RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW - THE LAW RELATING TO BIAS

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The Institute has asked me to discuss recent developments in the law relating to bias. Of course, the principles relating to bias are, in general, well established. But from time to time, it seems to me, certain aspects of them give rise to difficulties.

I want to examine three particular questions -

1 Is it enough that a relevant observer might form the view that a decision-maker might be biased? Or must he form the view that a decision-maker would, or would probably, be biased?

2 Is the relevant observer to have knowledge of the facts and law, just the facts, or just some of the facts?

3 Is there a new category of bias, called unintended actual bias?

Question 1

Is it enough that a relevant observer might form the view that a decision-maker might be biased? Or must he form the view that a decision maker would, or would probably, be biased?

The question arises in relation to cases of apparent (apprehended or ostensible) bias. Australian jurisdictions have differed from time to time as to the precise formulation of the legal principle to be applied in cases of this kind. Is it enough that a possibility of bias is shown? Or must there be a probability? Of course, strictly speaking, there are four possible formulations, based on the distinction between possibility and probability.

These are:

(1) & (2) Whether or not a hypothetical reasonable observer might form the view that a decision-maker (1) might be biased or (2) would, or would probably, be biased.

(3) & (4) Whether or not a hypothetical reasonable observer would form the view that a decision-maker (3) might be biased or (4) would, or would probably, be biased.

In practice, however, courts in this country have limited the debate to the first two possibilities. It is convenient to begin discussion of the modern debate with a case decided a over a decade ago, *Livesey v. The New South Wales Bar Association* (1983) 151 C.L.R. 288. In that case, the High Court preferred the first of these formulations. The facts in *Livesey* were straightforward enough. In 1981 the Bar Association had applied to the Court of Appeal of the Supreme Court of New South Wales for a number of declarations against Peter Livesey, including a

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declaration that he was not a fit and proper person to be a member of the Bar, and for an order striking his name from the roll of counsel. The Bar Association's complaint concerned the lodging of a $10,000 cash surety to secure bail for one of Livesey's clients. In a previous proceeding in which Livesey had been neither a party nor a witness, two judges of the Court, Moffitt, P. and Reynolds, J.A. had expressed the view that Livesey had actively and knowingly participated in a corrupt scheme in connection with the provision of the surety. The matter came on for hearing before the Court constituted by Moffitt, P., Hope, J.A. and Reynolds, J.A. Before the hearing of the case began, Moffitt, P. had stated from the Bench that senior counsel for Livesey had spoken to him in his chambers that morning in the presence of senior counsel from the Bar Association and that he had raised the question whether the President and Reynolds, J.A. should sit because of the views which they had previously expressed. The President said that the Court had considered the matter and could find "no valid reason why the Court as constituted should not sit". The Court found against Livesey. On appeal, the sole issue was whether, in all the circumstances, the due administration of justice required that the President and Reynolds, J.A. should not sit. It was not, of course, said that the judges were motivated by any impropriety. The argument was that, because of the views expressed by them in earlier proceedings, a fair-minded observer might reasonably doubt that the proceedings could be dealt with by their Honours without bias by reason of pre-judgment. The question was, in *Livesey*, determined by reference to the following principle:

> 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 questions involved in it.

Applying that principle the Court allowed the appeal. In stating the principle in this way, the Court relied upon *R. v. Watson; ex parte Armstrong* (1976) 136 C.L.R. 248 at 258-263. That case in turn had relied upon *R. v. Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 C.L.R. 546.

The *Livesey* formulation entails two "occasions of possibility", one "nesting" inside the other, i.e., whether the observer (however described) might reasonably form the view that the decision-maker might be biased. In *Gascor v. Elliot & Ors.* [1997] 1 V.R. 332, a decision of the Victorian Court of Appeal, Ormiston, J.A. referred to this as an "apparently attenuated test of possibility upon possibility" (at p.350).

A decade after *Livesey*, the two "occasions of possibility" test was approved and applied again by the High Court in *Webb v. R.* (1994) 181 C.L.R. 41, at 47 by Mason, C.J., McHugh, J. and at 67 by Deane, J. This was the case of the juror who, in the course of a murder trial, had brought a bunch of flowers to Court, requesting that they be given to the deceased's mother. In that case, Mason, C.J., Toohey and McHugh, JJ. held that, in the circumstances, a fair-minded observer would not have had an apprehension of lack of impartiality on the part of the juror, and the judge had properly directed the trial should proceed. Brennan and Deane, JJ. dissented on the point.

The *Livesey* formulation contrasts with narrower formulations. For example, one that requires the observer to come to a reasonable view that there be a "real likelihood" of bias. Of course, the narrower formulation is not a stricter one for the decision-maker. The broader possibility net will be the wider and so the tougher one for decision-makers.

The question whether *Livesey's* two occasions of possibility represented the

current state of the law has arisen in the Courts of Appeal in Victoria and New South Wales relatively recently. The leading case in Victoria is *Gascor v. Elliott* which in turn followed upon *Rozenes & Anor. v. Kelly & Ors.* [1996] 1 V.R. 320. *Gascor v. Elliott* concerned an arbitration in 1995 between Gascor as the sellers of off-shore natural gas and Esso Resources Ltd. and B.H.P. Petroleum (North West Shelf) Pty. Ltd. as the buyers. The buyers advanced three grounds for apprehending bias on the arbitrator's part. First, it was said that the arbitrator, who was the Honourable R.J. Ellicott Q.C., had acted as leading counsel for the producers in an arbitration about the price of on-shore natural gas in 1985-1987. Secondly, it was said that in 1987-1990, Ellicott had been one of a number of arbitrators in another arbitration concerning off-shore natural gas production which had been determined in favour of the sellers (who were different parties to those in the Gascor arbitration). Finally, it was said that the arbitrator was disqualified for failing to disclose appropriate information concerning his participation in earlier arbitrations to the buyer before undertaking the arbitration. The arbitrator declined to disqualify himself as required by the buyers. A judge refused to order his removal and the Court of Appeal also dismissed the buyers' appeal. Tadgell, J.A., at 340-3, and Ormiston, J.A., at 350, specifically applied the two occasions of possibility test.

The New South Wales Court of Appeal, in *Australian National Industries Ltd. v. Spedley Securities Ltd. (In liq) & Ors.* (1992) 26 N.S.W.L.R. 411, also came to apply the two occasions of possibility test, although with some misgivings. See pp.427 per Samuels, J.A. and 439-40 per Mahoney, J.A. Samuels, J.A. referred to the possibility that certain of the observations of Mason, J. in *Re JRL; ex parte CJL* (1986) 161 C.L.R. 342 at 352 indicated that there had been a shift away from the two occasions of possibility test formulated in *Livesey*. In *Re JRL*, Mason, J. had said:

> 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.

The position has been different in the Federal Court. In *Khadem v. Barbour* (1995) 38 A.L.D. 299, a decision of Hill J., and in the Full Court decision of *Kaycliff Pty. Ltd. & Ors v. Australian Broadcasting Tribunal & Anor.* (1989) 90 A.L.R. 310, the Federal Court lent towards the "likelihood" version of the principle, i.e., that a hypothetical reasonable observer might form the view that a decision-maker would be biased. In *Khadem*, Hill, J. said, at 308, that he was bound by the Full Court's decision in *Kaycliff* in which the Full Court had said "Parties such as the appellants must raise quite a substantial case in order to succeed" (at 317). After saying that, the Full Court had cited a passage from the joint judgment of Dixon, C.J., Williams, Webb and Fullagar, JJ. in *R. v. Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co. Pty. Ltd.* (1953) 88 C.L.R. 100, at 116. In that passage, the majority had said:

> 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 will be seen that this is roughly equivalent to version 4 referred to earlier, i.e., whether a hypothetical reasonable observer would form the view that a decision-maker would be biased.

With all this in mind, Hill, J. in *Khadem*, at 307, cited the discussion in *Spedley* as showing there was some variety (or wavering) in opinion on the issue and said, at 308:

> To the extent that the full court in *Kaycliff* was adopting a test of probability of bias rather than possibility of bias, it would seem that there is a conflict between the views of the full court of this court and the views of the New South Wales Court of Appeal.

In passing, I note that the Victorian Court of Appeal has not construed the comments of Mason, J. in *Re JRL* as supportive of anything other than the two occasions of possibility test. In *Gascor*, at 342, Tadgell, J.A. said that Mason, J. was simply:

> concerned to ... point out that the reasonable apprehension that matters is of a partial or prejudiced decision and not of a decision adverse to the party harbouring the apprehension.

His Honour went on to say "the court is to be satisfied that the criterion is met, not that it might be". This accords with the possibility approach if it is understood that the criterion in question is that a reasonable observer might view the decision-maker as possibly biased. where "a reasonable observer" allows for the possibility that some observers might, reasonably, not view things in this way. The possibility approach does not say that the only reasonable view is the one which views things as containing a possibility of bias. To hold that would be to adopt a narrower test, although sometimes the cases are not perfectly clear on this point.

In any event, it seems that the Full Court of the Federal Court has, without saying so, decided not to follow *Kaycliff* and has re-aligned itself with the two occasions of possibility approach. In *Gaisford v. Hunt* (1996) 71 F.C.R. 187, the Court, constituted by Beaumont, O'Loughlin and Lehane, JJ., returned to the possibility approach, ignoring *Kaycliff* and *Khadem*. It is presumably to be understood, without being explicit, that the Full Court has rejected the likelihood approach in favour of the possibility approach.

The concerns which occupied the High Court in *Melbourne Stevedores* and later the Full Federal Court in *Kaycliff* are not to be dismissed as trifling. Perhaps concerns about "substance" can more usefully be articulated in terms of the reasonableness of the observer's view, instead of the likelihood of bias. That is to say, the apprehension must be reasonable and not fanciful; significant and not trifling. This would fit better with the concern about "substantial distrust" mentioned in *Melbourne Stevedores*. For example, substantial distrust would not be reasonably engendered where it is reasonable to hold there is a high probability that a decision-maker has a trivial dislike (or bias) against the mauve trousers worn by counsel.

This sort of approach, at least in relation to reasonableness, can be seen in Tadgell, J.A.'s comment in *Gascor* (at 342) that:

> It is a reasonable and not a fanciful or fantastic apprehension that is to be established; and the apprehension is to be attributed to an observer who is 'fair minded' - which means 'reasonable.

The exclusion of trivial or insubstantial bias is implied in Ormiston, J.A.'s comment in *Gascor*, at p.350, that "the test must be applied to a variety of situations and in circumstances where the practicalities of the matter make its most stringent application impracticable", if "practicality" means, not that it can be applied but that it is sensible or more productive of justice on balance not to apply it.

In the context of apprehended bias, the observations of Merkel, J. in *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd.* (1996) 65 F.C.R. 215 may be of particular assistance. In that case, the applicant had issued proceedings seeking relief against the respondents who conducted the business of Qantas Airways. The relief was founded on alleged breaches of the *Trade Practices Act 1974* (Cth.). In the course of the case senior counsel for the applicant had made

application that his Honour not sit on the case, on the ground that a reasonable apprehension of bias might arise by reason of his association with senior counsel for the respondent. The judge ultimately held that, sitting as a trial judge, the parties or the public might entertain a reasonable apprehension that he would not bring an impartial and unprejudiced mind to the resolution of the issue. His Honour's comments about the nature of the association between himself and counsel are relevant to the question of substance. His Honour acknowledged that there was "the requirement for a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case". It is, he said, "the capacity of the association to influence the decision rather than the association as such that is disqualifying" (at 226). Earlier his Honour had said (at 222):

> There must be something in the nature or the extent of the association which leads [the] bystander to conclude, whether for friendship, love, money, fear, favour or otherwise, that the adjudicator might be influenced by it. Where the association in question is trivial, remote or indirect the courts might conclude that it is not a disqualifying one.

Merkel, J. reiterated this approach in *Velasco v. Carpenter* (unreported, 24 June 1997) in which the question of apprehended bias arose in a quite different context, relating to the determination of charges of misconduct against a public servant. The applicant alleged apparent bias, on the ground that the officer appointed to inquire was answerable to an area manager who had made decisions against the applicant in the past.

It seems to me that Merkel, J.'s observations could readily be applied *mutatis mutandis* in many situations said to give rise to bias, including comments made at trial.

Question 2

Is the relevant observer to have knowledge of the facts and law, just the facts, or just some of the facts?

As now formulated, the principle against apprehended bias gives rise to a further difficulty, namely, what is the nature and extent of the knowledge to be attributed to the observer which, it is said, can give rise to a reasonable apprehension of bias? The need to examine the question necessarily arises from the assertion that "it is the court's view of the public's view, not the court's own view, which is determinative", a proposition accepted by Mason, C.J. and McHugh, J. in *Webb* (at 52).

Some such notion as "the public's view" or "the hypothetical lay observer" is needed to distinguish cases of "actual bias" from cases of "apprehended bias". If the court were to investigate simply how things appeared to it (i.e. to make its own findings), then that would be a case of "actual bias", not "apprehended bias". The distinction is really between the appearance to the Court and the appearance to a reasonable lay observer, not between appearance and actuality. This is because the court has no more "direct access" to the inner mind of the decision-maker than the lay observer, although speaking in terms of actual versus apparent bias can sometimes, if unintentionally, convey the contrary sense. Both courts and lay observers make inferences about possible states of mind from appearances, or external evidence, in the form of words, actions and the result of actions. A court simply has different, and presumably better, knowledge of the law and evidence before it in making its factual judgment.

Returning to the question of what knowledge is to be imputed to the public observer, Tadgell, J.A. said in *Gascor* that (at 342-343):

> ... it is for the court to determine what knowledge the fair-minded or reasonable

> lay observer is to apply to an appraisal of the situation. No exhaustive criteria for such determination appear to have been authoritatively laid down - perhaps it is not feasible to do so or useful to try ... [T]he observer whose view the court is to seek is in my opinion to be fastened with sufficient knowledge to enable a rational and reasonable view - not just a perfunctory or superficial view - to be formed. Of course that is really to say no more than there must be attributed to the fair-minded observer knowledge which would afford an opportunity to consider all the relevant circumstances of the case.

If this is the correct approach, one may, I think, reasonably ask: is the observer to be imputed with all the knowledge, legal and factual, that might be possessed by a court in an actual bias case? If so, then there is no real difference between the court and the observer: they are the same. If not, then, is the observer to be imputed with knowledge of the facts only (and not with knowledge of the law)? In the latter case, then the notion of "relevant circumstances" is to be limited in some way by the ignorance fairly to be expected of a non-lawyer.

Indeed, in *Webb*, Deane, J. appeared to be of the latter view. His Honour said, at 73:

> The knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, ... as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court.

A different approach was taken by Mahoney, J.A. in *Spedley* where his Honour seems to have been sympathetic to the view that not too much is fairly to be expected of the lay observer. Mahoney, J.A. went so far as to say, at p.438, that apprehended pre-judgment "is to be judged, not according to what the court and the parties know, but according to the impressions of a lay person who does not know the facts". *Spedley* concerned the position of a judge of the commercial division of the New South Wales Supreme Court who had heard a series of cases dealing with the same or similar issues. The judge had made adverse findings on the credit of certain witnesses and the conduct of the parties. The Court of Appeal held that, on the ground of apprehended bias, the trial judge should have disqualified himself from hearing related matters in which the same issues arose. In this context Mahoney, J.A., had said, at 441:

> This matter is to be judged often, if not ordinarily, according to the view of one who is mistaken. The fact will ordinarily be that the court will be impartial in the relevant sense but the judge will step aside because, though he will be impartial, the appearance of what he does to a person who does not know, for example, the integrity of the court, the capacity of a judge, or the full facts of the case will raise the reasonable apprehension that he might not be so.

In *Gascor*, Tadgell, J.A. said, at 343, that:

> If his Honour meant that the observer is not to be treated as having a sufficient knowledge of the facts giving rise to the case, and of the basis on which the bias is alleged, I am respectfully unable to agree with him.

It seems to me that Merkel, J. in *Aussie Airlines* has offered a way out of the problem. After comparing the dissenting and majority view in *S. & M. Motor Repairs Pty. Ltd. v. Caltex Oil (Aust.) Pty. Ltd.* (1988) 12 N.S.W.L.R. 358 and *Laws v. Australian Broadcasting Tribunal* (1990) 170 C.L.R. 70, Merkel, J. concluded that the differences of view:

> demonstrate the difficulties in imputing knowledge of the processes of the law to the hypothetical observer. ... [H]owever, the differences ... relate more to the extent of the knowledge to be imputed than any underlying difference as to the principles to be applied (at 230).

Merkel J. proceeded by attributing to the observer a certain amount of knowledge about the role of the barrister and concluded his observation, at 230, by saying:

> The issue is whether that observer upon being informed of [these] kind of matters ... concludes, not whether it would be better for another judge to hear the matter, but whether the judge sitting to hear the matter might not bring an impartial and unprejudiced mind to the resolution of the ... question ... for decision.

Another way of putting the same thing may be to say that what the judge may do may be a matter for regret, but he must not act so as to give rise to a justified resentment on the part of the observer (or the parties).

Question 3

Is there a new category of bias, called unintended actual bias?

The last matter I raise for your consideration today is whether there is a new category of bias, called unintended actual bias. The Full Court of the Federal Court, constituted by Wilcox, Burchett and North JJ, has recently raised this question in a case called in *Sun Zhan Qui v. Minister for Immigration and Ethnic Affairs* (unreported, 23 December 1997). It was said in that case that actual bias had infected the decision of the Refugee Review Tribunal. Wilcox, J. left the issue of actual bias open, but both Burchett and North, JJ. took the view that a case of actual bias had been made out and that actual bias was not to be confined to an intentional state of mind. Burchett, J. said, at p.49, that:

> Bias may be subconscious, provided it is real.

His Honour went on, at p.49, to say:

> A notable feature of the Tribunal's reasons is the repeated drawing of extremely adverse conclusions ... on what, upon examination, turn out to be the flimsiest grounds.

That led him to conclude, at p.54, that:

> I accept that, just as the Tribunal member should not lightly have drawn the conclusion that the appellant had fabricated the account which had been accepted as true by another Tribunal member with the advantage of actually hearing it, so also the Court should not lightly make a finding of actual bias. But the ground of bias has been made available by Parliament as a protection for individuals, and it would be no protection if the Court shrank from giving effect to it in a proper case. When the accumulated matters I have discussed are taken into account, this must be seen as a proper case. It is more than a matter of Wednesbury unreasonableness, which is not in itself an available ground. Errors occur, but to err so many times and in such ways, and each time against the appellant, argues overwhelmingly for the conclusion that the Tribunal member proceeded to consider the case from a pre-conceived opinion and a fixed position so adverse to him that he could not obtain a fair hearing. In my opinion, that situation fell within the provision of s.476(1)(f) [of the *Migration Act 1958*]: the decision was affected by actual bias.

North, J. also made a finding of actual bias against the tribunal as his chief ground for judgment. His Honour said, at p.56:

> A decision-maker may not be open to persuasion and, at the same time, not recognise that limitation. Indeed, a characteristic of prejudice is the lack of recognition by the holder. Some judges, including myself, who have in recent years attended gender and race awareness programmes, have been struck by the unrecognised nature of the baggage which we carry on such issues. Decisions made upon assumptions or pre-judgments concerning race or gender have been made by many well-meaning judges, unaware of the assumptions or pre-conceptions which, in fact, governed their decision-making. Thus, actual bias may exist even if the decision-maker did not intend or did not know of their prejudice, or even where the decision-maker believes, and says, that they have not pre-judged a case.

North, J. went on to say that:

> Once it is appreciated that actual bias may exist, even if unintended, any special reticence in pursuing such a case should be diminished.

Why did his Honour consider that reticence should be the less if there were a category of actual, though unintended, bias? It may be that bias of this kind is easier to establish in an evidentiary sense. In one sense, however, all cases of bias involve the court in making a judgment about what is probably the case rather than what is possibly the case, because the latter can be left to the lay observer. Hence, it may be more useful to distinguish between publicly apparent bias and "judicially apparent" bias with the higher standards required in the latter case. All empirical findings, whether by courts or lay observers, are provisional or probabilistic in some way or other so that "high probability bias" rather than "actual bias" might be a more accurate term and better contrasted with "possible" bias rather than "apparent" bias. Perhaps the real advantage which his Honour saw in the notion of unintended actual bias is that it is easier on the decision-maker insofar as it does not attribute any ill will to him or her. But it seems to me that the finding of actual although unintended bias may entail a deeper and even harsher criticism of the decision-maker. Not only is it said that there is bias "in there somewhere", it is implicit that there has been a radical lack of self-understanding on the decision-maker's part.

A question may arise as to whether the concept of unintended actual bias has very much application beyond the context of paragraph 476(1)(f) of the *Migration Act 1958* which constrains a person seeking to challenge a decision of the Refugee Review Tribunal to bring this challenge within one of the grounds nominated by the Act (here "actual bias").

I shall be very interested to see whether, and in what way, courts choose to develop the concept, or having raised it, give it burial.

In this context, the need for 'quite a substantial case' was mentioned in *Satwinder Singh v. MIEA* (1997) 44 A.L.D. 55, at 558 and in a brief discussion in *Sarbit Singh v. MIEA* (unreported, 18 October 1996), two decisions of the Federal Court concerned with actual bias. In *Sarbit Singh*, it was said of a member of the Refugee Review Tribunal that he had pre-judged the matter before the conclusion of the hearing. As Lockhart, J. said, it was not:

> sufficient to show that a decision-maker has displayed irritation or impatience or even sarcasm during a hearing; regrettable though these manifestations may be, whether the relevant states of mind approach the level required to support a finding of actual bias remains a question of fact in each case.

Actual bias was not found to be established in that case, though the tribunal had, it was said, conducted the hearing "somewhat robustly". In *Satwinder Singh* it was said that remarks made by a member of the Refugee Tribunal in an "exasperated and mocking tone" were not sufficient to make out a case of actual bias (558).