

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2010-404-6349
[2013] NZHC 3329**

BETWEEN FRANCISC CATALIN DELIU
Plaintiff

AND BOON GUNN HONG
Defendant

Hearing: 11 December 2013

Appearances: Plaintiff in person
KG Davenport QC and JW Wall for Defendant

Judgment: 11 December 2013

JUDGMENT OF BREWER J

Solicitors: Plaintiff in person
Defendant in person

[1] The plaintiff, on 6 December 2013, filed in the Court two bundles of documents labelled “plaintiff’s exhibits”. Under tab E in bundle 1 of the exhibits is a large number of documents which are, on Mr Deliu’s evidence, client references. Mr Deliu did not address these documents in his evidence-in-chief. However, subsequently, he advised the Court of his intention to rely on their contents when making his closing submissions. This was objected to by counsel for the defendant. I have heard argument this morning on the admissibility of the references.

[2] Mr Deliu’s contention is that the documents are admissible as business records within the exception to the rule against hearsay contained in s 19 of the Evidence Act 2006 (“the Act”). Section 19 provides:

19 Admissibility of hearsay statements contained in business records

(1) A hearsay statement contained in a business record is admissible if—

(a) the person who supplied the information used for the composition of the record is unavailable as a witness; or

(b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or

(c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.

(2) This section is subject to sections 20 and 22.

[3] The first definition to consider is the definition of “business record”. This is contained in s 16 of the Act, as follows:

Business record means a document—

(a) that is made—

(i) to comply with a duty; or

(ii) in the course of a business, and as a record or part of a record of that business; and

(b) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had,

personal knowledge of the matters dealt with in the information he or she supplied

[4] Mr Deliu's evidence on this point is that the references were compiled in a number of ways. Some were compiled by staff members who had standard instructions from Mr Deliu to seek references from satisfied clients. There was, for at least some of the references, a template to which staff were required to adhere. Others of the references were compiled by Mr Deliu himself. A third category is that of references compiled by the clients without recourse to a template of Mr Deliu's barrister's chambers. All of the references, on Mr Deliu's evidence, have been signed by the clients concerned.

[5] Accordingly, Mr Deliu submits that the references are business records in that they were made to comply with a duty (the references compiled by staff members pursuant to direction) or in the course of his business as a barrister's chambers and they are records of that business. They were made in the course of business because they were made for business purposes. They are marketing tools and have been used as such.

[6] Mr Wall, for the defendant, submits that the references cannot be business records because they were made by clients and made for the clients' purposes, not in the course of Mr Deliu's business. The point Mr Wall makes is that the references are not statements of any of Mr Deliu's employees or indeed of Mr Deliu himself but are statements of the clients. That is the only way they can have evidential weight in this trial.

[7] Mr Wall also criticises the references on a number of grounds, but really those grounds do go to weight rather than whether the references can fall within the definition of "business record".

[8] Mr Wall also submits that, on a purposive interpretation, Parliament intended business records to be reliable documents produced in the course of a business rather than the subjective statements of clients. Mr Wall referred, as an example, to the files of a liquidator amassing information to be used for the purposes of a liquidation.

[9] That might be so, but Parliament, against the advice of the Law Commission, added s 19 to the Act rather than leave s 18, which deals with general admissibility of hearsay, to govern all situations. Section 18 has a specific requirement of reliability. Section 19 does not. I am left with the view that Parliament's intention was that if a hearsay statement is contained in a business record, it is admissible subject to the balance of s 19 being satisfied.

[10] I have some sympathy for Mr Wall's submission that documents made by a third party not involved in a business cannot be business records. However, the case law suggests otherwise. If one has regard to criminal law jurisprudence there is a clear line of cases, for example *R v Kereopa*,¹ which extends business records to the written statements of eye witnesses given to the Police.

[11] The evidence is that the references were prepared in the course of Mr Deliu's business as a barrister's chambers and they are the documents of the clients who signed them. They are a part of Mr Deliu's business records and have been used in the course of his business. I, therefore, find that they are business records within the definition in s 16 of the Act.

[12] I do not think it necessary to decide whether or not some of them were prepared in order to comply with a duty since their existence in the trial can only have meaning if they have been adopted by clients.

[13] The references will, therefore, be admissible under s 19 if, firstly, the person who supplied the information used for the composition of the record is unavailable as a witness. I do not know the answer to that question. On Mr Deliu's evidence, for some of the references, the person who supplied the information used for the composition of the record is one of his staff members. For others the person was Mr Deliu himself. For the third category, the person who supplied the information used for the composition of the record would be the client.

[14] There is no evidence as to the unavailability of the people who supplied the information. The onus is on Mr Deliu to satisfy me as to availability so I rule that

¹ *R v Kereopa* HC Tauranga CRI-2007-087-411, 11 February 2008.

s 19(1)(a) is not available to Mr Deliu for the purpose of admitting the references as business records.

[15] For the sake of completeness, I record that the first reference in the references under tab E purports to be by Yatesh Babulal. Mr Deliu has given evidence that he has been deported and so is unavailable as a witness. But I have no evidence as to whether Mr Babulal was the person who supplied the information used for the composition of the record.

[16] I now turn to whether s 19(1)(b) can assist Mr Deliu. The provision would require me to consider that no useful purpose would be served by requiring the clients to be witnesses, having regard to the time that has elapsed, as they could not reasonably be expected to recollect the matters dealt with in the information they supplied. Under this heading, I have regard to the clients since, by signing the references, they must be taken to have adopted the information contained in the references. It could have no evidential value otherwise.

[17] Mr Deliu has submitted that, by having regard to the dates on the references, I can consider that no useful purpose would be served by requiring clients to be witnesses because they cannot reasonably be expected to remember the cases to which they have referred.

[18] I cannot accept that submission. I have read the references. All refer to very significant events in the lives of the clients. All express heartfelt relief or satisfaction with the outcome secured by Mr Deliu. I cannot infer that no useful purpose would be served by requiring them to give evidence.

[19] Section 19(1)(c) can be invoked if I consider that undue expense or delay would be caused if, in this case, the clients were required to be witnesses. Mr Deliu has submitted that this would certainly be the case. There are some 50 or 60 references. Mr Deliu's submission is that the references are explicit and cannot really be expected to be contradicted by the defendant if the clients come and give evidence about them. If 50 or 60 clients were called, it would of course take days for their evidence to be given.

[20] Mr Wall, to the contrary, submits that the evidence of the clients would have to be given in person because cross-examination would be required in order for fair trial rights to be preserved. Mr Wall points out that the references were received by the Defence only on the eve of trial. There was no time for the Defence to make inquiries into the references. The Defence would wish to investigate the circumstances in which the references were made and the manner in which the cases referred to in the references were actually resolved.

[21] Mr Wall also points out that until today the Defence did not know why the references were sought to be introduced into evidence by Mr Deliu. Mr Deliu's submission to me is that the use he would wish to make of them is irrelevant. If the references are admissible then he can use them as he wishes and how he uses them can go only to issues of weight.

[22] Mr Wall responds that key questions in this case relate to Mr Deliu's competence as a lawyer. It would be of prejudice to the defendant if references directly attesting to competence could be admitted as business records and so be unchallengeable.

[23] I have to consider the issue of undue expense or delay against the purpose for which the evidence would be required. Mr Deliu wants to refer to the references as testimonials to his competence. He wishes to do that to rebut allegations made by the defendant, Mr Hong, on that subject and also to rebut allegations by Mr Hong as to the propriety of his dealings with his clients.

[24] If I considered that the references are documents to which I will have to give serious consideration then I would rule that s 19(1)(c) does not assist Mr Deliu. I would not rule that documents produced at the last minute and which have serious weight should be admitted on an undue expense or delay basis. However, I accept the submission of Mr Wall as to the weight that can be given to references prepared, mostly it would seem, by Mr Deliu or his staff and signed by clients. I do not know the circumstances of the cases. I do not know the circumstances under which the references came to be signed. I do not know whether the clients had a good understanding of English or not.

[25] Mr Deliu has already given evidence as to his legal experience. He has already given evidence as to the hundreds of cases he has taken. He has already given evidence of his success and experience as a litigator. All I take from the references is that he has clients who have not condemned him. I would not expect anything else for any lawyer.

[26] Therefore, because I have held that they are business records and because I find that they have very little weight in evidential terms, I do consider that undue expense or delay would be caused if the clients were required to be witnesses. I see no real prejudice to the defendant in my making this ruling and I will not exercise my residual discretion to otherwise exclude them.

[27] Accordingly, Mr Deliu's application is granted.

Brewer J