

THE REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV2015-00671

BETWEEN

K & A HOLDINGS LIMITED

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

**Appearances:**

Claimant: Ronald Simon and Lindi Ann Marshall for the Claimant

Defendant: Seenath Jairam SC leading Jagdeo Singh and instructed by Sean Julien and Nissa Simmons for the Defendant

**Before The Honorable Mr. Justice Devindra Rampersad**

Dated the 27<sup>th</sup> day of January 2017

**Ruling on Application for Further and Better Particulars**

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1. On 21 September 2016, the court was informed that there was an outstanding application for further and better particulars dated 4 September 2015 in relation to the defence filed on 15 July 2015 and in respect of which submissions were filed by both parties on 2 November 2015, 24 November 2015 and 4 December 2015.
2. Mr. Jairam SC, for the defendant, undertook to consider the outstanding application for further and better particulars and to notify the court and the claimant's attorney at law by email by 12 October 2016 whether the application would still be contested. In the event that there was no agreement on that application, the court would rule on it in chambers *based on the submissions filed to that date*.
3. The defendant has not altered his position with respect to the particulars sought and so the court must proceed to rule on the application based on the submissions referred to above.

## The Law

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4. Uncertainty sometimes arise as to the source of the jurisdiction to grant further and better particulars. On occasion, reliance has been placed on part 35 of the CPR, as the defendant has done to some extent in these proceedings.
5. Part 35 of the CPR 1998, as amended, provides as follows:

*Right of parties to obtain information*

35.1 (1) *This Part enables a party to obtain from any other party information about any matter which is in dispute in the proceedings.*

(2) *To do so he must serve a request for information that he wants on that other party.*

(3) *He must state in his request precisely what information he wants.*

35.2 (1) *If a party does not give information which another party has requested under rule 35.1 within a reasonable time, the party who served the request may apply for an order compelling him to do so.*

(2) *An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.*

(3) When considering whether to make an order the court must have regard—

(a) to the likely benefit which will result if the information is given;

(b) to the likely cost of giving it; and

(c) to whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with such an order.

35.3 An application for an order compelling a reply to a request for information **may not be made before the time for serving witness statements has expired nor less than 42 days before the date fixed for the trial.**

(The time for serving witness statements will be specified in directions given by the court under Part 27)”

**[Emphasis added]**

6. On the other hand, Part 26.1 (1)(w) provides:

“26.1(1) The court (including where appropriate the court of Appeal) may-

(w) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.”

7. Jamadar JA, in Civil Appeal No. 238 of 2011 - **Real Time Systems Limited v Renraw Investments Limited & Or** made it abundantly clear that, at this stage of the proceedings, where pleadings are not yet closed and discovery has not yet taken place, Part 35 of the CPR is inapplicable and, instead, the court is left to further the overriding objective using the provisions of Part 26.1 (w) to order further and better particulars.

8. The learned judge stated<sup>1</sup>:

“9. The thrust of the CPR, 1998 is towards litigation with full disclosure at the earliest opportunity and against tactical non-disclosure for the purposes of gaining strategic advantages in the conduct of litigation.”

9. He continued at paragraph 23:

“...the court is given certain general wide ranging powers of management. These are listed at Rule 26.1, CPR, 1998. Among these powers are several which are directly related to identifying issues and determining whether they should be heard and if so when and how. And critical to these powers of management is the specific power to: “take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.”

24. This specific power includes the power to order the delivery of ‘further and better particulars’ on either a statement of case or a defence. And, in

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<sup>1</sup> At paragraph 9

*exercising this power the court can act on its own initiative, pursuant to its duty and power to actively manage cases. Clearly this is a necessary power, because there will always be matters in which a ‘pleading’, whether a statement of case or a defence, is defective by reason of the inadequacy of facts disclosed, but not to the extent to make it an abuse of process or to constitute such a non-compliance with Parts 8 or 10 to reasonably or proportionally justify striking it out pursuant to Part 26.2. In such cases a court ought to be able to manage the matter so as to properly identify the issues to be responded to, in say a defence, by making an appropriate order for the supplying and serving of ‘further and better particulars’ as directed. In my opinion, a purposive reading and interpretation of the CPR, 1998 reveals this intention.*

25. *In this case it has been argued that by reason of Rule 35, any order compelling a request for information can only be made after the time for serving a witness statement, and therefore could not be made and enforced before a defence has been filed (an argument which the trial judge upheld and which influenced his decision in this case). As already indicated, I disagree with this position.”*

“27. ....*In this understanding, Part 35 deals with what was under the RSC, 1975 generally dealt with by way of interrogatories. Prior to the delivery of a defence it is not possible to formally say what are the matters in dispute between the parties. Therefore Part 35 is inapplicable at this stage.”*

“34. .... *Indeed, it would make complete nonsense of the Overriding Objective, if it was that a party could not request and a court order particulars of a statement of case or defence when a pleading was defective or inadequate but not irremediably so....”*

10. Following on from that judgment, in the case of CV No. 2006 – 01349 *VSN Investments Limited v Seasons Limited*, Jones J discussed<sup>2</sup> the factors to be considered by the court in relation to a request for further and better particulars, namely, whether the information requested is necessary:

10.1. In order to fairly dispose of the claim or save costs; or

10.2. For the purpose of managing the case and furthering the overriding objective.

11. In Blackstone’s Civil Practice 2011, in discussing the UK Part 18.1<sup>3</sup>, it was stated<sup>4</sup>:

*“The distinction between the old “request for further and better particulars” and “interrogatories” has been abolished. Formulate the*

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<sup>2</sup> At paragraph 11

<sup>3</sup> 18.1(1) The court may at any time order a party to –

(a) clarify any matter which is in dispute in the proceedings; or

(b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.”

<sup>4</sup> At paragraph 30.1 on page 430

*distinction between the two was that the request for further and better particulars was part of the pleadings process, and was (at least technically) limited to matters which should have been disclosed in the first place, so that a proper response to the pleading could be made..... Interrogatories, on the other hand, were technically part of the discovery process and were answered on affidavit...*

*The doctrine of proportionality and the more “utilitarian” approach to statements of case generally, should mean that requests for further information should be used with some caution. Although they can be used to advantage in some claims, considerable care must be taken in selecting the areas to be investigated by a request, and in formulating the questions to be put. Experience has shown that the CPR have been effective in severely curtailing, if not extinguishing altogether, the use of the request for further information for tactical purposes, and the request for further information appear to be employed much more rarely than the old request for further and better particulars. On the other hand, a request for further information may be the proportionate and best way of dealing with a statement of case by an opponent which does not provide for information, rather than the more drastic approach of applying to strike out (Deutsche Morgan Grenville Group PLC v Commissioners of Inland Revenue [2006] UKHL 49, [2007] 1 AC 558 at [148])”*

12. Adrian Zuckerman, in his text “Zuckerman on Civil Procedure” discussed the application of the English rule i.e. CPR 18.1. That rule does not include the restriction as to time for filing an application for an Order pursuant to part 35 under part 35.3 of our CPR.

13. Zuckerman said that<sup>5</sup>:

*“The purpose of the jurisdiction is to ensure that the parties and the court have all the information needed for dealing justly and efficiently with the matter in dispute. The overriding objective and, in particular, the need for proportionality require the court to have regard to the following considerations when dealing with an application for further information: the likely benefit that the information would have for the just determination of the issues; the cost that is likely to be involved in supplying it; whether the request places an unreasonable burden on the respondent; and the respondent’s conduct in the litigation. In assessing the need for such an order the court will want to be persuaded that it is necessary, proportionate and does not involve disproportionate expense.”*

14. The factors discussed by Zuckerman compare favorably with the provisions of Part 35.2 (3) of our CPR. Clearly, but for the restriction provided by Part 35.3 of our CPR as to the time when such applications may

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<sup>5</sup> Paragraph 7.36 at page 304

be made, the principles for consideration behind Part 18.1 of the UK CPR, as discussed by Zuckerman, and Part 35 of our CPR are remarkably similar. Accordingly, to my mind, the same principles discussed in the quoted paragraph from Zuckerman and Part 35 seem apposite in our jurisdiction and ought to assist the court in determining whether particulars should be ordered.

15. So whereas in the UK, the terminology used under their Part 18.1 – Requests for Further Information – incorporates the old principles of “further and better particulars” and “interrogatories”, our Part 35 preserves the latter leaving the former to be dealt with under Part 26.1 (1) (w).
16. Therefore, as per the learning in *Renraw*, this court holds that it has the jurisdiction under Part 26.1 (1)(w) to consider making an order for the provision of further and better particulars by the defendant providing the court is of the respectful view that the pleading in question is not irretrievably defective and to do so would:
  - 16.1. Benefit the just determination of the issues in the case and it’s just and fair disposal by allowing the claimant, inter alia, to fully understand and be prepared to meet the case put forward by the defendant;
  - 16.2. Not be disproportionate to the burden placed on, and the financial resources required of, the defendant in meeting any such order;
  - 16.3. Further the overriding objective.
17. Essentially, as Zuckerman has put it, the requested information should be necessary, proportionate and not involve disproportionate expense.

#### The Particulars Requested

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18. The claimant’s attorney at law has submitted that the issues arising are as follow:
  - 18.1. Whether a legally binding contract existed between the claimant and the defendant;

- 18.2. Whether, if it found that a legally binding contract existed, the defendant breached the same;
  - 18.3. Whether the persons contracting on behalf of the defendant had the authority to do so;
  - 18.4. Whether the claimant procured the said agreement in question through fraudulent means;
  - 18.5. Whether the persons deeming the works completed by the claimant as satisfactory had the authority to do so;
  - 18.6. Whether the claimant is then entitled to the reliefs that are being sought.
19. Bearing those issues in mind, requests were made by the claimant's attorney in relation to the following paragraphs of the defence.

Paragraphs 6 (d) and (e)

*“(d) Further, the historically established rules of the procurement procedure were implemented to ensure that public funds were paid only when the Ministry of Works and Infrastructure was satisfied that the works contracted were completed according to the scope of works (and any authorized variations thereof) to the satisfaction of the said Ministry.*

*(e) It is also the practice, such a practice being a custom or trade practice and being reasonable, certain and imperious, that the Minister of the Ministry of Works and Infrastructure (“the Minister”) sets the mandate as to how many projects and/or the type of works to be conducted by the UPR (sic) for every financial year.”*

20. The defendant says that this request is unnecessary and premature and the burden was on the claimant to prove.
21. The claimant's case is that all arrangements were made and contracts entered into with and approvals given by the Ministry of Food Production. In order for the claimant to know the full extent of the defence and the case that it needs to meet i.e. that a different Ministry was responsible for the approval, then particulars of the alleged *“historically established rules of the procurement procedure”* have to be given. In particular, any such procedure must be particularized and set out and exhibited or referred to if the same is set out in a written document. Obviously, this information goes to the procurement procedure which the defendant has suggested ought to have

applied and since the defendant is making a positive statement that such a procedure existed at the relevant time and was not followed by the claimant, then it must be particularized to give the claimant an opportunity to respond as to its state of knowledge of those particular “*historically established rules*”. If, for example, such a procedure was not made known to the public, then that issue would have to be addressed at the trial to see how it impacts upon the alleged contracts with the claimant. The court is appreciative of the fact that the burden is on the claimant to prove the contract but the burden of proving the procurement procedure would shift in a case like this where the defendant is alleging that an improper procedure was followed.

22. Further, the words “*being reasonable, certain and notorious*” in paragraph 6 (e) need to be particularized so that the issue of the reasonableness, certainty and notoriety of the practice referred to in that paragraph may be addressed by the claimant in the preparation of its case for trial.
23. Therefore, the court will direct the defendant to file and serve the particulars requested with the following variation shown in italics.

#### The Order

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24. The defendant shall provide particulars of:
  - 24.1. The document and or instrument *whatsoever*:
    - 24.1.1. Which gave to the Ministry of Works and Infrastructure Total jurisdiction over *the work to be done; and*
    - 24.1.2. *Which set the mandate as to how many projects and/or type of works were to be conducted;*

*for and on behalf of the Ministry of Food Production, Unemployment Relief Program Agriculture, including the Unemployment Relief Program Agriculture Unit during the period 28<sup>th</sup> of May 2013 – 11 September 2013 and, in particular, which authorized the Ministry of Works and Infrastructure to be the governmental agency to be the entity to be satisfied of any such work done before the payment out of monies due under a contract for the same with the said Ministry of Food Production.*

- 24.2. Particulars of the custom or trade practice relating to the Minister referred to in paragraph 6 (e) of the defense and the reasons why the defendant says that such a practice was reasonable, certain and notorious.

Paragraph 6 (f)

*“..., the Defendant has no records of any legally binding written contractual arrangement made between the Claimant and the URP and the Claimant is out to strict proof of any and or all alleged contractual arrangement(s) between itself (the Claimant) and the duly authorized representative(s) of the State. The Defendant further avers that the exhibit marked “K&AHL1” (namely the letter dated 12<sup>th</sup> June 2013 purportedly under the hand of one Dr. Bibi Ali”.*

25. The claimant submitted that this pleading suggests that the exhibit marked “K & AHL1”, a letter dated 12 June 2013 under the hand of one Dr. Bibi Ali, did not constitute a contractual agreement. As a result, the claimant would like particulars of the documentation and or instrument removing Dr. Ali’s authority.
26. To my mind, the pleading does not warrant such a request for particulars. What the defendant is clearly saying is that the exhibited letter in and of itself is incomplete as it failed to include the spreadsheet referred to in the 1<sup>st</sup> paragraph of the letter which would necessarily have identified the flood alleviation works and areas which were to have been the subject of that letter’s alleged authorization and, further, that the letter did not contain any contractual terms. This paragraph does not say anything about Dr. Ali’s alleged authority or lack of it.
27. Therefore, these particulars sought are refused.

Paragraph 6 (i)

*“...during the period August – October 2013, numerous fraudulent claims were made by a number of contractors for works allegedly performed for the URP due in March-August 2013.”*

28. The claimant has sought particulars of these fraudulent claims going as far as to seek to find out when the reports were made to the Fraud Squad and the investigating officer appointed.
29. To my mind, this information is irrelevant to the case for determination by the court. The request made seems premised on an assumption that

fraudulent claims were made by this claimant but the pleading does not say so. As I see it, the plea seeks to set the context for the rest of the paragraph as it gives the motivation for the audit referred to thereafter. There is no allegation made in this paragraph as against the claimant in relation to fraudulent claims so that to grant the particulars sought would be unnecessary and may very well incur disproportionate costs to seek and obtain the information being requested.

30. Therefore, these particulars sought are refused.

Paragraph 6 (k)

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*“However, after the said investigation was completed, it was discovered that several fraudulent claims were made by a number of contractors and that the works allegedly claimed were either never done or incomplete. This particular Claimant has failed, refused and/or neglected to participate in the said exercise.”*

31. In referring to the first sentence of the paragraph set out above, the claimant seeks particulars in relation to the audit report prepared upon the completion of the investigation. The claimant goes on to suggest that the claimant was identified as one of the contractors who had submitted a fraudulent claim to the defendant but the pleading does not suggest that. Having regard to the fact that material facts must be specifically set out in the pleading, the court bears in mind that the defendant did not allege in this paragraph that the claimant made any fraudulent claim. In fact, it says quite clearly that the claimant failed, refused and/or neglected to participate in the exercise but does not go on to suggest that any finding of a fraudulent claim(s) was made as against the claimant.
32. In any event, the burden is on the claimant to establish that the work allegedly contracted to be done was done and one would expect that in the fullness of the evidence, one would find appropriate delivery notes, work orders and other contemporaneous documentation along with viva voce evidence to support the completion of the same. The issue of the alleged audit report is not relevant to any plea made by the defendant in these proceedings and is not the substance of the defence raised in this paragraph. Otherwise, the defendant would have been required under the CPR to have

properly referred to it and exhibited it to these proceedings. Therefore, the production of this audit report is unnecessary.

33. These particulars sought are therefore refused.

Paragraphs 7 (e) and (f)

*“(e) Once the works are completed, (including the Claimant) thereafter submit an invoice and before payment is made by the URP, checks are done by the URP representatives to confirm the completion of works based on the scope of works illustrated in the contractual agreement. In the present case, the Defendant is unaware of the purported works, which the Claimant has completed”.*

*“(f) In or around August 2013, claims for payments were made on certain agricultural projects some of which were completed without the knowledge and consent of the relevant authorities at the URP...”*

34. Essentially, the defendant is suggesting in these paragraphs that it has no record of any contracts involving the claimant or any work done by the claimant. As a result, the burden is on the claimant to establish its case. That would not be helped by the particulars being sought of the defendant. Those particulars are with respect to the scope of authority/responsibilities of the people whom the claimant alleges authorized the contract. Respectfully, that would not assist the claimant’s case. The claimant suggests that the persons mentioned in the request and also referred to in the statement of case were the ones who authorized the contract with it. Therefore, it is for the claimant to establish the validity of its contract (s). It is reasonable to expect that at the time of the trial, any or all of the named persons may have to attend to validate any contract that the claimant wishes to rely upon. At that time, it is up to them to establish their authority. At this time, however, that burden does not fall on the defendant and therefore these particulars sought cannot be ordered.

35. Therefore, these particulars sought are refused.

Paragraph 7 (f) (ii), (iii) and (iv)

*“(ii) It is also found that there was substantial fraudulent collusion between the contractors and the unauthorized personnel in formulating the alleged illegal contracts”.*

*“(iii) Many contractors (including this Claimant) fabricated contracts and or made fraudulent claims...the staff at the URP has identified the said claims as fraudulent”....*

*“(iv) Most contractors (including the Claimant) overbilled for works they did not complete the works outlined in their scope of works and invoice(s) and they fraudulently claimed that they completed the said works”.*

36. The claimant seeks particulars in relation to these paragraphs with respect to alleged fraudulent crimes and offences and wishes to get information as to when these offences were reported to the police for investigation and was the investigating officer.
37. Once again, the defendant says that this information is unnecessary and the request is premature.
38. The defendant has alleged, in essence, that the work claimed by the claimant was not in fact done and the invoices submitted were over billings and were therefore fraudulent. In such an instance, this court is not concerned with whether there is a parallel police investigation being pursued at this time since it does not assist with the issues at hand, which is whether the claimant had a valid contract and performed it and has to be paid as per its invoices. Any report to or resulting investigation by the police is of no moment to this court with respect to this issue. The burden, as has been stated above, is on the claimant to prove that work was contracted for and was completed and therefore it ought to be paid.
39. Therefore, these particulars sought are refused.

#### Paragraph 8

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*“The Defendant avers that the supervisory personnel of the URP did not monitor the Claimant’s work according to established protocol since they were unaware of same...the Defendant states that the verification process did not take place immediately after the Claimant submitted his invoice...the Defendant contends that the unnamed stakeholders did not have the authority to complete the verification process and to certify that works were completed satisfactorily or at all by the Claimant”.*”

40. For the reasons given above in relation to persons who allegedly authorized/supervised the work done, the court will not grant the request in relation to the scope of authority/responsibilities of Joshua Maynard,

Errol Kirton and Steven Valere. The fact is that, according to the claimant, these persons were the ones who were directly involved but the defendant says that the supervisory personnel of the URP did not monitor the work done by the claimant because they were unaware of “the established protocol”. That issue would be one for the defendant to prove. However, “the established protocol” has to be established by the defendant for the claimant to meet that case and therefore decide whether or not the established protocol was met.

41. With respect to the allegation that there was no record of the claimant being hired according to the URP protocol, once again, that would be a matter for the claimant to establish and getting the particulars of the authority and responsibility of the persons named above does not assist in that. It will be for the claimant to provide that evidence at the trial.
42. With respect to the verification process referred to in the last sentence of paragraph 8, again, it would be up to the claimant to establish who the unnamed stakeholders were and whether they had the authority to complete the process. The claimant would know who these stakeholders were and would have to get that information from them. Respectfully, it is not for the defendant to make the case for the claimant in relation to this issue.
43. Therefore, the court will not grant the request for particulars sought by the claimant but, instead, is of the respectful view that the case necessarily requires that the defendant identify and particularize “*the established protocol*” referred to in paragraph 8.

#### The Order

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44. The court therefore directs the defendant to give particulars of “*the established protocol*” referred to in paragraph 8 of the defence and how and when this established protocol was notified to the supervisory personnel of the URP and/or the Ministry of Food Production.

Paragraph 11 (incorrectly referred to as paragraph 8 in the Notice of Application)

*“In response to paragraph 9 of the Claimant’s Statement of Case the Defendant denies that a thorough investigation of the projects was done. The Defendant further avers that Mr. Joshua Maynard had no authority to approve certain projects and recommend for payment contractors, including the Claimant”.*

45. At paragraph 9 of the statement of case, the claimant referred to a letter being done by the Assistant Engineer, Joshua Maynard, dated 1 October 2013 indicating that after a thorough investigation of the projects, he was pleased to report that the work was done and the contractors should be paid. The defendant denies the thorough investigation and denies Mr. Maynard’s authority to approve certain projects and recommend payment.
46. The request made for further and better particulars in relation to this paragraph is in relation to the scope of authority/responsibilities of Lester Herbert, Director Central Audit Committee at the Ministry of Finance, Khemkaran Kissoon, Senior Audit Analyst, Central Audit Committee at the Ministry of Finance and Varuna Ramdial, Senior Audit Analyst, Central Audit Committee at the Ministry of Finance.
47. To my mind, this information being sought is irrelevant to the issues raised in this paragraph and, therefore, is unnecessary for the just determination of the case. These persons are not mentioned at paragraph 11 as the focus is on the authority of Joshua Maynard.
48. As a result, these particulars sought are refused.

The Order for Particulars

49. In summary, bearing in mind what has been said and the orders which the court is willing to make as referred to above, the court makes the following orders for the provision of the further and better particulars set out below.
50. The defendant shall provide particulars of the following paragraphs of the defence by 3 March 2017 and, in default, these paragraphs would be struck out:

- 50.1. In relation to paragraph 6 (d) of the defence, the document and or instrument whatsoever:
- 50.1.1. Which gave to the Ministry of Works and Infrastructure total jurisdiction over the work to be done; and
- 50.1.2. Which set the mandate as to how many projects and/or type of works were to be conducted;
- for and on behalf of the Ministry of Food Production, Unemployment Relief Program Agriculture, including the Unemployment Relief Program Agriculture Unit during the period 28th of May 2013 – 11 September 2013 and, in particular, which authorized the Ministry of Works and Infrastructure to be the governmental agency to be the entity to be satisfied of any such work done before the payment out of monies due under a contract for the same with the said Ministry of Food Production.
- 50.2. Particulars of the custom or trade practice relating to the Minister referred to in paragraph 6 (e) of the defence and the reasons why the defendant says that such a practice was reasonable, certain and notorious.
- 50.3. Particulars of “*the established protocol*” referred to in paragraph 8 of the defence and how and when this established protocol was notified to the supervisory personnel of the URP and/or the Ministry of Food Production.
51. The costs of the application shall be paid by the defendant to the claimant to be quantified by the court in default of agreement especially in light of the failure the defendant to indicate his position as directed by the court on 21 September 2016.
52. A CMC is fixed for 7 March 2017 at 10 AM in POS 20.

*/s/ Devindra Rampersad*  
Devindra Rampersad  
Judge