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Practice Direction does not make perfect: the impact of the recent civil witness statement rules on parallel proceedings

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Alexandra Webster at Simmons & Simmons in London and Kathryn Arnot-Drummond from Cloth Fair Chambers examine the impact that significant changes to the rules on the content and preparation of civil witness statements may have on cases involving parallel criminal proceedings, including the challenges and opportunities differing standards in each forum may create for the defence.

The recent Practice Direction 57AC to the Civil Procedure Rules (PD57AC) and its accompanying statement of best practice has significantly changed the way in which witness statements in civil cases are prepared, requiring shorter,

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concise statements written in the witness's own words, limited to matters about which they have personal knowledge and with sparing references to documents or commentary on the evidence of others. These changes, which were proposed by a witness evidence working group set up in 2018, address the previously widespread practice in commercial court cases where lawyers produced lengthy, factual witness statements containing background narrative, comment and extensive document references. These witness statements were usually produced following multiple drafts and with significant input from legal advisers in an approach that, although not expressly provided for within the procedural rules, was generally accepted in the belief that ventilating disputed issues in detail before trial could assist in the early resolution of cases.

Lay witness evidence in criminal proceedings, given by oral examination in chief and in cross-examination, is generally limited to matters of fact rather than narrative, comment or opinion. It would therefore seem at first blush that the contents of civil witness statements will now be more closely aligned with evidence adduced in criminal trials, potentially conferring an advantage on parties to parallel civil and criminal proceedings by reducing the scope for conflict, tension and inconsistency in the accounts given by a witness in each different forum, as well as any risk of prejudice to the criminal case caused by the contamination or corruption of a witness's account through the civil evidence preparation process. However, a closer examination demonstrates that the Civil Procedure Rules now require greater transparency in the process of taking evidence than in criminal proceedings. As explained in this article, this shift in practice is likely to have a significant impact on long running, large-scale and complex parallel civil and criminal fraud cases – creating the potential for satellite disputes and added procedural complexity, cost and delay in civil proceedings, as well as new opportunities for challenge by the defence in a related criminal case. There may even be some cause for optimism for the co-operating corporate.

The importance of unvarnished recollections

Prior to PD57AC, parties to civil proceedings and their lawyers enjoyed a certain amount of freedom in their interactions with witnesses. Provided that no actions taken by the lawyer could amount to improper coaching or pressuring, the content of statements and the manner in which they were prepared appeared to be a matter of professional judgement. However, as is apparent from the working group findings, in recent years commercial court judges have come to the view that long, narrative civil witness statements are "often ineffective in performing their core function of achieving best evidence at proportionate cost". More than that, they have recognised that the practices

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adopted in preparing such statements "may corrupt memory and render the final product less reliable than the first "unvarnished" recollection". The group expressly noted that the process of compiling evidence through numerous drafts and iterations was in stark contrast to the practices adopted in criminal proceedings where "best evidence is often obtained by a traditional examination-in-chief, when witnesses are giving their evidence in their own words and give a more genuine version of their recollection".

To recover and preserve the witness's "unvarnished recollection", as well as impose the limitations on the scope and content of a civil witness statement as described above, PD57AC prescribes the process which must be adopted in producing it. The statement must be prepared using as few drafts as practicable and be closely based on records of discussions with the witness. Clarification or elaboration on specific points may be obtained during the drafting process by the use of non-leading questions only. In addition, all documents shown for the purposes of refreshing the witness's memory, including privileged documents identified by general description, must be included in a list to be shared with the other side when the statement is filed. Such documents may be shown "…only if the witness created or saw the document while the facts evidenced by or referred to in the document were still fresh in their mind…". Both the witness and the lawyer responsible for obtaining the evidence must certify their compliance with these requirements and the witness must also identify within the statement how well they recall important disputed matters and if their recollection has been refreshed by reference to particular documents.

Procedural disparity in criminal proceedings

Evidence in criminal investigations is obtained by prosecuting authorities following an evolving process. As the investigation (and in particular, a complex fraud investigation) develops, a prosecution witness may be asked or compelled to attend numerous and lengthy interviews, taking place at intervals over an extensive period of time. During these interviews, it may be necessary for the investigator to assist a witness to refresh their memory of the underlying facts or contemporaneous documentation to pursue lines of inquiry. The investigator may also repeat the key aspects of the prosecution case theory and ask sometimes leading questions. The witness evidence is recorded ultimately in a written statement, which amounts to a distillation of the content of the interviews. As a result, at this stage the statement will often resemble a pre-PD57AC civil witness statement. However, unless specifically agreed, the statement does not stand as evidence in chief – the approach in criminal proceedings, as reflected by the working group, is to achieve best evidence at trial by hearing the witness's account in their own words. It should

be noted however, that the witness is permitted pursuant to section 139 of the Criminal Justice Act 2003 to use their statement to refresh their memory when giving evidence, and in complex fraud cases may do so extensively, reading out sections if permitted. Where the statement is to be introduced at trial without the witness being present - so simply read to a jury or magistrate – the other party may object to the inclusion of narrative, comment and opinion and this may be excised prior to the statement being adduced.

Importantly there is no obligation on the witness in criminal proceedings to provide an account in their statement of how their memory has been refreshed or how well they recalled events prior to producing it. The witness will sign a declaration that the content of the statement is true to the best of their knowledge and belief and, while the criminal disclosure regime may provide a level of transparency for the process by which the evidence was taken, this falls short of what is now expected by the civil court. Similarly, a defence lawyer taking a statement from a witness of fact will not be operating under such onerous requirements as those of PD57AC.

A maelstrom of challenges on the civil side

A preceding criminal investigation can create real difficulty for a witness seeking to comply with PD57AC. As noted, criminal investigation and defence preparation may take place over a number of years, meaning that some witnesses yet to appear in any court will have been shown significant quantities of documents, including material that may not be subject to disclosure in the civil case, and may have prepared draft statements and proofs of evidence. It is unclear whether the witness will be expected to identify this material as part of their statement in the civil proceedings. Such material can, on the face of it, justifiably be excluded from the accompanying list of documents as not having been "referred to for the purpose of providing the evidence", but the witness may nonetheless be expected to make clear within the statement the areas where such documents have refreshed their memory of important disputed issues. At the very least an acknowledgment that the witness has seen such material would be prudent in the interests of transparency before the civil court. This may result in the witness evidence being challenged or undermined on the basis that it has been compromised by the criminal investigation. It may also lead to allegations of breaches of the rules against collateral use – a particular hazard in parallel proceedings where multiple pools of documents related to the same matters are in play. One further challenge for the witness who wishes, or is expected, to identify material it has previously seen within a civil statement or accompanying list of documents is that there is no corresponding obligation in criminal proceedings for a prosecutor, defendant or witness to maintain a list of all documents shown in interviews or as part of

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defence preparation. Even where this material can be identified, a witness in an ongoing criminal investigation may not be free to share details of it without the civil parties, the prosecution and the court first agreeing to the imposition of potentially complex procedural safeguards to ensure the information does not become public through the civil process and risk prejudicing a future criminal trial.

Collateral benefits for parallel criminal proceedings

In contrast to the challenges for civil proceedings, compliance by a witness with PD57AC may create opportunities for parties to parallel criminal proceedings. Counsel for the corporate or individual defendant may wish to consider witness statements filed in related civil proceedings to identify inconsistencies or ambiguities with evidence in the criminal case. However, to do so, permission to make a collateral use of the statement would need to be sought from the civil court. Given that a considerable amount of content within the old-style civil witness statements was inadmissible in a criminal court, the effort and resource required in making these applications was disproportionate to their value. However, the introduction of PD57AC will necessarily give rise to an increase in civil witness statements which contain the witness's actual words including, potentially, looser language and less well mitigated admissions. Even if the account itself does not proffer a gem for the defence, it will set out exactly how much the witness recalled prior to any memory-refreshing exercise and the extent to which it may be argued that any contamination or corruption of evidence has occurred as a result. In many Serious Fraud Office (SFO) trials, memory (or its lack) is a key feature for the defence as the underlying conduct will undoubtedly have taken place many years previously. It therefore seems likely that the balance will tip in favour of an increase in the numbers of collateral use applications made in civil proceedings by criminal defendants, particularly those involved in complex fraud cases.

In addition, there may be some cause for optimism for the co-operating corporate who is called upon to engage with the SFO but must in tandem provide the transparency expected of a party in the civil courts. In some historic cases a significant challenge has been posed by the SFO's reluctance to allow co-operating corporates to interview civil witnesses during the course of its criminal investigation, or, where interviews are permitted, its requirement that they "refrain from tainting a potential witness's recollection, for example, by sharing or inviting comment on another person's account or showing the witness documents that they have not previously seen". The SFO's stance is informed by its desire to avoid prejudice to its investigation as well as the real significance it attaches to the availability and integrity of first witness accounts. Thus, the issues to be confronted by the corporate will inevitably vary according

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to the sequencing and timing of events in each of the related proceedings. However, the new rigour and transparency required in civil proceedings ought in many cases to provide a basis for the co-operating corporate to argue that the SFO should allow witness interviews and evidence preparation to proceed, enabling it to obtain the information it needs fully to defend its civil case and mitigating a considerable source of past tension where related criminal investigations proceed in parallel.

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