BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 0217 of 2011

BETWEEN

MIA AMOR MOTTLEY	**CLAIMANT**
AND	
THE NATION PUBLISHING CO. LIMITED	**FIRST DEFENDANT**
VIVIAN-ANNE GITTENS	**SECOND DEFENDANT**
KAYMAR JORDAN	**THIRD DEFENDANT**

Before the Hon Mr Justice Alrick Scott, QC, Judge of the High Court (Acting).

Date of Decision: 8th October 2018.

Mr Elliott D Mottley, QC, in association with Mr Leslie F Haynes, QC, Mr Stewart T Mottley and Ms Ava-Marissa Lee for the claimant.

Mr C Anthony Audain, QC, in association with Mr Brian L Barrow for the first and second defendants.

DECISION

Introduction

[1] This is an application by the claimant for an order that the witness statement filed by the second defendant be struck out, because it does not contain a certificate of truth as required by rule 29.5(1)(f) of the Supreme Court (Civil Procedure) Rules 2008 ("CPR 2008"). The claimant also seeks an order that certain identified sentences in the witness statement be struck out on the basis of inadmissible hearsay.

[2] The application is opposed. The first and second defendants' response raises the question of the purpose of the certificate of truth. It also engages the Court in the perplexing task of distinguishing between original evidence and testimonial evidence. The response further requires me to decide whether the identified statements fall within the exceptions to the hearsay rule under sections 50 and 51 of the Evidence Act Cap 121, particularly in relation to an anonymous confidential source. Compliance with the procedural requirements under section 54 of the Evidence Act, when relying on the hearsay exceptions under sections 50 and 51, is another matter for my consideration. And finally, I am to consider too, the first and second defendants' argument that a non-expert opinion stated in the second defendant's witness statement is admissible as a lay opinion under section 65 of the Evidence Act.

[3] I concluded, after I explored the nature of the hearsay rule and the exceptions under sections 50 and 51 of the Evidence Act, that some, not all, of the identified statements are inadmissible for hearsay. I judged that the non-expert opinion was not admissible under section 65 of the Evidence Act. I took the view too that the first and second defendants should be permitted, within a limited time, prior to trial, to rectify the witness statement and to file a witness statement properly verified by a certificate of truth. Even before these determinations, I considered the first and second defendants' submission that the claimant's strike out application should properly be made at trial, and not as a preliminary ruling on admissibility before trial. On that question, I favoured the view that, generally, questions of admissibility of evidence are best left for the trial.

[4] At the time the claim form was filed, the claimant was a member of the Parliament of Barbados. She is an attorney-at-law of longstanding, and one of Her Majesty's Counsel. The claimant is now the Prime Minister of Barbados. The first defendant is the leading newspaper in Barbados. Its publications are widely circulated. The second and third defendants were the chief executive

officer and editor-in-chief respectively of the first defendant, when the alleged defamatory statements were published.

[5] In the substantive action, the claimant claims damages for alleged defamatory statements published about her in the first defendant's newspaper, on its website, and on its Facebook page. The first and second defendants deny that the statements are untrue or defamatory of the claimant. They have also denied publishing some of the alleged defamatory statements.

The Arguments

[6] The witness statement filed by the second defendant does not contain a signed certificate of truth. Accordingly, the claimant contends that it should be struck out. He argued that, without the certificate of truth, the second defendant will not be bound to confine herself to the facts within her knowledge. Further, that it would have the effect of allowing the second defendant to put forward any statement without fear of being held in contempt. Accordingly, that the claimant would likely be unfairly prejudiced in the proceedings. Counsel for the first and second defendants suggested that the witness statement could be verified at trial, and therefore it should not be struck out. He suggested further that this is the approach I should take.

[7] Counsel for the claimant has identified a number of statements which he stated, offend the hearsay rule. He argued that the identified statements are inadmissible under the exceptions provided for by sections 50 and 51 of the Evidence Act.

[8] In his oral argument, counsel for the claimant pointed to what has traditionally been regarded as one of the dangers of the admission of hearsay evidence: the absence of the out-of-court declarant for cross-examination. He stated that he would not be able to cross-examine the witness on the out-of-court

statements. JD Heydon, in the seminal work on evidence, *Cross on Evidence* (11th edn LexisNexis Butterworths, Australia 2017) ("*Cross on Evidence*"), explained the challenge thus (at page 1173):

> "The techniques open to a cross-examiner are much diminished if the witness is not a person who observed an event in issue, but only a person who was told what happened by someone who claimed to have observed an event in issue. The non-observer witness can be asked about the circumstances in which the alleged observer of the relevant event made the hearsay statement to the non-observer witness, but not about the circumstances of the actual observation, or the alleged observer's memory, narrative powers and sincerity."

Counsel for the claimant contended further that the identified statements constitute inadmissible hearsay as they are being relied upon for their truth.

[9] Counsel for the first and second defendants argued that the identified statements do not offend the hearsay rule. He stated that the statements complained of were tendered, not for the truth of the matters asserted, but for a non-hearsay purpose. Counsel for the first and second defendants further submitted that if the statements are hearsay, that they are admissible under section 50 of the Evidence Act.

Preliminary Rulings on Admissibility

[10] Counsel for the first and second defendants first argued that the Court should not consider the application at this stage and that it is best left to be determined at the substantive trial. The argument echoes the sentiments of Lord Justice Mummerry in *Beazer Homes Limited v Stroude* [2005] EWCA Civ 265, where he noted at paragraph (10):

> "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, rather than at a separate preliminary hearing. The judge at a preliminary hearing on admissibility will usually be less well

> informed about the case. Preliminary hearings can also cause unnecessary costs and delays."

[11] Counsel for the claimant argued otherwise. There is a somewhat contrary opinion expressed by Irvine J in *Director of Corporate Enforcement v. Bailey and another* [2007] IEHC 365. In that case, the application concerned the admissibility of, *inter alia,* hearsay and opinion evidence. It was contended that the application was premature. Irvine J was

> "…….. convinced that the appropriate time for a party to object to the admissibility of evidence in an affidavit supporting proceedings brought by way of originating notice of motion is the time at which that affidavit is delivered. Applications such as the present one assist in defining the actual issues which will be pursued by the applicant and this brings about a reduction in legal costs" (see page about 14 of the unpaginated decision).

[12] Sykes J, in *Kennedy Holland et al v. Williams et al* [2009] 6 JJC 3001, was writing, *inter alia*, on an application to strike out certain statements in a witness statement for hearsay. He observed that pre-trial decisions on admissibility of evidence could have drawbacks. He seems to favour a flexible approach. But he concluded that, in the case before him, it was preferable that the issue of admissibility be dealt with at the trial. He noted:

> "Additionally, any decision on admissibility taken before the trial may itself have precipitated an appeal which would have led to further delay. In all the circumstances of this case, it was better to have the issue of admissibility resolved during the trial. The rules were designed for flexibility ……..*"*

[13] The authors of *Blackstone Civil Court Practice 2016* ("*Blackstone's*"), relying on *Anglo Continental Educational Group (GB) Ltd v. Capital Homes (Southern) Ltd* [2009] EWCA 218, write that a person served with a witness statement which contains inadmissible evidence has one of three courses of action as following (at paragraph 51.14):

> "(a) Write to the other side asking for the basis on which the evidence is said to be admissible. If dissatisfied with the answer, apply to exclude the evidence before replying to it.

> (b) Issue an application, to be heard at the trial, to exclude the allegedly inadmissible evidence. The problem with this approach is that it potentially increases the costs of the trial and can lead to the detailed analysis of material which may be of minor importance.
>
> (c) At a case management conference ask the court to direct the parties to identify in writing the precise point which they say the evidence establishes and why it is said that the evidence is admissible.*"*

[14] The approaches at (a) and (c) in the preceding paragraph both involve the other side asking the party who served the witness statement containing the seemingly inadmissible evidence, such as hearsay, to state the basis upon which the party is contending that the evidence is admissible. And the third course, at (b), involves issuing an application to be heard at the trial. Even though the authors of *Blackstone's* expressed the view that the course at (b) would potentially increase the cost of the trial, that course is more in line with the opinion of Mummery LJ, that such applications be heard at the trial. The various options mentioned by the authors of *Blackstone's* would suggest a flexible approach to applications for rulings on admissibility of evidence.

[15] I do not understand the opinion of Mummery LJ as ruling out altogether a preliminary ruling on the admissibility of evidence. In some circumstances, a pre-trial ruling on admissibility may be desirable. Where the success or failure of a party's case depends on the admissibility of a piece of evidence, it may be desirable and useful to get a ruling on its admissibility before trial. In such a case, time and expense could be saved by an early ruling on the admissibility of the evidence. I think Mummery LJ had this in mind when he noted that:

> "In the present case no good reason is apparent nor has one been advanced for departing from the usual practice. It has not been suggested that this is one of those cases in which the ruling on admissibility would dispose of or abbreviate the substantive application. The practical effect of a split proceeding seeking a pre-emptive ruling has been to hold up the hearing of the summary judgment application. It may well have increased the

> costs of proceedings. I cannot see what advantage there was in it for anyone."

Mummery LJ was not seeking to legislate any rigid rule against a preliminary hearing on admissibility of evidence. He appeared to accept that there should be flexibility, and that a preliminary hearing would be justified where there are practical benefits likely to accrue, such as saving time or costs or abbreviating the trial.

[16] When counsel for the first and second defendants made the argument before me that the application should be heard at trial, I was not attracted to it. But there is substance in the argument, since on an application like this, in a defamation action, it requires the court to be informed fully about the case, both as to the facts and the law, in a way that other applications may not require. The court must be aware of the law and the facts in issue in the substantive action. That involves judicial time, which is at a premium.

[17] It is not every case where it is desirable that a preliminary ruling on admissibility should be sought. I think there should be flexibility, depending upon the benefits to be gained from an early ruling on admissibility. I think there is much benefit to the party who is served with a witness statement containing alleged inadmissible evidence, writing to the opposing party enquiring as to the basis on which the evidence is said to be admissible. That process may result in the delineation of the issues and arguments. I am inclined to the view articulated by Mummery LJ that, generally, questions of admissibility are best left to be resolved at trial.

[18] I do not think that there were practical benefits to be achieved from an early ruling on admissibility in this case. But having heard the application, I cannot leave it for the parties to argue twice, and later for the trial judge to deal with the same issues.

Certificate of Truth

[19] Rule 29.5(1)(f) of CPR 2008 requires that a witness statement must "include a statement by the intended witness that he believes the statements of fact in it to be true." The witness statement is thus one of a number of documents which, under CPR 2008, must be verified by a certificate of truth. By the statement of truth, a party verifies that he believes the facts set out in the statement of case or witness statement, are true and accurate.

[20] The requirement that a statement of case be verified by a certificate of truth is a departure from the old Rules of the Supreme Court, 1982. The purpose of the certificate of truth is to discourage parties from advancing a case which the party does not believe, or which is speculative, or inventive, or unsupported by evidence but the party is hopeful that something might turn up (see *Kadyamarunga v Secretary of State of the Home Department* [2014] EWHC 301, at paragraph 29, and *Clarke v Marlborough Fine Art (London) Ltd and another* [2002] 1 W.L.R. 1731, at paragraphs 20 and 21). The certificate of truth serves the further purpose of confining a party to the facts set out in the witness statement, unless, in the case of CPR 2008, the court gives permission, under rule 29.9, to amplify the witness statement. In *Malgar Ltd. v. R E Leach (Engineering)* Lexis Citation 3122, at page 5, Sir Richard Scott expressed the view that "…. it is important that flagrant breaches of the obligation to be responsible and truthful in verifying statements of case and in verifying witness statements should be policed and enforced ……..". I agree. Otherwise, the purposes for which the certificate of truth was introduced would be lost, and the certificate of truth would become meaningless.

[21] A party should not make statements, verified by a certificate of truth, which he does not have an honest belief in. Nor should he make statements recklessly, that is, without care as to whether the statements are true or false. The court may deal with false statements in a statement of case or witness statement

verified by a certificate of truth in different ways. In *Molloy v. Shell EK Ltd* [2001] EWCA Civ 1272, the Court of Appeal expressed the view that the claimant ought to have been made to pay the defendant's cost where the claimant in a personal injury case made a dishonest claim verified by a certificate of truth. It seems to me also, that it would be open to a court, in an appropriate case, to deal with dishonest statements in a statement of case or witness statement by striking out a head of claim. Therefore, the certificate of truth must be taken seriously by the attorney preparing the statement of case or witness statement and the person signing the certificate of truth. The absence of a certificate of truth, or defects in the same cannot be ignored or taken lightly.

[22] On an application to strike out a witness statement, the court must have regard to the overriding objective to deal with cases justly. Giving effect to the overriding objective will, in most cases, favour allowing a party to correct any menial errors or defects in the witness statement (see *Hannigan v. Hannigan* [2000] ALL ER (D) 693; *Jennifer Jones v Turtle Beach*, (Civil Case No 1039 of 2010, unreported), Barb HC, and *Afrikan Option and Walcott v Bank of Baroda (Trinidad and Tobago) Limited* (Civil Case No. 350 of 2014, unreported), TT HC, TT 2014 HC 350). However, in an appropriate case, the court may strike out a statement of case or witness statement where there is wholesale disregard for adherence to the rules of court. Or, as Alleyne J, in *Maria Agard v. Mia Mottley et al* (Civil Case No 1753 of 2015, unreported), Barb HC, at paragraph [40], puts it: "Striking out ought to be reserved for cases where the employment of curative options would not do justice."

[23] In the case at hand, the witness statement is defective. It was signed by the witness, but it does not contain a certificate of truth. A date has not been fixed for the hearing of the case. There is, yet to be heard, an application for permission to amend the defence. The first and second defendants' contention is that the procedural irregularity could be rectified at trial by the witness

swearing on oath to the matters in the witness statement. This would mean that, until trial, the claimant would not know whether the first and second defendants would be relying on the entirety of the contents of the witness statement or not.

[24] I think there is force in the argument made by counsel for the claimant that, without a certificate of truth, the second defendant is not bound to confine herself to the facts set out in the witness statement, and that there is greater freedom to put forward different facts without fear of some sanction. The approach as suggested by counsel for the first and second defendants ought to be the exception rather than the rule. If the irregularity could be rectified before trial without affecting any trial dates which have been fixed, then it should be done. Given the importance to be attached to the certificate of truth, and the stage of the action, the defect should be rectified before trial. In that way, the claimant can be satisfied, at an early stage, that the case which the first and second defendants have advanced in the witness statement is one which they believe to be true, and that if it turns out to be an invented case or to contain statements which the first and second defendants do not honesty believe, that they could likely face sanctions.

[25] The usual course, where a statement of case or witness statement is not properly verified by a certificate of truth, is to permit the party in default to file the statement of case or witness statement properly verified, within a limited time (see *Blackstone's,* paragraph 23.17, and *Jennifer Jones v Turtle Beach* (Civil Case No 1039 of 2010, unreported), Barb HC). This is a case where I should exercise my discretion to permit the witness statement to be rectified, by requiring the first and second defendants, within a limited time, to file a witness statement of the same witness, properly verified by a certificate of truth.

The Hearsay Rule

A. *Hearsay: Complexity of Rule*

[26] JD Heydon, the former Judge of the High Court of Australia, in *Cross on Evidence*, at page 1167, writes, regarding the hearsay rule: "The rule against hearsay is one of the oldest, most complex and most confusing of the exclusionary rules of evidence. One of the reasons is that its definition, and the ambit of exceptions to it, are both unclear." It is a rule that has been universally criticized by judges and commentators alike. The criticism was captured by The Australian Law Review Commission, Evidence, ALRC 26 (Interim), Vol 1 (1985), ("ALRC 26"), at paragraph 329, which wrote:

> "The common law rule and its exceptions have been the object of repeated criticism for many years. Criticisms range from 'absurdly technical', through 'a conglomeration of inconsistencies' to the famous Morgan and Maguire comment that the rules 'resemble an old-fashioned crazy-quilt made of patches cut from a group of paintings by cubists, futurists and surrealists'. The difficulties created by the common law are reflected in the vast body of differing legislation which has attempted to address problems as they have emerged. These have added to the 'crazy-quilt' effect. Dissatisfaction with the law in the United Kingdom and Commonwealth countries has, at last count, resulted in at least twelve reports by law reform bodies in recent years."

The obscurity of the hearsay rule is no more evident than in the divided decisions of the House of Lords in *DPP v Myers* [1965] AC 1001, and *R Kearley* [1992] 2 AC 228, where the House of Lords was, in both cases, divided on whether statements were inadmissible for hearsay.

[27] Despite the opinion expressed above, the ALRC 26 was still of the view that there is a role for an exclusionary hearsay rule in both civil and criminal proceedings. The hearsay rule remains a fundamental part of evidence in civil and criminal proceedings in Barbados to date, as it is in Australia.

B *Hearsay: Common Law*

[28] English law of evidence enshrines, as a general principle, that a witness is to give testimony in court as to what he or she has personal knowledge of, having perceived it with one of the five senses (*Lithgow City Council v Jackson* (2011) 244 CLR 352, 281 ALR 223, [2011] HCA 36 ("*Lithgow v Jackson*")). In that sense, the witness is said to have firsthand knowledge. The corollary is that a witness is not to give evidence of what he heard from others or read about. In such a case, the witness is regarded as having secondhand (or other more remote) knowledge; he is repeating what another observed or perceived or experienced or which he read. English law terms such as hearsay. The general rule at common law is that hearsay evidence is not admissible. Therefore, the hearsay rule is exclusionary in nature. But there are departures or exceptions to the general rule. Therefore, hearsay evidence is inadmissible in evidence unless it falls within an exception provided by the common law or by statute.

[29] The hearsay rule seems to lack a comprehensive definition at common law (see Lord Reid in *Myers v DPP* [1965] AC 1001 at pages 1019 to 1020). Various definitions of hearsay abound. Probably the most cited statement on the hearsay rule is that of the Judicial Committee of the Privy Council in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, at page 970:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

[30] JD Heydon's statement on the rule is (at page 52, *Cross on Evidence*): "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact asserted*" (the emphasis is that of JD Heydon). That statement, also given in an earlier edition of *Cross*

on Evidence, English edition, was approved by the House of Lord in *R v Sharpe* [1988] 1 All ER 65, at page 68. In *R v Horncastle and another* [2010] 2 AC 373, at paragraph [20], the rule was described thus: "Hearsay evidence is any statement of fact other than one made, of his own knowledge, by a witness in the course of oral testimony." In *Walton v The Queen* [1989] HCA 9, Mason CJ stated the hearsay rule as follows (at paragraph 9):

> "The hearsay rule applies only to out-of-court statements tendered for the purpose of directly proving that the facts are as asserted in the statement. Generally speaking, evidence of out-of-court statements relied on for another purpose is not excluded by the rule. Thus, evidence of a relevant out-of-court statement is admissible evidence of the maker's knowledge or state of mind when he made the statement in a case where such knowledge or state of mind is a fact in issue or a fact relevant to a fact in issue…."

The definition of hearsay given by the authors of *Phipson on Evidence* (14th edn Sweet & Maxwell, London 1990), at paragraph 21-02, is: "Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them." And these are but a few of the attempts to define the hearsay rule at common law.

[31] Notwithstanding the absence of a precise definition, there are some common strands to the rule which emerge from the above statements on the hearsay rule. In brief, at common law, hearsay consists of an out-of-court statement, that is, the evidence tendered by the witness testifying in the proceedings, is the statement of some other person. The statement may take the form of writing (such as letters, medical records, business records and public records), or be made orally, or by conduct (such as by way of gestures, signs, drawings, charts and photographs).

[32] The purpose for which the out-of-court statement is tendered is important. If the out-of-court statement is tendered to prove the truth of the fact which it asserts, it would be regarded as hearsay, sometimes described as testimonial or said to be for a hearsay purpose. An out-of-court statement tendered for the truth of the statement is inadmissible, unless it falls within an exception to the hearsay rule at common law or statute. On the other hand, if the out-of-court statement is tendered for a purpose other than to prove the truth of the facts which it asserts, it would not be treated as hearsay. In that case, it would be regarded as original evidence or having been tendered for a non-hearsay purpose, and would be admissible.

[33] The formation of the hearsay rule by JD Heydon and others excludes statements or assertions by persons who do not give evidence in the proceedings, as well as the previous statements of the witness testifying in the proceedings. Thus, the prior statements of any person, including the prior statements of the witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.

[34] Whether a statement is tendered to prove the truth of the matter asserted in it, or for a non-hearsay purpose, is at times difficult to determine. This is where the rule is easy to state, but at times very difficult to apply. It is important in this case, where the first and second defendants state that certain of the identified alleged hearsay statements have been tendered for a non-hearsay purpose.

[35] JD Heydon, in *Cross on Evidence,* writes that original evidence falls within three classes (page 1192): (i) facts in issue, (ii) statements which are relevant to facts in issue, and (iii) prior consistent or inconsistent statements of a witness. JD Heydon, in *Cross on Evidence,* gives examples of several cases where evidence may be tendered for a non-hearsay purpose (see pages 1192

to 1200). Neil Williams, John Anderson, Judith Marychurch and Julia Roy in *Uniform Evidence in Australia* (2nd edn LexisNexis Butterworths, Australia 2018) (here after, Neil Williams and others, *Uniform Evidence in Australia*), at page 232, explain that,

> "…non-hearsay relevance may lie in the fact that particular words were spoken, or that a representation was made at a certain time, in a certain place or in a certain context……..Previous representations may be led for various non-hearsay purposes, such as evidence of overt acts to prove a conspiracy, evidence of an explanation as to why subsequent conduct occurred, evidence that a statement was false, or in order to prove a consciousness of guilt, or as background or 'context' evidence."

[36] In determining whether a statement is testimonial or original evidence, one must always ask why the party who tenders the out-of-court evidence considers that it is relevant. It is necessary to consider what finding the party tendering the out-of-court evidence will ask the court to make. Or put somewhat differently, what it is that the previous representation is tendered to prove. If the truth of the previous representation is not relevant or does not matter, then it is non-hearsay. If the only relevance of the previous representation depends upon its truth, then, it is offered for its truth and is hearsay. The hearsay rule "will be avoided only if the non-hearsay purpose of the evidence of a representation is relevant" – see paragraph 59-7, page 232, Neil Williams and others, *Uniform Evidence in Australia*. The High Court of Australia, in *Lee v R* [1998] HCA 60, confirmed that the relevance of the previous representation must be considered in determining whether it is inadmissible hearsay. At paragraph 22, the Court noted:

> "Section 59 must be understood in this light. The rule's operation requires consideration first of why it is sought to lead evidence of something said or done out of court (a previous representation). What is it that that "previous representation" is led to prove? In particular, is it sought to lead it to prove the existence of a fact that the person who made the representation intended to assert by it? The fact that the statement or the conduct concerned might unintendedly convey some assertion

> is not to the point. The inquiry is about what the person who made the representation intended to assert by it."

Section 59 of the Evidence Act 1995 (Cth) (hereafter referred to as the "Uniform Evidence Act 1995"), enacts the hearsay rule.

[37] Whether an out-of-court statement was tendered for a hearsay or non-hearsay purpose can arise in an action for defamation. JD Heydon, in *Cross on Evidence,* writes (at page 1192): "In several classes of cases the question before the court is whether certain words were spoken or written, not whether they were true or false. Obvious instances are provided by actions for defamation and intimidation." However, from the preceding paragraph, it is apparent that it is insufficient to simply state that the statement is tendered not for the truth of the statement and leave it there for the court to divine. It is necessary to identify whether the non-hearsay purpose is, for example, to confirm that the statement was made or that its making is relevant to a fact in issue in the proceedings, or is a prior consistent or inconsistent statement.

C. *Hearsay: Evidence Act*

[38] Section 48 of the Evidence Act codifies the hearsay rule. It is this definition of hearsay that applies in Barbados, notwithstanding the continued references to *Subramaniam's* case and other common definitions of the rule. Section 48 supersedes all common law definitions of the hearsay rule. It provides as follows:

> "(1) Evidence of a previous representation is not admissible to prove the existence of a fact, in this Division referred to as an "asserted fact", intended by the person who made the representation to be asserted by the representation.
>
> (2) Where evidence of a previous representation is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove the existence of an asserted fact."

[39] Section 48 refers to “representations” and “previous representations”, and not statements, and also refers to “asserted facts”. Section 2 defines a “representation” as including

> “an expressed or implied representation, whether oral or in writing, and a representation to be inferred from conduct”. It also defines “previous representation” as meaning “a representation made otherwise than in the course of the giving of evidence in the proceedings in which evidence of the representation is sought to be adduced”.

[40] Section 49 of the Evidence Act further provides that:

> “A reference in this Division to a previous representation is a reference to a previous representation that was made by a person whose knowledge of the asserted fact, in this Division referred to as “personal knowledge”, was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived, other than a previous representation made by some other person about the asserted fact.”

[41] The exclusionary rule enacted by section 48 operates similarly to the common law rule, in that previous representations made out-of-court (whether oral, written, or in the form of conduct) which are tendered to prove the existence of a fact (as evidence of the truth of the fact or matter in the representation) would be hearsay, and would be inadmissible. As under the common law, under section 48, where a previous representation is tendered for a purpose other than to prove the truth of the fact in the representation, it would not be hearsay. Therefore, under section 48, it is necessary, as under the common law, to consider the purpose for which the evidence is being tendered, whether for a hearsay purpose or non-hearsay purpose.

[42] The definition of hearsay in section 48(1) excludes a previous representation, “unintended” by the person to prove the truth of the fact asserted by the representation. It is not the subjective intention of the person tendering the

previous representation that determines the purpose for which the statement is tendered, or what is intended by the person who made the representation. The purpose for which the previous representation is tendered or the use intended by the person who made the representation, is determined objectively, having regard to the circumstances in which the previous representation was made. To the extent that a somewhat different approach has been suggested in *R v Hannes* (2000) 158 FLR 359, it is not one to follow given the commentary on that case.

[43] Section 48(2) applies where evidence is admissible for a non-hearsay purpose. In such a case, it could also be used to prove the existence of an asserted fact. In effect, the representation can be used for both a non-hearsay purpose (original evidence) and a hearsay purpose, to prove the truth of the asserted fact. The subsection is a departure from the common law, which held that evidence admissible for a non-hearsay purpose, could be used only for that purpose (see Australian Law Commission, ALRC 102, paragraph 7.63). The hearsay rule under section 48 also includes the previous representation of the witness testifying, as is the case at common law.

D. *Exceptions: Evidence Act*

[44] The Evidence Act provides exceptions to the general exclusion of hearsay evidence provided for in section 48. The exceptions to the hearsay rule in civil proceedings, relevant here, are set out in sections 50 and 51 of the Evidence Act. These sections provide as follow:

> "50. In civil proceedings where the person who made a previous representation is not available to give evidence about an asserted fact, the hearsay rule does not apply in relation to
>
> > (a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the representation or some other representation to which it is reasonably necessary to refer in order to understand the representation.

"51. (1) This section applies in civil proceedings where the person who made a previous representation is available to give evidence about an asserted fact.

(2) Where it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person referred to in subsection (1) to give evidence, the hearsay rule does not apply in relation to

(a) oral evidence of the previous representation referred to in subsection (1) given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the previous representation or some other representation to which it is reasonably necessary to refer to understand the previous representation.

"(3) Where the person referred to in subsection (1) has been or is to be called to give evidence, the hearsay rule does not apply in relation to evidence of the representation that is given by

(a) that person, or

(b) a person who saw, heard or otherwise perceived the making of the representation,

if, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(4) Where subsection (3) applies in relation to a representation, a document containing the representation shall not, unless the court gives leave, be tendered before the conclusion of the examination-in-chief of the person who made the representation."

[45] Sections 50 and 51 provide exceptions to section 48 for the admission of oral and documentary hearsay (i) where the maker is not available, and (ii) where the maker is available, but calling the witness would cause undue delay, undue expense or be impracticable, respectively. The exceptions apply only to firsthand hearsay (see *Lee v R* (1998) HCA 60, at paragraph 34). Secondhand and more remote hearsay are not admissible under sections 50 and 51.

[46] Section 49 of the Evidence Act requires that the previous representation be made by a person whose knowledge of the asserted fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived. Section 48 does not require, in every case, that it be established or proved that the person who made the previous representation had personal knowledge. It is sufficient that it be established that the out-of-court declarant's knowledge "was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived….." There must be some material to show that it could reasonably be supposed that the person had personal knowledge of the asserted facts. In *Jiang v Quach* [2000] NSWCA 147, there was no material upon which an inference could have been drawn that the author had personal knowledge of the asserted facts. Accordingly, the court did not accept the evidence as firsthand hearsay (see paragraph 20). If the inference can be drawn that the out-of-court declarant may have been given the evidence by another person, then it cannot be supposed that the person had personal knowledge of the asserted fact.

[47] In this case, the witness seeks to tender previous representations made by an anonymous confidential source. The interesting question arises as to whether the hearsay evidence of a confidential anonymous witness is admissible under section 50 of the Evidence Act. In effect, can it be said that a confidential source had personal knowledge or might reasonably be supposed to have had personal knowledge of the asserted facts? Neil Williams and others, in *Uniform Evidence in Australia,* write that (at page 258):

> "It is not settled to what extent it is necessary to precisely identify the person who made the previous representation in order to fall within the s 63 exception. It has been held for the purposes of s 64 (Exception: civil proceedings if maker available) that in order for that exception to apply it is necessary to be able to identify the maker of the representation……."

And at page 259, the authors added: "Provided sufficient information about the unknown maker of the previous representation can be inferred from the available evidence, there appears no reason why his or her 'unavailability' may not be adequately assessed for the purposes of s 63." Section 63 of the Uniform Evidence Act 1995 enacts the exception to the hearsay rule in civil proceedings where the marker is not available, as does section 50 of the Evidence Act.

[48] In *R v Horncastle and another* [2010] 2 AC 373, Annex 4, para [13], the UK Supreme Court held that anonymous hearsay was inadmissible under the Criminal Justice Act and at common law. JD Heydon, in *Cross on Evidence*, writes (at page 1376):

> "Against that somewhat shifty and unsatisfactory background, the question arises: "what is the Australian position?" Hearsay, anonymous or not, is excluded by the general ban unless an exception applies. Often the terms of any given exception will not extend to permit anonymous hearsay …."

I think the last sentence is true of the position under section 50, in that the terms of section 50 would not extend to permit anonymous hearsay. I think it would be difficult to establish that an anonymous confidential source is not available, as well as that the anonymous confidential source had personal knowledge or might reasonably be supposed to have had personal knowledge of the asserted facts. More importantly, in this case, there is insufficient information, or rather no material to assess whether the confidential source is unavailable for the purpose of section 50 of the Evidence Act, or has personal

knowledge or may reasonably be supposed to have had personal knowledge of the asserted fact, again for the purpose of section 50 of the Evidence Act.

[49] There are procedural requirements to sections 50 and 51 of the Evidence Act. Hearsay evidence is admissible at a trial under sections 50 and 51 on condition of notice being given of the party's intention to tender hearsay evidence (section 54 of the Evidence Act). Based on the ALRC 26, at para [687]: "The purpose of giving the notice is to avoid surprise and to give the other parties the opportunity to investigate the availability of the maker and the context of the representations."

[50] The hearsay notice should not be treated as an empty formality or meaningless requirement. Based on section 54, the hearsay notice is a precondition to the application of sections 50 and 51 of the Evidence Act (see *Azizi v R*, [2012] USCA 205, (2012) 224 A. Crim R 325, at paragraph [32]). If notice is not given, a party may make an application for either section 50 or 51 to apply, notwithstanding the failure to give notice. The court is not given a residual discretion to admit hearsay evidence under sections 50 and 51 where there is failure to give notice of intention to admit hearsay evidence or where there is no application for either section 50 or 51 to apply notwithstanding the failure to give notice. Where notice is given of a party's intention to admit hearsay evidence, the right to object is given to the other party (section 54(3)). Neither the Evidence Act nor any provision in CPR 2008 provides that the service of a witness statement containing hearsay evidence would constitute notice for the purpose of either section 50 or 51. Neither the first nor the second defendant has given notice, based on the file before me, of its or her intention to tender hearsay evidence. Further, there is no application that section 50 is to apply notwithstanding the failure to give notice.

[51] It is possible that parties may miss that evidence is hearsay, or a party may waive his right to object. The words "not admissible" in section 48(1) mean that

hearsay is not admissible over objection (see *Perish v R* [2016] NSW CCA 89). If objection is not taken to the hearsay evidence by the other party or the court on its own motion, then the hearsay evidence is admissible to prove the existence of a fact that the person intended to assert in the representation. However, where objection is taken to hearsay evidence, as is the case here, and reliance is placed on either section 50 or 51, section 54 must be complied with if the hearsay evidence is to be admitted. Neil Williams and others, in *Uniform Evidence in Australia*, at para 67-9, page 320, write:

> "Where a party does not give notice and does not obtain a direction under S 67(4), the relevant hearsay exception/s do not apply; hence the evidence will not be admissible for a hearsay purpose if objected to, unless it falls within one of the other exceptions to the rule that do not require notice …… Contrast this with the English law/rules which provide that breach of the notice provisions affects the weight of the evidence but not its admissibility."

[52] The section 50 exception applies where the maker is not available. Not available is defined by section 6 of the Evidence Act to mean where the person is dead or the person is not competent to give evidence about the fact. A person is also taken to be not available where it would be unlawful for the person to give evidence about the fact, or where the evidence under a provision of the Evidence Act may not be given. Where all reasonable steps have been taken to find the person or to secure his attendance, but without success, or all reasonable steps have been taken to compel the person to give the evidence, but without success, the person is also taken to be not available. Section 6(2) provides that: "In all cases other than those set out in subsection (1), the person shall be taken to be available to give evidence about the fact."

[53] The effect of section 6(2), is that the list of circumstances in section 6(1), is exhaustive. If none of the situations under section 6(1) is shown, the person is regarded as available, and the section 50 exception would not apply. In the

case before me, there is no material upon which to conclude whether any out-of-court declarant is not available.

E. *Witness Statements and Hearsay*

[54] Part 29 of the CPR 2008 governs the preparation and use of witness statements. Rule 29.1(1) empowers the court to control the evidence to be given at a trial by giving appropriate directions as to the issues on which it requires evidence, and the way in which any matter is to be proved, at a case management conference or by other means.

[55] Rule 29.5(1)(d) provides that a witness statement must not include any matters of information or belief which are not admissible and, where admissible, must state the source of any matters of information or belief. This rule does not extend the exceptions to the hearsay rule. The effect of the rule is that, where hearsay would be admissible under any exception to the hearsay rule, the source of the hearsay must be identified. As Mann J, in *JSC Mezhelunarodury Promyshlenniy Bank and another v Pugachev* [2014] EWHC 4336, at paragraph 38, observed:

> "The position is that giving hearsay evidence in those circumstances is an opportunity afforded to a litigant but it comes at the price of identifying individuals who are the source of the evidence (usually) ….. A litigant has a choice. If he wishes to rely on the information then the price is that the source is no longer privileged. If he does not want to identify the source then he cannot rely on the information and at the same time maintain the claim to privilege."

In that case, it appears that there was an objection to disclosing the source of the information because of claims to privilege. However, the statements of Mann J would be applicable here as well, where the confidential source has not been identified. This seems to be an issue of some import here where there is reference to an unidentified confidential source as the original source of some information.

[56] The requirement to identify the source is an important protective safeguard for the opposing party. In *Masri v Consolidated Contractors International Company SAL and another* [2011] EWCA Civ 21, Aikens LJ, at paragraph 32, noted that:

> "….the aim of that paragraph of the Practice Direction is to ensure that a person against whom serious allegations are being made can identify the source of any information or belief that is not within the deponent's own knowledge so that the facts deposed to on the basis of information or belief can be investigated. That is only fair to the person against whom the evidence in the affidavit is directed. Therefore, I would interpret the phrase "…must indicate…the source for any matters of information or belief" as meaning that, save in exceptional cases, the deponent must identify the source of the relevant information or belief. If the source is a person, that person must, save in exceptional cases, be identified with sufficient certainty to enable the person against whom the affidavit is directed to investigate the information or belief in accordance with the rules of court or other relevant legal principles."

It seems from the last-mentioned case, that pointing to a confidential source would not generally satisfy the requirements of rule 29.5(i)(d).

[57] A witness statement is no more and no less than a statement in writing of the evidence which a witness would be permitted to give in oral testimony in proceedings. Therefore, the witness statement must comply with the rules relating to admissibility of evidence. Counsel drafting a witness statement must do so with the rules of evidence in mind, only to include evidence which is relevant, admissible, probative and not prejudicial. Counsel should therefore be alert to any evidence that may be inadmissible for hearsay or otherwise. Rule 29.5(2) empowers the court to strike out any inadmissible, scandalous, irrelevant or otherwise oppressive matter from any witness statement. Thus the court could strike out inadmissible hearsay from a witness statement.

F. *Flexible Approach to Hearsay Rule*

[58] Counsel for the first and second defendants argued that the claimant is taking a very technical approach to the application of the hearsay rule. Both the highest courts in Australia and Canada have suggested a more flexible approach to the hearsay rule. Mason CJ, in *Walton v R* [1989] HCA 9, advocated thus (paragraph 23):

> "The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay ….."

[59] Similarly, in *R v Khan* (1990) 2 SCR 531, Madam Justice McLachin, writing for the Supreme Court of Canada, observed:

> "The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions."

[60] I think there is considerable force in the opinion of the High Court of Australia that the hearsay rule ought not to be applied inflexibly where the dangers which the rule seeks to prevent are not present. In some countries, the hearsay rule has either been abolished or relaxed in civil proceedings (see Civil Evidence (Scotland) Act 1988; Civil Evidence Act 1995, England and Wales; and the Evidence Act, Jamaica, as discussed by Sykes J in *Kennedy Holland et al v. Williams et al* [2009] 6 JJC 3001). The justification for the hearsay rule, based on the danger of misleading juries, loses its significance in civil proceedings

where there is trial by judge alone. The professionally trained judge can weigh the probative value of any hearsay statement. Traditionally, the hearsay rule has not been applied with the same stringency in civil cases as in criminal cases. In civil proceedings, the hearsay rule is often ignored or waived. This is an observation also made in ALRC 26, at paragraph 329, and is reflected in the fact that most decisions on hearsay come out of criminal proceedings. That is not to say that the hearsay rule is to be ignored in this or any other case in civil proceedings.

Non-expert Opinion

[61] Counsel for the first and second defendants argued that the alleged offending statement, at paragraph 7 of the witness statement, is admissible as a lay opinion under section 65 of the Evidence Act. The provisions of the Evidence Act, Division 2, sections 64, 65 and 66, dealing with opinion evidence, are similar to sections 76 (general exclusionary rule), 77 (evidence relevant other than as opinion evidence), 78 (exception: lay opinion) and 79 (exception: expert opinion) of the Uniform Evidence Act 1995.

[62] The Evidence Act does not define "opinion". Section 2 of the Evidence Act provides that the "opinion rule" is to be construed in accordance with section 64(1). Like the hearsay rule considered earlier, there are various attempts to define "opinion". Three definitions seem to be referenced more than others. JD Heydon, in *Cross on Evidence*, at page 1086, defines opinion as meaning "…any inference from observed or assumed facts" (see too *Quick v Stoland* (1998) 87 FCR 371, 157 ALR 615, where Branson J adopted the definition of "opinion" given in *Cross on Evidence*). Several cases, including *Hodgson v Amcor Ltd* [2011] VSC 272, at paragraph [46], *DPP v Iliopoulos and others* [2016] VSC 47, at paragraph 55, and other cases, refer to the definition of "opinion" given by Giles J, in *R W Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* 34

NSWLR 129, 130 as: "Opinion evidence may be described as evidence of a conclusion, usually judgmental or debatable, reasoned from facts." In *Lithgow v Jackson*, at paragraph [10], the High Court referred to an opinion as "….an inference from observed and communicable data". The last definition seems to be the most commonly adopted meaning of "opinion" under the Uniform Evidence Act 1995.

[63] Opinion evidence was generally inadmissible at common law, subject to a number of exceptions. The opinion rule "…derives from the general rule that witnesses must speak only to that which was directly observed by them" (JD Heydon, *Cross on Evidence*, page 1086). Section 64 of the Evidence Act enacts a general exclusionary rule for opinion evidence. It provides as follows:

> "(1) Evidence of an opinion is not admissible to prove the existence of a fact as to the existence of which the opinion was expressed.
>
> (2) Where evidence of an opinion is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove the existence of a fact as to the existence of which the opinion was expressed."

Section 64 does not require an exegesis here.

[64] The Evidence Act, Division 2, provides two exceptions to the general exclusionary opinion rule enacted by section 64. These are in respect to lay or non-expert opinions (section 65) and opinions based on specialized knowledge (section 66). It is the non-expert opinion exception which is relevant here. Section 65 of the Evidence Act provides as follows:

> "65. Where
> (a) an opinion expressed by a person is based on what the person saw, heard or otherwise noticed about a matter or event; and
>
> (b) evidence of the opinion is necessary to obtain an adequate account of the person's perception of the matter or event,

> the opinion rule does not prevent the admission or use of the evidence."

[65] The High Court of Australia, in *Lithgow v Jackson*, considered section 78 of the Uniform Evidence Act 1995, which is similar to section 65 of the Evidence Act. There are two important qualifications to the admission of non-expert opinion evidence under section 65. These are pertinent in this case.

[66] First, the opinion must be based on a matter or event which the person tendering the opinion "… saw, heard or otherwise noticed about a matter or event.." French CJ, Heydon and Bell JJ, in *Lithgow v Jackson*, accepted that it is necessary for the person stating the opinion to have witnessed the matter or event (see paragraph 41 of *Lithgow v Jackson*). The person must have personally perceived the matter or event on which the opinion is stated. If the person stating the opinion did not witness it, that is, did not see, hear or otherwise perceive the event or matter, the opinion is outside of section 65. The opinion cannot be based on hearsay, if it is to be admitted under section 65. It can easily be seen, by way of example only, that where the editor-in-chief states an opinion about a matter or event, which is based on what was told to her by a third person, that the opinion falls outside of section 65 of the Evidence Act. This is because the editor-in-chief would be stating an opinion on a matter or event or fact which she would not have perceived personally, but which would be based on hearsay. The same applies to the second defendant.

[67] Secondly, the evidence of the opinion must be *"…* necessary to obtain an adequate account of the person's perception of the matter or event…." (section 65(b) of the Evidence Act). French CJ, Heydon and Bell JJ, in *Lithgow v Jackson*, at paragraph 51, explained this limitation as follows:

> "The function of s 78(b) is to make up for incapacity to perceive the primary aspects of events and conditions, or to remember the perception, or to express the memory of that perception. But

> the ambulance officers were not shown to be suffering from incapacity in perception, memory or expression. Their record showed a gap in expression in fact – they had said nothing about what they perceived about the position of the respondent's body. It did not follow that there was any incapacity to perceive, to remember what they had perceived, or to say what they had perceived about it. ……"

[68] Paragraph (b) of section 64 of the Evidence Act is directed at the case where the facts on which the opinion is based are either too evanescent or too complicated to be seperately narrated. Again, French CJ, Heydon and Bell JJ, in *Lithgow v Jackson,* explained the type of non-expert opinion evidence that is admissible under the section thus (at paragraph 48):

> "The function of the law in relation to that category is to permit reception of an opinion where the primary facts on which it is based are too evanescent to remember or too complicated to be separately narrated. Where the evidence is that a person appeared to be drunk or middle-aged or angry, for example, it is impossible in practice for the observer separately to identify, remember and narrate all the particular indications which led to the conclusion of drunkenness, middle age or anger. For that reason, s 78 permits the conclusion to be stated: without it the evidence does not convey an adequate account or generate an adequate understanding of the witness's perception of the sobriety, age or emotional state being observed. But in cases of the present type the primary facts are not too evanescent to remember or too complicated to be separately narrated……."

[69] In *Lithgow v Jackson*, the court had to consider the admissibility of a statement in a record of the ambulance service made by ambulance officers who were not called as witnesses. French CJ, Heydon and Bell JJ cautioned that the section is not to be used to meet challenges where a party has difficulty calling a witness for whatever reason, or to permit hearsay evidence where better evidence is available. French CJ, Heydon and Bell JJ, in *Lithgow v Jackson*, wrote, with respect to the comparable provision to section 65 of the Evidence Act as follows (at paragraph 54):

> “The word "necessary" is not directed to meeting difficulties that arise where it is impossible or inconvenient to call the person propounding the opinion as a witness. It is not analogous to the provisions permitting evidence of hearsay statements where better evidence is unavailable (eg ss 63 and 65 of the Act) or where to call better evidence could cause undue expense or undue delay or would not be reasonably practicable (s 64 of the Act). Section 78 is not a "best evidence" provision, permitting reception of the evidence if there is no better evidence. The word "necessary" is instead directed to a relationship internal to the evidence of the perceiver – the relationship between the perceiver's perceptions and the perceiver's opinion.”

[70] I think the caution is apposite here, where the first and second defendants are likely to face evidential challenges raised by the third defendant’s non-participation in the proceedings for whatever reason. As was stated in *Lithgow v Jackson*, at paragraph 17: “The onus of demonstrating the conditions of admissibility of evidence under the Act lies on the tendering party.” In my view, the first and second defendants cannot show that the editor-in-chief’s opinion is based on facts either too evanescent or too complicated to be distinctly narrated. The same would apply to any opinion expressed by the second defendant in the witness statement. I will examine the challenged statement in paragraph 7 of the witness statement in greater detail below.

Application: Hearsay Rule & Opinion Rule

[71] Counsel for the claimant identified 6 statements which he contended are inadmissible for hearsay. I propose to consider these individually, consistent with the decision in *Sio v R* [2016] HCA 32, at paragraphs 57 and 58, where the High Court of Australia held that each representation must be considered individually and not in a compendious way. The alleged offending statements are italicized, followed by my observations.

Objection 1

Paragraph 3: "The *First Defendant discovered that there was an accompanying webpage link, which contained a "Flying Fish & Cou Cou" article that was published online on the 23rd day of October 2010."*

[72] There are two possible previous representations in the sentence. The headline, which the witness read out-of-court would be a previous representation. That no doubt was tendered for a non-hearsay purpose and would be admissible. The statement that the "First Defendant discovered" the article published online seems to involve a previous representation. The witness does not state that she discovered the article. If she did, then there is no reason why she should not say so. If she did not discover it, then she is relying on the previous representation of an out-of-court declarant. The source of the information is not stated. The witness could be relying on firsthand or secondhand or even more remote hearsay for the evidence given in the sentence. I do not know.

[73] Even more so, the first defendant is an artificial legal entity. It cannot supply information to any person. Nor can it discover anything. It can only do so through its officers. The officer who supplies the information to the witness, or discovers something must be mentioned. It is not permissible in an affidavit, or witness statement, or in oral evidence at the trial to attribute a statement to an artificial person, without mentioning the officer of the artificial person who supplied the information. As said in *Mintz, In re; Malouf v Mintz* [1930] 2 DLR 777, [1930] 1 WWR 198, at paragraph [23],

> "Par. 4, wherein Mr. Kliman says he has been informed by "The Canadian Credit Men's Trust Association, Limited," is objectionable, because an incorporated association cannot give information, it can only do so by one or more of its officers, and the officer or officers giving the information should have been mentioned."

The sentence is inadmissible, in my view, as currently structured.

Objection 2

Paragraph 3: *"Immediately we became aware that the publication was posted online identifying the individuals the article was removed."*

[74] This sentence also includes a previous representation. The witness can testify when she became aware of the publication. Her knowledge as to when others became aware, would be dependent upon some previous representation made by the others to her. The persons who comprised the 'we', and who presumably supplied the information, have not been identified. In my judgment, this sentence is also inadmissible, as presently expressed.

Objection 3

Paragraph 4: "…*the Editor-in-Chief at the time, the Third named Defendant herein, investigated the newsroom in an effort to discover the source*."

[75] The assertion is that the editor-in-chief, the third defendant, carried out an investigation. It seems to me that the witness could have personal knowledge as to whether or not an investigation was carried out, by whom it was carried out, and what was the purpose of the investigation. The investigation could be an objective fact which the witness observed. I think this sentence is permissible.

Objection 4

Paragraph 7: "*She was confident that the publication regarding the Report dubbed "the Barker Report" was a document of the Barbados Labour Party. However, her confidential source could not provide a signed Report for our inspection*."

[76] Counsel for the first and second defendants submitted that the first sentence of these challenged statements, is admissible under section 65 of the Evidence Act, as a lay opinion.

[77] The first sentence refers to a conclusion reached by the then editor-in-chief that the Barker Report was a document of the Barbados Labour Party. Such a

conclusion seems to be based on the truth of the out-of-court representations made by an undisclosed confidential source to the then editor-in-chief, and would not satisfy the requirements of section 65. The opinion is based on what was told to the editor-in-chief and not on anything she witnessed. Further, the facts on which the opinion is based are not too evanescent or too complicated to be separately narrated.

[78] The witness could only report that the editor-in-chief was confident that the Barker Report was a document of the Barbados Labour Party based on some representation (oral, in writing, or by conduct) made by the editor-in-chief (or someone else) to the witness. Therefore, in the first sentence, the witness is reporting a previous representation. The editor-in-chief seems herself to be relying on a confidential unidentified source. Whether the confidential source had personal knowledge or might reasonably be supposed to have had personal knowledge of the asserted facts cannot be assessed. As it stands, it is possible that the confidential source may or may not be relying on a hearsay source. Again, I do not know.

[79] The editor-in-chief herself does not have personal knowledge of the Barker Report being a document of the Barbados Labour Party. In effect, the first sentence is not firsthand hearsay, but at minimum, secondhand hearsay and would be inadmissible under section 50, which permits the admission of first-hand hearsay in civil proceedings.

[80] The admission of the first sentence as a non-expert opinion under section 65, carries the danger that the hearsay rule would be infringed, since the statement contains inadmissible hearsay.

[81] It is not clear from the second sentence, as expressed, whether the witness is testifying that the confidential source reported to her, that a signed report could not be produced, or whether the witness is reporting what the confidential

source told the editor-in-chief, as the editor-in-chief related to the witness. It seems to me, more likely to involve an assertion made out-of-court by the confidential source to the editor-in-chief, who, in turn, reported it to the witness. Both cases would involve an out-of-court statement; the second scenario would involve secondhand hearsay, and would be inadmissible.

[82] I think that the previous representations in the identified sentences were tendered for the truth asserted, that the document dubbed the "Barker Report" was a document of the Barbados Labour Party. In my view, the statements are inadmissible for the reasons given above.

Objection 5
Paragraph 8: "*This notwithstanding, our employees were instructed to ask for a comment from Mr. Owen Arthur who was at that time the leader of the opposition Barbados Labour Party."*

[83] As JD Heydon, in *Cross on Evidence*, writes (at page 1192): "Evidence tendered to show that a request was made is not hearsay if the request is not tendered to establish the truth of a proposition in it. Another example is an instruction." An instruction given to employees to ask for a comment involves a previous representation made by the witness out-of-court or by some other person to the first defendant's employees. The sentence does not state who gave the instruction, whether the witness or some other person. The sentence is imprecise and leaves open a number of possibilities. It is possible that the witness became aware of the instruction given by way of firsthand, secondhand or even more remote hearsay. It seems to be tendered to prove the truth of the facts asserted. If the testimony of the witness is based on the previous representation of someone, the source has not been stated. In my judgment, the sentence is inadmissible as presently expressed.

Objection 6

Paragraph 9: *"Mr. Arthur at that time confirmed to an employee who interviewed him of the existence of the Report and said that "it was unfortunate that the report had come to the attention of the public before there had been a chance for the BLP's national council to discuss it and determine a response." He also said simply that the report "speaks for itself". This confirmed for us that the Report was indeed accurate and more importantly that the report was a document which originated within the Barbados Labour Party itself. His interview formed part of the article published on the 30th day of January 2011."*

[84] The first two sentences are imprecise. It is unclear how the witness learnt of the statements allegedly made by Mr Arthur to the unnamed employee. It is possible that she is reporting what the employee who allegedly interviewed Mr Arthur told her or what she read out-of-court. It is also possible that she is relying on what the editor-in-chief told her (the witness), as told to the editor-in-chief by some other employee or agent of the first defendant or someone else. It is evident that the first two sentences, are out-of-court representations by an unnamed declarant of a representation allegedly made by Mr Arthur to an unnamed employee. These sentences seem to me to be secondhand hearsay, and thus would be inadmissible under section 50. The imprecise manner in which the first two sentences are drafted carries the risk of even more remote hearsay than secondhand hearsay.

[85] The third sentence suggests that the out-of-court statements in paragraph 9 of the witness statement are tendered for the truth of the matters stated in them.

[86] In addition, the third sentence seems to be a judgment or conclusion reached by the witness and others, based on what the employee told the witness and others, as allegedly told by Mr Arthur to the employee. This would seem to fall within the definition of "opinion", given in *R W Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* 34 NSWLR 129, referred to above. Here, the witness formed a judgment on the information supplied that the report is accurate and originated within the Barbados Labour Party. The third sentence would not be admissible under section 65 of the Evidence Act. The conclusion or judgment is based on

what was told to the witness and to others who were not identified. Again, the witness would only know of the conclusion of others, who have not been identified, based on some hearsay statement by some other person or persons, again not identified. Further, the facts on which the opinion is based are not too evanescent or too complicated to be separately narrated.

[87] In my judgment, the challenged statements at paragraph 9 of the witness statement are inadmissible, as presently expressed.

Conclusion

[88] The basic rule, subject to some exceptions, still applies that a witness must give evidence of what the witness has personal knowledge of. That applies where the witness is giving evidence on behalf of a company or not. It should be clear from the witness statement, what evidence the witness has personal knowledge of, and when the witness is relying on evidence of another person. The importance of the latter statement cannot be underscored enough. I do not think that the hearsay rule should be avoided by permitting general or wide statements, which leave doubt as to whether the witness has personal knowledge of the matter or is relying on the evidence of another person.

[89] The second defendant could no doubt revisit some of the impugned sentences. But it seems to me that in some cases, the first and second defendants will need additional testimonial evidence if they are to avoid hearsay, or hearsay more remote than firsthand. There are means by which a party can compel a witness to testify to obtain the evidence it wishes, if the party considers the evidence important to its case. That applies to the first and second defendants. The second defendant should be scrupulous to observe the requirements of rule 29(5)(d)(i) in identifying the source of any information not within the personal knowledge of the witness, when the witness files a witness statement

properly verified by a certificate of truth. Where any statement does not, it should be struck out.

[90] Trial dates have not been fixed for the hearing. There is an application for permission to amend the defence, which is to be heard. The first and second defendants will have the opportunity to file a properly verified witness statement. It seems to me that given the stage of the case, it is still open to the first and second defendants to give a notice of intention, under section 54 of the Evidence Act, to adduce hearsay evidence in respect to any firsthand hearsay the refiled witness statement may contain. I think care must be taken to ensure that any statement in the refiled witness statement is not secondhand or more remote hearsay if it is the intention of the first or second defendant to bring the statement within the hearsay exception under section 50. I feel constrained to emphasize that, in respect to some pieces of evidence, it appears to me that the only way the first and second defendants would be able to avoid secondhand or more remote hearsay, would be to call an additional witness or additional witnesses with better evidence.

[91] Hopefully, the above preamble on the hearsay rule and the exceptions to it under sections 50 and 51 of the Evidence Act, as well as the introduction to non-expert opinion evidence, would benefit the parties going forward.

Disposal

[92] I therefore order that the first and second defendants file and serve a witness statement verified by a certificate of truth within 21 days of the date of this decision. The challenged sentences at paragraphs 3 (Objection 1 and Objection 2), 7 (Objection 4), 8 (Objection 5) and 9 (Objection 6) of the witness statement of the second defendant are inadmissible hearsay or inadmissible non-expert opinion evidence as indicated above. Those sentences cannot

stand, as currently expressed or in the same form, in any witness statement which is refiled by the second defendant.

[93] I will hear the parties on costs.

……..
ALRICK SCOTT, QC
Judge of the High Court (Acting)