

BVI Court Strikes Out Witness Statement of Fact for Trial

In a recent decision in *Petroci Holding v Masirah Oil Limited & Ors*,¹ the British Virgin Islands ("BVI") Commercial Court struck out materially the whole of a witness statement of fact for trial on the basis that it was not made from personal knowledge.

The proceedings arise out of share issuances in Masirah Oil Limited (the "Company") which Petroci alleges diluted its shareholding in an unfairly prejudicial manner. The defendants deny the claim.

Background

Petroci's representative who served on the Board of Directors of the Company and was involved in the share issuances in question had unfortunately passed away. Petroci instead filed a statement by a current employee of the Company which commented on disclosure documents, mostly consisting of board meetings and emails relating to the share issuances. However, the witness did not personally attend those meetings nor had they been a party to the emails.

Justice Mangatal held that materially the whole of the witness statement should be struck out. She cited the 2013 English High Court decision in *JD Wetherspoon plc v Harris*,² in which a witness statement constituting "a recitation of facts based

on the documents, commentary on those documents, argument, submissions and expressions of opinion" was struck out. While she observed and upheld dicta in *JD Wetherspoon* that the rule regarding personal knowledge is no "rigid statute" and can be relaxed in appropriate circumstances, she decided there was no good reason to do so in this case. In doing so, she observed that, by analogy to the unfortunate passing of Petroci's witness, in *JD Wetherspoon*, a previous director of the company with personal knowledge was unavailable to provide testimony, but this did not justify calling a witness who had no personal involvement in the events in question.

Justice Mangatal observed that the decision in *JD Wetherspoon* influenced the drafting of the English Practice Direction 57AC – Trial Witness Statements in the Business and Property Courts,³ introduced in April 2021. This strongly emphasises the requirement for such witness statements to be made from personal knowledge. While she rejected an argument that Practice Directions 57AC is imputed directly into BVI law by section 12 of the BVI Evidence Act 2006 or section 11 of the Eastern Caribbean Supreme Court Act, she held that it reflects pre-existing common law principles of best practice as reflected in *JD Wetherspoon* which apply equally in the BVI. She referenced a number of other English High Court decisions applying this

¹ BVIHC(COM)2021/0134

² [2013] 1 WLR 3296

³ As held in *Blue Manchester Ltd v Bug-Alu Technic GMBH and another* [2021] EWHC 3095 (TCC)

principle,⁴ including the 2020 decision in *Aven v Orbis*⁵ in which it was held that "...it is important that documents presented to the Court should focus on the functions they are meant to perform, and not stray into other domains."

Furthermore, Justice Mangatal held that Petroci was under a duty to identify which parts of the witness statement were not made from personal knowledge, citing EC CPR 29.5(1)(e), the English Practice Direction 32.18 and the English High Court decision in *Blue Manchester Ltd v Bug-Alu Technic GMBH and another*.⁶

Justice Mangatal also considered the English High Court decision in *Primavera Associates Ltd v Hertsmere Borough Council*,⁷ in which the judge held that an application to strike out a witness statement which had merely cited limited paragraphs as examples did not discharge the applicant's burden to prove that the non-specified paragraphs were inadmissible. She distinguished this decision on the basis that the applicants had adequately substantiated that materially the whole witness statement was inadmissible.

Conclusion

This decision serves as an important reminder to practitioners in the BVI that a witness statement of fact for trial should be made from personal knowledge and should not set out a narrative based on events in which the witness was not personally involved, or make arguments or give opinions based only on disclosure documents. The penalty for failure to comply can be severe, leading to the striking out of the witness statement and liability in costs. Where the breach is less extensive, the court has a wide discretion and may make alternative orders, such as an order to

⁴ *Greencastle MM LLP v Payne* [2022] EWHC 438, *Vardy v Rooney* [2022] EWHC 946 (QB), *Mad Atelier International BV v Manes* 2021 EWHC 1899 (Comm)

⁵ [2020] EWHC 474 (QB)

amend the statement, or to remove specified passages.

Maples and Calder, the Maples Group's law firm, acted for the successful applicants in the application.

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For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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⁶ [2021] EWHC 3095 (TCC). See also *Harrington and Charles Trading Co Ltd v Mehta* [2022] EWHC 2960 (Ch) at 286

⁷ [2022] EWHC 1240 (Ch)