TC04166

Appeal number: TC/2013/03364

PROCEDURE – witness summons issued – application for summons to be set aside – whether Tribunal had jurisdiction to issue them – whether summons should be set aside due to lack of full and frank disclosure – summons set aside

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLAVIS LIBERTY FUND 1 LP (acting through MR D J COWEN) — **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, London on 14 November 2014

Mr O Connolly, Counsel, instructed by Mourant Ozannes, for the applicants

Mr A Thornhill QC and Mr J Bremner, Counsel, for the Appellant

Ms L Moss, solicitor of HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appellant has lodged an appeal with this Tribunal against a determination by HMRC. The hearing is listed to take place 9 – 17 March 2015. Directions agreed by both parties and endorsed by this Tribunal on 3 December 2013 required both parties to provide statements from any witnesses on whose evidence they intended to rely at the hearing to be served by 7 February 2014.

2. The appellant served a witness statement from a Mr C Derricott on 7 February 2014. On the same day it applied for a witness summons to be served on a Mr Simon Young and Mr Peter Machon, both at the same address in Jersey. Mr Young and Mr Machon were the directors of Clavis Liberty 1 GP Ltd which was the general partner of the appellant at the time of the events the subject of the appeal. The application was brief and recited that the appellant believed that their evidence would be relevant to the appeal and:

> "[Mr Young and Mr Machon] have indicated, however, that they are not prepared either to give witness statements or to attend the hearing of the appeal unless required to do so by the Tribunal."

3. The application was refused by letter by the Tribunal on 13 February on the grounds that the Tribunal had no jurisdiction to summons persons from outside the United Kingdom.

4. The application for the witness summons was renewed on 25 June 2014 on the grounds that it could be served on the two potential witnesses at the London business address of a company (which I will refer to as 'Sanne UK') of which they were both directors and which, said the appellant, they attended on a regular basis.

5. HMRC objected to the issue of a witness summons unless it required the summonsed witnesses to provide a witness statement some months in advance of the hearing. HMRC's concern was that if they heard Mr Young's and Mr Machon's evidence for the first time at the hearing, it would be litigation by ambush and they would be deprived of the opportunity of responding with rebuttal evidence.

6. The Tribunal called a hearing to determine the matter. No notice of the hearing was given to the proposed two witnesses. No notice is required to be given to proposed witnesses under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. This provides at Rule 16(4) that a person summonsed must have the opportunity to object to the summons after it was made if they did not have the opportunity to object to it before, thereby making it clear that summons can be issued without notice to the recipient ('ex parte'). And indeed it is the normal, if not invariable, course of the Tribunal so far to issue summons without asking for the proposed witness' representations in advance.

7. In the hearing on 2 October 2014, I was informed that Mr Young and Mr Machon would not give evidence if they were not obliged to do so; that they were regularly present in the London office of Sanne UK, and that the directions referred to in §1 above had been agreed by the appellant on the basis that witnesses would attend voluntarily.

8. I ruled that the witnesses would be summonsed; I dealt with HMRC's concerns on procedural fairness (outlined at §5 above) by a direction that there would be hearing on 14 November 2013 for examination in chief of the summonsed witnesses. This would serve instead of a witness statement; the witnesses were to be told that if they served witness statements, they would no longer be required to attend this hearing. The witnesses were also summonsed to attend the main hearing in March 2015 for cross examination and re-examination.

9. The witness summons were issued addressed to Mr Young and Mr Machon at the London address of Sanne UK on 7 October 2014.

10. On 27 October, Mr Young and Mr Machon applied under Rule 16(4) for the witness summons to be set aside. Rule 16(4) provides:

> "(4) A person who receives a summons, citation or order may apply to the Tribunal for it to be varied or set aside if they did not have an opportunity to object to it before it was made or issued."

In view of the proximity of the first hearing on 14 November, the summons for this hearing were set aside and I directed that the hearing on 14 November would become the hearing of the applicants' objections.

11. The application originally contained five grounds of objection to the summons; only two of those were maintained at the hearing together with a new ground (b) below:

(a) the Tribunal did not have jurisdiction to issue the summons; and/or

(b) there was an alternative and more appropriate route to obtain the witness evidence so the summons should not have been issued; and/or

(c) the appellant had failed to make full disclosure to the Tribunal when applying for the issue of the summons.

12. The hearing of the applicants' objections to the summons overran the day allocated to it so the parties also made written submissions afterwards.

Jurisdiction

Facts

13. The Tribunal had very few facts in front of it. It heard no evidence although Mr Young submitted an affidavit. It was accepted by all parties that Mr Young and Mr Machon were resident in Jersey, and that they were currently directors of Sanne Group (UK) Ltd ('Sanne UK'), which was a UK company with an office in London.

14. The appellant's case was that Mr Young and Mr Machon had a substantial connection with the UK and indeed had told the Tribunal at the earlier hearing that these two gentlemen frequently attended the London offices of Sanne UK.

15. Mr Young did not accept that that was a correct representation of their position. His affidavit indicated that his main role was in Jersey as a director of Sanne Fiduciary Services Ltd, a Jersey company. As part of that role he was a non-executive director of a number of subsidiary companies, including Sanne UK. He had no operational responsibilities for Sanne UK. He said he had been to the offices of Sanne UK three times in 2014. He attended a quarterly governance meeting in early 2014; he inspected its new premises in the same month; and he visited the office in June to meet with a representative from the Isle of Man Sanne entity and not to dicuss Sanne UK business. Mr Young's evidence was that Mr Machon had much the same limited involvement in Sanne UK and made few visits to its UK premises.

16. I was given no information about how frequently Mr Young and Mr Machon visited the UK in general nor whether there were other UK companies of which they were directors. Subsequent to the hearing, their Jersey solicitors suggested they submit a further affidavit dealing with this but I agree with the appellant that any evidence either party wished to produce should have been made available at the hearing.

17. While I am cautious of putting too much weight on evidence in the form of affidavits in the absence of witnesses, and bear in mind Mr Machon did not even put in an affidavit, nevertheless the appellant produced no evidence at all. I find therefore that the appellant has not established that Mr Young and Mr Machon were frequent visitors to the UK, but I do find that they visit the Sanne UK offices in London occasionally. I had no evidence they visited the UK on any other occasion and make no finding to that effect.

18. So far as the tax dispute the subject of the appeal was concerned I was given no evidence at all. The appellant and applicant did not agree the nature of the dispute (the applicant's position was that it did not know it) and did not agree where the decisions were taken or where the transactions were executed which were the subject of the appeal. All that is clear is that on 1 February 2013 HMRC completed an enquiry into the appellant's partnership return and concluded (for various reasons) that the claimed loss of £60 million should be disallowed.

Law

19. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 do not contain a territorial limit for the issue of witness summons by this Tribunal but the applicants' position was that it could be no wider than that of the High Court. The courts with inherent jurisdiction can only summons persons who are "in" the UK. They cannot summons a person who is not in the UK. They can therefore summons a person who is not resident in the UK, but present here temporarily.

20. As there is no territorial restriction in the Rules I consider that this Tribunal's jurisdiction to issue a witness summons was not intended to more restrictive than that granted to the courts; indeed Rule 16(3) which states that the Tribunal cannot compel a person to give evidence if they could not be so compelled in a court of law suggests that this Tribunal's jurisdiction was intended to be co-extensive with that of the courts. Therefore, I consider that the limits applicable in the High Court are the limits which would apply in this Tribunal.

21. The applicant's position is that the High Court could only summons a 'visitor' to the UK in exceptional circumstances. For this he relied on what Rix LJ said in *Kuwait Airways Corp v Iraqi Airways Co* [2010] EWCA Civ 741 referring to the first instance judge's decision:

> "He cited *Phipson on Evidence* at paragraphs 8-32 which acknowledges the possibility of a witness summons against persons temporarily within the jurisdiction, but which also emphasises the limitations upon that possibility. In effect, something like a witness summons, or an application under CPR 71 for disclosure by the officer of a judgement debtor company for disclosure of assets in aid of execution, does not lie against persons outside the jurisdiction. That fact puts limits, explained in *Phipson*, upon the extent to which a summons against a non-resident temporarily within the jurisdiction may be subject to, where the opportunity afforded by such temporary presence might give rise to possible trespass upon exorbitant activity."

22. The passage in *Phipson* reads as follows:

> "Other than in exceptional circumstances, the court should not require a non-resident, who is not a party to the proceedings but who happens to have been served during a temporary visit to the UK, to produce documents held outside the jurisdiction relation to business conducted outside the jurisdiction, because the summons would be an infringement of local sovereignty. There are specific provision or circumstances where persons abroad may be required to provide evidence falling outside the witness summons practice."

23. *Phipson* took the principles here explained from a number of cases, including *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp and others* [1986] 1 Ch 482 where Hoffman J said:

> "In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement [to produce books held in New York] upon a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction."

24. The appellant considered the requirement for 'exceptional circumstances' did not apply to the issue of a witness summons but just to requests for documents; but my reading all these passages is that the requirement for 'exceptional circumstances' applies as much to witness summons as to requests for documents *but* only applies where there is what is referred to as 'exorbitant' activity. By this I understand the

court to be referring to activities outside the jurisdiction. In other words, there must be exceptional circumstances before a UK court would summons a visitor to the UK to answer questions (or produce documents) which relate to events abroad on the basis that would be encroaching on the sovereignty of other nation states.

25. The applicant's position on this seemed to be that the witness summons would encroach on the sovereignty of another state (Jersey) by requiring Mr Young and Mr Machon to give evidence about what they did in Jersey. I do not agree that there was any encroachment. The applicants were the directors of the general partner of a partnership which submitted a UK tax return and claimed losses in it. Even if the events said to give rise to the loss relief took place in Jersey (about which I was given no evidence and make no finding) the appeal concerns a claim to a UK tax relief. There is no extra-territoriality involved in requiring the persons who effectively represented the entity making the claim to give evidence about the claimed entitlement to it. The appellant does not need to show exceptional circumstances to justify the issue of a witness summons to a visitor to the UK in this case.

26. I derive support that this is the correct way to consider the matter by considering what was said by Lord Sumption in *Abela v Baadarani* [2013] UKSC 44:

> "[53]….It should no longer be necessary to resort to the kind of muscular presumptions against service out [of the jurisdiction] which are implicit in adjectives like 'exhorbitant'. The decision [to serve outside the jurisdiction] is generally a pragmatic one in the interest of the efficient conduct of litigation in an appropriate forum."

Here the applicants, while Jersey residents, were directors of the general partner of a partnership which claimed a UK tax relief in respect of activities which occurred before they resigned as directors. That will inevitably be litigated in the UK and it is not for them to say that service of the summons on them when visiting the UK is a breach of sovereignty of Jersey.

27. It was also the applicants' position that in any event they should not be equated to temporary visitors to the UK. Their case was that their connection with the UK was weak. Mr Young's affidavit suggested it was luck that the summons, sent to the London offices of Sanne UK, were even forwarded to them. I am not impressed by that. Mr Young and Mr Machon accept that they were non-executive directors of Sanne UK; a company can be supposed to have proper systems in place so that post addressed to even non-executive directors will be given to them promptly.

28. They also said summons should only be issued to temporary visitors in exceptional circumstances because it was more inconvenient for witnesses to attend from abroad and the risk of deprivation of liberty for breach of the order was worse for a non-resident. I do not accept this. Mr Young and Mr Machon chose to be directors of an entity that is claiming a UK tax relief: their status as non-residents should not mean a court or tribunal is any less willing to summons them when visiting the UK than it is willing to summons resident persons.

29. Mr Young and Mr Machon clearly are on occasions visitors to the UK. The Tribunal does have jurisdiction to issue them with witness summons, and, as I have said, the appellant does not need to show exceptional circumstances.

30. Mr Connolly suggested that it was not even proper for the Tribunal to issue witness summons ex parte although that is the normal procedure in the Tribunal, and so far as I understand, in the courts too. The witness is protected as he can object to the issue of the summons; I reject this criticism.

31. So Mr Young's and Mr Machon's challenge to the summons on the grounds that this Tribunal had no jurisdiction to issue them fails.

Were the witness summons served at all?

32. Mr Connolly's view was that the summons were not properly served on Mr Young and Mr Mahon in any event as they were merely posted to the London office of Sanne UK and not personally served on Mr Young and Mr Mahon. Mr Young and Mr Mahon actually received them when they were forwarded to them in Jersey from Sanne UK's London office. I note that Mr Thornhill took the view that there was nothing in the Tribunal's rules, nor in the CPR by analogy, that required personal service, and that service on a private person's business address would be sufficient.

33. I do not need to deal with this point as the question for this hearing is whether the summons should be set aside; the question is not whether they were properly served. That question would only need to be determined if the appellant was making an application under Rule 7 for the applicants to be referred to the Upper Tribunal for failure to comply with the summons. There has been no failure to comply so the question of whether the summons were properly served does not arise.

Alternative means of obtaining evidence

34. It was Mr Connolly's case that there was an alternative (and in his view more appropriate) method of obtaining Mr Young's and Mr Machon's evidence than a witness summons, and so the Tribunal, even if it had jurisdiction to issue one, ought not to have done so.

35. The alternative route was the ability of the High Court to issue Letters of Request. Letters of Request require a foreign court to take a deposition from a person within its jurisdiction for use in proceedings in front of the requesting court. It is a procedure only available where there are international treaties between the two countries concerned. The UK and Jersey are both signatories to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters 1970 and the parties were agreed that this would allow an English Court to issue Letters of Request to a Jersey Court.

36. Neither under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 or any other legislation does this Tribunal have power to issue Letters of Request to a foreign court. No one suggested it did. The only courts with power to

do so are the High Court, and any court or tribunal which has been given the same powers as those of the High Court. The High Court may issue Letters of Request on behalf of the County Court, but no one suggested that it could do so on behalf of the Tax Tribunal.

37. Section 25 of the Tribunals Courts and Enforcement Act 2007 ('TCEA') provides that:

> (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal
>
> (a) has…the same powers, rights, privileges and authority as the High Court, and…
>
> (2) The matters are –
>
> (a) the attendance and examination of witnesses,
>
> (b) the production and inspection of documents, and
>
> (c) all other matters incidental to the Upper Tribunal's functions

38. Mr Connolly considered that this section gave the Upper Tribunal power to issue Letters of Request and he may well be correct. I do not need to decide. Proceeding on the assumption that the Upper Tribunal (Tax and Chancery Chamber) can issue Letters of Request, the question is whether it would be able to do so in proceedings before this Tribunal, which is only the First-tier Tribunal (Tax Chamber).

39. Mr Connolly accepted that the only way in which the matter could be brought to the attention of the Upper Tribunal was via Rule 7 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 28 which allows a case to be transferred to the Upper Tribunal was irrelevant as HMRC were quite clear that they would not consent to this case being transferred to the Upper Tribunal, and certainly not in order to enable the service of Letters of Request which would inevitably threaten the listed hearing date in March next year. There is no procedure to waive consent by either party.

40. Rule 7 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

> "The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its powers under section 25 of the [TCEA] …in relation to, <u>any failure by a person to comply with a requirement imposed by the Tribunal</u> –
>
> (a) to attend at any place for the purpose of giving evidence;
>
> (b) otherwise to make themselves available to give evidence;
>
> (c) to swear an oath in connection with the giving of evidence;

(d) to give evidence as a witness…… (my emphasis)

41. Mr Connolly's view was that this Tribunal could *direct* even a non-resident person to give evidence, and when they failed to do so, to refer that non-resident person to the Upper Tribunal with a request for the Upper Tribunal to exercise its powers to send Letters of Request.

42. I do not agree. The Tribunal has no power to issue a summons to a person who is not present in the UK; nor does it have power to direct that such a person give evidence. A direction to give evidence is no different to a summons. Rule 7 only gives the Tribunal power to refer persons who have *failed to comply* with a direction or summons. If the Tribunal had no jurisdiction to issue the summons or direction then it is ineffective and there is no failure to comply with it; in any event Rule 7 was clearly only intended to apply to directions and summons which the FTT had power to issue.

43. Moreover, Rule 7 clearly was not drafted with the intention of including the issue of Letters of Request. Rule 7 deals with failures by persons to comply with FTT directions and summons; Letters of Request, on the contrary, are intended to be issued long before the hearing and long before anyone has failed to comply with any summons or directions to give evidence.

44. I do not know why Rule 7 was limited in this manner, but it clearly is so limited.

45. I accept that, where the Tribunal has jurisdiction to issue a witness summons (say to a visitor to the UK) then, if the summons was ignored, the failure could be referred to the Upper Tribunal. But the purpose of such a referral would be to sanction the failure; it should not be used as a back-door route to request the Upper Tribunal to issue Letters of Request when the Rules clearly do not envisage the Upper Tribunal being able to issue Letters of Request in any FTT case. In any event, it would be an extraordinarily cumbersome process as there would be no 'failure' until the actual hearing; and as Letters of Request take time to be issued and processed, that would probably cause a delay of well over a year in bringing hearing to a close.

46. I was not addressed on the cumbersome and expensive nature of Letters of Request in general and make no comment on it. Even without consideration of such issues, I am satisfied that there is no proper means by which a hearing in this Tribunal could benefit from the Upper Tribunal's powers (assuming it has them) to issue Letters of Request.

47. And even if I am wrong on this, I would still not agree, for the reasons given in the penultimate paragraph above, that the availability of Letters of Request would be a reason not to issue a witness summons that this Tribunal had jurisdiction to issue.

48. In conclusion, I reject Mr Connolly's view that Letters of Request represent a real alternative in this Tribunal to the issue of a witness summons to persons only visiting the UK. I reject his case, therefore, that such a route of obtaining evidence

should have been pursued rather than summons being issued. Therefore, I move on to consider his remaining objection to the issue of the summons, and that was that the appellant did not fully acquaint me with all the relevant facts when it applied for the summons.

Full disclosure

Facts

49. I had documentary evidence in the form of letters in front of me. The provenance of these letters and emails was not in dispute, although of course the parties differed on what conclusions I should draw from them. None of these documents were made available to me on 2 October 2014 when I was asked to issue the summons.

50. I find as follows:

51. On 12 October 2012 Mr Bremner of counsel and on behalf of the appellant partnership wrote to Mr Young by email asking him and Mr Machon to give evidence about the activities of the partnership. The letter gave a general outline of the appeal and explained that the appellant would like the ex-directors to give witness statements and be prepared to attend the hearing of the appeal. Help was offered with the preparation of the witness statements.

52. Mr Young replied on 6 November 2012. The letter was also long but in very brief summary doubted that the ex-directors could give any relevant evidence, stated that having a role in defending the tax claim was outside the terms of Sanne's engagement; that the partnership had continued the tax planning activities after Sanne's withdrawal as general partner and contrary to representations made to them; and finally that the appellant was in possession of all relevant documents in any event. While this letter was not an outright refusal to give evidence, its overall tone was negative.

53. On 11 February 2013 Pinsent Masons wrote a detailed letter to Mr Young on behalf of SNG Advisory LLP ('SNG') requesting Mr Young and Mr Machon to give witness evidence and provide documents. The letter asked for cooperation but indicated that a failure to cooperate might lead to the issue of witness summons or an application for Letters of Request. Mr Young was asked to respond in 14 days.

54. On 22 February 2013 (within the 14 days) Mourant Ozannes on behalf of Sanne, Mr Young and Mr Machon replied. The letter said:

> "Sanne is considering whether it is able to provide the assistance that you have requested, but to enable it to do so it first needs answers to a number of questions arising out of your letter…."

It then listed some 13 questions. The first five were about who SNG were, the appellant partnership having been dissolved, as the applicants were concerned about

their duty of confidentiality. Two questions asked for more information about the appeal, including a request for the statement of case. All but one of the remainder of the questions were about the requested documents, and are of no concern as the appellant no longer requires the applicants to produce any documents. The last question was about fees.

55. The letter concluded with two paragraphs indicating that Mr Young and Mr Machon would consider the reply to their questions before deciding whether to do as the appellant requested.

56. The appellant did not reply to this letter. I was told that it decided instead to progress obtaining a witness statement from Mr Derricott who was the adviser to the general partner at the time and from whom a witness statement was provided on 7 February 2014.

57. Having taken no steps for 16 months to reply to Mourant Ozannes letter, SNG again approached Mr Young and Mr Machon for a witness statement in July 2014. This was after making *both* applications to the Tribunal for the issue of summons.

58. There were exchanges of emails and letters after this. Ozannes asked for a reply to the questions in their letter of 22 February 2013. They did not get one. Nevertheless, they continued in a conciliatory manner despite the rather intemperate replies from SNG (a Mr N Masters and a Mr S Wilson). Ozannes suggested a telephone conversation which appears to have led to an agreement that SNG would draft the sort of witness statement it was expecting the witnesses to produce. Ozannes' email confirmed agreement to this with the qualification that they still needed to consider the extent to which Mr Young and Mr Machon could properly provide evidence.

59. This led to another intemperate reply from SNG. It said that they 'completely disagree', that the appellant had 'little choice', that the applicants had 'lost the opportunity to work together' and that a 'summons is necessary!'

60. I find that, while Mr Young's original letter had a negative tone, since then, Ozannes on behalf of the applicants, had always followed a conciliatory tone of correspondence, from which any reasonable person would conclude that the applicants were likely to willingly give witness summons if satisfactory answers were given to their questions. There was certainly no outright refusal to give evidence nor a statement that evidence would only be given if a witness summons was issued.

61. SNG's correspondence had an inflammatory tone (eg, at one point Mr Mr Masters wrote 'I would actually now prefer to serve them and for them not to turn up' which was I find a reference to earlier comments about the risk for the applicants of arrest if they disobeyed a witness summons). At no point did the appellant seek to answer the applicants' questions. And it is very far from clear to me why, when the parties appeared on the point of agreement, rather than pursuing that agreement, SNG chose to break off from negotiations and send yet another intemperate email (§59).

Were the questions reasonable?

62. Whether the questions asked in Ozannes' letter of 22 February 2013 were reasonable is relevant because, if the questions were unreasonable, then it may have been reasonable for the appellant not to have answered them (although that would not excuse why the appellant did not seek to explain to the applicants why it thought the questions unreasonable).

63. It seems entirely reasonable to me for the appellants to want to know who SNG and Mr Cowan were. The appellant partnership was dissolved. It is not immediately obvious why SNG and Mr Cowan are the successors in the tax litigation. There is an explanation, but it was reasonable for the applicants to ask for it. Indeed it seems HMRC and the Tribunal only recognised Mr Cowan as the representative of the partnership some time after the 22 February 2013 letter, and after hearings in this Tribunal in which the matter was aired.

64. The questions about the nature of the litigation I find were also reasonable. The appellant appears to accept this having (in November 2014) eventually provided answers and a copy of the statement of case to the applicants as requested. The questions about the documents were also presumably reasonable as the appellant no longer requires the applicants to produce any.

Was there a misrepresentation?

65. I am satisfied that objectively speaking the statement in both applications (see §2) and repeated to me at the hearing (§7) that the proposed witnesses had refused to give witness statements unless issued with summons, was a misrepresentation. At the time both statements were made, the last contact between the parties had been Ozannes' letter of 22 February 2013 (§54). No one could reasonably have described the position adopted by Ozannes in that letter as a refusal to give evidence unless a summons was issued. On the contrary, it was an indication that evidence would be given if questions, which I have found were reasonable, were answered.

66. By the time of the hearing before me in October 2014, a great deal of further correspondence had taken place between the parties. Could the applicants' position as set out in these emails reasonably have been interpreted as a refusal to give evidence unless summonsed?

67. Mr Thornhill's position was that it was reasonable for the appellant to summarise the position with Mr Young and Mr Machon in this manner. By this I understood him to mean that because Mr Young and Mr Machon had asked for questions to be answered before giving a decision on whether or not they would cooperate, it was reasonable to regard that as a refusal; and that therefore was necessary for a summons to be issued.

68. I do not accept that. Ozannes' questions were outstanding; Mr Young and Mr Machon had neither agreed nor refused to give evidence. They wanted answers to reasonable questions before deciding; as their tone was conciliatory, a reasonable person would assume that if reasonable answers were provided, witness statements

would be forthcoming. It was a clear misrepresentation to say that the applicants had refused to give evidence unless summonsed.

69. Moreover, I am satisfied that by failing to provide answer to the applicant's reasonable questions the appellant prevented agreement being reached on the voluntary provision of evidence by the applicants. This was not drawn to my attention in the October hearing either. There was a serious failure in the duty of full and frank disclosure to the Tribunal.

70. I am also not satisfied that the appellants' advisors (Mr Masters and Mr Wilson) who undertook the email correspondence with Ozannes genuinely believed that they had given a true representation of the position to the Tribunal: on the contrary, they appear to have made positive choices not to pursue agreement when it was offered; they chose not to reply to the appellant's letter of 22 February 2013 for 16 months and applied for a witness summons without reference to the proposed witnesses; when they did renew the correspondence, again they chose to break it off rather than pursue possible agreement (§ 59); the tone of their correspondence was not conciliatory and at least at one point Mr Masters appeared to more interested in the sanctions that might be imposed on the witnesses than actually obtaining their evidence (§61). In the face of this correspondence, and without any witness evidence, I cannot be satisfied that Mr Masters and Mr Wilson on behalf of the appellant actually thought that the statement at made in the application and reported at §2 above was accurate.

The law

71. Mr Thornhill accepted that Mr Connolly was right to say that the appellant (as the applicant for it) had the burden of proof of establishing that the witness summons was justified in the face of an objection to its issue. I was referred to 8-22 in *Phipson on Evidence* who footnoted as authority for this proposition *Sunderland Steamship P & I Association v Gatoil International Inc* [1988] 1 Lloyds Rep 180 at 185; *Macmillan Inc v Bishopsgate Investment Trust Plc* [1993] 1 WLR 1372 at 1375 and *Arhill Pty Ltd v General Terminal Company Pty Ltd* (1991) 23 NSWLR 545 at 555-56. I agree that the proposition is correct: this is the hearing of an objection to an ex parte order; the applicant had the burden of establishing the grounds of his application and nothing changes that position now that there is an objection to it: the applicant for the order must justify it.

72. I have found that a misrepresentation was made to the Tribunal and I have not been satisfied that the misrepresentation was innocently made. What is the effect of this misrepresentation to the Tribunal?

Is full and frank disclosure required?

73. The applicant's position is that where an application is made against a person who is not informed of the application the applicant has a duty of full and frank disclosure to the Tribunal. Mr Thornhill accepted this in cases where the application

was ex parte but suggested the application for the summons in this case was not ex parte as the applicants had been told the appellant would apply for the summons.

74. I do not agree that this was not ex parte. While it seems that the applicants were told informally that witness summons had been applied for (§53), they were not given formal notice of the hearing of the application in this Tribunal and they had not been invited to lodge objections. They were therefore without notice of the application. The duty of full and frank disclosure on the applicants applied.

75. An authority on this duty to which I was referred is *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907:

> "Those authorities in this court bring their reminder of the essential principles: that there is a 'golden rule' that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the Court's discretion; that failure to observe this rule entitles the court to discharge the order obtained even if the circumstances would otherwise justify the grant of such relief; that a due sense of proportion must be maintained between the desiderata of marking the court's displeasure at the non-disclosure and doing justice between the litigants; that for these purposes the degree of any culpability on the part of the applicant or of any prejudice on the part of the respondent are relevant to the reviewing court's discretion; and that a balance must be maintained between undermining 'the heavy duty of candour and care' which falls on applicants and promoting 'a tabula in naufragio' [a port in a storm] to save respondents who lack substantial merits.'

76. The appellant's position was that they had made full and frank disclosure if they believed that they had done so. I agree with Mr Connolly that that is not the test. The question is whether objectively there was full and frank disclosure; if there was not, but the appellant genuinely thought that there was, it might affect the sanction.

77. In the end, this distinction does not matter as, while I have found objectively there was a failure in the duty of full and frank disclosure, I have also not been satisfied that the appellant genuinely believed that they had made full and frank disclosure to the Tribunal.

Should the summons be set aside?

78. As is made clear from the citation from *Knauf,* the mere fact of non-disclosure does not automatically lead to the setting aside of whatever application was allowed in the without notice proceedings. The Tribunal must consider all relevant factors. In this case the relevant factors include:

(a) Whether full and frank disclosure would have made a difference to the outcome of the hearing on 2 October;

(b) To what extent the appellant is prejudiced if the summons are rescinded.

Would full disclosure have made a difference?

79. If Appellant had disclosed the chain of correspondence now before me in the October hearing I am in doubt that I would not have issued the witness summons. The correspondence showed that, so far from refusing to be witnesses, the applicants by their solicitors had offered a route to voluntary statements, subject only to reasonable questions being answered, which the appellant had, inexplicably, chosen not to pursue timeously or at all.

80. Mr Thornhill suggested that the applicants' concerns on confidentiality (the first five questions - §54) would be allayed by receipt of a witness summons. That might or might not be the case. The point is that if full and frank disclosure had been made to me in October, I could have considered the point. Even then, I am satisfied that I would not have issued the summons unless the appellant had taken steps to provide reasonable answers to <u>all</u> of the questions and the applicants had nevertheless not agreed to give evidence.

81. Mr Thornhill also points out that the applicants had never stated that witness statements would be forthcoming even if their questions were all answered satisfactorily. That is true. But it makes no difference. The appellant should have pursued agreement to provide evidence; only if the applicants had been provided with answers and still refused to give evidence should the Tribunal have been approached to issue a summons.

Effect of recision of summons

82. The appellant's case is that the evidence is important to them. Their case is that Mr Young and Mr Machon were the directors of the general partner and are the only persons who can definitively state what was done and why.

83. While satisfied that the evidence is relevant (no one has ever suggested it is not), I am not satisfied that it is of critical importance to the appellant. Firstly, for 16 months they failed to pursue it, on their own case choosing instead to obtain a statement from the directors' adviser, Mr Derricott. So clearly at that point the appellant did not regard Mr Young's and Mr Machon's evidence as critical. Secondly, the appellant does have the benefit of Mr Derricott's evidence, which would appear to cover much the same ground, although I accept he was a mere adviser rather than the decision-maker. I also note, though these points are less significant, that in the earlier letters, the appellant's position was that it might be possible to agree Mr Young's and Mr Machon's evidence with HMRC, suggesting that they did not consider it likely to be particularly controversial, and that at least at one point sanctions on Mr Young and Mr Machon appeared to more important to SNG's adviser than the evidence sought (§61).

84. I am therefore not persuaded that if the appellant is unable to rely on the evidence from the applicants it would be especially prejudicial to their case.

85. In any event, setting aside the summons on the grounds of failure of duty of full disclosure does not necessarily mean that the appellant is deprived of the benefit of evidence it would otherwise have.

86. I say this firstly because setting aside may not deprive the appellant of the evidence. This is because the applicants have still not refused to give evidence voluntarily. I understand that, belatedly, the applicants' questions have been answered and it is open to the appellant to pursue obtaining witness statements from them. Whether witness statements would be admitted at this late stage is a matter which I cannot decide here, although I comment in passing that any judge presented with such an application might want to consider the great delay by the appellant in answering the applicants' letter of 22 February 2013 and why it agreed to evidence closing on 7 February 2014.

87. Secondly, I say it because it is not clear to me that it would be possible to renew the witness summons on the basis they were issued in October. Maintaining the summons for the March hearing but without substituting a new hearing of the evidence in chief in substitution for the cancelled hearing on 14 November fails to deal with HMRC's concerns which I determined on 2 October should be addressed by such a hearing. Now may be simply too late to arrange such a hearing as it might not give HMRC time to respond to the evidence before March. The only possibility might be to vacate the substantive hearing date and, even if HMRC were to consent, the Tribunal would not automatically consent to this. So the point is that the appellant may already be too late to benefit from the evidence in the manner directed at the 2 October hearing.

Conclusion

88. The Tribunal is not here to punish parties for their failure to abide by the rules of tribunal; it is here to do justice. Nevertheless, in order to do justice, the Tribunal may need to impose sanction on parties who have failed to respect the Tribunal's rules and directions, even to the extent on occasion of actually striking out or barring a party. An applicant in this tribunal in a without notice hearing who fails to give full and frank disclosure to the Tribunal must expect that there is a real risk that any order obtained by that means will be discharged; that sanction is necessary to prevent a failure of justice.

89. There are undoubtedly cases were an applicant has failed in its duty of full and frank disclosure but that nevertheless the appropriate sanction is not to discharge the order obtained in that without notice hearing. This is not one of those cases.

90. Here the answer is clear. Had there been full and frank disclosure, the summons would not have been issued. Here the appellant has not satisfied me that it even had the excuse that it believed it had fulfilled its duty of full and frank disclosure. Moreover, I have also not been satisfied that the inability to rely on the evidence will be greatly prejudicial to the appellant; nor am I satisfied that discharging the summons means that evidence which would otherwise be heard will no longer be heard.

91. The appellant has no one to blame for this outcome but itself; the witness summons for 14 November 2014 will not be renewed for a later date; the witness summons for the March 2015 hearing are hereby set aside.

92. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 2 December 2014