EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2014/0023

MABLE PHILLIPS
(acting through her Attorney Nancy Mc Kenzie Greene)

Appellant

and

CORRINE CLARA

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

On written submissions:
Ms. Pauline Hannibal for the Appellant
Mr. Deloni Edwards for the Respondent

2015: January 27.

Interlocutory appeal – Whether learned judge erred in striking out portions of witness statement – Hearsay – Section 36E of the Evidence Act – Whether learned judge erred in dismissing application for issue of witness summons – Part 33 of the Civil Procedure Rules 2000

The appellant, Mable Phillips, is said to be over 95 years old and physically frail. In 2006 she gave a power of attorney to the respondent, Corrine Clara, to manage all of her affairs in Grenada. Prior to that, in or about 2004, the appellant had added the respondent to her bank account ("the Account") at Republic Bank ("the Bank") in St. George's, Grenada. The power of attorney in favour of the respondent was revoked by the appellant in March 2013 and that same month Nancy Mc Kenzie Greene, the appellant's step-daughter, was appointed by the appellant as her attorney ("the Attorney"). The Attorney subsequently instituted proceedings against the respondent in the name of the appellant, seeking, among other relief, an order requiring the respondent to account for sums of money withdrawn from the Account.

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On 27th February 2014, the Attorney filed a witness statement ("the Witness Statement") for and on behalf of the appellant. On 17th March 2014, the respondent applied to strike out various portions of the Witness Statement on the bases that they constituted hearsay evidence, are highly prejudicial and were of no probative or no sufficient probative value and therefore were inadmissible. In addition, on 1st April 2014, the appellant applied for permission to issue a witness summons ("the Witness Summons") pursuant to Part 33 of the Civil Procedure Rules 2000 ("CPR 2000") directed to one Garnet Ross, Retail Manager of the Bank, to bring various documents listed in the Witness Summons said to be pertaining to the Account to court on the date appointed by the court. The proceedings in the court below were reaching the pre-trial review stage, however, no date for trial had been fixed.

The two applications were heard by the learned judge in the court below at the pre-trial review. The learned judge, in her decision made on 30th June 2014, struck out various portions of the Witness Statement and dismissed the appellant's application for the issue of the Witness Summons. The appellant subsequently applied for and was granted leave to appeal the learned judge's decision.

Held: Allowing the appeal; setting aside the order of the learned judge made on 30th June 2014 in respect of paragraphs 31(b), (c), (f), (g), (h), (i), (j), and (m) of the judgment, with the exception of paragraphs 33 and 38 of the Witness Statement referred to at paragraph 31(m) of the judgment; setting aside the order of the learned judge dismissing the Witness Summons application and ordering that the same be issued subject to a judge in the court below fixing the time, date and place for the attendance of the witness for the purpose of producing the documents; and setting aside the costs orders made in the court below and ordering that the respondent pays the costs of the appellant below assessed in the sum of $2,500.00 in respect of both applications and costs on this appeal fixed at two thirds of that sum, that:

1. Section 36E(3) of the **Evidence Act** contemplates that the party who is served with a statement containing hearsay evidence should make known to the party serving the statement that the party so served will require the maker of the statements to be called as a witness. Thus, the party serving the statement, having knowledge of this requirement, has an opportunity to put before the court evidence which may satisfy one or more of the circumstances specified in section 36E(4) of the **Evidence Act** or evidence which engages the judge in a consideration of appropriate measures to be taken under CPR 33.7. Accordingly, section 36E(3) of the **Evidence Act** contemplates a step to be taken by the party served with hearsay evidence. The learned judge erred in concluding that the condition of section 36E(3) had not been met by the appellant. This was a step to be taken by the respondent and then, upon being met with a bare refusal or reasons which could not meet the requirements under section 36E(4), the respondent would have been justified in applying to strike out hearsay evidence from the Witness Statement.

   Section 36E(3) and (4) of the **Evidence Act** applied.

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2. No provision in CPR 2000 dealing with witness summonses contemplates or requires that permission for a witness summons ought to be made at case management or before witness statements are filed. Having regard to the tenor and purpose of Part 33 of CPR 2000, the appellant's application for permission to issue the Witness Summons could not be considered as not being expeditious. The proceedings were at the pre-trial review stage and no trial date had yet been fixed. Further, the learned judge overlooked the case management powers which were at her disposal at pre-trial review. Accordingly, she misapprehended the factual basis and had regard to irrelevant considerations when considering the application.

3. There is a distinction to be drawn between an order for disclosure made against a third party and a witness summons to produce documents. In substance, a witness summons to produce documents is nothing more than a *subpoena duces tecum* under the old rules regime and the difference between such summonses and an order for disclosure are reflected in the different procedures provided by CPR 2000. In this appeal, it does not appear that the learned judge addressed her mind to the entire regime dealing with witness summonses under Part 33 of CPR 2000. Had the learned judge given due regard to CPR 33.2 and 33.3, as well as the nature and purpose of the Witness Summons in the circumstances of the case, she would have avoided having regard to irrelevant considerations and generally misapprehending the very nature and purpose of the application. Accordingly, the learned judge's conclusion that the application was one for specific disclosure was wrong.

   Rules 33.2 and 33.3 of the **Civil Procedure Rules 2000** applied; **Tajik Aluminium Plant v Hydro Aluminium AS and others** [2005] EWCA Civ. 1218 applied.

4. In deciding whether to give permission to issue a witness summons, a court should seek to ensure that the application is not being abused; that it is utilised in good faith for the purpose of obtaining relevant evidence; and that it is not a fishing expedition, speculative, oppressive, does not offend against public interest immunity and such like considerations. This is not an exhaustive list, but the considerations will depend on the circumstances of each particular case. In this appeal, it does not appear that the learned judge addressed her mind to these types of considerations. This may have been as a result of her mischaracterizing the nature of the application and treating it as one seeking specific disclosure. The learned judge's conclusion that it was an application for specific disclosure was a fatal error in principle and led her into error in having regard to irrelevant considerations.

   Harrison and another v Bloom Camillin (a firm) (1999) Times, 12 May applied.

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JUDGMENT

[1] **PEREIRA CJ:** This is an interlocutory appeal pursuant to leave granted by a judge of the Court on 23rd September 2014. Written submissions were filed by the appellant, Mable Phillips ("Ms. Phillips") and the respondent on 14th and 27th October 2014 respectively. The appeal arises from the decision of the trial judge, Mohammed J, made on 30th June 2014, in which she ordered the striking out of various portions of a witness statement filed by the appellant's attorney for and on behalf of the appellant on 27th February 2014 ("the Witness Statement") and dismissed the appellant's application for the issue of a witness summons ("the Witness Summons") made pursuant to Part 33 of the **Civil Procedure Rules 2000** ("CPR 2000"). The Witness Summons was directed to one Garnet Ross, Retail Manager of Republic Bank ("the Bank") in St. George's, Grenada to bring various documents specified in the Witness Summons said to be pertaining to account #11123778 'formerly held in the names of Mable Phillips and Corrine Clara'[1] (the claimant and the defendant respectively in the proceedings below) to the court on the date appointed by the court.

The Background

[2] A background summary is necessary for the purposes of placing the issues raised on this appeal into context:

(a) Nancy Mc Kenzie Greene ("the Attorney"), a step-daughter of Ms Phillips, acts on behalf of Ms. Phillips as her duly appointed attorney pursuant to two powers of attorney granted to her by Ms. Phillips on 11th and 18th March 2013. Ms. Phillips is said to be over 95 years old and physically frail. At the relevant times she resided at the St. Martin's Home for the Aged in St. Andrews, Grenada.

[1] Application for issue of witness summons pursuant to Part 33 of the Civil Procedure Rules 2000 (filed 1st April 2014) at p. 1.

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(b) In 2006, Ms. Phillips gave a power of attorney to the respondent to manage all her affairs in Grenada. That power of attorney recited Ms. Phillips as saying among other things, the following:

> "I Mable Phillip ………. at present residing at the St. Martin's Home for the aged St. Andrews. Whereas I am now advanced in age and frail …... I hereby appoint Corrine Clara my lawful Attorney to act in and manage all my affairs in Grenada."[2]

That Power of Attorney was revoked in March 2013. In the same month the Attorney herein was appointed.

(c) The Attorney instituted the claim which is the subject of the proceedings below against the respondent in the name of Ms. Phillips. Ms. Phillip's case, as recorded by the learned trial judge at paragraphs 2 and 3 of her judgment, is that the respondent withdrew large sums of money from her account #11123778 ("the Account") at the Bank and did not apply or use it for her (Ms. Phillips). In 2004 Ms. Phillips had added the respondent to the Account as a joint holder of the Account for convenience of the respondent handling the financial affairs of Ms. Phillips.

(d) Ms. Phillips pleaded that she had obtained from the Bank a statement of the Account for the period 1st January 2012 to 17th May 2013 and had also obtained a statement of account for the period 2006 to 2011. Ms. Phillips sought, among other relief, an order requiring the respondent to account for the sums so withdrawn from the Account.

(e) The respondent denies that she withdrew large sums of money and denies liability to account to Ms. Phillips. The respondent also points at one Ruby Gilbert with whom she alleges that Ms. Phillips also operated an account, as the person who withdrew

[2] See witness statement of Nancy Mc Kenzie Green (filed 27th February 2014) at para. 26.

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large sums of money from the Account, the implication being that it was Ruby Gilbert and not the respondent who withdrew the large sums of money.

(f) The proceedings below were reaching the stage of pre-trial review. However, no trial date had been fixed and none has to date been fixed as far as this Court is aware.

(g) On 17th March 2014, the respondent applied to strike out paragraphs 3, 4, 5, 6, 8, 9, 14, 16, 19, 21, 25, 26, 27, 28, 29, 33, 34, 36 38 and 41 or such parts thereof of the Witness Statement on the basis that they constituted hearsay evidence, are highly prejudicial and of no or no sufficient probative value and are therefore inadmissible. On 1st April 2014 the appellant applied for permission to issue the Witness Summons. Both applications came up for hearing at the pre-trial review.

The Findings of the Judge Below

[3] In respect of the Witness Statement, the learned judge, after considering and reciting section 36E of the **Evidence Act**[3] as well as the principles relating to 'hearsay evidence' as expounded in **Halsbury's Laws of England**,[4] opined:

(i) At paragraph 11 of her judgment that:

"The following statements are made from the direct knowledge of the witness Nancy Mc Kenzie Greene are therefore *not hearsay*:
(a) The first two sentences in paragraph 3
(b) The entire paragraph 4 save and except the first sentence
(c) The second sentence in paragraph 5
(d) The first and third sentences in paragraph 8
(e) The last sentence in paragraph 9
(f) Paragraph 19
(g) The third, fourth and fifth sentences in paragraph 29

[3] Cap. 92, Revised Laws of Grenada 2010.
[4] (4th edn. 1976) vol. 17, paras. 11 and 53.

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(h) Paragraph 34 only the words "and having examined them with the Claimant I discovered that many large withdrawals were made by the Defendant"
(i) Paragraph 41."

(ii) At paragraph 12:

"The information containing first hand hearsay statements are:
(a) last sentence of paragraph 3
(b) the first sentence of paragraph 6
(c) the second sentence in paragraph 8
(d) the first two sentences in paragraph 9
(e) paragraph 14, paragraph 25
(f) the last sentence in paragraph 26, 27, 28
(g) the first two sentences in 29 and
(h) in paragraph 34 the words "a copy of the statement … 16th January 2014."

[4] The learned judge also found at paragraph 13 that the appellant had satisfied the condition for notice in section 36E of the **Evidence Act**, 'since the Witness statement was served long before the trial, and no trial date has been set...' She was however, 'not satisfied … that the other conditions in section 36E of the Act [had] been met which will deem the first hand hearsay admissible.'

[5] The learned judge went further. At paragraph 18 she held that:

"The following parts of the witness statement are also struck out since they do not state the source of the information or belief (CPR 29.5):
(a) The first sentence in paragraph 5
(b) Paragraph 6 save and except the first sentence
(c) Paragraph 16
(d) Paragraph 21
(e) The first sentence of paragraph 26
(f) Paragraph 34
(g) Paragraphs 33, 36, 38."

[6] In the end the learned judge struck out from the Witness Statement:[5]

"(a) The last sentence of paragraph 3
(b) The first sentence in paragraph 5
(c) Paragraph 6
(d) The second sentence in paragraph 8
(e) The first two sentences of paragraph 9

[5] At para. 31 of the judgment.

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(f) Paragraph 14
(g) Paragraph 16
(h) Paragraph 21
(i) Paragraph 25
(j) Paragraph 26
(k) Paragraphs 27 and 28
(l) The first two sentences in 29
(m) Paragraphs 33, 34, 36 and 38."

The learned judge therefore struck out in their entirety, paragraphs 26, 27 and 28 of the Witness Statement, despite her express earlier finding at paragraph 12 of her judgment that only the last sentences of those paragraphs amounted to hearsay.

[7] With regard to the Witness Summons, the learned judge found at paragraph 25 of her judgment that the relief sought was in essence specific disclosure by a non-party. She then concluded, at paragraph 27, that the appropriate rule for the appellant to apply for disclosure from the Bank (absent a specific rule for disclosure by a nonparty) was CPR 33.16. The learned judge then went on to consider the factors to which she considered she ought to have regard in exercising her discretion under CPR 33.16. She opined, at paragraph 29 that CPR 33.16 was 'designed to prevent the element of surprise at the trial'; that an application under CPR 33.16 ought to be made during case management 'and certainly before the filing of witness statements.' She opined that the only means for the representative from the Bank to produce the documents 'for them to form part of the evidence is if he files a witness statement but the deadline for doing so has passed.'[6] She concluded that the timing of the application placed the respondent at a distinct disadvantage if the purpose of the rule was to assist in clarifying the issues, as the appellant, she held, knew long before the case management directions that such an application was required. She concluded at paragraph 30 that the application had not been made expeditiously; had failed to explain why the application had not been made during case management or earlier; that the appellant was attempting to produce additional evidence after the

[6] At para. 29 of judgment.

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respondent had filed her witness statement and thus was severely prejudicial to the respondent.

The Grounds of Appeal

[8] The appellant has some seven (7) grounds of appeal complaining of errors made by the learned judge. These may be summarised as follows:

(1) that she erred in law in her treatment of hearsay evidence;

(2) that she erred in her finding of fact that the witness had failed to state the source of her information;

(3) that her striking out of the entirety of paragraphs 26, 27 and 28 was inconsistent with her earlier express ruling contained at paragraph 12 of her judgment;

(4) that she made factual findings contrary to the evidence before her;

(5) that she in essence misapplied CPR 33.16 and wrongly exercised her discretion in relation to a witness summons application under Part 33 of CPR 2000.

[9] The first three issues concern the Witness Statement while the remaining two relate to the Witness Summons. I propose to deal with them in that order.

Hearsay Statements Contained in the Witness Statement

[10] No issue has been taken with the learned judge's conclusion that the Witness Statement has satisfied the 21-day notice requirement under section 36E of the **Evidence Act**. There is no counter appeal in relation to this or any other finding made by the learned judge. The appropriate starting point then must be with section 36E of the **Evidence Act**, which may be said to be a statutory relaxation of the common law rule against the admission of hearsay evidence. The relevant portion of section 36E states as follows:

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"(1) Subject to section 36G[7], in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall, subject to this section, **be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible**.

(2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.

(3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.

(4) The party intending to tender the statement in evidence shall not be obliged to call as a witness, the person who made the statement if it is proved to the satisfaction of the Court that such person –

(a) is dead;
(b) is unfit, by reason of his or her bodily or mental condition, to attend as a witness;
(c) is outside of Grenada and it is not reasonably practicable to secure his attendance;
(d) cannot be found after all reasonable steps have been taken to find him;
(e) is kept away from the proceedings by threats of bodily harm.

(5) Where in any civil proceedings a statement which was made otherwise than in a manner and admissible by virtue of this section, by the person other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.

(6) The Court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements for notification as specified in subsection (2).

(7) Where the party intending to tender a statement of evidence has called as a witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the Court." (Emphasis added).

[7] Section 36G is not relevant for the purposes of this appeal.

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[11] It is always important to bear in mind one cardinal principle when considering the question whether statements are hearsay. That is, evidence is only 'hearsay' when tendered to prove the truth of the facts asserted. It is not hearsay when tendered simply to show that the statement was made.[8]

[12] The respondent in her written submissions says in essence that the learned judge was careful to strike out only those parts of the Witness Statement which violated legal principles.

[13] Before addressing the main arguments of the appellant challenging the bases on which the learned judge struck out the various parts of the Witness Statement as hearsay, I think it necessary to make this observation. It seems to me that once the learned judge had gotten to the stage where she decided that the 21-day notice condition had been satisfied, it would have triggered the question whether a strike out on the basis of hearsay could be sustained at that stage for failure to satisfy the other conditions under section 36E of the **Evidence Act** as the learned judge found.

The Other Conditions Under Section 36E of the Evidence Act

[14] In relation to section 36E(3), the learned judge appears to accept, without more, the argument put forward by the respondent to the effect that section 36E(3) had not been met because, said the respondent in her strike out application, it requires the maker of the hearsay statements to be present since the respondent ought to be given an opportunity to test the veracity of the statements under cross-examination. Plainly, what section 36E(3) of the **Evidence Act** contemplates is that the party who is served with a statement containing hearsay evidence make known to the party serving the same that the party so served will require the maker of the statements to be called as a witness. Nowhere in the evidence in support of the strike out application is it even hinted that such requirement was made known to the appellant. Indeed, section 36E(3) of the **Evidence Act** contemplates a step to be taken by the party served with hearsay evidence. Accordingly, with the

[8] See Halsbury's Laws of England (4th edn., reissue, 1998) vol. 17(1), at para. 651.

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utmost respect to the learned judge, it is difficult to fathom the basis on which it could be concluded without more that condition 36E(3) had not been met by the appellant. In my view it was a step to be taken by the respondent and then, upon being met with a bare refusal or reasons which could not pass muster under 36E(4), the respondent would be justified in launching her nuclear attack on the Witness Statement by way of a strike out application.

[15] The learned judge concluded that the condition contained in section 36E(4) of the **Evidence Act** had also not been met. This appears to be on the basis of paragraph 6 of the Attorney's affidavit in response to the respondent's strike out application,[9] where the Attorney states that 'Mable Phillip herself would have been able to give evidence of [if] she was physically able to testify herself' coupled with paragraph 41 of the Witness Statement and referred to at paragraph 15 of the judgment. The learned judge went on to point out at paragraph 16 that the deposition of a witness could be taken by an examiner prior to trial and could be done at a witness's home or even a hospital, having regard to CPR 33.7. On this basis she ruled the statements inadmissible. The difficulty with this line of reasoning by the learned judge is that it seems to proceed on the assumption that (a) the respondent had made known to the appellant that she was being required by the respondent to be called as a witness and (b) that the appellant, armed with knowledge of this requirement, had an opportunity to put before the court evidence which may have satisfied one or more of the circumstances specified in 36E(4), or which may have engaged the learned judge in a consideration of appropriate measures to be taken under CPR 33.7, for example, arranging for the evidence of the appellant to be taken at a different time and place. But this is not what happened. Rather, the respondent's approach was to launch what can only be considered as a pre-emptive strike against the Witness Statement without any regard for the way in which section 36E of the **Evidence Act** is intended to operate. The learned judge was persuaded and in my view was led into error by engaging in a premature consideration in respect of this aspect of the matter. The

[9] Filed 1st April 2014.

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statements contained in paragraph 41 of the Witness Statement and paragraph 6 of the affidavit simply do not afford a sufficient basis entitling the learned judge at that stage to conclude that the appellant had not met conditions 36E(3) and (4). This led her to erroneously conclude that such of the statements that she found to be hearsay were inadmissible. This, in my view, would be sufficient to dispose of this part of the appeal.

Were the Challenged Statements Hearsay?

[16] The appellant contends that statements in paragraphs 6, 14 and 26 of the Witness Statement do not fall within the definition of hearsay.[10] She says that the statement in paragraph 6 is not made in order to prove the truth of the statement but in essence merely to show that the statement was in fact made by way of explaining why the Attorney and her siblings did not interfere with the appellant's financial affairs. As such, it ought not to be classified as hearsay. I agree.

[17] With respect to paragraph 14 of the Witness Statement, the appellant says that the statements therein contained cannot be classified as hearsay. I agree. There is nothing in paragraph 14 of the Witness Statement which fits the definition. There is nothing in that paragraph to suggest that the Attorney is there making statements of which she personally has no knowledge.

[18] With respect to paragraph 26 of the Witness Statement, the appellant contends that it was not being sought to give evidence of a statement made to the witness by someone else. Rather, the witness was merely reciting and relying on the citations made in a power of attorney duly recorded as a deed and disclosed on the appellant's list of documents. This in my view does not fit the definition of hearsay. The Attorney witness seems to do no more than state the basis on which she says she knows that the appellant was in a home for the aged and could not transact banking business in person. The witness herself can be liable to be examined as to her basis for this knowledge. There is no indication that it is not

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[10] See appellant's submissions and list of authorities, p. 3 at para 1.i.

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intended to call the Attorney as witness at trial. I agree that this cannot be regarded as hearsay.

[19] With regard to paragraph 28 of the Witness Statement, the appellant contends that the same contains statements not only of information given to the Attorney by the appellant, but also gives the Attorney's own observations of matters seen by her. I agree. It must also be remembered that the Attorney witness stands in the shoes of the appellant. She is the appellant's attorney in fact or legal agent. I can see no basis for holding that the last sentence in this paragraph amounts to hearsay given the fact that the witness appears to be speaking as to matters in respect of which she has personal knowledge.

[20] With respect to the first two sentences in paragraph 29 of the Witness Statement, I reiterate the observations made at paragraphs 13, 14 and 18 above. Further, the Attorney also spoke as to her own observations as to the appellant's general appearance as well as in reliance upon a medical report issued by Dr. Layne which was disclosed on her list of documents. I agree that no sound reason has been advanced for striking out any of the statements contained in paragraph 29 of the Witness Statement.

[21] In reference to paragraph 34 of the Witness Statement, I agree with the appellant that there is no basis for striking the statements contained therein as being hearsay. There the Attorney witness appears to speak from her own knowledge of what the appellant did and not what someone told her the appellant did.

Failure to Disclose Source of Information

[22] This basis for striking out was not specifically stated in the strike out application, but nonetheless various portions of the Witness Statement as set out above were struck out on this ground. The appellant contends and I agree that when the entirety of paragraph 5 is read, the inference is clear as to the source of the witness's information and belief. She described how she kept in touch with the

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appellant. Accordingly the learned judge erred in striking out the first sentence in paragraph 5.

[23] In respect of paragraph 16 of the Witness Statement, it appears that the Attorney witness speaks from personal knowledge. Paragraphs of a witness statement are not to be read in isolation and subjected to sterile construction. Neither is it the role of the judge to speculate as to whether the basis of knowledge expressed or reasonably inferred is convincing or otherwise. That is the role of the examiner. Further, as the appellant contends, the foundation may be said to have been set beginning at paragraph 13 of the Witness Statement, where she says that the appellant was then staying with her.

[24] In respect of paragraphs 21 and 34 of the Witness Statement, I repeat the observations I have made in the preceding paragraph. I can see no basis for the learned judge assuming that the information contained therein is from a source other than the Attorney witness. In my view the learned judge was wrong to strike them out for this reason.

Striking Out the Entirety of Paragraphs 26, 27 and 28

[25] The appellant justifiably complains that the learned judge's striking out of the entirety of paragraphs 26, 27 and 28 was inconsistent with her express finding where she found that only the last sentence in paragraphs 26, 27 and 28 was hearsay. No other reason has been given by the learned judge for striking out the entirety of the paragraphs. As such, the striking out of the entirety of those paragraphs at paragraph 31 of her judgment could only be treated as having been done in error.

The Witness Summons – Unsupported Factual Finding

[26] The learned judge, at paragraph 30(a), said that it could not be ignored that the appellant stated that since February she was aware that she needed a production order in respect of the documents from the Bank to be produced; yet the appellant waited some five weeks after the deadline for serving witness statements and

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case management had passed. This delay was a factor which weighed against the appellant. The appellant says that this factual finding was incorrect as the evidence was that the request for the documents was made to the Bank on 21st February 2014 and it was not until the Friday before 24th March 2014 that the Bank responded to the effect that the documents requested would only be produced by court order.[11] An application for permission to issue the Witness Summons was filed on 1st April 2014 – less than two weeks after the Bank's response.

[27] The respondent in her submissions points to the fact that disclosure was ordered to be by 17th January 2014 and argues that the appellant must have known that the documents required from the Bank were crucial to her case from the start, yet she did nothing until 21st February 2014, by writing to the Bank to produce the documents in the possession of the Bank, by which time the respondent had presented her case.

Discussion

[28] CPR 2000 provides that a party's duty to disclose documents is limited to documents which are or have been in the possession or control of that party.[12] There is no indication that the appellant had failed to file her list of documents in respect of which she had possession and control. Indeed there were many references to the appellant's list of documents. This is what would have been contemplated in the case management order for disclosure. Further, I have been unable to discern any provision in CPR 2000 dealing with witness summonses which contemplate or require that permission for a witness summons ought to be made at case management or in any event before witness statements are filed. As matters then stood, the proceedings were at the pre-trial review stage, but importantly, no trial date had been fixed. Part 33 of CPR 2000 allows for a witness summons to be issued without the court's permission in certain circumstances. For example, a witness summons issued more than 21 days before the date fixed

[11] See affidavit of Nancy McKenzie Greene in support of application for witness summons (filed 1st April 2014).
[12] See CPR.28.2.

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for trial would not require the court's permission.[13] In other instances, the court's permission to issue a witness summons is required. One such instance is where it is to be issued less than 21 days before the day fixed for trial. Here no trial date was fixed. The other instance is where the requesting party wishes to have a witness attend court to give evidence or produce documents on a date different to the date fixed for trial.[14] Normally the request is for a date prior to trial or on the date fixed for trial. In short, as was said by Lord Justice Moore Bick in **Tajik Aluminium Plant v Hydro Aluminium AS and others**[15] '[a]lthough the form of the procedure is different … a witness summons requiring production of documents is in essence the same as the former writ of subpoena duces tecum.' Having regard to the tenor and thus the purpose of Part 33 of CPR 2000, the application for permission to issue the Witness Summons could not be considered as not being expeditious. No trial date had as yet been fixed. The matter had reached only the stage of a pre-trial review. Further, the learned judge appears to have overlooked the plenitude of case management powers which were at her disposal on a pre-trial review.[16] Accordingly, I am satisfied that the learned judge misapprehended the factual basis and further, had regard to irrelevant considerations.

The Witness Summons – Exercise of Discretion

[28] The respondent relies on the well-established principle that an appellate tribunal will only interfere with the exercise of a judicial discretion if the judge failed to consider relevant factors or considered irrelevant factors or misapplied the law. She says that none of these factors obtain in the present case. The appellant, on the other hand, says that the learned judge misdirected herself regarding the correct interpretation and application of the law in relation to a witness summons – in essence she made an error of principle and relies on the case of **Tajik**.

[13] See CPR 33.2, 33.3.
[14] See CPR 33.2, 33.3.
[15] [2005] EWCA Civ 1218 at para. 19.
[16] See. CPR 38.3.

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Discussion

[29] The learned judge concluded that the Witness Summons was an application for specific disclosure. No reason is provided for coming to that view. Here, the appellant was seeking to compel the Bank, a non-party, to produce specifically identified documents listed on the application to the court. In essence, what was being sought was nothing more than what under the old rules regime would have been a *subpoena duces tecum.* This had become necessary as it had become clear given the Bank's response that it was not prepared to produce to their customer (the appellant), documents relating to the operation of her own account with them unless compelled by court order to do so.

[30] The learned judge quite correctly opined that CPR 28.5, which deals with specific disclosure in respect of a party, was inapplicable. Here, the appellant was not seeking specific disclosure from the respondent. She was seeking the production of specific documents from her bankers bearing on the operation of her own account which were clearly relevant to the issues joined in the case. In essence, the respondent did not appear to challenge the fact or size of the withdrawals from the Account. Indeed, her assertion is that she was not the person who made the withdrawals. The documents may very well have an adverse effect on the respondent's case. It may be that the documents bolster the appellant's case. Whichever of the two purposes they serve, the test of relevance is satisfied.

[31] It does not appear that the learned judge addressed her mind to the entire regime dealing with Witness Summonses under Part 33 of CPR 2000 save and except for CPR 33.16 dealing specifically with an early appointment to produce documents. This is notwithstanding the fact that the Witness Summons application stated on its face that it was made pursuant to Part 33 of CPR 2000 and the appellant's submissions below placed reliance on CPR 33.2 and 33.3. Had the learned judge given due regard to CPR 33.2 and 33.3 as well as the nature and purpose of the Witness Summons in the circumstances presented, she would no doubt have avoided the pitfall into which she fell by having regard to irrelevant considerations and generally misapprehending the very nature of the application. Her conclusion

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that the application was one for specific disclosure, with utmost respect, was wrong. The Witness Summons application was precisely what it was stated to be – both in form and substance. In this regard, the statements of Lord Justice Moore Bick in **Tajik**,[17] when considering the equivalent provisions in the English Civil Procedure Rules, are quite instructive and I adopt them:

> "Whatever may be the origin of the present rules, there are in my view clear distinctions to be drawn between an order for disclosure made against a third party and a witness summons to produce documents. An order for disclosure normally directs the person to whom it is addressed to carry out a reasonable search for documents in his possession falling within classes which are often broadly described and to list them for the information of the parties to the proceedings. Often the documents are described in terms which call for the exercise of a degree of judgment in determining whether a particular document does or does not fall within the scope of the order. Any order of that kind, being an order of the court, is one that must be strictly obeyed, but it would be extremely unusual for a penal sanction to be attached to it or for a failure to comply in some material respect to be treated as a contempt of court, save in the case of a contumacious refusal to obey. Moreover, although disclosure is usually a prelude to production for inspection, the person giving disclosure may resist production, if he has grounds for doing so, and in any event has no obligation to do more than make the documents available to the party who has obtained the order. A witness summons to produce documents, by contrast, involves the exercise of the court's coercive powers. The person to whom it is addressed is at risk of being in contempt of court if he fails to comply in any material respect, as the summons itself makes clear. He is obliged to bring the documents to which the summons refers to court, not simply to list them or make them available for inspection. In substance a witness summons to produce documents is no different from a subpoena duces tecum and the differences between such a summons and an order for disclosure are reflected in the different procedures provided by rr 31.17 and 34.2."

[32] Lord Justice Moore Bick, drawing on earlier authorities, further provided useful guidance at paragraph 25 of his judgment as to the factors the court needs to keep in mind when exercising the jurisdiction. He opined that 'the documents to be produced had to be specifically identified, or at least described in some compendious manner that enabled the individual documents falling within the scope of the subpoena to be clearly identified.' The listing on the application met

[17] At para. 24.

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that criteria. The rationale for this is easily understood having regard to the coercive nature of a subpoena and in similar terms, a witness summons.[18]

[33] While it is true that CPR 2000 offers no guidance as to the considerations the court should have regard when considering whether to permit the issuance of a witness summons, it is helpful to consider the guidance given under the old rules in relation to subpoenas. Neuberger J in **Harrison and Another** v **Bloom Camillin (a firm)**[19] approved this approach. I would adopt a similar approach in relation to a witness summons under our CPR 2000 which is silent in this respect. I would accordingly hold that the court, in deciding whether to give permission to issue a witness summons where permission is necessary, should seek to ensure that the procedure is not being abused, that it is utilised in good faith for the purpose of obtaining relevant evidence and is not a fishing expedition, speculative, oppressive, does not offend against public interest immunity and such like considerations. This is not intended to be exhaustive and much may depend on the circumstances of each particular case. In any event no circumstances have been put forward to suggest that any of these factors have been made out on the evidence before the judge.

[34] In the present case, it is fair to say that the learned judge did not address her mind to these types of factors. This may have been the result of the learned judge mischaracterizing the nature of the application and treating it as one seeking specific disclosure. The conclusion that it was an application for specific disclosure in my view was a fatal error in principle and further led the learned judge into error in having regard to irrelevant considerations. The criticisms levelled at the learned judge by the appellant in respect of matters to which she accorded much weight, such as prejudice to the respondent and delay, rather than focusing her mind on the considerations referred to at paragraph 33 above, are well founded. She exercised her discretion on wrong principles and her refusal to give permission cannot stand. Having regard to the fact that a trial date has not

[18] See CPR 33.10 – 'Enforcing attendance of witness'.
[19] (1999) Times, 12 May.

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yet been fixed, I would remit the matter of the date, time and place in respect of which the Witness Summons should issue for the attendance and production of the documents by the Bank to a judge of the court below.

Conclusion

[35] Based on the conclusions I have reached above I would allow the appeal and set aside the order of the learned judge made on 30th June 2014 in respect of paragraphs 31(b),(c),(f), (g), (h),(i), (j) and (m) with the exception of paragraphs 33 and 38 of the Witness Statement referred to at paragraph 31(m) of the judgment. I would also, for the reasons I have given, set aside the order of the learned judge dismissing the witness summons application and order that the same be issued subject to a judge in the court below fixing the time, date and place for the attendance of the witness for the purpose of producing the documents. I would also set aside the costs orders made in the court below and order that the respondent pays the costs of the appellant below assessed in the sum of $2,500.00 in respect of both applications and costs on this appeal fixed at two thirds of that sum.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

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