LEARNED FRIENDS

LORD HOWE CONFERENCE 2014

AN EYE ON BIAS

IAN DUANE
Newcastle Chambers
38 Church Street
NEWCASTLE NSW 2300
T: 4929 6788
F: 4929 5524
E: iduane@newcastlechambers.com.au

INTRODUCTION

Unbiased adjudication is an obviously central plank of our system of justice. Judges are to be and be seen to be independent, objective and free from prejudice when making decisions.

Judges in Australia take an oath to "*do right to all manner of people after the laws of the state without fear or favour, affection or ill will."* Indeed in many instances a Judge will upon becoming aware of such a matter will stand aside of their own volition.

Indeed, the very image of justice Themis with her blindfold, scales and sword is reflective of this fundamental concept of unbiased decision making (and not to be confused with the other Greek God, Nemesis with her sword Vengeance).

Justice being seen to be done recognises the interest that *"even the appearance of departure from impartiality is prohibited. The reason for this is that even if there is no bias, but there is an appearance of bias, the integrity of the judicial system can be undermined. Public confidence depends significantly on the appearance as well as reality." (Justice David Ipp, Paper on Judicial Bias delivered 11.10.2004)*

Bias like beauty is to a certain extent in the eye of the beholder. The Judge, advocate and fictional observer view things from different perspectives.

These principles and perspectives collide often at short notice when a question arises as to whether a judge might not appear to be impartial.

Disqualification or recusal is a serious but sometimes necessary step which often raises sensitive issues which present particular challenges. These issues have the capacity to degenerate. This paper hopes to assist the proper handling of such circumstances.

BIAS WHAT IS IT?

The High Court in Minister for Multicultural Affairs v Jia (2001) 178 ALR considered the meaning of bias in the following terms:

> *'"Bias" is used to indicate some preponderating disposition or tendency, a "propensity; predisposition towards; predilection; prejudice". It may be occasioned by interest in the outcome, by affection or enmity, or, as was said to be the case here, by prejudgment. Whatever its cause, the result that is asserted or feared is a deviation from the true course of decision-making, for bias is "anything which turns a man to a particular course, or gives the direction to his measure".'* [1]

ACTUAL BIAS (ONLY DISRESPECTFUL FOOLS ALLEGE ACTUAL BIAS)

Disqualification may be sought on the grounds either of actual bias or apprehended bias.

Actual bias as it sounds requires factual proof that the particular Judge is in fact biased.

"Actual bias need not be intentional or conscious. It is possible for "actual bias [to] exist even if the decision-maker believes…that they have not prejudged a case". Strickland J in Stephens v Stephens [2010] Fam CA 184 10 March 2010 summarising Sun v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71

In practice often those alleging actual bias add the insult of suggesting intentional bias.

The outcome of a successful application for disqualification whether it is on the grounds of actual bias or apprehended bias is the same. Accordingly it makes little sense to pursue the more onerous test of actual bias.

---

[1] *Minister for Immigration & Multicultural Affairs v Jia* (2001) 178 ALR 421 at par 183, Hayne J, Gleeson CJ and Gummow J agreeing.

As Kirby J said in *Minister for Immigration & Multicultural Affairs v Legeng* [2001] HCA 17; (2001) 205 CLR 507, said at 541:

> *"A party would be foolish needlessly to assume a heavier obligation when proof of bias from the perceptions of reasonable observers would suffice to obtain relief."*

Accordingly whilst from time to time in the heat of battle allegations of actual bias are sometimes made they are generally withdrawn and they are certainly foolish and unnecessary. That is not to say that the vehicle of apprehended bias will not in many instances be regarded as a thinly veiled nicety.

APPREHENDED BIAS – THE TEST

In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) held at 344-345:

> *'6. Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge…the governing principle is….* ***a judge is disqualified if 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 required to decide.'***

This test was formulated in *Livesey v New South Wales Bar Association* (1983) 151 at 293 and has been confirmed in a series of decisions since including *Johnson v Johnson* (2000) 205 CLR 337.

PRINCIPLES UNDERLYING THE APPREHENDED BIAS TEST

The High Court in *Johnson v Johnson* (2000) 205 CLR 337 Gleeson CJ, Gaudron, Mchugh, Gummow and Hayne JJ at 630 [12] said:

> *'That test has been adopted, in preference to a differently expressed test that has been applied in England, for the reason that it gives due recognition to the fundamental principle that justice must both be done, and be seen to be done.*

It is based upon the need for public confidence in the administration of justice. "If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision." The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'.

TWO STEP TEST

Ebner described the test as involving the following two steps:

> *'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 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 apprehension of bias be assessed'.*[2]

As a practical matter this means some consideration needs to be given as to proper proof of the matter that is said to be complained of. In the event that the complaint is based on comments or interchange between judge and counsel during trial then transcript should be sought to be obtained time permitting.

Sometimes these matters can be dealt with less formally and in discussion but if there is a contest then an affidavit and transcript or playback of the audio should be obtained.

[2] Joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee* (2000) 205 CLR 337 at par 8.

THE REASONABLE OR FAIR MINDED LAY OBSERVER

"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 or ability of a particular judge, 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". (Johnson v Johnson above at page 630 [13]).

As might be expected, there is opportunity for considerable controversy about what a fair minded lay observer, properly informed, might think.

This has resulted in quite a bit of discussion in the cases about who the fair minded lay observer is, how much knowledge they have and what they are entitled to think.

Kirby J in *Johnson & Johnson* page 643, paragraph 53 said the following:

> "53. *The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality."*

PREJUDGEMENT WHAT IS IT?

'…185. Saying that a decision maker has prejudged or will prejudge an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots. First, there is the contention that the decision maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision maker will apply that opinion to that matter in issue. Thirdly, there is the contention that the decision maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.

…

186. *…preconceived opinions – though it is unfortunate that a judge should have any – do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded'.*[3]

'*71. Decision makers, including judicial decision makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision maker's mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias.'*[4]

'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

[3] Hayne J in *Minister for Immigation & Multicultural Affairs v Jia at paras 185 and 186.*

[4] Gleeson CJ & Gummow J in *Minister for Immigration & Multicultural Affairs v Jia (2001) 178 ALR 421 at par 71.*

previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.[5]

THE PROFESSIONAL MODERN JUDGE TENTATIVE VIEWS

The fictional observer also has to be aware that modern litigation involves significant case management with Judges engaged in at times robust interchange endeavouring to elicit and narrow the real issues at trial.

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 … (robust interchange) which is so helpful in the identification of real issues and real problems in a particular case." 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 prejudgment. 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.

EXCESSIVE INTERVENTION

There is obviously a continuum between the silent Judge who, if they had spoken their thoughts, may have been persuaded to a different conclusion at the one end and the Judge who intervenes so much as to appear to take on the role of an advocate in the case, thereby to have their "vision clouded by the dust of conflict".

A review of the principles concerning excessive intervention was considered in *Galea v Galea* (1990) 19 NSW LR 263 at 281/282 which, incidentally, found that the Judge did not intervene excessively, indeed Meagher JA saying:

"A reasonably disinterested bystander … would not have reasonably apprehended that the trial judge was prejudiced, he would only have noted

[5] *Johnson v Johnson*, Page 630, paragraph 13

that an exceptionally irritating witness had eventually succeeded in irritating the Judge."

SNAP JUDGMENTS/CLARIFICATION

In *Johnson & Johnson,* Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said at 631 par 14:

'There was argument…about whether the effect of a statement that might indicate prejudgment can be removed by a later statement which withdraws or qualifies it. Clearly, in some cases it can…no doubt some statements or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement. It depends upon the circumstances of a particular case. The hypothetical observer is no more entitled to make snap judgments than the person under observation.'

POSSIBILITIES RATHER THAN PROBABILITY

The relevant test involving "might not" is a significant departure from earlier more strict test of disqualification.

FIRMLY ESTABLISHED/REAL NOT REMOTE

In *re JRL; exparte CJL* (1986) 161 CLR 342 at 352 Mason J held

'*Disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": Reg v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group; Watson; re Lusink; ex parte Shaw'.*

DUTY TO SIT

The High Court spoke of the need for courts to sit and hear cases unless disqualified by law and reminded not to accede too readily to suggestions of an appearance of bias in R*e J.R.L; Ex parte C.J.L (1986)161 CLR 352*

"Although it is important that justice be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour"

OBLIGATION TO DISCLOSE

A number of cases have discussed the desirability of the trial judge at an early stage putting on the record any matters that might lead to a perception of bias.

See *Dovade Pty Ltd v Westpac Banking Corporation* (1999) 46 NSWLR 168 at [105] to [107].

PECUNIARY INTEREST

With pecuniary interest like other areas it really depends upon the particular facts of the case and the degree of interest or association.

The mere fact of being a bank customer for example would not give rise to disqualification in proceedings involving the bank.

Indeed owning shares in a bank would not by itself be a cause, however, if the outcome of the proceedings will affect the value of the shares then there should be a disqualification. See *Dovade Pty Ltd v Westpac Banking Corporation*. See also *Ebner v Official Trustee* above.

In *Ebner* at the commencement of the trial the Judge disclosed to the parties that he was the director of the trustee of a family trust which owned 8,000 to 9,000 shares in a bank and that he was a contingent beneficiary of the trust. The bank was not a party to the proceedings but had a pecuniary interest in the outcome.

As was said by Gleeson CJ, McKew, Gummow and Hayne JJ at page 350:

> "*Ownership, direct or indirect, of shares in a corporation is but one possible form of association with, and potential interest in, a litigant or a case. In contemporary Australia, ownership of shares in a listed public company is a common form of saving and investments, both amongst members of the community generally and amongst Judges. It is not confined of a wealthy individual. In recent years, processes of privatisation and demutualisation of what were formerly public institutions or utilities, or mutual societies have resulted in further expansion of share ownership. The nature of the association with, or interest in, litigation, of an investor in a listed public company, may be substantially different from that of a shareholder in a private company"*

And at page 356

> *"We do not accept the submission that there is a separate and freestanding rule of automatic disqualification which applies where a Judge has a direct pecuniary interest, however small, in the outcome of the case over which the Judge is presiding*".

And at 357;

> "*Dimes did not hold, and it is not the case, that the mere fact of ownership of shares in a listed public company which is a litigant means that the Judge has a direct pecuniary interest in the outcome of the litigation. There is a difference between having an interest in the outcome of a case, and having an interest in a party to the cause ... the apprehension of bias principal requires articulation of the connection between the asserted interest and the disposition of the cause which is alleged. If, on examination, the Judge does have a financial interest in the outcome of the litigation, the application of the apprehension of bias principle will lead to the Judge being disqualified. By contrast, where, as here, it is clear that the outcome of a case would have no bearing upon the value of the shares held by the Judge in the listed public company, and there is no other suggested from of pecuniary interest involved, then the Judge does not have a direct pecuniary interest in the outcome of the litigation*."

PRIOR VIEWS EXPRESSED

"The fact that a trial judge has expressed views in previous decisions, or in extra / judicial publications in relation to the kind of litigation before the Court, which may have questioned an existing line of authority is not normally a reason for

disqualification unless those views were expressed with such trenchancy, or in such unqualified terms, as to suggest that the Judge could not hear the case with an "open mind" : *Timmins v Gormley* [2000] 1 ALL ER 65 and *Newcastle City Council v Lindsay* [2004] NSW CA 198 (paper "disqualification for bias Judicial Commission of New South Wales").

COMMUNICATIONS WITHOUT THE KNOWLEDGE, CONSENT OR APPROVAL OF THE OTHER PARTY

In *Re JRL ex parte CJL* this issue of communications in the absence of another party between a Judge with another party witness or legal representative was dealt with. In that case a councillor had approached the Judge in chambers and expressed certain views about whether or not the Judge should as the Judge had planned adjourn some proceedings involving a child or children.

STATEMENTS MADE DURING TRIAL ABOUT CREDIT

Whilst Judges not to sit mute during trial, ultimately the question will turn upon the strength of the language used in the circumstances of the case.

It should be noted that statements indicating that the Judge will not take into account either of the parties' testimony whilst appearing to operate equally in relation to each of the parties may have more serious consequences for one party than another and as such have been held to be a proper basis for disqualification as held by the High Court in *R v Watson*; *ex parte Armstrong* (1976) 136 CLR 248.

However, comments which indicate that in an appropriate case the Judge intends to focus mainly on documents may not amount to bias. See *Johnson v Johnson* (2000) 201 CLR 488 where a Judge was resolving a contest as to the extent of a party's enormous financial interests.

PRIOR CREDIT FINDINGS AND CREDIT FINDINGS AT INTERLOCUTORY STAGES

Strong findings on credit or in relation to facts where such credit or facts are of significance in later proceedings may cause disqualification. An example of this is in *Spedley* above where there was a large and complicated series of litigation of a commercial nature being managed by a Judge and there were real problems of a practical nature that would flow from such disqualification.

See also *Livesy v NSW Bar Association (1983) 151 CLR 288* for example of credit findings in prior proceedings.

FAMILY RELATIONSHIPS

A Judge being related to an important player in the litigation whether that is a lawyer, witness or party, may lead to disqualification again depending on the circumstances and the closeness of the relationship. Ordinarily a Judge would not sit in a case being where one of their children is an advocate.

What is required is a logical connection between the relationship and the feared deviation from impartiality. See *Smits v Roach (2006) 227 CLR 423*.

In that case before the hearing began the Judge disclosed to the parties that the second Defendant was personally known to the Judge and invited the parties to indicate whether or not there was an objection to the Judge hearing the case. No objection was made. Some months after conclusion of the hearing but before judgment the Judge disclosed that his brother was the chairman of partners of the firm that had been sued for professional negligence. This fact was known by Senior Counsel for the Plaintiff but apparently not the Plaintiffs themselves.

The decision was really made on the basis the Plaintiff were bound by their Senior Counsel's knowledge and failure to promptly apply for disqualification and accordingly had waived the right to object,

OTHER ASSOCIATIONS

Associations may also cause difficulties and lead to recusal and these have been considered in a number of cases and perhaps the most famous being the trial of General Pinochet.

As was said by the majority in *Ebner* at 350:

> *"It is not only association with a party to litigation that may be incompatible with the appearance of impartiality there may be a disqualifying association with a party's lawyer, or a witness, or some other person concerned with the case. In each case, however, the question must be how it is said that the existence of the "association" or "interest" might be thought (by the reasonable observer) possibly to divert the Judge from deciding the case on its merits. As has been pointed out earlier, unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies. Similarly, the bare identification of an "association" will not suffice to answer the relevant question. Having a mortgage with a bank, or knowing a party's lawyer, may (in many cases will), have no logical connection with the disposition of the case on its merits."*

PRIOR COMPLAINTS

Prior complaints to the Judicial Commission, Legal Services Commissioner, Bar Association or other in relation to the Judge may also raise issues for consideration about whether a Judge should step aside. See *Attorney General of New South Wales v Klewer [2003] NSWCA 295*.

WAIVER

Waiver is quite and important area. Waiver may be express or implied. The question of implied waiver was dealt with in *Vakauta v Kelly* (1989) 167 CLR 568 where the majority (Brennan, Deane and Gaudron JJ) said at 572:

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

Dawson J said separately:

'Where a party, being aware of his right to object, waives that right, there will be little danger of the appearance of injustice… In my view, where a party in civil litigation, being aware of the circumstances giving rise to a right to object, allows the case to continue for a sufficient time to show that he does not presently intend to exercise that right, he may be held to have waived it.'

The principles of waiver outlined in *Vakauta & Kelly* have been regularly affirmed including by the High Court in *Smits & Anor v Roach & Ors* (2006) 228 ALR 262 with a joint judgment of Gleeson CJ, Heydon and Crennan holding at 274:

'It has been held in this Court, on a number of occasions, that an objection to the constitution of a court or tribunal on the ground of apprehended bias may be waived, and that, if a litigant who is aware of the circumstances constituting a ground for such objection fails to object, then waiver will result.'

Kirby J in the same case held at 296:

> *'It is now settled law…that where a litigant, aware of circumstances providing a ground for objection on the basis of disqualification, fails to object promptly, that litigant will be taken to have waived the objection and cannot later rely on it. Obviously, this conclusion represents a practical approach, even if at the cost of doctrinal purity'.*

Whilst a different jurisdictional basis of estoppel may also be invoked generally the less onerous contention of waiver is relied upon given that waiver does not require proof of reliance.

EXCEPTIONS INCLUDING NECESSITY CONSENT OR SPECIAL CIRCUMSTANCES

Even if a ground for disqualification has been made out a judge may continue to hear a case in circumstances which amount to necessity, consent or special circumstances.

Essentially necessity in particular is looking at the types of cases where by necessity the judge has to continue to hear the case which might include circumstances of urgency or risk, for example, to children, combined with a lack of availability of another judge to hear a matter.

Although there is no doubt that the exception is recognised considerable controversy exists as to its exercise.

Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70. See also *Australian National Industries Limited v Spedley Securities Limited* (in liq) (1992) 26 NSWLR 411.

PROCEDURE

The relevant procedure for bringing an application for disqualify may vary depending upon the circumstances. Such an application may be made without filing a formal motion or application in a case. Before considering such a matter it is appropriate to put the issue onto the record at an early stage which amongst other things would allow the opportunity for a perception to be clarified by the judge.

In the event that an application has to proceed then it must be on explicit instructions and it is advisable that there be an adjournment which allows for time to advise and reflect on the wisdom of the application (*Johnson v Johnson*, Kirby J, page 639)
If there is an application it is preferable that it be by motion and or interim application supported by affidavit including transcript, if necessary, which proves the matter said to give rise to the problem along with the connection between the matter and the issue to be decided.

The procedure is to be listed before the judge who is the subject of the application and it is not to involve any contest on facts.

Whilst the judge has a duty to disclose there is to be no cross examination of the judge about such matters.

APPEALS

In some cases there may be the ability to appeal (with leave) directly against a decision declining to step aside. In other circumstances an appeal should form part of the appeal against the judgment overall. In any such later appeal the bias ground should be the first ground of appeal.

It is important to bear in mind that it is not the actual reasons for the decision but the appearance of prejudging the decision that is relevant to such an appeal ground.

The remedy of prohibition may also be considered for Local or District Court matters.

COSTS

In the event that there is a successful application to disqualify an application may be made by one or both of the parties and any Independent Children's Lawyer under s.10 of the *Federal Proceedings (Costs) Act* 1981 (Cth). Each of the States and Territories have similar provisions for State proceedings. In New South Wales see Section 6A Suitors Fund Act NSW.

If the discontinuance and new hearing are not attributable to the neglect, default or improper act of any party (s.10(3)(b)). See *Reisner v Reisner (Costs)* [2010] FamCA 588; see also *Cramer v Davies* 72 ALJR 146 for questions relating to capping of the amount.

CAREFUL, THEY BITE *GRIMWADE v MEAGHER*

This whole area is fraught with the real possibility of a serious degeneration in the trial process and at times in the relationship between Counsel and the Bench.

An example of this is *Owens and Owens (No. 2)* [2010] FMCA Fam 2 where Counsel applied for the then Federal Magistrate to disqualify himself and the then Federal Magistrate threatened to remove Counsel pursuant to the power of the Court to control Counsel discussed in *Grimwade v Meagher* (1995) 1VR 446.

In another recent case involving a local Newcastle matter an application was made for the Federal Circuit Court Judge to disqualify herself. That application was rejected and there was an appeal. In the course of the reasons for Judgment at trial and reported on appeal the Trial Judge and Appeal Court found that there was a possibility that the wife had received very poor legal advice. See *Scully and Waugh* [2013] FamCAFC209 2012-2013.

It is necessary at this point to reflect on the need for there to be a mutually respectful relationship but in particular having regard to the reality of the process and in

particular the need for Counsel to accept rulings with grace on the one hand and the opportunity for Counsel to be heard and present their case on the other.

SOME OF THE CASES FACT SCENARIOS

Dovade Pty Ltd v Westpac **[1999] NSWCA 113**

Judge had previously acted as a prosecutor in a committal and contested stay proceedings against a witness called by one of the parties.

Smits & Anor v Roach & Ors **[2006] 227 CLR 423**

Judge's brother a partner of Defendants' law firm. Defendants were being sued for professional negligence. Plaintiff's Senior Counsel's knowledge and response consitituted waiver.

Galea v Galea **(1990) 19 NSWLR 263**

Judge (Powell J) significant questioning and comments about a witness's evidence and a question about whether the Judge had entered the fray.

JRL ex parte CJC **161 CLR 343**

Custody proceedings. A counsellor sees a Judge in his private Chambers regarding a proposed adjournment of the proceedings and the question of the prospective expert's qualifications.

Laws v ABC **[1990] 170 CLR 71**

Proposed Tribunal Member had made a prior finding of breach of standards and therefore disqualified from sitting on Tribunal in relation to whether there had been a non-compliance with standards.

Australian National Industries v Spedley Securities **… (1992) 26 NSWLR 411**

In this series of complex company litigation the Judge had made findings critical of the recollection, credit and commercial conduct of the parties and the same or similar issues arose in these proceedings.

***Johnson & Johnson* 26 FamLR 627**

Sixty-six day hearing, big money Family Law property case. Issue as to whether one of the parties had beneficial ownership of various assets held overseas. The trial Judge had said that he would be primarily looking at witnesses other than the parties and other documents in determining where the truth lies.

***Strahan v Strahan* (Disqualification) (2009) FLC 93/414**

Judge had previously in his former life as a solicitor employed the wife and terminated her due to unsatisfactory performance.

***Stevens & Willis* [2010] FamCA**

Judge in proceedings involving the proposed relocation of a child or children to Ireland by an Irish Catholic declared that she was of Irish Catholic heritage.

***Livesy v NSW Bar Association* (1983) 151 CLR 288**

Proceedings were to strike a barrister off the roll for professional misconduct in the course of which the Court was required to determine certain matters of fact and hear evidence from a witness in relation to them. In previous proceedings where the Barrister had not been a party or a witness two of the Judges had expressed adverse opinions about the barrister's conduct and had expressed the view that he had actively and knowingly participated in a conspiratorial arrangement to secure release of the client on bail by the use of the client's own money.

***R v Watson ex parte Armstrong* (1976) 136 CLR 248**

These were property proceedings in the Family Court and the Judge during interlocutory applications had said that he would not accept evidence of either of the parties at trial without corroboration.