

IN THE SUPREME COURT OF NEW ZEALAND

SC 1/2013
[2013] NZSC 23

BETWEEN

RANJIT KESHVARA
Applicant

AND

DAVID MURRAY BLANCHETT AND
GRANT EDWARD BURNS AS
LIQUIDATORS OF APG HOLDINGS
LTD (IN LIQUIDATION)
Respondent

Court: Elias CJ, McGrath and Glazebrook JJ

Counsel: L Herzog for Applicant
M D Branch and S J Rawcliffe for Respondent

Judgment: 21 March 2013

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant is to pay to the respondents costs of \$2,500 plus all reasonable disbursements to be fixed if necessary by the Registrar.**
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REASONS

[1] The respondents are the liquidators of APG Holdings Ltd. In the High Court they claimed that Mr Keshvara had breached his duties as a director of APG. This claim was successful.¹

[2] In support of the claim, the liquidators produced a bundle of documents relating to the affairs of APG while Mr Keshvara was a director. At the beginning of the High Court hearing, objection was made to the admission of these documents. Venning J held that, while the documents referred to by Mr Blanchett contained

¹ *Blanchett v Keshvara* [2011] NZCCLR 34 (HC).

hearsay statements, they were admissible as business records under s 19 of the Evidence Act 2006.

[3] Venning J held that the person most likely to have produced the documents was Mr Antoo, a former employee of the company. Given that seven years had passed since the time of the creation of the records, the Judge considered that Mr Antoo could not reasonably be expected to recollect the matters dealt with in the documents. Accordingly s 19(1)(b) of the Evidence Act applied, as no useful purpose would be served by requiring Mr Antoo to be a witness.² Venning J also noted that, as the objection to the documentary evidence was raised at a very late stage,³ it would have been necessary to adjourn the trial to enable Mr Antoo to be located. He found that undue expense and delay would have been caused and thus that s 19(1)(c) also applied.⁴

[4] On appeal, the Court of Appeal upheld Venning J's decision.⁵ The Court said that it was not necessary in the circumstances of this case for the liquidators to seek to call more detailed or specific evidence directed at proof of the statutory requirements of s 19. The Court did not accept Mr Keshvara's submission that the identity of the person or persons who supplied information used for the compilation of the record needs to be precisely demonstrated as a pre-requisite to admissibility.⁶

[5] Mr Keshvara seeks leave to appeal on the grounds that the decision of the Court of Appeal conflicts with the decision in *Fiefia v Department of Labour*.⁷ This was a case where Immigration New Zealand sought to rely on a stamped entry in Mr Fiefia's passport to support the conclusion that he had overstayed a temporary permit. The Court of Appeal in that case held that there must be a sufficient factual foundation in the evidence for establishing that the conditions of admissibility of business records are met before the documentary material may be admitted.⁸ In that case, the Court held that, in the absence of sufficient evidence regarding the

² At [20].

³ Counsel for the appellant had not prior to the hearing signalled an objection to any documents contained in a previously filed "Bundle of Documents to be relied upon by the Plaintiffs".

⁴ At [21].

⁵ *Keshvara v Blanchett* [2012] NZCA 553.

⁶ At [32]–[33].

⁷ *Fiefia v Department of Labour* [1983] NZLR 704 (CA).

⁸ At 706.

circumstances in which the record had been supplied, the requirements of s 19 were not met.⁹ *Fiefia* had not been referred to (or by) the Court of Appeal in this case.

[6] The decision in *Fiefia* was made in a different statutory context¹⁰ and at a time when hearsay evidence was generally not admissible, subject to certain exceptions.¹¹ The situation under the Evidence Act 2006 relating to hearsay is very different.¹²

[7] More importantly, the type of evidence and the factual context in *Fiefia* was different. In the present case, the High Court was dealing with relatively routine financial transactions with a long time gap. The inference establishing the condition for admissibility under s 19(1)(b) and (c) by the High Court were conclusions of fact arrived at because of the circumstances of the particular case. The High Court's conclusion was upheld by the Court of Appeal. No question of general or public importance arises.

[8] Leave is therefore declined.

Solicitors:
Mark Henley-Smith, Auckland for applicant
Harkness Henry, Hamilton for respondents

⁹ At 707.

¹⁰ The relevant statutory provision was s 3 of the Evidence Amendment Act 1980 (No 2). This Act was repealed as from 1 August 2007 pursuant to s 215 of the Evidence Act 2006.

¹¹ *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVAPart2Subpart1.1].

¹² See Evidence Act 2006, s 17.