22/13; [2013] VSC 146

SUPREME COURT OF VICTORIA

MATTHEWS v SPI ELECTRICITY & ORS (Ruling No 17)

J Forrest J — 25, 26 March, 5 April 2013

EVIDENCE – THE HEARSAY RULE – ALLEGED PRIOR INCONSISTENT STATEMENT – TENDER OF NEWSPAPER ARTICLE INCLUDING ALLEGED PRIOR INCONSISTENT STATEMENT – WHETHER TENDER SHOULD BE REFUSED: *EVIDENCE ACT* 2008 (VIC), SS35, 45 AND 59.

A vigneron claimed that he suffered economic loss as a result of smoke damage to the grapes on his vineyard caused by the Black Saturday bushfires. The vigneron was interviewed some time later by a journalist whereby he was alleged to have said that the smoke did not hang over his area like it did further up the mountain. It was sought to tender the newspaper article on the basis that it contained a prior inconsistent statement alleged to have been made by the vigneron and was therefore admissible under s45 of the *Evidence Act* 2008 ('Act').

HELD: The article was inadmissible and the tender of it rejected.

1. First, the admission of a document under s45(3) is discretionary. A court should, in exercising its power under s45(3) of the Act to permit the tender of the article as a whole, be extremely cautious about the admission of such untested and potentially dubious material especially where the contents of the article go far beyond that of the alleged prior inconsistent statement. If allowed, the tender of the article on the basis that it contained a prior inconsistent statement meant that the whole of the document was received as evidence of the asserted facts contained within it. So the author's statements as to the reasons for the decision to abandon the 2009 crop could, at least potentially, have become evidence of the fact. Of itself, this was good reason to refuse the tender.

2. Second, counsel contended that the statements attributed to the vigneron were hearsay and therefore not admissible. He relied on s45(4) of the Act which requires the Court to ensure that the document is admissible by reason of Chapter 3 of the Act. The quote concerning the smoke attributed to the vigneron was, at the least, first-hand hearsay – but that did not mean that it was inadmissible.

3. Section 60 of the Act permitted the admission of such evidence for a non-hearsay purpose, such as the proof of a prior inconsistent statement pursuant to s45, provided it met the test of relevance set out in s55(1). However, in this case, the balance of the article was replete with hearsay (which was neither background nor explanatory to the alleged prior inconsistent statement) and material not germane to the alleged prior inconsistent statement.

4. Accordingly, the article was inadmissible.

J FORREST J:

Introduction

1. Mr Stephen Bennett, a vigneron, is a sample group member who claims that he suffered economic loss as a result of smoke damage to the grapes on his vineyard at Cottles Bridge. He says that the grapes were so affected that he abandoned picking the 2009 crop. He also alleges that he lost income from a drop in cellar door sales and function bookings as a result of a downturn in business caused by the Black Saturday bushfires.

2. Mr Bennett was cross-examined by counsel for the State parties on the basis that he made contradictory statements to a journalist in April 2009 concerning the reasons underlying his decision not to pick the crop.

3. The State parties now seek to tender a newspaper article published in the *Diamond Valley Leader* in April 2009 on the basis that it contains a "prior inconsistent statement" alleged to have been made by Mr Bennett and is therefore admissible under s45 of the *Evidence Act* 2008 (Vic).[1]

4. In my opinion, for the reasons that follow, the article is inadmissible and the tender should be rejected.

The relevant legislation

5. The relevant provisions of the Act are:

43 Prior inconsistent statements of witnesses
(1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not—
(a) complete particulars of the statement have been given to the witness; or
(b) a document containing a record of the statement has been shown to the witness.

(2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner—
(a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and
(b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.

(3) For the purpose of adducing evidence of the statement, a party may re-open the party's case.

45 Production of documents
(1) This section applies if a party is cross-examining or has cross-examined a witness about—
(a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
(b) a previous representation alleged to have been made by another person that is recorded in a document.

(2) If the court so orders or if another party so requires, the party must produce—
(a) the document; or
(b) such evidence of the contents of the document as is available to the party—to the court or to that other party.

(3) The court may—
(a) examine a document or evidence that has been so produced; and
(b) give directions as to its use; and
(c) admit it even if it has not been tendered by a party.

(4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of Chapter 3.

(5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

59 The hearsay rule—exclusion of hearsay evidence
(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an ***asserted fact***.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

The article

6. The article titled "Now it's time to graze" was published in the 8 April 2009 *Diamond Valley Leader*. It is apparently authored by Brigid O'Connell and relates to an upcoming wine and food festival in the Diamond Valley area.

7. There are four quotes attributed to Mr Bennett, only one of which is potentially inconsistent with his testimony:

> The smoke didn't hang over this area like it did further up the mountain.[2]
> Inferentially, at least, such a statement may be inconsistent with the proposition that there was sufficient smoke to damage the grapes, as Mr Bennett contends.

8. There are also several statements of fact contained in the article which may have come from information provided by Mr Bennett. For example:

> The 10-acre vineyard, however, was not affected by smoke taint, unlike many others in the region. The couple had already decided, before the fires, not to pick their 2009 harvest because it was already a write-off because of the heat damage, drought and frost.[3]

Mr Bennett's *viva voce* evidence

9. As I mentioned earlier, Mr Bennett asserted that he was unable to harvest his grapes in the planned March 2009 harvest because of damage from smoke from the fire.

10. It was put to him in cross-examination by counsel for the State parties that he had already determined prior to Black Saturday that he would not harvest in 2009 because of the climatic damage already suffered to the crop. He denied making this decision:

> [Counsel] Mr Bennett, isn't it the case that before Black Saturday you and your partner had already decided not to pick the 2009 harvest because it was already a write-off due to the impact of the weather?---That's not correct.
>
> [Counsel] And that before the fires indeed hit the area near you the decision had already been made that you were going to leave the grapes on the vines?---That's not correct.[4]

11. Mr Bennett later said he could not recall having made that decision:

> [Counsel] Regardless of the words you said to the journalist, the fact that you and your partner had made a decision not to pick the harvest before the fires is the truth, isn't it?---I don't recall having made that decision.[5]

12. Mr Bennett could not remember giving an interview or having the photo taken although he did not deny that either of these things happened:[6]

> [Counsel] You don't in fact have a recollection of a journalist coming to speak to you about the fact that you were the sole representative from that municipality in the Grape Grazing Festival?---No, I don't recall it but I am not denying that it took place.[7]

13. Counsel also put to Mr Bennett:

> [Counsel] Could I ask you to look at the right-hand column there you will see the paragraph says: "The 10 acre vineyard, however, was not affected by smoke taint unlike many others in the region. The couple had already decided before the fires not to pick their 2009 harvest because it was already a write-off because of heat damage, drought and frost." That was something you said to the journalist, wasn't it?---It does appear that I said that.
> [Counsel] And that was the fact, wasn't it?---I don't recall saying those exact words, in fact.
> [Counsel] Regardless of the words you said to the journalist, the fact that you and your partner had made a decision not to pick the harvest before the fires is the truth, isn't it?---I don't recall having made that decision.[8]

14. In relation to the smoke and the effect of the wind:

> [Counsel] The wind was in fact beneficial because it meant that smoke did not hangover your area at all?---I disagree.
> [Counsel] Didn't the wind mean that any smoke was dispersed very quickly?---Not in my memory of that, no.
> [Counsel] You don't remember ever forming the view after the fires that the vineyards in the Diamond Valley region had been untouched by the effects of smoke?---No.
> [Counsel] You don't recall forming the view that your own grapes were not affected by any impact of the smoke?---I haven't formed that view at all.
> [Counsel] I take it, therefore, you would say you haven't expressed such a view to any person?---I don't recall so, no.[9]

15. Counsel then cross-examined Mr Bennett in relation to the quote attributed to him concerning the smoke:

> [Counsel] You will see in the article that it goes on to record you as saying: "The smoke didn't hangover this area like it did further up the mountain"?---What I mean by that is that the smoke - the appearance of smoke in an area was worse in other areas.
> [Counsel] Mr Bennett, the only area that you were in on the day was your own vineyard, wasn't it?---That's correct.
> [Counsel] The wind on that day ensured that any smoke that may have come your way was quickly dispersed?---The wind was apparent on Black Saturday but not every day afterwards.
> [Counsel] The statement attributed to you there reflects the view you held at the time that there had

> been no damage done to your grapes by any smoke generated by the fires. That's the case, isn't it?---That's the way it's been written, yes.
>
> [Counsel] It also reflects the fact that you had that view, that there had been no damage done to your grapes by any smoke?---I don't agree with that view.[10]

Analysis

16. Section 43 of the Act governs the procedural requirements relating to the use of an alleged prior inconsistent statement. As Barr J said in *Aslett v The Queen*:[11]

> Under the modern law, on the other hand, there is a purpose in tendering such statements beyond any attack on credibility, namely proof of the facts asserted: s60. Nothing in s43 is directed to the admissibility of any prior inconsistent statement to prove the truth of its assertions. All subs(2) does is ensure that a witness who is about to be attacked on credit is fairly dealt with. Nothing in s43 purports to limit the effect of ss38, 103 or 60.[12]

17. The State parties in cross-examination complied with the requirements of s43 of the Act and, in particular, s43(2).

18. Section 45 enables both the production and the tender of a document used in the cross examination of a witness on the basis that it contains an alleged prior inconsistent statement.

19. The tender here is sought to be made under s45(3). The first point to make is that notwithstanding the answers given by Mr Bennett in cross-examination as to statements he may have made to the reporter (which is a separate matter to that of the admissibility of a prior inconsistent statement contained in the article) the sole issue to be resolved is that of the tender of the article including the alleged statement concerning the length of time the smoke spent on Mr Bennett's property.[13] It is not an examination of the quality or extent of any concessions made by Mr Bennett in cross examination.

20. The alleged "prior inconsistent statement" is not contained in a document signed or adopted by Mr Bennett. Apart from a couple of equivocal concessions by Mr Bennett there is no evidence at the present time that Mr Bennett made the statement (or for that matter any of the statements attributed to him). However, on its face, s45, which the State parties rely upon, does not require such evidence: the section contemplates a document being admitted merely if it records an allegation of a prior inconsistent statement.

21. Here the State parties seek to tender the whole of the article (approximately 200 words), notwithstanding that only one small quote contains "the alleged prior inconsistent statement". The scope of s45 is extraordinarily broad: provided there is an "alleged prior inconsistent statement" recorded in a document the Court may, pursuant to s45(3), admit the document itself or permit its tender. So, for example, a piece of nondescript paper containing the hand-written scrawl of an anonymous author purporting to record a prior inconsistent statement of a witness could be tendered – notwithstanding the absence of any evidence as to the accuracy of the material contained in the note. Moreover, once admitted, absent a direction for its limited use,[14] the note would become evidence of the facts contained in it.[15]

22. There are some ready examples of situations where a court may consider allowing the tender of the whole or a large part of a document containing an alleged prior inconsistent statement. For instance where a witness has made a signed statement or completed a record of interview, the alleged prior inconsistent statement(s) as well as any qualifying statements or material relevant to its context may be admissible notwithstanding that they are hearsay. Provided they are tendered as part of the prior inconsistent statement material they would not fall foul of s45(4).

23. There may also be circumstances in which a document containing an alleged prior inconsistent statement may be tendered pursuant to s45 for the limited purpose of understanding the cross-examination of a witness on the statement. No such application was made here – in any event, I think the transcript is sufficiently intelligible without the article being in evidence. Nor was any application made to tender a redacted version of the article containing only the prior inconsistent statement.

24. This application, however, relates to a very different case to these examples. There are two reasons to reject the tender.

25. First, the admission of a document under s45(3) is discretionary. I think that a court should, in exercising its power under s45(3) to permit the tender of the article as a whole, be extremely cautious about the admission of such untested and potentially dubious material especially where the contents of the article go far beyond that of the alleged prior inconsistent statement. If allowed, the tender of the article on the basis that it contains a prior inconsistent statement means that the whole of the document is received as evidence of the asserted facts contained within it.[16] So the author's statements as to the reasons for the decision to abandon the 2009 crop could, at least potentially, become evidence of the fact. Of itself, this is good reason to refuse the tender.

26. In my view it would be unfair to permit the untested assertions of the author to become evidence in this case even if for a limited purpose. It remains open to the State parties to call Ms O'Connell to prove not only the prior inconsistent statement contained in the article but also any other inconsistent oral statements made by Mr Bennett to her. If that course is undertaken, counsel for Mrs Matthews and the group members will have the opportunity to test any representations attributed to Mr Bennett.

27. Second, counsel for Mrs Matthews contended that the statements attributed to Mr Bennett were hearsay and therefore not admissible. He relied on s45(4) which requires the Court to ensure that the document is admissible by reason of Chapter 3 of the Act. I accept that the quote concerning the smoke attributed to Mr Bennett is, at the least, firsthand hearsay – but that does not mean that it is inadmissible.

28. Section 60 permits the admission of such evidence for a non-hearsay purpose, such as the proof of a prior inconsistent statement pursuant to s45, provided it meets the test of relevance set out in s55(1). However here the balance of the article is replete with hearsay (which is neither background nor explanatory to the alleged prior inconsistent statement) and material not germane to the alleged prior inconsistent statement.

29. In my opinion the article is inadmissible.

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[1] ("The Act").
[2] PUB.STA.0001.0021.
[3] PUB.STA.0001.0021.
[4] T 1371-1372.
[5] T 1375.
[6] T 1373, 1375.
[7] T 1373.
[8] T 1375.
[9] T 1372.
[10] T 1377-1378.
[11] [2006] NSWCCA 49.
[12] Ibid [76].
[13] See [7] above.
[14] Pursuant to s136 of the Act.
[15] Section 60 of the Act.
[16] Section 60 of the Act.

APPEARANCES: For the Plaintiff Matthews: Mr R Richter QC with Mr T Tobin SC, Mr AJ Keogh SC, Mr LWL Armstrong & Ms M Szydzik, counsel. Maurice Blackburn, solicitors. For the First Defendant SPI Electricity: Mr J Beach QC with Mr PH Solomon SC, Mr B Quinn SC, Mr D Farrands, Mr C Parkinson & Mr J Kirkwood, counsel. Herbert Freehills Smith, solicitors. For the Second Defendant: Mr R Ray QC with Ms E Brimer, counsel. Holman Fenwick Willan, solicitors. For the Third, Fourth and Fifth Defendants: Mr CM Caleo SC with Mr PE Anastassiou SC, Ms WA Harris SC, Mr SA O'Meara SC, Mr P Zappia, Ms AL Robertson, Dr MD Rush, Mr N McAteer & Mr AD Pound, counsel. Norton Rose, solicitors.
