

22/11; [2011] VSC 295

SUPREME COURT OF VICTORIA

HODGSON v AMCOR LTD (No 5)

Vickery J

20- 21 June 2011

EVIDENCE – BUSINESS RECORDS – WHETHER SOLICITOR’S FILE (OR PART THEREOF) ADMISSIBLE AS A BUSINESS RECORD – INTER OFFICE MEMORANDUM – INTERNAL FILE NOTE – INSPECTION OF DOCUMENT – REFUSAL TO ADMIT DOCUMENT INTO EVIDENCE BECAUSE IT WAS CONFUSING: EVIDENCE ACT 2008, SS69, 133, 135.

The first issue was whether or not an internal memorandum between two solicitors within the solicitor's firm was a business record for the purposes of s69 of the *Evidence Act 2008* ('Act'). The second issue was whether or not a file note from another firm of solicitors was a business record under the Act.

HELD: (1) The document was an internal record of the firm and admissible in evidence. (2) The file note from the other firm of solicitors was admissible as a business record but excluded from evidence.

1. The word "records" is not defined in the Act but its concept is a broad one. It is said to include a history of events in some form which is not evanescent although it connotes the idea that information is kept in an organised form accessible in the usual course of business and generally connotes documents truly regarded as internal records in respect of the company's business.

2. The document of the firm of solicitors was an internal memorandum, in which a solicitor within the firm sought advice from another solicitor within the same firm as to a particular business in order to advise clients of the firm. In those circumstances, it fell within s69(1) of the Act and was therefore able to be admitted as such.

3. In relation to the undated file note of an unidentified person from another firm of solicitors, whilst it may have been admissible as a business record, given its rather cryptic nature and confusing elements in it, it should not be admitted into evidence. Such probative value as it might have, given the shortcomings as to the proof of the document and its precise meaning, were substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, or be confusing.

VICKERY J:

Internal Memorandum

1. The first issue is whether or not an internal memorandum between two solicitors within the solicitor's firm Deacons Brisbane is a business record for the purposes of s69 of the *Evidence Act 2008* ("Evidence Act").

2. This is pertinent to the present application because it is proposed to use the memorandum in cross-examination pursuant to s44(2)(b) of the *Evidence Act*. This provides that a cross-examiner may question a witness about a hearsay representation contained in such a memorandum if the court is satisfied that the document into evidence will be admitted. The Amcor parties seek to admit the relevant memorandum pursuant as a business records pursuant to s69 of the *Evidence Act*.

3. As has been observed by Austin J in *Australian Securities and Investments Commission v Rich and Ors*^[1], the word "records" is not defined in the *Evidence Act*. The concept is a broad one. It is said to include a history of events in some form which is not evanescent although it connotes the idea that information is kept in an organised form accessible in the usual course of business and generally connotes documents truly regarded as internal records in respect of the company's business.

4. In *Roach v Page*^[2] the question was whether an article in the journal of The Association of Mushroom Growers was admissible as a business record. Sperling J held that the article was not a business record. He said:

The records of a business are documents or other means of holding information by which the activities of the business are recorded. Business activities so recorded will typically include business operations so recorded, internal communications and communications between the business and third parties.

5. In the case which was referred to by both parties, that of *Hansen Beverage Co v Bickfords*^[3], Middleton J said in analysing s69 of the *Evidence Act*:

In my view s69(1) was drafted deliberately broadly with the rationale being to allow as an exception to the hearsay rule the tender of documents which by virtue of the fact that they are kept as records of the business should be assumed to be accurate. However a document created to be sold as part of a business should not be considered to be a record kept in the course of or for the purposes of the business just because there is reason to believe that the document is to be regarded as reliable and accurate. One has to determine whether the document is in truth a record of the type described.

The records referred to in s69(1) of the *Evidence Act* are the documents a business generates in the course of or for the purpose of the business not documents which it may have or kept as part of the product of the business. The concept of a business record is an internal record kept in an organised form accessible in the usual course of business actually recording the business activities themselves and does not include the product of the business itself.

6. In this particular case in order to determine the question, I relied upon s133 of the *Evidence Act*. This section provides that if a question arises under this part in relation to a document the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

7. I made such an order and the document was produced for my inspection. Without addressing the document in detail, it is clear that it is an internal memorandum between two solicitors of the one firm, that is Deacons Brisbane, in which one solicitor, Mr Dillman, seeks assistance from another solicitor within the firm as to the stamp duty implications and tax effectiveness of a particular business structure under consideration. He concludes with the following observation: "I guess they also need to know about stamp duty implications and tax effectiveness. Can you give this some thought, please. Thanks, Mark Dillman", dated 14 December 2000.

8. In my view, the document is an internal record of Deacons. This firm is a profession within the meaning of the *Evidence Act*. The document is an internal memorandum, in which solicitor within the firm seeks advice from another solicitor within the same firm as to a particular business in order to advise clients of the firm. In my view, it falls within s69(1) and is therefore able to be admitted as such.

9. Accordingly, pursuant to s44(2)(b) of the *Evidence Act*, I am satisfied that the document will be admitted. I am aided in arriving at this conclusion by the advice of senior counsel for Amcor, who advises the Court that it is the intention of Amcor to admit the document into evidence. For these reasons, the cross-examination on the document may continue.

The file note from Norton Rose

10. I have also considered the position in relation to a file note from another firm of solicitors, Norton Rose, Senior Counsel for Amcor sought to put to Mr Hodgson in the course of cross-examination.

11. Initially I rejected that document as being a business record pursuant to s69 of the *Evidence Act* on the basis that it was in a different category to the Deacons internal memorandum.

12. However on reflection, I think I was wrong about that.

13. A solicitor in the course of practice provides legal services to the client. The solicitor does not produce a file in the course of practice as the primary purpose of its undertaking. Rather the file is regarded as a record of the matter being dealt with on behalf of the client. Further, a file of a solicitor may be used for a number of purposes beyond merely being a record of the matter transaction or services provided to the client. It is commonly used, for example, to cost a file and to protect the solicitor in the event that a query is raised as to the fact of work having been done or the quality of the work performed.

14. A solicitor's file therefore appears to satisfy the fundamental rationale for receiving into evidence documents maintained as business records. The basic rationale for the exception is that operators and employees of a business, as this is defined in the *Evidence Act*, are likely to be under a duty to be accurate in observing, reporting, and recording facts relating to the conduct of a business. Such documents are considered to be generally reliable because of the regularity with which the records are made and kept, combined with the usual legislative incentive and business imperatives for operators and employees to keep accurate records.

15. However, an exception is provided by s69(3)(a) of the *Evidence Act* 2008 where the representation contained in the document in issue is prepared or obtained for the purpose of conducting or in contemplation of or in connection with an Australian or overseas proceeding. For this reason, some documents maintained in a solicitor's file, or indeed the whole of a solicitor's file in litigation for example, may fall outside the scope of a business record within the meaning of s69.

16. However the diary note from the Norton Rose file in this case does not fit within this exception. Rather it is a diary note of a solicitor handling a matter in a non-litigious context.

17. A number of cases in this area serve to illustrate this point. For example, *In the Marriage of Bowran*^[4], diary notes maintained by bank officers which formed part of the bank records in relation to one of its customers were held to be admissible as a business record.

18. For these reasons it appears to me that the Norton Rose file note may be admitted as a business record. However, given that it is a solicitor's file note which is written in rather cryptic shorthand, it may nevertheless be appropriate to exclude it from evidence or being put to Mr Hodgson in cross-examination pursuant to s135 of the *Evidence Act*.

19. Having examined the file note in contention, pursuant to s133 of the *Evidence Act*, in my opinion, I ought to exercise the general discretion provided by s135 to exclude the evidence. The file note in contention is not in narrative form. It consists of jottings of an unidentified person who may be a solicitor on a Deacons attendance note. It is undated.

20. Its form, in part at least, tends to be confusing as to any statement contained within it. Mr Dillman, who is claimed to be the author of the note, although there is no evidence to that effect, is not to be called as a witness to explain the document.

21. For these reasons, I take the view that I should refuse to admit the file note into evidence. Such probative value as it might have, given the shortcomings as to the proof of the document and its precise meaning, are substantially outweighed by the danger that the evidence might be unfairly prejudicial to Mr Hodgson, or be confusing.

22. For those reasons, in the exercise of the discretion under s135, I refuse to admit the document.

[1] NSWSC 417 at [180]

[2] (No.15) [2003] NSWSC 939 at [181].

[3] [2008] FCAFC 406 at [131- 133]

[4] 8 FLR 651

APPEARANCES: For the plaintiff Hodgson: Mr C Gunst QC with Mr P Booth, counsel. AJ Macken & Co, solicitors. For the defendant Amcor Ltd: Mr WT Houghton QC with Dr SB McNicol and Mr G Fitzgerald, counsel. Corrs Chambers Westgarth, solicitors.
