FACTUAL WITNESS EVIDENCE IN TRIALS BEFORE THE BUSINESS & PROPERTY COURTS

REPORT OF THE WITNESS EVIDENCE WORKING GROUP

A. INTRODUCTION

1. This project stemmed from an impression shared by a substantial majority of the judges of the Commercial Court that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost in Commercial Court trials. The issue was raised in a meeting of the Commercial Court Users' Committee in March 2018, at which such concerns were echoed. A working group was set up to consider ways in which the current practice in relation to factual witness evidence could be improved not only in the Commercial Court but in all of the Business and Property Courts of England and Wales ("BPCs"). The working group included judges, barristers, and solicitors working in the BPCs and a nominee from GC100 representing lay client users. An online survey was undertaken of all stakeholders, disseminated widely to lay and professional users of the BPCs, followed by consideration in focus groups and the working group itself.

2. The BPCs, including those sitting outside London, decide cases which differ widely in their nature, size and complexity. The practice in relation to factual witness evidence must be tailored to the circumstances of individual cases. It is not desirable to adopt a prescriptive "one size fits all" approach. Nevertheless in most cases before these Courts the current practice involves exchange of witness statements, and reforms to such system should be available in all Courts so as to achieve uniformity of practice so far as possible.

3. The great majority of those consulted showed little enthusiasm for radical reform of the system of exchange of witness statements in most cases, and we do not propose any such radical change. We have however identified a number of ways in which the use of witness statements in the BPCs can be improved.

4. This report proceeds in five parts. **Part B** sets out the perceived problems with the current practice. **Part C** outlines the process undertaken by the working group in examining this issue. **Part D** is a summary of the results of the online survey of the relevant stakeholders. **Part E** outlines the proposals considered by the working group along with an assessment of their advantages and drawbacks. Finally, **Part F** sets out the working group's recommendations.

B. PERCEIVED PROBLEMS WITH THE CURRENT PRACTICE

Current practice

5. The usual practice in the BPCs is for witness statements to be exchanged following disclosure and before expert evidence is served, and to stand as the witness's evidence-in-chief at trial, in accordance with CPR Rules 32.4 and 32.5. Although the Court has the power to require that evidence-in-chief must

be given orally at trial, either generally or on particular issues, this power is rarely invoked or exercised.

6. Practice Direction 32 contains requirements as to the preparation and contents of witness statements. In particular 32PD18.1 provides that the witness statement should "if practicable be in the intended witness's own words." 32PD18.2 provides that it must identify which part of its contents are within the intended witness's own knowledge; and where matters are hearsay, it must state the source of the information or belief on which they are based. 32PD20 requires the witness statement to include a statement by the witness that he or she believes it to be true. Rule 32.14 provides that the making of a false statement in a witness statement is punishable as a contempt of court. 32PD25.1 provides that in the case of a statement which does not comply with the Rule or the Practice Direction, the Court may refuse to admit it in evidence and disallow the costs arising from its preparation.

7. The constituent parts of the BPCs have Guides which contain practices in those particular Courts. The relevant parts dealing with witness evidence and witness statements contain the provisions set out in the following paragraphs (with emphasis in the original). We consider below the desirability of further harmonization of the Guides.

8. The Commercial Court Guide includes the following:

"H1.1 Witness statements must comply with the requirements of PD 32. The following points are also emphasised:

(a) the function of a witness statement is to set out in writing the evidence-in-chief of the witness; as far as possible, therefore, the statement should be in the witness's own words;

(b) a witness statement should be as concise as the circumstances of the case allow without omitting any significant matters; there may be no need to deal with (or deal with other than briefly) matters that are common ground;

(c) a witness statement should not contain lengthy quotations from documents;

(d) it is seldom necessary to exhibit documents to a witness statement;

(e) a witness statement should not engage in (legal or other) argument;

(f) a witness statement must indicate which of the statements made in it are made from the witness's own knowledge and which are made on information or belief, giving the source for any statement made on information or belief;

(g) a witness statement must contain a statement by the witness that the witness believes the matters stated in it are true; proceedings for contempt of Court may be brought against a person for making, or causing to be made, a false statement in a witness statement without an honest belief in its truth: rule 32.14(1).

(h) a witness statement must comply with any direction of the Court about its length. Unless the Court directs otherwise, witness statements should be no more than 30 pages in length.

H1.2 It is usually convenient for a witness statement to follow the chronological sequence of events or matters dealt with (PD 32 § 19.2). It is helpful for it to indicate to which issue in the List of Common Ground and Issues the particular passage in the witness statement relates, either by a heading in the statement or in a marginal notation or by some other convenient method.

H1.3 It is improper to put pressure of any kind on a witness to give anything other than the witness' own account of the matters with which the statement deals. It is also improper to serve a witness statement known to be false or where it is known the maker does not in all respects actually believe the witness statement to be true.

Witness statement as evidence-in-chief

H1.6 (a) Where a witness is called to give oral evidence, the witness statement of that witness is to stand as the witness' evidence-in-chief unless the Court orders otherwise: rule 32.5(2).

(b) In an appropriate case the trial Judge may direct that the whole or any part of a witness's evidence-in-chief is to be given orally. This course may be taken on the Judge's own initiative or on application by a party. Notice of an application for such an order should be given as early as is reasonably convenient. It is usually reasonable for any such application to be made at a pre-trial review if one is held."

9. The Chancery Division Guide includes the following:

"19.1 CPR rule 32.4 describes a witness statement as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally".

19.2 The function of a witness statement is to set out in writing the evidence-in-chief of the maker of the statement. Accordingly witness statements should, so far as possible, be expressed in the witness's own words. This guideline applies unless the perception or recollection of the witness of the events in question is not in issue.

19.3 A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence-in-chief. It should therefore be confined to facts of which the witness can give evidence. It is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument, expressions of opinion or submissions about the issues, nor to make

observations about the evidence of other witnesses. Witness statements should not deal with other matters merely because they may arise in the course of the trial.

19.4 Witness statements should be as concise as the circumstances of the case allow. They should be written in consecutively numbered paragraphs. They should present the evidence in an orderly and readily comprehensible manner. They must be signed by the witness, and contain a statement that he or she believes that the facts stated in his or her witness statement are true. They must indicate which of the statements made are made from the witness's own knowledge and which are made on information and belief, giving the source of the information or basis for the belief.

19.5 Inadmissible material should not be included. Irrelevant material should likewise not be included. Any party on whom a witness statement is served who objects to the relevance or admissibility of material contained in a witness statement should notify the other party of their objection within 28 days after service of the witness statement in question and the parties concerned should attempt to resolve the matter as soon as possible. If it is not possible to resolve the matter, the party who objects should make an appropriate application, normally at the pre-trial review ("PTR"), if there is one, or otherwise at trial.

19.6 Witness statements must contain the truth, the whole truth and nothing but the truth on the issues covered. Great care must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence. It is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true. In addition, a professional adviser may be under an obligation to check where practicable the truth of facts stated in a witness statement if he or she is put on enquiry as to their truth. If a party discovers that a witness statement which they have served is incorrect they must inform the other parties immediately.

19.7 It is incumbent on solicitors and counsel not to allow the costs of preparation of witness statements to be unnecessarily increased by over-elaboration of the statements. Any unnecessary elaboration may be the subject of a special order as to costs."

10. The TCC Guide includes the following:

"12.1.1 Witness statements should be prepared generally in accordance with CPR Part 22.1 (documents verified by a statement of truth) and CPR Part 32 (provisions governing the evidence of witnesses) and their practice directions, particularly paragraphs 17 to 22 of the Practice Direction supplementing CPR Part 32.

12.1.2 Unless otherwise directed by the Court, witness statements should not have annexed to them copies of other documents and should not reproduce or paraphrase at length passages from other documents. The only exception

arises where a specific document needs to be annexed to the statement in order to make that statement reasonably intelligible.

12.1.3 When preparing witness statements, attention should be paid to the following matters:

• Even when prepared by a legal representative or other professional, the witness statement should be, so far as practicable, in the witness's own words.

• The witness statement should indicate which matters are within the witness's own knowledge and which are matters of information and belief. Where the witness is stating matters of hearsay or of either information or belief, the source of that evidence should also be stated.

• A witness statement should be no longer than necessary and should not be argumentative.

• A witness statement should not contain extensive reference to contemporaneous documents by way of narrative.

• The witness statement must include a statement by the witness that he believes the facts stated to be true.

12.1.4 Costs. If at any stage the judge considers that the way in which witness statements have been prepared, particularly by the inclusion of extensive irrelevant or peripheral material, is likely to lead or has led to inefficiency in the conduct of the proceedings or to unnecessary time or costs being spent, the judge may order that the witness should resubmit the witness statement in whole or part and may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment: see paragraph 5.5.5 above."

Advantages and drawbacks of current practice

11. The current practice has a number of advantages, at least if witness statements, treated as evidence-in-chief at trial, have complied in letter and spirit with the current rules and guidance. Consistently with the modern "cards on the table" approach, it enables the parties to identify at a relatively early stage the evidential case they have to meet. It thereby enables informed advice to be given as to the merits and promotes the prospect of settling disputes well in advance of trial. It also serves to identify the evidential issues for the purposes of the expert evidence in a case and for the efficient management of the pre-trial process and the trial itself. Signed witness statements also reduce the room for misunderstandings over proposed evidence and reduce witnesses' ability credibly to distance themselves from the evidence in their statements. Moreover, certainty as to what the witnesses' evidence will be at trial, at least in theory, allows for cross-examination to be more efficient (both in preparation and at trial).

12. Nevertheless, experience has shown that in the BPCs the current practice has a number of drawbacks.

13. First, there are real concerns that it does not always achieve best evidence. The experience in criminal trials, and of the position in civil trials before the introduction of witness statements, suggests that 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. The common experience of witnesses "not coming up to proof" in oral examination-in-chief is/was a reflection of the fact that evidence elicited orally in courtroom surroundings is often more reliable than that which a witness is prepared to sign up to in a pre-trial written statement. This is in part because the process of preparation of witness statements in larger cases, involving the polishing of numerous drafts and iterations, results in the final version being far from the witness's own words even if it started life as such, a problem exacerbated by one of the perceived benefits of witness statements, namely as a tool to assist in early resolution of cases; the nuanced account the witness may initially proffer may be beefed up into what appears to be a simpler and firmer version in a witness statement. It is common in the BPCs for witness statements to appear to contain irreconcilably stark conflicts which turn out at trial to be only marginally different perspectives whose difference does not matter. The disconnect between the contents of a statement and the witness's best evidence is also in part because witnesses will often be prepared to sign up in a pre-trial statement to an 'aspirational' version of what they may be able to recall.

14. Moreover, developing statements through numerous drafts, getting the witness to retell the story over and over, is a process which may corrupt memory and render the final product less reliable than the first "unvarnished" recollection.

15. Furthermore, throwing a witness into cross-examination straightaway puts them on the defensive from the outset, deprives them of the opportunity of making a favourable impression by evidence-in-chief, and encourages counterproductive over-lawyering and lengthening of witness statements in an attempt to anticipate cross-examination. The process of cross-examination often limits the witnesses' ability to express things in their own words because of the advantage that the skillful cross examiner has in framing questions which admit only of binary answers, and re-examination often does not provide an adequate opportunity to remedy it. The time pressure on trials in the BPCs often requires guillotining of cross examination time, such that it is the cross-examiner who can choose the battleground covered in the oral evidence. This results in a skewing of the oral evidence before the Court which is undesirable. It leaves the parties feeling that important parts of their evidential case have not come across at trial, and risks the Court losing sight of important evidence because written evidence which is read outside court sitting hours tends to make less impact than that which is explored as part of the hearing process.

16. Second, the vast majority of the current practitioners (solicitors and counsel), and indeed most of the judges, have little or no experience of trying commercial disputes under the previous system which required oral evidence-in-chief at trial. Unsurprisingly, the proper and sensible scope of evidence-in-chief is no longer the stock-in-trade knowledge of those responsible for proofing witnesses and helping them draw up their statements. In view of this, the statement of

principle in paragraph H1.1(a) of the Commercial Court Guide that "*the function of a witness statement is to set out in writing the evidence-in-chief of the witness*" has limited practical utility.

17. Third, and perhaps partly for the reason stated above, witness statements frequently stray far beyond any evidence the witness would in fact give if asked proper questions in chief. They often cover matters of marginal relevance and/or stray into comment and 'spin', even if blatant argument is avoided. It is easy to fall into the trap of assuming that evidence is either relevant or irrelevant. In practice in complex commercial disputes there is a spectrum of relevance, with a penumbra of what is arguably relevant, for example that which forms part of the background narrative to the critical events in dispute. Sometimes this is a proper and necessary foundation to explain the critical evidential disputes. However the current practice involves regular and lengthy recitation of background which is either wholly irrelevant or of such marginal relevance that it would not justify being adduced at trial in the interests of proportionate and cost efficient trial management.

18. Fourth, for these reasons the time and cost savings of the current practice are often somewhat illusory. Cross-examination under the present system takes much longer (both at trial and in terms of preparation) because of the ground that the cross-examiners feel (or fear) they have to cover. In substance, cross-examination becomes a process of challenging the contents of the witness statements rather than a process of exploring and testing only the critical evidence of the witness. As a result, the supposed advantage of efficiency and cost saving at trial is often not realized.

19. Fifth, the witness statement phase of the pre-trial process has itself become very time-consuming, increasing cost and lengthening the pre-trial timetable. There is little doubt that the introduction of witness statements has resulted in a substantial increase and front loading in costs, which is both undesirable in itself and can have the effect of inhibiting rather than promoting settlement.

C. PROCESS ADOPTED BY THE WORKING GROUP

20. The working group has its origin in meetings of the Commercial Court judges in late 2017, at which the question whether factual witness statements were effective in performing their function in Commercial Court trials was discussed. Many judges shared the impression that factual witness statements often failed to put best evidence before the Court. There was consensus that the topic should be examined further taking into account the views of all stakeholders, i.e. judges, practitioners and the wider business community. A discussion paper was produced and circulated for consideration at a meeting of the Commercial Court Users' Committee in March 2018 with a view to creating an appropriately constituted working group. The concerns expressed by the Judges were echoed by a number of users. Following that meeting, a working group consisting of Commercial Court Judges, practitioners and a representative of the business community was formed.

21. In late 2018, the Chancellor of the High Court suggested that the project might usefully be broadened to address the issue in the BPCs more widely. The suggestion was taken up, with the membership of the working group being

expanded to include a judge and two practitioners from the Chancery Division. It already included a judge and practitioners with experience in the TCC.

22. In its final form, the working group consisted of the following members:

    a. Mr Justice Popplewell (Commercial Court) (Chair)
    b. Mr Justice Andrew Baker (Commercial Court)
    c. Mr Justice Fancourt (Chancery Division)
    d. Mr Justice Waksman (Commercial Court and Technology and Construction Court, and formerly Circuit Commercial Court)
    e. Andrew George QC (Blackstone Chambers)
    f. Ian Clarke QC (Selborne Chambers)
    g. Joe Smouha QC (Essex Court Chambers)
    h. John Kimbell QC (Quadrant Chambers)
    i. Audley Sheppard QC (Clifford Chance)
    j. Chris Bushell (Herbert Smith Freehills)
    k. Jon Turnbull (Clyde & Co)
    l. Ted Greeno (Quinn Emanuel Urquhart & Sullivan)
    m. Richard Blann/Giulia Da Re (Lloyds Banking Group)

23. Following the working group's discussions, an online survey was launched to gauge the views of practitioners and litigation parties regarding the use of factual evidence at trials. The survey ran from 1 October 2018 until 21 December 2018 and attracted participation from 932 respondents. The results of the survey are summarised in Part D below.

24. Following the survey, it was apparent that most participants had concerns about the enforcement of the current rules by the Court as well as the suitability of the present rules. Two focus groups were set up, one to address reform of the rules, the other to consider enforcement. The focus groups included individuals who had indicated in their responses to the survey that they would be prepared to assist with discussing these issues, in addition to the members of the working group. They included a number of judges, practitioners and lay users of the BPCs who were not part of the main working group.

25. The focus groups held meetings and reported back to the working group which has produced this report taking into account those discussions.

D. SUMMARY OF THE SURVEY RESULTS

26. The survey results are attached as Appendix 1. Perhaps the most striking feature was the wide range of views expressed by participants, both in answer to the specific questions and by way of narrative suggestions. The following is a summary of the salient points which emerged.

Participants

27. The online survey elicited responses from 932 participants. A large proportion of the participants were barristers (50%) and solicitors (42%). 30 judges (4%) and three people who identified as litigation parties also took part in the survey.

28. 43% of the participants said that they principally worked in the Commercial Court. The figures for participants from the Chancery Division and the Technology and Construction Court were slightly smaller (34% and 23%). A significant number of respondents will have had experience in more than one of the three constituent BPCs. Almost 70% of participants had over 10 years' experience of litigation, with 41% having more than 20 years' experience.

Current practice

29. Only 6% of the participants thought that the current system of witness statements 'fully' achieved the aim of producing the best evidence possible. While 48% of the participants, the largest proportion, felt that the current system achieved that aim 'substantially', 45% of them considered that it did so only partly or not at all.

30. As for the reasons why the current system may be failing to fulfil its purpose, the responses point to a range of factors. Of those who gave reasons why witness statements did not fulfil their purpose (75% of all participants) a majority thought that they were too long (68%), strayed into legal argument (73%), included extensive recitation of documents (72%), and contained irrelevancies (68%); and a majority thought that witness statements failed to reflect witnesses' own evidence (55%).

31. A consistent theme that emerges from the more detailed answers given by many of the respondents is the over-lawyered nature of witness statements. The respondents to the survey described witness statements as "*heavily crafted by solicitors*", "*lawyer-led, rather than witness-led*" and "*a vehicle for the lawyer's view of the case*". To alleviate this concern, one respondent suggested that there should be a standard rubric at the start of every witness statement explaining the purpose of the statement to the witness.

32. A significant majority of the participants also felt that the existing rules were not enforced by the Court (64%) and that they are not followed (63%). 80% of the participants said that they would support enforcing the current rules in section H of the Commercial Court Guide on witness statements more vigorously.

33. In the more detailed narrative responses, many of the respondents pointed out that while the existing rules were broadly fit for purpose, in practice, no action was taken in respect of non-compliant witness statements. As one respondent put it, "*failure to follow the rules is barely even commented on, never mind punished*". Some respondents observed that this may perhaps be because judges did not feel sufficiently on top of the issues at the CMC/PTR stage to determine whether the witness statement properly complied with the rules.

Reform and Enforcement

34. A wide range of potential reform measures was identified and put to the participants of the online survey. Many were rejected by an overwhelming majority. These included having examination-in-chief and/or cross examination

prior to trial along the lines of US style depositions with a transcript and/or use of digital video recording of such examination standing as evidence for the trial; a general practice of disclosure of evidence gists or summaries with oral evidence-in-chief at trial; lifting privilege in the production of witness statements so as to require a note to be taken of oral communications with the witness with all communications and drafts to be disclosed to the opposing party; permitting the opposing party's representative to be present at the interviewing of witnesses, as happens, for example, in insurance cases pursuant to contractual obligations; and replacing witness statements with a pre-trial statement from the parties as to their factual case. However the narrative responses reveal some enthusiasm for allowing parties to produce a pre-trial statement of facts cross-referenced to the relevant documents in addition to (rather than instead of) witness statements. As one respondent put it, "*[i]f there was an alternative document that was not a witness statement but which set out what each party thinks are the key documents and how they interpret them that would be useful and would mean that it did not have to be contained in a witness statement*".

35. Other suggestions had significant support but failed to gain a majority in favour. These included requiring the parties to identify in their statements of case the allegations they intend to prove by witness evidence, as recommended by the Jackson Final Report (2009) p377 para 2.6; and requiring witness statements to contain a statement that they were in the witness's own words. The suggestion that judges should be allowed to take a flexible approach at CMCs and choose from a menu of different options was also not supported by the majority (41% in favour and 48% against).

36. Only three proposals which were specifically identified in the survey gathered the support of a majority of the participants, with a significant minority disagreeing in each case.

37. One was that the Court, on the application of a party or of its own motion (at the CMC, PTR or at any other stage in advance of trial), should retain its discretion to direct that parts of the evidence in a statement should elicited by examination-in-chief. 55% of the participants agreed with this proposal while 32% disagreed with it.

38. A second was that specific issues for witness statements should be identified at the CMC and factual witness statements limited to those issues (53% in favour, 36% against).

39. The third was the suggestion that witness statements should contain a statement by the witness about how well they recall the events described in it and identifying the extent and quality of their recollection; and the means by which recollection has been refreshed by documents. This proposal found favour with 54% of the participants with 31% against it.

E. PROPOSALS CONSIDERED

40. This section will set out the proposals considered by the working group in the light of the survey results, along with a brief evaluation of their perceived advantages and drawbacks.

Reform Measures

41. As is apparent from the survey results there was little appetite for radical reform of the current system amongst stakeholders, and the working group as a whole did not favour such reform, although one or two individual members were attracted by some of the suggested alternatives. Accordingly the working group ultimately focused on four main proposals.

A statement of the best practice regarding preparation of factual witness statements

42. As highlighted above, an overwhelming proportion of the participants in the survey felt that the current practice regarding the drafting of factual witness statements is problematic in several respects. This difficulty is exacerbated by the fact that the lawyers who are in charge of drafting witness statements have very little guidance as to that process. The seniority and experience of those lawyers may differ widely. Junior solicitors may be given the function of preparing first drafts of evidence when they have limited experience of the function and role of the witness statement in the trial process.

43. There is universal agreement among the members of the working group that an authoritative statement of the best practice in relation to the preparation of witness statements would be of assistance to practitioners and of utility in training and education so as to result in the production of more focused witness statements limited to their proper content.

44. We have not conducted the exercise of drafting such guidance but we think it should include and build upon the following points:

(i) a witness statement should be confined to the evidence that the witness would give if properly examined-in-chief; it must be the evidence a witness would give if asked open (non-leading) questions about his/her recollection of events by a competent advocate with an understanding of the issues in the case;

(ii) a witness statement must use the witness's own words, based on his or her own recollection, with revisions limited to aiding brevity and clarity without changing meaning or emphasis; the evidence which a witness is able to give must in no circumstances be altered, distorted or spun in order to seek to help the case of the party calling the witness;

(iii) the content of a witness statement must be regulated by the parameters of the relevant issues and by the relevant evidential rules;

(iv) the focus of a witness statement must be on its utility to the trial judge in presenting accurately the witness's own recollection, not as a tool for internal purposes or presentation to the other side;

(v) lawyer assistance and input into the preparation of a witness statement is useful if not essential, but must be provided with conspicuous care with the above principles in mind and conscious of the risk of corrupting memory through the process.

A more developed statement of truth

45. Many factual witnesses and some lawyers do not understand the purpose of witness statements or the limits on what it is appropriate to include in them. There is consensus among members of the working group that a more developed statement of truth for factual witness statements may be of help in this regard, reflecting the practice in relation to expert witnesses.

46. We recognise, however, that compliance with the requirements will primarily be the responsibility of the legal advisers. Most factual witnesses will be less familiar with the rules and appropriate practices regarding the drafting of witness statements. They should be made aware of them, but care must be taken not to require them to certify matters outside their expertise. The statement of truth should use a form of words that confirms that the witness has had explained to them and understands the objective of a witness statement and the appropriate practice in relation to its drafting. It is important that this is not just an "add-on" at the end of the statement as the current statement of truth has become but ensures that the witness really does understand the proper parameters of a statement and has complied with them so far as within their own ability to do so.

Certification of compliance

47. In addition to introducing a better developed statement of truth, we believe that it would be helpful to require that witness statements must contain a certification of compliance by the solicitor in charge of preparing them confirming that they are compliant with the rules and the relevant Court Guide.

48. We think that this will encourage witnesses and solicitors to focus on the relevant requirements without adding substantially to costs. The named solicitor will be at risk of being identified if criticism is subsequently expressed. Moreover, it offers a useful ground for solicitors to be able to resist current pressures from their clients to include inappropriate material in a witness statement; the solicitor will simply be able to say that they are unable to sign off the statement as required by the rules unless the client complies with the advice as to the proper scope of the content of the statement.

A Pre-Trial Statement of Facts

49. The current pre-trial process does not offer an opportunity for the parties to set out their factual case in detail, drawing together those parts to be found in documents and witness evidence so as to be presented as piece of written advocacy in relation to the factual case being advanced. The skeleton argument served shortly before trial is the first opportunity to do this, and then only in

summary terms. This was identified as one important factor leading to the unsatisfactory form of witness statements; for the purposes of presentation both internally and to the other side, parties often wish to capture their full factual case through witness statements which, in turn, results in lengthy statements replete with advocacy, argument and extensive reference to the content of documents where the witness cannot add anything to what is evident from the document itself but the content is included for lack of any other medium for a complete narrative.

50. The working group considered a proposal that the pre-trial process should include a statement of facts, being a detailed narrative document setting out each party's factual case, to be served after disclosure and at the same time as witness statements. Those in favour identified the advantages as being that this would give the parties an opportunity to advance their case on the facts and thereby encourage parties to confine witness statements to their appropriate content, so removing one of the main causes of inappropriate material in witness statements. It would additionally identify the evidential issues at an early stage, and thereby assist in promoting both settlement and better trial management, as well as being, at least potentially, a useful document for the judge in drafting judgment.

51. Others identified countervailing considerations. In particular, that it would add yet another layer to the pre-trial process with associated increases and frontloading of costs; that it is doubtful whether the pre-trial statement of facts could be drafted without taking a full proof of evidence from the witnesses, and if it is to reflect the evidence accurately it would have to be prepared at a stage when the witness statements are largely finalized; the risk, therefore, is that it will not remedy the present mischief of witness statements containing inappropriate material unless the draft witness statements are then rigorously edited back, and the practicalities mean that this would often not be achieved. Concern was also expressed that the introduction of this additional requirement might cause considerable delay in the pre-trial timetable. It is often the case in more complex litigation in the BPCs that disclosure is a continuing process after the main disclosure has been given despite conscientious efforts. This sometimes holds up exchange of witness statements, but often does not do so because the witness evidence is not dependent on the additional disclosure. But an advocacy document setting out the total of a party's factual case is likely to need to await the final end of the disclosure process. If it is to be linked to exchange of factual witness statements, this is a recipe for delay. The introduction of a pre-trial statement of facts also raises difficult questions about its status. For example, are parties restricted by what is stated in them? Do they need permission to amend it? If so, it is likely to lead to considerable satellite litigation.

52. Among the members of the working group, there is a significant divergence of views as to the utility of a pre-trial statement of facts. A majority (although not a very large majority) are in favour of introducing a pre-trial statement of facts in addition to (and to be exchanged at the same time as) witness statements in some cases at least. However, these members do not suggest that the pre-trial statement of facts must be mandatory in every case. They are of the view that

its utility ought to be assessed at the CMC and ordered by the case management judge on a case-by-case basis. A significant minority of members feel that this proposal would produce the worst of both worlds. A slightly larger minority believe that although this proposal has its advantages and disadvantages, overall, its drawbacks outweigh the benefits.

List of factual issues

53. The working group has considered the proposal that parties should be required to produce a list of factual issues either before witness statements (so that they can serve as a framework for the preparation of witness statements) or after the exchange of witness statements (when common ground and key issues are more easily identifiable).

54. There is universal agreement within the working group that such a document is likely to be of very little utility. The factual issues in dispute between the parties ought to be identifiable from the pleadings. Moreover, the parties are already required to prepare lists of issues for various purposes throughout the trial process already. For example, the Disclosure Pilot Scheme requires parties to identify the issues in relation to which disclosure is sought. Moreover, in cases where experts are involved there is a separate list of expert issues.

55. However there may be scope for greater use of the existing lists of issues in management of the scope of factual witness evidence at the CMC.

Harmonisation of the Guides

56. Concern was expressed by a number of users that it was confusing and unhelpful to have three guides with different practices within the BPC. The view of the working group was that some divergence is inevitable given the varying nature of the work and of the experience in each Court, and it was not desirable to be prescriptive. Different considerations apply to a large Commercial Court case in London, for example, from those in a smaller Chancery Division case on circuit. To apply the same page limit, for example, would be absurd. Nevertheless it is desirable that the Guides should be harmonised so far as possible, particularly when dealing with general principles as to the content of statements, and we recommend that they be reviewed with this objective.

Enforcement Measures

57. Although the survey results indicated a strong desire for better enforcement of the existing rules, echoed by the non-Judge members of the focus group and working party, the working group recognized that that is often easier said than done. The reform measures identified above include those designed to prevent inappropriate content appearing in witness statements. But removing or sanctioning such content after service presents challenges. In summary the two main problems are over-lawyered statements which do not reflect the witness's evidence; and statements that are too long, argumentative or contain irrelevant material such as the extensive recitation of documents. The former problem will

not be apparent in most cases until after trial and the findings of fact by the trial judge. The latter may be obvious immediately in the most egregious examples but often can only be determined and adjudicated upon with the benefit of a full or fullish reading of statements and a full understanding of the detailed evidential issues in the case.

58. It is recognized that the page limit in the Commercial Court Guide is a useful tool but it is a fairly blunt one. In some cases all the narrative history has to be covered by one witness on one side but can be split between different witnesses on the other, allowing for more expansive exposition within the page limit. The complexity of a case is not necessarily a safe guide to the requirements for witness evidence to supplement what is often a very substantial documentary record. It is often impossible for a judge to tell whether an extension to the page limit is justified in advance of the time for service of statements, and in the Commercial Court judges are regularly asked to sanction longer statements without seeing the drafts.

59. It was universally recognized that specific interlocutory applications to disallow parts of witness statements were generally unattractive for both the parties and the Court. The experience of both judges and practitioners has been that such hearings involve a disproportionate amount of time and cost for the parties and take up an unjustified share of court resources, bearing in mind the need to focus closely on the detailed evidential issues in the case.

60. The working group considered the following proposals in relation to better enforcement of the current rules.

Oral Evidence-in-chief as an option

61. Although the Court has the power to order evidence to be given in chief in appropriate cases, it rarely occurs in the BPCs. We have considered whether there should be more encouragement for evidence to be given in chief in appropriate cases.

62. Within the working group, there is a divergence of views as to whether oral examination-in-chief produces better evidence. Some members are of the view that, when examined-in-chief, witnesses may simply learn and recite a polished statement. In contrast, some others feel that witnesses may be willing to put their name on paper to language which they would be reluctant to express in court. Oral evidence-in-chief may also alleviate the concern that witnesses are constantly on the defensive at trial since they can only speak under cross examination. However, it comes with the risk that the evidence is highly contingent on how the witness performs on the day, a concern particularly expressed by some members.

63. The participants of the survey decisively rejected a wholesale return to a system that relies entirely on oral examination-in-chief. However, we feel that examination-in-chief should be available as an option, to be considered at the CMC, and to be ordered in appropriate cases. In order to encourage parties to think about whether examination-in-chief is appropriate at an early stage, a specific question should be included in the Case Management Information

Sheet requiring parties to identify whether they would be seeking oral examination-in-chief of any witnesses and, if so, on what topics/issues.

64. There is universal agreement among the members of the working group that, even in cases where the case management judge orders examination-in-chief, it should be confined to well-defined issues/topics. We also consider that, in order to avoid ambush, it is important for the issues/topics that will be addressed by way of examination-in-chief to be covered in a witness statement or at least in a witness summary.

Applications for extension of page limits

65. The Commercial Court Guide contains a limit of 30 pages unless the Court otherwise directs. Although a blunt tool, it has proved useful in requiring parties and their solicitors to consider carefully whether they can justify a longer statement. The Chancery Division and TCC might usefully consider whether to introduce a limit at least in some cases. In the Commercial Court, the current judicial practice is that applications seeking an extension of the page limits for witness statements are readily granted simply on the general basis that the case is very complex and appears to raise many issues. In many cases, this is because at the time of the application the judge does not have sufficient information to assess whether it is justified. He or she has no detailed knowledge of the evidential issues in the case and is not provided with draft statements, which have either not yet been drafted or are then still privileged.

66. We believe that an extension to the page limit of a witness statement should rarely be granted unless the judge has had the opportunity to see the contents of the intended witness statement. Instead the parties should serve witness statements at the time of exchange at their own costs risk if they are longer than the prescribed page limit. Where there is to be a PTR, permission will be sought at the PTR, and the Judge will have an opportunity at that stage to refuse permission to extend the page limit for non-compliant statements and require re-service of a compliant and cut-down statement. This may be feasible at the PTR without undue additional cost or delay, because a general perusal of the statements may enable a judgment to be formed as to compliance without a line by line or paragraph by paragraph analysis. At the PTR, the judge has the opportunity to form (at the very least) a cursory impression about whether the witness statement includes inappropriate material. If the judge considers that it does, there will be no permission to rely on the witness statement in its current form, and the redrafting will be at that party's cost. In cases where no PTR has been ordered, the application for an extension to the page limit may be dealt with without a hearing, but the Court will at least have the benefit of seeing the proposed draft statements.

67. We believe that this judicial practice will carry strong coercive effect.

Costs sanctions

68. As pointed out earlier, the results of the survey offer clear support for imposing costs sanctions to penalize non-compliant witness statements. However, in

practice, imposition of costs sanctions on this basis is not entirely straightforward.

69. If a statement is clearly non-compliant in significant respects, and appears so at the PTR, the judge may refuse to give permission for it to be relied on and require a further statement to be served without the offending material at that party's cost. This could be done without the expense of a detailed consideration for all statements. We consider that Judges should be encouraged to do this at the PTR, but without embarking on anything like a detailed reading of all statements (which in larger cases would itself occupy several days or more). Judicious use of costs sanctions at this stage may have a suitably coercive effect, but care will need to be taken not to allow this power to give rise to expensive and time-consuming satellite litigation in any but the clearest cases.

70. Imposing costs sanctions at the end of a trial rarely occurs, despite the frequency of non-compliant statements. Why is this? One main reason is that costs orders following trial are often not 100% orders and reflect multiple issues being decided in different directions. Percentage costs orders are common in such cases and result in a broad brush estimation of costs attributable to issues. In those circumstances it seems inconsistent with the costs exercise as a whole to adopt a precise exercise in disallowing the costs of drafting certain paragraphs of an excessively long witness statement or one which is too argumentative. Moreover when a witness has departed substantially from the evidence in his or her witness statement, it does not follow that there was anything inappropriate in the drafting, and determining whether the statement was over-lawyered for the purposes of considering a costs sanction is unlikely to be cost effective.

71. However the view of the working group is that egregious cases should be singled out more frequently for judicial criticism and for costs sanctioning in order to encourage compliance in future cases. Even if the quantum of the costs sanction imposed is not substantial, the fact of such an order, coupled with judicial criticism, is likely to have a beneficial effect.

F. RECOMMENDATIONS

72. On the basis of the proposals considered above, we make the following recommendations.

73. An authoritative **statement of the best practice** regarding the preparation of witness statements should be formulated, based on the principles identified in this report.

74. Witness statements should contain a more developed **statement of truth** whereby the witness confirms that they have had explained to them and understand the objective of a witness statement and the appropriate practices in relation to its drafting.

75. The solicitor in charge of drafting the witness statement should be required to sign **a solicitor's certificate of compliance** with the Rules and the relevant Court Guide.

76. The individual Courts within the BPCs should give further consideration to the introduction of a requirement for parties to produce a **pre-trial statement of facts** setting out their factual case. This would be in addition to witness statements and exchanged at the same time, with a view to confining the witness statements themselves to evidence which can properly be given by that witness at trial.

77. **Examination-in-chief** on specific issues/topics should be available as an option, to be considered at the CMC and ordered in appropriate cases. The issues/topics that are addressed by way of examination-in-chief should be covered in a witness statement or (at least) in a witness summary.

78. **An extension of the page limit** for a witness statement should rarely be granted unless the judge has had the opportunity to scrutinise its contents. The general practice should be to consider such applications retrospectively at the PTR.

79. The Court should more readily apply **costs sanctions** and express **judicial criticism** of non-compliance with the Rules, Practice Direction and Guides, both at the PTR and following the trial.

80. There should be a **harmonisation of the Guides** of the Commercial Court, Chancery Division and TCC insofar as they address the general principles as to the content and drafting of witness statements.