[HIGH COURT OF AUSTRALIA.]

LIVESEY . . . . . APPELLANT;
RESPONDENT,

AND

THE NEW SOUTH WALES BAR ASSOCIATION . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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March 9, 10; *May* 20.

Mason, Murphy, Brennan, Deane and Dawson JJ.

Courts and Judges — Bias — Prejudgment of issues and of credibility of witness — Refusal to withdraw.

Proceedings were instituted in the Court of Appeal Division of the Supreme Court of New South Wales to strike a barrister off the roll of counsel for professional misconduct. The Court had to determine certain matters of fact and to hear evidence from a witness in relation to them. In previous proceedings in which the barrister had been neither a party nor a witness two members of the Court had expressed adverse opinions about those matters and the credit of the witness. Objection was taken on behalf of the barrister to those judges sitting upon the case. The judges refused to withdraw. The Court found the charges of impropriety sustained and ordered that the barrister should be struck off.

Held that a fair minded observer might entertain apprehension of bias by reason of the prejudgment of the issues or the credibility of a witness. Hence the order could not stand.

Reg. v. Watson; Ex parte Armstrong (1976), 136 C.L.R. 248, applied.

Decision of the Supreme Court of New South Wales (Court of Appeal): *New South Wales Bar Association v. Livesey*, [1982] 2 N.S.W.L.R. 231, reversed.

APPEAL from the Supreme Court of New South Wales.

In July 1981, the New South Wales Bar Association applied by a summons to the Court of Appeal Division of the Supreme Court of New South Wales for declarations that Peter Martin Livesey was not a fit and proper person to be a member of the New South Wales Bar, that he had engaged in unprofessional conduct, and that he had acted in a manner contrary to the standards of practice becoming a

barrister; and for an order striking his name off the roll of counsel. The particulars supplied by the Association made it clear that the conduct about which complaint was made included the role Livesey had allegedly played in events surrounding the lodging of a $10,000 cash surety to secure bail for one of his clients. In previous proceedings in which Livesey was neither a party nor a witness, Moffitt P. and Reynolds J.A. had expressed the view that he had actively and knowingly participated in a corrupt scheme or a conspiratorial arrangement to secure the release of his client on bail by the use of the client's own money. The matter came before the Court of Appeal on several occasions for interlocutory purposes. At least once, Reynolds J.A. sat without objection. The hearing commenced before the Court of Appeal constituted by Moffitt P., Hope J.A. and Reynolds J.A. Moffitt P. stated from the Bench that senior counsel for Livesey had spoken to him in his chambers that morning in the presence of senior counsel for the Bar Association and had raised the question of whether the President and Reynolds J.A. should sit in the case because of the evidence that had been given and views they had expressed about the evidence and other matters in the other case. He said that the Court had considered the matter and could find "no valid reason why the Court as constituted should not sit". After a lengthy hearing the Court unanimously found the charges sustained and held that Livesey's name should be struck off the roll (*New South Wales Bar Association v. Livesey* (1a)).

Livesey appealed to the High Court by special leave.

L. J. Priestley Q.C. (with him *R. K. Eassie*), for the appellant. The only questions for determination are whether two of the judges should have sat, whether their sitting denied natural justice to the appellant, and whether it follows that the judgment is voidable and should be set aside. A court which in one case has expressed strong views about a party that are material to the result of that case which later embarks upon other proceedings involving the same set of incidents must create in the mind of a reasonable observer a suspicion that the second proceedings have been predetermined and that a fair hearing cannot be obtained: *Ex parte Schofield; Re Austin* (1); *Reg. v. Watson; Ex parte Armstrong* (2). The appearance of bias vitiates the judgment. [He also referred to *Barton v. Walker* (3) and *Sharp v. Carey* (4).]

K. R. Handley Q.C. (with him *B. W. Walker*), for the respon-

(1a) [1982] 2 N.S.W.L.R. 231.
(1) (1953) 53 S.R. (N.S.W.) 163.
(2) (1976) 136 C.L.R. 248.
(3) [1979] 2 N.S.W.L.R. 740.
(4) (1897) 23 V.L.R. 248, at p. 254.

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dent. There is no general principle that preconceived views about a transaction or some feature of it or some issue that will come before a court disqualifies the holder of those views from adjudicating or participating in the adjudication of that question: *Reg. v. Australian Stevedoring Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (5). A judge may have preconceived ideas on a question of fact. Exercising strictly judicial power he is at liberty to sit in proceedings that call for the determination of that fact: *Re Evatt: Ex parte New South Wales Bar Association* (6); *Re Veron; Ex parte Law Society of New South Wales* (7); *Re Miles; Ex parte Law Society of New South Wales* (8); *Reg. v. Watson; Ex parte Armstrong* (9). Reasonable members of the public have confidence in the capacity of judges through training, ethos and position to be able to put inadmissible or irrelevant material out of their minds *Re Judge Leckie; Ex parte Felman* (10); *Ex parte Shaw; Re Shaw* (11); *Reg. v. Fry* (12); *Ewart v. Lonie* (13); *Ex parte Lewin; Re Ward* (14); *Police v. Pereira* (15); *Reg. v. Liverpool City Justices; Ex parte Topping* (16); *Reg. v. Molesworth* (17); and *Turner v. Allison* (18). A judge is even qualified to hear and determine proceedings for criminal contempt committed in the face of the court where he was presiding when the alleged contempt was committed: *Keeley v. Mr. Justice Brooking* (19).

L. J. Priestley Q.C., in reply.

Cur. adv. vult.

May 20.

THE COURT delivered the following written judgment:—

On 2 May 1979, Mr. Stephen Sellers ("Sellers") was held in the Remand Centre at Long Bay Penitentiary in Sydney awaiting trial on a charge of criminal conspiracy. He had been granted bail upon terms which included a requirement that either one surety lodge cash surety of $10,000 or two sureties lodge cash surety in the sum

(5) (1953) 88 C.L.R. 100, at pp. 115-116.
(6) (1967) 67 S.R. (N.S.W.) 236.
(7) (1966) 84 W.N. (Pt 1) (N.S.W.) 136.
(8) (1967) 84 W.N. (Pt 1) (N.S.W.) 163.
(9) (1976) 136 C.L.R., at p. 264.
(10) (1977) 52 A.L.J.R. 155, at pp. 158-159, 160.
(11) (1980) 55 A.L.J.R. 12.
(12) (1898) 67 L.J.Q.B. 712.
(13) [1972] V.R. 308.
(14) [1964] N.S.W.R. 446.
(15) [1977] 1 N.Z.L.R. 547.
(16) [1983] 1 W.L.R. 119; [1983] 1 All E.R. 490.
(17) (1897) 23 V.L.R. 582, at p. 591.
(18) [1971] N.Z.L.R. 833.
(19) (1979) 143 C.L.R. 162.

of $5,000 each. In the afternoon of that day, Ms. Wendy Bacon ("Ms. Bacon") was driven to the Remand Centre by the present appellant, Mr. Peter Martin Livesey ("the appellant"). There, in the appellant's presence, Ms. Bacon agreed to act as surety for Sellers and lodged $10,000 as cash surety. Sellers was released upon conditions which incuded reporting daily to the Police. He was driven from Long Bay by the appellant. Ms. Bacon was in the car with them. Sellers did not comply with the conditions of his bail and failed to appear in court to answer the charge against him. The $10,000 cash surety was forfeited.

At the time she agreed to act as surety for Sellers, Ms. Bacon was a law student. The appellant was a member of the New South Wales Bar. On 13 July 1979, Ms. Bacon applied to the Barristers' Admission Board ("the Board") for approval of her admission as a barrister. In December 1980, the Board rejected the application. Ms. Bacon then applied to the Supreme Court of New South Wales for a declaration that she was a fit and proper person to appear and act as a barrister and for an order for her admission to the Bar notwithstanding that the Board had neither been satisfied that she was a person of good fame and character nor had approved her as a fit and proper person to be admitted as a barrister (see *Legal Practitioners Act* 1898 (N.S.W.) ss. 9 and 10). The application was moved into the Court of Appeal. The Court of Appeal held that it had jurisdiction to make the order of admission which Ms. Bacon sought. It declined to do so, however, on the ground that Ms. Bacon had not shown herself to be a fit and proper person to be so admitted. The Court was constituted by Moffitt P., Reynolds J.A. and Helsham C.J. in Equity. The learned President recorded in his judgment that none of the members of the Court had participated in decisions of the Board concerning Ms. Bacon. While other matters relevant to Ms. Bacon's fitness to be a barrister were involved, each member of the Court made clear in his judgment that his conclusion that Ms. Bacon's application should be dismissed was founded on the part she had played in the lodging, on 2 May 1979, of the $10,000 cash surety to procure the release of Sellers from custody.

On 29 July 1981, the New South Wales Bar Association ("the Association") applied, by summons, to the Supreme Court of New South Wales (Court of Appeal) for declarations that the appellant was not a fit and proper person to be a member of the New South Wales Bar, that the appellant had engaged in unprofessional conduct and that the appellant had acted in a manner contrary to the standards of practice becoming a barrister and for an order striking the appellant's name off the roll of barristers. The particulars

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supplied by the Association made clear that the conduct of which complaint was made included the role which the appellant had allegedly played in the events surrounding the lodging by Ms. Bacon of the $10,000 cash surety on 2 May 1979. The matter came before the Court of Appeal on a number of occasions for interlocutory purposes. On at least one of those occasions, Reynolds J.A. sat, without objection on behalf of the appellant, as a member of the Court.

The hearing of the proceedings against the appellant commenced before the Court of Appeal on 22 March 1982. The Court was constituted by Moffitt P., Hope J.A. and Reynolds J.A. When the Court assembled, the learned President made the following statement:

> "There is a matter that I should state before the proceedings commence. Mr. Priestley, of Queens Counsel, counsel for the plaintiff [sic], in the company of Mr. Callaway, senior counsel for the Bar Association of New South Wales saw me in chambers this morning and raised the question whether Mr. Justice Reynolds and I should sit in this case by reason of evidence given and views expressed by us severally in relation to such evidence in the application of Wendy Bacon, heard by a court of which we were members last year. Mr. Priestley submitted we should not sit.
>
> We do not think the matter is one for formal submissions or debate. Members of the Court as now constituted as a whole and individually have considered the relevant factual material, the course of authority and the practice of the court and find no valid reason why the court as constituted should not sit.
>
> I should add that I am authorised by Mr. Justice Reynolds and say on my own behalf that we find no difficulty personally in deciding this case upon the evidence given in this case."

The President's reference to the "practice of the court" would seem, plainly enough, to be a reference to a practice that the three most senior members of the Court of Appeal who are available to sit constitute the Court in proceedings in which an order striking the name of a legal practitioner off the relevant roll is sought. Mr. Priestley Q.C. who appeared for the appellant has informed this Court that, in the discussion which took place in the learned President's chambers, express reference was made to the possibility that Ms. Bacon might be called as a witness in the proceedings against the appellant in that there was mention of a possibility that the Court of Appeal itself might call her to give evidence. The submission that the President and Reynolds J.A. should not participate in the proceedings against the appellant was opposed by the Association.

The hearing in the Court of Appeal extended, with intervening

adjournments, over a considerable period. On 25 May 1982, which the transcript refers to as the "ninth day", it had become clear that neither the Association nor the Court of Appeal itself would be calling Ms. Bacon as a witness and that she would be called as a witness on behalf of the appellant. The application that the learned President and Reynolds J.A. not participate in the case was renewed on behalf of the appellant. It was again rejected. The hearing continued until 28 May 1982, when judgment was reserved. On 16 July 1982, the members of the Court of Appeal, in separate judgments, unanimously found that the appellant should be disbarred. The Court made the declarations which the Association sought and ordered that the appellant's name be struck off the roll of barristers. The appellant appeals, by special leave, to this Court from the judgments, declarations and order of the Court of Appeal to that effect.

The issue.

In accordance with the order granting special leave to appeal, the issue on the appeal is restricted to whether, in all the circumstances, the due administration of justice required that neither the president nor Reynolds J.A. should have participated in the hearing once objection to their participation was taken on the appellant's behalf. The appellant has not suggested that either Moffitt P. or Reynolds J.A. was in any way motivated by impropriety in sitting. Nor has the appellant submitted that either Moffitt P. or Reynolds J.A. was actually biased or prejudiced in hearing or deciding the proceedings against the appellant. The argument advanced on behalf of the appellant is that the views which their Honours had expressed in their respective judgments in the proceedings against Ms. Bacon ("the *Bacon Case*") both as to the credibility and credit of Ms. Bacon as a witness and on the circumstances surrounding the lodging by Ms. Bacon of the $10,000 cash surety created a situation in which a party (i.e. the appellant) or a fair-minded observer might reasonably doubt that the question involved in the proceedings against the appellant could be dealt with by their Honours without bias by reason of prejudgment.

The law.

It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in *Reg. v. Watson; Ex parte Armstrong* (20). That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might

(20) (1976) 136 C.L.R. 248, at pp. 258-263.

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entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. That principle has subsequently been applied in this Court (see, e.g., *Re Judge Leckie; Ex parte Felman* (21); *Reg. v. Shaw; Ex parte Shaw* (22)) and in the Supreme Court of New South Wales (see, e.g., *Barton v. Walker* (23). Although statements of the principle commonly speak of "suspicion of bias", we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning.

In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways" (per Aickin J. in *Shaw* (24)). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court. Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or pre-judgment. Such a conclusion does not involve any personal criticism of the judge at first instance or any assessment of his qualities or of his ability to have dealt with the case before him fairly and without pre-judgment or bias. It is simply an instance of the

(21) (1977) 52 A.L.J.R. 155, at p. 158.
(22) (1980) 55 A.L.J.R. 12, at pp. 14, 16.
(23) [1979] 2 N.S.W.L.R. 740, at pp. 748-749.
(24) (1980) 55 A.L.J.R., at p. 16.

ordinary working of the appellate process in which the views of the judges who constitute the appellate court prevail over the views of the judge or judges who constituted the court from which the appeal is brought.

On the hearing of the appeal, it was conceded by the Association that if the Court came to the view that the case came within the principle enunciated in *Watson*, the declarations and order of the Court of Appeal should be set aside and the matter should be remitted to the Court of Appeal to be heard afresh. In that regard, there is no suggestion that the present case is one in which reliance could be placed upon what has been referred to as "the principle of necessity" (see *Dickason v. Edwards* (25)).

The Bacon Case.

The judgments of the learned President and of Reynolds J.A. in the *Bacon Case* make clear that each of their Honours was strongly of the view that Ms. Bacon lacked both credit and credibility as a witness. Thus the learned President, in the course of his judgment, commented that he was "unimpressed with the plaintiff as a witness and during the hearing found the content of her evidence at critical points of the bail matter to be incredible and unacceptable . . .". His Honour expressed the view that much of Ms. Bacon's evidence on the bail matter "was tailored by a sharp mind to meet the difficult implications which arise from admitted facts, rather than to recollect and tell the Court frankly what occurred". His Honour concluded that "clearly the plaintiff has not told this Court the truth, as she knows it, of important and critical aspects of the bail matter" and that Ms. Bacon's "untruthful evidence given in this Court" was a factor contributing to a conclusion that she was "unfit to be a barrister". Reynolds J.A., in his judgment, expressed an equally unfavourable assessment of Ms. Bacon as a witness. His Honour stated that, having carefully listened to the cross examination of Ms. Bacon, he was "left with the firm conviction that she is not telling the truth as to what occurred". He expressed the view that part of her evidence was "inconceivable", "highly improbable" and "implausible".

It is clear that both Moffitt P. and Reynolds J.A. regarded Ms. Bacon's role in procuring the release of Sellers on bail as, to use the President's words, "the critical part of the case" against her. Ms. Bacon claimed that the $10,000 in question had been lent to her by a Ms. Altman and that it was therefore, at the time she lodged it as surety, her own money. In findings which were

(25) (1910) 10 C.L.R. 243, at p. 259.

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strongly adverse to Ms. Bacon, their Honours rejected that claim. The effect of their Honours' findings can be summarized as being, in the words of Reynolds J.A., that Ms. Bacon deposited "Bail moneys falsely pretending that they were her moneys and knowing the true source thereof and that in so doing she was party to a corrupt agreement designed to enable the prisoner to purchase his freedom with his own money".

The President's and Reynolds J.A.'s findings were also strongly adverse to the appellant. Each made clear that, on the evidence in the *Bacon Case*, he concluded that the appellant actively and knowingly participated in the arrangements in pursuance of which Ms. Bacon had lodged the $10,000 surety. Thus one finds, for example, in the judgment of the learned President, the following references to the appellant (who is referred to as "L", Ms. Bacon and Ms. Altman being referred to as "the plaintiff" and "V.A." respectively):

> "An essential part of the plaintiff's story of complete innocence concerning her conduct the day she bailed S.S. (Wednesday, 2 May 1979) was that she was then completely unaware that the $10,000 or most of it had come from Victoria from Dr. Wainer and from either S.S. or his family and that she was then also completely unaware, as is now alleged as part of her story, that V.A. had herself borrowed the $10,000 or most of it by some loan agreements with Dr. Wainer and the Sellers source and that she was then unaware of the transportation of the money in specie from Victoria by Mr. Livesey (hereafter 'L'), who was the barrister for S.S. at his trial for conspiracy
> . . . .
> . . .
> . . . the truth must have been, on the plaintiff's story, by that time L, who had just been in communication with V.A., had arrived back in Sydney with the large sum in cash the subject of loans from the Victorians to V.A. arranged with the Sellers source by L with her authority and arranged by her with Dr. Wainer and implemented by L, the transactions being obviously such that the lenders would only have provided the money, so in the end it would be used to bail S.S. It was stranger still as L after arriving back with the money went to the jail before the inquiry was made of the plaintiff by V.A.
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> The arrangement was made to bail S.S. that day. The appointed meeting place was at the home of L. The plaintiff went there and there saw V.A. and L. V.A. handed her the $10,000 in cash according to the plaintiff's story. It must be presumed that before her arrival L had handed the money, (or the bulk of it) to V.A. L and V.A. then each well knew where the money had come from."

Reynolds J.A., in the course of his judgment, said:

> "The next contact the applicant had with Mr. Sellers was on

> 2 May when she went to the gaol in company with that barrister, Peter Livesey, carrying $10,000 in notes. It is clear that at least the substantial part of the money which was in her possession was transported in specie from the State of Victoria and it is equally clear that it was collected and transported in this manner for the sole purpose of effecting the release on bail of the prisoner as I will relate . . . .
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> . . .
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> . . . It is a fair inference that the bulk of the money, if not all of it, came from sources close to the prisoner and that it was available, probably on a weekend, in specie from sources designated by Mr. Sellers. So counsel who had been briefed for Mr. Sellers in the forthcoming committal proceedings journeyed interstate, obviously at the request of or with the concurrence of his client, although it is suggested he went to Victoria for the highly implausible reason to discuss 'police verbals' with Dr. Wainer, collecting money from one or more sources to be used to provide a cash deposit as bail to secure the freedom of his client."

In summary, both Moffitt P. and Reynolds J.A. found, in the *Bacon Case*, that Ms. Bacon was an untruthful witness whose evidence that the $10,000 bail money had been lent to her by Ms. Altman should be rejected. Their Honours found, on the evidence in the *Bacon Case*, that the bail money had been lodged by Ms. Bacon pursuant to "a corrupt agreement" or a "conspiratorial arrangement" (per Reynolds J.A.) between a number of persons including the appellant aimed at achieving Sellers' release on bail by depositing $10,000 which was in truth his own money or money which was available to him. It was apparently common ground that such an agreement or arrangement would constitute a criminal conspiracy (see *R. v. Porter* (26); *Reg. v. Baba* (27)).

The charge against the appellant and the relevance of Ms. Bacon's evidence.

The particulars furnished by the Association of the unprofessional conduct alleged against the appellant comprised sixteen numbered paragraphs which included the following:

> "7. Without the intervention of a solicitor, and for the purpose of securing cash, so that other persons could act as sureties for that client to be released on bail, he made arrangements for that cash to be obtained.
>
> 8. Thereafter, without the intervention of a solicitor, he travelled to Melbourne, and took delivery of that cash, which he then brought back to Sydney, knowing and intending that it would be used by other persons who would act as sureties for that client being released on bail, that cash not being the property of those persons.

(26) [1910] 1 K.B. 369.

(27) [1977] 2 N.S.W.L.R. 502.

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> 9. He participated in the making and carrying out of an arrangement whereby a person acted as surety for that client, and deposited sums of cash by way of security, the money as deposited not being her property."

These paragraphs refer to the appellant's participation in the events surrounding the lodging by Ms. Bacon of the $10,000 bail money. The person referred to in par. 9, which was amended on the hearing to read as above, is Ms. Bacon.

The Association's allegations against the appellant in respect of the bail money constituted the most serious charge levelled against him. As the above particulars make clear, there lay at the heart of those allegations the assertion that the $10,000 which Ms. Bacon lodged was not, to the knowledge of the appellant, in fact her money. If Ms. Bacon's claim that there had been a genuine loan of the $10,000 by Ms. Altman to herself were accepted, the cornerstone of the Association's case against the appellant in relation to the bail money would be rejected. At the commencement of the proceedings against the appellant, two of the three judges constituting the Court of Appeal had already made findings in the *Bacon Case* that Ms. Bacon's evidence in relation to the alleged loan should be rejected, that the bail money lodged by Ms. Bacon was not in fact her money and that the appellant was aware of that fact. Perusal of the transcript of the proceedings reveals that, as the hearing progressed, it became clear that the Court did not intend itself to call Ms. Bacon as a witness and that a failure by the appellant to call her would result in adverse inferences being drawn against him. Eventually, Ms. Bacon was called by the appellant. She again gave evidence that the $10,000 which she lodged as bail money had been the subject of a genuine loan by Ms. Altman to her. Again, she was disbelieved. The Court found that the $10,000 lodged as bail was not Ms. Bacon's money and that the appellant was aware of that fact. That involved a determination against the appellant of what Hope J.A., in the main judgment in the Court of Appeal, described as "the central and most important" of the contested issues in the proceedings.

Was there an appearance of prejudgment or bias?

It was submitted on behalf of the Association that a reasonable observer would be aware of the ability of any judge of the Court of Appeal to put from his mind evidence heard and findings made in a previous case and to decide the case at bar impartially and fairly on the evidence led in that particular case. As we have already indicated however, we do not consider that a case such as the present is to be resolved by reference to the ability of the members of a particular court or the public confidence in the integrity of the

judiciary. What is in issue in the present case is the appearance and not the actuality of bias by reason of prejudgment. The reasonable observer is to be presumed to approach the matter on the basis that ordinarily a judge will so act as to ensure both the appearance and the substance of fairness and impartiality. But the reasonable observer is not presumed to reject the possibility of prejudgment or bias; nor is the reasonable observer presumed to have any personal knowledge of the character or ability of the members of the relevant court (see *Hannam v. Bradford Corporation* (28); *Reg. v. Liverpool City Justices; Ex parte Topping* (29)).

It was also submitted on behalf of the Association that the appeal should be approached on the basis that, at the time when the hearing commenced in the Court of Appeal, neither the Association nor the appellant intended to call Ms. Bacon as a witness and that, in these circumstances, any views expressed in the previous case about Ms. Bacon's credit or her evidence of the alleged loan from Ms. Altman were of no real significance. We see little force in that submission. The Association does not dispute Mr. Priestley's recollection that there was express mention, in the discussion in the learned president's chambers, of the possibility that Ms. Bacon would be called as a witness. The transcript of the hearing indicates that any reluctance of the appellant to call Ms. Bacon as a witness flowed, at least in part, from the fact that the evidence which she would give had been disbelieved by two members of the Court of Appeal in the previous case. In the circumstances, the appellant was confronted by a dilemma. If he called Ms. Bacon to give evidence he was, to quote what was said on his behalf to the Court of Appeal, "put in a position of having to call a person whose evidence, on the issue relevant to this case, [had] already been not believed" by two members of the Court hearing the case against him. If he did not call Ms. Bacon as a witness, he would be in the position where two members of the Court of Appeal, having heard Ms. Bacon give evidence in the previous case in which he was neither a party nor a witness, had, in their respective judgments in that case, published the conclusion that her evidence was untruthful and demonstrated that the claim that there had been a genuine loan by Ms. Altman of the bail money should be rejected.

Necessity and the extraordinary case (see, e.g., *Ex parte Lewin; Re Ward* (30)) make it impossible to lay down an inflexible rule; each case must be determined by reference to its particular

(28) [1970] 1 W.L.R. 937, at p. 949; [1970] 2 All E.R. 690, at p. 700.

(29) [1983] 1 W.L.R. 119, at p. 123; [1983] 1 All E.R. 490, at p. 494.

(30) [1964] N.S.W.R. 446, at p. 447.

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circumstances. It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact. The consideration that the relevant question of fact may be conceded or that the relevant person may not be called as a witness if the particular judge sits would not, of course, avoid the appearance of bias. To the contrary, it would underline the need for the judge to refrain from sitting.

In the light of the foregoing, the situation which existed at the commencement of the hearing of the proceedings against the appellant can be shortly summarized. A central issue in the main charge against the appellant was whether the money which Ms. Bacon lodged as bail was her own money. Two of the three members of the Court of Appeal, which was hearing the proceedings as a court of first instance, had already held in a previous case that it plainly was not. Another central issue in the main charge was whether, if the money lodged were not Ms. Bacon's, the appellant knew that that was so. Again, two members of the Court had held in the previous case that he clearly did. Ms. Bacon was a possible and critical witness on the appellant's behalf and was in fact called to give evidence. Two members of the Court had, in the previous case, expressed the strong view that she was a witness without credit whose evidence on the matters relevant to the proceedings against the appellant should be rejected. The question which arises is whether, in these circumstances, either the appellant or a fair-minded observer might have entertained a reasonable apprehension that the views which the two members of the Court of Appeal had formed and expressed in the *Bacon Case* might result in the proceedings against the appellant being affected by bias by reason of prejudgment. With due respect to the members of the Court of Appeal who saw the matter differently, it follows from what we have said that we consider that that question must be answered in the affirmative.

The appeal should be allowed. The declarations and orders of the Court of Appeal should be set aside. The matter should be remitted to the Court of Appeal to be heard de novo. The Association should be ordered to pay both the appellant's costs of the proceedings in the Court of Appeal subsequent to (and

including) 22 March 1982 and the appellant's costs of the appeal. The costs of the proceedings in the Court of Appeal prior to 22 March 1982 should be reserved to be dealt with by the Court of Appeal on the rehearing.

Appeal allowed with costs.

Declarations and orders of the Supreme Court of New South Wales (Court of Appeal) set aside.

Matter remitted to the Court of Appeal to be heard de novo.

Appellant's costs of the proceedings in the Court of Appeal subsequent to (and including) 22 March 1982 be paid by the respondent.

Costs of the proceedings in the Court of Appeal prior to 22 March 1982 be reserved to be dealt with by that Court on the rehearing.

Solicitors for the appellant, *G. P. Andrews & Associates.*
Solicitors for the respondent, *Hunt & Hunt.*

E.N.M.