

**From:** [Kathleen Clough](#)  
**To:** [Jon Reid](#)  
**Cc:** [Channa Wijesinghe](#)  
**Subject:** RE: APES215 [SEC=OFFICIAL]  
**Date:** Wednesday, 21 April 2021 3:14:30 PM  
**Attachments:** [image005.png](#)

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Hi Jon,

You're right, example 7 needs to be modified to add greater clarifications between a pure summary and drawing inferences based on specialised training/knowledge/experience.

Both examples 6 and 7 can be either lay witness or expert evidence (other evidence) depending on whether or not an inference has been drawn.

In example 6, if the forensic accountant is merely creating a table that juxtaposes the account general ledger report against the bank statement to compare the same data set—this would be lay evidence. If however, the forensic accountant comments on the accuracy of the accounting ledger, this would be expert evidence.

The Hobbs case makes it very clear that irrespective of the volume of the accounting/financial source documents, if you are simply categorising, summarising or reorganising data – as long as you have not drawn any inferences, it will remain in the realm of a lay summary.

Good pick up!

Regards,

**Kathleen Clough**

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**From:** Jon Reid <[jon.reid@apesb.org.au](mailto:jon.reid@apesb.org.au)>  
**Sent:** Wednesday, 21 April 2021 3:01 PM  
**To:** Kathleen Clough <[Kathleen.Clough@asic.gov.au](mailto:Kathleen.Clough@asic.gov.au)>  
**Cc:** Channa Wijesinghe <[channa.wijesinghe@apesb.org.au](mailto:channa.wijesinghe@apesb.org.au)>  
**Subject:** RE: APES215 [SEC=OFFICIAL]

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Hi Kathleen,

Thank you for sending through your request. I have read through your notes and the case and have a couple of queries I wanted to check with you before we discuss this matter with the APES 215 Taskforce members.

The first concern you raise is the example in the definition of Other Evidence relating to providing a summary of sales based on information in the general ledger. The accountant's specialised knowledge would aid the extraction of this information from the accounting software and potentially in interpreting what the reports mean, which a lay person would not necessarily be able to do.

However, this issue is not really discussed in the Hobbs case, which does discuss scheme records (eg Connor's spreadsheets one column is 'scheme record payer/payee') and business records (more so in relation to Taylor) but not really about what these records were and how they were extracted/interpreted. Do you have any thoughts on this issue, ie whether the accountant's specialised knowledge derived from training, study or experience is relevant to how the underlying documents are adduced?

The other concern you raise refers to Example 6 which relates to summarising complex transactions and related journals and ledger entries. This example seems to be referring to complex accounting entries (not necessarily bank transactions) and which I believe to be able to understand, summarise and explain accounting journals and ledger entries, "requires the application of the Expert Witness's specialised knowledge derived from the Expert Witness's training, study or experience". This may amount to 'scientific facts' as per ASIC v Rich and described on page 12 of APES 215 but is also interrelated to my first query.

When we met recently, my understanding was that the example that ASIC had concerns with was Example 7 which relates to summary of a flow of funds for proceedings which would be based solely on bank documents, vouchers and traces etc. Example 7 appears to reflect more what the ASIC investigator Connor submitted as evidence in the Hobbs case and as you summarise below.

As such, I just want to confirm that you only want us to consider the two iterations of Example 6 as per your email, whether you also have concerns about Example 7, or if the two iterations are more relevant to Example 7?

Please let me know if you have any queries in relation to the above or give me a call on 0409 553 391 if you would like to discuss.

Kind regards

Jon

**Jon Reid**

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- *The Independence Guide - Fifth Edition*
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**From:** Kathleen Clough <[Kathleen.Clough@asic.gov.au](mailto:Kathleen.Clough@asic.gov.au)>

**Sent:** Monday, 12 April 2021 4:06 PM

**To:** Channa Wijesinghe <[channa.wijesinghe@apesb.org.au](mailto:channa.wijesinghe@apesb.org.au)>; Jon Reid <[jon.reid@apesb.org.au](mailto:jon.reid@apesb.org.au)>

**Subject:** APES215 [SEC=OFFICIAL]

**Importance:** High

Hi Channa and Jon,

My apologies for the delay in providing you with this information (I needed to run it past ASIC's in-house lawyers first).

Attached\* is the common law case *Idyllic Solutions PL & ors—ASIC v Hobbs*.

Below are some notes for your reference:

*Idyllic Solutions Pty Ltd & ords—Australian Securities and Investments Commission v Hobbs*  
[2012]

- Matter examined whether evidence summarising voluminous or complex underlying documents could be adduced as “summaries” pursuant to s50
  - HELD: document prepared through simple application of arithmetical formula is a “summary” and not expert evidence

**Details of the case:**

- Summaries were produced by two related parties of the plaintiff:
  - Mr Peter Connor, Senior Investigator (Financial Economy—Deterrence)
  - Mr Barry Taylor—a Chartered Accountant and registered liquidator
- From over 6,000 documents, a number of summaries were prepared with the assistance of staff under the supervision of Mr Connor or Mr Taylor respectively
  - The summaries included spreadsheets or schedules
  - The summaries produced by Mr Connor included spreadsheets that summarised, including but not limited to, information recorded in (including but not limited to):
    - Bank statements
    - bank traces for transactions contained within bank statements
    - transaction receipts (information recorded in receipts issued to customers by banks)
  - The summaries included spreadsheets which listed information as to:
    - Debit/credit transactions by reference to bank account number

- Date
  - Description
  - Currency
  - Characterisation (for example, referring to investment of capital, bank interest, bank fees, transfer from trader)—the information recorded in this column was drawn from the source documents (being the bank statements/traces)
- Supplementary summary tables were also prepared, which summarised selected data extracted from the first summaries
  - These summaries contain an additional entry to the source documents, namely a total of the amounts in the listed entries in that table
- Objection to the admission of the summaries sought to be tendered as evidence on the basis:
  - Argument: the summaries produced by Mr Taylor were not summaries for the purposes of s50, for three main reasons:
    - The schedules or spreadsheets include an arithmetical addition of particular entries
    - The schedules or spreadsheets encompass an exercise of judgement or discretion and hence are not summaries, but statements of opinion or conclusions drawn from the underlying documents (namely, in the characterisation)
    - The application to adduce the summaries prepared as evidence was under s 50 an attempt to adduce expert evidence without leave
- The court held:
  - Provided that the calculation of the total sum does not require the application of any opinion or judgement as to what amounts are to be comprised in the calculation, but on its face is simply an arithmetical exercise, the whole of the summary table would be admitted as a summary
  - If the summary tables list amounts extracted from the underlying documents and simply add up those amounts, the summary table would be admissible as a summary and the last line (containing a total of the amounts in the listed amounts) would be read as submissions
  - The categorisation was admitted as a summary of the relevant facts in the underlying documents and admissible under s 50
- It was found a summary of one aspect or part only of the content of the underlying documents can fall within s 50
- It was also found that a comprehensive summary of particular facts (such as, for example, a listing of all payment transactions to or by a particular entity or on a particular date or in relation to a particular investment) would be a summary falling within s 50
- It was also held as a matter of principle, where the documents contain more than arithmetic calculation of the total of listed entries drawn from the underlying documents, then they would go beyond what is admissible under s 50 as a summary (and be a submission)
- It was also found that the provided summary tables in fact summarise the contents of two or more underlying documents, then the fact that as a practical matter they were derived by a process of extraction (by computer or manual re-sorting) from a larger and more comprehensive summary of the underlying documents does not preclude them being a summary for the purposes of s 50. “Summary” in s 50 is a reference to the nature of the document, not to the process by which it was prepared

The significance of this case is it calls into question the following examples in APES215:

1. Other Evidence (page 5)— An example might be where a Member provides a summary of the sales, by month, by product, by geography, based on the information contained within a series of invoices and a general ledger. Whilst it may be a matter of fact as to what sales were made, the extraction and summary of this information is facilitated by the Member’s specialised knowledge.
  - Using the principles in the case above, the court will most likely rule this is not expert evidence. As the sorting of the data does not add anything new to the underlying source documents, it is a summary (same data, displayed differently—no inferences drawn).
2. Example number 6 Member employed by/engaged by a law enforcement/ regulatory body to provide a summary of complex transactions for Proceedings
 

*Facts:* The Member is employed by a law enforcement/regulatory body and has been

asked to prepare a chart or summary that summarises a number of complex transactions and related accounting journals and ledger entries. The chart or summary will be produced by the Member in Court in relation to legal action that has been commenced by the law enforcement/regulatory body. The chart or summary is likely to aid the comprehension of material that is to be produced for the Court. The Member offers no opinions in the chart or summary that has been prepared.

*Analysis:* Expert Witness – the Member is using the Member’s specialised knowledge derived from the Member’s training, study or experience in accounting to provide assistance to the Court, through the chart/summary of transactions. As it is not lay evidence (i.e. the Member is not simply describing what the Member observed or did), it is considered expert evidence (even though it may not involve the expression of opinions).

- Further information is required to draw a clearer distinction between ‘lay witness’ service and ‘expert witness’ service. For example (I have included in bold the modifications to example 6):
  - *Facts:* The Member is employed by a law enforcement/regulatory body and has been asked to prepare a chart or summary that summarises a number of complex transactions and related accounting journals and ledger entries. The chart or summary will be produced by the Member in Court in relation to legal action that has been commenced by the law enforcement/regulatory body. The chart or summary is likely to aid the comprehension of material that is to be produced for the Court. **The chart or summary only includes information obtained direct from the underlying source documents, and there are bank vouchers to explain the movement of funds for each transaction.** The Member offers no opinions in the chart or summary that has been prepared.

*Analysis: Lay Witness* – the Member is simply describing what the Member observed or did to provide assistance to the Court, through the chart/summary of transactions. The Member has drawn no inference from the source documents and is simply providing a chart/summary using information derived direct from the underlying source documents.

- *Facts:* The Member is employed by a law enforcement/regulatory body and has been asked to prepare a chart or summary that summarises a number of complex transactions and related accounting journals and ledger entries. The chart or summary will be produced by the Member in Court in relation to legal action that has been commenced by the law enforcement/regulatory body. The chart or summary is likely to aid the comprehension of material that is to be produced for the Court. **The Member has drawn inferences from the bank statements without supporting bank vouchers, including identifying intra-account transfers between accounts by reconciling matching dates and amounts.**

*Analysis: Expert Witness* – the Member is using the Member’s specialised knowledge derived from the Member’s training, study or experience in accounting to provide assistance to the Court through the chart/summary of transactions. As it is not lay evidence (i.e. the Member is not simply describing what the Member observed or did), it is considered expert evidence (even though it may not involve the expression of opinions).

As discussed in the meeting, there is no issue with the standard—the issue arises in two of the examples provided (APES215 states they are expert evidence (other evidence) where the courts have ruled it is non-expert evidence (summaries).

ASIC position will be unless an inference has been drawn from the underlying source documents, forensic accountants will be providing lay witness services. Provided that ASIC’s forensic accountants are not going beyond the information contained within the underlying source documents, it will remain in the realm of lay witness evidence as they are only capturing what

they observed (read) and did (classify/calculate).

I appreciate your time in considering the reclassification/clarification of these two examples and look forward to hearing the outcome of the board meeting.

Regards,

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