

37/08; [2008] VSC 291

SUPREME COURT OF VICTORIA

SHMEE PTY LTD v BRESHAM INVESTMENTS PTY LTD

Vickery J

16 June 2008

CIVIL PROCEEDINGS – EVIDENCE – ADMISSIBILITY OF DOCUMENTARY HEARSAY – STATEMENT MADE BY PERSON WHO WAS AN EMPLOYEE OF PARTY – STATEMENT CONTAINED EVIDENCE OF A CENTRAL ISSUE IN THE CASE – WITNESS DIED BEFORE COMMENCEMENT OF TRIAL – APPLICATION SEEKING TO ADMIT WITNESS STATEMENT INTO EVIDENCE – MATTERS TO CONSIDER UPON DETERMINATION OF APPLICATION – APPLICATION REFUSED: EVIDENCE ACT 1958, S55.

1. Section 55 of the *Evidence Act* 1958 ('Act') makes provision for the admissibility of documents which tend to establish facts in issue in a trial. The maker of the statement must have had at the time of the making of the statement personal knowledge of the matters dealt with by the statement. However, the section is designed to exclude statements made by persons swayed by personal interests and not detached, impartial and independent.

Tobias v Allen No 2 [1957] VicRp 32; [1957] VR 221, applied.

2. For a person to be interested he or she must have a substantial material interest. A statement will be excluded only if there is a clear personal interest in the result of the proceedings, as opposed to a merely sympathetic interest. However the interest need not be material in the sense of a direct pecuniary interest, and a close relationship with a person who may benefit is sufficient. The legislation contemplates the admissibility of documents which may not be completely impartial. The question of interest must be determined upon the circumstances existing at the time the statement was made, and involves an enquiry as to what the circumstances were and how they were known to and calculated to affect the maker of the statement. As to the position of an employee, the mere fact that the maker of a documentary statement is the employee of a party does not of itself make him or her a person interested, though it may. If the facts stated are relevant to the personal liability of the employee the statement is liable to be excluded.

3. Where a person who made a statement prior to trial but died prior to the commencement of the trial and who had been an employee at the senior management level of the party, such a person was likely to have been affected by material interest which was substantial and real and which was reasonably calculated in the sense of being reasonably likely to have affected his impartiality in the making the statement.

4. Accordingly, in the exercise of discretion, it was inexpedient in the interests of justice for the statement to be admitted into evidence.

VICKERY J:

1. I have considered the position as to the admissibility of the witness statement of Phillip McIvor dated 19 December 2006 under the *Evidence Act*, namely s55 of the *Evidence Act*, and I have determined that the statement ought to be rejected because it does not satisfy s55(2) and, further, in the exercise of my discretion under s55(9) I determine that it is not in the interests of justice to admit the statement in all the circumstances of this case. I have a written ruling which I will read into the transcript, it is a number of pages long. What I propose to do ultimately is to incorporate it into the judgment in this matter because it does deal with a central issue in the case, but for the moment I will hand down my draft and speak to it and read it into the transcript as my reasons, but they may be subject to some minor editing by the time the judgment is published.

2. Mr Phillip McIvor, (Mr McIvor) was a former manufacturing manager employed by Insulform, a position he occupied in 2002. Subsequent to the sale of the Insulform business to the plaintiffs, which was effected on 23 December 2002, he was employed as the Customer Alignment Manager by the second plaintiff, INC, in the Insulform business which it purchased. The proceedings commenced by issue of a writ on 26 May 2005. Mr McIvor signed a witness statement dated 19 December 2006 which had been prepared for him by the solicitors for the plaintiffs. The witness

statement was signed and dated by Mr McIvor on the last page and was initialled and dated by him on all pages. The witness statement in this form was subsequently filed in the proceeding by the solicitors for the plaintiffs and provided to the defendants' solicitors prior to trial. There was no other evidence of the circumstances surrounding the preparation of the signing of the witness statement by Mr McIvor.

3. It is common ground that Mr McIvor has since died; an event which occurred, it appears, a short time before the commencement of the trial. Accordingly he could not give evidence at the trial or be cross-examined on his witness statement. It is also common ground that Mr McIvor's statement was signed by him. During the course of the trial the plaintiffs sought to admit the statement of Mr McIvor dated 19 December 2006 into evidence pursuant to s55 of the *Evidence Act* 1958 (Vic). This application was opposed by the defendants. A *voir dire* was conducted to determine the admissibility of the statement. Section 55 of the *Evidence Act* makes provision for the admissibility of documents which tend to establish facts in issue in a trial. There set out is s55 in full.

4. As to the personal knowledge of Mr McIvor, Dr Bleechmore, who appeared on behalf of the plaintiffs, presented evidence in the *voir dire*. The evidence which he called was to the effect that Mr McIvor, the maker of the statement, had at the time of the making of the statement personal knowledge of the matters dealt with by the statement and therefore satisfied sub-s55(1)(a) of the Act. I accept this evidence. Mr John Caine, the present business manager of INC, gave evidence in the *voir dire*. Prior to the sale to the defendants in December 2002 Mr Caine was employed by Insulform as a Business Development Manager. In this position he was responsible for all sales activities. His subordinates included the quality manager and the engineering manager who both reported to him.

5. He said that Mr McIvor was the Manufacturing Manager at Insulform in 2002 and remained with the business until he left in January 2008. Mr Caine described Mr McIvor's duties as manufacturing manager. His responsibilities included ensuring that materials were delivered and that finished goods were dispatched on time, finished to the correct quality and delivered in the correct quantities required by customers. As such he was responsible for all manufacturing operations and also logistics and transport. He also had responsibility for ensuring that all products manufactured complied with the quality procedures established in the business, including the international standard known as QS9000 in relation to the quotation process used in the business. The maintenance of machinery was also under the control of Mr McIvor.

6. Mr McIvor, in his signed statement, describes matters which go to manufacturing and production issues within the Insulform business, both before and after the settlement of the sale on 23 December 2002. He also describes a number of events in which he was personally involved. Accordingly, I am satisfied that Mr McIvor had personal knowledge of the matters dealt with in his statement within the meaning of s55(1) of the *Evidence Act*. The principal objection taken by Mr Osborne, who appeared for the defendants, was that under s55(4) of the *Evidence Act* Mr McIvor was a "person interested" at the time when proceedings were pending, and for this reason his signed statement is inadmissible.

7. In *Tobias v Allen No. 2* [1957] VicRp 32; [1957] VR 221, Justice Sholl described the purpose of the sub-section to be:

The sub-section is designed to exclude statements made by persons swayed by personal interest and not detached, impartial and independent. I think it necessarily follows from the subject matter of the section that the question of interest is to be decided as upon the circumstances existing when the statement was in fact made.

8. The modern law on the operation of s55(4) of the *Evidence Act* in Victoria, may be summarised as follows, "A person is interested within the meaning of the provision if anything is shown which is reasonably calculated in the sense of being reasonably" likely to affect the impartiality of the person making the statement.

9. This test has been said to be not that different to the test which appears to have been adopted in New South Wales, in which a person interested is a person who has such an interest as could lead to the belief that he or she had an interest in distorting the truth. The interest must be real, definite or substantial, and not remote, vague or insubstantial.

10. For a person to be interested he or she must have a substantial material interest. A statement will be excluded only if there is a clear personal interest in the result of the proceedings, as opposed to a merely sympathetic interest. However the interest need not be material in the sense of a direct pecuniary interest, and a close relationship with a person who may benefit is sufficient. The legislation contemplates the admissibility of documents which may not be completely impartial. The question of interest must be determined upon the circumstances existing at the time the statement was made, and involves an enquiry as to what the circumstances were and how they were known to and calculated to affect the maker of the statement. As to the position of an employee, the mere fact that the maker of a documentary statement is the employee of a party does not of itself make him or her a person interested, though it may. If the facts stated are relevant to the personal liability of the employee the statement is liable to be excluded. In *Plomien Fuel Economiser Company Limited v National Marketing Company* [1941] 1 Ch 248 it was held that every shareholder and director is a person interested in the result of the proceedings brought by a company, and an employee may be interested in the proceedings brought by his or her employer if it is better for the employee that the employer succeed rather than it being a matter of indifference.

11. Although note the footnote where the breadth of that statement has been the subject of some observation. There are two schools of thought on the meaning of "person interested". On one view a "person interested" is a person who is not completely free from the suggestion of bias when the statement was made. On the other view, a person interested is someone who is shown to have been affected by any material interest which is substantial and real, and which is reasonably calculated in the sense of being reasonably likely to affect the impartiality of the person making the statement.

12. The first view found favour with Lord Justice Goddard where a statement made by the defendant to a running down action to the police after a caution had been administered, was held by the Court of Appeal to have been wrongly received by the trial judge. Lord Justice Goddard considered that guidance was to be derived from the famous statement of Lord Eldon that at common law various reported statements "are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of the truth." Support for this view may also be found in the view of Justice Birkett in *Evon v Noble* [1949] 1 KB 222 that in order that a person should come outside the category of those interested, he must be "completely detached, judicial, impartial, independent".

13. However, I do not take the observations of Justice Sholl in *Tobias v Allen No. 2* to go so far. His Honour formulated the following proposition:

It is my opinion sufficient to constitute a disqualifying interest within the meaning of the sub-section if a person's conduct is likely to be called in question in the pending or anticipated litigation, or his reputation, or if a person's financial interest is likely to be affected. If in short anything is shown which is reasonably calculated to affect the impartiality of the person making the statement.

14. The test as stated by Justice Sholl in *Tobias v Allen No. 2* focuses both on the materiality of the person's interest, and also the likely effect of that interest on the quality of the evidence proposed to be given in terms of its impartiality. It does not involve proof of the person's complete detachment, impartiality and independence *per se*, although these may be elements in establishing the effect which the material interest of the person may have had on the quality of his or her evidence. In my opinion a person interested under s55(4) of the *Evidence Act* is someone who is shown to have been affected by any material interest which is substantial and real, and which is reasonably calculated in the sense of being reasonably likely to affect the impartiality of the person making the statement. In this case it is clear that at the time when Mr McIvor signed his witness statement proceedings were pending. Proceedings are pending from their commencement until their conclusion. In my opinion Mr McIvor was a person interested at the time when he made his statement within the meaning of s55(4) of the *Evidence Act*.

15. Mr McIvor at the time of making the statement in question was then an employee of the party seeking to admit his evidence, namely INC. However, Mr McIvor was more than merely an employee, he was an employee at the senior management level of INC. It is true that the facts surrounding the making of the statement and indeed the statement itself do not disclose any

criticism of the conduct of Mr McIvor in his capacity as the manufacturing manager of Insulform in 2002 and subsequently of INC, which may have provided an incentive for Mr McIvor to defend his reputation or justify his conduct at the time when he made the statement. However, he was placed in an invidious position. He was asked by his then current employer to give evidence which was critical to its case about events which occurred under the management of his previous employer when it may be inferred that Mr McIvor knew only too well that his current employer was in serious dispute with his previous employer, and was in the course of preparing a significant piece of litigation for trial.

16. In my opinion, at the time of him making his statement, Mr McIvor was likely to have been affected by material interest which was substantial and real, and which was reasonably calculated in the sense of being reasonably likely to have affected his impartiality in making the statement. As a senior manager employed by INC, he had an interest in cementing rather than potentially compromising his relationship with his then current employer. This was not likely to have been a matter of indifference to him. Further, the material interest was such that it was reasonably likely that it would have acted upon him to adversely compromise the impartiality of the evidence comprised in the statement.

17. I now turn to s55(9) of the *Evidence Act* which provides for a discretion to reject the admission of the statement in evidence, notwithstanding that the provisions of s55 have been otherwise satisfied, where it appears to be inexpedient in the interests of justice that the statement should be admitted. The statement deals in part with the period of production prior to 23 December 2002 when the defendants operated the Insulform business.

18. In respect of this period at least, the defendants are in a position to call their own evidence as to the performance and conduct of the manufacturer of the motor vehicle components under their management, and thereby challenge what is said by Mr McIvor. However, Mr McIvor's statement also elaborates on the production of goods in the business after the plaintiffs took over. In this respect the defendants find themselves at a significant disadvantage. Mr Johnston, a principal of Insulform who conducted the business prior to settlement of the sale on 23 December 2002, had barely nothing to do with the conduct of the business by INC after that time. He left the business on 12 February 2003 and did not return.

19. There is no evidence that the other principal of the Insulform business, Mr Whitaker, was present at the business at any time after the stocktake was completed on 24 December 2002. The defendants therefore are not in any realistic position to controvert the proposed evidence of Mr McIvor by firsthand evidence of their own as to what occurred in the running of the business by the plaintiffs after 12 February 2003.

20. Dr Bleechmore submitted that the very status of the statement as a signed witness statement which was intended to stand as Mr McIvor's evidence in chief at the trial, made this a very powerful case for the reception of the documentary evidence in the exercise of the discretion under s55(9). He submitted that the making of the statement in these circumstances indicated that Mr McIvor was willing to subject himself to cross-examination and be tested on the statement, and that this reinforced the veracity of the evidence comprised in the document.

21. However, in the exercise of my discretion, I also cannot ignore the fact that the statement was prepared by the plaintiff's lawyers as a witness statement and was intended for use by them in the adversarial context of this hard fought litigation. Even though the legislation contemplates the admissibility of documents under s55(4), which may not be completely impartial, this nevertheless may in the appropriate case be a factor in the rejection of the statement in the exercise of the discretion conferred by s55(9). In this case the statement seeks to provide evidence of a central issue in the case. It contains nothing adverse to the parties seeking to admit the evidence, namely the plaintiffs, nor does it contain anything which on its face could assist the defendants. It is not only what is contained in the statement which must be considered in this case.

22. A question also arises here as to at least the possibility that something of relevance or even of critical relevance may have been omitted from the statement which could qualify the statements contained within it or present them in a different light. In making this observation, I do not mean to convey any criticism whatsoever of the plaintiff's legal team or indeed Mr McIvor, and

I expressly confine my observations to the reality of the forensic context in which the statement was produced.

23. For these reasons, on balance it appears to me that it would be inexpedient in the interests of justice for this statement to be admitted. Accordingly in the exercise of my discretion, and even if I am wrong about the basis for excluding the statement under s55(4), I would reject the statement in the exercise of my discretion under s55(9) and would do so notwithstanding that the requirements of s55 have been otherwise satisfied.

APPEARANCES: For the plaintiffs: Dr J Bleechmore, counsel. JA Fillmore & Co, solicitors. For the defendants: Mr M Osborne, counsel. Madgwicks Lawyers.
