Evidence —'without prejudice' material

Pinot Nominees Pty Ltd v Commissioner of Taxation (2009) 181 FCR 392; [2009] FCA 1508

Siopis J, 15 December 2009

Issue

The interaction of 'without prejudice' provisions in the *Federal Court of Australia Act 1976* (Cwlth) (FCA) and the *Evidence Act 1995* (Cwlth) (Evidence Act) are considered in this case, with the question being whether the bar found in s. 53B of FCA on giving evidence of things said at a mediation conference convened pursuant to the FCA was lifted by the Evidence Act, which allows for the admission of evidence of 'without prejudice' communications in a hearing as to costs. This case provides useful context for considering the interaction of those same provisions of the Evidence Act with s. 94D(4) of the *Native Title Act 1993* (NTA).

Background

Pinot Nominees Pty Ltd (the company) appealed to the Federal Court against the Commissioner of Taxation's decision to disallow its objection to certain tax assessments. The court referred the parties to mediation pursuant to s. 53A(1)(b) of the FCA and a mediation conference but no settlement was reached. When the trial commenced, the company advised the court no case would be argued and it sought to lead evidence only as to costs. It contended the Commissioner acted unreasonably in rejecting three offers of compromise, two made during the course of the mediation conference and a third in a 'without prejudice' letter, and sought orders to pay the Commissioner's costs only up to a certain date (i.e. before the offers to compromise). It relied on an affidavit setting out details of the offers of settlement, including a description of what happened at the mediation conference. The Commissioner objected, contending this evidence was inadmissible because s. 53B of the FCA 'precluded the admission into evidence of anything said during the course of a mediation conference' ordered by the court—at [13].

Federal Court Act

Section 53B of the FCA provides that evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under s. 53A is not admissible in any court (whether exercising federal jurisdiction or not) or in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

Evidence Act

Subsection 131(1) of the Evidence Act provides that evidence is not to be adduced of:

- a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or

- a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

However, s. 131(2)(h) provides that s. 131(1) does not apply if 'the communication or document is relevant to determining liability for costs'.

Earlier cases distinguished

The company relied on *Silver Fox Co Pty Ltd (as Trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)* (2004) 214 ALR 621 (*Silver Fox)*, where Justice Mansfield found that s. 131(2)(h) of the Evidence Act applied to affidavit evidence of offers and counter offers made during the course of a mediation conference conducted pursuant to a mediation agreement. As a result, that evidence was admitted. However, neither *Silver Fox* and nor any of the three cases Mansfield J referred to in his reasons dealt with communications made during the course of court-ordered mediation. Nor did Mansfield J deal with the mediation conference in that case on the basis that it was a mediation conference to which ss. 53A and 53B applied. Therefore, it was found that the decision in *Silver Fox,* and the cases referred to therein, could be distinguished because there was no consideration of the relationship between s. 53B of the FCA and s. 131(2)(h) of the Evidence Act.

Decision

Since this case concerned a mediation conference convened pursuant to an order made under s. 53A(1), it followed that s. 53B of the FCA applied and that 'anything said during the course of that conference is inadmissible in this proceeding'. Therefore, the only evidence as to the offer to compromise that was admissible was the 'without prejudice' letter. His Honour reconciled s. 53B of the FCA with s. 131(2)(h) of the Evidence Act on the basis that s. 131(2)(h) applied to 'without prejudice' communications *other than* communications made during the course of a mediation conference to which s. 53B applied—at [29] to [32].

Relevance to mediators under the NTA

Subsection 94D(4) of the *Native Title Act* 1993 (Cwlth) (NTA) provides that: 'In a proceeding before the Court, unless the parties otherwise agree, evidence may not be given, and statements may not be made, concerning any word spoken or act done at a conference'. It is not in the same terms as s. 53B of the FCA. The main differences are that:

- the parties can agree to give evidence and make statements that are otherwise covered by s. 94D(4) of the NTA, which is not the case under s. 53B of the FCA (but there is a similar 'by agreement' provision in s. 131(2)(a) of the Evidence Act);
- s. 53B applies much more broadly that s. 94D(4), which only applies to proceedings before the Federal Court;
- the prohibition in s. 94D(4) relates to the giving of evidence and the making of statements 'concerning any word spoken or act done at a conference' whereas s. 53B applies to 'anything said, or of any admission made' at a conference 'conducted by a mediator in the course of mediating anything referred' under s. 53A(1) of the FCA.

However, despite these differences, it seems s. 131(2) of the Evidence Act would not apply to statements about, or evidence of, things said and done at a mediation conference convened under s. 94D(1) as a result of a referral under s. 86B of the NTA, assuming s. 94D(4) was otherwise attracted. Support for this proposition comes from Justice Dowsett's comments in *Walden on behalf of the Waanyi People v Queensland* [2009] FCA 1179 (*Waanyi*, summarised in *Native Title Hot Spots* Issue 31), where it was argued that s. 131(2)(g) of the Evidence Act applied. It lifts the s. 131(1) prohibition on adducing evidence of 'without prejudice' communications or documents if:

> [E]vidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence.

Dowsett J expressed the view that the court may not receive evidence of things said or done at a mediation conference because there was 'no cogent argument for implying the terms' of s. 131 of the *Evidence Act* into s. 136A (now s. 94D) of the NTA 'so as to qualify the general prohibition in the absence of the agreement contemplated' by s. 94D(4), i.e. without the agreement of the parties. 'For that reason alone', his Honour was inclined to think that the evidence in question 'may not be received'. However, note that his Honour's views in *Waanyi* are obiter.

Subsection 131(2) of the Evidence Act provides a wide range of circumstances in which s. 131(1) does not apply. The breadth of these provisions, and the finding in *Pinot Nominees* that the 'without prejudice' letter was not covered by s. 53B of the FCA, highlight the fact that 'without prejudice' communications conducted outside of a s. 94D(1) conference can be introduced into the proceedings (and elsewhere) in a relatively wide range of circumstances (assuming they are not otherwise inadmissible). Mediators acting in relation to a referral under s. 86B of the NTA should take this into account when determining whether the parties would be better served by communicating under the protection of s. 94D(4).

Further, as noted earlier, the wording of s. 94D(4) of the NTA is relatively narrow, i.e. it relates to 'any word spoken or act done at a conference'. So, for example, the act of tabling a document, and any word spoken about its contents during the conference, are covered but the document itself may not be. If the parties seek to prevent disclosure of such a document, a direction from the mediator under s. 94L should be considered. Such a direction can place wider prohibitions or restrictions on the disclosure of 'information given, or statements made' at a mediation conference than those imposed by s. 94D(4).