HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MAXWELL WILLIAM EBNER APPELLANT

AND

THE OFFICIAL TRUSTEE IN BANKRUPTCY RESPONDENT

Ebner v The Official Trustee in Bankruptcy [2000] HCA 63
7 December 2000
M131/1999

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

G T Bigmore QC with M N C Harvey for the appellant (instructed by Clayton Utz)

J B R Beach QC with M Clarke for the respondent (instructed by Deacons)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CLENAE PTY LTD & ORS APPELLANTS

AND

AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED RESPONDENT

Clenae Pty Ltd v ANZ Banking Group Ltd
7 December 2000
M2/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

F M Douglas QC with K M Connor and W D H Walsh for the appellants (instructed by McKean & Park)

D F Jackson QC with R L Berglund QC for the respondent (instructed by Blake Dawson Waldron)

CATCHWORDS

Ebner v The Official Trustee in Bankruptcy
Clenae Pty Ltd v ANZ Banking Group Ltd

Courts and judges – Bias – Reasonable apprehension of bias – Direct or indirect shareholding by judge in a corporation which is a party to litigation or financially interested in its outcome – Whether judge automatically disqualified – Principles governing disqualification – Disclosure – Relationship between principles governing disqualification and requirement of disclosure – Necessity – Whether there is a principle of necessity – Circumstances for operation of principle of necessity.

Constitutional Law (Cth) – Chapter III – Judicature of the Commonwealth – Impartiality of Judiciary – Bias – Reasonable apprehension of bias – Whether requirement of impartial and independent judge derived from implications arising from Chapter III of the Constitution.

Words and Phrases: "impartial", "independent".

Constitution, Ch III.

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. These two appeals were heard together. In each case it was contended that the judge who heard and determined the proceedings at first instance was disqualified by reason of a shareholding in a listed public company, Australia and New Zealand Banking Group Ltd ("the Bank"). In the first case, the judge did not hold shares in the Bank personally, but was a beneficiary of a trust which held the shares. The Bank was not a party to the proceedings, but had a financial interest in the outcome. In the second case, the judge held the shares personally, and the Bank was a party to the proceedings. In that case, the circumstances in which the judge came to hold the shares also gave rise to a question whether, even if the judge would otherwise have been disqualified, considerations of necessity required that he should determine the matter.

2 Ownership of shares in a listed public company, a common form of investment, is one possible form of association between a judge and a litigant, and of potential interest in the outcome of litigation. The facts of these two cases illustrate differences in the nature and degree of the association and potential interest that might exist. Such possible differences are further exemplified by *Dovade Pty Ltd v Westpac Banking Group*[1]. In that case a bank was a party to litigation. The trial judge was a customer of the bank, which held a mortgage over some land owned by the judge. The judge's wife owned shares in the bank worth about $89,000[2]. There are many possible forms of association, personal, social, financial, or ideological, that might exist between a judge and a litigant, or someone concerned in litigation. Such association may, or may not, have the potential to bring into question the independence or impartiality of the judge. It may, or may not, give rise to a suggestion that a judge has an interest in the outcome of proceedings.

3 Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to Magna Carta (with its declaration that right and justice shall not be sold[3]) and the *Act of Settlement* 1700[4] (with its provisions for the better securing in England of judicial

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1 (1999) 46 NSWLR 168.

2 (1999) 46 NSWLR 168 at 183.

3 Holdsworth, *A History of English Law*, 6th ed (1938), vol 1 at 57-58.

4 12 and 13 Wm 3, c 2.

independence[5]). It is a principle which could be seen to be behind the confrontation in 1607 between Chief Justice Coke and King James about the supremacy of law[6]. It could be seen to be applied when Bacon was stripped of office and punished for taking bribes from litigants[7]. Many other examples could be drawn from history. It is unnecessary, however, to explore the historical origins of the principle. It is fundamental to the Australian judicial system.

4 The principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision making and decision maker. Most often it now finds its reflection and application in the body of learning that has developed about procedural fairness[8]. The application of the principle in connection with decision makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making. Two examples will suffice to make the point. First, as Mason CJ and Brennan J said in *Laws v Australian Broadcasting Tribunal*[9]:

> "The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it. Or, to put the matter another way, the statutory requirement that the tribunal perform the functions assigned to it must prevail over and displace the application of the rules of natural justice. Those rules may be excluded by statute: *Twist v Randwick Municipal Council*[10]; *Salemi v MacKellar* [No 2][11]; *FAI Insurances Ltd v Winneke*[12]."

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5 cf as to the colonies *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482 at 492-493 per Lord Goddard CJ.

6 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 5 at 430.

7 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 5 at 241.

8 For example, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.

9 (1990) 170 CLR 70 at 89.

10 (1976) 136 CLR 106 at 109-110, 112 et seq, 118-119.

11 (1977) 137 CLR 396 at 401, 442.

12 (1982) 151 CLR 342 at 348-349, 362-363.

Secondly, few administrative decision makers would enjoy the degree of independence and security of tenure which judges have.

5 These differences, however, must not obscure the fundamental principle. That principle is obviously infringed in a case of actual bias on the part of a judicial officer or juror. No suggestion of actual bias is made in the present appeals.

6 Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide[13]. That principle gives effect to the requirement that justice should both be done and be seen to be done[14], a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

7 The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one

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13 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 74 ALJR 1380; 174 ALR 655.

14 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.

8 The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

9 The apprehension of bias principle which has become part of the common law of Australia is expressed somewhat differently from the corresponding principle adopted in England[15]. Allowing for that difference, it is of interest to note what was said recently by the Court of Appeal of England in *Locabail (UK) Ltd v Bayfield Properties Ltd*[16]:

> "In practice, the most effective guarantee of the fundamental right [to a hearing before an impartial tribunal] is afforded not … by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias."

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15 See also *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 and *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* (*Seafoods Division Fish Processing*) 2000 (3) SA 705 at [12]-[18], [33].

16 [2000] 2 WLR 870 at 883; [2000] 1 All ER 65 at 73.

10 The concluding words of that passage reflect the difference between the English and Australian apprehension of bias rules. Substituting the Australian rule for the English, we agree with what the Court of Appeal said.

11 For reasons that will appear, in both of the present appeals the application of the reasonable apprehension of bias test leads to the conclusion that the judge was not disqualified. In one case, this was conceded. In the other case, the conclusion follows from primary facts which were not in dispute.

12 The proposition upon which the appellants in both cases chiefly relied was that there is also a rule, that was described as a rule of automatic disqualification, which applied in both cases. If such a rule applied in the second case, the question of necessity would arise.

The facts in *Ebner*[17]

13 The appellant's husband was a bankrupt. Proceedings were brought in the Federal Court of Australia by the Official Trustee in Bankruptcy, pursuant to ss 120 and 121 of the *Bankruptcy Act* 1966 (Cth), seeking a declaration that a transfer of property to the appellant by the bankrupt was void.

14 The Bank was not a party to the proceedings. However, it was a creditor of the bankrupt and contributed to the funding of the proceedings instituted by the Official Trustee[18]. In that respect, the Bank had a financial interest in the outcome of the proceedings. The property in question, which was said to be worth between $300,000 and $450,000, had been transferred for $150,000[19]. There was no possibility that the outcome of the proceedings would affect the market value of shares in the Bank.

15 The proceedings came on for hearing before Goldberg J. He disclosed that he was a "contingent beneficiary" under a family trust which owned 8,000 to 9,000 shares in the Bank, and that he was a director of the trustee of the trust[20]. Objection was taken to the judge sitting. He overruled the objection, saying:

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17 *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353.

18 (1999) 91 FCR 353 at 356 and 362.

19 (1999) 91 FCR 353 at 356-357.

20 (1999) 91 FCR 353 at 362.

> "It seems to me that the issues before the court … are such that they could not in my opinion impact in any significant way on the share price of the ANZ Bank, and it seems to me therefore that to that extent there is no real pecuniary interest that I have in the proceeding in any way which is such that … an objective observer, knowing all the relevant facts, would entertain a reasonable apprehension that I would not decide the case impartially or without prejudice. I propose to proceed with the hearing."

16 On appeal to the Full Court of the Federal Court it was conceded that the appellant could not establish any reasonable apprehension of bias on the part of Goldberg J and that if the reasonable apprehension of bias test were the test to be applied the appeal must fail[21]. The concession was repeated in this Court. The appeal was dismissed.

The facts in *Clenae*[22]

17 The Bank sued the borrowers of a foreign currency loan. The borrowers counterclaimed, alleging negligence and unconscionability. The case was heard by Mandie J. The trial lasted 18 days. The judge reserved his decision for a lengthy period. During that period a principal witness for the Bank died. During the same period, the judge's mother also died. The judge inherited from her 2,400 shares in the Bank. The value of the shares fluctuated, the highest level being $11.45 per share. There were, at the relevant time, more than 1,508 million ordinary issued shares of the Bank, and there were more than 130,000 shareholders. The net assets of the Bank were of the order of $8,000 million. It was conceded that it could not be argued that the outcome of the case would have affected the judge's value of the shares in the Bank. That concession was examined and was held to have been correct[23].

18 Mandie J did not disclose his inheritance. He gave judgment in favour of the Bank. Later, the fact of his shareholding was discovered by the borrowers. They appealed to the Court of Appeal of Victoria, arguing that the trial judge was disqualified by reason of his shareholding in the Bank. Winneke P and Charles JA held that Mandie J was not disqualified by reason of any rule relating

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21 (1999) 91 FCR 353 at 360.

22 *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573.

23 [1999] 2 VR 573 at 592-593.

to bias or interest[24]. Callaway JA decided the case on a different ground, holding that, in the circumstances, which included the length of the trial, and the death of an important witness, it was necessary for Mandie J to deliver judgment notwithstanding the shares he had acquired by inheritance after reserving his decision. On that point the other two members of the Court agreed[25].

The principle to be applied

19 Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

20 This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

21 It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly decline to sit. Circumstances vary, and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a

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24 [1999] 2 VR 573 at 574 per Winneke P, 593-594 per Charles JA.

25 [1999] 2 VR 573 at 574 per Winneke P, 593 per Charles JA, 603-604 per Callaway JA.

judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise.

22 The particular principle or principles which determine the grounds upon which a judge will be disqualified from hearing a case follow from a consideration of the fundamental principle that court cases, civil or criminal, must be decided by an independent and impartial tribunal.

23 Bias, whether actual or apprehended, connotes the absence of impartiality. It may not be an adequate term to cover all cases of the absence of independence.

24 In *Webb v The Queen*[26], a case concerning a juror, Deane J identified four distinct, though overlapping, categories of case involving disqualification by reason of the appearance of bias: interest; conduct; association; and extraneous information. It is not necessary to decide upon the comprehensiveness of such categorisation, and its utility may depend upon the context in which it is employed. However, it provides a convenient frame of reference.

25 The concept of "interest" is protean. Its use in this context has a long history. In the case of *Dimes v Proprietors of the Grand Junction Canal*[27], in 1852, Lord Campbell said that the maxim that no one is to be a judge in his own cause is not confined to a cause in which he is a party, but applies to a cause in which the judge has an interest. It will be necessary to make further detailed reference to that case. His Lordship did not explain what he meant by a cause in which a judge has an interest. Subsequent judicial statements concerning automatic disqualification limited the concept to a direct pecuniary or proprietary interest in the outcome of the case[28], until that limitation was reconsidered and rejected, or at least modified, by the House of Lords in *R v Bow Street Magistrate, Ex parte Pinochet Ugarte (No 2)*[29].

26 As a matter of principle, in considering whether circumstances are incompatible with the appearance of impartiality, there is no reason to limit the concept of interest to financial interest, and there may be cases where an indirect

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26 (1994) 181 CLR 41 at 74.

27 (1852) 3 HLC 759 at 793 per Lord Campbell [10 ER 301 at 315].

28 eg *Webb v The Queen* (1994) 181 CLR 41 at 75 per Deane J; *R v Gough* [1993] AC 646 at 661, 673.

29 [2000] 1 AC 119.

interest is at least as destructive of the appearance of impartiality as a direct interest. It may be that, at a time when the focus of most civil litigation was some financial claim or right of property, it was easier to confine relevant interests to financial interests, but in modern times, when so much litigation is concerned with the enforcement of non-economic rights, it is difficult to do so. And even at the level of purely financial interests, the variety of arrangements under which persons may order their affairs makes a rigid distinction between direct and indirect interests artificial and unsatisfactory.

27 Lord Campbell's recognition that people other than the parties to the litigation may have an interest in the outcome of litigation had implications going far beyond the circumstances of the particular case he was considering. However, he found it unnecessary to explore those implications, or to formulate any principle beyond the maxim to which he referred, and which he said applied to the case with which the House of Lords was then concerned.

28 The concepts of interest and association will overlap in many cases. *Pinochet (No 2)* provides an example. If, in the present appeals, it had appeared that the value of the shares in the Bank might well have been affected by the outcome of the litigation in question, then they would have provided further examples. There is no justification for having different principles for interest and association.

29 The potential forms of association between a judge and a litigant are manifold. Banks provide a good illustration. It may be assumed that all Australian judges have some form of relationship with a bank. There are only four major banking groups in the country. Banks are frequent litigants. In the area of bankruptcy practice, they are creditors of many insolvent estates.

30 It is not only association with a party to litigation that may be incompatible with the appearance of impartiality. There may be a disqualifying association with a party's lawyer, or a witness, or some other person concerned with the case. In each case, however, the question must be how it is said that the existence of the "association" or "interest" might be thought (by the reasonable observer) possibly to divert the judge from deciding the case on its merits. As has been pointed out earlier, unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies. Similarly, the bare identification of an "association" will not suffice to answer the relevant question. Having a mortgage with a bank, or knowing a party's lawyer, may (and in many cases will) have no logical connection with the disposition of the case on its merits.

31 Ownership, direct or indirect, of shares in a corporation is but one possible form of association with, and potential interest in, a litigant or a case. In contemporary Australia, ownership of shares in a listed public company is a common form of saving and investment, both amongst members of the community generally, and amongst judges. It is not confined to wealthy individuals. In recent years, processes of privatisation and demutualisation of what were formerly public institutions or utilities, or mutual societies, have resulted in a further expansion of share ownership. The nature of the association with, or interest in, litigation, of an investor in a listed public company, may be substantially different from that of a shareholder in a private company.

32 Issues such as the present are best addressed by a search for, and the application of, a general principle rather than a set of bright line rules which seek to distinguish between the indistinguishable, and which were formulated to meet conditions and problems of earlier times. Furthermore, the brightness of the lines drawn by such rules sometimes dims over time, as circumstances change, or issues are raised in different forms.

33 The common law in both England and Australia in relation to this subject has come a long way since the middle of the nineteenth century. In Australia, the common law has developed along lines somewhat different from the development in England. In this country, an issue such as that which arose in *Pinochet (No 2)* would be resolved by asking whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide. That is the test to be applied in the present appeals, and it reflects the general principle which is to be applied to problems of apprehended bias, whether arising from interest, conduct, association, extraneous information, or some other circumstance.

34 In the practical application of that test, financial conflicts of interest are likely to be of particular significance. One reason why, in the earlier cases, pecuniary and proprietary interests may have attracted special attention has already been mentioned. There are other considerations which continue to affect the practical significance of economic interests. Usually, (although not always), they are more concrete in nature than other kinds of interest, and, when the primary facts are known, easier to identify. Furthermore, at least in the past, there has been a public perception that they are more insidious than other forms of interest in their likely effect upon impartiality. That perception may be changing, but it continues to be important.

35 Upon the application of the test stated above, neither Goldberg J nor Mandie J was disqualified. That was conceded in the case of Goldberg J, and it was correctly decided by the Court of Appeal of Victoria in the case of Mandie J.

36 In both cases, the primary factual consideration that was addressed was whether there was a realistic possibility that the outcome of the litigation would affect the value of the relevant judge's shareholding in the Bank. That was a relevant factual consideration, not the ultimate test. In the circumstances of these particular cases, it was not suggested that there was any other factual issue to be explored. It was not suggested that the judge in question had any interest in the outcome of the case other than its possible effect on the value of his shares in the Bank. In neither case was there any difficulty about answering the question of fact.

37 There may be other cases where the facts are not so simple. The nature of the judge's association with a litigant may be more complicated, as in *Pinochet (No 2)*. The possible effect of the outcome of a case upon the value of assets owned by a judge may be a matter of serious difficulty. However, in the ordinary case, where a judge owns shares in a listed public company which is a party to, or is otherwise affected by, litigation, and there is no other suggested form of interest or association, the question whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares will be a useful practical method of deciding whether a fair-minded observer might hold the relevant apprehension. In such a case, if the answer to the question is in the negative, the judge is not disqualified. If the answer to the question is in the affirmative, the judge is disqualified, not "automatically", but because, in the absence of some countervailing consideration of sufficient weight, a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.

The case of *Dimes*

38 The appellants threw the weight of their argument behind the proposition that, in addition to the general principle dealt with above, there is an additional rule, said to be "of automatic application", which operated in the present cases to disqualify the judges in question, regardless of any circumstances except the bare fact that, directly or indirectly, they owned shares in the Bank.

39 It was not suggested that this was a special rule relating to ownership of shares in corporate litigants, but it was argued that the mere fact of such ownership, regardless of any possible effect the outcome of the litigation might have upon the value of the shares in the Bank, disqualified the judge.

40 The rule for which the appellants contended was that if a judge has a direct pecuniary interest in the outcome of a case then the judge is automatically

disqualified (subject to considerations such as waiver or necessity) without any further examination of the circumstances. Support for this proposition was found in the judgment of Deane J in *Webb v The Queen*[30], the speech of Lord Goff of Chieveley in *R v Gough*[31], and the reasons for judgment of the House of Lords in *Pinochet (No 2)*. The appellants also relied upon the dictum of Isaacs J in *Dickason v Edwards* that[32]:

> "One disqualification is pecuniary interest. If that exists there is an end of the matter at once and the Court goes no further."

41 It is not sufficient for the appellants to demonstrate the existence of such a rule. It is necessary to show that it covers the facts of the present cases. One of the difficulties about the rule is that, in its possible application to relatively common situations, its meaning is unclear. What looks like a bright-line rule draws a line which is far from bright. Does a judge have a *direct pecuniary interest* in the *outcome* of a case merely by reason of ownership, direct or indirect, of shares in a company which is a party to the case or which has an interest in the proceedings?

42 As to the application of the rule to the facts, reliance was placed upon the decision in *Dimes v The Proprietors of the Grand Junction Canal*[33]. Since that case has been cited by a number of eminent judges as authority for the rule of automatic disqualification relied upon, it is convenient to go to it directly.

43 Legal thought and reasoning has a temporal dimension. It is a well-recognised method of legal reasoning to return to authority which is said to control the formulation of presently applicable principle, and to ascertain the conditions and problems of earlier times to which that authority responded, and the legal institutions which then controlled the formulation of principle. With the appreciation of such matters which is then acquired, "a measure of reconceptualisation"[34] may provide a better foundation for the present development of the law. A well-known example of this common law technique

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30 (1994) 181 CLR 41 at 75.

31 [1993] AC 646 at 661.

32 (1910) 10 CLR 243 at 259.

33 (1852) 3 HLC 759 [10 ER 301].

34 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 264.

is the analysis by Dixon and Fullagar JJ in *McRae v Commonwealth Disposals Commission*[35] of the decision (as it happens, contemporary with the *Dimes* litigation) in *Couturier v Hastie*[36]. Their Honours demonstrated that the earlier decision provided no basis for a principle, later attributed to it, respecting contracts rendered void for mistake.

44 The decision of the House of Lords in *Dimes* was the culmination of protracted litigation involving Mr Dimes and the Grand Junction Canal Company. The company had been incorporated in 1793 by private Act of Parliament for "making and maintaining a navigable canal" from the Oxford Canal to the River Thames near Brentford[37]. In 1797, the company had purchased from the copyhold tenant a portion of land held by the Lord of the Manor of Rickmansworth[38]. The copyhold tenant indemnified the company against quit-rents and other claims and interests of the Lord of the Manor and, with the concurrence of the Lord, the company took possession and constructed the canal and tow-path. In 1831, Dimes purchased the Lordship of the Manor. The then copyhold tenant died intestate in 1835, leaving as the heir, a minor. Dimes, as Lord, asserted a right to exclusive possession, and in actions brought in the common law courts successfully asserted his title to the land over which

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35 (1951) 84 CLR 377 at 401-410. Another example is the analysis of past authority undertaken in *Northern Territory v Mengel* (1995) 185 CLR 307 at 339-341.

36 (1852) 8 Ex 40 [155 ER 1250]; (1853) 9 Ex 102 [156 ER 43]; (1856) 5 HLC 637 [10 ER 1065].

37 33 Geo 3, c 80. When completed, the Grand Junction Canal was over 90 miles in length and contained 102 locks; at the time of the *Dimes* litigation, the Railway Age had commenced but the Grand Junction Canal was still an important artery of trade from the Midlands: see Faulkner, *The Grand Junction Canal* (1972) at 157, 222.

38 Copyhold was a form of tenure which never applied in Australia: *Wik Peoples v Queensland* (1996) 187 CLR 1 at 111. By the 19th century in England copyhold had "lost its taint of servility" and had become one of the commonest forms of tenure: Megarry and Wade, *The Law of Real Property*, 6th ed (2000) at §2-036.

the canal was constructed[39]; he obtained writs of possession and orders for mesne profits for trespass by the company[40].

45 The eventual appeal to the House of Lords was to involve three orders made in the Chancery litigation, on 15 December 1838, 16 November 1846 and 27 January 1848. In 1838, the company filed a bill in Chancery seeking injunctive relief against interference with the navigation of the canal. Interlocutory relief was obtained *ex parte* from the Vice-Chancellor and continued, with variations, by successive orders. One of these was an order made on 15 December 1838, by the Lord Chancellor, Lord Cottenham[41].

46 On 16 November 1846, Shadwell V-C made a decree for a declaration that the heir of the copyhold tenant was entitled to be admitted to the land on payment of the customary fine[42] and that, when admitted, he was to hold as trustee for the company[43]. The Vice-Chancellor also made perpetual the injunction, which had issued on 6 July 1839, after the variations made by Lord Cottenham on 15 December 1838[44], enjoining Dimes from impeding the use of the canal[45]. On 27 January 1848, Lord Cottenham LC dismissed Dimes' petition of appeal from the Vice-Chancellor's judgment[46]. Subsequently, Dimes discovered that Lord

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39 See *Dimes v The Grand Junction Canal Company* (1846) 9 QB 469 at 518 [115 ER 1353 at 1372n] and actions noted by Sharman, "Feudal Copyholder and Industrial Shareholder: The Dimes Case" (1989) 10 *Journal of Legal History* 71 at 76-80.

40 *Dimes v The Company of Proprietors of the Grand Junction Canal* (1844) 13 LJ QB 314; 8(1) Jur 847; *Dimes v The Company of Proprietors of the Grand Junction Canal* (1846) 9 QB 469 [115 ER 1353]; 16 LJ QB 107; 11(1) Jur 429. See also the note at (1846) 15 Sim 402 at 426 [60 ER 675 at 684].

41 *Grand Junction Canal Company v Dimes* (1838) 2 Jur 1077.

42 An amount equal to two years' improved value: see (1838) 2 Jur 1077 at 1077.

43 *Grand Junction Canal Company v Dimes* (1846) 15 Sim 402 at 425 [60 ER 675 at 684]; 16 LJ Ch 148 at 152.

44 See *Grand Junction Canal Company v Dimes* (1838) 2 Jur 886 and *In re William Dimes* (1850) 14(1) Jur 198.

45 *Grand Junction Canal Company v Dimes* (1846) 15 Sim 402 at 425 [60 ER 675 at 684]; 13(1) Jur 779 at 779-780.

46 *Grand Junction Canal Company v Dimes* (1848) 17 LJ Ch 206.

Cottenham held shares in the company[47]. His applications to have the petition restored for rehearing and to recover the company's costs he had paid were refused by the Master of the Rolls (Lord Langdale)[48] and the Vice-Chancellor (Sir Lancelot Shadwell)[49]. The Vice-Chancellor also granted an injunction restraining Dimes from bringing any further actions at law[50]; Dimes had brought 15 actions of trespass against the company in respect of 15 barges that passed through the portion of the canal upon the land.

47 Some time in November 1849, Dimes disobeyed the perpetual injunction by impeding the passage of vessels through the canal. In December 1849, he was committed to gaol by order of the Vice-Chancellor[51]. The Court of Queen's Bench refused his application for habeas corpus[52], as did Lord Langdale MR[53]. In July 1850, Lord Truro, newly appointed as Lord Chancellor, released Dimes

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47 Lord Cottenham held 17 shares in his own right, 25 with two other partners, and 50 shares in his capacity as an executor: (1849) 13(1) Jur 779 at 780. These holdings appear to have been 0.8 per cent of the issued shares: *Dovade* (1999) 46 NSWLR 168 at 186. The company's capital originally consisted of 5,000 shares at £100 (33 Geo 3, c 80) but further half shares were later issued: see Faulkner, *The Grand Junction Canal* (1972) at 108. By 1850 they appear to have been returning a dividend of 3 per cent: see (1850) 2 Mac & G 285 at 297 [42 ER 110 at 114]; 2 H & Tw 92 at 114 [47 ER 1610 at 1619]. Alderson B and Wightman J also held shares and disqualified themselves at other stages of the litigation: see 2 H & Tw 92 at 114 [47 ER 1610 at 1619-1620]; *In re William Dimes* (1850) 14(1) Jur 198 at 199; *Dimes v The Company of Proprietors of the Grand Junction Canal* (1852) 19 LTR 317 at 318.

48 *Grand Junction Canal Company v Dimes* (1849) 18 LJ Ch 365; 13(1) Jur 503.

49 *Grand Junction Canal Company v Dimes* (1849) 12 Beav 63 [50 ER 984]; 18 LJ Ch 418; 13(1) Jur 779.

50 *Grand Junction Canal Company v Dimes* (1849) 17 Sim 38 [60 ER 1041]; 13(1) Jur 779.

51 *In re William Dimes* (1850) 14(1) Jur 198 at 198-199.

52 *In re William Dimes* (1850) 14(1) Jur 198.

53 *Grand Junction Canal Company v Dimes* (1850) 2 Mac & G 285 [42 ER 110]; 2 H & Tw 92 [47 ER 1610].

from gaol with the consent of the company and on giving an undertaking not further to disobey the injunction[54].

48 The litigation then came before the House of Lords. Dimes brought an appeal against various Chancery orders, in particular, the orders made by Lord Cottenham on 15 December 1838 and 27 January 1848 and the decree of the Vice-Chancellor of 16 November 1846. The Solicitor-General appeared for Dimes. He submitted that Lord Cottenham had a pecuniary interest in the suit and this incompetency affected the Vice-Chancellor, who was his deputy; the result was that "the whole proceedings in Chancery were incompetent and void", and Dimes would be left free to enjoy his successes in the common law courts[55].

49 The appeal was not decided on any narrow basis that Lord Cottenham had had a pecuniary interest in the canal company. This appears, first, from the phrasing of the questions reserved for the Judges by Lord St Leonards (who had followed Lord Truro as Lord Chancellor)[56]:

> "1. Were the orders of the Vice-Chancellor void on account of the interest of the Lord Chancellor?
>
> 2. Were the orders of the Lord Chancellor void on account of his interest, *and of his having decided in his own cause?*"[57] (emphasis added)

50 The question respecting the orders of the Lord Chancellor was answered[58]:

> "We think that the order of the Chancellor is not void; but we are of opinion, that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a Judge; that it was a

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54 *In re Dimes* (1850) 3 Mac & G 4 [42 ER 162].

55 (1852) 3 HLC 759 at 767 [10 ER 301 at 305].

56 The Judges who were summoned to assist the House were Maule, Coleridge, Erle, Cresswell, Williams, Talfourd and Crompton JJ and Parke, Alderson and Platt BB: see the report (1852) 19 LT 317. Parke B delivered their unanimous opinion which the House accepted.

57 (1852) 3 HLC 759 at 784-785 [10 ER 301 at 312].

58 (1852) 3 HLC 759 at 786 [10 ER 301 at 312].

> voidable order, and might be questioned and set aside by appeal or some application to the Court of Chancery, if a prohibition would not lie."

51 The answer to the other question was[59]:

> "[W]e are of opinion that the Vice-Chancellor, under 53 Geo 3, c 24, is not the mere deputy of the Chancellor. We agree that the interest of the principal affects the deputy, on the rule adopted in *Wood v Corporation of London*[60] and *Brooks v Earl of Rivers*[61], but we think that the Vice-Chancellor is not a deputy, but has independent jurisdiction to make decrees, subject to the power of the Chancellor, to be reversed, discharged, or altered by the Chancellor."

52 The orders made by their Lordships after hearing on the merits the appeal against the decree and orders of Shadwell V-C were[62]:

> "that the orders and decrees of the Lord Chancellor be reversed, without prejudice to the orders and decrees of the Vice-Chancellor; that the orders and decrees of the Vice-Chancellor appealed against be affirmed, and declared to be unaffected by the orders and decrees of the Lord Chancellor, and that the appeal be dismissed."

53 Secondly, counsel for the company conceded that the principle that no man could be a judge in his own cause applied "for the sake of argument … whether he is named or not on the record"[63]. Thirdly, the House of Lords held that Lord Cottenham's orders were voidable and not void by operation of the general rule illustrated by the maxim, as Lord Campbell put it, that "no man is to be a judge in his own cause"[64]. Lord Campbell thought that this maxim "should

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59 (1852) 3 HLC 759 at 786-787 [10 ER 301 at 313].

60 (1704) 12 Mod 669 at 686 et seq [88 ER 1592 at 1601 et seq].

61 (1669) Hardres 503 [145 ER 569].

62 (1852) 3 HLC 759 at 811 [10 ER 301 at 322].

63 (1852) 3 HLC 759 at 777 [10 ER 301 at 309].

64 (1852) 3 HLC 759 at 793 [10 ER 301 at 315].

be held sacred" and, importantly, that it was "not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest"[65].

54 Having regard to the current state of the common law in Australia on the subject of disqualification for apprehended bias, we do not accept the submission that there is a separate and free-standing rule of automatic disqualification which applies where a judge has a direct pecuniary interest, however small, in the outcome of the case over which the judge is presiding. The principle of general application earlier considered would have been sufficient (had it then existed) to cover the case of *Dimes*. For the reasons already explained, a rule of automatic disqualification would be anomalous. It is in some respects too wide, and in other respects too narrow. There is no reason in principle why it should be limited to interests that are pecuniary, or why, if it were so limited, it should be limited to pecuniary interests that are direct. This is illustrated by the problem that concerned the House of Lords in *Pinochet (No 2)*[66]. The concept of interest is itself vague and uncertain. It is not logical to have one rule applying to disqualification for interest and a different rule applying to disqualification for association. A problem that has attended attempts to apply the rule has been whether, notwithstanding the language in which it has been expressed, it is subject to a de minimis qualification[67].

55 *Dimes* did not hold, and it is not the case, that the mere fact of ownership of shares in a listed public company which is a litigant means that the judge has a direct pecuniary interest in the outcome of the litigation. There is a difference between having an interest in the outcome of a case, and having an interest in a party to the case. *Dimes* and the cases which have followed it have all recognised that difference by their repeated reference to "interest in the *cause*" rather than referring to an interest in a party to the cause[68]. The application of the apprehension of bias principle does not deny the validity of this distinction. Indeed, it directs attention to the very question which is masked by saying that a

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65 (1852) 3 HLC 759 at 793 [10 ER 301 at 315].

66 [2000] 1 AC 119.

67 See, eg, *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 at 148.

68 *Dimes* (1852) 3 HLC 759 at 785 [10 ER 301 at 312]. See also, for example, *R v Rand* (1866) LR 1 QB 230 at 232 per Blackburn J; *R v Gough* [1993] AC 646 at 661 per Lord Goff of Chieveley; *Pinochet (No 2)* [2000] 1 AC 119 at 132-133 per Lord Browne-Wilkinson, 137-138 per Lord Goff of Chieveley.

judge holding shares in a litigant "means" that the judge has (or is to be regarded as having) an interest in the cause. Elevating that statement of conclusion to a principle of invariable appreciation would mean that the assumption which it makes would never be tested. What *is* the interest that the judge has in the cause? The apprehension of bias principle requires articulation of the connection between the asserted interest and the disposition of the cause which is alleged. If, on examination, the judge does have a financial interest in the outcome of the litigation, the application of the apprehension of bias principle will lead to the judge being disqualified. By contrast, where, as here, it is clear that the outcome of a case would have no bearing upon the value of the shares held by the judge in the listed public company, and there is no other suggested form of pecuniary interest involved, then the judge does not have a direct pecuniary interest in the outcome of the litigation.

56 It is not the case that *Dimes* has been generally accepted as authority for the proposition that, subject to waiver, a judge who owns shares in a party to a cause is automatically disqualified. Charles JA, in his judgment in *Clenae*[69], reviewed the approach taken to *Dimes* by judges and commentators. Lord Bingham of Cornhill, whilst Master of the Rolls, contributed a chapter entitled "Judicial Ethics" to Cranston's *Legal Ethics and Professional Responsibility*[70]. His Lordship said of *Dimes*[71]:

> "This was … a very strong decision, but I have no doubt that it would be followed today on similar facts although I do not think a judge would stand down on account of a share-holding in a litigant company, or perhaps even disclose it, *unless the share-holding and the action were such that the outcome could have a more than negligible effect on his fortune*." (emphasis added)

57 That statement, by a leading English judge, of the English practice in 1995, accords with the two decisions presently under appeal.

58 For reasons already given, we accept that, in the practical application of the general test to be applied in cases of apprehended bias, economic conflicts of interest are likely to be of particular significance, and that, allowing for the

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69 [1999] 2 VR 573 at 585-589.

70 (1995).

71 (1995) at 40-41.

imprecision of the concept, the circumstance that a judge has a not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation will ordinarily result in disqualification. That circumstance did not exist in either of the present cases.

Independence – the judge as party

59 Although it is not material to the decision in the present cases, we note that the requirement that a judge must not be a party to the case he or she is deciding is one which may have significance apart from, and where necessary may operate independently of, problems relating to apprehension of bias.

60 It was said earlier that the fundamental principle to which effect is given by disqualification of a judge is the necessity for an independent and impartial tribunal. Concepts of independence and impartiality overlap, but they are not co-extensive. In order to maintain both the reality and the appearance of independence, as well as impartiality, there must be a prohibition upon a judge sitting in a case to which he or she is a party, and that would include a case where one of the parties on the record is a nominee or alter ego of the judge.

61 There is a line of cases where the judicial officer was a party to proceedings either because the name of that officer was on the record as a necessary and proper party to the case[72], or because effectively or in substance the judicial officer was a moving party to the proceedings (eg as a member of a body instituting a prosecution) even though not named on the record[73].

62 These cases were described by Isaacs J in *Dickason v Edwards*[74] as instances of "incompatibility".

63 It is not difficult to think of examples of cases where a party to a litigation has no financial interest in the outcome of the litigation. That may arise, for

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72 *Dickason v Edwards* (1910) 10 CLR 243 at 258-259.

73 *R v Meyer* (1875) 1 QBD 173 at 177; *R v Milledge* (1879) 4 QBD 332 at 333; *R v Gibbon* (1880) 6 QBD 168 at 170; *R v Lee* (1882) 9 QBD 394 at 396; *R v London County Council; Ex parte Akkersdyk; Ex parte Fermenia* [1892] 1 QB 190 at 198; *R v Gaisford* [1892] 1 QB 381 at 383-384; *Dickason v Edwards* [1909] VLR 403 at 408-409; revd (1910) 10 CLR 243.

74 (1910) 10 CLR 243 at 259.

example, because of arrangements of indemnity or insurance, or in the case of a submitting party, or in various other circumstances. A judge is disqualified from deciding a case to which he or she is a party, even if the judge has no pecuniary interest in the outcome of the case. Again, this rule is subject to qualifications of waiver and necessity.

Necessity

64 In the light of what has already been said, it is strictly unnecessary to deal with the alternative basis upon which the appeal in *Clenae* was dismissed in the Court of Appeal of Victoria. However, we would agree that, if the question had arisen, the case was one of necessity.

65 Indeed, the case of *Clenae* provides a good example of the reason for the qualification of necessity. There had been a lengthy trial followed by a reserved decision. Following the trial, one of the principal witnesses had died. The witness was a man whose credibility was of central importance to the issues in the case. As Callaway JA pointed out[75], a fair adjudication of the case required that it be decided by the judicial officer who had seen all the significant witnesses. Attempting to resolve issues of credit on the basis of diary notes would not have been an adequate substitute. After the decision was reserved, the judge's mother died and left him a modest parcel of shares in the Bank. The judge's clear duty was to give his decision in the case. What interest, private or public, might be served by a rule that, in the circumstances, required the judge to disqualify himself, and required the parties to embark upon a fresh hearing of the case before a new judge? Such a consequence would not promote public confidence in the administration of justice. It would have the opposite effect.

Disclosure

66 It is necessary to deal with a further argument that was advanced in the appeal of *Clenae*. The issue does not arise in the *Ebner* appeal.

67 It was argued that Mandie J's failure to disclose his acquisition of shares in the Bank was itself a ground of, or constituted evidence in support of a ground of, disqualification. This argument requires consideration of the matter of disclosure of potentially disqualifying interests or associations, although in the

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75 [1999] 2 VR 573 at 603-604.

relatively straightforward context of ownership of shares in listed public companies. In other contexts, the problem may be more difficult.

68 It is necessary to distinguish between considerations of prudence and requirements of law.

69 As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying. It is common, and proper, practice for a judge who owns shares in a company which is involved in a case in which the judge is sitting to inform the parties of that fact and to give them an opportunity to raise an objection should they wish to be heard. In most cases, the outcome is that no objection is raised and, by reason of waiver, any potential problem disappears. One reason for the practice is that it gives the parties an opportunity to bring to the attention of the judge some aspect of the case, or of its possible consequences, not known to, or fully appreciated by, the judge.

70 It is, however, neither useful nor necessary to describe this practice in terms of rights and duties. At most, any "duty" to disclose would be a duty of imperfect obligation. A failure to disclose is relevant (if at all) only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias[76]. A failure to disclose has no other legal significance. In particular it does not, of itself, give a litigant any right to have the judge desist from further hearing the matter or to have the ultimate decision in the matter set aside for want of procedural fairness.

71 To describe the practice of making disclosure as a matter of right or duty may distract attention from the fundamental question to be answered which is whether the reasonable apprehension of bias test is established. That question will be litigated on appeal from the substantive decision in the matter or in proceedings for prohibition, certiorari or similar relief. Whatever the process which the person alleging reasonable apprehension of bias may adopt, there will, in those proceedings, be a full opportunity to make whatever case for disqualification of the judge the moving party can. Inquiring whether the moving party was denied some opportunity to make submissions on the question of disqualification to the judge in question is irrelevant. The question of disqualification can and will be litigated fully in the appeal or application for prerogative or like relief and no separate question of denial of procedural fairness

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76 cf *Aussie Airlines v Australian Airlines* (1996) 65 FCR 215 at 221 per Merkel J; *Gascor v Ellicott* [1997] 1 VR 332 at 361 per Ormiston JA.

could arise. The point can be illustrated by what happened in *Clenae*. The fact that the judge did not disclose his shareholding gives no different or additional right to the present appellants. All that they were denied by the fact that there was no disclosure was an opportunity to put an argument which we consider must fail.

72 Disclosure of association may raise more difficult questions than are presented by the straightforward case of ownership of shares in a corporation. It is impossible to identify all of the kinds of association which might be thought to reveal a serious possibility of being potentially disqualifying. As we have said earlier, the application of the apprehension of bias principle requires identification of what it is said might lead a judge to decide a case other than on its legal and factual merits, and the articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.

73 In the present case, the failure of Mandie J to disclose his acquisition of shares in the Bank was of no legal consequence. For the reasons already given, he had a clear duty to deliver the judgment he had reserved. His failure to make disclosure did not deprive the appellants of an opportunity to advance any argument or inform him of any facts which would have given rise to a contrary conclusion. His silence could not reasonably support an inference of want of impartiality.

Resolution of challenges

74 We note that Callinan J, in relation to the third matter referred to in his reasons for judgment, has expressed the view that it would be preferable in future for challenges of apprehended bias to be determined, where possible, by a judge other than the one who has been asked to disqualify himself or herself. With respect, we are unable to agree. On that approach, for example, some other judge of the Federal Court would have considered the challenge made to Goldberg J in *Ebner*. Adopting such a procedure would require examination of the power of that other judge to determine the question and the way in which that other judge's conclusion would find its expression. In particular, is the question of possible disqualification to be treated as an issue in controversy between the parties to the proceeding and is it to be resolved by some form of order? The issue is not one which was argued in the present appeals, and it is sufficient to say that, in our view, Goldberg J adopted what was both the ordinary, and the correct, practice in deciding the matter himself.

Conclusion

75 Both appeals should be dismissed with costs.

76 GAUDRON J. These appeals were heard together. They raise the question whether a judge is disqualified from hearing a matter by reason of his or her interest in shares in a listed public company when that company is party to proceedings before him or her or has a direct financial interest in its outcome.

77 The history of both proceedings and the relevant facts are set out in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ and need not be repeated. However, because of the view that I take, it is necessary to note two differences. In the first appeal, the matter was heard in the Federal Court of Australia in the exercise of federal jurisdiction[77]; in the second, the matter was heard in the Supreme Court of Victoria and, it may be assumed, in the exercise of non-federal jurisdiction[78].

78 The other difference is that, in the first appeal, the judge who heard the matter disclosed his interest in the shares in question[79]; in the second, the judge did not[80]. Doubtless the judge's failure to disclose his interest was the result of his acquisition of the shares on the death of his mother some time after he had reserved his decision[81]. Nonetheless, his failure in that regard is a matter which necessitates specific consideration.

Ch III of the Constitution: impartiality and the appearance of impartiality

79 It is not in issue that the underlying principle which, on occasions, requires that a judge disqualify himself or herself is that courts must act impartially and must also be seen to act impartially. These are requirements embedded in the common law and in all developed legal systems[82]. In my view, they are also required by Ch III of the Constitution.

80 In a number of cases I have expressed the view that the term "judicial power" in Ch III of the Constitution does not simply refer to power to settle justiciable controversies, but to the power to settle controversies of that kind in

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77 *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353.

78 *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd* [1999] 2 VR 573.

79 (1999) 91 FCR 353 at 358 [15].

80 [1999] 2 VR 573 at 581 [26] per Charles JA.

81 [1999] 2 VR 573 at 580 [21]-[22] per Charles JA.

82 See Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shetreet and Deschênes (eds), *Judicial Independence: The Contemporary Debate*, (1985) 590 at 630-631.

accordance with the judicial process[83]. Impartiality and the appearance of impartiality are so fundamental to the judicial process that they are defining features of judicial power[84]. And because the only power that can be conferred pursuant to Ch III of the Constitution is the judicial power of the Commonwealth[85], that Chapter operates to guarantee that matters in federal jurisdiction are determined by a court constituted by a judge who is impartial and who appears to be impartial. And that is so whether the matter is before a federal court or a State or Territory court invested with federal jurisdiction.

81 Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system. Because State courts are part of the Australian judicial system created by Ch III of the Constitution and may be invested with the judicial power of the Commonwealth, the Constitution also requires, in accordance with *Kable v Director of Public Prosecutions (NSW)*[86], that, for the maintenance of public confidence, they be constituted by persons who are impartial and who appear to be impartial even when exercising non-federal jurisdiction. And as courts created pursuant to s 122 of the Constitution may also be invested with the judicial power of the Commonwealth[87], it should now be recognised, consistently with the decision in *Kable*, that the Constitution also requires that those courts be constituted by persons who are impartial and who appear to be impartial.

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83 See, for example, *Harris v Caladine* (1991) 172 CLR 84 at 150-152; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 703; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 22; *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209.

84 See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 22, 25. See also *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209.

85 See, for example, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Grollo v Palmer* (1995) 184 CLR 348; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Nicholas v The Queen* (1998) 193 CLR 173; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

86 (1996) 189 CLR 51.

87 See *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 603-604 [127] per Gaudron J; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1330-1332 [25]-[35] per Gaudron J, 1336 [63] per Gummow and Hayne JJ; cf 1340-1341 [84]-[88] per Kirby J; 165 ALR 171 at 178-181, 187, 192-193.

82 It follows from what has been written that, in my view, Ch III of the Constitution operates to guarantee impartiality and the appearance of impartiality throughout the Australian court system.

The rules as to disqualification

83 It is not in doubt that the requirement that courts be and appear to be impartial dictates the result that a judge is disqualified by actual bias and, also, by the appearance of bias. The test in this country with respect to the appearance of bias is "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question [he or she] is required to decide"[88].

84 The test for the appearance of bias was formulated in a series of cases decided by reference to common law principles and without regard to the role of Ch III of the Constitution. However, in my view, that test properly reflects the requirement of Ch III. What is in issue is not bias, but the appearance of bias. And as a practical matter, that can only be determined by reference to considerations of reasonableness and fairmindedness. And because the ultimate rationale for the requirement that courts appear to be impartial is the maintenance of public confidence in the administration of justice, it is appropriate that the test be formulated by reference to the reasonable apprehension of the hypothetical fair-minded lay observer.

Dimes' Case

85 It was held in *Dimes v The Proprietors of the Grand Junction Canal*[89] that Lord Chancellor Cottenham had such an interest in a public company that was party to proceedings before him that he was disqualified as a judge[90]. The

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88 *Johnson v Johnson* (2000) 74 ALJR 1380 at 1382 [11]; 174 ALR 655 at 658 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ citing *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; cf *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262 per Barwick CJ, Gibbs, Stephen and Mason JJ, and also in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294, where the test was also expressed as whether "the parties or the public" might entertain a reasonable apprehension of bias on the part of the judge.

89 [1852] 3 HLC 759 [10 ER 301].

90 [1852] 3 HLC 759 at 786 [10 ER 301 at 312].

Lord Chancellor's interest was that of "a shareholder ... to the amount of several thousand pounds"[91].

86 The decision in *Dimes* was rested on the need for the appearance of impartiality, rather than actual bias. As Lord Campbell observed:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but ... it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."[92]

87 Since the decision in *Dimes*, the maxim that "no man is to be a judge in his own cause" has sometimes been viewed as an independent rule[93]. However, the maxim is but an aspect of the fundamental requirement of impartiality and the appearance of impartiality. Moreover, although there is considerable utility in precise rules, the expression "judge in his own cause" has no very precise content. In this regard, it is sufficient to note that the expression extends "to a cause in which [a judge] has an interest"[94] and "interest" is not confined to a pecuniary interest[95].

88 There are two aspects to the decision in *Dimes* which should be noted. The first is that the rule expressed in that case is sometimes said to be automatic. Thus, in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)*, Lord Browne-Wilkinson spoke in terms of a non-pecuniary interest resulting in automatic disqualification[96]. In *Webb v The Queen*, however, Deane J considered that the special class of case in which "disqualification is automatic without there being any 'question of investigating, from an objective point of view, whether there [is] any real likelihood of bias, or any reasonable

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91 [1852] 3 HLC 759 at 784 [10 ER 301 at 311].

92 [1852] 3 HLC 759 at 793 [10 ER 301 at 315].

93 See, for example, *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 132-133 per Lord Browne-Wilkinson.

94 [1852] 3 HLC 759 at 793 [10 ER 301 at 315].

95 [2000] 1 AC 119 at 135 per Lord Browne-Wilkinson, 138-139 per Lord Goff of Chieveley, 143 per Lord Hope of Craighead, 145 per Lord Hutton.

96 [2000] 1 AC 119 at 135 per Lord Browne-Wilkinson.

suspicion of bias, on the facts of the particular case' ... consists of cases in which the judge ... has a direct pecuniary interest in the outcome of the proceedings"[97].

89 In *Webb*, Deane J explained that where the judge has a direct pecuniary interest in the outcome of proceedings "public confidence in the administration of justice requires that there be disqualification regardless of the particular circumstances"[98]. His Honour added that, in his view, there was great force in the view expressed in *R v Gough*[99] "that automatic disqualification should be confined to cases of direct pecuniary interest"[100] by which, his Honour explained, he meant "an interest sounding in money or money's worth."[101]

90 The second matter to be noted with respect to *Dimes* is that a view has developed that that case decides that if a judge owns shares in a company which is a party to litigation, he or she is automatically disqualified "because he [or she] has by virtue of his [or her] shareholding an interest in the cause."[102] There is, however, another view. Thus, for example, in *R v Gough*, Lord Woolf said that *Dimes* was a case "involv[ing] direct pecuniary or proprietary interest on the part of Lord Cottenham LC in the subject matter of the proceedings"[103]. And in *Locabail (UK) Ltd v Bayfield Properties Ltd*, it was pointed out that "[i]n the *Dimes* case the outcome of the litigation certainly could have ... [affected] the Lord Chancellor's personal position."[104]

91 There are a number of reasons why *Dimes* should not be treated as conclusive of the issue in these appeals. First, there is uncertainty as to whether the decision applies to every shareholding, no matter how small, on the one hand, or, on the other, to a substantial shareholding or one the value of which might be

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97 (1994) 181 CLR 41 at 75.

98 (1994) 181 CLR 41 at 75, quoting the test postulated in *R v Gough* [1993] AC 646 at 661 per Lord Goff of Chieveley – a test that differs somewhat from that adopted by this Court in *Johnson v Johnson* (2000) 74 ALJR 1380; 174 ALR 655.

99 [1993] AC 646 at 664 per Lord Goff of Chieveley, 673 per Lord Woolf.

100 (1994) 181 CLR 41 at 75.

101 (1994) 181 CLR 41 at 75, fn 33.

102 See, for example, *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 137 per Lord Goff of Chieveley.

103 [1993] AC 646 at 673.

104 [2000] 2 WLR 870 at 881; [2000] 1 All ER 65 at 71.

affected by the outcome of the proceedings. Secondly, as already pointed out, the maxim upon which the decision is based is not expressed with unmistakeable clarity. Moreover, the maxim is but the expression of one aspect of the fundamental requirement that a court be and appear to be impartial. And to the extent that the maxim gives expression to the requirement for the appearance of impartiality, it must be accepted that it cannot have a completely unchanging content because that question has to be viewed through the eyes of the fair-minded lay person whose hypothetical apprehensions do not necessarily remain constant. Finally, the question is one that derives from Ch III of the Constitution and should be considered from a constitutional perspective.

Automatic disqualification: pecuniary interest in the outcome of proceedings and substantial shareholding

92 Inevitably, a fair-minded lay person would reasonably apprehend that a judge who has a direct pecuniary interest (in the sense indicated by Deane J in *Webb*[105]) in the outcome of proceedings might not bring an impartial and unprejudiced mind to bear in determining the issues in those proceedings. Although a judge may have a pecuniary interest in the form of shares or other financial interest in a public company that is party to proceedings before him or her, that does not necessarily mean that he or she has a pecuniary interest in the outcome of those proceedings.

93 In many cases in which a company is party to litigation, the outcome of the proceedings may have no capacity to affect the value of shares held by an individual, his or her ownership of those shares or any other matter relating to them or to the individual's interest in them. And the same is true in the case of shares held by a judge before whom the proceedings are heard.

94 As pointed out in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ, there has been considerable growth in the ownership of shares in public companies in recent years, particularly as a result of demutualisation and privatisation. That being so, the fair-minded lay observer would, in my view, appreciate that not every legal proceeding to which a public company is a party or in the outcome of which it has an interest affects the value of shares owned by an individual investor or otherwise affects the individual's interest in those shares. That being so, but subject to two important qualifications shortly to be mentioned, the fair-minded lay observer would not reasonably apprehend that, simply by reason of a judge's ownership of a parcel of shares or other financial interest in a public company, he or she might not bring an unprejudiced mind to bear in determining the issues involved in proceedings to which that company is party or in the outcome of which that company has an interest.

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105 See fn 101.

95 The first qualification to what has been said is this: it cannot be assumed that proceedings to which a company is party will not affect the value of an individual's shares in that company or otherwise affect the individual's interest in those shares. That is a question that requires investigation in every case. Logically, the question whether proceedings might affect the value of shares or a judge's interest in them can be determined at any time, including on appeal. However, the efficient administration of justice requires that it be determined at the earliest possible stage. And that necessitates that the judge disclose his or her interest in the company at the first opportunity.

96 Although it is not necessary to determine the issue in these appeals, it is my view that the fair-minded lay observer would not conclude that a judge might not bring an impartial mind to bear on proceedings simply because his or her partner or spouse owns shares or has some other financial interest in a public company which is party to proceedings or has an interest in their outcome. At least that is so if the shareholding or other interest is not substantial. And if it is not substantial, there is no reason why his or her shareholding should be disclosed. Indeed, it cannot be disclosed if – as may often be the case – the shareholding is not known to the judge.

97 It is necessary to turn to the second qualification to which I referred earlier. That qualification concerns shareholdings which a fair-minded lay observer might consider to be substantial. In my view, a fair-minded lay person might reasonably apprehend, if a judge or a member of his or her household has a substantial parcel of shares or a substantial financial interest in a public company that is party to a litigation, that the judge is so closely associated with that company that he or she might not bring an impartial mind to bear on the proceedings.

98 Of course, minds may differ as to what constitutes a substantial holding or financial interest in a company. However, the ultimate question is what a fair-minded lay observer might think, not whether the shareholding is or is not substantial. For this reason, any holding or financial interest by a judge in a public company which cannot fairly be described as modest should be regarded as substantial. And in my view, waiver and necessity aside, a substantial shareholding or financial interest automatically results in a judge's disqualification if the company concerned is a party to litigation or has an interest in its outcome.

The present appeals

99 In each case, the judge's shareholding in the public company involved in the proceedings before him is fairly described as modest. And, as the joint reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ make clear, in neither case could the outcome of the proceedings in question affect the value of the

judge's shares or his interest in them. Thus, in neither case was the judge automatically disqualified. And as the parties point to nothing else which could in any way be affected by the outcome of the proceedings in question, there is no basis on which it could be said, in either case, that a fair-minded lay person might reasonably apprehend that the judge would not bring an impartial mind to the resolution of the issues in the proceedings before him.

100 It is unfortunate, that, in the proceedings involved in the second appeal, the judge did not draw his shareholding to the attention of the parties. The parties were thereby deprived of an opportunity, at that stage, to put submissions as to whether his shareholding was substantial and, also, whether his interests could be affected by the outcome of the proceedings. However, those questions have since been investigated and answered adversely to the appellants in that matter. Earlier investigation would necessarily have produced the same answer. The fact that the parties were not afforded an opportunity to put submissions at an earlier stage cannot alter the outcome of the appeal.

Necessity

101 It follows from what has been written that, in both matters, the appeal should be dismissed. It is, thus, not strictly necessary to consider whether the judge in the second matter was obliged, as a matter of necessity, to give judgment in the proceedings in which evidence and submissions had been completed. However, it is a matter on which the majority in this case has expressed a firm view. Unfortunately, it is a view which I do not share.

102 Because the requirements of impartiality are, in my view, constitutional requirements, notions of necessity should be resorted to only in a case where, if the judge in question does not sit, a court cannot be constituted to hear and determine the matter in issue. Constitutional requirements cannot yield to expediency or convenience. Certainly that is so with respect to the requirements of Ch III of the Constitution.

103 The common law's requirements with respect to impartiality and the appearance of impartiality derive from the need to maintain the rule of law. Important though that be, the constitutional requirements are directed to maintaining public confidence in the judiciary not simply to promote the rule of law but because the judiciary has a central role in maintaining the federal compact embodied in the Constitution and, ultimately, the Australian nation. For this reason, the notion of necessity must, in my view, be limited in the manner indicated.

Orders

104 In each matter, the appeal should be dismissed with costs.

105 KIRBY J. These are two of three recent appeals[106] in which this Court provided special leave to permit examination of aspects of the law that disqualifies judges and other adjudicators on the grounds of apprehended bias. Reconsideration of the law on this topic has been undertaken recently by the courts of England[107], New Zealand[108] and South Africa[109].

106 The point common to the present appeals concerns the suggested disqualification of the primary judge in each case by reason of his pecuniary interest. Upon certain questions affecting the disqualification of judges and other adjudicators[110], it is easy enough for reasonable minds to differ[111], as often they have in this[112] and other[113] courts. This fact imposes upon this Court a duty, so far as possible, to express the applicable law with as much precision as possible, in order to reduce uncertainty amongst judges, litigants and legal representatives, whilst at the same time contributing to community confidence in the administration of justice.

The facts and common ground

107 The facts relevant to the appeals are stated in the reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ in terms which I accept[114]. The basic facts were not contested.

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106 The other case is *Johnson v Johnson* (2000) 74 ALJR 1380; 174 ALR 655.

107 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 ("*Pinochet*").

108 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *BOC New Zealand Ltd v Trans Tasman Properties Ltd* [1997] NZAR 49.

109 *BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union* 1992 (3) SA 673; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147.

110 Such as jurors: *Webb v The Queen* (1994) 181 CLR 41.

111 *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 16 per Aickin J; 32 ALR 47 at 54.

112 eg *Webb v The Queen* (1994) 181 CLR 41 at 57 per Brennan J, 67 per Deane J.

113 eg *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 378-381 per Priestley and Clarke JJA, 375-376 of my own reasons.

114 See reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ ("joint reasons") at [13]-[16], [17]-[18].

108 In each matter, the primary judge, at the time of his orders, either held shares in a party to the litigation[115] or had a contingent interest in shares in a company concerned in the litigation[116]. In each matter, it could not be suggested that the value of the respective shareholdings could be increased, to the benefit of the judge, by his decision in the case. But in each matter, the judge's orders favoured the party to which his pecuniary interest was related.

109 In neither matter was it asserted that the judge was disqualified for actual bias. It is rare indeed for this defect to be claimed, doubtless for reasons which include prudence, politeness and difficulty of proof[117]. In one case, it was specifically conceded (properly in my view) that, if the only test to be applied in deciding the issue of judicial disqualification were whether an impartial, fair-minded observer might reasonably apprehend that the judge had prejudged, or might prejudge[118], the case by reason of his interest in the shares, the objection was bound to fail[119]. Although the same concession was not proffered in the other matter, it was accepted that any judgment entered by the judge could not have affected the value of his shares[120].

110 In this way, the facts of the two cases present to this Court the issue of the applicable legal rule requiring disqualification of a judge for pecuniary interest, in this case being shares in, or of real relevance to, a party to the litigation before that judge. In one case, the judge's interest was not insubstantial and was not

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115 In *Clenae*, Mandie J was bequeathed 4,800 shares in the defendant bank as part of the residuary estate of his mother as tenant in common in equal shares with a brother. The residuary estate also included a debenture for $200,000 secured over the assets of a finance company which at the relevant time was a wholly owned subsidiary of the bank: see *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* [1999] 2 VR 573 at 580 ("*Clenae*").

116 In *Ebner*, Goldberg J was a director and a beneficiary of a family trust. The trust owned a parcel of shares in a bank which was not a party, but was a major creditor of a party to the proceedings and was involved in funding the proceedings: see *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353 at 362 ("*Ebner*").

117 cf *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 123, 135. Actual bias is sometimes suggested but later replaced by the allegation of apprehended bias: *Najjar v Haines* (1991) 25 NSWLR 224 at 227.

118 *Webb v The Queen* (1994) 181 CLR 41 at 47.

119 *Ebner* (1999) 91 FCR 353 at 360.

120 *Clenae* [1999] 2 VR 573 at 582, 592.

disclosed before judgment was given in favour of the party in which the shares were held[121]. In the other case, the parcel of shares was smaller, the judge did not own them himself, his interest was fully disclosed and the company concerned was not a party[122]. Nonetheless, in the latter case, the appellant emphasised three factual considerations: (1) that the company was a major creditor of a party; (2) that it was entitled to apply for orders giving it priority over other creditors[123]; and (3) that it was "funding the action up to a certain level" and thus more than a mere bystander[124].

111 It was contended for each of the appellants that the test for disqualification to be applied was not the test for apprehended bias. Instead, each argued that the judge in question was automatically disqualified. This was so by reason of an established rule of the common law. According to that rule[125], "any direct pecuniary interest, however small, in the subject of inquiry ... disqualif[ies] a person from acting as a judge in the matter"[126]. This is so because the judge is regarded as being impermissibly involved with a party, and thus not wholly disinterested. He or she is not independent and impartial as between the party and its opponent. In this sense, the judge has become a judge in his or her own cause[127], in breach of a principle long held sacred[128]. This Court was invited to reaffirm this common law rule.

The issues

112 The arguments of the parties give rise to the following issues:

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121 *Clenae* [1999] 2 VR 573 at 580-581.

122 *Ebner* (1999) 91 FCR 353.

123 *Bankruptcy Act* 1966 (Cth), s 109(10); *Ebner* (1999) 91 FCR 353 at 362.

124 *Ebner* (1999) 91 FCR 353 at 362.

125 Traced to *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HLC 759 [10 ER 301] ("*Dimes*").

126 *R v Rand* (1866) LR 1 QB 230 at 232 applied in *R v Gough* [1993] AC 646 at 661 per Lord Goff of Chieveley.

127 *Dimes* (1852) 3 HLC 759 at 793 [10 ER 301 at 315].

128 *Dr Bonham's Case* (1610) 8 Co Rep 113b [77 ER 646].

1. Is there, as part of the common law of Australia, a specific rule requiring disqualification of a judge for any direct pecuniary interest, however small, in the subject matter of, or in a party to, litigation before that judge?

2. If such a rule exists, should it now be regarded as anomalous and subsumed either in (a) the test for cases of reasonable apprehension of bias on the part of a judge?; or (b) some other test of automatic disqualification for interest, wider than that applicable solely to a pecuniary interest[129]?

3. If the rule of the common law does require automatic disqualification, were either of the judges in the present cases excused from disqualification because: (a) they did not have an "interest" in the relevant sense on the ground that their pecuniary involvement was not such as would, or might, be affected by the outcome of the proceedings; (b) any "interest" of the judges was trivial or insubstantial and not within the rule requiring disqualification; (c) in the case of *Ebner*, the interest was not a "direct" pecuniary interest, either in a party or in the subject matter of the litigation; (d) in the case of *Ebner*, the "interest" was not within the rule, as it had been disclosed and was such as should have been waived; and (e) in the case of *Clenae*, necessity required the judge to continue to participate in, and to decide, the litigation.

Constitutional and statutory requirements

113 In *Ebner*, the court concerned was the Federal Court of Australia. This is a court created within the federal Judicature. The judge was there exercising the judicial power of the Commonwealth, as were the judges disposing of the appeal against his orders. In *Clenae*, the court concerned was the Supreme Court of Victoria. Such a court is also referred to in Ch III of the Constitution[130]. It is part of the integrated Judicature of the Commonwealth[131] and subject to the requirements of the Constitution.

114 In the United States of America, some of the principles which have been held to govern the disqualification of judicial and other adjudicators have been derived from constitutional norms[132]. Substantially, the constitutional

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129 *Pinochet* [2000] 1 AC 119 at 135, 138-139, 143, 146.

130 s 73(ii).

131 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; cf Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium", (1999) 25 *Monash University Law Review* 209 at 211.

132 See eg *Tumey v Ohio* 273 US 510 (1927).

requirements have been traced to Amendments V and XIV[133]. These entrench in the United States Constitution the requirement of due process of law. It has been inferred that more rigorous standards are imposed on judicial than on other adjudicators in order to uphold the impartiality essential to the performance by the judiciary of its constitutional functions[134]. One such inference is that the possession by judges of economic interests that are not trivial will normally breach constitutional requirements and demand redress[135]. Generally speaking, the development of the common law in the United States appears to have been influenced by this constitutional setting[136]. It is now further reinforced by statutory provisions[137], by professional codes of conduct[138], by judicial practice and by the inherent supervisory role exercised by the Supreme Court over federal courts[139].

115 In Australia, the Constitution does not spell out an entitlement to due process of law. Nevertheless, it is difficult to read the provisions of Ch III, viewed in context and having regard to their purposes, without deriving a requirement that the courts for which Ch III provides must be "courts" and act in accordance with the "judicial process". There are observations in a number of decisions of this Court to such effect, at least in respect of the vesting of the "judicial power" of the Commonwealth in courts authorised to exercise that power by or under the Constitution[140].

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133 cf *Mathews, Secretary of Health, Education, and Welfare v Eldridge* 424 US 319 (1976); Allison, "A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest", (1995) 32 *American Business Law Journal* 481 at 485 ("Allison").

134 *Marshall, Secretary of Labor v Jerrico, Inc* 446 US 238 at 248-249 (1980); cf Allison, (1995) 32 *American Business Law Journal* 481 at 513.

135 Allison, (1995) 32 *American Business Law Journal* 481 at 511.

136 Allison, (1995) 32 *American Business Law Journal* 481 at 489.

137 Now esp 28 USC §144.

138 American Bar Association, *Model Code of Judicial Conduct*, (1990), Canon 3E.

139 *Offutt v United States* 348 US 11 (1954).

140 See eg *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487-490 per Deane and Toohey JJ, 501-503 per Gaudron J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 112-114 per Gaudron J (diss); *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [73]-[74] per Gaudron J. See also reasons of Gaudron J at [79]-[82], [91].

116 The implied constitutional requirement of due process of law in Australia has been noted by commentators[141]. It can be tested in matters such as the present by considering what the Constitution would mandate if the federal Parliament were to enact a law purporting to require a court to conduct itself without regard to disqualification for interest or apprehended bias. Because no party argued the present appeals by reference to any constitutional standard, I am content to put the question to one side[142]. But in my view, in Australia, the ultimate foundation for the judicial requirements of independence and impartiality rests on the requirements of, and implications derived from, Ch III of the Constitution[143]. And it does as much in the case of a State Supreme Court as it does in a federal court.

117 The federal Parliament has not enacted any law that is equivalent to those governing judicial disqualification[144] and financial disclosure[145] in the United States. Although there is a federal statutory provision rendering it an offence for a judge or magistrate in Australia "wilfully and perversely" to exercise federal jurisdiction "in any matter in which he has a personal interest"[146], that provision has no application in the present matters. This Court must therefore search for the applicable rule of the common law.

The English common law on disqualification for pecuniary interest

118 The principles of the common law in Australia governing judicial disqualification derive from the law of England. That country, in turn, derived its approach from many sources, including the Bible, the ancient philosophers

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141 Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341; Blackshield and Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 2nd ed (1998) at 1151-1165. Note that in s 44(v) of the Constitution, express provision is made for disqualification of members of the House of Representatives having a "pecuniary interest".

142 cf *Johnson v Johnson* (2000) 74 ALJR 1380 at 1386 [37]; 174 ALR 655 at 664.

143 cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 95, 102, 114, 136, 143.

144 28 USC §455.

145 Ethics in Government Act 1978, 5 USC Appendix §§ 101, 102; cf Cranston, "Disqualification of Judges for Interest, Association or Opinion", (1979) *Public Law* 237 at 252 ("Cranston").

146 *Crimes Act* 1914 (Cth), s 34.

and Roman law[147]. Fundamental to the judicial office was a requirement that the judge must be a stranger to the cause falling for decision[148]. The elaboration of this general principle by reference to an explicit prohibition upon a judge having a pecuniary interest in, or common to, a party to proceedings before that judge arose in a dramatic way in 1852 in *Dimes v Proprietors of the Grand Junction Canal*[149].

119 *Dimes* was a case involving a litigant who challenged the right of Lord Cottenham, the Lord Chancellor, to decide a case affecting him. The litigant did so on the ground that his Lordship held a substantial parcel of shares in a company whose proprietors were a party to the litigation and whose entitlements were an issue for decision. The litigant's appeal to the House of Lords was successful. Lord Cottenham, as judge, was held to be disqualified by his interest in a party to the proceedings from adjudicating the case. His decree was voidable and it was declared reversed[150].

120 The relief granted in *Dimes* was not based upon the reasonable apprehension of bias test or the "real danger"[151] test. Those tests were not developed in England until the twentieth century[152]. They received their ultimate rationale in Lord Hewart CJ's famous dictum in 1924 about the importance of the appearance of justice[153]. In *Dimes*, the House of Lords was not concerned with appearances as they might strike reasonable bystanders. Instead, it was concerned to apply to the highest court in England a rule which the Court of Queen's Bench had repeatedly applied to inferior tribunals "because an

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147 Exodus 18:13-26; Aristotle, *The Rhetoric*, bk 1, Ch 1; Aquinas, *Summa Theologica*, Pt 1-2, Q 105, Art 2, as noted in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 361; Coke, *Commentary Upon Littleton*, (1823), vol 1 at 141.a.

148 *Nemo debet esse judex in propria causa* ("no one may be a judge in his own cause"): see *Pinochet* [2000] 1 AC 119 at 140.

149 (1852) 3 HLC 759 [10 ER 301] ("*Dimes*").

150 (1852) 3 HLC 759 at 793 [10 ER 301 at 315].

151 *Webb v The Queen* (1994) 181 CLR 41 at 51, 71 referring to *R v Gough* [1993] AC 646 at 670.

152 *R v Lancashire Justices* (1906) 94 LT 481 at 482; *R v Byles; Ex parte Hollidge* (1912) 108 LT 270 at 270-271.

153 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259; cf *Johnson v Johnson* (2000) 74 ALJR 1380 at 1387-1388 [41]-[42]; 174 ALR 655 at 666.

individual, who had an interest in a cause, took a part in the decision"[154]. So far as the House of Lords was concerned, this was a rule of law of general application. It was applicable to all judges as a matter of basic legal doctrine. There is no evidence in the reasoning in *Dimes* to suggest that this was a case considered special to the then still developing field of corporate personality or limited to such substantial shareholdings as Lord Cottenham in fact enjoyed[155]. On the contrary, the exceptional intervention of the House of Lords, and the language of the speeches supporting that intervention, were (and were seen at the time to be) a serious reproof to Lord Cottenham who, according to his biographer, never recovered from the judgment[156].

121 Attempts now to reinterpret *Dimes* by reference to new considerations are ahistorical and divert attention from what the decision, at the time and since, has been taken to lay down as a matter of law. In *Dimes*, Lord Campbell said[157]:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern".

This was not simply a contradiction of actual bias. By reference to the perceptions of "no one", it amounts, as we can now see, to a contradiction of bias inferred from the apprehended perception of anyone else. Therefore *Dimes* was never about actual or apprehended bias for interest. It was about disqualification for interest by a separate and specific rule of law.

122 There was no doubt on the part of contemporary judges (who were in a good position to know) about the principle set out in *Dimes*. In *R v Hammond*[158], Blackburn J clearly saw the decision as holding that a person with a direct pecuniary interest in the subject of an inquiry was disqualified from adjudicating the inquiry. He said: "The interest to each shareholder may be less than a

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154 *Dimes* (1852) 3 HLC 759 at 793 per Lord Campbell [10 ER 301 at 315].

155 His shareholding still represented only 0.8% of the shares in the company: Sharman, "Feudal Copyholder and Industrial Shareholder: The Dimes Case", (1989) 10 *The Journal of Legal History* 71 at 82 ("Sharman").

156 Atlay, *The Victorian Chancellors*, (1906), vol 1 at 415.

157 *Dimes* (1852) 3 HLC 759 at 793 [10 ER 301 at 315].

158 (1863) 9 LT 423. To the same effect, see *R v Rand* (1866) LR 1 QB 230 at 232; cf *R v Farrant* (1887) 20 QBD 58 at 60; *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366 at 384; *R v Gaisford* [1892] 1 QB 381 at 384; *R v Burton; Ex parte Young* [1897] 2 QB 468 at 474.

farthing, but still it is an interest"[159]. A judge with even a tiny direct pecuniary interest is disqualified from acting as such. No inquiry is addressed to whether the judge was actually biased or might appear so. The law imputes bias in such a case – it is the law that disqualifies the judge and not the opinion of reasonable observers about the propriety of the judge's participation in the decision[160].

123 This principle of bias imputed by law survived the advent of the supplementary doctrine of apprehended bias[161]. In England, it has not been treated as subsumed by the later doctrine. As recently as 1993, in *R v Gough*[162], the principle in *Dimes* was reaffirmed by the House of Lords. It was identified as one of the "certain cases" in which "it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand"[163].

124 Most recently in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)*[164], Lord Browne-Wilkinson explained that a judge who was "a party to the litigation or has a financial or proprietary interest in its outcome" was automatically disqualified without investigation of whether there is "a likelihood or suspicion of bias". Only if the judge made "sufficient

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159 *R v Hammond* (1863) 9 LT 423 at 423.

160 cf *Maclean v The Workers' Union* [1929] 1 Ch 602 at 625; *R v Camborne Justices; Ex parte Pearce* [1955] 1 QB 41 at 47.

161 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at 758.

162 [1993] AC 646 at 661 per Lord Goff of Chieveley (with whom Lords Ackner, Mustill, Slynn of Hadley and Woolf agreed).

163 *R v Gough* [1993] AC 646 at 661.

164 [2000] 1 AC 119 at 132-133; cf *Weatherill v Lloyds TSB Bank Plc* unreported, Court of Appeal (England), 26 July 2000 where a judge, in the middle of a long trial discovered, and declared, an "extremely small shareholding" in the respondent bank which he immediately disposed of. The litigant accepted the assurance that the judge had been unaware of, and would be unaffected by, the shareholding but after closing addresses asked the judge to disqualify himself. The judge declined and the Court of Appeal, in an appeal by leave of the trial judge, dismissed the appeal.

disclosure"[165] would that legal outcome be avoided. To the same effect was the speech of Lord Goff of Chieveley who said[166]:

> "[A] judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous *Dimes* case itself."

125 It follows from the above course of authority, stretching over nearly 150 years, that the courts in England have accepted the principle in *Dimes* as a rule of law. It is a rule that arose separately from the later principle of disqualification for apprehended bias. A judge with a personal interest in the matter for decision, however small, or having shares in a party before the court, is by this rule disqualified "subject only to waiver by the party or parties to the proceedings thereby affected"[167]. Because of this repeated, and recently reaffirmed, statement of the English common law as expressed in *Dimes*, it would be a very dubious act of an Australian court now to impose on *Dimes* its own retrospective and different legal analysis of that decision and what it stands for.

Australian authority on disqualification for pecuniary interest

126 That the foregoing understanding of *Dimes*, and its rule, were inherited and applied as part of the common law in Australia can be demonstrated by reference to numerous judicial decisions, as well as academic and other commentaries.

127 The relevant decisions predate federation. They include at least one of Griffith CJ, then in the Supreme Court of Queensland, who accepted the principle set out in *Dimes* as the applicable standard[168]. In the early years of this Court, Isaacs J, in *Dickason v Edwards*[169], accepted *Dimes* as stating the law of disqualification with respect to the particular subject of "pecuniary interest". "If

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165 *Pinochet* [2000] 1 AC 119 at 133.

166 *Pinochet* [2000] 1 AC 119 at 137.

167 *Pinochet* [2000] 1 AC 119 at 138.

168 *Raven v Burnett* (1895) 6 QLJ 166 at 168-169.

169 (1910) 10 CLR 243 at 259.

that [interest] exists", his Honour wrote, "there is an end of the matter at once and the Court goes no further"[170].

128 The existence of this separate rule as part of the law in Australia would appear to have been acknowledged by Latham CJ during the course of argument in the *Bank Nationalisation Case*[171]. The wife of Starke J held shares in one of the plaintiff banks. Williams J was trustee of certain shares in one of the plaintiff banks for a family member who lived overseas. These interests were declared. Objection was taken. It appears that the objection was rejected on the basis that neither Justice had a direct pecuniary interest. During argument, Latham CJ stated, apparently as an accepted principle: "[I]f there is any degree of pecuniary interest, however small, a Judge is disqualified from sitting"[172]. The significance of the outcome of the litigation for the value of the shares was clear because, under the legislation, whose validity was in question before this Court, the shares were appropriated to the Commonwealth. Their value was thus immediately affected. Accordingly, the contest was not the applicability in Australia of the *Dimes* rule or even the requirements of necessity and the functions of this Court under the Constitution[173]. The debate concerned only the application of the rule.

129 In a number of more recent decisions of this Court, the rule in *Dimes* has been referred to in order to sustain the strict requirement of disqualification for pecuniary interest[174]. The rule was described as establishing a "special class" in which disqualification is required "regardless of the particular circumstances"[175]. The existence of the special rule as separate from, and additional to, the test for apprehended bias, is implicit in the reasoning of many members of this Court in

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170 *Dickason v Edwards* (1910) 10 CLR 243 at 259. He also referred to *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at 758.

171 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1.

172 The transcript of argument was noted in *R v The Industrial Court* [1966] Qd R 245 at 279-280.

173 Webb J, who was absent from Australia and the hearing, reportedly wrote to Latham CJ that "had I sat I would have retired if objected to": Latham Papers, 1009/62/335 cited in Cranston, (1979) *Public Law* 237 at 239.

174 See eg *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263 per Barwick CJ, Gibbs, Stephen and Mason JJ.

175 *Webb v The Queen* (1994) 181 CLR 41 at 75 per Deane J; cf Bingham, "Judicial Ethics" in Cranston (ed), *Legal Ethics and Professional Responsibility*, (1995) 35 at 40-41.

recent years[176]. No member of the Court has previously thought fit to regard the special rule as anomalous or subsumed in the test for disqualification for apprehended bias.

130 Likewise, early[177] and recent[178] decisions of State Supreme Courts in Australia have accepted as a separate and binding rule of law the principle of disqualification for direct pecuniary interest. In *Clenae*[179], one of the judges in the Court of Appeal reached his conclusion that the judgment should not be set aside on the basis of necessity. He did not, therefore, find it necessary to decide the question of disqualification. By inference, he was prepared to assume the latter, for otherwise necessity would not have arisen for consideration. In *Ebner*, a separate rule of disqualification for direct pecuniary interest was accepted by the Full Federal Court but held inapplicable to the facts of that case[180].

131 In addition to these judicial opinions, other expressions of the applicable law reinforce the conclusion that the Australian common law has established a separate rule of disqualification for pecuniary interest. The rule was accepted and justified in an article written by Professor Cranston in 1979[181]. A reason given for retaining the separate rule was that it avoided inquiry of the judge that would otherwise invade the judge's privacy. The continued existence of the separate rule established by *Dimes* was also accepted as an "established category" by Sir Anthony Mason, writing after his retirement from this Court[182].

132 Against this background, it would certainly be open to this Court to abolish the separate rule. It might now conclude that it is anomalous and should be replaced by later legal developments governing apprehended bias. But the starting point for such a step is a clear appreciation of what the common law

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176 *Vakauta v Kelly* (1989) 167 CLR 568 at 575 per Dawson J; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88 per Mason CJ and Brennan J.

177 See eg *The Commercial Banking Co v Balgarnie* (1864) 3 SC Rep 27 at 28-29; *Ex parte Dalton* (1876) 14 SC Rep 277 at 282.

178 *Dovade Pty Ltd v Westpac Banking Group* (1999) 46 NSWLR 168 at 183-185.

179 *Clenae* [1999] 2 VR 573 at 602-603 per Callaway JA.

180 *Ebner* (1999) 91 FCR 353 at 366. The Full Federal Court questioned the justification for a special rule of law.

181 Cranston, (1979) *Public Law* 237 at 240.

182 Mason, "Judicial disqualification for bias or apprehended bias and the problem of appellate review", (1998) 1 *Constitutional Law and Policy Review* 21 at 25.

presently requires. Once this is ascertained, it then involves an identification of the legal principles and legal policy that would justify substituting a new and different legal rule[183]. Any such principles or policy did not convince our predecessors[184] or the judges of the final appellate court in the United Kingdom[185]. In my respectful opinion, only this approach, and not an ahistorical reinterpretation of *Dimes*[186], leads to an acceptable judicial conclusion.

Reasons for abolishing automatic disqualification

133 In the joint reasons[187], it is stated that the rule of automatic disqualification for pecuniary interest is anomalous and that no "free-standing rule of automatic disqualification" will henceforth apply in Australia. Instead, the issues hitherto resolved by reference to the separate rule will be decided by the application of the principle governing disqualification for apprehended bias on the part of the judge concerned. Looked at from the perspective of legal principle and legal policy, I accept that there are arguments that support this course.

134 First, it is not uncommon, especially in a final court of appeal, for periodic review of common law authority to take place. Rules, developed to meet the requirements of particular cases, are collected, conceptualised and restated in a simpler, unifying form[188]. There have been many decisions of this kind. l have frequently supported such an approach[189].

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183 For the approach proper to elaboration of the common law, see *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 344-345.

184 eg *Webb v The Queen* (1994) 181 CLR 41 at 75 per Deane J.

185 eg *Pinochet* [2000] 1 AC 119 at 133-134 per Lord Browne-Wilkinson, 137 per Lord Goff of Chieveley, 143-144 per Lord Hutton.

186 cf joint reasons at [42]-[53].

187 Joint reasons at [54].

188 eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Bryan v Maloney* (1995) 182 CLR 609.

189 eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 275 [259]; cf *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 at 36-42.

135 Secondly, it is true[190] that the rule for disqualification for apprehended bias applicable in Australia is more stringent than the test applied in England[191], although the differences may not be as great in practice as some observers have suggested[192]. The rigorous approach adopted in this country is reflected in other jurisdictions of the common law that have retained a separate and automatic disqualification for pecuniary interest[193]. Nevertheless, the availability of a broad category for apprehended bias which has developed differently in Australia does pose the question of the utility of retaining the separate rule.

136 Thirdly, the evolution of company law[194] and the consequent growth of the number, variety and size of corporations (and of their importance to the economy) makes it appropriate to re-examine a rule which, applied strictly, might effectively exclude judges and perhaps close members of their families from owning shares in corporations. The number of privatised governmental corporations and demutualised societies has expanded the participation of many people in private corporate investment in Australia. A good reason is needed to exclude judges, in effect, from enjoyment of the right to invest in private companies. Furthermore, virtually every judge will have a bank account. All banks are major litigators before the courts. The extremes to which the pecuniary disqualification principle can sometimes be pushed may be seen in United States cases where recusal applications have been made against judges presiding in criminal trials for robbery of a bank because of the judge's account with the bank concerned[195]. The changing patterns of company interrelationships, whereby a shareholder might legitimately, and innocently, have no knowledge of the secondary shareholdings of the company also illustrates the problem[196] of applying a strict pecuniary disqualification rule. Such complicated interrelationships did not exist when *Dimes*, and most of the earlier cases, were decided.

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190 As the joint reasons point out at [9]-[10].

191 See eg *Webb v The Queen* (1994) 181 CLR 41 at 49, 69-70; cf *R v Gough* [1993] AC 646 at 670.

192 cf *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 at 149; *BOC New Zealand Ltd v Trans Tasman Properties Ltd* [1997] NZAR 49 at 55.

193 Such as the United States, although in that country the disqualification is now principally governed by statute and by professional codes of conduct.

194 Particularly after *Salomon v Salomon & Co* [1897] AC 22; cf *Hamilton v Whitehead* (1988) 166 CLR 121 at 128.

195 *United States v Ravich* 421 F 2d 1196 (1970).

196 cf *Weingart v Allen & O'Hara* 654 F 2d 1096 at 1107 (1981).

137 Fourthly, there is now a much greater willingness to mount arguments of disqualification against judges. The persistent Mr Dimes has been succeeded by many litigants who raise objections to the composition of a court, from trial courts to the highest courts[197]. Whilst it is essential that such objections be decided dispassionately and in a principled manner, it is equally desirable that litigants should not be able to control which judge or judges will decide their cases[198]; that the applicable rule should take into account the realities of litigation; and that the rule should avoid imposing unnecessary disqualifications on judges, having little or nothing to do with the merits of the judge's involvement in the case.

138 Fifthly, many cases reveal circumstances in which judges have innocently overlooked some pecuniary or other interest and are thereby rendered hostage, if there be a strict disqualification rule, to arbitrary refusals to waive the point[199]. Although commentators may suggest that there is no excuse for a judge not to know the details of his or her share portfolio[200], events can occur (such as the supervening death of, and bequest from, a family member[201] or the marriage of a judge to a spouse with relevant shares[202]) that unexpectedly change the judge's position at a time when litigation is well advanced. Moreover, in contemporary circumstances, it can less readily be assumed than might have been the case in earlier times that a judge will be aware of the shareholdings of a spouse, partner or other close family member[203].

139 Sixthly, the foregoing considerations therefore address attention to the essential purpose of the separate rule of disqualification for direct pecuniary interest. If that purpose is, ultimately, the maintenance of public confidence in

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197 eg *Kartinyeri v The Commonwealth [No 2]* (1998) 72 ALJR 1334; 156 ALR 300; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147; *Pinochet* [2000] 1 AC 119.

198 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352; *Dovade Pty Ltd v Westpac Banking Group* (1999) 46 NSWLR 168 at 191.

199 cf *Lampert v Hollis Music, Inc* 105 F Supp 3 at 5-6 (1952); *United States v Ravich* 421 F 2d 1196 at 1205 (1970).

200 Sharman, (1989) 10 *The Journal of Legal History* 71 at 82.

201 As in *Clenae* [1999] 2 VR 573.

202 As in *Union Carbide Corporation v US Cutting Service, Inc* 782 F 2d 710 (1986).

203 cf *Dovade Pty Ltd v Westpac Banking Group* (1999) 46 NSWLR 168 at 187.

the administration of justice[204] and sustaining the public perception of the integrity of the judiciary, some reconceptualisation of the current law might be justified. The respondents to these appeals urged that this be done by abolishing the separate rule and meeting its objects by treating pecuniary interest as an instance of disqualification for apprehended bias. In *Pinochet*, the House of Lords considered that reconceptualisation should occur. However, their Lordships decided that it should take the path of enlarging, and generalising, the kinds of "interests", beyond the pecuniary, that invited automatic disqualification by law. A third possible approach would be to retain the present special rule but to place new emphasis on the "pecuniary" interest that will disqualify the judge, so that it must be more than "trivial", "minor", or merely "indirect, theoretical and immaterial"[205].

140 I acknowledge the force of the foregoing arguments of principle and policy. But different considerations of legal principle and policy hold me back in the present circumstances[206].

Reasons for adhering to automatic disqualification for pecuniary interest

141 *Established authority*: The first reason is that the principle in *Dimes* has been a rule of the common law, in Australia and England, for 150 years. It has informed many decisions of the courts as well as judicial practice. In my experience, it is virtually invariable for judges to notify parties of any relevant pecuniary (and other) interests, connections or associations before a hearing, before argument commences, during argument and even (if it has been overlooked) after the matter stands for judgment[207]. It is the strength of the separate rule in *Dimes*, and of decisions applying that rule, that makes this practice such a clear and unquestioned one in Australian courts. To that extent, *Dimes* and its progeny provide a "bright-line" principle[208]. They obviate debate, making the course proper to the judge clear and relieving the parties and the judge, normally, of embarrassing and potentially intrusive questioning that might otherwise be required.

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204 cf Caldwell, "The *Pinochet* Saga", (1999) *New Zealand Law Journal* 103 at 106.

205 Thomas, *Judicial Ethics in Australia*, 2nd ed (1997) at 54.

206 cf my reasons in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 395-404; *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 74 ALJR 743 at 768-769 [120]-[124]; 170 ALR 594 at 628-629; *Jones v Bartlett* [2000] HCA 56 at [228]-[237].

207 *Webb v The Queen* (1994) 181 CLR 41 at 74-75 per Deane J.

208 cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 216 [91] per McHugh J. See also 215-216 [88]-[90], [92].

142 Where this Court is invited to alter or re-express long established law, it is always a question for judgment as to whether it should do so or leave such matters to the legislature. I accept that it may be more appropriate than in other cases to change the law by judicial decision because this matter is one touching on performance of the judicial function[209]. However, the duration of the legal principle and the influence which it has had upon judicial and legal practice both act as strong reasons for restraint. Upon this subject, contemporary judicial practice in this country has undoubtedly grown out of the "free-standing" rule.

143 *The basic concepts*: There is also a conceptual reason for withholding change. It can be explained by reference to the international norms of human rights. Even where such norms are not incorporated into Australian domestic law, they may inform the elaboration of the common law[210]. This is especially so where they appear in an instrument, such as the International Covenant on Civil and Political Rights[211], in respect of compliance with which Australia has submitted itself to the scrutiny of the United Nations Human Rights Committee.

144 By Art 14.1 of that Covenant, it is provided, relevantly, that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"[212]. The key adjectives, pertinent to the present appeals, are "independent" and "impartial". It will be noted that these are the same adjectives that are accepted by the common law itself in describing the essential features of an Australian court to which litigants in this country are entitled[213].

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209 *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 at 39; cf *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 74 ALJR 339 at 359-363 [100]-[113]; 168 ALR 123 at 150-156; *Lipohar v The Queen* (1999) 74 ALJR 282 at 320-324 [186]-[199]; 168 ALR 8 at 62-66; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1135-1137 [144]-[149]; 172 ALR 625 at 663-664.

210 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

211 Opened for signature 19 December 1966, 999 UNTS 171; 1980 ATS 23; 6 ILM 368 (entered into force 23 March 1976).

212 See also Universal Declaration of Human Rights, General Assembly Res 217 A (III), (183rd plen mtg), UN Doc A/Res/217A (1948), Art 10.

213 Joint reasons at [3]; cf Gleeson, "Judicial Legitimacy", (2000) 12 *Judicial Officers' Bulletin* 41 at 42; Brennan, "Principle and Independence: The Guardians of Freedom", (2000) 74 *Australian Law Journal* 749 at 758.

145 The juxtaposition of "independent" and "impartial" makes it clear that different, although related, concepts are intended. "Impartiality" may not connote exactly the same notion as "neutrality", which is a word sometimes used[214]. Similarly, whilst "independence" helps to reinforce "impartiality" and vice versa, the concepts are distinct. Independence is often conceived of as requiring independence from the other branches of government, as indeed it does[215]. But independence also connotes independence of mind from the influence of private interests, and independence from the litigants and their representatives[216]. Impartiality is more concerned with the approach of the judge to the hearing and determination of the matters in dispute. Whilst independence may encourage and facilitate impartiality, a judge can be wholly independent but not impartial. Similarly, a judge, though lacking independence (such as from government), may be able to maintain true impartiality.

146 Although it is impossible to be dogmatic, I take the common law principle which forbids a judge from having a pecuniary interest, at least one involving a direct interest in a particular party, as a principle mainly concerned with upholding the fundamental guarantee of judicial "independence". I take the guarantee of "impartiality" as one basically supported by the common law principle of disqualification for apprehended bias as perceived by a reasonable bystander. The fact that there are two basic notions expressed in human rights norms makes it unsurprising that, over 150 years, the common law should have evolved two principles of its own that to some extent overlap. This fact imposes a brake on any overly enthusiastic reduction of the separate legal rules into a single overarching one.

147 The decisions of regional and international bodies, charged with elaboration of the foregoing human rights norms, lend some support to this analysis. In the European Court of Human Rights, the requirement of judicial "impartiality" has been held to mean the lack of judicial "prejudice or bias"[217]. That Court has accepted the common law doctrine that "justice should not only

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214 *R v S(RD)* [1997] 3 SCR 484 at 501, 509; *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 at [14]; Ipp, "Judicial impartiality and judicial neutrality: Is there a difference?", (2000) 19 *Australian Bar Review* 212.

215 cf *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

216 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 360.

217 *Piersack v Belgium* (1982) 5 EHRR 169 at 179.

be done, but should … be seen to be done"[218]. Upon this basis, it has emphasised that the promise of judicial impartiality is concerned with "appearances"[219]. Thus, in relation to "impartiality", the Court has expounded the relevant principles in ways similar to those of this Court concerning apprehended bias[220]. Indeed, it is this elaboration which may ultimately induce acceptance by the English courts of the notion of bias which they have so far resisted[221].

148 On the other hand, "independence" has sometimes been viewed in human rights jurisprudence as a different notion[222], requiring not only independence from the executive government but "also of the parties"[223]. Whilst the question of a pecuniary interest involving a party does not appear to have been considered, the strict standards adopted to uphold the independence of tribunals and adjunctive bodies[224] suggest that the approach the European Court of Human Rights would take to pecuniary interest would be a vigilant but practical one. The decisions of the United Nations Human Rights Committee appear consistent with the foregoing[225].

149 Although the foregoing considerations do not resolve the question whether this Court should re-express the common law of Australia, they do, I believe, serve to emphasise that "independence" of judges and other adjudicators is a concept separate and different from "impartiality". It is thus one apt to separate, different and additional protection by the common law. Arguably, the rule

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218 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

219 *Sramek v Austria* (1984) 7 EHRR 351 at 364.

220 cf Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, (1995) at 234-239; *Piersack v Belgium* (1982) 5 EHRR 169; *Hauschildt v Denmark* (1989) 12 EHRR 266 at 279.

221 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 476-477.

222 van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed (1998) at 451-457.

223 *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455 at 490.

224 *Belilos v Switzerland* (1988) 10 EHRR 466 at 489; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 at 198-199.

225 See eg *Karttunen v Finland* unreported, United Nations Human Rights Committee, CCPR/C/46/D/387/1989, 5 November 1992 at [7.2] discussed in Martin et al (eds), *International Human Rights Law and Practice: Cases, Treaties and Materials* (1997) at 527-531.

forbidding any direct pecuniary interest, however small, in an issue for decision, and in a party claiming a decision in its favour, supports and upholds judicial "independence", so far as this is concerned with complete independence from the parties.

150 *Other jurisdictions*: Reinforcement for maintaining the separate rule of disqualification for pecuniary interest can also be derived from an examination of the approach in other common law countries. Thus the law in Scotland appears to have followed *Dimes*. The ownership of even a "very small interest" by way of shares in a company was held in *Smith v Liverpool and London and Globe Insurance Co*[226] to involve disqualification. The principle was described as "binding", "well settled", "never ... doubted" and "a fixed rule ... both in England and in Scotland"[227].

151 The same principle was applied by the House of Lords in the Scottish case of *Sellar v Highland Railway Co*[228]. Although it was recognised that, in practice, the rule was "increasingly irksome", its relaxation was rebuffed "in the slightest degree"[229]. It is obvious from Lord Hope of Craighead's speech[230] in *Pinochet* that *Dimes* remains the law in the United Kingdom, not only in England but also in Scotland. Lord Hope also pointed out that the same question as had arisen in *Dimes* was considered in a Scottish appeal to the House of Lords six years later[231]. The report records that Lord Wensleydale, a shareholder in the appellant company, had stated that he would take no part in the hearing although counsel had asserted that he had no objection.

152 In Canada, the continuing authority of *Dimes* appears to have been accepted by the Supreme Court[232]. A distinction is drawn in Canadian case law between apprehension of judicial bias and disqualification for pecuniary

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226 (1887) 14 SC 931 at 937.

227 *Smith v Liverpool and London and Globe Insurance Co* (1887) 14 SC 931 at 938, 939.

228 [1919] SC (HL) 19.

229 *Sellar v Highland Railway Co* [1919] SC (HL) 19 at 20.

230 [2000] 1 AC at 140-141.

231 *Pinochet* [2000] 1 AC 119 at 140 referring to *London and North-Western Railway Co v Lindsay* (1858) 3 Macq 99 at 114-115.

232 *Ghirardosi v Minister of Highways for British Columbia* [1966] SCR 367 at 373.

interest[233]. A recent survey of judges in Canada reveals a general attitude of strictness with respect to the possession of even small shareholdings by a judge or a judge's spouse[234].

153 In South Africa, the precise point in issue does not appear to have arisen. However, the recently expressed concern about resentment on the part of some judges over submissions that they be disqualified for apprehended bias[235] illustrates at least one advantage of adhering to a strict rule in relation to pecuniary interest. The existence of such a rule tends to avoid such resentment and to sustain a strong convention of disclosure[236].

154 In New Zealand, the governing rule appears to be similar to that in England, although the need for an exception for trivial pecuniary interest has been acknowledged[237]. Some commentators in New Zealand[238] and Canada[239] have proposed a modification of the strict rule by reference to consideration of the amount of the judge's interest which stood to be affected by the decision and whether the interest would give rise to a reasonable suspicion of possible bias.

155 In the United States, recusal of federal judges and magistrates has long been regulated by legislation. To that extent, there is less utility in examining the case law, which is typically concerned with the elaboration of statutory provisions[240]. Before Congress enacted the statutory requirements, the position in the United States was similar to that urged by the respondents on this Court: "[J]udges did not recuse themselves in such cases unless the interest was so large that a reasonable person might think it could influence the judge's decision"[241].

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233 *Sacred Heart v Armstrong's Point* (1961) 29 DLR (2d) 373 at 382; *Energy Probe v Atomic Energy Control Board* (1984) 8 DLR (4th) 735 at 741-742.

234 Canadian Judicial Council, *Commentaries on Judicial Conduct*, (1991) at 10.

235 *Moch v Nedtravel (Pty) Ltd* 1996 (3) SA 1 at 13.

236 Thomas, *Judicial Ethics in Australia*, 2nd ed (1997) at 54.

237 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 at 148.

238 Caldwell, "The *Pinochet* Saga", [1999] *New Zealand Law Journal* 103 at 104.

239 Canadian Judicial Council, *Ethical Principles for Judges*, (1998) at 42.

240 28 USC §455.

241 *Union Carbide Corporation v US Cutting Service, Inc* 782 F 2d 710 at 714 (1986).

Yet according to Judge Posner in *Union Carbide Corporation v US Cutting Service, Inc*[242]:

> "This standard was too nebulous – not least from the judge's standpoint – and Congress replaced it by a flat prohibition. Although the prohibition results in recusal in cases where the interest is too small to sway even the most mercenary judge, occasional silly results may be an acceptable price to pay for a rule that both is straightforward in application and spares the judge from having to make decisions under an uncertain standard apt to be misunderstood."

156 It is at least a consideration to be borne in mind that if this Court demolishes a strict rule which applies, by common law or statute, in so many other countries (and has applied in Australia for so long), the legislature may be tempted (as in the United States) to reincorporate it as a "flat prohibition". That consideration tends to demonstrate the prudence of clarifying the existing rule rather than abolishing it as anomalous.

157 *Analogous rules of strictness*: In a number of areas of the law bearing some analogy to the decision-making of judges, a strict rule has been adopted. Any retreat from such a strict rule in the case of judges runs the risk of being seen as partial and self-interested.

158 A first illustration concerns the principle that no one having fiduciary duties shall be allowed to enter into engagements in which there is a personal interest which conflicts or may conflict with those duties[243]. An engagement entered into in breach of this rule will be set aside and "[s]o strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness"[244] of the contract concerned. This rule, formulated by the English courts at about the time the principle in *Dimes* was stated, has been applied since[245]. It is the foundation for the rule of disclosure by company directors of interests that might place them in a position of conflict. The strictness of the rule

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242 782 F 2d 710 at 714 (1986).

243 *Aberdeen Rail Co v Blaikie Brothers* (1854) 2 Eq Rep 1281 at 1286; [1854] All ER Rep 249 at 252.

244 *Aberdeen Rail Co v Blaikie Brothers* (1854) 2 Eq Rep 1281 at 1286 per Lord Cranworth LC; [1854] All ER Rep 249 at 252.

245 See eg *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488 at 502.

has been traced[246] to the law of trusts and fiduciary duties[247]. It does not depend on proof of mala fides.

159 In recent years, in this country[248], and in England[249], the strict rule has been relaxed a little. Thus it is necessary to show a "significant" or "substantial" possibility of conflict of interest and duty. But if that exists, the only defence available to the director in respect of any profit made is that it was made with the full knowledge and assent of the company affected[250]. The foundation of the governing principle is prophylactic, not compensatory. Its object (like the rule in *Dimes*) is to instil the habit of transparent conduct and not merely to afford remedies when a breach can be proved[251].

160 Outside the field of company law, rules enforced in respect of local government bodies and other administrative adjudicators have also demanded a strict standard which forbids any pecuniary interest, however small, on the part of a decision-maker[252]. The fact that the decision-maker may have acted honestly is no answer to proof of the existence of such an interest[253]. Indeed, in some cases, the rules applied to administrative decision-makers have been borrowed from the rules regarding the judiciary precisely because of the common requirement of complete impartiality on the part of holders of public office involved in the deployment of governmental power. In Canada, an administrator has been subjected to separate and cumulative grounds of disqualification: both for the presence of a pecuniary interest and for imputed bias[254].

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246 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 137-138; cf *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 at 451-452; [1972] 2 All ER 162 at 174-175.

247 *Keech v Sanford* (1726) Sel Cas T King 61 [25 ER 223].

248 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103 per Mason J; *Chan v Zacharia* (1984) 154 CLR 178 at 198.

249 *Phipps v Boardman* [1967] 2 AC 46 at 124.

250 cf *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399; 18 ALR 1.

251 *Movitex Ltd v Bulfield* [1988] BCLC 104.

252 *Beer v Rural Municipality of Fort Garry* (1958) 16 DLR (2d) 316.

253 *Sacred Heart v Armstrong's Point* (1961) 29 DLR (2d) 373.

254 *Sacred Heart v Armstrong's Point* (1961) 29 DLR (2d) 373 at 382.

161 *Residual policy reasons*: In addition to the foregoing, the following considerations of legal policy support maintaining a separate rule disqualifying a judge for any pecuniary interest in the subject matter of, or a party to, litigation.

1. The rule is pragmatic. It deals with an aspect of partiality that is well understood by litigants and the community[255]. It addresses a want of independence from the parties by adopting a simple rule which upholds the legitimacy of the judicial institution. Ascertaining, proving and correcting other causes of judicial disqualification are necessarily more contentious and less certain[256]. The fact that pecuniary interest can usually be more easily identified is a consideration that tends to raise the expectations of litigants, and of the community, that this element, at least, will be removed from the equation[257]. It is a real contribution to securing a decision-maker who is independent[258]. To the extent that there are multiple biasing influences, the removal or minimisation of this obvious one is a positive step in the desired direction[259].

2. The retention of the strict rule also affords a sanction that promotes manifest integrity in the judicial institution. The rule alerts judges to a specific obligation requiring prior consideration. Necessarily, when considering any disqualification which the strict rule on pecuniary interest obliges, judges will turn their attention to other disqualifications of interest, connection or association that may be relevant. The separate rule obviates investigation of the effect of the judge's decision on the value of any interest held. It spares the judge concerned the invidious requirement of considering whether a reasonable and disinterested bystander would conclude that the pecuniary interest in question might give rise to an apprehension of bias. Much court time can be consumed in resolving such issues. A simple rule avoids that necessity. At least it does so in respect of a subject susceptible to simple expression and relatively objective determination.

3. The maintenance of the special rule governing pecuniary interest also concentrates the law's attention upon the *fact* of the integrity of the adjudicator. The rule governing imputed bias, by reference to the possible

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255 Frank, "Disqualification of Judges", (1947) 56 *Yale Law Journal* 605.

256 Allison, (1995) 32 *American Business Law Journal* 481 at 539.

257 Allison, (1995) 32 *American Business Law Journal* 481 at 516.

258 Allison, (1995) 32 *American Business Law Journal* 481 at 516.

259 Allison, (1995) 32 *American Business Law Journal* 481 at 539.

reaction of the reasonable bystander, is addressed to that fact but only as it might *appear* to others. Maintaining the purity of the judicial process has an importance of its own. This is separate from the impressions of a hypothesised member of the public[260]. Upon one view, whatever the impressions of the parties or the public, judicial adjudication must be pure and unsuspect. It must be so, in the end, not because of people's impressions but because, in Australia, these are essential features of the Judicature itself, as envisaged by the Constitution.

4. To the complaint that adherence to the special rule may effectively oblige some judges to cease holding shares in corporations that are frequent litigants before their courts (or to dispose of such shares, where necessary, before participating in a case directly involving such corporations), the answer is clear. If the rule is maintained and enforced, that is simply another duty of judicial office. It is certainly a duty required of judges in many other countries. If complied with, it provides an answer to the suggestion that judges with shareholdings in company litigants, "might adopt the mentality of business"[261] to the detriment of other litigants, including consumers, environmentalists, employees and those who are insolvent.

5. A final consideration requires attention to be given to a number of practical factors that lend support to maintenance of the special rule. In my view, it is not timely to alter the strict Australian common law rule against pecuniary interest by judges in the subject matter of, or in a party to, litigation. The issue is one of universal concern, but especially in countries in the Asia-Pacific region, with which Australian legal institutions have increasing connection[262]. At a time when, in the United States, public registration of pecuniary interest is required by law and the data so registered is available on the Internet[263], the abolition by this Court

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260 cf Spigelman, "Seen to be Done: The Principle of Open Justice – Part I", (2000) 74 *Australian Law Journal* 290.

261 Cranston, (1979) *Public Law* 237 at 238 referring to Friedrich, *The Pathology of Politics: Violence, Betrayal, Corruption, Secrecy, and Propaganda* (1972) at 154.

262 See eg Malcolm, "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region", (1996) 70 *Australian Law Journal* 299 at 300, Art (7); cf Malcolm, "Judicial Ethics: Financial Disclosure", unpublished paper presented at the 8th Conference of Chief Justices of Asia and the Pacific, Seoul, Korea, 7 September 1999.

263 For discussion, see Mauro, "Judges' Finances Still Out of View", *Legal Times*, 29 May 2000 at 9. APBnews.com sued for and gained access to the 1998 financial

(Footnote continues on next page)

of a longstanding, separate and strict rule of law seems unwise and liable to be misinterpreted[264]. For my own part, I respectfully regard it as a step in the wrong direction. Contemporary circumstances require more, not less, transparency in all significant public and private institutions. I acknowledge that views concerning what must be disclosed by judges, the conditions of disclosure and precisely what interests disqualify a judge may vary at the margins. I accept that the present common law rule involves defects and uncertainties. But, in default of constitutional elaboration, statutory prescription or an applicable judicial code of conduct, the resolution of such difficulties and the removal of the uncertainty lies, as in the past, in common law elaboration of settled doctrine[265]. It does not require abolition of a discrete and useful part of that doctrine.

Nor am I convinced that the course adopted by the House of Lords in *Pinochet* constitutes a reconceptualisation of the applicable law which this Court should follow. The belated expansion of the categories of automatic legal disqualification to include interests other than pecuniary interest is not, in my opinion, practicable. Non-pecuniary interests are not so susceptible to objective, and therefore automatic, application. Necessarily, they raise questions for evaluation and judgment. Moreover, especially within the rules adopted in Australia to govern disqualification for apprehended bias, such a re-expression of the common law is unnecessary.

162 In the result, I would adhere to the settled authority of this Court as most recently explained by Deane J in *Webb v The Queen*[266]. There is a "special class" of case where a judge is disqualified when he or she has "a direct pecuniary interest in the outcome of the proceedings"[267]. That "special class" includes all

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disclosure forms made by federal judges. These forms can be viewed at http://www.apbnews.com/cjsystem/judges/search.html.

264 The Council of Chief Justices of Australia and New Zealand has proposed development of a set of ethical guidelines: see Malcolm, "Judicial Ethics: Financial Disclosure", unpublished paper presented at the 8th Conference of Chief Justices of Asia and the Pacific, Seoul, Korea, 7 September 1999 at 17.

265 As was done in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 with respect to the previous involvement of a judge with the legal representatives of a party; cf *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215.

266 (1994) 181 CLR 41 at 75.

267 *Webb v The Queen* (1994) 181 CLR 41 at 75 (footnotes omitted).

direct pecuniary interests. All other cases of disqualification fall to be decided by reference to the principle of apprehended bias based on the reasonable impression of the hypothetical bystander. This has long been the way the law in Australia has approached such questions. The approach should not be changed[268].

163 It is worth adding that, before the current recusal statute was enacted, the present law, borrowed in turn from *Dimes*, was adopted and approved by the Supreme Court of the United States[269]. That Court's approach was later reaffirmed[270]. Those who litigate in Australia are entitled to no lesser protection than has long been accorded by courts in England, the United States and New Zealand. Having regard to their own longstanding practice, I do not believe that Australian judges would expect, or desire, the abolition by this Court of such established legal doctrine.

Clarification of the scope of disqualification

164 *The problem*: The common law abhors extreme or unreasonable outcomes and ordinarily permits elaboration and clarification of its rules where unexpected circumstances so require. The question is therefore whether, short of abolishing the special rule, its application is susceptible to refinement so as to make it more sensible and less apparently arbitrary. This is the path I prefer.

165 *Requirement of a real "interest"*: In the United States, both under earlier common law and the original recusal legislation, the kind of interest that would oblige disqualification was "substantial"[271]. In some cases, remote, contingent or speculative interests in the subject matter of the cause or in a party were classified not merely as insubstantial but as lacking the character of an "interest" at all for the purposes of recusal law[272]. The suggestion that a judge in a criminal trial concerning a bank robber was disqualified because he or she, or a close family member, had an account with the bank concerned would clearly fall within such an exception. Moreover, the fact that the bank was not a party to the

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268 *Breen v Williams* (1996) 186 CLR 71 at 115.

269 *Tumey v Ohio* 273 US 510 at 522-523 (1927). See 28 USC §455.

270 *Commonwealth Coatings Corp v Continental Casualty Co* 393 US 145 at 148 (1968).

271 *Lampert v Hollis Music, Inc* 105 F Supp 3 (1952). See also *Weingart v Allen & O'Hara* 654 F 2d 1096 at 1106 (1981).

272 *United States v Ravich* 421 F 2d 1196 at 1205 (1970); cf *In re Placid Oil Co* 802 F 2d 783 at 787 (1986).

proceedings, and could only be remotely affected by them, would also fall within such an exception[273]. In cases of this kind, the common law would hold that there was no relevant "interest" at all. This historical development, which obtained before the intervention of legislation in the United States, suggests to my mind the way in which the Australian common law should develop.

166 *De minimis exception*: But what of the suggestion, expounded by the present respondents, that to constitute an interest large enough to give rise to disqualification, it should be essential to show that the ratio of the judge's shareholding to the company's total issued capital was such that the judge's adjudication might have affected his or her interest as a shareholder[274]? This could well be an appropriate criterion if the matter to be judged were the possible response of the reasonable bystander to the facts disclosed. But in my view, there is an anterior question of disqualification for pecuniary interest. It is necessary to answer that question before considering any different or additional ground of disqualification[275]. It is in addressing that question that some authorities have been willing to concede a de minimis exception to relieve the judge, the parties and the administration of justice of an automatic disqualification that would otherwise apply[276].

167 In support of such an exception, it may be pointed out that Lord Cottenham's shareholding in the canal company, held to disqualify him in *Dimes*, was a most "substantial" one[277]. Yet, whilst I would be prepared to accept a de minimis exception to the special rule, the prophylactic purpose of the rule makes it important to reserve that exception to cases that are truly de minimis and not simply cases of a small interest. Thus, it would be wrong to infer from the facts in *Dimes* that only a shareholding approaching one percent of the issued capital of a company, or more, would attract disqualification of the judicial shareholder. I would confine the exception to cases where the pecuniary interest in question is so trivial and insubstantial that the suggestion of disqualification could be

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273 cf *United States v Ravich* 421 F 2d 1196 at 1205 (1970); *Sollenbarger v Mountain States Telephone and Telegraph Co* 706 F Supp 776 at 777 (1989).

274 *Clenae* [1999] 2 VR 573 at 592 per Charles JA.

275 In any case, the proportion of the judge's shares to his or her total assets might be another consideration: Cranston, (1979) *Public Law* 237 at 242-243.

276 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 at 148.

277 cf *Pinochet* [2000] 1 AC 119 at 133 per Lord Browne-Wilkinson.

dismissed as absurd[278]. Cases attracting this exception would be few. They would ordinarily only arise where the judge had disclosed the trivial interest[279]. If the interest were discovered belatedly, the exception would only apply where the oversight was excusable and the injustice occasioned by a refusal to waive the interest was such an affront to commonsense, having regard to the trivial size of the interest, as to demand exception from the rule in the circumstances.

168 *Indirect, remote and speculative interests excluded*: Similarly, it is appropriate to confine the principle, in the terms in which Deane J stated it, to cases where the pecuniary interest in question is a "direct" one[280]. A judge is not expected to stand aside where his or her interest in the subject matter of, or in a party to, the litigation (or that of a close family member) is "indirect and attenuated"[281] or "speculative"[282].

169 The fact that a judge does not personally have shares in a litigant corporation will not necessarily render an interest "indirect" if it is held by a close family member and its existence is known to the judge. In such a case, it is the usual practice of judges in Australia to disclose such interests as are known, to place them on the record, and to seek waiver of the judge's participation in the proceedings, which is ordinarily given. Even where the interests of close family members are disclosed and no objection is taken, a judge may still regard it as necessary or desirable to decline participation[283]. This may be done notwithstanding that the decision occasions delay and unrecoverable costs. To hold that a judge is disqualified only in the case of a substantial pecuniary interest, or one liable to be affected by the adjudication, misstates the

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278 Cases where such an exception has been invoked include *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 473; cf *BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union* 1992 (3) SA 673 at 694.

279 Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, (1976) at 309; Canadian Judicial Council, *Commentaries on Judicial Conduct*, (1991) at 60.

280 *Webb v The Queen* (1994) 181 CLR 41 at 75.

281 cf *TV Communications Network, Inc v ESPN, Inc* 767 F Supp 1077 at 1080 (1991).

282 *In re Drexel Burnham Lambert Inc* 861 F 2d 1307 at 1313 (1988); *Exxon Corporation v Heinze* 792 F Supp 77 at 79 (1992).

283 As occurred in *Cooper v Amcor Ltd*, Court of Appeal of Victoria, transcript of proceedings, 20 February 1997 per Brooking JA.

longstanding and strict common law rule. It also undermines the achievement of the purposes of that rule. I would adhere to the established law[284].

170 *Relevance of disclosure*: Disclosure of a relevant pecuniary interest is a precondition for effective waiver on the part of the parties[285]. Indeed, such disclosure, if complete, enlivens a duty in the parties affected to object without delay to the continued participation of the judge[286]. I have previously questioned the entitlement of a party to waive the right to an independent and impartial tribunal, given that such right belongs as much to the public as to the parties[287]. However, that issue must now be taken to have been settled by this Court[288]. I do not dissent from the principle so established. Obviously, it has great practical advantages.

171 Many authorities emphasise the prudence and desirability of disclosing to the parties any facts or circumstances which could lead to a disqualification for bias[289]. Moreover, in some circumstances, failure to disclose such an interest will not only remove the possibility of an informed waiver but will lead to a sense of disquiet[290], and perhaps the suggestion that the want of disclosure has an improper or sinister explanation[291]. In Australia, for lack of a public register, a litigant cannot ordinarily be expected to ascertain, in advance, any relevant undeclared pecuniary interest of the judge. Often the litigant will be unaware of the identity of the judge until immediately before the hearing[292].

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284 *Clenae* [1999] 2 VR 573 at 585-587; *Dovade Pty Ltd v Westpac Banking Group* (1999) 46 NSWLR 168 at 184-185. See also *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 472.

285 cf *Pinochet* [2000] 1 AC 119 at 137 per Lord Browne-Wilkinson.

286 *Sollenbarger v Mountain States Telephone and Telegraph Co* 706 F Supp 776 at 785-786 (1989); cf *Sankey v Whitlam* [1977] 1 NSWLR 333 at 358.

287 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 373 by reference to *United States v Lustman* 258 F 2d 475 at 478 (1958).

288 *Vakauta v Kelly* (1989) 167 CLR 568 at 587-588 per Toohey J.

289 *Dovade Pty Ltd v Westpac Banking Group* (1999) 46 NSWLR 168 at 191-192; cf *Gascor v Ellicott* [1997] 1 VR 332 at 356.

290 Canadian Judicial Council, *Ethical Principles for Judges*, (1998) at 44.

291 Thomas, *Judicial Ethics in Australia*, 2nd ed (1997) at 53-55.

292 *Najjar v Haines* (1991) 25 NSWLR 224 at 261.

172 *The exception of necessity*: In some circumstances, the interests of justice require that, notwithstanding an interest in the subject matter of, or in a party to, litigation, a judge of that court may participate in the decision out of "necessity"[293]. A special rule governing necessity applies to ultimate courts of appeal. This is so either because there is usually no way of substituting ad hoc judges for a particular case[294] or because no other court can correct the decision of the ultimate court[295]. It may be that this consideration, rather than any other, sustained the decisions of Starke and Williams JJ to participate in the *Bank Nationalisation Case*[296], notwithstanding the disclosed shareholdings of, or on behalf of, close family members[297].

Conclusions

173 Having decided that the special rule for automatic disqualification for pecuniary interest in the subject matter of, or in a party to, litigation, remains, in the circumstances in which it applies, I must apply that rule to each of the appeals before this Court. In the case of *Clenae*, it also remains to consider the suggested exception on the ground of necessity.

174 I deal with the case of *Ebner* first. I regard it as a comparatively simple case. In fact, I agree substantially with the way in which the Full Court of the Federal Court primarily disposed of the argument for disqualification. There was, relevantly, a pecuniary interest of the judge. It was not an interest in a party (for the relevant "party" was the Official Trustee in Bankruptcy, not the bank whose shares were included in the family trust of which the judge was a director). There was therefore no direct pecuniary interest in the subject matter of the litigation. The most that could be said was that there was a remote and insubstantial interest, of a contingent kind, in a company that was, for its part, interested in the outcome of the litigation and had contributed to funding it.

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293 *Builders' Registration Board of Queensland v Rauber* (1983) 57 ALJR 376 at 385-386; 47 ALR 55 at 71-73; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88-89, 96-98; *Australian National Industries Ltd v Spedley Securities Ltd (In Liq)* (1992) 26 NSWLR 411 at 421-423.

294 *Laird, Secretary of Defense v Tatum* 409 US 824 at 837-838 (1972) per Rehnquist J.

295 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 169.

296 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1.

297 Cranston, (1979) *Public Law* 237 at 240.

175 If such involvement was a relevant "pecuniary interest" at all (which I doubt) it clearly fell within the de minimis exception. It was an interest twice removed. Properly, the trial judge had disclosed this "interest". He had done so at the outset of the proceedings. The fact that a party did not (as would usually be the case) waive objection to the judge's continued participation is not determinative. A party cannot veto the participation of a judge. The decision on whether or not to sit, at least in the first instance, remains one for the judge concerned. Properly, the judge took into account the judicial duty, unless legally disqualified, to perform the functions of his office. Although another judge might have decided to stand aside, the judge's decision not to do so is unassailable. This is so not because the reasonable observer might have perceived that the judge could not have been able impartially to discharge his judicial functions. It is because any "pecuniary interest" of the judge in the subject matter of the litigation was indirect, insubstantial and trivial and did not attract the automatic disqualification by law.

176 The appeal in *Clenae* is more difficult. There, the bank was actually a party to the litigation. At the time of judgment, the judge therefore had an interest in a party. That interest was, in my view, classifiable as a "pecuniary interest". To deny this on the ground that the bank is a legal person separate from its shareholders would be to elevate form over substance in an area of the law where technicalities should not override the interests of the parties and the public in the manifest independence and impartiality of judges. The question therefore becomes whether the judge's pecuniary interest in the party, which otherwise attracts automatic disqualification, should have that result. Regrettably, I am of the view that it does.

177 It cannot be said that the judge's pecuniary interest was so remote that it was not an "interest" for legal purposes. It was a significant shareholding. It was supplemented by a significant debenture holding. These cannot be regarded as trivial or de minimis. Nor was the shareholding and other interest "indirect". It was directly held by the judge himself, both as to the legal and equitable interest[298]. The failure of the trial judge to disclose to the parties his interests in the bank as soon as those interests were acquired was undoubtedly innocent. The case books are full of similar instances that involve a "confluence" of unexpected events and unnoticed interests[299]. But when such an interest is not disclosed, it removes the possibility of an informed waiver. Here, it deprived the judge of the submissions of the parties regarding any special relevance which his new

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298 See *Clenae* [1999] 2 VR 573 at 580.

299 *Union Carbide Corporation v US Cutting Service, Inc* 782 F 2d 710 at 713 (1986).

pecuniary interest might have had in the circumstances of the case[300]. In this instance, although the non-disclosure does not betoken wrongdoing, it makes the conclusion about the relief required all the more obvious.

178 It was suggested that the special circumstances of "necessity" applied in *Clenae*. This was so, as it was put, because the trial had been long, the decision delayed, an important witness had died and the pecuniary interest arose unexpectedly after the decision was reserved. Callaway JA in the Court of Appeal regarded the exception of necessity as being attracted by the strong reasons of convenience and advantage that warranted delivery of the reserved judgment and the fact that this was required to ensure the conclusion of a "fair trial"[301]. In the context of disqualification for undisclosed pecuniary interest, this case presents the issue as to how much inconvenience can justify a conclusion of necessity. If the trial judge in *Clenae* were disqualified by operation of law for the undisclosed direct pecuniary interest, a second trial could undoubtedly be had before a different judge. True, there would be disadvantages to both parties by reason of the passage of time and the burden of ultimate costs. There would be a special disadvantage to the bank because of the death of an important witness. Whether or not that witness's testimony would in any case be admissible under Victorian law, counsel for the appellant in *Clenae* undertook before the Court of Appeal that no objection to the tender of that witness's testimony would be raised in a retrial. This undertaking was renewed before this Court in the special leave hearing[302].

179 In my view, this case does not attract the exception of necessity. So to hold would be seriously to debase this notion. Retrial would be inconvenient, costly and a serious burden on the parties and the community. But that is commonly the case where courts conclude that a judge, who has conducted a trial, was disqualified. Retrial is the price that is paid by our system of law for upholding fundamental legal and civil rights. It is a price worth paying if it reinforces the community's confidence in the administration of justice and demonstrates the important principle that judges, under our law, do not participate in the determination of the rights of parties in which they have a direct, significant and, in this case, undisclosed interest.

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300 None was ever later established. Similarly in *Ebner*, the bankrupt, despite having ample opportunity to do so, never commenced a proceeding to contest the bank's assertion of his indebtedness to it: see *Ebner* (1999) 91 FCR 353 at 360.

301 *Clenae* [1999] 2 VR 573 at 603.

302 *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd*, High Court of Australia, transcript of proceedings, 9 December 1999 at 12.

Orders

180 It follows that in *Ebner v The Official Trustee in Bankruptcy* the appeal should be dismissed with costs.

181 In *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd*, the appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of Victoria should be set aside. In place of those orders, this Court should order that the appeal to that Court be allowed with costs and the judgment appealed from set aside. In lieu thereof, it should be ordered that there be a retrial of the action. The costs of the first trial should abide the outcome of the retrial. The parties should have leave to apply to the Court of Appeal of the Supreme Court of Victoria for any further order that may arise by virtue of the *Appeal Costs Act* 1998 (Vic).

182 CALLINAN J. I agree with the reasons for judgment and orders proposed by Gleeson CJ, McHugh, Gummow and Hayne JJ. I would however, draw attention to these further matters.

183 The doctrine of necessity may have a special significance and may call for a different application in this Court. The decisions of appellate courts, and certainly this Court, may have the capacity to affect the business, conduct, and other affairs of many corporations and people not parties to the litigation[303]. A decision for example, in relation to native title in one case, may have a particular capacity to affect the operations of many, if not most mining businesses, and many leasehold agriculturalists and pastoralists in this country who are not parties to the relevant litigation, and, as well as not being heard, may not have the opportunity of raising any point of apprehended bias if it possibly arises. On the other hand, because this is the Court of final resort and a definitive decision, rather than one in which there is no majority is undesirable[304], the doctrine of necessity may have an acute relevance in the High Court. The implications of these matters may call for separate consideration on another occasion.

184 The second matter is that in my opinion a clear distinction needs to be drawn between cases of express waiver and waiver to be inferred from counsel's conduct which this Court held to have occurred in *Vakauta v Kelly*[305]. About the former there can be no doubt. I would simply refer, without repeating them, to the difficulties I consider to be associated with, and the reservations that I hold regarding the latter that I stated in *Johnson v Johnson*[306].

185 The third matter is this. A claim of apprehended bias is not infrequently made at the outset, or very early in the proceedings. When a claim of apprehended bias is so made the basic facts should almost always be uncontroversial in the sense that, between them, the parties and the judge under challenge, should have laid out all of the relevant matters and facts that he or she can recall, for the decision whether they establish the relevant apprehension[307]. That decision has conventionally been made by the judge in respect of whom the

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303 See *Vakauta v Kelly* (1989) 167 CLR 568 at 587 per Toohey J.

304 See, for example, *Gould v Brown* (1998) 193 CLR 346.

305 (1989) 167 CLR 568.

306 (2000) 74 ALJR 1380 at 1395-1397 [77]-[80]; 174 ALR 655 at 677-679.

307 See for a discussion of a related matter, Mason, "Judicial disqualification for bias or apprehended bias and the problem of appellate review", (1998) 1 *Constitutional Law and Policy Review* 21-27 and see *RPS v The Queen* (2000) 74 ALJR 449 at 467 [95]; 168 ALR 729 at 752-753.

claim is advanced. The decision of the primary judge here was made in accordance with that established practice. Neither party, either in the courts below or here suggested a departure from it. The practice may however place a judge in what Mandie J in the second matter described as an invidious position. I doubt whether the Federal Court Act 1946 (Cth) or any State acts dealing with, or affecting the jurisdictions of the respective courts, or any rule of common law which may apply to them, require that a decision whether in the circumstances a reasonable apprehension of bias arises, necessarily be the decision of the judge under challenge. If there is no legal inhibition upon it, and if it is convenient for it to be so made, I think it preferable that such a decision be made by another judge. That procedure would better serve the general public interest and the litigants in both the appearance and actuality of impartial justice. Although the judge in a particular jurisdiction could hardly order that another judge of it not sit on, or decide a matter, it may well be possible for the former to decide a question whether the relevant facts are capable of giving rise to an apprehension of bias on the part of the latter if that judge were to sit on the case. No matter what the status of the rejection or upholding of such an application may be, and regardless that it is not an issue between the parties, it is still a matter that has to be decided by the Court. The ambit for example, of O 10(1A)[308] and O 29(1)[309] of the Federal Court Rules (Cth) is a very broad one and certainly would appear to permit such a course. In saying what I have, I do not mean to cast any doubt on what was said by the Court of Criminal Appeal of New South Wales (Gleeson CJ, Wood and Brownie JJ) in Roger Caleb Rogerson[310] that the refusal of a judge to disqualify himself after an application did not constitute a judgment or order within the statutory meaning of those terms against which it was possible to appeal to the Court of Appeal there although such a refusal might constitute a ground of appeal against the ultimate decision in the case in the course of which the application was made[311].

186 I would dismiss the appeals with costs.

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308 "In any proceeding which is to be heard by a Full Court, whether in the original or appellate jurisdiction, such directions as is thought proper with respect to the conduct of the proceeding may be given by the Court constituted by a single Judge."

309 "In this Order, 'question' includes any question or issue in any proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings, agreement of parties or otherwise."

310 (1990) 45 A Crim R 253 at 255.

311 See *Barton v Walker* [1979] 2 NSWLR 740.