

**EIP**

# Parties and their lawyers will have to reveal how the sausage is made.

## **Cook UK Limited v Boston Scientific Limited & Ors [2023] EWHC 2163 (Pat)**

A little over two years ago a new practice direction, called PD57AC, was issued regarding the preparation of witness statements for trial in the Business and Property Courts. Since then parties and the Courts have been grappling with how to apply this new practice direction, and recently the High Court has handed down a short obiter judgment which says that a party seeking to do the process differently will have to provide the evidence justifying why it is not complying with PD57AC to the other parties in the proceedings.

### Background

The witness statements commented upon by the High Court were served by Cook UK Ltd in an ongoing patent dispute with Boston Scientific Limited. The parties had settled their dispute after the conclusion of the trial but before judgment was handed down and so no judgment was needed, however despite this the Court thought it appropriate to discuss an issue relating to PD57AC further.

Cook and its lawyers had been unable to comply with certain provisions within PD57AC, and so Cook had issued an application, supported by evidence, before trial without notice to Boston Scientific seeking to vary the certificate of compliance required by PD57AC. This was made by Cook under a specific provision within the practice direction allowing for such an application. This application was decided by the Court on the papers without hearing from Boston Scientific and without Boston Scientific seeing the evidence explaining why Cook were unable to comply with PD57AC.

Boston Scientific did not make an application for Cook's evidence which explained why

Cook were unable to comply with the standard process for preparing witness evidence but argued that they were entitled to copies of that evidence on the basis of Civil Procedure Rule 23.9(2) which states that "Where the court makes an order, whether granting or dismissing the application, a copy of the application notice and any evidence in support must, unless the court orders otherwise, be served with the order on any party or other person against whom the order was made". The issue for the Court to consider was whether an order varying the process to prepare a party's evidence is an order made against the other party, and so whether CPR 23.9(2) was triggered such that Cook should have served the evidence explaining why Cook could not comply with PD57AC on Boston Scientific.

#### Comments of the Court

Cook's argument at trial was that their application to vary the preparation of witness statements was not sought or made against Boston Scientific and so CPR 23.9(2) did not apply. Whereas Boston Scientific's argument was that as it affected them it was an order against Boston Scientific.

The Court rejected Cook's argument saying that permitting a party to rely on evidence not prepared in compliance with the Court's practice direction would affect the other parties in a dispute. This means an order varying compliance with the practice direction is an order made against the other parties and so therefore the party seeking the variation would have to serve the evidence justifying such a variation on the other party.

The Court also rejected Cook's argument that as Cook's application had been decided on the papers without a public hearing the documents should not be provided to Boston Scientific as the principle of public access to documents referred to in open court did not apply. The Court denied this on the basis that the Judge who granted the application was exercising their public judicial function and making a substantive determination so the principles of public access to documents referred to in open court applied to Cook's documents.

#### Takeaway point

Whilst this latest judgment on the proper process for preparing witness statements is not binding as the comments are purely obiter it is likely given the logic behind the decision that it will be followed by future judges. Therefore, any party seeking an order from the court permitting them to prepare witness statements for trial in a manner different to that set out by the practice direction will need to provide any evidence justifying that change to all the other parties to the proceedings. It is therefore important that parties and their lawyers understand that any evidence which justifies why they have not been

able to comply with the practice direction when preparing witness evidence for trial will be seen by any other parties in the proceedings.