



Case No: HT-2021-000033

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 2747 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2021

Before:

MRS JUSTICE O'FARRELL DBE

Between:

MANSION PLACE LIMITED	<u>Claimant</u>
- and -	
FOX INDUSTRIAL SERVICES LIMITED	<u>Defendant</u>

Camille Slow & Dalton Hale (instructed by **Addleshaw Goddard**) for the **Claimant**
George Eyre (instructed by **Excello Law Limited**) for the **Defendant**

Hearing date: 6th October 2021

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.

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 14th October 2021 at 2pm”

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matters before the court are cross applications by the parties in respect of witness statements served for the trial in this matter, listed to commence on 18 October 2021. The applications raise issues as to the interpretation and requirements of Practice Direction 57AC, concerning trial witness statements in the Business and Property Courts.

Background to the dispute

2. By a contract dated 19 February 2020, the Defendant contractor agreed to design and build an extension to, and refurbishment of, student accommodation in Nottingham for the Claimant property developer.
3. Delays occurred to the project and the contractual dates for completion were not achieved. A dispute arose between the parties concerning the Claimant's right to deduct liquidated damages from sums claimed by the Defendant in a payment notice dated 22 October 2020.
4. The central issue is whether on 14 October 2020 Mr Mark Kite, managing director of the Defendant, entered into an oral agreement by telephone with Mr Shankar Ramanathan, a director of the Claimant, whereby the Claimant agreed that it would not deduct any liquidated damages from the Defendant in respect of the delays to the project, in return for which the Defendant would not claim any loss and expense.
5. The Claimant's position is that no binding agreement was made as alleged; alternatively any agreement amounted to a revocable waiver of rights which the Claimant validly retracted by means of a subsequent payless notice.
6. The Defendant's position is that there was a binding agreement as alleged; alternatively the liquidated damages provision is void and/or unenforceable because it is uncertain and/or a penalty and/or the Claimant failed to serve the required contractual notices.

Proceedings

7. The dispute was referred to adjudication, an award was given in the Defendant's favour and enforcement proceedings were settled by the Claimant's payment of £524,300 to the Defendant.
8. On 28 January 2021 the Claimant issued proceedings, seeking declaratory relief and repayment of the settlement sums paid to the Defendant.
9. The proceedings are being conducted under the Shorter Trials Scheme. At the case management conference held on 30 April 2021, Jefford J ordered that the trial should take place on 18 October 2021 with a duration of 3 days. Directions were given, including permission for witness statements to be served by 25 June 2021, with supplementary statements by 30 July 2021, in each case limited to Mr Ramanathan and Mr Maunder for the Claimant; Mr Kite and Mr Higginbottom for the Defendant.
10. The dates for the service of witness statements and supplementary witness statements were extended by consent.

11. On 20 July 2021, the day before witness statements were due to be served, Ms Roberts of Addleshaws, the Claimant's solicitors, sent an email to confirm the approach that would be used for cross-referencing the witness statements to the documents:

“In compliance with Practice Direction 57AC, each witness statement will be accompanied by a list of documents identifying what documents the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement (PD57AC, paragraph 3.2). Documents will only be referred to in the body of the witness statements where necessary and if required for any of the reasons indicated in the Statement of Best Practice appended to this Practice Direction.

Paragraph 3.6 of the Statement of Best Practice requires that where documents have been referred to in accordance with the above the witness statement should not exhibit the document but should give a reference enabling it to be identified by the parties, unless it is a document being produced or disclosed by the witness that has not been disclosed in the proceedings. We intend to enable any such documents to be identified by inserting a cross reference to the number of this document in either the Claimant's Disclosure List (CDL) or Defendant's Disclosure List (DDL) as appropriate ...

If you could please confirm that such an approach will be adopted by you it would be greatly appreciated. If not, please do let us know how you intend to identify such documents within the Defendant's witness statements.”

12. In response, Mr Belshaw of Excello Law, solicitors for the Defendant, stated:

“I have to confess I wasn't aware Practice Direction 57AC applied and have prepared the statements the “old fashioned way” by exhibiting documents referred to in the statements.

Whilst I am happy to adopt the approach suggested in your email below this will though require producing lists of documents for each statement identifying the documents referred to in the statements cross referenced to the disclosure lists which will take time which I haven't allowed for and don't have due to other work commitments. Because of this are you happy to nudge back the date for filing and exchange of statements of fact to 5:00pm on Friday 23 July 2021 as I will require this time to draw up the document lists cross referenced to the disclosure lists.

If you are happy to further extend the date for exchange of statements I will draw up a draft consent order for signing, dating and filing at court...”

13. The date for the witness statements was extended but, by email dated 21 July 2021, Mr Parker-Bishop of Addleshaws raised his concerns:

“I note with some surprise that you have failed to comply with Practice Direction 57AC in preparing your witness statements. Whilst this non-compliance causes us significant concern, our client is content to allow the extension requested. We reserve our client's right to bring this correspondence to the attention of the court in relation to costs in due course. I await to see how you propose to deal with this failure to comply with the Practice Direction so as to ensure that your statements are fully compliant with the same.”

14. Mr Belshaw replied by return email, stating:

“Firstly we haven't failed to comply with Practice Direction 57A hence the reason for my previous email to Bethany. Had I provided witness statements which didn't comply with Practice Direction 57A then there would be some force in the point which you are seeking to make.”

15. On 23 July 2021 the parties exchanged their respective witness statements.
16. By letter dated 10 August 2021 the Claimant raised concerns in relation to the Defendant's witness statements and compliance with PD 57AC.
17. By letter dated 13 August 2021 the Defendant replied, refuting the allegations of non-compliance and raising concerns in relation to the Claimant's witness statements.
18. Further exchanges took place but the parties were unable to resolve the issue.

The applications

19. On 16 September 2021, one day before the PTR, the Claimant issued its application, seeking the following orders:
- i) pursuant to Paragraph 5.2 of Practice Direction 57AC, the first and second witness statements of Mr Mark Kite dated 23 July 2021 and 20 August 2021 respectively and the first witness statement of Mr Guy Higginbottom dated 23 July 2021 be redacted to remove those parts of the evidence that are said to be non-compliant with PD 57AC; and
 - ii) pursuant to Paragraph 4.4 of Practice Direction 57AC, the certificate of compliance in respect of the above witness statements be amended to include statements that the requirements of PD57AC were not discussed with or explained to the witnesses until after the statements had been drafted, and that they were not prepared in accordance with the Statement of Best Practice.
20. On 28 September 2021 the Defendant issued its application, seeking an order pursuant to CPR 32.1 and/or paragraph 5.2 of Practice Direction 57AC, that the first witness statements of Mr Shankar Ramanathan dated 23 July 2021 and Mr Matthew Maunder

dated 23 July 2021 be amended/redacted to remove those parts of the evidence that are said to be non-compliant with those rules.

21. The Court has the benefit of reading witness statements in respect of the applications:
 - i) Mr Paul Barge of the Claimant's solicitors dated 16 September 2021;
 - ii) Mr Stephen Belshaw of the Defendant's solicitors dated 28 September 2021;
 - iii) Mr Guy Higginbottom, claims consultant for the Defendant, dated 28 September 2021;
 - iv) Mr Jake Parker-Bishop of the Claimant's solicitors dated 1 October 2021.

Relevant rules for trial witness statements

22. CPR 32.1 provides:

“(1) The court may control the evidence by giving directions as to –

- (a) the issues on which it requires evidence;
- (b) the nature of the evidence which it requires to decide those issues; and
- (c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.”

23. CPR 32.4(1) defines a witness statement as:

“a written statement signed by a person which contains the evidence which that person would be allowed to give orally.”

24. CPR 32.8 provides that a witness statement must comply with the requirements set out in Practice Direction 32, which includes requirements that the witness statement should be in the witness's own words, should explain the process by which it has been prepared and be verified by a statement of truth.

25. In *JD Wetherspoon Plc v Harris* [2013] EWHC 1088 (Ch), Sir Terence Etherton, Chancellor, set out the general principles applicable to factual witness statements at [38]-[41], which can be summarised 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.
26. Similar comments were made by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse* [2013] EWHC 3560 (Comm).
27. 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.
28. Paragraph 2 of Practice Direction 57AC identifies the purpose of a trial witness statement as follows:
- “2.1 The purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement.
- 2.2 Trial witness statements are important in informing the parties and the court of the evidence a party intends to rely on at trial. Their use promotes 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.”
29. Paragraph 3 of PD 57AC prescribes the contents of a witness statement, including the following requirements:
- “3.1 A trial witness statement must contain only –

(1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and

(2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.

3.2 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.

...

3.4 Trial witness statements should be prepared in accordance with –

(1) the Statement of Best Practice contained in the Appendix to this Practice Direction ...”

30. The Statement of Best Practice sets out the approach that should be followed in the preparation of trial witness statements:

“2.4 The duty of factual witnesses is to give the court an honest account of matters known personally to them (including, if relevant to the issues in the case, what they recall as to matters witnessed personally by them or what they would or would not have done or thought if the facts, or their understanding of them, had been different). It is improper to put pressure of any kind on a witness to give anything other than their own account, to the best of their ability and recollection, of the matters about which the witness is asked to give evidence.

2.5 The evidence in chief of a factual witness, if not given by witness statement, must be given to the court without the use of leading questions (except where their use has been permitted by the court).

2.6 During evidence in chief given otherwise than by witness statement, the witness’s memory may be refreshed by being shown a document, but 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, so that they would have known if they were accurate or inaccurate.”

31. Paragraph 3 of the Appendix provides that trial witness statements should be as concise as possible without omitting anything of significance, refer to documents only where necessary and should not:

- i) quote at any length from any document to which reference is made,
 - ii) seek to argue the case, either generally or on particular points,
 - iii) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument; or
 - iv) include commentary on other evidence in the case (either documents or the evidence of other witnesses).
32. The Appendix sets out the obligations of legal representatives when preparing witness statements, including at paragraph 3.9:
- “Any witness providing a trial witness statement should have explained to them, by the legal representatives of the relevant party, the purpose and proper content of such a statement and proper practice in relation to its preparation, before they are asked to prepare or consider any draft statement and, wherever practicable, before any evidence is obtained from them (by interview or otherwise). This should include ensuring that the witness has read, or reading to them, the witness confirmation required by paragraph 4.1 of Practice Direction 57AC.”
33. Paragraph 4.1 of PD 57AC requires the witness to verify the statement by a statement of truth and confirm compliance with the above rules.
34. Paragraph 4.3 of PD 57AC requires that a trial witness statement must be endorsed by a certificate of compliance by the legal representative (where acting at the time the statement has been prepared) in the following form:
- “I hereby certify that:
1. I am the relevant legal representative within the meaning of Practice Direction 57AC.
 2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].
 3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.”
35. Paragraph 4.4 provides for any application to dispense with the above certificate of compliance, or for permission to vary or depart from the stipulated form, to be made to the court without notice, for determination without a hearing.

36. Paragraph 5.2 empowers the Court to impose sanctions for any failure to comply with the Practice Direction, including striking out the offending parts of the witness statement.
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.

Claimant's application to revise certificate of compliance

39. Ms Slow, counsel for the Claimant, submits that the Practice Direction cannot be complied with retrospectively because it requires steps to be taken by a legal representative before the statement is prepared and regulates the method adopted in producing the statement. Mr Belshaw's admission that he was not aware of the applicability of PD 57AC shows that full adherence to it was not possible so as to permit the certificate of compliance to be completed. Ms Slow submits that the disclosed email of 21 July 2021 from the Defendant's counsel, identifying parts of the witness statements that needed correction to bring them into compliance with PD 57AC and requiring inclusion of the appropriate declarations and document referencing, demonstrates that the Statement of Best Practice must not have been followed.
40. Further, Ms Slow submits that there are concerns surrounding the use of Mr Higginbottom to take Mr Kite's evidence for the initial drafts of his statements. Mr Higginbottom is a witness in the case and therefore not independent. His witness statement of 28 September 2021 suggests that he was not given clear instructions by Excello Law as to the requirements of PD 57AC. He used an earlier witness statement produced by Mr Kite in the adjudication as a first draft. He does not state that he explained to Mr Kite the purpose and proper content of a witness statement and proper practice in relation to its preparation, or that he must read the witness confirmation at paragraph 4.1 of the Practice Direction, nor that this was explained to him in the context of his statement.

41. Mr Eyre, counsel for the Defendant, submits that the Defendant has complied with its obligations in relation to PD 57AC. The witness statements served by the Defendant are short: Mr Kite's first statement dated 23 July 2021 (10 pages); Mr Kite's supplementary statement dated 20 August 2021 (9 pages); and Mr Higginbottom's first statement dated 23 July 2021 (7 pages); Mr Higginbottom's supplementary statement dated 20 August 2021 (5 pages). They are concise statements of fact with cross-references to the documents. Each statement is verified by a statement of truth, contains confirmation of compliance by the witness and a certification of compliance by Mr Belshaw, the legal representative.
42. Mr Eyre submits that the Claimant's central allegation, that of non-compliance with PD 57AC, is wrong. As explained in Mr Belshaw's witness statement dated 28 September 2021, his admission in the email of 20 July 2021 that he was not aware of the application of the Practice Direction referred only to the requirement relating to lists of documents, the subject of Ms Roberts' email to which he was replying. He was well aware of PD 57AC, having referred to it in earlier, unrelated adjudication proceedings. Mr Higginbottom prepared first drafts of both his own and Mr Kite's statements but they were subject to review by the solicitor and counsel, by email, telephone and remote meetings with Mr Higginbottom and Mr Kite.
43. Mr Eyre submits that there is no prohibition on witness statements being prepared by someone other than the party's solicitor, provided that the solicitor is satisfied that the third party can be relied upon to exercise the same standards that would apply if the statements were taken by the solicitor: *Aquarius Financial Enterprises Inc v Lloyd's Underwriters (The Delphine)* [2001] 2 Ll.Rep. 542. Mr Higginbottom has a law degree, has passed the Legal Practice Course, is a chartered quantity surveyor, a member of RICS, the Chartered Institute of Building and the Chartered Institute of Arbitrators. He is also an experienced claims consultant. It was more convenient and cost-effective for this approach to be adopted because Mr Belshaw does not have assistance on this matter and Mr Higginbottom was closer geographically to Mr Kite.
44. Before Mr Higginbottom started to prepare the witness statements, Mr Belshaw explained by telephone the approach that needed to be adopted in preparing the trial statements; in particular, he explained that they must be in the witness' own words, be confined to the facts and avoid argument or submission and any detailed commentary on documents.

Discussion

45. It is common ground that Mr Belshaw, an experienced solicitor specialising in construction dispute resolution for thirty-three years, was aware of PD 57AC at the time that the witness statements were being prepared. I accept Mr Belshaw's evidence that he was also aware of the applicability of the Practice Direction to the witness statements in this case when they were prepared. In his email of 20 July 2021, he was candid with the Claimant's solicitors in admitting his lack of awareness of the Practice Direction in relation to the listing and cross-referencing of documents. Against that frankness, the court would be slow to reject his clear denial in his email of 21 July 2021, and his witness statement prepared for these applications, that there was any failure to comply with the Practice Direction. As explained above, the Practice Direction does not change the approach that should be taken to the preparation of witness statements. Even prior to introduction of the Practice Direction,

a proper approach to preparation of a trial witness statement would result in compliance with the Statement of Best Practice.

46. Ms Slow correctly draws attention to the fact that Defendant counsel's email of 21 July 2021 identified a number of corrections and additions to the witness statements that were necessary to comply with the Practice Direction. It does not follow that the Statement of Best Practice had not being used prior to that stage. Counsel was commenting, quite properly, on the procedural requirements for the statements to ensure that the final statements were compliant with both the letter and substance of the Practice Direction.
47. There is more force in the Claimant's criticism of Mr Higginbottom's involvement in taking the drafts of Mr Kite's statements. There is no prohibition on a draft witness statement being taken by a non-solicitor. However, in a case such as this, where the key issue turns on what was, or was not, said by two individuals in a telephone call, Mr Kite and Mr Ramanathan, the credibility and reliability of their factual accounts are critical. In those circumstances, it was inadvisable for another factual witness in the case, Mr Higginbottom, to prepare Mr Kite's draft statements. The Claimant is justified in raising a concern as to whether Mr Higginbottom could remain independent and impartial when drafting Mr Kite's account of the telephone exchange. As Mr Higginbottom already held a view as to where the merits of the dispute lay, particularly in the light of the earlier adjudication, it would be difficult for him to record Mr Kite's evidence without viewing it through the lens of his formed opinion. Fortunately, it is evident from Mr Belshaw's witness statement and counsel's email of 21 July 2021 that steps were taken to ensure that the account in Mr Kite's statement was revised before service, to set out the words he had used, rather than any paraphrasing. Further safeguards against any tainted evidence arise from the fact that Mr Kite and Mr Higginbottom will be tendered for cross-examination at trial so that their recollections of events can be challenged.
48. Save for the above issue, the Court is satisfied that the Defendant's witness statements were prepared with the Practice Direction in mind and that the principles applicable to best practice were adopted. For those reasons, the Court rejects the Claimant's application to order the Defendant's legal representatives to re-draft the certificate of compliance.

Claimant's application for redactions

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.
50. In this case, these contested applications have taken a full day's hearing in court. The trial next week has a duration of three days. No criticism is made of the parties in this

case in bringing this matter before the court, as it has highlighted the new Practice Direction and enabled the court to provide some guidance on the re-stated approach to witness statements. However, in future cases, serious consideration should be given to finding a more efficient and cost-effective way forward.

Mr Kite's first witness statement dated 23 July 2021

51. Objection is taken to the last sentence of paragraph 7, a reference to negotiations on the contract sum, on the basis that it is irrelevant. It is a very brief reference to background matters and the court does not consider it necessary to strike it out.
52. Objection is taken to paragraph 32 and the first sentence of paragraph 33, a quotation from Mr Ramanathan's witness statement in the adjudication, together with Mr Kite's response to that evidence. The extract contains an assertion by Mr Ramanathan that Mr Kite knew that the Claimant had not waived and would not waive its rights to claim liquidated damages. Mr Kite was entitled to address this in his witness statement by setting out his direct evidence as to his state of knowledge at the time. This is not improper commentary by Mr Kite but refutation of an allegation made against him.

Mr Kite's second witness statement dated 20 August 2021

53. Paragraph 18 is a comment on the Claimant's disclosed correspondence and not part of Mr Kite's direct evidence. This should be redacted.
54. Paragraph 22 is argument going to the Defendant's entitlement to extensions of time and commentary on what the documents indicate regarding Mr Maunder's intention to deduct liquidated damages. This should be redacted.

Mr Higginbottom's witness statement dated 23 July 2021

55. Paragraphs 3 and 4 identify the earlier adjudications and briefly summarise Mr Higginbottom's role in advising on the merits. This is legitimate background to explain his involvement in the dispute.
56. In paragraph 5 Mr Higginbottom purports to confirm the contents of Mr Kite's statement as true and accurate to the best of his knowledge and belief. This is of no probative value because much of Mr Kite's evidence is clearly not within Mr Higginbottom's knowledge. It is contrary to the requirement that the witness should give the evidence that he would be permitted to give if called to give oral evidence in chief. It should be redacted.
57. Paragraphs 14 and 15 set out brief calculations of liquidated and unliquidated damages. This is not comment but relevant information in respect of the validity and penalty issues and properly included.
58. Paragraph 17 is commentary on the Claimant's documents and should be redacted.

List of documents

59. Ms Slow submits that the Defendant's witness statements fail to comply with the Practice Direction because they attach lists of documents referred to in the statements

but do not list all documents to which the witnesses has been referred. 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. In this case, there is no indication that documents not referred to in the statements have been used to refresh the witnesses’ memories. This is not surprising given that the key exchange in question was a telephone conversation. The witnesses can be cross-examined on this at trial.

The Defendant’s application for redactions

Mr Ramanathan’s witness statement dated 23 July 2021

60. Paragraphs 8 to 13 explain that Mr Ramanathan did not have authority to waive the Claimant’s claim for liquidated damages. The Claimant has not pleaded lack of authority as a basis for its case and Ms Slow confirms that the Claimant does not rely on any absence of authority to defeat the Defendant’s case that there was a binding agreement. Mr Ramanathan purports to rely on it as a reason for him not entering into a binding agreement on 14 October 2020. However, he goes further than simply stating his understanding that he needed authority; he makes a positive assertion that he did not in fact have authority. If this was to be relied on, it should have been pleaded as an allegation in the Particulars of Claim. There is no such plea. In those circumstances, no purpose is served by this evidence and it should be redacted.
61. Paragraphs 14 to 16 set out a brief summary of the Claimant’s understanding as to its entitlement to liquidated damages. It is a very brief reference to the underlying dispute and the court does not consider it necessary to strike it out.
62. Paragraphs 25 and 30 contain Mr Ramanathan’s state of mind that he relies on as explaining why he would not have entered into the alleged agreement on 14 October 2020. Subject to removal of the claim in paragraph 25 that he did not have authority, for the reasons set out above, he is entitled to give an explanation to the court in support of his account.

Mr Maunder’s witness statement dated 23 July 2021

63. Paragraphs 11, 12, 14, 15 and 16 set out a brief summary of the delays and the decision to levy liquidated damages. It is a very brief reference to the underlying dispute and the court does not consider it necessary to strike it out.
64. Paragraphs 17 and 20 are comments on documents forming part of the narrative and should be redacted.
65. Paragraph 24 is Mr Maunder’s subjective comment on the Defendant’s allegation and on documents. It is of no probative value and should be redacted.

Conclusion

66. For the above reasons, the cross-applications by the Claimant and the Defendant succeed to the extent that the above redactions are stated to be required.
67. Given that both parties have had a measure of success on their applications, the court is minded to order that costs be in the case.
68. Any consequential issues arising out of this judgment, including any further submissions on the form of order or costs, should be dealt with as part of the trial.