

LC Paper No. CB(2)465/98-99(01)

**Proof of documents and copies of documents**

5.66 Under the Evidence Ordinance, a hearsay statement contained in a document can be proved in civil proceedings by the production of the document itself or by the production of a copy of the document (or of its material part), authenticated in such manner as the court may approve.<sup>67</sup> Copies of documents can therefore be received into evidence provided that they are authenticated in an approved manner. However, it is not clear whether a copy of a copy is admissible.<sup>68</sup>

5.67 In the business world today, it is common to use copy documents and even copies of copies. To require the original documents to be brought before court may cause undue disruption to the proper functioning of daily business. Sometimes, routine business documents are microfilmed for easy storage and the originals are destroyed after a specified period of time. In such cases, it is impossible to produce the original documents as proof.

5.68 We therefore think that the current rules which allow proof by the production of the original or copies of documents should be preserved. The English Law Commission also held the same view.<sup>69</sup> In Scotland, the Civil Evidence (Scotland) Act 1988, while preserving the admissibility of copy documents, requires copy documents to be authenticated by "a person responsible for the making of the copy"<sup>70</sup>, instead of in a manner approved by the court. We do not intend to follow the authentication requirements in Scotland. We prefer instead to leave this to the court's discretion, enabling the court to take account of the particular circumstances of the case. We note in addition that "a person responsible for the making of the copy" may not be a person holding a responsible position in an organisation. It is more often than not a junior member of staff who is assigned to make copies of documents. Our approach follows that of the Civil Evidence Act 1995, which provides that a hearsay statement in a document may be proved by the production of a copy of that document "authenticated in such manner as the court may approve".<sup>71</sup>

5.69 The English Law Commission suggested that, contrary to existing common law rule, copies of copies should be received in evidence, subject to authentication in manners approved by the court.<sup>72</sup> The 1995 Act reflects that approach and provides that it is immaterial how many removes there are between a copy and the original for the purpose of proving a hearsay statement in the

<sup>67</sup> S 51(1) of the Evidence Ordinance (Cap 8).

<sup>68</sup> *Cross on Evidence* (7th edition, 1990), p.684.

<sup>69</sup> English Report, para 4.37.

<sup>70</sup> Civil Evidence (Scotland) Act 1988, s 6.

<sup>71</sup> Civil Evidence Act 1995, s 8(1).

<sup>72</sup> English Report, para 4.37.

document.<sup>73</sup> We believe that that is a sensible approach, as it is not uncommon to use copies of copies in the business world. Copies are often made, for example, from copy documents stored in microfilms.

5.70 We recommend that where a statement contained in a document is admissible as evidence in civil proceedings, it should be capable of being proved, either by the production of that document, or by the production of a copy of that document, authenticated in such manner as the court might approve. It should be immaterial how many removes there are between a copy and the original.

## Business, computerised and other records

### *Records of business or public authority*

5.71 Under the existing Evidence Ordinance, a business or other statement is admissible if it is contained in a document which forms part of a record compiled by a person acting under a duty from information which was supplied by a person who had personal knowledge of the matters dealt with in that information.<sup>74</sup>

5.72 The current rules governing admissibility of business and other records are, in our view, outdated and do not meet the requirements of the modern automated office. Nowadays, business and other records are often prepared by automated means rather than manually by people with specific duty to compile records. It is therefore often difficult to identify a person with a duty to compile the records. Moreover, it is unrealistic to expect the supplier of information always to have personal knowledge of the matters concerned. The supplier of information may well be another electronic office machine rather than a human being. For example, electronic sensors may be used to collect automatically source information and pass it on to other electronic devices for processing.

5.73 We therefore take the view that business and other records should be admissible generally without the requirement that the compiler acting under a duty or the supplier of information have personal knowledge. This is also the position taken in the Civil Evidence Act 1995.

### *Means of admitting business or other records in evidence*

5.74 Under the current rules, the record has to be produced in evidence by a witness. The English Law Commission criticised this requirement as being artificial.<sup>75</sup> The English Law Commission thought that steps should be taken to make it easier to admit business or other records in evidence. They suggested that documents certified by an officer of a business or public authority should be

<sup>73</sup> Civil Evidence Act 1995, s 8(2).

<sup>74</sup> S 49(1) of the Evidence Ordinance (Cap 8)

<sup>75</sup> English Report, para 4.39.

receivable in evidence without further proof and the form and content of certificates might be set in the rules of court. The Civil Evidence Act 1995 implemented this proposal by providing that a document which forms part of the records of a business or public authority may be received in evidence without further proof and a document should be taken to form part of such records if the party is able to produce a certificate to that effect signed by an officer of the business or authority.<sup>76</sup> We share the same view as the English Commission because it is often difficult to find a witness who can give evidence of the compilation of the records, given that many records are compiled by electronic or automated means. We think it wasteful of time and resources to require a witness to attend court merely for the purpose of formally producing the records into evidence.

#### *Definitions of "business" and "officers"*

5.75 The Civil Evidence Act 1995 provides that "business" includes "any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual". The reasoning is that "it is the quality of regularity that ensures the reliability of a business record, not the existence of a profit motive or the juridical nature of the person carrying on the activity". The Act also defines "officer" as including "any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records" because a business as defined in the Act may not have "officers" in their strict sense.<sup>77</sup> We agree with the reasoning behind the two definitions and will adopt them in our proposals.

#### *Proof of absence of an entry in a record*

5.76 The current rules governing the admissibility of records are based on the assumption that there is a person who supplied the information contained in the record. Problems may arise when it is sought to prove the absence of an entry from the records. The current rules only recognise the evidence of the supplier of the information contained in the records, but there cannot be a supplier of information where what is in issue is the absence of entries in the record. The Civil Evidence Act 1995 therefore provides that the absence of an entry in a record may be proved by affidavit of an officer of the business or authority.<sup>78</sup> We note in contrast that under the Civil Evidence (Scotland) Act 1988, such evidence may be given orally or by the affidavit of an officer of the business or undertaking.<sup>79</sup> We favour the greater flexibility of the Scottish approach on this and recommend its adoption.

#### *Court's discretion to disapply certification requirements*

5.77 The Civil Evidence Act 1995 provides for a specific discretion allowing courts to disapply all or any of the certification provisions, having regard to

<sup>76</sup> Civil Evidence Act 1995, s 9(1) and (2).

<sup>77</sup> English Report, para 4.39, Civil Evidence Act 1995, s 9(4).

<sup>78</sup> Civil Evidence Act 1995, s 9(3), English Report, para 4.40.

<sup>79</sup> Civil Evidence (Scotland) Act 1988, s 7.

the circumstances of the case.<sup>80</sup> We think such a discretion is desirable as it can provide for flexibility in cases where strict application of the proposed certification provisions would not be workable.

### *Computerised records*

5.78 The responses to our Consultation Paper, generally pointed to a consensus opinion that the current rules governing the admissibility of computerised records are out-dated and cumbersome. The Bar Association commented that the present rules do not assist in determining an issue critical to the weight to be attached to computerised records, namely, the likelihood of a mistake being made during the manual input of information, or errors in software. They also commented that the present rules do not distinguish between computer generated original evidence and computer stored hearsay evidence.

5.79 In the light of the criticisms of the present rules, the English Law Commission recommended that no special provisions should be made in respect of the manner of proof of computerised records. They suggested that computerised records should be made admissible in general but subject to the ordinary notice and weighing provisions.<sup>81</sup> In Scotland, computerised records are already admissible generally under the Civil Evidence (Scotland) Act 1988. We share the views of the English and Scottish Commissions that computer-generated information should be treated similarly to other records as regards its admissibility. The present rules are, in our view, cumbersome and do not afford any real protection against abuse. They should be replaced by a simpler regime as in the case of other records and no notice provisions should be made specifically for computerised records.

5.80 We recommend that documents, including those stored by computer, which form part of the records of a business or public authority, should be admissible as hearsay evidence under our recommendation in paragraph 5.19.

5.81 We recommend that unless the court otherwise directs, a document, including a document stored by computer, should be taken to form part of the records of a business or public authority if it is certified as such by an officer of the business or authority and should be received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerised records.

5.82 We recommend that the definition of "records" should cover records in any form, and should include computer-generated records.<sup>82</sup>

<sup>80</sup> Civil Evidence Act 1995, s 9(5), English Report, para 4.42.

<sup>81</sup> English Report, para 4.43.

<sup>82</sup> Civil Evidence Act 1995, s 9(4).

5.83 We recommend that the absence of an entry should be capable of being formally proved by the oral evidence or affidavit of an officer of the business or public authority to which the records belong.

5.84 We recommend that an "officer" of a business or public authority should include any person occupying a responsible position in relation to the relevant activities of the business or authority or in relation to its records.