Commercial Court decides that new Practice Direction in relation to Trial Witness Statements in Business & Property Courts has not changed law on admissibility of evidence

MAD Atelier International BV v Manes [2021] EWHC 1899 (Comm)

Stewart Chirnside

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Yesterday, Sir Michael Burton GBE handed down judgment dismissing an application by the Defendant ("**Mr Manes**") to strike out parts of the Claimant's ("**MAD International**") witness statements on the grounds that they contained inadmissible opinion evidence.

The application was made under paragraph 5.2(1) of PD 57AC which gives the Court the power to strike out all or part of a trial witness statement which fails to comply with the new Practice Direction. The decision is of interest because it is the first reported judgment considering the Court's powers under the new Practice Direction and it also contains an overview of the authorities in relation to the admissibility of non-expert opinion evidence.

In 2015, MAD International and Mr Manes (amongst others) entered into a joint venture to develop an international franchise of restaurants under the "L'Atelier de Joel Robuchon" brand. MAD International alleges that Mr Manes fraudulently induced it to enter into a transaction which led to the termination of the joint venture agreement and claims damages for fraud and loss of profits from the joint venture.

Mr Manes applied to strike out parts of MAD International's supplemental witness statements which addressed the quantum of damages claimed, in particular what would have happened to the joint venture business if it did not terminate, on the grounds that they were in breach of: (1) paragraph 3.1 of PD 57AC because they were not limited to facts which needed to be proved at trial; and/or (2) paragraph 3.6 of the Appendix to PD 57AC because they sought to argue the case and/or contained *"matters of belief, opinion or argument about the meaning, effect, relevance or significance of other evidence"*. Mr Manes also applied to strike out parts of MAD International's expert report which referred to or relied on the impugned evidence.

The Judge emphasised the flexibility of the Court's approach to the contents of witness statements as set out in ***JD Wetherspoon plc v Harris*** [2013] 1 W.L.R. 3296 and held that the new Practice Direction had not changed the law or overruled any of the previous authorities in relation to the admissibility of evidence.

The Court held that the test is one of admissibility at trial as is made clear by paragraph 3.1(2) of the Practice Direction which provides that, in addition to matters of fact, a witness statement may include evidence which *"the witness would be allowed to give in evidence in chief, if they were called to give evidence at trial..."* Reference to documents in a witness statement also does not necessarily amount to inadmissible "commentary" because paragraph 3.2 of PD 57AC requires the identification of documents to which the witness has been referred for the purposes of giving their statement.

The Judge also emphasised that the power to strike out witness statements under paragraph 5.2(1) is discretionary and left open the question of whether the Court had jurisdiction to strike out parts of MAD International's expert report in light of the fact that the new Practice Direction is limited to dealing with trial witness statements only.

The judgment makes clear that there is no blanket rule that witnesses who are not independent experts cannot give opinion evidence. There are 3 points of particular note.

First, the authorities demonstrate that non-expert witnesses of fact may be permitted to give opinion evidence where it is related to the factual evidence which they give, particularly if they have relevant experience or knowledge: ***DN v. London Borough of Greenwich*** [2004] EWCA Civ 1659 and ***Multiplex Construction (UK) Limited v. Cleveland Bridge UK Limited*** [2008] EWHC 2220 (TCC).

Second, non-expert witnesses of fact may give opinion evidence where the evidence given relates to a hypothetical situation as to what could or would have happened: ***Kirkman v. Euro Exide Corp (CMP Batteries Ltd)*** [2007] EWCA Civ 66; ***Rogers v Hoyle*** [2015] Q.B. 265. Such evidence may be considered as evidence of fact, even though it is, by its nature, hypothetical and not evidence of observed fact. The Judge rejected the argument that this principle is limited to evidence as to what the person giving evidence themselves, or possibly their company, could or would have done and held that it extends, provided the witness can give evidence by reference to personal knowledge and involvement, to what would or could have happened in the relevant counterfactual or hypothetical scenario.

Third, the above exception to the general rule is all the more relevant in the context of quantum where the Court is trying to do the best it can on the evidence available. Where the quantification of loss involves a hypothetical exercise, the Court does not apply the same balance of probabilities approach as it would to the proof of past facts but instead estimates the loss by making the best attempt it can to evaluate all the chances, great or small, taking into account all significant factors: ***Parabola Investments Ltd v Browallia Cal Ltd*** [2011] Q.B. 477.

Jasbir Dhillon QC and Stewart Chirnside acted for the successful Claimant, MAD Atelier International BV (instructed by Andrew Rimmington, Simon Style, Shona Coffer, Sian Harding and Mariel Stringer-Fehlow of Mishcon de Reya LLP).

Stewart Chirnside

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