[2023] JMSC Civ 174

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV04830

BETWEEN	**RICHARD REITZIN**	**CLAIMANT**
AND	**JACQUELINE THOMAS & SONS DEVELOPERS LIMITED**	**1st DEFENDANT**
AND	**THOMAS & SONS DEVELOPERS LIMITED**	**2nd DEFENDANT**
AND	**JOSEPH THOMAS SNR.**	**3rd DEFENDANT**
AND	**JAHKEEM THOMAS**	**4th DEFENDANT**

IN CHAMBERS

Richard Reitzin instructed by Reitzin and Hernandez for the claimant

Jerome Spencer Attorney-at-Law for the 4th defendant

Heard: July 20, 2022, May 2, 2023 and May 9, 2023

Civil Procedure - Application to strike out portions of affidavit - Application to cross examine affiant - Application to issue witness summons.

MASTER T. DICKENS (AG.)

BACKGROUND AND INTRODUCTION

[1] The substantive claim is rooted in the tort of negligence, arising out of a motor vehicle accident between Honda XR 125L motorcycle registered No. 6682 operated by the claimant and 2004 Toyota Tundra Pick-up truck registered No. 2811 EC driven by the 4th defendant. The said motor vehicle accident occurred at

or about the intersection of Norbrook Acres Drive on October 30, 2015 at about 8:20 a.m.

[2] On December 9, 2020, the claimant filed the instant claim against Jacqueline Andrea Thomas, Thomas & Sons Developers Limited, Joseph Thomas Snr. & Jahkeem Thomas. The claimant claims damages, interest and costs for injuries, loss and damage he suffered and continues to suffer on account of the alleged negligence of the 4th defendant in relation to the said accident on October 30, 2015.

[3] On March 5, 2021, the 4th defendant filed his defence to the claim and therein asserts that the accident was solely caused by the claimant who was, inter alia, riding without the degree of care and attention which would enable him to foresee and avoid the collision. The 4th defendant further asserts that the claimant was riding at such an excessive speed that a reasonable driver exercising all precaution and codes of the road would not have seen him coming based on the nature of the roadway and how fast he was riding the motorcycle.

THE INSTANT APPLICATIONS

[4] On March 9, 2021, the claimant sought summary judgment against the 4th defendant. The claimant grounds this application in rule 15.2(b) of the Civil Procedure Rules ("the CPR") and asserts that the 4th defendant has no reasonable prospect of successfully defending the claim. The claimant asks the court to consider on this application whether the 4th defendant is entitled, as a matter of law, to maintain that he was not negligent given that he admitted in his defence that on 10 December 2015, he pleaded guilty to the offence of careless driving in relation to the accident. The claimant filed an affidavit in support of the application for summary judgment on March 9, 2021 and the 4th defendant filed an affidavit in response on April 27, 2022.

[5] By amended application for court orders filed July 18, 2022, the claimant seeks orders, inter alia, for the 4th defendant to be required to attend for crossexamination in relation to his affidavit filed on 27 April 2022, for inadmissible portions of the 4th

defendant's said affidavit to be struck out and for witness summonses to be issued for British Caribbean Insurance Company Limited to produce the 4th defendant's statement in relation to the motor vehicle accident which is the subject of these proceedings and for the Commissioner of Police to produce the 4th defendant's statement made to the police on or about 30 October 2015 in relation to the motor vehicle accident which is the subject of the proceedings. In submissions before the court, the claimant also requested that witness summons be issued for the Constant Spring Police Officer, Constable D. Dennis, referred to at paragraph 20 of his affidavit filed March 9, 2021 to attend court to give evidence.

APPLICATION TO STRIKE INADMISSIBLE PORTIONS OF AFFIDAVIT

[6] I will first treat with the application to strike out inadmissible portions of the 4th defendant's affidavit.

[7] The claimant seeks to impugn the affidavit of the 4th defendant on many grounds. The claimant prepared a table of his objections to the affidavit of Jahkeem Thomas filed April 27, 2022, and the court finds it useful and expedient to utilize the table here.

[8] Affidavit of Jahkeem Thomas sworn on 27 April, 2022:

Para	Section	Basis/bases
3	**First sentence**, "…I was, therefore, not acting as the 2nd Defendant's servant and/or agent." (sic)	Incomprehensible; Irrelevant.

4	**First sentence** "…and it was otherwise safe for me to do so…	Statement as to the ultimate issue; Attempt to usurp function of the court;

		Statement of alleged opinion; Statement of alleged belief; based on facts.
5	**First sentence**, "…having been nowhere in sight…"	Attempt to state the possible perception of another or others.
7	**Third sentence**, "In fact, he was in such pain, that he could not speak at the scene of the collision."	Attempt to state the physical and/or mental condition, capacity or faculties of another person.
8	**First sentence**, "…(it is considerably less)…"	Vague; Statement of alleged opinion; Statement of alleged belief; Conclusion based on unstated facts.
9	**First sentence**, "The claimant is not telling the truth…"	Improper averment; Scandalous.
9	**First sentence**, "…when he said that I told Constable Dennis that I never saw him…"	False premise (that is not the allegation)

10	**Third sentence**, "My decision to plead guilty was not because I believe did anything wrong." (sic)	Self-serving; Self-corroboration; Previous consistent statement; Exculpatory narrative; No probative value; Statement of alleged intention (or lack thereof).
10	**Third sentence**, "I entered the guilty plea to have the matter determined quickly."	Self-serving; Self-corroboration; Statement of alleged intention; Previous consistent statement;
		Exculpatory statement; Narrative; No probative issue.
10	**Third sentence**, "I was even encouraged by policemen at Traffic Court to plead guilty to have the matter determined without any further court appearances."	Hearsay; Conclusion based on unstated facts.
10	**Fourth sentence**, "Had I known that my decision to plead guilty could have been construed as me accepting that I had negligently operated the Tundra, I would have never done so…"	Self-serving; Self-corroboration; Previous inconsistent statement; Exculpatory statement; Narrative; No probative value; Statement of alleged intention (or lack thereof).
10	**Fourth sentence**, "…I deny that I operate (sic) the Tundra in a negligent manner immediately before and at the time of the collision."	Statement as to the ultimate issue; Attempt to usurp the function of the court.

[9] Counsel for the 4th defendant opposed the application to strike out inadmissible portions of the 4th defendant's affidavit and submitted that the evidence contained

in the affidavit of the 4th defendant merely recites the assertions contained in his defence and refutes aspects of the claimant's evidence contained in his affidavit in support of application for summary judgment. Counsel for the 4th defendant submitted therefore that the paragraphs impugned should not be struck out.

ISSUE(S)

[10] Whether the paragraphs of the 4th defendant's affidavit challenged by the claimant ought to be struck out.

THE LAW AND ANALYSIS

[11] In ruling on this aspect of the application the court is guided by rule 30.3(3) of the CPR, which provides as follows:

> "the court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit"

[12] The court is also guided by the authorities of **Delcine Thomas v Victor Wilkins** decision of the Antigua and Barbuda High Court of Justice given on December 18, 2008 and **JIPFA v Minister of Physical Planning & Ors** decision of the Eastern Caribbean Supreme Court given on October 31, 2011. I find these cases instructive as their Civil Procedure Rules regarding striking out portions of affidavits are very similar in terms to that of Jamaica.

[13] In the case of **Delcine Thomas v Victor Wilkins** at paragraphs 32-35, Blenam J noted that:

> *"[32] It is the law that the Court acting under its inherent jurisdiction is clothed with the power to strike out part or paragraphs of an affidavit that contains scandalous, frivolous and vexatious information.*
>
> *[33]Part 30.3 (1) of CPR 2000 provides that the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge……..*
>
> *[34]The Court is therefore empowered to strike out any matter in an affidavit which may be scandalous, irrelevant or otherwise oppressive. The primary test of whether a matter is scandalous is whether it is relevant*

> *to an issue raised. The test of relevance in this context is admissibility in evidence. The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation. Analogously, where unnecessary matter in a pleading contains any mitigation on the opponent or makes any degrading charges or allegations of misconduct or bad faith against him or anyone else, then it becomes scandalous and will be struck out. The mere fact than an allegation is unnecessary is no ground for striking it out.*
>
> *[35]Affidavits should contain evidence that is relevant and necessary. They are not to be used to attack others unnecessarily by giving the opinions of others. It is the law that the Court in determining whether to strike out paragraphs of an affidavit must examine the affidavit in question with care. The Court is enjoined to determine whether any aspect of the affidavit offends the rules of evidence or procedure. Should the Court come to the conclusion and only in very clear cases where it is shown that the affidavit offends either of the two sets of rules, the offending paragraphs should be struck out. [Emphasis Added]*

[14] In the case of **JIPFA Investments Limited**, at paragraph 27, Hariprashad–Charles J., noted that:

> *"……..the jurisdiction to strike out affidavits or portions of them ought to be exercised sparingly. Affidavits should contain evidence that is relevant and necessary. They are not to be used to attack others unnecessarily by giving the opinions of others. While an applicant is required to set out the grounds of his application, and the court may allow a degree of latitude in this regard, the affidavit should not cross the line into the realm of "unacceptable opinion, legal argument, speculation or conjecture".*

[15] Further, in the case of **Jamar Grant v Angela Lee and Kirk Lee [2022] JMSC Civ 214**, the court had to treat with an application to strike out portions of an affidavit on an interim application. Nembhard J noted at paragraph 46 that:

> *"In its approach to its consideration of the primary issue raised by this application, the Court has regard to the law of evidence, which by now is trite, that, for evidence to be admitted in court, it must be relevant and material. It is equally trite that, evidence is admissible if it relates to the facts in issue and lends itself to making those facts either probable or improbable. To be deemed relevant, that evidence must have some tendency to help prove or disprove some fact and must have some probative value."*

[16] At paragraph 49, Nembhard J distilled the following criteria in determining whether to strike out evidence thus:

> *"In order to resolve the primary issue raised by this application, the Court must determine firstly, whether the impugned evidence is relevant to the determination of the amended application for interim payment; secondly, whether the impugned evidence is relevant to the determination of any of the interlocutory applications which remain extant; thirdly, whether that evidence is scandalous, irrelevant and/or otherwise oppressive in nature, such as to render it inadmissible; and finally, whether the statements contained in the impugned paragraphs of the several affidavits are likely to impede the just disposition of the matter."*

[17] It is against the backdrop of the above enunciated principles that the court will examine the objections raised by the claimant against portions of the affidavit of the 4th defendant filed April 27, 2022.

THE IMPUGNED PARAGRAPHS

[18] With regard to paragraph 3, I do not agree that the highlighted portions are incomprehensible and irrelevant. The claimant has asserted in his particulars of claim that the 4th defendant was acting as the servant and/or agent of the 1st, 2nd and 3rd defendants and within the course of his employment. The circumstances in which the 4th defendant was operating the Toyota Tundra is therefore material and relevant to the substantive claim. There is nothing scandalous, oppressive/offensive or irrelevant about the 4th defendant outlining the circumstances in which he was operating the vehicle in question. Even if the court were to find this evidence unnecessary, in keeping with the case of **Thomas v Wilkins,** that is not a basis for striking out. Importantly, I do not find that the evidence contained in the impugned portion of paragraph 3, is likely to impede the just disposition of the application. The court therefore will not strike out this paragraph.

[19] With regard to paragraph 4 and in relation to the statement "it was otherwise safe for me to do so", I find that this statement is relevant to the issues arising on the application for summary judgment as well as to the substantive claim itself. The impugned statement within the whole context of the paragraph is couched as an

"observation". The 4th defendant is here speaking to what he observed just before making the right turn. Whether a situation is safe can be seen as both a matter of fact as well as an opinion. What the 4th defendant observed just before the collision is relevant to the application for summary judgment and I do not find that the evidence contained in the impugned portion of paragraph 4 is likely to impede the just disposition of the application. Accordingly, the application to strike this portion of paragraph 4 is refused.

[20] In relation to paragraph 5, the court does not agree that there is an attempt to state perception of others. There is no reference in that paragraph to what anyone else said but the 4th defendant. In any event, what the 4th defendant saw at the time of the accident or did not see is also relevant to the application for summary judgment. The application to strike the portion challenged in paragraph 5 is therefore refused.

[21] In relation to paragraph 7, the court takes the view that this is evidence that the 4th defendant is not in a position to give. The 4th defendant can only speak to what he observed. Though it is noted that the claimant depones in his affidavit filed March 9, 2021, at paragraph 14, that he was in excruciating and extreme pain, this is not evidence that the 4th defendant can himself speak to as a matter fact. This portion is therefore struck.

[22] In relation to paragraph 8 "it is considerably less", the court takes the view that this amounts to a direct response to the contentions made by the claimant in his affidavit evidence as well as the 4th defendant's account of the distance of visibility along the road where the accident took place. The court therefore finds it to be relevant and material to the instant application. Further, this court does not take the view that the evidence contained in the impugned portion of paragraph 8 is likely to impede the just disposition of the application. Accordingly, the application to strike this portion of paragraph 8 is refused.

[23] In relation to paragraph 9, the court takes the view that the impugned statement that "the claimant is not the telling truth….when he said that I told Constable Dennis

that I never saw him" amounts to a denial of the contention put forward by the claimant. The 4th defendant is directly disputing evidence given by the claimant in his affidavit as to the circumstances of the accident and as such is relevant to the application. I do not find that the statement is scandalous and I do not find that the evidence contained in the impugned portion of paragraph 9 is likely to impede the just disposition of the application. The application to strike this portion of paragraph 9 is therefore refused. The court also takes the view that there is no basis to strike the remaining portion of paragraph 9, as the 4th defendant is merely responding to evidence put forward by the claimant and as such it is material and relevant to the substantive application before the court.

[24] In relation to paragraph 10, the court takes the view that the evidence contained therein is directly relevant to issues on the summary judgment application. The guilty plea is the basis upon which the claimant is asserting that the 4th defendant has no reasonable prospect of successfully defending the claim. Therefore the circumstances in which the 4th defendant pleaded guilty must be a relevant consideration for the court. With regard to the portion of paragraph 10 that is said to be hearsay, there is no indication that the 4th defendant is relying on same for the truth of its content, rather than the fact that it was said and that it influenced his decision to plead guilty. There is also no indication in the paragraph of a previous consistent statement made by the 4th defendant. In any event, I find that the entire paragraph is relevant to the application in question and the substantive claim. I also do not find that the evidence contained in paragraph 10 is likely to impede the just disposition of the application. Accordingly, the claimant's application to strike paragraph 10 is refused.

[25] The court will further say that the affidavit of the 4th defendant on a whole does not cross the line into the realm of "unacceptable opinion, legal argument, speculation or conjecture". The 4th defendant's affidavit when examined in its entirely merely seeks to directly counter the evidence put forward by the claimant. Save for the portion of paragraph 7 outlined above, the claimant's application to strike out inadmissible portions of the 4th defendant's affidavit is refused.

APPLICATION TO CROSS-EXAMINE

[26] In relation to this aspect of the application, the claimant relied on the English case of **Comet Products UK Limited v Hawkex Plastics Limited** [1971] 2 QB.67 and argued that in interlocutory proceedings where there is a bona fide application to cross-examine a defendant on his affidavit, that application should normally be granted.

[27] The claimant further submitted that there is a wide divergence of factual allegations in the affidavits before the court and the determination of whether the 4th defendant has a real prospect of successfully defending the claim cannot properly be made on affidavits alone. The claimant also relies on **Western Broadcasting Services v Edward Seaga** [2001] UKPC 19 and **Stanley Gabriel Marzo Michel v Bonnetta Barton & Desroy Reid** [2014] JMSC Civ 218.

[28] Counsel for the 4th defendant on the other hand opposed the application to crossexamine on the basis that the CPR does not permit cross-examination on applications for summary judgment and that the only evidence upon which a court can determine an application for summary judgment is affidavit evidence. The 4th defendant's counsel succinctly submitted that cross-examination is not permissible on an application for summary judgment and in support of this submission counsel relied on the Court of Appeal decision of **Barbican Heights Limited v Seafood & Ting International** [2019] JMCA Civ 1**.**

ISSUE(S)

[29] The issue on this application is whether the claimant ought to be permitted to cross-examine the 4th defendant on his affidavit filed April 27, 2022 in response to the claimant's application for summary judgment.

THE LAW AND ANALYSIS

[30] It is a trite and fundamental principle of law that the court has the power to control the evidence before it. Indeed, the learned authors of **Halsbury's Laws of**

England at volume 12A (2020), paragraph 831, note that the court has a general discretionary power to control evidence, including the court's general discretionary power to limit cross-examination. In the case of **Comet Products** relied on by the claimant, Lord Denning MR, noted at page 1145 of the judgment, that "this power to cross examine is a matter for the discretion of the Judge who is trying the case".

[31] Rule 26.1(2)(l) of the CPR grants the court the power to require the maker of an affidavit to attend for cross-examination and rule 30.1(3) of the CPR provides that whenever an affidavit is to be used in evidence, any party may apply to the court for an order requiring the deponent to attend to be cross-examined. It is therefore beyond doubt that the court has the power to order that the 4th defendant be crossexamined on his affidavit filed herein on April 27, 2022. The issue is whether within the context of the application before the court, that is, an application for summary judgment, it should make such an order.

[32] Summary judgment is a means of disposing of a claim without the need for trial. In the case of **Barbican Heights Limited**, Sinclair-Haynes JA, noted at paragraph 76, that an application for summary judgment is a process for ridding the courts of cases that are doomed to fail. Parties are therefore obligated to demonstrate, upon such an application that the prospect of their case succeeding is realistic.

[33] In the case of **Doncaster Pharmaceuticals Group Limited v Bolton Pharmaceutical Company Limited v & Ors.** [2006] EWCA Civ 661, Mummery LJ, sounded the following caution in treating with applications for summary judgments thus:

> *[4] Summary judgment procedures, which are designed for the swift disposal of straight forward cases without trial, are only available where the applicant demonstrates that the defence (or the claim, as the case may be) has no "real" prospect of success and if there is no other compelling reason why the case or issue should be disposed of at a trial: CPR Pt 24.2. Thus, without the assistance of pre-trial procedures, such as disclosure of documents, and without the benefit of trial procedures, such as cross examination, the court's function is to decide whether the defendant's prospect of successfully establishing the facts relied on by him is "real", that is more than "fanciful" or "merely arguable". The test to be applied was*

> *summarised by Sir Andrew Morritt V-C in Celador Productions Ltd v Melville [2004] EWHC 2362 (Ch) at paras 6 and 7.*
>
> ……
>
> *[12] In handling all applications for summary judgment the court's duty is to keep considerations of procedural justice in proper perspective. Appropriate procedures must be used for the disposal of cases. Otherwise there is a serious risk of injustice.*
>
> **……..**
>
> *[17] It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Pt 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice. [Emphasis Added]*

[34] Further the learned author of, **A Practical Approach to Civil Procedure**, Stuart Sime, 12 ED & page 203, notes that summary judgment hearings should not be allowed to degenerate into mini-trials of disputed facts. They are simply summary hearings to dispose of cases where there is no prospect of success.

[35] The learned author further notes at page 439, in writing on cross-examination of witnesses on interim applications, that –

> *"The usual position is that evidence in interim applications is placed before the Court in written form, and no 'live' evidence is called. However, there are occasions where the facts adduced in a witness statement or Affidavit are seriously challenged, and the Court may be persuaded to make an Order granting permission to cross-examine the person who signed the witness statement or swore the Affidavit. These Orders are made only if there are good reasons to justify the additional being and expense."*

[36] The authority of **Comet Products UK Limited**, relied on by the claimant to ground this application is one decided prior to the advent of the CPR and would not have been guided by the overriding objective. It also concerns contempt proceedings which are different in nature from a summary judgment application. I am bound to be guided by the overriding objective in deciding on this application and to ensure that this case is dealt with justly, expeditiously and fairly and that expense is saved.

[37] I observe that the claimant has highlighted only two (2) issues to be determined on the application for summary judgment namely:

(1) whether the 4th defendant has a real prospect of successfully defending the claim; and

(2) whether the 4th defendant is entitled as a matter of law to maintain that he was not negligent given he admitted in his defence that on December 10, 2015 he pleaded guilty to the offence of careless driving.

[38] As to the latter issue, the claimant having contended that this is a matter of law (with which the court agrees), then there is no need for cross-examination to resolve same. Further, there is no dispute by the 4th defendant that he pleaded guilty to the offence of careless driving. Indeed, the 4th defendant admits in his defence as well as in his affidavit filed April 27, 2022 that he pleaded guilty to the offence and explains in the said affidavit his reason for so doing.

[39] With regard to the first issue, determining whether the 4th Defendant has a real prospect of successfully defending the claim, this requires an examination of his defence *vis-a-vis* the claim and his affidavit evidence as against that of the claimant.

[40] The authorities make it abundantly clear that a summary judgment application ought not to be morphed into a mini-trial. The facts in dispute on the application for summary judgment mirror the facts in dispute on the substantive claim. I therefore find that it would not be in keeping with the overriding objective to save expense, to deal with cases fairly and expeditiously to embark upon a crossexamination of the 4th defendant at this juncture of the proceedings. The crossexamination of the 4th defendant at this summary judgment stage would amount to a mini-trial whilst foregoing all other appropriate steps and procedure for trial such as disclosure and relying on other witnesses. As Mummery LJ noted in the case of **Doncaster** at paragraph 17 “a mini-trial on the facts conducted under

CPR Pt 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice". I likewise take the view that crossexamination on this instant application for summary judgment must be avoided. I am also fortified in this decision by the statement of Sinclair-Haynes J.A., in

Barbican Heights at paragraph 114 where she stated "it is true that a summary judgment hearing is not a mini trial in the sense that the cross-examination of parties are not permitted".

[41] In all the circumstances, the claimant's application to cross-examine the 4th defendant on his affidavit filed April 27, 2022 is refused.

WITNESS SUMMONS

[42] As previously noted, the claimant seeks witness summonses to be issued for British Caribbean Insurance Company Limited to produce the 4th defendant's statement in relation to the motor vehicle accident which is the subject of the proceedings, for the Commissioner of Police to produce the 4th defendant's statement made to the police on or about 30 October 2015 in relation to the motor vehicle accident which is the subject of the proceedings and for the Constant Spring Police Officer, Constable D. Dennis, to attend court to give evidence.

[43] The claimant argued that issuing the witness summonses as prayed would serve to deal with the case justly, expeditiously and fairly as it involves the court seeking the truth as quickly and as efficiently as possible. The claimant also submitted that it is vitally important for the court to be fully apprised of what the 4th defendant said about the accident long before litigation commenced.

[44] Counsel for the 4th defendant also opposed this aspect of the application. Counsel argued that the only relevant material for the purpose of the summary judgment application are the affidavits of the respective parties and that this application amounts to a fishing expedition on the part of the claimant. Counsel further argued that the claimant should instead await disclosure at the case management conference as the documents sought can be obtained otherwise.

ISSUE(S)

[45] Whether witness summonses are to be issued for the production of the 4th defendant's statements concerning the accident and for Constable Dennis to attend at the hearing of the summary judgment application to give evidence.

THE LAW AND ANALYSIS

[46] Pursuant to rule 33.2 of the CPR, the court has the power to issue witness summons requiring a witness to attend court or in chambers to give evidence or to produce a documents to the court.

[47] The case of **South Tyneside Borough Council v Wickes Building Supplies Limited [2004] EWHC 2428** is a useful authority in guiding the court as to the criteria to be met in determining whether to issue a witness summons to produce documents or for the witness to attend court to give evidence. The case of **South Tyneside Borough Council** is also referred to at paragraph 43 of the case of **Omar Guyah and Anor. v Drummond & Ors [2020] JMFC Rule 04**. Gross J, noted at paragraph 22 of South Tyneside, that among other considerations:

> ***"****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)"*

[48] Using the above guideline, I find that the production of the 4th defendant's statements and the summons for the Constant Spring Police Officer to attend at the hearing to give evidence are not necessary for the fair disposal of the application for summary judgment. The court is able to make a determination as to whether the 4th defendant has a realistic prospect of successfully defending the claim by examining the pleadings and assessing the affidavit evidence filed on the application. Further, an order to issue witness summonses will result in costs being incurred rather than costs being saved and would result in the application utilizing more of the court's time than is necessary for the just disposal of the application.

The court is also minded to avoid a mini-trial on the summary judgment application as this may run the risk of producing summary injustice.

[49] Accordingly, it would not be in keeping with the overriding objective and the principles enunciated in **South Tyneside Borough Council** for witness summonses to be issued as prayed on the claimant's application for summary judgment. I therefore refuse this application.

DISPOSITION

[50] In light of the foregoing and in all the circumstances the court makes the following orders:

(i) The claimant's amended application for court orders to strike out inadmissible portions of the 4th defendant's affidavit (save for paragraph 7 as challenged), to cross-examine the 4th defendant and to issue witness summons is refused.

(ii) Permission to appeal is refused.

(iii) Costs to the 4th defendant on the collective applications to be taxed if not agreed.

(iv) The claimant's attorneys-at-law to prepare file and serve this order.