

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-01032**

**BETWEEN**

**UNIVERSAL MANAGEMENT SOLUTIONS LIMITED**

**Claimant**

**AND**

**MANSOOR ALI**

**First Defendant**

**HANIFFA ALI**

**(In her capacity as the Legal Personal Representative of Rasheed Ali, deceased)**

**Second Defendant**

**MUSTAPHA ALI**

**Third Defendant**

**SHAMSHAIR ALI**

**Fourth Defendant**

**PREMIER AUTO SERVICES LIMITED**

**Fifth Defendant**

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

**Date of Delivery:** Friday 14 February 2020

**Appearances:**

Mr. Terrence Bharath instructed by Ms. Sophia Vailloo for the Claimant

Ms. Lynette Maharaj S.C. and Ms. Tynneille Tuitt instructed by Ms. Shaheera Allahar for the Second to Fifth Defendants

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**DECISION ON THE CLAIMANT'S OBJECTION TO THE SECOND TO FIFTH  
DEFENDANTS' WITNESS SUMMONSES ISSUED ON 12 OCTOBER 2018**

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## **Introduction**

[1] This decision deals with the objection taken during the trial by Counsel for the Claimant to three witnesses being called to give evidence pursuant to witness summonses issued on 12 October 2018 on behalf of the Second to Fifth Defendants. These witnesses are:

- (i) The relevant officer from First Citizens Bank (“FCB”);
- (ii) Sameer Ali, Mechanical Engineer (Ag), Chief Mechanical Engineer/Head HSE/ Measurement Division and/or any authorized officer of the Ministry of Energy and Energy Industries (“the Ministry of Energy”); and
- (iii) Chester Bheeput, former General Manager – Retail & Industrial Fuels (Ag.) currently General Manager – Aviation and Maritime Fuels and/or any authorized representative of Trinidad and Tobago National Petroleum Company Limited (“NP”).

## **Background**

[2] The Claimant initiated proceedings against the Defendants by Claim Form and Statement of Case filed on 6 April 2016 for specific performance of an agreement made partly oral and partly in writing between the Claimant and the Defendants for the purchase of lands described in Certificate of Title Volume 1610 Folio 19 and the structures thereon, which included a gas station.

[3] At a case management conference (CMC), the parties indicated that they would agree to a timetable for the filing of all appropriate and relevant documents before the Court. In this agreed timetable, the deadline for the filing of witness statements and/or witness summaries was fixed for 10 October 2018. This agreed timetable was made an order of the Court. However, the timetable for this deadline was varied by consent between the parties. It was subsequently agreed that the deadline for filing witness statements and/or witness summaries would be extended to 16 October 2018. This variation was, again, sanctioned by the Court.

[4] The parties filed their respective witness statements and witness summaries as follows:

**On behalf of the Claimant**

- i. Witness statement of Anil Gunness filed on 16 October 2018;
- ii. Witness statement of Shelley Ann Rawlins filed on 16 October 2018;
- iii. Witness statement of Leslie Sylvester filed on 16 October 2018;
- iv. **Witness summary of Shaheed Hosein** filed on 16 October 2018;
- v. **Witness summary of Rena Ramoutar** filed on 16 October 2018;
- vi. **Witness summary of Beena Poliah** filed on 16 October 2018; and
- vii. **Witness summary of Ronald Clarke** filed on 31 October 2018.

**On behalf of the First Defendant**

- i. Witness statement of Manzoor Ali filed on 16 October 2018.

**On behalf of the Second to Fifth Defendants**

- i. Witness statement of Shamshair Ali filed on 16 October 2018;
- ii. Witness statement of Haniffa Mohammed-Ali filed on 16 October 2018; and
- iii. Witness statement of Sira Khan filed on 16 October 2018.

[5] The Claimant also filed three witness summonses on 16 October 2018 for the following witnesses: (i) Shaheed Hosein; (ii) Rena Ramoutar; (iii) Beena Poliah and one witness summons on 31 October 2018 for Ronald Clarke.

[6] The trial for this matter was carded for 7, 8, 13 and 14 November 2018. On the first day of trial, 7 November 2018, the Claimant opened its case and called its first witness, Mr. Anil Gunness. His witness statement filed on 16 October 2018 was tendered as his evidence-in-chief. Cross-examination of Mr. Gunness continued on 8 and 13 November 2018.

Thereafter, the Claimant called Mr. Shaheed Hosein and he was examined in accordance with the witness summary filed in relation to the evidence counsel for the Claimant required of him. Mr. Hosein was then cross-examined by the respective defence counsel. On 14 November 2018, the Claimant called Ms. Shelley Ann Rawlins and Ms. Leslie Sylvester and their witness statements were tendered into evidence as their evidence-in-

chief. They were then subjected to cross-examination. The trial continued on 5 February 2019; the Claimant called Ms. Rena Ramoutar and she was examined in relation to her witness summary after which she was subjected to cross-examination. The case for the Claimant was then closed.

[7] The First Defendant opened its case on 5 February 2019 and called its witness Manzoor Ali. His witness statement was tendered into evidence as his evidence-in-chief. He was cross-examined at length by counsel for the Claimant. The First Defendant thereafter closed its case. The trial was then adjourned to 27 February 2019 for the Second to Fifth Defendants to open their case.

On the adjourned date of the trial, the Second to Fifth Defendants called their first witness, Ms. Haniffa Mohammed-Ali and her witness statement was tendered into evidence as her evidence-in-chief. Ms. Mohammed-Ali was cross-examined by Counsel for the Claimant while Counsel for the First Defendant reserved his right to cross-examine her.

Thereafter, the Second to Fifth Defendants sought to call the persons named in the three witness summonses filed into Court on 12 October 2018 to which the Claimant vehemently objected.

[8] The Court, having heard brief submissions from both Counsel for the Claimant and the Second to Fifth Defendants, subsequently ordered the parties to file written submissions by 14 March 2019 to assist the Court in its determination on whether the witnesses named in the witness summonses can be called.

The Second to Fifth Defendants filed their submissions on 15 March 2019 and the Claimant filed submissions on 18 March 2019. When the matter was called on 19 March 2019, the Court heard further oral submissions from Counsel and decided that it would provide the parties with a written ruling of its decision on the objection since the question to be decided was starved of authority.

## **SUBMISSIONS**

### **On behalf of Second to Fifth Defendants**

[9] Mrs. Maharaj SC argued that there is no defect and/or non-compliance with the procedure outlined in **Part 34 of the Civil Proceedings Rules 1998** (“the CPR”) as it relates to the issuance and service of the witness summonses. She contended as follows:

- (i) All four witness summonses were filed more than 21 days before the first date of trial on 7 November 2018 in compliance with **Part 34.3 of the CPR**. Thus, permission from the Court was not required for the issuance of the summons.
- (ii) The summonses were issued in accordance with the prescribed format and clearly identified the person/s to produce the documents and/or to give evidence pursuant to **Part 34.2 of the CPR**.
- (iii) All witness summonses were served on the respective individuals at least fourteen (14) days prior to the date on which the witnesses were required to attend (i.e. 7 November 2018) and the said individuals were offered conduct money so that the witness summonses were binding on the witnesses: **Part 34.5 and 34.7 of the CPR**.
- (iv) The oral evidence and documents requested to be produced are relevant and necessary to the assessment and determination of the following issues: (1) whether there was a concluded contract; and (2) the credibility of witnesses.
- (v) The documents sought to be produced by the persons summoned are in their actual possession and the request for documents is not too wide. The documents are confined to that which are reasonably necessary for the fair determination of the live issues in dispute such that any intrusion into the Claimant’s affairs is proportionate to achieving the information required as it is generally preferable not to decide a matter on a partial assessment of the available evidence and documents.

[10] Mrs. Maharaj SC submitted that the witness summons issued to FCB is relevant and necessary, as FCB is a non-party with actual possession of the documentation and records related to the manager’s cheque, that is, its issuance and the date of its return to the bank. It was further submitted that in the Claimant’s pleadings and the written evidence of Mr.

Anil Gunness, there are varying positions adopted with respect to the delivery of the manager's cheque and the location of the manager's cheque.

Mrs. Maharaj SC advanced that FCB's evidence is independent, which will allow the Court to properly assess and determine whether there was a concluded agreement, as well as assess the credibility of the Claimant and its witnesses. It was submitted that these bank records and documents were not readily available to any of the Defendants and this summons, thus, specifies what documents are to be produced.

[11] Mrs. Maharaj SC submitted that the witness summons issued to the Ministry of Energy is relevant and necessary since the Ministry of Energy as a non-party is in actual possession of the documents relating to the marketing licence issued to the Fifth Defendant as well as inspection reports with respect to the condition of the gas station of the Fifth Defendant. It was further submitted that the Claimant refused to agree to the documents issued by the Ministry of Energy and that no counter-notice was filed to the Second to Fifth Defendants hearsay notice on 16 October 2018 with respect to the report dated 1 April 2014.

Mrs. Maharaj SC contended that at all times there was disclosure that the witness summons was to be issued for persons from the Ministry of Energy to provide evidence in relation to the hearsay statements contained in the report. It was further contended that the evidence and documents are relevant to the determination of (1) whether the gas station can be operated as claimed by the Claimant or by the Second to Fifth Defendants; and (2) whether the sale of the marketing licence can occur as claimed by the Claimant or whether the Ministry of Energy has additional requirements for such process.

[12] Mrs. Maharaj SC submitted that the witness summons issued to NP is also relevant and necessary since NP as a non-party is in actual possession of the documents in relation to (1) the supply agreement made between NP and the Fifth Defendant; and (2) the correspondence in relation to the gas station passing between NP and representatives of the Fifth Defendant. It was further submitted that no counter-notice was filed in relation to some of the correspondence, the inspection report prepared by the Ministry of Energy

and sent to NP and correspondence sent by the Fifth Defendant's attorney-at-law, Mr. Krisendath Neebar, listed in sections D and E of the hearsay notice filed by the Second to Fifth Defendants on 16 October 2018.

Mrs. Maharaj SC contended that at all times there was disclosure that the witness summons was to be issued for persons from NP. It was further contended that the evidence and documents to be produced are necessary for the determination of the following issues (1) whether there is a concluded agreement; and (2) whether the Court is empowered to order specific performance without NP being involved particularly where NP under the supply agreement requires certain information prior to approval of a sale and if NP's criteria as set out in its supply agreement is not satisfied can the Court order for specific performance?

[13] Mrs. Maharaj SC argued that the Claimant has disclosed only certain information about its operations and expressed opinions on NP's operating practice and, therefore, there are issues as to credibility as to the Claimant's true operations and to understand the extent to which a sale and/or transfer of NP's supply agreement can take place. It was submitted that any documents in relation to the Claimant's operation of the gas station situate at Bonne Aventure Road, Gasparillo for the supply of NP Products would not ordinarily be obtained by the Defendants without compulsion from the law. Therefore, it is necessary to bring this material evidence to the Court for the learned judge to make a fair assessment.

[14] Mrs. Maharaj SC further advanced that if the Court accepts the technical objection made by the Claimant regarding the non-service on the Claimant, the Court, nevertheless, has the requisite power under **Part 40.6 of the CPR** to summon a witness to attend the trial to give evidence or to produce documents in relation to any question the learned judge may pose and the parties will also have an opportunity to cross-examine that witness.

It was further submitted that the learned judge has the power to require a person to attend the trial particularly where the document/s and/or evidence is/are relevant and necessary to determine the following critical issues:

- 1) whether there is a concluded agreement;
- 2) whether the Court is empowered to order specific performance without NP being involved particularly where NP under the supply agreement requires certain information prior to the approval of a sale and if NP's criteria as set out in its supply agreement is not satisfied can the Court order for specific performance;
- 3) whether the gas station can be operated as claimed by the Claimant in its pleadings or as stated by the Second to Fifth Defendants;
- 4) whether the sale of the marketing licence can occur as claimed by the Claimant or whether the Ministry of Energy has additional requirements for such process;
- 5) the credibility of Mr. Anil Gunness in relation to the manager's cheque No. 067372.

[15] Mrs. Maharaj SC further submitted that there are no applications before the Court to have any of the three witness summonses set aside on any grounds and that representatives attended Court on the respective dates, that is, 7 November 2018 and 29 February 2019.

### **Submissions on behalf of the Claimant**

[16] Counsel for the Claimant, Mr. Bharath, submitted that all parties disclosed relevant correspondence and documents issued by the three witnesses named in the witness summonses through standard disclosure. Therefore, the witness summonses are being used now as an instrument to seek disclosure and/or fish for evidence.

[17] Mr. Bharath contended that the parties agreed to a timetable for the filing of documents. He added that there were various requests for extensions of time to file documents that were made and granted by the parties; all parties provided standard disclosure and



inspection of documents. He submitted that provision was made for the filing of witness statements and/or witness summaries and agreed and un-agreed documents. He further submitted that there are no witness statements and/or witness summaries filed by the Second to Fifth Defendants in relation to the three witnesses named in the witness summonses.

[18] Mr. Bharath advanced that the witness summonses are in effect a request for discovery from third parties who are not parties to the proceedings. He submitted that there is no application for specific disclosure pursuant to **Part 28.5 of the CPR** filed before the Court by the Second to Fifth Defendants and neither was there any witness summons filed to produce the documents in advance of the trial.

[19] Mr. Bharath further advanced that if the Court were to uphold the witness summonses, there may be the production of documents that the parties may be seeing for the first time and could likely be prejudicial to one or all of the parties. He submitted that the Court is entitled to take into account whether the Second to Fifth Defendants could have obtained the disclosure by some other means and at some other stage of the proceedings.

[20] Mr. Bharath contended that the law on the use of a witness summons is quite clear – it is to be used as a last resort where the parties cannot obtain disclosure otherwise or where the person from whom disclosure may have been sought previously failed to produce the document due to confidentiality purposes. He submitted that it is a procedure used for disclosure to the Court; it is a specific jurisdiction where the documents must be identified.

[21] Mr. Bharath submitted that the witness summons for NP is unfair; that the evidence called for is too wide for the Claimant to deal with. He added that Counsel for the Second to Fifth Defendants could have asked for the relevant information on Premier Auto Services by way of interrogatories, disclosure for specific items or disclosure from NP long before the witness statements. Counsel submitted that the same arguments equally apply to Mr. Ali from the Ministry of Energy.

[22] Mr. Bharath advanced that the **Civil Proceedings Rules** contain adequate procedures by which the Second to Fifth Defendants could have availed themselves to obtain documents throughout the proceedings and well in advance of the trial. It was submitted that this is not a case that requires **Part 34 of the CPR** to be deployed; there is no evidence that has been produced by the Second to Fifth Defendants to suggest that the **Part 34** procedure is applicable or necessary.

He contended that it is pellucid from the face of the witness summonses that the Second to Fifth Defendants are attempting to adduce new evidence that ought to have been contained either in a witness statement or a witness summary. It was submitted that the law on the use of a witness summons states that a witness summons must not be used as a tool to carry out a fishing expedition in relation to the oral evidence and the production of a wide range of documents, which they seek from the witnesses. Counsel relied on the authority of **Harrison v Bloom Camillin**<sup>1</sup>.

[23] Mr. Bharath submitted that the witness summons issued to FCB requests the production of the manager's cheque No. 067372, which has already been disclosed by the Claimant. Therefore, there is no need for a witness summons to compel any officer from FCB to produce the said manager's cheque.

It was further submitted that the Claimant filed a witness summary for two officers of NP, Ronald Clarke and Beena Poliah, which contained questions which the Claimant intended to ask the witnesses and the list of relevant correspondence and documents on which they would be questioned. Mr. Bharath contended that all of the documents referred to in the witness summaries in respect of the two NP officers had previously been disclosed by the Claimant. Counsel argued that on a close examination of the witness summons filed by the Second to Fifth Defendants, they appear to be seeking production of documents that have never been disclosed previously. Therefore, to uphold this witness summons, the

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<sup>1</sup> (1999) The Independent, 28 June 1999

Claimant would be severely prejudiced as new documents and fresh evidence would be produced.

It was further submitted that the witness summons for Chester Bheeput is seeking the production of, inter alia, documents in relation to the Claimant's operations at Bonne Aventure Road, Gasparillo. These documents as they relate to the gas station operated by the Claimant have no relevance to the issues before the Court.

### **Issue for determination**

[24] The main issue to be considered is whether the Court should allow Counsel for the Second to Fifth Defendants to call the three witnesses named in the witness summonses filed on 12 October 2018, notwithstanding that no witness statement or witness summary was filed in relation to the evidence sought to be adduced from these witnesses.

### **Law and Analysis**

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

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

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

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

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

litigation should be conducted with as little technicality as possible: *per Lord Woolf* in **Douglas, Zeta Jones & another v Hello! Limited and others**<sup>2</sup>.

[27] **Part 29.2 of the CPR** deals with evidence at trial. The general rule is that any fact, which needs to be proved at trial by the evidence of witnesses, is to be proved by their oral evidence given in public.

Traditionally, and pre-CPR, evidence given at trials has been by witnesses giving oral testimony from the witness box. The process was very much an oral affair. However, with the advent of the CPR, the trial and presentation of evidence is now a very different affair. As stated in Adrian Zuckerman's Civil Procedure 1<sup>st</sup> Edition<sup>3</sup>:

*“Under the modern procedure the presentation of evidence and of argument begins well before the trial hearing. By exercising its court management powers the court can now influence the fact-finding process long before the trial hearing. **The preparations for the trial require the parties to supply the court in advance with virtually all the evidence and arguments on which the parties propose to rely. Witness statements, expert reports, bundles of relevant documents, reading guides and skeleton arguments have to be made available to the court before the hearing.** All these are designed to provide the court in advance of the trial with comprehensive information about the evidence and the parties' arguments.”*

While evidence in civil trials continues to be given from the witness box, the presentation of the evidence is primarily by witness statements exchanged well before trial in accordance with the directions of the Court and which said statements stand as the evidence-in-chief of the witnesses once they attend the trial and accept, on oath, that the

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<sup>2</sup> [2003] EWCA Civ 332

<sup>3</sup> Page 643, para 21.5

contents of their witness statements are true and correct. **Part 29.4 of the CPR** sets out the Court's powers relating to witness statements as follows:

*“(1) The court may order a party to serve on any other party a statement of the evidence of any witness upon which the party serving the statement intends to rely in relation to any issues of fact to be decided at the trial...”*

*“(3) The court may give directions as to the order in which witness statements are to be served and the time when they are to be filed.”*

Today, witness statements stand in place of oral evidence-in-chief so that oral testimony in open court is usually confined to cross-examination of witnesses on the contents of their pre-trial statements<sup>4</sup>. The purpose behind requiring the parties to exchange their witness statements is to save time and costs at trial, but more importantly, to enable the parties to evaluate the merits of their dispute with a view to settlement.

[28] Nonetheless, where a person has relevant evidence to give or is in possession of relevant documents, his attendance may be compelled by means of a witness summons. A witness summons is used to secure the attendance of a witness at the trial or at a hearing prior to the trial (formerly known as *subpoena ad testificandum*); or to require the witness to produce documents to the court at the trial or at a hearing prior to the trial (formerly known as *subpoena duces tecum*). The procedure is set out in **Part 34 of the CPR**.

[29] **Part 34.2 of the CPR** states as follows:

*“(1) A witness summons is a document issued by the court requiring a witness to attend court –*

*(a) to give evidence; or*

*(b) to produce documents to the court.”*

*(2) A witness summons must be in the prescribed form.*

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<sup>4</sup> Zuckerman on Civil Procedure Principles of Practice, 2nd Edition at paragraph 19.3

- (3) There must be a separate witness summons for each witness.*
- (4) A witness summons may require a witness to produce documents to the court either –*
- (a) on the date fixed for a hearing; or*
- (b) on such date as the court may direct.”*

[30] Pursuant to **Part 34.3(4) of the CPR**, the Court may set aside or vary a witness summons.

Mrs. Maharaj SC submitted that Mr. Bharath is essentially seeking to have the witness summonses set aside. However, an opposing party to litigation does not have the right to apply to set aside a witness summons, although, in specific instances, he may object<sup>5</sup>. An opposing party may object to the production and admissibility of the documents when the witness summons is complied with in court<sup>6</sup>. This is what Mr. Bharath is attempting to do; he is objecting to the production of the documents as well as the attendance of the witnesses to give evidence at the trial.

[31] I have examined the three witness summonses filed on 12 October 2018 by the Second to Fifth Defendants which all seek, not only the production of documents from the witnesses named therein but, also oral evidence from those witnesses.

[32] The Court is of the view that all three witness summonses are in compliance with the procedure outlined in **Part 34 of the CPR**. The witness summonses were in the prescribed format and clearly identified the persons to be called to give evidence and to produce documents.

[33] Nevertheless, Mr. Bharath expressly objected on numerous occasions to the witness summonses issued on the basis that he was not given notice of the witness summonses nor was he served with the witness summonses. Mrs. Maharaj SC countered that **Part 34 of the CPR** does not stipulate that the other party to the litigation must be given notice or

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<sup>5</sup> *Harmony Shipping v Saudi Europe Line* [1979] 1 W.L.R. 1380; *Boeing Co v PPG Industries Inc.* [1988] 3 All ER 839 at 842

<sup>6</sup> *Boeing Co v PPG Industries Inc.* (supra)

be served with the witness summons. Nonetheless, Mrs. Maharaj SC argued that the Second to Fifth Defendants gave notice of two of the witness summonses issued in their Hearsay Notice filed on 16 October 2018, four days after the witness summonses were filed on 12 October 2018. At Section C of the Hearsay Notice, the Second to Fifth Defendants gave notice that they had issued a witness summons to Mr. Sameer Ali of the Ministry of Energy to attend the trial to give evidence. Further, at Sections D and E, they also gave notice that they had issued a witness summons to Mr. Chester Bheeput of NP to attend the trial to give evidence.

[34] However, Mr. Bharath's more forceful objection was on the basis that *witness summaries for the witnesses named in the witness summonses should have been filed alongside the witness summonses issued*, which is what he did when he filed and issued three witness summonses on 16 October 2018 and one on 31 October 2018.

[35] The Court agrees with this objection made by Counsel for the Claimant. **Part 29.6 of the CPR** provides that a party, who is required to provide a witness statement, may apply to the court for permission to serve a witness summary instead if he is not able to obtain a witness statement.

A witness summary, as the name suggests, is a summary of the evidence, if known, which would otherwise be included in a witness statement. The intention is to be able to refer to brief notes obtained and prepared which do not go quite as far as the full statement. Alternatively, if the evidence is not known, it is a summary of the matters about which the party serving the witness summary proposes to question the witness<sup>7</sup>.

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

*“Where a party is unable to obtain a witness statement but intends to call a witness, normally by serving a witness summons, he must still*

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<sup>7</sup> Part 29.6 (4) CPR

*comply with **CPR r.32.9** [This rule is equivalent to our **Part 29.6 of the CPR**] by seeking permission to serve a witness summary instead.”*

[37] The fundamental change that has occurred in civil cases in recent years relates not only to the taking of evidence at trial, but more importantly, the giving of notice of the evidence to be given at trial, particularly through the obligation to disclose witness statements [or as the case may be, witness summaries] in advance<sup>8</sup>. This practice is said to be regarded as the “*cards on the table approach*”.

[38] The Court is of the opinion that the Second to Fifth Defendants ought to have filed witness summaries of the witnesses named in the three witness summonses. At the time that the hearsay notice was filed (16 October 2018), the Second to Fifth Defendants would have been aware of the matters on which they proposed to question the witnesses. It is in that regard that the Court finds that witness summaries consisting of the questions to be asked and the list of correspondence and documents on which the witnesses would be cross-examined ought to have been filed into Court, that is, within the time specified by the Court for witness statements or witness summaries.

As stated above, the parties had agreed to a timetable for the filing of both witness statements and witness summaries. Therefore, permission from the Court was not required and thus, the Second to Fifth Defendants were in a position to file witness summaries on behalf of these witnesses alongside the witness summonses issued.

[39] This procedure would have allowed the other parties, particularly the Claimant, to not be blindsided at the trial with any new evidence or evidence for which the Claimant has not been given an opportunity to prepare. The Claimant would have been aware of the matters about which the witnesses were going to be questioned in advance and accordingly, would be better able to prepare his case. To allow the witnesses to be called without having an idea of the summary of the matters about which they are to be questioned is likely to lead

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<sup>8</sup> **Phipson on Evidence, 19th Edition at paragraph 10-01**



to this matter being dealt with unjustly and disproportionately contrary to the overriding objective of the CPR.

[40] Consequently, in the absence of witness summaries being filed for the persons named in the three witness summonses, the Court is minded to uphold Counsel for the Claimant's objection and not permit the attendance of those witnesses to give evidence at the trial. A timeline was given for the filing of witness statements and witness summaries, to which the Second to Fifth Defendants failed to adhere. When a party fails to file a witness summary within the time specified, that witness may not be called **unless the Court permits: Part 29.13 (1) of the CPR.**

[41] According to the learning in **The White Book, Civil Procedure Volume 1 (2013) at 32.10.2 page 994**, this prohibition imposed by **rule 32.10** (which is the equivalent rule to our **CPR Part 29.13 (1)**) on calling a witness whose witness statement or **summary has not been served in accordance with the Court's directions** amounts to a **"sanction"** which takes effect from the time the failure to comply occurs. The consequence of this state of affairs is captured by **CPR Part 26.6 (2)** which provides as follows:

*"Where a party has failed to comply with any of these Rules, a direction or any court order, **any sanction for non-compliance imposed** by the rule or the court order **has effect unless the party in default applies for and obtains relief from sanction**, and **rule 26.8 shall not apply**."*[Emphasis added]

[42] It is clear then that the proviso ("**unless the court permits**") attendant on **Part 29.13 (1)**, giving the Court a discretion to allow the witness to be called even though there has been non-compliance, is qualified by **Part 26.6 (2)** which requires the defaulting party to apply for **relief from sanction** by satisfying the criteria stipulated in **CPR Part 26.7**: see **Primus Telecommunications Netherlands B.V. v Pan European Limited [2005] EWCA Civ 273; Papa Johns (GB) Ltd v Doyley [2011] EWHC 2621 (QB)**<sup>9</sup>. It is also

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<sup>9</sup> See also Nottinghamshire & City of Nottingham Fire Authority v Nottingham County Council [2011] EWHC 1918

clear that once **Part 26.6 (2)** applies, the Court is not allowed to apply **Part 26.8** which would otherwise allow the Court to rectify matters where there has been an error of procedure. Further, **CPR Part 29.13 (2)** provides that *“The Court may not give permission at the trial unless the party asking for permission has a good reason for not seeking relief under rule 26.7 earlier.”* [Emphasis added]

[43] The Second to Fifth Defendants, having failed to file and serve witness summaries within the time specified for the proposed witnesses named in the respective witness summonses and having also failed to apply for relief from sanction imposed by **CPR Part 29.13 (1)**, the Court, in keeping with the analyses and findings espoused in paragraphs 35-42 above, the Second to Fifth Defendants are prohibited from calling the said proposed witnesses.

[44] It is this Court’s considered opinion that the provisions of **Part 34** which deal with the issue, service and enforcement of witness summonses cannot be read in isolation to the case management directions given by the Court in relation to witness statements and/or witness summaries pursuant to **CPR Part 29**, in particular, **Part 29.4, 29.6 and 29.13**. The timetable set by the Court or agreed to by the parties, culminating in an order of the Court, constitutes the *“case-plan”* or *“blue-print”* for the progress of the matter. Derogation from or non-compliance with those directions without permissive variation, either by consent, rule or court order, will, in most instances, attract some measure negative consequences or sanction.

[45] The Claimant issued four witness summonses in this matter and also filed witness summaries for the four witnesses whom they intended to call. This was in harmony and compliance with the agreed case-plan. By doing so, the other parties knew in advance the general terms of the case they were going to have to deal with at the trial. Reciprocity demands that the Claimant should have been given the same courtesy as it relates to the three witnesses named in the witness summonses. Consequently, to permit the attendance of these witnesses at trial to give evidence without a witness summary being filed together with the witness summonses, is more than likely to be unfair and prejudicial to the

Claimant and in stark contradiction to the underlying philosophy of the overriding objective of the CPR.

[46] As it relates to the production of the documents identified in the three witness summonses, Mr. Bharath objected on the basis that it is a request for discovery from third parties; no application for specific disclosure was made nor were there any witness summonses filed to produce the documents prior to the trial. Mr. Bharath further submitted that the Court is entitled to take into account whether the Second to Fifth Defendants could have obtained the disclosure by some other means and at some other stage of the proceedings.

[47] Mr. Bharath referred to **Part 31.17 of the UK CPR** which provides for disclosure by a non-party to the proceedings. However, there is no similar rule in **Part 28** (which deals with disclosure and inspection) in our **CPR**. The only appropriate method available to a party to obtain documents from a third party in this jurisdiction is through a witness summons under **Part 34 of the CPR**.

[48] A witness summons for the production of documents differs from inter-parties' disclosure of documents in the following ways:

- (1) It requires the production of documents; it does not require the recipient to disclose the existence of documents or to list them;
- (2) It requires the production of documents identified by the summons itself;
- (3) It requires production at the trial or other hearing in the action, not at the disclosure stage (e.g. at a **“production hearing”**: **Part 34.20 (1) CPR**); and
- (4) It requires production to the Court, not to either or both parties<sup>10</sup>.

[49] In the absence of guidelines from the CPR, it was held in the case of **South Tyneside MBC v Wickles Building Supplies Ltd**<sup>11</sup> that regard should be had to authorities decided under the previous Rules of Court which found the applicable principles to be:

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<sup>10</sup> **Phipson on Evidence, 19th Edition at paragraph 8-03**

<sup>11</sup> [2004] EWCA Civ 248

*“(i) The object of a witness summons is to obtain production at trial of specified documents; accordingly, the witness summons must specifically identify the documents sought, it must not be used as an instrument to obtain disclosure and it must not be of a fishing or speculative nature;*

*(ii) The production of the documents must be necessary for the fair disposal of the matter or to save costs. The Court is entitled to take into account the question of whether the information can be obtained by some other means;*

*(iii) Plainly a witness summons will be set aside if the documents are not relevant to the proceedings; but the mere fact that they are relevant is not by itself necessarily decisive in favour of the witness summons;*

*(iv) The fact that the documents of which production is sought are confidential or contain confidential information is not an absolute bar to the enforcement of their production by way of witness summons; however, in the exercise of its discretion, the Court is entitled to have regard to the fact that documents are confidential and that to order production would involve a breach of confidence. While the Court’s paramount concern must be the fair disposal of the cause or matter, it is not unmindful of other legitimate interests and that to order production of a third party’s confidential documents may be oppressive, intrusive or unfair. In this connection, when documents are confidential, the claim that their production is necessary for the fair resolution of proceedings may well be subjected to particularly close scrutiny;*

*(v) The court has power to vary the terms of a witness summons but, at least ordinarily, the Court should not be asked to entertain or perform a redrafting exercise other than on the basis of a considered draft tendered by the party’s advocate.”*

[50] With respect to the manager's cheque No. 067372 from FCB, the Court agrees with Counsel for the Claimant that there is no need for FCB to attend the trial to produce the manager's cheque since the said cheque has already been disclosed by the Claimant. As to the credibility of the evidence of the Claimant on the location of the said cheque, the Court will conduct its balancing exercise and attach whatever weight is deemed appropriate to the evidence before the Court in determining the matter before it.

[51] With regard to the documents identified in the witness summons to Mr. Sameer Ali from the Ministry of Energy, the Court is of the opinion that there is no need for this person to be compelled to produce these documents to the Court. The inspection report dated 1<sup>st</sup> April 2014 and a letter from the Ministry of Energy concerning the inspection report have already been disclosed.

Furthermore, the request for *“any subsequent documents including reports and correspondence with Premier Auto Services”* is a general description; the witness summons ought to identify the documents required by means of a particular description<sup>12</sup>. The Court is of the opinion that the witness summons to Mr. Ali, in this respect, failed to identify or specify precisely the particular document or documents required to be produced. At best, it amounted to a request for a broad 'class' of documents, rather than specific documents known to exist. The Court agrees with Counsel for the Claimant that the witness summons is plainly an attempt to obtain discovery from a third party and constitutes a speculative expedition.

[52] Having regard to the documents identified in the witness summons to Mr. Chester Bheeput of NP, the Court is also of the opinion that it is not necessary for this person to attend the trial to produce the documents identified in the witness summons.

The request for *“all correspondence and documents including accounts with Premier in respect of the Supply Agreement dated 31st July 2012, the supply of NP products and the*

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<sup>12</sup> Phipson on Evidence, 19th Edition at paragraph 8-10

*upgrade of the gas station at No. 3 Guapo Cap-de-Ville Road, Point Fortin” is in the most general terms followed by reference to certain matters. This is a general description of the class of documents; it does not specify precisely the particular document or documents to be produced to the Court. The Court agrees with Counsel for the Claimant that the witness summons constitutes an attempt to obtain discovery from a third party and that it was of a speculative or fishing nature.*

[53] The Court is of the opinion that the third party is not required to produce “*all correspondence and documents including accounts with respect to the gas station situate at Bonne Aventure Road, Gasparillo, operated by Universal for the supply of NP products*”. The Court is also of the view that the documents sought are not relevant to any of the issues in the proceedings; the main issue for determination before the Court is whether there is an enforceable contract between the Claimant and the Defendants for the sale of the land and the gas station situate thereon. The Claimant’s operations at the gas station situate in Gasparillo are irrelevant in assisting the Court in its determination of the main issue. Furthermore, the documents sought are not necessary for fairly disposing of the issues in this matter.

[54] Counsel for the Second to Fifth Defendants submitted that the Claimant has disclosed only certain information about its operations and expressed opinions on NP’s operating practice. It was further submitted that any documents in relation to the Claimant’s operation of the gas station situate in Gasparillo for the supply of NP products would not ordinarily be obtained by the Defendants without the compulsion of law.

The Court is of the view that there were two appropriate courses available to the Second to Fifth Defendants: (i) the making of an application for specific disclosure pursuant to **Part 28.5 of the CPR** against the Claimant for the specified documents or (ii) pursuant to **Part 34.20 (1) of the CPR** *where the Court may permit a party to issue a witness summons requiring **either a party or any other person** to attend a **“production hearing”** at a date, time and place specified in the witness summons **other than the date of the trial** for the purpose of producing one or more documents.* As a result of the Second to Fifth

Defendants failure to utilize this route, the Court finds it unfair to permit the production of these documents at the trial. The witness summons to Mr. Bheeput, in effect, is being used against the Claimant as a substitute for disclosure, which is unfair and prejudicial to the Claimant.

[55] Bearing in mind all of the above analyses and findings, the Court also holds that it will be inappropriate to accede to the submission of Mrs. Maharaj SC for the Court to exercise its power under **CPR Part 40.6** to summon the witnesses to attend Court for the purposes outlined in the respective witness summonses or any variations thereof.

### **Disposition**

[56] Accordingly, having considered the parties' written and oral submissions as well as the above analyses and findings, order of the Court is as follows:

#### **ORDER:**

- 1. The Claimant's objections to the Second to Fifth Defendant's witness summonses issued on 12 October 2018 are upheld.**
- 2. The Second to Fifth Defendants are prohibited from calling the witnesses named in the three witness summonses issued on 12 October 2018 at the trial to give evidence or produce any documents.**
- 3. Accordingly, the witness summonses issued on 12 October 2018 be and are hereby set aside.**
- 4. Costs in relation to this distinct part of the trial to be the Claimant's costs to be paid by the Second to Fifth Defendants in any event.**

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