



Inside this Issue:

**Judicial Bias:
What is the
Appropriate Test?**
Pages 1–4

M+R Insurance Law Partners:

Patrick Monahan
Philip Rowell
Robert Tuck
Bruce Butler
Mark Attard
Andrew Probert
Allison Grice
Justin Griffin

Scope of Services:

Construction risk
Contractual +
commercial litigation
Directors' + officers'
cover
Discrimination law
Employment contracts
Employment law
Equal opportunity
Financial services
General insurance
Life insurance
Medical defence
OH+S
Policy drafting +
interpretation
Professional indemnity
Public + products
liability
Self insurance
Superannuation
Trade + transport
+ aviation

EDITOR'S NOTE

The case covered in this edition of the Reporter, concerns a hapless engineer, Ted Roach, who was disappointed by not one, but two law firms. His battle with his second set of lawyers over their fees appears to have been more vigorously contested than the primary claim. The fee claim ended up in the High Court in very unusual circumstances. The law firm, with whom the trial judge had a close association (social golf), after discovering that his Honour was about to dismiss their fee claim, applied to disqualify him by reason of apprehended bias.



**Mark Attard
Partner**

JUDICIAL BIAS: WHAT IS THE APPROPRIATE TEST?

**SMITS & ROACH
High Court of Australia
20 July 2006**

BACKGROUND

In the late 1980s, Ted Roach retained Freehill Hollingdale & Page, solicitors, to advise him in respect to the exploitation of a peat deposit. In his subsequent claim, Roach alleged that Freehills were negligent because they had not advised him to apply for a mining licence resulting in another person obtaining the right to exploit the peat deposit. Roach claimed a loss of profits to the value of \$1 billion. Mr Leslie, solicitor with Smits Leslie ("*Smits*") was subsequently retained by Roach and his companies to prosecute a professional negligence claim against Freehills.

The High Court proceeding under consideration arose from a falling out between Roach and Smits in respect to payment of Smits's legal fees.

THE RETAINER

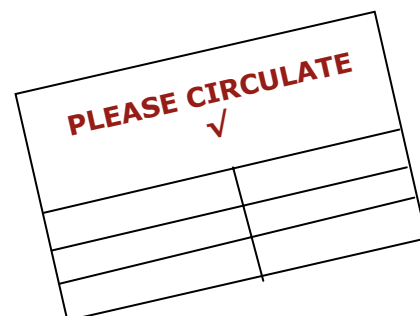
The retainer between Smits and Roach allowed some work to be charged at an hourly rate, together with a provision that Smits was entitled to a share of any judgment in the proceeding. By about

September 1998, relations between Roach and Smits began to strain. Smits approached a litigation funder on behalf of Roach and arranged an upfront fee of \$300,000 to \$400,000 to be paid to Smits on account of legal costs already incurred. In April 1999, Smits's retainer was terminated and in the following month Roach's companies were placed into voluntary liquidation. Smits sued Roach and his companies in respect to unpaid fees.

"... No objections were raised to His Honour hearing the case ..."

PRIMARY TRIAL

The fee claim was listed for hearing before McLennan J. of the Supreme Court of New South Wales on 11 March 2002. Prior to the hearing, McLennan J invited the parties to indicate whether they objected to him hearing the case because he was well known to Mr Leslie of Smits,



M+R = The Thinking Client's Law Firm

having played golf with him on a number of occasions. Mr. Leslie was a former registrar of the Supreme Court and was known to many Judges. No objections were raised to his Honour hearing the case.

His Honour found against Smits and dismissed their fee claim. He found that the Smits's fee arrangement was champertous; that old common law notion that lawyers are prevented from sharing in the fruits of litigation. As noted in an earlier Reporter, different considerations apply to litigation funders.

“... Smits applied to have His Honour disqualify himself and refrain from making any further orders ...”

However, before handing down judgment, His Honour provided the parties with a draft copy. His Honour also invited a representative for Freehills to review the draft judgment. He was concerned about disclosing in his judgment, confidential matters arising from the separate Roach proceeding against Freehills. During his discourse with the lawyers, His Honour disclosed that his brother, Geoff McLennan, was the chairman of partners at Freehills.

BIAS ALLEGED

Upon learning of the connection between His Honour and Freehills (and no doubt disappointed by the result), junior counsel for Smits applied to have His Honour disqualify himself and refrain from making any further orders in the proceeding. It was submitted that his Honour's judgment had the effect of reducing the damages that Roach could claim against Freehills. Accordingly, His Honour should not have determined the dispute. The following exchange then occurred:

“HIS HONOUR: Mr. Lindsay (Senior Counsel for Smits) would have known that my brother was at Freehills without the slightest question. I find this an extraordinary proposition. Are you telling

me that Mr. Lindsay did not know that my brother was a partner at Freehills?”

JUNIOR COUNSEL: No, I am not saying that. I can't speak for Mr. Lindsay.

HIS HONOUR: I don't know about (Mr. Leslie) but I would imagine that probably Counsel on both sides knew that my brother was at Freehills.

JUNIOR COUNSEL: I didn't know, Your Honour.

HIS HONOUR: I would be certain Mr. Lindsay knew.”

In fact, Mr Lindsay did know that His Honour's brother was a partner at Freehills. Lindsay later deposed that he may have informed Smits of this connection but he was prepared to be corrected on this point.

His Honour proceeded to dismiss the disqualification motion and enter judgment in favour of Roach.

COURT OF APPEAL

Smits's appeal to the Court of Appeal enjoyed some success. The Court of Appeal allowed Smits the sum of \$500,000 in respect of their time charges and permitted it to submit a proof of debt to the liquidators of the Roach companies. Costs orders were adjusted accordingly. The Court of Appeal also accepted Smits's claim of apprehended bias on the part of the trial judge. The apprehended bias was held to have arisen because the Judge had failed to reveal, at an early stage, his association with the senior partner at Freehills who was also a defendant in the Freehills litigation. However, the Court of Appeal concluded that Smits had waived its right to object and it was not prepared to set aside his entire judgment and refer the matter to rehearing.

HIGH COURT

Even though Smits enjoyed substantial success, the appeal outcome fell short of its expectations.

M+R = The Thinking Client's Law Firm

The Smits appeal to the High Court was limited to the trial Judge's alleged error in failing to disqualify himself from the proceedings.

The High Court was critical of the manner in which the Court of Appeal applied the relevant principles. Nonetheless, all six judges dismissed Smits's appeal.

The High Court affirmed the principles set out in the case of *Ebner -v- Official Trustee and Bankruptcy* namely, that the relevant test is not whether there was a real likelihood of bias but whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question in hand.

"... the joint judgment held against Smits because of its failure to object to the trial Judge at an earlier time ..."

The High Court was asked to decide essentially two issues. Firstly, whether the trial Judge should have disqualified himself and secondly whether the appellants had waived their right to object to the trial Judge hearing their dispute. Gleeson C.J., Heydon and Crennan JJ. in a joint judgment confirmed that *Ebner* proposed a two step analysis of apprehended bias:

"First it requires the identification of what is said might lead a Judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the (disqualifying) matter and the feared deviation from the course of deciding the case on its merits."

In their joint judgment, their Honours were critical of the Court of Appeal for failing to articulate a logical connection between the concern identified that gave rise to apprehended bias (namely the Judge's association with Freehills) and the feared deviation from impartial decision making. They

expressed doubt about the proposition that Freehills had a financial interest in the outcome of the dispute between Roach and his former solicitors. There was no demonstrable relationship between the judgment in the case at hand and any amount that Freehills ultimately might be called upon to pay and an even smaller connection between the trial Judge's brother and Freehills' ultimate liability, if any.

"... He held that these issues were not to be decided by fine legal analysis but rather by public perception ..."

On the question of waiver, the joint judgment held against Smits because of its failure to object to the trial Judge at an earlier time. It was immaterial whether the appellants knew of the connection between the trial Judge and Freehills' senior partner or whether this was only known by their senior counsel. The court and opposing litigants are not privy to discussions between counsel and their clients. Counsel are their clients' agents and have wide discretion in the management of litigation. In this case, no objection was taken at an early stage. Objection was taken after the decision was known and the court would not permit litigators to raise objections at such a late stage.

Gummow and Heydon JJ., in a separate and rather short judgment, agreed with the joint judgment, namely that the Court of Appeal had focused on the first step set out in *Ebner* to the exclusion of the second step. They also agreed with the joint judgment on the issue of waiver.

Kirby J. in a separate judgment also dismissed the appeal.

In respect to disqualification, Kirby J. identified the following potential grounds for disqualification, namely, disqualification by interest, conduct, association and extraneous information. He held this was a case of disqualification by association. It was advantageous to adopt strict rules and practices in respect to disclosure by Judges of

potential disqualifying interests or associations as it promotes transparency in the judicial process.

He applied the two step approach prescribed by *Ebner* but unlike the other judges, found that both steps were satisfied in this case. He held that these issues were not to be decided by fine legal analysis but rather by public perception. Kirby J. held that once the trial Judge appreciated the facts and significance of the Freehill's litigation, he should have disclosed his relationship to Freehill's senior partner and disqualified himself from hearing the matter.

This should have been done well in advance of publishing the draft reasons for judgment.

He held that in circumstances where the litigant is aware of grounds for objection but fails to object promptly, then the litigant is taken to have waived the right to object and cannot later object. On the issue of waiver, he did not dissent from the reasoning of the joint judgment.

It was not necessary to prove senior counsel's communication of the association between the trial Judge and his brother at Freehills to the appellants. The Court of Appeal was correct to conclude that the failure to seek disqualification was waived by the appellants having regard to the conduct of the case by their Counsel.

Kirby J. expressed a differing view in finding that the trial judge's familial connection to Freehills disqualified him from hearing the fee dispute between Roach and Smits. The majority were not inclined to accept that the association by itself was sufficient. Without expressing a view either way, I would support Kirby's emphasis on public perception being the appropriate touchstone. Confidence in the judicial system is important and unless justice is seen to be done, such confidence will be under threat.



Karen Wong
Senior Associate
kwong@mrlaw.com.au

Interesting Fact !

With drought conditions prevailing and water restrictions in place, many Victorians have begun conserving water through the use of the humble bucket. Buckets are now appearing in bathrooms, laundries and kitchens. It is, therefore, not surprising to learn recently of a large number of sprains and strains caused by the injudicious carrying of buckets of water.

A handy reminder - A litre of water weighs one kilogram. Those who developed the metric system decided to measure the base units of their new system with reference to the properties of natural objects such as the Earth and water. For example, one metre is defined with reference to the circumference of the Earth and water freezes at 0 °C and boils at 100 °C at standard pressure.

Oxfam Australia

This year, M+R are sponsoring a team of four staff members to take part in the annual Oxfam Trailwalker in Melbourne, to be held on 23 March 2007. The trail begins with the wide open spaces of Jells Park in Wheelers Hill. Passing south-east through the Corhanwarrabul Wetlands then east through the Churchill and Lysterfield National Parks, the trail heads north through Belgrave and into the beautiful Dandenong Ranges National Park. From here it travels east along the Warburton Trail before looping south of Warburton to the ups and downs of Mt Little Joe, finishing in the expansive Warburton Park. Our team (Nadia Spiller, James Tucker, Aida Lee and Andrew Brennan) are hoping to raise \$5,000 in support of Oxfam and are hopeful of completing the 100 kilometre walk within 26 hours.

For publication enquiries—marketing@mrlaw.com.au