

**Witness Statements and the new Civil Procedure Rules**  
**The OECS experience**  
**by**  
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About three or four years ago, the Bar Associations of the islands of the Eastern Caribbean Supreme Court (ECSC) invited the Court of Appeal to hold a series of seminars in each island on WITNESS STATEMENTS. After several months of practising the new rules, many of the lawyers felt somewhat frustrated in their efforts to craft witness statements. It took them an inordinate amount of time to accomplish these tasks. They didn't think they were doing them properly. And indeed, the view from the bench suggested that one or two clearly were not! The lawyers felt overwhelmed by this new burden. They questioned whether it was a justifiable use of their precious time. Some of them had suffered awful experiences in court either because of sloppily prepared witness statements or because of their tardiness in filing them coupled with what appeared to be a new aggressively intolerant attitude of judges to dilatoriness and incompetence. The lawyers felt that they needed help and they sought the assistance and support of the judiciary.

At the time I was the Acting Chief Justice. Justice Hugh Rawlins was the Chairman of our Judicial Education Institute. We arranged to hold seminars in each island. They were all very well attended. All the Justices of Appeal<sup>2</sup> participated and made presentations on divers aspects of the Rules and on Witness Statements in particular. The resident judges also attended. We, i.e. the lawyers and the judges present at the seminars, thoroughly discussed the subject. Since the holding of the seminars, the lawyers in the OECS<sup>3</sup> have overcome their feelings of frustration at having to produce witness statements. Indeed, they have all fully embraced this vital aspect of the new Civil Procedure Rules. The preparation of the statements is now something that is done routinely and today, the OECS judges have assured me that the quality of the statements filed is much improved over what it used to be.

Looking back now, I can say that yes, the seminars that we held were useful, very useful. But I wouldn't over-estimate their usefulness. Ultimately, I think that the lawyers needed to give the new rules more time. They simply needed to become accustomed to and experienced in the new ways of litigating. These rules represent big changes. It isn't always easy to adapt to change, far less big changes. There's a natural tendency to hark after the past; to find fault in the new way of doing things; to question whether the new is indeed superior to the old.

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<sup>2</sup> Justices of Appeal Brian Alleyne, Michael Gordon, Denys Barrow and Hugh Rawlins. This Paper gratefully acknowledges their various presentations as a source of some of the material contained here.

<sup>3</sup> Organisation of Eastern Caribbean States, the territories that by treaty subscribe to the ECSC.

I don't know how much of the above resonates with you here in Trinidad & Tobago. I suppose the central idea that I wish to convey is that firstly, to the extent that, on this matter of witness statements, you feel as inadequate as many of the OECS lawyers felt some years ago, then that is a natural and understandable emotion. But my advice is not to be dismayed. However, if you attended this seminar believing that there is something we can say or do today that will suddenly make the preparation of witness statements become an effortless activity, then you are going to be disappointed. In the first place, crafting a witness statement is always an *effortful* activity. More importantly, it is going to take practice to get used to creating good witness statements. But, at the end of the day, I am confident that each of you will get to a point where you are comfortable with this new burden, as you will with other aspects of the new rules. What we can do today is to discuss some tips, some insights that might enable you to get there sooner rather than later. In this respect, comparing this seminar to the ones we held in the OECS, you have the advantage of being able to lean on the experience<sup>4</sup> and the case law that have emerged from other jurisdictions, including the OECS jurisdiction, on the subject.

In our seminars in the OECS, we tackled the subject matter under four broad areas. I think it is convenient in this Paper also to address these four areas. What are they? Firstly, the philosophical background to the Rules that require witness statements. Secondly, the actual rules themselves and case law on them. Thirdly, the content of witness statements. And finally, miscellaneous aspects of witness statements.

### **The philosophical background**

A number of critical features underpin the new civil procedure rules (CPR). One of these is the elimination of surprise in our adversarial system of litigation. It is now accepted practice that before a litigant goes into court the litigant should know what case he/she is going to meet. The days of ambush, which were with us as recently as a few years ago, have in a relatively short time become so discredited that one need hardly say more about those benighted days.

A second cardinal feature of the new CPR is the encouragement they consciously seek to give to the early settlement of disputes. In the OECS we carried out an exercise in the 1990s. I am sure that exercise must have also been done here in Trinidad because, so far as these new rules and their implementation were concerned, in the 1990s we were tailing you in many respects. Your human resources in the fields of IT and court administration played a big part in advancing the completion of the process in the OECS. The exercise we carried out was to determine what percentage of filed cases ultimately resulted in a judgment being given after a fully heard contested trial. The results were startling. Less than 5% of the matters filed resulted in a judgment after a fully contested trial. Yet, the old rules were geared almost exclusively to regulating and catering for a contested trial. In other words, in large measure the old rules were written for only 5% of the matters

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<sup>4</sup> In preparing this Paper I canvassed and gratefully received the views of several OECS legal practitioners including **Courtney Abel, Anne Henry, Paul Webster QC, Dexter Theodore, Nicole Sylvester, Ruggles Fergusson, Jaundy Martin** and **Emile Ferdinand**. Each of them, at short notice, contributed valuable insights on the subject and in some instances I have quoted them at great length. I wish here to thank these practitioners for their tremendous assistance.

filed. What accounted for the other 95% of the cases filed? There were some writs that were never served (perhaps the defendant could not be found and the plaintiff didn't think it worth the effort to seek substituted service); there were some matters that were settled out of court before or after the writ was served; there were some matters that were abandoned by the plaintiff (who perhaps had obtained an injunction or some other interlocutory relief and, having secured that relief, chose not to go further); there were some cases that settled on the morning of the trial; there were some matters which actually went to trial but then after some evidence was led the court urged the litigants to settle after the judge had heard one or two witnesses; and so on and so on.

The point is that for civil procedure rules to be sensible, they had to address themselves not only to the 5% of matters that might ultimately be heard but more importantly to the other 95% of matters that were unnecessarily clogging the system, using up scarce judicial and other resources and creating backlog. The procedural rules had to find ways to ensure that these latter cases were weeded out of the system, disposed of in a timely, orderly, expeditious manner that was satisfactory to the litigants and to the justice system as a whole.

A third critical objective of the new rules is to render the trial process more efficient and shorter and hence to abbreviate the period between the filing and final disposition of cases. We all got accustomed to the old examination-in-chief of witnesses. But, let's face it. Examinations-in-chief were often more about memory contests and skilful advocacy than about justice. The poor witness could not be "led" and so he/she either had to have an elephantine memory or else rely on the lawyer carefully to tease the vital evidence out of the witness's head. And at every turn, if the judge didn't first personally intervene, counsel on the other side was quick to frustrate the process by appealing to the court "to dissuade my worthy opponent from leading". That approach is now a thing of the past. And rightly so! Under the old rules, clients who felt that the judge was unsympathetic to their version of the case were frequently inclined to blame the lawyer for not adequately or accurately putting forward their client's case. To a considerable degree, witness statements now remove that possibility. Skilful advocacy now concentrates on astute, penetrating cross-examination which can be much better performed now that you know long beforehand precisely what evidence the witness to be cross-examined is placing before the court.

The preparation of witness statements plays a critical role in demonstrating and enhancing the features and meeting the objectives detailed above. In the OECS, settlements now occur sooner, hopeless cases are culled from the system, trials are of shorter duration, the time taken between filing and final disposition for a fully contested action has been reduced from 3 - 5 years to 12 -18 months and counsel are now better positioned to expose the witness who is a stranger to the truth.

In the world of English common law, the exchange of witness statements was a procedure that began in the English Commercial Court but the practice rapidly spread to

all courts. Judge Greenslade noted<sup>5</sup> that the aims and results of serving witness statements can be summarized as follows:

- The fair and expeditious disposal of proceedings and the saving of costs
- Elimination of surprise
- Promotion of fair settlements and avoidance of trial
- Identification of the real issues and elimination of unnecessary issues
- Encouragement for admissions of fact
- Reduction in pre-trial applications
- Shortening of evidence in chief
- Improvement in cross-examination
- Concentration of parties on the real issues

In his Report to the ECSC, just prior to drafting our Rules, Judge Greenslade stated that it had been put to him that witness statements may not fit happily into Eastern Caribbean culture. He appeared grudgingly to concede that possibility at the time. He would be delighted to know however that the nay-sayers have been proved utterly wrong and the procedure is not only alive and well in the ECSC but that all its promises of a more efficient trial process have been fulfilled.

### **The rules**

I shall be referring to English and OECS Rules and case law on the same. In every instance however I shall endeavour to give the appropriate TT Rules in italicized brackets.

Part 29 of the TT Rules relates to Evidence at the trial. The OECS Part 29 is similar (but not identical) to the TT Part 29 but numbered slightly differently. Part 29 rule 4 of the TT Rules enables the court to require parties to serve witness statements in relation to any issues of fact to be decided at the trial. In the OECS I don't know if there are any instances where, these days, parties are not automatically ordered to serve witness statements for an impending trial. The order to so serve is usually made at the case management conference. Invariably, the case management order stipulates the time within which the witness statement should be served and it often goes on to stipulate that the statements are to serve as evidence-in chief. The order may be made for statements to be served simultaneously or sequentially [*TT Rule 29.4(3)*]. If the order is for sequential service, then TT Part 29.7 governs situations where one party is able and prepared to serve but the other party is not.

Orders for the service of witness statements must be obeyed or else very serious consequences can ensue. In one of the earliest cases on the issue in the OECS, *St. Bernard v. The Attorney-General of Grenada*<sup>6</sup>, the claimant, who complained of being

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<sup>5</sup> Report on Civil Procedure to the ECSC by Dick Greenslade, October 1998. Justice Greenslade, a member of the Woolf Commission, was the person mainly responsible for the draft CPR prepared for the Trinidad and ECSC judiciaries.

<sup>6</sup> Grenada Civil Case No.0084 of 1999. This judgment was reversed on appeal but there is no written judgment of the Court of Appeal and the note that exists of the appellate decision does not indicate that the Appeal Court disapproved of the dicta of Barrow, J. In large measure, the dicta of Barrow, J. continues to be quoted authoritatively.

brutalized by the police, filed his witness statement almost three weeks out of time. The statement of one of his witnesses was filed even later, on the very morning of the trial. In contrast, the witness statements for the police were filed by the date ordered by the Master at case management. Barrow, J. (as he then was) set the tone for the manner in which the new rules were to be applied in the following trenchant remarks in his judgment:

[4] When the trial was about to begin counsel for the police pointed to rule 29.11 [TT - 29.13] of the **Civil Procedure Rules 2000**. That rule says that if a witness statement is not served in the time specified the witness may not be called unless the court permits. The court may not give permission at the trial, the rule states, unless the party seeking permission has a good reason for not previously seeking relief under rule 26.8 [TT - 26.7].

[5] This provision is of arching importance as it distills the essence of the new Rules. Before **CPR 2000** it was a matter for the broad discretion of the court how to treat noncompliance, which had become commonplace. There was nothing in the old rules standing in the way of the court deciding, as the claimant's counsel has invited the court to decide in this instance, that since there was no prejudice to the defendants it would waive the non-compliance. This was the accepted way of proceeding. In *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at 1671 the English Court of Appeal described the reluctance that had become established in the courts to apply sanctions even where there had been violations of peremptory orders. The courts hesitated to act because they did not want to be draconian.

[6] Non-compliance has continued to be commonplace under the new rules, in the daily experience of these courts. Case management orders are often flouted. The breadth of this practice may have given acceptability to it. In truth, that very acceptability stands as a reproach. Casual accommodation of non-compliance with orders is a violation of clear rules. It is a subversion of a fundamental objective of the rules which was precisely to put a stop to habitual non-compliance. The rules need to be obeyed, they need to be enforced.

[7] In our small societies personal as opposed to purely professional relationships are unavoidable and those relationships may cause or may be perceived as causing reluctance to enforce the rules. The approach of the new rules to non-compliance eliminates the operation of the personal factor. CPR 2000 took away the wide discretion formerly reposed in the courts to determine what should be the consequence of noncompliance. A basic part of that discretion had been to determine whether, in fact, there was to be any consequence. How a given judge or how different judges responded to non-compliance depended on the individual exercise of discretion. That exercise was unavoidably affected by the dynamics of the relationships between different lawyers, between different chambers and between different lawyers or chambers and different judges. Results were understandably seen as arbitrary.

[8] CPR 2000 set a fixed sanction for non-compliance. Rule 29.11 [TT - 29.13] states that the person whose witness statement has not been delivered in time may not be called as a witness at the trial. I reject out of hand the suggestion of counsel that this means that the late witness statement is to be received and used but the witness himself may not testify. That would not be a sanction; instead it would be the ultimate reward because it would admit the evidence of a witness

but relieve him of exposure to cross-examination. The rule could not have intended to reward default.

[9] The setting of a fixed sanction for non-compliance results in the elimination of the wide discretion of old and this last is completed by limiting the court's ability to grant relief from sanction. The court can only consider granting relief, at the trial, if the defaulting party gives good reason for not having previously applied for relief. A tight structure is therefore established to deal with non-compliance. However convincing may be the explanation for non-compliance the court cannot even start to consider it, far less allow itself to be affected by any explanation, unless the defaulter has a good reason for not having made a formal application for relief from sanctions. The effect of rule 29.11 [TT - 29.13] is that a defaulter may have a good explanation for non-compliance but no good reason for having failed to previously apply for relief from sanction and in that event the defaulter must suffer the sanction.

[10] Rules 26.7 [TT - 26.6] and 26.8 [TT - 26.7] express the central idea that the fixed sanction for non-compliance will take effect unless there is a prompt application for relief supported by evidence on affidavit. The requirement underscores the imperative that the defaulter must act. The defaulter cannot sit by until the day of the trial, as was the old practice, because not even an excuse of superior merit can save the defaulter if he does not act promptly to seek relief from sanction. It is mandatory that such an application must be made promptly because if an application for relief could be made any old time there would be no certainty to trial dates since these would need to be vacated to accommodate late compliance that had been permitted upon late applications. The companion requirement to promptitude, that there must be evidence on affidavit, emphasizes the weightiness of satisfying the stated conditions and eliminates the old practice of counsel merely trotting out an excuse from the bar table.

[11] In this case there was no application for relief from sanction. The rule says I may not permit the witnesses to be called unless the claimant has a good reason for not previously seeking relief. The reason given by counsel for the default and, presumably, for not previously seeking relief, is that his chambers had been unable to find the claimant and chambers only recently discovered that the claimant is in prison. After I had adjourned the trial to deliver this Ruling, which would determine how the trial was to continue, the claimant filed an application pursuant to rule 26.8 [TT - 26.7] to seek relief from sanction. That is an extreme example of a late application and demonstrates why the rules preclude late applications. To entertain it I would need to delay the ruling and the trial to hold a hearing of that late application. That would make a mockery of the requirement of promptitude. I refuse to do so.

The refusal of Barrow, J. to have the evidence adduced must be seen in the context of the fact that the application to admit the evidence was being made *on the morning of the trial*. A court will however adopt a different approach where there has been a failure to comply with the case management order but there is still sufficient time to run before the trial date and therefore the prejudice occasioned is minimal. This was the situation in the English case of *Mealey Horgan Plc v. Horgan*<sup>7</sup>. where a witness statement was served by the defendant outside the time ordered and the defendant sought relief from the sanction attending his non-compliance. Mr. Justice Buckley stated, inter alia:

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<sup>7</sup> [1999] WL 249899

The Claimants' original position... was that the court should not give the relief sought. Mr. Goldberg sensibly in my judgment does not pursue that submission before me and indeed it would be wholly out of proportion in my judgment for a court to deal with a case in effect on one side's evidence. It is or would be wholly unsatisfactory and unjust save in fairly extreme circumstances. I do not need to identify or suggest what those circumstances might be. Clearly they would include or might include deliberate flouting of court orders by the other side or such inexcusable delay that would mean that the only way the court could fairly entertain their evidence would be by adjourning the trial and so forth. This is not such a case. The Claimants can properly prepare for trial and can do their case justice, notwithstanding the extra days that the Defendants took in producing these witness statements. In my judgment therefore it is quite plain that relief should be given...

Counsel pressed the court to impose the sanction of making the defaulting party, the Defendants, pay money into court, but Buckley, J. countered:

...The only reason for this [i.e the application to impose a sanction] I think is the spirit of the new rules, the thought that judges must be tough in ensuring from now on that rules are complied with, that timetables laid down are not just there for guidance but to be adhered to, and that if parties do not adhere to them there should be a penalty. To my mind the penalty for this type of situation is that the party in default has to come to court and obtain permission to use the statement. I think all are agreed that I have jurisdiction in an appropriate case to impose further sanction including a payment into court but I do not think it is appropriate in the present case. It may be appropriate if a party has behaved worse than the Defendants have here, there is a history of repeated breach of timetables or of court orders or if there is something in the conduct of the party that gives rise to suspicion that they may not be bona fide and the court thinks the other side should have some financial security or protection. Again those are matters or examples that come to mind as it were off the cuff. I am sure there are many others. But to my mind this is a straightforward case in which both parties did not adhere to the original timetable for witness statements. The Defendants took some days longer than the Claimants to produce theirs, which took them beyond the final agreed date, but that default has not prejudiced the trial and has not significantly prejudiced the Claimants to my mind. There is no suggestion here of deliberate manoeuvring or that the Defendants are not likely to be good for this claim. Indeed such evidence as I have seen is rather to the reverse...

In *Treasure Island Company v. Audubon*<sup>8</sup>, the ECSC Court of Appeal considered Justice Barrow's judgment in the *St. Bernard* case. In *Treasure Island*, the claimant's witness statements had been served outside the time laid down by the case management judge. Part of the reason for the late service was the fact that the relevant witness had just undergone a difficult pregnancy and in the circumstances, counsel for the defendant was prepared to allow her more time. The statement was ultimately served. It was late but almost three months were still to run before the trial date. The defendant's solicitors made no objection to the late service of the witness statement upon them. Instead, both sets of parties prepared for trial as usual. The first morning of the trial was taken up in sorting and putting order to the eight volumes of various documents filed. In the

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<sup>8</sup> BVI Civil Appeal No. 22 of 2003

afternoon, as counsel for the claimant began to open his case, counsel for the defendant rose to submit *in limine* that by reason of the late service of the claimant's witness statements, in order for the claimant to call witnesses, permission of the court had to be obtained [**TT Rule 29.13**]. Counsel urged that the court could not grant any such permission unless the claimant adduced a good reason for not seeking relief [**TT Rule 29.13**]. The claimant had no good reason, said counsel, and the extra-judicial indulgence granted by the defendant was not a good reason. Counsel therefore sought dismissal of the action on the ground that the claimant could not muster any admissible evidence.

In parenthesis one must indicate that the OECS Rules actually contain a rule, Part 26.7, that states that where an order

- a) requires a party to do something by a specified date; and
- b) specifies the consequences of failure to comply;

*the time for doing the act in question may not be extended by agreement between the parties* (my emphasis).

The Trinidad rules do not have this provision as far as I can tell. However, I cannot see that this omission in the TT Rules means that lawyers in Trinidad & Tobago can collude to defeat the object and spirit of the new rules. Courts today no longer see the course of litigation strictly as a matter concerning the respective litigants and I would be very surprised if the courts in Trinidad & Tobago would indiscriminately approve agreements arrived at by contending counsel. Courts have now assumed, under the new rules, full control of the pace and direction of litigation and they examine the fairness of the process not only from the vantage point of the litigants in the case but also from the standpoint of the demands of other litigants upon the finite resources of the court<sup>9</sup>.

In *Treasure Island* the ECSC Court of Appeal regarded the approach of the claimant as a form of ambush by technicality. As I said then, there was no way that we could allow skilful advocacy to drive a dagger through the heart of fundamental precepts of the new Rules. We distinguished the *St. Bernard* case ...

[20] The facts in *St. Bernard v. The A.G. of Grenada* are far removed from the circumstances here. In that case the claimant filed his witness statement three days before the day of the trial. The witness statement of his witness was filed on the morning of the trial. The Court found that no good reason had been adduced for the failure previously to apply for relief from sanction and accordingly, the Judge disallowed the witnesses from giving evidence.

[21] CPR 29.11 [**TT Rule 29.13**] has such severe consequences for a litigant in breach of it that I think that, in keeping with the overriding objective, a Court should liberally approach its second sub-rule. Did the Audubon solicitors have a good reason for not previously seeking relief? The special relationship among *Treasure Island*, Mr. Sims and Mrs. Sims cannot be discounted. The solicitors for [the defendant] were actually seeking to accommodate Mrs. Sims. In the context of the length of time available before the trial date, the delay in filing or exchanging the witness statements was inconsequential. No prejudice whatsoever was occasioned by the delay. Most importantly, the solicitors for Audubon could not have imagined that in light of all these circumstances, they were going to be ambushed with this technical point sprung on them on the morning of the trial. Prior to that date the other side had conducted themselves as though they were intent

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<sup>9</sup> See *Arrow Nominees Inc. v. Blackledge & Ors.* [2000] 2 BCLC 167 (at paragraph 55)

on proceeding with the trial. On 22<sup>nd</sup> September they had filed a Pre-Trial Memorandum in keeping with CPR 38.5(3) and no indication was given that they intended to take the point of the failure strictly to comply with that aspect of the case management order.

[22] For all these reasons it seems to me that the Audubon solicitors could establish a “good reason” for not previously seeking relief under rule 26.8 [TT Rule 26.7].

Similarly, in *St. Kitts Development Limited v. Golfview*<sup>10</sup>, Alleyne JA (as he then was) declined to strike out a witness statement filed and served out of time without an order for relief from sanctions. He noted that the Respondent had ample notice of the statement, was not taken by surprise, could and should have raised the issue ahead of the date of trial, but sought instead to take advantage of a technical breach. Justice Alleyne regarded this conduct as “a reversion to the technique of trial by ambush which the CPR seeks to discourage”. In the same vein, Madame Justice George-Creque in *Hodge v Cable & Wireless*<sup>11</sup> deprecated attempts to have witness statements, filed out of time by a few days, ruled inadmissible in circumstances where the trial was several months away and counsel who was entitled to complain stood by throughout all the preparations leading up to the trial only to take the point on the day of the trial.

These decisions clearly illustrate that while the court is intent on applying the rules in a firm manner, the overriding objective is still to deal with the cases in a just manner. The court will be wary of the taking of technical points on the rules if to accede to them will defeat the ends of justice. In this regard, the words of a learned Caribbean jurist are still extremely appropriate. Over forty years ago, in *Baptiste v Supersad*<sup>12</sup>, Chief Justice Wooding cautioned that “The law is not a game, nor is the court an arena. It is ... the function and duty of a judge to see that justice is done as far as may be according to the merits”.

It is important to stress however that doing justice as far as may be according to the merits does not mean that resort can be had to the overriding objective, contained in Part 1 of the rules, in order to justify breaches of the rules. As I said in the *Treasure Island* case:

“...it must not be assumed that a litigant can intentionally flout the rules and then ask the court’s mercy by invoking the overriding objective. I completely adopt Mr. Bennette’s submission that the overriding objective does not in or of itself empower the court to do anything or grant to the court any discretion. It is a statement of the principle to which the court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the court must be found not in the overriding objective but in the specific provision itself. As May LJ stated in *Vinos*<sup>13</sup>, “Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored”.

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<sup>10</sup> St. Kitts and Nevis Civil Appeal No. 24 of 2003

<sup>11</sup> Anguilla High Court Civil Suit No. 108 of 1998; See also *Joyce v Antigua Public Utilities Authority* Antigua & Barbuda High Court Civil Suit No. ANUHCV1998/0112

<sup>12</sup> (1967) 12 WIR 140 @ 144B

<sup>13</sup> *Vinos v. Marks & Spencer (2001)* 3 A.E.R. 784 @ 789

If counsel finds herself in danger of missing a service deadline because there is some difficulty in getting the witness to sign a statement that has already been prepared, the rules **[TT Rule 29.6(1)]** provide that you can approach the court, without notice, for permission to serve instead a witness summary. If it is impractical to make such an application, then my own view is that you may still consider serving the unsigned statement with an undertaking to provide a signed copy (or to have, *ex post facto*, the court's formal permission to serve the witness summary) as soon as possible. A witness summary is, after all, defined **[TT Rule 29.6(4)]** as "a summary of the evidence, so far as is known, which would otherwise be included in a witness statement". What is most important is that the other side should have an early idea of what evidence they are to meet at the trial. They must not be taken by surprise. Justice Buckley said in *Mealey Horgan Plc v. Horgan*<sup>14</sup>

...It seems to me that a witness statement is not, so far as the court and the rules of court are concerned, a witness statement until it is served on the other side or filed in court and that the provisions about amending a witness statement therefore do not apply so long as the statement remains in the hands of one party, and indeed it is I would have thought not that uncommon for certainly draft statements to be amended by the witness and not that uncommon even for amendments or second thoughts to occur after the statement has been signed. I say that subject of course to the proper conduct and standards to be expected of solicitors and counsel in respect of such statements and of course it may be that if a statement is clearly made, let alone signed, and the witness then purports to go back on it and say something that is inconsistent at the very least without a good explanation, that of course could place the lawyers in a position of professional embarrassment...

Where one party is ready to exchange witness statements but the other side is not. The rules **[TT Rule 29.7]** provide that the first party is entitled to file his statements in a sealed envelope by the appointed date and the court office is not permitted to disclose these statements to the other side before the latter has served his statements. In the OECS I know that some court officials flatly refuse to accept sealed envelopes for filing and therefore one may have to file the statements first and then personally supervise the sealing of them in an envelope to be left with the appropriate court official so as to comply with the rule.

The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public. This rule is however subject to any order of the court **[TT Rules 29.2 & 29.9]**. Where at a case management conference therefore an order is made that witness statements are to be regarded as evidence-in-chief, the practice in the OECS has been that at trial, the witness nevertheless goes into the witness box and, having been sworn, states his name, occupation and address and then affirms the authenticity of his witness statement. The witness is then turned over for cross-examination. Judges have, however, tried matters where, at the pre-trial conference, on the agreement of counsel that there was no need for a particular witness, or witnesses, to attend the trial, because their statements were not being

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<sup>14</sup> [1999] WL 249899

challenged, an appropriate order was made to this effect. In such cases, the witness statements, though not having been made on oath, stood as evidence in the case and was accorded no less weight than other sworn evidence that was given at the trial. The Trinidad & Tobago rules specifically provide for this [*TT Rule 29.11*].

There remains an area of concern in the light of the decision in *Millwood v. Richards*<sup>15</sup> a case from Antigua. What if, after witness statements have been exchanged (particularly after a case management order stating that they are to stand as evidence-in-chief), a witness for one side does not attend the trial? What if, further, the statement given by the absent witness contained material that the other side wished to exploit at the trial? This was the situation that confronted Mitchell, J. in *Millwood v. Richards*. The defendant in that case had filed witness statements in respect of witnesses who were not produced. It is unclear whether the case management order had indicated whether the statements were to stand as evidence-in-chief. At the trial, the claimant wished the court to take into account the contents of the statements of these absent witnesses. The claimant considered that aspects of those statements supported the claimant's case. The legal arguments that ensued on the matter appeared to have focussed on Part 29.8 of the OECS rules and on the English practice. Part 29.8 states:

- (1) If a party
  - a) has served a witness statement or summary; and
  - b) wishes to rely on the evidence of that witness;that party must call the witness to give evidence *unless the court orders otherwise* (my emphasis)
- (2) If a party
  - (a) has served a witness statement or summary; and
  - (b) does not intend to call that witness at the trial;that party must give notice to that effect to the other parties not less than 28 days before the trial.

In England, the Civil Evidence Act 1995 coupled with specific rules of court (which the ECSC does not have) provide that the statement of a witness not called can be put in evidence as a hearsay document by either party and treated as such. Mitchell, J. stated in *Millwood* that

In the Leeward Islands, our rules relating to evidence in civil cases is governed by the old **Evidence Act of 1876**, now properly described as the **Evidence Act, Cap 155** of the Laws of Antigua and Barbuda. Under that Act, the common law position is preserved, and hearsay evidence is not generally admissible in evidence in civil trials. The position is otherwise in the Windward Islands where their **Codes of Civil Procedure** permit the modern **UK Evidence Acts** to apply, and hearsay evidence is there admissible in civil trials.

Clearly, the Defendant in this case has been in breach of the requirement to have given the Claimant 28 days notice that he was not intending to call the witnesses whose statements he had filed. Our **CPR 2000** does not, as compared to the position in the UK, provide any remedy or penalty for the breach in question. Unlike the position in the UK, there is no stated consequence that flows from

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<sup>15</sup> Antigua & Barbuda Civil Suit No. ANUHCV1997/0121

this breach. It would seem that Part 29 of **CPR 2000** does not contemplate the court looking at witness statements when those witnesses have not been produced to the court for cross examination. The result is that such witness statements must be completely ignored by the court in considering the evidence in the case. It is possible that, if I were finding in favour of the Defendant, one consequence of this breach of Part 29 that he might suffer is that he might well be penalised in costs. In this case, as I am finding in favour of the Claimant on the claim partially and generally, there is no consequence adverse to the Claimant from my not accepting his Counsel's submission on this point.

Part 29.11 of the Trinidad rules specifically addresses instances where a witness statement is evidence even if the witness is not called. Where there is no dispute as to facts, or there is unlikely to be such a dispute, or where the only or main issue is either the meaning of a document or hinges upon statutory interpretation or where the parties agree, a party may rely on a witness statement as evidence at trial without calling the witness to give oral evidence. The OECS does not have a provision similar to this Trinidad & Tobago Part 29.11.

The OECS rules do not seem sufficiently to cater to the possibility that one party may have a vital stake (other than the prospect of cross-examination) in the production of the other party's witness. Consider this scenario. Y's witnesses give statements proving a particular fact important to X's case. X does not trouble herself to garner evidence to establish that fact, or X prepares her case on the premise that such fact has already been confirmed by Y. It is clearly an unacceptable ambush if on the day of the trial (and in breach of the rules requiring prior notification) X finds himself unable to prove the fact because Y's witnesses have not been produced. For the court to proceed with the matter and perhaps merely impose sanctions on Y may not properly repair the unfairness thereby caused to X.

Although the Trinidad & Tobago Part 29.11 clarifies the circumstances in which a witness statement may be relied upon where a witness is not called at the trial, that rule also seems to proceed on the footing that the interest of the party not producing the witness lies only in cross-examining the witness as distinct from allowing in, as evidence, some or all of the statement. Perhaps in these situations courts may make creative orders to secure the fairness of the trial process as in both jurisdictions the relevant rules give the court, in the phrase "*unless the court orders otherwise*", a discretion which must be exercised in keeping with the overriding objective to do justice. But this is a matter that will have to be approached with great care.

Service of a witness statement does not preclude the witness from adding new material to what has already been served. Where further matters on which the witness can give evidence arise or become relevant or known to the party, a supplemental witness statement may be prepared and served as soon as possible [**TT Rule 29.8**]. At the trial, the judge may give permission to a witness to give evidence of new matters which have arisen since service of the witness statement and which could not reasonably have been contained in a supplemental statement. The judge may also permit the amplification of evidence given in a witness statement. However, there must first have been disclosure of the substance of what is being amplified [**TT Rule 29.8**]. There is therefore a

distinction to be made between new material and the mere amplification of old material. The former requires prior disclosure to the other side while the court may at the trial permit the latter even if there had been no prior disclosure. A judge, like counsel, will be expected to use common sense in determining whether a particular piece of evidence is mere amplification of already disclosed evidence or a new piece of evidence that has the capacity for taking the other side by surprise.

### **The form and content of witness statements**

Part 29.5 of the TT rules gives us clear guidance on the form and content of a witness statement. Practitioners would do well constantly to refer to this rule before and after a witness statement is prepared; before, to try to get the process right and after, to ensure that you have indeed gotten it right. It is absolutely critical that counsel conforms with the requirements of this rule.

The statement must, of course, be truthful. At the very least, the witness must believe it to be true and so state *[TT Rule 29.5(1)g]*. The statement must be easy to follow. It should set out all the facts upon which the witness relies and is able to speak. The best practice is to lay it out in numbered paragraphs thereby facilitating ease of reference. Inadmissible evidence, eg hearsay material, irrelevant or scandalous matter, should be excluded from the statement. If the statement refers to supporting documents then the latter must be clearly identified.

It is especially important that in the statement, the witness speaks to all the facts upon which the witness relies. It is not enough for example to plead special damages and exhibit a quantity of invoices and receipts. The witness statement should sufficiently spell out the link between these exhibits and what is pleaded. I recall trying a running down action where the claimant had completely neglected to give in the witness statement details of special damages that had been elaborately pleaded. Counsel for the defence delicately declined to cross-examine on this issue. At the close of the claimant's case there was therefore no admissible evidence to establish the special damages and naturally they could not be recovered. Counsel should make a conscious effort to confirm that every allegation of fact contained in the Statement of Case is supported in a material way by adequate evidence in one or more witness statements. For example, allegations in the Statement of Case of fraud, breach of trust, notice or knowledge of a fact, undue influence should all be supported by detailed material contained in witness statements.

The statement is for the witness to give in his/her own words. A lawyer in the OECS recalled an amusing incident in his Chambers once when a witness refused to sign a statement the lawyer had prepared. The client complained that there were "some big words" in the Statement that he didn't understand. That was a smart witness! I know of incidents in court where the words in a witness statement were put to a witness and the witness professed that he was hearing those words for the first time! Counsel would want to avoid that possibility. The statement is the witness's version of an event or transaction or series of transactions. The style and flavour of the witness in the recounting of the story should be captured. At the same time the statement should be coherent and complete. Simplicity in language should be one's guide. An OECS practitioner said:

“I always prefer simple language which conveys precisely the information/thought which I desire to convey. I believe that even the choice of words can make a difference. When the judge is reviewing the evidence, while he will remember the manner in which the witness responded to cross-examination, for the evidence-in-chief he will be primarily relying on the written word, hence the importance of word choice and turn of phrase...”

The statement should contain relevant evidence and must not be used as a vehicle for complex legal argument<sup>16</sup>. The person taking the statement should not try to persuade the witness to say what he or she should say or make threats or offer inducements. In *Aquarius Financial Enterprises Inc. and Another v. Certain Underwriters*<sup>17</sup> Mr. Justice Toulson stated:

44. The procedure by which witness statements ordinarily stand as witnesses' evidence in chief has been an integral part of practice in the Commercial Court for some years and now applies generally under the Civil Procedure Rules: see r. 32.5(2) [*TT Rule 29.11 is comparable but not identical*].

45. Part H1.3 of the Commercial Court Guide provides that: . . . whilst it is recognised that in commercial cases, a witness statement will usually be prepared by legal representatives, the witness statements must, so far as practicable, be in the witness's own words.

46. It cannot be too strongly emphasized that this means the words which the witness wants to use and not the words which the person taking the statements would like him to use.

47. Part H1.4 of the Commercial Court Guide provides that the rules of any professional body regarding the drafting of witness statements must also be observed.

48. The Law Society's Guide to the Professional Conduct of Solicitors provides guidance on the taking of witness statements. It requires a high degree of skill and professional integrity. The object is to elicit that which the witness is truthfully able to say about relevant matters from his or her own knowledge or recollection, uninfluenced by what the statement taker would like him or her to say.

49. Counsel on both sides expressed anxiety that this is in practice not what generally happens even when statements are taken by solicitors. If it is not, the situation is worrying. In the U.S.A. pre-trial depositions of witnesses are a standard feature of civil litigation. The process is costly and time-consuming. Our system is quicker and cheaper, but it depends for its proper working on witness statements being properly taken. Bad practices, like bad money, tend to drive out good. If bad practices in the taking of witness statements come to be seen as normal, so that witness statements become lawyers' artefacts rather than the witnesses' words, their use will have to be reconsidered. Central to the problem is the ignorance of the Court and the other party about how any witness statement has in fact been taken. It might therefore be thought salutary that, where a witness statement is prepared by somebody other than the witness, there should be a written declaration by the person who prepared the statement giving

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<sup>16</sup> *Alex Lawrie Factors Limited v. Morgan* [2001] C.P. Rep. 2 per Brooke LJ

<sup>17</sup> [2001] 2 Lloyd's Rep. 542 @ 547

information about how, when and where it was prepared and certifying compliance with any appropriate code of practice.

50. Moreover where parties are represented in litigation by solicitors (as is almost invariably the case in the Commercial Court), I would regard it as part of their duty to ensure, so far as lies within their power, that any witness statements taken after they have been instructed are taken either by themselves or, if for some reason that is not practicable, by somebody who can be relied upon to exercise the same standard as should apply if the statements were taken by the solicitors themselves. So far as Counsel may be involved in the preparation of witness statements for use in civil proceedings, there are rules and guidance in the Code of Conduct for the Bar and in the Bar Council's supplementary guidance note dated Jan. 16, 2001.

When I asked a senior practitioner of the OECS how he went about taking a witness statement, this is how he responded:

- (a) I try to ascertain and be familiar with the overall facts, circumstances and context surrounding the transaction or event (or series of such transactions or events) with which the Witness Statement is concerned.
- (b) I read and try to be familiar with the pleadings of the case and be very clear about and understand the issues that arise for determination at the trial.
- (c) I try to be familiar with and have a clear view of the law and all the legal questions that may arise and in particular have a good grasp of the evidential matters that may arise in the case i.e. proving of documents and questions of admissibility, relevance.
- (d) I try to have available and at hand all the documents which concern the case and in particular that specific Witness.

#### **Setting of taking the Statement**

The setting should usually be formal (as in Chambers) but it could be anywhere including at the prospective Witness's home if that is most convenient to the witness. The tone should be conversational and not unsympathetic.

#### **Actual Taking of Statement**

In the case of an articulate and highly educated prospective witness I might ask them to go away with the documents and ask them to prepare their own written statement of the matters in question. I would then use that statement as the basis for the Witness Statement asking strategic open questions to supplement their statement.

In all other cases I would have the witness present and at first ask the Witness to tell me in his/her own words what s/he knows about the matters in issue/question.

I think it advisable to let them tell me the whole story from beginning to end without interruption or interrupting as little as possible. A detailed note should not be taken at this stage but the emphasis should be on listening to the Witness and assessing the relevance of the story, their vantage point in relation to the questions at hand, their powers of observation and the strength and weakness of the Witness and their story.

I try to take as brief a note as possible at this stage so as not to slow down the witness too much and cause him or her to lose where they are in their story. Important matters to be recorded at this stage may be dates, names of principal actors and the sequence of events.

If the story is long and complicated then once I get the gist of what the story is about, and I have the general contours of the story and I am satisfied that the person has relevant evidence then at a convenient time I restart the process at the beginning at which point I then commence taking a detailed note of what is being said.

In taking the detailed note I conform to certain formalities in the taking of Witness Statements by including the following information some of which are required by the Rules of Court:

- Date
- Name, address and occupation of the witness
- Statement by intended witness that he or she believes statements of fact to be true
- State matters of information or belief that are admissible and state the source.
- Be in the intended witness' own words
- Identify any document to which the statement refers without repeating the contents unless this is needed to identify the document.
- Have the Statement Signed or authenticated by the intended witness

I would usually take down contemporaneously by hand or on the word processor what the Witness is saying and attempt to get it down word perfect. This could be done by dictating directly into a voice recorder as the witness speaks. The latter device requires some expertise to be done effectively but it can be a very useful device as it can be quite fast and the Witness is able to immediately correct any error in the transcription as s/he can hear what is being recorded.

I would attempt, as far as possible, to start at the beginning of the story and work through to the end of the story chronologically carefully noting and accounting for the passage of times and dates.

I attempt to ask as few questions as possible and then mainly to clarify points and to guide the Witness along the relevant line of the story but not so as to interrupt the train of thought of the Witness. I always try to ask open ended and not leading questions.

Although I attempt to give a precise and grammatical exposition of the Witness's story, as far as possible I try to use the witnesses own words even if it may be an unusual use of language. Where an unusual use of language is used then I would ask the witness to explain what s/he means. The clear meaning of the Witness should be ascertained and presented at all times. If, for example, a double negative is used then I would ask the witness precisely what s/he means i.e. if it is positive or negative.

If the Witness says things which do not fit into my theory of the case I nevertheless do not excise or change the statement. The theory will have to change to fit into what the Witness is saying. It is better for the Witness's view to be accommodated at an early stage into the theory than in re-examination after the Witness has been totally destroyed in the Witness box.

As far as possible I try not to include in the Statement facts and matters which are irrelevant or inadmissible, scandalous, or oppressive, but sometimes if it forms part of the transaction I would leave it in especially if the story would not make sense otherwise.

I pay particular care with children and other immature, elderly or vulnerable persons to ensure that what is recorded is their story and pitched at a level they fully understand and will repeat. Their precise words are used at all times with as little interpretation and word substitution as possible.

I always try to take a Statement without third parties being present as their presence often does distort the story in many ways. Children and young persons tend to tell their story in the presence of adults or their parents in a way to win approval for their behavior and are often completely different persons once the adult or parent is not present. Adults may also do the same thing. The third party may also intervene into the story directly or subtly by gestures to influence the Witness. All this I try to avoid by keeping third parties out of the interview session.

### **After Taking Statement**

I would then have the notes of the interview typed up and then tidied up and put into the format for Witness Statement as prescribed by the rules of Court.

The draft Statement is then given to the Witness or read to them by me. The Witness is then encouraged to change any thing in the draft Witness Statement which s/he thinks is not correct before s/he is asked to sign it.

Care should be taken to ascertain if a Witness can read as discovery of lack of reading ability in the Witness box could be fatal to one's case. Many Witnesses are adept at hiding their reading disability from the public and their lawyers. It is also important to ascertain if a Witness is not able to read so that their Witness Statement could be read to them and the appropriate form used to attesting the Statement.

## **Miscellaneous Aspects of Witness Statements**

Another OECS practitioner detailed for me her *modus operandi* in the taking of witness statements. She said:

In our chambers, the practice has always been to take a written statement from clients when they come in and announce that they have a case for which they seek our representation.

We try to make that first statement as full as possible because it will indicate whether the client has a cause of action at all. It will also indicate whether we will need to interview other persons who may have personal knowledge of certain matters (and who may also have to give Witness Statements) and also point us in the direction of documents which we may need to review and disclose as evidence at the trial.

We use this first interview as an opportunity to ask all the hard questions which need to be asked. I find that once one has committed to a case, one ceases to be as objective in analysis as when the client first walks through the door and often, as time passes, the client's memory for important, but sometimes painful details, fades.

We do not typically come back to the preparation of the Witness Statement until the Defence/Counter-claim has been filed. Frequently the Defence and Counter-claim tell us the other part of the story which our client may have "forgotten".

[Hopefully, they would not entirely derail our theory of the case]. At this time, we will interview the client again and, if necessary, challenge them on any discrepancies in their version of the story, just to be sure that we have a credible client.

Although the Rules do not specifically require it, we prepare a Case Management Memorandum for in-house use during the case management process. Part of the memorandum is a statement of the facts. In preparing this Memorandum, some refinement in the statement which we originally took will have taken place based on the information which we would elicit from the client after reading the Defence/Counter-claim. Our Case Management Memorandum is set out like the Pre-Trial Memorandum required under the Rules and includes a brief statement of the facts, the issues which arise and the applicable law.

Once it is time to do the formal Witness Statement, we usually do the first draft in-house and then go through it paragraph by paragraph with the client/witness to ensure that we have the accurate story.

It would be further refined by input from the witness and also by reference to the Law. In respect of the latter, sometimes one finds that the client's recounting of the facts may not address important principles of the law which have to be underpinned by evidence.

I also asked senior practitioners of the OECS whether they personally prepared witness statements in those cases they tried themselves or whether they left this task to their juniors. There was no uniform practice. Some of them indicated that they took the statements personally while others said that their juniors or associates might prepare the statements under their supervision. It appears to be a rare thing for the statement to be prepared by the witness without any input by counsel although in the case of an articulate and highly educated prospective witness, counsel might ask the witness to prepare a draft statement.

The taking of witness statements pursuant to the new CPR need not be an intimidating experience for the legal practitioner. One OECS practitioner informed me that he has incorporated modern IT into his preparation of them. He uses a software called HOTDOCS, which may be purchased from [www.hotdocs.com](http://www.hotdocs.com), to assist in fashioning templates of all kinds, including for witness statements. It is certainly encouraging to see such use being made of modern Information Technology. Master Morris-Alleyne recently drew to my attention a Practice Note issued by the Chief Justice of Australia giving Guidelines for the use of information technology in civil litigation in that country<sup>18</sup>. The primary purpose of the Practice Note is

“...to encourage the use of information technology during the discovery process in civil litigation in the Court. But parties are also encouraged to consider the use of information technology during trial. Parties are encouraged to consider these issues from the commencement of proceedings”.

One hopes that throughout the Commonwealth Caribbean similar encouragement will be given to the widespread use of modern Information Technology. IT, like mediation and

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<sup>18</sup> See [http://www.fedcourt.gov.au/how/practice\\_notes\\_cj17.htm](http://www.fedcourt.gov.au/how/practice_notes_cj17.htm)

other methods of ADR, is a natural, indispensable companion to the operation of the new Civil Procedure Rules.

As with other elements of the rules, the taking of witness statements calls for the front-loading of much of the legal work. But the flip side of this is that cases are disposed of much more quickly whether through settlement, mediation or after a court hearing. An OECS practitioner summed it up in this way:

“The system of witness statements is very demanding. It requires the lawyers to fully understand the case by the time you get to Case Management [but] I have almost completed the adjustment with the help of my associates and the ultimate result is better preparation for trial. I can still remember the days when the examination-in-chief was prepared during the week before trial which quite often resulted in a last minute realization that you needed an extra witness. These discoveries are now being made weeks or months before the trial. At the end of the day I have to confess that it is a better system”.

*April, 2007*