EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2014/0006

BETWEEN:

JOSEPH W. HORSFORD

Appellant

and

GEOFFREY CROFT

Respondent

Before:

The Hon. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On written submissions:

Mr. Joseph Horsford in person
Ms. E. Ann Henry, QC for the Respondent

2014: October 22.

Civil appeal – Interlocutory appeal – Whether statements made in witness statements were irrelevant and scandalous – Whether the learned master was correct in striking out statements as irrelevant and scandalous – Whether learned master exercised discretion wrongly

The appellant filed an amended claim against the respondent for assault and battery and sought aggravated and exemplary damages. In support of his amended claim he filed two witness statements, one in which he provided the evidence and the other witness statement was filed by his witness Mr. Robert Jackson. The respondent filed an application with an affidavit in support to strike out several paragraphs of both witness statements complaining that the paragraphs were irrelevant and scandalous, and were more prejudicial than probative in value. Further, he argued that the inclusion of the matters sought to be struck out will unnecessarily protract the proceedings by reason that they introduce matters which are not the subject of the proceedings but which have already been adjudicated upon by the court.

The application came on before the learned master who found that the last sentence in paragraph 20 and paragraphs 1 to 10 in addition with 23 to 26 of the appellant's witness statement, were superfluous and irrelevant to the determination of the cause of action in the claim. The master also found that the last sentence in paragraph 22 referred to previous litigation between the parties. In relation to the Mr. Jackson's witness statement, the learned master found that paragraph 20 dealt with an issue prior to the event which was of no consequence to the claim for assault and battery and that paragraph 22 was irrelevant, opinion evidence. Accordingly, the master struck out the impugned paragraphs in both the appellant's and Mr. Jackson's witness statements.

The appellant took issue with the decision of the master and appealed the judgment alleging that the master erred in striking out the relevant paragraphs and sentences as they embody the action and pattern of the respondent's conduct up to and subsequent to the time of the alleged wrongful act.

Held: allowing the appeal in part; setting aside the strike out order in relation to the appellant's witness statement and paragraph 20 of Mr. Jackson's witness statement; dismissing the appeal in relation to paragraph 22 of Mr. Jackson's witness statement; and awarding costs to the appellant in the appeal and in the court below, to be assessed, if not agreed, within 21 days, that:

1. A witness statement should contain the evidence which a person would be allowed to give orally. Legal arguments or opinion evidence (except from someone who is qualified to provide that evidence), or irrelevant evidence should not be included in a witness statement. Any matters of information or belief which are admissible must state the source of any such matters of information or belief. Paragraph 20 of Mr. Jackson's witness statement was clearly inadmissible in evidence as it failed to disclose the source of his belief.

   Rule 29.5(1)(e) of the Civil Procedure Rules 2000 applied.

2. It is the law that when the state of mind of a party is material, all facts and declarations from which it may be inferred, whether previous or subsequent to the transaction are, in general, evidence either for, or, against him. Particularly, where a claimant seeks to be awarded exemplary damages it is necessary for the evidence in support of the allegation of unjust enrichment on the part of the defendant to be placed before the court. In the present case, the evidence given by the appellant in his witness statement was evidence which provided the historical and factual matrix of the alleged dispute that is at the heart of the alleged assault and battery. The paragraphs did not merely relate evidence from previous disputes but served very useful and necessary purposes and were relevant to the nature of damages that may be awarded.

   Rookes v Barnard and Others [1964] AC 1129 applied.

3. Allegations or evidence are held to be scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the other party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct. However, an allegation which is scandalous, as, for example, by making charges of dishonesty, immorality or outrageous conduct, cannot be struck out if it is necessary or relevant to any issue in the action. The appellant's evidence in his witness statement provided evidence which was significant and indicated the relevant conduct of the respondent both before and after the date of the alleged assault and battery. This evidence is necessary and relevant to the issue of the type of compensation that may be awarded to the appellant should he be able to prove his claim against the respondent.

   Christie v Christie (1873) LR 8 Ch 499 applied.

4. In order to successfully challenge the exercise of discretion it is necessary to show that the master has exceeded the generous ambit within which a reasonable disagreement is possible. The learned master in exercising her discretion erred in principle as she concluded that the impugned paragraphs were irrelevant and scandalous without embarking on the critical examination of the evidence in an effort to determine the relevance to the issues.

   AEI Rediffusion Music Ltd v Phonographic Performance Ltd (Costs) applied.

5. Disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action.

   Stroude v Beazer Homes Ltd [2005] EWCA CIV 265 applied.

JUDGMENT

[1] BLENMAN, JA: This is an interlocutory appeal by Mr. Joseph W. Horsford against the judgment of the learned master in which she struck out several paragraphs of the witness statement that was filed by him in support of his amended claim and that of the witness statement that was filed by Mr. Robert Jackson also in support of the amended claim. Indeed, Mr. Horsford has filed the amended claim against Mr. Geoffrey Croft. He is dissatisfied with the master's judgment and has appealed against the decision of the master and seeks to have

this Court set aside the judgment. He also seeks an order that Mr. Croft be made to pay his costs in this Court and in the court below.

Background

[2] Mr. Horsford, appearing in person, filed an amended claim for assault and battery with a deadly weapon, to wit, a motor car against Mr. Croft. In his amended claim he seeks aggravated and exemplary damages. As alluded to earlier, he filed two witness statements in support of his amended claim, one in which he provided the evidence and the other witness statement was filed by his witness Mr. Jackson.

[3] Acting pursuant to rule 29.5(2) of the Civil Procedure Rules 2000 ("CPR 2000"), Mr. Croft filed an application, which was supported by an affidavit, in which he sought to have the court strike out several paragraphs of both witness statements. Among other things, he complained that most of the matters in Mr. Horsford's and Mr. Jackson's statement did not concern the case at bar. He also complained that several of the paragraphs of Mr. Horsford's witness statements were irrelevant and scandalous, and were more prejudicial than probative in value. Further, he sought to have the paragraphs of the witness statement struck on the basis that the sole issue for consideration by the court is whether or not the defendant assaulted and/or committed battery against the claimant as alleged or at all. He complained that the inclusion of the matters sought to be struck out will unnecessarily protract the proceedings by reason that they introduce matters which are not the subject of the proceedings but which have already been adjudicated upon by the court.

[4] Mr. Horsford opposed the application to strike and filed an affidavit in answer to the affidavit of Mr. Croft, in which he maintained that the facts in his and Mr. Jackson's witness statements were all relevant to the case at bar. Mr. Horsford also stated that Mr. Croft had filed and served his defence in which he had admitted much of which he now sought to have struck. He urged the court not to strike out any paragraphs of his or Mr. Jackson's witness statement.

[5] The learned master having heard the application struck out paragraphs 1-10 and paragraphs 23-26 of Mr. Horsford's witness statement together with the last sentence in paragraphs 20 and 22. However, she refused to accede to Mr. Croft's request to strike out other paragraphs of Mr. Horsford's witness statement. Shortly, I will go into detail in relation to this. In similar vein, the master struck out paragraphs 20 and 22 of Mr. Jackson's witness statement while refusing to strike out others based on Mr. Croft's application.

[6] I will now briefly highlight the relevant paragraphs of the master's judgment.

The judgment

[7] In relation to Mr. Horsford's witness statement the learned master stated at paragraph 7 as follows:

> "The claimant's claim is for damages and other reliefs arising out of assault and battery where the claimant alleges that he was struck by the defendant with his motor vehicle. Upon review it is noted that the claimant's witness statement is replete with irrelevant details which are not necessary for the determination of the issues in the claim. Paragraphs 1 to 10 and paragraphs 23 to 26 contain information relating to issues of succession from which the claimant obtained title to the parcel of land on which the alleged trespass was committed. The paragraphs also relate to letters of administration and evidence from previous disputes in relation to the ownership of the land, issues already litigated between the parties which in my considered view are not relevant in the extant claim. It has been accepted that statements in pleadings in previous litigation are not evidence against the party pleadings in subsequent proceedings and are therefore inadmissible. Paragraphs 1 to 10 and 23 to 26 are superfluous and irrelevant for the determination of cause of action in the extant claim form. Accordingly paragraphs 1 to 10 and 23 to 26 of the witness statements of Mr. Joseph Horsford are irrelevant and scandalous and are hereby struck out."

[8] In paragraph 9 of the judgment the learned master stated:

> "I accept the defendant's contention that the last sentence in paragraph 20 is superfluous and irrelevant to the issue of assault and battery and should be struck out. I also accept that the last sentence in paragraph 22 refers to previous litigation between the parties which are also irrelevant to the issue to be determined on the claim."

[9] In the above circumstances, the master ordered that paragraphs 1 to 10 and paragraphs 23 to 26 of Mr. Horsford's witness statement be struck out, together with the last sentences in paragraphs 20 and 22.

[10] In relation to Mr. Jackson's witness statement, the master held at paragraph 11 of the judgment as follows:

> "I am on the view however that paragraph 20 deals with an issue prior to event which is of no consequence to the claim for assault and battery. Paragraph 22 is opinion evidence which is more prejudicial to the character of the defendant and is irrelevant in the proceedings before the court."

Accordingly, the learned master struck out paragraphs 20 and 22 of Mr. Jackson's witness statement.

[11] I turn now to address the ground of appeal.

Ground of Appeal

[12] In prosecuting his appeal Mr. Horsford has relied on four grounds of appeal. With no disrespect intended they are conveniently crystallised into one ground namely:

(1) Whether the learned master erred in striking out the paragraphs 1 to 10 and 23 to 26 of Mr. Horsford's witness statement together with the last sentence of paragraphs 20 and 22, in addition to paragraphs 20 and 22 of Mr. Jackson's witness statement.

[13] I propose to address the submissions of both sides in relation to the ground of appeal.

Mr. Horsford's submissions

[14] Mr. Horsford, in passing, referred to his amended claim and stated that it sets out the relationship and duty of the appellant in relation to the portion of land and the circumstances that give rise to the facts on which he seeks to rely at trial. These embody the action and pattern of Mr. Croft's conduct up to and subsequent to the time of the alleged wrongful act.

[15] Mr. Horsford submitted that the paragraphs of both of the witness statements that were struck out were not scandalous or unnecessary, but rather they relate to material facts that were required to be proven in his amended claim. He denies that the paragraphs were more prejudicial than probative in value. He says that the paragraphs that were impugned are consistent with the pleaded facts. Mr. Horsford also argued that the learned master was wrong to strike out the relevant paragraphs of the witness statements and the material sentences of his witness statements. He stated that rule 8.7 of CPR 2000 required the entire facts on which he relied to be pleaded. This is exactly what he did since the witness statements show the circumstances of the entire case and conduct of the parties. Also, he complained that Mr. Croft had provided no evidential basis upon which the learned master could have concluded that the paragraphs which were struck out were irrelevant and scandalous.

[16] Mr. Horsford said that in his amended claim he was seeking aggravated and exemplary damages for humiliation, assault and battery. Therefore the damages sought are at large and it is open to the court to take into account the motive and conduct of the defendant where they aggravate the injury that was done to him. He referred the Court to the well-known pronouncement of Lord Devlin in Rookes v Barnard and Others.[1] Mr. Horsford further submitted that the learned master's failure to consider the evidential requirements in cases where damages are at large, as in the case at bar, contributed to the error of striking out the material paragraphs.

[17] Finally, Mr. Horsford stated that the learned master had no good reason to strike out the paragraphs of the witness statements. He therefore urged the Court to quash the judgment of the master and set aside the order. He also implored the Court to award him costs in this Court and in the lower court against Mr. Croft.

[1] [1964] AC 1129 at p. 1221

Mr. Croft's submissions

[18] Learned Queen's Counsel, Ms. E. Ann Henry, submitted that the learned master acted quite properly in striking out the relevant paragraphs from Mr. Horsford and Mr. Jackson's witness statements, together with the offending sentences of paragraphs 20 and 22 of Mr. Horsford's witness statements that were alluded to earlier.

[19] Ms. Henry, QC stated that the learned master made certain important findings of fact and law in relation to Mr. Horsford's witness statement, particularly in relation to paragraphs 1 to 10 and 23 to 26. Indeed, the master determined that the paragraphs were replete with superfluous and irrelevant details which, in the main, were repeated evidence from previous disputes which had already been litigated between the parties. By reason of those findings, the learned master struck out paragraphs 1 to 10 and 23 to 26 of Mr. Horsford's witness statement. For similar reasons and based on similar findings, the learned master struck out the last sentence from paragraphs 20 and 22 of Mr. Horsford's witness statement as being irrelevant and scandalous.

[20] Ms. Henry, QC reminded the Court that in relation to the witness statement of Mr. Jackson, the learned master struck out paragraph 20 for the reason that it concerned an issue prior to the event and was irrelevant to the amended claim. The learned master also struck out paragraphs 22 of the witness statement of Mr. Jackson for the reason that it is opinion evidence and that it was more prejudicial than probative and, in any event, was irrelevant.

[21] Learned Queen's Counsel, Ms. Henry, submitted that in considering the application before her, the learned master had regard to rule 29.5(2) of the CPR 2000 pursuant to which the application to strike was made by Mr. Croft and additionally to the learning in the case of John Duggan, as executor of the Estate of Jean Duggan, deceased and as executor of the Estate of Joseph P. Kelly, Jr. deceased v HMB Holdings Limited et al,[2] May v Taylor[3] and In Re

[2] Antigua and Barbuda, ANUHCV2002/0055 (delivered 29th May 2009, unreported).

Whiteley and Roberts' Arbitration.[4] It is of significance that in making her decision the learned master did not strike out all of the paragraphs of the witness statements requested in the application. Ms. Henry, QC submitted that this underscores the thoughtful approach taken by the learned master to her task. She reminded the Court that rule 29.5(2) is in such terms as to permit the court to exercise a discretion as to whether or not it will allow the application made thereunder by a party to litigation.

[22] Next, Ms. Henry, QC said that it is a well-established legal principle that the Court of Appeal will interfere in the exercise of discretion by a trial judge if it is satisfied that "the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him" in the exercise of his discretion. This was the statement of the principle given in Ward v James[5] which followed the decision in Evans v Bartlam[6] in which the statement of the principle was expressed in similar terms.

[23] Ms. Henry, QC submitted that rule 29.5(2) of the CPR 2000, as interpreted in the John Duggan v HMB Holdings Limited et al case, requires the court to carefully consider the content of the witness statements to determine whether, in the judgment of the court, it is offensive within the meaning of rule 29.5(2) and may be struck out. It is accepted that the court in pursuing this exercise should be constrained as expressed by Lord Templeman in Williams and Humbert Ltd. v W. & H. Trade Marks (Jersey) Ltd.:[7]

> "[I]f an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself."[8]

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[3] (1843) 5 Man & G 26.
[4] [1891] 1 Ch 558.
[5] [1965] 1 All ER 563 at p. 293.
[6] [1937] AC 473.
[7] [1986] AC 368.
[8] At pp. 435-436.

[24] Learned Queen's Counsel, Ms. Henry, finally submitted that the learned master in her determination of the application gave sufficient and appropriate weight to the matters which she ought to have considered and her decision was consistent with the Rules and the applicable legal principle. She therefore submitted that the appeal should be dismissed with costs to Mr. Croft.

Discussion and Analysis

[25] Before embarking on an in-depth discussion in relation to the sole ground of appeal it is prudent to have a cursory look at the material aspects of the pleadings in order to ascertain their nature and to assess their significance, if any.

The Statement of Claim

[26] In paragraph 1 of the statement of claim, Mr. Horsford states that he is the sole administrator of the Estate of William Horsford (Estate of Horsford) and that the path in question belongs to the Estate of Horsford. Mr. Croft who owns adjoining land has no permission to use the path and he continues to use the path despite Mr. Horsford having told him not to do so.

[27] In paragraphs 2 and 3 of the statement of claim, Mr. Horsford indicated that in 2008 Mr. Croft had filed an action in the High Court claiming that two lanes that pass on either side of Mr. Croft's property gave him unrestricted access to his house. Also Mr. Croft filed an injunction to restrain Mr. Horsford from restricting Mr. Croft's access along the lanes. Mr. Croft lost the appeal in the Court of Appeal and insists that he will continue to use the lane on the east side of his (Mr. Croft's) land to access his property.

[28] In paragraph 11 of the statement of claim, Mr. Horsford states that Mr. Croft having lost in the Court of Appeal on 1st October 2011 had applied for conditional leave to appeal to Her Majesty in Council. On 21st December 2011, Mr. Croft had also applied for an interim injunction to restrain Mr. Horsford from restricting Mr. Croft from using the same east lane. The Court of Appeal dismissed the application for the injunction pending the conditional leave to appeal and a stay.

Mr. Horsford alleges that it was following the dismissal of the application for the interim injunction that Mr. Croft served the notice of discontinuance of his claims.

[29] At paragraphs 6, 7, 8, 9, 14, 15 of the statement of claim, Mr. Horsford alleges that he was assaulted by Mr. Croft and the nature of the injuries he suffered together with humiliation that was occasioned. These are the bases of his amended claim.

[30] I turn now to briefly examine the defence.

The Defence

[31] In paragraph 1 of his defence, Mr. Croft denied that he had committed any act of assault and battery. In paragraph 2 of the defence he admitted that he has constructed a house on the parcel of land that he owns. Mr. Croft states in paragraph 3 of the defence that he has driven on the road which gives access from the public highway to his house notwithstanding Mr. Horsford's repeated demands that he ceases to do so.

[32] In paragraphs 4 and 5 of the defence, Mr. Croft admitted that he had unsuccessfully instituted a claim in the High Court but denies that he has become angry or belligerent as a consequence. In paragraph 6 of the defence, Mr. Horsford indicates that he accepts the decision of the Court of Appeal but asserts that he has a right of access over the road in question. In paragraphs 8 and 9 of the defence, Mr. Croft denies Mr. Horsford's allegations in relation to the assault and battery.

[33] The above represents the material aspects of the pleadings and it was in that context that Mr. Horsford filed the two witness statements which the learned master held contained irrelevant and scandalous information.

[34] I will now address some general principles of law and make some observations that are pertinent to the appeal at bar.

General Principles and Observation

[35] It is the law that the legal burden of proof is on the person who asserts. Mr. Horsford has the onus to prove what he asserts in his amended statement of claim. Evidential law dictates (1) which party must prove the facts in issue and (2) the type of evidence that is admissible.

Witness Statement

[36] The witness statement should contain the evidence which that person would be allowed to give orally. A witness statement should not contain inadmissible evidence. Legal arguments or opinion evidence (except from someone who is qualified to provide that evidence), or irrelevant evidence (i.e. evidence which has no bearing on the facts in issue) should not be included in the witness statement. In effect, the purpose of witness statements is to replace oral testimony.[9] A witness statement must therefore address all the factual issues in the case upon which the witness is in a position to comment. It is unimpressive when a witness mentions something of importance in oral evidence that does not appear in the witness statement.

Case Management

[37] It is accepted that the court has a duty to manage cases efficiently in keeping with the overriding objective. However, in circumstances where a litigant appears in person, accommodation should be made for the drafting style of a lay person which may well be very different from that of a lawyer. In any event, witness statements, as far as possible, should be crafted in the witness's own words and address the issues in the claim. It is important to recognise that the kernel of Mr. Horsford's case is that as a consequence of the ongoing dispute or feud in relation to the path between himself and Mr. Croft the latter assaulted him when he sought to prevent him from continuing to use the path.

[38] It is noteworthy that the issue of whether or not a case management judge should deal with the question of admissibility of evidence at a preliminary hearing was

[9] See rule 29.5 (1)(e) of CPR 2000.

addressed in Stroude v Beazer Homes Ltd.[10] In this case the Court of Appeal of England answered the question in the negative. It held that:

> "In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action..."[11]

I will now look briefly at the claim for exemplary damages.

Exemplary damages

[39] In the appeal at bar, Mr. Horsford seeks, among other things, exemplary damages on the basis of unjust enrichment. Where a claimant seeks to be awarded exemplary damages it is necessary for the evidence in support of the allegation of unjust enrichment on the part of the defendant to be placed before the court.

[40] There are two categories in which exemplary damages are available to a claimant. In the appeal at bar, Mr. Horsford seeks to rely on the second of the two common law categories in which Lord Devlin, speaking in Rookes v Barnard and Others, held that exemplary damages are available to a claimant. Lord Devlin had this to say:

> "Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which either he could not obtain at all or not obtain except at a price greater than he wants to put down."[12]

[41] In determining whether to award damages the court may take into account, according to the decision in Praed v Graham[13] the conduct of the defendant right down to the time of judgment. Indeed, the amount that is awarded by way of exemplary damages can be influenced by the conduct of the defendant. Lord Devlin in Rookes Barnard and Others stated that:

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[10] [2005] EWCA CIV 265.
[11] At para. 9.
[12] At p. 1227.
[13] (1889) 24 QBD 53.

> "…a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."[14]

[42] It is the law that when the state of mind of a party is material all facts and declarations from which it may be inferred, whether previous or subsequent to the transaction are, in general, evidence either for, or, against him.

Scandalous or irrelevant

[43] Allegations or evidence are held to be scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the other party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct. However, an allegation which is scandalous, as, for example, by making charges of dishonesty, immorality or outrageous conduct, cannot be struck out if it is necessary or relevant to any issue in the action.[15]

[44] Having set out succinctly the nature of the pleadings and foreshadowed the factual and legal issues that are joined between the parties and some of the relevant legal principles, I propose now to briefly examine the paragraphs of Mr. Horsford's witness statement that were struck out in order to determine whether there is any merit in Mr. Horsford's complaint against the master's striking out order.

[45] Paragraphs 1 and 2 of the witness statement indicate the nature of his standing as the sole administrator of the Estate of Horsford in relation to the land in question. This indicates that he has the right to prevent Mr. Croft from using the path which forms part of the Estate. It is clear that he is not merely reciting matters of

[14] At p. 1228.
[15] See Christie v Christie (1873) LR 8 Ch 499.

succession but is providing the context to his amended claim. This is consistent with paragraphs 1 and 2 of his statement of claim.

[46] Paragraphs 3 and 4 indicate how the path that is in issue came to be created and the historical significance of the path. They seek to indicate that it is not a legal path but rather it is one which belongs to the Estate of Mr. Horsford. In my view, the paragraphs provide very relevant background information which supports Mr. Horsford's case that Mr. Croft has no right of access over the path.

[47] Paragraphs 5 and 6 of his witness statement indicate Mr. Horsford's view of the history of the existence of a dispute in relation to the path and how it was resolved. He recounts the matters so as to provide the historical and factual matrix of the alleged dispute that is at the heart of the alleged assault and battery and to show that Mr. Croft knows what he is doing is wrong since it was already the subject of litigation which Mr. Croft lost. The paragraphs do not merely relate evidence from previous disputes but serve very useful and necessary purposes and are relevant to the nature of damages that may be awarded.

[48] Paragraphs 6, 7, 8, 9 and 10 indicate Mr. Horsford's perspective of the facts and circumstances that gave rise to the continued strained relationship between himself and Mr. Croft. These are matters that the trial court may well take into account, if the case were to get to that stage, in order to determine the quantum of damages, if any, Mr. Horsford should be awarded bearing in mind he seeks both aggravate and exemplary damages. They also indicate Mr. Horsford's account of Mr. Croft's conduct which is relevant to the allegation of assault and battery. The evidence that is provided in paragraphs 7-10 of Mr. Horsford's witness statement are matters that will be considered in a claim for exemplary damages.

[49] I do not share the slightest doubt that paragraphs 1-10 of Mr. Horsford's witness statement are not only relevant but crucial to him being able to successfully deploy the amended claim that he has filed against Mr. Croft. They are neither unnecessary nor superfluous, but provide vital evidence.

[50] In relation to the contention that the paragraphs were scandalous, it is the law that is open to a court to strike out matters that are irrelevant and scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action. But such orders are not to be lightly made. One party cannot dictate how the other should provide the relevant evidence. The primary test of whether material is scandalous is whether the matter is relevant to an issue raised by the pleading. It should also be stated that even if a paragraph of a witness statement is not elegantly stated, without more, this is no ground for striking it out. In so far as I have concluded that paragraphs 1-10 of Mr. Horsford's witness statement are very relevant to the issues that are joined it is axiomatic that they cannot be properly held to be scandalous.

[51] In paragraphs 23-26 of Mr. Horsford witness statement he provides evidence which is significant and indicates the relevant conduct of Mr. Croft both before and after the date of the alleged assault and battery. Critically, most of the matters that are related in the impugned paragraphs have relevance to the issue of the type of compensation that should be awarded should Mr. Horsford be able to prove his claim against Mr. Horsford. Far from being irrelevant the alleged evidence indicate matters that seek to indicate Mr. Horsford's position that despite the fact that he has filed the amended claim Mr. Croft still seems to be undaunted. This evidence is plainly admissible and if accepted by the trial court could impact the nature of damages a claimant is awarded e.g. compensatory damages alone as distinct from aggravated and exemplary damages. Should the trial of the amended claim get that far it would be open to Mr. Horsford to lead evidence as to alleged conduct of Mr. Croft both before and after the alleged assault and battery in seeking to prove the latter intention and conduct in relation to the assault and battery.

[52] In passing it is important to state that in a striking out application it is no part of the judicial officer's function to seek to determine whether the evidence will be able to withstand any testing in cross examination. To the contrary, the duty of the court remains one to determine relevance of the evidence to the issues in the matter.

Paragraphs 23-36 of Mr. Horsford's witness statement have met the required relevance threshold.

[53] Still addressing Mr. Horsford's witness statement, I turn to examine Mr. Horsford's complaint in relation to the last sentence of paragraphs 20 and 22 that were struck out by the learned master. There is no basis to support the contention that the last sentence in paragraph 20 was irrelevant and superfluous. It is plain that the statement amounts to very factual matters which are integral to the amended claim. I am unable to see how the statement could have been regarded either as irrelevant or superflous. Even though the last sentence in paragraphs 22 refers to previous litigation it clearly goes towards Mr. Horsford's attempt to establish Mr. Croft's motive and conduct.

[54] Even though the learned master was well intentioned, the critical question was not addressed in seeking to determine whether the impugned paragraphs were relevant. All of the paragraphs that were struck, together with the impugned sentences, are consistent with the factual matrix of Mr. Horsford's amended claim and are very relevant.

[55] Further, I am not of the view that the learned master was correct in characterising the evidence that Mr. Horsford sought to provide in his witness statement, in general and in particular, the paragraphs that were impugned, as unnecessary and irrelevant without asking further the important question of whether they were relevant and admissible. Indeed, the learned master characterisation of paragraphs 1 to 10 and paragraphs 23 to 26 of Mr. Horsford's witness statement as matters that relate to "letters of administration", "evidence from previous disputes in relation to the ownership of the land", "issues already litigated between the parties", and finally "not relevant in the extant claim" is to misapprehend the nature of the evidence and its purpose. It is clear that the learned master did not address her mind to the pleadings and seek to determine what Mr. Horsford hoped to achieve by advancing the evidence in the impugned paragraphs of the witness statements. The relevant paragraphs of Mr. Horsford's witness statement are

consistent with his pleaded case and support his claim for exemplary and aggravated damages.

[56] I turn now to examine the impugned paragraphs of Mr. Jackson's witness statement.

Mr. Jackson's witness statement

[57] At paragraph 20, Mr. Jackson stated as follows:

> "Prior to the incident of 10th April 2012, I believe that Mr Horsford and Mr Croft had some court case going on."

This paragraph of the witness statement is inadmissible in evidence since it offends rule 29.5(1)(e) of CPR 2000. The source of the information or belief was not provided. The learned master was clearly correct in striking out that paragraph. The appeal in relation to this aspect of the master's order is dismissed.

[58] It bears repeating that the learned master held that paragraph 22 is opinion evidence. This is what Mr. Jackson had stated:

> "Mr Croft had always been rowdy and threatening to use his fists on Mr Horsford."

I am unable to see how the above quoted sentence amounts to opinion evidence. It is merely Mr. Jackson stating a fact as he knows; there is absolutely nothing in that statement that could take it to the level of an opinion.

Exercise of Discretion

[59] I agree with learned Queen's Counsel, Ms. Henry, that this appeal amounts to a challenge to the exercise of the learned master's discretion.

[60] In order to successfully challenge the exercise of discretion it is necessary to show that the master has "exceeded the generous ambit within which a reasonable disagreement is possible".[16] The test has alternatively been expressed by Lord

[16] See Tafern Ltd. v Cameron-McDonald and Another Practice Note [2000] 1 WLR 1311 at p. 1317.

Woolf MR in AEI Rediffusion Music Ltd v Phonographic Performance Ltd (Costs)[17] as follows:

> "The conventional approach of this court is conveniently summarised by Stuart-Smith L.J. in Roache v. News Group Newspapers Ltd. [1998] E.M.L.R. 161, 172 in these terms:
>
> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the factors fairly in the scale."[18]

The appellate court will also interfere with the exercise of discretion where the judge's decision was plainly wrong.[19]

[61] In view of the earlier conclusions arrived at, there is no doubt that the learned master in exercising her discretion plainly got it wrong or erred in principle since as alluded to earlier she concluded that the impugned paragraphs were irrelevant and scandalous without embarking on the critical examination of the evidence in an effort to determine the relevance to the issues.

[62] In those circumstances, it behoves the appellate court to seek to exercise the discretion afresh. In so doing the ineluctable conclusion that is arrived at is that the learned master's judgment must be set aside since the relevant paragraphs of Mr. Horsford's witness statement and the sentences in paragraphs 20 and 22 are far from unnecessary and scandalous but provide critical evidence in support of Mr. Horsford's amended claim. In so far as Mr. Jackson's witness statement is concerned, I have no doubt that the learned master exercised her discretion properly in striking out paragraph 20 of the witness statement for the reasons I have indicated. Even though the basis upon which the learned master's exercised her discretion was that it related to an issue prior to the event which is of no consequence, nevertheless, the master came to the correct conclusion since the

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[17] [1999] 1 WLR 1507.
[18] At p. 1523.
[19] See Stuart v Goldberg Linde (a firm) and others [2008] EWCA Civ 2; see also Edy Gay Addari v Enzo Addari, Territory of the Virgin Islands HCVAP2005/0002 (delivered 27th June 2005, unreported).

evidence was inadmissible. The court is required to exercise its discretion afresh in relation to paragraph 22 of Mr. Jackson's witness statement since the learned master erred in this regard. Having exercised the discretion afresh, there is no basis upon which the paragraph could be struck since it is not opinion evidence and amounts to no more than Mr. Jackson seeking to provide relevant evidence based on his knowledge.

Conclusion

[63] For the above reasons, I would allow the appeal against the learned master's judgment and set aside the strike out orders that were made in relation to Mr. Horsford's witness statement. Also, I would allow the appeal in relation to the master's order in relation to paragraph 20 of Mr. Jackson's witness statement but dismiss the appeal in relation to the master's order to strike out paragraph 22 of the said witness statement.

Costs

[64] Mr. Horsford has had a great measure of success in this appeal and therefore is entitled to have his costs on this appeal and in the court below, to be assessed, if not agreed, within 21 days of this order.

[65] I would remit the case to the High Court.

[66] I gratefully acknowledge the assistance received from both sides in this appeal.

Louise Esther Blenman
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal