at trial.

How will this affect you?

In casualty situations/maritime incidents where litigation in the Admiralty Court is a possibility, parties are advised:-



1. where there may be a need for them in proceedings, to take witness statements as soon as possible in order to minimise over-reliance on documents;
2. if English proceedings are anticipated, have witness statements taken by someone who understands the requirements of the PD; and
3. alert potential witnesses on what the courts require from them, including: (i) that statements must be in their own words; (ii) that it is not their function to argue the case (even if there may be pressure on them to do so); and (iii) stress the emphasis that will be placed on first-hand recollection over supporting documents.

This is especially important in circumstances where, as recent case law has shown, failure to comply with the PD could be far-reaching; for example, if experts rely on witness statements of fact that are subsequently challenged.

While the Admiralty Judge has indicated that the Court may show leniency when it comes to statements taken just after a maritime casualty or incident, it is unlikely that this will extend to evidence obtained “after the dust has settled”, especially in circumstances where recent cases suggest that the Courts will adopt a harder line going forwards as they encourage parties to try and resolve disputes regarding compliance with the PD themselves, rather than taking up Court time.

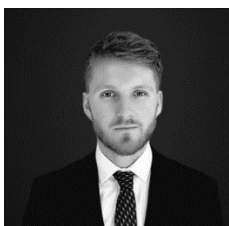
It may also be prudent for parties to adopt the principles set out in the PD when preparing witness statements in arbitration proceedings because, although these have not, as yet, been translated into any institutional rules, where the courts go, arbitral tribunals tend to follow. This will also ensure that witness statements prepared for arbitration can be used in subsequent court proceedings (e.g. if an arbitration award is challenged).

If you have any questions in relation to the issues covered above, please contact the authors, Kevin Cooper (kcooper@m-f-b.co.uk) and Oliver McGaw (omcgaw@m-f-b.co.uk) or your usual contact at MFB.



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