

Provenance of Documents

Gregg v R [2020] NSWCCA 245

Gregg is now the leading case in NSW regarding the provenance of documents sought to be tendered as evidence. Prior to 30 September 2020, the leading case was *NAB v Rusu*.¹ However, the Court of Criminal Appeal held in *Gregg* that *Rusu*, so far as it states that the authenticity of a document cannot be proved by consideration of the form or content of the document, was incorrectly decided and should not be followed.² This paper is designed to assist practitioners appearing in the Local Court of NSW.

Provenance

There are many rules about what evidence a court can consider when deciding an issue. The most familiar ones are the rules relating to relevance, hearsay and opinion. But, when dealing with documents, there is a hurdle to jump before we even get to those rules. That is that the party offering a document must prove on the balance of probabilities that the document is genuine – that it is what it purports to be.

NAB v Rusu

In his judgment in *Rusu*, Bryson J held that documents cannot prove themselves. If documents are tendered into evidence, their provenance must be proved by 'extrinsic evidence'. The opponent would then have an opportunity to cross-examine the author to see if they met the business records exception to the hearsay rule in s69 Evidence Act.

Gregg v R

Mr Gregg was convicted of fraud and appealed to the CCA. The basis of the appeal was that the trial judge had erred in excluding a 'Global Business Overview Presentation' document that Mr Gregg contended raised a reasonable doubt as to his guilt. The trial judge had relied on *Rusu* and held that the provenance of the GBOP needed to be proven by 'extrinsic evidence'.

In the appeal, Mr Gregg relied on s183 Evidence Act which provides:

If a question arises about the application of a provision of this Act in relation to a document or thing, the court may—

- (a) examine the document or thing, and*
- (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.*

¹ National Australia Bank Ltd v Rusu (1999) 47 NSWLR 309

² [362]-[372] (per Bathurst CJ); [712] (per Hoeben CJ at CL); [713]-[716] (per Leeming JA)

All three justices allowed the appeal and held that Rusu was wrongly decided. They rejected the central premise of Rusu that a document cannot prove itself. Bathurst CJ held at [368]:

'... There is no reason in principle that to the extent necessary, the authenticity of a document cannot be determined from the terms of the document itself. Bryson J, who did not have the benefit of argument on the question, was not referred to s 183 of the Evidence Act.'

Both Hoeben CJ at CL and Leeming JA concurred. Leeming held at [714]:

'First, I agree that [Rusu] should be regarded as bad in law, insofar as it holds that inferences as to the authenticity of a document cannot be drawn from its form and contents. ...'

Application

Let's apply the principle to a hypothetical assault matter in the Local Court. Let's say the police attempt to tender CCTV of the incident. The DVD falls within the definition of a document in the Evidence Act. As such, the principle in NAB v Rusu required that the DVD be authenticated by 'extrinsic evidence'. So, the police would need a statement from the operator of the CCTV system to authenticate the DVD.

However, since Gregg, the court may view the CCTV and 'draw any reasonable inferences from it' under s183 Evidence Act. Whether to draw an inference and how much weight to give the evidence are matters for the finder of fact to determine.

I'm available everyday if you have any interesting issues.

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