06/84

FAMILY COURT OF AUSTRALIA (SITTING AT PARRAMATTA, NEW SOUTH WALES)

In the Marriage of BOWRON

Baker J

15 November 1982 — 8 Fam LR 651; (1982) FLC 77, 507; [1982] FLC 91-270

FAMILY LAW – EVIDENCE – WHETHER COMMONWEALTH OR STATE EVIDENCE ACT PARAMOUNT IN FAMILY LAW ACT PROCEEDINGS - BANK RECORDS INCLUDING CUSTOMER ASSESSMENT – WHETHER ADMISSIBLE – SOLICITOR'S FILE ON CONVEYANCING TRANSACTION BY DAUGHTER AND SON-IN-LAW OF THE PARTIES – WHETHER ADMISSIBLE – PROCEDURE WHERE ADMITTED EVIDENCE SHOULD BE LATER REJECTED: *EVIDENCE ACT* 1905 (CTH.), SS2, 7A(1), 7B, 7F.

During the course of proceedings for property settlement orders under s79 of the *Family Law Act* 1975, the wife sought to tender:
(a) the complete bank file relating to the parties which included diary notes concerning the parties made by Bank officers; and
(b) a solicitor's file in relation to the purchase by the husband's daughter and son-in-law of certain property.

HELD:
(1) The *Evidence Act* 1905 (Cth.) applies to *Family Law Act* proceedings; therefore the State Act provisions can have no application to such proceedings.

(2) As the diary notes made by the bank officers were made in the ordinary course of the bank's business, and formed part of the bank's records in relation to one of its customers, they were admissible under s7B of the *Evidence Act* 1905 (Cth.).

(3) Statements contained in documents which form part of the business record of a solicitor, made in the course of carrying out that business, and made by qualified persons, are admissible under s7B of the Act.

(4) Where a court admits a document or statement into evidence, and subsequently concludes that such evidence is inadmissible, it is a proper exercise of the court's discretion to disregard and reject the document or statement tendered.

BAKER J: *[After setting out the facts and legal argument, together with the provisions of the* Evidence Act *1905 (Cth.) ss7A and 7B, His Honour continued]: ...* **[Fam LR 652; (1982) FLC 77, 508]** Section 2 of the Commonwealth Act in part provides:

> 'Courts' includes the High Court, the Commonwealth Court of Conciliation and Arbitration, the Commonwealth Industrial Court, all Courts exercising federal jurisdiction and all Courts of the several States and parts of the Commonwealth, and all Judges and justices and all arbitrators under any law of the Commonwealth or of a State, and all persons authorized by the law of the Commonwealth or of a State or by consent of parties to hear, receive, and examine evidence."

It seems therefore that as the Family Court is clearly a court exercising federal jurisdiction pursuant to the provisions of the *Family Law Act* 1975 and as I am a judge appointed pursuant to the said Act, it is the *Evidence Act* 1905 (as amended) of the Commonwealth which applies to proceedings instituted under the *Family Law Act.* That being so, the Commonwealth Act clearly "covers the field" and therefore the provisions of the *Evidence Act* of the State of New South Wales can have no application to proceedings in the Family Court. **[Fam LR 654; (1982) 77, 510]** Included amongst the documents which Mr Coleman seeks to tender are various diary notes made by officers of the bank. As the statements contained in such diary notes were made by an employee of the bank in the ordinary course of its business and form part of the bank's records in relation to one of its customers I am of the view that such statements are admissible pursuant to the provisions of s7B.

[His Honour then set out the provisions of s7F of the Act, and continued]: ... **[Fam LR 655; (1982) 77, 511]** The second document which Mr Coleman seeks to tender is the solicitor's file in relation

to the purchase by Deborah Florence Brewer and John Edward Brewer of Lot 188 The Mainbrace, Tweed Heads from Noel Raymond Jansen. Mr and Mrs Brewer are not parties to the proceedings although they are respectively the husband's son-in-law and daughter. Evidence was given by the wife that because of an anniversary card given to her by the husband she believed that she was a half-owner of the above-mentioned property. Mr Wilson objected to the tender on the grounds, firstly, as to relevance; secondly, that the file related to parties who were not parties to the proceedings; and, thirdly, that the *Evidence Act* in any event did not permit of such a tender.

As to the first objection, facts have been alleged by the wife tending to show that both she and the husband have or had a proprietary interest in the property. Clearly therefore the solicitor's file in relation to the most recent transaction concerning the property is relevant. I reject Mr Wilson's second submission that the file is not properly tenderable as to the parties to the transaction are not parties to the proceedings before me. Although neither the husband nor the wife appear to have been registered as the proprietors of the Tweed Heads land or indeed to have held the legal estate it may well be that the parties or either of them have an equitable interest in the property. In any event a father/daughter relationship exists between the husband and Mrs Brewer and the evidence of the wife is that she was informed by the husband that she held a half interest in the property. For these reasons therefore I reject the submission that the file cannot be tendered because it relates to a transaction between third parties.

Mr Wilson's third submission raises the general proposition that the *Evidence Act* does not provide for the tender of a document of the kind in question. A solicitor's file which relates to a conveyancing transaction is clearly caught in my view by the provisions of s7B of the *Evidence Act* 1905 for the reason that the documents containing the statements sought to be tendered form part of the business record of a legal practitioner; were made in the course of the carrying on of the said business and by qualified persons. The admission into evidence of the file will of course be subject to the provisions of s7F. I cannot at this stage of the proceedings indicate what weight, if any, I may give at the end of the day to such evidence.

The foregoing reasons raise the question as to whether a court having admitted statements or documents into evidence in the course of a hearing may later in the proceedings reject such document or statement. In *R v Watson* [1980] 2 All ER 293; [1980] 1 WLR 991; (1980) 70 Cr App R 273 the appellant appealed against a conviction for burglary and theft on the ground, *inter alia*, that the trial judge was wrong in law in holding that he had no power to rule on the admissibility of evidence at the end of the prosecution case because he had ruled on it in the trial within a trial, even though there were relevant matters that came to light in the trial that had not done so in the trial within a trial.

In the course of the trial and following a trial within a trial the trial judge ruled that two written statements made by the accused were voluntary statements and admitted them into evidence. From later evidence it appeared however that the statements may not have been voluntary and counsel for the accused submitted to the trial judge that he should reconsider the ruling which he had previously given at the end of the trial within a trial and rejected the statements. The judge refused to reconsider his ruling intimating that the question whether the statements were voluntary had been finally determined in the trial within a trial. The appeal was heard by the Criminal Division of the Court of Appeal and in the course of its judgment the court said:

> "In our view the judge was wrong to rule as he evidently did that he had no power to consider the relevance of evidence, given after the 'trial within a trial', on the issue whether the written statements were not voluntary and therefore inadmissible. He should satisfy the judge that the evidence on which he has already ruled is inadmissible the judge must take the appropriate steps to prevent the jury acting on it It is the duty of the judge to exclude from the jury's consideration evidence which is inadmissible. In the case of a written statement, made or signed by the accused, the judge must be satisfied that the prosecution have proved that the contested statement was voluntary, before allowing the jury to decide whether to act on it. Experience has shown that where the question of the voluntary character of a statement has been investigated and decided at a trial within a trial it is only in very rare and unusual cases that further evidence later emerges which may cause the judge to reconsider the question whether he is still satisfied that the statement was voluntary and admissible. But where there is such further evidence the judge has power to consider the relevance of the admissibility of evidence on which he has already ruled. We are not aware of any English decision directly on the point, but we accept the reasoning expressed in a passage in a judgment of the Northern Ireland Courts – Martial Appeal Court in *R v Murphy* [1965] NI 138 at 143-144, delivered

by Lord MacDermott LCJ, which, though immediately concerned with a question of discretionary exclusion, is equally relevant to exclusion on the ground of legal inadmissibility:

> 'Is the discretion spent once it has been exercised against the accused and the evidence has been admitted? We are not aware of any authority on this question, but on general principles we are of opinion that the court's discretionary powers are not necessarily at an end when the relevant evidence has been admitted. Sometimes the true bearing of evidence said to operate unfairly against an accused person may only appear clearly to do so when seen in the light of evidence adduced at a later stage of the trial and after the material objected to has become part of the record. To say that it is then too late to reconsider the objection would, we think, be to run the risk of letting the technicalities of the situation prevail over the requirements of justice. The admission of a confession as voluntary, on evidence heard in the absence of the jury, may be shown by subsequent evidence to have been clearly involuntary and therefore inadmissible. In such circumstances we consider it would undoubtedly be within the province of the court either to instruct the jury to disregard the evidence as no longer admissible or, in the absence of other evidence capable of sustaining the charge, to direct an acquittal. If this is right, we can see no reason for making a distinction between what becomes inadmissible after being thought admissible and what is seen to be unfair after an earlier view to the contrary. We are, therefore, of opinion that the discretion under discussion may, in certain circumstances, properly be the subject of reconsideration.'

The matter is discussed by Professor Cross in his treatise on *Evidence* (5th edn, 1979, p72), in which he refers to *R v Murphy*: 'The judge retains his control over the evidence ultimately to be submitted to the jury throughout the trial. Accordingly, if, having admitted a confession as voluntary on evidence given in the absence of the jury, the judge concludes, in the light of subsequent evidence, that the confession was not voluntary, he may either direct the jury to disregard it, or, where there is no other sufficient evidence against the accused, direct an acquittal, or, presumably, direct a new trial.' We accept the accuracy of this statement of the law."

Although the latter case deals with admissibility of evidence in criminal proceedings before a judge and jury there is a clear analogy to be drawn in regard to the admissibility of evidence in civil proceedings. If a judge having admitted into evidence a document or statement in the course of civil proceedings, comes to the conclusion later in those proceedings that such evidence is inadmissible then it would in my view be a proper exercise of the judge's discretion to disregard the evidence and reject the tender.

Suffice it to say, in the context of the present case, that although I have admitted the documents above referred to into evidence at this stage in the proceedings it may well be that such documents in the light of later evidence prove to be inadmissible in which event it might be appropriate in the proper exercise of my discretion to either disregard or reject such evidence.
