HIGH COURT OF AUSTRALIA

9 February 2011

BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES LIMITED v LAURIE & ORS
[2011] HCA 2

Today the High Court prohibited a judge from hearing proceedings on the basis of a reasonable apprehension of bias, in circumstances where in earlier, unrelated, proceedings, that judge had made findings adverse to one party on an issue that was also likely to arise in the later proceedings.

Mr Donald Laurie commenced negligence proceedings against British American Tobacco Australia Services Limited ("BATAS"). After his death from lung cancer in May 2006, the claim was continued by his widow, Mrs Claudia Laurie, who also brought negligence proceedings on her own behalf as his dependant. The claim alleged that Mr Laurie had smoked BATAS tobacco products for a number of years and that throughout this period BATAS knew, or ought to have known, that smoking tobacco products could cause lung cancer. A significant issue in the proceedings was whether BATAS had adopted and implemented a document management policy for the purpose of destroying documents adverse to its interests. The claim was listed before Judge Curtis in the New South Wales Dust Diseases Tribunal.

In earlier, unrelated, proceedings involving BATAS ("the Mowbray proceedings"), Judge Curtis found that BATAS drafted or adopted a document management policy for the purpose of a fraud. The finding was an interlocutory finding made for the purpose of determining whether the evidence of Mr Gulson, a former in-house counsel and company secretary of BATAS, was admissible in those proceedings. Judge Curtis noted in his reasons that the application was only interlocutory and that whether the document management policy was implemented for the purpose of destroying prejudicial documents remained a live issue for trial. However, the Mowbray proceedings did not proceed to trial. It was likely that Mr Gulson would also be called in Mrs Laurie's proceedings to prove the allegations concerning the document management policy.

BATAS made an application to Judge Curtis asking that he disqualify himself from hearing Mrs Laurie's claim on the ground that his findings in the Mowbray proceedings gave rise to a reasonable apprehension of bias. Its application relied on a principle requiring that a judge not sit to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide.

Judge Curtis refused the application. BATAS sought leave to appeal to the New South Wales Court of Appeal, and also commenced proceedings in that Court seeking an order prohibiting Judge Curtis from hearing or determining Mrs Laurie's claim. The Court of Appeal dismissed both summonses.

The High Court by majority allowed the appeal, and made an order prohibiting Judge Curtis from further hearing or determining Mrs Laurie's claim. The impression created by reading the judgment from the Mowbray proceedings was that the clear views there stated might influence Judge Curtis's determination of the same issue in Mrs Laurie's claim. Although Judge Curtis acknowledged in the Mowbray proceedings that different evidence could be led at trial, the High

Court considered that his findings were otherwise expressed to be without qualification or doubt, and indicated extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials leading to a different outcome. The Court held that, in the circumstances, a reasonable observer might apprehend that Judge Curtis would not bring an impartial mind to the question in Mrs Laurie's proceedings, even if different materials were presented.

Pursuant to an undertaking given to the Court, BATAS was ordered to pay Mrs Laurie's costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*