Admissibility – Relevance - Authenticity

12 October 2015

At a recent Continuing Professional Development panel session held by the Law Society of Tasmania on the use of social media in litigation, the Honourable Justice Stephen Escort, referred the audience to a helpful explanation of the law relating to admissibility, relevance and authenticity of a document in *Australian Competition and Consumer Commission v Air New Zealand Limited (No1)* (2012) 207 FCR 448; (2012) 301 ALR 32; [2012] FCA 1355. Being saved from foolishly objecting to the admissibility of a document on the basis that the document lacks authentication, is greatly appreciated. Perram J explains at [92]:

1. There is no provision of the *Evidence Act* which requires that only authentic documents be admitted into evidence. The requirement for admissibility under the Act is that evidence be relevant, not that it be authentic. On some occasions, the fact that a document is not authentic will be what makes it relevant, i.e., in a forgery prosecution. In other cases, there may be a debate as to whether a particular document is or is not authentic, for example, a contested grant of probate where it said that the testator's signature is not genuine.

2. In cases of that kind, the issue of authenticity will be for the tribunal of fact to determine. In cases heard by a judge alone, this will be the judge at the time that judgment is delivered and the facts found. In cases with a jury, it will be the jury.

3. The question of what evidence will be admitted is a question of law for the tribunal of law, which will be the Court.

4. Since authenticity is not a ground of admissibility under the *Evidence Act*, the issue of authenticity does not directly arise for the tribunal of law's consideration at the level of objections to evidence.

5. What does arise for its consideration is the question of relevance under s 55. If the evidence is relevant it is admissible: s 56. It will be relevant under s 55 if the evidence is such that 'if it were accepted, [it]

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could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue'.

6. The question of a document's authenticity is relevant only to the tribunal of law's consideration of relevance under s 55. It has no other role.

7. In that inquiry, the question for the tribunal of law is not whether the document is authentic but whether receipt of the document could, to paraphrase s 55, rationally affect the assessment of the probability of a fact.

8. If there is raised a question about the authenticity of a document (and assuming that, if authentic, it would otherwise be relevant to an issue) then there will be an issue in the proceedings about its authenticity. This will be a question for the tribunal of fact to resolve, if the document is admitted.

9. The question for the tribunal of law, by contrast, will be whether the document is relevant to a fact in issue under s 55. That is, the question will be whether the document can rationally affect the assessment of the probabilities of the fact, including its authenticity.

10. What materials may be examined in answering this question? The answer is provided by s 58:

> **58 Inferences as to relevance**
>
> (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
>
> (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

11. The position then is clear. In answering the only question before the tribunal of law – relevance – the tribunal may examine the document to see what may be reasonably inferred from it (s 58(1)). It may also examine other material (s 58(2)).

12. The tribunal of law does not find that the document is authentic. It finds that there is, or there is not, a reasonable inference to that effect and hence that the document is, or is not, relevant. If there is a reasonable inference that the receipt of the document will rationally affect the probability of a finding of fact, then the matter may to go to the tribunal of fact which will then determine at the end of the trial whether the document is authentic and whether the fact is proved.

13. At no time does the tribunal of law determine that the document is or is not authentic because this is not a question for it. It may, however, determine that no reasonable inference to that effect is open and thereby conclude that it is not relevant. In a jury context, that will be similar to taking the question of authenticity away from the jury. Analytically, it will be the same where the tribunal of fact is a judge.

14. In deciding relevance (i.e. whether the tribunal of fact could reasonably infer that the document (otherwise relevant) was authentic), the tribunal of law is explicitly authorised by s 58(1) to ask what inferences as to authenticity are available from the document itself. That is what s 58(1) says.

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