HIGH COURT OF AUSTRALIA

1 December 2011

MICHAEL WILSON & PARTNERS LTD v ROBERT COLIN NICHOLLS
[2011] HCA 48

The High Court today held that a trial judge had been correct not to disqualify himself from hearing a proceeding in the Supreme Court of New South Wales and that the proceeding was not an abuse of the process of the court. The High Court thus allowed the appeal and remitted the matter for further hearing by the Court of Appeal of issues which that Court had not decided.

Michael Wilson & Partners Ltd ("MWP"), the appellant, was a law firm and business consultancy in Kazakhstan. MWP employed a solicitor, Mr Emmott, in effect as a partner, and two of the respondents, Messrs Nicholls and Slater, as lawyers. A few years later, Messrs Emmott, Nicholls and Slater left MWP. MWP claimed that each of them had wrongfully caused it loss by taking clients with them or by assisting or conspiring with others to do so.

Mr Emmott's contract of employment required arbitration of any dispute with MWP. MWP commenced an arbitration in London against Mr Emmott. MWP claimed, among other things, that Mr Emmott breached a fiduciary duty owed to MWP. MWP then commenced the proceeding in the Supreme Court against the respondents, including Messrs Nicholls and Slater. MWP alleged that they had knowingly assisted Mr Emmott's breach of fiduciary duty and were liable to MWP on that basis as well as in tort. The claims of loss in both proceedings were substantially the same.

Before the trial, MWP applied, without notice to the respondents, for permission to use, for foreign proceedings and criminal investigations, affidavits of Messrs Nicholls and Slater in the Supreme Court proceeding. The judge granted MWP's application and six similar applications over approximately a year, relying on MWP's uncontested affidavit evidence. On each occasion, the application was heard in closed court and orders were made preventing the respondents from knowing, or knowing fully, about MWP's applications. These confidentiality orders (with some variations) stood for about a year. When, before trial, the confidentiality orders were lifted, the respondents became aware of MWP's applications and applied to the judge to disqualify himself from hearing the case further. The judge refused their applications and tried the action.

The trial judge gave judgment for MWP against the respondents. The arbitrators in London later delivered an award on Mr Emmott's liability to MWP. The trial judge and the arbitrators made differing findings about what losses MWP had suffered.

The Court of Appeal held that the trial judge should have disqualified himself and that the Supreme Court proceeding brought by MWP was, in any case, an abuse of process. The High Court overturned the Court of Appeal's decision.

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The High Court held that the trial judge had been correct not to disqualify himself. A fair-minded lay observer could not reasonably have apprehended that the trial judge might not bring an impartial mind to the case due to what had occurred in connection with MWP's applications without notice. The trial judge had not decided any issue arising at trial, nor were the confidentiality orders themselves enough to found a reasonable apprehension of bias.

The High Court also held that neither the institution nor the prosecution to judgment of the Supreme Court proceeding was an abuse of process. The Supreme Court proceeding was not a collateral challenge to the arbitration. Further, because the respondents' liability to MWP was not necessarily limited by Mr Emmott's liability to MWP, the differing findings about loss did not make the Supreme Court proceeding an abuse.

- *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.*