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IN THE HIGH COURT OF NEW ZEALAND 2/6
AUCKLAND REGISTRY

CP 2455/89 & CP 111/94

S88

BETWEEN	EQUITICORP INDUSTRIES GROUP LTD (IN STATUTORY MANAGEMENT) & Anor	
	Plaintiffs	
AND	THE CROWN	
	12th Defendant	
AND	EQUITICORP AUSTRALIA LTD	
	14th Defendant	

Counsel: Sian Elias QC, W G Manning & Ms A Cook
for plaintiffs

DL Mathieson QC, Arthur Tompkins
Ms K L Clark, for 12th defendant

MEDIUM PRIORITY

Hearing: 1 & 2 May 1995

Judgment: 17 May 1995

JUDGMENT NO 33 OF SMELLIE J
re WHETHER OR NOT MR CLATWORTHY SHOULD HAVE BEEN ALLOWED TO REFRESH HIS MEMORY ON 1 MAY FROM THE TRANSCRIPT OF THE CRIMINAL TRIAL AND ON 2 MAY FROM THE INTERROGATORIES OF HIS FIRM, BUTTLE WILSON LTD AND WHETHER AS A CONSEQUENCE OF HIM HAVING BEEN ALLOWED TO DO SO THE ANSWERS HE GAVE SHOULD BE RECEIVED AS EVIDENCE

Introduction

Mr Clatworthy is a principal of Buttle Wilson Ltd, the sharebrokers who acted for both the Crown and EHL in the sale by the Crown to EHL of its NZS shares and which also underwrote the buy back of the EHL shares which the Crown took in the first instance as consideration for its shareholding in NZS.

The witness appeared on subpoena. On the advice of counsel who had been looking after Buttle Wilson's interests prior to the settlement in September last year involving all defendants except the Crown, he declined to co-operate with the plaintiffs' legal advisers. As a consequence, when he stepped into the witness box he had neither conferred with counsel calling him, nor provided any written statement of the evidence he could give. At the request of counsel for the plaintiffs however, Mr Clatworthy had re-considered certain documents of which he had some prior knowledge.

On one occasion on 1 May during his examination in chief, he asked for and was granted leave provisionally to refresh his memory from evidence that he had given on oath in the criminal trial in the second half of 1992, which of course was five years after the events in question. Then on 2 May, while still being examined in chief, he requested and was granted leave, again provisionally, to refresh his memory from interrogatories which had been filed on behalf of Buttle Wilson Ltd, and which touched directly on some answers that he had given. Those interrogatories were filed in Court on 11 February 1994 which was over six years after the events of October 1987.

The Specific Circumstances under which the Issue arose

In the Realtime record for 1 May 1995, between p 4771 and p 4791 will be found the run up to the issue as it emerged, followed by a verbatim report of the arguments advanced by counsel.

So far as the events of 1 May are concerned, they were summarised by Mr Mathieson at p 4780 between l 5 and 20 as follows:

> "The starting point, your Honour, is the exact question asked. Page 4771, the witness had given an answer that:
>
> > 'That letter may have been attached to my letter to the Crown enclosing the formal Equiticorp Holdings offer, but I can't say with certainty whether that was so, or not.'
>
> The next question:
>
> > 'Were you asked questions about this?... Not that I can recall.
> > Would it assist you to refresh your memory from what you said at that time? ... Certainly.'"

On 2 May commencing at p 4804 through to 4807, the circumstances under which reference was made to the interrogatories is recorded, together with further brief submissions and my ruling that provisionally the interrogatory could be looked at for the purpose of the witness refreshing his memory, but with directions also as to how the matter was to proceed after that in terms of the precise questions to be asked. The manner in which the issue arose is to be found on p 4084 between l 12 and 21, where the record reads:

> "Do you recollect showing the Samuel Montagu people any documentary material supporting the arrangements? ... Not that I recall.

> Do you recollect answering on oath an interrogatory question directed at this issue, documents shown to Samuel Montagu? ... I can't recall that.
>
> Would it assist you to refresh your memory from the answers you gave in the interrogatories?... If it would help the Court."

The Plaintiffs' argument

Ms Elias made a two tier argument.

First she submitted that there is no objection to a witness being asked to refresh his or her memory from a prior statement, whether or not it is contemporaneous. Here she relied extensively upon a thesis to that effect developed by Wigmore in *3 Wigmore, Evidence/(Charbourn Rev.1970)* at para 761 on pages 133, 134 and 135 of the volume. Wigmore draws a distinction between "past memory recorded" where the witness now has no recollection of the events, and "past memory revived" where the witness, having revived his or her memory is able to testify from present knowledge. She submitted that in the first case the document comes in as evidence. In the second, it is the witness's oral testimony that is evidence, the document only serving to act as a trigger for his or her independent recollection.

Counsel's second argument was based upon the decision of the English Court of Appeal in ***R v Da Silva*** [1990] 1WLR 31 where a witness was allowed by the trial Judge to retire from the witness box, reread a statement that was not contemporaneous and having refreshed his memory to return to the box and then give evidence of what had happened.

More generally, Ms Elias relied upon the comments of Turner J in ***re Jorgensen v News Media Ltd*** [1969] NZLR 961, where at p 990 l 55 and

onto the top of p 991, it was said, although admittedly in a different context, that:

> "...the law of evidence is Judge made law, directed to the control of the process by which Judges daily endeavour to do justice; and if it requires modification that modification is particularly a matter with which Judges should be entrusted."

Ms Elias also referred to the Court of Appeal decision in ***R v Naidanovici*** [1962] NZLR 334, and the reference made to the same in the recent Court of Appeal decision in this litigation, ***CA252/94*** decision 21 March 1995 in the judgment of the President at p4.

The Crown's Reply

Mr Mathieson submitted that the thesis advanced by *Wigmore* has not been accepted, and that it would be dangerous to adopt it because it abandons the requirement of contemporaneity which must be insisted upon if prior statements are to be used to refresh memory. He further submitted that if ***Da Silva*** is seen as departing from that rule then it was wrongly decided. Counsel's submission was however, that because the document in ***Da Silva*** (although admittedly not contemporaneous), was made only a month after the events, the decision is of no assistance because here the statements were made five or more years after the event.

Decision

The distinction identified by *Wigmore* was recognised by the Court of Appeal in ***Naidanovici*** (supra). At p 339 in the judgment of North and Cleary JJ at l.24,:

> "A distinction has long been recognised between the case where a witness refers to a document in order to refresh his memory of the details of a transaction of which he retains some present recollection, and the case where a witness with no present or

> independent recollection at all is enabled to testify to a transaction solely in reliance on a record made by him at the time."

A little later on the same page, having referred to *Wigmore*, the judgment reads at l 45:

> "Logically there would seem to be no answer to *Wigmore's* view, especially when it is borne in mind that the question is not whether the document must be treated as evidence when used by the witness to 'refresh' his memory, but whether it may be treated as evidence if desired."

Para 761 of the third volume of *Wigmore* referred to by Ms Elias is headed "Writing not made at the time of the event; depositions and former testimony." The text then develops the argument as follows:

> "That the paper was not drawn up *about the time* of the events is not a fault. The recollection may be equally refreshed by a recent note as by some contemporaneous record. It might, in fact, be argued that there is less danger of reliance upon the record itself and more probability of actual refreshment where the paper is one confessedly having no value as a contemporaneous record of past recollection."

The text then goes on to recognise that the weight of authority is in favour of requiring that the memorandum used should have been made contemporaneously, or nearly so. Nonetheless *Wigmore* argues that most authorities do not recognise the "radical difference between the purposes of the two sorts of papers." Then on p 134 and onto p 135 the text reads:

> "The instance which is at once the plainest test of principle and the most common practice is that of a *deposition* or report of *prior testimony.* Here the document was certainly not made at or near the time of the events observed; but orthodox practice has always conceded that the witness may refer to it to refresh his memory; either on direct examination or on cross-examination. The rulings in which this has been refused have apparently been influenced more or less by the apprehension that thereby the counsel, when a cross-examiner, might evade the rule which forbids the witness' prior contradictory statements to

> be introduced as independent testimony, or that the counsel on a direct examination might evade the rule against impeaching one's own witness by his contradictory statements. But neither of these rules in itself interposes any obstacle."

Of the authorities relied upon by *Wigmore* to support his contentions, the case of ***United States v Riccardi*** 3 Cir., 1949,174 F.2d 883; *cert.denied* 337 US 941 contains perhaps the most succinct statement at p 888 as follows:

> "In the case of present recollection revived, the witness, by hypothesis, relates his present recollection, and under oath and subject to cross-examination asserts that it is true; "

Also in that case the judgment quotes from ***United States v Rappy*** 2 Cir., 1947,157 F2d 964 967-968; *cert denied* 329 US 806 where it was put this way:

> "When a party uses an earlier statement of his own witness to refresh the witness' memory, the only evidence recognised as such is the testimony so refreshed. ... Anything may in fact revive a memory: a song, a scent, a photograph, an allusion, even a past statement known to be false. When a witness declares that any of these has evoked a memory, the opposite party may show, either that it has not evoked what appears to the witness as a memory, or that, although it may so appear to him, the memory is a phantom and not a reliable record of its content. When the evoking stimulus is not itself an account of the relevant occasion, no question of its truth can arise; but when it is an account of that occasion, its falsity, if raised by the opposing party, will become a relevant issue if the witness has declared that the evoked memory accords with it..."

Finally, reference may be made to ***Hoffman v United States*** 87 F (2d) 410, 411 (9th Circ 1939) where the judgment reads at p 411:

> "The law of contemporary writing or entry qualifying it as primary evidence has no application. The primary evidence here is not the writing. It was not introduced in evidence. It was not offered. The primary evidence is the oral statement of the hostile witness. It is not so important when the statement was

> made or by whom if it serves the purpose to refresh the mind and unfold the truth.'

An example of the application of this approach can be seen in ***United States v Stayback*** 3 Cir 1954 212 F2d 313 *Cert denied* 348 US 911 where the defendant's accountant was allowed to refresh his memory with respect to preparation of income tax returns from an affidavit he had given to the tax authorities five years after making the returns.

In my judgment there is a compelling logic about the *Wigmore* approach and the authorities he relies upon. It may not be appropriate in all cases, but in the unique and complex circumstances of this litigation, I consider its application appropriate to the circumstances outlined earlier in this judgment. Having seen it applied and observed Mr Clatworthy carefully during the process, I am satisfied his memory was revived by the documents and that the answers he gave were his honest recollection as a result of a revived memory.

I now consider the ***Da Silva*** (supra) judgment.. As is indicated in the report at p 34 between lines f and h, the argument advanced was that while a contemporaneous statement could be used during the giving of evidence to refresh a witness's memory, a statement that did not so qualify could only be used to refresh the witness's memory before he entered the witness box. Of that argument, p 35 between lines g and h, the Court said:

> "But since in either case, that is to say both with contemporaneous statements and those that do not fall within that class, the witness is refreshing his memory, it may fairly be said that there is no logical reason why in the one case he must do it in the witness box, and in the other he must do it before he enters the witness box and not once he has done so."

After further considering the matter, the Court reached its decision as recorded on p.36 of the report, between lines e and f, as follows:

> "In our judgment, therefore, it should be open to the Judge, in the exercise of his discretion and in the interests of justice, to permit a witness who has begun to give evidence to refresh his memory from a statement made near to the time of events in question, even though it does not come within the definition of contemporaneous, provided he is satisfied:
> (1) that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place;
> (2) that he made a statement must nearer the time of events, and that the contents of the statement represented his recollection at the time he made it;
> (3) that he had not read the statement before coming into the witness box;
> (4) that he wished to have an opportunity to read the statement before he continued to give evidence."

The Court went on to emphasise that if a witness is given the opportunity to refresh his or her memory in that way, the statement should be removed from the witness before the testimony continues, thus emphasising again that it is the revived recollection which is the evidence, not the document which triggered the memory.

The 4th Australian edition of *Cross on Evidence* (1991) appears to be the only recognised text published since the ***Da Silva*** decision was handed down. At para 17195 at p 430 of the text, the learned authors say when discussing the issue of contemporaneity:

> "However, the Court of Appeal in England has greatly modified the law in ***R v Da Silva***. It held that the Judge had a discretion to admit (sic) (permit?) a witness who has begun to give evidence to refresh his memory from a statement made near the time of the events in issue, even if it was not contemporaneous..."

As earlier recognised, the period of time between the event and the making of the statement in ***Da Silva*** was only one month, whereas here the period is in excess of five to six years. Clearly therefore, in applying the ***Da Silva*** conclusion to this case I am extending its application. Once again, however, in the unusual circumstances of this litigation, I think such an application is appropriate, even if, as a general rule that would not be so.

I should add also that Mr Mathieson submitted ***Da Silva*** was "plainly wrong". I reject that submission. There, as here, the concern was and is to see the truth emerge so that justice can be done.

For the reasons articulated above, the provisional rulings recorded at the time the objections were taken are confirmed, the answers given by Mr Clatworthy after he had refreshed his memory from the materials in question will be received in evidence.

The point came up without prior notice and since it is somewhat out of the ordinary and in other respects open to argument, it was not inappropriate that Mr Mathieson should have raised and argued his objections and asked for a ruling.

There will be no order as to costs.

Robert Smellie J.

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R P Smellie J