
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : BRYAN KEVIN HUGHES as liquidator of
WESTGEM INVESTMENTS PTY LTD (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) -v- COMMONWEALTH BANK OF
AUSTRALIA LTD [2018] WASC 150

CORAM : TOTTLE J

HEARD : 2 MAY 2018

DELIVERED : 16 MAY 2018

FILE NO/S : COR 77 of 2014

BETWEEN : BRYAN KEVIN HUGHES as liquidator of
WESTGEM INVESTMENTS PTY LTD (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED)
Plaintiff

AND

COMMONWEALTH BANK OF AUSTRALIA LTD
First Defendant

WESTPAC ADMINISTRATION 2 LTD
Second Defendant

WESTPAC ADMINISTRATION 3 LTD
Third Defendant

Catchwords:

Evidence - Admissibility - Financial records - Quickbooks program - Whether data file a book kept by body corporate - Whether data file admissible under s 1305 of the *Corporations Act 2001* (WA) - Whether reports prepared using data stored on data file is a book kept by a body corporate

Legislation:

Acts Interpretation Act 1901 (Cth), s 25
Corporations Act 2001 (Cth), s 9, s 286, s 288, s 1305, s 1306

Result:

Evidence admissible

Category: B

Representation:

Counsel:

Plaintiff : Mr C R C Newlinds SC, Mr W A D Edwards & Mr R May
First Defendant : Mr P Jopling QC, Mr J A Thomson SC, Ms S E Russell & Mr E A Gisonda
Second Defendant : Mr P Jopling QC, Mr J A Thomson SC, Ms S E Russell & Mr E A Gisonda
Third Defendant : Mr P Jopling QC, Mr J A Thomson SC, Ms S E Russell & Mr E A Gisonda

Solicitors:

Plaintiff : Jackson McDonald
First Defendant : King & Wood Malleons
Second Defendant : King & Wood Malleons
Third Defendant : King & Wood Malleons

Case(s) referred to in decision(s):

Australian Securities and Investments Commission v Rich [2009] NSWSC 1229

Bevan v State of Western Australia [2010] WASCA 101
Caratti v The Queen [2000] WASCA 279; (2000) WAR 527
Stone v Melrose Cranes & Rigging Pty Ltd [No 2] [2018] FCA 530

TOTTLE J:**Introduction**

1 These are my reasons for ruling that the Quickbooks data file presently marked for identification should be admitted into evidence pursuant to s 1305 of the *Corporations Act 2001* (Cth) (the Act). The Quickbooks data file is stored on a USB stick and contains the financial records of Westgem Investments Pty Ltd.

Context

2 In this action the plaintiff as liquidator of Westgem seeks, amongst other relief, orders setting aside various transactions between Westgem and two banks to which the defendants are the successors in law. The relief is sought under s 588FF(1) of the Act. This action is being heard along with other actions in which Westgem is one of several plaintiffs. The issues and evidence in the actions overlap. The tender of the Quickbooks data file is pressed by the plaintiffs in all the actions and the reference to 'plaintiffs' in these reasons is a reference to the plaintiff in this action and the plaintiffs in the related actions.

3 The plaintiff pleads that Westgem was insolvent from no later than 25 September 2009 until 5 October 2010.¹ Amongst the large number of particulars given in support of that plea, the plaintiff refers to the amount owing by Westgem to its creditors on 11 dates in the period between 24 September 2009 and 5 October 2010 and attach documents that appear to be 'aged payable' summaries as of the 11 dates. The particulars refer to a large number of documents in addition to the aged payable summaries that are attached to the pleading.

4 The defendants deny that Westgem was insolvent as alleged and plead to the insolvency allegation in some detail. The defendants plead that they will refer to the documents referred to in the plaintiff's particulars of insolvency for their full terms, meaning and effect.²

5 At a directions hearing held on 29 November 2017 senior counsel for the defendants, Mr Thomson SC, mentioned that a witness statement made by Mr Gregory Dower had been filed and served the previous day by the plaintiff. Mr Dower is the financial controller of the group of companies of which Westgem formed part. In his

¹ Fourth amended substituted statement of claim 12 February 2018 par 10.

² Defence to fourth amended substituted statement of claim 8 March 2018 par 10(n).

statement Mr Dower said that he had looked at the attachments (the aged payable summaries) to the then current version of the statement of claim, which are the same as those attached to the present version of the statement of claim. Mr Dower said that he had downloaded the attachments from the Westgem Quickbooks accounting system, having earlier explained that Westgem used such an accounting system. Senior counsel for the plaintiffs informed the court that the purpose of the statement was to do no more than prove that the accounts of the company are business records.³ At that hearing, Mr Thomson identified an issue he perceived arose from what appeared to be the plaintiffs' approach to the insolvency issue. After further exchanges the plaintiffs' senior counsel expressed the view that the documents were receivable as business records and that parts of the defendants' case rested on the same accounts. Mr Thomson then said that he was not objecting to the admission of the documents. The statement made by Mr Thomson that he was not objecting to the admission of the documents was made in the context of the plaintiffs' position as it then was, that is, that Mr Dower's statement would be tendered and he would be called so that he could be cross-examined.

6 The plaintiffs' solicitors provided the defendants' solicitors with the Quickbooks data file and correspondence was exchanged between the solicitors about a number of issues arising from the data file. It is unnecessary to go into the detail of the correspondence but I will mention two matters. First, on 6 December 2017 the plaintiffs' solicitors informed the defendants' solicitors that 'in light of Mr Thomson's concession at the last court hearing that there is no issue that the accounts are business records, we doubt in any event that Mr Dower's statement will need to be read at the hearing'. Secondly, that the defendants' solicitors were able to access the data file from 8 December 2017.

7 On 16 April 2018 senior counsel for the plaintiffs informed the court that Mr Dower's witness statement would not be read and he would not be called. The admissibility of the Quickbooks data file has been hotly contested since that date.

Relevant statutory provisions

8 Section 1305 of the Act provides:

³ ts 768.

TOTTLE J

- (1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.
- (2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).

9 The term 'books' is defined by s 9 of the Act as follows:

'books' includes:

- (a) a register; and
- (b) any other record of information; and
- (c) financial reports or financial records, however compiled, recorded or stored; and
- (d) a document;

but does not include an index or recording made under Subdivision D of Division 5 of Part 5.6.

10 Section 1306 deals with the form and evidentiary value of books. Relevantly it provides that:

- (5) If:
 - (a) because of this Act, a book that this Act requires to be kept or prepared is prima facie evidence of a matter; and
 - (b) the book, or a part of the book, is kept or prepared by recording or storing matters (including that matter) by means of a mechanical, electronic or other device;

a written reproduction of that matter as so recorded or stored is prima facie evidence of that matter.

- (6) A writing that purports to reproduce a matter recorded or stored by means of a mechanical, electronic or other device is, unless the contrary is established, taken to be a reproduction of that matter.

11 'Document' is relevantly defined in s 25 of the *Acts Interpretation Act 1901* (Cth) (as in force on 1 January 2005)⁴ to include any paper or other material on which there is writing and any article or material from

⁴ See s 5C of the Act.

which writings are capable of being reproduced with or without the aid of any other article or device.

12 The term 'financial records' is defined in s 9 of the Act to include:

- (a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
- (b) documents of prime entry; and
- (c) working papers and other documents needed to explain:
 - (i) the methods by which financial statements are made up; and
 - (ii) adjustments to be made in preparing financial statements.

13 Section 286 of the Act imposes an obligation on companies to keep financial records. Relevantly, it provides that a company must keep written financial records that correctly record and explain its transactions and financial position and performance, and would enable true and fair financial statements to be prepared and audited.

14 Section 288 of the Act provides that if financial records are kept in electronic form they must be convertible into 'hard copy'.

An outline of the parties' submissions

15 Shortly stated, the plaintiffs argue that the conditions of admissibility under s 1305 of the Act are satisfied for the following reasons. First, the Quickbooks data file is the electronic record of Westgem's financial information, that is, it falls within the statutory definition of 'books'. Secondly, the data file was kept by Westgem as a systematic set of accounting data file records in the usual form and in this respect the plaintiffs point to the fact that the data file was discovered by the liquidators of Westgem. Thirdly, the data file was kept as required by s 286 of the Act.

16 The defendants outlined the basis of their objection to the tender in lengthy written submissions which were developed orally. In summary the defendants' objection is based on the following propositions:

- (a) There was no evidence given by a witness as to the provenance of the Quickbooks data file and there is no print out associated with the tender.
- (b) The plaintiffs have not proved that the software ('the Reckon software') used to access the Quickbooks data file could do so accurately and fully. The defendants consented to the use of the Reckon software to access and review the data file for the purposes of determining its admissibility without making any concession as to the ability of the software to accurately and fully access the data.
- (c) The Quickbooks data file is not a 'book' for the purposes of s 1305 of the Act because it does not state or record matters that may be reproduced but is a compilation of data which may be manipulated to generate reports depending on the parameters selected by a person using the software.
- (d) A report generated by the plaintiffs, the defendants or the court using the software to manipulate the data will not be a book which has been 'kept' by Westgem for the purposes of s 1305.
- (e) The Quickbooks data file is said to contain information for the period 2004 to 2011. It is not possible to know whether the data is relevant to a matter in issue without having reports generated from the data file. At this stage no such reports have been generated. Thus, the plaintiffs have failed to demonstrate the relevance of the data file.
- (f) The court should exercise its discretion to exclude the Quickbooks data file because the evidence contained in it will be unfairly prejudicial to the defendants if reports are generated of which the defendants have had no notice.

17 In summary the plaintiffs' response to the defendants' submissions was as follows.

- (a) The defendants' submission that the provenance of documents or information the subject of the tender must be proved by some evidence other than the document itself leaves no work for the words 'purporting' in s 1305(2) and 'purports' in s 1306(6) to do.
- (b) The Quickbooks data file contains prime books of entry which the plaintiffs' senior counsel described as 'basal information' that

had not been manipulated by the software. He set out to establish this by demonstrating in the course of the hearing the nature of the information recorded in the data file.⁵

- (c) The text of the relevant statutory provisions did not provide any warrant for taking away the ability of the tendering party to make use of the computer program into which the information was entered so that courts, amongst others, could work out a company's financial position on a particular day. The plaintiffs argue that s 1305 is intended to be facilitative and should not be construed narrowly.
- (d) The concept of 'purporting' introduced in s 1305(2) and reflected in s 1306(6) removes the need for the tendering party to prove the software, that is, if the computer system produces an image on the screen of a document that purports to be a book of the company, that alone is sufficient to make it admissible.
- (e) It is necessary to tender the entire data file containing information for the period 2004 to 2011 because, for the purposes of admissibility, the whole document must be tendered.
- (f) The plaintiffs will provide print outs of the reports on which they wish to rely upon by 11 May 2018. These include but are not limited to the aged payable summaries attached to the fourth amended substituted statement of claim. The plaintiffs wish to tender aged payable summaries for other dates in the period between September 2009 and October 2010 as well as balance sheets on various dates. These will be retrieved from the Quickbooks data files in report format.

Disposition

Authenticating evidence not required

18 In *Australian Securities and Investments Commission v Rich* Austin J held that s 1305(1) allows a company's books to be introduced into evidence as they are, without any authenticating evidence by any witness, and allows the books to be relied upon to prove transactions recorded in them.⁶ With respect, I agree with Austin J's conclusion. It

⁵ For the purpose of determining the admissibility of the data file the defendants consented to the use of the Reckon software to access and review the data file.

⁶ *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229.

is a conclusion that acknowledges the significance of the words '[a] document *purporting* to be a book' in s 1305(2). The absence of authenticating evidence is not a bar to the admission of the Quickbooks data file.

It is unnecessary to prove the software

19 In my view, it is unnecessary for the plaintiffs to prove the Reckon software. This conclusion rests heavily on the inclusion of the word 'purporting' in s 1305(2) as referred to in the preceding paragraph and the use of the word 'purports' in s 1306(6): '[a] writing that *purports* to reproduce a matter'. In assessing the significance to be given to those words I bear in mind that s 1305 and s 1306 are provisions that facilitate the admission of books into evidence and they should be construed in a way that promotes their legislative purpose.⁷

20 The effect of s 1305(2) when applied to a document maintained in electronic form viewable on a computer screen is that if the document purports to be a book kept by a body corporate, the document is, without more, taken to be kept by the body corporate for the purposes of s 1305(1) unless the contrary is proved. This is its effect for two reasons. First, because construing the subsection as having this effect reflects the ordinary meaning of 'purporting'. The Macquarie Dictionary definition of the verb 'purport' is 'to profess or claim; to convey to the mind as the meaning or thing intended; express; imply'. Secondly, there is no textual or other warrant for importing into the provision a requirement to prove the software that enables the document to be viewed on the computer screen.

21 Applying the same reasoning, the effect of s 1306(6) is that if a book or part of a book which records or stores a matter in electronic form is printed - that is, a written reproduction is created - the writing that purports to reproduce the matter recorded is, without more, taken to be a reproduction of the matter unless the contrary is proved. There is no statutory requirement to prove the software or device by which the reproduction is made.

22 In reaching the conclusion that it is unnecessary to prove the software I have considered the decision of the Court of Appeal of this court in *Bevan v State of Western Australia*.⁸ In that case Blaxell J,

⁷ *Acts Interpretation Act 1901* (Cth) s 15AA (as in force on 1 January 2005); cf the observations of Malcolm CJ in *Caratti v The Queen* [2000] WASCA 279; (2000) WAR 527 at [134] in relation to s 1305 of the *Corporations Law*.

⁸ *Bevan v State of Western Australia* [2010] WASCA 101.

with whom Owen and Buss JJA agreed, held that the technology employed to download data from a SIM card and (separately) from a mobile telephone for the purposes reading text messages stored on the SIM card and on the phone was not admissible without evidence being adduced to the effect that the downloading process was a process generally accepted by experts as being accurate and that the downloading of the messages was performed properly. Such evidence was required in that case because the downloading process was not undertaken by 'notorious' scientific or technical instruments. The issue raised in this case does not, however, involve the common law principles that govern the admission of the material generated by scientific and similar processes. The issue is one of the correct construction of s 1305 and s 1306 of the Act.

- 23 It is important to note that s 1305(1) provides that a book is admissible as prima facie evidence of any matter stated or recorded in it. It is open to the defendants to adduce evidence to demonstrate that reliance should not be placed on the book, including evidence that the Reckon software is unreliable.

The Quickbooks data file is a book of Westgem

- 24 Having viewed some of the material on the Quickbooks data file in the course of the hearing I am satisfied that the data file contains material from which writings may be reproduced (that is, documents within the meaning of s 25 of the *Acts Interpretation Act 1901*) which purport to be Westgem's books. I am satisfied that the data file comprises documents and financial records recorded and stored on it. The documents include accounting documents of prime entry.

- 25 I am satisfied that the records on the Quickbooks data file are records of the kind Westgem was required to keep under s 286 of the Act and that by inference they were kept by Westgem pursuant to its statutory obligation to do so.

A report created from the Quickbooks data file following the tender is a book kept by the company

- 26 As a matter of language and logic, the defendants' submission that a report generated from the Quickbooks data file following its tender cannot be a book 'kept' by Westgem is, on first analysis, an attractive one. I do not accept the submission, however, because I consider the word 'books' should be construed expansively to include data retrieved in the form of reports from the data file.

27 To construe the word 'books' so as to exclude data retrieved in the form of reports generated after the tender would be a narrow construction which would undermine the legislative purpose of s 1305. It would give rise to the prospect that all that could be adduced in evidence was, to use the words of the plaintiffs' senior counsel, 'the basal information', that is the primary data. It would then be necessary for reports to be prepared using the primary data in order to make sense of it. Courts would not be assisted by the presentation of a large volume of primary data which must then be compiled into reports to obtain an understanding of the financial position of a company.

28 I take judicial notice of the facts that it is a common practice for businesses to record and store financial information electronically and, for that purpose, businesses use accounting software packages such as 'Quickbooks'. As is apparent from the submissions that have been made in this case, a feature of accounting software packages is that data is retrieved by means of reports or financial statements by reference to particular dates or periods as such reports or statements are required. Whilst it must be acknowledged that the retrieval of data in report form involves processes of selection and calculation, the retrieval of data in report form is a method by which data in accounting software packages is accessed. To adopt a narrow construction of 'books' which excludes such reports from its ambit would not promote the purpose of the provision.

29 I draw support for the expansive construction of the word 'books' that I have adopted from the reasons of Markovic J in *Stone v Melrose Cranes & Rigging Pty Ltd* for allowing into evidence profit and loss statements and balance sheets printed from an insolvent company's MYOB accounting software.⁹ In *Stone* the liquidators of an insolvent company sought to recover payments made to the respondent on the basis that they were unfair preferences. Objection was taken to the tender of the profit and loss statements and balance sheets by the liquidators on the basis that they could not attract the operation of s 1305 because they were produced by the liquidators for the sole purpose of being deployed in evidence in the proceeding and therefore could not have been kept by the insolvent company under a requirement of the Act.¹⁰ Although Markovic J noted that the evidence was not clear, it seemed that the profit and loss statements and balance sheets had been printed after the litigation had commenced for the purpose of

⁹ *Stone v Melrose Cranes & Rigging Pty Ltd [No 2]* [2018] FCA 530.

¹⁰ *Stone v Melrose Cranes & Rigging Pty Ltd* [194].

being attached to the liquidator's affidavit.¹¹ Markovic J admitted the profit and loss statements and the balance sheets on the basis that they simply reflected the MYOB records.¹²

30 For the reasons given above, I hold that reports generated from the data file and print outs of those reports would be admissible.

Relevance is established

31 Plainly not all the material on the data file is relevant but I accept the plaintiffs' submission that they are tendering the entire file to establish that it contains Westgem's books maintained in a systematic way.

No reason to exclude the material on the data file

32 I am not satisfied that the court should exercise a discretion to exclude the Quickbooks data file on the grounds that admitting it into evidence will be unfairly prejudicial to the defendants. The plaintiffs have proposed that they will provide notice to the defendants of the particular data retrieved in report form upon which they wish to rely. Questions of prejudice can be considered after the plaintiffs have identified those materials.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JB
ASSOCIATE TO THE HONOURABLE JUSTICE TOTTLE

16 MAY 2018

¹¹ *Stone v Melrose Cranes & Rigging Pty Ltd* [196].

¹² *Stone v Melrose Cranes & Rigging Pty Ltd* [196].