JOHNSON ..... APPELLANT;
APPLICANT,

AND

JOHNSON ..... RESPONDENT.
RESPONDENT,

[2000] HCA 48

ON APPEAL FROM THE FAMILY COURT OF AUSTRALIA

H C OF A
2000
May 24;
Sept 7
2000

Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ

Courts and Judges — Bias — Statement by trial judge of intention to rely on evidence of independent parties and documents — Reasonable apprehension of bias.

A wife commenced proceedings under s 79 of the *Family Law Act* 1975 (Cth) for the alteration of property rights following the dissolution of marriage. In the course of the trial in the Family Court of Australia the judge stated that he would be relying principally on witnesses other than the parties and independent documents in determining where the truth lay. The husband applied for the judge to disqualify himself from the case on the ground that his remarks had given rise to an appearance of bias. The judge refused to do so.

Held, that the judge's statement did not create an appearance of bias.

Per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. The test to be applied in determining whether a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide.

Re Lusink; Ex parte Shaw (1980) 55 ALJR 12; 32 ALR 47; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Vakauta v Kelly* (1989) 167 CLR 568; and *Webb v The Queen* (1994) 181 CLR 41, applied.

R v Watson; Ex parte Armstrong (1976) 136 CLR 248, distinguished.

Decision of the Family Court of Australia (Full Court): *Marriage of Johnson* (1999) 26 Fam LR 475; [2000] FLC ¶93-039, affirmed.

APPEAL from the Family Court of Australia.

Brian Godfrey Johnson and Kathleen Johnson were married in 1979. They separated in 1994 and the decree nisi for the dissolution of their marriage became absolute on 30 August 1996. On 19 February 1997 the wife commenced proceedings in the Family Court under s 79 of the *Family Law Act* 1975 (Cth) for the adjustment of property rights. Her case was that as well as assets that the parties held in Australia, substantial assets were held overseas on behalf of the husband. This was denied by the husband. During the trial, and just before the

husband was to give evidence, the judge (Anderson J) made a statement to the effect that he would be relying principally on witnesses other than the parties and documents to determine where the truth lay. Next day, counsel for the husband applied for the judge to disqualify himself. The application was dismissed. The husband appealed to a Full Court of the Family Court (Ellis, Kay and Dessau JJ) which on 31 March 1999 dismissed the appeal (1). He then appealed to the High Court from certain of the orders of the Full Court by special leave granted by Gaudron and Hayne JJ.

G Griffith QC (with him *R S Ingleby*), for the appellant. The offending statement is indistinguishable on any relevant basis from the statement made in *R v Watson; Ex parte Armstrong* (2) and gave rise to a reasonable apprehension of bias. The judge had pre-judged the husband's credit in circumstances where credit was crucial to the outcome of the proceeding. Bias constituted by such pre-judgment was ineradicable. Alternatively, if bias which was constituted by pre-judgment is capable of correction, there was no correction. [He referred to *Livesey v NSW Bar Association* (3); *Re JRL; Ex parte CJL* (4); *Vakauta v Kelly* (5); *Newfoundland Telephone Co v Newfoundland* (6); *BTR Industries SA (Pty) Ltd v Metal & Allied Workers Union* (7); *R v Gough* (8); *Webb v The Queen* (9); *R v Inner West London Coroner; Ex parte Dallaglio* (10); *Auckland Casino Ltd v Casino Control Authority* (11); *R v Secretary of State for the Environment; Ex parte Kirkstall Valley Campaign Ltd* (12); *R v Curragh Inc* (13); *R v S (RD)* (14); and Mureinik, "Administrative Law" (15).]

D F Jackson QC (with him *K R Wilson*), for the respondent. The judge was saying nothing more than in a case of this kind, mere assertions by a party were unlikely to be of assistance. He was also adverting to the fact that where there was a significant conflict of evidence, the evidence of other witnesses and documents would be of great significance in determining where the truth lay. A judge is

(1) *Marriage of Johnson* (1999) 26 Fam LR 475; [2000] FLC ¶93-039.
(2) (1976) 136 CLR 248.
(3) (1983) 151 CLR 288.
(4) (1986) 161 CLR 342.
(5) (1989) 167 CLR 568.
(6) [1992] 1 SCR 623.
(7) (1992) 3 SA 673.
(8) [1993] AC 646.
(9) (1994) 181 CLR 41.
(10) [1994] 4 All ER 139.
(11) [1995] 1 NZLR 142.
(12) [1996] 3 All ER 304.
(13) [1997] 1 SCR 537.
(14) [1997] 3 SCR 484.
(15) *Annual Survey of South African Law* 1989, pp 503-507.

entitled, and sometimes obliged, to indicate during the course of the trial his or her views about the issues or difficulties in a case (16). The contention that apparent bias by pre-conception is always ineradicable is not correct; it depends on the circumstances. [He also referred to *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (17) and *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (18).]

G Griffith QC, in reply.

Cur adv vult

7 September 2000

The following written judgments were delivered: —

1 GLEESON CJ, GAUDRON, MCHUGH, GUMMOW AND HAYNE JJ. The question in this appeal from the Full Court of the Family Court of Australia is whether the trial judge, Anderson J, was disqualified from continuing to hear the case on the ground of apprehended bias. The Full Court of the Family Court decided that question in the negative.

2 The parties to the appeal were married in November 1979. The marriage was dissolved in 1996. The proceedings before Anderson J arose out of a dispute as to the financial arrangements to be made following such dissolution. There was a substantial amount at stake. It was held that there was what the Full Court described as an "asset pool" valued at nearly $30 million. Anderson J decided that the respondent (the wife) should receive 40 per cent of that pool. One of the principal areas of dispute at the trial, which lasted for sixty-six days, concerned the extent of the appellant's assets and, in particular, whether he was beneficially interested in substantial offshore assets owned by other persons and entities. It is unnecessary to go into the detail of that dispute. What is important is that, at the trial, the respondent was asserting, and the appellant was denying, that the appellant was beneficially interested in various assets, and the investigation of that issue of fact involved a great deal of hearing time.

3 On the twentieth day of the hearing, Anderson J made a comment which resulted in an application by counsel for the appellant that he should disqualify himself.

The application for disqualification

4 The comment of Anderson J referred back to statements made earlier in the trial, and to an application by the appellant's counsel, to

(16) *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 294; *Vakauta v Kelly* (1989) 167 CLR 568 at 571.
(17) (1953) 88 CLR 100.
(18) (1999) 161 ALR 599.

which the statement was a response. It is necessary, therefore, to examine the context.

5 The record of the trial shows that there was recurring argument about the discovery of documents, and frequent objection by counsel for the appellant to what he contended to be an undue widening of the scope of discovery. Before the commencement of the trial, both the appellant and the respondent filed written statements of the evidence they were to give. The respondent gave evidence first. At an early stage of the hearing, whilst the respondent was being cross-examined, she was asked about a claim she made that a certain asset belonged to the appellant. In the course of an exchange between counsel and the trial judge, the judge remarked that, having regard to the nature of the issues between the parties, he would "be looking, in so far as it is possible, to independent evidence". Some days later, in the course of a similar exchange, the judge said:

> "As I indicated a couple of times earlier in these proceedings, I will be certainly looking to the independent people and independent documents in the search for the truth in this matter."

6 These were perfectly understandable observations, and no possible exception could be taken to them. There was no complaint about them, either at the time, or later. The hearing progressed.

7 On 19 March 1997, after a further discussion with counsel as to the discovery of documents, Anderson J ruled that the appellant was required to list, as discoverable documents, certain transcripts of proceedings in an investigation by a corporate regulatory authority. At that stage, the appellant had still not given oral evidence. At the close of proceedings on 19 March 1997, counsel for the appellant applied for the ruling to be vacated. In support of the application, counsel complained again about the width of discovery and the time and expense that was being taken up in what he said was turning into a Royal Commission. Responding to that submission, Anderson J said:

> "Well, [let] me go back to what I said at the very beginning ... is that I will rely, principally, on witnesses other than the parties in this matter — and documents — to determine where the truth lies; and any other documents that are available to assist me in that regard, I'll be grateful to receive. I'm not vacating my earlier order; and I am adjourning."

8 On the following day, counsel for the appellant applied to the judge to disqualify himself, arguing that the case was indistinguishable from *R v Watson; Ex parte Armstrong* (19). In response to that application, Anderson J said:

> "Before this matter began, I spent two days reading the affidavits

(19) (1976) 136 CLR 248.

filed by both parties and some of the witnesses ... It was apparent that there was a wide divergence between the evidence of both parties relating to the matters in issue in this case. That has become more apparent as the case has proceeded. I drew attention to this difficulty. When yesterday I repeated what I earlier said, I was simply pointing out to the parties the wide divergence. It was going to be a difficult task. My statement was not to be taken as a predetermination of the credibility of both parties, or of either of them. My statement merely affirms my need to look to the other evidence to assist in determining who is telling the truth. I was not saying I would not accept the evidence of either party; I did not reject the credit of both parties; I was merely saying that the other evidence was important in determining the credit of one or other of the parties.''

9 Anderson J declined to disqualify himself. The Full Court of the Family Court (20) upheld that decision.

The governing principles

10 The disposition of this appeal depends upon the application of principles which are well established and which neither party disputed. The contention was that there had been a departure from those principles which the Full Court of the Family Court had wrongly failed to correct, thus calling for the intervention of this Court, if only to emphasise the importance of intermediate courts applying these principles (21). In these circumstances it is neither necessary nor appropriate to undertake any detailed analysis of the principles or their basis.

11 It is not contended that Anderson J was affected by actual bias. It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide (22).

12 That test has been adopted, in preference to a differently expressed test that has been applied in England (23), for the reason that it gives due recognition to the fundamental principle that justice must both be

(20) Ellis, Kay and Dessau JJ.

(21) *State Rail Authority of NSW v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306; 160 ALR 588.

(22) eg, *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41.

(23) cf *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

done, and be seen to be done (24). It is based upon the need for public confidence in the administration of justice. "If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision" (25). The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial" (26).

13 Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge (27), the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* (28) Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case" (29). Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

(24) cf *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Hewart CJ.
(25) *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263, per Barwick CJ, Gibbs, Stephen and Mason JJ.
(26) *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, per McHugh JA, adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585, per Toohey J.
(27) *Webb v The Queen* (1994) 181 CLR 41 at 73, per Deane J.
(28) (1989) 167 CLR 568 at 571.
(29) See also *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 15; 32 ALR 47 at 53, per Murphy J.

14 There was argument in this Court, prompted by Anderson J's explanation of what he intended to communicate, about whether the effect of a statement that might indicate prejudgment can be removed by a later statement which withdraws or qualifies it. Clearly, in some cases it can. So much has been expressly acknowledged in the cases (30). No doubt some statements, or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement. It depends upon the circumstances of the particular case. The hypothetical observer is no more entitled to make snap judgments than the person under observation.

The present case

15 The comment made by Anderson J at the conclusion of proceedings on 19 March 1997 has to be considered in the context in which it was made. The judge was ruling on an application to vacate an order requiring discovery of certain documents. Counsel was urging that the obligations of discovery which had been imposed on his client were unduly onerous. In response, the judge reminded counsel that, early in the case, having read the written statements of the parties and other witnesses, he had said that he expected that, in determining where the truth lay, he would be looking to independent evidence, including documentary material. Hence the importance he attached to discovery. He repeated that view. He was making a point about the significance of documentary evidence, which was the subject of the application on which he was ruling.

16 If one were to remove some of the words used by Anderson J from the context of the ruling on discovery, and the reference back to earlier statements, then, upon parsing and analysis, they could possibly have created an impression that the judge was discounting the credit of the respondent (whose evidence he had heard) and of the appellant (whose evidence he had not heard). To isolate the words in that way would not have been reasonable. When, on the following day, the judge gave an explanation of what he had intended to convey by his earlier remarks, there was no reasonable ground for not accepting that explanation. A reasonable observer would not have imputed to Anderson J, who had not yet heard the appellant give evidence, a view that the appellant was a person whose credit was of no worth.

17 The case, it was argued, was the same, in substance, as *R v Watson; Ex parte Armstrong* (31). The judge in that case had stated categorically, at commencement of the trial, that his opinion of the

(30) eg, *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 372, per Dawson J; *Vakauta v Kelly* (1989) 167 CLR 568 at 572, per Brennan, Deane and Gaudron JJ; at 577, per Dawson J.

(31) (1976) 136 CLR 248.

parties was such that credit was a ''non-issue'', and that he would not believe either of them unless his or her evidence was corroborated. The reasons why the judge had come to entertain that low opinion of the parties need not be elaborated. They can be seen from a reading of the judgments in this Court. The judge, it was held, had created a reasonable apprehension of bias in the form of prejudgment. So too, it was argued, in the present case, the judge had expressed a concluded view as to the credit of the parties, including the appellant, by stating that he would rely principally on the evidence of other witnesses, and on documents, to determine where the truth lay.

18 When what Anderson J said is considered in its context, and in the light of his subsequent explanation, the argument for the appellant must fail. The judge was not to be understood as intending to express a concluded view on the credibility of either party. In particular, he was not to be understood as intending to express such a view about the credibility of the appellant, who had not yet been called to give evidence. His expectation as to the importance of independent evidence, and documentary material, was understandable (32). An apprehension that he had formed a concluded view on the credibility of witnesses, and would not bring an open mind to bear when he decided the case, would have been unwarranted and unreasonable.

Conclusion

19 The appeal should be dismissed with costs.

20 KIRBY J. This is one of three recent appeals in which issues of judicial disqualification have been argued before this Court (33). It comes from a judgment of the Full Court of the Family Court of Australia (the Full Court) (34). I agree that the appeal should be dismissed. What is important about the matter is the explanation for that order.

21 Disqualification for prejudgment, classified as a form of apprehended bias on the part of judicial officers and other formal decision-makers (adjudicators), has lately attracted the attention of final courts in several countries (35). It is appropriate to consider the issues in this appeal in that context and to take the occasion to measure the submissions for the parties against the applicable principles of law.

(32) cf *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599 at 603 [16], per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

(33) The other two are *Ebner v Official Trustee in Bankruptcy* and *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* which were heard together on 14 and 15 June 2000 and in which judgment is reserved.

(34) *Marriage of Johnson* (1999) 26 Fam LR 475; [2000] FLC ¶93-039.

(35) *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *R v S (RD)* [1997] 3 SCR 484; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147; *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]* [2000] 1 AC 119; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

22 Upon one of the questions raised by this appeal, differing views have, in the past, been expressed in Australia (36). That question concerns the extent of knowledge of the issues in the particular case, and of legal practices and procedures, that the appellate court will attribute to the fictitious bystander whose judgment is invoked as the touchstone for reaching a conclusion that apprehended prejudgment exists (37).

The facts and common ground

23 The facts are stated in the reasons of the other members of the Court (38). The issue for decision is whether, given the observations of the primary judge in the Family Court of Western Australia, Anderson J, read in context, the conclusion of the Full Court that there was no apprehended bias has been shown to be erroneous. Of all the many matters contested between the parties in the courts below, this is the sole ground upon which special leave to appeal to this Court was permitted.

24 Forensically, the appellant (the husband) had, in my opinion, two arguable points. The first was essentially a factual point. The trial before the primary judge, when his Honour made the statement complained of (39), was already in its twentieth day. The statement was made after the judge had listened to the respondent's oral evidence and before he had heard the appellant's oral evidence. If the judge had waited to make his observation until after the appellant's oral evidence had been given, no complaint could have been made. It was the fact that the judge said what he did without first hearing the appellant's oral testimony that gave rise to the appellant's submission that the judge had prejudged the credibility of his evidence.

25 However important other oral testimony and documentary evidence might be in clarifying the complex property arrangements of the appellant, the assessment of his own truthfulness was bound to have an impact, at least to some degree, on the ultimate consideration and outcome of the parties' dispute. The factual point of the appellant's case was that the judge did not allow the appellant an equal chance to make whatever impression he could by force of the appellant's own sworn testimony. In that sense, the appellant argued, a fictitious

(36) See, eg, *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358; *Australian National Industries Ltd v Spedley Securities Ltd (In liq)* (1992) 26 NSWLR 411; *R v Masters* (1992) 26 NSWLR 450.

(37) *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155; 18 ALR 93; *Webb v The Queen* (1994) 181 CLR 41 at 47.

(38) Reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at 490-492 [1]-[9]; reasons of Callinan J at 511-514 [63]-[69].

(39) Set out in the reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at 491 [7]; reasons of Callinan J at 512 [64].

bystander might reasonably conclude that he had been deprived of a forensic advantage which the judge had accorded to the respondent.

26 The second point was a legal one and lay in the suggested application to the appellant's case of the principles laid down by this Court in *Watson*. In that case, Barwick CJ, Gibbs, Stephen and Mason JJ observed (40):

> "It was said that there was no bias because the judge had formed an equal distrust of both parties. The formation of a preconceived opinion that neither party is worthy of belief amounts to bias in the sense in which that word is used in a number of the authorities ... To form such an opinion is to predetermine one of the issues in the case, and may operate unfairly against one party, even though both are discredited. A prejudice against the credit of both parties will not necessarily damage both parties equally. It will prove more damaging to that party who wishes to establish a fact by means of his or her own unsupported evidence. A party who believes, on reasonable grounds, that the judge has decided, in advance, to disbelieve her evidence cannot have confidence in the result of the proceedings, even if the judge has decided to reject the evidence of her adversary as well."

27 With a change in the personal pronoun, the appellant urged that these words applied, word for word, to his case. The fact that he had complex property arrangements, and that some of them would be proved by oral evidence, made it all the more important that he should have been given the chance to begin the process of persuasion without a prior public statement that his oral testimony would be discounted. This was especially so as the appellant bore the forensic as well as the legal burden of demonstrating exactly what his property was. He had to answer his wife's assertion that his property, in the form of diverse corporate and trust arrangements, included onshore and offshore assets controlled by him or by those responding to his instructions. When the appellant made his application to the primary judge that he should disqualify himself from further participation in the trial, he suggested that "any fair-minded person" would share the appellant's apprehension that the judge had prejudged the issue of his credibility.

28 A considerable amount of judicial writing has been devoted to stating, and justifying, the different formulae to determine whether there is an apprehension of prejudgment (41). It is probably true that in most cases the same results would follow, whatever the precise form of words used (42). However, at the margins, different verbal expressions may incline an adjudicator towards, or against, the contention that prejudgment, sufficient to justify disqualification,

(40) *Watson* (1976) 136 CLR 248 at 265.
(41) See, eg, *Webb* (1994) 181 CLR 41 at 47-53.
(42) *Auckland Casino* [1995] 1 NZLR 142 at 149; *Locabail* [2000] QB 451 at 477.

exists. That is why it is useful to notice the way in which the law in Australia and overseas has developed on this point before turning to the particular facts of this appeal.

Developments in the law of apprehended bias for prejudgment

29 In the early years of this Court, the English law governing disqualification of adjudicators was accepted as part of Australian law (43). A distinction was drawn between disqualification for pecuniary interest and disqualification for what Isaacs J termed "incompatibility" (44). It is clear that this latter category was taken to include a case where the adjudicator "by reason of some pre-determination ... arrived at in the course of the case ... ought not to act unless there is something to relieve him from these disqualifications" (45).

30 In 1953, in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (46), Dixon CJ, Williams, Webb and Fullagar JJ expressed the rule of the common law on prejudgment, as then understood in Australia, in these terms:

> "Bias must be 'real'. The officer must so have conducted himself that a *high probability* arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions — though it is unfortunate that a judge should have any — do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded'." (47)

31 So the law in this country stood effectively until the mid-1970s. Then, in a series of decisions, a principle more protective of the manifest integrity of judicial decision-making was established. The chief point of departure was the substitution of a test expressed in terms of possibilities (might) rather than in terms of "high probability", as accepted in *Melbourne Stevedoring*. Thus, in *Livesey v NSW Bar Association* (48), the new and different approach was explained in these words:

> "That principle 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 it."

(43) *Dickason v Edwards* (1910) 10 CLR 243 at 259-261.
(44) *Dickason v Edwards* (1910) 10 CLR 243 at 259.
(45) *Dickason v Edwards* (1910) 10 CLR 243 at 260.
(46) (1953) 88 CLR 100 at 116 (emphasis added).
(47) *R v London County Council; Ex parte Empire Theatre* (1894) 71 LT 638 at 639, per Charles J.
(48) (1983) 151 CLR 288 at 293-294 (emphasis added).

32 The distinction between these two statements, thirty years apart, is an important one. *Livesey* has been described as introducing a "Spartan" principle and a "novel doctrine" (49). It may have been novel by reference to earlier expressions of the common law, but similar trends had already begun to emerge in England (50), Scotland (51) and South Africa (52).

33 In England, this trend of authority towards a test of reasonable suspicion or apprehension of bias was substantially arrested by the decision of the House of Lords in *R v Gough* (53). There, the applicable test for disqualification for the appearance of prejudgment was reformulated in terms of "whether, having regard to [the relevant] circumstances, there was a *real danger* of bias on the part of the [decision-maker], in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration" (54).

34 The test adopted in England in *Gough* fell short of imposing an obligation that the complainant establish the suggested "danger" to the level of "a high probability" (55). But the necessity to show a "real danger", as distinct from the kind of possibility expressed in the later decisions of this Court, was acknowledged to be a deliberate point of difference. In *Webb* (56), this Court was asked to reconsider its own authority in *Watson* in the light of the decision in *Gough*. The Court declined to alter its rule. In this appeal, the Court was not invited to revisit that decision. If anything, the more recent decision of the House of Lords on the point, in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]* (57), may suggest a gradual return to their Lordships' earlier position, more in harmony with the approach adopted by this and other courts.

35 I have traced the way Australian law came to the expression of its current rule in order to make three points. First, that rule involved a deliberate refinement of the standard previously adopted in England

(49) *Spedley Securities* (1992) 26 NSWLR 411 at 448, per Meagher JA.
(50) *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 at 290; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259; *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599, 602; *R v Liverpool City Justices; Ex parte Topping* [1983] 1 WLR 119 at 123; [1983] 1 All ER 490 at 494; cf *R v Mulvihill* [1990] 1 WLR 438 at 444; [1990] 1 All ER 436 at 441.
(51) *Bradford v McLeod* [1986] SLT 244 noted in *Locabail* [2000] QB 451 at 475.
(52) *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147.
(53) [1993] AC 646.
(54) *Gough* [1993] AC 646 at 670, per Lord Goff of Chieveley (emphasis added).
(55) *Melbourne Stevedoring* (1953) 88 CLR 100 at 116.
(56) (1994) 181 CLR 41 at 51.
(57) [2000] 1 AC 119; cf *Rees v Crane* [1994] 2 AC 173 at 196-198.

concerning disqualification for prejudgment (58). Secondly, when given an opportunity to moderate or reconsider this standard, this Court refused to do so. Thirdly, in so far as one looks outside Australia, to South Africa (59), to some expositions of the law in Canada (60), and to the principles applied in the United States of America (61), all appear harmonious with that accepted by this Court. Although the New Zealand Court of Appeal has preferred to follow English authority (62), this was only because that Court was convinced that the outcome would have been the same if either test had been applied. Specifically, this was explained by the fact that the more recent judicial authority in Australia had attributed to the fictitious bystander a larger awareness of the facts of the particular case.

The basic principles

36 There are three interrelated reasons that explain the approach to apprehended bias established by this Court. Considering them helps, in a way that incantation of verbal phrases may not, to understand the manner in which a problem such as that presented in the present appeal is to be resolved.

37 *Fundamental rule of justice*: The first involves the ultimate foundation for the rule that an adjudicator must be free of actual or apprehended bias. I leave aside any requirements that may be inherent in, or implied from, the Constitution. The establishment of an integrated Judicature by Ch III of the Constitution undoubtedly carries with it various affirmative and negative requirements and implications. However, no party to the present appeal (or in the courts below) relied upon a constitutional argument. Without deciding that none is available (63), I put this potential source for the foundation of the Australian rule on judicial disqualification to one side.

(58) eg, *R v London County Council; Ex parte Empire Theatre* (1894) 71 LT 638 at 639.

(59) *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673; *Moch v Nedtravel (Pty) Ltd* 1996 (3) SA 1.

(60) *Old St Boniface Residents Assn Inc v Winnipeg* [1990] 3 SCR 1170 at 1197; cf *R v S (RD)* [1997] 3 SCR 484 at 531-532.

(61) United States federal law requires judges to disqualify themselves in any proceeding in which their "impartiality might reasonably be questioned": 28 USC §455. The same formula is used in Canon 3E of American Bar Association, *Model Code of Judicial Conduct* (1990); cf *Limeco Inc v Division of Lime* (1983) 571 F Supp 710 at 711 (it is enough to disqualify that there be the mere appearance of partiality).

(62) *Auckland Casino* [1995] 1 NZLR 142 at 149 applying *Gough* [1993] AC 646; cf *Small v Police* [1962] NZLR 488.

(63) See, eg, *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487, 502; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 111; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; Parker, "Protection of Judicial Process as an Implied Constitutional Principle", *Adelaide Law Review*, vol 16 (1994) 341, at pp 350-354.

38 It is a "fundamental rule" (64) of natural justice and an "abiding value of our legal system" (65) that every adjudicator must be free from bias. This same principle has been accepted in the international law of human rights, which supports the vigilant approach this Court has taken to the possibility that the "parties or the public might entertain a reasonable apprehension" (66) that an adjudicator may not be impartial. Thus, Art 14.1 of the International Covenant on Civil and Political Rights, the starting point for consideration of the relevant requirements of international law, states (67):

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent *independent and impartial* tribunal established by law."

In *Karttunen v Finland* (68), elaborating that Article, the United Nations Human Rights Committee concluded that "impartiality" of a court:

> "implies that judges must not harbour preconceptions about the matter put before them, and ... they must not act in ways that promote the interests of one of the parties ... A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14."

39 Similar stringent rules have been adopted by the European Court of Human Rights in relation to the equivalent guarantee of impartiality under the European Convention on Human Rights (69). The strict rule adopted by the European Court, by way of contrast with the English rule, was recently noted by the English Court of Appeal (70).

40 In expressing the common law of Australia, it is legitimate, at least in the case of any uncertainty, to take into account the exposition of

(64) *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351, per Mason J; cf *R v George* (1987) 9 NSWLR 527 at 535-536, per Street CJ; *Fitzgerald v Director of Public Prosecutions* (1991) 24 NSWLR 45 at 50, per Samuels JA.

(65) *Galea v Galea* (1990) 19 NSWLR 263 at 277.

(66) *Livesey* (1983) 151 CLR 288 at 293-294.

(67) International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23, 6 ILM 368 (entered into force 23 March 1976) (emphasis added).

(68) Unreported; United Nations Human Rights Committee; CCPR/C/46/D/387/1989, 5 November 1992, at [7.2], discussed in Martin et al (eds), *International Human Rights Law and Practice: Cases, Treaties and Materials* (1997), pp 527-531.

(69) Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, ETS 5, Art 6(1) (entered into force 3 September 1953); cf *Huber v Switzerland* (1990) 188 Eur Ct HR (Ser A) discussed in Martin et al (eds), *International Human Rights Law and Practice: Cases, Treaties and Materials* (1997), pp 532-533.

(70) *Locabail* [2000] QB 451 at 476.

international human rights law where that law states principles of universal application (71). The ultimate foundation of the principle of the common law rests, relevantly, on the presupposition that a court deciding a matter between parties will be independent and impartial. The fundamental requirements of independence and impartiality do not imply that adjudicators must be absolutely neutral, in the sense of having "no sympathies or opinions" (72). But they do require that adjudicators "strive to ensure that no word or action during the course of the trial or in delivering judgment" (73) leaves an impression of prejudgment of a point in issue.

41 *Appearance of justice*: The reason commonly given for adopting the comparatively strict approach that has found favour in this Court in recent years is that it mirrors the importance attached by the law not only to the *actuality* of justice (that is, whether the adjudicator had, in fact, prejudged issues in the case) but also the *appearance* of impartiality both to the parties and to the community (74). From the point of view of public policy, the practical foundation for a relatively strict approach lies in the obligation on an appellate court to defend the purity of the administration of justice and thereby to sustain the community's confidence in the system (75). In the words of Lord Denning MR, "[j]ustice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'" (76).

42 Lord Hewart CJ was the author of the famous aphorism that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (77). That dictum should be kept in mind in approaching any case such as the present. It is a strong reason for resisting attempts to undermine the principle which this Court has followed. Such attempts represent judicial pining for a return to the previous rule (78), or an endeavour to attribute undue knowledge and sophistication to the fictitious bystander, whose imputed judgment is

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

(72) cf *R v S (RD)* [1997] 3 SCR 484 at 534, per Cory J, citing the Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), p 12.

(73) *R v S (RD)* [1997] 3 SCR 484 at 534.

(74) *Livesey* (1983) 151 CLR 288 at 293-294.

(75) Lord Esher MR in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at 758, applied in *R v Liverpool City Justices; Ex parte Topping* [1983] 1 WLR 119 at 122; [1983] 1 All ER 490 at 493-494.

(76) *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599; cf *R v Liverpool City Justices; Ex parte Topping* [1983] 1 WLR 119 at 123; [1983] 1 All ER 490 at 494.

(77) *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259. The words may have been written by Lord Sankey; cf *Hobbs v Tinling* [1929] 2 KB 1 at 48; Spigelman, "Seen to be Done: The Principle of Open Justice — Part I", *Australian Law Journal*, vol 74 (2000) 290, at pp 291-292.

(78) cf *Spedley Securities* (1992) 26 NSWLR 411 at 448.

crucial (79). These attempts sometimes manifest themselves in the form of suggested distinctions between the rules applied in different courts (80), or emerge in the form of claims made for the exception of "necessity", by reference to pressing considerations of convenience and cost (81). Such endeavours should, in my view, be resisted. To the extent that the criterion becomes divorced from the reasonable impressions, knowledge and values of the fictitious bystander, taken as representative of the community, the maintenance of the appearance of justice is undermined. The result of doing this, over time, would inevitably be to damage public confidence in the integrity of the institutions of public decision-making (82).

43 *Applying realistic criteria*: The third consideration grows out of the first two. However, it also derives from the changes that have occurred in society since the earlier rules were expressed in terms requiring proof of "a high probability" (83) of bias before an adjudicator was disqualified on the basis of prejudgment.

44 Older authorities contain statements about the asserted special capacity of adjudicators, especially judges, because of their training and experience, to bring a detached mind to the task in hand whatever their earlier stated opinions might suggest (84). It was on this basis that the old rules requiring affirmative proof of a "real danger" of bias were stated. Part of the reason for the eventual retreat from this approach is undoubtedly the growing inclination of parties to litigation, and also many members of the public, to regard such assertions with scepticism (85). To some extent, this change of attitude may be a product of higher levels of education and social awareness. In part, it may reflect public attitudes to all institutions, especially where claims are made based on unproved assertions by those affected (86). In part, it may be a consequence of the growth in the judiciary and other adjudicative bodies and the greater willingness of members of the legal profession to challenge things that once would

(79) cf *S & M Motors* (1988) 12 NSWLR 358 at 375-376.
(80) cf *R v Masters* (1992) 26 NSWLR 450 at 470-472.
(81) *Spedley Securities* (1992) 26 NSWLR 411 at 421; *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd* [1999] 2 VR 573 at 575, 603-604.
(82) *Spedley Securities* (1992) 26 NSWLR 411 at 420.
(83) *Melbourne Stevedoring* (1953) 88 CLR 100 at 116.
(84) This was the basis for the opinion of Charles J in *R v London County Council; Ex parte Empire Theatre* (1894) 71 LT 638 at 639; cf *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554; *Re Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155 at 160; 18 ALR 93 at 101.
(85) *Galea v Galea* (1990) 19 NSWLR 263 at 277-278; Cardozo, *The Nature of the Judicial Process* (1921), pp 12-13, 167, cited in *R v S (RD)* [1997] 3 SCR 484 at 504; *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [No 9]* (unreported; Court of Appeal (NSW); 27 November 1990) at 20-21, cited in *Spedley Securities* (1992) 26 NSWLR 411 at 419-420.
(86) cf Mureinik, *Annual Survey of South African Law* (1989), pp 504-505.

have been left alone. Despite these changes, there are still many constraints upon raising the possible disqualification of an adjudicator (87). If the party complaining is legally represented, the submission will require explicit instructions and usually be made (as in the present case) after time for advice and reflection. The advice will weigh up a host of countervailing factors. In part, the increase in the number of litigants in person (88) has undoubtedly produced a siseable proportion of the applications for disqualification for prejudgment and resulted in many of the recent Australian decisions on the subject (89). These developments confirm this Court's present rule. They strengthen a conclusion that any watering down of the rule would be undesirable.

45 Such considerations lay behind the salutary warning given in *Re JRL; Ex parte CJL* (90) that judicial officers in Australia were obliged to discharge their professional duties unless disqualified by law. They were told not to accede too readily to suggestions of an appearance of bias, lest parties be encouraged to seek such disqualification without justification. Applications of that kind might sometimes be made in the hope of securing an adjudicator more sympathetic to a party's cause. Or they might be made because of the strategic advantage that may thereby be secured, especially the interruption of lengthy proceedings (91) and the delays consequent upon obtaining a fresh start in a busy court or tribunal.

The fictitious bystander and matters that lawyers know

46 If a court of appeal were deciding an allegation of prejudgment for itself, according to its own knowledge and standards, a number of considerations might be taken into account in a case such as the present:

1. Appellate judges realise that most adjudicators strive to be independent and impartial and to make adjustments (so far as they can) for factors of which they are aware which might impact on their decision-making. By their training and experience, most such adjudicators are conscious of the high expectations imposed upon them.

2. Whatever may have been the tradition in earlier times, opinions favouring silence on the part of an adjudicator during a hearing (92)

(87) *Goktas v Government Insurance Office of NSW* (1993) 31 NSWLR 684 at 686-687, considered in *Auckland Casino* [1995] 1 NZLR 142 at 152.

(88) Dewar, Smith and Banks, *Litigants in Person in the Family Court of Australia* (2000).

(89) eg, *Wentworth v Rogers [No 3]* (1986) 6 NSWLR 642; *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272; *Wentworth v Rogers [No 12]* (1987) 9 NSWLR 400; *Rajski v Powell* (1987) 11 NSWLR 522; *Yeldham v Rajski* (1989) 18 NSWLR 48; *Rajski v Wood* (1989) 18 NSWLR 512; *Bainton v Rajski* (1992) 29 NSWLR 539.

(90) (1986) 161 CLR 342 at 352.

(91) cf *Locabail* [2000] QB 451 at 479.

(92) *Watson* (1976) 136 CLR 248 at 294, per Jacobs J.

(which is the surest means of avoiding most allegations of prejudgment) are now seen as carrying risks of an even greater injustice (93). Unless the adjudicator exposes the trend of his or her thinking, a party may be effectively denied justice because that party does not adduce evidence or present argument that could have settled the adjudicator's undisclosed concerns (94). A frank dialogue will commonly be conducive to the avoidance of oversight and the repair of misapprehensions. Uninformed members of the public are doubtless sometimes surprised by the robust exchanges which take place in court, especially between a judge and experienced lawyers. But judges and other adjudicators and lawyers know that such dialogue can have great value.

3. Changes that have come about in the administration of justice, including the increase in the number of trials by single judges, have also required, to some extent, an adjustment to the rules of reticence in judicial observations that may still be appropriate where trials, criminal or civil, are conducted before a jury. One of the reasons for such changes has been the desire to increase the efficient management of the trial process. Yet it is in that context that the expressions of preliminary and tentative views may sometimes appear to an outsider to indicate prejudgment. Although some adjudicators may be hard to shift from tentative opinions, lawyers know that, in most judicial decision-making, the process is a continuous one. Preliminary inclinations do change (95).

4. The adversary system depends on vigorous interaction not only between the parties and their representatives but also between the adjudicator and those persons. Where the parties are represented by trained lawyers, the latter can be taken to be aware of (and presumed, if necessary, to have explained to their clients) the character and purpose of tentative opinions that guide the direction of the trial and encourage its proper focus. No rule of law should be adopted in relation to disqualification for prejudgment which unreasonably undermines, or is fundamentally inconsistent with, that system.

5. In earlier times, great confidence was placed in the capacity of adjudicators to discern the truth on the basis of their impressions of witnesses. However, the trend of modern authority has cast doubts on that supposedly unique perceptiveness (96). That is why many

(93) *Vakauta v Kelly* (1989) 167 CLR 568 at 571; cf *Galea v Galea* (1990) 19 NSWLR 263 at 281-282.

(94) cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; Shapiro, "In Defense of Judicial Candor", *Harvard Law Review*, vol 100 (1987) 731, at p 737.

(95) Kirby, "Judging: Reflections on the Moment of Decision", *Australian Bar Review*, vol 18 (1999) 4.

(96) *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 327-330 [87]-[88]; 160 ALR 588 at 616-618; *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599 at 605-606 [29]-[35].

adjudicators now rest their decisions, so far as they can, on indisputable facts, contemporary documents and the logic of the circumstances, rather than mere impressions. This is a desirable development (97). Upon one view, the interventions of the primary judge in the present matter amounted to no more than an affirmation of his acceptance, as applicable to the trial before him, of this modern and beneficial viewpoint.

47 The Full Court would have known all of the foregoing considerations. When all of them are given due weight, there was abundant reason for the Full Court to come to the conclusion which it did in this matter. If the decision were the Full Court's alone, according to its own awareness of such matters, the argument for rejecting the complaints of the appellant would thus have been overwhelming and compelling.

48 However, the test which the law calls for interposes a fictitious bystander. It hypothesises a person whose judgment in the matter is taken to be determinative. One might consider that the fiction should not be taken too far. Indeed, it is important to reserve to the appellate court a capacity to review the facts and the complaints having regard to the "serious and sensitive issues" (98) raised by an allegation of prejudgment.

49 Nevertheless, the interposition of the fictitious bystander and the adoption of a criterion of disqualification expressed in terms of possibilities rather than "high probability" (99) are both intended to serve an important social interest which must be restated in disposing of this appeal. Each of these considerations lays emphasis on the need to consider the complaint made ultimately, not by what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and to the public (100). That is why one does not attribute to the fictitious bystander highly specialised knowledge, such as that known perhaps to only some lawyers concerning the supposed inclinations and capacities of a particular adjudicator (101). It is also why it would be a mistake for a court simply to impute all that was eventually known to the court to an imaginary reasonable person because to do so would be only to hold up a mirror to itself (102).

50 These considerations leave open the other matters which the

(97) cf *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 210-211; *Chambers v Jobling* (1986) 7 NSWLR 1 at 8-10.

(98) *R v S (RD)* [1997] 3 SCR 484 at 527.

(99) *Livesey* (1983) 151 CLR 288 at 293-294 contrasted with *Melbourne Stevedoring* (1953) 88 CLR 100 at 116.

(100) *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 623 at 637-638 applying *Old St Boniface Residents Assn Inc v Winnipeg (City)* [1990] 3 SCR 1170 at 1197.

(101) *S & M Motors* (1988) 12 NSWLR 358 at 376.

(102) *R v Secretary of State for the Environment; Ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 316, per Sedley J.

fictitious bystander is assumed to know, or to attempt to obtain, in order to make the hypothetical decision. Does the law assume that the bystander is simply a member of the public who may have sat in the back of the courtroom and heard no more than the particular statement of the primary judge about which the appellant complains? Most members of the public, if they visit courts at all, stay only for a matter of minutes, rarely for hours, and almost never for days. Even parties, if represented, may absent themselves entirely or for extended periods of time. Does the law presume that, to make the hypothesised decision, given its serious consequences, the fictitious bystander will secure acquaintance with at least the five considerations mentioned above? If such knowledge is to be attributed to the bystander, does that fact undermine the modern test adopted by this Court and restore once again a restrictive judgment according to the opinion of lawyers rather than the public? Would that be effectively to shift the balance back to the test previously favoured? (103) Or at least towards the "real danger" test adopted by the House of Lords in *Gough* (104) despite its recent rejection by this Court in *Webb*?

51 It is important to face these questions in this appeal both because differences of view have been expressed upon them within Australia (105) and because some overseas decisions have suggested that the attribution of increasing knowledge to the fictitious bystander, about the law and its ways, is the means by which, in practice, the "vigilant" or "Spartan" test (depending on one's point of view) is revealed as no different in application from the alternative test which requires affirmative proof of a "real danger" (106) of apparent bias before the adjudicator is disqualified.

The knowledge imputed to the fictitious bystander

52 There is no simple answer to the foregoing questions. As is usually the case when a fiction is adopted, the law endeavours to avoid precision. The nature of the fiction involved in this instance is illustrated by the many ways in which the hypothesised bystander is described. Phrases that have been used include the "lay observer" (107), "fair-minded observer" (108), "fair-minded, informed lay observer" (109), "fair-minded people" (110), "reasonable or fair-minded observer" (111), "reasonable and intelligent man" (112), the

(103) *Melbourne Stevedoring* (1953) 88 CLR 100 at 116.
(104) [1993] AC 646.
(105) See, eg, *S & M Motors* (1988) 12 NSWLR 358 at 360, 378.
(106) *Auckland Casino* [1995] 1 NZLR 142 at 149; cf *Locabail* [2000] QB 451 at 475.
(107) *Vakauta v Kelly* (1989) 167 CLR 568 at 573, 574.
(108) *Livesey* (1983) 151 CLR 288 at 300; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87.
(109) *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 92.
(110) *Watson* (1976) 136 CLR 248 at 263.
(111) *Vakauta v Kelly* (1989) 167 CLR 568 at 585.
(112) *Watson* (1976) 136 CLR 248 at 267.

"parties or the public" (113), a "reasonable person" (114), or (as has sometimes been favoured in England (115) and Canada (116)) the somewhat quaint and circular phrase, a "right-minded" person. Obviously, all that is involved in these formulae is a reminder to the adjudicator that, in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public. It is their confidence that must be won and maintained. The public includes groups of people who are sensitive to the possibility of judicial bias. It must be remembered that, in contemporary Australia, the fictitious bystander is not necessarily a man nor necessarily of European ethnicity or other majority traits (117).

53 The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer (118). Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided (119). Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers (120). The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted (121). The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality (122). Acting reasonably, the fictitious bystander would not reach a hasty conclusion

(113) *Re Media, Entertainment & Arts Alliance and Theatre Managers' Association; Ex parte Hoyts Corporation Pty Ltd* (1994) 68 ALJR 179 at 182; 119 ALR 206 at 210.

(114) *Vakauta v Kelly* (1989) 167 CLR 568 at 576.

(115) *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599.

(116) *Committee for Justice and Liberty v Canada (National Energy Board)* [1978] 1 SCR 369 at 394; *R v S (RD)* [1997] 3 SCR 484 at 505, 507.

(117) *R v S (RD)* [1997] 3 SCR 484 at 508.

(118) *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [No 9]* (unreported; Court of Appeal (NSW); 27 November 1990) at 20, cited in *Spedley Securities* (1992) 26 NSWLR 411 at 419.

(119) *R v George* (1987) 9 NSWLR 527 at 536, per Street CJ.

(120) *Galea v Galea* (1990) 19 NSWLR 263 at 282.

(121) *Wentworth v Rogers [No 12]* (1987) 9 NSWLR 400 at 422.

(122) *R v S (RD)* [1997] 3 SCR 484 at 533; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 177.

based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context (123). Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious (124).

54 About the precise detail of the knowledge ascribed to the fictitious bystander, there can be (and sometimes is) a difference of opinion. This observation is illustrated by *S & M Motors* (125). The majority there explained their reasoning by reference to a dialogue between citizens (126). In that dialogue, one participant, obviously with more knowledge of the particular proceedings and of legal proceedings generally, endeavoured to explain to the other, who was more sceptical, the unreasonableness of concluding that there was any danger of bias or prejudgment in that matter. I disagreed with that view on the footing that the hypothetical conversation attributed excessive "sophistication and knowledge about the law and its ways" to one of the participants which was "atypical of the general community" (127). Later, in *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [No 9]* (128), I returned to this point and what I said there still expresses my opinion.

Conclusion: prejudgment is not demonstrated

55 When the foregoing considerations are taken into account, I do not consider that prejudgment on the part of the primary judge is shown in this case. The case, in significant ways, is different from *Watson*. The judge's statement here was more qualified, less emphatic and less personal to the parties. It was apparently open to dissuasion or modification. When the context and the entire circumstances are taken into account, a fictitious bystander, observing what was said and done, would not, in my view, entertain a reasonable apprehension that the primary judge might not bring an impartial and unprejudiced mind to the resolution of the issues before him. All the judge did was to repeat the statement that he had made earlier in the proceedings. It was an obvious statement which showed good sense. It could be understood by lawyer and layperson alike.

56 The timing of the judge's statement was not, in the end, an indication of prejudice against, or predisposition to disbelieve the oral testimony of, the appellant. On the contrary, following the testimony of the respondent, and referring to her as well as to the appellant, it

(123) *R v S (RD)* [1997] 3 SCR 484 at 505; *Galea v Galea* (1990) 19 NSWLR 263 at 282.
(124) cf *R v S (RD)* [1997] 3 SCR 484 at 505.
(125) (1988) 12 NSWLR 358 at 381.
(126) *S & M Motors* (1988) 12 NSWLR 358 at 379-380.
(127) *S & M Motors* (1988) 12 NSWLR 358 at 376.
(128) Unreported; Court of Appeal (NSW); 27 November 1990, at 20-21, cited in *Spedley Securities* (1992) 26 NSWLR 411 at 419-420.

indicated an adherence to the sensible view stated at the outset of the hearing.

57 We should not attribute to the fictitious bystander, any more than to the modern adjudicator and lawyer, a conviction that judges, or adjudicators as a class have a special capacity to distinguish truth from falsehood by the appearance of witnesses or the presentation of their oral evidence. As I read the primary judge's intervention in this case, it was rather a timely reminder to the appellant and his lawyers of the judge's general approach. Such a reminder afforded the appellant and his representatives the opportunity to present the oral testimony of the appellant in a way that sensibly laid emphasis on all of the means available to establish, objectively, the entirety of the property belonging to the appellant or under his control. It was well timed because the ascertainment of that property was crucial to the resolution of the dispute between the parties. In their comparative positions of access to evidence, including documentary evidence, the appellant had obvious advantages over the respondent. All the judge did was to remind the appellant of the approach that he was inclined to take.

The necessity for and appropriateness of analysis

58 A view has been expressed that it is neither necessary nor appropriate to undertake any detailed analysis of the principles that govern the outcome of this appeal or the basis of those principles which, it is said, neither party disputed (129). I respectfully disagree.

59 Since the appellate jurisdiction of this Court was validly limited (130), in virtually every case (131), to appeals for which the Court must grant "special leave", legal issues of public importance or general application, differences of opinion about the law, or the interests of the administration of justice, are required to attract the grant (132). Once a matter comes to the Court, it will therefore ordinarily involve questions of significance not only for the parties but for the law of Australia. It must be assumed that this appeal was so considered. So much appears to be confirmed by the constitution of the Court for the hearing, comprising as it did the entire Court. No suggestion was made in argument, still less given effect, that special leave should be revoked.

60 This Court hears only a small number of appeals each year. Its responsibilities include, where relevant, the review and reconsideration of legal authority as well as legal principle and legal policy. In my view, that responsibility was enlivened in this appeal by the

(129) Reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at 492 [10].

(130) *Judiciary Act* 1903 (Cth), ss 35, 35AA, 35A.

(131) But see *DJL v Central Authority* (2000) 201 CLR 226 at 238 [15], 258-259 [77]-[79].

(132) *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 218, where the "greater emphasis to [the Court's] public role in the evolution of the law" was explained as being a consequence of the new provisions for special leave.

submissions of the parties. In particular, in his written and oral submissions, the appellant, in addition to his reliance on *Watson* (133), advanced argument addressed to the developing law on judicial bias in England, Canada, South Africa and New Zealand, as well as in Australia. He also mentioned academic literature. Because the appellant loses, he is entitled to know that his submissions have been considered. What is necessary and appropriate should, in my view, take this consideration into account.

Order

61 The appeal should be dismissed with costs. Those costs should not include costs needlessly incurred by the insistence of the respondent, if such is proved to the taxing officer, that the appeal papers include much evidentiary material irrelevant to the narrow ground of appeal upon which special leave was granted.

62 CALLINAN J. The question in this case is whether a trial judge should have acceded to a timely submission that he should disqualify himself on the ground of apprehended bias, by reason of a statement made on the twentieth day of a hearing which was to continue for many more sitting days.

Facts

63 In August 1996 the marriage of the appellant and the respondent which had lasted about seventeen years was dissolved. By then the parties were locked in a bitter and prolonged dispute over very substantial assets which were available for division between them in matrimonial proceedings in the Family Court of Western Australia. The financial affairs of the parties, especially those of the appellant husband, were extremely complex. The respondent claimed that they related to assets, both onshore and offshore. Elaborate arrangements had been devised for the holding of these assets and their disposition, by means of the establishment of various trusts and legal personalities, in, among other places, Australia, the United Kingdom, Switzerland, Liechtenstein, Vanuatu, Bahrain and Panama. Numerous complicated transactions had been undertaken over the years at the direction of the appellant for the acquisition, movement and disposition of these assets and their proceeds. The respondent claimed that at the time of the trial a substantial proportion of the assets that the appellant ultimately controlled were held by an English resident of Bahrain, Andrew Hedges. This was denied by the appellant. For present purposes it is sufficient to make this observation: that without access to all of the relevant documents, and frank and complete disclosure, and all necessary explanation in respect of them, the financial affairs and assets over which the appellant presided would remain impenetrable.

(133) (1976) 136 CLR 248 at 265. See above at 497 [26]-[27].

The trial judge's task was further complicated by the failure of the appellant to file affidavits before the trial started.

64 The hearing before his Honour lasted sixty-six days. On 19 March 1997, the twentieth day, the trial judge Anderson J said:

> "Well, [let] me go back to what I said at the very beginning ... is that I will rely, principally, on witnesses other than the parties in this matter — and documents — to determine where the truth lies; and any other documents that are available to assist me in that regard, I'll be grateful to receive. I'm not vacating my earlier order; and I am adjourning."

65 The earlier order to which his Honour was referring was an order that the appellant should list as a discoverable document a transcript of some evidence that he had given to the Australian Securities and Investments Commission (ASIC) with respect to some corporate transactions.

66 By the time that his Honour made the statement that I have quoted the respondent and a number of witnesses had given evidence and been cross-examined, but not all of the appellant's written material had been filed or produced and he had been neither examined nor cross-examined. So much of the transcript of the proceedings of the trial, as it was necessary for this Court to consider, showed that the parties continued throughout the proceedings to make claims and counter-claims about the failure of each to define the issues. It is easy to understand why the trial judge might be attracted to the documents evidencing the transactions which he had to explore, in preference to the assertions and counter-assertions of the parties about them. And, even though the case had yet forty-six days to run, enough had plainly appeared to his Honour to indicate that the documents would in all probability offer a more reliable guide to events and resources, than the claims of the parties about them. A particular aspect of the complaint that the appellant makes about his Honour's remarks is that they were made before he had heard any of the husband's oral evidence. This aspect of the complaint loses much, if not all of its force, for three reasons: many of the matters in issue were ones peculiarly within the knowledge of the appellant; he had a clear obligation under O 17, r 3 of the Family Law Rules 1984 (Cth) (134) to

(134) "*Full and frank disclosure* A person who is required by these Rules to file a financial statement in accordance with rule 2 must make in the financial statement a full and frank disclosure of the person's financial circumstances including details of: (a) any vested or contingent interest in property (including real or personal property and legal and equitable interests); and (b) the person's income from all sources, including any benefit received in relation to, or in connection with, the person's employment or business interests; and (c) the person's other financial resources; and (d) any trust: (i) of which the person is the appointor or trustee; or (ii) of which the person, or the person's child or spouse, or de facto spouse, is an eligible beneficiary as to capital or income; or (iii) of which a

put all of his financial cards on the table; and, his counsel had had an opportunity and indeed was under an obligation to put relevantly contentious matters and his case to the respondent and to her witnesses in his cross-examination of them (135).

67 On the resumption of the trial on the day following his Honour's remarks, counsel for the appellant made an application that the trial judge disqualify himself. The submission was that his Honour's statement gave rise to a reasonable apprehension of bias. His Honour reserved his decision until after the luncheon adjournment when he made the following ruling:

> "When yesterday I repeated what I earlier said, I was simply pointing out to the parties the wide divergence. It was going to be a difficult task. My statement was not to be taken as a predetermination of the credibility of both parties, or of either of them. My statement merely affirms my need to look to the other evidence to assist in determining who is telling the truth. I was not saying I would not accept the evidence of either party; I did not reject the credit of both parties; I was merely saying that the other evidence was important in determining the credit of one or other of the parties, and to that extent I don't accede to the application that has been made by the husband."

68 His Honour reserved his judgment on the trial for about ten months (136). No reference was necessary, or made in his Honour's reasons to the application by the appellant and its rejection.

69 The appellant appealed to the Full Court of the Family Court of Australia on a multiplicity of grounds including a ground that the remarks of the trial judge had given rise to a perception of bias which should have led to his Honour's disqualification of himself. The Full Court rejected this ground of appeal. In doing so the Full Court (Ellis, Kay and Dessau JJ) said that the remarks that his Honour made, needed to be read as a whole, and in context, and that he had been attempting to say no more than what he had said earlier, that because

(134) *cont*
corporation is an eligible beneficiary as to capital or income if the person, or the person's child or spouse, is a shareholder or director of that corporation; or (iv) over which the person has any power or control, either direct or indirect; or (v) of which the person has the power, directly or indirectly, to remove or appoint a trustee; or (vi) of which the person has the power (whether subject to the concurrence of another person or not) to amend the terms; or (vii) of which the person has the power to disapprove: (A) a proposed amendment of the terms; or (B) the appointment or removal of a trustee; or (viii) over which a corporation has a power referred to in subparagraphs (iv) to (vii), if the person is a director or shareholder of that corporation; and (e) any gift or other disposition of property made by the person since the separation of the parties."

(135) *Browne v Dunn* (1893) 6 R 67.

(136) Judgment was delivered on 30 April 1998.

the stories of the parties were greatly divergent, external evidence would be extremely important in finding where the truth lay.

The appeal to this Court

70 The grounds of appeal to, and the argument in this Court, came down to three basic propositions: that the Full Court should have held that his Honour's statement on the twentieth day of the trial did give rise to a reasonable apprehension of bias; that nothing that had happened or had been said earlier ameliorated the impact of his Honour's statement; and what his Honour said later in declining to disqualify himself did not cure the perception which the statement in question would have engendered in the mind of the fair-minded observer.

71 The remarks which his Honour made may be contrasted with those that this Court held gave rise to an apprehension of bias in *R v Watson; Ex parte Armstrong* (137) and which are set out at length in the reasons for judgment of Jacobs J (138). Those included a statement that "credit [was] a non-event in this case." (139) Another difficulty about the trial judge's statement there was that he had said that he regarded himself as conducting a "general inquiry" (140).

72 Barwick CJ, Gibbs, Stephen and Mason JJ were of the opinion that the latter statement compounded the problem that his Honour's other observations had caused. They pointed out that the judge was not entitled to do "palm tree justice" (141), but was obliged to exercise his discretion in accordance with legal principles. After discussing some differences between the English approach to apprehended bias and the test that had conventionally been applied in Australia their Honours concluded that a judge (142) "should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced and impartial." Their Honours rejected an argument that there was no bias because the judge had formed an equal distrust of both parties, by pointing out that (143):

> "[T]he formation of a preconceived opinion that neither party is worthy of belief amounts to bias ... [T]o form such an opinion is to predetermine one of the issues in the case, and may operate unfairly against one party, even though both are discredited ... A party who believes, on reasonable grounds, that the judge has decided, in advance, to disbelieve her evidence cannot have confidence in the

(137) (1976) 136 CLR 248.
(138) *Watson* (1976) 136 CLR 248 at 269-290.
(139) *Watson* (1976) 136 CLR 248 at 281.
(140) *Watson* (1976) 136 CLR 248 at 283.
(141) *Watson* (1976) 136 CLR 248 at 257.
(142) *Watson* (1976) 136 CLR 248 at 262.
(143) *Watson* (1976) 136 CLR 248 at 265.

result of the proceedings, even if the judge has decided to reject the evidence of her adversary as well.''

73 In relation to all of these matters Jacobs J (in dissent) was of a different view: that a judge cannot be biased or (presumably) does not produce any appearance of bias ''because he approaches the two parties without bias, because he does not regard the credit of one as higher than the credit of the other!'' (144).

74 *Watson's* case was applied in another case from the Family Court, *Re Lusink; Ex parte Shaw* (145) in which the burden of the remarks of her Honour the trial judge were that it would be necessary for her to find a way, by appropriate orders, to ensure that the wife and the five children of the marriage were not left without a roof over their heads. Gibbs A-CJ in refusing prohibition accepted that it may well have been that the trial judge had expressed herself more absolutely than was prudent, but that her remarks were stated to be, and could fairly be regarded as being preliminary only, and not involving any pre-judgment of the case (146).

75 Stephen, Murphy and Wilson JJ in short separate reasons in substance agreed with the acting Chief Justice, but Aickin J would have granted prohibition on the ground that her Honour's observations may well have created an impression of pre-judgment (147). Aickin J also pointed out that repeated denials of pre-judgment might well convey the ''impression of 'protesting too much' '' rather than dispel any earlier apprehension of bias that may have been conveyed (148).

76 In *Livesey v NSW Bar Association* (149) the circumstances were different again. Two members of the Court of Appeal of New South Wales (Moffitt P and Reynolds JA) had sat on some earlier proceedings in which they had made some critical comments about a party. Nonetheless their Honours declined an invitation to disqualify themselves. In applying *Watson's* case the Court (Mason, Murphy, Brennan, Deane and Dawson JJ) pointed to some of the problems confronting counsel in a situation in which an apprehension of bias may have been created (150); that among other things counsel may have to resolve the dilemma of deciding whether or not to call the person as a witness who had been the subject of the previous remarks.

77 The next case in this Court on which the appellant relies is *Vakauta v Kelly* (151). The reasoning in that case has, in my opinion, had the effect of imposing a particular burden upon counsel representing a

(144) *Watson* (1976) 136 CLR 248 at 291.
(145) (1980) 55 ALJR 12; 32 ALR 47.
(146) *Lusink* (1980) 55 ALJR 12 at 14; 32 ALR 47 at 51.
(147) *Lusink* (1980) 55 ALJR 12 at 16; 32 ALR 47 at 54-55.
(148) *Lusink* (1980) 55 ALJR 12 at 16; 32 ALR 47 at 55. See also *RPS v The Queen* (2000) 199 CLR 620 at 651-652 [93].
(149) (1983) 151 CLR 288.
(150) *Livesey* (1983) 151 CLR 288 at 298-299.
(151) (1989) 167 CLR 568.

party who has a basis for submitting that a judge has so conducted himself or herself that he or she should no longer continue to hear the case. Brennan, Deane, Toohey and Gaudron JJ did not doubt that the remarks of the trial judge in that case would have excited in the minds of the parties, and in the members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the matters before him (152) and Dawson J accepted that the trial judge's conduct would have conveyed an impression of ostensible bias (153). The conduct in question was the expression by the trial judge of highly critical remarks about an expert witness who had given evidence before his Honour in earlier proceedings. Counsel or solicitors were not entitled however, it was held, to stand by until the final judgment became known, and its contents found to be unpalatable, and then to argue that by reason of the earlier comments there had been a failure to observe the requirements of impartiality.

78 Toohey J in the course of his reasons said this (154):

> "There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case. That is not to say that the litigant in such a position must expressly call upon the judge to withdraw from the case. It may be enough that counsel make clear that objection is taken to what the judge has said, by reason of the way in which the remarks will be viewed. It will then be for the judge to determine what course to adopt, in particular whether to stand down from the case. For counsel to invite the judge to withdraw from the case may be quite premature, particularly if the judge acknowledges the apparent bias in what has been said and thereafter takes steps to dispel that apprehension. But, as Dawson J noted in *Re JRL; Ex parte CJL* (155), suspicion of bias based on preconceptions existing independently of the case 'may well be ineradicable'. In that situation there will be no option but to ask the judge to disqualify himself. In any event objection must be taken (156). It was not taken in the present case."

79 In this case counsel for the appellant did make a timely submission about the trial judge's comments and invited his Honour to withdraw from the case. Accordingly, it is unnecessary to explore the sorts of problems to which some of the statements in *Vakauta* may give rise; such as: that, on one view, the literal application of them may have the consequence that a higher and greater responsibility to ensure the

(152) *Vakauta* (1989) 167 CLR 568 at 573, per Brennan, Deane and Gaudron JJ; at 588, per Toohey J.
(153) *Vakauta* (1989) 167 CLR 568 at 579.
(154) *Vakauta* (1989) 167 CLR 568 at 587.
(155) (1986) 161 CLR 342 at 372.
(156) See *Re McCrory; Ex parte Rivett* (1895) 21 VLR 3 at 6.

conduct of impartial proceedings is imposed upon counsel than the judge trying the case; that an apprehension of bias may be created cumulatively, so that its full impact and relevance may really only become apparent when judgment is pronounced; that exceptionable, apparently biased statements by judges in the course of proceedings may confront counsel with dilemmas which it is almost impossible for them to resolve, or to resolve without causing offence to the court and the creation of a not unreasonable perception on the part of the parties, of prejudice to the one who takes the point; the risk of other dilemmas of the kind to which the Court referred in *Livesey* (157); that in some exceptional cases a submission of apprehended bias may be no more than a polite fiction for no doubt unintended, unconscious and ultimately unprovable, but nonetheless actual bias; and that the application of formal, technical principles of waiver to a party upon the basis of the conduct of his or her counsel in not checking inappropriate and judicial conduct, may produce unfairness to that party (158). Nor is it necessary to expatiate on the particular deficiency of a purported waiver in a case in this Court in which the decision, as a decision of a final court, may have the capacity to affect the rights and obligations of non-parties, who, if given the opportunity might have been unprepared to offer to waive.

80 As was made clear in *Watson's* case (159) for an apprehension of bias to be created the remarks that a judge makes need not be confined to remarks about one party only. Nor to create such an apprehension do the remarks necessarily need to be disparaging of a party or the parties. Something might be said or done by a judge which simply has the effect of producing in the mind of a fair-minded observer a reasonable perception that a fair trial, is not occurring, or has not taken place (160). As to the latter however it is important to keep in mind that the notional, fair-minded observer is a rational person not unacquainted with the legal process, the oath or affirmation that judges have taken and judicial obligations generally, and in broad terms what has occurred and may occur in the case before and after the challenged

(157) (1983) 151 CLR 288 at 299.

(158) Contrast the difference in approach that has sometimes been adopted to failures by lawyers to act diligently on behalf of their clients in the context of applications for extensions of time under limitations statutes and rules of court. See, eg, *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419 at 425, per Macrossan J; at 431, per McPherson J; at 439, per Thomas J; *Repco Corporation Ltd v Scardamaglia* [1996] 1 VR 7 at 13, per Smith J; *Lord v Australian Safeway Stores Pty Ltd* [1996] 1 VR 614 at 621, per Phillips JA; *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 260-261, per Diplock LJ.

(159) (1976) 136 CLR 248 at 265.

(160) Devlin, *The Judge* (1979), p 4, quoted by Brennan J in *Webb v The Queen* (1994) 181 CLR 41 at 57; *RPS v The Queen* (2000) 199 CLR 620 at 653 [97], per Callinan J.

conduct. Furthermore it is as well to keep in mind what Mason J said in *Re JRL; Ex parte CJL* (161):

> "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way."

81 In my opinion, what was said by the trial judge in this case was reasonable in its language, and was said in circumstances in which it was reasonable for his Honour to say it.

82 As counsel for the respondent submitted, the statement by the trial judge had to be placed in context. His Honour had earlier suggested to counsel for the appellant that he ought put to the respondent the actual documents evidencing an alleged loan whose existence she mistrusted. This had apparently remained undone. It was an entirely reasonable suggestion. By the time that his Honour made his comments the issues in the case should have been fairly clearly defined. His Honour's position might well therefore be contrasted with the position of a judge, who may have, for example, engaged in intensive case management before a trial, and has come to believe himself or herself so well educated about the proceedings, and the respective positions of the parties, as to be able to make predictions about the outcome on the impressions so far formed, a real danger which may lie in intensive case management undertaken by a judge who is to conduct the trial.

83 The true significance of his Honour's statement in this case, and its particular relevance also assume an innocent and unexceptionable complexion, when it is seen what the submission by counsel for the appellant was that preceded it:

> "Your Honour, with respect, if we're going to go to the point of, okay, it is totally open slather, and whoever wants to do whatever they can, let's just barrow on and put as much material, relevant or not — concise or not — before the court; your Honour, we will be here for a long time; we will spend many more hundreds of thousands of dollars; it must be contained, your Honour, to the point

(161) (1986) 161 CLR 342 at 352.

of what your Honour needs to decide in this case, rather than, with respect, the 'Royal Commission' that it's turning into.''

84 Among other things his Honour was obviously looking for some means to break the impasse of what looked like being an unnecessarily long and expensive case by the provision *where and when appropriate* of relevant documents.

85 In the circumstances I do not consider that the trial judge did make any remarks which could have given rise to any relevant perception of bias. This was not therefore a case which could have involved protestations of impartiality of the kind referred to by Aickin J in his dissenting judgment in *Lusink* (162) and which might therefore have reinforced, rather than dispelled, any prior apprehensions of bias. This was a case which called for no more than attention to the submission that his Honour should disqualify himself, and with that his Honour dealt adequately. There was effectively nothing to correct and his Honour's remarks in rejecting the submission were sufficient and apt for that purpose.

86 I would dismiss the appeal with costs.

Appeal dismissed with costs

Solicitors for the appellant, *Lewis Blyth & Hooper.*

Solicitors for the respondent, *K Wilson & Co.*

PDC

(162) (1980) 55 ALJR 12 at 16; 32 ALR 47 at 55.