

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2021-409-000198
[2022] NZHC 2864**

BETWEEN	COMMISSIONER OF NEW ZEALAND POLICE Applicant
AND	LYNDON VAUGHAN RICHARDSON First Respondent
AND	TERRENCE AUSTIN MCFARLAND Second Respondent
AND	SIMON JOHN TURNER Third Respondent

Hearing: 31 October 2022, 1, 2 November 2022

Appearances: K South and C C White for Applicant
S N B Wimsett and L R Toepfer for Second Respondent and
Lincoln Property Investments Ltd

Judgment: 3 November 2022

RULING OF DUNNINGHAM J

*This judgment was delivered by me on 3 November 2022 at 2.30 pm, pursuant to
r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar
Date:*

Introduction

[1] The Commissioner of Police has applied, under the Criminal Proceeds (Recovery) Act 2009, for civil forfeiture orders in respect of, among other things, a house at Vickerys Road, Sockburn, Christchurch, which is the clubhouse of a gang known as the Head Hunters Motorcycle Club (the Head Hunters).

[2] On receiving the briefs of evidence for the Commissioner, Mr Wimsett, for the second respondent,¹ raised a number of objections to parts of the evidence, primarily on the grounds the briefs included inadmissible hearsay evidence.

[3] Many of those objections were resolved by the Commissioner obtaining witness summons for the individuals who made the relevant statements and those individuals then appearing and giving evidence. The only remaining objection was to the admissibility of a red notebook, said by the police to contain records of the takings of clubhouse pokie machines and its expenditure (the pokies notebook), which was most likely created by a former gang member, Darrin Baylis.

The disputed evidence

[4] The pokies notebook is a small red hardcover notebook with a pen attached by a piece of string to the spine of the book and containing handwritten entries. The first page of the book reads “This note Book is for the Pokie machines Only ...”. The records contained in the pokies book span from 9 July through to 26 August 2016. The entries in the book start from the back of the book and move forward. The pages are generally headed with a date. The total monetary figure from the previous page is either recorded at the top of the fresh page or, on some pages, is added in further down. There are then amounts entered alongside the narrations #1 – #3, “Changer” and “Tin” which are added to the total from the previous page to reach a new total. There are then various outgoings listed and described, which are taken off the total amount to reach a new total.

¹ He also appeared for the company Lincoln Properties Investments Ltd, which is the registered owner of the property. The three respondents are directors of the company.

[5] By way of example, on an unknown date but between 21 July and 27 July, the entry is as follows:

#1	–
#2	475
#3	185
Changer	775
Tin	<u>20</u>
	\$1455
	<u>\$12382</u>
	\$13,837
–	2 200 (concrete)
–	750 (carpet)
–	<u>500 (Float)</u>
	\$10,387

The figure of \$12,382 is the total reached on the previous page.

[6] Mr White, for the Commissioner, said the pokies notebook was found in the front console of the car Darrin Baylis was driving, along with three passengers, when it was stopped by police on 27 August 2016. Mr Baylis was acknowledged by other witnesses to have undertaken the role of being the gang's bookkeeper at times and it was a reasonable inference that he had made the records in the pokies notebook.

Attempts by the Commissioner to have Mr Baylis appear as a witness

[7] Mr Baylis was served a witness summons to attend the hearing by Detective Alan Newton. Detective Brendan Patten gave evidence to say he messaged Mr Baylis on the morning of the trial to remind him to attend Court that day. Mr Baylis sent a reply text to say he had tested positive for COVID-19 on Saturday and therefore was self-isolating for seven days. He said he would provide a photograph of the positive test. He provided the address of a car yard he was residing at as the address at which he would be self-isolating.

[8] Police officers were tasked to attend the car yard around the middle of the first day of the hearing to see if arrangements could be made for Mr Baylis to give his

evidence remotely. However, they were advised by the other occupants that Mr Baylis was well, and had left the address approximately an hour ago. That afternoon I issued a warrant to arrest Mr Baylis. Police were assigned to check on the address to arrest him. On Tuesday morning an occupant at the address advised they had not seen Mr Baylis since the previous day.

[9] Detective Patten made various attempts to make contact with Mr Baylis, including asking another witness who attended Court and knew Mr Baylis to speak to him, but to no avail. The last text Detective Patten received from Mr Baylis advised that Mr Baylis would be turning his phone off. Detective Patten also advised that when served with the witness summons, Mr Baylis had said something to the effect that he did “not think that will fly” to the officer effecting service, which was understood to mean that Mr Baylis was unlikely to comply.

The Commissioner’s application

[10] The Commissioner seeks to have the pokies notebook ruled admissible as a business record within the exception to the rule against hearsay evidence contained in s 19 of the Evidence Act 2006 (the Act). Section 19 provides:

19 Admissibility of hearsay statements contained in business records

- (1) A hearsay statement contained in a business record is admissible if—
 - (a) the person who supplied the information used for the composition of the record is unavailable as a witness; or
 - (b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or
 - (c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.
- (2) This section is subject to sections 20 and 22.

[11] A business record is defined in s 16 of the Act as follows:

business record—

- (a) means a document—
 - (i) that is made—
 - (A) to comply with a duty; or
 - (B) in the course of a business, and as a record or part of a record of that business; and
 - (ii) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied; but
- (b) does not include a Police record that contains any statement or interview by or with an eyewitness, or a complainant, or any other person who purports to have knowledge or information about the circumstances of alleged offending or the issues in dispute in a civil proceeding.

[12] “Business” is in turn defined in s 16 as follows:

business—

- (a) means any business, profession, trade, manufacture, occupation, or calling of any kind; and
- (b) includes the activities of any department of State, local authority, public body, body corporate, organisation, or society

[13] Section 16 also specifies the following:

- (2) For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—
 - (a) is dead; or
 - (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
 - (c) is unfit to be a witness because of age or physical or mental condition; or
 - (d) cannot with reasonable diligence be identified or found; or
 - (e) is not compellable to give evidence.
- (3) Subsection (2) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

[14] Mr White's submission was that, similar to the gang's accounting notebook produced in evidence, this was a business record which related to the operation of the three functional pokie machines located in the gang clubhouse and which was intended to be a reliable record of the relevant financial transactions.

[15] In emphasising that the gang kept relatively accurate records of financial transactions at Vickerys Road, Mr White pointed to entries in the separate accounting notebook where outgoings recorded as rates could be cross-referenced to payments received by the Council around the same date and outgoings which were recorded as power bill payments were similarly recorded in Contact Energy's records as cash payments received. Given the importance of keeping accurate records, so that there was accountability to other gang members, Mr White submitted that, just as the accounting notebook was accepted as a business record, the pokies notebook fits within the definition of business records.

[16] Although much of the business being carried out by the gang was illicit business, including sale of controlled drugs and other criminal ventures, Mr White submitted there is nothing within the Act which suggests that an illicit business or trade is excluded from the definition of "business". The Act defines "business" broadly and non-exhaustively. Here, he submitted that the Head Hunters can be considered a "society" and their business activities, illicit or not, involve either a "trade", "occupation" or "calling of any kind".

[17] This is supported by the High Court's decision in *Commissioner of Police v Vincent*, where a spreadsheet recording the distribution and sales of controlled drugs was held to be admissible as a business record, despite the fact the business in question was a criminal venture.²

[18] Mr White accepted that the Commissioner has not definitively identified the author of the pokies notebook, although it was found in Mr Baylis' possession, and he was acknowledged in evidence to have regularly carried out the function of treasurer for the local gang members. If it is Mr Baylis, the circumstances described in [7]–[9] above demonstrate that Mr Baylis is either unavailable as a witness, or the delay that

² *Commissioner of Police v Vincent* [2016] NZHC 892 at [26]–[27].

would be caused in endeavouring to secure his appearance as a witness would be undue in the circumstances of the case, thus satisfying either s 19(1)(a) or (c).

[19] In any event, Mr White submitted that the identity of the author does not have to be conclusively demonstrated as a pre-requisite to admitting a business record. As the Court of Appeal said in *Keshvara v Blanchett*:³

[33] With respect to the requirements in s 19(1), even if we had considered that Mr Antoo was unlikely to be the person who supplied the information used in composing the documents, the judge's conclusions on admissibility are still valid. Nothing in s 19 requires the judge to make an explicit finding as to the identity of the person who supplied the information relevant to the documents in question. We are satisfied that a judge may rely on s 19(1)(b) if satisfied that, given that sufficient time has passed, whoever the precise person or persons might be, no useful purpose would be served by requiring that individual (or individuals) to be a witness.

[20] Here, Mr White argued that whether or not Mr Baylis created the accounting records, any supplier of the information which was used to compile those records, even if they could be identified and located, could no longer reasonably be expected to recollect the matters dealt with in the information they supplied given the time that has elapsed. There could be no useful purpose in requiring every individual who was responsible for each transaction recorded in the notebook to be called and give evidence. For these reasons, the pokies notebook is admissible under s 19(1)(b).

[21] Finally, Mr White noted that, given the association of the three respondents to the suppliers of the information used to compile the pokies notebook, they are more likely to be able to obtain the information that they require to interpret and certify its contents than the Commissioner.

Submissions for the defendant

[22] Mr Wimsett maintained his objection as to the admissibility of the pokies notebook. Whether or not it was admissible under s 19 of the Act, he emphasised that the Court must still consider the s 8 test and whether the admission of the evidence would have an unfairly prejudicial effect on the proceeding.

³ *Keshvara v Blanchett* [2012] NZCA 553, (2012) 21 PRNZ 475.

[23] In this regard, he submitted that hearsay statements in business records are admissible under s 19 because, by their very nature, they speak for themselves. However, the pokies notebook did not have the same “on its face” readability as, say, bank records, which are clear and readily understood. In his submission, one cannot read the entries in the pokies notebook and know exactly what the figures represent. It would therefore be prejudicial to the respondents for the Commissioner to take these entries which have been prepared by an unknown author and introduced as evidence without explanation and then calculate the “benefit” said to have been generated through the gang’s pokie machines. Without being confident as to what this notebook records, the Court would be engaging in guesswork in interpreting its contents.

Discussion

[24] I am satisfied that the pokies notebook falls within the definition of being a business record for the purpose of the Act. The evidence I did hear from witnesses who were associated with the gang at the time these documents were created satisfied me that the gang required accountability when money was being handled by individuals on the gang’s behalf. Mr Tonihi, who kept the accounting notebook for a period of five months, emphasised that it was important to keep records because “the money was never personally mine so it was really there to keep me safe to make sure that people did not think I ripped them off”. Mr Tonihi’s role in running the accounting notebook ended when he handed it over to Darrin Baylis.

[25] Similarly, Mr Murphy, who was an associate of the gang, explained how careful records were kept of money taken from the pokie machines, the drinks machine and the snack machine which were in the clubrooms. He pointed out that all those machines took coins so there was also a coin changer machine which people could use to change notes for coins. He would be entrusted with taking the excess notes out of the coin changer and take it away as float. He observed that he would “write down which machine done what for myself then I would count it up, I would get someone else to count it up so there is no discrepancies and then most of the money I would take to pay for whatever was needed, to keep it safe”. I thus have some evidence of the care with which tallies of cash from the pokie machines were undertaken and the likely reliability of the records in the pokies notebook.

[26] That then leads to whether any of the circumstances in s 19 of the Act apply. While much has been made about Mr Baylis being the likely author of the pokies notebook and, being “unavailable as a witness” because he has been unable, with reasonable diligence, to be found,⁴ that only addresses part of s 19(1)(a). It is unclear whether, even if Mr Baylis authored the notebook, that he supplied each financial record which is recorded there. The evidence I have heard demonstrates different members and associates of the gang paid money in, or oversaw the checking of the pokie machine takings, or made payments out. Whoever created the pokies notebook recorded these transactions for the record.

[27] To the extent that Mr Baylis may have been the author of the pokies notebook, or may have had first hand knowledge of some of the transactions, I am satisfied he is unavailable as a witness because of his deliberate steps to avoid coming to Court and then to evade police attempts to locate him. I also consider that there would be undue delay if I required the hearing to be adjourned until and unless the police were able to locate Mr Baylis.

[28] However, more importantly, I consider the pokies notebook falls within s 19(1)(b). Whoever recorded the transactions, the person who supplied the information to the bookkeeper cannot, in each case, be identified and nor could they reasonably be expected, having regard to the six years that have elapsed since they provided the information, to recollect the matters dealt with in the information he or she supplied. Indeed, to the extent witnesses were questioned on particular transactions associated with the separate accounting notebook, they could not recall the details of the transaction and I would not expect the individuals who supplied the information to whoever kept the pokies notebook to be able to recall the details of individual payments in or out.

[29] That leads to Mr Wimsett’s main objection, which is that, without explanation, the pokies notebook is simply not comprehensible on its face and cannot be relied on, without explanation, to estimate the throughput of the pokie machines.

⁴ Evidence Act 2006, s 16(2)(d).

[30] I do not accept that submission. While the records are not particularly formal, they are not as opaque as Mr Wimsett suggests. In the context of the evidence I have heard, it is a logical inference that the numbers #1 – #3 refer, respectively, to the three pokie machines and the reference to the “Changer” is to the machine which dispenses coins in exchange for bank notes. In each case it is clear that the total from the previous page in the notebook is transferred onto the fresh page, the income from the pokie machines added in to reach a new total and then the payments out are recorded to reach a new total.

[31] On its face, there is no other logical way to read the records in the pokies notebook and no obvious ambiguity arises. Furthermore, as Mr White submitted, the respondents who were connected to the Head Hunters at the time could be expected to provide a credible alternate explanation of what the pokies notebook recorded if in fact there was one.

[32] Accordingly, at the conclusion of the admissibility hearing, I ruled the pokies notebook admissible in evidence, and advised that closing submissions could proceed on the basis that it was in evidence.

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