



Neutral Citation Number: [2022] EWHC 1240 (Ch)

Case No: BL-2019-002244

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 25 May 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

PRIMAVERA ASSOCIATES LIMITED **Claimant**
- and -
HERTSMERE BOROUGH COUNCIL **Defendant**

John Campbell (instructed by **New Media Law LLP**) for the **Claimant**
Michael Walsh (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 18 May 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:15 am on Wednesday 25 May 2022.

HHJ Paul Matthews :

Introduction

1. On 18 May 2022, I heard the pre-trial review in this claim, listed for trial for six days (including pre-reading) beginning 11 July 2022. It is a claim by a property developer against a local planning authority, alleging that the defendant was negligent in the planning process for certain development land the claimant owned, causing the claimant loss and damage valued at just under £1.7 million. Apart from one or two non-contentious matters, the only matter before me on the pre-trial review was an application by the defendant to strike out the witness statement for trial made on behalf of the claimant. This is my judgment on that application.

Procedure

2. The claim form in this claim was issued on 3 December 2019. The defence is dated 3 April 2020 although it appears to have been filed somewhat later than that. There is also a reply, which is undated. On 24 May 2021 Deputy Master Linwood held a costs and case management conference, giving directions to trial. These directions included the exchange of witness statements for trial by 17 September 2021 and trial in a five-day window from 11 July 2022. The exchange of witness statements was extended by agreement between the parties to 15 October 2021. In the event, however, the defendant's solicitors informed the claimant's solicitors that no witness statements would be filed on behalf of the defendant, since they had no witnesses who could make statements complying with CPR Practice Direction 57AC.
3. In the light of that statement, the claimant's solicitors sought a further extension of time to consider their position, but this was refused. The claimant therefore applied by notice to extend time to serve witness statements. This application was heard by Master Kaye on 3 November 2021, when time was extended to 5 November 2021. On that day a single witness statement on behalf of the claimant, by Andrew Down, was served. However, this witness statement was considered by the defendant to be "wholly non-compliant with" Practice Direction 57AC. Amongst other things, it did not contain the certificate of the witness required by paragraph 4.1 of the practice direction, nor the certificate of the claimant solicitor required by paragraph 4.3 of the practice direction.
4. The defendant's solicitors wrote to the claimant's solicitors on 22 November 2021 to make a number of critical comments about the substance of the witness statement. No response was sent to this or to chasing letters in December 2021 and January 2022. In February 2022 defendant solicitors wrote again, making clear that if no satisfactory response were received, the defendant would issue an application. No substantive response was received.
5. On 9 March 2022 the defendant applied by notice for an order requiring the witness statement by Mr Downes to be redrafted in compliance with the practice direction, or alternatively be struck out. This was supported by the second witness statement of Charles Mahoney, a solicitor acting for the defendant,

dated the same day. Apart from the problem with the certification, this witness statement said, in part:

“22. The Defendant's position is that much of Mr Down's statement seeks to either take the court through documents or derive a narrative from the documents (contrary to paragraph 3.6 (3) of the appendix to PD57AC), sets out matters which are unlikely to be within the personal knowledge of Mr Down (contrary to paragraph 2.3 of the Appendix to PD57AC), and seeks to argue the Claimant's case (contrary to para 3.6 (2) of the appendix to PD57AC).”

6. The application came before Mr James Pickering QC, sitting as a deputy High Court judge, on 29 April 2022, when both sides were represented by counsel. It is not entirely clear to me how much of a reasoned judgment the judge gave on that occasion, but there can be no doubt that he made an order, in the following terms:

“1. The Claimant shall re-draft the witness statement of Andrew Down so that it complies with Practice Direction 57AC by 4.00pm on 13 May 2022. If the Claimant fails to file and serve a re-drafted statement by that date the witness statement of Andrew Down shall stand struck out and the Claimant may not rely on any further evidence of fact in these proceedings without the permission of the Court.”

He also ordered the claimant to pay 75% of the defendant's costs of that application.

This application

7. The revised witness statement of Mr Down, dated 13 May 2022, was filed and served on that day. That was a Friday. On the following business day, Monday, 16 May 2022, the defendant issued a further application by notice for an order to strike out that statement, on the basis that the statement did not comply with Practice Direction 57AC. It was that application that came before me at the pre-trial review and in respect of which I am now giving judgment. The application is supported by the evidence contained in box 10 of the notice, rather than by a separate witness statement.

8. That evidence includes the following:

“8. The Amended Statement still does not comply with the Practice Direction. The Claimant refers to paragraph 22 of the Second Witness Statement of Charles Mahoney (para 22 of page 80 of the Bundle) which set out the reasons why the original statement did not comply with the Practice Direction. Those reasons remain applicable to the Amended Statement.

9. In particular:

- a. It remains the case that the Amended Statement seeks to take the court through documents or derive a narrative from the documents (e.g. paras 19, 26, 32, 34, 36, 44, 47, 61, 63, 66);
- b. The Amended Statement continues to argue the Claimant's case (e.g. 53, 67, 70);
- c. The Amended Statement fails to set out how well Mr Down recalls matters and whether his memory has been refreshed by considering documents, and if so how and when, contrary to the declaration contained in the Amended Statement (throughout)."

The form of written evidence in civil proceedings

9. The CPR (like the RSC before them) have always contained rules controlling the form in which written evidence is given to the court: see CPR Part 32, and especially rules 32.1, 32.4 and 32.8. In *JD Wetherspoon Plc v Harris* [2013] EWHC 1088 (Ch), Sir Terence Etherton C set out the general principles applicable to factual witness statements at [38]-[41]. In *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC), [25], O'Farrell J summarised these as follows:

"i) they should contain evidence that the maker would be allowed to give orally as provided in CPR 32.4;

ii) they should cover those issues, but only those issues, on which the party serving the witness statement wished the witness to give evidence in-chief;

iii) they should not provide a commentary on the documents in the trial bundle, nor set out quotations from such documents, nor engage in matters of argument;

iv) they should not deal with other matters merely because they may arise in the course of the trial;

v) they should not include opinion evidence, save where it is necessary as part of the witness's account of admissible factual evidence in order to provide a full and coherent explanation and account; but

vi) the rules as to witness statements and their contents are not rigid statutes and it is conceivable that in particular circumstances they may properly be relaxed in order to achieve the overriding objective of dealing with cases justly."

Practice Direction 57AC

10. However, the new practice direction takes matters further. In *Mansion Place*, O'Farrell J described the genesis of the new practice direction in these terms:

"21. In March 2018 the Witness Evidence Working Group was formed to address concerns on the part of the judiciary that factual witness statements were often ineffective in performing their core function of achieving best

evidence at proportionate cost in trials. Initially limited to the Commercial Court, it was extended to cover all trials in the Business and Property Courts, including the TCC. In December 2019 the BPC Board accepted the recommendations in the Working Group's final report and on 22 October 2020 the Working Group's implementation report was accepted. In January 2021 Practice Direction 57AC and Appendix (Statement of Best Practice) were published, applicable to all trial witness statements signed on or after 6 April 2021."

11. The main thrust of the new practice direction is contained in paragraphs 3, 4 and 5. Paragraph 3 deals with the contents and style of witness statements, paragraph 4 with the certificates of compliance required both from the witness and from the parties' legal representative (if there is one), and paragraph 5 with sanctions for failure to comply. Paragraph 3 also refers to an appendix to the practice direction, containing a Statement of Best Practice. Paragraph 2 of this statement sets out certain principles, and paragraph 3 contains valuable statements of practice to follow and not to follow. I will not set out the terms of the practice direction verbatim, because they are widely available, but I will summarise the important points as follows.
12. Paragraph 3.1 of the practice direction restricts the contents of the witness statement to matters of fact that need to be proved, and evidence as to those matters which the witness could give if giving oral evidence in chief. Paragraph 3.2 requires that the witness give evidence only of matters of fact of which he or she has personal knowledge that are relevant to the case, identifying by way of a list the documents to which the witness refers or has been referred. Paragraph 3.3 requires that the statement should comply with paragraphs 18 and 19 of CPR Practice Direction 32. This means that the statement must be drafted in the witness's own words and in his or her own language, expressed in the first person, giving the name, address, occupation, status of the witness and the process of the preparation of the statement. It also requires that the witness distinguish clearly between matters within his or her own knowledge and matters of information or belief. Paragraph 3.4 requires that the witness in preparing the witness statement should adhere to the Statement of Best Practice.
13. Paragraph 3.4 of the Statement of Best Practice enjoins the witness to refer to documents in the statement only where this is necessary. Examples of such necessity would be in order to prove or disprove the authenticity of the document, in order to explain how the witness understood a document, and to confirm that the witness did or did not see a particular document at a particular time. Paragraph 3.6 prohibits the witness from quoting at any length from any documents referred to, seeking to argue the case, taking the court through the documents or setting out a narrative derived from those documents, and including commentary on other evidence in the case. Paragraph 3.7 requires that, in relation to important and disputed matters of fact, the witness should, if practicable, state how well the matters of which evidence is given have been recalled, and also state whether and if so how the witness's recollection has been refreshed.

Caselaw

14. There have been a number of judicial decisions which have considered the terms of Practice Direction 57AC in detail. I have already mentioned the decision of O’Farrell J, in *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC). In her judgment she helpfully summarises the purpose of the new practice direction and makes recommendations to practitioners as to how not to fall foul of it:

“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 at [9]; rather it is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument. The Practice Direction explains that the purpose of trial witness statements is to further the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial. The Statement of Best Practice sets out the rules that should be followed to produce compliant statements.

38. Anyone involved in producing a witness statement for a trial in the BPC is urged to read PD 57AC and follow the Statement of Best Practice. It should be used as a checklist by parties and their legal representatives to ensure that they do not unwittingly offend against the rules that restrict the use of trial witness statements for their proper purpose, that is, providing in writing the evidence that the witness would give as oral evidence in chief. The stipulation that witnesses must confirm their understanding and compliance with the rules in their statements, and specification of the form of certificate of compliance to be completed by the parties’ legal representatives, serve an important function in demonstrating compliance with the restated practice, supported by the court’s power to impose sanctions in the event of failure.”

15. The judge also went on to set out what should happen when one party had concerns that another had not complied:

“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.”

16. Later in her judgment, the judge referred to the requirement for the witness to list documents:

“59. ... The requirement in paragraph 3.2 of PD 57AC is that the witness statement 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.’ This does not require the witness statement to list every document which the witness has looked at during the proceedings. The purpose of the rule is to provide transparency in respect of documents used to refresh the memory of the witness so that the court and the other side can understand the extent to which, if at all, the witness might have been influenced by the contemporaneous documents, including those not seen at the time. ... ” (Emphasis in original)

17. The decision of O’Farrell J was referred to and followed in the subsequent decision of HHJ Stephen Davies, sitting as a High Court judge, in *Blue Manchester Ltd v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC). In that decision the judge made a number of helpful comments on aspects of the operation of the practice direction. In relation to the direction to state the degree of recall and refreshment of memory, he said this:

“40. As to compliance with SBP par. 3.7, I accept that the obligation to state how well the witness recalls the matters addressed and providing details of documents used to refresh memory is only in relation to important disputed matters of fact and is qualified by the words ‘if practicable’. However, in my view a witness cannot glibly assert that it is not practicable to comply so as to justify wholesale departure from this important requirement. If there is apparent non-compliance the witness would have to justify why it is not practicable to do so. ... ”

18. As to what was an “important” point for this purpose, he said:

“41. ... I am unable to accept the argument that compliance with this requirement means that it is solely for the witness herself to decide whether or not a point is important. It is understandable that a witness can and should only be asked to certify compliance in relation to points which she thinks important. However, that does not mean that the court cannot intervene where it is plain that in fact there has not been compliance in relation to a point which is, on any objective analysis, important. ... ”

19. On the process which was required when a challenge was made to a witness statement on the grounds of non-compliance with the practice direction, the judge said this:

“43. ... I remind myself that the process needs to be speedy and cost-effective, and that judges should resist becoming embroiled in the minutiae of these complaints save where unavoidable.”

He also said that:

“44. ... striking out the witness statements ... is a very significant sanction which should be saved for the most serious cases.”

I note that the judge’s decision involved making amendments to some 15 of the 38 paragraphs of the witness statement of one of the witnesses in that case.

20. Lastly there is the decision of Nicholas Thompsell, sitting as a deputy High Court judge, in *Prime London Holdings Ltd v Thurloe Lodge Ltd* [2022] EWHC

79 (Ch). There the judge referred to the decisions in both the *Mansion Place* and the *Blue Manchester* cases, to which I have referred. He said that they set out “the approach to be taken by the court and by the parties in a case where the Practice Direction has not been followed”. For what it may be worth, I respectfully agree. I note in passing that the judge’s ultimate decision required the deletion (or at least the amendment) of some 12 out of the at least 45 paragraphs of the witness statement in question.

The defendant’s complaint

21. For the purposes of the present application, the complaint made by the defendant about the revised witness statement of Mr Downs is put, in paragraph 8 of the evidence in box 10 of the notice, in general terms, that is, that the witness statement still does not comply with the practice direction. Some particularity is given by reference to paragraph 22 of the second witness statement of Mr Mahoney, but even that is still put in a general way, as (i) taking the court through documents or deriving a narrative from them, (ii) setting out matters which are unlikely to be within the witness’s personal knowledge, and (iii) seeking to argue the claimant’s case. However, in paragraph 9 of the evidence in box 10, greater detail is given, by assigning criticisms to particular numbered paragraphs of Mr Downs’ witness statement. During the oral argument Mr Walsh for the defendant put a little more flesh on the bones.
22. Mr Campbell, on behalf of the claimant, reminded me of the advice of O’Farrell J in *Mansion Place*, and of HHJ Stephen Davies in *Blue Manchester*, that where there are disagreements about the application of the practice direction, the parties must engage with each other before coming to court. It was not supposed to be a source of trench warfare. I entirely agree about the desirability of the parties engaging with each other, and not embarking upon any kind of warfare, whether in trenches or otherwise. But it does appear to me that in the present case there have been considerable attempts to resolve the problems through correspondence, which have not borne fruit. It is therefore not surprising that the complaining party, the defendant, should ultimately have made an application to the court for the witness statement to be redrafted, and subsequently, when the redraft was still complained of, to issue a further application, especially considering the limited amount of time remaining before trial.

The parties’ submissions

23. The defendant’s present application is to strike out the whole of the witness statement, on the basis (as stated in the application notice) that as a whole it “fails to comply with the spirit and the letter” of Practice Direction 57AC. The specific paragraphs of Mr Down’s witness statement referred to in paragraph 9 of box 10 of the notice are stated merely to be *examples* of continued non-compliance. The claimant’s position is that it is for the defendant in making this application to allege and prove non-compliance with the practice direction, rather than for the claimant to respond to points that have not been made. The points that have been made relate to the specified paragraphs of the witness statement, rather than to the whole witness statement. I agree with the claimant about this. This is the defendant’s application, and the defendant must prove its

case. It has alleged deficiencies in specified paragraphs, and I will examine them. But merely calling the specified paragraphs “examples” does not somehow mean that the burden is thereby cast on the claimant in relation to the non-specified paragraphs. The burden is still on the defendant. Showing, for example, that one paragraph in a statement consists of argument does not prove that other paragraphs do as well.

24. Mr Campbell also made some more general points. First, he pointed out, by reference to the judgment of O’Farrell J in *Mansion Place* at [55], that general background information can be admissible in a witness statement. Secondly, he submitted that the requirement that a witness statement be expressed in the witness’s own words necessarily meant that the practice direction was being applied to statements which were not the product of the work of lawyers. Instead, the practice direction was to be applied to something produced by laymen. So the court should be cautious in its criticism.
25. In *Mad Atelier International BV v Manes* [2021] EWHC 1899, [9], Sir Michael Burton GBE, sitting as a High Court Judge, said that:

“the new Practice Direction does not change the law as to admissibility of evidence or overrule the directions given by the previous authorities, including in the Court of Appeal, as to what may be given in evidence.”

The problem that the Witness Evidence Working Group sought to address was that witness statements for trial were being overloaded with discussions of the documents that had been disclosed in the case, and sometimes of the law which was relevant, often constructing a kind of lengthy commentary or narrative, whether or not the witness concerned had been involved at all (or indeed any) points along the way. As O’Farrell J said in *Mansion Place*, [37], the practice direction’s purpose

“is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument”.

In my judgment, in construing the practice direction it is important to bear all this in mind.

26. I accept that relevant general background information known to a witness is admissible in a statement by that witness. I do not however accept Mr Campbell’s submission that the requirement that a witness statement be expressed in the witness’s own words necessarily means that the practice direction is being applied to statements which were not the product of the work of lawyers. The practice direction not only does not expressly or impliedly prohibit lawyers from drafting a witness statement, but paragraph 3.13 of the Statement of Best Practice (annexed to the practice direction) expressly states that legal representatives “may take primary responsibility for drafting” the statement. As Mr Walsh observed during argument, the lawyer may guide the witness. Nevertheless, if they do the drafting, they must prepare for it in an open way, *ie* by interview, and asking open and not leading questions (see paragraphs 3.10 to 3.12 of the Statement of Best Practice), and they must draft it using the language and, if practicable, the words of the witness: PD 32, paragraph 18(1).

27. The difference between language and words in this context is clear. The “language” of a witness refers to a language system, with its own grammar and vocabulary, such as English, French, Hindi or Swahili. The “words” of a witness refers to the kind of vocabulary and language constructions which the witness normally uses in speaking or writing his or her own language. To put it another way, it would be doubly wrong for a lawyer to draft a witness statement for a witness in a foreign language which he or she could not understand (or could not understand well enough), and moreover to draft it in a legal or formal style, including the use of technical legal expressions, which the witness would never employ.
28. In his reply submissions, Mr Walsh argued that the prohibition on “narrative” in a witness statement meant that the effect of the practice direction was to prevent a witness saying in his statement what he did or said if there was a document before the court which expressed what that witness did or said. Of course, if the statement was being made for a collateral purpose, for example to say that what was said at a meeting was different from what was in the document, that was acceptable, but it was not permitted to refer to it otherwise.
29. I do not accept this argument. At common law, the primary rule of evidence was that it was to be given orally under oath by a competent witness called before the court. This remains the primary rule for evidence given at civil trials: CPR rule 32.2(1)(a). So, at common law, with certain exceptions, a document had to be proved by such oral evidence before it could be received in evidence: *Permanent Trustee Company of New South Wales v Fels* [1918] A.C. 879, 885. Of course, modern reforms mean that most documents are nowadays admissible in evidence without the need for oral evidence to prove them. For example, documents in an agreed bundle for use at a hearing are under the modern rules generally admissible evidence of their contents: CPR PD 32, paragraph 27.1. But oral evidence is still admissible. And, as already noted, the contents of witness statements served for trial should contain the evidence which the witness could and would give orally in chief at trial.
30. As already stated, Practice Direction 57AC did not change the rules of admissibility of evidence. In my judgment, it was not intended to prevent a witness from giving evidence of his or her own experiences or what he or she had seen or heard, done or said, even where there was a document before the court which recorded the same thing. The practice direction’s prohibition on “narrative” was intended to prevent a lengthy discussion of relevant events by simply going through the documents in the bundle, one by one. In the *Mad Atelier* case, Sir Michael Burton GBE referred to “absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it”. But where a witness took part in a meeting, he or she can give first-hand evidence of what happened, and the fact that there is also a document (whether minutes of the meeting or otherwise) before the court which also states what happened is neither here nor there.

The paragraphs complained of

31. I turn therefore to a discussion of the particular paragraphs in Mr Down’s witness statement of which complaint is made. In each case, I set out the

paragraph concerned, and then I set out my decision. The text of the paragraphs is taken from a version of the statement provided by the defendant. The amendments in red in each paragraph indicate differences between the originally drafted witness statement of November 2021 and the present version of May 2022. I begin with paragraphs said by the defendant to take the court through the documents or to derive a narrative from them.

32. *Paragraph 19*

“19. I also refer to further During the course of this litigation, the Defendant disclosed documents that explain the chain of events from the perspective of HBC, ~~unknown to Primavera,~~ between the grant of planning at committee and issue of planning permission on 31 August 2012 following agreement of the S.106. ~~There~~ My knowledge of those events derives from the documentation disclosed and was not known to me prior to disclosure. Within disclosed documentation was also correspondence between Ashfords, the firm of solicitors acting on behalf of the next door neighbour at number 20, Dr Wayne Bickerton (‘Dr Bickerton’), to HBC confirming they would be applying for a judicial review. ~~Exhibit AD1-, pages 350-375.”~~

33. In this paragraph Mr Down gives evidence of what documents have been disclosed, and some of what they say. But he does not assert any personal knowledge of the events described in them. This is clearly a narrative derived from the documents, and offends the practice direction.

34. Obviously, in circumstances of this kind, the court has a choice of potential sanctions: see paragraph 5 of the practice direction. At one extreme, the court could strike the paragraph out. At the other it could leave it alone, *eg* because the breach was minor or isolated, and then with or without an adverse costs order. In between are the possibilities of ordering the paragraph to be redrafted, and withdrawing permission to the party to rely on it.

35. In my judgment, where (i) the claimant is professionally represented by solicitors and counsel, (ii) the lawyers have already redrafted the witness statement once for non-compliance with the practice direction, and (iii) they have opposed the present application on the basis that the statement is already compliant with the practice direction, it would be inappropriate to impose a lesser sanction than at least withdrawing permission to the claimant to rely on the offending words or paragraph. In my judgment, however, this is worse: the appropriate sanction here is to strike out the whole paragraph.

36. *Paragraph 26*

“23-26. We were not naive. Primavera used its commercial judgement about the risks. We were assured by HBC that they were correct and we relied upon that. Fusion agreed to exchange contracts despite the threat of a judicial review. Fusion, like us, were following the advice of HBC that they were right and any judicial review would be quashed. I ~~prefer~~ refer to Mark’s email dated 4 ~~December~~ October 2012 MK to Investors relating to the sale to Fusion and the email dated 5 October 2012 -from Fusion to me

regarding the exchange and the judicial review. **Exhibit AD1, pages 376-381 and 382**”.

37. The first two sentences explain the claimant’s thinking. The next two describe what Fusion (as the claimant’s agent) did, which no doubt the witness knew and can give evidence of. The last sentence merely refers to the emails concerned. This paragraph is not objectionable.

38. *Paragraph 32*

“~~29-32~~. In an email dated 28 March 2013, Mr Christoforou informed me that on 28 March 2013, Fusion met with HBC and agreed the way forward for resubmission of the planning. They obtained confirmation that the S.106 payment and affordable housing element would remain the same as already agreed and set in writing in any new application. Exhibit AD1, page 390-391.”

39. As to the first and second sentences, Mr Down’s knowledge on 28 March 2013 of any agreement on the way forward with the defendant does not appear to me to be relevant to the case, or need to be proved. The third sentence is simply a reference to emails. The whole paragraph is a narrative derived from the documents, and (for the reasons given under paragraph 19) should be struck out.

40. *Paragraph 34*

“~~31-34~~. ~~There~~Mr Christoforou and Mr Iain Taylor made us aware that there were then a number of discussions, principally between Fusion and HBC, examples of which are the emails from 11 April 2013 to 3 July 2013. Drawings were then submitted on 19 July 2013, with Highways being the main reason for the delay. Exhibit AD1-, pages 395430.”

41. As to the first sentence, Mr Down’s knowledge of the discussions between Fusion and HBC in this period does not seem relevant or need to be proved. The second sentence is simply narrative, with additional argument. The third sentence merely contains references. For the reasons previously given, the whole paragraph should be struck out.

42. *Paragraph 36*

“~~33-36~~. The followed a huge amount of procrastination and delay from HBC for several months. HBC gave no indication that the issues had moved on and there were further objections. I refer to emails passing between HBC, Fusion and Shandler Homes between August and October 2013. Exhibit AD1-, paged 437-440.”

43. The first sentence is simply argument, and must be struck out. The remainder is not objectionable. As to the second sentence, Mr Down can properly say that the defendant did not indicate any further objections in its emails, and the emails thereafter refer to further objections from Dr Bickerton, in September.

44. *Paragraph 44*

“41.44. ThereFrom Defendant’s disclosure it became apparent to me that there was a difference in public versus private pronouncements. The locum legal advisor stated HBC was correct in its position leading to the second planning permission i.e. Dr Bickerton was wrong in the second proposed judicial review letter of claim.”

45. This paragraph contains both comment and argument, and Mr Down’s knowledge of this at the time is not relevant. It does not therefore explain why Mr Down acted as he did then. For the reasons previously given, it should be struck out.

46. *Paragraph 47*

“44.47. The above can be seen from the communications between Councillor Harvey Weinberg and the locum solicitor about the opinion from Rupert Warren, saying they will lose but letting it go to Committee, but with emails to Primavera stating HBC were going to get their own evidence. The abovementioned emails were disclosed by the Defendant in the course of this litigation. Exhibit AD1, page 485 and 486-487.”

47. The first sentence is narrative, simply setting out what the communications say. There is no evidence of any personal experience by Mr Down. The second sentence simply gives their source. For the reasons previously given, the paragraph should be struck out.

48. *Paragraph 61*

“58.61. Representatives of the Claimant, Mr Christoforou and Mr Iain Taylor by e-mails, letters and phone calls tried to get HBC counsellors involved because there was no movement from the planning department. Exhibit AD1, pages 550-574 The replies were simply that they were too busy to deal with our requests.”

49. The first sentence is narrative, summarising what the communications say, and there is no evidence of any personal experience by Mr Down. The second sentence contains references. The third sentence suffers from the same defects as the first. For the reasons previously given, the whole paragraph should be struck out.

50. *Paragraph 63*

“60.63. Material weight attributable to the Draft 2014 Affordable Housing SPD was an introduction in January 2016 of an overage demand by HBC for affordable housing. The sum proposed of a 25% donation of the total properties on site was a separate affordable housing requirement. The £414,000 within the S.106 was “Additional Affordable Housing Contribution calculated following the BNPP Report and means 60% of the Surplus subject to a cap of the Maximum Sum”. The Maximum Sum was £414,276. I refer to the chain of communications between Primavera’s advisors and representatives, primarily Iain Taylor at Fusion with June Taylor, Senior Planning Officer at HBC, between November 2016-

February 2017, which demonstrate how agreement was reached. Exhibit AD1, pages 578-587.”

51. Mr Down does not say when or how he was told these things. There are no documents in the exhibit to his witness statement with the dates November 2016 to February 2017. Accordingly, on the face of it, this is not within his personal knowledge. It is therefore narrative derived from the documents themselves. For the reasons previously given, the whole paragraph must be struck out.

52. *Paragraph 66*

“63-66. There were then a further 6 months delay in getting to the committee from November 2015 to April 2016. All delays were due to HBC. This can be demonstrated by the emails between Primavera’s representatives and HBC. Exhibit AD1, pages 616-657.”

53. Mr Down can give the evidence set out in the first sentence. However the second and third sentences simply contain argument, and, for the reasons previously given, must be struck out.

54. The following complaints are about paragraphs said to argue the claimant’s case.

55. *Paragraph 53*

“50-53. It then took HBC an enormous and unjustifiable time to deal with the third planning application, for reasons I set out below. Primavera could do nothing to mitigate its loss. We were faced with a run down building, empty for 3 years, which had been squatted in, and which was worth far less than we paid for it. ~~Once one considers the economic and political turmoil and onset of Brexit, it~~ It took until October 2014 for HBC to be ready for a revised application to be submitted.”

56. The first sentence is both argument and narrative from the documents. The second and third sentences are not objectionable, save for the reference to value in the third sentence. This is a matter of opinion and therefore for expert evidence. No permission has been given for Mr Down to give expert evidence on this matter. As to the fourth sentence, Mr Down has no personal experience here, and it is a narrative derived from the documents. Accordingly, for the reasons previously given, the whole paragraph must be struck out, apart from the second sentence and the first 17 words of the third sentence.

57. *Paragraph 67*

“64-67. There was then another two months delay from planning permission when there was a wholesale failure by HBC to respond to numerous requests until June 2016. It then took another three months to finalise the S.106 documents.”

58. As to the first sentence, whilst it is acceptable to say that the claimant received no reply, because this is something of which the witness would probably be

aware, it is unacceptable to refer to this as amounting to “wholesale failure”. That is argument. Accordingly, the words “when there was a wholesale failure by HBC to respond to numerous requests” must be struck out. The second sentence is acceptable.

59. *Paragraph 70*

~~“67:70. Had~~It is my firm belief based on my previous experience, had HBC conducted themselves properly, reasonably and transparently, Primavera would not have found itself in an impossible position. Primavera re-entered negotiations with Fusion as they were the only option available and a deal was struck at the original price, but the overage had to be removed. Furthermore, as the project was financially unviable as it stood, Fusion insisted that for them to continue, they would need to secure an alternative planning permission for 2 extra units.”

60. The paragraph states several matters of fact, belief or hope within the personal experience of the witness, and is acceptable.

Recall and refreshment of memory

61. Finally, the defendant complains that the ‘Amended Statement fails to set out how well Mr Down recalls matters and whether his memory has been refreshed by considering documents, and if so how and when, contrary to the declaration ...’. The claimant in its turn complains that no sufficient details have been given, and the complaint is so vague as to be impossible to respond to. As I have already noted, although paragraph 3.7 of the Statement of Best Practice provides that the witness should, if practicable, state (i) how well the matters of which evidence is given have been recalled, and also (ii) whether and if so how the witness’s recollection has been refreshed, this applies only in relation to “important disputed matters of fact”. It does not apply generally. But not everything in Mr Down’s witness statement is disputed, and, of the things that are disputed, some are more important than others. Yet the defendant has not identified those matters to which the obligation may attach. I cannot assume that it attaches to everything.

62. On the other hand, so far as I can see, Mr Down has made no attempt at all to comply with this obligation. There is nowhere in the statement any mention of degree of recall or refreshment of memory. It is true that, at paragraph 19 of his statement, Mr Down says that his knowledge of

“the chain of events from the perspective of HBC between the grant of planning at committee and issue of planning permission on 31 August 2012 following agreement of the S.106 ... derives from the documentation disclosed and was not known to me prior to disclosure.”

But that is not compliance with the practice direction. The witness should have addressed this question, and has not. Nevertheless, in circumstances where the defendant has not identified the “important disputed matters” where the obligation might have attached, I am not prepared to take the lead in searching

the witness statement for them, and assessing their importance. Accordingly, I decline to take the matter further at this stage.

Conclusion

63. Accordingly, I will order that paragraphs 19, 32, 34, 36 (part), 44, 47, 53 (part), 61, 63, 66 (part), and 67 (part) of Mr Down's witness statement be struck out. I should be grateful to have an agreed minute of order for approval.