

**IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS**



Action No. CL 43/17

BETWEEN:



- 1. ATEKAH DEFREITAS**
- 2. TITO SEYMOUR**

Plaintiffs

AND

- 1. ALVIN DEANE**
- 2. CBMS LTD**

Defendants

JUDGMENT

CORAM: **The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)**

Appearances: **Devon McLean and Yuri Saunders for the Plaintiffs**
Mark Fulford for the Respondents

Venue: **Court No. 5, Graceway Plaza, Providenciales**

Hearing Date: **19 July 2022**

Date Delivered: **5 August 2022**

Background

1. This is an application by the Plaintiffs to file a supplemental witness statement, a statement of anticipated evidence, and an amended trial bundle. The substantive claim

is a running-down action arising out of a road traffic accident which occurred on the Leeward Highway in the vicinity of Scotia Bank on 21 December 2015.

2. By a directions order dated 24 April 2019, the parties were ordered to exchange witness statements on or before 27 May 2019 and a trial bundle on or before 17 June 2019. The parties filed and exchanged their respective witness statements in May 2019. The Plaintiffs' proposed witnesses include the second Plaintiff ("Mr Seymour") and Royal Turks & Caicos Islands Police Force Officer Felicia Robinson ("Officer Robinson"). The Plaintiffs filed a purported witness statement of Officer Robinson but it was unsigned.
3. The trial was originally scheduled for 19 June 2019, but it was adjourned to 24 August 2020. On 21 August 2020 the Plaintiffs issued a writ of subpoena for Officer Robinson. On 24 August 2020 by consent, the trial was adjourned and it was ordered that the matter be set down for trial upon request of the parties. The trial is now scheduled for 21 November 2022.

The summons

4. By a summons dated 7 April 2022 the Plaintiffs applied for:
 - a. leave to file a supplemental witness statement of Mr Seymour;
 - b. leave to file a statement of anticipated evidence of Officer Robinson;
 - c. a production order against the Royal Turks & Caicos Islands Police Force; and
 - d. leave to file a fresh as amended trial bundle.
5. The Defendants object to the entirety of the summons. Prior to the hearing of the summons the Plaintiffs abandoned their application for a production order.

The submissions

6. Counsel for the Plaintiffs argue that they should be allowed to file the additional documents as the Defendants will suffer no prejudice, no pleadings will need to be amended, the trial date will be unaffected, and because the documents will allow the introduction of evidence at the trial in a manner that will best assist the Court, saving time and costs.
7. As regards the supplemental witness statement, the Plaintiffs argue that the supplemental evidence, which are mainly photographs, were disclosed and are mentioned in their list of documents, which forms part of the trial bundle. As regards the statement of anticipated evidence of Officer Robinson, the Plaintiffs argue that it is nearly identical to her unsigned witness statement, and in any event they intend to subpoena her to give evidence at the trial, as was done previously.
8. Counsel for the Defendants argues that the application has been made at the 11th hour, is cost intensive, unnecessary, and an abuse of process of the Court. As regards the supplemental witness statement, counsel argues that the Plaintiffs have had the benefit of the Defendants' witness statements since 2019 and this is merely an attempt to "put a different spin" on evidence which is already included in the trial bundle, or to introduce new evidence which was known to the Plaintiffs when Mr Seymour's original witness statement was filed. This, counsel argues, would be prejudicial to the Defendants' defence.
9. As regards the statement of anticipated evidence, counsel argues that this is an outright attempt to bolster the Plaintiffs' claim and make good, imperfections in their case.

The law

10. The Supreme Court Practice 1999 practitioner's text ("the White Book"), contains commentary on the rules of civil procedure which were in effect at that time in the United Kingdom. These rules were nearly identical to the Rules of the Supreme Court 2000. At paragraph 38/2A/10, the White Book states:

Although there is no express provision to this effect, the Court has power, if it thinks fit to do so, to direct that a further written statement of a witness be served supplementary to that already served....A supplementary statement may be allowed to be served to give the witness of a party the chance to fill in the gaps in his own statement or to answer the statement of the opposite party.

11. In exercising its power to allow supplemental evidence, the Court should determine what is just in all the circumstances. I start from the premise that unless there is a very good reason to exclude it, all admissible evidence should be available to the trial judge, and "a very good reason" will almost invariably include proof of prejudice to another party.
12. **Ryanair Ltd v Bravofly Ltd** [2016] IESC 53 is a fairly recent appellate decision from Ireland. In considering whether the trial judge was correct to reject an application to have a supplemental witness statement adduced in evidence, (albeit under differently worded rules) McKechnie J adopted a similar approach:

[37] As is evident from the recital of the relevant facts and circumstances above given, the delivery of the supplemental witness statement was some distance outside the time limit imposed therefor by order of the commercial court. Such occurrences, though infrequently tolerated within the context of O. 63A RCS, can occur, but can be overlooked or conditioned in the event of the trial court exercising its discretion, which it undoubtedly has, in this regard. **It should be noted that the rules do not expressly**

exclude the admission of such a statement, surely for the very reason that to do so would both overly restrict the court's power and curtail the court's control over the litigation process.

[38] The circumstances in which Ryanair failed to include the additional material, which evidently had to exist as of November, 2007, in the original witness statement of Mr. Dickson cry out for an explanation. The same must undoubtedly exist but for some reason it has not been offered to this Court. **As unsatisfactory as this is, its absence however cannot per se prevent the trial judge from admitting such a statement if otherwise it would be appropriate to so do. Again, such failure cannot have the effect of automatically ruling out such a statement. However, in such circumstances the court will rigorously scrutinise the surrounding circumstances with a high level of scepticism so as to make sure that justice in an overall sense, as between the parties and the court, is not impaired if the statement should be admitted.**

...

[40] Furthermore, the respondent has never suggested that it would be prejudiced in any other way by having to meet this evidence: this apart from the obvious, namely that the additional material might support the position of the defaulting party and damage its own. Thus, what one can deduce from this is that the respondent did not envisage irredeemable prejudice being caused to its ability to prepare for trial if the supplemental statement was to be allowed in. In other situations, prejudice may be irreversible in the sense that irrespective of what ameliorating orders were made by the court, the same could not be addressed. Again, one could find that the prejudice identified might be conditional in nature, for example, that the innocent party would not have sufficient time to consult its own expert, or to obtain a responding statement on its behalf. None of these difficulties, however, arise in this case.

[41] The absence of such a prejudice by itself, much like the absence of an explanation from Ryanair, does not mean that the statement should automatically be admitted. It is, however, an additional factor to be

considered by the court, but its precise significance in any given case will move on the vertical scale when viewed in the context of the overall evidence.

[42] It has often been said that **the underlying purpose of the commercial rules is to implement three imperatives in respect of actions admitted to that list. Firstly, that the parties should engage in a fair trial of the issues so identified; secondly, that such issues should be dealt with and disposed of with reasonable expedition; and, thirdly, that costs should be reduced so far as possible in such litigation** (O. 63A, r. 5 & 14(7) RSC). I agree with this particular classification and would only add a general observation, even if trite, namely that **justice is the ultimate objective of case management**. This may suggest an *inter partes* evaluation only, but that is not the case: the administrative system is an integral part of the justice objective and its functional operability is a real factor for consideration on an application such as that moved before the trial court.

[43] That being so, **the final matter of general importance is the requirement of upholding the integrity of the Commercial Court rules, which would be seriously undermined if court orders made by it in the context of the imperatives above outlined were routinely disregarded. I do not feel that the default in this case, even when the additional factors are also considered, is such as to jeopardise the ongoing value of such rules. Moreover, the court has available to it a range of options short of rejecting the statement, including appropriate orders via the imposition of costs and other appropriate conditions, if it so wishes to rely upon them.**

(emphasis mine)

13. I am also guided by Spencer J's observations in **Rashid v Oil Companies International Marine Forum** [2019] EWHC 2239 (QB) (1 July 2019). On allowing

an application to introduce a supplemental witness statement at the outset of a trial, he said:

7. **No specific prejudice is relied upon in the sense that the defendant is embarrassed by this evidence in dealing with it at trial now** on 1 July 2019, and it is the case that the defendant has had this witness statement and this schedule for a significant time.

8. Had the defendant needed more time to serve a counter-schedule, or to serve evidence in response, it would clearly have been afforded that time, but no adjournment is sought, **and I can see in those circumstances no real prejudice to the defendant in meeting this claim. The justice of the situation demands that the claim by the claimant should be presented as it truly is and not on some artificial basis** which would be the case were Mrs Rashid's evidence to be excluded.

(emphasis mine)

14. In the instant case, the Defendants have not shown that they would suffer any real prejudice if this evidence is allowed to be admitted. The supplemental witness statement would introduce photographs which were previously disclosed, and which appear to be relevant to the case. The statement of anticipated evidence is largely in the same terms as the unsigned witness statement that the Plaintiffs had previously (and erroneously) filed.
15. Having considered the parties written and oral submissions, the authorities and the applicable rules, I therefore grant the orders sought in paragraphs i, ii, iv(a) and iv(b) the Plaintiffs' summons, as the trial judge should have all available evidence and be allowed to determine what weight to give to each item. As regards costs, this summons became necessary because of errors or delays by the Plaintiffs. I therefore order the Plaintiffs to pay the costs of this summons.

Disposition

16. It is ordered that:
- a. the Plaintiffs are given leave to file and serve a supplemental witness statement of Tito Seymour on or before 29 August, 2022;
 - b. the Plaintiffs are given leave to file and serve a statement of anticipated evidence of the Royal Turks & Caicos Islands Police Force Officer Felicia Robinson on or before 29 August, 2022;
 - c. the Plaintiffs are given leave to file and serve a fresh as amended trial bundle on or before 15 September, 2022;
 - d. the supplemental witness statement and the statement of anticipated evidence shall be in in the terms of the documents annexed to the summons dated 7 April 2022; and
 - e. the Plaintiffs shall pay the costs of this summons.

The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)
Judge of the Supreme Court
5th day of August 2022

