HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
HAYNE, HEYDON, CRENNAN AND BELL JJ

MICHAEL WILSON & PARTNERS LIMITED APPELLANT

AND

ROBERT COLIN NICHOLLS & ORS RESPONDENTS

Michael Wilson & Partners Limited v Nicholls [2011] HCA 48
1 December 2011
S67/2011

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraphs 3, 4, 5, 6 and 7 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 15 September 2010.*

3. *Remit the matter to the Court of Appeal for further consideration of:*

   (a) *grounds 5(b) to (c), 6 to 15, 17(b) to (d), 18, 20 and 21 of the Amended Notice of Appeal dated 7 May 2010; and*

   (b) *the Notice of Cross-Appeal dated 29 January 2010.*

4. *Costs of the appeal to the Court of Appeal, including the costs of the hearing on remitter, be in the discretion of that Court.*

5. *Money paid into Court by the appellant, in satisfaction of a condition of the grant of special leave, be paid out to or at the direction of the appellant.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with M Walton SC and D F C Thomas for the appellant (instructed by Clayton Utz Lawyers)

G C Lindsay SC with G W McGrath SC and A D B Fox for the respondents (instructed by Henry Davis York)

CATCHWORDS

Michael Wilson & Partners Limited v Nicholls

Courts and judges – Bias – Apprehended bias – Appellant successfully applied ex parte to use respondents' affidavits for foreign proceedings and criminal investigations on several occasions – Judge relied on appellant's unchallenged affidavit evidence – Applications heard in closed court and orders made preventing respondents knowing about applications – Whether fair-minded lay observer might reasonably apprehend judge might not bring impartial and unprejudiced mind to resolution of issues at trial of action.

Practice and procedure – Appeal – Trial judge refused respondents' pre-trial disqualification applications – Trial judge offered to make orders facilitating urgent appeal – Whether order on disqualification application capable of appeal – Respondents did not seek leave to appeal – Whether respondents permitted to raise disqualification on appeal from final judgment.

Abuse of process – Multiple proceedings – Appellant commenced arbitration proceeding against solicitor in London for breach of fiduciary duty then proceeding against respondents in Supreme Court of New South Wales for knowingly assisting solicitor's breach and in tort – Loss from substantially same breaches of fiduciary duty alleged in both proceedings – Proceedings could not be brought in one venue – Supreme Court delivered judgment before arbitrators delivered award on liability – Findings about appellant's loss differed – Whether Supreme Court proceeding abuse of process.

Equity – Remedies – Solicitor liable to appellant for breach of fiduciary duty – Respondents liable to appellant for knowingly assisting solicitor's breach – Whether respondents' liability ancillary to, coordinate with or necessarily limited by solicitor's liability – Equity against double recovery – Whether respondents have equity to prevent appellant enforcing Supreme Court judgment against them where particular loss satisfied pursuant to arbitral award against solicitor.

Words and phrases – "abuse of process", "appeal", "apprehended bias", "arbitration", "disqualification", "double recovery", "ex parte application", "multiple proceedings", "order".

GUMMOW ACJ, HAYNE, CRENNAN AND BELL JJ.

The issues

1 This appeal raised three issues.

2 First, should the judgment entered for the appellant at trial in the Supreme Court of New South Wales have been set aside (as it was by the Court of Appeal) because a fair-minded lay observer might reasonably have apprehended, from what had occurred in several interlocutory applications made before trial by the appellant without notice to the respondents, that the judge might not bring an impartial and unprejudiced mind to the resolution of the issues in the trial?

3 Second, were the respondents (the parties that alleged there was a reasonable apprehension of bias) prevented from making that complaint in an appeal against the final judgment given at trial because they did not seek, before the trial began, to appeal against the trial judge's refusal to recuse himself?

4 Third, did the institution or prosecution (or both institution and prosecution) in the Supreme Court of New South Wales of the appellant's proceedings against the respondents constitute an abuse of the process of the Supreme Court? One of the claims made by the appellant against the respondents in the New South Wales proceedings was that the respondents had knowingly assisted a person not a party to those proceedings in that person's breaches of fiduciary duties to the appellant. The appellant had commenced an arbitration in London against that other person seeking relief for substantially the same breaches of fiduciary duties as the appellant alleged in the New South Wales proceedings. As events turned out, different conclusions were reached in the London arbitration from those reached in the New South Wales proceedings about the loss the appellant suffered as a result of the breaches of fiduciary duty.

5 The three issues raised in this Court should be resolved as follows. There was not a reasonable apprehension that the trial judge was biased. The question of waiver need not be decided. There was not an abuse of process. The appeal should be allowed and consequential orders made.

The parties

6 The appellant, Michael Wilson & Partners Limited ("MWP"), was incorporated in the British Virgin Islands. MWP was controlled by Michael Earl Wilson, who described himself as a "corporate transaction lawyer". At the times

relevant to this matter, MWP practised as a law firm and a business consultancy in the Commonwealth of Independent States[1] from offices in Kazakhstan.

7 In December 2001, MWP made an agreement with John Forster Emmott, an English and Australian solicitor, that Mr Emmott would join MWP as a director and shareholder with effect from January 2002. They agreed that "in effect" MWP would "operate as a quasi-[p]artnership between them". The agreement provided that each party should have and would observe "the usual partnership obligations and duties to each other".

8 From 24 April 2004 until 1 March 2006, the first respondent (Mr Nicholls, an Australian barrister) was employed by MWP as a senior associate or, as he described himself, a "senior expatriate lawyer". From 1 September 2005 to 9 January 2006, the second respondent (Mr Slater, an Australian solicitor) was employed by MWP as an associate.

9 By the end of June 2006, Messrs Nicholls, Slater and Emmott had all left MWP. Mr Slater did not return to work from annual leave he took from 21 December 2005; Mr Nicholls left employment on 1 March 2006; by letter dated 30 June 2006, Mr Emmott gave notice terminating his agreement with MWP with immediate effect.

10 The third, fourth and fifth respondents ("the Temujin companies") are companies that, at the relevant times, were associated directly or indirectly with some or all of Messrs Nicholls, Slater and Emmott. The exact nature of that association need not be explored. The fourth respondent (Temujin International Ltd – "TIL") operated as a business adviser, agent and arranger, and provided legal services. Two of the Temujin companies (TIL and the third respondent – Temujin Services Ltd) were incorporated in the British Virgin Islands; the third (Temujin International FZE – the fifth respondent) was incorporated in a Free Trade Zone in the United Arab Emirates. Another Temujin company (Temujin Holdings Ltd) and a Kazakhstani limited liability company called Shaikenov & Partners LLP were named as defendants in the New South Wales proceedings, but neither took any active part at first instance, and neither was a party to the subsequent proceedings in the Court of Appeal or this Court.

11 MWP alleged that each of Messrs Nicholls, Slater and Emmott, separately and together, furthered his or their own interests at the expense of MWP. A

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1 An association of states that had been constituent republics of the Union of Soviet Socialist Republics.

central allegation was that Messrs Nicholls, Slater and Emmott had conspired together to divert, and had in fact diverted, clients and business opportunities away from MWP to their own benefit by having one or more of the Temujin companies act for the clients in question or by taking advantage of business opportunities that would otherwise have gone to MWP.

Arbitration and action

12 MWP sought relief in several different jurisdictions. The persons and entities MWP sued were located in different places. The principal proceedings brought by MWP were an arbitration in London against Mr Emmott and the proceedings in the Supreme Court of New South Wales against Messrs Nicholls and Slater, the Temujin companies and the other defendants mentioned earlier in these reasons. Other litigation in other jurisdictions can conveniently be described as satellite litigation and, although some reference must be made to some of those satellite proceedings, chief focus must fall upon the London arbitration and the New South Wales proceedings.

13 MWP served a notice of arbitration on Mr Emmott in August 2006; it commenced the New South Wales proceedings against Messrs Nicholls and Slater and others in October 2006. It will be necessary to describe the course of events in both proceedings. But before doing that it is desirable to say a little more about why there was both an arbitration and an action and the nature of the claims that were made in each.

14 The London arbitration between MWP and Mr Emmott was instituted in accordance with an arbitration clause contained in the agreement those parties had made. Because Messrs Nicholls and Slater and the other defendants in the New South Wales proceedings were not parties to that (or any other) arbitration agreement with MWP they could not be added as parties to the arbitration between MWP and Mr Emmott.

15 After MWP had commenced its action in New South Wales against Messrs Nicholls and Slater and others, it invited Mr Emmott to consent to being joined as a party to the New South Wales action. Mr Emmott declined that invitation and threatened to seek an anti-suit injunction if MWP took any step to have him joined in the New South Wales proceedings. Thereafter, the London arbitration and the New South Wales proceedings took their separate courses.

16 Because MWP had made the agreement it had with Mr Emmott, the controversy between MWP and those who it alleged had acted together to harm MWP was to be resolved as to part in one venue (the London arbitration) and as to part in another (the Supreme Court of New South Wales). Although MWP

alleged that Mr Emmott had breached fiduciary duties he had owed it, and that Messrs Nicholls and Slater and the corporate defendants in the New South Wales proceedings were liable to MWP because, among other things, they had knowingly assisted Mr Emmott in those breaches, MWP could not have those complaints heard and determined by the one process, whether arbitral or curial.

17 Of the satellite litigation it is enough to notice that, in the Eastern Caribbean Supreme Court, MWP sought and obtained freezing orders against the two Temujin companies that were incorporated in the British Virgin Islands and the appointment of a receiver to several other entities said to be associated with some or other of Messrs Nicholls, Slater and Emmott. In the High Court of Justice in England, MWP obtained freezing orders against Mr Emmott, his wife and others said to be associated with him.

18 In the course of the New South Wales proceedings, MWP made several applications ex parte seeking and obtaining orders against or in relation to Messrs Nicholls and Slater or their assets. It will later be necessary to describe those applications in a little detail for it is those applications and their disposition that lie at the heart of the allegation of apprehended bias.

19 MWP also made complaints or reports to authorities in the British Virgin Islands, the United Kingdom and Switzerland alleging that Mr Emmott had committed criminal offences or that his activities warranted investigation. Again it will be necessary, for the purposes of considering the question of apprehended bias, to notice steps taken in the New South Wales proceedings in connection with the complaint made to Swiss authorities. Before undertaking those tasks, it is as well to identify the general nature of MWP's claims and sketch the course of events in the London arbitration and the New South Wales proceedings.

The nature of the claims made by MWP

20 MWP alleged that Mr Emmott had acted in breach of contractual and fiduciary obligations he owed to MWP. It claimed, in the London arbitration, an account of the profits Mr Emmott had made from what it characterised as clients and work he had diverted from MWP to his own benefit. MWP claimed damages for breach of contract, and compensation for the loss occasioned to it by Mr Emmott's breach of fiduciary duties. It appears likely that at some point in the London arbitration MWP also claimed that there should be a general accounting between it and Mr Emmott (in effect, an accounting as between partners) but on the basis of wilful default by Mr Emmott. That was the relief the arbitrators granted.

21 In the New South Wales proceedings, MWP alleged that Messrs Nicholls and Slater had acted in breach of their contractual and fiduciary obligations and had knowingly assisted Mr Emmott in his breaches of his fiduciary obligations. MWP claimed (amongst other relief) damages, compensation and an account of profits.

22 There was substantial but not exact overlap between the allegations made in both proceedings. In particular, subject to some exceptions which can be put aside as immaterial, there was substantial identity in the allegations made in both proceedings about what clients and business opportunities were said to have been diverted.

The course of the London arbitration and the New South Wales proceedings

23 As already recorded, notice of arbitration was given on 14 August 2006 and the New South Wales proceedings were commenced on 9 October 2006. Hearing of the arbitration (on issues of liability only) commenced on 10 November 2008 and concluded on 24 February 2009; trial of the New South Wales proceedings on all issues began on 15 June 2009 and concluded on 10 September 2009.

24 The primary judge in the Supreme Court of New South Wales (Einstein J) delivered reasons for judgment[2] on 6 October 2009 and on 11 December 2009 delivered supplementary reasons[3] and made final orders granting MWP substantially the relief it had claimed. Among other things, Messrs Nicholls and Slater were held jointly and severally liable to pay MWP $US3,508,793.91, €555,258.94 and $A4,000,000.

25 On 14 December 2009, the present respondents gave notice of appeal to the Court of Appeal of the Supreme Court of New South Wales.

26 On 22 February 2010, the London arbitrators published, as their "Second Interim Award", an interim award on questions of liability. That award held that Mr Emmott was liable to MWP in some but not all of the respects in which Einstein J had found Messrs Nicholls and Slater liable to MWP for knowingly assisting in Mr Emmott's breaches of his fiduciary obligations. In particular, the arbitrators found that some of the clients taken from MWP would not have stayed

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2 *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 1033.

3 *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 1377.

with MWP once Mr Emmott had left, because they did not want to deal with Mr Wilson. Accordingly, the arbitrators gave MWP no relief against Mr Emmott in respect of the loss of those clients. By contrast, Messrs Nicholls and Slater were held liable in the New South Wales proceedings to compensate MWP in amounts that included an assessment of the value of the lost opportunity for MWP to continue to deal with those clients.

27 On 22 March 2010, in London, MWP filed a Claim form (arbitration) in the High Court of Justice challenging parts of the Second Interim Award under ss 68 and 69 of the *Arbitration Act* 1996 (UK) (provisions dealing respectively with serious irregularity and appeal on a question of law). This Court was informed that the application has been heard but not determined.

28 The present respondents' appeal against the judgment of Einstein J, and a cross-appeal by MWP, were heard by the Court of Appeal (Basten and Young JJA and Lindgren AJA) in July 2010. That Court allowed[4] the appeal, set aside the orders made at first instance, directed that there be a new trial but further directed that the new trial "not commence until the determination of the appeal against the second interim award of the Arbitral Tribunal made on 22 February 2010 in London or, if the appeal is upheld and the Tribunal required to reconsider its reasons in any respect, until the redetermination has been made". The cross-appeal of MWP was dismissed.

29 The Court of Appeal held that there should be a new trial because there had been a reasonable apprehension of bias of the trial judge. It ordered deferral of commencement of the new trial on the footing that otherwise there would be an abuse of process.

30 By special leave, MWP appeals to this Court.

Apprehension of bias – the test to be applied

31 It has been established by a series of decisions of this Court[5] that the test to be applied in Australia in determining whether a judge is disqualified by

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4 *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177.

5 See, for example, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; [1983] HCA 17; *Johnson v Johnson* (2000) 201 CLR 488; [2000] HCA 48; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Smits v Roach* (2006) 227 CLR 423; [2006] HCA 36; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; [2006] HCA

(Footnote continues on next page)

reason of the appearance of bias (in this case, in the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. No party to the present appeal sought in this Court, or in the courts below, to challenge that this was the test to be applied.

32 As the plurality in *Johnson v Johnson*[6] explained, "[t]he 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."

33 Because the test is objective it is important to keep an inquiry about apprehension of bias distinct from any inquiry about actual bias. An inquiry about actual bias in the form of prejudgment would require assessment of the state of mind of the judge in question. No doubt that would have to be done, at least for the most part, on the basis of what the judge had said and done. But to allow an inquiry about whether the judge had *in fact* prejudged some issue to enter into a debate about what a fair-minded lay observer might *apprehend* is to introduce considerations that are irrelevant to the issue that is to be decided when a party submits that there is or was a reasonable apprehension of bias. The respondents did not submit in this Court or in the courts below that the trial judge had in fact prejudged any issue.

34 The respondents twice submitted to Einstein J that he should recuse himself because there was a reasonable apprehension of bias. On both occasions Einstein J rejected the application. To explain the basis upon which the applications were made and to identify the different stages in the proceedings at which the applications were made, it is necessary to refer to a number of interlocutory applications MWP made in the proceedings.

Interlocutory applications

35 In October 2006, MWP obtained freezing orders in relation to certain identified assets of Messrs Nicholls and Slater, both in Australia and elsewhere. Those orders were made by Palmer J. They required Messrs Nicholls and Slater

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55; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; [2011] HCA 2.

6 (2000) 201 CLR 488 at 493 [12].

to file affidavits identifying all of their assets including bank accounts and other assets in which they had interests. Later in October 2006, Bergin J made an order, by consent, restricting access to the disclosure affidavits to MWP's legal advisers.

36 In 2007 and 2008, Einstein J heard and determined several applications made by MWP without notice to the defendants in the action.

37 On 26 March 2007, MWP applied to Einstein J, without notice to the defendants, for orders which, among other things, would permit MWP to use the disclosure affidavits that had been made by Messrs Nicholls and Slater in obedience to the orders described above, and the correspondence that related to the affidavits, in proceedings MWP then proposed to institute in "the Eastern Caribbean Supreme Court [and the] High Court of the British Virgin Islands" and for the purpose of "considering the relief and remedies available to [MWP] and possible proceedings in Switzerland". In an affidavit filed in support of the application Mr Wilson described the "possible proceedings in Switzerland" as a criminal complaint against Mr Emmott, another man called Risbey, and entities controlled by them in Switzerland. Mr Wilson said that he believed that "in order to obtain relevant information and to put measures in place to protect assets which are alleged to belong to MWP, criminal proceedings are the most appropriate forum to obtain the relief sought". Neither Mr Nicholls nor Mr Slater was then identified as a person who might be the subject of criminal investigation or charge by Swiss authorities.

38 The application to Einstein J was said to be urgent because of the foreshadowed application in the British Virgin Islands to appoint a receiver to British Virgin Islands entities allegedly controlled by Messrs Nicholls and Slater. It was said that, if Messrs Nicholls and Slater became aware that MWP was making the application to use the disclosure affidavits in connection with an application to appoint receivers, assets controlled by those entities (assets to which MWP alleged it was entitled) would be removed.

39 Einstein J dealt with the application in closed court and made the orders that MWP sought. In his reasons for judgment, Einstein J said that it was "important that the Court scrutinise very closely an application which is made ex parte to vary orders which had been made by consent". He expressed himself to be "satisfied that it is necessary for [MWP] to establish that there has been a significant change in the circumstances" since the consent order was made. The change in circumstances identified was that there were "stark inconsistencies between the affidavits and disclosure information furnished by Mr Slater in the British Virgin Island proceedings as compared with that furnished in similar documents in this jurisdiction" and "likewise discrepancies in the affidavits made

by Mr Nicholls". The reasons set out a list of matters to which the discrepancies were said to relate[7].

40 If orders are made without notice to a party it is ordinarily sound practice to require the moving party to give to the opposite party notice of the making of the orders and the material on which the orders were made as soon as reasonably practicable after the making of the orders. The party affected by the orders can then move to have the orders amended or discharged[8]. And if there is shown to be some real fear that the effect of an order would be frustrated by notice being given before the order is executed, notice of its making and the material on which it is made should nonetheless be given as soon after its making as is consistent with the avoidance of frustration of its effect.

41 There was no consideration given in the reasons of Einstein J to why, if it was necessary to deal with the application ex parte, it was not appropriate to require, once the orders had been carried into effect and the foreshadowed application in the British Virgin Islands dealt with, that MWP give notice to those affected by the orders of both the terms of the orders and the material on which those orders had been made. Rather, on MWP's application, Einstein J ordered, among other things, that MWP's notice of motion and the affidavits on which it had relied not be placed on the Court file; that no part of what had occurred during the hearing or the transcript of the hearing be communicated to any person other than a legal adviser of MWP and otherwise than as was necessary to have the orders taken out; that the associate's note of the making of the orders be kept in the chambers of Einstein J; that the making of the orders not be shown on the Court file. Einstein J also gave leave to MWP to issue a subpoena on a third party returnable on 28 March 2007.

42 The matter came back on for further hearing on 28 March 2007 for the return of the subpoena. On MWP's application, Einstein J made orders for the use of the documents then produced in answer to the subpoena that were in substance identical to the orders of 26 March 2007 in relation to the disclosure affidavits. The third party having not completed its production of documents in

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7 cf (2010) 243 FLR 177 at 187 [30].

8 *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689; [1910] HCA 77; *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679; [1912] HCA 72. See also *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966; [1978] 3 All ER 164; *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1989) 89 ALR 366.

answer to the subpoena, Einstein J stood over its further return until 30 March 2007. On 30 March 2007, the matter again came on. Counsel for MWP informed the Court that an order for the appointment of receivers in the British Virgin Islands had been made and that it would soon be enforced. The third party expected to complete production pursuant to the subpoena by the following Tuesday (3 April 2007), so the matter was adjourned to 4 April 2007.

43 Both these further hearings on 28 and 30 March 2007 were conducted in closed court and on both occasions, in addition to the orders described above, orders like those earlier made were made to prevent communication of what had happened in court and to prevent recording on the Court file what orders had been made. However, on both occasions, Einstein J pointed out to the legal representatives of MWP in argument that the "confidentiality parameters" should not remain in place for any longer than was necessary and indicated the desirability of allowing service upon the defendants of MWP's notices of motion, the orders that had been made and the material upon which they had been made.

44 On 5 April 2007, on MWP's application, Einstein J made orders lifting many of the restrictions on publication and the restrictions on recording orders on the Court file and directed MWP to file and serve on the respondents redacted copies of the notices of motion, supporting material, orders and the transcript of proceedings on 26 March 2007. What was to be removed from the copy documents to be filed and served on the respondents was described as:

> "any parts of those documents which contain any reference to proceedings or potential proceedings in jurisdictions other in [sic than in] the United Kingdom, the British Virgin Islands, Jersey, the Bahamas, Colorado in the United States of America and the proceedings in this Honourable Court".

Thus any reference to potential proceedings in Switzerland was removed from the documents served on the respondents. Why this should be done was not examined in the course of the application to Einstein J and was not the subject of any consideration in any reasons for judgment.

45 About one week later (on either 11 or 12 April 2007) MWP made a further ex parte application to Einstein J. MWP sought orders granting it leave (a) to make a criminal complaint to Swiss authorities (and to be joined as a civil party to any criminal proceedings that were instituted), (b) to assist the receiver appointed to the British Virgin Islands entities to furnish a money laundering report to the Financial Investigation Agency in the British Virgin Islands, and (c) to make a criminal complaint to police in the United Kingdom. MWP sought leave to supply and use the disclosure affidavits and associated correspondence

for the purposes of making those complaints, being joined as a party in Switzerland and providing assistance to the authorities.

46 In an affidavit filed in support of the application, Mr Wilson swore that there was a "need for confidentiality" because if any of the defendants to any of the proceedings (including Messrs Nicholls and Slater) became aware of the proposed criminal complaints "there is a danger that the assets controlled by them will be dissipated thereby endangering the purpose of the proposed criminal complaints". Counsel for MWP told Einstein J that, although Messrs Nicholls and Slater were "not the focus of the complaints" that MWP proposed to make, they could be "caught up" in the matter. Why, in these circumstances, their disclosure affidavits should be made available (without their knowledge) to authorities in Switzerland, the British Virgin Islands or the United Kingdom was not explained.

47 MWP again asserted that the matter was urgent because, according to Mr Wilson, there was "a real danger that, as more time passes, more of the assets which are in the hands of Emmott, Nicholls, Slater (and their nominees) and/or their associates and entities controlled by them, will be dissipated and unrecoverable". How this would be done in face of the various freezing orders that had been obtained was not explained.

48 Einstein J made the orders sought. In his reasons for judgment delivered on 12 April 2007, Einstein J said that "to facilitate the effectiveness of the prosecutor's inquiries in each jurisdiction" and "to ensure the effectiveness of steps that may be taken … in Switzerland" the application should remain confidential. Orders were made about disclosure of what had occurred at the hearing and about recording of the orders in similar terms to those that had been made in connection with earlier ex parte applications.

49 Einstein J asked MWP to return to Court on 6 June 2007 to explain "the extent to which and reasons for which the existing confidentiality regime or regimes need to be continued". At that hearing, counsel for MWP submitted that he could not then point to any reason "in relation to asset preservation as a reason for maintaining confidentiality". He further submitted, however, that the existence of "tipping off" legislation (described as legislation that made it an offence to disclose something that may prejudice a serious fraud investigation) in the United Kingdom and British Virgin Islands made it desirable not to alter the then existing regime until authorities in those jurisdictions had been consulted. Being satisfied that no alteration to the existing regime was required, Einstein J adjourned the matter to a date in July for consideration of whether the confidentiality regime should continue. On that day the matter was stood over to 28 September 2007 without any variation of the earlier orders about

confidentiality. Again, at both the 6 June and the July hearings, orders were made about disclosure of what had occurred at the hearing and about the recording of the orders in terms similar to those made in connection with the earlier ex parte applications.

50 In fact the matter seems not to have come on for further hearing until 11 October 2007. On that day, Einstein J was told that there were continuing investigations in England, Switzerland and the British Virgin Islands but that "none of the investigations are directed at prosecuting any party to the New South Wales proceedings". MWP asked Einstein J to direct that the material that had been used in the various applications and had been the subject of confidentiality orders no longer be retained in the judge's chambers but placed in an envelope and put on the Court file subject to an order that the envelope not be opened until further order. Those orders were made.

51 In the reasons for judgment given on 18 October 2007 for making the orders sought by MWP, it was noted that none of the overseas authorities had sought to insist on continuing non-disclosure and that the Swiss authorities had frozen relevant assets. Yet it was said that there was "an obvious risk" that the continuing criminal investigations by authorities "may be impeded if the persons being investigated or identified as possibly assisting in enquiries are forewarned as to the nature of the investigations and the subject matter of the complaints". Why that was still "an obvious risk" was not explained beyond saying that it had been submitted that "questions of timing and extent of disclosures are ordinarily left to the prosecuting authorities themselves, and so should be the case here".

52 The orders for confidentiality that had been made by Einstein J remained in force in one form or another until 13 June 2008, more than a full year after they had first been made. On 13 June 2008, Bergin J made orders by consent giving the legal representatives of the defendants in the action access to the documents that were in the sealed envelope held on the Court file. Those orders prevented any wider disclosure of the material but nothing now turns on that condition.

Applications for disqualification

53 On 12 May 2008, about a month before the consent orders were made that gave the defendants access to the material held on the file in a sealed envelope, the defendants asked Einstein J to disqualify himself from hearing any further interlocutory application in the proceedings. The bases upon which this application was made do not appear directly from material reproduced in the appeal books used in this Court. Having regard, however, to what was submitted when later, in May and June 2009, the defendants asked Einstein J to disqualify

himself from trying the action, it may be inferred that the first application for disqualification was based upon what had happened in the earlier interlocutory proceedings. The record available in this Court does not make clear which features of those proceedings founded that complaint. It is not necessary, however, to pursue that aspect of the matter. It is evident from written submissions made at the time of the second disqualification application that the second application was based on a footing no narrower than the first application.

54 In making the second application, the defendants submitted that Einstein J: (a) had "entertained controversial ex parte applications by [MWP], in closed Court, on 7 separate days", (b) had delivered three sets of confidential reasons for judgment, (c) had made confidential orders "designed" to expose the defendants to criminal investigation overseas and to impose upon the defendants an obligation to pay, as part of the ordinary costs of the proceedings, the costs of transcript of the confidential proceedings, and (d) had, in the course of the confidential proceedings, invited MWP to prepare written submissions that could be and were adopted in the preparation of reasons for judgment.

55 The defendants further submitted that Einstein J had not disclosed the "confidential" proceedings to them "when an opportunity for him to do so naturally arose". That opportunity was identified as being the first disqualification application made on 12 May 2008. The defendants submitted that "the nature and extent of the Judge's private dealings" with MWP was disclosed only when consent orders were made on 13 June 2008 giving the defendants' legal representatives access to the materials that had been held on the Court file in a sealed envelope. They submitted that the ex parte orders that Einstein J had made required his acceptance of "'facts' (including opinions and expressions of suspicion) and arguments asserted by Michael Wilson, the principal" of MWP, and "findings that conduct of the Defendants was 'suspicious' and that they could not be trusted: (A) to respect orders of the Court as to the maintenance of confidentiality; (B) to cooperate with police investigations; or (C) not to dissipate assets".

56 The defendants submitted that these findings were "on questions that are the subject of hot contest at the trial and which suggest that [the judge had] prejudged those questions".

57 Einstein J rejected[9] the second disqualification application and delivered ex tempore reasons for decision. A few days later the solicitors for the

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9 *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 505.

defendants wrote to the solicitors for MWP saying that the defendants maintained the objection to Einstein J trying the proceeding and asking the solicitors for MWP to join in making an application that the judge recuse himself. Unsurprisingly, the solicitors for MWP refused the invitation to make a joint application and pointed out that Einstein J had granted the defendants "liberty to apply on short notice to obtain an Order to assist in any urgent appeal they might wish to bring in relation to his Honour's ruling".

58 The trial proceeded and, as already noted, MWP succeeded. The respondents in this Court appealed to the Court of Appeal on grounds including grounds alleging that Einstein J should not have tried the case because there was a reasonable apprehension of bias.

Apprehension of bias – the Court of Appeal's conclusions

59 The Court of Appeal concluded that Einstein J should have disqualified himself because there was a reasonable apprehension of bias. The principal reasons of the Court of Appeal on this issue were given by Basten JA, who identified[10] the circumstances said to be relevant to whether there was a reasonable apprehension of bias.

60 Five matters were identified[11] as pointing *against* that conclusion: (a) the rulings of which complaint was made were interlocutory, not final, (b) there had been a significant lapse of time between the rulings (in 2007) and trial (in 2009), (c) some but not all of the orders and the supporting material were supplied in April 2007 to those against whom the orders had been made, (d) there was no material in the reasons for judgment given in respect of the ex parte applications "which would provide unequivocal support for a reasonable apprehension of prejudgment", and (e) in so far as the matters of concern arising from the interlocutory proceedings may have been thought to affect the assessment by Einstein J of the argument that the proceedings were an abuse of process, that argument had not been raised until four weeks after the trial began.

61 Six matters were said[12] to be "countervailing considerations":

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10 (2010) 243 FLR 177 at 197-198 [79]-[80].

11 (2010) 243 FLR 177 at 197-198 [79].

12 (2010) 243 FLR 177 at 198 [80].

"(e) the material placed before the primary judge was not entirely supportive of the orders made;

(f) some of the orders were, in their nature, contestable;

(g) neither the transcripts nor the various ex parte judgments revealed full and proper disclosure and consideration of the weaknesses of the applications;

(h) it might be thought that the confidentiality regime was maintained beyond a justifiable period;

(i) the primary judge acted on a basis as to the credibility and possible criminality of [Messrs Nicholls and Slater], which they had no opportunity to rebut; and

(j) the judge made orders on the basis of material put on through the affidavits of Mr Wilson, which he accepted for the purposes of the interlocutory applications, a factor which could have caused him embarrassment when invited to make adverse credit findings against Mr Wilson at the trial."

62 Each of these countervailing considerations was a particular expression of a single central complaint: that "on seven separate days"[13] Einstein J had made orders which affected the defendants, without hearing from them, and without providing them with an early opportunity to challenge the bases upon which the orders were made by applying to discharge or vary those orders.

63 In *Ebner v Official Trustee in Bankruptcy*, the plurality pointed out[14] that application of the apprehension of bias principle requires two steps. First, it requires the identification of what it is said might lead the judge to decide a case other than on its legal and factual merits. And second, there must be an articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits. The plurality in *Ebner* went on to say[15] that "[t]he 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

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13 (2010) 243 FLR 177 at 199 [85].

14 (2000) 205 CLR 337 at 345 [8].

15 (2000) 205 CLR 337 at 345 [8].

the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated". So too, in this case, the bare assertion that the judge appeared to be biased through prejudgment would be of no assistance without articulation of the connection between the events giving rise to the apprehension of bias through prejudgment and the possibility of departure from impartial decision making.

64 In the Court of Appeal, the present respondents sought to articulate the connection between the ex parte applications that had been dealt with by Einstein J and the alleged appearance of prejudgment by pointing to what they said was revealed by the final judgment that had been delivered at trial. They submitted[16] that the reasons for judgment delivered at trial "demonstrated a mind which had been, at least subconsciously, influenced to accept the 'case theory' presented by Mr Wilson in his affidavits during the interlocutory proceedings". They submitted[17] that Einstein J had not addressed in his reasons arguments that had been made in support of adverse findings about the credibility of evidence Mr Wilson gave at trial, that his Honour had not made sufficiently detailed factual findings to support the conclusions he reached about liability and the relief to be granted and that, although he had apparently accepted the evidence of certain witnesses called on behalf of the defendants, he had "paid no attention to the possible consequences of their evidence in relation to the relief granted".

65 Basten JA noted[18] that these considerations might have been thought to demonstrate actual rather than apprehended bias but that no submission of actual bias had been made. Basten JA said[19] that it was "not appropriate" to consider that argument further, but continued[20]:

> "The alternative basis, on which the appellants [the present respondents] did rely, was that this material *confirmed in a practical fashion* the reasonableness of the apprehension of bias otherwise created by the pre-trial events. … [I]t may be said that these aspects of the judgment would have prevented any diminution in the apprehension which the lay

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16 (2010) 243 FLR 177 at 198 [82].

17 (2010) 243 FLR 177 at 198-200 [82], [88]-[90].

18 (2010) 243 FLR 177 at 200 [91].

19 (2010) 243 FLR 177 at 200 [91].

20 (2010) 243 FLR 177 at 200 [91].

observer might otherwise have felt and which might have been laid to rest by persuasive reasoning, inconsistent with the apprehension." (emphasis added)

66 Basten JA concluded[21] that there was "substance in each of the complaints made in relation to the judgments" and that it was "sufficient to accept that the final reasons [of Einstein J] did not remove the pre-existing apprehension of bias, as being unfounded". More particularly, Basten JA concluded[22] that there was a reasonable apprehension that Einstein J "might not be able to bring an open mind to the issues raised in the trial, and particularly an assessment of the credibility of Mr Wilson on the one hand and Messrs Nicholls and Slater on the other". The judgments given by Einstein J following trial were said[23] to "tend to enhance, rather than diminish, the apprehension that would otherwise arise".

Apprehended bias not established

67 As pointed out earlier in these reasons, an allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge might not bring an impartial mind to bear upon the issues that are to be decided. An allegation of apprehended bias does not direct attention to, or permit consideration of, whether the judge had *in fact* prejudged an issue. To ask whether the reasons for judgment delivered after trial of the action somehow confirm, enhance or diminish the existence of a reasonable apprehension of bias runs at least a serious risk of inverting the proper order of inquiry (by first assuming the existence of a reasonable apprehension). Inquiring whether there has been "the crystallisation of that apprehension in a demonstration of actual prejudgment"[24] impermissibly confuses the different inquiries that the two different allegations (actual bias and apprehended bias) require to be made. And, no less fundamentally, an inquiry of either kind moves perilously close to the fallacious argument that *because* one side lost the litigation the judge was biased, or the equally fallacious argument that making some appealable error, whether by not dealing with all of the losing side's arguments or otherwise, demonstrates prejudgment.

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21 (2010) 243 FLR 177 at 200 [92].

22 (2010) 243 FLR 177 at 201 [94].

23 (2010) 243 FLR 177 at 201 [94].

24 (2010) 243 FLR 177 at 200 [91].

68 The Court of Appeal was wrong to take account as it did of the reasons for judgment published by Einstein J after the trial in deciding whether in this case there was a reasonable apprehension of bias. The central and determinative question for this aspect of the matter was: might what was done in connection with MWP's ex parte applications reasonably cause a fair-minded lay observer to apprehend that the judge might not bring an impartial mind to the resolution of a question for decision at the trial? Basten JA rightly accepted[25] that the making of an interlocutory order does not, of itself, preclude the judge from sitting on the trial of that matter, at least where the orders "are made inter partes and it cannot be said that there has been communication between one party and the judge in the absence of the other party or parties". As Basten JA pointed out[26], again correctly, an interlocutory order "will not usually require a judge to determine any matter on a final basis".

69 Here, however, it was said[27] that "the fact that one party appeared before the judge on seven separate days in closed court raised a different and additional concern". That concern was identified[28] as the possibility "in such circumstances that the judge's mind will become familiar with the character of the plaintiff's case to an extent that, consciously or subconsciously, there will be a tendency to *place the further evidence within the pre-existing mental structure*" (emphasis added). But the existence of a "concern" described as the possibility of placing the evidence led at trial into a "pre-existing mental structure" does not demonstrate that the fair-minded lay observer might reasonably apprehend that the judge might have prejudged an issue to be decided at trial. In order to establish such a reasonable apprehension it is necessary to analyse more closely the connection that is asserted between the conduct and disposition of interlocutory applications and the possibility of prejudgment.

70 The fact that Einstein J made several ex parte interlocutory orders and on each occasion directed that those applications, the material in support, the reasons for making the orders and the orders themselves not be disclosed to one side of the litigation did not found a reasonable apprehension of prejudgment of the issues that were to be fought at trial. It may well be that the directions not to

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25 (2010) 243 FLR 177 at 199 [83].

26 (2010) 243 FLR 177 at 199 [83].

27 (2010) 243 FLR 177 at 199 [85].

28 (2010) 243 FLR 177 at 199 [85].

disclose material should not have been left in force for as long as they were. Perhaps they should not have been made at all. But if their making or the failure to limit their duration was wrong, that did not found a reasonable apprehension of bias.

71 All of the applications MWP made to Einstein J without notice to the opposite parties were applications about the use that MWP or Mr Wilson could make of the disclosure affidavits made by Messrs Nicholls and Slater and associated correspondence or of documents produced on subpoena. More particularly, a central question in each application was whether that material could be supplied to others.

72 In none of the applications was Einstein J required to make, and in none of the applications did he make, any determination of any issue that was to be decided at trial[29]. Einstein J did decide that the disclosure affidavits could be made available for use in applications made to another court (for freezing orders and appointment of receivers) and for use by investigating authorities in other countries. And he decided that the proceedings which yielded those orders and the orders themselves should not be disclosed to the present respondents. But in none of the applications was it necessary for Einstein J to make any finding about the reliability of any party or witness, and in none did he make such a finding[30]. Nor was Einstein J required to make any choice between competing versions of events. All that was required, and all that was found, was that there was apparently credible evidence of a sufficient risk of dissipation of assets to warrant making the confidentiality orders that were made.

73 Neither the hearing nor the disposition of any of the ex parte applications could found a reasonable apprehension of prejudgment of the credit of those who gave evidence in support of the applications. Their credit was not challenged in the ex parte hearings and no decision had to be made about their credit beyond determining that the unchallenged evidence they gave was apparently credible. Nor could the hearing or the disposition of the applications found a reasonable apprehension of prejudgment of the credit of those who had given no evidence in relation to the applications and who first were heard to give evidence at trial. There was, therefore, no sufficient basis to conclude that there was reasonable apprehension that Einstein J might have, as Young JA said[31], "put himself into

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29 cf *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

30 cf *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; [1976] HCA 39.

31 (2010) 243 FLR 177 at 205 [122].

the mindset of accepting that [MWP or MWP's witness] is the 'good guy' and thus the opponent is otherwise". And the Court of Appeal concluded that there was such a reasonable apprehension only by (impermissibly) reasoning backwards from what was decided at trial, and how it was decided, to the conclusion that it might reasonably be apprehended that the judge might have prejudged those matters.

Giving up the right to complain?

74 The respondents did not seek leave to appeal against the refusal by Einstein J of their application that he not try the proceedings.

75 In light of the conclusion that there was not a reasonable apprehension of bias in this case, it is not necessary to decide whether the respondents were thus not able to pursue the issue in their appeal against the final judgment given at trial. It is as well, however, to make the following points.

76 It is well established[32] that a party to civil proceedings may waive an objection to a judge who would otherwise be disqualified on the ground of actual bias or reasonable apprehension of bias. (It may well be that the principle extends to criminal proceedings but that issue need not be considered.) If a party to civil proceedings, or the legal representative of that party, knows of the circumstances that give rise to the disqualification but acquiesces in the proceedings by not taking objection, it will likely be held[33] that the party has waived the objection.

77 Here, of course, the respondents did object to Einstein J trying the proceeding. They did not waive their objection by any failure to raise the point. But could they, having failed in their application to have Einstein J recuse himself, raise the issue on appeal against the final judgment entered at trial?

78 In general, any interlocutory order which affects the final result can be challenged in an appeal against final judgment[34]. As the majority noted in

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32 See *Vakauta v Kelly* (1989) 167 CLR 568 at 577-579 per Dawson J; [1989] HCA 44 and the cases cited there.

33 See, for example, *Smits v Roach* (2006) 227 CLR 423 at 439-440 [43] per Gleeson CJ, Heydon and Crennan JJ, 445 [61] per Gummow and Hayne JJ.

34 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 482-484 [4]-[7] per Gaudron, McHugh and Hayne JJ; [2002] HCA 22.

Gerlach v Clifton Bricks Pty Ltd[35], there may be some limits to that general rule but it was not necessary in that case, and is not now necessary, to decide what those limits might be. The majority in *Gerlach* noted[36], however, that there are some kinds of interlocutory decision made otherwise than at trial that may present other issues. In particular[37], "[t]here are circumstances in which an interlocutory decision must be treated as concluding an issue between the parties" and reference was made in that regard to *O'Toole v Charles David Pty Ltd*[38] and *Fidelitas Shipping Co Ltd v V/O Exportchleb*[39].

79 In most cases, a judge's refusal of an application that the judge not try, or continue to try, a case on account of reasonable apprehension of bias will constitute a final determination by the judge that the facts and circumstances relied on by the applicant do not establish the relevant apprehension. In such a case, it may be that an applicant who does not seek to challenge the refusal by seeking leave to appeal should be held to have given up the point.

80 In this case, if the respondents were right in asserting that there was a reasonable apprehension of bias, the whole of the trial with its attendant expense and use of court time would be wasted. Of course it must be recognised that the respondents in this case had no right to appeal against the refusal of Einstein J to recuse himself. But the respondents did have a right to seek leave to appeal.

81 As was explained in *Gas & Fuel Corporation Superannuation Fund v Saunders*[40], a later interlocutory order made by a judge who has refused an application that the judge not hear the matter on account of a reasonable apprehension of bias is an order against which leave to appeal can be sought on the ground that the judge who made the order should not have done so. Conversely, as *Saunders* itself illustrates, where a judge allows an application for

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35 (2002) 209 CLR 478 at 484 [8].

36 (2002) 209 CLR 478 at 484 [8].

37 (2002) 209 CLR 478 at 484 [8].

38 (1990) 171 CLR 232 at 245 per Mason CJ; [1990] HCA 44.

39 [1966] 1 QB 630 at 642.

40 (1994) 52 FCR 48 at 64 per Gummow and Heerey JJ. See also *Brooks v The Upjohn Company* (1998) 85 FCR 469 at 475-476.

disqualification and makes orders effecting that decision[41], leave to appeal can be sought against those orders on the ground that they should not have been made. Thus the order against which the respondents could have sought leave to appeal in this case was whatever order was made by Einstein J after he had refused to recuse himself. If, as the respondents asserted, Einstein J should not have continued to sit in the matter, whatever order was made (other than an order adjourning the case for the purpose of allowing another judge to deal with it) was an order which should not have been made by the judge who made it and would found an application for leave to appeal. And as it happened Einstein J made such an order on 4 June 2009 when he set dates for compliance with the general requirements for trial of proceedings in the Equity Division.

82 In so far as *Barton v Walker*[42] holds to the contrary, that decision should not be followed. The decision in *Barton v Walker* depended upon the proposition that whether a judge should continue to hear a case was a matter only for the judge concerned and that a motion that the judge disqualify himself or herself

was "not cognizable"[43]; the judge was held[44] to make no order on the application for disqualification.

83 The decisions about apprehension of bias that have been given by this Court since *Barton v Walker* show that a judge's decision to grant or refuse an application for disqualification is not a matter only for the particular judge. As was pointed out[45] in the plurality reasons in *Ebner*, the apprehension of bias principle has its roots in principles fundamental to the common law system of adversarial trial.

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41 *Gas & Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48 at 58.

42 [1979] 2 NSWLR 740.

43 [1979] 2 NSWLR 740 at 750. See also *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 266 per Barwick CJ, Gibbs, Stephen and Mason JJ; *Rajski v Wood* (1989) 18 NSWLR 512; *Australian National Industries Ltd v Spedley Securities Ltd (In liq)* (1992) 26 NSWLR 411.

44 [1979] 2 NSWLR 740 at 751.

45 (2000) 205 CLR 337 at 343-345 [3]-[7].

84 Whether failure to seek leave to appeal against refusal of an application that a judge not try the case on account of a reasonable apprehension of bias precluded maintenance of the complaint in an appeal against the final judgment would require consideration of whether the failure to seek that leave was reasonable. That would require examination of all relevant circumstances. Ordinarily those would include the stage the proceedings had reached when the disqualification application was made and refused and the consequences that would follow from leaving appellate determination of the issue of disqualification until after trial. In this case, trial was fixed to begin within a very short time after the refusal. How much time and money would be spent if the question were to be left over to an appeal against final judgment? The trial of this matter was expected to be very long. A lot of time and money would have been wasted if the judge who tried the proceedings should not have done so.

85 If it was reasonable in the circumstances of the particular case not to seek leave, and there was no other basis upon which a choice not to persist with the allegation of apprehended bias can be identified as having been made (either then or at some later time), the point would remain open in an appeal against the final judgment. But if it was reasonable in the circumstances to seek leave, and leave was not sought, why should it not be concluded, absent countervailing considerations, that the party making the complaint did not maintain the objection? Simply saying to the opposite party that it is sought to preserve the point for consideration in an appeal against final judgment would not of itself be effective to achieve that result.

86 As explained earlier these points need not be decided. It is, however, important to add, contrary to what was said in the Court of Appeal[46], that an application for leave to appeal against the rejection of an application that a judge not hear a matter due to apprehended bias may well be a case where the usual criteria[47] would require leave to be granted, at least if a long and costly trial would be wasted if the judge's decision were incorrect.

Abuse of process?

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46 (2010) 243 FLR 177 at 197 [77] per Basten JA.

47 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; [1981] HCA 39; *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 485-486 [13].

87 The third issue raised in the appeal to this Court was whether the Court of Appeal was right to hold that there was an abuse of process. It will be necessary to identify the different ways in which the Court of Appeal identified an abuse and the still further ways in which, in the course of the appeal to this Court, the respondents sought to identify an abuse. Before doing so, however, it is as well to say something shortly about the general subject of abuse of process.

88 It has long been recognised that the term "abuse of the process of the court" may be used in different senses[48]. This case concerns an alleged abuse of the process of the Supreme Court of New South Wales. The respondents submitted that the abuse requires either, as the Court of Appeal held, an order staying the further prosecution of the New South Wales proceedings pending the final determination of the London arbitration, or the dismissal of at least some of the claims that MWP made in the New South Wales proceedings.

89 As the majority pointed out in *Batistatos v Roads and Traffic Authority (NSW)*[49], "[w]hat amounts to abuse of court process is insusceptible of a formulation comprising closed categories". In *Ridgeway v The Queen*, Gaudron J noted[50] that the concept extended to proceedings "instituted for an improper purpose", and to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging"[51] or "productive of serious and unjustified trouble and harassment"[52]. In *Rogers v The Queen*, McHugh J concluded[53] that, although the categories of abuse of process are not closed, many cases of abuse can be identified as falling into one of three categories: "(1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute."

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48 *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 55 per Griffith CJ; [1911] HCA 46.

49 (2006) 226 CLR 256 at 265 [9] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27.

50 (1995) 184 CLR 19 at 74-75; [1995] HCA 66.

51 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247; [1988] HCA 32.

52 *Hamilton v Oades* (1989) 166 CLR 486 at 502; [1989] HCA 21.

53 (1994) 181 CLR 251 at 286; [1994] HCA 42.

90 One recognised class of abuse of process is where proceedings are instituted against a party in a second forum when there are proceedings against that party pending in another and the continuance of the second would be an abuse of the process of the first[54]. In such a case, the continuance of the second proceedings would be an abuse if it would be unjustifiably oppressive to the party that is named as defendant in both forums. But, of course, that was not this case. The respondents to the appeal in this Court were not, and could not have been, joined as respondents to the London arbitration. And it was not suggested that Mr Emmott could have been joined as a party to the New South Wales proceedings.

91 How then was there said to be an abuse of process in this case? To answer that question it is necessary to begin by identifying when and how the contention was raised.

92 Shortly before the trial began, the respondents applied[55] to have the proceedings stayed or dismissed as an abuse of process. As framed, the application alleged[56] that the institution and maintenance of the proceedings was an abuse of process "in that they have been instituted and maintained for [a] collateral, improper purpose" and that the maintenance of the proceedings was an abuse because MWP had "conducted (and persists in conducting) the proceedings in a manner that is vexatious and oppressive and there is a reasonable apprehension that it will continue to do so". The application set out a list of respects in which it was alleged that MWP and Mr Wilson had acted inappropriately, both during the proceedings and before they were commenced. Determination of that application was deferred[57] until trial. The desirability of following that course was not canvassed in argument in this Court. In the first set of reasons for judgment that were published after trial (dealing chiefly with issues of liability) Einstein J rejected[58] the application.

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54 See, for example, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; [1990] HCA 55.

55 [2009] NSWSC 1033 at [586].

56 [2009] NSWSC 1033 at [588].

57 [2009] NSWSC 1033 at [583].

58 [2009] NSWSC 1033 at [644].

93 In the Court of Appeal the respondents again alleged[59] that the proceedings should be dismissed as an abuse of process. The alleged abuse appears to have then been formulated in several different ways. Basten JA identified[60] it as depending upon three propositions: (a) that there was an "absence of connection between [MWP] and the subject matter of its claims, and New South Wales", (b) "the close connection between [MWP] and the conduct on which the claims were based, and Kazakhstan", and (c) "the relationship between the claims and the London arbitration involving [MWP] and Mr Emmott". The first two propositions were rejected[61] and were not pursued in this Court. They may be put aside from further consideration. The Court of Appeal's conclusion that there was an abuse depended upon the third proposition concerning the relationship between the claims made in the New South Wales proceedings and those made in the London arbitration.

94 Basten JA concluded[62] that, to the extent that MWP was unsuccessful in the arbitration, it should not be able to pursue claims against the present respondents based upon those aspects of Mr Emmott's liability. To do so, Basten JA said[63], was to "constitute a collateral challenge to the findings of the arbitrators". Reference was made in this regard to the decision of the Court of Appeal in *Rippon v Chilcotin Pty Ltd*[64], a case directed principally to the application of doctrines of preclusion and, in particular, an extension of that species of preclusion dealt with in *Port of Melbourne Authority v Anshun Pty Ltd*[65].

95 Lindgren AJA described the abuse differently. He identified[66] it as being the *enforcement* of the orders obtained at trial when (a) any liability attaching to

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59 (2010) 243 FLR 177 at 201 [96]-[97].

60 (2010) 243 FLR 177 at 201 [97].

61 (2010) 243 FLR 177 at 201-202 [98].

62 (2010) 243 FLR 177 at 203 [104]-[105].

63 (2010) 243 FLR 177 at 203 [104].

64 (2001) 53 NSWLR 198.

65 (1981) 147 CLR 589; [1981] HCA 45.

66 (2010) 243 FLR 177 at 249-250 [393], [398].

the respondents "is ancillary, or coordinate with, liability attributed by the Court to Mr Emmott" and the entitlements of MWP and Mr Emmott had been determined, as between them, in the arbitration, and (b) MWP "must be taken to have received from Mr Emmott, by virtue of the Arbitration Award, satisfaction of any liability owed to [MWP] by Mr Emmott (eg, as a 'co-conspirator' under the common law or in respect of a breach of fiduciary obligations in equity) in common with" the respondents.

96 In this Court, the respondents supported the reasoning of the Court of Appeal but also advanced some further arguments that, in effect, sought to reframe the ways in which an abuse was alleged to arise. The respondents initially placed the chief weight of their arguments in this Court about abuse of process on the proposition that the abuse that had occurred (or would occur) in this case was the same as, or at least analogous to, that considered in *Reichel v Magrath*[67]. In that case, "the same question having been disposed of by one case, the litigant [sought] by changing the form of the proceedings to set up the same case again"[68].

97 In the course of argument in this Court, the respondents proffered an alternative formulation. They submitted that there was an abuse of the process of the Supreme Court of New South Wales "insofar as the predominant purpose of [MWP] was the institution or maintenance of the proceedings directed toward obtaining an advantage for which the proceedings were not designed or an advantage beyond what the law offers". The "advantage" was described as being the claim for, or recovery of, compensation from the respondents as accessories to Mr Emmott "independent of the taking of accounts between [MWP] and Mr Emmott and without bringing into account in favour of the Respondents profits or property (by way of set off or otherwise) for which [MWP] is or might be obliged to account to Mr Emmott".

98 Each of the different formulations of the alleged abuse adopted in the Court of Appeal or advanced in argument in this Court is flawed. Neither the institution nor the prosecution to judgment of the proceedings was an abuse of the process of the Supreme Court of New South Wales. No abuse of that process emerged for the first time when the arbitrators reached conclusions that differed from those reached by Einstein J.

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67 (1889) 14 App Cas 665.

68 (1889) 14 App Cas 665 at 668.

99 It is convenient to deal first with the formulation adopted by Basten JA – that there was an abuse because the New South Wales proceedings should be treated as a form of collateral attack upon the arbitrators' findings. In its terms, the proposition appears to presuppose that the arbitral award preceded the institution of, or at least the giving of judgment in, the proceedings in the Supreme Court. But that is not so. The arbitrators' award on issues of liability was not published until after judgment had been entered for MWP in the New South Wales proceedings. In those circumstances there was not, and could not have been, any attack at the trial of the proceedings in the Supreme Court of New South Wales upon any finding of the arbitrators. If the conclusion that there was an abuse because there was some collateral attack upon findings of the arbitrators did not proceed from an erroneous presupposition of the kind described, it is anything but clear when the alleged abuse was said to have arisen or how it was said to be constituted. How could an abuse of that kind be said to have arisen at the commencement of the proceedings? How could it arise before the arbitrators' award was published? How is it that an abuse of process could spring into existence upon the arbitrators making their award *after* judgment had been given in the proceedings? The respondents offered no explanation, whether by reference to the reasons of Basten JA or otherwise.

100 All of the arguments that asserted there was an abuse of process proceeded, explicitly or implicitly, from a common starting point – that any liability of the respondents to MWP for knowingly assisting Mr Emmott in the breach of his fiduciary duties was limited by the nature and extent of the relief MWP sought and obtained in the arbitration of its claims against Mr Emmott. That is, as Lindgren AJA put[69] the point, the liability of the respondents was no more than "ancillary, or coordinate with," the liability of Mr Emmott. This understanding of the relationship between the liabilities of a defaulting fiduciary and a knowing assistant of the fiduciary's breach should not be accepted. Before explaining why that is so, three important, but nonetheless subsidiary, points should be made about particular aspects of the respondents' arguments about abuse of process.

101 First, to the extent to which the submissions about abuse depended upon the proposition that prosecution of the New South Wales proceedings to judgment, or the subsequent execution of that judgment, might lead to MWP recovering compensation for more than it had lost, the submissions ignored the equity which the respondents (and Mr Emmott) would have to prevent enforcement of an award or judgment against them where to do so would lead to

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69 (2010) 243 FLR 177 at 249 [393].

double recovery[70]. The respondents (and Mr Emmott) would have an equity to prevent enforcement of a judgment (or an award) to the extent to which the claim or claims for compensation for which judgment (or the award) was obtained had been satisfied. And as between Mr Emmott and the respondents the doctrine of contribution[71] would regulate the ultimate allocation of the burden of satisfying the particular claims. The spectre of double recovery and unjust allocation of responsibility for satisfaction of liabilities to compensate MWP for loss it suffered must therefore be put aside from consideration in connection with the allegation of an abuse of process.

102 The second point is related to the first. The respondents stressed that MWP obtained in the London arbitration an award which required, in effect, a general accounting between MWP and Mr Emmott. Amounts which the arbitrators found Mr Emmott liable to pay MWP would be an important element in that accounting. But it is also clear that for the purposes of that accounting MWP would be obliged to allow amounts which it owed to Mr Emmott in the taking of accounts as on the dissolution of a partnership. The accounts have not yet been taken. Until those accounts are struck, and amounts due between the parties are set off, it is not clear which of MWP or Mr Emmott would owe a net balance to the other.

103 Upon the accounts being struck, MWP may obtain satisfaction of some or all of what the arbitrators find to be owed to MWP by Mr Emmott. If, for example, the amount which Mr Emmott owes MWP were to be less than the total of the amounts due to him from MWP on a final accounting as between partners, the reduction in the amount which MWP would otherwise have owed Mr Emmott would constitute satisfaction of Mr Emmott's liability to MWP. But,

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70 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 608 per Gummow J; [1996] HCA 38; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 653-654 [38]-[40] per Gleeson CJ and Callinan J, 658-659 [56]-[57] per Gummow and Hayne JJ; [2001] HCA 66; *Morris v Robinson* (1824) 3 B & C 196 at 205-206 [107 ER 706 at 710]; *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521-522, 526.

71 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 349-350 per Kitto J; [1969] HCA 55; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 292-293 [14]-[16], 294 [22] per Gaudron ACJ and Hayne J, 298-299 [38] per McHugh J; [2002] HCA 17; *Friend v Brooker* (2009) 239 CLR 129 at 148-149 [38]-[43] per French CJ, Gummow, Hayne and Bell JJ (Heydon J agreeing); [2009] HCA 21.

contrary to the respondents' submissions, the bare fact that there has been an award which requires the taking of accounts does not constitute satisfaction of Mr Emmott's liability to MWP. It does not entail that MWP is to be barred from pursuing to judgment its claims against persons who it alleges knowingly assisted Mr Emmott in the breach of his fiduciary duties. Nor does it entail that MWP could not enforce the judgment it obtained against persons proved to have knowingly assisted a breach of fiduciary duty by Mr Emmott. Whether the respondents would have an equity to prevent enforcement of the judgment against them would depend upon whether MWP's claims for compensation had been satisfied.

104 The third point to be made is that each of the several different formulations of abuse depended upon treating the claims made against the respondents for knowingly assisting Mr Emmott in a breach or breaches of his fiduciary duties as the only relevant claims made in the New South Wales proceedings. They were not. MWP made, and succeeded[72] in, claims against the respondents for the torts of conspiracy and procuring breach of contract. Damages for those torts were not assessed separately[73] because it was not shown that the damages allowable would differ in any respect from the amounts to be allowed as equitable compensation for knowingly assisting in the breach of Mr Emmott's fiduciary duties. But it is not right to treat the success of the claims in tort as irrelevant to the consideration of whether there was an abuse of process in instituting or maintaining the claims that were made against the respondents or in enforcing a judgment that was obtained at trial of those claims. In the New South Wales proceedings the respondents were found liable to MWP for torts that required no proof of breaches by Mr Emmott of his fiduciary obligations. Mr Emmott was not found in the London arbitration to be liable in tort. It was not, and could not be, suggested that the pursuit of the claims in tort that were made against the respondents was an abuse of process.

105 The claim that there was an abuse of the process of the Supreme Court of New South Wales was flawed for a more fundamental reason than the three particular matters that have just been examined. No matter how the allegation of abuse of process was formulated, the allegation depended upon treating the liability of the respondents as necessarily confined by the extent of Mr Emmott's liability to MWP. This was said to be because the respondents' liability to MWP was no more than accessorial to the principal wrongdoing of Mr Emmott. That is

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72 [2009] NSWSC 1033 at [284]-[290], [291]-[302].

73 [2009] NSWSC 1033 at [582]; [2009] NSWSC 1377 at [49], [64]-[65].

not so. The claims against the respondents, as knowing assistants, were not dependent upon the claims made against Mr Emmott in the fashion asserted by the respondents.

106 As MWP rightly pointed out, this Court has held[74] that liability to account as a constructive trustee is imposed directly upon a person who knowingly assists in a breach of fiduciary duty. The reference to the liability of a knowing assistant as an "accessorial" liability does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows, as MWP submitted, that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ[75]. It follows that neither the nature nor the extent of any liability of the respondents to MWP for knowingly assisting Mr Emmott in a breach or breaches of his fiduciary obligations depends upon the nature or extent of the relief that MWP obtained in the arbitration against Mr Emmott.

107 No doubt the respondents' liability as knowing assistants to a breach of fiduciary duty depends upon proof, in the proceedings against the respondents, that there was a relevant breach of fiduciary duty by Mr Emmott. It may be doubted that MWP would have been precluded from pursuing that allegation in the New South Wales proceedings if, contrary to the fact, the arbitrators had found, before judgment was given in the New South Wales proceedings, that Mr Emmott had not breached his fiduciary obligations in any respect. Such a finding, in proceedings between other parties, would not estop MWP from asserting to the contrary in the proceedings against alleged knowing assistants. The principles stated in *Port of Melbourne Authority v Anshun Pty Ltd*[76] and in

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74 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397, 408; [1975] HCA 8. See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 159 [160]-[161]; [2007] HCA 22.

75 See *Consul Development* (1975) 132 CLR 373 at 397-398.

76 (1981) 147 CLR 589.

Rippon v Chilcotin Pty Ltd[77] could not be directly applied. (As explained at the outset of these reasons, the claim against the knowing assistants could not have been brought in the proceedings against Mr Emmott. Once Mr Emmott insisted upon performance of the arbitration clause in his agreement, there had to be separate proceedings against the alleged knowing assistants.) It is not necessary to decide whether some wider principle of abuse of process could be engaged in a case of the kind postulated.

108 In so far as the respondents submitted that there was an abuse because the New South Wales proceedings were directed to obtaining an advantage for which the proceedings were not designed or beyond what the law allows, the submission is circular. To frame the alleged abuse in this way assumes rather than demonstrates that the proceedings have the character or consequence alleged.

109 As already explained, the common starting point for all of the arguments that there was or would be an abuse of the process of the Supreme Court was that MWP's claims against the respondents in the Supreme Court were limited by the nature and extent of the relief it sought and obtained in the arbitration of its claims against Mr Emmott. That premise is flawed. Because it is flawed, this is not a case like *Reichel v Magrath*[78] where, by its proceedings in the Supreme Court of New South Wales, MWP sought to set up the *same* case as was to be heard and determined in the arbitration. Because it is flawed, neither the institution nor the prosecution to judgment of the claims against the respondents was an abuse of process. Because it is flawed, execution of a judgment obtained against the respondents as knowing assistants of a breach of duty by Mr Emmott would not be an abuse, but would, as already explained, be subject to the equity that the respondents would have to prevent double recovery.

110 The fact that the same transactions and events are the subject of two separate proceedings in different forums may raise a question about abuse of the process of one or other of those forums, but it does not lead inexorably to the conclusion that there is an abuse. There was no abuse in this case.

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77 (2001) 53 NSWLR 198.

78 (1889) 14 App Cas 665.

Conclusion and orders

111 For these reasons MWP's appeal must be allowed. There is no reason why the costs of the appeal to this Court should not follow the event.

112 The parties did not agree what consequential orders should be made in that event. It was accepted that the matter must be remitted for further consideration by the Court of Appeal of grounds of appeal pleaded by the present respondents as appellants in that Court but not yet determined by the Court of Appeal. It was also accepted that the Court of Appeal has not yet determined MWP's cross-appeal to that Court and that the remitter should require consideration of that cross-appeal. The parties differed about whether the remitter should permit the respondents to argue in the Court of Appeal some further aspects of the question of abuse of process that were said not to have been dealt with by the Court of Appeal or raised for consideration in this Court. Given that the Court of Appeal's conclusions about abuse of process were put directly in issue by MWP's appeal to this Court and that the respondents did not seek to justify the conclusion reached or orders made by the Court of Appeal in that regard by reference to any of the matters which they now seek to reserve for further argument on remitter, the consequential orders made in this Court should not take the form the respondents advanced. The respondents should not be permitted, on the remitter, to argue afresh either of grounds 4 or 5(a) in their Amended Notice of Appeal in the Court of Appeal.

113 There should, therefore, be consequential orders setting aside paragraphs 3, 4, 5, 6 and 7 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 15 September 2010 and remitting the matter for the further consideration by that Court of (a) grounds 5(b) to (c), 6 to 15, 17(b) to (d), 18, 20 and 21 of the Amended Notice of Appeal dated 7 May 2010, and (b) the Notice of Cross-Appeal dated 29 January 2010. The costs of the appeal to the Court of Appeal, including the costs of the hearing on remitter, should be in the discretion of that Court. Money paid into Court by the appellant, in satisfaction of a condition of the grant of special leave, should be paid out to or at the direction of the appellant.

114 HEYDON J. The respondents did not allege that Einstein J had actually prejudged any issue. It is therefore necessary to put aside complaints which could go only to that question, for example, complaints that Einstein J "actively concealed" matters from the respondents or manifested various predispositions adverse to them.

115 The respondents rather alleged that the circumstances created a reasonable apprehension of prejudgment.

116 Of the six factors which the Court of Appeal saw as supporting that conclusion[79], the first five are no more than pointers to possible legal error on the part of Einstein J. Similarly, among the arguments advanced by the respondents in support of the view that there was a reasonable apprehension of prejudgment were arguments that Einstein J had fallen into error in dealing with the ex parte applications which justified appellate intervention. Even if Einstein J had fallen into error, which he did not, that by itself would not support the conclusion that there was a reasonable apprehension of prejudgment.

117 The sixth of the Court of Appeal's six factors related to Einstein J's acceptance of Mr Wilson's evidence on the ex parte applications and the difficulty this could create if his credit were attacked at the trial. In other circumstances the process by which the supposed legal errors were made might have involved Einstein J in deciding facts in issue at the trial, or in assessing the credibility of persons later to give evidence at the trial. But in fact it did not in this case. That is so partly because none of the facts in issue at the trial were relevant to the ex parte applications. And it is so partly because the credit of Mr Wilson, who gave evidence in relation to those applications, was unchallenged. In view of the ex parte character of the applications, there was obviously no challenge from the respondents. The respondents did not allege that it was wrong for Einstein J to hear the ex parte applications made by the appellant. They did not allege that that by itself prevented Einstein J from presiding at the trial. Einstein J acted on the affidavit evidence of Mr Wilson on the ex parte applications. But nothing arose requiring Einstein J to accept Mr Wilson's credibility in the sense of making a positive choice between belief and disbelief in the face of material creating possible reasons for disbelief. An assessment of whether a fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of the issues at the trial may include attribution to that observer of knowledge that judicial experience is a safeguard against the alleged danger that, having acted on a witness's unchallenged evidence given on one issue at an interlocutory stage, that judge might not fairly evaluate other evidence given by the witness at the trial on other issues, being evidence which was challenged at the trial and had to be

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79 See above at [61].

weighed against that of the opposing witnesses, and that it is common for witnesses to be accepted on one issue but not others. Of course it is possible that in particular instances, despite that judicial experience, it should be concluded that there is a reasonable apprehension of prejudgment. It was not demonstrated that that conclusion should be drawn here. The same applies to the alleged danger that Einstein J's prolonged familiarity with the appellant's case gained during the ex parte applications might engender excessive knowledge of it, and, consciously or unconsciously, undue favour towards it in various ways.

118 Therefore the allegation that there was a reasonable apprehension of prejudgment must, with respect to the Court of Appeal's careful reasoning, be rejected. It is accordingly not necessary to consider questions about whether there had been what was perhaps miscalled "waiver" by the respondents of any right to object to Einstein J hearing the trial, and about the correctness of *Barton v Walker*[80].

119 In relation to abuse of process – a part of the appeal which is yet a further reminder of the unwisdom of consenting to arbitration – I agree with the reasoning of Gummow ACJ, Hayne, Crennan and Bell JJ[81]. I agree too with the orders proposed.

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80 [1979] 2 NSWLR 740.

81 Namely, at [91]-[110].

Heydon J

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