

# Apprehended bias after British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283

## Commercial Court Seminar

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### A. Introduction:

1. In *Livesey v New South Wales Bar Association*<sup>1</sup> the Court stated –

In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters “of degree and particular circumstances may strike different minds in different ways” per Aickin J in *Shaw*<sup>2</sup>).

2. The observation that circumstances which are alleged to give rise to a reasonable apprehension of bias may strike different minds in different ways was borne out in *British American Tobacco Australia Services Ltd v Laurie*<sup>3</sup> (*BAT v Laurie*). Of the eight appellate judges sitting on review of the primary judge’s refusal to recuse himself, four judges concluded that there was a reasonable apprehension of pre-judgment, and four judges concluded that there was not a reasonable apprehension of pre-judgment.

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<sup>1</sup> (1983) 151 CLR 288 at 294 per Mason, Murphy, Brennan, Deane and Dawson JJ

<sup>2</sup> *Re Lusink; ex parte Shaw* (1980) 55 ALJR at 16

<sup>3</sup> (2011) 242 CLR 283, reversing *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414

**B. Background:**

3. In *Re Mowbray; Brambles Australia Ltd v British American Tobacco Australia Services Ltd (No 8) (Mowbray)*<sup>4</sup>, His Honour Judge Curtis of the Dust Diseases Tribunal of New South Wales determined an application by the cross-claimant, Brambles Australia Ltd, that the cross-respondent, British American Tobacco Australia Services Ltd (**BAT**) make further discovery of documents. The decision was an interlocutory decision. In the course of making the decision it was necessary for the judge to address a submission by Brambles that the statutory fraud exception to client legal privilege in s 125 of the *Evidence Act 1995* (NSW) was engaged so as to defeat a claim for privilege by BAT in relation to the evidence of a witness called by Brambles. The substance of the fraud alleged by Brambles was the deliberate destruction of relevant, prejudicial documents by BAT, in combination with the adoption of a document retention policy which was alleged to have been contrived to give an innocent explanation for the document destruction<sup>5</sup>.
4. Section 125 of the *Evidence Act* is in the following terms –

**125 Loss of client legal privilege: misconduct**

- (1) This Division does not prevent the adducing of evidence of:
- (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or
  - (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.
- (2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:
- (a) the fraud, offence or act, or the abuse of power, was committed, and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,

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<sup>4</sup> (2006) 3 DDCR 580; [2006] NSWDDT 15

<sup>5</sup> The substance of the allegations was similar to the allegations the subject of the ruling by Eames J in *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73, but reversed by the Court of Appeal in *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.

the court may find that the communication was so made or the document so prepared.

(3) In this section:

"power" means a power conferred by or under an Australian law.

5. Relevantly, under s 125(2) it was sufficient for the judge to determine only that there were reasonable grounds for finding fraud &c in order that the section be engaged.

6. In ruling on the question, the judge expressed himself in the following terms<sup>6</sup> –

I should make it plain that BATAS has at all times maintained that its document management policies and practices at no time permitted selective destruction of prejudicial documents. The assertion by Brambles to the contrary remains a live issue for the trial.

7. And<sup>7</sup> –

I am persuaded on the present state of the evidence that BATAS in 1985 drafted or adopted the Document Retention Policy for the purpose of a fraud within the meaning of s125 of the Evidence Act. ...

8. And<sup>8</sup> –

In the absence of evidence to the contrary, I infer that legal advice to the effect that destruction of documents pursuant to the terms of the policy was not contrary to law, was integral to the decision by BATAS to persist with its policy of selective destruction. ... I find that the communications made for the purpose of obtaining that advice were communications in furtherance of the commission of a fraud within the meaning of s 125.

9. And further<sup>9</sup> –

I find that on the evidence of Mr Gulson, Mr Welch, and Dr Wigand presented on this application, Brambles has sufficiently discharged an onus of demonstrating, *prima facie*, that it can make good the allegations pleaded in the amended statement of claim summarised in paragraph 11 above. ...

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<sup>6</sup> at [45]

<sup>7</sup> at [56]

<sup>8</sup> at [57]

<sup>9</sup> at [69]

10. In another proceeding in the Dust Diseases Tribunal, *Laurie v British American Tobacco Australia Services Ltd*, the plaintiff claimed damages against BAT for negligence which was alleged to have been a cause of Mr Laurie's lung cancer, from which he later died. The plaintiff sought aggravated damages against BAT, the particulars of which relied on allegations of deliberate document destruction. The plaintiff also alleged that inferences were to be drawn from the fact and circumstances of the destruction of documents. The allegations made by the plaintiff in *Laurie* were similar in substance to the allegations advanced by Brambles in its application for further discovery upon which Judge Curtis had made findings in the *Mowbray* case.
11. His Honour Judge Curtis managed *Laurie* at the interlocutory stages and had taken evidence from Mr Laurie before his death which was recorded on video. Judge Curtis was expected to preside at the trial of the proceeding. In these circumstances, BAT made an application to Judge Curtis to recuse himself. That application was refused. The judge's refusal to recuse himself was the subject of an application for leave to appeal, and an application for prohibition, to the New South Wales Court of Appeal. Both the appeal and the application for prohibition were dismissed by majority. The appeal to the High Court was allowed by majority.

**C. Existing principles:**

12. Before turning to the reasons of the members of the High Court, it is desirable to identify the relevant principles on the pre-existing state of authorities.
13. Grounds giving rise to a reasonable apprehension of bias may take many forms. Any consideration of the appearance or presence of bias requires identification of the grounds which are alleged. In *Ebner v Official Trustee in Bankruptcy*<sup>10</sup> Gleeson CJ, McHugh, Gummow and Hayne JJ stated that two steps are required –

First, it requires the identification of what it 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 matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest in litigation, or an interest in a party to it, will be of no assistance until the nature

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<sup>10</sup> (2000) 205 CLR 337

of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

14. In *Webb v R*<sup>11</sup> Deane J identified four main categories of apprehended bias –<sup>12</sup>
- (a) disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or pre-judgment;
  - (b) disqualification by conduct, including published statements, which category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias;
  - (c) disqualification by association, which will often overlap the first and consists of cases where the apprehension of pre-judgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and
  - (d) disqualification by extraneous information, which will commonly overlap the third and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.
15. *BAT v Laurie* is an instance of category (b), disqualification by conduct. The conduct alleged by BAT was the appearance of pre-judgment of a question in issue in consequence of the judge’s decision on the discovery application in the *Mowbray* case. Pre-judgment is a well travelled ground on which a reasonable apprehension of bias may be found to exist. The starting point is *Livesey v New South Wales Bar Association*, which has already been mentioned, where the issue of pre-judgment arose because, in “the *Bacon* case”<sup>13</sup> two judges had found that a witness who was apt to be called in the *Livesey* case, “lacked both credit and

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<sup>11</sup> (1994) 181 CLR 41 at 74

<sup>12</sup> The categories are referred to in *Ebner v. Official Trustee* (2000) 205 CLR 337 at 348 as a “convenient frame of reference” and by French CJ (dissenting) in *BAT v Laurie* (2011) 242 CLR 283 at 302 [38]

<sup>13</sup> *Re B* [1981] 2 NSWLR 372 (151 CLR at 293)

credibility as a witness”. In reaching the conclusion that those judges should not sit, the Court stated<sup>14</sup> –

It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact.

16. The Court’s reference in *Livesey* to “clear views” about a question of fact, or the credit of a witness, should be noted. And the court’s reference to what might be entertained by a “fair-minded observer” should also be noted. Later, in *Ebner v Official Trustee*, the Court confirmed the test as<sup>15</sup> –

[W]hether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide. That is the test to be applied in the present appeals, and it reflects the general principle which is to be applied to problems of apprehended bias, whether arising from interest, conduct, association, extraneous information. or some other circumstance.

17. And, as *Johnson v Johnson* indicates, the element of reasonableness informs the knowledge to be attributed to the fictional fair-minded lay observer<sup>16</sup>.
18. *Livesey* was applied by the New South Wales Court of Appeal in *Australian National Industries v Spedley Securities Ltd (ANI v Spedley)*<sup>17</sup>. In *ANI v Spedley* Cole J, sitting in the Commercial Division of the Supreme Court of New South Wales, was assigned to hear a number of proceedings involving claims by Spedley against ANI and others. In some of the proceedings, the judge had made findings of fact, and findings as to credit, which were adverse to some of the parties and critical of some of the witnesses. ANI moved that a further proceeding, yet to be tried, not be listed before Cole J. Cole J refused the motion. By a 3-2 majority<sup>18</sup>,

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<sup>14</sup> (1983) 151 CLR 288 at 300 per Mason, Murphy, Brennan, Deane and Dawson JJ

<sup>15</sup> (2000) 205 CLR 335 at 350 [33] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also, *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ

<sup>16</sup> (2000) 201 CLR 488 at 493 [13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ

<sup>17</sup> (1992) 26 NSWLR 411

<sup>18</sup> Kirby P, Mahoney JA and Meagher JA; Gleeson CJ and Samuels JA dissenting

the Court of Appeal held that Cole J should not sit, thus demonstrating again that circumstances may strike different minds in different ways<sup>19</sup>.

19. There have been other cases where intermediate appellate courts have held that findings on interlocutory applications have constituted circumstances which might give rise to a reasonable apprehension of pre-judgment. Those cases have included *Southern Equities Corporation Limited (in liq) v Bond*<sup>20</sup>, where the subject matter was findings made by the trial judge on an interlocutory application for a *Mareva* order. The Full Court applied *Livesey* and held by a 2-1 majority that the judge's findings were expressed in such a conclusive way as to give rise to a reasonable apprehension that following a trial those views would not change. And in *Kwan v Kang*<sup>21</sup>, the Court of Appeal held that a finding by the primary judge (in the course of determining whether s 125 of the *Evidence Act* was engaged in relation to claims for privilege) that he was "satisfied" that documents had been prepared in furtherance of a fraud gave rise to a reasonable apprehension of pre-judgment of like issues at trial.
20. In *R v Watson; ex parte Armstrong*<sup>22</sup> a judge of the Family Court, during the course of an interlocutory hearing, and before seeing either of the parties in the witness box, stated that he would not accept the evidence of either party – or even an admission – unless it was corroborated. The judge then refused an application that he decline to hear the proceeding. A writ of prohibition was granted by the High Court. In their reasons, the majority stated<sup>23</sup> –

During the course of argument a judge will often follow the common, and sometimes necessary, course of formulating propositions for the purpose of enabling their correctness to be tested, and as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory. However, a fair-minded observer would have been justified in thinking that the remarks of the learned trial judge in the present case were not of that description. ... As the cases show, there are some matters on which a judge may have preconceived opinions, and yet be qualified to sit, but speaking

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<sup>19</sup> Further reinforcement of this point comes from the fact that later a Court of Criminal Appeal in *R v Masters* (1992) 26 NSWLR 450 at 472 disapproved what was described as, "the interpretation of the apprehended bias rule now adopted by the Court of Appeal".

<sup>20</sup> (2000) 78 SASR 339

<sup>21</sup> [2003] NSWCA 336

<sup>22</sup> (1976) 136 CLR 248

<sup>23</sup> at 264 per Barwick CJ, Gibbs, Stephen and Mason JJ

generally the credit of an essential witness, where the case may turn on credibility, is not one of them.

21. *R v Watson; ex parte Armstrong* was a clear case<sup>24</sup>. In less clear cases, suggested pre-judgment may give rise to unique difficulties. Judges often bring with them knowledge of other cases or events, or pre-conceived views which may have some bearing on the trial at hand on questions of fact or law. However, the mere fact of such knowledge or pre-conception does not lead to disqualification. The following observations of Mason J in *Re JRL; Ex parte CJL* must be borne in mind<sup>25</sup> –

It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.

22. It is only if in the all circumstances there might be a relevant reasonable apprehension of partiality or prejudice that any question of disqualification can arise<sup>26</sup>. And reasonable apprehension of bias by reason of pre-judgment must be “firmly established”<sup>27</sup>.
23. There are instances, such as *Livesey* and *ANI v Spedley*, where a judge has heard other cases involving the same parties, or witnesses, and has expressed views as to the credit of those persons. A preconceived view of the credibility of a witness is more significant than a preconceived view of the principles applicable to the case<sup>28</sup>. If the judge in an earlier case expresses strong views about the credibility

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<sup>24</sup> Although it is to be noted that Jacobs J dissented

<sup>25</sup> (1986) 161 CLR 342 at 352

<sup>26</sup> *Rozanes v. Judge Kelly* [1996] 1 VR 320 at 333

<sup>27</sup> *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, at 553-554.; *R v. Watson; ex parte Armstrong* (1976) 136 CLR at p 262; *Re Lusink; Ex parte Shaw* (1980) 32 ALR 47, at 50-51. *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352 per Mason J.

<sup>28</sup> *R v. Watson; ex parte Armstrong* (1976) 136 CLR 248 at 264. See also *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2009) 174 FCR 175

of a witness or one of the parties, this can give rise to an apprehension in a reasonable person that there has been a predetermination by the Court and that no fair trial may be had<sup>29</sup>.

24. In the case of witnesses, a distinction is to be drawn between a case where a judge has some preconceived views about the expertise or reliability of the professional opinions of an expert medical witness and the case where a judge has preconceived views about the credit or trustworthiness of a non-expert witness “whose evidence is of significance on ... a question of fact” which “constitutes a live and significant issue” in the case<sup>30</sup>. In the case of expert witnesses, the High Court has suggested that the administration of justice in certain types of cases, such as personal injuries cases, would be all but impossible if the rules relating to opinions as to the credit of lay witnesses were to apply to expert witnesses who frequently give evidence before the courts. A judge sitting without a jury may in the course of dialogue with counsel express his or her views about a particular expert witness<sup>31</sup>. The line is crossed, however, if the words or actions of the judge convey the impression that –

- (a) pre-conceived adverse views about a particular medical witness were influencing the judge’s approach to the case to an extent that the judge was entering the arena to denigrate the witness or to oppose the witness’ views;
- (b) the judge was biased against the party who had called that particular witness; or
- (c) the judge was likely to be concerned, in the judgment actually deciding the case, to vindicate the pre-conceived adverse views about the witness by findings contrary to whatever views that witness might express.<sup>32</sup>

25. There are other cases where a judge expresses views as to the proper application of legal principle before hearing full argument. As a general rule, anything that a

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<sup>29</sup> *Ex parte Schofield* (1953) 53 SR(NSW)163 at 168; *Livesey v. New South Wales Bar Association* (1983) 151 CLR 288; *Rozenes v. Judge Kelly* [1996] 1 VR 320

<sup>30</sup> *Vakanta v. Kelly* (1989) 167 CLR 568 at 571

<sup>31</sup> *Vakanta v. Kelly* (1989) 167 CLR 568 at 571

<sup>32</sup> *Vakanta v. Kelly* (1989) 167 CLR 568 at 572

judge says in the course of argument will be merely tentative and exploratory<sup>33</sup>. What is clear is that a judge can and, one might say, should be expected to bring with him or her, some understanding of the relevant principles to be applied to the case at hand. The expression of a preliminary view as to those principles should not ordinarily amount to an apprehension of bias. In *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*<sup>34</sup> the High Court said in relation to the suggestion that members of the Conciliation and Arbitration Commission had pre-judged an issue by the expression of opinions on questions of principle –

Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.

26. So too, dialogue between bench and bar aimed at clarifying issues will not ordinarily be indicative of pre-determination. This point was made by Kirby and Crennan JJ (with whom Gummow A-CJ agreed) in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*<sup>35</sup> –

Sometimes judicial interventions and observations can exceed what is a proper and reasonable expression of tentative views. Whether that has happened is a matter of judgment taking into account all of the circumstances of the case. However, one thing that is clear is that the expression of tentative views during the course of argument as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias.

27. However, the appearance of pre-judgment may well arise when the judge conveys the impression that the judge's mind is closed to any reasonable argument. There may be a fine line between expressing views in strong terms, and displaying a closed mind. In *Antoun v R*<sup>36</sup> Gleeson CJ stated that indignation should never be

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<sup>33</sup> *R v. Watson; ex parte Armstrong* (1976) 136 CLR 248 at 264

<sup>34</sup> (1969) 122 CLR 546 at 553-554

<sup>35</sup> (2006) 229 CLR 577 at [112]

<sup>36</sup> (2006) 224 ALR 51 at [22]

permitted to compromise the appearance of impartiality that is required of judges. And Kirby J stated –<sup>37</sup>

Judicial indignation at a particular course of action, or proposed action, may on occasion be understandable. Couched appropriately, at the proper time and in due sequence, it may give rise to no reasonable apprehension of bias. For centuries in courts of our tradition, judges have been telling parties and their lawyers, sometimes in quite robust terms, that they consider that a particular submission or course of action is hopeless, a waste of the court's time or doomed to fail. I would not want to say anything that needlessly molycoddled candid judicial speech addressed to trained advocates.

**D. The decision of the High Court in *BAT v Laurie*:**

28. It is against the above background of legal principle that the findings of Judge Curtis in the *Mowbray* case, and their bearing upon what the fair-minded lay observer would reasonably think, fell to be assessed. The Court of Appeal divided 2-1 on the question whether there was a reasonable apprehension of pre-judgment. And the High Court divided 3-2, reversing the Court of Appeal. The reasons of the majority were those of Heydon, Crennan and Kiefel JJ. The majority applied<sup>38</sup> the fair-minded lay observer test, as identified in *Livesey v New South Wales Bar Association*<sup>39</sup>, *Johnson v Johnson*<sup>40</sup> and *Ebner v Official Trustee*<sup>41</sup>. There was no apparent departure by the majority from those established principles, but the principles were applied to the facts as they were presented. The features of the case which, in the opinion of the majority, gave rise to the reasonable apprehension of pre-judgment were as follows –

- (a) Judge Curtis did not state that his findings were made merely because there were reasonable grounds for finding fraud - he found fraud under s 125(1) of the *Evidence Act*, independently of s 125(2)<sup>42</sup>;
- (b) Judge Curtis's findings were expressed without qualification or doubt, based on an actual persuasion as to the correctness of the conclusion<sup>43</sup>;

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<sup>37</sup> (2006) 224 ALR 51 at [27]

<sup>38</sup> 242 CLR 283 at 322 [104] and 331 [139]

<sup>39</sup> (1983) 151 CLR 288

<sup>40</sup> (2000) 201 CLR 488

<sup>41</sup> (2000) 205 CLR 337

<sup>42</sup> 242 CLR 283 at 325 [117]

<sup>43</sup> 242 CLR 283 at 333 [145]

- (c) the judge expressed himself in terms indicating extreme scepticism about BAT's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious;
- (d) whilst the judge acknowledged that different evidence might be led at a later time, that did not remove the impression created by reading the judgment that the clear views there stated *might* influence the judge's determination of the same issue in the *Laurie* proceeding; and
- (e) in the circumstances of what was described by the majority as an unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial<sup>44</sup>.

29. Allsop P dissented in the Court of Appeal. The majority stated that Allsop P's conclusion was correct<sup>45</sup>. Allsop P had concluded<sup>46</sup> –

A trial judge persuaded in his or her mind of the fraud and dishonesty of a litigant and who, properly discharging the curial task before him or her, announces to the parties and to the world his or her conclusion as to that grave fact does more than merely find a relevant fact. The grave quality of such a finding by a trial judge and the necessity for the trial judge to be persuaded in his or her mind as to its truth informs my view that a fair-minded lay observer might reasonably think that a judge, who has been so persuaded, might not be able to bring a mind free of the effect of the prior conclusion, so solemnly reached, to bear in dealing with the same issue in respect of the same party on a later occasion.

30. French CJ and Gummow J each dissented. French CJ stated that the judge made it clear that he was not making a finding that would stand, come what may, at a trial<sup>47</sup>. And French CJ concluded<sup>48</sup> –

[I]n my opinion, the fair-minded lay observer would not conclude that there had been firmly established a reasonable fear that Judge Curtis' mind was so

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<sup>44</sup> 242 CLR 283 at 333 [145]

<sup>45</sup> 242 CLR 283 at 333 [145]

<sup>46</sup> [2009] NSWCA 414 at [11]

<sup>47</sup> 242 CLR 283 at 308 [51]

<sup>48</sup> 242 CLR 283 at 309 [51]

prejudiced in favour of his finding of fraud that he would not alter that conclusion irrespective of the evidence or arguments provided to him in the Laurie proceedings. To conclude, as required by *Ebner*, that the judge might be led to decide the case other than on its legal merits, would require the observer to give no account to the express qualifications made by the judge in his findings in the Mowbray ruling.

31. To like effect was the opinion of Gummow J<sup>49</sup> –

It is in this setting that the first respondent correctly submits that the hypothetical observer, upon reading the 2006 reasons, would appreciate that the judge was qualifying his conclusions by emphasising that if the same issues arose at a later stage in the Mowbray litigation he would decide them on the evidence then led by the parties. His Honour “found fraud” but on the evidence then available and admissible in the Mowbray litigation.

### **E. Other instances of pre-judgment:**

32. In what other ways might questions of reasonable apprehension of pre-judgment arise? A non-exhaustive list is as follows –

- (a) applications of a preliminary nature, such as applications for a *Mareva* order, or an *Anton Piller* order;
- (b) a contested application for an interlocutory injunction pending trial;
- (c) an application for summary judgment;
- (d) robust comments are made by a judge during a directions hearing or case management conference;
- (e) rulings are made within a trial; and
- (f) a decision is set aside, or varied on appeal or review, and the matter is remitted to the primary decision-maker for re-trial or further adjudication.

#### **E.1 Preliminary orders:**

33. The adjudication of *ex parte* applications for *Anton Piller* or *Mareva* orders<sup>50</sup> may, of their nature, give rise to grounds on which apprehended bias may be properly

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<sup>49</sup> 242 CLR 283 at 320 [97]

<sup>50</sup> These orders are referred to in Orders 37A and 37B of the *Supreme Court Civil Procedure Rules* rather clinically, and without any mystique, as “Freezing Orders” and “Search Orders”.

alleged if the same judge is assigned to the trial<sup>51</sup>. Whether those grounds exist will depend upon three features: the questions which the judge was called upon to determine, the terms in which any findings were expressed, and the issues for determination at trial. In some applications, it may be necessary for a judge to make findings which go beyond a mere finding of a *prima facie* case, particularly if the application is later contested, and questions of criminality or fraud are in issue. The past conduct of a party might have to be adjudged in order to inform the assessment of possible, or likely future conduct. The decision of the Full Court of the Supreme Court of South Australia in *Southern Equities Corporation Limited (in liq) v Bond*<sup>52</sup> referred to in paragraph 19 above was a case in which the adjudication of an application for a *Mareva* order was held to give rise to a reasonable apprehension of bias. Olsson J went so far as to observe that<sup>53</sup> –

It is stating the obvious to say that there are inherent dangers in a judicial officer assigned as trial judge entertaining and ruling on a pre-trial application for a *Mareva* injunction.

34. But it is necessary in each case to measure any findings made, and the terms in which they were expressed, against the principles essayed in *Livesey*, which speak of “clear views” about a question of fact, or the credit of a witness.

## **E.2 An application for an interlocutory injunction:**

35. The adjudication of an application for an interlocutory injunction may, but is less likely to, give rise to proper grounds to allege a reasonable apprehension of pre-judgment. That is because in accordance with the principles in *Australian Broadcasting Corporation v O'Neill*<sup>54</sup> the court will be called upon to consider whether there is a sufficient *prima facie* case to justify an injunction pending trial, and where the balance of convenience lies. The determination of those issues will rarely give rise to the need to make findings of contested fact, or findings going

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<sup>51</sup> See, for example, *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177 (NSWCA). At the time of writing this paper an appeal from this decision to the High Court after a grant of special leave had been heard, but not determined.

<sup>52</sup> (2000) 78 SASR 339

<sup>53</sup> 78 SASR 339 at 349 [46]

<sup>54</sup> (2006) 227 CLR 57

to credit, so as to engage the principles in *Livesey*. And necessarily, the determination of the issues will rarely involve making any final decision.

### **E.3 An application for summary judgment:**

36. Applications for summary judgment may now take two forms: an application under the Rules under *General Steel*<sup>55</sup> principles, and an application under s 63 of the *Civil Procedure Act* 2010 on the ground that a claim, or a defence, has no reasonable prospect of success<sup>56</sup>. A judge hearing such an application would not ordinarily have to do more than determine whether the requisite degree of satisfaction exists. If the application is refused, it would not normally be necessary for the judge to make findings that would engage *Livesey*. And if the application is granted, no occasion to allege pre-judgment is likely to arise, unless the judgment is set aside on appeal. In that case, however, there might be good grounds for submitting that a judge who had erroneously found that a claim or defence had no reasonable prospects of success should not hear the trial.

### **E.4 Robust comments made during a directions hearing or case management conference:**

37. The overarching purpose of the *Civil Procedure Act* which inform the exercise of the Court's procedural powers<sup>57</sup>, may require more judicial activism than has been observed in the past. In the course of giving effect to the overarching purpose, robust remarks might be made by a judge during the course of a directions hearing, or in the course of a case management conference, or during the course of a trial. How are such remarks to be assessed?
38. Even before the commencement of the *Civil Procedure Act* robust debate was a feature of our courts. In fact, it has probably always been a feature. The High Court addressed the issue in *Johnson v Johnson*, where Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated<sup>58</sup> –

Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character

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<sup>55</sup> *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125

<sup>56</sup> *Spencer v The Commonwealth* (2010) 241 CLR 118

<sup>57</sup> *Civil Procedure Act* 2010, ss 7, 8 and 47 to 53

<sup>58</sup> (2000) 201 CLR 488 at 493 [13]

or ability of a particular Judge,<sup>59</sup> the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern Judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a Judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakautu v Kelly*<sup>60</sup> Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of “the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case”.<sup>61</sup> Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate pre-judgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

39. The touchstone is that any views expressed by an active, inquiring judge will, *prima facie*, be regarded as tentative, and as not giving rise to any reasonable apprehension of pre-judgment. But the line is crossed if the interventions and observations exceed what is a proper and reasonable expression of tentative views<sup>62</sup>.

#### **E.5 Rulings made before or within a trial:**

40. Trial judges are routinely called upon to make rulings excluding irrelevant, or prejudicial, or privileged material before, or during the course of trials. In *BAT v Laurie* the majority stated that such rulings are unlikely to disqualify a judge from further hearing the proceeding<sup>63</sup>. Part of the reason for this is that the hypothetical observer is taken to be observing a judge whose training, and oath or affirmation, require the judge to discard the irrelevant, the immaterial and the prejudicial<sup>64</sup>. The observations in *BAT v Laurie* accord with earlier authority,

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<sup>59</sup> *Webb v R* (1994) 181 CLR 41 at 73, per Deane J.

<sup>60</sup> (1989) 167 CLR 568 at 571

<sup>61</sup> See also *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 15; 32 ALR 47 at 53, per Murphy J.

<sup>62</sup> *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [112] per Kirby and Crennan JJ (with whom Gummow A-CJ agreed). An example of going well beyond what was permissible is the conduct of Her Honour Judge Jenkins, recorded in *P v R* [2010] VSCA 142.

<sup>63</sup> 242 CLR 283 at 332 [140]

<sup>64</sup> *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

including *R v Masters*, where the New South Wales Court of Criminal Appeal stated<sup>65</sup> –

We do not accept the submission on behalf of Richards that a judge would be obliged to disqualify himself from continuing with a criminal trial because, in deciding the admissibility of evidence after a voir dire examination in which the accused gave evidence, he had expressed views critical of the accused's credit and because it was likely that he may have to determine later in the case another issue involving the credit of the accused on either a further voir dire examination or when imposing sentence. Such a proposition makes nonsense of the judicial system. We do not pause to consider whether that is so because the principle of apprehended bias does not operate so as to require the judge to be disqualified during the course of the one trial or because such a case falls within the somewhat uncharted exemption afforded for necessity: *Livesey v New South Wales Bar Association* (at 300). We see no distinction between the situation where the decision in question is made on a voir dire examination during the trial and the situation where the judge has in a pre-trial motion decided an issue against an accused which may well arise again for his decision in the trial itself.

41. The rationale for the above observations is the following observations of Mason J in *Re JRL; ex parte CJL*<sup>66</sup> which were cited in *R v Masters* –

There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.

42. The principle, therefore, is that if a ruling on one question before, or during the course of a trial creates no more than an expectation that like questions will be adjudicated in the same way, then that expectation is insufficient to raise a reasonable apprehension that the judge will not approach like questions in an impartial way.
43. An example of a case in which findings of credit on a *voire dire* led to the disqualification of the trial judge was *Rozenes v His Honour Judge Kelly*<sup>67</sup>. Judge Kelly presided over a drug trial and excluded the evidence of a Crown witness in a preliminary ruling. In the preliminary ruling the Judge found (inter alia) that the

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<sup>65</sup> (1992) 26 NSWLR at 450 472-3 per Hunt CJ-CL, Allen and Badgery-Parker JJ

<sup>66</sup> (1986) 161 CLR 342 at 352

<sup>67</sup> [1996] 1 VR 320

Crown witness was a liar, not by reference to any evidence the witness had given on the *voire dire*, but by reference to evidence that the witness had given at another trial over which the judge had presided. The preliminary ruling was the subject of successful challenge in the Full Court on the ground (inter alia) that it was wrong for the judge to exclude evidence before he had heard what the evidence was to be. In a later application to the Court of Appeal the Court declared that the judge was disqualified from hearing the trial on the ground of apprehended bias, arising from the judge's strident pre-judgment of the evidence of the Crown witness<sup>68</sup>.

44. The requirement to make rulings before or during trial is to be distinguished from other cases, where judges make statements during the course of a hearing which amount to unjudicial conduct giving rise to a reasonable apprehension of bias<sup>69</sup>.

#### **E.6 Further adjudication following appeal:**

45. Under s 74(3) of the *County Court Act 1974*, the Court of Appeal is directed not to remit a proceeding for re-hearing before the same judge unless it specifically directs otherwise. There is no corresponding provision in relation to appeals from the Trial Division of the Supreme Court to the Court of Appeal. But s 74(3) reflects a concern that generally, new trials should take place before a different judge. That concern also exists in administrative law, where what has been described as a “guiding principle” is<sup>70</sup> –

[R]emittal will be to a differently constituted primary decision-maker where there is some feature of the conduct or reasons for decision of the primary decision-maker which would render it unfair to the successful party or give the appearance of unfairness to that party (whether arising from strongly expressed views on key issues, adverse findings on the credit of witnesses, apprehended

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<sup>68</sup> The text of the ruling of His Honour Judge Kelly reported at [1996] 1 VR 320 at 324-5 is worth reading for its literary value. In particular, the concluding paragraph is worthy of note –

But neither I, nor my brother judges, young or old, are deaf to the call of duty. The trial of The Queen against Beljajev and Ors is capable of description in military metaphor. It is an outpost surrounded by a desert of millions of words through which no supply can be had. No judge has the time or patience to have explained to him the circumstances upon which his advice might be sought. It is a lonely outpost. But I have been entrusted with the command of that outpost. I am not persuaded that I have betrayed that trust. I will not run away. If I am to be relieved it must be by death or superior orders.

<sup>69</sup> See, for example, *Mogan Holdings Pty Ltd v Harrison* [2011] VSCA 202 and *Antoun v R* (2006) 224 ALR 51 (HCA)

<sup>70</sup> *Vegco Pty Ltd v Gibbons* [2008] VSC 363 per Kyrou J. See also, *Body Corporate Strata Plan No 4166 v Stirling Properties Ltd (No 2)* [1984] VR 903 per Ormiston J

bias or otherwise) if the matter were remitted to the same decision-maker or where it would be impracticable for the same decision-maker to re-determine the matter.

46. Different considerations may apply where the appellate court does not order a retrial, but there is a remitter. In *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 2)*<sup>71</sup> a Full Court held, following a trial, that expert evidence had been wrongly excluded by the trial judge, and remitted the proceeding to the trial judge for further hearing. The trial judge came to the same conclusion as he had in the first judgment, and dismissed the proceeding. On appeal the Full Court held by a 2-1 majority that a fair-minded lay observer, properly informed of all of the circumstances, would not reasonably apprehend that the primary judge might not bring an impartial and unbiased mind to the resolution of the questions before him on remitter from the Full Court.

#### **F. Other grounds:**

47. *BAT v Laurie* was a pre-judgment case. There are other types of case which fall within one or more of the categories identified by Deane J in *Webb v R*<sup>72</sup> which are capable of giving rise to a reasonable apprehension of bias. A detailed discussion of those other categories is beyond the scope of this paper, but they may be identified as follows –

- (a) unjudicial conduct<sup>73</sup>;
- (b) private communications with the judge<sup>74</sup>;
- (c) the judge's professional or private association with one of the parties<sup>75</sup>;

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<sup>71</sup> (2009) 174 FCR 175

<sup>72</sup> (1994) 181 CLR 41 at 74

<sup>73</sup> *P v R* [2010] VSCA 142; *State of Victoria v. Psaila* [1999] VSCA 193; *Mogan Holdings Pty Ltd v Harrison* [2011] VSCA 202 and *Antoun v R* (2006) 224 ALR 51 (HCA)

<sup>74</sup> *R v. Sussex Justices; ex parte McCarthy* [1924] 1 KB 256; *R v. Magistrates Court at Lilydale; ex parte Ciccone* [1973] VR 122; *Re JRL; ex parte CJL* (1986) 161 CLR 342; *Kennedy v Cabill* (1995) 19 Fam LR 173; *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 540; *R v Fisher* (2009) 22 VR 343; *John Holland Rail Pty Ltd v Comcare* (2011) 276 ALR 221

<sup>75</sup> *Smits v Roach* (2006) 227 CLR 423; *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78; *Thebbusson v Lord Rendlesham* (1859) 7 HLC 429; *R v Moss; Ex parte Mancini* (1982) 29 SASR 385; *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358; *Howell v Millais* [2007] EWCA Civ 720; *British American Tobacco Australia Limited v Gordon* [2007] NSWSC 109; *Trustees of the Christian Brothers v. Cardone* (1995) 57 FCR 327; *Precision Fabrication Pty Ltd v. Roadcon Pty Ltd* (1991) 104 FLR 260; *R v. Bow Street Magistrate; ex parte Pinochet (No. 2)* [2000] 1 AC 119; *R v Judge Russell; Ex parte Reid* (1984) 35 SASR 417; *Whalebone v Auto Panel Beaters & Radiators Pty Ltd (In liquidation)* [2011]

- (d) the judge’s association with a witness<sup>76</sup>;
- (e) the judge’s pecuniary interest in the result<sup>77</sup>; and
- (f) the judge’s association with counsel or the solicitors for one of the parties<sup>78</sup>.

### **G. Making the application:**

48. In most cases, it will be unnecessary to allege actual bias of the court or tribunal<sup>79</sup>. Actual bias is difficult to prove; a finding of actual bias should not be made lightly. Cogent evidence is needed<sup>80</sup>, and the *Briginsshaw* test<sup>81</sup> will be applied to allegations of actual bias<sup>82</sup>.
49. To disqualify a judge from sitting, it is not necessary to show that the Judge was in fact biased. It is sufficient to show a reasonable apprehension of bias.<sup>83</sup> In considering whether there was an apprehension of bias, the Court does not look at the mind of the Judge him or herself, but at the impression which would be given to the fair-minded lay observer. If the fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge has to decide, then the Judge should not sit and if the Judge does sit, then the decision cannot stand<sup>84</sup>.

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NSWCA 176; *Setka v Gregor* [2011] FCAFC 64; *Western Australia v. Watson* [1990] WAR 248; *Kartinyeri v Commonwealth* (1998) 156 ALR 300; *Gascor v Ellicott* [1997] 1 VR 332.

<sup>76</sup> *Trustees of the Christian Brothers v. Cardone* (1995) 57 FCR 327; *Fried v. National Australia Bank Ltd* [2000] FCA 787; *Temwell Pty. Ltd. v. DKGR Holdings Pty. Ltd* [2003] FCA 345; *Wintle v Stevedoring Industry Finance Committee* [2002] VSC 39.

<sup>77</sup> *Ebner v. Official Trustee* (2000) 205 CLR 337

<sup>78</sup> *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty Ltd* (1996) 65 FCR 215; *Kennedy v. Cabill* (1995) 19 Fam LR 173; *Taylor v. Lawrence* [2003] QB 528

<sup>79</sup> An exception was the now repealed provisions of the *Migration Act* 1958 (Cth) which permitted review of decisions of the Refugee Review Tribunal and the Minister on the grounds of actual bias.

<sup>80</sup> *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [69] per Gleeson CJ and Gummow J; *Sun v. Minister for Immigration* (1997) 81 FCR 71 at 123

<sup>81</sup> *Briginsshaw v Briginsshaw* (1938) 60 CLR 336 at 361, where Dixon J. said that the court “must feel an actual persuasion of its occurrence or existence ... It cannot be found as a result of a mere mechanised comparison of probabilities independently of any belief in its reality”.

<sup>82</sup> In *Keating v. Morris* [2005] QSC 243 at [47] it was suggested that the *Briginsshaw* test applies to cases of apprehended bias. However, this is not specifically supported by other authorities except to the extent that apprehended bias on the grounds of apprehended prejudice must be “firmly established”: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554.

<sup>83</sup> *R v. Watson; ex parte Armstrong* (1976) 136 CLR 248 at 258

<sup>84</sup> *Ebner v. Official Trustee* (2000) 205 CLR 337 at 344 [6]

50. An appeal from a decision, or an application for orders in the nature of certiorari or prohibition on the ground of apprehended bias, is unlikely to succeed unless application is made to the judge that he or she ceases hearing the case as soon as the relevant party becomes aware of the grounds giving rise to the application. If a party becomes aware of relevant facts giving rise to a suggestion of apprehended bias, and then sits on its hands, it is likely that –
- (a) as a matter of substance the party will be held to have waived its right to challenge the judge<sup>85</sup>; or
  - (b) as a matter of discretion, a remedy in the nature of a prerogative writ will be refused.
51. It has been said to be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her<sup>86</sup>. The following passage in the reasons of Brennan, Deane and Gaudron JJ in *Vakauta v Kelly*<sup>87</sup> was approved by Gleeson CJ, Heydon and Crennan JJ in *Smits v Roach*<sup>88</sup> –

Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a

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<sup>85</sup> *Smits v Roach* (2006) 227 CLR 423 at [43] per Gleeson CJ, Heydon and Crennan JJ

<sup>86</sup> *Vakauta v Kelly* (1989) 167 CLR 568 at 572

<sup>87</sup> (1989) 167 CLR 568 at 572

<sup>88</sup> (2006) 227 CLR 423 at [43]

situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her.

52. If, however, remarks by a judge which might give the appearance of bias are repeated in the judge's reasons for judgment, then this may constitute a separate ground, as the judgment itself would convey the appearance of bias. Any failure to take objection to earlier conduct of the judge during the trial would not necessarily amount to a waiver, as the reasons would provide a separate foundation for any challenge<sup>89</sup>.
53. Counsel must in appropriate circumstances be able to make a submission that a judge should be disqualified on the ground of apparent bias without that submission being treated as a contempt. If the submissions are properly and courteously made, even if they are misguided, the fact that the judge is annoyed or insulted by such an allegation cannot convert the making of such a submission into contempt of court.
54. However, any application to a judge must be based upon proper grounds. And a submission of bias by counsel, not for any genuine concern of bias, but to prevent the case being dealt with by a particular judge, or to gain an adjournment, or to gain some other procedural advantage whether in criminal or in civil proceedings, might well amount to contempt<sup>90</sup>.
55. *Magistrates Court of Victoria v. Robinson*<sup>91</sup> concerned misconduct by a Magistrate at Heidelberg which justified the Court of Appeal upholding an award of costs in prohibition proceedings brought against the Magistrate. Such an award can be made only in exceptional circumstances. The relevance of the case for present purposes is that the Magistrate threatened the applicant's solicitor with contempt proceedings when the solicitor suggested that the Magistrate should disqualify himself. Brooking JA summarised the position as follows –<sup>92</sup>

During the initial discussion (if such it can be called) on 5 November the magistrate continued in his rude and abrupt way. He was then met with an

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<sup>89</sup> *Vakanta v. Kelly* (1989) 167 CLR 568 at 573

<sup>90</sup> *Magistrates Court at Prabran v. Murphy* [1997] 2 VR 186 at 209 per Charles JA

<sup>91</sup> (2000) 2 VR 233

<sup>92</sup> (2000) 2 VR 233 at 241

application that he disqualify himself — an application properly made, both as regards its foundation and the manner in which it was put forward. The solicitor, Mr Metcalfe, in very trying circumstances, behaved courteously in trying to make his application. It was perfectly proper for him to ask the magistrate to disqualify himself, the intended basis of the application no doubt being — at least in part — that the magistrate had prejudged the matter by making up his mind irrevocably at too early a stage, without listening to argument and possible evidence. The magistrate behaved like a bully and, worst of all, threatened the solicitor with instant committal for contempt of court if he persisted in his application. What Martin J once called the immensity of the power to commit<sup>93</sup> makes the abuse of that power in the present case deplorable. It cannot be said to be mitigated by any stress that the magistrate was under or any justifiable irritation. The magistrate was continuing to behave as he had behaved up till then, although now his behaviour became worse. He refused to hear a party, and moreover in a criminal proceeding, and did so by using his contempt power as an instrument of oppression. Adapting the words of Wallace P in *Ex parte Corbisley; Re Locke*,<sup>94</sup> it may be said that “there was a denial of natural justice in the proceedings before this magistrate, and it is discouraging to learn that justice has been administered in this way by a modern Victorian court”.

56. Charles JA discussed the Magistrate’s threat to deal with the solicitor for contempt in the following terms —<sup>95</sup>

[25] A threat to deal with an advocate for contempt is a very serious matter. It is a “drastic and most unusual course”.<sup>96</sup> Courts must proceed very carefully before they make an order to commit to prison: *Re B (JA) (An Infant)*.<sup>97</sup> Furthermore it is particularly important that the power not be misused to prevent an advocate in good faith making proper submissions to a court. As Mason, Murphy, Wilson, Brennan and Dawson JJ said in *Levis v His Honour Judge Ogden*:<sup>98</sup>

The freedom and the responsibility which counsel has to present his client’s case are so important to the administration of justice, that a court should be slow to hold that remarks made during the course of counsel’s address to the jury amount to a wilful insult to the Judge, when the remarks may be seen to be relevant to the case which counsel is presenting to the jury on behalf of his client.

These observations, although made in relation to counsel’s address to the jury, are in my view at least equally relevant to the situation when an advocate is making legal submissions to a Judge or magistrate.

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<sup>93</sup> *Morris v Withers* [1954] VLR 100 at 104

<sup>94</sup> (1967) 67 SR (NSW) 396 at 398

<sup>95</sup> (2000) 2 VR 233 at 244

<sup>96</sup> *Maharaj* per Lord Salmon at 415

<sup>97</sup> [1965] Ch 1112 per Cross J at 1117–18

<sup>98</sup> (1984) 153 CLR 682 at 689

[26] There can be no question that counsel must be able in appropriate circumstances to make a submission that a magistrate should be disqualified on the ground of apparent bias without the making of that submission being treated as contempt: see *Magistrates' Court at Prabran v Murphy*.<sup>99</sup> The fact that a tribunal is annoyed or insulted by the fact that such an allegation has been made cannot convert the making of such a submission into contempt of court. Such a submission might become contemptuous if made in a sufficiently insulting or disrespectful manner,<sup>100</sup> or if made for an improper purpose<sup>101</sup> (eg not for any genuine concern of bias, but to prevent the case being dealt with by a particular Judge or magistrate, or to obtain an adjournment). But there was not the slightest suggestion in the evidence or submissions that Mr Metcalfe was disrespectful to the magistrate, and his application that the magistrate disqualify himself was, on the material before us, at the least made with full justification.

[27] In the present case the magistrate in my view failed to observe the principles of natural justice both on 7 September and 5 November, and, when the solicitor made a proper application that the magistrate disqualify himself, seriously abused his position by threatening to commit the solicitor for contempt of court.

## H. Appeal:

57. A decision of a court which is tainted by apprehended bias may be challenged by way of statutory right of appeal, where available, and by way of judicial review, where this has not been curtailed by statute. Care should be exercised in relation to courts and tribunals where the right of appeal is restricted to an appeal “on a question of law”. This is the position with both VCAT<sup>102</sup> and the Magistrates’ Court in respect of final orders in civil proceedings<sup>103</sup>. It is arguable that the existence or otherwise of grounds of apprehended bias is not a question of law. This doubt flows from the decision of the Court of Appeal in *Vidovich v. Mildura Rural City Council*<sup>104</sup> where Brooking JA observed –

A possible view is that whether a natural justice point raises a question of law within the meaning of s. 52 depends upon the nature of the point. One matter discussed with Mr. Southall, senior counsel for the appellant, was whether in a

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<sup>99</sup> [1997] 2 VR 186 at 209

<sup>100</sup> *Ex parte Bellanto; Re Prior* (1962) 63 SR (NSW) 190 at 196; *Magistrates' Court at Prabran v Murphy* at 209

<sup>101</sup> Compare *R v Shumiatcher* (1967) 64 DLR (2d) 24 at 32

<sup>102</sup> Section 148 of the *VCAT Act* 1998

<sup>103</sup> Section 109 of the *Magistrates Court Act* 1989

<sup>104</sup> [1999] 2 VR 399 at 406

case like the present the question of reasonable apprehension of bias should be viewed as one of law. It has been said that this question can be a difficult one involving matters of degree and that the particular circumstances may strike different minds in different ways: *Re Shaw; Ex parte Shaw* (1980) 55 A.L.J.R. 12 at 16 per Aickin J.; *Livesey v New South Wales Bar Association* (1983) 151 C.L.R. 288 at 294 and *Re J.R.L.; Ex parte C.J.L.* (1986) 161 C.L.R. 342 at 359 per Wilson J. One would not ordinarily say of a question of law that its resolution may involve matters of degree or that particular circumstances may strike different minds in different ways. But I shall assume for the purposes of this case that the question is one of law.

58. Perhaps the better view is that an erroneous refusal by a judge or magistrate of a statutory court to disqualify him or herself would inevitably result in an erroneous assumption by that judge or magistrate of a jurisdiction which he or she did not have. Thus the decision to refuse to disqualify raises a question of law. That argument found favour with Allsop P in *BAT v Laurie*<sup>105</sup>.
59. The High Court held in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*<sup>106</sup> that an intermediate appellate court dealing with an allegation of apprehended bias and other grounds of appeal must deal with the issue of bias first. As Kirby and Crennan JJ stated –<sup>107</sup>

An intermediate appellate court dealing with allegations of apprehended bias, coupled with other discrete grounds of appeal must deal with the issue of bias first. It must do this because, logically, it comes first. Actual or apprehended bias strike at the validity and acceptability of the trial and its outcome. It is for that reason that such questions should be dealt with before other, substantive, issues are decided. It should put the party making such an allegation to an election on the basis that if the allegation of apprehended bias is made out, a retrial will be ordered irrespective of possible findings on other issues. Even if a judge is found to be correct, this does not assuage the impression that there was an apprehension of bias (133). Furthermore, if, as here, an intermediate appellate court finds the allegation made out, but grants no relief because it otherwise finds in favour of the party making the allegation, a defect in the administration of justice has been found to have occurred which, in the absence of any successful appeal on the point, will remain unremedied. Inevitably, this adversely affects public confidence in the administration of justice.

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<sup>105</sup> [2009] NSWCA 414 at [27]

<sup>106</sup> (2006) 229 CLR 577

<sup>107</sup> at [117]

60. The rationale was explained by Gummow A-CJ<sup>108</sup> on the basis that to do otherwise permits an appellant to argue the appeal on inconsistent bases.

**I. Conclusions:**

61. *BAT v Laurie* does not mark any departure from established legal principle. The reasons of the judges in *BAT v Laurie* depend upon the assessment of a hypothetical impression. That is because the question as to what might reasonably be thought by the hypothetical fair-minded lay observer will always be a matter of impression on which judicial minds may differ. That accounts for the frequent divisions of opinion in appellate courts in pre-judgment cases.
62. As noted in paragraph 28(e) above, the majority described the circumstances in *BAT v Laurie* as unusual. But *BAT v Laurie* might be said to be no more than an application of *Livesey v New South Wales Bar Association*, and the only real question in controversy was the clarity of the adverse findings made by Judge Curtis in the *Mowbray* case.

**Michael Wheelahan, SC**

Aickin Chambers,

17 August 2011.

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<sup>108</sup> at [2]