



## HIGH COURT OF AUSTRALIA

**Public Information Officer**

20 July 2006

**LEONARDUS GERARDUS SMITS AND JOHN ANTHONY LESLIE v WALTER EDWARD ROACH,  
WINNOTE PTY LIMITED (in liquidation) AND SYDTECH PTY LIMITED (in liquidation)**

A judge whose brother chaired a major law firm which Mr Roach and his companies were suing in separate proceedings did not have to disqualify himself from hearing a dispute between Mr Roach and the principals of a small law firm which he had engaged to conduct the litigation, the High Court of Australia held today.

Mr Roach and companies formerly controlled by him sued Freehills, claiming damages for loss of profits of \$1 billion after it allegedly gave him negligent advice in relation to a peat deposit in Victoria which he wished to exploit. To act in these proceedings they retained Mr Leslie, who went into partnership with Mr Smits in 1995. A retainer agreement was signed in 1998 on a contingency basis, under which Smits Leslie was entitled to receive 10 per cent of any amount recovered from Freehills under \$10 million and five per cent of amounts recovered beyond that. The relationship between Smits Leslie and Mr Roach broke down, principally because of a lack of funding for preparing and prosecuting the case against Freehills. In April 1999, Smits Leslie ceased dealing with Mr Roach and soon after commenced proceedings against him and his companies for \$675,000 in professional fees and expenses plus 10 per cent of proceeds in the Freehills litigation. Smits Leslie claimed Mr Roach had wrongfully repudiated the retainer agreement. He claimed the agreement was illegal and unenforceable.

Proceedings came before the NSW Supreme Court in March 2002. Justice Peter McClellan asked the parties whether they objected to his sitting, apparently because he and Mr Leslie, a former Supreme Court registrar, had played golf together. Neither party objected and Justice McClellan heard the case. He found the retainer agreement was illegal but even if enforceable the right of Smits Leslie to be paid was contingent upon success in the Freehills action. Before publishing his judgment, Justice McClellan gave a draft to the parties and to Freehills for comment in case it inadvertently disclosed potentially privileged information in the Freehills litigation. At a hearing for this purpose, Justice McClellan revealed that his brother, Geoff McClellan, was chairman of partners at Freehills, and although he would not normally sit he did not believe he had a choice given the way in which the issue involving Freehills had arisen. Mr Smits and Mr Leslie sought to have Justice McClellan disqualify himself because they had not known of the relationship and that a finding against them in the litigation against the Roach interests would benefit Freehills by minimising the legal costs for which it would be liable if the Roach interests won the Freehills litigation. Justice McClellan dismissed the application after satisfying himself that senior counsel for Smits Leslie, Geoffrey Lindsay SC, had known of the relationship between him and Mr McClellan.

The Court of Appeal reversed Justice McClellan's finding that the retainer agreement was invalid but held that the parties had made no provision for Smits Leslie to be paid if it ceased acting for the Roach interests before a successful outcome in the Freehills litigation could be achieved. It held that Justice McClellan should have disclosed his brother was chairman of Freehills at the start of proceedings, but held that Smits Leslie had by Mr Lindsay's conduct waived any objection. Smits Leslie appealed to the High Court on the issue of disqualification.

The Court unanimously dismissed the appeal. All Justices held that the Court of Appeal's decision on waiver was correct and four Justices dismissed the appeal on that basis. Five Justices also held that the Court of Appeal failed to articulate a logical connection between the relationship of Justice McClellan and Mr McClellan and any reasonable apprehension of bias and two Justices would have dismissed the appeal on that basis rather than on the issue of waiver. On waiver, the Court held that Smits Leslie was bound by Mr Lindsay's conduct in not objecting to Justice McClellan sitting when he at least knew of the relationship of the judge to Mr McClellan. On the bias issue, a majority held that a court must both identify what might lead a judge to decide a case other than on its legal and factual merits, and also articulate the logical connection between the matter complained of and the feared deviation from impartial decision-making.

- *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.*