In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 44

BETWEEN:-

WONG, WEN-YOUNG

Plaintiff/Applicant

- and -

(1) GRAND VIEW PRIVATE TRUST COMPANY LIMITED

(2) TRANSGLOBE PRIVATE TRUST COMPANY LIMITED

(3) VANTURA PRIVATE TRUST COMPANY LIMITED

(4) UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED

(5) THE ESTATE OF HUNG WEN-HSIUNG, DECEASED

(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

(7) WANG, RUEY HWA (aka "Susan Wang")

Defendants/Respondents

(8) WANG, VEN-JIAO (aka "Tony Wang")

(as joint administrator of the Bermudian estate of YT Wang)

(9) WANG, HSUEH-MIN (aka "Jennifer Wang")

(as joint administrator of the Bermudian estate of YT Wang)

Defendants

IN CAMERA-VIA VIDEOCONFERENCE

Date of hearing: June 2, 2021

Draft Ruling circulated: June 4, 2021

Ruling delivered: June 9 2021

Mrs Elspeth Talbot Rice QC and Mr Dakis Hagen QC of counsel and Mr Rod S. Attride-Stirling, ASW Law Limited, for the Plaintiff

Mr Richard Wilson QC of counsel and Mrs Fozeia Rana-Fahy MJM Limited ("MJM"), for the 8th Defendant ("Tony"/"D8")

Mr Mark Howard QC and Mr Jonathan Adkin QC of counsel and Mr Paul Smith and Mr Scott Pearman, Conyers Dill & Pearman ("Conyers"), for the 1st to 4th and 6th Defendants (the "Trustees")

Mr Stephen Midwinter QC of counsel and Mr Steven White, Appleby (Bermuda) Limited, for the 5th Defendant

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Hearsay Notices served at trial-whether extension of time should be granted- whether witness is "beyond the seas"-principles governing exercise of discretion to permit witness statements of an important witness to be admitted in evidence without cross-examination- Evidence Act 1905 sections 27A-27B, 68C, 68E-Evidence (Audio Visual Link) Act 2018 sections 4,10-Rules of the Supreme Court 1985 Order 38 rules 21(1), 22, 25, 27 and 29

RULING ON TRUSTEES AND D5'S HEARSAY NOTICES

Introductory

1. By a Summons dated May 31, 2021, the Trustees applied for the following substantive relief:

> "*1. Pursuant to Order 3 Rule 5 of the Rules of the Supreme Court 1985 (RSC) the period of time for the Trustees to serve a Notice be extended pursuant to RSC Order 38, Rule 21 in respect of the First Witness Statement of William Wen-Yuan Wong dated 15 September 2020, the Second Witness Statement of*

William Wen-Yuan Wong dated 13 November 2020 and the Third Witness Statement of William Wen-Yuan Wong dated 6 January 2021.

2. Alternatively, pursuant to Order 38 Rule 29 of the RSC, the said statements be allowed to be given in evidence by the Trustees at trial on the grounds that it is just to do so."

2. On May 28, 2021, D5 had already filed her Summons seeking similar relief in relation to the three Witness Statements of William Wong (the "Witness Statements"). The proposed Hearsay Notices in each case rely on the ground that the witness is "*beyond the seas*". The Plaintiff and D8 opposed both applications.

3. Mr. William Wong is one of the Trustees' most important witnesses and his evidence, particularly as regards D8's case, is highly contentious. He is a director of each of the Private Trust Companies, a member of the Business Management Committees of each of the five Bermuda Purpose Trusts and also the Chairman of the FPG Executive Committee. The Trustees intended to make him available for cross-examination at trial which commenced on April 19, 2021 via video-conference link with all Taiwanese-based live witnesses scheduled to testify from the Chinese Arbitration Association Centre. However, by letter dated May 26, 2021, the Trustees' attorneys advised that he would not be made available for cross-examination at all.

The Trustees' grounds for seeking an extension of time for serving a Hearsay Notice

4. The Trustees' Summons is firstly supported by the Third Affidavit of Roderick McAlpine, a Hong Kong-based partner of Skadden, Arps, Slate, Meagher & Flom. It is acknowledged by the deponent that William Wong's evidence substantially overlaps with that of his brother Wilfred who will still be made available for cross-examination. I infer from this not simply that the Plaintiff and D8 will not be as prejudiced from being deprived of the ability to cross-examine the witness as might otherwise be the case. I also infer that the Trustees consider that their own case will not be critically impaired if:

    (a) the Witness Statements are admitted, but given lesser weight; or

    (b) the Witness Statements are not admitted at all.

5. The deponent avers that the witness had been preparing to give evidence over several weeks, had attended meetings with his lawyers and listened to portions of the evidence

given by other witnesses at trial. It became clear by May 24, 2021, that he would not be able to commence his evidence as scheduled on May 31, 2021. Attempts were made to reschedule his evidence, which proposals were opposed on May 25, 2021. This was not, it must be emphasised, dispositive. Mr Wong and his lawyers after considering his options "*concluded, reluctantly, that he could not realistically be expected to testify prior to the scheduled conclusion of the factual evidence of the trial*" (paragraph 14). It was agreed to facilitate cross-examination of Mr Wilfred Wang on matters which would otherwise have been raised with William Wong by extending the time allotted to Wilfred's oral evidence.

6. As regards the reasons for the witness' inability to testify, the most significant consideration is a sensitive personal matter explained in a confidential Affidavit which I ordered to be sealed. It suffices to say that reliance is placed on a combination of Covid 19-related business and wholly separate personal pressures which I have little difficulty in accepting as constituting, in general terms, a reasonable explanation as to why Mr William Wong has belatedly felt unable to testify at the present trial. I summarily reject (at this stage, for the purposes of the present applications) as entirely unfounded and inherently lacking in credulity any suggestion that he is simply a reluctant witness. For the avoidance of doubt I should add that there is no suggestion that he is "unfit" to give evidence in the requisite legal sense.

D5's grounds for seeking an extension of time for serving a Hearsay Notice

7. Mr Midwinter QC for D5 made it clear that he primarily supported the Trustees' application, and only secondarily made a freestanding application on his client's behalf to rely on the Witness Statements. In his Skeleton Argument (at paragraph 5), it was most pertinently submitted that:

> "*e. In short, it would be disproportionate, unjust and wrong to penalise the Fifth Defendant for not having served a hearsay notice in respect of William's statements in time in circumstances in which she reasonably anticipated that it would be unnecessary to serve such a notice because William was due to attend trial and where the lateness of the notice has caused and will cause no prejudice whatsoever to any other party.*"

8. It is obvious D5's independent interests do not go beyond seeking to rely on those portions of the Witness Statements which directly support her case. On the face of it, there was no clear basis for concluding that the entirety of the Witness Statements of the Trustees' witness should be admissible at the instance of D5 if they were not admitted at the instance of the parties whose cases the evidence was primarily designed to directly support.

Governing legal principles

Primary legislation: the Evidence Act 1905

9. The Evidence Act 1905 contains two pertinent provisions. Firstly, section 27A:

> "*27A In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this or any other Act or by agreement of the parties, but not otherwise.*"

10. Mrs Talbot Rice QC submitted that this provision created a default position of excluding hearsay evidence and that in this respect the Bermudian approach does not reflect the "sea change" movement away from the common law that Mr Howard QC contended. She argued that the English framework under the Civil Evidence Act 1995 ("1995 UK Act"), which replaced the Civil Evidence Act 1968 ("1968 UK Act"), is more permissive. I accept this submission.

11. In my judgment, Part IIA of the Evidence Act 1905 is materially based on the 1968 UK Act. Section 27A is substantially the same as section 1(1) of the 1968 UK Act. Section 27B(1) is substantially the same as section 2(1) of the 1968 UK Act. Section 27B(1) provides:

> "*27B (1) 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 and to the rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.*"

12. It is clear from '*Phipson on Evidence*', 29th edition at paragraphs 29-01-29-02 that section 1(1) of the 1995 UK Act is more permissive than our own section 27A and was enacted as part of reforms designed to liberalise the regime under the 1968 UK Act upon which the Bermudian legislative scheme is seemingly based. The opening section in that scheme provides:

> "*(1) In civil proceedings evidence shall not be excluded on the grounds that it is hearsay.*"

13. Over 10 years ago in *Knight-v-Warren* [2010] SC (Bda) Civ 20 (27 April 2010) , I stated:

> "*Under Bermuda law there is a presumption that documentary evidence relied on for the truth of the statements contained therein is not admissible unless the party seeking to adduce it can bring the relevant material within the statutory exceptions. This is to be contrasted with the modern English position under section 1(1) of the Evidence Act 1995: "In civil proceedings evidence shall not be excluded on the grounds that it is hearsay."*""

14. However, it is unclear how great a difference exists in practice when it comes to witness evidence. Mrs Talbot-Rice QC placed reliance on the following statement in *Phipson* at paragraph 29-16:

> "*The Act is not intended to provide a substitute for oral evidence. The basic principle under which the courts operate is that evidence is given orally with cross-examination of witnesses, and the admission of hearsay evidence is, and should be, the exception to the rule. Caution should be exercised before tendering important evidence through hearsay statements. Hearsay evidence is better used when the evidence is peripheral or relatively uncontroversial.*"

15. The commended practical approach essentially reflects the approach the parties adopted to hearsay notices in the run up to the trial, insofar as reliance was placed on the "*beyond the seas*" ground. Be that as it may, the statutory position may be summarised as follows:

    (a) section 27A provides that hearsay evidence is inadmissible save where expressly permitted by the 1905 Act or some other statutory provision; and

    (b) section 27B(1) (as relied upon in relation to the present applications) provides that statements in documents shall be admissible to the same extent as oral evidence "*subject to this section and to the rules of court*".

Order 38 of the Rules of the Supreme Court 1985

16. Part III of Order 38 of the Rules deals with "*HEARSAY EVIDENCE*". Order 38 rule 21 provides:

> "*Subject to the provisions of this rule, a party to a cause or matter who desires to give in evidence at the trial or hearing of the cause or matter any statement which is admissible in evidence by virtue of section 27B, 27D or 27E of the Act must—*
>
> *(a) in the case of a cause or matter which is required to be set down for trial or hearing or adjourned into court, within twenty-one days after it is set down or so adjourned, or within such other period as the Court may specify, and*
>
> *(b) in the case of any other cause or matter, within twenty-one days after the date on which an appointment for the first hearing of the cause or matter is obtained, or within such other period as the Court may specify,*
>
> *serve on every other party to the cause or matter notice of his desire to do so, and the notice must comply with the provisions of rule 22, 23 or 24, as the circumstances of the case require.*" [Emphasis added]

17. A party seeking to rely on hearsay statements under section 27B (1) must serve a notice complying with rule 22 within 21 days of the case being set down for trial or such other period as the Court may specify. Rule 22(2) merely requires a copy of the document in question to be annexed to the notice. However Order 38 rule 22(3) provides:

> "*(3) If the party giving the notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reason relied on.*"

18. Rule 25 provides:

> "*25. The reasons referred to in rules 22(3), 23(2) and 24(3) are that the person in question is dead, or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness or that despite the exercise of reasonable diligence it has not been possible to identify or find him or that he cannot*

reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement to which the notice relates."

19. Mr Howard QC submitted that, if one of the rule 25 grounds applies, there is an automatic right for the evidence to be admitted if a hearsay notice is served in time. This analysis of the procedural scheme was not challenged. It finds support in the fact that Order 38 rule 26(4) provides that where a rule 25 ground is relied upon in a hearsay notice, the admission of the evidence cannot be forestalled merely be serving a counter-notice (without prejudice to the Court's power to admit hearsay under Order 38 rule 29). Where a rule 25 ground is relied upon, Order 38 rule 27 provides:

> "*(1) Where in any cause or matter a question arises whether any of the reasons specified in rule 25 applies in relation to a person particulars of whom are contained in a notice under rule 21, the Court may, on the application of any party to the cause or matter, determine the question before the trial or hearing of the cause or matter or give directions for it to be determined before the trial or hearing and for the manner in which it is to be so determined.*
>
> *(2)Unless the Court otherwise directs, the summons by which an application under paragraph (1) is made must be served by the party making the application on every other party to the cause or matter.*
>
> *(3) Where any such question as is referred to in paragraph (1) has been determined under or by virtue of that paragraph, no application to have it determined afresh at the trial or hearing of the cause or matter may be made unless the evidence which it is sought to adduce in support of the application could not with reasonable diligence have been adduced at the hearing which resulted in the determination.*"

20. The jurisdiction to entertain an application in relation to a disputed hearsay notice which relies on Order 38 rule 25 at the substantive hearing at which the hearsay evidence is sought to be adduced is not excluded. But the prescribed procedure is that hearsay notices should be served before trial and that disputes about their validity should be adjudicated before trial. Accordingly, as the Trustees' counsel contended, the primary question which arises, where a hearsay notice is served out of time, is whether an extension of time should be granted. This flows from Order 38 rule 29, which confers a power to admit hearsay statements falling within, *inter alia*, section 27B(1) of the Act where the applicant has failed to comply with rule 21:

> "*29(1)…the Court may, if it thinks it just to do so, allow a statement falling within section 27B(1), 27D(1) or 27E(1) of the Act to be given in evidence at the trial or hearing of a cause or matter notwithstanding—*
>
> *(a) that the statement is one in relation to which rule 21 (1) applies and that the party desiring to give the statement in evidence has failed to comply with that rule, or*

(b) that that party has failed to comply with any requirement of a counternotice relating to that statement which was served on him in accordance with rule 26.

(2) Without prejudice to the generality of paragraph (1), the Court may exercise its power under that paragraph to allow a statement to be given in evidence at the trial or hearing of a cause or matter if a refusal to exercise that power might oblige the party desiring to give the statement in evidence to call as a witness at the trial or hearing an opposite party or a person who is or was at the material time the servant or agent of an opposite party."

21. However, rule 29(2) signifies that a material consideration explicitly promulgated by the Rules is the question of whether a party seeking to rely on hearsay statements may be impeded from calling a witness who is a servant or agent of an opposing party.

Principles governing the application of statutory rules

22. It was essentially common ground that my own observations in *Knight-v-Warren* [2010] SC (Bda) Civ 20 identify the higher level policy considerations which are engaged:

> "*80. So Order 38 rule 29 made pursuant to section of the Evidence Act gives this Court a discretion to admit documents under section 27D(1) of the 1905 Act in circumstances where the relevant notice requirements, and by necessary implication the formal requirements of the statute itself, have not been met. The fundamental duty of the Court is to afford both parties a fair trial under section 6(8) of the Constitution. As an 'existing law' for the purposes of section 5 of the Bermuda Constitution Order, the Evidence Act itself must "be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution". And in applying any power under the Rules, the Court is required to have regard to the Overriding Objective enshrined in Order 1A of the Rules (Order 1A(2), which is essentially designed to give embed those fundamental fair hearing rights in the ordinary practice of the courts*…"

23. However, at a more practical level, clearly, where (as is the case here) the non-compliance involved relates to time, material considerations must first and foremost include:

    (a) the reasons for the delay;

    (b) whether a rule 25 ground is validly relied upon;

    (c) an assessment of the prejudice which will be suffered by the various parties if the application to admit the hearsay statements is granted or refused; and

(d) all other things being equal, the onus rests with the party seeking to rely on a hearsay notice which does not comply with Order 38 rule 21 to persuade the Court that it is just to grant the application under Order 38 rule 29.

24. In my judgment it is far from easy to identify any dispositive general principle which informs how the Order 38 rule 29 discretionary power should be exercised in a case such as the present where the competing prejudices are fairly evenly balanced. It is not obvious to me that the Trustees will suffer greater prejudice than the Plaintiff and D8 if the Witness Statements are either excluded or admitted. Mrs Talbot-Rice QC commended the "best evidence rule" to the Court, Mr Wilson QC warned of the dangers of encouraging witnesses to conjure up excuses for not testifying orally and Mr Howard QC invoked the "modern approach" of admitting all evidence. Bermuda's legislative scheme is based on the 1968 UK Act. Before that statutory scheme was further liberalised in England and Wales in 1995, the prevailing English view apparently was that the 1968 UK Act had not undermined the traditional view that important controversial evidence should be subject to cross-examination: '*The Ferdinand Retzlaff"* [1972] 2 Lloyd's Rep. 120 at 127; *Morris-v-Stratford-on-Avon RDC* [1973] 1 W.L.R. 1059 at 1064-1065; *Greenaway-v-Homelea Fittings (London) Ltd* [1985] 1 W.L.R. 234 at 236F.

25. I am therefore unable to accept that, as regards the admission of witness statements provided by important witnesses dealing with contentious matters, the modern default position under Bermudian law is that such statements should be admitted. *Phipson On Evidence*, 19th edition (updated to 2020) at paragraph 19.16 suggests a cautionary approach to such evidence. The text cites *Gubarev-v-Orbis Business* [2020] EWHC 2912 (QB), a case which cites the same paragraph in *Phipson* with approval at paragraph 115(2), but this is in the context of a discussion of what weight should be attached to hearsay evidence. Nor do I accept the implication by the Plaintiff's counsel's submissions that this passage directly supports a restrictive approach to Order 38 rule 29. It does provide indirect general support for both declining to admit the Witness Statements altogether and admitting them but according less weight to them in the final analysis. The Trustees' counsel relied upon *Masquerade Music Ltd-v-Bruce Springsteen* [2001] EWCA Civ 513 (at paragraphs 77-80) in reply; but this case did not deal with the hearsay notice scenario either.

Implications of the Evidence (Audio Visual Link) Act 2018 (the "2018 Act")

26. Mrs Talbot Rice QC submitted that Mr William Wong should not be treated as being "*beyond the seas*" within Order 38 rule 25 because of the following provisions of the 2018 Act:

> "*10. A party or a witness, whether inside or outside Bermuda, who appears at a proceeding, or part of a proceeding, by the use of an audio visual link is regarded as being present at the place of hearing at the proceeding, or that part of the proceeding, for the duration of that use*".

27. I accept Mr Howard QC's responsive submission that this section only applies to the time when a remote witness is actually giving evidence. Nonetheless, the fact remote evidence is now possible must have some legal impact on the jurisdiction to grant hearsay notices. Before the 2018 Act was enacted, the stark choice was between requiring an overseas witness to attend Bermuda to give evidence and serving a hearsay notice. Today, there is a three-part suite of options in relation to the evidence of an overseas witness:

    (a) attendance in Court;

    (b) attendance remotely; and

    (c) admitting a witness statement under Order 38 rules 21, 25 and 29.

28. Section 4(5) of the 2018 Act also provides that a direction for remote evidence under section 4(1) can be given on grounds set out in section 68C of the Evidence Act 1905. Section 68C (1) of the Act provides that a judicial officer may direct that a witness may give evidence in an alternative way as prescribed by section 68E. Alternative ways of giving evidence include "*from an appropriate place outside the courtroom, either in Bermuda or elsewhere*" (section 68E(1)(a)(ii)).

29. The grounds on which a section 68C (1) direction may be made include (under section 68C(3)):

    "*(i) the absence or likely absence of the party or witness from Bermuda; …*"

30. In my judgment, the fact that the Legislature has through primary legislation empowered the Court to permit a witness who is "*beyond the seas*" to give evidence via an audio visual link must fall to be taken into account when considering whether a witness is beyond the seas for the purposes of Order 38 rule 25 of the Rules. What effect the 2018 Act (as read with the amendments enacted in 2018 with effect from November 12, 2020, which introduced section 68E and related provisions into the 1905 Act) has in this regard will necessarily vary depending on the facts of each case. However, it follows that I reject the submission that had a hearsay notice been served within the prescribed time on the grounds that the witness was beyond the seas, the Trustees would have been entitled as of right to rely on the Witness Statements merely because the witness was located abroad. Such a construction of the Rules would mean that litigants could subvert the legislative powers conferred by the 2018 Act and section 68C of the Act in relation to overseas witnesses merely by timely serving a notice prescribed by earlier subsidiary legislation. Equally, as submitted by Mr Wilson QC, it would be absurd if remote evidence directions could be subverted after they have been made by justifying a belated application to serve a hearsay notice on the "beyond the seas ground".

Findings: merits of Trustees' Hearsay Notice application

Delay

31. The Trustees have clearly demonstrated through their evidence that there is a reasonable explanation for their non-compliance with prescribed time-limits under Order 38 rule 21. Neither they nor D5 could reasonably have served Hearsay Notices earlier because the witness was scheduled to give evidence via video link.

"Beyond the seas"

32. As I put to Mr Howard QC in the course of argument, it seems wholly artificial to regard Mr William Wong as being "*beyond the seas*" when the Hearsay Notices were filed having regard to the fact that this Court had already directed that he could give evidence from Taipei, along with other witnesses, pursuant to the 2018 Act. This artificiality stems from a very fundamental and ultimately obvious fact which it was difficult to discern in the context of what was for me an entirely novel factual and legal matrix.

33. The true grounds on which the Hearsay Notices have been served are those set out in the evidence filed in support of the Trustees' May 31, 2021 Summons. They are summarised in the Trustees' Skeleton Argument (at paragraphs 15 to 16). Those grounds are business and personal circumstances which are not to any material extent connected to the fact that Mr William Wong is not located within the territorial jurisdiction of the Court. Nor are the grounds related to an assertion that he is beyond the jurisdiction of the place designated for the taking of remote evidence in Taiwan, the Chinese Arbitration Association Centre. The "beyond the seas" ground is an ill-fitting label for the true basis of the application properly understood on its evidential terms.

34. I find pursuant to Order 38 rule 27 that the rule 25 reason relied upon in relation to the witness does not apply to him at all and that the application for an extension of time to serve the Hearsay Notice must be considered on the assumption that the Trustees could not have served their Hearsay Notice, as it were, "as of right", had they done so within time. Accordingly, I refuse the application for an extension of time to serve the Hearsay Notice on the sole ground relied upon in the draft Notice.

Order 38 rule 29: is it just to admit the Witness Statements?

35. Having rejected the Trustees' central thesis that their Hearsay Notice could have been served as of right at an earlier stage merely because the witness is overseas, the scales tip heavily against granting their application on general discretionary grounds. In substance, the application has been made because a series of unfortunate events have resulted in an important but not critical witness becoming unavailable to give oral evidence within the existing schedule of a significant trial. The submission that due to the overlapping evidence of other witnesses the loss of the opportunity to cross-examine William Wong will be mitigated is a double-edged sword. It also signifies that the Trustees are not so dependent on his Witness Statements that they will suffer greater prejudice by not being allowed to rely on them. The unfairness complained of in their Skeleton, properly analysed, is very insubstantial indeed:

"*18. Excluding William Wong's evidence would be unjust:*

(1) First, William Wong gives relevant evidence on a number of issues central to these proceedings. It would somewhat artificial for the Court to close its mind to that evidence, some of which it has examined in the course of these proceedings already.

(2) Second, it would be unfair to visit the consequences of the unforeseeable and unfortunate reasons for William Wong's unavailability to give oral evidence on the Trustees by excluding his statements. The Trustees and William Wong are in no way to blame for William Wong's unavailability. The Trustees should not in effect be punished for things beyond their (and indeed William Wong's) control by having William Wong's Statements excluded."

36. It is difficult to avoid the distinct impression that the most significant underlying motivation for their application is a desire to console a leading character that the contribution he hoped to make will not be entirely lost. Be that as it may, and not without both sympathy for Mr William Wong's predicament and respect for the personal choice that he has made in relation to the trial, I find that the Plaintiff and D8 will suffer greater prejudice through being deprived of the ability to cross-examine the witness than the Trustees will suffer through not being able to rely upon the Witness Statements. I have regard in particular to:

    (a) the contentious and complex nature of the topics involved and the high value the common law system places on the importance of testing such evidence through oral cross-examination;

    (b) the fact that the Witness Statements are not as straightforward as that prepared, for example, by an eyewitness to a traffic accident shortly after an accident. They cover events spanning a period of 20 years, have likely been prepared with significant legal assistance and contain extensive observations about interactions with key actors who are now dead;

    (c) leaving the parties to address the reliability of these Witness Statements through submissions might be justifiable as a last resort in the case of a critical witness, or a less pivotal witness who was dead or could not be traced, but is not in my judgment justifiable in the unique circumstances of the present case.

37. The Trustees have not demonstrated that it would be just to permit the Witness Statements to be admitted in evidence under Order 38 rule 29 of the Rules and I accordingly refuse the second limb of their application. For the avoidance of doubt I have dispensed with any requirement that the Plaintiff and/or D8 serve a counternotice, to save time and costs, having found that the application was not validly made in reliance on a rule 25 reason for not calling the witness.

Findings: D5's application

38. For the same reasons as I refused to extend time for the Trustees to serve a Hearsay Notice, I refuse the relief sought under the first limb of D5's Summons. The "beyond the seas" ground simply does not apply.

39. The only express material consideration for granting relief under Order 38 rule 29 is the plight of a party who would like to rely on the hearsay evidence of a witness who is controlled by an opposing party. D5's interests throughout have been aligned with those of the Trustees, and so she cannot rely on this freestanding ground. Mr Midwinter QC primarily supported the Trustees' application, and advanced D5's freestanding application as a very brief fallback position. The application lacked conviction. Firstly it is overreaching: it is obvious that all of the contents of the Witness Statements cannot be relevant to D5's defence. D5's counsel referred to the most vivid example of an averment by William Wong that Mr Hung's disloyalty is inconceivable. He is not the only witness to make such an assertion, and the general integrity of Mr Hung no longer seems contentious in light of the oral evidence given at trial by both Dr Winston Wong and Mr. Tony Wang. The relief sought under the second limb of D5's Summons is also refused.

Conclusion

40. The Trustees' and D5's Hearsay Notice Summonses are both dismissed. Unless any party applies to be heard as to costs within 14 days of the date of delivery of this Ruling, the Trustees shall pay the costs of the Plaintiff and D8 to be taxed if not agreed on the standard basis and no Order shall be made as regards D5's costs.

_____

IAN RC KAWALEY
ASSISTANT JUSTICE