HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

TANIA ISBESTER APPELLANT

AND

KNOX CITY COUNCIL RESPONDENT

Isbester v Knox City Council
[2015] HCA 20
10 June 2015
M19/2015

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 10 September 2014 and, in its place, order that:*

    (a) the appeal be allowed with costs; and

    (b) the order of the Supreme Court of Victoria made on 17 June 2014 be set aside and, in its place, order that:

        (i) the decision of the defendant notified to the plaintiff by letter dated 15 October 2013 be quashed; and

        (ii) the defendant pay the plaintiff's costs of the proceeding.

On appeal from the Supreme Court of Victoria

Representation

B R St. A Kendall QC with A S Felkel for the appellant (instructed by Phoenix Legal Solutions)

S P Donaghue QC with R C Knowles for the respondent (instructed by Maddocks)

CATCHWORDS

Isbester v Knox City Council

Administrative law – Natural justice – Bias – Reasonable apprehension of bias – Incompatibility of roles – Where respondent made order under s 84P(e) of *Domestic Animals Act* 1994 (Vic) for destruction of appellant's dog – Where there was panel hearing and deliberation prior to decision being made – Where member of panel had been involved in prosecuting related criminal charges – Whether fair-minded observer might reasonably apprehend that panel member might not bring impartial mind to decision – Whether interest of panel member might affect decision-making of others on panel.

Words and phrases – "conflict of interest", "incompatibility of roles".

Domestic Animals Act 1994 (Vic), s 84P(e).

1 KIEFEL, BELL, KEANE AND NETTLE JJ. Following a hearing before the Knox Domestic Animals Act Committee of the Knox City Council, a decision was made that a dog owned by the appellant, which had earlier been seized by the Council, be destroyed. Section 84P(e) of the *Domestic Animals Act* 1994 (Vic) ("the Act") provides the Council with the power to destroy a dog where its owner has been found guilty of an offence under s 29 of the Act. The appellant had been convicted of an offence under s 29(4), on her plea of guilty to the charge that on 4 August 2012 her Staffordshire terrier called "Izzy" had attacked a person and caused "serious injury".

2 The issue on this appeal is whether that decision should be quashed because of the substantial involvement of a member of that Committee (referred to in the proceedings as "the Panel") both in the prosecution of charges concerning the dog and in the decision of the Panel as to the fate of the dog.

Background facts

3 Ms Kirsten Hughes was the Council's Co-ordinator of Local Laws. Part of her duties involved the regulation of domestic animals under the Act. In June 2013, the appellant was charged with a series of offences arising out of recent attacks by her three dogs. At this time it came to Ms Hughes' attention that the investigation of the August 2012 incident had not been completed. In the August 2012 incident, two of the appellant's dogs were involved in an attack upon another dog. A person who tried to pull one of the attacking dogs off the other dog sustained a wound to her finger.

4 Ms Hughes directed Council employees to further investigate the identity of the dog involved in inflicting the injury on the person in that attack and she spoke with the complainant herself. She determined that six charges should be laid with respect to that attack, arranged for charges and summonses to be drafted and signed some of the charges, including that brought under s 29(4), as informant. Ms Hughes gave instructions to the Council's solicitors to prosecute the charges and to negotiate pleas which might be accepted from the appellant. Those pleas were entered in the Ringwood Magistrates' Court on 12 September 2013.

5 An order for destruction of the dog under s 29(12) of the Act could have been, but was not, sought from the Magistrates' Court. It was the practice of the Council to itself convene a panel of its officers where it was necessary to consider cases of this kind. Ms Hughes decided that a hearing by the Panel should be held and made arrangements for that to occur.

6 The day following the hearing in the Magistrates' Court, a letter drafted by Ms Hughes was sent to the appellant. The letter advised the appellant that it was open to the Council to consider the destruction of her dog. The letter also advised that if an order for destruction was not made, the Council could declare her dog to be dangerous under s 34(1)(a) of the Act. Such a declaration would have the effect that the appellant's dog would be subject, in particular, to requirements as to the restraint of the dog within and without her property (ss 38 and 41).

7 The appellant was further informed that a hearing by the Panel would be held on 30 September 2013 and that the Panel would consist of three Council officers "who will consider all the information prior to making any decision." The chairperson was to be the person delegated to make the decision; the second Panel member was to be Ms Hughes and the third was to be an officer of the Council "who has not had any involvement in the matters, to provide assistance in the decision making process." The letter went on to say that "[t]he officer involved in the investigation may be present but they will not be involved in the decision making." If that advice was intended to suggest that Ms Hughes would not participate in the decision-making process, it was incorrect. It may be that it was intended to refer to Mr Martonyi, who was the investigator subject to Ms Hughes' direction.

8 The appellant was invited to and did attend, provided evidence and made submissions to the Panel. The Panel comprised Mr Angelo Kourambas, Director of City Development; Mr Steven Dickson, Manager of City Safety and Health, who was the chairperson; and Ms Hughes. Each of the Panel members held a delegation from the Council for the purposes of s 84P of the Act.

9 In preparation for the hearing, Ms Hughes made enquiries of the Department of Human Services as to whether the appellant's dog could return to the house which the appellant occupied, in the event that the dog was released. The other members of the Panel were also provided with other materials. They included the briefs of evidence which had been prepared for the Magistrates' Court hearing concerning the attacks in both 2012 and 2013, and Ms Hughes' notes of the hearing in the Magistrates' Court on 12 September 2013, which included comments made by the Magistrate which were adverse to the appellant. At the conclusion of the Panel's hearing the appellant was informed by Mr Dickson that the Panel would make a decision and she would be notified of it.

10 It is not disputed that Ms Hughes participated fully in the decision-making process of the Panel following the hearing. She agreed in cross-examination that she played a major role in that process. After a detailed discussion between the Panel members, Ms Hughes said, Mr Kourambas provided the instruction that the

dog should be destroyed and she proceeded to draft reasons for his approval and signature. The appellant was notified of the decision by a letter dated 15 October 2013.

The decisions of the Courts below

11 The appellant, unsuccessfully, sought judicial review of the Council's decision and orders in the nature of certiorari and prohibition under O 56 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic). A number of grounds were relied upon for the orders sought. Only the ground that relied upon an apprehension of possible bias on the part of Ms Hughes remains relevant to this appeal and then only in one respect.

12 The primary judge (Emerton J) identified[1] the relevant principle for apprehended bias to be that stated in *Ebner v Official Trustee in Bankruptcy*[2], where it was said that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". Her Honour then referred to what had been said in *Minister for Immigration and Multicultural Affairs v Jia Legeng*[3], namely that the application of that principle will not be the same for a decision-maker who is not a judicial officer. What is required in relation to apprehended bias by prejudgment, her Honour said, depends on the circumstances[4].

13 Her Honour the primary judge considered[5] that the requirement for impartiality exists to the extent necessary to give persons affected by a decision under s 84P(e) a genuine hearing. Her Honour referred in this respect to statements in *McGovern v Ku-ring-gai Council*[6] concerning the expectations of decision-making by a local council:

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1 *Isbester v Knox City Council* [2014] VSC 286 at [84].

2 (2000) 205 CLR 337 at 344 [6]; [2000] HCA 63.

3 (2001) 205 CLR 507 at 563 [181]; [2001] HCA 17.

4 *Isbester v Knox City Council* [2014] VSC 286 at [85].

5 *Isbester v Knox City Council* [2014] VSC 286 at [110].

6 (2008) 72 NSWLR 504 at 519 [80] per Basten JA.

> "The real question is what, with the appropriate level of appreciation of the institution, the fair-minded observer would expect of a councillor dealing with a development application. The institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers."

The Court of Appeal of the Supreme Court of Victoria (Hansen and Osborn JJA and Garde AJA) accepted that the essential requirements of natural justice were those as identified by the primary judge[7]. It will be necessary to refer to the circumstances of *McGovern*'s case later in these reasons.

14 Her Honour the primary judge considered that the requirement that there be an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the appellant's submissions could be satisfied even where a decision-maker has been involved in the earlier prosecution. A fair-minded observer would not apprehend that there might be a disqualifying predisposition from this fact alone[8].

15 The appeal to the Court of Appeal was limited to the ground of apprehended bias. The Court approached that ground on two bases, found that neither was made out and dismissed the appellant's appeal.

16 The Court of Appeal considered the question whether there was a possibility that Ms Hughes could have prejudged the decision under s 84P(e) separately from the question whether her involvement in the prosecution of the charges against the appellant could give rise to an apprehension of conflict of interest. This approach may have been influenced by the reasons of Spigelman CJ in *McGovern*, where his Honour distinguished between these two categories of bias on the basis that they required a different kind of analysis[9]. On this appeal the appellant does not argue for a finding of prejudgment. Only the question of Ms Hughes' possible conflict of interest remains relevant.

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7 *Isbester v Knox City Council* [2014] VSCA 214 at [48], [65], [69].

8 *Isbester v Knox City Council* [2014] VSC 286 at [111].

9 *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at 509-510 [25]-[27].

17 The Court of Appeal concluded[10] that the case did not involve a conflict of interest such as was evident in *Stollery v Greyhound Racing Control Board*[11] and *Dickason v Edwards*[12]. In these cases it had been held that a person who is in the position of an accuser cannot also hear and decide the charge in conjunction with other people. The Court of Appeal agreed with the primary judge that this case was distinguishable from *Stollery* and it did so on three bases[13]: (1) the Panel hearing was not a quasi-judicial hearing of the type required to be conducted by the Board in *Stollery*; (2) although Ms Hughes had been in the position of accuser in the Magistrates' Court, she was not in that position at the Panel's hearing; and (3) Ms Hughes had no special or personal interest in the matters in controversy, as had existed in *Stollery* and *Dickason*. None of the circumstances in issue involved her personally.

18 It remains to mention an aspect of the reasoning of the Court of Appeal which is the subject of an application by the Council for leave to file a notice of contention.

19 Her Honour the primary judge[14] accepted that Ms Hughes participated in every aspect of the Panel decision and that, given her experience and knowledge of the relevant legislation, her views would carry considerable weight. However, her Honour found that the relevant decision to destroy the dog was made by Mr Kourambas, the delegate for this purpose, not the other members of the Panel. The Court of Appeal accepted[15] that the facts found by her Honour may be relevant to the question whether Mr Kourambas had prejudged the matter, but did not[16] base its decision as to the perceived conflict of interest arising from Ms Hughes' involvement in the matter on the fact that she was not the designated decision-maker. It accepted that she had a material part in the decision-making process. Before this Court, the Council sought to contend that, given the finding

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10 *Isbester v Knox City Council* [2014] VSCA 214 at [69], [78]-[80].

11 (1972) 128 CLR 509; [1972] HCA 53.

12 (1910) 10 CLR 243; [1910] HCA 7.

13 *Isbester v Knox City Council* [2014] VSCA 214 at [78]-[80].

14 *Isbester v Knox City Council* [2014] VSC 286 at [103]-[105].

15 *Isbester v Knox City Council* [2014] VSCA 214 at [65].

16 *Isbester v Knox City Council* [2014] VSCA 214 at [68].

of the primary judge, the Court of Appeal should have found a fair-minded observer would not reasonably apprehend bias on the part of Mr Kourambas.

How the governing principle is to be applied

20 The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.

21 The principle governing cases of possible bias was said in *Ebner*[17] to require two steps to be taken in its application. The first requires the identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits. Where it is said that a decision-maker has an "interest" in litigation, the nature of that interest must be spelled out. The second requires the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits. As Hayne J observed in *Jia Legeng*[18], essentially the fear that is expressed in an assertion of apprehended bias, whatever its source, is of a deviation from the true course of decision-making.

22 It was observed in *Ebner*[19] that the governing principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers. It was accepted that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making. The analogy with the curial process is less apposite the further divergence there is from the judicial paradigm[20]. The content of the test for the decision in question may be different[21].

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17 (2000) 205 CLR 337 at 345 [8].

18 (2001) 205 CLR 507 at 563 [183].

19 (2000) 205 CLR 337 at 343-344 [4].

20 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 563 [181].

21 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 460 [70]; [2002] HCA 51.

23 How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised[22]. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made[23] as well as to have knowledge of the circumstances leading to the decision[24].

24 The two cases referred to in the Courts below, *Jia Legeng* and *McGovern*, furnish examples of how the above-mentioned factors assume relevance to the question of what a fair-minded observer may reasonably expect as to the level, or standard, of impartiality which should be brought to decision-making by certain non-judicial decision-makers. Whether those factors assume particular relevance to a case such as the present, where the essential question concerns incompatibility of roles, or a conflict of interest, is another question.

25 In *Jia Legeng*, the context for the Minister's decision was a statute providing a particular power in the exercise of which it was necessary to consider the national interest. The decision had a political quality and rendered the Minister subject to a particular kind of accountability unlike that to which a judge would be subjected. It was observed that a person in the position of the Minister may not be as constrained in the wide range of factors to be taken into account and in receiving opinions from a number of sources[25]. It would be artificial, in a decision-making process of this kind, to require the Minister to exercise his power so as to avoid acting in a way that would, in the case of a judge, create the appearance of bias[26]. The same level of evident neutrality as applies to a judge could not be required of a person in the Minister's position.

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22 *Kioa v West* (1985) 159 CLR 550 at 612; [1985] HCA 81.

23 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 459 [68].

24 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519.

25 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 562 [179], 565 [187] per Hayne J.

26 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 540 [104].

26 In *McGovern*, a local council approved an application for consent to further develop a residential property, over the objections of the applicant's neighbours. Prior to voting on the matter, two councillors had come to the view that the application should be approved and they had expressed their view in strong terms on more than one occasion.

27 It was considered by Spigelman CJ in *McGovern*[27] to be of particular significance that the relevant statutory power was vested in a democratically elected council exercising a discretionary power expressed in broad terms to which multiple considerations applied and in respect of which there might be a range of permissible opinion. At a practical level, it is also to be expected that a person in the position of a councillor will form opinions before voting and may express them. As was observed[28] in *Jia Legeng*, it would be unrealistic to expect a political decision-maker to modify his or her behaviour in order to conform to higher standards inappropriate to his or her office. It could not be suggested that a councillor who has expressed views to constituents with respect to a development application should disqualify himself or herself. It was in this context that Basten JA said, in the passage quoted by the primary judge in this case and set out above, that a fair-minded observer would expect little more of a councillor than an absence of personal interest and a willingness to give genuine and appropriate consideration to the application.

28 At issue in *Jia Legeng* and in *McGovern* was the possibility of bias in the nature of prejudgment on the part of the relevant decision-makers. Neither case had the feature concerning the decision-maker present in this case and they consequently did not address the question whether a person's involvement in the matter antecedent to the decision is incompatible with his or her participation in the decision.

The application of the principle in this case

29 The discretionary powers of the Council under the Act with respect to dogs are broad, consistently with their protective purpose. The question for the Council, and its delegates, in exercising the power under s 84P(e) involves the safety of the public. Matters relevant to the decision would include a dog's propensity for attacking dogs and persons and whether measures other than

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27 (2008) 72 NSWLR 504 at 508 [13].

28 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 539 [102].

destruction could be taken without exposing the public to an unacceptable risk of harm, for example whether the animal could be effectively restrained.

30 A decision under s 84P(e) affects the owner of the dog. Whether one describes an interest in a dog as a property right, or acknowledges the importance of a domestic pet to many people, the appellant is a person who may be affected by a decision which will require her interests to be subordinated to the public interest. It is therefore understandable that the Council has accepted throughout these proceedings that a decision under s 84P(e) requires compliance with the requirements of natural justice.

31 In its argument, the Council was concerned to make the point that it was not required to provide a hearing of the kind undertaken nor convene a panel to make the decision under s 84P(e). The point may be made in aid of the submission, reiterated at various points in the Council's argument, that the constitution of the Panel to hear the matter did not make the process quasi-judicial in nature. The process could therefore be distinguished from the processes undertaken in cases such as *Dickason* and *Stollery*. Describing a process as having, or not having, a quasi-judicial quality is rarely helpful[29]. In a case such as this it diverts attention from the real question, which is directed to the impartiality of the decision-maker, given her particular involvement in the matter.

32 It may be accepted that there is no statutory requirement for a hearing or for a panel in connection with a decision under s 84P(e). The Council or a delegate could themselves decide the matter, subject to the requirements of natural justice. However, it is not to be inferred from the fact that the Council could decide the matter for itself that the standard of neutrality referred to in *McGovern*, that of merely genuine and appropriate consideration, is relevant to, or determinative of, this case.

33 At issue in *McGovern* were allegations of prejudgment. The question raised concerning the impartiality of the two councillors was whether they could be expected to give genuine consideration to the application, given the opinions they had expressed. The concern as to the impartiality of Ms Hughes raises a different question. There is no issue before this Court concerning her possible prejudgment of the matter. The question here is whether it might reasonably be

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29 *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 419 per Gibbs J; [1977] HCA 26.

apprehended that a person in her position would have an interest in the decision which could affect her proper decision-making.

34 The interest which the appellant alleges existed in this case is akin to that which a person bringing charges, whether as a prosecutor or other accuser, might be expected to have in the outcome of the hearing of those charges. It is generally expected that a person in this position may have an interest which would conflict with the objectivity required of a person deciding the charges and any consequential matters, whether that person be a judge or a member of some other decision-making body. In *Dickason*[30], Isaacs J referred to cases of this kind as instances of "incompatibility".

35 The plaintiff in *Dickason* was a member of a friendly society regulated by statute. He was accused of insulting the District Chief Ranger of the society. It was held that the District Chief Ranger could not sit as part of the committee to hear the charges brought against the plaintiff. Isaacs J[31] said that, subject to a statute providing otherwise and the principle of necessity[32], "[i]f it is incompatible for the same man to be at once judge and occupy some other position which he really has in the case, then prima facie he must not act as a judge at all." O'Connor J[33] thought that it would be impossible not to reasonably suspect a man who is a prosecutor in a charge concerning himself of bias.

36 *Stollery* is a case not unlike *Dickason*. In *Stollery*, a greyhound owner was accused by the manager of an association which conducted dog racing of attempting to bribe the manager. The manager reported the incident in question to the Greyhound Racing Control Board, which then held an inquiry. The manager himself was a member of the Board. Although he took no part in the deliberations, he remained present in the room whilst they were taking place. The decision of the Board was quashed by this Court.

37 In *Stollery*, Menzies J referred[34] to a long line of authority which establishes that a tribunal decision will be invalidated if "there is present some

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30 (1910) 10 CLR 243 at 259.

31 *Dickason v Edwards* (1910) 10 CLR 243 at 259.

32 Recognised in *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HLC 759 [10 ER 301].

33 *Dickason v Edwards* (1910) 10 CLR 243 at 257.

34 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 520.

person who, in fairness, ought not to be there". In the view of Barwick CJ[35], the manager was personally involved as he was in the position of an accuser. Gibbs J took a similar view[36]. It was contrary to the rules of natural justice, his Honour held[37], for an accuser to be present as a member of a tribunal hearing the charge he promoted. Their Honours held that the manager's mere presence was sufficient to invalidate the decision, either because he was an influential person[38] or because his presence might inhibit and affect the deliberations of others[39].

38 The joint reasons in *Ebner*[40] gave as an example of the prohibition on a judicial officer hearing a case the circumstance where that person is a member of a body which instituted the prosecution. In doing so, the reasons also referred to authority, including *Dickason*, which suggests that the application of the prohibition was not considered to be limited only to judicial officers.

39 Ms Hughes' position with respect to the charges in the Magistrates' Court is analogous to the positions of the moving parties in *Dickason* and *Stollery*. It can scarcely be doubted that she had a similar interest in the outcome of the charges. However, neither of those cases addressed the issue behind the question which arises here, on the Council's case, as to whether it could reasonably be apprehended that Ms Hughes also maintained an interest in the outcome of the decision under s 84P(e).

40 The Council places considerable reliance upon the fact that the decision-making process took place in two stages. The charges were heard, and pleas taken, in the Magistrates' Court. The Council, through the Panel, dealt with the subsequent but separate issue as to the fate of the dog. Ms Hughes' interest, if any, as a prosecutor, on the Council's argument, ended when the proceedings in the Magistrates' Court came to an end.

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35 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 516.

36 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 527.

37 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 526-527.

38 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 517 per Barwick CJ.

39 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 527 per Gibbs J.

40 (2000) 205 CLR 337 at 358 [59]-[61].

41 It is true that the question for the Panel was different from that with which the Magistrates' Court was concerned, in the same way that a penalty proceeding may be regarded as different from that concerning the underlying offence. It may be accepted that different questions are raised in penalty proceedings. In the present case the questions for the Panel would include matters directed to the future, such as the dog's propensity to attack and the safety of the public. However, it is also to be expected that much of the evidence relating to the past offence will also be relevant to penalty and this was the case here. This explains why the briefs of evidence from the Magistrates' Court proceedings and Ms Hughes' notes of those proceedings were provided to the other Panel members.

42 It is not realistic to view Ms Hughes' interest in the matter as coming to an end when the proceedings in the Magistrates' Court were completed. A line cannot be drawn at that point of her involvement so as to quarantine the Magistrates' Court proceedings from her actions as a member of the Panel. It is reasonably to be expected that her involvement in the prosecution of the charges created an interest in the final outcome of the matter. Ms Hughes' continuing interest in the matter may be tested by asking whether, if the Magistrates' Court had been asked to make an order for destruction, as could have been done following conviction, it might reasonably be apprehended that she would remain interested in whether the Magistrates' Court granted the order. The answer must clearly be "Yes".

43 In any event, it is not accurate to describe Ms Hughes as a person who in fact had no ongoing involvement in advancing the matter after the Magistrates' Court proceedings. Having participated in obtaining the conviction for the offence under s 29(4), she organised the Panel hearing and drafted the letter advising the appellant of it. She supplied the Panel with evidence, including further evidence she had obtained as relevant to the future housing of the dog. If Ms Hughes could not actually be described as a prosecutor with respect to the decision under s 84P(e), she was certainly the moving force.

44 That leaves for consideration the opinion of the Court of Appeal that the disqualifying interests in *Dickason* and *Stollery* were of a kind particularly personal to the persons in question and that such an element is absent in the case of Ms Hughes.

45 It is true that Ms Hughes' role in this matter did not involve her at quite the same personal level as the manager in *Stollery*, who was subjected to, and affronted by, the alleged bribe; nor was she the target of abuse as in *Dickason*, which was directed to the District Chief Ranger. It may be accepted that these factors added another dimension to the level of involvement of those persons. It

cannot, however, be said that this dimension accounted for the disqualification in those cases. The interest identified in *Dickason* and *Stollery* as necessitating disqualification was that of a prosecutor, accuser or other moving party. An interest of that kind points to the possibility of a deviation from the true course of decision-making.

46 A "personal interest" in this context is not the kind of interest by which a person will receive some material or other benefit. In the case of a prosecutor or other moving party it refers to a view which they may have of the matter, and which is in that sense personal to them. The interest of a prosecutor may be in the vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment. It is not necessary to analyse the psychological processes to which a person in such a position is subject. It is well accepted, as the two cases referred to show, that it might reasonably be thought that the person's involvement in the capacity of prosecutor will not enable them to bring the requisite impartiality to decision-making. This is not to equate such a person with a judge.

47 In that part of the joint reasons in *Ebner* which deals with the incompatibility of the interest of a prosecutor and judge, it is said that cases of incompatibility might have a special significance, and might operate independently of problems relating to apprehension of bias[41]. It may be inferred that their Honours were distinguishing cases of incompatibility from those where pecuniary interests are in question, because in the latter, difficult questions may sometimes arise as to whether the second step of the two-stage test in *Ebner* is satisfied. In cases of incompatibility, disqualification would seem to be the only possible outcome, because the second step will necessarily be satisfied.

48 The Council submitted that the Court should not apply an automatic disqualification if it found that Ms Hughes' involvement gave her a relevant interest, and that the test in *Ebner* should be applied. It submitted that the test could not be met because (i) even if Ms Hughes had an interest, the primary judge had found as a fact that she did no more than diligently carry out her responsibility; and (ii) the decision was not made by her, but by her superior, Mr Kourambas. The first of these submissions might be relevant to an allegation of actual bias, but provides no answer to one of apprehended bias based on an interest in the decision. The second is relevant to the proposed notice of contention. For the reasons given in *Dickason* and *Stollery*, the participation of

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41 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 358 [59].

others does not overcome the apprehension that Ms Hughes' interest in the outcome might affect not only her decision-making, but that of others. The Court of Appeal was correct to approach the question on the basis that she played a material part in the decision. That is so even if Mr Kourambas was responsible as delegate for the decision.

49 The majority reasons in *Ebner* should not be understood to exclude cases of the kind here in question from the application of the principle by the test there stated. The test directs attention, as a first step in cases where apprehended bias is alleged, to the critical question of the decision-maker's interest. The difference in the application of the test is that in cases like the present one that concern incompatibility of roles, once the interest is identified as one which points to a conflict of interest, the connection between that interest and the possibility of deviation from proper decision-making is obvious.

Conclusion and order

50 A fair-minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision under s 84P(e). This conclusion implies nothing about how Ms Hughes in fact approached the matter. It does not imply that she acted otherwise than diligently, and in accordance with her duties, as the primary judge found[42], or that she was not in fact impartial. Natural justice required, however, that she not participate in the decision and because that occurred, the decision must be quashed.

51 Leave to file the notice of contention should be refused. The appeal should be allowed with costs and the orders of the Court of Appeal set aside. In lieu thereof the orders of the Court of Appeal should read: appeal allowed with costs, the decision of the primary judge be set aside, the decision of the Council notified to the appellant by letter dated 15 October 2013 be quashed and there be an order for costs in favour of the appellant of the proceedings before the primary judge.

52 The appellant does not suggest that the injunctions sought against the Council in the notice of appeal are necessary.

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42 *Isbester v Knox City Council* [2014] VSC 286 at [115].

53 GAGELER J. The *Domestic Animals Act* 1994 (Vic) ("the Act") allows a municipal council to appoint an employee to be an "authorised officer"[43]. The resultant powers of the employee include to charge the owner of a dog with an offence relating to a dog attack under s 29 of the Act[44] and to seize the dog if the owner is found by a court to be guilty of that offence[45]. If the owner is found by a court to be guilty of an offence under s 29 of the Act and if the dog is then seized, the municipal council itself has power under s 84P(e) of the Act to order that the dog be destroyed. The municipal council can delegate that power to an employee under the *Local Government Act* 1989 (Vic)[46].

54 There is no dispute that the power conferred by s 84P(e) of the Act is impliedly conditioned by the requirement that it can only be exercised as the result of a process which affords procedural fairness to the owner of the dog[47]. There is also no dispute that the standard incidents of procedural fairness are not displaced by the scheme of the Act.

55 The standard incidents of procedural fairness, as it ordinarily conditions the exercise of a statutory power, include "the absence of the actuality or the appearance of disqualifying bias" in addition to "the according of an appropriate opportunity of being heard"[48]. The content of each of those incidents of procedural fairness accommodates to the particular statutory framework as well as to the particular factual context of a particular exercise of the power.

56 The issue in this appeal relates to the content and application of the requirement of the absence of the appearance of disqualifying bias in the exercise of power under s 84P(e) of the Act.

57 The test for the appearance of disqualifying bias in an administrative context has often been stated in terms drawn from the test for apprehended bias in a curial context. The test, as so stated, is whether a hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the administrator might not bring an impartial mind to

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43 Section 72.

44 Section 92(b).

45 Section 81(2)(a).

46 Section 98.

47 *Gubbins v Wyndham City Council* (2004) 9 VR 620.

48 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367; [1990] HCA 33.

the resolution of the question to be decided[49]. Such statements of the test have nevertheless been accompanied by acknowledgement that the application of this requirement of procedural fairness "must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making"[50].

58 To accommodate to a multi-stage decision-making process, or a multi-member decision-making body, the test for the appearance of disqualifying bias in an administrative context might sometimes more usefully be stated in a form which focuses on the overall integrity of the decision-making process. The test in that alternative form might be stated as whether a hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the question to be decided might not be resolved as the result of a neutral evaluation of the merits. Neutrality in the evaluation of the merits cannot for the purpose of that or any other test be reduced to a monolithic standard; it necessarily refers to the "kind or degree of neutrality" that the hypothetical fair-minded observer would expect in the making of the particular decision within the particular statutory framework[51]. What must ultimately be involved is "an assessment (through the construct of the fair-minded observer) of the behaviour of a person or persons in a position to exercise power over another, and whether that other person was treated in a way that gave rise to the appearance of unfairness being present in the exercise of state power"[52].

59 Whether or not it might be useful to state the test in that alternative form, the test for the appearance of disqualifying bias in an administrative context is to be understood to mirror the test for apprehended bias in the curial context in two important respects. The first is that it is an "objective test of possibility, as distinct from probability"[53]. The second is that its application necessarily

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49 *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 989-990 [27]-[30]; 179 ALR 425 at 434-435; [2001] HCA 28; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at 507 [2], 516-517 [71]-[72], 553 [234].

50 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 538 [99]; [2001] HCA 17, citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343-344 [4]; [2000] HCA 63. See also *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at 507-508 [6]-[13].

51 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 564-565 [187], 566 [192]; see also at 538 [100].

52 *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [3].

53 *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 990 [28]; 179 ALR 425 at 435.

involves three analytical steps. Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way[54].

60 Where the factor identified at the first analytical step concerns one person who is a participant in a multi-stage decision-making process or in a multi-member decision-making body, the second analytical step can be seen to divide into two elements: articulation of how the identified factor might affect that person individually, and articulation of how that effect on that person individually might in turn affect the ultimate resolution of the question within the overall process of decision-making. It has accordingly been emphasised that, if an appearance of disqualifying bias is hypothesised to have resulted from conduct or circumstances of a person who is not the ultimate decision-maker, "then the part played by that other person in relation to the decision will be important"[55].

61 How a person who is individually affected might in turn affect the ultimate resolution of a question required to be resolved as the result of a neutral evaluation of the merits, however, remains always to be determined by reference to the objective possibilities which arise from the externally manifested facts. Although it necessarily involves a consideration of the significance of the role played by the person in the decision-making process, it necessarily involves no inquiry into the actual state of mind of that person or of any other person involved in the decision-making process. The touchstone throughout the relevant inquiry remains the appearance rather than the actuality of bias.

62 That last point is well enough illustrated by an English case[56], to which Barwick CJ drew attention in *Stollery v Greyhound Racing Control Board*[57]. There, a person who was a member of a firm of solicitors engaged by a party to a civil action relating to a motor vehicle collision also acted as a clerk to justices who convicted the other party in a criminal proceeding relating to the same collision. The conviction was set aside in circumstances where it was accepted that the person "retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him",

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54 Cf *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8].

55 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 448 [22]; [2002] HCA 51.

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

57 (1972) 128 CLR 509 at 518-519; [1972] HCA 53.

notwithstanding that it was also accepted that "the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way"[58].

63 There has been said to be a "general rule which is strictly applied that the same person cannot be accuser and judge … where … the principles of natural justice are required to be observed"[59]. The rule is best understood, at least in an administrative context, not as a free-standing rule of law but instead as referring to a factor the identification of which will almost inevitably give rise to a clear-cut application of the ordinary test for the appearance of disqualifying bias. Rarely could a fair-minded observer not think it appropriate to say of a person: "[i]f he is an accuser he must not be a judge"[60]. That is because a person who has been the adversary of another person in the same or related proceedings can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the exercise of that degree of neutrality required dispassionately to weigh legal, factual and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person.

64 The underlying concern was spelt out in the report which led in the United States to the introduction of the *Administrative Procedure Act* 1946 (US), which contains an express statement of a general proscriptive rule that no employee "engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision [or] recommended decision" of an agency undertaking an adjudication "except as witness or counsel in public proceedings"[61]. The report explained[62]:

> "Two characteristic tasks of a prosecutor are those of investigation and advocacy. It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision.

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58 [1924] 1 KB 256 at 258-259.

59 *Australian Workers' Union v Bowen [No 2]* (1948) 77 CLR 601 at 616; [1948] HCA 35.

60 *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366 at 384.

61 Section 5(c) of the *Administrative Procedure Act* 1946 (US) (as passed).

62 Attorney General's Committee on Administrative Procedure, *Final Report of Attorney General's Committee on Administrative Procedure*, (1941) at 56.

> This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. In addition, an investigator's function may in part be that of a detective, whose purpose is to ferret out and establish a case. Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding. For this same reason, the advocate – the agency's attorney who upheld a definite position adverse to the private parties at the hearing – cannot be permitted to participate after the hearing in the making of the decision. A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide."

65 Of course, if a person who has once been an accuser is not the ultimate decision-maker, examination of the role of the person in relation to the decision will remain important. But it will ordinarily be sufficient to support the reasonableness of an apprehension that the resultant decision might not have been reached as a result of a neutral evaluation of the merits that the person participated in, or even that the person was present during, the substantive deliberations which resulted either in the decision[63] or in the making of a recommendation that the decision be made[64].

66 The facts here are fully explained in the joint reasons for judgment. The most critical of them are these. Ms Hughes was the employee of Knox City Council who, as authorised officer, charged Ms Isbester with an offence under s 29 of the Act relating to an attack by her dog. Ms Hughes was later a member with Mr Kourambas of a three-member Panel which deliberated and recommended to Mr Kourambas that he make the order that the dog be destroyed. Mr Kourambas was the employee of the Council who, as delegate of the Council, then made the decision to order under s 84P(e) of the Act that the dog be destroyed.

67 It is important to recognise that nothing in the Act compelled the decision-making structure in fact adopted by the Council for the purpose of s 84P(e). It is also important to note the absence of any suggestion that the participation of

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63 *Dickason v Edwards* (1910) 10 CLR 243 at 252-253, 256-257, 259, 262; [1910] HCA 7; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519-520, 525, 527.

64 *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 507.

Ms Hughes was a practical necessity. The Council did not need to establish the Panel. The Council having established the Panel, Ms Hughes did not need to be a member.

68 Ms Hughes might have developed, as Ms Isbester's prosecutor, a frame of mind incompatible with the dispassionate evaluation of whether administrative action should be taken against Ms Isbester's interests in light of Ms Isbester's conviction. Ms Hughes' frame of mind might have affected the views she expressed as a member of the Panel, and the expression of those views might have influenced not only the recommendation made by the Panel, which included Mr Kourambas, but also the acceptance of that recommendation by Mr Kourambas in his capacity as delegate of the Council. Those are all possibilities which fairly arise from the established facts. There is nothing fanciful or extravagant about them. A hypothetical fair-minded observer with knowledge of all of the circumstances would be quite reasonable to apprehend them.

69 In particular, the reasonableness of the apprehension of those possibilities is not negatived by the circumstances: that Ms Hughes acted throughout in her professional capacity as a Council employee; that Ms Isbester pleaded guilty to the offence and that her conviction was on the basis of agreed facts; that the question for decision by the Council under s 84P(e) of the Act arose subsequently to and was different from the question for decision by the Magistrates' Court under s 29 of the Act; and that the evidence as to the course of the Panel hearing did not demonstrate that Ms Hughes took the position of an accuser in that hearing[65].

70 Contrary to the decision of the Court of Appeal, the proper conclusion is therefore that the involvement of Ms Hughes in the deliberative process resulted in a breach of the implied condition of procedural fairness so as to take the decision of Mr Kourambas beyond the power conferred by s 84P(e) of the Act. Although I would grant leave to the Council to file its notice of contention, I would reject the contention that the decision of the Court of Appeal should be affirmed on the ground that a fair-minded observer would not reasonably apprehend bias on the part of Mr Kourambas.

71 I agree with the plurality that the appeal to this Court should be allowed, that the orders of the Court of Appeal and of the primary judge should be set aside, and that the purported legal effect of the decision made in fact by Mr Kourambas should be quashed by an order in the nature of certiorari.

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65 *Isbester v Knox City Council* [2014] VSCA 214 at [70]-[75].