THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV2015-01868

BETWEEN

DELBERT CHARLES

Claimant

AND

NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED

First Defendant

AND

CENTURY 21 JANITORIAL SERVICES & COMPANY LIMITED

Second Defendant

AND

NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED

First Defendant/Ancillary Claimant

AND

CENTURY 21 JANITORIAL SERVICES & COMPANY LIMITED

Second Defendant/Ancillary Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: **January 21, 2019**

Appearances:

Mr Shawn Roopnarine & Ms S. Balgobin instructed by Mr Anand Rampersad for the Claimant

Mr. John Heath instructed by Mr. Lionel M. Luckhoo for the Second Defendant

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DECISION ON 2ND DEFENDANT'S ORAL APPLICATION OF 7TH MAY 2018

Introduction and Procedural History

[1] This decision deals with the oral application made by Counsel for the Second Defendant on the first day of the trial (7th May 2018) between the Claimant and the Second Defendant seeking the Court's permission to have the witness Krishna Ramnarine attend Court to be cross-examined on his witness statement which was filed on behalf of the First Defendant, notwithstanding that the Claim against the First Defendant was discontinued by the Claimant.

[2] The background and procedural history to this Claim leading up to the oral application is important and is set out with sufficient particularity hereunder.

[3] The Claimant initiated proceedings against the First Defendant by Claim Form and Statement of Case filed on 3rd June 2015 for negligence and occupier's liability for injuries which he sustained on 22nd March 2014.

The First Defendant entered its appearance on 31st July 2015 and filed its Defence to the Statement of Case on 5th October 2015. The matter was subsequently assigned, on 8th October 2017, to the Honourable Mr. Justice Rajkumar (as he then was).

On 9th November 2015, the First Defendant filed an Ancillary Claim against the Second Defendant. The Second Defendant entered its appearance to the Ancillary Claim on 23rd December 2015 and filed its Ancillary Defence to the Ancillary Claim on 17th February 2016.

[4] The Claimant, thereafter, filed an Amended Claim Form and Statement of Case on 31st March 2016 wherein he added the Second Defendant to his Claim. The First Defendant filed its Amended Defence on 28th April 2016. The Second Defendant filed its Defence to the Amended Claim Form and Statement of Case on 2nd May 2016.

[5] Thereafter, the First Defendant filed its Amended Ancillary Claim on 2nd May 2016 and a Reply to the Ancillary Defence on 18th May 2016.

[6] The matter was then re-assigned to my docket on 3rd October 2016. On 27th January 2017, the Claimant was granted permission to file his Re-Amended Statement of Case which he did on 30th January 2017. The First Defendant filed its Re-Amended Defence on 9th March 2017 and the Second Defendant filed its Amended Defence to the Re-Amended Statement of Case on 29th March 2017. The First Defendant thereafter filed its Re-Amended Ancillary Claim on 24th April, 2017.

[7] On the 28th July 2017 case management directions were given for the filing and exchange of witness statements by the 30th November 2017. A pre-trial review was fixed for the 26th March 2018 and the trial was set for the 7th and 8th days of May 2018.

[8] Pursuant to case management directions and extensions granted thereto, all parties eventually filed and exchanged their witness statements on 31st January 2018. The Claimant filed three witness statements in support of his case, namely that of: (i) Maria Velox Charles; (ii) Sean Mendez; and (iii) his own. The First Defendant filed a witness statement of Krishna Ramnarine. The Second Defendant filed three witness statements, namely that of: (i) Jennifer Khan; (ii) Neremala Williams; and (iii) Miguel Mohammed.

[9] At the pre-trial review on the 26th March 2018, Ms. Shanta Balgobin, appearing for the Claimant, gave oral notice of the likelihood of the Claimant discontinuing his Claim against the First Defendant but stated the intention to continue against the Second Defendant. The trial dates were nonetheless confirmed for the 7th and 8th May 2018.

[10] On 1st May 2018, the Claimant filed a Notice of Discontinuance of his Claim against the First Defendant. The First Defendant thereafter filed and served a Notice of Discontinuance of its Ancillary Claim against the Second Defendant on 3rd May 2018.

On the first day of trial scheduled for 7th May 2018, this Court ordered the discontinuance of the Claim against the First Defendant and the discontinuance of the Ancillary Claim against the Second Defendant. Before the trial commenced, Counsel for the Second Defendant announced his intention to make an application to have the witness for the First Defendant, Krishna Ramnarine, attend Court to be cross-examined on his witness statement

but agreed to proceed with the trial stating that such application would be made at the appropriate time. The trial then began and the Claimant called his witnesses in support and thereafter closed his case.

The Second Defendant opened its case and called two witness thus far in support. These witnesses were Neremala Williams and Jennifer Khan. Counsel for the Second Defendant thereafter made an oral application before the Court to have the witness, Krishna Ramnarine, attend Court and be cross-examined on his witness statement filed into Court on behalf of the First Defendant. Counsel for the Claimant strongly objected to such a course being adopted by the Court.

[11] The Court ordered Counsel for the Second Defendant to file and serve written submissions with authorities on or before 11th June 2018 and gave permission to the Claimant to file and serve response submissions with authorities on or before the 2nd July 2018. The Second Defendant subsequently filed a Notice of Application on 11th June 2018 together with its submissions formalising its application to have the witness, Krishna Ramnarine, attend trial to be cross-examined on his witness statement which was filed on behalf of the First Defendant, notwithstanding that the Claim against the First Defendant had been discontinued. Krishna Ramnarine is a Supervisor, currently employed by the First Defendant, the National Gas Company of Trinidad and Tobago Ltd.

[12] The Claimant filed his submissions in response on 2nd July 2018 objecting to the Second Defendant's Application. The Second Defendant filed reply submissions on 6th July 2018. The Claimant subsequently filed a Notice of Application on 11th July 2018 requesting that certain parts of the Second Defendant's reply submissions be struck out and that the Registrar of the Supreme Court issue a witness summons for one Sunil Chingee to attend trial pursuant to **Part 40.6 of the Civil Proceeding Rules 1998 ("the CPR")** to give evidence on behalf of the Claimant.

Grounds of Second Defendant's Application

[13] The grounds upon which the Second Defendant's application is based are as follows:

(i) The Honourable Court has the power to require a witness to attend trial under **Rule 40.6 of the CPR**;

(ii) The Court in making its order at the pre-trial review to require deponents of witness statements to attend the trial for cross-examination validly exercised its discretion;

(iii) The failure of the First Defendant's witness, Krishna Ramnarine, to attend the trial as witness, has a prejudicial effect on the Second Defendant; and

(iv) There being no property in a witness, the Second Defendant can call Krishna Ramnarine as a witness.

Issue for determination

[14] The main issue to be considered in this application is whether the Second Defendant should be allowed to cross-examine Krishna Ramnarine on his witness statement filed on behalf of the First Defendant who is no longer a party to these proceedings.

Law and Analysis

[15] The first question to be answered is this: ***how does a witness statement become evidence in a trial?***

Part 29 of the CPR is pertinent and must be examined. 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: [**Rule 29.2]**. Further, **Rule 29.4 of the CPR** requires that the evidence of witnesses of fact must be set out in a witness statement. It states 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."***

[16] **Rule 29.9 of the CPR** provides as follows:

"(1) Except where rule 29.11 applies, if—

(a) a party has served a witness statement; and

(b) he wishes to rely on the evidence of the witness who made the statement,

he must call the witness to give evidence unless the court orders otherwise.

(2) If—

(a) a party has served a witness statement; and

(b) he does not intend to call that witness at the trial,

he must give notice to that effect to the other parties not less than 21 days before the trial."

The significance of this Rule is that in order for a party to be able to rely on a witness statement given by a witness, he must call that witness unless the Court orders otherwise.

[17] Witness statements are not served for tactical purposes; they are served because they are intended to be relied on at the trial at the time they are served by the party serving them, although there may be no concluded view as to whether the witness will be called at the trial. The witness is not bound to be called merely because a statement has been served: **Douglas and others v Hello! Limited and others [2003] EWCA Civ 332**.

[18] Nonetheless, there are certain cases where a witness statement can be used even if the witness is not called. This is provided for in **Rule 29.11 of the CPR** which states as follows:

(1) Unless the court orders otherwise, a party may rely on a witness statement as evidence at trial without calling the witness to give oral evidence if—

(a) there is no dispute as to facts, or there is unlikely to be such a dispute;

(b) the only or main issue is the meaning of a document or statutory provision;

(c) the only or main issue is a matter of law;

(d) the proceedings are such that there must be a hearing although default judgment has been entered; or

(e) in any other case, the parties agree.

(2) Where a party intends to rely on a witness statement under paragraph (1) he must give notice of his intention to the other parties not less than 21 days before the trial or other hearing at which such evidence is to be relied on.

(3) On receipt of such notice any party may apply to the court for an order requiring the maker of the witness statement to attend to be cross-examined.

(4) If the person who made the witness statement does not attend in accordance with the order, his witness statement may not be used as evidence.

[19] There is a discretion for a judge to allow a party to rely on a witness statement even though the witness is not being called. A party who has filed a witness statement is obliged to call that witness if he wishes to rely on his evidence unless the Court orders otherwise. A witness statement is the witness' examination-in-chief subject to it being adopted by the witness, on oath or by affirmation, at the trial. Unlike other statements for which hearsay notices are normally filed, the witness statement is specifically drafted for the purposes of being used at trial. Ordinarily, the Court will strike out a witness statement of a witness who does not present himself or herself for trial: **Tucker Energy Services Limited v Weatherford Trinidad Limited CV2010-02730**.

[20] In **Tucker (supra)**, the defendant made an application on 13th May 2013 to admit a witness statement by one Lorraine Manon dated the 21st September 2012 as hearsay evidence. It was made under **Part 30.6 of the CPR** on the basis that she was overseas. Boodoosingh J refused the application to adduce the witness statement of Lorraine Manon as hearsay evidence under **Part 30.6** on the basis that **Part 30** was not intended to allow the admission of entire witness statements as hearsay evidence. Boodoosingh J suggested that the defendant seek to have the Court exercise its judgment or discretion to receive the witness statement under **Part 29 of the CPR**. The learned Judge did not decide whether the witness statement can be received under **Part 29 of the CPR** since that issue was not before him.

However, Boodoosingh J, in deciding whether to admit a witness statement opined that -

"*the court must therefore exercise its judgment on whether a party should be allowed to rely on a witness statement even though the witness is not being called. In exercising its judgment the court must be able to consider the reasons for the witness not being called, whether this will cause material prejudice to the opposing party, what is the nature of the evidence contained in the witness statement, among other considerations.*"

[21] A witness statement for Krishna Ramnarine was filed on the 31st January 2018 on behalf of the First Defendant. However, the Claimant on the 1st May 2008 filed a Notice of Discontinuance against the First Defendant. The First Defendant/Ancillary Claimant then filed a Notice of Discontinuance on the 3rd May 2008 against the Second Defendant/Ancillary Defendant. On the 7th May 2018, the first day of trial, the Court officially ordered the discontinuance of the Claim by the Claimant against the First Defendant and the Ancillary Claim by the First Defendant/Ancillary Claimant against the Second Defendant/Ancillary Defendant. In view of that, the First Defendant was no longer a party to these proceedings.

[22] The Second Defendant now wishes to have Krishna Ramnarine attend trial to be cross-examined on his witness statement filed on the 31st January 2018. However, in order for a witness to be cross-examined on his witness statement in a civil trial, his witness statement must be accepted as his evidence-in-chief before the Court. I bear in mind that a witness statement is not a sworn document like an affidavit. **Rule 29.5(1)(g) of the CPR** merely requires the inclusion of a statement by the intended witness that he believes the statements of fact in it to be true (a certificate of truth).

[23] Accordingly, the witness in this case would have to be called by the party on whose behalf the witness statement was filed and must take an oath or affirmation that the evidence he intends to give is the truth. The witness must identify his witness statement and say whether the contents thereof are true and correct whereupon his witness statement will be entered into evidence as his evidence-in-chief. Thereafter, opposing parties can cross-examine the witness on his witness statement.

Though there are instances in which the witness statement is evidence even if the witness is not called provided for by **Rule 29.11 of the CPR**, it is questionable whether any of those instances apply in this case.

[24] Furthermore, in this circumstance, the First Defendant is no longer a party to the proceedings. As a result, the witness statement of Krishna Ramnarine cannot be tendered into evidence as the First Defendant will not be present during the trial to call him.

[25] Though the Second Defendant submitted that the witness statement of Krishna Ramnarine is disclosed and in the possession of the Court, the witness statement is not before the Court as evidence. Therefore, the Second Defendant is prevented from cross-examining the witness on his witness statement. I shall now consider in turn the grounds upon which the Second Defendant's application is premised.

Ground (i) – The Honourable Court has the power to require a witness to attend trial under Rule 40.6 of the CPR

[26] The Second Defendant submitted that the trial judge has the power to require a witness to attend trial pursuant to **Rule 40.6 of the CPR**.

Rule 40.6 of the CPR states that-

"*40.6 (1) The judge may—*

(a) issue a witness summons requiring a party or other person to attend the trial;

(b) require a party to produce documents or things at the trial; and

(c) question any party or witness at the trial.

(2) The judge may examine a party or witness—

(a) orally; or

(b) by putting written questions to him and asking him to give written answers to the questions.

(3) Any party may then cross-examine the witness."

[27] It therefore follows that a judge has a discretion to issue a witness summons requiring a party or other person to attend the trial. The Rules, however, do not specify at what time throughout the proceedings the Judge can issue a witness summons requiring a person or other party to attend trial. However, it can be safely concluded that once an issue in the case arises, a judge can issue a witness summons to a party or other person to attend trial to aid in resolving the issue.

[28] The Second Defendant cited the Court of Appeal case of **Sheriza Lalwah v Deodath Dookie CA P 069/2017** which reviewed this power of the Court. In this case, the Court of Appeal upheld the trial judge's order issuing a witness summons for a witness who had evidence that was directly relevant to an issue in the case and there was evidence that the Claimants were having difficulty obtaining the evidence otherwise. The Court of Appeal found that the trial judge reasonably acted within her powers under **Part 40.6 of the CPR** when she ordered that the doctor be required to attend and produce to the Court whatever evidence the doctor may have had on the central issue in the case.

The issue in the case before the lower court was the mental capacity of one, Khurban Ali, the deceased, at the time of making his will. The Defendant stated that there was a medical report prepared by a Dr Bibi Singh who certified that the deceased was mentally competent, re: decision-making. There had been full disclosure that the Respondent's challenge to the Claimant's assertion that the deceased was not in his right mind relied on a stated and exhibited medical report of a named doctor. The Claimants were experiencing difficulties in obtaining a witness statement from Dr Singh. In view of that, the Judge issued a witness summons for the doctor to produce and give evidence to the Court.

[29] The Court agrees that it has a power to issue a witness summons requiring a party or other person to attend trial. The Court, however, must exercise its discretion reasonably. In this instance, the Second Defendant is asking the Court to issue a witness summons to Krishna Ramnarine to attend trial to be cross-examined on his witness statement which was filed on the 31st January 2018 by the First Defendant who is no longer a party to the proceedings. The case at bar can clearly be distinguished from the Sheriza Lalwah case as the facts are not on all fours. There is no evidence before this Court nor is there any

submission made to the effect that the Second Defendant attempted in any way to get Krishna Ramnarine to give a witness statement or to give evidence on its behalf, notwithstanding that the Second Defendant had notice since at the pre-trial review that the Claimant was likely to discontinue its Claim against the First Defendant. This, taken in the context that counsel for the Second Defendant is well aware of the principle that there is no property in a witness.

[30] Consequently, the Court cannot find sufficient justification under this ground for exercising its discretion under Rule 40.6 of the CPR to issue a witness summons to Krishna Ramnarine to attend trial to be cross-examined on his witness statement which is not before this Court as evidence.

Ground (ii) - The Court in making its order at the pre-trial review to require deponents of witness statements to attend the trial for cross-examination validly exercised its discretion

[31] The Second Defendant cited the Court of Appeal case of **Ansa Merchant Bank Limited v Sara Swan CA P 234-236 of 2017** in arguing that an order made by a court of unlimited jurisdiction stands until set aside. The Second Defendant submitted that none of the parties availed themselves of the opportunity to seek to appeal, vary, or obtain clarification with regard to the above order as made. The Second Defendant contended that notwithstanding being ordered to attend trial on 7th May 2018, Krishna Ramnarine did not attend trial.

[32] However, one should consider the purpose of a pre-trial review. A pre-trial review is held shortly before trial if the Court so orders. At a pre-trial review, the Court must give directions as to the conduct of the trial in order to ensure the fair, expeditious and economic disposition of the issues. The directions which the Court may give at a pre-trial review are found in **Part 39.6 of the CPR**.

[33] On the 26th March 2018 at the pre-trial review, Shanta Balgobin, one of the Attorneys-at-Law for the Claimant, indicated to the Court that the Claimant and NGC (the First Defendant) were negotiating towards a position whereby the Claimant would discontinue

against NGC (the First Defendant) – but continue against Century 21 (the Second Defendant).

[34] At the conclusion of the pre-trial review, the Court ordered as follows:

> *"1. The decision on evidential objections to be given before the date fixed for Trial but in any event before the filing of the Trial bundle.*
> *2. The dates fixed for Trial that is the 7th and 8th days of May, 2018, each day from 9:30am to 2:30pm in Courtroom SF10 be and is hereby confirmed.*
> *3. The Registrar of the Supreme Court be and is hereby directed to issue a Witness Summons for Dr Krishna S. Maharaj who has been appointed as a Court expert by Order dated 28th July, 2017 to attend Court on the 7th May, 2018 at 10:00am in Courtroom SF10, Supreme Court, Harris Street, San Fernando.*
> *4. All other Deponents of Witness Statements to be present at the Trial for cross-examination."*

[35] One must then consider the effect of this order. At the pre-trial review, the Claimant only informed the Court of its negotiations with NGC about discontinuing the matter; there was no confirmed decision to discontinue. In view of that, the Court nevertheless confirmed the dates for trial, directed that a witness summons be issued for Dr Krishna S Maharaj and that all other deponents of witness statements be present at the trial for cross-examination.

The Court ordered that all other deponents of witness statements be present at trial for cross-examination as the Court is not aware of which witnesses each party is likely to call on their behalf to give evidence on the trial dates. By giving this general order, the Court would have secured the attendance of all witnesses intended to be called so that there would be no delay in the progress of the trial. This order was made on the basis that if any witness who is required to give evidence did not attend the trial then that witness' witness statement will not be admitted into evidence unless there is some good reason to justify the court exercising its discretion to admit same.

[36] The Second Defendant argued that notwithstanding being ordered to attend trial for cross-examination, Krishna Ramnarine did not attend trial on 7th May 2018. However, on 1st May, 2018, the Claimant filed a Notice of Discontinuance against the First Defendant.

[37] **Part 38 of the CPR** sets out the procedure by which a Claimant may discontinue all or part of a claim. **Rule 38.2(1)** states that "The general rule is that a claimant may discontinue all or part of his claim without the permission of the Court."

Rule 38.5 of the CPR provides:

"(1) Discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on him under rule 38.3(1)(a).

(2) The proceedings are brought to an end as against him on that date."

[38] The Notice of Discontinuance against the First Defendant was filed and served on the 1st May 2018 and the Notice of Discontinuance against the Second Defendant was filed and served on the 3rd May, 2018. In view of that, the Claim against the First Defendant was brought to an end on 1st May 2018 and the Ancillary Claim against the Second Defendant was brought to an end on the 3rd May 2018. So that counsel's understanding of the true purport of the order for witnesses to attend trial to be cross-examined is misconceived. From the context of the order it would be straining language to hold that where a party's case is discontinued before the trial that its witnesses would still be required to attend the trial for cross-examination in obedience to the order.

[39] Accordingly, as the Claim was discontinued against the First Defendant and the Ancillary Claim discontinued against the Second Defendant, the First Defendant was no longer a party to the proceedings before the Court at the date of the trial and hence its witness who gave a witness statement was not required to attend on the date fixed for the trial.

Ground (iii) - The failure of the First Defendant's witness, Krishna Ramnarine to attend the trial as witness, has a prejudicial effect on the Second Defendant

[40] The Second Defendant argued that the exclusion of Krishna Ramnarine's witness statement would be highly prejudicial and unjust to the Second Defendant since the statement of Krishna Ramnarine together with annexures "K.R.1" to "K.R.8" are directly relevant to the issues pleaded by the Claimant.

[41] The Court is mindful that the overriding objective of the CPR is for the Court to deal with all cases justly and the failure of Krishna Ramnarine to attend trial is likely to have a prejudicial effect on the Second Defendant.

[42] However, as indicated above, the Second Defendant had notice since the pre-trial review that the Claimant was likely to discontinue his Claim against the First Defendant. In that regard, it would have been vigilant on the part of the Second Defendant to take the initiative to attempt to secure a witness statement from Krishna Ramnarine and to have him give evidence on its behalf keeping in mind the legal principle that there is no property in a witness. In the event that the Second Defendant was successful in this regard, then an application could have been made for permission to serve an additional witness statement (of Krishna Ramnarine) on the Claimant. Having regard to the turn of events, it would have been reasonable for the Court to entertain such an application. In the event, however, that this approach failed, then there would have been clear effort shown on the part of the Second Defendant to secure its evidence and so the instant application for the Court to exercise its discretion under Rule 40.6 CPR to issue a witness summons for Krishna Ramnarine to attend Court to give evidence would have had more weight. Further, it was also open to the Second Defendant to seek permission to file and serve a witness summary instead of a witness statement for Krishna Ramnarine on the questions and points the Second Defendant needed to get into evidence. Sadly, however, nothing of the sort was done and it is now much too late for the Court to approve of such approach.

[43] Additionally, there are no instances available for the witness statement to be accepted as evidence without calling the witness in this case. Therefore, Krishna Ramnarine cannot be cross-examined on his witness statement.

Ground (iv) - There being no property in a witness, the Second Defendant can call Krishna Ramnarine as a witness

[44] It is trite law that there is no property in a witness as Lord Denning MR in **Harmony Shipping Co. S.A v Saudi Europe Line Ltd [1979] 1 WLR 1380** put it:

> *"There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena."*

[45] However, in that case, a handwriting expert who had provided a report to the Plaintiff on the authenticity of a document was subsequently engaged by the Defendants to advise them of the document's authenticity. He did so before he realised that he had already advised another on that particular document. When the expert declined to accept further instructions from the Defendants, the Defendants, who wished the expert to give evidence on their behalf, issued a subpoena ad testificandum requiring the expert to attend and give evidence. The Plaintiff sought to prevent the Defendants from calling the expert. The judge ruled that the expert was a compellable witness and ought to give evidence as to his opinion of the document. The Plaintiffs appealed.

[46] The Court of Appeal in that case held that the Plaintiff could not prevent the Defendant from adducing the evidence of the expert, who could properly be made the subject of a subpoena to appear at trial. The Court of Appeal held that the principle that no party had any property in the evidence of a witness of fact and that he could be compelled by the Court to give evidence applied to an expert witness. The Court was, therefore, entitled to compel an expert witness to give evidence both of the facts he had observed and of his opinion on those facts, subject only to any claim to legal professional privilege by the expert in respect of communications between him and a party's lawyer.

[47] That case can be distinguished from the present facts. In that case, the Defendants wished for the handwriting expert to give evidence on their behalf, after the handwriting expert had provided a report to the Plaintiff on the authenticity of a document. This occurred before the commencement of trial. In the case at bar, however, the First Defendant is no longer a party to the proceedings, thus, the witness Krishna Ramnarine will not be attending trial. The trial is now in progress and the Second Defendant is requesting that the witness Krishna Ramnarine be called to attend trial to be cross-examined on his witness statement.

[48] The Second Defendant contended that the Honourable Court has a 'right to every man's evidence'. The Second Defendant, further, submitted that its primary duty is to ascertain the truth and neither side can debar the Honourable Court from ascertaining the truth either by seeing a witness beforehand or by making communication to him. It is also argued that since there is no property in a witness, the Second Defendant ought to be allowed to call Krishna Ramnarine as a witness.

[49] The Court agrees with the principle that there is no property in a witness – that one party cannot prohibit the other side from seeing a witness of fact, from getting facts from him and from that other party calling him to give evidence or issuing him with a subpoena (witness summons). Nonetheless, the Court is of the view that the Second Defendant has missed the opportunity to utilise such principle to its benefit (as explained in paragraph 42 hereinabove).

[50] The crucial issue before the Court is whether the Second Defendant can cross-examine Krishna Ramnarine on the witness statement filed on behalf of the First Defendant who is no longer a party to these proceedings.

[51] The Court's answer to that question is in the negative. As stated above, the Second Defendant is barred from cross-examining Krishna Ramnarine on his witness statement, as the witness statement is not before the Court as evidence.

[52] The Second Defendant has argued that it was relieved from the burden of taking and filing a witness statement of Krishna Ramnarine since the First Defendant had done so in support of its case. The Second Defendant did not anticipate that the Claimant would have discontinued the matter against the First Defendant, thus removing Krishna Ramnarine from the picture.

[53] **Versloot Dredging BV v HDI Gerling Industrie Versicherung AG and others [2013] EWHC 581 (Comm)** applied the learning of Lord Denning MR as expounded in **Harmony Shipping Co. S.A v Saudi Europe Line Ltd (supra)**.

[54] In that case, a surveyor was engaged by the Defendant underwriters to determine the cause of casualty and the extent of loss in respect of a damage to a vessel. The surveyor was to be called as a witness for the Defendants at the trial. The Claimant wished to interview the surveyor on a wide range of topics because of his intimate knowledge of the vessel in his capacity as a professional surveyor. However, they wished to do so in the absence of the representatives of the Defendants or their solicitors. In the course of proceedings, the Claimant applied for an injunction to restrain the Defendant and their solicitors from inducing or encouraging the surveyor, to determine the cause of the casualty and the extent of the loss, not to talk to or provide information and evidence to the Claimant outside the presence of the Defendants' solicitors; or in any way seeking to restrict or impede the Claimant's access to the surveyor for the purpose of interviewing him and obtaining evidence and information from him.

[55] The Claimant submitted that it was entitled to free and unimpeded access to the surveyor, that it was entitled to ask him questions without the Defendant's solicitors being there, because, if they were there, they would or might learn from the questions something of the Claimant's thinking about the case which would be privileged. It contended that any attempt to prevent it from enjoying such access was a contempt. The Claimant relied on the proposition that there was no property in a witness. Consideration was given to the CPR. The application was dismissed. On the facts, it was not appropriate or necessary to grant injunctive relief against the Defendants on the grounds that they were acting, or

were likely to continue acting, in an unlawful way. The Court was not satisfied that there was a prospect of unlawful behaviour in the future on the part of the Defendants or their solicitors which justified injunctive relief.

[56] Clarke J at paragraph 9 said as follows:

> *"The fact that there is no property in a witness undoubtedly means that party A cannot prevent party B from calling as a witness at trial (under subpoena if necessary) someone from whom A obtained a statement or whom he intended to call himself. A has no right to have the witness to himself, or for no one else to have him. Further, a witness, once called, may be required to give evidence, if it is relevant, which would otherwise be confidential to A."*

[57] He stated further at paragraph 10 that-

> *"We are, however, concerned here with the position before trial. In respect of that, certain matters seem to me to be established. First, the decision whether or not to cooperate with a party to whom no relevant contractual or fiduciary obligations are owed is that of the witness in question. Absent a subpoena or other compulsory process, a witness cannot be compelled to provide assistance and information. He may, all other things being equal, make his own choice. Second, the "no property in a witness" rule means that, in cases where no question of breach of confidence arises, a solicitor commits no impropriety simply because he seeks information and takes a statement from a witness, even though that witness has given a statement to the other side. He must not, of course, tamper with evidence or threaten or intimidate the witness or suborn him, but that is a different matter. Third, the fact that a witness could at trial be compelled to reveal confidential information does not mean that he is entitled to do so before trial. He is not. Further, the confidentiality obligation does not cease following disclosure in accordance with the CPR – see* ***Porton Capital Technology Funds v 3M UK Holdings Ltd [2010] EWHC 114****. Fourth, neither before nor at trial is a witness entitled to reveal information which is legally privileged unless there has been a waiver, or unless one of the relevant exceptions applies. Fifth, it cannot, as it*

seems to me, be a contempt of court for a party to whom obligations of confidence are owed, or who is the beneficiary of legal privilege, to tell a witness that he may not reveal information which is truly confidential or privileged."

[58] That case is different from the present facts. In that case, a surveyor was to be called as witness for the Defendants at trial. The Claimants wished to interview the surveyor about a wide range of topics because of his intimate knowledge of the vessel in his capacity as a professional surveyor. In this case, the Second Defendant wishes to cross-examine a witness on his witness statement filed on behalf of the First Defendant who is no longer a party to the proceedings.

As rightfully stated by the Claimants, the Second Defendant was not precluded from meeting with Krishna Ramnarine to obtain a witness statement on its behalf to support its case.

In accurately applying the principle of 'there is no property in a witness', the Second Defendant at the time of filing and serving witness statements, was not prohibited from obtaining a witness statement from Krishna Ramnarine to aid in supporting its case. Based on the principle, it was opened to the Second Defendant to obtain a witness statement from Krishna Ramnarine even though, he gave a witness statement to the First Defendant and was likely to be called on behalf of the First Defendant.

[59] The Second Defendant cannot now seek to rely on this principle after the time for filing and serving witness statements has passed. Nevertheless, the Second Defendant's request is to cross-examine on the witness statement filed into Court. As the First Defendant is no longer a party to the proceedings, Krishna Ramnarine's witness statement will not and cannot be tendered into evidence before the Court. As such, the Second Defendant cannot cross-examine Krishna Ramnarine on his witness statement and therefore application shall be refused.

The Claimant's Application filed on 11th July 2018

[60] The Claimant's Application filed on 11th July 2018 for the Court to issue a witness summons for Mr Sunil Chingee to attend trial to give evidence was clearly premised on the position that if the Court were to find favour with the Second Defendant's Application, then it would only be fair to allow the Claimant to call this other witness (Sunil Chingee). On the basis that the Court has refused to grant the Second Defendant's Application, and more importantly, on the basis that the Claimant has not satisfied the Court that it would be just to exercise its discretion under Rule 40.6 CPR, the Claimant's Application filed on 11th July 2018 shall also be refused.

Disposition

[61] In light of the above analyses and findings, the order of the Court is as follows:

ORDER:

1. **The Second Defendant's oral application made on the 7th May 2018 formalised into writing by virtue of Notice of Application filed on the 11th June 2018 for an order that Krishna Ramnarine do attend the trial to be cross-examined on his witness statement filed into Court on the 31st January 2018 be and is hereby dismissed.**

2. **The Claimant's Notice of Application filed on the 11th July 2018 for an order that a witness summons be issued for Sunil Chingee to attend the trial as a witness of the Court be and is hereby dismissed.**

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Robin N Mohammed
Judge