HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND GLEESON JJ

G CHARISTEAS APPELLANT

AND

Z V CHARISTEAS & ORS RESPONDENTS

Charisteas v Charisteas
[2021] HCA 29
Date of Hearing: 3 September 2021
Date of Judgment: 6 October 2021
P6/2021

ORDER

1. *The first respondent's application for an extension of time to file a notice of contention be refused.*

2. *The appeal be allowed with the first respondent to pay the costs of the appeal.*

3. *The orders of the Full Court of the Family Court of Australia made on 10 July 2020 be set aside and, in their place, there be orders that:*

   (a) *the husband's appeal be allowed with the wife to pay the costs of the appeal, including any costs of the wife's cross-appeal;*

   (b) *the orders made by Walters J on 10 February 2015 and 12 February 2018 be set aside; and*

   (c) *the application for orders pursuant to s 79 of the* Family Law Act 1975 *(Cth) further or in addition to paragraphs 1, 5-13 and 15 of the orders made by Crisford J on 9 December 2011 be remitted to the Family Court of Western Australia for rehearing.*

On appeal from the Family Court of Australia

Representation

S Penglis SC and F A Robertson for the appellant (instructed by DS Family Law)

P J Ward with A L Spencer for the first respondent (instructed by Williams + Hughes)

Fourth respondent (limited to written submissions)

No appearance for the second, third and fifth to eighth respondents

CATCHWORDS

Charisteas v Charisteas

Family law – Property settlements – Apprehended bias – Where husband and wife separated – Where husband commenced proceedings in Family Court of Western Australia seeking orders for settlement of property – Where Family Court made orders for settlement of property – Where orders provided for early vesting of trust and distribution of trust fund and income – Where early vesting orders set aside on appeal but not remitted for redetermination – Where different judge of Family Court ("trial judge") made new and inconsistent orders for settlement of property – Where wife's barrister engaged in private communication with trial judge, including while case underway and while judgment reserved, without previous knowledge and consent of other parties – Where wife's barrister said communications did not concern substance of case – Whether fair-minded lay observer might reasonably apprehend that trial judge might not bring impartial mind to decision – Whether Family Court retained power to make orders for settlement of property subject of early vesting orders.

Words and phrases – "apprehended bias", "bias", "disclosure", "fair-minded lay observer", "final orders", "hypothetical observer", "independence and impartiality", "informed consent", "judicial practice", "private communications", "professional conduct", "property settlement", "public confidence in the judicial system", "reasonable apprehension of bias".

Family Law Act 1975 (Cth), ss 79, 79A.

1 KIEFEL CJ, GAGELER, KEANE, GORDON AND GLEESON JJ. The appellant ("the husband") and the first respondent ("the wife") married in 1979 and separated in 2005. In 2006, the husband commenced proceedings under s 79 of the *Family Law Act 1975* (Cth) ("the Act") for orders settling the property of the parties to the marriage. The ensuing and still unfinished litigation was aptly described by the trial judge as "long-running" and "staggeringly expensive". There has been a litany of applications, hearings, orders and appeals. For present purposes, it is necessary to refer to only some of this unfortunately long and tortured history.

2 In 2011, Crisford J of the Family Court of Western Australia made property settlement orders under s 79 of the Act ("the 2011 Property Orders"). The orders divided the net assets of the parties (excluding superannuation) between the wife (as to 38%) and the husband (as to 62%) and specifically addressed, among other things, the sale of the former matrimonial home and disbursement of the sale proceeds, the transfer of shares and the splitting of superannuation. Paragraphs 2 to 4 of the 2011 Property Orders provided for the early vesting of an identified trust ("the Trust"); upon vesting, for the distribution of the trust fund and income in accordance with the trust deed between the husband, the wife and their three adult children; and, before such distribution, for a payment of $338,000 to the husband's mother, who was a general beneficiary of the Trust ("the Early Vesting Orders").

3 In April 2013, the Full Court of the Family Court of Australia set aside the Early Vesting Orders on the basis that the husband's mother had been denied procedural fairness. The Full Court did not make any consequential orders whether remitting that issue for rehearing or otherwise. The parties could not agree on what was then to happen. In February 2015, Walters J of the Family Court of Western Australia ("the trial judge") published a lengthy interlocutory judgment in which his Honour held that the 2011 Property Orders were not final orders and that the Court retained power to make property settlement orders under s 79 of the Act.

4 Over a year later, in March 2016, the trial judge listed the trial of what property settlement orders should in fact be made to be heard before his Honour starting on 3 August 2016. The trial commenced on that date. Evidence was led from 3 August to 17 August. The trial was then adjourned to 13 September 2016 for the parties to make oral submissions and "to be heard in relation to the making of interim or interlocutory orders pending the delivery of [final] judgment" as "[a]ll parties accepted that it would be likely to take up to 12 months for the judgment to be delivered". Written submissions were filed by the adult children of

the husband and wife, as well as "the Additional Parties"[1], on 24 August, by the husband on 31 August and by the wife on 7 September.

5 On 9 September 2016, the Additional Parties applied for the trial judge to recuse himself on the ground of apprehended bias, relying on ten statements and rulings made by the judge during the trial ("the First Recusal Application"). The application was supported by the husband. The wife and adult children opposed the application. The First Recusal Application was heard and dismissed by the trial judge on 13 September. His Honour delivered ex tempore reasons. Approximately two months later, the trial judge published written reasons for dismissing the First Recusal Application. An appeal by the corporate trustee and the husband's mother against the dismissal of the First Recusal Application, supported by the husband, was dismissed by the Full Court of the Family Court of Australia.

6 On 12 February 2018, the trial judge delivered judgment and, among other things, purported to make orders under s 79 of the Act ("the 2018 Property Orders"). Those orders did not set aside or vary the 2011 Property Orders but were inconsistent with them. Three days later, the trial judge retired. On 12 March 2018, the husband appealed to the Full Court of the Family Court of Australia against the 2018 Property Orders.

7 On 8 May 2018, the husband's solicitor wrote to the barrister who had appeared for the wife before the trial judge raising with her "gossip" that while the trial judge was seised of the Charisteas matter, the barrister and the judge had engaged outside of court in a manner inconsistent with her obligations and those of the judge. The letter asked the barrister to provide written assurance that "during the time the former Judge was seised of the [Charisteas] matter, [she] had no contact with him outside of court"; and if she could not provide that assurance, she was asked to "outline the circumstances of [her] dealings with him".

8 Two weeks later, the barrister responded stating that she had met with the judge for a drink or coffee on approximately four occasions between 22 March 2016 and 12 February 2018; had spoken with the judge by telephone on five occasions between January 2017 and August 2017; had exchanged "numerous" text messages with the judge between 20 June 2016 and 15 September 2017 (except for a brief hiatus during the evidence stage of the trial); and had exchanged "occasional" text messages with the judge from 15 September 2017 until

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1 Namely, the corporate trustee of the Trust, a director of the corporate trustee, the executors of the estate of the husband's father, and the husband's mother.

12 February 2018. The barrister concluded by stating that the "communications" with the trial judge did not concern "the substance of the ... case". The husband filed an amended notice of appeal adding grounds alleging apprehension of bias.

9 On appeal to the Full Court there were two relevant issues. The first was whether the 2018 Property Orders should be set aside on the ground of a reasonable apprehension of bias arising from the trial judge's private communications with the wife's barrister. There was no suggestion of actual bias. The second was whether the power under s 79 of the Act was capable of being exercised by the trial judge when Crisford J had already made the 2011 Property Orders. By majority (Strickland and Ryan JJ, Alstergren CJ dissenting), the Full Court dismissed the appeal. Strickland and Ryan JJ rejected the allegations of apprehended bias and dismissed the appeal against the 2018 Property Orders. Alstergren CJ would have allowed the appeal on the ground of apprehended bias and remitted the matter for rehearing. His Honour did not address s 79 of the Act.

10 The husband's appeal to this Court raised the same issues. It is appropriate to deal first with the appeal ground raising apprehended bias, as it "strike[s] at the validity and acceptability of the trial and its outcome"[2]. As will be explained, the Full Court should have allowed the appeal on that basis and remitted the matter for retrial. It remains necessary, however, to address the appeal grounds concerning ss 79 and 79A of the Act, as those sections affect what issues arise in the retrial.

Apprehended bias

11 Where, as here, a question arises as to the independence or impartiality of a judge, the applicable principles are well established[3], and they were not in dispute.

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2 *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 611 [117]; see also 581-582 [3]. See also *Webb v The Queen* (1994) 181 CLR 41 at 86; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [7]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 97-98 [54]-[55].

3 *Ebner* (2000) 205 CLR 337 at 344-345 [6]-[8]; *Concrete* (2006) 229 CLR 577 at 581-582 [3], 609 [110]; *Smits v Roach* (2006) 227 CLR 423 at 443-444 [53]; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 437 [31]; *Isbester*

The apprehension of bias principle is 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"[4]. The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal[5]. Its application requires two steps: first, "it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits"; and, second, there must be articulated a "logical connection" between that matter and the feared departure from the judge deciding the case on its merits[6]. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed[7].

12 As five judges of this Court said in *Johnson v Johnson*[8], while the fair-minded lay observer "is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice".

13 Ordinary judicial practice, or what might be described in this context as the most basic of judicial practice, was relevantly and clearly stated by Gibbs CJ and

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v Knox City Council (2015) 255 CLR 135 at 146 [21]; *CNY17* (2019) 268 CLR 76 at 88 [21], 98-99 [57].

4 *Ebner* (2000) 205 CLR 337 at 344 [6]; *Concrete* (2006) 229 CLR 577 at 609 [110].

5 *Ebner* (2000) 205 CLR 337 at 343 [3], 344-345 [6]-[7], 348 [22]-[23], 362 [79]; *Concrete* (2006) 229 CLR 577 at 609-610 [110]-[111].

6 *Ebner* (2000) 205 CLR 337 at 345 [8]; see also 350 [30].

7 *Ebner* (2000) 205 CLR 337 at 345 [8], 350 [30]; *Concrete* (2006) 229 CLR 577 at 609-610 [110]-[111]; *CNY17* (2019) 268 CLR 76 at 88 [21], 98-99 [57].

8 (2000) 201 CLR 488 at 493 [13] (footnote omitted), quoted in *Concrete* (2006) 229 CLR 577 at 609-610 [111]. See also *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 378-381.

Mason J in *Re JRL; Ex parte CJL*[9] in 1986 by adopting what was said by McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone*[10] in 1972:

> "The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."

14 In this matter, what is said might have led the trial judge to decide the case other than on its legal and factual merits was identified. It comprised the various communications between the trial judge and the wife's barrister "otherwise than in the presence of or with the previous knowledge and consent of"[11] the other parties to the litigation. Indeed, given the timing and frequency of the communications between the trial judge and the wife's barrister, it cannot be imagined that the other parties to the litigation would have given informed consent to the communications even if consent had been sought, and it was not. The communications should not have taken place. There were no exceptional circumstances.

15 A fair-minded lay observer, understanding that ordinary and most basic of judicial practice, would reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of the questions his Honour was required to decide. The trial judge's impartiality might have been compromised by something said in the course of the communications with the wife's barrister, or by some aspect of the personal relationship exemplified by the communications.

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9 (1986) 161 CLR 342 at 346, 350-351.

10 [1973] VR 122 at 127. Now reflected in Australasian Institute of Judicial Administration Inc, *Guide to Judicial Conduct*, 3rd ed (2017) at 19-20 [4.3].

11 cf *Magistrates' Court at Lilydale* [1973] VR 122 at 127.

Accordingly, there is a logical and direct connection between the communications and the feared departure from the trial judge deciding the case on its merits.

16 In their reasons the majority in the Full Court recognised the principle of judicial practice. Their Honours accepted that once a trial has commenced, private communication between a judge and counsel for one of the parties, without the knowledge and consent of the other parties, is so obvious a departure from the norms of judicial and professional conduct that it will usually be sufficient to establish the first limb in *Ebner v Official Trustee in Bankruptcy*[12]. Nothing that was said in the passage in *Magistrates' Court at Lilydale*[13] extracted above, in guidelines[14] or in a leading text on judicial ethics[15] limits the period necessary to avoid communication to after the commencement of the trial. In any event, whilst communication here was halted while evidence was taken, it was resumed before final submissions and continued over the lengthy period of 17 months when the written reasons for the judgment on the question of recusal and the judgment on the settlement of property were reserved.

17 Focusing on this latter period, the majority in the Full Court reasoned that the trial judge and the wife's barrister were aware of some of their obligations, by not communicating during the course of the trial, and the trial judge may be taken to have failed to appreciate that the same strictness applied at other times. According to the majority, the hypothetical observer would understand that the trial judge mistakenly held such a view but would not consider his lack of disclosure to be sinister.

18 This reasoning is erroneous. The apprehension of bias principle is so important to perceptions of independence and impartiality "that even the *appearance* of departure from it is prohibited lest the integrity of the judicial system be undermined" (emphasis added)[16]. No prediction by the court is involved

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12 (2000) 205 CLR 337.

13 [1973] VR 122 at 127.

14 Australasian Institute of Judicial Administration Inc, *Guide to Judicial Conduct*, 3rd ed (2017) at 34 [6.11.1].

15 Thomas, *Judicial Ethics in Australia*, 3rd ed (2009) at 65 [4.65].

16 *Ebner* (2000) 205 CLR 337 at 345 [7].

in deciding whether a judge might not bring an impartial mind to bear[17]. No question as to the understanding or motivation of the particular judge arises.

19 The lack of disclosure in this case is particularly troubling. It is difficult to comprehend how the trial judge could have failed to appreciate the need to disclose the communications, particularly when he was dealing with the application to recuse himself on other grounds. It may give the hypothetical observer reason to doubt the correctness of the claim by the wife's barrister that their communications did not concern "the substance" of the case, if the ambiguity inherent in that statement is not itself of sufficient concern.

20 The majority also reasoned that the second limb in *Ebner* was not made out by reference to what the fair-minded lay observer, properly informed as to the judiciary and the Bar, would think. The information included that barristers are professional members of an independent Bar who do not identify with the client; that judges are usually appointed from the senior ranks of the Bar; and that it may be expected they will have personal or professional associations with many counsel appearing before them[18]. Informed by such matters, the majority reasoned, the hypothetical observer would be "able to tolerate" some degree of private communication between a judge and the legal representative of only one party, even if undisclosed. The majority considered that the hypothetical observer would accept in this case that the judge and the wife's barrister would adhere to professional restraint in what was discussed and would accept that a professional judge who has taken an oath of office would not discuss the case at hand.

21 Once again, this reasoning is erroneous. The alignment of the fair-minded lay observer with the judiciary and the legal profession is inconsistent with the apprehension of bias principle and its operation and purpose. The hypothetical observer is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system[19]. The hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts. It would defy logic and render nugatory

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17 *Ebner* (2000) 205 CLR 337 at 345 [7]-[8].

18 Citing *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215 at 230. See also *Taylor v Lawrence* [2003] QB 528 at 554-555 [73].

19 *Johnson* (2000) 201 CLR 488 at 492-493 [12]; *Ebner* (2000) 205 CLR 337 at 359 [65], 363 [81], 364 [84], 375 [123].

the principle to imbue the hypothetical observer with professional self-appreciation of this kind.

22 It may be accepted that many judges and lawyers, barristers in particular, may have continuing professional and personal connections. The means by which their contact may be resumed is by a judge making orders and publishing reasons, thereby bringing the litigation to an end. It is obviously in everyone's interests, the litigants in particular, that this is done in a timely way.

23 The wife sought an extension of time to file a notice of contention contending that the husband had waived his right of complaint of apprehended bias. The communications between the trial judge and the wife's barrister should not have occurred and, in the absence of informed consent to all of the communications, there was no waiver. The application for an extension of time to file the notice of contention should be refused. The appeal should be allowed and the matter remitted for rehearing before a single judge of the Family Court of Western Australia.

24 What issues are to be determined on that rehearing depends upon the proper understanding and application of ss 79 and 79A of the Act.

Section 79

25 Section 79 of the Act confers power on a court exercising jurisdiction in proceedings by virtue of the Act[20] to make an order for the settlement of property. When an order is made under s 79, subject to the limited jurisdiction to vary it or set it aside given by s 79A of the Act, "the power of the ... Court to make an order under s 79 is treated as having been exercised and as exhausted"[21].

26 Crisford J set out her Honour's findings of the assets and liabilities of the parties to the marriage and the 2011 Property Orders dealt with all of that property. The s 79 power had been exercised and was exhausted. A Full Court of the Family Court set aside the Early Vesting Orders, which, as noted, were paras 2 to 4 of the 2011 Property Orders. It is important to understand what that Full Court did and did not do. When it set aside the Early Vesting Orders, the Full Court did not deal with the re-exercise of the s 79 power in relation to the Early Vesting Orders or

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20 Act, s 4(1) definition of "court".

21 *Mullane v Mullane* (1983) 158 CLR 436 at 440. See also *Clayton v Bant* (2020) 95 ALJR 34 at 41 [26]; 385 ALR 41 at 47.

remit that aspect for further hearing. But nor did the Full Court alter any other aspect of the 2011 Property Orders.

27 Given that there is to be a retrial, that remains the position. The 2011 Property Orders, without the Early Vesting Orders, have not been set aside. Contrary to the view reached by the Full Court that set aside the Early Vesting Orders, the power under s 79 of the Act to deal with the property the subject of the Early Vesting Orders is not spent. The Family Court of Western Australia retains the power under s 79 to make orders that, in all the circumstances, it is satisfied are just and equitable, in relation to the property the subject of the Early Vesting Orders. If orders were to be made in the same form as the Early Vesting Orders, the 2011 Property Orders would stand unaffected. By contrast, if some different order were to be made with respect to the early vesting and distribution of the Trust, there may be a question about whether a party can show that powers can and should be exercised under s 79A.

28 The Family Court of Western Australia should list the matter for rehearing to address the Early Vesting Orders. The parties to the litigation, as well as that Court, must take steps to ensure that this litigation is brought to an end without further delay.

Conclusion and orders

29 For those reasons, the following orders should be made:

1. The first respondent's application for an extension of time to file a notice of contention be refused.

2. The appeal be allowed with the first respondent to pay the costs of the appeal.

3. The orders of the Full Court of the Family Court of Australia made on 10 July 2020 be set aside and, in their place, there be orders that:

    (a) the husband's appeal be allowed with the wife to pay the costs of the appeal, including any costs of the wife's cross-appeal;

    (b) the orders made by Walters J on 10 February 2015 and 12 February 2018 be set aside; and

    (c) the application for orders pursuant to s 79 of the *Family Law Act 1975* (Cth) further or in addition to paragraphs 1, 5-13 and 15 of the

orders made by Crisford J on 9 December 2011 be remitted to the Family Court of Western Australia for rehearing.