BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES LIMITED..... APPELLANT; APPLICANT,

AND

LAURIE AND OTHERS..... RESPONDENTS. RESPONDENTS,

[2011] HCA 2

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

Courts and Judges — Bias — Reasonable apprehension of bias — Pre-judgment — Allegation by plaintiff that defendant company had policy to destroy adverse documents — Judge found in unrelated proceeding that company adopted document retention policy for purposes of fraud — Whether judge should be prohibited from hearing plaintiff's case.

HC of A 2010-2011

Sept 1 2010

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French CJ, Gummow, Heydon, Kiefel and Bell JJ

In proceedings in the Dust Diseases Tribunal of New South Wales continued by the widow of a smoker against a tobacco company after her husband's death, the widow alleged that the company had a policy of destroying documents that may have provided evidence adverse to its interests in litigation. The judge before whom the trial was listed for hearing had, at an interlocutory stage in unrelated proceedings, found that the company adopted its document retention policy for the purposes of fraud. The company applied for an order from the Supreme Court prohibiting the judge from further hearing or determining the widow's case because his previous finding gave rise to a reasonable apprehension of bias on the ground of pre-judgment.

Held, by Heydon, Kiefel and Bell JJ, French CJ and Gummow J dissenting, that the judge should be prohibited from further hearing or determining the widow's case. Apart from acknowledging that different evidence might be led at the trial, the judge's previous finding was expressed without qualification or doubt. It was based on actual persuasion of the correctness of the conclusion. The judge had expressed himself in terms indicating extreme scepticism about the company's denials and strong doubt about the possibility of different materials explaining the difficulties. The nature of the fraud was extremely serious. A reasonable observer might possibly apprehend that at the trial of the widow's case the judge might not move his mind from the position reached on one set of material even if different material were presented at the trial.

Livesey v NSW Bar Association (1983) 151 CLR 288 at 299-300, applied.

Per Heydon, Kiefel and Bell JJ. (1) It would be wrong to decide the present question by taking into account the novel evidential provisions

available to the Tribunal. The existence of those provisions is unconnected to whether a judge of the Tribunal is reasonably apprehended to have pre-judged an issue that is not to be determined by recourse to them.

Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 at 87-88 and *Johnson v Johnson* (2000) 201 CLR 488 at 493, referred to.

(2) The judge's reasons for refusing to disqualify himself should be excluded from consideration. Later statements made by a judge may be taken into account to explain an earlier statement which might otherwise suggest he has made up his mind about a matter. But where apprehended, not actual, bias is alleged, the judge's expression of a willingness or confidence in his ability to maintain an open mind is irrelevant.

Johnson v Johnson (2000) 201 CLR 488 at 494, applied.

Decision of the Supreme Court of New South Wales (Court of Appeal) reversed.

APPEAL from the Supreme Court of New South Wales.

In 2006, Donald Henry Laurie commenced proceedings in the Dust Diseases Tribunal of New South Wales against Amaca Pty Ltd, the Commonwealth of Australia and British American Tobacco Australia Services Ltd (BATAS). In May 2006, Mr Laurie died. His widow, Claudia Jean Laurie, continued the proceedings on behalf of his estate and also sued in her own right as a dependant. She alleged that each of the defendants was liable for causing her late husband to contract lung cancer. As against BATAS, she alleged that it had developed and implemented a policy of destroying documents that may have provided evidence adverse to its interests in litigation and invited the Tribunal to draw adverse inferences from this destruction. The trial of the proceedings was listed to be heard by Judge Curtis. Previously, in unrelated proceedings in the Tribunal, BATAS was the respondent to a cross-claim by the defendant to that proceeding. The defendant alleged that BATAS had destroyed prejudicial documents to put them beyond the reach of litigants and had advanced an innocent housekeeping explanation so as to prevent adverse inferences being drawn. The defendant applied for an order that BATAS provide further discovery, supported by an affidavit sworn by the former in-house counsel and company secretary of BATAS, Frederick Gulson, and a transcript of evidence given by him in a proceeding in the United States. Parts of both documents were the subject of client legal privilege under the *Evidence Act 1995* (NSW). The defendant's application came before Judge Curtis. The judge was required to determine whether the privileged material could be adduced under s 125(1) of the *Evidence Act*, which permitted evidence to be adduced of a communication that was the subject of client legal privilege if the communication was made in furtherance of the commission of a fraud. Section 125(2) provided that it was sufficient if there were reasonable grounds for so

finding. The judge found that BATAS had drafted or adopted its document retention policy for the purpose of a fraud (1). The finding was substantially based on acceptance of the evidence given by Mr Gulson. It was likely that he would be called to give evidence for the same purpose in Mrs Laurie's case. BATAS applied to the judge to disqualify himself from hearing the case on the ground that his previous finding gave rise to a reasonable apprehension of pre-judgment. The application was refused (2). BATAS sought leave to appeal to the Court of Appeal of the Supreme Court of New South Wales pursuant to s 32(1) of the *Dust Diseases Tribunal Act 1989* (NSW) and commenced proceedings in that Court as applicant pursuant to s 69 of the *Supreme Court Act 1970* (NSW) for an order prohibiting the judge from hearing or determining Mrs Laurie's case. Mrs Laurie, Amaca and the Commonwealth were the first to third respondents to both the appeal and the summons for prerogative relief. Judge Curtis was the fourth respondent to the latter only. The Court of Appeal, by a majority (Tobias and Basten JJA, Allsop P dissenting), dismissed both summonses (3). French CJ, Hayne and Bell JJ granted BATAS special leave to appeal to the High Court against the refusal of prohibition, conditional on BATAS paying Mrs Laurie's costs of the appeal in any event and there being no disturbance to the costs orders already made. Mrs Laurie was the first respondent. The other respondents filed submitting appearances.

J R Sackar QC and *P J Brereton* SC (with them *M J O'Meara*), for the appellant. A judge should 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 he is required to decide (4). The judge need not approach the case with a clean slate or blank mind (5) but must be open to persuasion (6). Justice must not only be done but be seen to be done (7). It demands that a judge must and must be seen to determine a case based solely on the evidence in the case (8). This case is similar to *Livesey v NSW Bar*

(1) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580.
(2) *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14.
(3) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414.
(4) *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 264; *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294; *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].
(5) *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 531 [71]; Hammond, *Judicial Recusal* (2009), pp 33-34.
(6) *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 100; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at 508-509.
(7) *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.
(8) *Australian National Industries Ltd v Spedley Securities Ltd (In liq)* (1992) 26 NSWLR 411 at 437; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 564-565 [187].

Association (9): the same alleged business policy is at issue as that which was the subject of the judge's previous finding and the issue is going to be central. A fair-minded lay observer might apprehend that when the same allegations come before the judge again, there is a possibility of pre-judgment. The reasonable observer is not presumed to reject that possibility (10). The judge previously rejected the attack on Mr Gulson's credit made by BATAS. A reasonable lay observer might reasonably apprehend that the judge has a preconceived opinion that Mr Gulson's evidence should be accepted and that the same attack on his credit would again fail before the judge. Pre-judgment on an issue of credit is particularly significant (11). Questions of uncertainty should be resolved in favour of recusal, especially where issues of credit may be presented for decision (12). Section 125(2) of the *Evidence Act* permitted the judge to find the communications were in furtherance of a fraud if there were reasonable grounds for so finding. That did not require him to find fraud on the balance of probabilities (13). The judge went further: he said he was persuaded on the evidence in its present state that there had been fraud. The problem lies in the character and gravity of the judge's previous finding and the actual persuasion of his mind of the moral delinquency of BATAS that warranted the expressed conclusion of fraud. The reasonable lay observer might apprehend that the judge's mind, having been so persuaded, might not be free to approach the same issue again in an impartial and unprejudiced way. He might approach the issue from a jaundiced point of view (14). That is not a criticism of the judge but a recognition of the frailty of the human mind (15). [KIEFEL J. In relation to a finding of fraud would the test usually require a judge to disqualify himself?] Yes, particularly if he has gone beyond s 125(2) and there is a determination of credit. That does not apply a different test to fraud cases. It applies the ordinary test with due regard to the seriousness of a finding of fraud (16): given the gravity and solemnity of the finding, the judge's mind might not be freed of its effect. The reasonable observer is not presumed to know anything about the judge's character or ability (17). Even if the judge did not use language that was objectionable or emotive, or the emphatic language of absolute finality, that is not required. There was nothing provisional or tentative about

(9) (1983) 151 CLR 288.
(10) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299.
(11) *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 264; *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 300; *Vakauta v Kelly* (1989) 167 CLR 568 at 571.
(12) *Smits v Roach* (2006) 227 CLR 423 at 465 [123].
(13) *Kang v Kwan* [2001] NSWSC 698 at [37].
(14) *Southern Equities Corporation Ltd (In liq) v Bond* (2000) 78 SASR 339 at 352 [64], 374 [150].
(15) *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].
(16) *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Rejfek v McElroy* (1965) 112 CLR 517.
(17) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299.

the judge's finding (18). He expressed clear views (19). It was a persuasion of the mind. The hypothetical observer is not a lawyer but rather a fair-minded lay person. The observer is not to be attributed an overly sophisticated understanding of court procedure (20). [GUMMOW J referred to *Johnson v Johnson* (21).] The lay observer would know that judges behave impartially and fairly, determine matters according to their judicial oath or affirmation, and are used to putting things in and out of their minds. The observer would also have knowledge of some fundamental legal concepts, such as the presumption of innocence. But the observer is not to be taken to understand that the evidence before the judge at an interlocutory hearing in the other proceeding might be broader than the evidence at trial in this proceeding because the hearsay rule would apply to the latter but not the former. This was not explained in the judge's previous reasons. Nor is the observer to be taken to understand the special procedures of the Tribunal. The test is not narrow or technical: it does not turn on nice distinctions (22). It is irrelevant that the judge, in his reasons dismissing the application for recusal, expressed confidence in his ability to deal with the matter afresh: those reasons were removed in time from the previous finding and were incapable of explaining or qualifying what was said earlier. The test does not require a judge to express such a view or for an appellate judge to consider and express a view about the judge's ability to retain an open mind. Those subjective views are irrelevant: it is the court's view of the public's view, not the court's own view, that is determinative (23). It is wrong to point to any risk that BATAS will be seen to be manipulating the system to avoid an adverse result. BATAS is entitled to have the proceeding decided by a judge beyond a reasonable apprehension of bias. The onus is on Mrs Laurie to prove the alleged fraud and the reasonable lay person should have no preconception that BATAS was fraudulent.

D F Jackson QC (with him *B F Quinn* and *S Tzouganatos*), for the first respondent. There is no dispute as to the test to be applied (24). There may be apprehended bias where a judge, in a previous case,

(18) *R v Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 14-15; 32 ALR 47 at 51; *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13]; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 610 [112].

(19) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 300.

(20) *Vakauta v Kelly* (1989) 167 CLR 568 at 585; *Webb v The Queen* (1994) 181 CLR 41 at 52; *Johnson v Johnson* (2000) 201 CLR 488 at 506 [49], 508-509 [53]-[54]; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 477.

(21) (2000) 201 CLR 488 at 492-493 [12]-[13].

(22) *Builders' Registration Board (Qld) v Rauber* (1983) 57 ALJR 376 at 384; 47 ALR 55 at 69; *Australian National Industries Ltd v Spedley Securities Ltd (In liq)* (1992) 26 NSWLR 411 at 420; *R v Bow Street Magistrate; Ex parte Pinochet [No 2]* [2000] 1 AC 119 at 135.

(23) *Webb v The Queen* (1994) 181 CLR 41 at 52; *Johnson v Johnson* (2000) 201 CLR 488 at 506 [49].

(24) *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 264; *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294; *Re JRL; Ex parte CJL* (1986) 161

expressed clear views about a question of fact which constitutes a live and significant issue in a subsequent case before the judge or about the credit of a witness whose evidence is significant to such a question (25). But this will not necessarily be so. A reasonable bystander does not entertain a reasonable fear a decision-maker will bring an unfair or prejudiced mind to an inquiry merely because he has formed a conclusion about an issue involved in the inquiry: it must be established that the decision-maker's mind is so prejudiced that he will not alter his conclusion irrespective of evidence or argument (26). Tentative views expressed during argument or in reasons for an interlocutory judgment do not manifest partiality or bias (27). The question is one of the terms and context in which a judge expresses his views. The observer is taken to be reasonable, with broad knowledge of the material objective facts, as distinct from detailed knowledge of the law, or the character or ability of members of the relevant court (28). But the observer is not wholly uninformed and uninstructed about the law in general or the issue to be decided: the observer is acquainted with judges' obligations (29) and the characteristics of modern litigation (30). A judge's statements must be understood in the context of the nature of the proceedings, not by a technical inquiry whether, upon parsing and analysis, statements could have created an impression the judge was making a final determination (31). Here, the fair-minded lay observer would: understand all of the judge's reasons for decision in the other proceedings; appreciate the extent to which the issues in the two proceedings might overlap; know proceedings involve interlocutory steps; appreciate that judges must decide issues on the basis of evidence and that the same issue might be decided differently if different evidence is adduced; have sufficient reasonableness to consider reasons for judgment without undue parsing and analysis; and appreciate that a judge is a professional whose training, tradition and oath or affirmation require him to discard the irrelevant, immaterial and prejudicial. The particular character and gravity of the allegations the judge was required to consider in the other proceedings, and the judge's persuasion of the moral delinquency and dishonesty of BATAS, should not be overemphasised. There is no difference between

(cont)
CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488 at 492-493 [11]-[12]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[8]; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 609 [110].

(25) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 300.

(26) *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87-88, 100.

(27) *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 610 [112].

(28) *Webb v The Queen* (1994) 181 CLR 41 at 73-74.

(29) *Johnson v Johnson* (2000) 201 CLR 488 at 508 [53], 517 [80].

(30) *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 609-610 [111]-[112].

(31) *Johnson v Johnson* (2000) 201 CLR 488 at 494 [16].

the task of a judge determining an allegation of fraud and any other allegation. To say the judge was "actually persuaded" takes the matter no further. Evidence later adduced may change the judge's view. To attribute to allegations of fraud a special status would create a different apprehended bias test applicable only to fraud cases. It would entail imputation to the reasonable lay observer of an incorrect appreciation of the principle in *Briginshaw v Briginshaw* (32): it is not that, to find fraud, a judge must be so satisfied of dishonesty that no further evidence could dissuade him. The judge's reasons for his previous finding were expressed to be on the present state of the evidence. There is no reason to think he was doing anything other than considering whether there were reasonable grounds for finding in terms of s 125(2) of the *Evidence Act*. The reasons recognised that Mr Gulson's credit was subject only to a peripheral attack. They do not indicate that the judge had come to a conclusion or that his views were unalterable irrespective of later evidence or argument (33). *R v Watson; Ex parte Armstrong* (34) and *Livesey v NSW Bar Association* (35) are distinguishable on this basis. [HEYDON J. The findings were about a shocking state of affairs. Is not the reasonable hypothetical observer likely to think it incredible that the judge will change his view, because human beings are not like that when dealing with conduct of this character?] The observer must be taken to have read the judge's reasons explaining the qualified nature of his findings. Because the judge's reasons for his previous finding allude to the difference between interlocutory proceedings and a trial, and the admissibility of hearsay evidence in the former and not the latter, the reasonable fair-minded reader must be assumed to understand those references. The fair-minded lay observer ought to be assumed to have knowledge of the judge's subsequent explanation of his previous reasons (36), and also the evidential and procedural rules applicable in the Tribunal, as they are part of the context. Whether there may be an appearance of pre-judgment can be a difficult question, involving matters of degree on which minds may differ (37). [GUMMOW J. The judge said the threshold of apprehended bias is very low.] Judges should not too readily accede to applications for disqualification lest litigants succeed in effectively influencing the choice of judge (38).

(32) (1938) 60 CLR 336.
(33) cf *Kwan v Kang* [2003] NSWCA 336 at [86]-[87].
(34) (1976) 136 CLR 248.
(35) (1983) 151 CLR 288.
(36) *Kwan v Kang* [2003] NSWCA 336.
(37) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 294.
(38) *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352; *Johnson v Johnson* (2000) 201 CLR 488 at 504 [45]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348 [19]-[20].

J R Sackar QC, in reply. The judge's reference to the threshold being low is taken from *McGovern v Ku-ring-gai Council* (39). It was a reference to the notion that the test involves two "mights" and that what must be shown is a real possibility, not a probability.

Cur adv vult

2 February 2011

The following written judgments were delivered: —

FRENCH CJ.

Introduction

1 In 1986 Mason J said (40):

> "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."

That observation is applicable to this case.

2 British American Tobacco Australia Services Ltd (BATAS) contends that an interlocutory finding adverse to it in proceedings in the Dust Diseases Tribunal of New South Wales (the Tribunal) should disqualify the judge who made the finding from presiding at the trial of subsequent proceedings brought against BATAS by another party. The adverse finding was that BATAS had dishonestly concealed the destruction of documents which might be prejudicial to it in litigation and had done so under the pretence of a Document Retention Policy.

3 The judge refused to accede to a motion by BATAS that he disqualify himself from presiding in the subsequent proceedings (41). On summonses issued by BATAS for leave to appeal against the judge's decision, and for prohibition against his Honour, the Court of Appeal of New South Wales by majority agreed with the judge. The Court of Appeal dismissed both summonses (42). BATAS appealed to this Court against the dismissal of the summons for prohibition. In my opinion the Court of Appeal was correct. The judge made it clear in the interlocutory ruling that he was basing his conclusions on the limited evidence put before him and that a different picture might emerge at trial. His finding would not appear, to a fair-minded lay observer, to give rise to a reasonable apprehension of bias in different proceedings some years later against the same defendant. In my opinion, which differs from that of the majority in this case, the appeal against the decision of the Court of Appeal should be dismissed. The difference of

(39) (2008) 72 NSWLR 504 at 508 [14].

(40) *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352, a caution endorsed in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 86 per Brennan, Gaudron and McHugh JJ. See also *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 480.

(41) *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14.

(42) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414.

views in the Court of Appeal and in this Court reflects the truth of the observation made by Aickin J about the test for apparent bias (43):

> "It is a test which is not always easy to apply for it may involve questions of degree and particular circumstances may strike different minds in different ways."

Procedural history

4 Claudia Laurie is the plaintiff in proceedings in the Tribunal against BATAS. She is continuing proceedings against BATAS commenced by her late husband, Donald Laurie, in 2006 alleging that BATAS was negligent in the manufacture, sale and supply of tobacco products which he smoked from 1946 until 1971. Mrs Laurie also sues in her own right as a dependant widow under the *Wrongs Act 1958* (Vic) and the *Compensation to Relatives Act 1897* (NSW).

5 In her amended statement of claim filed on 13 July 2007, Mrs Laurie alleged, inter alia, that BATAS had a policy of destroying documents in its possession which might have evidenced its negligence. That allegation was made in support of a claim for aggravated damages. The document destruction policy was also pleaded in support of an inference that at all material times BATAS knew, or ought to have known, that the use of its tobacco products could cause lung cancer.

6 The pre-trial management and the trial of the action in the Tribunal were allocated to Judge Curtis, who conducted a number of directions hearings and heard evidence from Mr Laurie in the United States on 26 April 2006. That evidence was transcribed and videotaped. On 9 March 2009, BATAS filed a motion in the Tribunal seeking an order that Judge Curtis disqualify himself from further hearing or determining the proceedings. His Honour dismissed the BATAS motion and ordered that BATAS pay Mrs Laurie's costs.

7 BATAS filed two summonses in the Court of Appeal, one of which sought leave to appeal from the decision of Judge Curtis pursuant to s 32(4)(a) of the *Dust Diseases Tribunal Act 1989* (NSW) (the DDT Act). By the other BATAS sought prohibition against the judge under s 69 of the *Supreme Court Act 1970* (NSW).

8 The Court of Appeal by majority (Tobias and Basten JJA, Allsop P dissenting) dismissed both summonses on the basis that a fair-minded lay observer would not reasonably apprehend, as a result of the previous interlocutory finding, that Judge Curtis may not bring an impartial and unprejudiced mind, in Mrs Laurie's proceedings, to the question whether BATAS had committed a fraud.

9 On 28 May 2010, this Court (French CJ, Hayne and Bell JJ) granted special leave to appeal against the decision of the Court of Appeal on the summons for prohibition.

(43) *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 16; 32 ALR 47 at 54; see also *Builders' Registration Board (Qld) v Rauber* (1983) 57 ALJR 376 at 383-384; 47 ALR 55 at 69 per Brennan J; *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 294.

The prior ruling by Judge Curtis

10 Judge Curtis made his interlocutory findings against BATAS in proceedings commenced by the widow of the late Mr Alan Mowbray against Brambles Australia Ltd (Brambles). Mrs Mowbray alleged that her husband had contracted lung cancer as the result of exposure to asbestos while working for Brambles. Brambles cross-claimed against BATAS for contribution on the basis of Mr Mowbray's use of BATAS' tobacco products. Judge Curtis made an order in November 2002 that BATAS give discovery. BATAS claimed legal professional privilege in respect of most of the relevant documents.

11 In May 2006, Brambles obtained an order from Judge Curtis for further discovery from BATAS. In support of its motion for that order, Brambles adduced oral testimony from Frederick Gulson, who had been Company Secretary and in-house solicitor to BATAS (44) in 1989-90. It also tendered a transcript of testimony which Mr Gulson had given in proceedings in the US, and an affidavit sworn in February 2003.

12 Judge Curtis ruled initially that certain paragraphs from Mr Gulson's statements were prima facie covered by lawyer-client privilege (45). Brambles submitted that the testimony could be admitted by virtue of s 125 of the *Evidence Act 1995* (NSW) on the basis that the allegedly privileged communication, which it evidenced, had been made in furtherance of the commission of a fraud. The asserted fraud, based upon Mr Gulson's testimony, was the dishonest concealment by BATAS, under pretence of a rational non-selective housekeeping policy, known as the Document Retention Policy, of its purpose of destroying prejudicial documents in order to suppress evidence in anticipated litigation. BATAS maintained that its policies and practices did not permit selective destruction of prejudicial documents. His Honour said of that contention that it remained "a live issue for the trial" (46).

13 Counsel for BATAS attacked the credit of Mr Gulson in cross-examination but did not put it to Mr Gulson that he was not telling the truth. Judge Curtis found that Mr Gulson's evidence stood uncontradicted but noted "[h]e has not yet been tested by a contrary version of events" (47). He accepted that there might be good reasons why BATAS had not called any rebuttal evidence, but added (48): "however, I must determine the proceedings now before me *on the evidence now before me*." (Emphasis added.) His Honour observed that

(44) Then known as WD & HO Wills Australia Ltd.

(45) *Evidence Act 1995* (NSW), ss 118, 119.

(46) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 599 [45].

(47) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 601 [52].

(48) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 601 [53].

if BATAS was not selectively destroying scientific documents prejudicial to its position the question arose why lawyers rather than scientists were assigned to judge the value of the research material for the purposes of the policy. His Honour said (49): "This may be explained at the trial; however, the evidence of Mr Gulson gives rise to an obvious inference that has not yet been rebutted by BATAS."

14 Judge Curtis's crucial finding for the purposes of s 125 was in the following terms (50):

> "I am persuaded *on the present state of the evidence* that BATAS in 1985 drafted or adopted the Document Retention Policy for the purpose of a fraud within the meaning of s 125 of the *Evidence Act*."

(Emphasis added.)

And further (51):

> "*In the absence of evidence to the contrary*, I infer that legal advice to the effect that destruction of documents pursuant to the terms of the policy was not contrary to law, was integral to the decision by BATAS to persist with its policy of selective destruction."

(Emphasis added.)

His Honour found that communications made for the purposes of obtaining that legal advice were communications in furtherance of the commission of a fraud within the meaning of s 125. The passages of Mr Gulson's evidence in respect of which privilege was claimed referred to communications made in respect of legal advice about the Document Retention Policy.

15 Judge Curtis referred to evidence, corroborative of Mr Gulson's testimony, given in the US proceedings by John Welch, a former Chief Executive Officer of the Tobacco Institute of Australia, and by Dr Jeffrey Wigand, who had worked for a subsidiary of British American Tobacco Plc in the US. His Honour noted that Mr Welch's evidence had "not yet been challenged" (52) and that he had not been required for cross-examination. His Honour said (53):

> "I find that on the evidence of Mr Gulson, Mr Welch, and Dr Wigand presented on this application, Brambles has sufficiently discharged an onus of demonstrating, prima facie, that it can make good the allegations pleaded in the amended statement of claim summarised in [12] above."

(49) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [55].

(50) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [56].

(51) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [57].

(52) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 605 [63].

(53) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 607 [69].

16 In the event, Judge Curtis made orders for further discovery by BATAS. The message conveyed by the repeated qualification in his Honour's findings was clear. Upon different or other evidence, which might be adduced at trial, a different conclusion might be drawn. No fair-minded lay observer could have overlooked that message.

Statutory framework – Evidence Act 1995 (NSW)

17 Section 125 of the *Evidence Act* provides:

"*Loss of client legal privilege: misconduct*

(1) This Division does not prevent the adducing of evidence of:

(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or

(b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act, or the abuse of power, was committed, and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,

the court may find that the communication was so made or the document so prepared.

(3) In this section:

power means a power conferred by or under an Australian law."

18 BATAS submitted that Judge Curtis found fraud when it was unnecessary for him to do so for the purposes of s 125. He could have limited himself to determining that there were reasonable grounds for so finding. As to that, s 125(2) sets out a basis upon which the court "may find" that a communication was made in furtherance of a fraud. Whether or not s 125(2) is invoked the end result is that a finding of fraud is made or it is not. The operation of the provision was considered by Santow J in *Kang v Kwan* (54). His Honour held that the standard for establishing reasonable grounds will depend on the circumstances but must be sufficient to "give colour to the charge" at a prima facie level (55). An appeal against the decision of Santow J was

(54) [2001] NSWSC 698.

(55) [2001] NSWSC 698 at [37]. Similar approaches were taken by McCallum J in *Nuclear Utility Technology & Environmental Corporation Inc v Australian Broadcasting Corporation* [2009] NSWSC 78 and by R A Hulme J in *Franks v Warringah Council* [2010] NSWSC 1318.

allowed by the Court of Appeal on the basis that his Honour's findings of fraud in a ruling, applying s 125 and made in the course of the trial, gave rise to a reasonable apprehension of bias (56). The Court of Appeal, of which Tobias JA was a member, held unanimously that his Honour had expressed his findings "in emphatic language of absolute finality" (57), notwithstanding that he stated that the findings were based on "reasonable grounds". The Court of Appeal did not discuss the minimum content of a "reasonable grounds" finding beyond making clear that it was to be distinguished from a finding "in absolute and unconditional terms" (58).

19 For the purposes of determining the existence or non-existence of a reasonable apprehension of bias in this case, in my opinion, no relevant distinction was demonstrated between the finding of fraud that was made by Judge Curtis and expressly stated to be based upon limited and possibly incomplete evidence and a finding of fraud on the basis of reasonable grounds.

Ruling on disqualification motion

20 Judge Curtis formulated the question for determination on BATAS' motion that he disqualify himself as (59):

> "whether a fair minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if, in *Re Mowbray*, I expressed myself in terms of such finality that a reasonable bystander *might* think that I *might* not bring an impartial and unprejudiced mind to the questions of whether Mr Gulson is a witness of credit, and whether BATAS intentionally destroyed documents tending to prove knowledge with the intention of placing those documents beyond the reach of litigants."

(Emphasis in original.)

21 His Honour referred to the various qualifications he had made upon his findings. He said (60):

> "Far from expressing my conclusions in terms of finality, I took pains to recognise that the assertions by Brambles as to a document destruction policy remained a live issue for the trial, that the evidence of Mr Gulson had not been tested in cross-examination, and that there may be good reasons why BATAS, in an interlocutory proceeding, did not wish to take issue with, nor call evidence to contradict, Mr Gulson."

His Honour concluded (61):

> "I do not believe that, having read my published reasons in *Re Mowbray*, any reasonable observer might entertain a reasonable apprehension that I might not bring an impartial and unprejudiced

(56) *Kwan v Kang* [2003] NSWCA 336.
(57) *Kwan v Kang* [2003] NSWCA 336 at [97].
(58) *Kwan v Kang* [2003] NSWCA 336 at [50].
(59) *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14 at [13].
(60) *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14 at [20].
(61) *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14 at [22].

mind to the resolution of the questions of whether Mr Gulson is a witness of truth, and whether or not BATAS engaged in a dishonest document destruction policy."

Decision of the Court of Appeal

22 Tobias JA accepted that there was nothing provisional or tentative about the finding made by Judge Curtis given the standard of proof to which he was required to be satisfied before making it. His Honour referred to the emphasis placed by Judge Curtis on the fact that Mr Gulson's evidence was uncontradicted and that he was merely making findings based on the limited evidence before him. Tobias JA characterised the hypothetical fair-minded observer as a person who would have some understanding (62):

- of the nature of the application before Judge Curtis;
- that hearsay evidence was admissible in such an application but not in other circumstances;
- that the findings made were for the limited purpose of allowing inspection of documents otherwise the subject of legal professional privilege; and
- that BATAS, perhaps for proper tactical reasons, had decided not to call evidence in the interlocutory application to counter Mr Gulson.

The fair-minded observer, it was said, would not reasonably apprehend that Judge Curtis might not bring an impartial and unprejudiced mind to the issue with respect to BATAS' document management policies once all admissible evidence had been elicited by all of the parties at trial and after full argument (63).

23 Basten JA accepted the applicable principles as set out in the judgment of Tobias JA (64). His Honour pointed to the following factors antithetical to a reasonable apprehension of bias (65):

"(a) the earlier determination was made on an interlocutory basis;

(b) the Tribunal permitted reagitation of the same issue, which had not been determined on a final basis;

(c) the interlocutory determination itself had not been challenged, although [BATAS] had had an opportunity to do so had it thought fit, and

(d) the interlocutory application was not accompanied by any

(62) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [115].

(63) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [116].

(64) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [134].

(65) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [148].

> objectionable or emotive language otherwise casting doubt on the willingness or ability to reconsider objectively the position earlier adopted."

His Honour also referred to provisions of the DDT Act designed to facilitate the admission of evidence used in earlier proceedings and to prevent relitigation of general issues from case to case, as a matter which a fair-minded lay observer should properly take into account (66). In my opinion, however, neither provision is relevant to a lay observer's assessment of whether an appearance of bias is created by a specific finding of fact, about a particular party, of the kind which is in issue in this case.

24 Basten JA noted that it had not been contended in the Court of Appeal that Judge Curtis had prejudged the issue or was in fact unwilling or unable to consider with an open mind such material and submissions as might be tendered by BATAS for further consideration. Basten JA said he could formulate no reasonable basis for concluding that a fair-minded lay observer would conclude other than that the chance of Judge Curtis being inhibited in a fair consideration of fresh material was remote (67). He added that if BATAS were to succeed there would be a real risk of a diminution in public confidence in the administration of justice due to the perception that one litigant, facing an adverse outcome in the absence of persuasive material which would properly permit a different conclusion to be reached, had manipulated the system in the hope of obtaining a more favourable outcome from a different judge (68). The latter proposition, with respect, was speculative. However, it was not central to his Honour's reasoning and does not affect the outcome of this appeal.

25 Allsop P dissented. His Honour pointed out that Judge Curtis had made a relevantly unqualified finding of dishonesty and fraud (69). It was not merely a conclusion that the evidence was strong enough that if accepted at trial it would ground such a finding. His Honour encapsulated his dissent when he said (70):

> "The grave quality of such a finding by a trial judge and the necessity for the trial judge to be persuaded in his or her mind as to its truth informs my view that a fair-minded lay observer might reasonably think that a judge, who has been so persuaded, might not be able to bring a mind free of the effect of the prior conclusion, so

(66) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [142]-[147] referring to ss 25 and 25B of the DDT Act.
(67) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [149].
(68) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [149].
(69) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [8]-[10].
(70) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [11].

solemnly reached, to bear in dealing with the same issue in respect of the same party on a later occasion."

The Court of Appeal dismissed both the summonses brought by BATAS and directed that BATAS pay Mrs Laurie's costs of both proceedings.

Grounds of appeal

26 The substantive grounds of appeal in this Court were:

"(b) the majority of the Court of Appeal erred in holding that, for the purposes of assessing whether the fair-minded lay observer might apprehend bias, the fair-minded lay observer is taken to know and appreciate:

(i) the distinction between findings made on an interlocutory application and those made at a final hearing;

(ii) the differences between the rules of evidence applicable in an interlocutory application and those applicable at a final hearing; and

(iii) the existence and application of section 25 and 25B of the *Dust Diseases Tribunal Act 1989* (NSW);

(c) Basten JA erred in considering, as a matter relevant to the application of the apprehension of bias principle, whether an application by a party that a judge disqualify himself or herself is or may be properly viewed as involving a manipulation by the applicant of the rules of apprehended bias to avoid an adverse result which, if acceded to, would undermine public confidence in the administration of justice; and

(d) the Court of Appeal should have held the Fourth Respondent [Judge Curtis] is prohibited from hearing proceedings 6057 of 2006 in the Dust Diseases Tribunal of NSW between the Appellant (as defendant) and the First Respondent (as plaintiff) on the grounds of apprehended bias arising by reason of his Honour's judgment in *Re Mowbray*."

The Dust Diseases Tribunal

27 The Tribunal was established by the DDT Act "to hear claims in tort for negligence and breach of statutory duty relating to death or personal injury attributable to specified dust diseases and other dust-related conditions" (71). The Tribunal was established against a background of concern about delays in the common law jurisdictions of the Supreme and District Courts of New South Wales. The Attorney-General in his Second Reading Speech for the Bill, referring to diseases such as mesothelioma, said: "The Government is

(71) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 May 1989, p 7398.

committed to these claims being dealt with expeditiously by the creation of a separate tribunal that will provide a fast-track mechanism (72)."

28 The Tribunal is a court of record (73). Persons qualified to be members of the Tribunal are Judges and acting Judges of the Supreme and District Courts or of any court of equivalent status to either of those courts. The Governor may appoint one of the members of the Tribunal as its President (74).

29 The primary jurisdiction of the Tribunal, which is conferred by s 10 of the DDT Act, is to hear and determine proceedings referred to in ss 11 and 12. Section 11 enables a person who is suffering or has suffered from a dust-related condition allegedly attributable or partly attributable to a breach of duty owed by another person, to bring proceedings for damages in respect of that dust-related condition in the Tribunal. Such proceedings "may not be brought or entertained before any other court or tribunal". Proceedings may also be brought under s 11 by persons claiming through a person who died from a dust-related condition. The breach of duty may be a breach of a statutory duty as well as of a duty imposed under the common law (75). Section 12 provides for transfer of such proceedings which are brought in or are pending in the Supreme Court or in the District Court. The Tribunal is required to hold its proceedings in open court except to the extent that the rules provide otherwise (76). The President is to nominate the member before whom proceedings are to be held (77).

30 Relevantly to Mrs Laurie's position in these proceedings, s 17(4) provides:

> "An executor, administrator, trustee or other legal personal representative may bring or defend proceedings before the Tribunal in the same manner as if he or she were bringing or defending proceedings in his or her own right."

31 There are also specific provisions of the DDT Act, mentioned earlier, which facilitate the admission of evidence used in earlier proceedings (78) and prohibit the relitigation or rearguing of "issues of a general nature" already determined in proceedings before the Tribunal (79). In my opinion, neither of these provisions has any particular significance for the present case.

(72) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 May 1989, p 7398.
(73) DDT Act, s 4.
(74) DDT Act, s 7.
(75) DDT Act, s 11(2).
(76) DDT Act, s 13(1).
(77) DDT Act, s 13(2).
(78) DDT Act, s 25.
(79) DDT Act, s 25B.

The appearance of bias – applicable principles

32 Impartiality is an essential characteristic of courts. As was said in *Forge v Australian Securities and Investments Commission* (80):

> "An important element … in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal."

(Footnote omitted.)

33 In judging whether the appearance of impartiality has been lost difficulties of principle and application can arise. Courts must make their judgments upon criteria referable to a legally constructed, fair-minded lay observer. That means, in effect, that their judgments are made on a subset of the available information. That is because the reasonable apprehension of bias goes to confidence in the courts on the part of litigants and the public, who will not have access to details of the substantive law and all relevant aspects of the practice and procedure of the courts. In determining whether an apprehension of bias has a reasonable basis, the courts are asked to see themselves as others, not judges or lawyers, would see them. As Laws LJ put it in *Sengupta v Holmes* (81): "it is not enough to show that those in the know would not apprehend any bias." A standard for apparent bias dependent upon how the matter appeared to judges and lawyers would be difficult to distinguish, in practical effect, from a standard of actual bias.

34 The maxim that no person can be a judge in his or her own cause is an expression of the requirement of impartiality which extends to the fact and the appearance (82). It has deep historical roots (83). It was prefigured in Justinian's Institutes, which proposed that a judge "who delivers an unjust or partial decision" should be subject to a pecuniary penalty (84). Bracton in the thirteenth century wrote of the desirability of recusing the judge where "for some reason, fear, hatred or love, he is considered suspect" (85). Judicial statements in England of a rule against anybody being a judge in his own cause could be found in decisions of the seventeenth and eighteenth centuries (86). So too could its application to administrative tribunals or decision-makers

(80) (2006) 228 CLR 45 at 76 [64].
(81) [2002] EWCA Civ 1104 at [11].
(82) *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 364 [87] per Gaudron J.
(83) *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3].
(84) *The Institutes of Justinian*, Moyle trans, 5th ed (1913), bk IV, Title v, p 172.
(85) Bracton, *De Legibus et Consuetudinibus Angliae*, Woodbine ed, Thorne trans (1977), vol 4, f 411, p 280.
(86) *Earl of Derby's Case* (1613) 12 Co Rep 114 [77 ER 1390]; *Inter Brookes v Earl of Rivers* (1668) Hardres 503 [145 ER 569]; *Wright v Crump* (1702) 2 Ld Raym 766 [92 ER 12]; *Between the Parishes of Great Charte and Kennington* (1742) 2 Str 1172 [93 ER 1107].

exercising "quasi-judicial" functions (87). Blackstone's deferential observation that "the law will not suppose a possibility of bias or favour in a judge" (88) did not survive the test of time. The importance of the appearance of impartiality in judicial and quasi-judicial decision-making was highlighted in *Dimes v Proprietors of Grand Junction Canal* (89). Lord Campbell, in that case, warned all inferior tribunals "to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence" (90). The requisite standard required appearance beyond suspicion of bias. It was emphasised in the observation by Bowen LJ in *Leeson v General Council of Medical Education and Registration* that (91) "judges, like Caesar's wife, should be above suspicion."

35 The reasonable or substantial suspicion of bias as a criterion of apparent bias was enunciated in *Allinson v General Council of Medical Education and Registration* (92). Because a reasonable suspicion attributable to a non-lawyer must have some non-judicial vessel, the Court constructed the reasonable person as its arbiter (93). That approach was followed by this Court in *Dickason v Edwards* (94). In 1924, in *R v Sussex Justices; Ex parte McCarthy* (95) Lord Hewart CJ made the observation, much quoted in Australian courts, that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (96).

36 In 1993 the reasonable person whose apprehension was the test of the appearance of bias was retired from duty by the House of Lords in *R v Gough* (97) in favour of a "real danger of bias" test to be administered by the court. That new approach was not accepted by this Court (98). The reasonable person was recalled by the Court of Appeal in 2001 by way of a "modest adjustment" to the "real danger of bias" test. The question for the court under the revised test was whether the circumstances "would lead a fair-minded and informed observer to

(87) *Dr Bonham's Case* (1610) 8 Co Rep 113b [77 ER 646]; *Day v Savadge* (1614) Hobart 85 [80 ER 235]; *City of London v Wood* (1701) 12 Mod 669 [88 ER 1592].
(88) Blackstone, *Commentaries on the Laws of England* (1768), bk III, c 23, p 361.
(89) (1852) 3 HL Cas 759 [10 ER 301].
(90) (1852) 3 HL Cas 759 at 793-794 [10 ER 301 at 315].
(91) (1889) 43 Ch D 366 at 385; see also at 390 per Fry LJ.
(92) [1894] 1 QB 750 at 758-759 per Lord Esher MR.
(93) [1894] 1 QB 750 at 759 per Lord Esher MR. See also *R v Sunderland Justices* [1901] 2 KB 357 at 373 per Vaughan Williams LJ. The latter case erected a requirement for a "real likelihood of bias". See also *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599 per Lord Denning MR, discussed in Hammond, *Judicial Recusal* (2009), p 36.
(94) (1910) 10 CLR 243 at 256-257 per O'Connor J; at 258-259 per Isaacs J.
(95) [1924] 1 KB 256.
(96) [1924] 1 KB 256 at 259.
(97) [1993] AC 646 at 670 per Lord Goff of Chieveley.
(98) *Webb v The Queen* (1994) 181 CLR 41.

conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased" (99). The revised test was approved by the House of Lords in *Porter v Magill* (100).

37 In 2000, the test in Australia was stated by this Court in *Ebner v Official Trustee in Bankruptcy* (101). It requires two steps. The first is "the identification of what it is said might lead a judge … to decide a case other than on its legal and factual merits". The second is an "articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits" (102). In *Ebner* the constructed observer was the "fair-minded lay observer" concerned only with a *reasonable* apprehension of bias (103). The test is generally applicable to cases of asserted apprehended bias, including cases in which the judge is said to have a pecuniary interest in the outcome of the case which he or she is hearing. This Court rejected the proposition that automatic disqualification applies to such classes of case (104).

38 There is a variety of ways in which the impartiality of a court may be or may appear to be compromised. Deane J in *Webb v The Queen* (105) identified four of them as "distinct, though sometimes overlapping, main categories of case". They were:

- interest – where the judge has an interest in the proceedings, whether pecuniary or otherwise, giving rise to a reasonable apprehension of prejudice, partiality or prejudgment;
- conduct – where the judge has engaged in conduct in the course of, or outside, the proceedings, giving rise to such an apprehension of bias;
- association – where the judge has a direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings;
- extraneous information – where the judge has knowledge of some prejudicial but inadmissible fact or circumstance giving rise to the apprehension of bias.

These four categories were described in *Ebner* (106) as providing "a convenient frame of reference" albeit not necessarily a comprehensive taxonomy.

(99) *In re Medicaments and Related Classes of Goods [No 2]* [2001] 1 WLR 700 at 726-727 [85] per Lord Phillips of Worth Matravers MR.

(100) [2002] 2 AC 357 at 494 [102]-[103] per Lord Hope of Craighead. See also *R v Abdroikov* [2007] 1 WLR 2679 at 2687-2688 [15]; [2008] 1 All ER 315 at 323-324, and the critique of the fair-minded and informed observer in Olowofoyeku, "Bias and the Informed Observer: A Call for a Return to Gough", *Cambridge Law Journal*, vol 68 (2009) 388.

(101) (2000) 205 CLR 337.

(102) (2000) 205 CLR 337 at 345 [8].

(103) (2000) 205 CLR 337 at 344 [6].

(104) (2000) 205 CLR 337 at 356-357 [54].

(105) (1994) 181 CLR 41 at 74.

(106) (2000) 205 CLR 337 at 349 [24]. See also *Muir v Commissioner of Inland*

39 Particular applications of the general principle enunciated in *Ebner* will be required for the different classes of case in which an apprehension of bias is said to arise and different sets of circumstances within those classes. A gratuitous observation, adverse to a party, made in the course of proceedings or in extra-curial speech is one thing. A finding properly made by a judge in the course of an interlocutory ruling or in earlier proceedings is another. The latter is the area of concern in this appeal. It is an area in which courts should be astute not to defer to that kind of apprehension that is engendered by the anticipation of an adverse outcome, rather than a legitimate concern about partiality. By way of example, the fact that a judge who has made a finding of fact adverse to a party on particular evidence is likely to make the same finding on the same evidence, is not of itself indicative of bias. It could be indicative of consistency subject to the judge having an open mind when it came to argument about the effect of the evidence.

40 This Court at one time held that, in claims of apprehended bias on the part of judicial or "quasi-judicial" officers based on conduct, the apprehended bias must be "real". That standard was explained by the plurality in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (107):

> "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."

The requirement of a "high probability" of bias propounded in *R v Australian Stevedoring Industry Board* did not persist. *R v Australian Stevedoring Industry Board* was not referred to and the high probability criterion was not relied upon in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (108). The apprehended bias asserted in *Angliss* was based upon a statement contained in reasons for decision published by the Commonwealth Conciliation and Arbitration Commission which tended to favour the principle of equal pay for both sexes. Rejecting an application for prohibition to prevent the members from hearing an equal pay claim, the Court referred to *Allinson*, *Dickason* and *R v Sussex Justices* and said (109):

> "Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds."

(cont)
Revenue [2007] 3 NZLR 495 at 509 [64].
(107) (1953) 88 CLR 100 at 116 per Dixon CJ, Williams, Webb and Fullagar JJ.
(108) (1969) 122 CLR 546.
(109) (1969) 122 CLR 546 at 553-554.

41 In allowing an appeal against a decision to refuse to order disqualification of a member of a statutory body in *Stollery v Greyhound Racing Control Board* (110), Barwick CJ quoted from *R v Sussex Justices*, and cautioned that (111)

> "[t]he basic tenet that justice should not only be done but be seen to be done does not, of course, warrant fanciful and extravagant assertions and demands. What justice requires will ever depend on circumstances, and the degree to which it should be manifest that it is being done will likewise be related to the particular situation under examination."

42 A claim of apprehended bias succeeded where a judge in interlocutory proceedings in the Family Court said that he would not accept the evidence of either the husband or the wife unless it were corroborated. In that case, *R v Watson; Ex parte Armstrong* (112), *Angliss* was quoted by Barwick CJ, Gibbs, Stephen and Mason JJ. Their Honours essayed a "fair-minded person" test (113):

> "It is of fundamental importance that the public should have 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."

The judge's statement in *Watson* precluded the possibility of his acceptance of the uncorroborated evidence of either party on its merits. That situation differs materially from a case such as the present in which a judge makes an interlocutory finding expressly acknowledging the possibility that there might be a different outcome on different evidence or after a full trial.

43 *Watson* was applied in *Livesey v NSW Bar Association* (114) and the principle restated thus (115):

> "[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."

The Court invoked the "reasonable observer", also designated as the "fair-minded observer", who was presumed to approach the matter on the basis that a judge would ordinarily act so as to ensure both the appearance and the substance of fairness and impartiality. The Court acknowledged the impossibility of any inflexible rule and the need to determine each case by reference to its particular circumstances (116).

(110) (1972) 128 CLR 509.
(111) (1972) 128 CLR 509 at 518-519.
(112) (1976) 136 CLR 248.
(113) (1976) 136 CLR 248 at 263.
(114) (1983) 151 CLR 288.
(115) (1983) 151 CLR 288 at 293-294. *Livesey* was also invoked in a case of ex parte communication with a Family Court judge by a Family Court counsellor in chambers in *Re JRL; Ex parte CJL* (1986) 161 CLR 342.
(116) (1983) 151 CLR 288 at 299-300.

44 The fact that a judge has expressed a strongly worded view at the outset of a hearing does not prevent characterisation of that view as provisional. In such a case the reasonable apprehension of bias must be "firmly established" before prohibition will issue (117). Sometimes the line of judgment is "ill-defined" (118). On the other hand, a gratuitous statement in a judgment given in one case adverse to a person not involved in that case against whom a prosecution was pending, was sufficient to disqualify the judge who made the statement from sitting on an appeal arising out of the prosecution (119).

45 The scrutiny required of claims of bias based on prior findings by a decision-maker was emphasised, in relation to administrative decisions, by Gaudron and McHugh JJ in *Laws v Australian Broadcasting Tribunal* (120). Their Honours, after referring to *R v Australian Stevedoring Industry Board*, *Angliss* and *Shaw*, said (121):

> "When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be *firmly established* is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she *will not alter that conclusion* irrespective of the evidence or arguments presented to him or her."

(Emphasis added.)

The requirement that an apprehension of bias, based on judicial conduct, be "firmly established" is consistent with the most recent decisions of this Court and gives content to the requirement that an apprehension of bias, in that class of case, be reasonable.

46 Much debate in this appeal turned on the extent of the knowledge attributable to the fair-minded lay observer for the purpose of determining whether that observer would reasonably apprehend bias. That knowledge does not extend to a knowledge of the law that ordinary experience shows not to be the case (122). The question was discussed in *Johnson v Johnson* (123), where the plurality said (124):

(117) *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 14; 32 ALR 47 at 50-51 per Gibbs A-CJ, Stephen, Murphy and Wilson JJ agreeing, see also the observations of Murphy J at 15; 53. See also *R v Simpson; Ex parte Morrison* (1984) 154 CLR 101 at 104 per Gibbs CJ.

(118) *Vakauta v Kelly* (1989) 167 CLR 568 at 571 per Brennan, Deane and Gaudron JJ.

(119) *Grassby v The Queen* (1989) 168 CLR 1 at 19-21 per Dawson J, Mason CJ, Brennan, Deane and Toohey JJ agreeing.

(120) (1990) 170 CLR 70. See also *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 86 per Brennan, Gaudron and McHugh JJ, citing *R v Australian Stevedoring Industry Board*.

(121) (1990) 170 CLR 70 at 100.

(122) *Vakauta v Kelly* (1989) 167 CLR 568 at 585 per Toohey J, Brennan, Deane and Gaudron JJ agreeing; *Webb v The Queen* (1994) 181 CLR 41 at 52 per Mason CJ and McHugh J.

(123) (2000) 201 CLR 488.

(124) (2000) 201 CLR 488 at 493 [13]. See also *Webb v The Queen* (1994) 181 CLR 41 at 73 per Deane J (who was dissenting).

> "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, 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."

(Footnote omitted.)

Kirby J also discussed the attributes of the fictitious bystander (125):

> "Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. 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."

(Footnotes omitted.)

And further (126): "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious." (Footnote omitted.)

47 I agree with the observation of Kirby J that a fair-minded lay observer would, before forming a view about the existence of a reasonable apprehension of bias, take the trouble to inform himself or herself to the extent necessary to make a fair judgment.

48 The interposition of the fair-minded lay person could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim. As Professor Olowofoyeku says (127):

> "In the end, despite the pitch on objectivity and the view that the apprehensions of bias must have an objective basis, it is the opinion of the reviewing court on this issue that matters."

Professor Olowofoyeku has expressed the view that the judicial construct of the informed observer no longer provides a reliable guide to decision-making on the issue of apparent bias (128). However, the

(125) (2000) 201 CLR 488 at 508 [53].

(126) (2000) 201 CLR 488 at 509 [53], an observation endorsed by the House of Lords in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at 193 [14] per Lord Steyn and by the Court of Appeal of New Zealand in *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 at 514 [96].

(127) Olowofoyeku, "Bias and the Informed Observer: A Call for a Return to Gough", *Cambridge Law Journal*, vol 68 (2009) 388, at p 396.

(128) Olowofoyeku, "Bias and the Informed Observer: A Call for a Return to Gough",

utility of the construct is that it reminds the judges making such decisions of the need to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers. In so doing they will not have recourse to all the information that a judge or practising lawyer would have. It requires the judges to identify the information on which they are to make their determinations. While it is necessary to be realistic about the limitations of the test, in my opinion it retains its utility as a guide to decision-making in this difficult area.

Contentions and conclusions

49 BATAS adopted the reasoning of Allsop P in dissent in the Court of Appeal. It referred particularly to his Honour's observations about the character and quality of the finding of fraud made by Judge Curtis and his actual persuasion of the moral delinquency of BATAS. Allsop P, in a passage quoted by BATAS, said (129):

> "In my view, a fair-minded lay observer might reasonably think that a trial judge might not be able to eradicate the effect of this conclusion from his or her mind in attempting to deal fairly and impartially with the issue on a later occasion."

BATAS made the following discrete points:

- the present case is similar in character to *Livesey*;
- the findings by Judge Curtis in relation to the credit of Mr Gulson might lead a reasonable observer to reasonably apprehend that Judge Curtis had a preconceived opinion about Mr Gulson's evidence;
- Judge Curtis could have made a lesser finding under s 125 than he did – as to this submission it has been explained earlier in these reasons that, in the circumstances of this case, no significant difference has been demonstrated between the approach that Judge Curtis took and the approach that he would have taken if expressly relying upon s 125(2);
- the qualified expression by Judge Curtis in his reasons for decision did not overcome the character and gravity of his finding and the actual persuasion of his mind which it reflected;
- it made no difference that Judge Curtis did not use language that was objectionable or emotive or that he could have expressed himself in emphatic language of absolute finality;
- the majority in the Court of Appeal attributed to the fair-minded lay observer an overly sophisticated understanding of court procedures;
- Basten JA was also in error in attributing to the fair-minded lay observer awareness of ss 25 and 25B of the DDT Act – as already explained in my response to this submission these

(cont)

Cambridge Law Journal, vol 68 (2009) 388, at p 396.

(129) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [13].

provisions were not material to the assessment of apprehended bias in the circumstances of this case;

- Basten JA wrongly held that the fair-minded lay observer would have read and taken into account Judge Curtis' reasons for refusing to recuse himself; and
- Basten JA wrongly took into account the possibility that BATAS, by its application, might be seen to be manipulating the system to secure a hearing before a different judge.

50 In my opinion it is not necessary to go further for the purposes of this appeal than to consider the view of the fair-minded lay observer aware of the following matters:

1. That Judge Curtis made his finding of fraud in dealing with a dispute about whether legal professional privilege meant that certain material could not be used in the *Mowbray* proceedings.
2. That his finding was made in 2006 in the *Mowbray* proceedings and that the motion for his recusal was brought in 2009 in the *Laurie* proceedings.
3. The content of Judge Curtis' reasons for the ruling on the matter of legal professional privilege and the information conveyed by those reasons, including the information they conveyed about the nature of the proceedings and the fact that the ruling was not a final determination of fraud in relation to the Document Retention Policy for the purpose of the *Mowbray* proceedings.
4. The qualifications stated by Judge Curtis in relation to his findings.

51 In this case, the salient features of the judge's finding against BATAS would be apparent to the fair-minded lay observer without assistance from special knowledge of the law, the Tribunal or the rules of practice and procedure. The judge made it clear he was not making a finding which would stand, come what may, as a finding at trial. The observer would need no understanding of the rules relating to the admissibility of hearsay evidence in interlocutory proceedings to come to that conclusion. So much was apparent from the judge's statement of his task, which was to "determine the proceedings now before me on the evidence now before me" (130). He referred to things which "may be explained at the trial" (131) and qualified his finding of fraud by his statement that he was persuaded to that finding "on the present state of the evidence" (132). His reference to the decision by BATAS not to call any rebuttal evidence in the interlocutory proceedings

(130) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 601 [53].

(131) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [55].

(132) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [56].

carried with it the clear implication, which an observer would not require a law degree to draw, that it would be open to BATAS to call rebuttal evidence at trial. On this material alone, in my opinion, the fair-minded lay observer would not conclude that there had been firmly established a reasonable fear that Judge Curtis' mind was so prejudiced in favour of his finding of fraud that he would not alter that conclusion irrespective of the evidence or arguments provided to him in the *Laurie* proceedings. To conclude, as required by *Ebner*, that the judge might be led to decide the case other than on its legal merits, would require the observer to give no account to the express qualifications made by the judge in his findings in the *Mowbray* ruling. Even allowing for a reasonable scepticism about human nature, there is nothing in this case to warrant the view that the judge's disclaimers were simply to be put to one side as having little or no weight.

52 The fair-minded lay observer is not in my opinion assumed to have had regard to the reasons for judgment published by Judge Curtis in dismissing the BATAS motion for his recusal. In so saying, it should be acknowledged that there may be cases where reliance may be placed on later statements which withdraw or qualify earlier comments that might otherwise indicate prejudgment (133). It is nevertheless difficult to see how, as a general rule, a judge's own explanation for refusing a recusal motion will assist in determining whether the facts and circumstances upon which the judge's ruling is based, were such as to give rise to a reasonable apprehension of bias in the mind of a fair-minded lay observer.

53 In my opinion, the fair-minded lay observer aware of the circumstances in which Judge Curtis made his finding against BATAS and the qualifications which he expressed in relation to it, would not have an apprehension, firmly established on reasonable grounds, that Judge Curtis might undertake the trial of the *Laurie* proceedings other than impartially. The appeal should be dismissed.

54 GUMMOW J. The Dust Diseases Tribunal of New South Wales (the Tribunal) is established as a court of record by s 4 of the *Dust Diseases Tribunal Act 1989* (NSW), and has exclusive jurisdiction to hear and determine actions of a specified kind which otherwise would be heard in the Supreme Court or the District Court of that State (134). Section 69 of the *Supreme Court Act 1970* (NSW) provides for relief in the nature of prohibition directed to inferior courts such as the Tribunal. Upon appeal from the Court of Appeal that is the remedy now sought in this Court.

(133) See *Webb v The Queen* (1994) 181 CLR 41 at 73-74 per Deane J; *Johnson v Johnson* (2000) 201 CLR 488 at 494 [14] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Kwan v Kang* [2003] NSWCA 336 at [69].

(134) See *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 428-429 [36]-[38].

55 In the course of litigation in the Tribunal, Judge Curtis dismissed an application to recuse himself. This result was challenged unsuccessfully in the Court of Appeal. An application for leave to appeal was dismissed by that Court and an application for prohibition also failed. The refusal of prohibition is now challenged in this Court. Before turning to the issues on the appeal something first must be said of the litigation in which the recusal application was made.

The Laurie litigation

56 On 15 March 2006 Mr Donald Henry Laurie instituted in the Tribunal an action against British American Tobacco Australia Services Ltd (BATAS), which is the appellant in this Court, Amaca Pty Ltd (Amaca), the second respondent, and the Commonwealth, the third respondent. Mr Laurie died shortly thereafter, on 29 May 2006. He was sixty-five years of age. The first respondent, Mrs Laurie, is his widow and she is administratrix of his will under a grant made by the Supreme Court of New South Wales on 14 June 2007. Pursuant to an order made by the Tribunal on 11 July 2007 and upon an amended statement of claim, she continues the action on behalf of the estate and also sues on her own behalf as the dependant widow of her husband.

57 Mrs Laurie alleges that Mr Laurie died as a result of carcinoma of the lung which was a consequence of exposure to and inhalation of, in the course of employment by several employers, asbestos fibres in products manufactured by Amaca, then named James Hardie & Coy Pty Ltd. Amaca, as well as the Commonwealth and the fourth respondent, Judge Curtis, entered submitting appearances in this Court.

58 Mrs Laurie also sues BATAS, alleging breach of a duty to Mr Laurie, a smoker of its tobacco products in the period 1946-1971. In her amended statement of claim filed 13 July 2007, she alleges that not only did BATAS know that the smoking of its tobacco products could cause lung cancer, but that, pursuant to a "document destruction policy", it intentionally destroyed documents that tended to prove this knowledge and did so with the intention of placing these documents beyond the reach of potential litigants such as Mr Laurie.

59 The action has yet to come to trial. The statement of claim by Mr Laurie, filed 15 March 2006, alleged the "document destruction policy" and "document destruction" against BATAS in support of the claim for exemplary damages and BATAS pleaded to these allegations in its defence filed 19 April 2006. The amended statement of claim later filed by Mrs Laurie redirected these allegations to supply a foundation for specific adverse inferences on the negligence claim itself.

60 On 20 April 2006 Judge Curtis was designated the member of the Tribunal to take the evidence of Mr Laurie, who by then was seriously ill and living in the United States. The Tribunal noted an agreement between the parties that his Honour was to be entitled when subsequently hearing and deciding the action "to take into account credit, credibility and demeanour observations made while taking the

evidence as examiner". The evidence of Mr Laurie was taken by Judge Curtis in Texas on 26 April 2006, and was transcribed and video taped.

The Mowbray litigation

61 Shortly thereafter, in an action to which BATAS was a party and in which it had engaged the same firm of solicitors as it had (and retains) in the present action, Judge Curtis ruled upon an application by Brambles Australia Ltd (Brambles). Brambles previously had consented to entry of judgment by the Tribunal in favour of the widow of its employee, Mr Mowbray, who had died from cancer, allegedly caused by asbestos in products upon which he had worked. Brambles asserted that the cancer had also been caused by the smoking of cigarettes manufactured by BATAS and sought, by cross-claim, contribution or indemnity from BATAS.

62 The particular dispute before Judge Curtis in the Mowbray litigation was an application by Brambles that BATAS make further discovery of documents, in particular with reference to an amendment made on 17 May 2006 to its cross-claim alleging intentional destruction by BATAS of prejudicial documents. Judge Curtis noted that these allegations were not new, having been considered in the Victorian proceedings in *British American Tobacco Australia Services Ltd v Cowell* (135).

63 His Honour acceded to the application by Brambles and on 30 May 2006 gave detailed reasons for the making of the orders for further discovery (the 2006 reasons) (136). He found that on the evidence called by Brambles, particularly that of Mr Frederick Gulson, BATAS's company secretary and in-house solicitor in 1989-1990, Brambles had sufficiently discharged an onus of demonstrating, prima facie, that it could make good the allegations in the amended cross-claim.

The continuation of the Laurie litigation

64 The Laurie litigation next came before the Tribunal (constituted by Judge Duck) on 26 June 2006, a month after BATAS had received the reasons of Judge Curtis in the Mowbray litigation. Mrs Laurie had filed a motion seeking her appointment as administrator ad litem of her husband's estate. This was stood over and was not proceeded with after the grant of probate by the Supreme Court on 14 June 2007. What is of considerable importance for present purposes is that although BATAS appeared at the directions hearing on 26 June 2006, and although the parties had been at issue on the pleadings since 19 April 2006 regarding the "document destruction policy", and although the reasons

(135) (2002) 7 VR 524.

(136) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580.

on the Mowbray application (to which BATAS was a party) had been delivered a month earlier, BATAS made no recusal application respecting Judge Curtis.

65 On 11 July 2007, the Tribunal in the Laurie litigation made the order already described whereby Mrs Laurie became the plaintiff. At a directions hearing on 10 December 2007 before Judge Curtis, the Tribunal was told that there was now pending in the Supreme Court an application by BATAS under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) that the action be transferred to the Supreme Court of Victoria.

66 The application was to fail, being dismissed by Harrison J on 27 February 2009. In his detailed reasons (137), Harrison J described as "patent" the importance of the role that Judge Curtis has already played in taking the evidence in Texas and is yet to play in the resolution of the action in the Tribunal, and continued:

> "The agreement among the parties that he should be given the power to deal with observations made by him in a particular way was predicated upon his continuing to hear the proceedings to finality. It is in the interests of justice that that agreement not lightly be frustrated."

67 At the hearing in the Tribunal on 10 December 2007, the solicitor for BATAS had informed Judge Curtis that, if the cross-vesting application were to fail, BATAS then would submit that he should not hear the trial, "having regard to some of the prima facie findings that [his] Honour made in the context of the discovery application made by Brambles in the Mowbray case".

68 Apparently in anticipation of any query as to the delay by BATAS since delivery of the 2006 reasons in moving any recusal application, the solicitor for BATAS said at the hearing on 10 December 2007 that it was the first time, since the reconstitution of the action on 11 July 2007, that the matter had been before the Tribunal with the solicitors present. In truth, however, the period of delay had begun long before, on 30 May 2006, with the delivery of the 2006 reasons.

The recusal application

69 Eventually, after the dismissal by Harrison J of the cross-vesting application on 27 February 2009, BATAS filed a motion on 9 March 2009 that Judge Curtis disqualify himself from further hearing the Laurie litigation. The application was heard on 15 May 2009 and, on 27 May, his Honour delivered his reasons dismissing the application. His conclusion was (138):

> "I do not believe that, having read my published reasons in *Re Mowbray*, any reasonable observer might entertain a reasonable apprehension that I might not bring an impartial and unprejudiced

(137) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWSC 83 at [51].

(138) *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14 at [22].

mind to the resolution of the questions of whether Mr Gulson is a witness of truth, and whether or not BATAS engaged in a dishonest document destruction policy."

70 BATAS, both before this Court and in the Court of Appeal, submitted that the hypothetical observer would not have regard to the reasons of Judge Curtis on the recusal application or, if they did, such reasons should carry little, if any, weight. But it was remarked in the joint reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Johnson v Johnson* (139), to which further reference is made below, that the hypothetical observer would be no more entitled to make snap judgments than would be the decision maker under observation. Accordingly, and as the joint reasons make clear, later statements which qualify earlier statements may be relevant. There is no logical reason why any temporal element should be brought into that general principle (140); it depends upon the circumstances of the particular case. As will become evident later in these reasons, the considered conclusions, such as that stated above, by Judge Curtis in the recusal application are important for an understanding of the 2006 reasons and the hypothetical observer would attend to them in deciding whether the 2006 reasons had produced a sufficient apprehension of prejudgment.

71 To that perception of the role of the hypothetical observer must be added the consideration 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". The words are those of Mason J in *Re JRL; Ex parte CJL* (141), in a passage adopted by Callinan J in *Johnson v Johnson* (142). Mason J also said in that passage (143), using words later said by the English Court of Appeal to have "great persuasive force" (144), and adopted by the New Zealand Court of Appeal (145):

> "In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (146); *Watson* (147); *Re Lusink; Ex parte Shaw* (148).

(139) (2000) 201 CLR 488 at 494 [14].
(140) cf *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [77] per Tobias JA.
(141) (1986) 161 CLR 342 at 352.
(142) (2000) 201 CLR 488 at 518 [80].
(143) (1986) 161 CLR 342 at 352.
(144) *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 479. See also *Sengupta v Holmes* [2002] EWCA Civ 1104 at [25].
(145) *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 at 504. See also Hammond, *Judicial Recusal: Principles, Process and Problems* (2009), pp 35-36.
(146) (1969) 122 CLR 546 at 553-554.
(147) *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262.

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

72 The references in *JRL* to the phrase "firmly established" in the joint reasons of all seven Justices of this Court in *Angliss* and to the subsequent authorities is important. BATAS presented its argument to Judge Curtis and to this Court on the false footing that "the threshold of apprehended bias is very low". For that proposition BATAS relied upon a remark by Spigelman CJ in *McGovern v Ku-Ring-Gai Council* (149). However, the expression "low threshold" was immediately qualified by the statement that "an issue of some specificity" is presented in the identification of that which is said to constitute lack of "impartiality" or "prejudice". Nevertheless, references to thresholds in this context are apt to distract attention from the force of what was said by Mason J in *JRL* and should not be made.

The appeal

73 An application by BATAS for leave to appeal to the Court of Appeal (Tobias and Basten JJA, Allsop P dissenting) from the dismissal by Judge Curtis of its motion seeking his disqualification was dismissed on 17 December 2009; the Court of Appeal, by the same majority, also refused an application by BATAS for prohibition directed to Judge Curtis, again on the ground of apprehended bias (150). Against the refusal of prohibition BATAS, by special leave, appeals to this Court, on the condition that it pay the costs of Mrs Laurie of the appeal and that costs orders already made not be disturbed.

74 It is important to note that the appeal is brought from the refusal by the Court of Appeal of a prohibition application. That is a discretionary remedy. It was open to the Court of Appeal to refuse prohibition having regard to the delay, waiver, acquiescence or other conduct of BATAS in the course of the litigation in the Tribunal, or other relevant circumstances (151).

75 In submissions upon the recusal application it made to Judge Curtis, BATAS had submitted that delay was not a relevant consideration. The submission was made apparently in response to reliance by Mrs Laurie upon the delay by BATAS. The submission by BATAS was not well founded. It cannot be in the interests of the due administration of justice, for example, for a well-resourced litigant, apprised of apparent

(148) (1980) 55 ALJR 12 at 14; 32 ALR 47 at 50-51.
(149) (2008) 72 NSWLR 504 at 508.
(150) [2009] NSWCA 414.
(151) See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 106-107 [53], 144 [172].

grounds for a recusal application (152), to bide its time in the hope of a favourable outcome on the merits at trial and then complain if it loses the trial.

76 However, no case against BATAS of this character was made by Mrs Laurie to the Court of Appeal. Special leave having been granted, and there being no application for the revocation of that grant and no notice of contention by the first respondent, it is in that unsatisfactory state that the appeal falls for decision.

77 For the reasons which follow, prohibition was correctly refused by the Court of Appeal on the grounds argued before it, and the appeal to this Court should be dismissed.

Applicable principles

78 This is not a case where the ground for apprehended bias is identified as an extraneous influence such as financial interest in the outcome of the litigation or personal connection with a litigant. The apprehension upon which BATAS founds its complaint is that Judge Curtis will not approach the Laurie case with an open mind because he appears to have prejudged an issue and cannot or will not reconsider it with an open mind.

79 The controversy in *Johnson v Johnson* (153) turned upon the significance to be attached to remarks by the judge in the course of a trial in the Family Court of Australia. In the joint reasons of five Justices in this Court several points of immediate significance were made.

80 First, their Honours said (154):

> "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' (155)."

81 Secondly, their Honours added (156):

> "Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of

(152) cf *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]* [2000] 1 AC 119 at 127-129, 138.

(153) (2000) 201 CLR 488.

(154) (2000) 201 CLR 488 at 493 [12]. L'Heureux-Dubé and McLachlin JJ and Cory J had spoken in similar terms in *R v S (RD)* [1997] 3 SCR 484 at 501-503, 532-534 respectively. cf *Helow v Secretary of State for Home Department* [2008] 1 WLR 2416 at 2435; [2009] 2 All ER 1031 at 1049-1050 per Lord Mance.

(155) *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.

(156) (2000) 201 CLR 488 at 493 [13].

the law, or of the character or ability of a particular judge (157), 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."

82 Thirdly, the conclusions in the joint reasons in *Johnson* were expressed as follows (158):

"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 (159). 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."

83 Fourthly, where, as was the situation in *Johnson*, the judge in question later explains in court what he or she had intended to convey by an earlier statement in court, the question is whether a reasonable observer would reject that explanation, or whether the explanation could not remove "an ineradicable apprehension of prejudgment" (160).

84 To this may be added an observation in the joint reasons of the whole Court in *Angliss* (161). Their Honours emphasised the significance of the particular subject matter before the decision maker and the questions arising from it, saying of the mind of the decision maker (162):

"Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it."

The reasons on the recusal application

85 In his reasons for refusing the recusal application, Judge Curtis described the circumstances now said by BATAS to give rise to apprehended bias. He noted that the document destruction policy had been pleaded against BATAS in the Mowbray litigation, and continued with an analysis of the 2006 reasons (163):

(157) *Webb v The Queen* (1994) 181 CLR 41 at 73 per Deane J.
(158) (2000) 201 CLR 488 at 495 [18].
(159) 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.
(160) (2000) 201 CLR 488 at 494 [14]-[16].
(161) (1969) 122 CLR 546 at 552-554.
(162) (1969) 122 CLR 546 at 554.
(163) [2009] NSWDDT 14 at [4]-[5].

"In that matter, Brambles sought an order for further and better discovery in relation to the document destruction policy, and that interlocutory application, opposed by BATAS, came before me for resolution.

A question arose as to whether certain otherwise privileged evidence given in an American action by Mr Frederick Gulson, a former Company Secretary and in-house solicitor to BATAS, could be adduced in the proceedings. That question was resolved by my finding that the evidence in question constituted communications 'in furtherance of the commission of a fraud' within the meaning of s 125 of the *Evidence Act 1995* [(NSW)]."

86 Section 125 is concerned with the loss of client legal privilege by reason of certain types of misconduct. The court may hold that the privilege does not prevent the adducing of evidence of a communication made or a document prepared in furtherance of, amongst other things, the commission of a fraud (s 125(1)). If the commission of the fraud is a fact in issue and there are reasonable grounds for finding the fraud was committed, the court "may find that the communication was so made or the document so prepared" (s 125(2)). In such circumstances, it is not necessary for the denial of privilege to make a finding beyond that standard of "reasonable grounds".

87 After the passage from his reasons on the recusal application set out above, Judge Curtis continued his analysis of the 2006 reasons, saying (164):

"That finding was based substantially upon my accepting the evidence of Mr Gulson, who was called before me. The allegation of fraud, as I identified it, was not simply that BATAS destroyed prejudicial documents for the purpose of suppressing evidence in anticipated litigation, but that it 'dishonestly concealed this purpose by pretence of a rational non-selective housekeeping policy'."

88 The English Court of Appeal has treated as an extreme and unlikely situation the expression by a judge, called upon to make a preliminary ruling, of the decision in such extreme language as to give rise to an apprehension that further persuasion at trial would be to no avail (165). That extreme situation is far from the present case. It needs to be emphasised that it is not said that Judge Curtis at any stage expressed himself in extravagant or extreme terms. Both sets of reasons are laid out in a measured fashion. The complaint now made by BATAS is quite different. The submission is that, in deciding against BATAS in the further discovery application in the Mowbray litigation, his Honour in the 2006 reasons, by failing expressly to frame his findings as being made only on the basis of "reasonable grounds", went beyond the standard sufficient for the satisfaction of s 125 and so made an adverse

(164) [2009] NSWDDT 14 at [5].
(165) *Sengupta v Holmes* [2002] EWCA Civ 1104 at [34], [47].

finding against BATAS at a higher, more prejudicial, standard. That finding then is said to lead to the conclusion that BATAS should have succeeded on its recusal application in the Laurie litigation.

Logical connection

89 However, the hypothetical reasonable observer, having regard to the application by Judge Curtis of s 125 in the 2006 reasons, would approach the question of whether apparent bias on the recusal application was sufficiently established in the manner required by the joint reasons in *Ebner v Official Trustee in Bankruptcy* (166), the two sets of joint reasons in *Smits v Roach* (167) and the joint reasons in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (168). The observer would require articulation of the logical connection between the matter in the 2006 reasons and the apprehended deviation from the course of deciding, on their merits, the issues in the Laurie litigation.

90 The first matter the observer would note would be the statement by Judge Curtis in the 2006 reasons of the submission by BATAS as to how he should approach the operation of s 125 in the further discovery application made against BATAS with which he was dealing. That statement was (169):

> "For present purposes I accept the submission by BATAS that, consistently with the decisions in *Idoport Pty Ltd v National Australia Bank Ltd* (170), *Kang v Kwan* (171) and *ATH Transport v JAS (International) Australia Pty Ltd* (172), a finding of fraud sufficient to enliven s 125 must involve an element of dishonesty."

91 In the first of these three decisions, Hodgson CJ in Eq expressed a tentative view that "fraud" as used in s 125 requires an element of dishonesty (173). In the second, Santow J followed that view (174), and in the third Barrett J did the same. But it is significant that Barrett J, who was ruling on an application for access to documents produced on subpoena, accepted that to enliven s 125 some evidence was required which at a prima facie level was sufficient to give some colour to the charge of fraud, and concluded that on the material before him that standard had not been met and s 125 did not apply (175).

92 However, the effect of the submission made by BATAS to Judge Curtis was that more was required for s 125 to apply against its

(166) (2000) 205 CLR 337 at 345 [8].
(167) (2006) 227 CLR 423 at 443-444 [53], 444 [56].
(168) (2006) 229 CLR 577 at 609 [110].
(169) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 595.
(170) [2001] NSWSC 222.
(171) [2001] NSWSC 698.
(172) [2002] NSWSC 956.
(173) [2001] NSWSC 222 at [63].
(174) [2001] NSWSC 698 at [37].
(175) [2002] NSWSC 956 at [13]-[15].

claim of client legal privilege than the reasonable grounds spoken of in s 125(2). The observer then would note that, BATAS having pitched at that level its case against the operation of s 125, Judge Curtis went ahead to decide the discovery application on the basis of the evidence presented. The observer also would note from the 2006 reasons that BATAS did not rise with any forensic vigour to counter the case put by the applicant, Brambles. On that state of the evidence, and with frequent reiteration that matters might emerge differently at the trial, Judge Curtis ruled against BATAS on the discovery application.

93 Judge Curtis indicated that the standard of proof where dishonesty is alleged must take into account the gravity of that allegation, and that, while vitally important to Brambles on the present application, the evidence of Mr Gulson to a large extent was vague and consisted of hearsay.

94 Counsel for BATAS had cross-examined Mr Gulson but subjected him to no more than a peripheral attack. Counsel did not put to him directly that his evidence, largely hearsay but strongly against BATAS, was untruthful, unreliable or actuated by malice. In the 2006 reasons Judge Curtis had said that while there may have been good reasons why BATAS had not joined issue with the evidence of Mr Gulson and had called no evidence to contradict him, the discovery application had to be determined on the evidence then before the Tribunal. His Honour emphasised that there remained a live issue for the trial, being the contention by BATAS that at no time had its policies and practices permitted selective destruction of prejudicial documents.

95 After referring to these matters in the course of his reasons in the recusal application, Judge Curtis continued (176):

> "Under the heading 'Findings of fact relevant to s 125' I stated:
>
> 'I am persuaded *on the present state of the evidence* that BATAS in 1985 drafted or adopted the Document Retention Policy for the purpose of fraud within the meaning of s 125 of the *Evidence Act*.'
>
> And further:
>
> '*In the absence of evidence to the contrary*, I infer that legal advice to the effect that destruction of documents pursuant to the terms of the policy was not contrary to law, was integral to the decision by BATAS to persist with its policy of selective destruction.'"

(Emphasis added by Judge Curtis.)

96 He then said (177):

> "Far from expressing my conclusions in terms of finality, I took pains to recognise that the assertions by Brambles as to a document destruction policy remained a live issue for the trial, that the evidence of Mr Gulson had not been tested in cross-examination,

(176) [2009] NSWDDT 14 at [16].
(177) [2009] NSWDDT 14 at [20]-[22].

and that there may be good reasons why BATAS, in an interlocutory proceeding, did not wish to take issue with, nor call evidence to contradict, Mr Gulson.

I accept the submission of [counsel for BATAS] that the threshold of apprehended bias is very low. Nevertheless it is a threshold that must be crossed by a reasonable person. That person is not overly suspicious.

Conclusion

I do not believe that, having read my published reasons in *Re Mowbray*, any reasonable observer might entertain a reasonable apprehension that I might not bring an impartial and unprejudiced mind to the resolution of the questions of whether Mr Gulson is a witness of truth, and whether or not BATAS engaged in a dishonest document destruction policy."

97 It is in this setting that the first respondent correctly submits that the hypothetical observer, upon reading the 2006 reasons, would appreciate that the judge was qualifying his conclusions by emphasising that if the same issues arose at a later stage in the Mowbray litigation he would decide them on the evidence then led by the parties. His Honour "found fraud" but on the evidence then available and admissible in the Mowbray litigation. Further, as explained earlier in these reasons, upon the prohibition application the subject of the present appeal by BATAS, that observer would have the benefit of the statements made by Judge Curtis on the recusal application. Those statements would remove any apprehension of prejudgment at a trial of the Laurie litigation.

98 There could have been no objection to Judge Curtis trying the dispute between Brambles and BATAS in the Mowbray litigation upon such evidence as then was presented, notwithstanding his earlier ruling on the discovery application. A fortiori, should the Laurie litigation go to trial, the fair-minded lay observer would not, upon the basis of the Mowbray litigation, apprehend that the judge would not bring an impartial and open mind to the resolution of the issues in the Laurie litigation. For the observer there would be lacking the necessary logical connection between the 2006 reasons and the Laurie litigation to support such an apprehension.

The reasons in the Court of Appeal

99 The leading majority judgment in the Court of Appeal was delivered by Tobias JA. After referring to statements of principle by this Court in *Johnson v Johnson* and *Parramatta Design* he went on (178):

"[T]he hypothetical fair-minded observer would have some understanding of the nature of the application with which the primary judge was dealing and, in particular, an understanding of the fact that hearsay evidence in such an application was admissible

(178) [2009] NSWCA 414 at [115].

> whereas in other circumstances it was not and that his Honour's findings were only for the limited purpose of allowing inspection of documents which would otherwise be the subject of client legal privilege. That observer would thus be acquainted with the difference between an interlocutory proceeding and a trial and, in particular, of the significant difference between the evidence admissible in the former as distinct from that admissible in the latter. That observer would also understand that, perhaps for perfectly proper tactical reasons, BATAS had decided not to call evidence in the interlocutory proceedings to counter that of Mr Gulson which it might well call at trial, thus putting a completely different complexion on the issue of BATAS' document management policies."

100 BATAS criticises this attribution to the observer of an appreciation of the significance of the hearsay rule and the distinction between rulings made in proceedings before trial and at trial on other evidence. However, as was emphasised in the second, third and fourth matters referred to above under the heading "Applicable principles", the understanding to be attributed to the lay observer depends upon the circumstances. Here the reasoning of the judge was laid out in the 2006 reasons and explained further in the reasons on the recusal application. The 2006 reasons record a submission that the evidence of Mr Gulson contained inadmissible hearsay, and the reliance by his Honour upon s 75 of the *Evidence Act* in rejecting that submission. The 2006 reasons record that the evidence of Mr Gulson stands uncontradicted, and that, although he may be, he has not yet been tested by a contrary version of events.

101 In his dissenting reasons Allsop P emphasised that (179):

> "The problem lies in the character and gravity of the finding and the actual persuasion of the mind of the trial judge of the moral delinquency of the party to a degree to warrant the expressed conclusion of fraud."

This appears to attribute to the lay observer an incorrect application of the principle in *Briginshaw v Briginshaw* (180) by requiring satisfaction of dishonesty to a degree that no further evidence could dissuade the court from that conclusion. But if the evidence later adduced is different the court in question may be persuaded to a different conclusion and that, Judge Curtis made clear in the 2006 reasons, might be the outcome at a later trial. The reasons on the recusal application underscore the point that there was not the ineradicable apprehension of prejudgment of which BATAS complains.

Conclusion

102 The appeal should be dismissed. BATAS should pay the costs of the first respondent.

(179) [2009] NSWCA 414 at [13].
(180) (1938) 60 CLR 336.

HEYDON, KIEFEL AND BELL JJ.

Introduction

103 Judge Curtis, who is the fourth respondent to this appeal, is a judge of the Dust Diseases Tribunal of New South Wales (the Tribunal). In proceedings which are unrelated to the present appeal, his Honour found that the appellant, British American Tobacco Australia Services Ltd (BATAS), developed and adopted a fraudulent business policy. The existence of that policy is in issue in proceedings which are brought against BATAS by the first respondent, Claudia Jean Laurie. Mrs Laurie's claim has been listed for hearing before Judge Curtis. The question raised by the appeal is whether the apprehension of bias rule disqualifies his Honour from hearing Mrs Laurie's claim. It has not at any stage been alleged, nor could it have been, that his Honour displayed actual bias.

104 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 (181). The apprehension here raised is of pre-judgment; it is an apprehension that, having determined the existence of the policy in the earlier proceeding, Judge Curtis might not be open to persuasion towards a different conclusion in Mrs Laurie's proceeding.

Background matters

105 Mrs Laurie is the widow of Donald Henry Laurie. Mr Laurie died from lung cancer in May 2006. Shortly before his death he commenced proceedings in the Tribunal claiming damages in negligence against three defendants including BATAS. In the case against BATAS, Mr Laurie pleaded that he had smoked tobacco products for a number of years and that throughout this period BATAS knew, or ought to have known, that smoking tobacco products could cause lung cancer. He claimed that BATAS was in breach of the duty of care that it owed to him. The breaches of duty particularised included making public statements denying that there was reliable evidence that smoking could cause lung cancer and disparaging material in the public domain which indicated the existence of that link. Mr Laurie asserted that BATAS had developed and implemented a policy of destroying documents that may have provided evidence adverse to its interests in litigation.

106 Similar allegations concerning the existence and implementation of a document destruction policy were pleaded in proceedings in the Tribunal brought against Brambles Australia Ltd (the Mowbray proceedings). In those proceedings, Judge Curtis found that BATAS had drafted or adopted its Document Retention Policy for the purpose

(181) *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

of a fraud (182). The finding was substantially based upon acceptance of the evidence of Mr Frederick Gulson, who had been the in-house counsel and company secretary of BATAS.

107 It is likely that Mr Gulson will be called in Mrs Laurie's case to prove the allegations concerning the document destruction policy.

108 BATAS made an application to Judge Curtis asking that he disqualify himself from hearing Mrs Laurie's claim on the ground that his findings in the Mowbray proceedings gave rise to a reasonable apprehension of pre-judgment. The application was refused (183).

109 BATAS sought leave to appeal from Judge Curtis's order to the Court of Appeal of the Supreme Court of New South Wales (184). BATAS also commenced proceedings in that Court claiming an order prohibiting Judge Curtis from hearing or determining Mrs Laurie's claim (185).

110 The Court of Appeal dismissed BATAS's summons for leave to appeal. By majority (Tobias and Basten JJA, Allsop P dissenting) the Court dismissed BATAS's claim for prerogative relief.

111 BATAS appeals by special leave against the order of the Court of Appeal dismissing its summons for prerogative relief. The grant of special leave is conditioned on BATAS paying Mrs Laurie's costs of the appeal in any event and upon there being no disturbance to the costs orders that have already been made in the proceedings. Each of the remaining respondents to the appeal has filed a submitting appearance. For the reasons that follow, the appeal should be allowed and an order made prohibiting Judge Curtis from hearing or determining Mrs Laurie's claim.

The Mowbray proceedings

112 The Mowbray proceedings were commenced by the widow of Alan Mowbray, a former employee of Brambles who died of lung cancer in January 2002. Mrs Mowbray claimed that her husband's cancer had been caused by the inhalation of asbestos fibres contained in the brake pads on which he had been required to work. A consent judgment was entered in her favour on 27 February 2002. Thereafter Brambles brought a cross-claim against BATAS for contribution (186). Brambles asserted that smoking tobacco products manufactured and marketed by BATAS had been a cause of the late Mr Mowbray's cancer. It sought an order that BATAS provide further discovery. The application came before Judge Curtis. In the course of the application Brambles was

(182) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [56].

(183) *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14.

(184) Section 32(1) of the *Dust Diseases Tribunal Act 1989* (NSW) confers a right of appeal to the Supreme Court on a party who is dissatisfied with a decision of the Tribunal in point of law or on a question as to the admission or rejection of evidence.

(185) *Supreme Court Act 1970* (NSW), s 69.

(186) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5(1)(c).

given leave to amend its cross-claim to make further allegations concerning BATAS's document retention policies. One of these allegations was that BATAS had destroyed prejudicial documents in order to put them beyond the reach of litigants. Another was that it had falsely advanced an innocent housekeeping explanation for that destruction so as to prevent adverse inferences being drawn from it.

113 Each of the parties was represented by senior and junior counsel on the hearing of the discovery application, which occupied several days. Judge Curtis accepted Mr Gulson's evidence. He found it was corroborated by the evidence of Mr Welch, Chief Executive Officer of the Tobacco Institute of Australia between January 1991 and April 1992, and Dr Wigand, Vice-President of Research and Development at Brown and Williamson, a subsidiary of BATAS's parent company, between 1989 and 1993.

114 Also in evidence in Brambles' case on the discovery application was an affidavit sworn by Mr Gulson in February 2003 and a transcript of evidence given by him in proceedings in the United States. Both documents were the subject of a hearsay objection. Since the discovery application was interlocutory, and since Mr Gulson had identified the sources of his information, the hearsay rule did not apply (187). Judge Curtis gave two additional reasons for his decision to admit the evidence: Mr Gulson was subject to cross-examination at the hearing and the allegations were not new; and BATAS had had the opportunity to investigate Mr Gulson's claims and to call evidence in rebuttal of them.

115 Parts of the transcript of Mr Gulson's evidence in the United States proceeding and his affidavit were the subject of client legal privilege (188). Judge Curtis was required to determine whether this material could be adduced in evidence under s 125(1) of the *Evidence Act 1995* (NSW), which permits evidence to be adduced of a communication that is the subject of client legal privilege if the communication is made "in furtherance of the commission of a fraud" (189).

116 Proof of fraud for the purposes of s 125(1) is facilitated by sub-s (2), which, relevantly, provides:

> "For the purposes of this section, if the commission of the fraud … is a fact in issue and there are *reasonable grounds for finding* that:
>
> (a) the fraud … was committed, and

(187) Section 75 of the *Evidence Act 1995* (NSW) provides that "[i]n an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source".

(188) *Evidence Act 1995* (NSW), ss 118, 119.

(189) *Evidence Act 1995* (NSW), s 125(1)(a).

(b) a communication was made … in furtherance of the commission of the fraud …

the court may find that the communication was so made …"

(Emphasis added.)

117 Judge Curtis did not state that his findings were made merely because there were reasonable grounds for finding fraud. He found fraud under s 125(1) independently of s 125(2). He approached the determination upon the footing that a finding of fraud under s 125(1) must involve an element of dishonesty (190). It is implicit that his findings were arrived upon by application of the principles stated by Dixon J in *Briginshaw v Briginshaw* (191). They were expressed as follows. First, "on the present state of the evidence … BATAS in 1985 drafted or adopted the Document Retention Policy for the purpose of a fraud within the meaning of s 125 of the *Evidence Act*" (192). Secondly, "[i]n the absence of evidence to the contrary … I find that the communications made for the purpose of obtaining [advice to the effect that destroying documents pursuant to the Policy was not contrary to law] were communications in furtherance of the commission of a fraud within the meaning of s 125" (193).

118 Judge Curtis's findings were dependent upon the evidence of Mr Gulson, which he described as being vague and consisting of Mr Gulson's impressions, interpretations and conclusions as to what he was told (194). His Honour allowed cross-examination of Mr Gulson on the application. That cross-examination included cross-examination on matters relevant only to Mr Gulson's credibility (195). Mr Gulson acknowledged that he had taken control of a company by means of artificial or sham transactions in order to bring proceedings against a former director for breach of fiduciary duty and that he had made a claim against BATAS for wrongful dismissal which he had not pursued. BATAS submitted that Mr Gulson's evidence on these topics made it unsafe and unsatisfactory to accept his evidence. Judge Curtis rejected this submission (196). Notably, senior counsel for BATAS did not challenge Mr Gulson on the substance of his allegations.

(190) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 595 [29].

(191) (1938) 60 CLR 336 at 362.

(192) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [56].

(193) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 602 [57].

(194) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 600 [48].

(195) Section 103(1) of the *Evidence Act 1995* (NSW) provides that the credibility rule (which renders inadmissible evidence that is relevant only to a witness's credibility) does not apply to evidence adduced in cross-examination if it has substantial probative value.

(196) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 601 [51].

119 Judge Curtis said that the sting in Mr Gulson's account was not simply that BATAS had destroyed prejudicial documents for the purpose of suppressing evidence in anticipated litigation, but that BATAS had dishonestly concealed this purpose by the pretence of a rational, non-selective housekeeping policy (197). This was the dishonesty which Judge Curtis identified as warranting the conclusion of fraud.

120 Judge Curtis was mindful that the application was interlocutory and of the limited challenge that BATAS had advanced to the acceptance of Mr Gulson's evidence. In these respects his Honour stated the following reservations (198):

> "I should make it plain that BATAS has at all times maintained that its document management policies and practices at no time permitted selective destruction of prejudicial documents. The assertion by Brambles to the contrary remains a live issue for the trial.
>
> …
>
> Mr Gulson's evidence stands uncontradicted. He has not yet been tested by a contrary version of events …
>
> There may be good reasons why BATAS has not yet joined issue with, and called evidence to contradict, Mr Gulson; however, I must determine the proceedings now before me on the evidence now before me."

121 In the event, Brambles' cross-claim did not go to trial. On 5 July 2006, the Tribunal made orders dismissing it with no order as to costs.

The Laurie proceedings

122 Mrs Laurie, on behalf of the estate of her late husband and on her own behalf as his dependant, by amended statement of claim invites the Tribunal to draw inferences adverse to BATAS from the destruction of documents under a document destruction policy. She claims aggravated damages in reliance on the allegations of destruction of documents under the policy. BATAS admits that, from time to time, it destroyed documents in its possession under its document management policies. It admits that some of the documents which it destroyed may have been relevant to matters in issue in the Laurie proceedings. Otherwise it denies the document destruction allegations. The question of whether BATAS adopted and implemented a document retention/destruction policy for the purpose of destroying documents adverse to its interests under the guise of a non-selective policy is a live and significant one in the Laurie proceedings.

(197) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 599 [44].

(198) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 599-601 [45], [52], [53].

The Court of Appeal

123 Tobias JA (with whose reasons Basten JA generally agreed) accepted that there was nothing provisional about Judge Curtis's finding of fraud and that essentially the same issue is to be litigated in the Laurie proceedings. However, his Honour considered that the hypothetical observer would have some understanding that the finding was interlocutory and made on hearsay evidence that would not be admissible on a final hearing. His Honour also considered that the observer would appreciate that for tactical reasons BATAS might have decided not to call evidence on the application to counter that of Mr Gulson (199). In these circumstances, Tobias JA concluded that the observer would not reasonably apprehend that Judge Curtis might not bring an impartial and unprejudiced mind to the determination of the issue once all admissible evidence had been received and the matter had been fully argued (200).

124 Allsop P dissented. His Honour characterised Judge Curtis's finding as an unqualified one of dishonesty and fraud (201). In his view, the gravity of the finding was such that a fair-minded lay observer might reasonably doubt that Judge Curtis could eradicate the effect of it when endeavouring to deal fairly and impartially with the same issue in the Laurie proceedings (202). The problem, as Allsop P saw it, lay in the gravity of the conclusion of fraud and in Judge Curtis's persuasion of BATAS's moral delinquency to the degree warranting that conclusion (203).

The submissions

125 BATAS adopted Allsop P's reasoning. The decision of this Court in *Livesey v NSW Bar Association* (204) was relied on in support of it. BATAS submitted that the majority in the Court of Appeal wrongly attributed an overly sophisticated understanding of the rules of evidence and of procedure to the lay observer. A discrete challenge, discussed below, was made to a strand of Basten JA's reasoning concerning the observer's awareness of the Tribunal's governing statute.

126 In *Livesey* it was said that a fair-minded observer might entertain a reasonable apprehension of bias if a judge sits to hear a case after the judge has, in a previous case, expressed "clear views" about a question of fact constituting a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such

(199) *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [115].
(200) [2009] NSWCA 414 at [116].
(201) [2009] NSWCA 414 at [8].
(202) [2009] NSWCA 414 at [8], [13].
(203) [2009] NSWCA 414 at [13].
(204) (1983) 151 CLR 288.

a question (205). In that case, the critical allegation made by the New South Wales Bar Association in support of Mr Livesey's asserted unfitness for practice was that he had been a party to a corrupt arrangement involving the deposit of bail moneys. The moneys had been lodged by Ms Bacon. Two members of the Court of Appeal had made findings in earlier proceedings between Ms Bacon and the Bar Association. In that case, their Honours had rejected her evidence concerning the bail moneys and found that Mr Livesey had been an active and knowing participant in the corrupt arrangement (206). In these circumstances it was held to have been an error for the two members of the Court of Appeal to hear the proceedings against Mr Livesey.

127 In BATAS's submission, Judge Curtis's reasons convey that his Honour holds a clear view of the existence of the document retention/destruction policy. His Honour's repeated reference to the fact that Mr Gulson's allegations were not new, taken with his observation that BATAS had the opportunity to rebut them, was said to be suggestive of the view that they are unanswerable.

128 Mrs Laurie relied on Judge Curtis's acknowledgment that his findings were made in the context of an interlocutory determination and that the issue of the existence of the document policy remained a live one for the trial. In her submission, his Honour's reasons made clear his recognition that different evidence may produce a different conclusion at the trial.

129 Before turning to the apprehension of bias rule and its application, it is convenient to address two aspects of the reasons of the majority below.

The evidentiary provisions under the Tribunal's statute

130 In addition to his concurrence with Tobias JA's reasons, Basten JA advanced further reasons for refusing prohibition. These included that the hypothetical observer should be taken to have an understanding of the procedural characteristics of the Tribunal and the evidentiary provisions that are contained in its statute (207). Under the statute, historical evidence and general medical evidence concerning dust exposure and dust diseases that has been admitted in earlier proceedings may, with leave, be received in later proceedings whether or not the proceedings are between the same parties (208). There is provision for material obtained by discovery or interrogatories in one proceeding to be used in other proceedings whether or not the proceedings are between the same parties (209). Issues of a general

(205) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 300 per Mason, Murphy, Brennan, Deane and Dawson JJ.
(206) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 297 per Mason, Murphy, Brennan, Deane and Dawson JJ.
(207) [2009] NSWCA 414 at [147].
(208) *Dust Diseases Tribunal Act 1989* (NSW), s 25(3).
(209) *Dust Diseases Tribunal Act 1989* (NSW), s 25A.

nature may not be re-litigated in other proceedings without leave (210). Basten JA noted that these provisions had not been relied upon in this instance. His Honour said that, nonetheless, the circumstance that a different approach might be available to the Tribunal in respect of "issues of a general nature" was indicative of a statutory intention that the Tribunal not be required to "reassess such matters repeatedly" (211). His Honour considered that the fair-minded observer should properly take into account these procedural characteristics of the Tribunal (212).

131 BATAS submitted that to attribute knowledge of the Tribunal's statute to the lay observer is to endow that hypothetical construct with a degree of legal knowledge that is likely to be enjoyed only by practitioners who appear regularly before the Tribunal.

132 The attributes of the hypothetical observer have been considered in a number of decisions of this Court. In *Johnson v Johnson* the emphasis was on the need to assess any suggested apprehension of bias in the context of ordinary judicial practice (213). At issue in that case was the expression of views by the trial judge in the course of exchanges with counsel. It was accepted that the lay observer must be taken to have some understanding that modern judges, responding to the need for active case management, are likely to intervene in the conduct of the proceedings and in so doing may well express tentative opinions on matters in issue.

133 The application of the apprehension of bias rule depends upon the particular circumstances of each case (214). In *Laws v Australian Broadcasting Tribunal* the hypothetical observer's assumed knowledge extended to understanding that defences filed by the Australian Broadcasting Tribunal did not amount to assertions of belief (215).

134 The Tribunal is a court of record (216). It has exclusive jurisdiction to hear claims for damages for breach of duty in respect of dust-related conditions (217). The Tribunal's power to refuse to allow the re-litigation of general issues (and to receive historical evidence and general medical evidence admitted in other proceedings) says nothing about the requirement in actuality and in appearance that its judges be

(210) *Dust Diseases Tribunal Act 1989* (NSW), s 25B.
(211) [2009] NSWCA 414 at [142]-[145].
(212) [2009] NSWCA 414 at [147].
(213) *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
(214) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299-300 per Mason, Murphy, Brennan, Deane and Dawson JJ.
(215) *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87-88 per Mason CJ and Brennan J.
(216) *Dust Diseases Tribunal Act 1989* (NSW), s 4.
(217) *Dust Diseases Tribunal Act 1989* (NSW), ss 10(1), 11. A tort-feasor who is liable to pay damages to a plaintiff in respect of a dust-related condition may bring proceedings in the Tribunal to recover contribution from another tort-feasor under s 11(1A).

impartial. It would be wrong to decide the present question by taking into account the novel evidentiary provisions that are available to the Tribunal. This is not because to do so is to attribute excessive knowledge to the lay observer but because the existence of those provisions is unconnected to whether a judge of the Tribunal is reasonably apprehended to have pre-judged an issue that is not to be determined by recourse to them.

135 In any event, neither Basten JA's nor Tobias JA's conclusion depends upon clothing the hypothetical observer with arcane legal knowledge. Their Honours considered that the finding of fraud might not *reasonably* cause the lay observer to apprehend pre-judgment in circumstances in which Judge Curtis acknowledged that the same issue remained "live" and that different evidence may be received on the final hearing.

The disqualification judgment

136 While the issue was not critical to their conclusion, Tobias and Basten JJA differed on whether the hypothetical observer is to be assumed to have read Judge Curtis's reasons on the recusal application. Tobias JA considered that Judge Curtis's disqualification judgment, delivered three years after the discovery judgment, should not form part of the material upon which the lay observer's assessment is made (218). Basten JA considered that the disqualification judgment provided an additional basis for declining to grant prohibition. His Honour put it this way (219):

> "Where the trial judge expresses willingness and confidence in his or her ability to maintain an open mind and where that view is shared by the appellate judge, for reasons which are in each case articulated, to demand that the trial judge be disqualified tends to demonstrate lack of faith in the proper administration of justice, rather than the contrary. For the courts to adopt such a view does not self-evidently promote public confidence. In such a case, there is a real risk that the applicant is seen to be manipulating the system, not to avoid a prejudiced mind, but to avoid an adverse result based on a fair and unchallenged opinion, established by reference to the facts and circumstances then revealed in the evidence, and which may with proper consistency be maintained in the absence of evidence suggesting a different conclusion."

137 It is clear, as Tobias JA acknowledged, that later statements made by a trial judge may be taken into account in determining whether there exists a reasonable apprehension of pre-judgment (220). A later statement may explain an earlier statement which might otherwise

(218) [2009] NSWCA 414 at [77].
(219) [2009] NSWCA 414 at [140].
(220) [2009] NSWCA 414 at [72] per Tobias JA, referring to *Johnson v Johnson* (2000) 201 CLR 488 at 494 [14] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

suggest that the judge has made up his or her mind about a matter. However, recourse to the later statement is not for the purpose of ascertaining whether the judge has expressed a willingness or confidence in his or her ability to maintain an open mind. It is assumed that a judge who is conscious of having formed so clear a view that the judge is unlikely to be persuaded from it would not sit to hear the later case. Ex hypothesi, a court reviewing the decision of a judge to sit to hear a case in circumstances where apprehended pre-judgment is alleged, but not actual bias, will be reviewing the decision of a judge who is confident of his or her ability to decide the case impartially.

138 Judge Curtis's disqualification judgment contains a correct statement of the principles together with extracts from the discovery judgment. His Honour went on to address BATAS's submission that Mr Gulson had been cross-examined "in a red-blooded way" and that the discovery application had been a "mini trial". His Honour considered that it was apparent from the earlier judgment that Mr Gulson's credit had been subjected to no more than a "peripheral attack". The circumstance that cross-examination of Mr Gulson extended to matters relevant only to his credibility, but did not challenge the material parts of his account, has been noted. The substance of the cross-examination is detailed in the discovery judgment. In the event that the discovery judgment gives rise to a reasonable apprehension of pre-judgment, his Honour's subsequent characterisation of the cross-examination as having been no more than a peripheral attack could not serve to allay that apprehension. The recusal judgment adds nothing of moment to the material on which the hypothetical observer's assessment is to be made. Tobias JA was correct in the circumstances of this case to exclude it from consideration.

The apprehended bias test

139 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 (221). 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. It is the public's perception of neutrality with which the rule is concerned. In *Livesey* it was recognised that the lay observer might *reasonably* apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.

140 Of course judges are equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in

(221) *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.

evidence (222). Trial judges are frequently required to make rulings excluding irrelevant and prejudicial material from evidence. Routine rulings of this nature are unlikely to disqualify the judge from further hearing the proceeding. This is not a case of that kind. It does not raise considerations of case management and the active role of the judge in the identification of issues with which *Johnson* was concerned. At issue is not the incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knows that Judge Curtis has found that BATAS engaged in fraud and who has read his Honour's reasons for that finding. Some further reference should be made to those reasons.

141 His Honour drew inferences adverse to BATAS from the appearance of the policy adopted in 1985, styled the "Amatil Ltd Policy on Document Retention/Destruction" (Amatil being BATAS's former name). Judge Curtis described this policy as "a model of brevity" (223). In context this was not an encomium. His Honour considered that it was remarkable that BATAS had replaced a long-standing detailed policy comprised of forty-five pages, which prescribed mandatory retention and destruction periods for documents falling within each of fourteen categories, with the 1985 policy. He noted that the 1985 policy, in two pages, reduced the categories of documents to three, of which the third, "valuable business documents … in the sense that the business cannot do without it", was subject to the direction that these were to be retained only after the document had been "carefully reviewed to establish that it is truly valuable" (224).

142 Judge Curtis discussed Mr Gulson's evidence concerning an English firm of solicitors that had sent a team of three lawyers to Australia to ensure the implementation of the Document Retention Policy. This followed Mr Gulson's report that sensitive smoking and health documents were being held at BATAS's scientific library. Of this evidence, Judge Curtis said (225):

> "This is direct evidence, which has not been challenged or contradicted. In the absence of evidence from BATAS, *I find it difficult to understand how it was thought necessary that three English lawyers attend a scientific library to implement a Document Retention Policy which only permitted destruction of documents which were not* '*valuable business documents*'. *If BATAS was not selectively destroying scientific documents prejudicial to its position in future litigation, how is it that lawyers rather than scientists were assigned to judge the value of research material?* This may be

(222) *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

(223) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 597 [36].

(224) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 597 [36]-[37].

(225) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray [No 8]* (2006) 3 DDCR 580 at 601-602 [55].

explained at the trial; however, the evidence of Mr Gulson gives rise to an obvious inference that has not yet been rebutted by BATAS." (Emphasis added.)

143 The force of the rhetorical question is not lessened by the concluding sentence.

144 The hypothetical observer is reasonable and understands that Judge Curtis is a professional judge. Nonetheless, the observer is not presumed to reject the possibility of pre-judgment (226). If it were otherwise an apprehension of bias would never arise in the case of a professional judge.

145 Whenever a judge is asked to try an issue which he or she has previously determined, whether in the same proceedings or in different proceedings, and whether between the same parties or different parties, the judge will be aware that different evidence may be led at the later trial. Judge Curtis's express acknowledgment of that circumstance does not remove the impression created by reading the judgment that the clear views there stated *might* influence his determination of the same issue in the Laurie proceedings. Allsop P's conclusion was correct. In addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding. *Johnson v Johnson* (227) is distinguishable.

Exceptions to the rule

146 Exceptions to the apprehension of bias rule include necessity, waiver and, possibly, special circumstances (228).

Necessity

147 The Court of Appeal rejected a submission that Judge Curtis's refusal to recuse himself was justified upon the grounds of

(226) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299 per Mason, Murphy, Brennan, Deane and Dawson JJ.

(227) (2000) 201 CLR 488.

(228) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 300 per Mason, Murphy, Brennan, Deane and Dawson JJ; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88-89 per Mason CJ and Brennan J; at 96-98 per Deane J; at 102 per Gaudron and McHugh JJ; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [4] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

necessity (229). While the Tribunal is a small one and is currently constituted by three judges, the persons qualified to be members of the Tribunal include Judges or Acting Judges of the Supreme and District Courts of New South Wales (230). Mrs Laurie did not file a notice of contention seeking to uphold the decision below on the ground of necessity.

Waiver

148 Something should be said about the delay in bringing the recusal application. On 20 April 2006, Judge Curtis was appointed to take Mr Laurie's evidence in Texas in the United States, and to be the trial judge. Mr Laurie died on 29 May 2006. The following day Judge Curtis delivered judgment on the discovery application in the Mowbray proceedings. On 16 June 2006, Mrs Laurie filed a notice of motion claiming various orders including to reconstitute the proceedings. There were delays attending the latter. Mrs Laurie obtained a grant of probate in the Supreme Court of New South Wales on 14 June 2007. On 11 July 2007, the Tribunal made an order substituting Mrs Laurie as the plaintiff in the proceedings and giving her leave to file an amended statement of claim. The amended pleading was filed on 13 July 2007. Thereafter the proceedings were subject to further delays as the result of Mrs Laurie's decision to retain new solicitors to act for her. On 9 November 2007, the newly retained solicitors wrote to those acting for BATAS stating their view that Mrs Laurie's claim "should not be litigated" until certain proceedings against BATAS in Victoria were determined.

149 On 6 December 2007, BATAS filed an application in the Supreme Court of New South Wales seeking to have the Laurie proceedings transferred to the Supreme Court of Victoria. At a directions hearing held shortly thereafter, and before the cross-vesting application had been heard, BATAS foreshadowed that it would apply to the Tribunal for an order that Judge Curtis disqualify himself from hearing Mrs Laurie's claim in the event that the proceedings were not transferred.

150 BATAS's cross-vesting application was dismissed on 27 February 2009. On 5 March 2009, the Tribunal made directions in light of the foreshadowed recusal application. On 9 March 2009, BATAS filed its recusal motion.

151 Mrs Laurie does not submit that the delay in bringing the recusal application amounted to a waiver of BATAS's rights. The delay was not agitated before the Court of Appeal as a reason for denying BATAS the prerogative relief claimed in its summons. While the fact of the delay was noted in the submissions filed in this Court, it was not

(229) [2009] NSWCA 414 at [119] per Tobias JA.

(230) *Dust Diseases Tribunal Act 1989* (NSW), s 7(2). It appears that, currently, two appointments have been made of Acting Judges as members of the Tribunal: <http://www.lawlink.nsw.gov.au/lawlink/ddt/ll_ddt.nsf/pages/DDT_judges>.

submitted that delay was a circumstance which would justify the refusal of relief in the event that the apprehension of bias rule was engaged.

Special circumstances

152 *Livesey* left open the question whether special circumstances may also amount to an exception to the rule (231). This appeal does not raise for consideration what special circumstances might justify a judge sitting to determine a case despite being reasonably suspected of having pre-judged an issue. The fact that Judge Curtis took the evidence of the late Mr Laurie at his bedside is not relied upon in this respect. In circumstances in which the evidence was transcribed and video-recorded, such a contention would have been forlorn.

Orders

153 The appeal should be allowed and the second order of the Court of Appeal should be set aside. An order under s 69 of the *Supreme Court Act 1970* (NSW) prohibiting the fourth respondent from further hearing or determining the Laurie proceedings should be made. The appellant should pay the first respondent's costs of the appeal in this Court.

1. *Appeal allowed.*
2. *Set aside para 2 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 17 December 2009, and in place thereof order that the fourth respondent be prohibited from further hearing or determining proceeding 6057 of 2006 in the Dust Diseases Tribunal of New South Wales.*
3. *The appellant pay the first respondent's costs of the appeal in this Court.*

Solicitors for the appellant, *Corrs Chambers Westgarth*.

Solicitors for the first respondent, *Turner Freeman*.

PDH

(231) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299-300 per Mason, Murphy, Brennan, Deane and Dawson JJ.