HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

LEONARDUS GERARDUS SMITS & ANOR APPELLANTS

AND

WALTER EDWARD ROACH & ORS RESPONDENTS

Smits v Roach
[2006] HCA 36
20 July 2006
S398/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J McC Ireland QC with H Altan for the appellants (instructed by Moloney Lawyers)

T G R Parker SC with N J Owens for the respondents (instructed by Henderson Taylor Workplace Lawyers)

CATCHWORDS

Smits v Roach

Courts and judges – Apprehended bias – Disqualification of judge – Right to trial by independent and impartial tribunal – Familial association – Brother of judge alleged to have an indirect pecuniary interest in outcome of proceedings – Associated party given access to judge's draft reasons in advance of delivery –Non-disclosure of association until conclusion of trial – Whether apprehension of bias reasonable – Whether connection between familial association and feared deviation from impartial decision articulated.

Courts and judges – Apprehended bias – Disqualification of judge – Familial association – Brother of judge alleged to have an indirect pecuniary interest in outcome of proceedings – Failure to object promptly to judge's participation in the trial – Waiver of right to object.

Legal practitioners – Barrister and client – Relationship of agency – Imputation to litigant of knowledge possessed by counsel.

Words and phrases – "apprehended bias".

1 GLEESON CJ, HEYDON AND CRENNAN JJ. The appellants, who are solicitors, were retained to act for the respondents in an action for damages for professional negligence against another firm of solicitors. The appellants and the respondents fell into dispute. The appellants ceased to act for the respondents, who were subsequently represented in the professional negligence proceedings by other solicitors. The appellants sued the respondents in the Supreme Court of New South Wales, seeking to recover professional costs to which they claimed to be entitled. They failed at first instance before McClellan J[1]. An appeal to the Court of Appeal of the Supreme Court of New South Wales (Sheller, Ipp and Bryson JJA) was partly successful[2]. The issue in the further appeal of the appellants to this Court is narrower than the issues considered by the Court of Appeal. It concerns only the ninth ground of appeal to the Court of Appeal, which was that McClellan J "erred in failing to disqualify himself on 26 June 2002 from determination of the proceedings". The Court of Appeal rejected that ground on the basis that the appellants "waived their right to seek to have the judge disqualify himself".

2 In order to explain how the questions of disqualification and waiver arose, it is necessary to describe, in broad outline, the professional negligence proceedings, and the disputes that arose between the appellants and the respondents in relation to the conduct of those proceedings.

The professional negligence proceedings

3 The first respondent, Mr Roach, is an engineer. The second and third respondents are companies formerly controlled by the first respondent. They are now in voluntary liquidation. In the late 1980s, the first respondent became interested in a peat deposit in Victoria. The respondents engaged Freehill Hollingdale & Page ("Freehills") to act on their behalf in the legal steps to be taken to permit the exploitation of the peat deposit. The second respondent took a lease of the land. The respondents allege that, as a result of negligent advice from Freehills, the Roach interests failed to apply for a mining licence and, in consequence, another person obtained the right to exploit the deposit.

4 For many years the first respondent had been a personal friend of the second appellant, Mr Leslie. The first respondent sought the professional assistance of Mr Leslie in connection with a claim for damages against Freehills.

---

1 *Smits v Roach* (2002) 55 NSWLR 166.

2 *Smits v Roach* (2004) 60 NSWLR 711.

The respondents were not in a financial position to meet the costs of the proposed litigation in the ordinary way. A special agreement about costs was made. On 1 July 1995, before any proceedings against Freehills were commenced, the second appellant went into partnership with the first appellant.

5 On 15 November 1995, the firm of Smits Leslie commenced proceedings on behalf of the respondents against Freehills. On 7 April 1999, the retainer of Smits Leslie was formally terminated. The circumstances in which the termination occurred are part of the subject matter of the litigation between the appellants and the respondents. The parties had been in dispute for several months before the termination.

6 The damages claimed by the respondents against Freehills were for the loss of the profits that would have been made from the exploitation of the peat deposit. They were claimed to be in the order of $1 billion. There is no material before this Court that permits any conclusion about the credibility of that assessment of loss. In the Supreme Court of New South Wales, there was in evidence a report that a "spokeswoman for Freehills ... said the peat farm central to the proceedings is quite small and its only use is for fertiliser for mushrooms". There was also evidence that, at one stage, Freehills offered to settle the claim for $57,600 plus costs, but the offer was rejected. The offer was later increased to $125,000 plus costs, but was again rejected. Those offers may reflect no more than an assessment of what it was worth to Freehills, in terms of their own costs and time, to resolve the litigation. However, on the evidence in the present proceedings it is not possible to form a view about the merits of the claim against Freehills, or about the amount of damages likely to be awarded if the action were ultimately to succeed. Neither McClellan J nor the Court of Appeal made findings about those matters.

7 Another topic about which the evidence is unclear, and about which there are no findings, is the state of preparation of the litigation between the respondents and Freehills when, in late 1998 and early 1999, the appellants effectively ceased to act for the respondents. The absence of the financial resources necessary for the preparation and prosecution of the case against Freehills was a principal cause of the breakdown in the personal and professional relations between the appellants and the first respondent. No findings have been made as to the extent to which the respondents have had benefit from the professional services of the appellants, or as to the value of that benefit assessed by reference to ordinary professional fees. To what extent it may have been necessary for the solicitors who took over the case from the appellants to duplicate work for which the appellants claim to be paid does not appear. On the approach taken by the Court of Appeal to the issues with which this Court is concerned, that was not material. It is clear, however, that the litigation was not in an advanced state of preparation at the time the appellants ceased to act.

The disputes between the appellants and the respondents

8 The disputes that were the subject of the litigation before McClellan J arose out of the problem of funding the action against Freehills. They culminated in mutual distrust, animosity and recriminations. There was conflicting evidence before McClellan J as to the events leading up to the termination of the appellants' retainer in April 1999. McClellan J preferred the evidence of the first respondent to that of the appellants.

9 When, in 1995, the first respondent asked the second appellant to act for him and his companies, he proposed that the basis of the retainer would be that the second appellant would be entitled to be paid costs only in the event of success in the litigation, and that, in such event, the second appellant would be entitled to receive, in addition to normal professional fees, 10 per cent of any damages recovered by way of court order or settlement. The magnitude of the proposed litigation, and of the potential commitments to third parties, such as barristers and expert witnesses, was of concern to the first appellant when, in mid-1995, he went into partnership with the second appellant. Two written retainer agreements were signed. It is a measure of the rate of progress of the litigation, and the problems of litigation funding, that, although the action against Freehills was commenced in November 1995, the first retainer agreement was signed in April 1997, and the second on 23 June 1998. The first retainer agreement is of historical significance only. The retainer agreement of 23 June 1998 became of central importance. It pre-dated by only a few months the complete breakdown of the solicitor-client relationship. What was happening to the Freehills litigation while all this was going on appears only by inference from findings about the disagreements and recriminations between the appellants and the first respondent.

10 McClellan J and the Court of Appeal found that both retainer agreements were champertous. The second retainer agreement, of 23 June 1998, was supplemented by a letter dated 24 June 1998. The agreement specified hourly rates for the legal work undertaken by the appellants. It provided that "[t]he Clients' obligation to pay all of the Solicitors' and the barrister's costs otherwise payable under this Agreement is contingent on the successful outcome of the matters in which the Solicitors and barrister provide the legal services to the Clients". The supplementary letter provided that, if the amount recovered in the action was less than $10 million, the appellants would be entitled to share in the proceeds to the extent of 10 per cent of the amount recovered, and for values over $10 million "an extra maximum of 5% recovered". The share in the proceeds was to be in addition to "any costs and disbursements which might be recoverable from the defendants".

11 In September 1998, when it had become apparent that the prospect of settling the Freehills proceedings was remote, and that the preparation of the case for trial would involve significant financial commitments and risk, the appellants approached a litigation funder. The first respondent became personally involved in the discussions with the litigation funder. The appellants proposed an arrangement which involved "an up-front fee of $500,000 [to] be paid to Smits Leslie on account of legal costs and disbursements [already] incurred". This represented a fundamental departure from the retainer agreements. The terms of the proposed litigation funding, and, in particular, the proposed up-front fee of $500,000, became a source of dispute. By mid-December 1998, the solicitor-client relationship was under threat. In March 1999, the appellants issued a notice of rescission of the second retainer agreement. This was served on 7 April 1999 and, on the same day, the appellants filed in court a notice of ceasing to act for the respondents. Another firm of solicitors took over the conduct of the action against Freehills. For several months thereafter there were disputes, and legal proceedings, relating to the handing over of documents and other matters. These are presently irrelevant.

12 Following the termination of the appellants' retainer, in May 1999 the second and third respondents were placed in voluntary liquidation. This was part of a scheme to facilitate litigation funding. There are no findings about the financial position of those two companies. In particular, there are no findings about the amount creditors are likely to receive.

13 The present proceedings were commenced in July 1999. In the course of efforts to effect a settlement of at least some of the disputes, in September 1999 a "Ten Point Plan" was entered into between the appellants and the liquidators of the second and third respondents. The first respondent was not a party to that agreement. Under the Plan the liquidators agreed to admit the appellants as ordinary unsecured creditors in the liquidations in respect of an amount of $500,000 for acting in the professional negligence proceedings up to December 1998. The value to the appellants of that agreement is unclear, for the reasons given in the preceding paragraph.

14 By an amended summons filed on 3 March 2000, it was claimed that the respondents had repudiated the second retainer agreement and that the appellants had a present entitlement to damages. In the alternative, the appellants sued on an alleged agreement of 11 December 1998 claiming $500,000 and 10 per cent of the proceeds of the Freehills litigation. Between March 2000 and February 2002 there were further amendments to the summons, cross-claims were made, the parties were amended, and some aspects of some of the disputes were settled. The details are not presently material.

The hearing before McClellan J

15 The proceedings were listed for hearing, on issues of liability only, before McClellan J on 11 March 2002. The appellants were represented by Mr Lindsay SC and Mr Haffenden of counsel.

16 On or about 7 March 2002, McClellan J, on learning that he had been assigned to hear the case, invited the parties, through their respective counsel, to indicate whether they objected to his sitting. The reason for this appears to have been that the second appellant and the judge had played golf together on a number of occasions. It should be added that the second appellant is a former Registrar of the Supreme Court and would have been known personally to many of the judges. Issues of credit were involved in the case, and presumably that is what prompted McClellan J's enquiry. No objection was made to his sitting.

17 The hearing took place on 11-14 March, 18 March, and 20-21 March 2002. McClellan J reserved his decision, and delivered judgment on 19 June 2002. A brief account of his formulation of the issues, and his reasons for judgment, will suffice for present purposes. It is unnecessary to repeat, or attempt to summarise, his lengthy recital of the evidence, and his detailed findings of fact.

18 The case for the appellants, as opened by Mr Lindsay, included a claim, based on the Ten Point Plan of September 1999, to be admitted as creditors in the windings-up of the second and third respondents in the sum of $500,000. It also included a claim for a payment of $500,000 pursuant to an alleged agreement of December 1998. There was also a claim expressed by McClellan J as follows:

> "[I]t is said that the retainer agreements were wrongfully repudiated by the Roach interests, which entitles Smits Leslie to damages, being professional costs pursuant to the agreement, and future profit costs lost by reason of the termination of the agreement. In the alternative, Smits Leslie claim that they were entitled to terminate the agreement pursuant to cl 14 and plead an implied term (it not being expressly provided) that in the event the retainer was terminated, the defendants would pay professional costs, counsel's fees and disbursements. If those claims fail, Smits Leslie say they are entitled to reasonable remuneration for the work which they undertook."

The respondents argued that the retainer agreements were champertous, illegal and unenforceable. They also argued that the appellants had repudiated the second retainer agreement and that the respondents had terminated the agreement. Further, it was said that any entitlement to fees was contingent on the successful outcome of the Freehills proceedings which had not occurred. The

respondents denied the alleged agreements of December 1998 and September 1999. There was a cross-claim for damages.

19 It is necessary to make brief reference to certain legislation bearing on the issues at trial. The *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW) ("the Abolition Act") abolished the offence of maintenance (including champerty). Section 6 of the Abolition Act provided that the Act did not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal. At the same time, the *Legal Profession Act* 1987 (NSW) ("the Legal Profession Act") was amended. By the amendments, new provisions about costs agreements were included. Those provisions enabled a solicitor to make a costs agreement under which payment was contingent on a successful outcome. It also enabled such an agreement to provide for a premium (sometimes called an uplift) not exceeding 25 per cent of the costs payable.

20 McClellan J recorded that, in final argument, the appellants accepted that they could not sustain all the terms of the second retainer agreement. He went on:

> "However, they seek to sustain a claim for the following payments:
>
> (a) Smits Leslie's professional costs and counsel's fees contingent on a successful outcome in the Freehills proceedings;
>
> (b) payment of other disbursements incurred by Smits Leslie other than counsel's fees within thirty days of the issue of any account, and
>
> (c) a premium of 25 per cent on costs and disbursements contingent on a successful outcome."

21 McClellan J decided that the second retainer agreement (like the first retainer agreement) was champertous and that the appellants were "not entitled to recover any monies". He found that "the cause of many of the problems [between the parties] was the fact that Smits Leslie had failed to discharge their obligation to devise an effective litigation strategy and prepare [the case against Freehills] in a timely fashion". The Freehills litigation, he held, was beyond the skill and capacity of the appellants' firm, as well as their financial resources. By April 1999, the relationship between the appellants and their clients had deteriorated to the point where it was impossible for it effectively to continue. The appellants had no right to be paid for their work up until April 1999. The retainer agreement contained no such right, and in any event, even if enforceable, the agreement was conditional on a successful outcome in the Freehills litigation. As to the alleged agreement of December 1998, concerning a payment of

$500,000 on account of costs, McClellan J found that there was no such agreement. As to the September 1999 agreement, McClellan J accepted that the Ten Point Plan was reflected in a concluded agreement between the appellants and the second and third respondents under which the appellants could lodge proofs of debt in the liquidation of those respondents. However, he held that the commencement of the proceedings was a repudiation of that agreement, which the respondents had accepted. The appellants' claims failed. He also dismissed the respondents' cross-claims.

The disqualification issue

22 This issue arose, at the end of the proceedings before McClellan J, in unusual circumstances.

23 In the course of the hearing, evidence that might have been the subject of legal professional privilege, or that might otherwise have been the subject of a claim for confidentiality, was tendered. McClellan J was concerned that the form in which he published his reasons for judgment might inadvertently and unnecessarily disclose information the subject of such a claim. Accordingly, he handed a draft of his reasons to the parties and invited them, and Freehills, to make comments on the form of the reasons to be published. On 17 June 2002, at a hearing attended by junior counsel for the respective parties, and a representative of Freehills, McClellan J said that the matter he was raising (the form of his reasons for judgment and issues of confidentiality) affected the interests of Freehills as well as the interests of the parties. He said that his brother, Mr Geoff McClellan, was the Chairman of Partners of Freehills, that normally he would not sit on a matter which involved Freehills' interests, but that he did not appear to have any choice. He invited suggestions as to possible alternative courses, but none were made. Over the succeeding days, a number of issues of confidentiality were resolved by agreement between the parties and Freehills.

24 On 26 June 2002, the matter was again listed before McClellan J for the purpose of finalising issues as to confidentiality. On that occasion, again, the parties were represented by junior counsel. Counsel for the appellants, with the leave of McClellan J, filed a notice of motion for McClellan J to disqualify himself and to refrain from making orders in the matter. The motion was supported by an affidavit of the second appellant, who said that he had not been aware, before June 2002, that the judge's brother was the Chairman of Freehills. The affidavit said that Mr Geoff McClellan was the seventy-second defendant in the Freehills action (other evidence indicated that there were at least 80 partners in the Sydney firm of Freehills), and that the deponent would have requested the judge to disqualify himself "if his relationship with a defendant in the Freehills Proceedings had been disclosed to us or our Counsel". The affidavit also

asserted that the deponent had been told by both his counsel that they had not known that Mr Geoff McClellan, the judge's brother, was the Chairman of Freehills. The affidavit said, without elaboration:

> "The net commercial impact of the Judgment handed down in these proceedings on 19 June 2002 will be that Freehills will be relieved of a claim from the Defendants herein of not less than $675,000 on account of costs claimed by us as the Plaintiffs in these proceedings."

25 When the affidavit was read, the judge's immediate response was to ask whether Mr Lindsay was aware of the application, and of the contents of the affidavit. There was the following exchange with junior counsel for the appellants:

> "HIS HONOUR: Mr Lindsay would have known that my brother was at Freehills without the slightest question. I find this an extraordinary proposition. Are you telling me that Mr Lindsay did not know that my brother was a partner at Freehills?
>
> HAFFENDEN: No, I'm not saying that. I can't speak for Mr Lindsay.
>
> HIS HONOUR: I don't know about [Mr Leslie], but I would imagine that probably counsel on both sides knew that my brother was at Freehills.
>
> HAFFENDEN: I didn't know, your Honour.
>
> HIS HONOUR: I would be certain Mr Lindsay knew."

26 In his reasons for refusing to disqualify himself, McClellan J referred to the relevant part of the affidavit of the second appellant asserting lack of knowledge of the relationship and said:

> "Although I accept that this may be the case in relation to Messrs Leslie, Smits and Haffenden, I thought it unlikely to be the case in relation to Mr Lindsay. I asked Mr Leslie to tell me from the bar table whether he sought to sustain the allegation that Mr Lindsay was not aware that my brother was a partner of Freehills. He indicated that he did not and that that part of his affidavit was wrong."

27 What would have happened if the judge had not questioned the assertion about what Mr Lindsay had told Mr Leslie is not clear. It appears that, when the affidavit was handed up in court, Mr Leslie knew it contained an error. The judge noticed the error, not because it was drawn to his attention, but because of his knowledge of Mr Lindsay's professional background. When the judge asked Mr Leslie to come forward, and questioned him about what was said in the

affidavit, Mr Leslie responded that, after he had sworn the affidavit, Mr Lindsay had told him that "that is incorrect, as far as Mr Lindsay is concerned". When the matter later came before the Court of Appeal, an affidavit of Mr Lindsay was read. He said that, at the time of the commencement of the hearing before McClellan J, and at the time of discussion about whether to object to McClellan J sitting (for other reasons), he knew that Mr Geoff McClellan of Freehills was a brother of the judge (although he did not know that Freehills had a "Chairman of Partners"). He also testified that he believed, although he may have been mistaken, that he had referred to that fact in discussions with Mr Leslie.

28 It should be added that there was no suggestion that Mr Geoff McClellan had taken any personal role in the advice given to the Roach interests about the peat deposit, or the conduct of the professional negligence proceedings. There is no evidence as to the role in Freehills of a Chairman of Partners, but presumably it involves some administrative responsibilities.

29 On the motion for disqualification, junior counsel for the appellants said that the argument was that the judge was in "a position of potential conflict". The judge asked what was the conflict. Counsel said:

> "Now the issue of what costs there may have been [owing by Mr Roach and his companies] may very well impact upon those Freehills proceedings or any claim against Freehills or any settlement with Freehills. That is the argument."

30 McClellan J dismissed the motion. He said:

> "The questions involved in the present dispute did not require the resolution of any issue relating to Freehills or any of its partners. Although the fact that Freehills have been sued has given rise to the current proceedings, the proceedings are otherwise so remote, that I am satisfied, having regard to the appropriate test, I should not disqualify myself.
>
> In any event as the plaintiff's senior counsel was apparently aware that my brother was a partner at Freehills but the matter was never raised, any right to object has been waived."

The Court of Appeal's disposition of the issues other than disqualification

31 The Court of Appeal allowed the appellants' appeal against the second and third respondents to the extent to which it was based on the Ten Point Plan contained in the agreement of 16 September 1999. The Court of Appeal agreed that the attempt by the appellants to base a claim on the second retainer

agreement could have amounted to a repudiation of the Ten Point Plan agreement, but found that this had not been accepted. On the contrary, the second and third respondents had based a defence on the Ten Point Plan. The Court of Appeal made the following declaration to give effect to this part of its judgment. The terms of the declaration explain, sufficiently for present purposes, the relevant aspects of the Ten Point Plan:

> "4AA DECLARE that a valid and binding agreement was made on or about 16 September 1999 between the first and second appellants of the one part and [the second and third] respondents of the other part whereby:
>
> (a) the first and second appellants were to be admitted as ordinary unsecured creditors in the liquidations of each of the [second and third] respondents in a sum of $500,000 in respect of their time charges in acting as solicitors for those parties in the period up to 1 December 1998;
>
> (b) the first and second appellants were to be at liberty to submit proofs of debt to the liquidators of the [second and third] respondents respectively in respect of out of pocket expenses incurred by them in acting as solicitors for the [second and third] respondents in the period up to 19 April 1999 to a maximum of $75,000; and
>
> (c) that the first and second appellants were to be at liberty to submit proofs of debt to the liquidators of the [second and third] respondents in accordance with their retainer agreement up to a limit of $100,000."

32 The total of the three amounts referred to in those orders corresponds with the figure mentioned in the affidavit of Mr Leslie.

33 The claim based on the second retainer agreement failed. The Court of Appeal disagreed with McClellan J's view that, being champertous, it was wholly void. The effect of the amendments to the Legal Profession Act was held to be that the second retainer agreement was unenforceable only to the extent to which it went beyond the boundaries marked out by that Act. However, the agreement legitimately made recovery of costs contingent upon a successful outcome of the Freehills proceedings and the parties deliberately made no provision for the appellants to be paid anything if the solicitors decided to cease to act for their clients before that outcome was achieved. The terms of the agreement made it

plain that the appellants were not entitled to recover anything from their clients in contract or on a quantum meruit.

The appeal to this Court

34 The grounds of appeal to this Court relate solely to the Court of Appeal's decision on the issue of disqualification. If the appellants had succeeded on that issue, they would have been entitled to, and they would have sought, a new trial. This Court is asked to set aside the orders of the Court of Appeal (including those favourable to the second and third respondents) and order a new trial. It is not entirely clear what benefit would thus be gained by the appellants. The claim on the second retainer agreement failed in the Court of Appeal on legal grounds, and, at least as a practical matter, it seems very unlikely that a judge at a new trial would take a view different from that of the Court of Appeal. Nevertheless, the appellants argue that they have a right to a new trial. Presumably they see some possible advantage in persuading a trial judge to take a view of the primary facts different from that taken by McClellan J. They have already had an opportunity to pursue, in an appeal by way of rehearing, all the challenges they wished to make to the findings of McClellan J. If a view were taken that the grounds of appeal to this Court should be upheld, it might be necessary to give further consideration to the procedural position that thus would arise. In any event, the argument for the appellants serves to underscore the nature of the issue that arises in this appeal. If the appellants are right, and McClellan J should have disqualified himself in response to the motion of June 2002, then the consequences are visited upon the respondents. The motion for disqualification was brought after the appellants knew they were going to lose their case, in circumstances where at least their senior counsel had known from the outset the allegedly disqualifying fact. The appellants then pursued an appeal by way of re-hearing to the Court of Appeal, in which they argued all issues of fact or law that they wished to agitate. They were partly successful, and partly unsuccessful. Now, they contend, the entire case should be re-heard by another primary judge.

The Court of Appeal's disposition of the disqualification issue

35 McClellan J gave two reasons for rejecting the motion filed on 26 June 2002. The Court of Appeal rejected the ninth ground of appeal on the basis of the second of those reasons, that is to say, waiver.

36 Sheller JA, with whom Ipp and Bryson JJA agreed, said:

> "The following matters are established and not in dispute. His Honour's brother was on the date of judgment a partner and the chairman of Freehills. It is assumed that he had been both from the time the proceedings began before McClellan J. Neither of the plaintiff solicitors

> nor junior counsel, Mr Haffenden, was aware of this before the trial judge's announcement on 17 June 2002. The application was made at the end of a trial which had occupied five hearing days and after the trial judge's judgment had been published. The judgment was apparently published on 19 June 2002, two days after the first disclosure on 17 June 2002, though it had been distributed in draft form to the parties before 17 June 2002. The degree to which the plaintiffs in the proceedings before McClellan J were entitled to recover their costs from the Roach interests would translate into an increase in the costs that the Roach interests could recover in the proceedings against Freehills, if they were successful. In that way, success by the plaintiffs in the proceedings before McClellan J could add to the amount for which Freehills would be liable to indemnify the Roach interests by an amount in the order of $500,000."

37 The statement that neither of the appellants nor junior counsel was aware before June 2002 of the relationship between the judge and Mr Geoff McClellan is inconsistent with something that was said later in his Honour's reasons. The statement that this matter was not in dispute is not accepted by the respondents.

38 It may be observed that, consistently with the argument that was put for the appellants before McClellan J, and in the Court of Appeal, and in this Court, Sheller JA approached the matter on the basis that it was the possible financial impact on Mr Geoff McClellan of success of the appellants that was the critical consideration. It was, of course, never suggested that McClellan J had any financial interest, direct or indirect, in the outcome of the proceedings. It was the suggested financial interest of his brother that was the problem. Yet the facts recorded by Sheller JA leave the nature and extent of that possible interest unclear and speculative. Freehills is one of Australia's largest law firms. The position of Mr Geoff McClellan as seventy-second defendant in the Freehills action reflects its size. It is reasonable to infer that it has professional indemnity insurance, although there is no information about the extent of such insurance. If there were judgment against Freehills in the professional negligence proceedings, then, in the ordinary course, Freehills would be liable to pay the reasonable legal costs and expenses incurred by the Roach interests in prosecuting their claim against Freehills. Whatever speculative or other special arrangements about litigation funding, or legal costs, were made between the Roach interests and their lawyers would ordinarily have no bearing on the extent of Freehills' liability. At first sight, a dispute as to fees between the Roach interests and their former lawyers would appear to be a matter of indifference to Freehills. This is a subject to which it will be necessary to return in dealing with the respondents' notice of contention. For the present, it suffices to say that the statement that success by the appellants in the proceedings before McClellan J could add to Freehills' liability by an amount in the order of $500,000 is disputed by the respondents, and the process of reasoning involved in that statement is not clear.

The respondents argue that it is at least consistent with the facts established in evidence that the financial impact on Mr Geoff McClellan of success or failure by the appellants in their action against the Roach interests would be negligible, or non-existent.

39 Sheller JA went on to say:

> "The Court referred to a statement made by Latham CJ in the course of argument in the *Bank Nationalisation* case ... It was pointed out, and must be remembered, when considering some of the older cases, that the applicable test is now accepted to be that stated in *Ebner* ... It is not whether there was a 'real likelihood of bias' but whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question in hand. Against that test has to be weighed the nature of the interest of the judge's brother in the outcome of the litigation and the relationship between the judge and his brother which, in the absence of any other information, might reasonably be regarded as close. If the trial judge had had a pecuniary interest such as shares in a private company which stood in the same litigation relationship to the respondents as Freehills did, even if automatic disqualification did not follow, the appellants could rightly have claimed that a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case. The question was whether the fact that the trial judge had no pecuniary interest whatever in Freehills but his brother did, might give rise to a reasonable apprehension of bias. In the circumstance that so far as was known the relationship was close, a fair minded lay observer might reasonably have apprehended that the judge might not bring an impartial mind to the resolution of the case.
>
> The trial judge should have disclosed to the parties that his brother was a partner or chairman of Freehills when the proceedings began. His failure to do so is explained by the fact that, when considering whether they might object to McClellan J sitting, the parties were directing their minds to social relationships apparently enjoyed by the plaintiffs with various judges. Those matters were canvassed and dealt with. Clearly, the judge gave no consideration to the position of his brother. Mr Lindsay did. In the course of conversations with his junior and with Mr Leslie in early March he mentioned to each of them separately that it would be necessary for the solicitors to make a decision about whether or not to object to McClellan J. Mr Lindsay believes, though he may have been mistaken, that in the course of those conversations he referred to the fact that the judge's brother was a partner in Freehills as a factor to be taken into account. However, he was unable to devote any substantial time to consideration of whether or not the plaintiffs should object to McClellan J.

> On 11 March 2002, Mr Lindsay was instructed by the plaintiffs that they took no objection to McClellan J presiding at the hearing. Paragraph 14 in Mr Lindsay's affidavit is important. Amongst other things, he says that given the range and frequency of contact between the plaintiffs and all of the judges of the Equity Division and the fact (as he believed) that Mr Geoff McClellan was only one of a very large number of members of Freehills, he did not consider a decision by the plaintiffs not to object to McClellan J as remarkable. In par 15 Mr Lindsay said he was unconcerned that the trial judge did not refer to the fact that his brother was a partner of Freehills 'because I believed that fact to have been known to all parties'."

40 In the first of the two paragraphs just quoted, Sheller JA referred to a "pecuniary interest ... in Freehills" and, earlier, to an "interest ... in the outcome of the litigation". For the reasons explained in *Ebner v Official Trustee in Bankruptcy*[3], when questions of pecuniary interest are considered in this context, there is a danger of confusing pecuniary interest in the outcome of litigation with pecuniary interest in a party to litigation. Without doubt, Mr Geoff McClellan had a pecuniary interest in Freehills. What is important, however, is whether he had a pecuniary interest in the outcome of the litigation between Smits Leslie and the Roach interests.

41 Noting that waiver was available as an answer to an appeal grounded on an allegation of apprehended bias, Sheller JA, after referring to authority on the point, concluded:

> "As counsel, Mr Lindsay was bound to disclose to his clients that McClellan J's brother was a partner at Freehills. Indeed, according to his evidence, Mr Lindsay may well have done so. If the appellants did not act on that information at that time, or if Mr Lindsay did not inform them, they waived their right to seek to have the judge disqualify himself on the ground of his relationship with a partner in Freehills who was also the chairman. Ground 9 of the appeal accordingly fails."

42 Sheller JA did not make a finding about whether Mr Lindsay had mentioned to the appellants, or at least the second appellant, at the outset, that the judge was Mr Geoff McClellan's brother. On the approach he took, he did not have to. He left the matter open. Senior counsel for the respondents in this Court pointed out that, if this Court were to hold that Mr Lindsay's knowledge was not of itself sufficient to bind the appellants, the matter would have to go

---

3 (2000) 205 CLR 337 at 349 [25], 357 [55].

back to the Court of Appeal for a finding as to whether the appellants themselves knew. That is correct. As was noted earlier, Sheller JA's statement that, according to Mr Lindsay's evidence, he may well have told his clients that the judge's brother was a partner at Freehills is inconsistent with an earlier statement that it was not disputed that his clients did not know of the relationship before June 2002. On the approach taken by Sheller JA, it did not matter whether Mr Lindsay had told the clients earlier. However, if the appellants' submission in this appeal were to succeed, it would be important. The question could not simply be left unresolved.

Waiver

43 It has been held in this Court, on a number of occasions, that an objection to the constitution of a court or tribunal on the ground of apprehended bias may be waived, and that, if a litigant who is aware of the circumstances constituting a ground for such objection fails to object, then waiver will result. The general principle is not in contest in this appeal. The authorities on the point were examined by Dawson J in *Vakauta v Kelly*[4]. It is unnecessary to repeat what was said by Dawson J. It is as well, however, to repeat what was said in the joint judgment of Brennan, Deane and Gaudron JJ in the same case concerning the justice of the matter, because it is directly in point. In *Vakauta v Kelly*, the ground of apprehended bias was related to certain comments made by a trial judge in the course of proceedings. Brennan, Deane and Gaudron JJ, in a passage quoted by Sheller JA in the present case, said[5]:

> "Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair

---

4 (1989) 167 CLR 568 at 577-579.

5 (1989) 167 CLR 568 at 572.

> and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her."

44 Let it be assumed, for the purpose of argument, that the trial judge's family relationship with a member of Freehills meant that an objection by either party to the judge sitting would have been well-founded on the basis of apprehended bias. If one party knew of the relationship and the other did not, in the absence of any principle of waiver the party who knew of the relationship could wait for the trial judge's decision, accept the decision if favourable, and have the decision set aside if unfavourable. In this case, the appellants first raised the question of disqualification after they knew what the decision of McClellan J was going to be.

45 Let it be assumed, putting aside the unresolved question of fact noted earlier, that it was only senior counsel for the appellants, and not the appellants personally, who knew of the disqualifying relationship. From the point of view of the respondents, that makes no difference. Indeed, in most cases litigants in the position of the respondents, or trial judges, or an appellate court, would have no reliable basis for discriminating between knowledge of counsel and knowledge of counsel's clients. They are not privy to communications between counsel and their clients. Ordinarily, those are confidential and privileged. When a litigant is legally represented, judges communicate with counsel, not with the litigant. When, as sometimes occurs, a judge makes a disclosure of some matter for the purpose of enquiring whether a party desires to make submissions about possible disqualification, the response will come from counsel, not from the party. The judge may have no way of knowing what, if any, communications have taken place between counsel and client. The appellants were represented at trial by Mr Lindsay. If they had objected to McClellan J sitting, it would have been Mr Lindsay who would have made the objection. If the judge had disclosed his relationship with Mr Geoff McClellan, it would have been to Mr Lindsay that the disclosure would have been made, and it would have been for Mr Lindsay to respond. What, if anything, he might say to, or hear from, his clients before making that response, in the ordinary case, would be something of which neither the judge nor the respondents would know. If Mr Lindsay said that there was no objection to McClellan J sitting then it would not be for McClellan J, or the respondents, to investigate whether this was done upon instructions from his clients. Bearing always in mind that the ultimate question concerns the legal consequences for the respondents, does it make a difference that, in the present case, legal professional privilege having been waived, it is now known that Mr Lindsay, aware of the judge's relationship with

Mr Geoff McClellan, raised no objection, but did so (let it be assumed) without having taken instructions from the clients? The answer to that question turns upon the principle according to which Mr Lindsay was representing his clients. It is a principle that involves, but is not limited to, general concepts of agency[6].

46 The adversarial system of litigation operates upon the basis that a party is generally bound by the conduct of counsel, and that counsel has a wide discretion as to the manner in which proceedings are conducted. The width of that discretion is reinforced by the role of the barrister as an officer of the court, by the barrister's paramount duty to the court, and by the public interest in the efficiency and finality of the judicial processes[7]. This was civil litigation. If Mr Lindsay had failed to object to inadmissible evidence in the course of the trial, the appellants would have been bound by the consequences, and there would have been no enquiry by an appellate court as to whether that had occurred for a good reason, or with the approval of the clients. Indeed, such an enquiry would normally be impossible. Similarly, if Mr Lindsay had decided not to pursue a certain line of argument, or press a possible point of law, the appellants could not have complained to an appellate court that he had failed to consult them about the matter. The respondents were not at risk of having a favourable decision set aside on the ground that, in some aspect (perhaps some very important aspect) of the conduct of the case, Mr Lindsay was acting without express instructions from his clients. That was because, in conducting the case on behalf of his clients, Mr Lindsay was exercising wide and independent discretion. If it were otherwise, any judgment in a civil case would be at risk of being set aside on the ground that counsel had acted in excess of authority, and the appellate process would be one of endless re-litigation of contested issues.

47 The considerations according to which a principal is affected by an agent's knowledge, and the relevance of the circumstances in which the agent acquired the knowledge, depend upon the context in which the problem arises[8]. Having regard to counsel's role in the conduct of litigation, when a characterisation of the legal nature and quality of counsel's acts and omissions depends upon knowledge

---

6 See *Matthews v Munster* (1887) 20 QBD 141 at 142, 144-145.

7 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 761-762 [34]-[36], 776 [111]-[113], 780 [139]-[140]; 214 ALR 92 at 100, 120-121, 126; *R v Birks* (1990) 19 NSWLR 677 at 683; *Halsbury's Laws of England*, 4th ed (2005 reissue), vol 3(1), par 664.

8 *Bowstead & Reynolds on Agency*, 17th ed, (2001), Art 97; *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 701-704 per Hoffmann LJ.

of some fact or circumstance, then counsel's clients are affected by that knowledge. In this context, there is no reason in principle to distinguish between the knowledge of Mr Lindsay and that of his clients, or between knowledge that Mr Lindsay acquired as counsel for the appellants and knowledge that he acquired in some other capacity. To adopt language used by Handley JA[9], and quoted with approval by Gummow and Hayne JJ[10], in a somewhat different context, there is no basis for ignoring any part of Mr Lindsay's knowledge, present to his mind, when conducting the litigation.

48 If McClellan J had raised the matter of his relationship with Mr Geoff McClellan in the course of the original discussion as to whether any party objected to his sitting, and Mr Lindsay had said there was no objection, neither the judge nor the respondents would have (or, for that matter, could have) investigated the question whether Mr Lindsay had instructions from his clients to say what he did. It cannot make a difference, as far as the legal consequences for the respondents are concerned, that the case is one of omission by Mr Lindsay. In the course of the litigation, Mr Lindsay's conduct included what he did not do as much as what he did. Failure to object to evidence or to pursue a particular line of argument, may, from one point of view, be an omission, but it is part of the conduct of the case. Nor is it possible to distinguish between the failure to object considered in *Vakauta v Kelly*, where the potentially disqualifying conduct occurred in court, and the failure to object in the present case, where there was a potentially disqualifying circumstance known to counsel. Indeed, the case illustrates the futility of endeavouring to assign an omission by counsel to either a particular time or a particular place[11].

49 The decision of the Court of Appeal on the issue of waiver was correct.

The notice of contention

50 Against the possibility that this Court might disagree with the Court of Appeal's conclusion on waiver, the respondents filed a notice of contention challenging the finding that a fair minded lay observer might reasonably have

---

9 *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 at 697 [87].

10 *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (in liq)* (2003) 214 CLR 514 at 548 [87].

11 cf *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 770 [89]; 214 ALR 92 at 113.

apprehended that McClellan J might not bring an impartial mind to the resolution of the case. While, strictly speaking, it is unnecessary to express a conclusion on the point, it should be observed that there are serious difficulties with the reasoning of the Court of Appeal.

51 There is no suggestion that McClellan J had any personal interest, direct or indirect, in the case which he decided, or that he was in the position of being, either personally or through an alter ego[12], a party to the cause. The argument is based on association: a close family relationship with a person who, as a partner in Freehills, is said to have had a financial interest in the outcome of the litigation between Smits Leslie and the Roach interests.

52 It was pointed out in *Ebner*[13] that the concept of interest (like the concept of association) is protean, and that one of the difficulties with the bright line of automatic disqualification drawn by *Dimes v Proprietors of the Grand Junction Canal*[14] is that, upon examination, it is not nearly as bright as is sometimes supposed. Many of the cases it covers would in any event obviously be covered by a more general principle. In many other cases, the certainty which is thought to be part of its attraction is illusory. The proposition that Freehills, as a firm, had a financial interest in the outcome of the dispute between the Roach interests and their former solicitors is at least doubtful. The proposition that Mr Geoff McClellan, as one of at least 80 partners, was in such a position that the outcome of the dispute could have more than a negligible effect on his personal finances is even more doubtful[15]. If Freehills are ultimately successful in the Roach proceedings, then there is no reason to believe they will be affected in any way by the dispute with which McClellan J was concerned. If Freehills are ultimately unsuccessful, then they will almost certainly be ordered to pay the reasonable legal costs of the Roach interests. If the case is settled, the parties presumably will have negotiated on the basis of the assumptions just mentioned, so consideration of that possibility does not advance the argument. The Roach interests and Smits Leslie parted company at a time when, so far as appears from the evidence, the case against Freehills was still substantially unprepared. The disputes between Smits Leslie and the Roach interests were related to a special arrangement about fees, which would not concern Freehills. There was not

---

12 cf *R v Bow Street Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119 at 134.

13 (2000) 205 CLR 337 at 349 [25], 356-358 [54]-[56].

14 (1852) 3 HLC 759 [10 ER 301].

15 Compare the extra-judicial remarks of Lord Bingham of Cornhill MR quoted in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 358 [56].

shown, or found, to be any demonstrable relationship between the amounts of $500,000 or $675,000 and any amount that Freehills ultimately might be called upon to bear in respect of the legal costs attributable to the preparation of the Freehills litigation up until the time the Roach interests retained new solicitors. Furthermore, whatever that amount might be, (and nothing in the reasons of the Court of Appeal reflects any attempt to assess it), it would probably need to be divided by at least 80 to gauge its impact on Mr Geoff McClellan, leaving aside altogether considerations of insurance.

53 In *Ebner*, the joint reasons of four members of the Court stated[16]:

> "The apprehension of bias principle ... [in 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."

54 The same observations apply where the basis of the assertion is association with somebody who is said to have an interest in the litigation. The reasons of the Court of Appeal do not articulate a logical connection between the matter complained of and the feared deviation from impartial decision making, or explain why it would have been reasonable to apprehend that McClellan J might decide the case other than on its legal and factual merits. The general principle to be applied is not in contest. In its application of the principle to the particular, and unusual, facts of the present case, the reasoning of the Court of Appeal is not compelling. If it were necessary to decide the notice of contention the argument for the respondents should succeed.

---

16 (2000) 205 CLR 337 at 345 [8].

Conclusion

55 The appeal should be dismissed with costs.

56 GUMMOW AND HAYNE JJ. The first matter which calls for attention is the treatment by the New South Wales Court of Appeal of the issue of apprehended bias. That required attention to and application of what was decided by this Court in *Ebner v Official Trustee in Bankruptcy*[17]. In their joint judgment, Gleeson CJ, McHugh, Gummow and Hayne JJ said that the applicable principle requires two steps and continued[18]:

> "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."

57 Sheller JA, with whom Ipp JA and Bryson JA agreed set out that passage. However, after referring to authorities pre-dating *Ebner*, his Honour then concluded[19]:

> "The question was whether the fact that the trial judge had no pecuniary interest whatever in Freehills but his brother did, might give rise to a reasonable apprehension of bias. In the circumstance that so far as was known the relationship was close, a fair minded lay observer might reasonably have apprehended that the judge might not bring an impartial mind to the resolution of the case."

58 That treatment of the issue failed to articulate a logical connection between the matter complained of and the feared deviation by McClellan J from the course of deciding on its merits the proceeding before him. That is to say, the Court of Appeal fixed its attention upon the first of the two necessary steps required by *Ebner* at the expense of the second.

59 Given the abbreviated evidence on the disqualification application made to McClellan J, the Court of Appeal was required to approach with particular caution any attempt to circumvent the cumulative requirements of *Ebner*, lest the

---

17 (2000) 205 CLR 337.

18 (2000) 205 CLR 337 at 345 [8].

19 *Smits v Roach* (2004) 60 NSWLR 711 at 736.

shortcomings in the case presented on that application be visited upon other parties to the litigation.

60 It is on that ground, advanced by the respondents' notice of contention, that the actual outcome in the Court of Appeal is to be supported and the appeal to this Court consequently dismissed with costs.

61 We should add that, had it been necessary to do so, we also would dismiss the appeal for the reasons given by Gleeson CJ, Heydon and Crennan JJ on the issue of waiver.

62 KIRBY J. This appeal comes by special leave from a judgment of the New South Wales Court of Appeal[20].

63 Logically, the first issue in the appeal concerns the lawfulness of the orders made in a proceeding where the judge of trial is alleged to have been disqualified for apprehended bias[21]. The disqualification is said to have arisen in this case by reason of an undisclosed association of the judge with a party to interconnected proceedings or because of an impermissible, although indirect, interest which the judge is said to have had in its outcome.

64 If such a disqualification is established, the second issue concerns the law of waiver and whether, in the circumstances of this case, the parties complaining about the disqualification effectively waived that complaint. That depends, in turn, on the resolution of contested questions of law and fact. The relevant question of *law* is whether the complaining parties are to be taken, as a matter of law, to be constructively aware of the suggested ground of disqualification because that ground was at all times known to senior counsel retained for those parties in the trial. The relevant question of *fact* arises if such constructive knowledge cannot be attributed to the complaining parties as a matter of *law*. It is whether, as a matter of *fact*, the ground of disqualification was communicated to those parties by their senior counsel (as he thought he had done) or was not communicated or known to them (as junior counsel and the complaining parties assert).

65 In my opinion, given the present state of the law of disqualification and waiver, the general approach of the Court of Appeal on both of the foregoing issues was correct. The appeal should be dismissed.

The facts

66 *Complex interrelated litigation*: The issues in this appeal arise out of complex circumstances. The general background is described in the reasons of Gleeson CJ, Heydon and Crennan JJ[22]. From that description it is clear that the historical starting point of the dispute that occasions the proceedings, was the retainer of the legal firm Freehill Hollingdale and Page ("Freehills") by Mr Walter Roach, his wife and the companies that they then controlled.

---

20 (2004) 60 NSWLR 711 (Sheller JA; Ipp and Bryson JJA concurring) ("*Smits*").

21 Sometimes called "suspected", "imputed" or "apprehended" bias: *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414.

22 Reasons of Gleeson CJ, Heydon and Crennan JJ at [1]-[30].

Freehills, one of the largest legal firms in Australia, was retained by Mr and Mrs Roach and their companies ("the respondents") to protect their interests in the commercial exploitation of peat. The respondents claimed that Freehills was negligent in failing to advise them that an application should be made for a mining licence. That failure was said to have permitted a competitor to pre-empt the respondents and thereby to secure the legal right to exploit the deposit. That failure and its consequences are alleged to sound in damages for loss of profits worth many millions of dollars which the respondents would otherwise allegedly have recovered.

67 Upon the discovery of the loss of their venture, the respondents terminated their retainer of Freehills. They retained Mr Leslie, a sole practitioner who later entered into partnership with Mr Smits to form Smits Leslie ("the appellants"). The appellants were instructed to bring proceedings on behalf of the respondents against Freehills, claiming damages for negligence and breach of the contract of retainer ("the Freehills litigation"). To mount such an action, potentially sounding in substantial damages, it was essential for the appellants to develop a sound strategy for the litigation. Such litigation would be expensive, involving the procurement of expert evidence, the retainer of barristers, the conduct of extensive discovery and the gathering of substantial witness testimonies.

68 The litigation between the parties and Freehills proceeded very slowly. Much time was consumed in negotiations between the respondents and their new lawyers about costs. The three stages through which that negotiation passed from two retainer agreements, through an arrangement with a litigation funder, to a so-called "ten point plan" with the respondent companies (by this stage in liquidation) are also described in the reasons of Gleeson CJ, Heydon and Crennan JJ[23]. Ultimately, the respondents terminated the appellants' retainer. This step gave rise, in turn, to proceedings which the appellants brought against the respondents for legal costs which they claimed as their due. It was those proceedings that were assigned in the Commercial List of the Equity Division of the Supreme Court of New South Wales, to the primary judge, McClellan J.

69 *Potential disqualification is raised*: The proceedings were returned for trial before the primary judge beginning on 11 March 2002. At the close of business in the preceding week, the primary judge had caused the parties to be asked if they had an objection to his hearing (and thus deciding) the case. Mr John Leslie (the second appellant) had earlier been Registrar of the Equity Division of the Supreme Court. He had played golf on a number of occasions with the primary judge and his father. In his then capacity as Registrar, he also had professional dealings with the judge.

---

23 Reasons of Gleeson CJ, Heydon and Crennan JJ at [8]-[14].

70 The nature of this pre-trial communication was disclosed in the announcement at the very beginning of the trial by Mr G Lindsay SC, senior counsel for the appellants. He said[24]:

> "A question having arisen as to whether or not an objection would be taken to your Honour dealing with the case because of past contact with one of the plaintiffs, I am instructed to inform the court that on our side of the record, and I understand on the defendants' side of the record as well, there is no objection to your Honour dealing with the matter."

71 This statement appears to confirm what the appellants asserted was the content of the communication from the primary judge's chambers, as disclosed to them. It was addressed to social and professional contact between the appellants and the primary judge. It was not understood, or expressed to be, addressed to any association between the primary judge and the judge's brother, who, during the trial before the primary judge, was a partner and chairman of the partners of Freehills. Nor did it concern any indirect interest, familial, emotional, empathetic or otherwise, of the primary judge in his brother's contingent financial stake in the outcome of the proceedings between the appellants and the respondents, as to costs as part of the damages that might be recovered by the respondents against Freehills, were the respondents to succeed in the Freehills litigation.

72 Evidence before the Court of Appeal, which was not tested by cross-examination or challenged, indicated that Mr Lindsay was busy preparing for the trial when the foregoing communication came from the primary judge's chambers. Mr Lindsay substantially left to the appellants' junior counsel, Mr W Haffenden, the issue of whether the appellants should raise any objection to the conduct of the trial before the primary judge. Therein lay the seeds of the present dispute.

73 At all material times, the primary judge's brother was a partner of Freehills. During the trial before the primary judge, he was also the chairman of the partners of that firm. In the proceedings between the respondents and Freehills, the brother was named as the seventy-second defendant. The fact that the judge's brother was a partner (although not that he was chairman of partners) was known to Mr Lindsay. Before he was admitted to the Bar, Mr Lindsay had served his articles of clerkship at Freehills with the brother. In the preparation of the case, Mr Lindsay did not give this relationship much attention. He was later to say that he thought that he had mentioned the judge's relationship with his brother to the appellants. However, he acknowledged that he *might not* have

---

24 Transcript of the trial in *Smits v Roach*, Supreme Court (NSW), McClellan J in Equity Division, No 50099/99, 11 March 2002 at 1.

done so. Neither in the communication from the primary judge's chambers nor at the time the trial began and the nominated issues of disqualification were addressed in open court, did the primary judge disclose, or otherwise place on the record of the trial, his association, as a brother, with one of the defendants in the Freehills litigation, or any indirect interest in, or association he might have with, those proceedings because of the familial connection.

74 The trial proceeded. Important issues arose as to the credit of the appellants on the one hand and Mr and Mrs Roach (the first and second respondents) on the other. That dispute concerned the terms of the successive dealings between the appellants and the respondents. To resolve the contest about such dealings, it was necessary for the primary judge to resolve disputes that arose concerning the credit respectively of the appellants (particularly Mr Leslie) and of Mr and Mrs Roach. The primary judge preferred the testimony of the Roaches. In his reasons he said[25]:

> "There are many instances where the evidence of the Roaches is in conflict with that of Leslie or Smits …
>
> However, I have carefully observed the parties giving their evidence and for the reasons I have related, I have little difficulty in accepting Roach as against Leslie or Smits on any critical issue. Leslie admitted, and it was plain from his demeanour, that he hated Roach. He had come to believe, in my view entirely without justification, that Roach conspired with Justice Corporation to defraud him and Smits …
>
> The intensity of these feelings [on Mr Leslie's part] was manifest when he gave his evidence and I have formed the view that these feelings have influenced the account he gave.
>
> Smits evidence was equally unsatisfactory. When questioned, he failed to make concessions which should plainly have been made. He suggested that there was no conflict between the interests of Smits Leslie and Roach when dealing with Justice Corporation. This is hardly credible. In my judgment, the evidence which he gave was carefully crafted to suit the version of the events which he wished the court to accept and did not always accord with the true position.
>
> On the other hand, both Mr and Mrs Roach were impressive witnesses. Their evidence was clear, although their concern at the betrayal of their interests by Smits and Leslie was apparent.

---

25 *Smits v Roach* [2002] NSWSC 241 at [147]-[153].

I accept the evidence of the Roaches where it conflicts with either Smits or Leslie."

75 *Belated disclosure of the association*: After the hearing was complete and the submissions concluded, the primary judge disclosed on the record his association with his brother and that the brother was the chairman of partners of Freehills. Such disclosure came about in an unusual way. In advance of the formal delivery and publication of his reasons for judgment, the primary judge arranged for the case to be listed for directions. His purpose was to provide the appellants and the respondents with a confidential pre-publication draft of his reasons. But it was also to provide those reasons to Freehills. The object of this exceptional course was to allow the appellants, the respondents, and Freehills to consider, and make submissions on, the form of the reasons having regard to the possible relevance of their contents for the pending, but separate, Freehills litigation. On 17 June 2002 the proceedings were returned before the primary judge. Mr Haffenden, Mr Finnane, junior counsel for the respondents and Mr Drinnan, for Freehills, appeared[26].

76 The specific concern, explained by the primary judge, was that his reasons in the dispute between the appellants and the respondents might needlessly disclose confidential matters potentially detrimental to Freehills in its litigation. That litigation with the respondents lay in the future. The primary judge sought submissions in order to protect against unnecessary disclosure of confidential dealings between those parties or any of them. His Honour stated that "a judgment would be prepared in which two pages were replaced with other pages and that the matter would be listed at 9.30 the following morning". His Honour then said[27]:

> "I said this on Friday to the parties who were here then. My brother is the chairman of Freehills. I would normally not sit in relation to a matter which would involve Freehills' interests but I do not think I have any choice in this case. If anyone has any problem and can see a way in which another judge could deal with the matter, I would gladly do so. I do not think there is a way."

77 On 26 June 2002 the present proceedings were again listed for directions before the primary judge. Mr Haffenden asked the primary judge to receive a notice of motion, returned on a later date, in which the appellants asked him to disqualify himself from further participation in the hearing "by reason of the announcement in the court about your Honour being related to the chairman of

---

26 (2004) 60 NSWLR 711 at 725 [19].

27 (2004) 60 NSWLR 711 at 725 [19].

Freehills". "That was something", declared Mr Haffenden, "that we weren't aware of. It was not appropriate."[28]

78 There followed a lengthy exchange between the primary judge and Mr Haffenden concerning the basis of a proposed notice of motion. The exchange is set out in full in the reasons of Sheller JA in the Court of Appeal[29]. In the course of the exchange with Mr Haffenden the following appears[30]:

> "HIS HONOUR: Mr Lindsay would have known that my brother was at Freehills without the slightest question. I find this an extraordinary proposition. Are you telling me that Mr Lindsay did not know that my brother was a partner at Freehills?
>
> MR HAFFENDEN: No, I'm not saying that. I can't speak for Mr Lindsay.
>
> HIS HONOUR: I don't know about Mr Leslie, but I would imagine that probably counsel on both sides knew that my brother was at Freehills.
>
> MR HAFFENDEN: I didn't know, your Honour.
>
> HIS HONOUR: I would be certain Mr Lindsay knew."

79 *Rejection of disqualification*: The primary judge proceeded to dismiss the motion instanter. Amongst other things, he said[31]:

> "The motion is brought in the following circumstances. During the course of the making of submissions in relation to the publication of my reasons and the maintenance of the confidentiality of some of the material tendered in these proceedings, it was appropriate that [Freehills] have the opportunity of addressing me in relation to aspects of that matter which directly affected that firm's interests.
>
> To that end I asked that a representative of Freehills be present in court before I published my reasons for judgment in the matter in the event that there may be material in that judgment which Freehills sought to keep confidential.

---

28 (2004) 60 NSWLR 711 at 725-728 [21].

29 (2004) 60 NSWLR 711 at 725-728 [21].

30 (2004) 60 NSWLR 711 at 726 [21].

31 Reasons of the primary judge set out in (2004) 60 NSWLR 711 at 728-729 [22].

> On Monday, 17 June 2002, and later occasions, Freehills appeared before me and at that time, I disclosed to the parties the fact that my brother … is a partner and presently the chairman of Freehills. I did this because at that point of the proceedings it was obviously necessary for me to have regard to the interests of Freehills as well as the interests of the [respondents] in relation to any claim that evidence remain confidential, the privilege being that of either the [respondents] or Freehills. Smits Leslie were not affected by these matters.
>
> At that point no party suggested that I should disqualify myself from dealing with the issue of confidentiality and, as it happened, the issues relating to Freehills were resolved by consent.
>
> Since that occasion, the matter has been before me on further occasions when progress has been made towards identifying the documents in respect of which an order for confidentiality is to be made.
>
> …
>
> In his affidavit, Mr Leslie deposes to the fact, which is true, that before the proceedings commenced I did not disclose that my brother is the chairman of Freehills. He says this fact was not known to him and swears that he was informed by his partner, Mr Smits, Mr Geoffrey Lindsay of senior Counsel, and Mr William Haffenden of junior Counsel, that none of those persons were aware of that fact.
>
> Although I accept that this may be the case in relation to Messrs Leslie, Smits and Haffenden, I thought it unlikely to be the case in relation to Mr Lindsay …
>
> The proceedings which I have determined relate to a dispute between the solicitors, Smits & Leslie, and the [respondents], Mr and Mrs Roach, and relevant companies. Although those proceedings involve a claim for professional fees in relation to proceedings brought by the Roaches against [Freehills], I did not believe that fact caused me any embarrassment in determining the dispute between the present parties. For that reason, I did not believe it necessary for me to disclose that my brother is the chairman of Freehills, although I always believed, as it happens correctly, that at least Mr Lindsay would have been aware of that fact."

80 After recounting the appellants' submission that the primary judge's decision in these proceedings might impact "upon the costs which Freehills may have to pay in the, as yet undetermined, proceedings between the [respondents]

and Freehills", and after referring to authority of this Court[32], the primary judge refused to disqualify himself. He stated that he felt "no difficulty in determining the proceedings before me"[33]. He therefore dismissed the motion.

81 In the appeal to the Court of Appeal numerous challenges were made concerning issues that were resolved at trial in the proceedings between the appellants and respondents. However, the only ground of appeal continued in this Court is that by which the appellants complained that the primary judge had erred in failing to disqualify himself on 26 June 2002, or earlier, from determination of the proceedings[34].

The decision of the Court of Appeal

82 The outcome of the appeal to the Court of Appeal is described in the reasons of Gleeson CJ, Heydon and Crennan JJ[35]. As there explained, the appellants enjoyed a partial success. In place of the primary judge's conclusion that their claim for costs wholly failed[36], on all of the grounds propounded, the Court of Appeal allowed the appellants' appeal against the primary judge's orders in favour of Mr and Mrs Roach and their companies. Whilst dismissing Mr and Mrs Roach from the proceedings and ordering the appellants to pay their costs, the Court of Appeal made the declaration of the liability of the Roach companies set out in the reasons of Gleeson CJ, Heydon and Crennan JJ[37].

83 This outcome meant that the appellants were admitted as ordinary unsecured creditors of the Roach companies in a sum of $500,000 in respect of their time charges in acting as solicitors for the Roach companies in the period up to 1 December 1998. They were permitted to submit a proof of debt to the liquidators of those companies in the sums, and on the contingency, specified. The orders for the costs of the proceedings in the Supreme Court were adjusted accordingly.

---

32 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 294.

33 Reasons of the primary judge on the motion at [16], set out in (2004) 60 NSWLR 711 at 730 [22].

34 Notice of Appeal, Ground 9.

35 Reasons of Gleeson CJ, Heydon and Crennan JJ at [31]-[33]; cf reasons of Gummow and Hayne JJ at [56]-[57].

36 (2002) 55 NSWLR 166 at 198 [328].

37 Reasons of Gleeson CJ, Heydon and Crennan JJ at [35]-[36].

84 The decision of the Court of Appeal therefore constituted a significant victory for the appellants. However, the orders and declaration finally entered fell far short of what the appellants had hoped they would secure if they could obtain a rehearing of their claim by a judge who might be persuaded to reach conclusions that were not so clearly unfavourable to the appellants as those expressed in his reasons by the primary judge.

85 On the critical question that is still alive in this Court, the Court of Appeal accepted the appellants' claim of apprehended bias on the part of the primary judge. That apprehended bias was held to have arisen because the primary judge had failed to reveal, earlier than he did, his familial association with his brother, the senior partner of Freehills and a defendant in the Freehills litigation. The Court of Appeal found that the claim of disqualification on that ground was "not a claim without substance"[38]. Sheller JA (for the Court of Appeal) concluded[39]:

> "… The question was whether the fact that the trial judge had no pecuniary interest whatever in Freehills but his brother did, might give rise to a reasonable apprehension of bias. In the circumstances that so far as was known the relationship [with the brother] was close, a fair minded lay observer might reasonably have apprehended that the judge might not bring an impartial mind to the resolution of the case.
>
> The trial judge should have disclosed to the parties that his brother was a partner or chairman of Freehills when the proceedings began."

86 The Court of Appeal acknowledged that there were explanations why the primary judge had failed to make such disclosure, on his own initiative and in open court. Their Honours took into account Mr Lindsay's distraction and the matters disclosed by him in his affidavit to the Court of Appeal[40]. In particular the Court of Appeal noted Mr Lindsay's expressed belief that the primary judge did not refer to the fact that his brother was a partner of Freehills "because I believed that fact to have been known to all parties"[41]. However, after reference to authority in this Court, including *Webb v The Queen*[42] and *Ebner v Official*

---

38 (2004) 60 NSWLR 711 at 734 [29].

39 (2004) 60 NSWLR 711 at 736 [35]-[36].

40 The substance of this affidavit is set out at (2004) 60 NSWLR 711 at 730-733 [25].

41 (2004) 60 NSWLR 711 at 737 [36].

42 (2004) 60 NSWLR 711 at 735 [30], citing *Webb* (1994) 181 CLR 41 at 74 per Deane J.

Trustee in Bankruptcy[43], the Court of Appeal upheld the appellants' contention that the claim of apprehended bias had been made out. Without more, that conclusion, if sustained, would ordinarily have entitled the appellants to have the orders of the primary judge set aside and a retrial ordered.

87 Ultimately, the Court of Appeal concluded against that course on the ground that the appellants had waived their objection to the participation of the primary judge in the proceedings at first instance[44]. In this Court, naturally enough, the appellants accepted the Court of Appeal's finding of disqualification of the primary judge for apprehended bias. But they appealed against the finding of waiver. The respondents upheld the conclusion of waiver and added further reasons to support that conclusion. However, by notice of contention, they submitted that the Court of Appeal had erred in concluding that the primary judge was disqualified because of apprehended bias arising from his failure to disclose, at the outset of the proceedings, the familial relationship with his brother, a party to the connected Freehills litigation with a contingent interest in the outcome of that litigation, in turn potentially affected by any conclusion which the primary judge reached as to the appellants' entitlement to recover costs for their part in the early phase of the Freehills litigation.

The issues

88 *The issues arising*: Three principal issues arise in this appeal:

(1) *The disqualification issue*: Was the Court of Appeal in error in concluding that the primary judge was disqualified for apprehended bias by reason of his failure to disclose, at the commencement of the trial, his relationship with his brother and the brother's status as a partner of Freehills and a defendant in the Freehills litigation? Although arising on the notice of contention, logically this issue comes first. This is so because, if it is decided that error has occurred in the Court of Appeal's conclusion in this regard, the orders of the primary judge would ordinarily be restored. No issue of waiver would then arise. In concluding as it did on the disqualification issue, did the Court of Appeal, whilst correctly referring to the case, fail accurately to apply the principles expressed by four judges of this Court in *Ebner*? Were the circumstances of *Ebner*, in this respect, analogous to those of the present case, thereby rendering the *ratio decidendi* of *Ebner* binding in these proceedings? Was it open to the Court of Appeal, in the light of factual differences between *Ebner* and the

---

43 (2004) 60 NSWLR 711 at 733 [28], 736 [34], citing *Ebner* (2000) 205 CLR 337 at 344-345 [6]-[8] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

44 (2004) 60 NSWLR 711 at 739 [43].

present proceedings, to approach the issue of disqualification in the way that it did? If the approach expressed in *Ebner* is correctly applied, are the conclusions reached by the Court of Appeal confirmed, so that the conclusion of disqualification is upheld?

(2) *The waiver issue*: Did the Court of Appeal err in concluding that the appellants had waived their right to object to the participation of the primary judge in the orders disposing of the proceedings before him? In particular, was the very late motion for the primary judge's disqualification, after the appellants had exceptionally been given access to the primary judge's draft reasons, unavailing on that ground? Was it open to the Court of Appeal to conclude that the undoubted knowledge of Mr Lindsay concerning the position of the primary judge's brother as a senior partner of Freehills to be attributed, in law, as constructive knowledge of the appellants? Was this so even if the appellants (and their junior counsel, Mr Haffenden) were personally unaware of that relationship and contingent interest? In the circumstances, was that relationship, in any case, sufficient to oblige the disqualification of the primary judge or did its unexplored, unelaborated and indirect quality amount to such a tenuous ground for disqualification as to render it readily susceptible to waiver by the appellants' treatment of it (until after they had discovered the unfavourable conclusion of the primary judge by the provision of pre-judgment access to his reasons, which contained strong criticisms of their evidence)?

(3) *The relief issue*: In the event that the conclusion of the Court of Appeal on the disqualification issue is upheld and its conclusion on the waiver issue is set aside for error, are the respondents entitled (as they have requested) to have the proceedings returned to the Court of Appeal so that that Court might decide affirmatively whether Mr Lindsay had (as he originally believed) informed the appellants of the primary judge's association with Freehills, by reason of his relationship with his brother, a partner of that firm? The respondents submitted that the unresolved determination of whether that relationship had in fact been disclosed to the appellants by Mr Lindsay would afford them a further chance to establish actual waiver by the course taken by the appellants after such disclosure. If it were proved in the proceedings, when returned to the Court of Appeal, that the appellants had received *actual* notice of the relationship between the primary judge and a partner of Freehills (but raised no objection or argument of disqualification until they received the advance draft of the primary judge's adverse conclusions and reasons) this could, of itself, amount to the kind of waiver that has been accepted by this Court as applicable to cases of apprehended bias[45].

---

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

89 *Immaterial issues*: Many other issues were raised in the written submissions of the parties and in their oral submissions to this Court. They included arguments addressed to:

- Whether the disqualifying element applicable here was one of association or interest (even if that interest was the potential indirect financial interest of the brother in the ultimate outcome of the litigation between Freehills and the respondents or a non-financial, emotional interest or inclination to protect the brother from a contingent financial burden in proceedings brought against Freehills whilst the brother was a senior partner of that firm and indeed chairman of partners);

- Whether, as they seemed content to do, the appellants might accept (as they eventually did) certain conclusions in their favour, reached by the Court of Appeal whilst rejecting the adverse conclusion on waiver or disqualification? Or whether, if they were to succeed on the issues of disqualification and waiver, the result was inevitably a complete retrial of all issues without the possibility of the appellants' picking and choosing amongst the determinations made by the Court of Appeal of those decisions that the appellants accepted, and those which they did not. Ordinarily, disqualification for apprehended bias betokens a fundamental error going to the heart of the proceedings, signifying a failure of the trial and requiring a complete rehearing; and

- Whether the rehearing which the appellants had in the Court of Appeal, under the powers enjoyed by that Court[46] to receive fresh evidence (as it did in the form of Mr Lindsay's affidavit), allowed that Court to review all of the evidence and to draw its own conclusions from the entirety of the evidence in the record, thereby curing any defects of the trial[47].

90 In the conclusions that I have reached, none of these immaterial issues needs to be addressed. It is enough to decide the three issues that I have first identified. The decision on those issues will, without more, determine the outcome of the appeal.

---

46 *Supreme Court Act* 1970 (NSW), s 75A(7).

47 See *Fox v Percy* (2003) 214 CLR 118.

The finding of disqualification is sustained

91 *The fair-minded observer*: At the outset it must be said as clearly as possible that the appellants made no suggestion that the primary judge was actually biased against them.

92 The most that appears to have happened at trial is that the judge began by perceiving the proceeding before him as one wholly limited to the claim between the appellants and the respondents. For him, it was not connected to the separate Freehills litigation between the respondents and that firm of lawyers. It appears that, almost to the end, the primary judge kept the two proceedings separate in his mind. Apparently for this reason, it did not occur to him, at first, to disclose his brother's status in Freehills and his association with his brother.

93 This fact is made apparent because when the primary judge sent his message to the parties prior to the beginning of the trial, he specifically addressed an issue of possible disqualification. This was limited to his past professional and social contact with Mr Leslie. He did not then raise the further possibility of disqualification because of his relationship with his brother, his brother's position as a defendant in the Freehills litigation or the potential of his decision on the costs issue to affect the quantum of the respondents' ultimate recovery against Freehills, when the Freehills litigation was concluded.

94 The first issue in this appeal is whether the law governing the disqualification of judges (and like decision-makers) extends to a case of indirect and contingent interest and association, such as this.

95 To decide whether it does, only limited assistance is provided by reference to the principles stated in the case law. Repeatedly, such law, in this country, the United Kingdom and other common law jurisdictions, invokes a fiction when reaching conclusions on the issue of disqualification. It is a fiction that I have myself applied many times[48]. It involves the invocation of the reaction of the reasonable, intelligent, fair-minded lay observer. That hypothetical construct will be familiar with the general nature and course of the proceedings, its outcome and the suggested disqualifying elements. That person will express his or her opinion as to whether the judge might not bring an impartial mind to bear upon the resolution of the proceedings because of a disqualifying consideration, relevantly an interest or association.

---

48 See eg, *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 368, 374 applying *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 264; *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 419-420.

96 The fictitious postulate has been stretched virtually to snapping point. Courts throughout the common law world have built up a profile of the hypothetical observer, identifying features which this paragon will manifest and features that will be absent. I collected some of these myself in *Johnson v Johnson*[49].

97 Of course, the elaboration of such features is provided by judges to remind themselves, the parties and the community reading their reasons that the standard that is applied is not simply the reaction of the judges, at trial or on appeal, to a particular complaint. It is, as far as it can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters. As the cases show, in such decisions different judges can reflect different assessments and reach different conclusions. The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case. The use of the fictitious bystander, in resolving disputes over disqualification for apprehended bias, is similar to the analogous approach to the response of the "ordinary reasonable reader" for the law of defamation, to which reference was recently made in this Court[50]. Doubtless there are other instances where the standard of the "reasonable man" or, more recently, the "reasonable person" is invoked to help explain a court's decision and to give it the allure of objectivity beyond the opinions of the actual judges who make the decision.

98 *Categories of disqualification*: In order to provide guidance on the circumstances that oblige judicial disqualification, attempts have been made to categorise the circumstances where this may be required. In *Webb*[51], in reasons that dissented in the result, Deane J explained, in an oft-quoted passage[52]:

> "The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment.

---

49 (2000) 201 CLR 488 at 507-509 [52]-[54].

50 *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1719-1720 [10]-[12], 1722-1723 [23]-[25]; 221 ALR 186 at 190, 193-194.

51 (1994) 181 CLR 41 at 74, referred to in *Smits* (2004) 60 NSWLR 711 at 735 [30].

52 (1994) 181 CLR 41 at 74, citations omitted.

> The second is disqualification by conduct, including published statements. … The third category is disqualification by association. It will often overlap the first and consist of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third …"

99 In a footnote, as an example of disqualification by association, Deane J instanced in *Webb*, "a case where a dependent spouse or child has a direct pecuniary interest in the proceedings". As a matter of principle, the categories of association could not be limited to the identified connections. They would also extend to a brother, depending on the closeness of the relationship and the nature of the suggested link to the matter in issue[53].

100 In these proceedings, the Court of Appeal, correctly in my view, inferred that the relationship between the primary judge and his brother was close. There was nothing to suggest the contrary. Their common family and professional lives sustain the inference. As the Court of Appeal observed[54], if the facts were known to be that the brother (or other close relative) had lost touch with the judge over many years before the case was heard, disqualification by association would not arise[55]. But that was not this case.

101 Categories can be useful in judging new cases against previous applications of the law of judicial disqualification. However, obviously, common features are evident in the four categories identified by Deane J. What, then, are the common purposes of this body of law? Various attempts have been made to express those purposes. In *Gillies v Secretary of State for Work and Pensions*[56], the House of Lords recently suggested that the underlying objective was to preserve the administration of justice from anything that might distract the decision-maker from the maintenance of its integrity. In *Ebner*[57], I said much the same thing. Obviously, the underlying purpose of the law is to uphold the reality

---

53 cf *Webb* (1994) 181 CLR 41 at 74, fn 28.

54 (2004) 60 NSWLR 711 at 734 [29], 736 [35].

55 cf *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 369.

56 [2006] 1 WLR 781 at 788 [20]; [2006] 1 All ER 731 at 739; cf *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599 per Lord Denning MR.

57 *Ebner* (2000) 205 CLR 337 at 381 [139].

and the appearance of impartiality[58]. This body of law thereby helps to maintain the confidence of litigants, of the legal profession and the community in the independent and impartial administration of justice in our society[59].

102 The adoption of relatively strict rules and practices in respect of the disclosure by judges of a potentially disqualifying interest or association has many advantages. It promotes transparency in the judicial process. It relieves the parties of enquiring into, or otherwise investigating, judicial interests and associations. It invites a timely and informed decision on the part of the judge, litigants and legal practitioners as to whether any disclosed interest should be waived[60]. It removes a cause of judicial resentment or irritation when the question of disqualification is raised belatedly, as it was in this case[61]. The practice of prior disclosure of any possible interests, statements, associations, relationships and extrinsic knowledge thus operates prophylactically[62]. It helps to maintain respect for the integrity of judicial performance in the nation, as a model for the region and the building of the rule of law globally[63]. This is not just a question of prudence. It is part of the governing law.

103 *The right to an impartial tribunal*: There is a final purpose, namely to ensure that Australia's municipal law and practice, in this respect, conforms to its obligations under international law[64]. Where there is any ambiguity or uncertainty in the expression of the common law and perhaps in wider circumstances[65], it is permissible to give it a meaning and application bearing in mind Australia's treaty obligations[66]. Especially so in this case, since Australia has ratified both the International Covenant on Civil and Political Rights

---

58 *Ebner* (2000) 205 CLR 337 at 381 [139].

59 *Ebner* (2000) 205 CLR 337 at 381 [139].

60 *Ebner* (2000) 205 CLR 337 at 395 [177].

61 *Ebner* (2000) 205 CLR 337 at 385 [153], citing South African authority.

62 *Ebner* (2000) 205 CLR 337 at 387 [159].

63 *Ebner* (2000) 205 CLR 337 at 389 [161.5].

64 *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 418.

65 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477.

66 *Ebner* (2000) 205 CLR 337 at 389 [161.5].

("ICCPR")[67] and its supplementary Optional Protocol, affording those affected a right to complain to the United Nations Human Rights Committee about the content and operation of Australian law, measured against such standards[68]. The relevant ambiguity in this case is whether the judge's failure to disclose the association or interest amounted to apprehended bias as explained by *Webb*, *Ebner* and other cases.

104 By Art 14.1 of the ICCPR it is provided that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"[69]. The juxtaposition of "independent" and "impartial" makes it plain that two different, but related, concepts are intended. *Independence* connotes separation from other branches of government but also independence from the litigants, their interests and their representatives. *Impartiality* is concerned with the judge's approach to the hearing and the determination of matters in dispute[70]. The central importance of ensuring the reality and appearance of independence and impartiality in courts and tribunals is repeatedly emphasised in international and regional courts and bodies considering such questions[71].

105 The statement in the ICCPR of the essential features of the due administration of justice in courts and tribunals occasions no surprise to those operating in a common law system. Those features are also part of municipal law. Specifically, it is the duty of judicial officers to be vigilant for any disqualifying interests, statements, associations, relationships and knowledge.

---

67 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171; 1980 ATS 23 (entered into force 23 March 1976).

68 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

69 See also Universal Declaration of Human Rights, General Assembly Res 217A(III), (183rd plen Mtg) UN Doc A/Res/217A (1948), Art 10; European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953)**,** Art 6(1); American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978), Art 8(1); African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, 21 ILM 58 (entered into force 21 October 1986), Art 7(1)(b).

70 *Ebner* (2000) 205 CLR 337 at 383 [145].

71 See eg *Gonzalez del Rio v Peru*, United Nations Human Rights Committee Communication No 263/1987 (1992); *Karttunen v Finland*, United Nations Human Rights Committee Communication No 387/1989 (1992) at [7.2].

This is so wherever and whenever such disqualifications, or possible disqualifications, arise. So long as they are not excluded by the *de minimis* exception[72]; or because the propounded disqualification is too indirect, remote and speculative[73] or overcome by the requirement of necessity[74], it is my view that they must be brought to the notice of the parties so that they can properly consider waiver. Otherwise the judge must refuse participation in the case, absent any countervailing principle that requires, or permits, continued participation. One such countervailing principle was expressed in *Re JRL; Ex parte CJL*[75]: that litigants should not be able to select their preferred judge[76].

106 So far as disqualifying associations are concerned, particularly in cases having any connection with close family members or bodies with which such family members are known to be involved, it is not difficult for a judicial officer or tribunal member in Australia to institute arrangements with a court or tribunal registry to ensure that the decision-maker is rostered off hearings in which the close family member might be involved, directly or indirectly as a lawyer, as a party, or as a witness in the proceedings or as a person whose interests are contingently affected by its outcome[77].

107 Where a case slips through such arrangements and is discovered at a late stage, even after proceedings have commenced and are well advanced, the principle of disqualification for an incompatible association or interest requires notification to the parties as soon as the association or interest is discovered or appreciated. The parties should then be afforded the opportunity to consider the issue, to decide whether to waive the disclosed feature or to request the opportunity to make submissions about a rehearing before a differently constituted court or tribunal. In retrospect, this is the course which the primary judge should have taken in these proceedings once he appreciated the facts and significance of the interrelationship of this case with the Freehills litigation. He

---

72 *Ebner* (2000) 205 CLR 337 at 391 [166].

73 *Ebner* (2000) 205 CLR 337 at 392 [168]-[169].

74 *Ebner* (2000) 205 CLR 337 at 393 [172].

75 (1986) 161 CLR 342 at 352; cf *Antoun v The Queen* (2006) 80 ALJR 497 at 505 [34]; 224 ALR 51 at 60.

76 cf *Fingleton v The Queen* (2005) 79 ALJR 1250 at 1282 [160]; 216 ALR 474 at 516-517.

77 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 369.

should have done so before publishing the advance draft of his reasons. Had he done that, the problem that soon arose might have disappeared.

108 Taking this course will sometimes cause inconvenience and even loss to innocent parties. It will sometimes seem wasteful where the association appears minor and the disruption significant. However, the essential reason for relatively strict rules in this regard is that the reputational value of very high standards for the appearance of integrity is extremely precious. That cost and inconvenience must therefore be borne as the price of maintaining the reputation of courts and tribunals for the independent and impartial administration of justice.

109 Such integrity in the performance and discharge of the decision-making function is hard won and all too easily lost[78]. That is why decisions on such questions should normally, in my view, err on the side of disclosure, if there is any real possibility that a reasonable observer *might* consider that the judge *might* be influenced or appear to be influenced by a disqualifying feature of the case.

110 *The Ebner holding*: During the hearing of this appeal, I was reminded more than once[79] that the stricter view of disqualification for interest that I had expressed in *Ebner*[80] was not adopted by the joint reasons in that decision.

111 The Court's orders in *Ebner* were unanimous, although I accept that the approach that I favoured was stricter than that expressed in the joint reasons. To the extent that the holding in *Ebner* (and in the associated appeal in *Clenae Pty Ltd v Australia and New Zealand Banking Group*[81]) applies to the present case, there being no constitutional element in the earlier decisions[82], I am bound to give effect to the majority opinion.

112 Strictly, the *ratio decidendi* of *Ebner* (and *Clenae*) concerned an issue that is not present in this appeal. It concerned disqualification of judges for pecuniary interests of their own in a bank which had its own pecuniary interest in the

---

78 *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 419: "A thousand decisions faithfully and impartially made … could be undermined … by a reasonable, even though misguided, belief of partiality … or the conclusion that in that case 'things don't look right'."

79 [2006] HCATrans 74 at 1520, 3319.

80 *Ebner* (2000) 205 CLR 337 at 386-390 [157]-[163].

81 *Ebner* (2000) 205 CLR 337.

82 But cf *Ebner* (2000) 205 CLR 337 at 362-363 [79]-[82] per Gaudron J, 372-373 [115]-[117] of my own reasons.

outcome of the litigation (in *Ebner*) or was actually a party to proceedings before the judge (in *Clenae*). In the present case, the primary judge had no personal pecuniary interest whatever in the outcome of the proceedings. His brother had a pecuniary interest that was indirect and contingent. In so far as the primary judge had an interest, or apparent interest, its nature was potentially familial, emotional or empathetic. It was not pecuniary. This was, therefore, a case of disqualification by familial association with the brother who, in turn, had an indirect, contingent pecuniary interest in the dispute which the judge, his brother, was deciding.

113 Notwithstanding the differences between the issues raised in *Ebner* and *Clenae*, and in this case, I accept that, by analogy, what the Court held in *Ebner*, if extended, would apply to this appeal. Certainly, it could be expected that the approach adopted in *Ebner*[83] and *Clenae* would be adapted to the circumstances of this case.

114 This was also the conclusion of the Court of Appeal when the matter was before it. In its reasons, the Court of Appeal began its analysis by citing *Ebner*[84]. The citation included the "two steps" test appearing in the joint reasons in *Ebner*[85], quoted in the reasons of Gleeson CJ, Heydon and Crennan JJ in this appeal[86]. In adapting what is said in that passage, it is, I believe, necessary to make some adjustments, given that the disqualifying element in this appeal is not, ultimately, an "interest" but an "association" which the primary judge had that was ostensibly incompatible with a manifestly impartial determination of the case.

115 *Application of the Ebner test*: Applying the *Ebner* test to such a case of association, the answer to the first step is that the consideration that might lead a judge to decide a case other than on its legal and factual merits might be the judge's sense of loyalty to, or concern for, a brother. Particularly a brother with responsibilities as senior partner and chairman of partners of Freehills, with duties by inference extending to public relations for that firm, in litigation involving a huge claim that had already attracted unwelcome publicity.

116 It is true, as the respondents pointed out, that their litigation with the appellants and their litigation with Freehills involved legally separate

---

83 *Ebner* (2000) 205 CLR 337 at 349-350 [26]-[32].

84 (2004) 60 NSWLR 711 at 733 [28].

85 *Ebner* (2000) 205 CLR 337 at 345 [8].

86 Reasons of Gleeson CJ, Heydon and Crennan JJ at [53]; cf reasons of Gummow and Hayne JJ at [56].

proceedings and issues. No one contests that. The Freehills litigation itself involved a claim potentially, at the very most, of the order of $1 billion[87]. The proceedings between the appellants and the respondents involved a claim no greater than $700,000. However, the latter sum (or even the maximum that the Court of Appeal ordered in favour of the appellants [$500,000]) and the brother's potential share after any insurance entitlement, could not be described as trivial. It would not fall within the *de minimis* exception to the obligation of disclosure[88]. Common experience indicates a measure of scepticism today (even on the part of intelligent and reasonable observers) concerning public institutions[89]. Such scepticism might affect attitudes toward a judge deciding a case that might contingently (in whatever degree) affect the interests of the judge's brother. Perhaps it should not be so. Perhaps ordinary observers should accept that no such contaminating influence would influence a judge or influence the judge's decision on the merits of the case. But in the present age, there is more suspicion of authority than hitherto. Those who do not accept this must not be reading newspapers.

117 The second step in the *Ebner* formula requires an articulation of the logical connection between the disqualifying association or interest and the feared deviation from the course of deciding the case on its merits. Where the disqualifying factor is "interest" it is easier to give weight to relatively small and contingent pecuniary consequences for the judge or a close member of his or her family. In a sense, this makes it simpler to accept or reject the potential impact of the interest. But where, as here, what is complained of is a disqualifying "association", particularly a close family association, the disconnection of the postulated cause and the consequence is harder to accept. Put another way, a connection is easier to infer from familial associations.

118 In this case this is particularly so because of at least four considerations:

(1) The failure of the primary judge to raise the fraternal association when other potentially disqualifying associations were specifically identified by the judge for comment and possible waiver;

(2) The fact that the interconnection between these proceedings and the Freehills litigation was obvious; would have been noticed on any

---

87 Reasons of Gleeson CJ, Heydon and Crennan JJ at [6].

88 On what would and would not fall within the *de minimus* exception, see *Ebner* (2000) 205 CLR 337 at 367 [98], 385-386 [155], 391 [166].

89 *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414.

examination of the papers; and was observed by the primary judge himself, at the latest, about the time of preparing his reasons when it caused him, exceptionally, to provide a copy of his reasons in advance of their delivery to a representative of Freehills, a stranger to the present litigation, for comment and for their self-protection;

(3) The strong language, critical of the appellants' credibility, contained in the primary judge's reasons; and

(4) The denial of any recovery to the appellants (reversed by the Court of Appeal) which might seem intuitively surprising given the work they performed over a lengthy period and the disbursements they incurred, when acting for the respondents against Freehills.

119 The respondents submitted that the connection between a judgment in favour of the appellants for their costs and any pecuniary burden on the primary judge's brother was too indirect, remote, speculative and individually trivial to amount to a perceived disqualification for familial association. However, such matters are not to be judged by fine legal analysis alone. That is not how the reasonable lay observer thinks or how a judge giving effect to that standard should reason. Given the purposes of the law of disqualification and the interests those purposes protect, the question is ultimately one not of a lawyer's professional evaluation but of public perception. By that standard, I consider that a sufficient link existed to sustain the conclusion of disqualification expressed by the Court of Appeal. I do not agree that, on this issue, the reasoning of that Court "is not compelling"[90]. On the contrary, in my view it is appropriately explained and adequately justified. It reveals no error.

120 I reach this conclusion with natural reluctance because one measure of the care and accuracy of the primary judge's reasoning may be found in the fact that, after such hard fought proceedings, involving many factual disputes, numerous contested issues and difficult legal points, the primary judge's reasons have been sustained on most questions. In this Court, only the issue of disqualification (and the associated issue of waiver) were argued. The disqualification issue itself only arose at the last minute because the primary judge took steps to provide procedural fairness to Freehills, a party to separate, but connected, proceedings. To re-litigate the appellants' entitlement to costs after such an extensive trial would be very frustrating, not to say costly to the parties and the community. However, (subject to what follows) disqualification was required of the primary judge, who had to make a decision that contingently might have affected his brother's interests and those of the brother's legal firm.

---

90 Reasons of Gleeson CJ, Heydon and Crennan JJ at [54].

121 *The constitutional dimension*: I have not, in these reasons, addressed the possible application of the Constitution to reinforce the foregoing conclusion, as it concerns the provision of due process in a State Supreme Court. Such a court is expressly referred to in the Constitution[91]. It is part of the integrated Judicature of the Commonwealth[92]. The constitutional dimension of the requirements of impartiality, and the appearance of impartiality, were explained by Gaudron J in *Ebner*[93]. Her Honour said[94]:

> "[I]n my view, Ch III of the Constitution operates to guarantee impartiality and the appearance of impartiality throughout the Australian court system."

122 In my reasons in *Ebner*, I agreed with this statement[95]. In this appeal, the parties did not advance constitutional arguments. The usual practice of this Court is to decide cases, if we can, without unnecessarily invoking the Constitution[96]. That course is possible, and appropriate, here. Nevertheless, it is important not to lose sight of arguments arising from the constitutional underpinnings of the integrated Judicature of the Commonwealth. They indicate the fundamental character of independence and impartiality in the judiciary which it is the duty of the courts to observe, maintain and protect.

123 *Conclusion – disqualification shown*: It follows from this analysis that the decision of the Court of Appeal on the disqualification issue is sustained. The contrary view is insufficiently attentive to the right to trial before a manifestly impartial and independent tribunal. It departs from the proper tendency of our law to resolve questions of uncertainty in such matters in favour of recusal and especially where issues of credibility may be presented for decision[97]. But was

---

91 Constitution, s 73(ii).

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

93 *Ebner* (2000) 205 CLR 337 at 362-363 [79]-[81].

94 *Ebner* (2000) 205 CLR 337 at 363 [82].

95 *Ebner* (2000) 205 CLR 337 at 372 [115].

96 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *Hutchison 3G Australia Pty Ltd v City of Mitcham* (2006) 80 ALJR 711 at 730-731 [110]; 225 ALR 615 at 640.

97 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 480 [25]; applied *Morrison v AWG Group Ltd* [2006] EWCA 6 at [8], [18] per Mummery LJ.

the consequence of this conclusion avoided by waiver of the disqualification by or for the appellants?

The disqualification was waived

124 *Waiver and judicial disqualification*: The notion that a party may waive non-compliance with the requirement for the manifest impartiality and independence of a judge is, in some ways, curious. I say that because the entitlement to a manifestly impartial and independent judicial or like decision is not one that belongs only to the parties to the proceeding[98]. It also belongs to citizens, for whom the judiciary is the third branch of their government, by analogy to other persons having a proceeding in an Australian court, and to observers generally. On previous occasions, I have referred to this curiosity[99]. It is one that has also been noted in the United States of America[100].

125 However, it is now settled law in this Court[101] that where a litigant, aware of circumstances providing a ground for objection on the basis of disqualification, fails to object promptly, that litigant will be taken to have waived the objection and cannot later rely on it. Obviously, this conclusion represents a practical approach, even if at the cost of some doctrinal purity. Neither party to this appeal challenged the established holding of this Court in this regard. The issue, therefore, is whether, in the circumstances of this case, the appellants waived their objection to the disqualification of the primary judge on the basis of his association with his brother, a party to interconnected proceedings whose interests were contingently affected by the judge's decision.

126 It is clear that any objection to a judge's participation in a trial on the ground of disqualification for association must be made promptly, once the affected party becomes aware of the suggested cause of the disqualification[102]. Although the trial before the primary judge was a long time in preparation and the appellants had their attention directed expressly to any objections they might have had to the participation of the primary judge, they did not raise an objection

---

98 Bias may be a jurisdictional error to which a litigant technically cannot consent; cf Toy-Cronin, "Waiver of the Rule Against Bias", (2000) 9 *Auckland University Law Review* 850 at 864.

99 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 373; cf *Najjar v Haines* (1991) 25 NSWLR 224 at 229.

100 See eg *United States v Lustman* 258 F 2d 475 at 478 (1958).

101 *Vakauta* (1989) 167 CLR 568 at 577-579 per Dawson J, 587-588 per Toohey J.

102 *Vakauta* (1989) 167 CLR 568 at 572.

on the basis of his association with his brother until just before the formal publication of reasons and pronouncement of orders. Indeed, the objection arose only after the appellants, the respondents and a representative of Freehills were exceptionally given a pre-publication copy of the judge's reasons disposing of the trial, and the primary judge disclosed his association with his brother in order to explain that unusual course of action. Then, the appellants moved for disqualification with appropriate speed. Yet, their application was not made until immediately before judgment and after a trial that had lasted for five days.

127 If before, or at any time during the trial, the appellants had been informed by anyone, including their senior counsel, of the primary judge's familial association with his brother, and that his brother was a partner of Freehills, it is obvious that they would be taken to have waived any later objection based on that association.

128 In his affidavit, read before the Court of Appeal, Mr Lindsay stated that he believed that each of the appellants "knew that his Honour was the brother of … a partner of Freehills"[103]. Mr Lindsay affirmed his belief (but agreed that he might have been mistaken) that in his conversation with his junior, Mr Haffenden, he had "... referred to the fact that McClellan J's brother … was a partner of Freehills as one of the factors to be taken into account" in deciding any objection to the primary judge's participation in the hearing[104]. Mr Lindsay stated that, at the final conference before the trial commenced, the appellants "were enthusiastic about the prospect of McClellan J presiding at the trial"[105]. Thereafter, there was no further discussion with the clients or Mr Haffenden about the primary judge's position regarding Freehills until the draft reasons were provided to the parties. Mr Lindsay stated[106]:

> "Had McClellan J announced, at the time of commencement of the hearing on 11 March 2002, that his brother was 'the Chairman of Partners' of Freehills – that fact being unknown to me – I would have taken specific instructions in relation to it. I was unconcerned that he did not refer to the fact that his brother was a partner of Freehills because I believed that fact to have been known to all parties."

129 In his reasons for rejecting the motion to have him disqualify himself, the primary judge was willing to accept that the appellants and Mr Haffenden might

---

103 The affidavit is reproduced in *Smits* (2004) 60 NSWLR 711 at 730-732 [25.10].

104 (2004) 60 NSWLR 711 at 732 [25.11].

105 (2004) 60 NSWLR 711 at 732 [25.11].

106 (2004) 40 NSWLR 711 at 733 [25.15].

have been unaware that his brother was a partner of Freehills[107]. However, for reasons already explained, he did not accept this in the case of Mr Lindsay. The primary judge concluded that[108]:

> "… [T]he plaintiff's senior counsel was apparently aware that my brother was a partner at Freehills but the matter was never raised … [so] any right to object has been waived".

130 The Court of Appeal was also prepared to accept that "[n]either of the plaintiff solicitors nor junior counsel ... was aware of this before the trial judge's announcement on 17 June 2002"[109]. By this the Court of Appeal meant the position of the brother as a senior partner of Freehills, his contingent exposure to financial consequences as a result of the judge's decision and his fraternal association with the judge.

131 There is a tension between this conclusion and the later statement in the Court of Appeal's reasons to the effect that Mr Lindsay may have informed the appellants (as he thought he had) concerning the primary judge's brother. In the end, the Court of Appeal did not resolve this possible conflict of fact, given that it was their Honours' opinion that, in such a matter, the knowledge of Mr Lindsay was knowledge in the appellants.

132 Was this a correct conclusion? Did the Court of Appeal err in imputing Mr Lindsay's knowledge to the appellants although they, and significantly Mr Haffenden, stated in Court that, prior to the announcement, they had been unaware of that association. If knowledge of the association cannot, as a matter of law, be imputed to the appellants, is it necessary to return the issue to the Court of Appeal so that the appellants' actual knowledge can be the subject of a conclusive finding in that Court which, unlike this Court, can receive new evidence and make findings about it.

133 *Conclusion on imputed knowledge*: Attributing to the appellants all relevant knowledge in the possession of their senior counsel, although possibly not expressly shared with them or brought to their attention, presents several difficulties. First, it relies on a legal fiction, because it postulates the attribution of knowledge that the client may never personally have received. Secondly, it attributes such knowledge in circumstances where the question to be answered is

---

107 *Smits v Roach*, unreported, Supreme Court of New South Wales, Equity Division, Commercial List, 26 June 2002 at 10.

108 *Smits v Roach*, unreported, Supreme Court of New South Wales, Equity Division, Commercial List, 26 June 2002 at 15, citing *Vakauta* (1988) 13 NSWLR 502.

109 (2004) 60 NSWLR 711 at 730 [23].

whether a litigant has waived a disqualifying association[110]. How, it might be asked, can there be waiver if the person authorised in law to make such waiver is not conscious of ever having done so and was not actually provided with the information necessary to making the requisite choice[111]? Thirdly, given that waiver also affects the public's right to the conduct of manifestly fair trials before independent and impartial tribunals, should such waiver by the party at least be a free, informed and positive decision, not one forced on that party by a fiction or rule of law? Fourthly, because of this Court's majority reaffirmation of the immunity of advocates from suit for mistakes made in the conduct of litigation[112], does any notion of imputed knowledge or any fiction imposing knowledge contrary to the actual facts (without the chance of a legal remedy for faulty conduct or omission) work such an injustice as to cause this Court, in such circumstances, to draw back from a legal rule having such a consequence?

134 As against these considerations the applicable principle must be expressed on the footing of the practical circumstances of a trial according to our legal system; the necessity, where legal advocates are retained, to rely on them to raise with their clients any relevant knowledge that they have; the general undesirability of opening to outside scrutiny the privileged communications that occur between the client and advocate; and the acute difficulty of litigating the content of such communications when normally it can be assumed that all relevant issues have been explored and appropriate advice tendered on issues that, objectively, the lawyers regard as important.

135 Considerations such as these led the Court of Appeal, in the present case, to say[113], adapting the language of Lord MacNaghten in *Blackburn, Low & Co v Vigors*[114]:

> "There is nothing unreasonable in imputing to a litigant all the information with regard to proceedings which the barrister to whom the management of those proceedings is committed, possessed at the time and should in the ordinary course of things have communicated to the litigant."

---

110 (2004) 60 NSWLR 711 at 739 [43].

111 *Ebner* (2000) 205 CLR 337 at 393 [170] ("Disclosure of a relevant pecuniary interest is a precondition for effective waiver on the part of the parties.")

112 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755; 214 ALR 92.

113 *Smits* (2004) 60 NSWLR 711 at 739 [40].

114 (1887) 12 AC 531 at 542.

136 Because there is no settled authority of this Court, or of any equivalent court, that resolves the precise issue raised by this appeal, it is necessary to resolve the waiver issue by reference to considerations of authority, principle and policy[115].

137 Approaching the issue in that way, not without some hesitation, I will not dissent from the conclusion stated by Gleeson CJ, Heydon and Crennan JJ in their reasons[116]. I do not accept that, as the appellants submitted, such an acknowledgment of imputed knowledge will discourage judges in proper cases from disclosing disqualifying interests and associations where, without the judge's disclosure in open court, it will be difficult or impossible for the litigant to know the disqualifying element. The circumstances of this case were "unusual"[117]. The conclusion of the Court of Appeal, undisturbed by this Court, that the primary judge was disqualified for an undisclosed association with his brother, will reaffirm the strictness of the rule of disclosure. However, the failure to disclose the association in this case is not ultimately determinative[118]. The Court of Appeal was also correct to conclude that that failure was waived by the appellants, having regard to the conduct of the case by their counsel.

138 If Mr Lindsay (as he thought) notified the appellants of the primary judge's association with his brother, and the brother's position in Freehills (and contingent interest in the matter), express waiver would incontestably have occurred, and the judge would have been obliged to decide as such. However, if, as claimed and apparently accepted, he did not do so, the judge's association with his brother and Freehills was a consideration of which Mr Lindsay was undoubtedly aware. The brother's rank amongst the partners is of minor, if any, significance. If, then, Mr Lindsay did not raise the point before or during the trial, this was presumably because he did not judge it sufficiently significant, given all the other features of the case, including the appellants' apparent enthusiasm to have McClellan J presiding in the trial. It was because of those other features that Mr Lindsay "did not consider a decision by the [appellants] not to object to McClellan J as remarkable". In the multitude of decisions that have to be made in a large trial, especially just before the commencement of the hearing, there is no escaping reliance on the judgments made by the legal

---

115 *Oceanic Sun Line Special Shipping Company v Fay* (1988) 165 CLR 197 at 252.

116 Reasons of Gleeson CJ, Heydon and Crennan JJ at [55]; cf reasons of Gummow and Hayne JJ at [60]-[61].

117 Reasons of Gleeson CJ, Heydon and Crennan JJ at [22].

118 (2004) 60 NSWLR 711 at 732-733 [25.14].

representatives. Such judgments will ordinarily be upheld by the courts[119]. It is hard to see how the system of adversarial trial could operate otherwise. Viewed objectively, the opinion formed by Mr Lindsay was, on balance, a reasonable and justifiable one. The Court of Appeal was entitled to so hold. No error is shown requiring the Court's correction.

139 It follows that the decision of the Court of Appeal that the appellants had waived the disqualification of the primary judge was legally correct. That decision should also be affirmed.

Remitter to the Court of Appeal is unnecessary

140 In the light of these conclusions, it is unnecessary to return the proceedings to the Court of Appeal for a finding on whether, in fact, Mr Lindsay informed the appellants of the fact that the primary judge's brother was a partner of Freehills and so liable to disqualification on that ground. Any such finding could only strengthen the conclusion of waiver that may be reached without it. For the conclusion of waiver to be accepted, proof of actual communication of the association between the judge and his brother and the brother's position in Freehills, known to Mr Lindsay, is not necessary.

Order

141 It follows that the appeal should be dismissed with costs.

---

119 See, for example, *Birks v The Queen* (1990) 19 NSWLR 677 at 680; *TKWJ v The Queen* (2002) 212 CLR 124; *Ali v The Queen* (2005) 79 ALJR 662; 214 ALR 1; and *Nudd v The Queen* (2006) 80 ALJR 614; 225 ALR 161.