FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

Cases every family lawyer should have up their sleeve

The Honourable Justice Carew

Apprehension of bias: *Ebner v Official Trustee in Bankruptcy*

(2000) 205 CLR 337

Apprehension of bias principle

"Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver … or necessity … **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 is required to decide."**

Rationale for the principle:

"[J]ustice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal." (*Charisteas* (2021) 393 ALR 389 at [11])

What needs to be established: *Ebner* steps

1) Identification of what it is said might lead a judge to decide a case other than on its legal and factual merits

2) An articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits (from the perspective of the fair-minded lay observer)

Example: *Charisteas* (2021) 393 ALR 389

- Step one (identification): numerous communications both in writing and in person between the trial judge and one party's barrister (in the absence of the other party's barrister) and without the previous knowledge and consent of the other party
- Step two (logical connection): the trial judge's impartiality might have been compromised by something said during the communication or some aspect of the personal relationship exemplified by the communications
- Outcome: recusal should have occurred

Example: ***Johnson*** **(2000) 201 CLR 488**

- Step one (identification): trial judge made comments at the commencement of the trial that he would rely on witnesses other than the parties in order to determine where the truth lies
- Step two (logical connection): the argument that the comments indicated pre-judgment failed. In circumstances where the affidavit material indicated a wide divergence between the evidence of both parties, the comments of the trial judge made "good sense"
- Outcome: recusal application rightly failed

Example: *Strahan* (2009) FLC 93-414

- Step one (identification): a party had previously been employed by the trial judge and dismissed because of unsatisfactory performance
- Step two (logical connection): the trial judge might consider that a person deemed unsuitable by him even to be permitted to complete what was a short term contract of employment in an office position would be unlikely to be of any real assistance in helping develop a very sophisticated and profitable business.
- Outcome: recusal should have occurred

Example: *SCVG & KLD (No 2)* (2016) FLC 93-714

- Step one (identification): during an appeal, counsel was repeatedly interrupted and questioned about the authorities which he relied upon and asked to address other authorities. The interjections were described as “rapid fire” (doubt expressed that the ‘rapid fire’ could satisfy step one)
- Step two (logical connection): exchanges between counsel and judges can be helpful to both the judge and counsel in the identification of the real issues and the strengths and weaknesses of propositions and arguments as to the law
- Outcome: recusal application failed

Example: *Sellers & Burns* [2019] FamCAFC 111

- Step one (identification): various comments made during the proceedings by the trial judge as identified by reference to the transcript and the tone of voice used when making the comments
- Step two (logical connection): the trial judge's comments conveyed the impression of a formed opinion and were compounded by the absence of any evidence to support the opinion. When viewed as a whole, the nature of comments made and the sarcastic tone used raise the apprehension that the trial judge would not bring an impartial mind to the resolution of the dispute
- Outcome: recusal should have occurred

Adjournments: *Mertens & Mertens*

[2016] FamCAFC 136

Adjournments – what factors are relevant?

- Reasons for the adjournment
- Any delay in making the application for an adjournment
- Any prejudice to the other party that cannot be compensated by an order for costs

What factors are relevant? (cont)

- The impact on the court and other litigants if the adjournment is granted (***Aon Risk Services v ANU* (2009) 239 CLR 175)**
- Fundamental consideration is to do justice between the parties
- s97(3) FLA obligation to ensure proceedings are not protracted

Additional consideration in child-related proceedings

- s69ZN(3) obligation to consider the impact that the conduct of child-related proceedings may have on a child

Extensions of time: *Gallo v Dawson*

(1990) 93 ALR 479

Extensions of Time - principles

- Even where Rules permit a grant of extension of time – it is not automatic
- Rules which fix times for doing acts should not become instruments of injustice
- The discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties

What factors are relevant?

- The history of the proceedings
- The conduct of the parties
- The nature of the litigation
- The consequences for the parties of the grant or refusal of the application for extension of time
- When considering an extension of time to file an appeal, it is necessary to consider the prospects of the applicant succeeding in the appeal

Bound by the conduct of your case: *Metwally v University of Wollongong (No 2)*

(1985) 60 ALR 68

Bound by the conduct of your case

“Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.”

And:

"A party seeking to advance for the first time on appeal a new ground not taken at trial will be precluded from doing so if the new ground could possibly have been met by calling evidence at the hearing or if, had the ground been raised below, the respondent might have conducted the case differently" (*Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631)

Rationale:

"It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish." (*Coulton v Holcombe* (1986) 162 CLR 1)

Exception: *Tibb & Sheean* [2018] FamCAFC 142

- The central issue sought to be raised on appeal was a question of law

- "A party does not have a right to insist that a new point be decided on appeal simply because all of the facts have been established beyond controversy or the point is one of construction or of law, even constitutional law. This is because it remains a question of whether the appellate court 'may find it expedient and in the interests of justice to entertain the point'" (*Multicon Engineering*)

What was the question of law?

- The interpretation and application of s65DAA FLA (i.e. where ESPR: requirement to *consider* equal time/reasonable practicability and substantial and significant time/reasonable practicability)
- It was not suggested that either the respondent or the ICL would have called other evidence at trial or conducted their cases differently if this argument had been run at trial
- The ICL's arguments on appeal directly engaged with the interpretation of s65DAA

Court cannot abrogate its decision making responsibility to third party: *Re David*

(1997) FLC 92-776; [1997] FamCA 48

What order was made?

The trial judge made an order providing that physical contact only occur between the mother and the child, should the mother’s therapist and others agree that she should have contact with the child.

The concern expressed by the Full Court:

“In the first place, there may be no therapist for the mother because his Honour merely recommended that the mother should have therapeutic counselling. More importantly, however, we consider that to make an order in this form is to abdicate the responsibility of the Court to other people, one or more of whom may never agree to the resumption of contact.”

Federal Circuit and Family Court of Australia (Division 1)

That's all folks