HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P6/2021
File Title:	Charisteas v. Charisteas & Ors
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY
BETWEEN:

G CHARISTEAS
Appellant

and

Z V CHARISTEAS
First Respondent

YWB Pty Ltd
Second Respondent

L W BANDY
Third Respondent

A CHARISTEAS (by her Case Guardian R Elias)
Fourth Respondent

E A CHARISTEAS
Fifth Respondent

K A SOTIROSKI
Sixth Respondent

S M MANOLAS
Seventh Respondent

L W BANDY & A CHARISTEAS (as Executors of the Estate of D Charisteas)
Eighth Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1

2. As to the known facts:

(a) the trial Judge and the wife's trial counsel were in "telephone contact on 5 occasions between January 2017 and August 2017", and the wife's trial counsel did not exclude the possibility that one or more of those occasions occurred during the trial: FC 8;

(b) whilst judgment was reserved the trial Judge and the wife's trial counsel exchanged private text messages, the frequency of which was described by the wife's trial counsel as "occasional": **FC 8;**

(c) there was "personal contact for a drink or coffee on approximately 4 occasions, between 22 March 2016 and 12 February 2018", and the wife's trial counsel did not exclude the possibility that one or more of those occasions occurred either during the trial and/or whilst judgment was reserved: **FC 8**;

(d) the contact/communications between the trial Judge and the wife's trial counsel were not disclosed by either of them to the other parties until well after the event (and then only by the wife's trial counsel and after enquiry was made of her), and notwithstanding an application made to the trial Judge after the completion of evidence but before closing oral submissions, opposed by the wife through her counsel, that the trial Judge recuse himself on the basis of apprehended bias: **FC 19-24; AS 22;**

(e) the "disclosure" ultimately made by the wife's trial counsel was in terms of her letter dated 22 May 2018 (**Letter**): **FC 24.**

3. In addition to the known facts, the hypothetical fair-minded observer would be taken to know that it is a well-established and fundamental tenant of a democratic judicial system that a Judge must be and must at all times be seen to be impartial, and to achieve that, amongst other things, there exist well known and well-established "structures against private communications" that a trial Judge and counsel will not

have private communications during a trial or before judgment without the prior informed consent of the other parties: **AS 50.**

4. Having regard to the facts known and taken to be known, the proper conclusion is that the fair-minded lay observer might reasonably apprehend a lack of impartiality on the part of the trial Judge, largely along the lines of the reasoning of the Chief Judge below: **AS 21, 50, 51.**

5. Having rightly observed that "the hypothetical observer would give this matter anxious consideration, as we have, because the fact that there was any discussion about the case is troubling", FC [176], the majority fell into error in concluding that "the totality of the circumstances would be sufficient to dispel concern that the case would be decided other than impartially" **FC [176]**; **AS 47.**

6. The majority fell into error by approaching the Letter as an exercise of "proper interpretation" for the purposes of making findings of fact. The proper approach is to read and consider the Letter as a "fair-minded lay observer" would do (i.e. "warts and all"): **AS 23-26.**

7. Even adopting the majority's approach of "proper interpretation", the inferences drawn and conclusions reached by the majority are unsustainable: **AS 27-34.**

8. The majority fell into error in their analysis of the non-disclosure by the trial Judge with the result that insufficient weight was attributed to such non-disclosure: **AS 37-44**.

9. The majority fell into error in seeking to draw inferences as a result of the limited disclosure made in the Letter by reference to the onus for establishing a basis for recusal and the fact that no "request for further particulars" of the Letter was made: FC [178]; **AS 35, 45, 46.**

10. The majority fell into error when finding, based solely on the Letter, that the communications did not involve the "substance" of the case. First, as this is not a case of actual bias, what was actually said in the undisclosed private communications is irrelevant. Secondly, such a conclusion moves a hypothetical observer from being not unduly sensitive or suspicious to a person willing to uncritically accept unsworn statements made by a person who has already acted improperly: **AS 45-47.**

11. In short, the approach of the majority below was to impose a standard significantly less rigorous than that established by numerous decisions of this Court, a standard not put in issue by the wife: **AS 49; RS 8.**

Grounds 2 – 4

12. Crisford J's December 2011 finally disposed of the substantive section 79 proceedings on foot between the appellant and first respondent. Following the fourth respondent's successful appeal, the Full Court considered, but refrained from, ordering a remitter: **CAB 115 – 116, [103] – [104]**.

13. The primary judge was (re)exercising power pursuant to section 79. Nothing in section 79 evinces an intention to empower the Family Court of WA to set aside final orders made by other judges of the Court. That power is reserved to the exercise of appellate function and, in limited circumstances, pursuant to section 79A. The first respondent's section 79A application was, in fact, dismissed. Had section 79A been the source of power, the primary judge would have been obliged to make additional findings which clearly were not made. **AS 58 – 62.**

14. Embracing the proposition that further property settlement proceedings can be brought if there is any property which has not been dealt with by an existing order results in fragmentation and no finality. Section 79A(1)(a) makes clear that even if property is not dealt with (for example, by concealment), the power to vary or set aside an order only arises if there is a miscarriage of justice.

15. It would not have been competent to appeal the interpretation decision. It follows that a failure to appeal the interpretation decision did not result in any waiver of the right to do so after final judgment and orders. **AS 69 – 71; RS 15**. Nor would it have been appropriate, let alone desirable, for a writ of prohibition to be sought: **RS 19**.

Dated: 2 September 2021

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