Appeal number: FTC/610/2015

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

12 February 2015

CLAVIS LIBERTY FUND LP1 (acting through Mr D J Cowen)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents to the main action**
(1) SIMON YOUNG (2) PETER MACHON	**Respondents in this Appeal**

TRIBUNAL: MR JUSTICE WARREN, Chamber President

Sitting in public at the Rolls Building, London EC4A on 10 February 2105

Andrew Thornhill QC and Jonathan Bremner, instructed by SNP Advisory, for the Appellant

David Goy QC and Imran Afzal, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents to the main action

Oliver Conolly, instructed by Mourant Ozannes for the Respondents in this Appeal

Introduction

1. This is an appeal against a decision of Judge Mosedale ("**the Judge**") released on 2 December 2014 ("**the Decision**") in which she set aside two witness summonses which she had, following a hearing on 2 October 2014 addressed to Mr Simon Young and Mr Peter Machon. I shall refer to the appellant as CLF, to the first respondent as HMRC and to Mr Young and Mr Machon by their names. Mr Andrew Thornhill QC and Mr Jonathan Bremner appear for CLF, Mr David Goy QC and Mr Imran Afzal appear for HMRC and Mr Oliver Conolly appears for Mr Young and Mr Machon.

2. This matter has come before me as an expedited hearing. The urgency is that the tax appeal in which the evidence of Y&M is required commences on 9 March 2015 and is listed to run until 17 March. Accordingly, I am giving this decision without having been able to devote as much time to its preparation as I would otherwise have hoped for. It is for that reason that I deal with some of the points which have been raised only briefly.

The background

3. The background is set out in [1] to [11] of the Decision. Following that, CLF applied for permission to appeal to the Judge which was refused. I do not repeat it here save to note [11] where she identified the live issues:

    a. Whether the tribunal had jurisdiction to issue the summonses;

    b. Whether there was an alternative and more appropriate route to obtain the witness evidence so the summons should not have been issued; and

c. Whether CFL had failed to make full disclosure to the tribunal when applying for the issue of the summonses.

4. Permission to appeal was granted on a renewed application to the Upper Tribunal on 21 January 2015.

The Decision in outline

5. The Judge dealt first with jurisdiction. She decided that the tribunal did have jurisdiction to issue the witness summonses. An issue was raised about service. She declined to deal with the issue. She saw the question before her as being simply whether the witness summonses should be set aside. The question of service would only need to be dealt with if CLF was making an application under Rule 7 of the UT Rules to impose sanctions for non-compliance with the witness summonses.

6. Next she dealt with the "alternative route" issue. She rejected the submission that the Letters of Request Procedure represented a real alternative to the issue of witness summonses rejecting what she understood to be Mr Conolly's submission that that route should have been pursued rather than summonses being issued. She decided that there was a failure in the duty of full and frank disclosure which she considered was owed, adding that she was not satisfied that CLF genuinely believed that they had made full and frank disclosure.

7. The result was that she considered the witness summonses had been issued with jurisdiction but should be set aside. She summarised her conclusions in [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."

8. Quite apart from the Judge's view that the issue of service did not need to be dealt with for the reasons mentioned in paragraph 5 above, her decision on the merits was another reason why the issue did not need to be addressed.

Grounds of appeal

9. CLF contends that the Judge erred in law in the following ways (using my own description):

    a. She adopted an incorrect approach to the need, if indeed there is any need at all, for full and frank disclosure. In any case, any inadequacy in that regard was given far too much weight in the exercise of her discretion.

    b. She was wrong to conclude that the witnesses summonses should only have been applied for once Mr Young and Mr Machon had refused voluntarily to attend as witnesses even if all the questions which they had reasonably asked had been answered.

10. Mr Young and Mr Machon contend that, contrary to the conclusion of the Judge, the tribunal had no jurisdiction to issue the witness summonses as they are non-residents (they live in Jersey) and have no residence of place of business in the UK.

11. If CLF's appeal were to succeed and if the Judge was right about jurisdiction, the issue of service is very important. Mr Young and Mr Machon need to know, I consider, whether in those circumstances the witness summonses have been properly served. If they have been properly served, they may well feel constrained to comply with them otherwise they could face sanctions, at least if and when they visit the UK. In contrast, if they have not been served, there is no threat hanging over them. They can, and do, argue that the consequence of the failure properly to serve the witness summonses (if I conclude that they have not

been properly served) is that they should be set aside since, if they could not be served, they should not have been issued.

12. Mr Thornhill submits that the consequence of such a failure is not that the summonses should be set aside but merely that the service of them should be set aside or declared to be invalid. In that way, should Mr Young or Mr Machon actually come to the UK, there would be a potential for effecting personal service which should not be denied to CLF. Although the application before the Judge by Mr Young and Mr Machon was to set aside the witness summonses (as they were entitled to do under Rule 16 of the Tax Chamber Rules), I consider that the Judge's powers were wide enough for her to determine the matter of service had she decided not to set aside the witness summonses. She could have done so under the case-management power found in Rule 5(3)(e) or (f). The question of service is essentially one of law – there is no dispute about the facts which are said to give rise to valid service. Since the question of service was raised before the Judge, I consider that I am entitled to decide the point of law notwithstanding that she did not do so.

Jurisdiction and Service

13. I see the issues of jurisdiction and service as being closely linked. They are, of course, distinct and I must be careful not improperly to elide the considerations relevant to each. But they are linked nonetheless.

14. Witness summonses are dealt with in the Tax Chamber by Rule 16 of the Tax Chamber Rules. Rule 16(1) provides that on the application of a party, or of its own initiative, the tribunal may (among other matters) by summons "require any person to attend as a witness at a hearing….". Rule 16(2) provides that the summons must give at least 14 days' notice of the hearing (or such shorter time as

the tribunal may direct). Rule 16(3) provides that "no person may be compelled to give any evidence…" which he could not be compelled to provide on a trial of an action in a court of law in (so far as concerns the present case) England and Wales. Rule 16(4) provides that "a person who receives a summons… may apply to the Tribunal for it to be varies or set aside if they did not have an opportunity to object before it was issued.

15. There is nothing in Rule 16 about how the summons is to be provided to the intended recipient. Obviously a summons (or at least notice of it) has to be provided in some way; indeed, Rule 16(2) requires, as I have just noted, 14 days notice of the hearing to given by the summons. The question then is what is sufficient for the summons to be effective to bind the intended recipient other than personal service in England and Wales.

16. The Tax Chamber Rules do not anywhere use the words "service" or "serve" in relation to the provision of documents. Instead, they refer to sending, delivery and receipt of documents but do have a great deal to say about those. Rule 13(1) deals with the provision of documents <u>to</u> the tribunal. Rule 13(2) effectively provides that where a party has specified address for the electronic communication of documents, he must accept delivery of the document by that method.

17. Rule 13(3) is perhaps of more relevance in the present case and provides as follows:

> "If a party informs the Tribunal and all other parties that a particular form of communication (other than pre-paid post or delivery by hand) should not be used to provide documents to that party, that form of communication must not be so used."

This rule, it can be seen, applies to a party: it does not apply expressly to any other person but it might be seen as providing some indication of what is required to ensure that a document (such as a witness summons) has to be communicated.

18. There was some debate before me about the applicability, by analogy, of the CPR in order to explain or even supplement the provisions of the Tax Chamber Rules. Although on occasions an analogy can be drawn and the CPR thus be used as an aid to interpretation, it would not be right to fill gaps in any of the Tribunal Procedure Rules ("**the TPR**" – the various First-tier Rules and Upper Tribunal Rules) by incorporating, *mutatis mutandis*, corresponding provisions of the CPR into them. Although the courts and the tribunals share many aspects of their functions and operations, they are different bodies with their own distinct philosophies and procedures. The tribunals are, or are intended to be, less formal and less legalistic than the courts; and that is reflected in the different structure and language of the CPR and the TPR. Great care must therefore be taken when seeking guidance from the CPR about the operation of the TPR. And so, in the present case, great care must be taken in interpreting the TPR requirements about sending and delivery of documents by reference to the CPR provisions, in particular Part 6, relating to service. This echoes, I think, what May LJ said in *Godwin v Swindon Borough Council* [2002] 1 WLR 997 ("***Godwin***") at [42] – [45].

19. At this stage, I say something about service under the CPR. CPR Part 6 was completely recast by amendment in 2008. The original CPR contained in section I general rules (Rules 6.1 to 6.11) about service applicable to all documents, with claim forms being dealt with in section II. Rule 6.2 provided that a document could be served in a number of ways including personal service (*ie* in the case of an individual by leaving it with that individual (CPR 6.4(3)). Other methods include first class post to or by leaving the document at the address ascertained under Rule 6.5. The provisions of Rule 6.5(6) seem to apply, on their face, only

in relation to party (since it applies where "the party has not given an address of service") but I think it is correct to apply them by analogy to service of documents on non-parties. In particular, where there is no solicitor acting for the individual, service should be at the usual or last known residence: see the Table at the end of Rule 6.5(6).

20. The note to CPR Part 34.6 in the current edition (2014) of the White Book (which is clearly referring to the original version of CPR Part 6 rather than the version actually in the current edition) states that Rule 34(6(1) creates a presumption that service will be by the court so that Rule 6.3(2) will apply: that Rule (*ie* in the original CPA) provided that where the court is to serve a document, it is for the court to decide on the method of service under Rule 6.2. In the context of the original CPR, I agree with what the note says. It makes good sense. The person applying for the witness summons will specify an address for service; the court will then, usually, adopt 1st class post as the appropriate method of service.

21. Matters are not quite so straightforward under the current CPR. Part 34.6 remains as it was: it refers to service but does not explain what is required to ensure that there is good service. Service of documents in the UK is dealt with in Rule 6.20. Service can, as before, be effected by personal service. The combination of Rules 6.22(3) and Rule 6.5(3) means the personal service on an individual is effected by leaving it with that individual. A different method of service is, again, 1st class post "in accordance with Practice Direction 6A". The address for service is not specified and, as before, it is right to apply by analogy the provisions in the Table following Rule 6.9. That is not clear, however, since the provisions relating to alternative method of service of the claim form are expressly applied to other

documents (see Rule 6.27) but there is no corresponding express provision for service by post.

22. There is, it can be seen, a significant difference of approach between the TPR (in particular the Tax Chamber Rules) and the CPR when it comes to documents. The CPR requires service; the Rules provide a reasonably comprehensive code about what service amounts to and how it is effected. If service is not effected properly then, for some purposes at least, this can have disastrous consequences for a litigant even in cases where the relevant document has, in fact, reached the intended recipient: see for instance *Godwin*. In contrast, the TPR are concerned with the sending, delivery and receipt of documents without being overly-prescriptive about how receipt is brought about.

23. Take this scenario. The court wishes to serve a witness summons on Mr A who lives as No 22 which is the address provided by the applicant for the summons. Due to an administrative error, the address on the envelope is No 32 to which the postman delivers it. The kindly occupant of No 32 realises the mistake and hands the envelope to the intended recipient whom he sees walking past his house. The witness summons has not been properly served. Clearly for postal service to be effective, the envelope must be addressed to the last known residence of the intended recipient.

24. Now suppose that the witness summons is issued by the tribunal. The summons, as such, is a perfectly valid summons. Although it has not been served in the sense of service under the CPR, it has in fact been received by the intended recipient. He knows that he has been required to attend. Further, he has actually received the witness summons itself; this is not a case where he has knowledge of the summons and its contents but has not actually received the summons itself.

Assuming that the envelope was received more than 14 days before the hearing, there is no point open to him to take about the validity of the summons as giving insufficient notice. Accordingly, I think it is probably correct to say – although I do not need to decide and do not do so – that he has received the witness summons for the purposes of the Tax Chamber Rules and that if he fails to attend in accordance with the summons having taken no steps to have it set aside, that he exposes himself to sanctions: the matter can be referred to the Upper Tribunal under Rule 7(3) of the Tax Chamber Rules which then has enforcement powers under section 25 Tribunals, Courts and Enforcement Act 2007.

25. It is not necessary to decide the point because, in my judgment, the witness summonses, even if valid in themselves in the sense that the tribunal has jurisdiction to issue them, could not be effectively delivered to Mr Young and Mr Machon or received by them for the purposes of the Tax Tribunal Rules. What the CPR and the TPR do have in common is that they must both be interpreted against the background of the common law concerning the jurisdiction and powers over persons not resident in the UK and not carrying on business in the UK.

Service of originating process

26. So far as concerns originating process in the High Court, the general rule is that stated by Lawrence Collins J in *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17 but subject to a qualification. The Judge said that

> "it has always been, and remains, a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of the service, or deemed service."

27. That principle was disapproved by the Court of Appeal in *City & Country Properties Ltd v Kamali* [2007] 1 WLR 1219. But that decision was further explained by a differently constituted Court of Appeal in *SSL International plc v*

TTK LIG Ltd [2012] 1 WLR 1842. In *City & Country Properties*, the claim form was left at the defendant's place of business in England while he was abroad. He argued that it had not been properly served on him although it was the case that he had in fact received it before default judgment was entered against him. May LJ referred to *Rolph v Zolan* [1993] 1 WLR 1305 which, in his view, was decisive of the point against the defendant in *City & Country Properties*. In *Rolph*, the defendant had emigrated to Spain but retained his house in England. The Court of Appeal held that a Country Court summons delivered to that address by post was duly served under the relevant County Court rules which permitted service by post at the address stated in the request for the summons. He considered that there was no longer a fundamental rule such as that stated in *Chelleram* and that the relevant rule was to be given its ordinary meaning. It was not to be implied that the defendant had to be within the jurisdiction of the court at the time of service of the summons.

28. Neuberger LJ was more circumspect. He considered that the terms of the original CPR Part 6, Rules 6.2 to 6.5 did not exclude service in accordance with their terms "simply because the defendant was out of the jurisdiction". But that is not to say that there might be other reasons why service could not be effected: for instance, if there was no residence or place of business in the jurisdiction, the pre-condition for postal service would not subsist. Neuberger LJ also referred to *Rolph* as supporting that conclusion. It was inappropriate to imply the common law principle identified in *Chelleram* into Rules 6.2 to 6.5. A further reason relied on (Fourthly at p 1227C) was that nothing in Section III of Part 6 (relating to service out of the jurisdiction) appeared to him "to preclude service on a defendant out of the jurisdiction, where it is appropriate". On the facts of the case,

the defendant clearly had a place of business within the jurisdiction. He had owned the property for some time and had been closely connected with and had frequently been in England since 1974. He was therefore validly served. Wilson LJ agreed with the reasoning of May LJ and with the additional reasoning of Neuberger LJ.

29. Both *Rolph* and *City & Country Properties* were considered by Stanley Burnton LJ (giving the only reasoned judgment) in *SSL International*. He described the facts of *Rolph* as extraordinary. As he pointed out, no point was taken about whether the plaintiff had made any enquiry about whether the defendant still lived at the address he had left 5 years before. The case was therefore different from *SSL International* in that it had to be assumed that the plaintiff believed that the defendant still resided in England.

30. As to *City & Country Properties*, he referred to the judgments of Neuberger LJ and Wilson JL, setting out the whole of [19] to [23] of the former. He made no reference to the judgment of May LJ notwithstanding that Wilson LJ agreed with its reasoning. Nonetheless, he wholly agreed with the actual decision. The defendant in that case, he observed, carried on business and presumably resided in England. It was only his temporary absence of the UK which allowed him to run the argument that there was no valid service. Importantly, he observed that "he was, by reason of his business if not his residence subject to the jurisdiction". Once it is appreciated that there was jurisdiction over the defendant because of a relevant presences within the UK, it is not difficult to see that the rules should be interpreted in such a way as to allow service of proceedings in accordance with those rules to engage that jurisdiction. In contrast, in *SSL International*, there was no relevant connection with the jurisdiction. Instead, there was a company which

had never had and did not have any presence within the jurisdiction. It was not permissible to invoke the rules allowing service on a director or senior officer who happened to be in the jurisdiction. The artificiality of that was highlighted by the fact that the relevant director was a director appointed by and an employee of the claimants. It is worth setting out what he said in [57] to [59]:

> "57. It is a general principle of the common law that absent specific provision (as in the rules for service out of the jurisdiction) the courts only exercise jurisdiction against those subject to, ie within, the jurisdiction. Temporary absence, for instance on holiday, does not result in a person not being subject to the jurisdiction. In my judgment, Lawrence Collins J's statement of principle in *Chellaram v Chellaram (No 2) [2002] 3 All ER 17* was correct if read with that qualification, and was not inconsistent with the decision in *City & Country Properties Ltd v Kamali [2007] 1 WLR 1219*.
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> 58. Furthermore, I do not think that it is any answer that an individual who has no connection with this jurisdiction may be personally served if he is here temporarily. If he is here, to state the obvious, he is here. If a director of a foreign company which does not carry on business here is passing through this country, the company is not here.
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> 59 If a claim has any real connection with this jurisdiction, permission to serve out of the jurisdiction may be sought and will be granted. I therefore fail to see the need or the rationale for CPR r 6.5(3)(b) to apply to foreign companies that have no presence within the jurisdiction. It is significant that the thorough researches of Mr de la Mare and Mr Segan have not revealed any reported case in which there has been service under CPR r 6.5(3)(b) on a foreign company that does not carry on business here."

31. I am clearly bound by that explanation of *City & Property* even though there might be perceived a tension between the reasoning of May LJ (adopted by Wilson LJ) in that case and the reinstatement, if I can put it that way, of the fundamental principle stated in *Chelleram*.

32. *SSL International*, like the other cases referred to, was concerned with service of an originating process not of a witness summons or any other document requiring a person to do or refrain from doing something. However, as I have already pointed out, the central point in the reasoning of Stanley Burnton LJ was that the court had no jurisdiction over the company which had no presence here; there

being no jurisdiction over the company, it could not be served here. If the claim – in contrast with the defendant – had a real connection with this jurisdiction then leave to serve out of the jurisdiction might be obtained. Where the case is appropriate for service out of the jurisdiction (as in was the case in *Abelaa v Baadarami* [2013] UKSC 44, cited by the Judge at [26] of the Decision) it may be that service by alternative means should be ordered although this should not be done where there is in place an effective bilateral convention concerning service.

Jurisdiction and service of witness summons

33. The principle stated by Stanley Burnton LJ in [57] of his judgment in *SSL International* is of general application. It does not, I consider, apply only in the context of service of originating process although the rules which allow for service out of the jurisdiction clearly contemplate the court exercising substantive jurisdiction over a defendant who is served in accordance with those rules. It applies also in the context of a witness summons. Indeed, the principle is even stronger in this context than in the context of service or originating process: perhaps the most important purpose of service of the originating process is to notify the defendant of the claim, enabling him to decide how to respond to it whereas a witness summons has a direct effect on the prospective witness, compelling him to attend at the hearing to give evidence.

34. The English court will not compel an individual who has no relevant connection with the UK to attend to give evidence. In *MacKinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] 1 Ch 482, the plaintiff had obtained *ex parte* an order from the Master to inspect documents in New York of Citibank and other banks which had branches in London. Hoffmann J concluded that the order should be discharged. The general principle was that the court did not have

jurisdiction to issue such orders to non-residents save in exceptional circumstances on the basis that, where sovereign states have agreed alternative procedures for obtaining evidence, those procedures create a rebuttable presumption that they are the appropriate ones to utilise and that it would thereby subvert the sovereignty of the state for the court to circumvent the procedures. Hoffmann J said that, in such a case, "an infringement of sovereignty can seldom be justified except perhaps on the grounds of urgent necessity relied upon by Templeman J in *London and County Securities v Caplan*...". His analysis was directed at a case where the bank had a branch in London where it could be served with the order there. But in relation to a bank with no branch in the UK he said this (at pp 490-1):

> "The plaintiff therefore wishes to obtain the books and documents from Citibank itself. If Citibank did not have a branch in England, there would be only two ways in which this could be done. The first and more orthodox route would be to apply to a master under R.S.C., Ord. 39 for the issue of letters of request to the courts of New York specifying the documents required to be produced. The United States and the United Kingdom are both parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and, subject to any questions of privilege or public policy under New York law (compare section 3 of the Evidence (Proceedings in Other Jurisdictions) Act 1975) this court is entitled under the Convention to the assistance of the New York courts in obtaining evidence for the purposes of the pending action.
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> The second route is for the plaintiff to apply directly to a court in New York under provisions of United States or New York legislation. To adopt this course, the plaintiff would first have to obtain the leave of this court: see *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V. [1986] Q.B. 348* and the defendants, who are not party to this motion, would be entitled to be heard on an application for leave. At the moment, however, I cannot see why, subject to any question of costs, the plaintiff should not obtain such leave if a direct application is likely to be more expeditious than letters of request…."

35. I see no reason why the same should not apply to an individual. Further, I see no reason why a similar approach should not apply in relation to the obtaining of evidence from a prospective witness, that is to say by invoking the letters of

request to the Jersey court, Jersey being a party to the Hague convention. It may be possible to apply directly to the Jersey court for assistance, but I do not know if that is so.

36. I have been referred to *Phipson on Evidence* (17th ed) at 8-32. This section concerns witnesses within the UK and who can therefore be served in the UK. In the present case, Mr Young and Mr Machon were not in the UK. Neither has a residence in the UK and neither carries on business here. Mr Young's affidavit shows that their presence in the UK has been infrequent and has had nothing to do with the business of the general partner of which they were directors and which, in any case, was dissolved in 2008. I have no doubt that did not have a presence in the UK which would have justified the court assuming jurisdiction over them in accordance with the principles explained in *SSL International*. Their infrequent visits to the premises of those of the Sanne group of companies or which they are directors is wholly inadequate to found a presence for that purpose. Accordingly, this paragraph of *Phipson* does not appear to me to be relevant, but I will return to it later.

37. The next paragraph of *Phipson* deals with witnesses out of the jurisdiction. It states that the English court will not compel a non-party abroad to provide documentary or oral evidence, citing *MacKinnon*. I agree with that, for the reasons given above.

38. Accordingly, it is clear that under the CPR it would not be possible to serve witness summonses on Mr Young and Mr Morgan. They have no presence here to found a personal jurisdiction over them. In any case, there needs to be service under the CPR but there is no provision of CPR Part 6 which allows service on

them at the address in England of the Sanne group companies since that address is not a place of business of either of them.

39. Mr Thornhill's original case was that such service was possible because that address was a place of business of Mr Young and Mr Morgan. He effectively accepted that that was not so and that he could not rely on the application, by analogy, of CPR Part 6 to show that they were effectively served in England. Changing tack, he submitted that CPR Part 6 was not, after all, the relevant instrument by which to ascertain the service requirement of Rule 16 of the Tax Chamber Rules. Thus far I am in agreement with his revised argument.

40. Mr Thornhill then submits that the requirements of Rule 16 have been met. The tribunal has issued a summons and it has in fact been received by Mr Young and Mr Machon. In effect, although he did not put it this way, he is saying that the Tax Chamber Rules amount to a specific provision allowing the tribunal to exercise jurisdiction against persons not within the jurisdiction in the same way as the provisions of CPR Part 6 for service out of the jurisdiction amount to a specific provision: see [47] of the judgment of Stanley Burnton LJ in *SSL International*. I reject that argument. I do not accept that the Tax Chamber Rules (or indeed any of the TPR) were intended to abrogate the common law principle in such a broad way. In a situation similar to that in *City & County Properties* the sending of a witness summons to the prospective witness's residence will doubtless be effective if it is actually received (whether received when he returns home or is forwarded to him abroad). If it is not received, he can apply to have it set aside. But where, as in the present case, the prospective witnesses have no presence in the UK, the Tribunal does not have jurisdiction over them. If the witness summons is in fact received by the prospective witness he can, of course,

apply to have it varied or set aside: if he can show that he is not subject to the jurisdiction of the tribunal, the appropriate course, subject to one qualification, is to set the set aside.

41. The qualification is this. The case might be one where, were the prospective witness to be served if he happened to visit the jurisdiction, a witness summons would be appropriate. This is where 8-32 of *Phipson* comes into play. It is stated there as follows:

> "A witness summons may be served on a person during a temporary visit to the United Kingdom, and it is open to the court to set aside the summons if it considers that it would be unduly burdensome to require the individual to return to the United Kingdom for the trial. 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 United Kingdom, to produce documents held outside the jurisdiction relating to business conducted outside the jurisdiction, because the summons would be an infringement of the local sovereignty."

42. The second sentence reflects Hoffmann J's decision in *MacKinnon*. No authority is cited for the first sentence. It seems to me to be correct, in principle, and, of course, the tribunal has the same power to set aside the witness summons on its merits as it would have in a purely domestic case. Mr Thornhill submits that the witness summonses in the present case should not be set aside because Mr Young and Mr Machon may visit England and, if either of them did so, CLF would wish to be able to deliver the summons by hand (the process envisaged by Rule 13(1)(a), (3). It is possible to issue a claim form against a foreigner over whom the court has no jurisdiction. But unless the claim is suitable for service out of the jurisdiction, that will not get the claimant anywhere, save that it leaves open the possibility that if the potential defendant visits the UK he can be personally served. Once here he is, as Stanley Burnton LJ observed, here and amendable to the court's jurisdiction.

43. It may be that there are cases where that course could properly be taken in relation to a witness summons. But in such a case, the tribunal ought, in my view, at the very least direct, pursuant to a combination of its case management powers under Rule 5 and its powers under Rule 13(1)(b) that the witness summons may be brought to the attention of the prospective witness by delivery by hand and that it is not to be treated as delivered or received in any other way, notwithstanding that the prospective witness has received it, or a copy, in some other way. Further, the prospective witness should be permitted to apply to set the witness summons aside on its merits.

44. In my judgment, the present case is not one where it would be appropriate to adopt this course quite apart from the merits challenge to the witness summonses which the Judge accepted (and which are subject to CLF's appeal). The hearing is, as I have said, set for 9 – 17 March. It will be entirely unsatisfactory and, I suggest, disruptive of the hearing if Mr Young and Mr Machon simply give their evidence for the first time in examination in chief even though CLH has indicated the areas of questioning – thus enabling Mr Young and Mr Machon to undertake some preparation and for HMRC to have some idea of the evidence that they might want to adduce in response. I do not consider that such disruption should be countenanced at this stage or that the hearing date should be jeopardised by the need for HMRC to apply for an adjournment either before or during the hearing. In any case, it is not clear that the tribunal will be willing to admit the evidence of Mr Young and Mr Machon at the hearing. CLF have not approached the Judge for a ruling on, or even a non-binding indication of her attitude to, this aspect.

45. The parties have attempted meet this difficulty by considering the preparation of witness statements. But there is an impasse since Mr Young and Mr Machon are

not prepared to incur more expense (over an above that which they have already incurred in relation to their set-aside application) without some sort of costs undertaking from CLF, and CLF is not willing to give such an undertaking. The reality, I fear, is that witness statements will not be ready in time for the hearing. If that fear proves to be unfounded, then well and good; and it may be that Mr Young and Mr Machon would then be prepared to attend voluntarily.

46. Quite apart from all of that, there is the issue, which forms part of CLF's appeal, of full and frank disclosure. There is an issue about whether there is any duty of full and frank disclosure in relation to the issue of witness summons by the tribunal. The cases on full and frank disclosure in the courts are primarily concerned with cases where without notice injunctions are sought. Such injunctions may turn out to have been wrongly granted for the defendant may ultimately succeed in the action. To guard against the injustice of a wrongly granted injunction, the court requires a cross-undertaking in damages. It also required that there be full and frank disclose of material facts and of defences that might be raised. The consequence of a material non-disclosure may be that the injunction is discharged and, in extreme cases, even a refusal to renew the injunction on a further application when, had there been proper disclosure in the first place, the injunction would be continued.

47. This requirement is not restricted to injunctions, however. In any case where the court or the tribunal is asked to exercise a discretion in the absence of a person who is likely to be affected and who has no notice of the hearing, in the sense of notice sufficient to enable him to attend, the applicant should inform the court of material matters which could sensibly be seen as affecting how the discretion should be exercised. I do not suggest that the duty is as extensive in the case of

the issue of a witness summons by the tribunal as it is in the case of interim, without notice, injunctive relief in an action. In the court system, ordinarily speaking, the issue of a witness summons does not need the court's permission and there is no scope for full and frank disclosure in the first place. That there is such a requirement in the tribunal is, I imagine, to provide a gateway to prevent the excessive and oppressive use of witness summonses. The vast majority of the work of the tribunals which are governed by various iterations of the TPR concerns disputes between an aggrieved citizen and the State and very often involve litigants in person. The tribunal's involvement at the issue stage ensures that there are not endless applications by the relevant Government departments to set aside witness summonses against their employees (*eg* social security officers, HMRC officers) whose oral evidence will add little if anything to the other available and essentially uncontentious evidence.

48. But whatever the scope of the duty of disclosure in such cases – a matter I do not propose to address – I have no doubt that an applicant must not mislead the tribunal. In the present case, the Judge was of the view that she was mislead by the assertion made on behalf of CLF that Mr Young and Mr Machon had refused to give evidence when it was quite clear that they had not. What they had done was to decline to agree to give evidence until certain, reasonable, questions had been answered. Although they had been answered by the time of the set-aside hearing, it does not detract from the fact that the Judge was misled. Her conclusion is set out at paragraph 7 above: had she known of the true state of affairs concerning the willingness or otherwise of Mr Young and Mr Machon to give evidence, she would not have issued the witness summonses. I acknowledge that CLF's appeal is partly on the basis that she erred in law on other aspects of

her decision and so it would follow that her decision, had she known of the true facts, would have been equally flawed. But whether or not she would have been right to refuse issue the witness summonses is beside the point. The point is that she exercised her discretion in a way that she would not, she says, have exercised it.

49. This conduct on the part of CLF is another reason, sufficient in itself but in combination with my previous reasons compelling, for refusing to adopt a procedure which allows the witness summonses to stand with the potential for delivery by hand to Mr Young and Mr Machon if they come to England. If CLF wishes to have in its hands witness summonses available to deliver by hand to Mr Young and Mr Machon should they happen to come to England before or during the hearing, it will need fresh witness summonses. That, in practice, is unlikely to be achieved not least because of the lateness of any fresh application. I do not consider that it is for the tribunal (or for me on this appeal) to assist CLF to escape the consequences of its own conduct. I accept, of course, that the witness summonses were applied for and issued in good time; and although CLF cannot be blamed for the time which it has taken to challenge the witness summonses and to reach the decision on this appeal, Mr Young and Mr Machon cannot be blamed either – and nor can the tribunal.

50. That is sufficient to deal with the appeal against the Judge's decision to set aside the witness statements. Save to the extent that that have arisen in my discussion above, I have not dealt with the grounds of appeal raised by CLF. I do not propose to do so. Instead, I have dealt with the matter on considerations of jurisdiction, service and delivery of documents in the tribunal system. Save as explicit or implicit in what I have said, above (in particular in relation to

jurisdiction and full and frank disclosure), it should not be taken that I either agree or disagree with the criticisms made by Mr Thornhill of the Judge's reasoning or that I either agree or disagree with the submissions that she erred in law.

Conclusion

51. My conclusion is that the tribunal had no jurisdiction to summons Mr Young and Mr Machon. I decline to follow the course which Mr Thornhill invites me to make under which the witnesses summons would stand but would be effective if, but only if, they are delivered to Mr Young and Mr Machon within the jurisdiction.

52. Accordingly, CLF's appeal is dismissed.

53. This decision represents my written reasons for the purposes of Rule 40(4) of the Upper Tribunal Rules. I do not consider that the decision falls within Rule 40(2) and (3). Accordingly, there will no further decision notice. There is a right of appeal which should be made to the Court of Appeal. Permission will be needed from the Upper Tribunal or from the Court of Appeal. The time for seeking permission to appeal from the Upper Tribunal is laid down in Rule 44 of the Upper Tribunal Rules.