

Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja [2018] NSWCA 26

The NSW Court of Appeal provides a timely reminder of the interplay between various sections of the *Evidence Act* 1995 (NSW) (**Act**) as they relate to the admissibility of business records.

Facts

Capital Securities (referred to as Prime throughout the judgment) was a second tier lender that loaned \$290,000 to Calleja PJC Furniture Freighters Pty Ltd. The loan was guaranteed by its director, Elizabeth Calleja, whose obligations were secured by a mortgage over a property she owned.

After 12 months, Prime alleged that the Calleja interests were in default and commenced proceedings to enforce its security. The Calleja interest defended the claim on a number of bases, including that Prime had disbursed the loan funds without their consentⁱ: specifically to settle a \$60,000 debt the Calleja interests owed to Baycorp Collections.

First instance

During the hearing before Wilson J, Prime sought to tender 12 pages that had been produced by Baycorp in answer to a subpoena seeking, in effect, all documents relating to debts owed by Ms Calleja and assigned to Baycorp. Baycorp had evidently compiled the pages for the purposes of complying with the subpoena, as each page included a printed reference to the subpoena. Each page contained 3 “screenshots” that had apparently been copied and pasted onto the document. Each screenshot contained text that was consistent with file notes taken by Baycorp employees relating to communications with Ms Calleja in relation to the payment of the debt and had the “appearance of being derived from an electronic system for maintaining file notes”ⁱⁱ. Among other things, the screen shots contained a record of Ms Calleja informing Baycorp that she had obtained the Prime loan and wanted to settle in full the Baycorp debt for \$60,000ⁱⁱⁱ.

Prime sought to tender the 12 pages as business records belonging to Baycorp. The Calleja interests objected to the tender as the documents produced were not actual business records and because the notes were prejudicial to the Calleja interests by reason of certain factual errors they contained and because they were not a complete record^{iv}. The judge rejected the tender of the file notes on the basis that she could not be satisfied that they were genuine business records^v and that they might be unfairly prejudicial to the Calleja interests^{vi}

Wilson J ultimately dismissed Prime’s claim^{vii}, declared void Prime’s loan agreement and ordered Prime to discharge the mortgage it had sought to enforce^{viii}. In reaching her decision, her Honour was influenced by the unreliability of Prime’s witnesses, rejecting the evidence of Prime’s director that Prime had been authorised to disburse loan funds to Baycorp^{ix} in favour of the evidence of Ms Calleja that this authorisation had not been provided^x.

Appeal

On 26 February 2018, the Court of Appeal delivered its judgment in *Capital Securities XV Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja* [2018] NSWCA 26. In the leading judgment, Leeming JA (with whom Basten and Gleeson JJA agreed) upheld Prime's appeal on the basis that Wilson J had erred in rejecting the admission of the Baycorp pages as business records of that company.

Leeming JA held that there was no impediment to Prime tendering the pages produced on subpoena by Baycorp. Section 48 of the Act entitles parties to adduce evidence of the contents of a document in a number of ways. Most obviously, a copy of the document may be tendered^{xi}. If, however, the documents are stored in such a way that a particular device is needed to retrieve the information, a document that purports to have been produced by the device may be tendered^{xii}. In this case, the screenshots appearing on the pages were clearly documents^{xiii} produced by Baycorp's electronic filing system. This was a permissible way to produce the contents of Baycorp's electronic file notes. It did not matter that they were not exact copies of Baycorp's documents, provided they were "*identical . . . in all relevant respects*"^{xivxv}.

Leeming JA further held that the screenshots appearing on the pages produced by Baycorp were admissible as business records belonging to Baycorp^{xvi}. In determining whether a document fell within the business records exception to the hearsay rule^{xvii}, the wording of s.69 entitled the Court to draw inferences from the form and content of the document itself^{xviii}. The drawing of inferences from the document is also specifically sanctioned by s.183 of the Act^{xix}. His Honour concluded that, by having regard to the text contained in the screenshots, along with the cover letter from Baycorp's counsel accompanying the production of the subpoena confirming the production of file notes, the "overwhelming inference" was that the screen shots were business records of Baycorp^{xx} that disclosed a series of representations reflecting the notes of conversations made by the person who participated in the conversations^{xxi}.

Finally, Leeming JA held that Wilson J's exercise of the discretion under s.135 of the Act to exclude the file notes on the basis that they were unfairly prejudicial to the Calleja interests had miscarried^{xxii}. First, his Honour queried whether the Calleja interests could maintain their submission that the file notes were unfairly prejudicial (on the basis that they allegedly contained errors and were not a complete record) in circumstances where they had taken no steps to test or independently verify the evidence^{xxiii}. His Honour further held that, for the purposes of s.135, it was not sufficient for a court to be satisfied that evidence might be unfairly prejudicial; the section also required the Court to assess the probative value of the evidence and then assess whether the probative value was "substantially" outweighed" by the danger that the evidence might be unfairly prejudicial^{xxiv}.

Leeming JA concluded that, as it could not be concluded that rejection of the file notes would not have affected the outcome of the original hearing, the appeal must be allowed and a retrial ordered^{xxv}.

Application

This judgment provides number of helpful reminders as to the way in which the Act approaches business records and other documentary evidence.

First, it is unnecessary to be slavish to form when seeking to adduce evidence of the contents of a document. Sections 47 and 48 of the Act allow documentary evidence to be adduced in a variety of forms, and it doesn't matter if the document to be tendered is not a carbon copy of the original, provided it is identical in "all relevant respects". A common example is an email forwarded by a client to their solicitor which when printed contains the solicitor's details.

Second, in determining whether the Act applies to a document, the Court may examine the document and draw reasonable inferences from it. Possibly by reason of the judgment in *NAB v Rusu*, there appears to be some lingering doubt as to whether a court may determine whether a document is a business record simply by reviewing the document. Leeming JA's judgment makes it clear that this is possible.

Third, to prove a document is a business record, it is only necessary to satisfy 3 broad criteria: that the document forms part of the records kept by a business^{xxvi}, that the document contains a previous representation made for the purposes of the business^{xxvii}, and that the representation was made by a person who might reasonably be expected to have personal knowledge of the asserted fact^{xxviii}. Apparent errors or omissions appearing the document will not inform this inquiry; this is more a question of the weight given to the document in the event it is admitted.

Finally, parties seeking to exclude documentary evidence on the basis that it is unfairly prejudicial should not sit on their hands. The Act contains provision^{xxix} for parties to test this evidence in an attempt to resolve the controversy, and a failure to do so may result in the Court refusing to accept that the documents are in fact prejudicial. Parties wishing to tender the documents should also be ready to identify their probative value, so the Court can carry out the balancing exercise required by s.135.

ⁱ At [29]

ⁱⁱ At [49]

ⁱⁱⁱ At [55]

^{iv} At [64]

^v At [70]

^{vi} At [71] to [72]

^{vii} [2017] NSWSC 1694

^{viii} At [32]

^{ix} At [41]

^x At [120]-[121]

^{xi} Section 48(1)(b)

^{xii} Section 48(1)(d)

^{xiii} Noting the dictionary to Act defines document to include "any record of information"

^{xiv}xix

^{xv} Section 47(2); at [81]

^{xvi} Specifically rejecting the Calleja interests' reliance on *National Australia Bank Ltd v Rusu*^{xvi} (1999) 47 NSWLR 309 without expressing a concluded view on the accuracy of that judgment

^{xvii} Section 59

^{xviii} At [89], referring to the judgment of McDougall J in *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 849

^{xix} At [91]

^{xx} At [98]

^{xxi} At [109]

^{xxii} At [111] to [116]

^{xxiii} At [113], referring to Division 1 of Part 4.6 of the Act

^{xxiv} At [115]

^{xxv} At [124] and [161]

^{xxvi} Section 69(1)(a)

^{xxvii} Section 69(1)(b)

^{xxviii} Section 69(2)

^{xxix} Part 4.6, Division 1