



[2020] JMFC Full 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CONSTITUTIONAL DIVISION

CLAIM NO. SU2019CV00456 (formerly 2018 CD 00143)

BEFORE: **THE HONOURABLE MR JUSTICE MORRISON
THE HONOURABLE MR JUSTICE PALMER
THE HONOURABLE MISS JUSTICE NEMBARD**

BETWEEN	OMAR GUYAH	1ST CLAIMANT
AND	CORDELIA BROWN	2ND CLAIMANT
AND	JACK DRUMMOND	1ST DEFENDANT
AND	WINSTON LAWRENCE	2ND DEFENDANT
AND	GREGORY FARQUHARSON	3RD DEFENDANT
AND	MAJOR (RET'D) JOHANNA LEWIN	4TH DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	5TH DEFENDANT
AND	COMMISSIONER OF CUSTOMS	6TH DEFENDANT
AND	LT. COL. SEAN PRENDERGAST	7TH DEFENDANT

IN OPEN COURT

Evidence – Witness summons and witness summary issued by a party for an opposing party – Validity of witness summons – Application to strike out witness summary – Application to strike out portions of the claimants’ statement of case

**on the basis that it is a collateral attack on a previous decision of the privy council
– Civil Procedure Rules, rules 29.6 (3), 33.2, 33.3(4) and 33.3(5)**

**Captain Paul Beswick, Mesdames Gina Chang, Aisha Thomas and Terri-Ann Guyah
instructed by Ballantyne, Beswick & Company for the Respondent/1st Claimant**

**Mr Chukwuemeka Cameron instructed by Carolyn C. Reid & Company for the
Respondent/2nd Claimant**

**Miss Althea Jarrett and Mr Ricardo Maddan instructed by the Director of State
Proceedings for the Applicants/Defendants**

Heard: July 6, 7 and 13, 2020

MORRISON J

[1] I have read the judgment of my brother and sister and I agree with their conclusions.

PALMER J

Background

[2] This claim is one of several claims that emanate from charges laid against the Claimants in or about 2012 in the Resident Magistrate's Court for the Corporate Area, that were dismissed in or about 2015 for want of prosecution. The Claimants say that crown servants affiliated with the Revenue Protection Division and Jamaica Customs, acted out of malice in pursuing the prosecution. After the completion of the criminal proceedings, the Claimants were once again placed on interdiction with a view to further disciplinary proceedings being commenced against the Claimants, resulting in the filing claim number 2015HCV04964, in which an interim injunction was sought and obtained.

[3] In March of 2018 proceedings were filed seeking a number of declarations relating to malicious prosecution, infringement of several of their Constitutional rights, abuse of power, reinstatement to their posts, outstanding salary and emoluments,

injunctive relief among the forty-six (46) orders and declarations sought in the claim. The said latter claim, which was commenced in the Commercial Division, was amended in October 2018, and by order of the Commercial Court in November 2018, the matter was removed from the Commercial list and was assigned the claim number SU2019CV00456. By order of this Court later in 2019, the claims 2015HCV04964 and SU2019CV00456 were ordered to be heard together.

- [4] The matters came for hearing in the Full court but three (3) interlocutory applications were fixed to be heard in addition to the substantive actions. With limited remaining time to hear the substantive matter, due to an unforeseen delay the week prior, the Panel opted to facilitate the hearing of the applications, as they had the potential to affect the substantive claims. Further, the Claimants had filed an affidavit of urgency indicating the need for the claims to proceed. The Claimants did not pursue their application to strike out portions of witness statements of the Defendants' witnesses, opting instead to leave the issues raised for determination at the trial.
- [5] By application filed on January 31, 2020, the Defendants sought orders as follows:
1. *The allegations contained in paragraphs 61 to 94, 128 to 182, 202 to 209, 210 to 212 and 213 to 233 of the Particulars of Claim are struck out as an abuse of the process of the court;*
 2. *Paragraphs 114 to 119 of the Particulars of claim are struck out as being a collateral attack on the Privy Council decision in **Guyah v Commissioner of Customs and another** [2018] UKPC IO and an abuse of the process of the court;*
 3. *The 1st, 2nd, 3rd, 4th and 7th Defendants be removed as parties to the claim;*
 4. *Paragraphs 1, 2, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 23, 24, 27, 28, 29 and 30 in the Claimants prayer for relief are struck out as an abuse of the process of the court.*

- [6] The Defendants pursued the application only in regards to orders sought at paragraph 2, also opting to leave the remaining issues for determination at trial. In addition, they amended paragraph 2 to challenge only paragraphs 115 – 118 of the Particulars of Claim.
- [7] In January 2020 the Claimants filed a witness summary for Velma Ricketts-Walker, and in May 2020 filed a witness summons to have her compelled to give evidence on their case. The Defendants in turn, by Notice of Application for Court Orders filed on June 15, 2020, sought orders that:
1. *The Witness Summons issued on May 22, 2020 to Velma Ricketts -Walker Commissioner of Customs and Chief Executive Officer (CEO) of the Jamaica Customs Agency be set aside.*
 2. *The Witness Summary of Velma Ricketts -Walker filed on January 17, 2020 by the claimant be struck out.*

Application to strike out for collateral attack on Privy Council decision

The Privy Council decision

- [8] The decision of ***Guyah v Commissioner of Customs and Another [2018] UKPC10*** was delivered on May 14, 2018 and, as submitted by Counsel for the Defendant, made a definitive determination on whether one of the fourteen (14) motor vehicles (“the Suzuki”) was in fact uncustomed goods. In his action filed on August 12, 2013 (“the 2013 claim”), Mr. Guyah sought declarations that the Suzuki was not legally classifiable as uncustomed goods and was therefore not liable to seizure under section 210 of the Customs Act.
- [9] According to his claim, the Suzuki was unlawfully seized on February 15, 2012 under the Customs Act, and the officers who acted to effect seizure, had abused their powers under the Customs Act. He also sought an order requiring the Commissioner to transfer the registration of the vehicle to him or his nominee, damages for conversion, loss of use of the vehicle, aggravated, exemplary and punitive damages, but abandoned the latter aspects of the claim.

- [10] Pusey J, held in the 2013 claim *inter alia* that the Suzuki was not legally classifiable as uncustomed goods and was not liable to seizure under section 210 of the Customs Act, and that its seizure had been wrong in law to the extent that it was a seizure of uncustomed goods. This finding was based on the learned judge's view that the Suzuki could not be said to be uncustomed goods on the basis that the phrase meant that the goods evaded customs or that the customs duties had not been paid.
- [11] Pusey, J found that whether it was a seizure or detention, taking possession of the Suzuki had been wrong in law if done on the basis that it was uncustomed goods, he but declined to declare the taking of the vehicle as an abuse of power. He found that the officers were conducting investigations of an impropriety and had received conflicting statements. Accordingly, he found, the detention of the vehicle was reasonable while investigations continued. The learned judge also found that while not lawful under the Customs Act, the seizure might have been lawful under common law or other legislation. There were also comments made regarding Mr. Guyah's conduct, the particulars of which are not relevant for these applications.
- [12] On appeal, the Court of Appeal declared that the Suzuki constituted uncustomed goods on February 15, 2012 and was properly the subject of seizure by customs officials. The Court of Appeal disagreed with the interpretation of the term 'uncustomed goods' to exclude goods for which duties had been paid. The Court of Appeal found that the Suzuki constituted uncustomed goods because it had not been released according to the provisions of the Customs Act. The Court further found that the Suzuki could only have been disposed of by the Minister but had been disposed instead by the Commissioner without any evidence of such authorisation. It was therefore subject to forfeiture under the Customs Act and lawfully subject to seizure. The Court of Appeal also found that Mr. Guyah lacked the standing to seek an order that the vehicle had been unlawfully seized or that its seizure was an abuse of power since he had not sought to establish any proprietary interest in the vehicle.

- [13] On appeal to the Privy Council Mr. Guyah argued that there was nothing in the evidence to show that the seizure of the vehicles in 2010 was performed in compliance with the legislation. While the vehicles were imported without a license, the seizure of them required the service of a notice on the warfinger, which was not done prior to the seizure, or at all. It was argued that the forfeiture by the Commissioner was premature, as an application could have been made under the Act for the entry of the goods. The forfeiture and seizure were therefore implicitly withdrawn as they were irregular.
- [14] His arguments in this regard were rejected, as there had been no argument at the Courts below that the forfeiture and seizure were irregular and the natural meaning taken from his affidavits were that the vehicles were lawfully seized and lawfully forfeited. On his behalf, it was argued that though Ministerial approval was required for the disposal of the vehicles to Kingston Logistics, no such approval was obtained and the Commissioner was presumed to have been acting under Ministerial approval when the vehicles were disposed of. This argument was also rejected and the Law Lords concluded that the Suzuki was in fact uncustomed goods under the Customs Act.

Challenged paragraphs of the Particulars of Claim for the 2019 Claim

- [15] Paragraph 115 of the Particulars of Claim for the 2019 claim, asserts that the RPD's case surrounds the fact that the fourteen (14) vehicles were disposed of by the Commissioner of Customs and not the Claimants. They note that there has been a declaration that one of the vehicles, the Suzuki, was uncustomed goods, but that neither of the Claimants did anything wrong in relation to the offences for which they were charged. Mr. Guyah's affidavit, the sole evidence considered in those proceedings, did not address the issue of whether the Minister had given approval for the disposal of the motor vehicle nor details of the initial seizure of the Suzuki. The Claimants asserted in the Particulars of Claim that had the Defendants filed a defence taking the issue, Mr. Guyah would have filed a further Affidavit to

address it prior to trial and was denied the opportunity to amplify on the issue by the learned first instance judge.

- [16] In paragraph 116, the Claimants stated that not all the issues were ventilated in the 2013 claim and the Claimants rely on the approvals granted by the Commissioner of Customs. They allege also that that the Minister of Finance had granted general directions to the Commissioner of Customs and that discussions were had with the said Minister, presumably concerning the fourteen (14) vehicles, and the request would not have been unknown to him. The RPD, the Particulars of Claim further states, would have to show that the Claimants individually took steps in breach of the Customs Laws, and any errors of the Commissioner of Customs ought not to be laid at their feet. Further, Mr. Guyah states that the vehicle was purchased by his trustee and full duties and taxes were paid in accordance with the directives of the Commissioner of Customs. The Claimants assert that had the Attorney General and the Commissioner of Customs complied fully with the rules of the Court in filing a defence, that the vehicle would not have been declared uncustomed goods. It is useful to pause here to indicate that the submission of Counsel, Ms. Jarrett, is that the Privy Council decision expressly dealt with this very issue.
- [17] In paragraph 117 the Claimants say that the Commissioner of Customs issued procedural directives concerning the entry of the fourteen (14) vehicles by memorandum dated November 11, 2010. They go further to say that by letter to the warfinger from the Commissioner of Customs, dated March 7, 2011 there was authorization given for the entry of the fourteen (14) vehicles. Here is one of the collateral issues that Ms. Jarrett submitted was launched at the Privy Council decision, as this very act of the Commissioner of Customs was determined in those proceedings to have been *ultra vires* his power under the Customs Act.
- [18] Paragraph 118 went on to say that as the fourteen (14) vehicles were duly entered, that the prosecutions that ensued were malicious. They assert that the letters, which the Court of Appeal and Privy Council had considered in their respective

rulings, demonstrated that the taxes due on the fourteen (14) vehicles had been paid, and that the vehicles were then sold by Kingston Logistics to the public. Paragraph 119 states that the Claimants at no time showed any type of malfeasance and the charges laid against them were frivolous and an abuse of the process by the RPD.

Discussion

- [19] Counsel relied in her submissions on ***Ministry of Housing v New Falmouth Resorts Ltd.*** [2016] JMCA Civ 20 and ***Abraham Dabdoub and Raymond Clough v the Disciplinary Committee of the General Legal Council (ex parte Dirk Harrison, Contractor General of Jamaica)*** [2018] JMCA App. 33. The cases were cited in support of the contention that the subject paragraphs of the Particulars of Claim should be struck out as being either *res judicata* or alternately as a collateral attack on the decision of the Privy Council in the 2013 Claim.
- [20] In the ***Ministry of Housing*** case, the Court of Appeal struck out the application as an abuse of process where the Claimant filed several applications that were, in substance, all concerned with the compulsory acquisition of the subject land. In the dicta of F. Williams, JA, he found that the Minister had filed the several actions all as part of the real intention of the acquisition of the lands and had even intervened informally in an earlier action in an attempt to compulsorily acquire the subject lands. The appeal Panel determined that the issues of *res judicata* and abuse of process were relevant to those proceedings. F. Williams, JA also had to determine whether an alternate view could be taken that they were collateral attacks on the original judgment and orders.
- [21] F. Williams, JA in his dicta referred to the decision of Lord Diplock in ***Hunter v Chief Constable of West Midlands and another*** [1981] 3 All ER 727 in his and quoted a portion that I too pray in aid of as follows:

My Lords, collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported

*case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A L Smith LJ in **Stephenson v Garnett** [1898] 1 QB 677 and the speech of Lord Halsbury LC in **Reichel v Magrath** (1889) 14 App Cas 665 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cited from the judgment of A L Smith LJ in **Stephenson v Garnett** [1898] 1 QB 677 at 680–681:*

'... the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court.'

- [22] In the matter of **Abraham Dabdoub and Raymond Clough** the Applicants were the subject of a complaint by the Contractor General, to the Disciplinary Committee of the General Legal Council. The Committee found that there was a *prima facie* case and ordered that that the matter be fixed for trial for the issue to be determined. The complaint was eventually not heard and the Applicants rather than to seek relief in the Court of Appeal, filed a Fixed Date Claim Form, which was later struck out by Brown-Beckford, J upon the application of the Committee. This was on the basis that there was no reasonable chance of success as the Legal Profession Act provided that the Applicant's recourse was to appeal and not to file a fresh claim. The Court found that to proceed by any other means by that established under the Legal Profession Act was merely a means of attempting to have the Court re-adjudicate what had been decided by the Committee, and upheld the decision of Brown-Beckford, J.
- [23] Counsel, Mr. Beswick for the 1st Claimant referred in his submissions on the case of **Henderson v Henderson** (1843) 3 Hare 100, 67 ER 313. He argued that as there has not be a trial of the issues so as to be a bar to these proceedings and a defence was filed on the merits. While there is a situation where background facts to this case are similar to those in the 2013 claim, the several causes of action that arise are different. He stated in his submissions that any similarity was a factor

more of the common thread that runs through the matters; the malicious criminal matter that is their genesis, rather than an attempt to re-litigate.

- [24] Counsel submitted that the Defendants' contention that the claim is an abuse of process ought to have been taken before filing the defence and certainly long before the hearing date. The suit does not directly concern the Privy Council decision, Counsel argued, but the malicious criminal proceedings. He continued that this case was about breaches of constitutional provisions and is not dependent on the Privy Council decision, which was delivered after this claim was filed. Counsel posited that there would have been a claim for malicious prosecution no matter what the board had ruled.
- [25] Ms Lewin's career in this matter is bound up in this case, Counsel submitted, a factor that I fail to see as being relevant to these proceedings. Counsel made the argument that the judgment of the Privy Council was obtained by fraud by the Defendants to the 2013 claim, by failing to file a defence stating that the vehicles were never seized.
- [26] When a fraud is committed on the court it does not matter that it would not have altered the decision of the court, Counsel argued, and the Defendants knew that the goods were not seized goods. Despite this knowledge, he contended, the Defendants caused Mr. Guyah to be locked up for several days, even after a directive by the court to have him released, further demonstrating their malice against him.
- [27] In ***Takhar v Gracefield Developments Limited and others*** [2019] UKSC 13, relied on by Counsel in his submissions, the Court distinguished the ***Henderson*** 'reasonable diligence' test. ***Henderson*** is authority for the general principle that parties must normally advance the totality of their claim at the first bout of litigation. The Court in ***Takhar*** however stated that ***Henderson*** does not speak to circumstances where the new point was not in issue between the parties at the first trial and where, if it had been, the outcome would have been different. The

Court asked the question as to whether the **Henderson** position required modification or disapplication where the new issue raised an allegation of fraud by which it is claimed the original judgment was obtained.

[28] **Takhar** concerned an issue of the authenticity of a profit share agreement said to have been signed by the Claimant, which she claimed not to have signed or to have been aware of, prior to the dispute. She made a late application for a handwriting expert to review the document, which due to its lateness was refused. The trial proceeded and she was unsuccessful. She later retained new Counsel and obtained a handwriting expert's report concerning the document that confirmed that the signature purporting to be hers on the document, was transposed from another document.

[29] On the strength of the report, she filed a claim alleging fraud, to which the defendants pleaded that the new proceedings amounted to an abuse of process. The preliminary issue was tried and the Court in ruling that it was not an abuse of process, stated:

"... a party who seeks to set aside a judgment on the basis that it was obtained by fraud did not have to demonstrate that he could not have discovered the fraud by the exercise of reasonable diligence."

[30] In allowing the appeal, the Court held that a person who sought to have a judgment set aside on account of fraud had to show that the fraud could not have been discovered by reasonable diligence. On further appeal to the Supreme Court, Mrs. Takhar's appeal was unanimously allowed on the basis that a person alleging fraud as a basis to set aside a judgment does not have to demonstrate that the evidence of this fraud could not have been obtained with reasonable diligence in advance of the earlier trial.

[31] Counsel for the 1st Claimant argued that no issue was raised at the Privy Council that the Crown did not produce the evidence that it could have. In any event the application was made much too late and would prejudice the Claimant's case. Mr.

Beswick contended also that there were no orders sought to reverse or challenge the decision of the Privy Council and one cannot make a collateral attack except by an order being expressly sought. Merely setting out the facts do not amount to a collateral attack, he submitted.

- [32]** He also argued that the 2019 Claim (filed in 2018) was filed before the judgment was handed down and one cannot collaterally attack something that did not exist at the time of the filing of the Claim. Furthermore, this Court could not make orders that sought to reverse or alter the decision of Privy Council. No order has been sought to say that the Suzuki was not uncustomed goods, Counsel argued, and none was order sought to return of the vehicle or for damages relating to it.
- [33]** The charge for which Mr Guyah was detained, was a breach of section 210 of the Custom's Act. There were other charges brought after the matter was before the court, to include breaches of the Corruption Prevention Act and Larceny Act. Counsel submitted that these proceedings are to compensate the Claimants for losses resulting from the prosecution brought against them maliciously and for which they are still under interdiction.
- [34]** The Claimants herein, through Counsel, argued that due to fraud on the part of the Defendants in the 2013 claim, the Court was denied information that would have led the Court to arrive at an alternate result. No specific paragraphs of the Particulars of Claim have particularized that fraud, and Counsel simply makes the assertion. Counsel rightly questioned that assertion, as the Privy Counsel decision made reference to the fact that the Defendants application for an extension of time to file a response was denied by the first instance judge.
- [35]** I do not agree with the assertion that a claim can only be said to be making a parallel attack if it seeking orders that run specifically contrary to the previous decision. Where it seeks in Particulars of Claim or elsewhere to invite the Court in its findings to determine issues that were determined elsewhere it would be a collateral attack.

[36] It is clear that from a reading of the sections objected to, that there is a challenge to the findings of the Privy Council on the ground that all the relevant information was not before it or fraudulently excluded. The orders and declarations do not explicitly say so, but the Particulars of Claim seek to invite findings that run contrary to those made in the 2013 matter regarding the Suzuki. *Takhar* is distinguishable from the facts of this case as Mrs. Takhar doubted from years before the trial that she had signed the document but applied late to have the documents examined by an expert for the purposes of the trial.

[37] However, these claims being tried together include seven (7) defendants, and the issues are so closely intertwined with some of the issues raised in the 2013 matter, that it is prudent to allow the Particulars of Claim to remain undisturbed for the issues to be determined at trial. The Court can better make a determination after hearing the evidence in this matter, whether it is being asked make findings contrary to those of the Privy Council, which both Counsel acknowledge this Court does not have the jurisdiction to do.

Application to strike out witness summons and witness summary

[38] On January 17, 2020 the Claimants filed a witness summary for Velma Ricketts-Walker, Commissioner of Customs and the 6th Defendant in the 2019 matter. In May 2020, a witness summons was filed for Mrs. Ricketts-Walker seeking that she attend to give evidence, without any further particulars in the witness summons, and to produce certain documents. They had the effect of *subpoena ad testificandum* for her evidence and *subpoena duces tacum* for the documents referred to in the witness summons.

[39] The witness summary goes further to say that in addition to questions concerning the role, function and authority of the Commissioner of Customs she is to be called to speak to:

3. ... any perceived injustice or otherwise against the prosecution of the criminal proceedings which were initiated against the Claimants, and of any other relevant meeting or discussion;

4. ... the performance and duties of the Claimants while in the employ of the Jamaica Customs Department and their prospects in the Jamaica Customs Agency;

5. Such other relevant and/or other information, document or other evidence to assist the Court in this matter.

[40] Ms. Jarrett for the Defendants submitted that in public service there is continuity of office, and Mrs. Ricketts-Walker now sits as the Commissioner of Customs. The Claimants therefore seek to call a named Defendant to the claim to come to give evidence on their behalf. It was further submitted that the documents specified and others generally alluded to could have been obtained by seeking specific disclosure.

[41] Notwithstanding, Mrs. Ricketts-Walker was required to hand over documents and willingly produced them, save for those that could not be found. The Defendants oppose the application as the Commissioner of Customs is a Defendant to the claim and not a disinterested party with no interest in the litigation. Counsel argued that it is impermissible to compel a defendant to become a witness for the claimant and the Court ought not to presume or be invited to presume what evidence of another party will be giving.

[42] Mrs. Ricketts-Walker is being asked to speak to perceived prejudice in relation to the Claimant and about Mr. Guyah's performance during the time. In the case of ***Erika Jeep Morris v Paul Hatch*** [2017] EWHC 1448 (Ch) (19 June 2017) the court considered the propriety of a witness summons where the proposed witness was not one of the named parties and had no interest in the litigation to protect. In the case at bar, the Commissioner of Customs is a named party.

[43] This issue of whether a witness, the subject of a witness summons, was a party to the proceedings seemed to have weighed heavily in the decision of the Court in

Erika Jeep which referred to **South Tyneside Borough Council v Wickes Building Supplies Ltd.** [2004] EWHC 2428 where Gross J stated:

22. *It is clear that the Court has power under CPR Part. 34.3(4) to set aside or vary a witness summons; however, no guidance is given in the CPR as to the approach to be adopted by the Court. In these circumstances, albeit with caution, regard is to be had to the authorities decided under the previous Rules of the Supreme Court ("RSC"): Civil Procedure, Vol. 1 (2004 ed.), 34.4.1 and Harrison v Bloom Camillin, (un-reported, transcript dated 12th May, 1999), Neuberger J. (as he then was), at p.3.*

23. *For present purposes, the position under the "old" RSC may be summarised as follows (using current terminology):*

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. **It is to be remembered that, by its nature, a witness summons seeks to compel production from a non-party to the proceedings in question.** (emphasis added)*

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.

[44] Gross J went on to remark:

“... A moment's consideration shows that the original terms of the Witness Summonses were manifestly unsatisfactory. In my judgment, they had the hallmarks of a fishing expedition, were redolent of a request for disclosure and failed to identify the specific documents of which production was sought. It is to be remembered that the recipient of a witness summons should not be obliged to exercise judgment or discretion in order to comply with it - and that a failure to comply may be treated as a contempt of court. Wording such as “The transaction documentation relating to..” and “including...” simply will not do.

[45] The Claimants in summary stated that the attendance of Mrs. Ricketts-Walker was fair and just in the circumstances for the fair disposal of the matter. For the 1st Claimant it was argued that a party has a right to summon anyone as a witness, subject to any restrictions placed on this right by the Court, with the primary determinant being relevance. The witness being called by the Claimant is not being called by the Crown to make her available for cross-examination, Counsel argued. Counsel stated that Mrs. Ricketts-Walker was expected to speak to the animus of the Crown witnesses against the Claimants and the events that she is being summoned to speak to, occurred when she was not the Commissioner of Customs.

[46] The only interest a senior officer of the Crown can have, Counsel submitted, is in the truth. Counsel submitted that a clear distinction ought to be drawn between someone who has an interest to serve and interest in the result. Counsel submitted that Mrs. Ricketts-Walker, who was his immediate supervisor at the relevant time, is being called, not in her personal capacity, but as Commissioner of Customs. He however at the same time said that she was being called to speak to events that occurred when she was not yet the Commissioner of Customs, in particular an utterance by one of the Defendants that he would not rest until Mr. Guyah was in

jail. This witness is needed, he contended, to assist the Court in determining what may have become of each Claimant had this malicious prosecution not occurred.

[47] He placed reliance in his submissions on the authority of ***DPP v Senior Resident Magistrate for the Corporate Area*** [2012] JMFC Full 3, where the learned Director of Public Prosecutions sought to challenge a subpoena that had been issued for her attendance to give evidence regarding the circumstances of discussions had with a crown witness, formerly the co-accused in the substantive matter. Distilled from the dicta of E. Brown, J, the following six (6) criteria were identified as being important to the issue of whether or not a subpoena or witness summons should be set aside:

- (i) Whether the document or things that is the subject of the witness summons is admissible;
- (ii) The requirement of particularity;
- (iii) Whether the proposed document or evidence is material;
- (iv) Public interest immunity;
- (v) Whether it touches or concerns questions of confidentiality;
- (vi) Whether it is vexatious.

[48] This application invites the Court to set aside not only the witness summons but also the witness summary. In the case of ***Morley v Royal Bank of Scotland*** [2019] 4 WLR 152, witness summonses were issued for two (2) former employees of the Defendant bank. In the case at bar the Claimants argue that though she is being called also as Commissioner of Customs, Mrs. Ricketts-Walker's importance extended to events that occurred before she was in that position. The mainstay of the opposition to Mrs. Ricketts-Walker's evidence is that she holds the post of Commissioner and is the 6th Defendant in the 2018 matter, but she was not in that post when the events relevant to the claims occurred.

[49] Just as in this case, the Claimant in **Morley** relied on the United Kingdom's equivalent provision to the Jamaican Civil Procedure Rules (Rule 29.6 (3) b), which permits for a witness summary to be filed where the evidence is not known, for the party serving the witness summons to state the matters about which they propose to ask the witness. The Claimant in **Morley** outlined with clarity in the witness summary, several questions that they intended to ask of the witnesses and the reasons he formed the view that that witness had knowledge of those matters.

[50] Similar to **Morley** it would be reasonable to conclude that no such statement or summary would be willingly forthcoming from the witness. Mrs. Ricketts-Walker is an employee of the Jamaica Customs Department and is now the holder of the office of Commissioner of Customs, a named party to the 2019 Claim. In **Morley** the witnesses that were the subject of the witness summonses were former employees that held senior posts in the organisation and the Defendant had no intention to call those witnesses to give evidence; not dissimilar to the Defendants' position in the case at bar. There were other considerations such as an application for relief from sanctions which did not arise in this case, but the Court declined to set the witness summaries or summonses aside. Kerr, J in so ruling, stated:

*118 ... are the summaries adequate? Do they adequately set out "the matters about which the party serving the ... summary proposes to question the witness": CPR r 32.9(2)(b). In my judgment they do. There is no lack of clarity in the summaries. I think it is primarily for the party seeking to rely on the summary to say whether that party knows or does not know what evidence the witness will give. Very few things in life are known for certain. This is not a case where the witness's evidence is purely a matter of factual recollection, as in **Scarlett v Grace**, where the issue was whether a seat belt had been worn. The evidence of these witnesses will or may include evidence about their motivation and state of mind. That is not within the claimant's knowledge.*

119 Is it fair, in all the circumstances, to confront the defendant with the summaries? Subject to the considerations set out in the Denton case to which I am coming, in my judgment it plainly is. The situation is quite normal. A witness has relevant evidence to give. The party who most naturally would call the witness declines to do so. The other party wishes

to do so. I see nothing unfair to the defendant about evidence on the topics set out in the summaries being called at trial, provided the witnesses and the defendant have adequate time to prepare, provided the trial is not thereby disrupted...

- [51] In **Tyneside** Gross, J stated that “by its nature, a witness summons seeks to compel production from a non-party to the proceedings in question”. It cannot be disputed that Mrs. Velma-Walker is a not a ‘non-party’, but is named as the 6th Defendant to the claim. It was acknowledged in submissions that she is being called, in part, in her capacity as Commissioner of Customs and otherwise in her prior role as Deputy Commissioner and Mr. Guyah’s immediate supervisor during the relevant period. I have found no authority for the proposition that it impermissible for a party to a claim to be compelled by witness summons to giving evidence for another party, but I regard it to be at very least oppressive to require that the 6th Defendant be called as a witness for the Claimants in proof of the case against it and the other co-Defendants. In addition it appears unfair to the Defendants to require them at trial to respond to what the 6th Defendant might say, as the witness summons is couched in nebulous terms and the witness summary is not expressed with sufficient clarity or particularity.
- [52] E. Brown, J in **DPP v Senior RM** made mention of several issues to consider in an application to set aside a witness summons. Particularity was a factor that in my view affects the application regarding both the witness summons and witness summary, in addition to the issues I have already mentioned. The court should frown on the issuance of a witness summons that is speculative or that is being used as a tactical measure to embark upon a ‘fishing expedition’ of discovery. Particularity also assists the Court and the other litigants in determining issues of relevance. Certainly as it regards the issue of relevance, the witness summons provides little guidance, but even when read with the witness summary, is expressed in too general terms, particularly as it regards paragraphs 3, 4 and 5.
- [53] As it regards the oral evidence of Mrs. Ricketts-Walker, the witness summons only speaks of her giving evidence, without particularising what that evidence is.

Though it was submitted that no further issue was being made of the *subpoena duces tecum* aspect of the witness summons, it speaks generally of producing other documents and evidence as required, which leaves it quite open ended.

[54] Indeed, as stated in *Morley*, few things in life are known for certain but notwithstanding a witness must, from the witness summary and summons, have clarity as to what they are being asked to give evidence of. Speaking of “perceived prejudice” and any relevant meeting or discussion, apart from leaving the proposed witness without the means of clarifying what she is being asked, would leave the other Defendants and perhaps Mrs. Ricketts-Walker in her official capacity, as 6th Defendant, without the clarity or particularity to adequately defend the claim.

[55] Based on the foregoing, my orders are (subject to the dissenting view of Nembhard, J on the issue of ruling on the application to strike out the witness summary) as follows:

(i) The Defendants’ Application for Court Orders filed on January 31, 2020 to strike out portions of the Claimant’s Particulars of Claim, is refused, as the issues raised therein ought properly to be determined at the trial;

(ii) The Defendants’ Application for Court Orders filed on June 15, 2020 is granted, striking out the Witness Summons and Witness statement of Velma Ricketts-Walker, Commissioner of Customs;

(iii) Costs to be costs in the Claim.

NEMBHARD J

BACKGROUND

[56] The Respondents/Claimants, Mr Omar Guyah and Ms Cordelia Brown, were employed at all material times in the Jamaica Customs Department as the Director and Deputy Director of Customs, respectively, in the Contraband Enforcement Department (“CET”). Their duties included the enforcement of the customs laws of Jamaica and the oversight of the daily operations of CET.

- [57]** In or around November 2009, a Suzuki Swift motor vehicle (“the Suzuki”), one of fourteen motor vehicles, entered Jamaica in a container on board the vessel Zim Shanghai. It was unloaded and placed in a bonded facility operated by a firm of wharfingers, Kingston Logistics Centre Limited (“Kingston Logistics”). The importer of the vehicle took no steps to clear it through the customs department.
- [58]** In 2010, customs officers, acting on the instruction of Mr Guyah, seized the Suzuki and thirteen (13) other vehicles in a similar situation. On 11 November 2010, the Commissioner of Customs issued a memorandum concerning the procedure for the disposal of goods under requests made by the wharfinger under section 91 of the Customs Act.
- [59]** On 15 March 2011, CEC Customs Brokers & Freight Forwarding Ltd, acting on behalf of Kingston Logistics, submitted a Bill of Sight for the Suzuki to the Customs Valuation Branch. The parts of the Bill relating to the value of the goods were left blank. On 17 March 2011 a CIF value of US\$6,800.00 was provisionally accepted by the senior valuation certification officer.
- [60]** On 4 April 2011, the duties and taxes payable on the importation of the Suzuki were paid to the Jamaica Customs Department, using Mr Guyah’s credit card. A receipt for the payment was issued to Kingston Logistics.
- [61]** On 26 April 2011, the supervisor of the Jamaica Customs Queen’s Warehouse issued a certificate for the Suzuki, certifying that the vehicle had been sold to Kingston Logistics at public auction. No such auction had in fact taken place.
- [62]** By letter dated 27 April 2011, Kingston Logistics notified the Jamaican tax authorities that they had purchased the Suzuki from the Customs Department and had sold it to a Ms Audrey Carter. As evidence of the purchase, they produced the Customs Department’s certificate that the vehicle had been sold to them at auction. On about 2 June 2011 Ms Carter had the vehicle registered in her name and licensed to be operated on the island’s roads.

- [63] On 15 February 2012, the Suzuki was seized by customs officers and taken to the premises of the Customs Department.
- [64] On 9 March 2012, the Respondents/Claimants were arrested and charged with breaches of the Customs Act, the Corruption Prevention Act, the Larceny Act and Conspiracy. The charges related to all fourteen (14) vehicles. On 6 February 2015, those proceedings were dismissed for want of prosecution.
- [65] In October 2015, the Respondents/Claimants brought proceedings seeking a declaration and an injunction to prevent the commencement of disciplinary proceedings against them, together with damages. An interim injunction was granted on 2 October 2015.
- [66] On 9 March 2018, the Respondents/Claimants filed the instant Claim seeking Damages for Malicious Prosecution, False Imprisonment, Misfeasance in Public Office, Loss of Income and Handicap on the Labour Market, Aggravated, Exemplary, Vindictory and Punitive Damages and Constitutional redress, among other things.
- [67] An Amended Claim Form was subsequently filed on 1 October 2018.

THE APPLICATIONS

- [68] The Applications before the Court are as follows: -
- 1) By way of a Notice of Application for Court Orders, filed on 15 June 2020, the Applicants/Defendants seek the following Orders: -
 - i. The Witness Summons issued on 22 May 2020 to Velma Ricketts-Walker, Commissioner of Customs and Chief Executive Officer (CEO) of the Jamaica Customs Agency is set aside; and
 - ii. The Witness Summary of Velma Ricketts-Walker filed on January 17, 2020 by the Claimant is struck out.

- 2) By way of a Notice of Application for Court Orders to strike out portions of the Claimant's Statement of Case, filed on 31 January 2020, the Applicants/Defendants seek an Order that paragraphs 115 to 118 of the Particulars of Claim are struck out as being a collateral attack on the Privy Council decision in **Guyah v Commissioner of Customs and another** [2018] UKPC 10 and an abuse of the process of the Court.

A. The application to set aside witness summons and to strike out witness summary

THE SUBMISSIONS

The Applicants/Defendants' submissions

[69] Learned Counsel Miss Althea Jarrett, in her submissions on behalf of the Applicants/Defendants, began with the observation that the Commissioner of Customs is the 6th named Defendant in the instant Claim. Mrs Velma Ricketts-Walker, the witness whom the Respondents/Claimants are purporting to call as a witness on their behalf, is currently the Commissioner of Customs and the Chief Executive Officer of the Customs Agency.

[70] It was submitted that the Witness Summons, issued on 22 May 2020, ("the Witness Summons") should be set aside on the following bases: -

- 1) That it is improper to issue a witness summons to a defendant who is named in the claim to give evidence on behalf of a claimant;
- 2) That the documents required to be produced have already been produced to the Respondents/Claimants; and
- 3) That witness summonses to produce documents are issued to non-parties in civil proceedings and could have been requested by way of a request for specific disclosure.

- [71] It was also submitted that it is improper for the Respondents/Claimants, by virtue of the Witness Summary of Velma Ricketts-Walker, filed on 17 January 2020, to purport to suggest the evidence that the Commissioner of Customs is to give on their behalf at the trial of the instant Claim.
- [72] The Applicants/Defendants contend that any evidence which the Respondents/Claimants wish to provide the Court at the trial, in support of their Claim, must properly come from their own witnesses. Furthermore, any evidence relating to the operations of the Jamaica Customs Agency or the Department of Customs which the Respondents/Claimants wish to elicit at trial can be obtained by cross-examination of the witnesses for the Applicants/Defendants.

The Respondents/Claimants' response

- [73] In response to the Application, Learned Counsel Captain Beswick submitted firstly, that a party has a right to call anyone as a witness, whether or not that witness is a named party to the action. Whilst acknowledging that the Court is empowered to restrain the reception of evidence, he urged that that be done only after a careful exercise of the Court's discretion and after a recognition of this right.
- [74] Secondly, it was submitted that Mrs Ricketts-Walker is someone under whose direct supervision Mr Guyah worked and who is not being called as a witness by the Applicants/Defendants. The evidence that the Respondents/Claimants are seeking to elicit speaks to the functions and authority of a Commissioner of Customs; the animus that existed on the part of Crown servants towards Mr Guyah and to events which took place at a time when the witness was not the Commissioner of Customs; and the prospects of the Respondents/Claimants in terms of their continued employment to and advancement within the Customs Department.
- [75] Finally, the Respondents/Claimants contend that Mrs Ricketts-Walker is sued in a nominal capacity and is not a party with an interest in the outcome of the instant

Claim. It was submitted that she is an appropriate witness who can assist the Court in the just disposal of this case.

[76] It was accepted that the documents identified in the Witness Summons have already been produced to the Respondents/Claimants and were produced on 11 June 2020.

THE ISSUE

[77] The following issue arises for the Court's determination: -

- 1) Whether the Witness Summons, filed on 17 January 2020, ought properly to be set aside.

THE LAW

The general principles applicable to witness summonses

[78] Part 33 of the Civil Procedure Rules, 2002 ("the CPR") speaks to witness summonses. Rule 33.2 reads, in part, as follows: -

"(1) A witness summons is a document issued by the court requiring a witness to attend court or in chambers –

(a) to give evidence; or

(b) to produce documents to the court.

(2) A witness summons must be in form 13.

(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 on –

(a) the date fixed for trial or the hearing of any application in the proceedings, or

(b) such other date as the court may direct."

- [79] Rule 33.3(4) of the CPR allows the court to set aside or vary a witness summons. An application to set aside or vary a witness summons may be made by any party or by the witness to whom the summons is addressed. (See – Rule 33.3(5) of the CPR.)
- [80] Whilst rule 33.3(4) of the CPR vests the court with the power to set aside or vary a witness summons, it provides no guidance as to the approach that is to be adopted by the court. In those circumstances, careful regard can be had to the English authorities under the previous Rules of the Supreme Court of England (“RSC”). (See - **Harrison and another v Bloom Camillin (a firm)**, (1999) 45 LS Gaz R 32, **Re State of Norway’s Application** [1987] QB 433 and **Morgan v Morgan** [1977] 2 All ER 515, [1977] 2 WLR 712).

The position under the Rules of the Supreme Court

[81] The position under the RSC may be summarized as follows: -

- 1) The object of a witness summons is to obtain the 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;
- 2) 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. It is to be remembered that, by its nature, a witness summons seeks to compel production from a non-party to the proceedings in question;
- 3) 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;

- 4) 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 a witness summons, however, in the exercise of its discretion, the court is entitled to have regard to the fact that the 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;
- 5) The court has power to vary the terms of a witness summons but, at least ordinarily, it 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.

While these factors are entitled to individual consideration, the court will of course also look at the matter as a whole. (See – **South Tyneside Borough Council v Wickes Building Supplies Ltd** [2004] All ER (D) 69 (Nov)).

[82] In determining whether a witness summons ought properly to be set aside the court should have regard to the interests of a witness. However, those interests are second to the interests of the parties as litigants and the interests of justice. (See - **Harrison and another v Bloom Camillin (a firm) (supra)**).

[83] In **Director of Public Prosecutions v Senior Resident Magistrate for the Corporate Area** [2012] JMFC Full 3, E. Brown J stated, at paragraph 132, that there are six categories that have been identified in the circumstances of which a witness summons may be set aside. These are firstly, where a document is concerned, for lack of particularity. A witness summons must specify the document

or thing to be produced with reasonable particularity and which must be admissible. The requirement for particularity, it appears, is an attempt to prevent an abuse of process through the use of a document “designed to trawl through the files”. (See – **R v Miller** (unreported) 5 July 1993, cited in Archbold 1998).

[84] Brown J further stated that a witness summons may be set aside where the material that it requires to be produced is prima facie inadmissible; where the proposed document or evidence is adjudged immaterial; where public interest immunity attaches; where the witness summons touches and concerns questions of confidentiality, and where the witness summons is issued for vexatious reasons.

[85] At paragraph 141, Brown J opined as follows: -

‘It seems then, that the first hurdle to cross on an application of this nature is to demonstrate that the proposed evidence lacks specificity. That is, it cannot be identified with reasonable particularity. If it passes the particularity threshold, then the task is to show that it bears no relevance to the facts in issue. If the evidence is relevant, it must be shown that it is inadmissible. If it is both relevant and admissible, then it is material...Although the evidence that is being sought is material, the subpoena may yet be set aside because public interest immunity attaches or there is a breach of confidentiality. It is arguable that a subpoena which seeks material evidence is liable to be set aside also if it was issued for a “different and ulterior purpose”.

ANALYSIS

The burden of proof

[86] On an application to set aside or vary a witness summons, the burden of proof lies on the issuing party to justify the summons rather than on the resisting party to show why it should be set aside. (See – **Morris v Hatch** [2017] EWHC 1448 (Ch)).

[87] The cases (largely decided under the old RSC) have established a number of grounds on which the court may set aside a witness summons. These include the lack of specificity or particularity, that the summons was not issued in good faith for the purpose of obtaining relevant evidence, that the witness cannot in fact give any relevant evidence, that it is oppressive, and that it breaches the confidentiality of others, particularly where the same information could be obtained in ways that do not. (See - **South Tyneside Borough Council v Wickes Building Supplies Ltd (supra)** and **R v Baines and Another** [1909] 1 KB 258).

An examination of the witness summons

[88] In an effort to determine whether the Witness Summons ought properly to be set aside, the Court must begin with an examination of the Witness Summons itself. Such an examination reveals that the requirements of Mrs Ricketts-Walker are twofold; firstly, to attend court to give evidence and secondly, to produce certain stipulated documents.

[89] The Witness Summons purports to command Mrs Ricketts-Walker to produce the following documents: -

- 1) KRA's for the 1st and 2nd Claimants for the period 2008 through 2012;
- 2) Annual Performance Reports for the CET for the period 2008 through 2012;
and
- 3) Salary Scale of the JCA and detail(s) of all the benefits commensurate with the post of Deputy CEO.

[90] It is accepted that these documents have been produced to the Respondents/Claimants and were so produced on 11 June 2020. It has been disputed that the documents were provided as part of the process of disclosure. Rather, the Respondents/Claimants contend that the documents were produced to them in the Bundles that were prepared for the trial of the instant matter.

[91] The Witness Summons also purports to command Mrs Ricketts-Walker to attend court to give evidence. There is no indication in the Witness Summons of the areas that this evidence is expected to encapsulate. In fact, it is the Witness Summary of Velma Ricketts-Walker which was filed on 17 January 2020, that indicates that she is expected to provide evidence concerning the following: -

- 1) That she is currently the Commissioner of Customs and Chief Executive Officer of the Jamaica Customs Agency and that she was employed prior to 2012 at the Jamaica Customs Department;
- 2) The functions and authority of a Commissioner of Customs under the Customs Laws;
- 3) Any perceived prejudice or otherwise against the prosecution of the criminal proceedings which were initiated against the Claimants and of any other relevant meeting or discussion;
- 4) The performance and duties of the Claimants while in the employ of the Jamaica Customs Department and their prospects in the Jamaica Customs Agency; and
- 5) Such other relevant and/or other information, document or other evidence to assist the Court in this matter.

The requirement of particularity/specificity

[92] The authorities make it clear that the first hurdle to be cleared in an application of this nature is to demonstrate that the proposed evidence lacks specificity or cannot be identified with reasonable particularity.

[93] The Respondents/Claimants assert that Mrs Ricketts-Walker is able to speak to the functions and authority of a Commissioner of Customs; ‘various developments’ after she assumed Mr. Guyah’s duties and functions; ‘interactions, instructions and any other material concerning the assertions made in the Particulars of Claim’;

boisterous threats and outbursts made against by Mr Guyah by the 1st Defendant, Jack Drummond, which to the certain knowledge of the former were witnessed by her; and to the loss of income on the part of the Respondents/Claimants. (See – Paragraphs 7-11, 13-15 and 17 of the Affidavit in response of Omar Guyah seeking to strike out the Witness Summons of Velma Ricketts-Walker, filed on 17 June 2020).

[94] I find that the Respondents/Claimants have failed to identify with the required particularity or specificity the evidence that they are intending to elicit from Mrs Ricketts-Walker. Nor have they stated with any particularity or specificity the scope of that evidence.

An alternative source of evidence

[95] Furthermore, I observe that the Respondents/Claimants intend to elicit similar evidence from the witness, Commissioner Danville Walker, who was the Commissioner of Customs during the period 2008 to 2011. This evidence touches and concerns the functions and authority of a Commissioner of Customs; the performance and duties of the Respondents/Claimants and their prospects within the Jamaica Customs Agency. (See – Witness Summary of Hon. Danville Walker, O.J. filed on 17 January 2020 – Page 96 of the Index to Bundle of Witness Statements filed on 24 June 2020).

[96] Additionally, the performance reports relative to the Respondents/Claimants for the period 2008 through 2012, along with the Annual Performance Reports for the CET for the period 2009 through 2015, have been produced to them. Furthermore, any loss of income (where that income is statutory) suffered by the Respondents/Claimants can be proven without the need to call Mrs Ricketts-Walker as a witness on their case.

[97] In those circumstances, I find that the Witness Summons ought not to be allowed where there is an alternative source from which the evidence can be led.

[98] I am of the view that to allow Mrs Ricketts-Walker to be called as a witness on behalf of the Respondents/Claimants would be oppressive. Regrettably, I am unable to accept the submission that Mrs Ricketts-Walker is sued as a nominal defendant. A careful examination of the Particulars of Claim, filed on 9 March 2018 and the Amended Claim Form, filed on 1 October 2018, reveals that the Respondents/Claimants seek Damages against the Commissioner of Customs as well as a number of Declarations against her.

[99] Consequently, I am of the view that the Witness Summons issued on 22 May 2020 ought properly to be set aside. Having ruled that the Witness Summons ought properly to be set aside, the need to strike out the Witness Summary of Velma Ricketts-Walker does not arise.

B. The application to strike out portions of the Respondents/Claimants' case

[100] The Applicants/Defendants also seek an Order that paragraphs 115 to 118 of the Particulars of Claim are struck out as being a collateral attack on the Privy Council decision in **Guyah v Commissioner of Customs and another** [2018] UKPC 10 and an abuse of the process of the Court.

[101] It is my considered view that this Application ought to be refused as the issues raised therein ought properly to be determined after the Court has heard the evidence in its totality.

CONCLUSION

[102] I find that the Respondents/Claimants have failed to identify with the required particularity or specificity the evidence that they are intending to elicit from Mrs Ricketts-Walker. Nor have they stated with any particularity or specificity the scope of that evidence. Furthermore, there is an alternative source from which that evidence can be led.

[103] I am unable to accept the submission that Mrs Ricketts-Walker is sued as a nominal defendant. A careful examination of the Particulars of Claim, filed on 9 March 2018 and the Amended Claim Form, filed on 1 October 2018, reveals that the Respondents/Claimants seek Damages against the Commissioner of Customs as well as a number of Declarations against her. Therefore, I am of the view that to allow Mrs Ricketts-Walker to be called as a witness on behalf of the Respondents/Claimants would be oppressive.

[104] Consequently, I am of the view that the Witness Summons issued on 22 May 2020 ought properly to be set aside.

[105] Having ruled that the Witness Summons ought properly to be set aside, the need to strike out the Witness Summary of Velma Ricketts-Walker does not arise.

[106] Finally, it is my considered view that the Application for an Order that paragraphs 115 to 118 of the Particulars of Claim are struck out as being a collateral attack on the Privy Council decision in **Guyah v Commissioner of Customs and another** [2018] UKPC 10 and an abuse of the process of the Court ought to be refused as the issues raised therein ought properly to be determined after the Court has heard the evidence in its totality.

DISPOSITION

[107] I would propose that the following Orders be made: -

1. The Witness Summons issued on 22 May 2020 to Velma Ricketts-Walker, Commissioner of Customs and Chief Executive Officer (CEO) of the Customs Agency is set aside;
2. The Notice of Application for Court Orders to strike out portions of the Claimant's Statement of Case, filed on 31 January 2020, is refused, as the issues raised therein ought properly to be determined at the trial;
3. Costs to be costs in the Claim;

4. The Applicants/Defendants' Attorneys-at-Law are to prepare, file and serve the Orders made herein.

MORRISON, J

Orders:-

- 1) Application for court orders filed on January 31, 2020 is refused;
- 2) Application for court orders filed on June 15, 2020 is granted, as prayed.
- 3) Costs to be costs in the claim.
- 4) Claimant/Applicant Attorneys-at-Law to prepare file and serve the orders herein.
- 5) Leave to appeal granted to the Claimant/Applicant to be filed within 30 days of delivery of judgment.