

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-02013

BETWEEN

**KARKEL INDUSTRIES LIMITED**

**Claimant**

AND

**IRVID SAMPSON**

**Defendant**

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Date of Delivery:** Tuesday 17 August 2021

**Appearances:**

Mr. Ronnie Bissessar instructed by Ms. Saskia Samlal for the Claimant

Mr. Chanka Persadsingh instructed by Messrs Dipnarine Rampersad & Co for the Defendant

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**DECISION ON THE DEFENDANT'S APPLICATION FOR PERMISSION TO FILE  
WITNESS SUMMARIES INSTEAD OF WITNESS STATEMENTS**

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**I. Introduction**

[1] This decision deals with the Notice of Application filed on 18 July 2019 by the Defendant requesting permission pursuant to **Part 29.6 of the Civil Proceedings Rules 1998** (“the CPR”) to file witness summaries instead of witness statements on behalf of the following persons:

- (a) Sean Ramnarine;
- (b) Duane Imambaksh;
- (c) Natalie Imambaksh;
- (d) Victor Chinemilly; and
- (e) Preetab Ramlochan.

- [2] The Claimant initiated these proceedings against the Defendant on 7 June 2018 by filing a Claim Form seeking damages for breach of contract and damages for misrepresentation pursuant to **section 3 of the Misrepresentation Act, Chap 82:55** as well as interest at the rate of 3% per annum on the sum of \$1,813,688.50 from the date of filing of the Claim to the date of any order or judgment and thereafter interest at the rate of 5% per annum from the date of judgment to the date of payment.
- [3] On 17 August 2018, the Defendant filed a Defence and Counterclaim disputing liability and quantum in the Claimant's Claim. The Defendant counterclaimed for an order of payment of the sum of \$12,500.00, nominal damages for breach of contract and interest at a rate of 3% per annum on the sum of \$12,500.00 from the date of loss and thereafter the statutory rate of 5% per annum from the date of judgment until payment. The Claimant filed an Amended Claim Form and a Reply and Defence to Counterclaim on 26 October 2018.
- [4] At the first Case Management Conference on 8 February 2019, the Court gave directions for the filing and exchange of witness statements on or before 28 June 2019. However, by a consent application filed on 27 June 2019, the parties applied for an order that the time for the Claimant and Defendant to file and exchange their witness statements be extended to 18 July 2019. The Court granted the extension of time.
- [5] The Claimant complied and filed two witness statements on 18 July 2019 in the name of Anirudh J. Bhagwand and Kelvin Sookraj. The Defendant also complied and filed his own witness statement and the said Application seeking permission to file witness summaries instead of witness statements.
- [6] The Claimant objected to the Defendant's Application on the grounds that: (i) the Defendant has not adduced any evidence showing *why it was not possible to obtain the witness statements from the intended witness* contrary to **Part 29.6(3) of the CPR**; and (ii) the application was filed out of time since **Part 29.6(6) of the CPR** requires a witness summary to be served within the period in which witness statements are to be served/exchanged.

[7] The Court thereafter gave directions for the filing of written submissions. The Defendant and Claimant complied and filed their submissions on 30 September 2019 and 21 October 2019 respectively.

## II. Issue

[8] Having reviewed the Application, its attendant affidavit and submissions filed by the Claimant and Defendant, the Court must now rule on the following issue only:

*Should the Defendant be granted permission to file and serve witness summaries instead of witness statements?* To determine this issue the following factors must be considered:

- (i) *Time period for filing the Defendant's Application for permission to file witness summaries.*
- (ii) *Content and/or form of the draft witness summaries.*
- (iii) *Evidence led in support of the Defendant's Application for permission.*

## III. Law and Analysis

[9] **The Civil Proceedings Rules 1998 ("the CPR")** give the Court powers to control the evidence before the Court. **Part 29.1 of the CPR** provides as follows:

*"It is the duty of the court to control the evidence by giving directions as to –*

- (a) the issues on which it requires evidence; and*
- (b) the nature of the evidence it requires; and*
- (c) the way in which any matter is to be proved,*

*by giving appropriate directions at a case management conference or by other means."*

[10] These powers to control evidence are to be applied in accordance with the overriding objective in **Part 1 of the CPR**. The application of the overriding objective, in particular, the requirements to save expense and the underlying principle of proportionality in dealing with matters, may result in the Court restricting the scope and type of evidence that is to be adduced to prove the issues in a case. The general intent of the CPR is that litigation should be conducted with as little technicality as

possible: *per Lord Woolf* in **Douglas, Zeta Jones & another v Hello! Limited and others**<sup>1</sup>.

[11] **Part 29.6 of the CPR** deals with witness summaries and provides as follows:

*“(1) A party required to provide a witness statement may apply to the court for permission to serve a witness summary instead if he is not able to obtain a witness statement.*

*(2) The application may be made without notice.*

*(3) **It must however be supported by evidence showing why it is not possible to obtain a witness statement.***

*(4) A witness summary is a summary of the evidence, so far as is known, which would otherwise be included in a witness statement; **or if the evidence is not known, the matters about which the party serving the witness summary will question the witness.***

*(5) Unless the court orders otherwise a witness summary must include the name and address of the intended witness or other sufficient means of identifying him.*

*(6) Unless the court orders otherwise, **a witness summary must be served within the period in which a witness statement would have had to be served.***

*(7) Where a party provides a witness summary, so far as practicable, rules 29.4 (requirement to serve witness statements), 29.5 (form of witness statement), 29.7 (procedure where party will not serve witness statements), 29.8 (supplemental witness statements) and 29.10 (amplifying witness statements at trial) shall apply to the summary.” [Emphasis added]*

[12] This Court examined the use and purpose of witness summaries in its decision in **Universal Management Solutions Limited v Mansoor Ali et al**<sup>2</sup>. The following learning at paragraphs [35], [36] and [37] is instructive:

*“[35] The Court agrees with this objection made by Counsel for the Claimant. Part 29.6 of the CPR provides that a party, who is required to*

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<sup>1</sup> [2003] EWCA Civ 332

<sup>2</sup> CV2016-01032

*provide a witness statement, may apply to the court for permission to serve a witness summary instead if he is not able to obtain a witness statement. A witness summary, as the name suggests, is a summary of the evidence, if known, which would otherwise be included in a witness statement. The intention is to be able to refer to brief notes obtained and prepared which do not go quite as far as the full statement. Alternatively, if the evidence is not known, it is a summary of the matters about which the party serving the witness summary proposes to question the witness (Part 29.6 (4) CPR).*

**[36] Phipson on Evidence, 19th edition, at paragraph 10-11 states:**

*“Where a party is unable to obtain a witness statement but intends to call a witness, normally by serving a witness summons, he must still comply with CPR r.32.9 [This rule is equivalent to our Part 29.6 of the CPR] by seeking permission to serve a witness summary instead.”*

*[37] The fundamental change that has occurred in civil cases in recent years relates not only to the taking of evidence at trial, but more importantly, the giving of notice of the evidence to be given at trial, particularly through the obligation to disclose witness statements [or as the case may be, witness summaries] in advance (Phipson on Evidence, 19th Edition at paragraph 10-01). This practice is said to be regarded as the “cards on the table approach”.*

[13] **Part 29.6 of the CPR** envisages that a party who has been directed to file a witness statement within a specified period and who is unable to obtain such a witness statement, may apply to the Court for permission to serve a witness summary. However, such application ought to be supported by evidence contained in an affidavit showing why it is not possible to obtain a witness statement. Since, in the absence of a court order, a witness summary must be served within the period in which a witness statement would have had to be served, an application for permission to serve a witness summary ought also to be made within the period within which a witness statement would have had to be served.

*Time period for filing the Defendant's Application for permission to file witness summaries*

[14] Counsel for the Claimant submitted that the Defendant's Application should have been filed before 18 July 2019 so that if permission was given by the Court, the witness summaries could have been filed and served on or before 18 July 2019. Counsel further submitted that the Defendant's Application was not made promptly and that it was practically impossible for the witness summaries to be filed by 18 July 2019 when the Application was made on that date and no relief was sought for the hearing to be expedited to permit a decision to be made on 18 July 2019.

[15] Counsel for the Defendant, on the other hand, submitted that the filing of the Application seeking leave to file the witness summaries is permissible under **Part 29.6 of the CPR** and that it was filed within the prescribed time, that is, at the same time the witness statements were due.

[16] **Part 29.6(6) of the CPR** provides that unless the court orders otherwise, a witness summary must be served within the period in which a witness statement would have had to be served. In the matter at bar, this Court did not give any specific direction for the filing and serving of any witness summaries. Therefore, any witness summary ought to have been filed during the period within which the Court ordered for the filing and exchange of witness summaries.

[17] Initially, the deadline for the filing and exchange of witness statements was set for 27 June 2019. However, that deadline was varied, by consent of the parties, to 18 July 2019. Accordingly, any witness summary or application for permission to file witness summaries should have been served by 27 June 2019 in the first instance and then by the agreed extended deadline of 18 July 2019.

[18] The Defendant filed its Application for permission to file witness summaries on 18 July 2019, the last day of the deadline. The Court agrees with Counsel for the Defendant that the Defendant's Application was filed within the specified period as required by **Part 29.6(6) of the CPR** and the Order of the Court.

[19] The Court wishes to highlight that though the Defendant's Application for permission to file witness summaries was filed on the last day of the deadline, the Defendant exhibited the draft witness summaries to the Application. Therefore, if the Court were minded to grant the Defendant permission to file the witness summaries, the witness summaries as filed would be permitted to stand and the Claimant would be said to have been served effectively with the witness summaries as at the date of the Application.

*Content and/or form of the draft witness summaries*

[20] Pursuant to **Part 29.6(4) of the CPR**, a witness statement is a summary of the evidence, so far is known, which would otherwise be included in a witness statement. If however, the evidence is not known, the witness summary must contain the matters about which the party serving the witness summary will question the witness. As stated in **Universal Management Solutions Limited** (*supra*), the intention of a witness summary, where the evidence is known, is to be able to refer to brief notes obtained and prepared which do not go quite as far as the full statement.

[21] Counsel for the Defendant submitted that it is necessary for the intended witnesses to attend the trial of this matter to give evidence on the *circumstances, context, history, relationships, discussions and negotiations* between the intended witnesses and the parties. It was further submitted that the Claimant in its Statement of Case and Reply and Defence to Counterclaim averred at length about the contractual relations with the five intended witnesses. Counsel contended that the Defendant has posited another version of relations which ultimately had a direct impact on whether or not the Claimant would be awarded further contracts or phases of contract.

[22] From Counsel's submissions, it is evident that the Defendant is aware of the matters on which the intended witnesses will be questioned. However, in the witness summaries attached to the Defendant's Application, the following is stated as it relates to each witness:

(1) Sean Ramnarine: *"The negotiations, terms of contract, discussions, future phases, state of relationship, satisfaction and/or dissatisfaction with the standard of work*

*between the Claimant and this witness as it relates to the Polo Ground Contract and the Freeport Contract.”*

(2) Victor Chinemilly: *“The negotiations, terms of contract, discussions, future phases, state of relationship, satisfaction and/or dissatisfaction with the standard of work between the Claimant and this witness.”*

(3) Duane Imambaksh: *“The negotiations, terms of contract, discussions, future phases, state of relationship, satisfaction and/or dissatisfaction with the standard of work between the Claimant and this witness as it relates to the Chaguanas Town Houses Contract.”*

(4) Natalie Imambaksh: *“The negotiations, terms of contract, discussions, future phases, state of relationship, satisfaction and/or dissatisfaction with the standard of work between the Claimant and this witness as it relates to the Chaguanas Town Houses Contract.”*

(5) Preetab Ramlochan: *“The negotiations, terms of contract, discussions, future phases, state of relationship, satisfaction and/or dissatisfaction with the standard of work between the Claimant and this witness as it relates to the Madho Trace Contract.”*

[23] The Court is of the opinion that the matters stated in the witness summaries are too broad in nature and do not amount to a summary of the evidence so far as is known. Since Counsel for the Defendant has indicated that the Defendant has pleaded his own version of events, the witness summaries of these intended witnesses ought to include a summary of those events as it relates to the intended witnesses. It is in that regard that the Court finds that the intended witness summaries ought to have included the questions to be asked and the list of correspondence and documents on which the intended witnesses would be cross-examined. The witness summaries as drafted in the Defendant’s Application are grossly inadequate. The Court is further of the opinion that the content of the witness summaries are akin to what will be contained in a witness summons. In this regard, the Court is of the view that the form and content of the witness summaries attached to the Defendant’s Application do not comply with **Part 29.6(4) of the CPR.**



***Evidence led in support of the Defendant's Application for permission to file and serve witness summaries***

[24] Counsel for the Claimant contended that the Defendant, neither in his Application nor his affidavit in support, gave any evidence showing why it was not possible to obtain witness statements from the proposed witnesses. Counsel further contended that the Defendant gave a bald statement in his affidavit. Counsel submitted that the cases make it clear that the deponent must provide evidence of diligent attempts to see or meet the prospective witness and that the witness has clearly and unambiguously refused to give a witness statement. Counsel relied on the local cases of **Kristian Lutchmansingh v Rosemarie Sieunarine and others**<sup>3</sup>; **Rossie Beepath v Petrotrin**<sup>4</sup>; **Ernest Matthews and another v Adolphus Barron**<sup>5</sup>; and the United Kingdom case of **Scarlett v Grace**<sup>6</sup>.

[25] It is clear from the authorities cited by Counsel for the Claimant that the evidence in support of an application for permission to file witness summaries must be sufficient in showing why it was not possible to obtain witness statements from the intended witnesses. The deponent must provide details of his attempts to contact and/or meet with the intended witnesses such as dates, times and location of the witnesses. The evidence ought to show that numerous and repeated unsuccessful attempts were made or that the intended witnesses could not be located or were clearly evading communication.

[26] In this Application before the Court, no particulars were given as to the difficulty encountered by the Defendant and/or his attorney-at-law as to what attempts were made to obtain witness statements from the intended witnesses. At ground (d) of his Application, the Defendant stated "*The Defendant, despite valiant efforts has been unable to procure witness statements for Mr. Sean Ramnarine, Mr. Duane Imambaksh, Ms. Natalie Imambaksh, Mr. Victor Chinemilly and Mr. Preetab Ramlochan.*" This is woefully inadequate.

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<sup>3</sup> CV2013-02858

<sup>4</sup> CV2010-04018

<sup>5</sup> CV2010-04014

<sup>6</sup> [2014] WL 2194748

[27] In his affidavit in support, the Defendant did not give any dates, times and places where he met with the intended witnesses and what, if anything, they said which made it clear to him that it would not be possible to obtain witness statements from them. At paragraph 5 of the Defendant's affidavit, he baldly states "*I made many efforts procure Witness Statements for Mr. Sean Ramnarine, Mr. Duane Imambaksh, Ms. Natalie Imambaksh, Mr. Victor Chinemilly and Mr. Preetab Ramlochan.*" The Defendant has not given any evidence of any of the failed attempts to obtain witness statements from these intended witnesses. The Court is of the opinion that this does not satisfy the Court that it was impossible or, at least, impracticable for the Defendant to obtain witness statements from these intended witnesses as required by **Part 29.6(3) of the CPR**.

[28] Though the Court can exercise its judicial discretion in executing the overriding objective of **the CPR**, some persuasive material ought to be placed before the Court to justify the Court's discretion. However, the affidavit in support of the Defendant's Application for permission to file and serve witness summaries of the intended witnesses is grossly deficient.

[29] In that regard, the Court is of the view that permission ought not to be granted to the Defendant to file witness summaries of the intended witnesses in this matter. Accordingly, the Defendant's Application for permission to file and serve witness summaries ought to be dismissed.

#### **IV. Disposition**

[30] In light of the above analyses and findings, this Court orders as follows:

##### **ORDER:**

- 1. The Defendant's Notice of Application filed on 18 July 2019 for permission to file witness summaries be and is hereby dismissed.**
- 2. The Defendant shall pay to the Claimant costs of the Notice of Application filed on 18 July 2019, to be assessed in accordance with Part 67.11 of the CPR, in default of agreement.**

- 3. In the event that there is no agreement on the issue of costs, then the Claimant to file and serve a Statement of Costs for assessment on or before 30 September 2021.**
- 4. Thereafter, the Defendant to file and serve Objections to the items on the Statement of Costs, if necessary, on or before 21 October 2021.**
- 5. Decision on quantification of costs to be given without a hearing on a date to be announced or at the hearing of the next Case Management Conference.**
- 6. The next Case Management Conference is fixed for 29 November 2021 at 10:00 am in courtroom SF10.**

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**Robin N. Mohammed**  
**Judge**