HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Sep 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P6/2021
File Title:	Charisteas v. Charisteas & Ors
Registry:	Perth
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondents
Date filed:	03 Sep 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: G CHARISTEAS
Appellant

and

ZV CHARISTEAS & ORS
Respondents

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

Part II: OUTLINE OF PROPOSITIONS

2. Logically, grounds 2-4 should be dealt with first, as if they succeed, then the trial before Walters J was a nullity and no issue of apprehended bias arises.

Grounds 2 – 4 – Jurisdiction and power of the Family Court of WA

3. The power to adjust property interests under s.79 must be exercised in a manner that is "just and equitable": s.79(2). The Court must first determine what those interests are. The Full Court's decision in 2013 setting aside the vesting orders changed the basis for Crisford J's orders. It cannot be just and equitable to apply Crisford J's orders to a different pool of interests than that which they were intended to adjust.

4. The appellant does not challenge the correctness of the decisions in *Hickey* and *Gabel*, holding that there is a single exercise of power under s.79, which may be exercised iteratively, including varying or reversing earlier orders without consent or recourse to s.79A, until the power is spent when there are no more property interests to be adjusted: *Hickey* [60]; *Gabel* [57], [69].

5. The question is not whether Crisford J intended that her Honour's orders would adjust the entirety of property in a just and equitable manner, it is whether the orders in fact do so after the vesting orders were quashed. If they do not, then the power under s.79 had not been spent and Walters J was correct to proceed with the trial.

6. There was no basis for the respondent to appeal the order dismissing her s.79A application after Walters J had held that the trial should proceed. Contrary to the appellant's submissions, there was an order proposed from which the appellant could have sought leave to appeal: see order 7 at CAB 175. By that order, Walters J assumed jurisdiction over "*the further conduct of the substantive proceedings*".

7. The appellant waived his right to object to the making of further orders under s.79 both by not challenging Walters J's decision at the time, and by continuing express reliance on s.79: FC [212], CAB 599 lines 40-55. Had the appellant successfully challenged the Judge's decision to proceed with the trial at the appropriate time (after the delivery of the interpretation judgment), that would not have changed the outcome of the 2016 trial as the first respondent could and would have applied afresh under s. 79A and the Court would have utilised that power: CAB 165 [163].

8. There can be no miscarriage of justice in circumstances where the appellant willingly and actively participated in the 2016 trial to the extent that he even proposed orders pursuant to s. 79 that were different to those made by Crisford J.

Ground 1 – Apprehended bias

9. The first step in assessing a claim of apprehended bias is identification of what it is that might lead the judge to decide the case other than on its legal and factual merits: *Ebner* at [8]. The appellant's case does not clearly identify what is alleged: was it (i) that the Judge "engaged in a relationship" with counsel (ground 20 below (CAB 506); AS [40]); or was it (ii) the fact of private contact between Judge and counsel while the Judge was seized of the matter (FC [170]; AS [23], [34]; AR [2][1]); or was it (iii) the failure, of itself, to disclose the contact (FC [57]; AS [22], [44]); or was it (iv) that counsel may have imparted information outside of the trial process (FC [53], [60]; AS [47]); or does the appellant allege (v) that counsel may have had a financial interest in the outcome (AS [48])?

10. The appellant seeks to impugn the professional conduct of a long-serving Judge (who was senior counsel before appointment to the bench) and an experienced member of the independent bar. A conclusion that there is a reasonable apprehension of bias should not be drawn lightly against such a judicial officer: *Vakuata* at 584-5.

---

1 At AR [2], the appellant now denies reliance on the "relationship", contrary to the ground of appeal below and AS [40]. To the extent that the appellant now complains of contact other than as an incident of the relationship, that was not a matter raised in the grounds of appeal below.

11. A hypothetical reasonable observer must be assumed to know of the role of counsel at the independent bar; the likelihood of relationships between counsel and judges; and the capacity of counsel and judges to put aside personal associations in favour of their professional duties: *Aussie Airlines* at 766-7; *Day* at [50]-[54].

12. The appellant's case involves the highest degree of adverse inferences being drawn against the Judge and counsel from the weakest of evidence; blaming the Judge and counsel for the weakness of the evidence through an alleged failure to disclose; and drawing further adverse inferences from the alleged failure to disclose. No innocent inferences are weighed. The reasonable hypothetical observer is not so one-sided. The drawing of such serious adverse inferences against the Judge and counsel is unwarranted on the evidence and would be procedurally unfair.

13. Neither the Judge nor counsel were under a duty at law to disclose their friendship with each other and non-disclosure of their relationship does not, of itself, establish apprehended bias: *Ebner* at [68] – [70]; *Day* at [54]. Nor were they ever asked to make any disclosure beyond counsel being asked to "*outline the circumstances of* [her] *dealings with* [the Judge]" (CAB 525), with which she promptly and willingly complied. That disclosure: (i) was given in the absence of any current allegation of apprehended bias; (ii) has never been traversed; and (iii) either does not support, or directly contradicts, the existence of any of the factors in [1] above except the existence of a non-intimate personal and professional association between counsel and the Judge and the common incidents of contact attendant in such a relationship.

14. Nowhere in the appellant's submissions is the second limb of the *Ebner* test applied in respect of the admitted relationship and contact between counsel and Judge. That relationship and contact alone cannot reasonably be thought to divert the judge from deciding the case on the merits. The second limb could only be satisfied by a more intimate relationship, or by factors (iv) or (v) from [1] above, none of which are open on the evidence.

Dated: 2 September 2021

.....
Peter Ward
Francis Burt Chambers
T: 08 9220 0444
E: pward@francisburt.com.au

.....
Ann Spencer
Francis Burt Chambers
T: 08 9220 0444
E: aspencer@francisburt.com.au