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# Wentworth v Rogers & Anor

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## Case note in ADR

# Wentworth v Rogers & Anor

**Mei-Lin Robertson** 

**WENTWORTH** v **ROGERS & ANOR** [2004] NSWCA 109 (30 March 2004)

#### **Facts**

This case concerned the admissibility of a document signed at mediation. It is the first case to deal with the interpretation of s 110P in the Supreme Court Act 1970 (NSW). The dispute between the parties was convoluted and involved a long list of cases and hearings concerning charges of buggery and assault occasioning bodily harm and costs orders amongst others. However, the detailed facts of the

dispute are not pertinent to the current case. The relevant facts are as follows:

- 9 December 2003: mediation was held between Mr Rogers, Mrs Rogers, Ms Wentworth and Mr Russo, with Mr Morling QC as mediator. A document was then signed by all four parties, but disagreements have since arisen, and Ms Wentworth has commenced proceedings in the Common Law Division for specific performance of an agreement constituted by this document.
- · 9 March 2004: Ms Wentworth brought a notice of motion to the Supreme Court of NSW Appeal



Court seeking vacation of procedural steps in the appeal in this case.

- In this notice of motion, Ms
   Wentworth submitted that the
   progress of the appeal should
   be postponed until the specific
   performance proceedings had
   been determined.
- The document in question was tendered as evidence, but objected to by Mr Lovas appearing for Mrs Rogers on the basis of s 110P of the Supreme Court Act 1970 (NSW). Sections 110P and 110N apply because the 9 December mediation occurred pursuant to an order made by the Court under s 110K of the Act.

session' as being inadmissible in any proceedings or court.

The main issue in this case concerned the admissibility into evidence of the document in question. If the document was covered by the scope of s 110P and not subject to the exception in s 110P(6)(a), it would be inadmissible. Therefore, the questions that needed to be answered were:

(1) Was this 'a document prepared for the purposes of, in the course of, or as a result of, a mediation session' ie was it a document recording an interim agreement or a final document prepared for the purposes of the mediation or in the course of mediation or as a result of the mediation, and it would thus be admissible. Alternatively, such an agreement must carry with it consent to the admission of such a document into evidence and a promise not to withdraw that consent. Wentworth relied on the cases of *State Bank of New South Wales v Freeman*, 1 *Commonwealth Bank of Australia v McConnell*, 2 *Bell v Mediate Today Pty Ltd*, 3 and *ANZ Bank v Ciaverella*, 4 which all dealt with documents containing final agreements

#### **Issues**

This is the first case dealing directly with the application of s 110P of the *Supreme Court Act 1970* (NSW). Specifically relevant to this case was s 110P(5), which provides:

a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document is not admissible in evidence in any proceedings before any court, tribunal or body.

Furthermore, the possible application of s 110P(6)(a), which allows the admission of such a document as evidence if all persons present at mediation consent to such admission, was considered in its capacity as an exception to s 110P(5). Also, s 110N(1), which provides '[t]he Court may make orders to give effect to any agreement or arrangement arising out of a mediation session', was considered as another possible exception to s 110P. Since there have been no prior cases to date which deal with the interpretation of s 110P, the cases used to support the arguments for and against the admissibility of the document into evidence deal with s 15 of the Farm Debt Mediation Act 1994 (NSW), which refers to 'evidence of anything said or admitted during a mediation session and a document prepared for the purposes of, in the course of or pursuant to, a mediation

... the document was plainly a document prepared in the course of, and as a result of, a mediation session, and thus prima facie within s 110P(5). This would stand, unless there existed an implied exception in the terms of s 110N or expressed or implied consent under s 110P(6)(a).

- agreement? If it was an interim agreement, then the document was covered by s 110P(5).
- (2) If the document was within the purview of s 110P(5), was there an implied exception in s 110N to the application of s 110P?
- (3) If the document was within the purview of s 110P(5), did the document itself give express or implied consent as to its admissibility in court proceedings, thus coming within the s 110P(6)(a) exception? If the document did give express or implied consent to its admission in court, then the document would be admissible.

#### Arguments

Wentworth argued that the document was exceedingly comprehensive and purported to resolve and finalise all questions between the parties. Such an agreement was therefore not within the scope of s 110P because it was not a

and the applicability of the Farm Mediation Debt Act 1994 (NSW).

Rogers argued that the cases relied on by Wentworth were distinguishable because the document in this case was merely an interim document which left room for further negotiations and in fact did not bring the mediation to an end since there had been a further mediation. Furthermore, the document did not express or imply consent to its admissibility and therefore remained subject to the application of s 110P(5) and was inadmissible.

#### **Decision**

Hodgson JA ruled in favour of Rogers. He rejected the arguments of Wentworth by first dismissing the decisions Wentworth relied on as being not binding, thus disregarding all possible common law precedents for the case. He then interpreted the relevant provisions from the *Supreme Court Act 1970* (NSW) in his own



respectful opinion.

It may be useful to quickly summarise these cases and how they were considered in this case:

• State Bank of New South Wales v Freeman: Hodgson JA dismissed Badgery-Parker J's opinion in Freeman that a document recording an agreement reached at mediation was 'a document that came into existence after the mediation session

After considering the aspects of the document that would make it more likely to be a final agreement or an interim agreement, Hodgson JA did not decide whether or not it was a final and binding agreement ...

- concluded' and not prepared for purposes of, in the course of, or pursuant to a mediation session, as obiter, and thus not binding.
- Commonwealth Bank of Australia v McConnell: Rolfe J in McConnell stated in obiter that Badgery-Parker J's view in Freeman was prima facie correct but did not discount the possibility that the tender of a final agreement reached at mediation would be outside the scope of s 15. Hodgson JA also disregarded this as obiter.
- Bell v Mediate Today Pty Ltd: Barr J's view in Bell was dismissed on the grounds that in that case it was not clear whether the documents in question were documents filed in court to dispose of the proceedings that had been settled, or documents signed at the mediation. Barr J ruled that in either case, the documents would be outside the scope of s 15. Hodgson JA held that if the documents in Bell were filed in court, they would not be documents prepared pursuant to a mediation session, and thus not covered by s 15. However, if the documents were signed at the mediation, Hodgson JA disagreed with Barr J's view, and

- believed that they would be covered by s 15, and thus be inadmissible. Here, the document in the present case was not signed at the mediation.
- ANZ Bank v Ciaverella: The document in question in Ciaverella was signed at the mediation session itself, and was thus distinguished on that basis.

After distinguishing the above cases on the grounds that the fact scenario in

each is distinguishable from the present case, Hodgson JA then proceeded to consider the decision in *Gain v Commonwealth Bank*<sup>5</sup> which stressed the importance of giving effect to s 15 *Farm Debt Mediation Act 1994* (NSW), despite the subsequent limitations that would be placed on the ability of a party to challenge a mediation certificate given under the Act.

Hodgson JA then disregarded the influence of

all of these cases, and proceeded to interpret the words of s 110P Supreme Court Act 1970 (NSW) according to his own judgment. He held that the document was plainly a document prepared in the course of, and as a result of, a mediation session, and thus prima facie within s 110P(5). This would stand, unless there existed an implied exception in the terms of s 110N or expressed or implied consent under s 110P(6)(a). It was suggested that s 110N would give an implied exception to s 110P because in order for a document to be made enforceable under s 110N it must be admissible. Hodgson JA rejected this notion on the grounds that the wording of s 110N is insufficient to create such an implied exception to s 110P, and if such an implied exception existed, it would permit evidence of conversations at mediation as well as documents, which would be against the policy behind s 110P in encouraging parties to a mediation to be frank and open.

Section 110P(6)(a) provides an exception to s 110P(5) if the parties give express or implied consent to admit the document into evidence, and an express or implied promise not to

withdraw that consent. Such express or implied consent can be given in the document itself. Consent can be implied if the document is prepared in the form of terms of settlement ready to be filed in the proceedings being mediated. Hodgson JA held that the document here plainly contemplated the drawing up of a later deed and then raised issues of whether it was an immediately binding agreement of the kind discussed in Masters v Cameron.6 After considering the aspects of the document that would make it more likely to be a final agreement or an interim agreement, Hodgson JA did not decide whether or not it was a final and binding agreement, but stated that he was 'not affirmatively satisfied that this document did constitute a final agreement manifesting an intention to be bound'.7 He held that in such a case, it would be appropriate to tender evidence of the circumstances in which the document was made, as in Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd.8 However, since the claimant did not seek to present such evidence, Hodgson JA could only rely on the evidence provided, and concluded that there was no clear indication either way; if anything, however, the evidence pointed to the document being a consensus as to terms to be included in a later agreement.9 Thus there was no consent to the tendering of this document in legal proceedings or promise not to withdraw such consent. Therefore, s 110N and s 110P(6)(a) could not be used as exceptions to the application of s 110P(5). The document was held to be inadmissible, and the application dismissed since it depended on the admissibility of the document.

### Implications of the decision

In situations where it is unclear whether a document is a final and binding agreement, or an agreement containing terms to be included in a later agreement, the court will rule against the admissibility of the document. It is the mediation process which is being protected. It is possible that the decision may have been decided in favour of Wentworth if she had tendered evidence of the

circumstances in which the document was made. This could affect the nature of the agreement. If the agreement was found to be a binding final agreement, then it would be outside the scope of s 110P, and thus admissible. However, that is not the case here.

The effectiveness of mediation is highly dependent on it being a procedure that encourages participants to be frank and honest in a process which is protected by confidentiality. However, where the mediation process fails to resolve a dispute, as in this case, it is possible that the litigation process may be helpful in determining the enforceability of an agreement recorded in a document signed at mediation. The possibility that a subsequent court ruling could aid in resolving the dispute is the sacrifice that is made in the protection of the mediation process. But this is a sacrifice which the legal field is willing to make.

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#### **Endnotes**

- 1. State Bank of New South Wales v Freeman (unreported, NSWSC, Badgery-Parker J, 31 January 1994).
- 2. Commonwealth Bank of Australia v McConnell (unreported, NSWSC, Rolfe J, 24 July 1997).
- 3. *Bell v Mediate Today Pty Ltd* (unreported, NSWSC, Barr J, 29 October 1998).
- 4. ANZ Bank v Ciavarella [2002] NSWSC 1186.
- 5. Gain v Commonwealth Bank (1997) 42 NSWLR 252.
- 6. *Masters v Cameron* (1954) 91 CLR 353.
- 7. Wentworth v Rogers & Anor [2004] NSWCA 109 (30 March 2004) at para 34.
- 8. Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309.
- 9. Wentworth v Rogers & Anor [2004] NSWCA 109 (30 March 2004) at para 33.