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IN THE MATTER OF AN APPLICATION FOR AN ORDER NISI FOR A WRIT OF PROHIBITION; EX PARTE KARTA PTY. LTD. AND OTHERS

5 AUGUST 1988

JUDGMENT

WILSON J.
(In Chambers)

IN THE MATTER OF AN APPLICATION FOR AN ORDER NISI FOR A WRIT OF PROHIBITION; EX PARTE KARTA PTY. LTD. AND OTHERS

This is an ex parte application for an order nisi for a writ of prohibition directed to Mr Justice Fisher sitting in Adelaide in the bankruptcy jurisdiction of the Federal Court of Australia.

The writ is sought to prohibit his Honour from hearing actions 910/39 of 1986 and 910/40 of 1986, to the extent that the actions are brought against the applicants. The ground of the application is that his Honour is disqualified from hearing the actions by reason of a reasonable suspicion that he has or may have prejudged adversely to the applicants factual issues and issues of credibility relevant to the actions. The applicants failed to persuade his Honour that he should disqualify himself. The hearing is scheduled to begin on Monday next, 8 August 1988, and the applicants seek an interim stay of the hearing to complement an order nisi.

Each action involves an application to the Federal Court by the Official Receiver relating to the bankrupt estate of Ross Daniel Hodby, a person who formerly carried on a business in Adelaide as a land and finance broker. Action 910/39 relates to a mortgage over land situated at Campbell

Park in South Australia owned by the first applicant, Karta Pty. Ltd. ("Karta"), the mortgagor. Barbara Joy Hunt and Sophia Karounos, the third and fourth applicants, are directors of Karta and Krakat Pty. Ltd. ("Krakat"), the second applicant, and are named in the mortgage as co-borrowers.

Action 910/40 relates to a mortgage over land situated at Moana in South Australia owned by Karta, the mortgagor. In this mortgage Karta and Krakat are named as joint borrowers.

The nature of the issues which will be litigated in the actions are described by the applicant Sophia Karounos in the affidavit sworn on behalf of all the applicants in support of the present application in the following terms:

> "Both the said actions require the Court to determine common matters of fact relating to the circumstances of the negotiation of the said Mortgages, of the execution of the said Mortgages, of settlement in respect of the loans referred to in the said Mortgages, and of the means by which the funds for the said loans were provided. It is accepted by all parties to the two said actions that the bankrupt was intimately involved in all these events. There is a dispute between the parties to the said actions whether advances of monies to the mortgagors was in the ordinary course of business so far as the mortgagors were concerned or whether they were parties who had knowledge of the defalcations by the bankrupt which led to the advance of the said monies. Karta, Krakat, Mrs Hunt and I deny any such knowledge."

It is the Official Receiver's contention that he is entitled to consolidate the Campbell Park mortgage and the Moana mortgage, notwithstanding that they were entered into at different times, by reason of the fact that, in securing the monies that were advanced, the applicants were in collusion with Hodby in circumstances which made him their agent. The right to consolidate depends upon a conclusion that in effect there were common mortgagees to both mortgages. This is the essential bone of contention between the parties.

The applicants assert that the appearance of prejudgment arises from a passage in a reserved judgment delivered by his Honour some sixteen months ago when dealing with an earlier application by the Official Receiver in connection with the same bankrupt estate. The matter is entitled re the Bankrupt Estate of Ross Daniel Hodby; ex parte G. Balletti & Sons & Ors. and Krakat, No. 910/11 ("Balletti"). The decision was delivered on 16 April 1987 and the material passage reads as follows:

> "There is no doubt that at the time the transaction which falls for consideration in this matter was undertaken, persons associated with Krakat were placing considerable pressure on the bankrupt who was in consequence incapable of acting as a free agent."

The transaction referred to concerned another mortgage in

respect of which Krakat was the mortgagor. The application with which his Honour was dealing involved a determination as to the person or persons entitled to a sum of $586,000 paid into court by Krakat to discharge the mortgage. The sole question in issue was whether the creditors of the bankrupt estate or the persons named as mortgagees were entitled to the money. Krakat made no claim to the sum mentioned and was not represented during the hearing. The evidence before the Court consisted primarily of affidavit evidence tendered on behalf of the Official Receiver. The bankrupt gave some oral evidence upon which he was cross-examined to a limited extent.

Counsel for the applicants draws attention to the prefatory phrase in the passage from his Honour's judgment that I have cited - "There is no doubt" - and argues that it clearly confers on the sentence the character of a considered opinion which can rightly be described as a "finding". He draws support for the submission in a remark made by his Honour on 8 October 1987 in the course of a discussion with counsel in a case where certain members of the `Karounos family were seeking their discharge from bankruptcy. Counsel for the Official Receiver had recalled the evidence of the bankrupt Hodby in the course of his public examination to the effect that certain monies were advanced to Krakat and Karta on mortgage under threat that

his (Hodby's) defalcations would be disclosed to his clients. Counsel for the Karounos family intimated that he would obviously be objecting to what was being put. His Honour then said:

> "Well, then I am just giving issue. What I am doing is giving you, if you wish, the opportunity to do so. The trouble is, of course, that I have been inextricably involved in all these goings on and will continue to be so for quite a time and we have got the Krakat matter which does relate to, I do not know which Karounos's, but the Karounos's and the mortgage that is prepared to be given for some odd amount under severe pressure. I think I have already made a finding about that."

I am satisfied that the statement made by his Honour in Bailetti touches on matters which could be most relevant to the present actions. If the parties maintain their respective positions it will be necessary for the trial judge to choose between the evidence of Hodby and that of the applicants and their witnesses. Credibility will be important. Counsel for the applicants asserts that there is ground for a reasonable apprehension that his Honour has already predetermined or prejudged that vital question adversely to his clients.

There is no doubt about the underlying principle to be applied in dealing with the present application. It is that a judge should not sit to hear a case if in all the

circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in the case: Reg. v. Watson; Ex parte Armstrong (1976) 136 C.L.R. 248; Livesey v. New South Wales Bar Association (1983) 151 C.L.R. 288.

I can understand that the applicants may feel such an apprehension but if that is so I cannot accept that it would be a reasonable apprehension. The true significance of the statement made by his Honour in Balletti is to be determined in its context. Viewed objectively, the relevant circumstances are the following:

1. His Honour has not heard any cross-examination of Hodby on the circumstances surrounding the execution of the mortgages in question.

2. He has never heard any evidence from the applicants on that question.

3. The questions that are central to the coming trials have never been in issue before his Honour either in Balletti or in any other proceeding.

4. The substance of his Honour's statement was derived primarily from an affidavit filed on behalf of the Official Receiver detailing passages from evidence

given by Hodby on his public examination. Hodby made a brief appearance in the witness box but he was not subjected to cross-examination by any person appearing in the interests of the applicants. Krakat was a party to the proceedings in Balletti but it chose not to be represented, because the issues that fell to be determined were not contested by it.

5. The statement appears in the earlier part of the judgment and formed part of the background provided by the information placed before his Honour without objection. It was not necessary for his Honour in dealing with the issues to make any finding as to the truth or otherwise of the statement. Admittedly the prefatory words, "There is no doubt", suggest a degree of conviction in his Honour's mind and I shall deal separately with these words shortly.

6. The reference to "severe pressure" and "a finding" by his Honour in the course of a discussion with counsel on another matter on 8 October 1987 is, in my view, of little significance. Indeed, counsel for the applicants frankly admitted as much. His Honour was obviously giving voice to some recollection in his mind without purporting to be precise.

In the end, it is the words "There is no doubt" which must bear the whole weight of the application. I find it difficult to understand why his Honour should have prefaced the statement in this way. Certainly, it was quite unnecessary. It did not matter for the purposes of his decision in Balletti whether there was no doubt or a lot of doubt about the material contained in the statement. The statement cannot properly be described as a "finding" notwithstanding his Honour's recollection expressed with some diffidence some six months later.

Nor do I think that the statement could reasonably be regarded as any kind of prejudgment of the issues in the coming trials. Clearly his Honour accepted, for the purposes of the matter then before him, the material which had been placed before him and which was not the subject of any contest in those proceedings. But no reasonable person would suspect or think it possible that a long and vigorously contested trial sixteen months later might be nothing more than an expensive charade because the trial judge was embarking on it with his mind already closed to, or weighted against, the case that was to be put for the applicants. In my view such a suspicion would be unreasonable, but I remind myself that a reasonable observer is not a judge but any member of the public including a party who is not unfamiliar with the proceedings and who is

capable of making a reasonable response to the circumstances. Even so, I am satisfied that it is not seriously arguable that an observer of the kind I have described would apprehend as a real possibility, on the basis of an inconsequential phrase used in a judgment on another matter some sixteen months earlier, that the judge might not bring an unprejudiced or impartial mind to bear on the issues upon the resolution of which the outcome of the coming trials will depend.

I am therefore obliged to refuse the application. As I have said, I can understand the apprehension to which the applicants have testified; I can only hope that the delivery of my reasons for refusing their application will assuage that apprehension.

This and the preceding eight pages constitute my reasons for judgment in In the Matter of an Application for an Order Nisi for a Writ of Prohibition; Ex Parte Karta Pty. Ltd. and Others.

IN THE HIGH COURT OF AUSTRALIA

IN THE MATTER OF AN APPLICATION
FOR AN ORDER NISI FOR A WRIT
OF PROHIBITION;
EX PARTE KARTA PTY LTD & OTHERS

REASONS FOR JUDGMENT

Judgment delivered at CANBERRA

on 5 AUGUST 1988

RM74/30574

IN THE HIGH COURT

OF AUSTRALIA

ADELAIDE OFFICE

OF THE REGISTRY

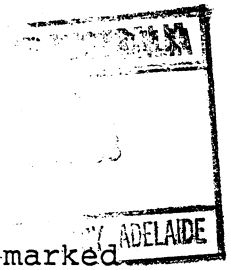
No. A26 of 1988

IN THE MATTER of an application for Writ of Prohibition directed to the Honourable Mr Justice Fisher a Judge of the Federal Court of Australia

Respondent

Ex Parte: KARTA PTY. LTD., KRAKAT PTY. LTD., BARBARA JOY HUNT and SOPHIA KAROUNOS

Applicants



This is the exhibit marked with the letter "G" referred to in the Affidavit of SOPHIA KAROUNOS
Sworn this 4TH day of AUGUST 1988
Before me:

I. C. ROBERTSON

A Commissioner for taking Affidavits in the Supreme Court of South Australia

PIPER ALDERMAN
Solicitors
167 Flinders Street
ADELAIDE SA 5000
Solicitors for the Applicants Karta Pty. Ltd. and Krakat Pty. Ltd.
IR/AS728055/AUG

ANDERSONS
Solicitors
41 Carrington Street
ADELAIDE SA 5000
Solicitors for the Applicants Barbara Joy Hunt and Sophia Karounos.

C A T C H W O R D S

BANKRUPTCY - Application made seeking order that Judge disqualify himself - whether statement made in reasons for judgment in separate matter arising from same bankruptcy indicated a reasonable likelihood of bias.

Re: THE BANKRUPT ESTATE OF ROSS DANIEL HODBY

B E T W E E N:

OFFICIAL RECEIVER for and on behalf of THE OFFICIAL TRUSTEE IN BANKRUPTCY

Applicant

- and -

KATHLEEN MAY SKERITT, KEVIN WILLIAM PENNY, PERCY DOUGLAS BINNING COLEMAN, DOROTHY KAYE JENKINSON, EILEEN HILDA ST CLARE HILL, ROBERT WILLIAM FARRANT, LEAH WELCH, OWEN DAVID ROBERTS, JANE BOOT, JEAN MARY SCHOMBURGK, DON RAYMOND MARSHMAN, MOLLY HAZEL MARSHMAN, ALFRED GEORGE MARCH, DULCIE IRENE GROSE, MORRIS LINDEN BARREY, FREDERICK WILL, ITALO GOSTI, CATHERINE GOSTI, HENDRICK JOANNES VAN ZYTVELD, JANNETTA FRANCINA VAN ZYTVELD, FLORENCE LILLIAN MARY MARRETT, GILBERT EDGAR HOLMES, KENNETH LLOYD JOHNSON and VICKY DALE JOHNSON and GLENELG LODGE NO. 6 BUILDING COMMITTEE INC., KARTA PTY. LTD., SOPHIA KAROUNOS and BARBARA JOY HUNT

Respondents

Fisher J.
Adelaide
2 August 1988

IN THE FEDERAL COURT OF AUSTRALIA)
)
SOUTH AUSTRALIA DISTRICT REGISTRY)
)
GENERAL DIVISION) No. 910/39 of 1986
)
BANKRUPTCY DISTRICT OF THE STATE)
)
OF SOUTH AUSTRALIA)

Re: THE BANKRUPT ESTATE OF ROSS DANIEL HODBY

B E T W E E N:

OFFICIAL RECEIVER for and on behalf of THE OFFICIAL TRUSTEE IN BANKRUPTCY

Applicant

- and -

KATHLEEN MAY SKERITT, KEVIN WILLIAM PENNY, PERCY DOUGLAS BINNING COLEMAN, DOROTHY KAYE JENKINSON, EILEEN HILDA ST CLARE HILL, ROBERT WILLIAM FARRANT, LEAH WELCH, OWEN DAVID ROBERTS, JANE BOOT, JEAN MARY SCHOMBURGK, DON RAYMOND MARSHMAN, MOLLY HAZEL MARSHMAN, ALFRED GEORGE MARCH, DULCIE IRENE GROSE, MORRIS LINDEN BARREY, FREDERICK WILL, ITALO GOSTI, CATHERINE GOSTI, HENDRICK JOANNES VAN ZYTVELD, JANNETTA FRANCINA VAN ZYTVELD, FLORENCE LILLIAN MARY MARRETT, GILBERT EDGAR HOLMES, KENNETH LLOYD JOHNSON and VICKY DALE JOHNSON and GLENELG LODGE NO. 6 BUILDING COMMITTEE INC., KARTA PTY. LTD., SOPHIA KAROUNOS and BARBARA JOY HUNT

Respondents

JUDGE MAKING ORDER : FISHER J.
WHERE MADE : ADELAIDE
DATE OF ORDER : 2 AUGUST 1988

THE COURT ORDERS THAT:

1. The application be dismissed.

Note: Settlement and entry of order is dealt with in Bankruptcy Rule 124.

IN THE FEDERAL COURT OF AUSTRALIA)
)
SOUTH AUSTRALIA DISTRICT REGISTRY)
)
GENERAL DIVISION) No.910/39 of 1986
)
BANKRUPTCY DISTRICT OF THE STATE)
)
OF SOUTH AUSTRALIA)

Re: THE BANKRUPT ESTATE OF ROSS DANIEL HODBY

B E T W E E N:

OFFICIAL RECEIVER for and on behalf of THE OFFICIAL TRUSTEE IN BANKRUPTCY

Applicant

- and -

KATHLEEN MAY SKERITT, KEVIN WILLIAM PENNY, PERCY DOUGLAS BINNING COLEMAN, DOROTHY KAYE JENKINSON, EILEEN HILDA ST CLARE HILL, ROBERT WILLIAM FARRANT, LEAH WELCH, OWEN DAVID ROBERTS, JANE BOOT, JEAN MARY SCHOMBURGK, DON RAYMOND MARSHMAN, MOLLY HAZEL MARSHMAN, ALFRED GEORGE MARCH, DULCIE IRENE GROSE, MORRIS LINDEN BARREY, FREDERICK WILL, ITALO GOSTI, CATHERINE GOSTI, HENDRICK JOANNES VAN ZYTVELD, JANNETTA FRANCINA VAN ZYTVELD, FLORENCE LILLIAN MARY MARRETT, GILBERT EDGAR HOLMES, KENNETH LLOYD JOHNSON and VICKY DALE JOHNSON and GLENELG LODGE NO. 6 BUILDING COMMITTEE INC., KARTA PTY. LTD., SOPHIA KAROUNOS and BARBARA JOY HUNT

Respondents

REASONS FOR JUDGMENT

FISHER J. : This is an application on motion by the respondents Karta Pty. Ltd. ("Karta"), Sophia Karounos and Barbara Joy Hunt

for an order that I disqualify myself from hearing these proceedings by the Official Receiver which are primarily against these three respondents. I need not refer to the general background of the proceedings as they have already been recited in some detail in various judgments, both on appeal and at first instance, of this Court. The particular application by the Official Receiver in which the three respondents make their application for my disqualification was taken out in November 1987. It concerns a mortgage over a property known as Campbell Park ("the Campbell Park Mortgage") granted by Karta in which Sophia Karounos and Barbara Joy Hunt are named as co-borrowers. The mortgagees were the other respondents in these proceedings, in which, however, they have at no time played any part. Because of the complexity of the matter, points of claim and points of defence were ordered at an early stage to be filed to which the parties other than the mortgagees have made a number of amendments. The matter has been before the Court on many occasions since November 1987 and I have given a number of directions including fixing dates for hearing of the Official Receiver's claim in May 1988 which dates were at the request of the parties subsequently vacated. At the present time I am due to commence hearing the matter and also the matter of the Moana mortgage hereafter referred to on 8 August 1988 and at this stage two weeks have been set aside for what is expected to be a lengthy hearing.

On 15 July 1988 the solicitor for Krakat mentioned during a directions hearing that his instructions were to make application that I and Forster J, and incidentally counsel for

the Official Receiver, disqualify ourselves because of our extensive earlier involvement in matters arising out of the Hodby bankruptcy. However counsel for the three applicants informed me that he had advised against proceeding with the proposed application in respect of both Forster J. and counsel for the Official Receiver. The application that I disqualify myself was taken out on 26 July 1988 returnable on 27 July and was heard on 28 July 1988. At the same time a similar application was made by Krakat Pty. Ltd. ("Krakat") in proceedings commenced by the Official Receiver in respect of a mortgage of Moana land ("the Moana mortgage") in which Krakat was named as mortgagor and a number of other respondents as mortgagee. However the motion relevant to the Campbell Park mortgage was essentially the basis around which the two applications to disqualify were argued.

Sophia Karounos swore an affidavit in support of the application, enumerating a number of occasions in which, directly or indirectly, I had been involved in matters in which she, Barbara Joy Hunt, Krakat and Karta were interested. However their counsel restricted his submissions essentially to a portion of my reasons for judgment in Re Hodby, Ex parte Bailetti and Krakat No. 910/11 of 1986, an unreported decision delivered 16 April 1987. In those reasons I said as follows:

> "There is no doubt that at the time the transaction which falls for consideration in this matter was undertaken, persons associated with Krakat were placing considerable pressure on the bankrupt who was in consequence incapable of acting as a free agent."

It was said that the inclusion of this passage in my reasons might give rise to a reasonable suspicion that I may not resolve the matters in these proceedings with a fair and unprejudiced mind. It is therefore necessary to consider both the issues and circumstances of the Bailetti proceedings and the issues in the present proceedings.

In the present matter the Official Receiver claimed in his points of claim that Karta was mortgagor and Sophia Karounos and Barbara Joy Hunt were co-borrowers under the Campbell Park mortgage. The principal sum thereunder was stated to be $520,000 repayable on 12 September 1987. The Official Receiver claimed that Karta and the co-borrowers were in default and that the mortgagees thereunder, being the remaining respondents in these proceedings, other than one Alfred George March, had assigned their respective interests under the mortgage to the Official Receiver. It was further pleaded that Karta had lodged a caveat in the Lands Titles Office forbidding registration of any dealing with the interest of the mortgagees. The Official Receiver's claim to relief was stated as a declaration that the interest of the mortgagees other than March vested in the Official Receiver on behalf of the Hodby estate, and in addition as orders that the Registrar General be directed to make an entry on the relevant certificates of title substituting the Official Receiver for the mortgagees thereon and to cancel the caveat. In the application relating to the Moana mortgage there were identical claims to relief.

Karta's points of defence were voluminous and were expressed by its counsel as being a denial of the jurisdiction of the Court, a contention, which was repeated in a cross-claim, that the Campbell Park mortgage was void on the ground that the mortgagees did not provide consideration for the grant of the mortgage and that their names had been inserted by Hodby or a company, Hodby Nominees Pty. Ltd., without their consent. There was also in the points of defence a recital of a series of transactions which conceded that certain persons called Hodby Investors had advanced the sum of $520,000 to Karta which transactions occurred on 12 September 1986 the date of the Campbell Park mortgage. Karta's final point of defence was that the Official Receiver, if he obtained the relief claimed, might seek to assert that Karta was not entitled to a discharge of the Campbell Park mortgage without at the same time repaying the amount due under the Moana mortgage. It was generally accepted that the Official Receiver's contention that in the circumstances he was entitled, both in equity and contractually, to consolidate the Campbell Park mortgage and the Moana mortgage was the essential bone of contention in the matter. Counsel for Karta did not refer to any other issue raised by his client's cross-claim as having relevance to this present matter of disqualification. Furthermore he was unable to point to any pleading by the Official Receiver or his client on which on its face my statement in Bailetti had a direct bearing or indeed even an undoubted indirect bearing.

Sophia Karounos and Barbara Joy Hunt essentially adopted the points of defence and the points of cross-claim of Karta.

In the Bailetti proceedings, for which reasonably extensive reasons for judgment were given, the contest turned on the entitlement to a sum of $586,000 which had been paid into Court as portion of the sum of $800,603.45 by Krakat Pty. Limited ("Krakat") to discharge a certain unregistered mortgage. At the time Krakat made no claim to the $586,000 but contended that it was entitled to the balance of the sum of $800,603.45 in excess of the sum of $586,000. The latter contention was not before the Court in the Bailetti proceedings as it was expressly adjourned for further consideration. When late in 1987 a hearing date was fixed in respect of this aspect Krakat withdrew its claim to these balance moneys. The sole question in issue before the Court in the Bailetti matter was whether the creditors of the bankrupt estate or the persons named as mortgagees were entitled to the sum of $586,000. Krakat was not represented during the hearing, having no interest in the sum of $586,000 and only some of the mortgagees participated and were represented by counsel. The evidence before the court was contained in an affidavit of Dean Richard Govan and the bankrupt gave oral evidence upon which he was to a limited extent cross-examined. Mr. Govan in his affidavit set out a summary of the bankrupt's evidence in his public examination in respect of the Krakat mortgage to which there was no objection in the hearing and no challenge in cross-examination. This summary was as follows:

> "(a) the persons named therein as mortgagees were not the persons who had truly advanced such funds to Krakat Pty. Ltd.;
>
> (b) the funds had been paid to Krakat Pty. Ltd. between the 9th day of April 1985 and the 2nd day of July 1986 and such funds belonged to the bankrupt's clients and were paid into the bankrupt's trust account or the account of Archer Finance Brokers for the purpose of

investment to be secured by a first mortgage;

(c) the true amount of advances to Krakat Pty. Ltd. made through the bankrupt's trust account or accounts conducted by Archer Finance Brokers was $903,091.40;

(d) the figure of $586,000.00 was agreed as the amount owing by Krakat Pty. Ltd. after some dispute between the bankrupt and George Karounos. It appears the said George Karounos took a dominant role in negotiations about these matters between Krakat Pty. Ltd. and the bankrupt. A threat by George Karounos to expose the bankrupt's defalcation to his clients in part caused the bankrupt to agree to the figure of $586,000.00 as being the figure actually advanced;

(e) the bankrupt could not positively identify the persons whose funds were applied to this transaction and in many cases could positively depose to the fact that the persons named as mortgagees in the said mortgage bore no relationship to the persons who had truly advanced such funds."

It was in the light of these unchallenged facts and the bankrupt's evidence that the particular statement in my reasons was made. It was not made in reference to the particular issue then before the Court but as part of the background against which the capacity of the mortgagees or any of them to trace their funds into the particular security, an unregistered mortgage, could be assessed. The statement had nothing to do with this issue, which was the only one before the Court, but was a circumstance which on the then evidence gave some explanation of how the irregularities came about.

Counsel for the applicants in this hearing relied upon that statement and referred to, but said he did not rely upon, a comment which I made during a directions hearing when an application was made by two members of the Karounos family, John

and Helen, for their discharge. The Official Receiver contended that the application was premature and that he would seek an order under s.149 (12) of the Bankruptcy Act that they not be discharged until further order. Reference was made to the then impending litigation concerning the surplus monies in the Bailetti matter and a summons which had been issued under s.81 of the Bankruptcy Act. This statement, as follows, was in response to a comment by the solicitor for the two applicants in that matter that he wished to object to what the solicitor for the Official Receiver was putting:

> "Well, then I am just giving issue. What I am doing is giving you, if you wish, the opportunity to do so. The trouble is, of course that I have been inextricably involved in all these goings on and will continue to be so for quite a time and we have got the Krakat matter which does relate to, I do not know which Karounos's, but the Karounos's and the mortgage that is prepared to be given for some odd amount under severe pressure. I think I have already made a finding about that."

There is little doubt that what was being referred to in that passage, however ineptly stated and elliptically expressed, was the Krakat application for the surplus in excess of $586,000 in the Bailetti matter which was due to be heard later in the following month. The finding there referred to was the finding in respect of the $586,000 amount in the Bailetti proceedings. It would be reasonable to interpret counsel's reference without placing reliance upon this statement as an indication that I would be likely to be partial in any subsequent proceedings concerning that pressure if it was a relevant issue therein.

Counsel for the three applicants particularly relied

upon the reasoning of the High Court in Livesey v New South Wales Bar Association (1983) 151 CLR 288 as being applicable to this matter and supporting his submissions. The difficulty is of course to apply the undoubted law to the circumstances of a particular case. The following passage at page 300 is helpful in this matter and can be applied to present circumstances:

> "It is, however, apparent that, in a case such as the present - where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact,"

The members of the High Court then went on to identify three central issues in those proceedings upon which two members of the Court of Appeal had already made findings. One of these findings was that a Ms. Bacon who was a possible and critical witness in the appellant's proceedings was a witness without credit whose evidence on matters relevant to those proceedings should be rejected. It appears that the court considered it necessary to ascertain whether the matter upon which a view had been expressed would constitute a significant issue in the subsequent case.

In my opinion the circumstances here are very different from those in the Livesey case. Counsel for the three applicants in this matter could not identify a question of fact concerning

which I had expressed clear views and which question of fact would constitute a "live and significant issue" in the forthcoming proceedings. Nor did my statement reflect upon the credit of a witness on such a question of fact. If there was any risk of prejudgment on any aspect, which is hardly likely as reference was only made to this circumstance as part of the background, it was not on a matter in issue either in the earlier proceedings or as I see it in these subsequent proceedings. Furthermore the statement in no way comprised a prejudgment of the credit of a witness to be called in the latter proceedings.

To my mind the circumstances here have more in common with those in Morling J's matter Mudginberri Station Pty. Ltd v The Australasian Meat Industry Employees Union & Ors (1986) ATPR 40-646 in which he declined to disqualify himself. His action was confirmed by Dawson J. in the High Court (Re Morling; Ex parte Australasian Meat Industry Employees Union & Ors (1986) 66 ALR 608). In that matter he had in fact, in the somewhat different circumstances, expressed a view on the credibility of a witness who would of necessity have to give later evidence. I agree that because of the course of the proceedings before him he had no alternative but to express such a view, which he acknowledged he might have to change upon further cross-examination and production of other facts. Likewise in respect of the proceedings in this bankruptcy in which at least 45 applications have been before the Court, each on several occasions at least, background facts are of necessity set out in reliance upon the then evidence. Those facts will require reconsideration if there is additional evidence and in the light

of subsequent cross-examination.

Counsel for the applicant also made reference to the High Court decision in The Queen v Watson; Ex parte Armstrong (1976) 136 CLR 248, and more particularly at page 259 to the extract from the reasons of Denning M.R. in Metropolitan Properties Co. (F.G.C.) Ltd. v Connor [1969] 1 QB 577. That passage read as follows:

> "... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does not, his decision cannot stand.... Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough.... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The Judge was biased'."

Counsel for the applicants placed particular emphasis on the words "the impression given to other people". A further reference made with approval by the High Court to that case is on point and was as follows:

> "Danckwerts L.J., who dealt with the matter quite shortly, appears to have accepted that it would be enough to justify the court's interference if a person knowing the circumstances might reasonably feel doubts as to the tribunal's impartiality. Edmund Davies L.J. was clearly of the view that the court should interfere

> if it considered that it would appear to right-thinking people that there were solid grounds for suspecting that a member of the tribunal responsible for the decision may (however unconsciously) have been biased." (my emphasis)

I do not think that my statement in Bailetti's case would lead a reasonable or rational person who knew the circumstances to feel that there were solid or indeed any grounds to suspect that I will be unable to keep an open mind on the questions in these present proceedings. In all the circumstances I think that it is appropriate that I continue with the hearing of the proceedings. This I propose to do. I have noted the considerable delay on the part of the applicants in seeking disqualification as well as the lengthy delay in the hearing of the matter which will necessarily ensue if I accede. However I have made my decision without placing reliance on either of these two considerations. The application will be dismissed. On the question of costs I am of opinion that they should be the Official Receiver's costs in the cause but I will hear the parties in this regard before making a formal order.

I certify that this and the // preceding pages are a true copy of the Reasons for Judgment of Mr Justice Fisher.

Associate R Mills.

Dated: 2/8/88.