Apprehended bias

British American Tobacco Australia Services Ltd v Laurie (as administratrix of the estate of Laurie) [2011] HCA 2; (2011) 273 ALR 429

In allowing this appeal, a majority of the High Court[1] held that a reasonable observer might apprehend that the court might not bring an impartial mind at trial to allegations of fraud in circumstances where the trial judge had found similar fraud allegations against the appellant to be substantiated in unrelated interlocutory proceedings determined several years earlier. The court ordered that the trial judge be prohibited from further hearing or determining the proceedings.

The Laurie proceedings

The proceedings were instituted in 2006 by Mr Donald Laurie against British American Tobacco Australia Services Ltd (BATAS) in the Dust Diseases Tribunal of New South Wales (tribunal). The case management and trial of the action were allocated to Judge Curtis of the tribunal. Mr Laurie's case against BATAS was that, in the decades in which he smoked BATAS' tobacco products, BATAS knew, or ought to have known, that smoking tobacco products could cause lung cancer. It was alleged that BATAS was negligent in the manufacture, sale and supply of its tobacco products. In May 2006 Mr Laurie died from lung cancer. Subsequently, his wife, Mrs Claudia Laurie, continued the proceedings.

One issue in the proceedings involved allegations that BATAS had developed and implemented a policy of destroying documents which might be adverse to BATAS's interests in the event of legal proceedings brought against the company. Allegations of that nature were not novel, either to BATAS or Judge Curtis.

The prior ruling

In 2006, Judge Curtis heard an interlocutory application in which orders were sought that BATAS give further discovery in unrelated contribution proceedings brought by Brambles Australia Ltd (Brambles) against BATAS (Mowbray proceedings). In determining the application the Judge had to consider whether BATAS's claim for legal professional privilege had been lost by reason of misconduct pursuant to s 125 of the *Evidence Act 1995* (NSW).

Brambles argued that the allegedly privileged communications had been made in furtherance of the commission of a fraud. The alleged fraud comprised the implementation of a policy of destroying documents adverse to BATAS's interests in anticipated litigation and the dishonest concealment of such policy by cloaking it in the guise of an innocent and non-selective housekeeping policy known as the 'Document Retention Policy'. Judge Curtis found that BATAS had adopted the policy as alleged and held that the communications were not privileged as they had been made in furtherance of the commission of a fraud within the meaning of s 125(1)(a).[2]

In his Honour's reasons for judgment, it was observed that:[3]

- the application was interlocutory and the question of whether BATAS maintained a document destruction policy as alleged remained a live issue for trial;
- the oral testimony of Mr Gulson, a former in-house counsel and company secretary of BATAS, adduced by Brambles was not contradicted or tested by BATAS;
- there could be good reasons why BATAS did not contradict or call evidence to contradict the evidence of Mr Gulson; and
- the determination was made on the evidence before the tribunal at the time and different or other evidence might be adduced at trial so as to lead to a different conclusion.

In the event, the Mowbray proceedings did not go to trial.

Recusal application

In March 2009, BATAS filed a motion in the Laurie proceedings seeking an order that Judge Curtis disqualify himself from further hearing the proceedings on the ground that his findings in the Mowbray proceedings gave rise to a reasonable apprehension of pre-judgment in respect of the allegations concerning BATAS's adoption of a document destruction policy. Judge Curtis dismissed the application.[4]

New South Wales Court of Appeal

The NSW Court of Appeal refused leave to appeal and dismissed a summons filed by BATAS seeking

prerogative relief in the nature of prohibition to prevent Judge Curtis from further hearing or determining Mrs Laurie's claim.[5]

Appeal to the High Court

The subsequent appeal to the High Court was allowed by Heydon, Kiefel and Bell JJ, French CJ and Gummow J dissenting. The apprehension of bias rule was articulated as follows: [6]

> The rule requires that a judge not sit to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide.

The function of the rule was explained in this way:[7]

> It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification.[8] Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick.

The court held that the hypothetical fair-minded observer is a lay person who, in a case of alleged pre-judgment, is assumed to have knowledge of the earlier decision and to have read the reasons for such decision.[9] In some cases (though not in the instant case), it might be appropriate to assume that the hypothetical observer has taken into account later statements by the judge which withdraw or qualify earlier comments that might otherwise indicate pre-judgment.[10] The hypothetical observer understands that the judge is a professional judge but is not presumed to reject the possibility of pre-judgment.[11]

In contrast to French CJ and Gummow J, the plurality was of the view that the finding of fraud in the Mowbray proceedings was expressed without qualification or doubt (save for an acknowledgment that different evidence may be led at trial) and, while the judge did not use violent language, he expressed himself in terms which indicated extreme scepticism about BATAS's denials and strong doubt about the possibility of different material explaining the difficulties faced by the judge.[12] Further, the nature of the fraud finding was extremely serious and it was a finding of actual persuasion of the correctness of that conclusion.[13] In such circumstances, a reasonable observer might apprehend that, having determined the existence of the alleged document destruction policy in the Mowbray proceedings, Judge Curtis might not bring an impartial mind to those issues in the Laurie proceedings.[14]

None of the exceptions to the apprehension of bias rule – necessity, waiver or (possibly) special circumstances – applied.[15] As such, the court ordered that Judge Curtis be prohibited from further hearing or determining the Laurie proceedings.

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Endnotes

1. Heydon, Kiefel and Bell JJ, French CJ and Gummow J dissenting.
2. *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray (No 8)* (2006) 3 DDCR 580 at 602 [56].
3. *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray (No 8)* (2006) 3 DDCR 580 at 599 – 601 [45], [52], [53]. Relevant passages are reproduced in *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2 at [120].
4. *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14.
5. *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 (Tobias and Basten JJA, Allsop P dissenting).
6. Heydon, Kiefel and Bell JJ at [104].
7. Heydon, Kiefel and Bell JJ at [139]. See also French CJ at [1], [32] – [37].
8. Heydon, Kiefel and Bell JJ at [139], citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 – 345 [6]-[7] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 77 [66] per Gummow, Hayne and Crennan JJ.
9. Heydon, Kiefel and Bell JJ at [140], French CJ at [50] – [51], Gummow J at [97].
10. Heydon, Kiefel and Bell JJ at [136] – [139], French CJ at [52].
11. Heydon, Kiefel and Bell JJ at [144].
12. Heydon, Kiefel and Bell JJ at [145].
13. Ibid. In the *Mowbray* proceedings Judge Curtis found that BATAS had committed a fraud (thus satisfying s 125(1)(a) of the Evidence Act) when, for the purposes of the application, he equally could have found that there were reasonable grounds for finding that fraud had been committed so as to come within the terms of s 125(2)(a).
14. Ibid, agreeing with Allsop P in *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [8]- [11].
15. Heydon, Kiefel and Bell JJ at [146] – [152]. The plurality observed that, despite Judge Curtis having case-managed the Laurie proceedings for almost three years by the time that BATAS applied for the judge to disqualify himself, Mrs Laurie did not submit that the delay in bringing the recusal application amounted to a waiver of BATAS's rights. The appeal did not raise for consideration the question of what special circumstances might justify a judge sitting to determine a case despite being reasonably suspected of having pre-judged an issue.