[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

WATSON;

EX PARTE ARMSTRONG.

H.C. OF A. 1976.

SYDNEY, *June* 8; *Aug.* 3.

Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ.

Courts and Judges—Bias—Prejudgment of issue in pending litigation—Writ of prohibition—Superior court of record—Family Court of Australia—The Constitution (63 & 64 *Vict.*, *c.* 12), *s.* 75 (*v.*)—*Family Law Act* 1975 (*Cth*), *s.* 21 (2).

A wife commenced proceedings under the *Family Law Act* 1975 (Cth) for dissolution of marriage and for ancillary relief under ss. 74 (maintenance), 79 (settlement of property) and 80 (lump sum payment). Matters of personal credit were likely to arise in the proceedings in connexion with evidence about the parties' financial affairs. In the course of interlocutory applications a judge of the Family Court of Australia stated that he would not accept evidence of either party at the trial without corroboration. The wife applied for a writ of prohibition against the judge's hearing the proceedings further.

Held, by Barwick C.J., Gibbs, Stephen and Mason JJ., Jacobs J. dissenting, that prohibition should issue.

Prohibition lies against a person to whom it may be directed if in all the circumstances the parties or the public might reasonably suspect that the person was not unprejudiced or impartial. The formation of a preconceived opinion that neither party is worthy of belief amounts to bias in the relevant sense.

Allinson v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; *Dickason* v. *Edwards* (1910), 10 C.L.R. 243; *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (1953), 88 C.L.R. 100; *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon*, [1969] 1 Q.B. 577; and *Reg.* v. *Commonwealth Conciliation and Arbitration Commission*; *Ex parte Angliss Group* (1969), 122 C.L.R. 546, applied.

Held, further, that prohibition lies under s. 75 (v.) of the Constitution to a judge of the Family Court, notwithstanding s. 21 (2) of the *Family Law Act* 1975 which declares the Court to be a superior court of record.

Reg. v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (1949), 78 C.L.R. 389, applied.

Per Barwick C.J., Gibbs, Stephen and Mason JJ. It is a misconception to consider proceedings before the Family Court not as adversary proceedings but as in the nature of an inquisition followed by an arbitration. Although the judges of the Family Court have a wide discretion they must exercise it in accordance with legal principles and discharge their duties judicially.

PROHIBITION.

Margaret Rose Armstrong commenced proceedings in the Supreme Court of New South Wales against her husband Alexander Ewan Armstrong claiming dissolution of the marriage and ancillary relief. The proceedings were transferred to the Family Court of Australia after the commencement of the *Family Law Act* 1975 (Cth). Applications concerning a number of interlocutory matters were heard by Watson J. in the Family Court. The parties had filed divergent affidavit evidence about the husband's financial affairs. Watson J. directed that the wife should file an affidavit setting out her financial position during the period of twelve months before she was supported by her husband. Before the trial of the proceedings and before either party had been examined upon any of the affidavits filed the judge informed the parties that he would not accept the evidence of either of them at the trial unless it was corroborated. The wife applied to the High Court for a writ of prohibition directed to Watson J. prohibiting him from further hearing the proceedings, on the grounds (1) that his direction concerning the filing of a further affidavit by the wife was prompted by a desire to delve into allegedly notorious matters concerning that period of the wife's life; (2) that he had prejudged the wife's credit to her disadvantage.

L. C. Gruzman Q.C. (with him Miss *C. E. Backhouse* and *M. Bloom*), for the prosecutrix. Credit is most important in the proceedings. The judge prejudged the issue of the credit of both parties. He was wrong in saying the proceedings were not adversary proceedings. Prohibition lies here: *Blackstone's Commentaries*, 4th ed., vol. 3, p. 112, *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* (1); *Anisminic Ltd.* v. *Foreign Compensation Commission* (2). *Reg.* v. *Commonwealth Conciliation and Arbitration Commission*; *Ex parte Angliss Group* (3) is distinguishable because there was a plan statement that the judge had formed a conclusion.

A. Cook, for the respondent, submitted to the order of the Court.

T. E. F. Hughes Q.C. (with him *A. D. Collins* Q.C. and *J. S. Goldstein*), by leave of the Court, for Alexander Ewan Armstrong. An appeal lay to the Full Court of the Family Court against the order by which the judge referred to declined to hear

(1) [1969] 1 Q.B. 577, at p. 598.
(2) [1969] 2 A.C. 147, at p. 171.
(3) (1969) 122 C.L.R. 546.

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the proceedings. Prohibition should be refused on discretionary grounds where an alternative remedy is available. It does not go ex debito in every case of bias: *Bergman* v. *Francis* (4). There is no admissible evidence that the judge had regard to the alleged rumours about the past life of the prosecutrix. The further affidavit was relevant to her present capacity for gainful employment. It should not lightly be presumed that a judge of a superior court had regard to inadmissable matters. Even if the discretion concerning the further affidavit was outside power and involved an error of law that is no matter for prohibition. It ought not to be presumed from observations a judge may make in the course of interlocutory proceedings that he has formed a view adverse to the interests of a party: *Ex parte Electronic Rentals Pty. Ltd.*; *Re Anderson* (5); *Reg.* v. *London County Council*; *Ex parte Empire Theatre* (6). Where it is alleged that an issue has been prejudged the prosecution must establish strong grounds for the proposition that the judge has acted in such a way that he cannot reasonably be expected to discharge his duty of fairness: *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (7). An allegation of bias has to be assessed in the whole of its context: *Russell* v. *Duke of Norfolk* (8). The judge had not closed his mind on the question of the credit of the prosecutrix. Prohibition will not lie to a superior court of record: *Attorney-General (Q.)* v. *Wilkinson* (9).

L. C. Gruzman Q.C., in reply. The writ may issue to a superior court: *R.* v. *Chancellor of St. Edmondsbury and Ipswich Diocese* (10). The question whether, for prohibition to lie, the prosecutor must show a likelihood of bias or a possibility of bias in the minds of reasonable persons has been resolved in favour of requiring only a possibility of bias in the mind of the reasonable bystander.

Cur. adv. vult.

Aug. 3. The following written judgments were delivered:—

BARWICK C.J., GIBBS, STEPHEN AND MASON JJ. This is an application to make absolute an order nisi for a writ of prohibition directed to the Honourable Mr. Justice Watson, a judge of the Family Court of Australia, prohibiting him from

(4) [1959] A.C. 616.
(5) (1970) 92 W.N. (N.S.W.) 672, at p. 676.
(6) (1894) 71 L.T. 638, at p. 639.
(7) (1953) 88 C.L.R. 100, at p. 116.
(8) [1949] 1 All E.R. 109.
(9) (1958) 100 C.L.R. 422.
(10) [1948] 1 K.B. 195, at p. 205.

hearing an application for dissolution of marriage and ancillary relief pending in the Family Court of Australia between the prosecutrix, Margaret Rose Armstrong ("the wife"), and her husband, Alexander Ewan Armstrong ("the husband"). The grounds stated in the order nisi are that the learned judge is biased against the wife and that he has prejudged her credit to her disadvantage.

The proceedings were commenced in the Supreme Court of New South Wales by the wife, who sought dissolution of the marriage and, *inter alia*, a settlement in a lump sum of $182,500. The petition was served on the husband on 25th November 1975. Injunctions, the nature of which is not quite clear, were granted in the Supreme Court on 15th and 30th March 1976. The wife filed three affidavits (sworn respectively on 22nd March 1976, 22nd March 1976 and 26th March 1976) in which she deposed in some detail as to her husband's assets, whose value she stated was of the order of $15,000,000, as to her own assets, expenses, mode of life and needs and as to the relationship between her husband and herself throughout the marriage. In one of the affidavits sworn on 22nd March she claimed to be entitled to $2,000,000 by way of settlement or as a lump sum representing maintenance. In that affidavit she swore that she did not previously claim the amount to which she believed she was entitled because her husband had said to her, before she issued her petition, "If you claim a substantial sum from me I will destroy you in Court and you won't live to enjoy the money."

On 12th April 1976 the proceedings were transferred to the Family Court and on 20th April the matter came before Watson J. His Honour then intimated that he would commence the hearing of the proceedings on 25th May 1976 and raised the question when information would be supplied by the husband as to his financial affairs in accordance with reg. 98 of the Family Law Regulations and accepted counsel's advice that an affidavit would be filed by 27th April. His Honour also said that he wished to have from the wife on affidavit "details of her financial position, her working capacity, her usual way of life in the twenty-four months before she was married to Mr. Armstrong". No request for evidence of this kind had been made by counsel for the husband but no objection to supplying it was made by counsel for the wife at the time when the learned judge requested it. The further hearing of the matter was then adjourned to 30th April 1976 for directions.

On 27th April 1976 the husband filed a statement of financial circumstances in the form prescribed by the Family Law

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Regulations (form 19). This showed assets estimated at a little over $600,000 and liabilities exceeding $845,000. No particulars of these assets or liabilities were given and to some questions, particularly as to the husband's real estate and as to his other property, the answer given was "N.R." (Not Relevant). On 28th April 1976 the husband made the wife an open offer to forgive debts said to be owed by her to him, to cause to be paid debts said to be owed by her to certain companies and to pay her a lump sum of $300,000. The debts apparently were said to total $195,000. The offer stated that the lump sum would be borrowed and would not come from the husband's personal assets. The offer has not been accepted.

On 30th April 1976 the matter again came before Watson J. His Honour stated that he had seen an affidavit filed by the wife in compliance with the direction given on 20th April. That affidavit is not before this Court but it apparently contained an objection to the direction which his Honour had given requiring the affidavit to be filed. Watson J. said that he rejected the affidavit on two grounds, first because he regarded certain paragraphs (apparently those incorporating the objection) as offensive, and secondly because although, as he had required, the affidavit dealt with the two years before the marriage, it appeared that the wife had for about five years before the marriage (which was celebrated in 1963) lived with the husband as his mistress. His Honour said that he thought that there should be on the file material indicating the wife's financial position and economic capacity before she became associated with the husband, and that he should know something of her background prior to her marriage. He said that he did not propose to allow anybody to rely upon the wife's affidavit and requested that a further affidavit be filed dealing with her financial position and financial capacity until twelve months before she formed a permanent relationship with the husband, or (as his Honour also stated it) before she was able to rely on him for any financial benefits. His Honour then proceeded to deal with other matters, including the delivery of interrogatories.

There were four further appearances before Watson J. before 24th May 1976 and various interlocutory questions were dealt with. It is unnecessary for present purposes to do more than state shortly the position which the proceedings had reached immediately before 24th May. On 14th May the wife had apparently filed a further affidavit (which is not before this Court, but which she described as "an extensive and detailed affidavit setting out my husband's assets which I estimated to be

worth some $10,000,000 to $15,000,000"). On the same day the husband had sworn what appears to be the only affidavit so far filed on his behalf as to his financial position. The affidavit dealt largely with the property owned by a company called Alexmar Investments Pty. Ltd. and by a number of other companies which were subsidiaries of that company. The affidavit showed that these companies held assets of very considerable value but it was stated that most of the shares in Alexmar Investments Pty. Ltd. were held by the husband and by a holding company as trustees of family trusts for the benefit of the husband's children and remoter issue. It was also stated in the affidavit that further material would be filed as to two other companies, Aurelius Investment Establishment and Trident Ltd., which it appears from affidavits filed by the wife are incorporated outside Australia. The affidavit did not purport to set out the assets and liabilities of the husband himself. The husband had also filed an affidavit as to the wife's standard of living. In addition he had filed an affidavit of discovery which, however, the wife contends is quite insufficient. The wife had delivered to the husband lengthy interrogatories but these had not been answered; however, when, as will be mentioned, the matter came before the Court on the afternoon of 24th May draft answers to about half the questions asked were handed to the wife's legal advisers. According to the wife, the documents to which she has had access show that the husband's financial transactions were on a large scale and of very great complexity and this statement hardly seems open to question. She alleged that large sums had been remitted abroad and that the husband had created at least thirty-seven trusts, some of which she said that she proposes to attempt to set aside. On 20th May 1976 an examination by the wife's legal advisers of a letter produced by the Reserve Bank had revealed that a firm of solicitors, who stated that they were acting on behalf of the husband as well as on behalf of two of his daughters, had said that the husband was contemplating leaving Australia at about the end of April with a view to taking up residence in Austria. Thereupon the wife obtained from Watson J., by telephone, an injunction restraining the husband from completing certain sales referred to in the letter. The consideration for one of these sales exceeded $4.8 million and the consideration for another exceeded $3.1 million.

At 10 a.m. on 24th May the matter was again brought before Watson J. Counsel for the wife then drew his Honour's attention to the fact that the interrogatories had not been answered and submitted that the affidavit of discovery was illusory. The

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intention of counsel was apparently to seek an adjournment of the hearing listed for the following day. In the course of argument as to the alleged failure of the husband to disclose his full financial position the following passage occurred:

> "HIS HONOUR: ... I would not at this stage accept the broad proposition that s. 75 automatically requires the Court to trace down before every trial the complete financial records between spouses. All s. 75 obliges the Court to do is to have regard to the income, property and financial resources of each of the parties.
>
> If one of the parties does not put in issue his capacity to meet a reasonable order, or even a quite generous order by the Court, and it says they have that capacity to meet it, and if, secondly, the Court accepts that admission, and I underline that because the Court may not, and I certainly would not in this case accept any admission without corroboration on either side—let me say on this point, in amplification of what I have said, it might assist you in handling this matter, I propose to conduct this case having regard to the inadequacies of both sides of the case upon the basis I will not find in my own mind that I am satisfied on either side unless there is corroboration of a particular matter. That will mean that there will be no great value to either counsel in cross-examination of credit because credit is a non-event in this case.
>
> MR. GRUZMAN [Counsel for the wife]: I can only say with respect I do not accept that so far as may client is concerned.
>
> HIS HONOUR: One great problem that goes to your client's credit Mr. Gruzman, and there is authority for this in Selby J.'s judgment some years ago where a spouse makes out an entirely different set of claims which are set out in her petition which might be described in the category of moderately generous in her own view and another set later on which is so far beyond that you wonder whether you have the same case before you. When both are made on oath it presents a threshold problem of credit, exactly the same as the conduct of the respondent here which I think, to put it at its lowest, is the combination of companies.
>
> MR. COLLINS [Counsel for the husband]: I would like you to hear me on the interrogatories.
>
> HIS HONOUR: I simply as the judge of the facts in this matter propose to proceed on the basis that credit is a non-issue because I require corroboration of any issues. I have to be satisfied on that."

Later there was some discussion as to the right of counsel to inspect certain documents which had been produced but which the learned trial judge declined to allow counsel to inspect at that stage. Counsel for the wife said: "At this rate if I may say so, the wife is never going to be in a position to present a case. The husband has successfully defied every order of this court." His Honour replied:

> "When you say present a case Mr. Gruzman, this will sound a strange comment but the proceedings in this Court are not strictly adversary proceedings. The matter in which I am involved is more in the nature of an inquiry, an inquisition followed by an arbitration. If it is an inquiry into the available funds of both parties, there is no such thing as your client's case and Mr. Armstrong's case. There is a general inquiry."

He then outlined the procedure that he proposed to follow on the following day and added: "We do the best we can as we can and look upon this procedure, at this stage until we have all the information in, look upon it generally as an inquiry rather than an adversary procedure." As to the complaint that the interrogatories had not been answered, his Honour proposed that when the proceedings commenced on the following day the evidence of the wife should be concluded and that the husband should then go into the witness box and answer the interrogatories on oath. He said that if that meant that counsel would then have to apply for an adjournment because of lack of material, that could be dealt with as it arose.

In the afternoon of 24th May the matter was again brought before Watson J. Counsel for the wife said that the comments made by his Honour during the course of the morning's proceedings were such as to lead him to submit that the case could not properly be tried before his Honour. He advanced a number of grounds in support of this contention but it is unnecessary to recapitulate his arguments. It should, however, be mentioned that when counsel submitted that the effect of what his Honour had said was that neither party was entitled to any credit in the proceedings his Honour said:

> "I did not say that. What I did say, having regard to the nature of your client's application on one side, and the variations of applications, and having regard to the way the respondent had conducted his case to date, it was my view in any matter about which my mind has to be satisfied on either side, I would require corroboration of any particular fact, which is [*semble* not] entirely what you have just put to me."

Counsel said that he had thought that his Honour had said that credit was a non-issue, and his Honour said:

> "I might have used the words non-issue. What I intended to say is namely where I have to satisfy my own mind in the issue I would require corroboration of the issue; I would have thought in the circumstances that credit may have been a non-issue."

His Honour rejected the submission that he should not hear the case. Counsel for the wife then applied for an adjournment

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which was at that stage refused, his Honour saying that the application could be repeated on the following morning.

On 25th May the matter was called on but Watson J., in proper compliance with the order nisi for prohibition, which had been made in the meantime, declined to proceed further. Counsel for the husband suggested that the matter be transferred to another judge but Watson J. informed the parties that this was not possible because every other judge in Sydney had had some connexion with one or other of the parties in the past.

According to an affidavit filed on behalf of the wife, Watson J., when dealing with another matter later on 25th May, mentioned the fact that an order for prohibition had been made and said: "They have prohibited me—I think it is something about calling a character witness from Paraguay." The wife said that she believed that the reference was to Alexander Barton, who, as was notorious, had been engaged in litigation with the husband and who is said to be a fugitive in Paraguay. The wife said that she believed that his Honour's comment suggested that in his opinion her creditworthiness is such that she would propose to call Barton as a witness to her character. It may be said immediately that the deponent to this affidavit was not sure of the words actually used and that it is so utterly unlikely that the learned judge thought that the prohibition had anything to do with calling a witness from Paraguay that this evidence should be ignored. It would have been better if so insubstantial a piece of evidence had not been introduced.

The first ground on which prohibition is sought can be dealt with quite shortly. It is based on the directions of the learned judge that the wife should file an affidavit as to her financial position at the time before she was first supported by the husband. She claims that because the husband was a party to the litigation with Barton, which attracted much publicity, she had become well known to the public and that there were a number of vicious and unfounded rumours concerning her life before her marriage. The suggestion made on her behalf is that the learned judge had heard these rumours and was prompted by them to make the orders that he did. This suggestion is completely without foundation. There is no evidence even that the learned judge had heard any such rumours, let alone that he had acted upon them. One of the matters to be taken into account in proceedings with respect to the maintenance of a party to a marriage, and which may if relevant be taken into account in proceedings for an order for the settlement of property, is the physical and mental capacity of the wife for appropriate gainful

employment (see the *Family Law Act* 1975, s. 75 (2) (b); s. 79 (4) (d), and see s. 72). It was understandable that the learned judge should have thought that evidence as to the manner in which the wife had supported herself at an earlier time would prove relevant to the question of her present capacity for gainful employment. It was also understandable that he should intimate that evidence of that kind should be available, for he was concerned to shorten, if he could, what promised to be a lengthy proceeding, and the Act declares that it is the duty of the Court to endeavour to ensure that proceedings are not protracted—s. 97 (3). These considerations sufficiently explain the directions which the wife now suggests were due to bias. That suggestion should be entirely rejected.

What has been said does not indicate approval of the course taken by the learned judge. It is quite unnecessary to consider whether he had power to direct the wife to file the affidavit, but assuming that he had such power it was perhaps unwise to exercise it on his own motion and by giving a direction in the terms which he used. If it had seemed to him that the wife's advisers might overlook the need to adduce relevant material, it would have been quite unobjectionable for him to have drawn their attention to the need for it. When the wife did file an affidavit, it was premature for the learned judge to reject it when no one was attempting to read it, and in any case the affidavit was not rendered inadmissible simply because it did not contain all the information which the learned judge thought was necessary. These matters do not lend support to a charge of bias, but the active intervention of the learned judge in this way at this interlocutory stage was consistent with his remark that the proceedings were not adversary proceedings but were in the nature of an inquisition followed by an arbitration. It is impossible to allow that observation to pass uncorrected. It indicated a basic misconception as to the position of the Court in proceedings of this kind under the *Family Law Act* 1975. Proceedings in which a wife seeks an order for maintenance or the settlement of property may involve a dispute as to property of great value and will often be bitterly contested on both sides. The order made determining such proceedings may be of the utmost importance to the future of both parties. The judge called upon to decide proceedings of that kind is not entitled to do what has been described as "palm tree justice". No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down (in such sections as

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ss. 43, 72, 75 and 79, whichever may be applicable). He must also follow the procedure provided by the law. The provisions of s. 97 (3) of the Act, which require him to proceed without undue formality, do not authorize him to convert proceedings between parties into an inquiry which he conducts as he chooses. The provisions of reg. 108 (2), which enable the court "with the consent of the parties to the proceedings" to dispense with such procedures and formalities as it thinks fit, show that without such consent the Court has no such dispensing power. A judge can neither deprive a party of the right to present a proper case nor absolve a party who bears the onus of proof from the necessity of discharging it. These remarks are not intended to fetter a judge of the Family Court in the exercise of a proper discretion or to insist upon the observance of unnecessary formality; they are designed to make it clear that a judge of the Family Court exercises judicial power and must discharge his duty judicially.

It is then necessary to turn to the second ground on which prohibition is sought, namely, that the learned judge has prejudged the wife's credit to her disadvantage. This ground in substance also alleges bias—not of course bias through interest, nor by reason of relationship, friendship or enmity, but bias "by reason of some pre-determination he has arrived at in the course of the case": per Isaacs J. in *Dickason* v. *Edwards* (11). In stating that there was actual bias in this sense, the wife has gone further than she needs to go, and, as some would say, further than it was right for her to go. It is clear that to disqualify a judge from sitting it is not necessary that it should be shown that he was in fact biased. There has, however, been a difference of opinion as to the test that should be applied when bias is suggested. One view is that it is necessary for the person seeking prohibition to show that "there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties": per Blackburn J. in *Reg.* v. *Rand* (12); the other view is that it is enough that the judge could "reasonably be suspected of being biassed": per Lord Esher M.R. in *Allinson* v. *General Council of Medical Education and Registration* (13). Sometimes these two tests have been applied in conjunction. It would serve no useful purpose to cite the many authorities in which one view or the other has been espoused. Some of those authorities were reviewed in *Reg.* v. *Camborne Justices*; *Ex parte Pearce* (14), where it was held that

(11) (1910) 10 C.L.R. 243, at p. 260.
(12) (1866) L.R. 1 Q.B. 230, at p. 233.
(13) [1894] 1 Q.B. 750, at p. 759.
(14) [1955] 1 Q.B. 41, at pp. 47-51.

it is necessary for the applicant to show a real likelihood of bias. The same view was taken in *Reg.* v. *Barnsley Licensing Justices*; *Ex parte Barnsley and District Licensed Victuallers' Association* (15) where Devlin L.J. said that it is immaterial what impression might have been left on the minds of the applicants or of the public generally, and that it was not enough that an impression that the tribunal had been biased might reasonably get abroad. However, in *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* (16) the Court of Appeal again considered this question and did not accept the statement of the law in those two decisions. Lord Denning M.R. commenced his discussion by citing the oft-repeated saying of Lord Hewart C.J. in *R.* v. *Sussex Justices*; *Ex parte McCarthy* (17): "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." After saying that he stood by that principle, Lord Denning M.R. continued (18):

> ". . . in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. . . . Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough . . . . There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

Danckwerts L.J., who dealt with the matter quite shortly, appears to have accepted that it would be enough to justify the court's interference if a person knowing the circumstances might reasonably feel doubts as to the tribunal's impartiality (19). Edmund Davies L.J. was clearly of the view that the court should

(15) [1960] 2 Q.B. 167, at p. 187.
(16) [1969] 1 Q.B. 577.
(17) [1924] 1 K.B. 256, at p. 259.
(18) [1969] 1 Q.B., at p. 599.
(19) [1969] 1 Q.B., at p. 602.

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interfere if it considered that it would appear to right-thinking people that there were solid grounds for suspecting that a member of the tribunal responsible for the decision may (however unconsciously) have been biased (20). He expressed his conclusions as follows (21):

> "With profound respect to those who have propounded the 'real likelihood' test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by *Reg.* v. *Barnsley Licensing Justices* (22) itself, as Devlin L.J. made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is *reasonable* suspicion of bias on the part of one or more members of the adjudicating body."

It has since been doubted whether in practice materially different results would follow from the adoption of one test rather than another: see *Hannam* v. *Bradford Corporation* (23). No doubt in many cases it will be immaterial which test is applied, but that is not universally true, as Edmund Davies L.J. pointed out in the passage already cited from *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* (24). It has also been said that the "two tests are often overlapping and it may be that one is appropriate to one situation and another is appropriate to another situation": *Reg.* v. *Altrincham Justices*; *Ex parte Pennington* (25). However that may be, the judgments of the Court of Appeal in *Metropolitan Properties Co. (F.G.C.) Ltd* v. *Lannon* provide authority for the proposition that if there is a reasonable suspicion of bias against a judge that is enough to warrant the court's interference.

In Australia there has been a similar conflict of authority, and it has been similarly resolved. In *Dickason* v. *Edwards* both O'Connor J. (26) and Isaacs J. (27) accepted that the principle was correctly stated by Lord Esher M.R. in *Allinson* v. *General Council of Medical Education and Registration* (28). The same principle was followed and applied by the Full Court of New South Wales in *Ex parte Schofield*; *Re Austin* (29), a case in

(20) [1969] 1 Q.B., at p. 605.
(21) [1969] 1 Q.B., at p. 606.
(22) [1960] 2 Q.B. 167.
(23) [1970] 1 W.L.R. 937, at pp. 942, 949; [1970] 2 All E.R. 690, at p. 700.
(24) [1969] 1 Q.B., at p. 606.
(25) [1975] 1 Q.B. 549, at pp. 553-554.
(26) (1910) 10 C.L.R., at p. 256.
(27) (1910) 10 C.L.R., at pp. 258-260.
(28) [1894] 1 Q.B., at p. 759.
(29) (1953) 53 S.R. (N.S.W.) 163, at pp. 165, 167, 168.

which prohibition was granted where a magistrate had, in an earlier case, expressed strong views as to the credibility of two persons who had been the defendants in that case and were the complainants in the later proceedings in which prohibition was sought. Herron J. said that the circumstances in which the magistrate dealt with the later proceedings "could give rise to a suspicion in the mind of a passer-by that the cases had been predetermined by the Court, and that a fair hearing was not able to be obtained" (30). However, later in the same year this Court in *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (31) held that a delegate of the Australian Stevedoring Industry Board was not disqualified from holding an inquiry because he had made some comments from which it might well have been inferred that he had prejudged some aspects of the case. Dixon C.J. and Williams, Webb and Fullagar JJ. said in their joint judgment (32):

> "But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions—though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded', per Charles J., *Reg.* v. *London County Council*; *Ex parte Empire Theatre* (33)."

The learned justices in that case appear to have considered that to warrant the grant of prohibition it is necessary that there should be shown a real likelihood of bias, and that the fact that reasonable persons would distrust the result is evidence of, or perhaps a consequence of, that likelihood. However, if doubts were left by that decision as to the correct approach to this question, they were removed by *Reg.* v. *Commonwealth Conciliation and Arbitration Commission*; *Ex parte Angliss Group* (34). In that case it was again submitted that observations made by the tribunal against which prohibition was sought suggested that it had prejudged the issue. It was held that the expression of an attitude of mind by members of the Commonwealth

(30) (1953) 53 S.R. (N.S.W.), at p. 168.
(31) (1953) 88 C.L.R. 100.
(32) (1953) 88 C.L.R., at p. 116.
(33) (1894) 71 L.T. 638, at p. 639.
(34) (1969) 122 C.L.R. 546.

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Conciliation and Arbitration Commission on a matter of principle would not justify a reasonable apprehension that those members might not bring fair and unprejudiced minds to the resolution of the question arising before them. In a joint judgment, delivered by all seven members then constituting the Court, it was said (35):

> "The common law principles of natural justice are well understood though they have been variously expressed. It is sufficient here in relation to that aspect of those principles which is called in aid by the applicant to recall the well known passages from *Allinson* v. *General Council of Medical Education and Registration* (36), as cited and commented upon by Isaacs J. in *Dickason* v. *Edwards* (37), and from *R.* v. *Sussex Justices*; *Ex parte McCarthy* (38). A recent exposition is to be found in the judgment of the Master of the Rolls in *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* (39).
>
> 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. 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."

In later cases, in the Supreme Courts of some of the States, it has been accepted that prohibition will lie to a tribunal which in all the circumstances may be reasonably suspected of bias: *Ex parte Qantas Airways Ltd.*; *Re Horsington* (40); *Reg.* v. *Peacock*; *Ex parte Whelan* (41); *Ewert* v. *Lonie* (42).

The view that a judge should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced and impartial, and that if a judge does sit in those circumstances prohibition will lie, is not only supported by the balance of authority as it now stands but is correct in principle. It would be wrong to regard the observations of Lord Hewart C.J. in *R.* v. *Sussex Justices*; *Ex parte McCarthy* (43) as meaning that the appearance of justice is of more importance than the attainment of justice itself: cf. *Reg.* v. *Camborne Justices*; *Ex parte Pearce* (44). However, his statement of principle, which was recently reaffirmed in this Court in

(35) (1969) 122 C.L.R., at pp. 553-554.
(36) [1894] 1 Q.B. 750.
(37) (1910) 10 C.L.R. 243, at p. 258.
(38) [1924] 1 K.B. 256.
(39) [1969] 1 Q.B. 577.
(40) [1969] 1 N.S.W.R. 788, at pp. 790-791.
(41) [1971] Qd. R. 471.
(42) [1972] V.R. 308, at p. 313.
(43) [1924] 1 K.B., at p. 259.
(44) [1955] 1 Q.B., at p. 52.

Stollery v. *Greyhound Racing Control Board* (45) does go to the heart of the matter. 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. To repeat the words of Lord Denning M.R. which have already been cited, "Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

Of course under the general law prohibition was not directed to a superior court. By the *Family Law Act* 1975 the Family Court of Australia is declared to be a superior court of record: s. 21 (2). Such a declaration would not in itself mean that prohibition would not lie to that Court: *Attorney-General (Q.)* v. *Wilkinson* (46). However, it is in any case firmly established that under s. 75 (v.) of the Constitution prohibition will lie to a judge of a tribunal set up by the Commonwealth Parliament notwithstanding that it is declared to be a superior court: see the authorities cited in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (47). It was not in the present case doubted that prohibition would lie to a judge of the Family Court.

The fact that prerogative writs did not lie to a superior court did not mean that the rule that a judge who might reasonably be suspected of bias should not hear the cause was not applicable to superior courts; it meant only that a particular remedy was not available to redress a departure from the rules of natural justice if it occurred in a superior court. It would be absurd to suggest that the administration of justice should be less pure in a superior than in an inferior court, or that the confidence upon which justice rests is less necessary in the case of the former than in the latter. The rule that a judge may not sit in a cause in which he has an interest has been applied to the most eminent of judicial officers: *Dimes* v. *Proprietors of the Grand Junction Canal* (48). In the same way, the rule that a judge may not sit to hear a case if it might reasonably be considered that he could not bring a fair and unprejudiced mind to the decision applies to every court in Australia, subject only to the exceptions (statutory authority, necessity and waiver), mentioned by Isaacs J. in *Dickason* v. *Edwards* (49) none of which has any application to the present case.

(45) (1972) 128 C.L.R. 509, at pp. 518-519.
(46) (1958) 100 C.L.R. 422, at p. 431.
(47) (1949) 78 C.L.R. 389, at p. 399.
(48) (1852) 3 H.L.C. 759 [10 E.R. 301].
(49) (1910) 10 C.L.R., at pp. 259-260.

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It remains, then, to apply these principles in the circumstances of the present case. The question is not whether there was a real likelihood that Watson J. was biased. The question is whether it has been established that it might reasonably be suspected by fair-minded persons that the learned judge might not resolve the questions before him with a fair and unprejudiced mind.

The remarks on which the wife's submission was founded were made during argument in an interlocutory proceeding. One must be careful not to exaggerate the importance of remarks of that kind. During the course of argument a judge will often follow the common, and sometimes necessary, course of formulating propositions for the purpose of enabling their correctness to be tested, and as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory. However, a fair-minded observer would have been justified in thinking that the remarks of the learned trial judge in the present case were not of that description. He expressly said that he thought it might assist counsel in handling the matter to know that he would not accept the evidence of either party—or even an admission—unless it were corroborated. He repeated, and gave reasons for, his rejection of the credit of both parties. He adhered to his statements even after it had been submitted that he should decline to hear the proceedings further. No doubt he had read and considered the affidavits already filed, but he had not seen either party in the witness box, and the matters which led him to hold that he could not believe them had not been fully examined either in evidence or in argument. It hardly needs to be said that he was not at that stage entitled to form the settled view that neither party was worthy of credit, or to impose on them both the extra-legal requirement that their evidence must be corroborated, but a reasonable observer would have been justified in thinking that he had done so.

As the cases show, there are some matters on which a judge may have preconceived opinions, and yet be qualified to sit, but speaking generally the credit of an essential witness, where the case may turn on credibility, is not one of them. It is apparent from the facts that have been recited that it is possible, if not probable, that an assessment of the credit of the witnesses may play an important part in the resolution of the proceedings between the husband and the wife. This has indeed already been shown by the fact that the learned judge has drawn an inference adverse to the wife because she has greatly increased the amount which she has claimed. Clearly no such inference

could be drawn from the mere fact that she had increased her claim if it was true that, as she said, she had in the first place been influenced by her husband's threats to claim less than she believed was her entitlement, but in any case the statement of the amount which she sought by way of settlement or maintenance was only a claim and, although verified, was not a sworn assertion as to a statement of fact, so that the increase in the amount claimed can hardly affect her credibility. Further, the extent of the husband's assets appears to be an important issue in the proceedings. The question whether sums of between $1,000,000 and $2,000,000 placed to the credit of funds in Switzerland and Liechtenstein are in fact the property of the husband may depend on whether the evidence of the husband or of the wife is believed. As to this matter the wife said in her affidavit:

> "Because of the manner in which Anstalts is [sic] created and transferred the determination of this question may rest solely on credit. I believe that numerous major issues will emerge in which my credit may be a determining factor.
>
> I believe that if His Honour puts my credit on no higher basis than my husbands credit, I am gravely prejudiced before the taking of evidence has commenced."

This passage was very clumsily expressed. Obviously the wife could not complain if she were treated equally with her husband. However, what she may have intended to say, and what at any rate is true, is that if it were necessary for her credit to be accepted to enable her to succeed in proving that the property was that of her husband, she would be gravely prejudiced if she were disbelieved in advance, even if the husband were disbelieved as well.

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

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In the background of the case lay the fact that the learned judge had not at that stage granted the wife's application for an adjournment. It hardly seems possible that the complexities of the husband's financial situation could have been unravelled with fairness to the wife if she had been forced to proceed before proper discovery had been made and proper answers to the interrogatories had been delivered. Having regard to the nature of the issues and of the interrogatories themselves, the course of obtaining answers viva voce appeared to have little to commend it. If an adjournment were to be granted, it might have seemed preferable to avoid requiring the parties to attend court on 25th May, and then face the prospect of a trial. We are not directly concerned with these matters, but they cannot be ignored in considering what effect the judge's remarks might reasonably have had on the wife.

In the unusual circumstances of the present case, it has been established that the wife might reasonably suspect that Watson J. has prejudged an important question in the case, and that she might therefore reasonably have no confidence in the result if that learned judge proceeded to decide the matter. Therefore, prohibition should issue.

Two matters remain to be mentioned. It was submitted on behalf of the husband that the wife's proper remedy was to appeal to the Full Court of the Family Court. As to that submission no more need be said than that an appeal lies only from a "decree" (s. 94 (1)), which means a "decree, judgment or order" (s. 4 (1)), and a judge who simply continues to sit after it has been submitted that he is disqualified does not thereby make a "decree". No doubt an appeal could have been brought if the learned judge had finally given judgment in the matter, but it would be obviously inconvenient to allow him to complete the proceedings when he is disqualified to hear them. The fact (if it be a fact) that no other judge of the Family Court in Sydney is available to hear the case is no obstacle to the grant of prohibition since there are other judges of the Family Court available elsewhere in Australia who could come to Sydney for the purpose.

The order nisi should be made absolute.

JACOBS J. This is an application to make absolute an order nisi granted on 24th May 1976 calling upon Watson J., a judge of the Family Court of Australia, to show cause why a writ of prohibition should not issue prohibiting him from hearing or further hearing the application for dissolution of marriage and

ancillary relief No. S. 4811 of 1976 in the Family Court of Australia, the proceedings there being between the prosecutrix wife, the applicant here and in the Family Court, and her husband. The grounds of the order nisi are: 1. that his Honour is biased against the applicant, and 2. that his Honour has prejudged her credit to her disadvantage.

I propose to assume that the remedy of prohibition is available upon the ground that a judge of a superior court of record has prejudged credit or is biased where the bias is not a bias by interest in the proceedings. If the remedy is available then there is an original jurisdiction in this Court to grant the remedy, a judge of a federal court being an officer of the Commonwalth within the meaning of s. 75 (v.) of the Constitution. I do not base my decision on any ground of unavailability of remedy because no occasion in fact is disclosed for grant of the writ and it is desirable in the interests of maintaining public confidence in the administration of justice generally and in the Family Court in particular that this should be made clear. The test is whether a real apprehension of bias would be raised in the mind of a reasonable and intelligent man in the circumstances of the case. *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (50), per Dixon C.J., Williams, Webb and Fullagar JJ.:

> "But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions—though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded', per Charles J., *Reg.* v. *London County Council*; *Ex parte Empire Theatre* (51)."

I now turn to the circumstances of this case.

The proceedings before Watson J. were proceedings under the *Family Law Act* 1975 (Cth) for dissolution of marriage and ancillary relief, namely, orders for maintenance of the wife by the husband under s. 74, including a claim for payment of a lump sum under s. 80, and it would appear, orders under s. 79 for

(50) (1953) 88 C.L.R. 100, at p. 116. (51) (1894) 71 L.T. 638, at p. 639.

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settlement of property. The proceedings had been commenced in the Family Law Division of the Supreme Court of New South Wales on 25th November 1975 by petition under the previous legislation. By this petition the wife petitioner sought maintenance for herself in a lump sum of $182,500 together with other financial relief the nature of which has not been disclosed in these proceedings. The husband respondent did not in any defence specify pursuant to r. 200 of the Matrimonial Causes Rules particulars of his financial position. He was required by that rule so to do if he wished to oppose the making of the order sought.

Injunctions were granted by Carmichael J. in the Supreme Court of New South Wales on 15th March 1976 and on 30th March 1976. It is not wholly clear what those injunctions were but one of them, it may be inferred, related to the respondent husband leaving the country and another related to his disposing of property. An application was filed by the husband in the Family Court of Australia for transfer of the proceedings to that court. It is not clear that the Family Court had power to make such an order. Be that as it may, Carmichael J. of his own motion on 12th April 1976 transferred the proceedings under s. 45 (2) from his court to the Family Court of Australia in Sydney. Meanwhile, various affidavits had been sworn by the wife, two on 22nd March 1976 and one on 26th March 1976 and, on 29th March 1976, the wife had filed an application in the proceedings claiming, in lieu of the amount previously claimed, a sum of $2,000,000 by way of lump sum maintenance or property settlement. By virtue of s. 9 (4) of the *Family Law Act* 1975 the proceedings for maintenance and property settlement, not being proceedings for principle relief, were continued and fell to be dealt with as if they were proceedings instituted under the *Family Law Act* 1975.

The transferred proceedings came before Watson J. on 20th April 1976. It would appear that one matter then outstanding was an injunction granted by Carmichael J. which related to the husband's passport. Watson J. declined to vary that order saying that he did so for reasons given in one of the wife's affidavits. The judge made clear that he regarded the whole proceedings as being then before him for the making of any appropriate order including an order under reg. 81 of the Regulations made under the *Family Law Act* 1975. He then asked the husband's counsel when the court was going to get information from the husband on financial matters and was told that it would be in the coming week. His Honour indicated that

the statement of financial circumstances in accordance with form 19 and pursuant to reg. 98 should be filed by 4 p.m. on Tuesday, 27th April.

The learned judge then turned attention to the hearing date. He specially fixed the hearing for 25th May and indicated that before then the matter should go in the list for further mention and directions. He fixed 11 a.m. on Friday, 30th April, subject to any approach for a different date. He ordered that all the orders of Carmichael J. be continued until further order, and then continued:

> "Mr. Gruzman, I would like to have from your client on affidavit details of her financial position her working capacity, her usual way of life in the 24 months before she was married to Mr. Armstrong. I regard that as a relevant matter. You can take it from the relevant sections of the Act. Information concerning 75 (2) (b) relating to your client over a period of two years before she married Mr. Armstrong. You should be able to file that before 2.00 p.m. on the 27th April."

Mr. Gruzman replied "We should Your Honour" and then went on to ask for an interim order for maintenance under s. 77. This was refused. The question was again raised of dates for hearing and his Honour stated that he would reserve the 25th, 26th, 27th and 28th of May. Mr. Gruzman indicated that those dates did not suit him personally but his Honour adhered to his decision and stated further that he did not propose to list any long matters between 25th May and 9th June, thus allowing nine sitting days.

The matter was then adjourned to 30th April and it came on again before his Honour on that day. The transcript reads in its first presently relevant part:

> "MR. GRUZMAN: On the last occasion Your Honour indicated that Mrs. Armstrong should file an affidavit as to her financial circumstances prior to the two years of the marriage.
>
> HIS HONOUR: I have seen that affidavit. It has been filed. I propose to reject the affidavit. I find pars 1 and 2, particularly par. 2, quite offensive. It is an unnecessary piece of pleading. It is open to counsel when the matter is being discussed at the hearing to raise objections. It is not open in my view when this court gives a direction that certain material shall be filed to include in an affidavit material of the nature of par. 2.
>
> Secondly although, I have looked at the transcript, the affidavit itself in fact dealt with the two years prior to the marriage, it appears from the affidavit that the two years dealt with are actually two years of de facto marriage between Mr. & Mrs. Armstrong. What I do regard as relevant and I do believe should be on file is material

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indicating Mrs. Armstrong's financial position and her capacity for her economic faculties as at the time before she became associated in a de facto marriage with Mr. Armstrong. I am concerned that, as she was born in 1921 and this relationship did not commence until 1961, I should know something of her background prior to the marriage.

I therefore do not propose to allow anybody to rely upon the affidavit of 22nd April. It is not necessary for the respondent to reply to it.

I request that a further affidavit be filed dealing with her financial position and her financial capacity until twelve months before she became part of a permanent relationship with Mr. Armstrong.

MR. GRUZMAN: Until one year before she became . . .

HIS HONOUR: In other words, before she was able to rely on Mr. Armstrong for any financial benefits."

His Honour then turned to the husband's counsel:

"HIS HONOUR: You filed, Mr. Goldstein, a statement of financial circumstances?

MR. GOLDSTEIN: Yes.

HIS HONOUR: And something else called balance sheets, without any verification at all. You filed no general affidavit of your client?

MR. GOLDSTEIN: No. And such affidavits as I would be filing, I would indicate to Your Honour I would be filing these within the forthcoming ten days."

Discussion then turned to the question of an open offer by the husband and subsequently to a submission by the wife's counsel that the form 19 filed by the husband was not meaningful. It is not possible to avoid setting the transcript out at length partly because portions of it are relied on in this application and partly because it is very important to examine the whole context of events:

"MR. GRUZMAN: I understand Your Honour's direction to my friend. Form 19 was intended to be meaningful, and Your Honour perhaps notes that the wife's affidavit indicated the assets of her husband at $10M. to $15M. The husband has produced a document which showed he was insolvent to the extent that his property is said to be worth $600,000 and his debts $845,000, a fair discrepancy. That by the fact that the husband states in his affidavit that his real estate is not relevant and that his bank accounts are not relevant, and his building society not relevant, and all other property is not relevant. So that we would submit that that form does not apply to either the letter or the spirit of what the Court says.

HIS HONOUR: Would the parties direct their attention to reg. 99.

MR. GOLDSTEIN: What we were minded to do . . .

HIS HONOUR: You see, gentlemen, this Court is an extremely busy Court as you know, and whilst Mr. and Mrs.

Armstrong have their rights to litigate matters, I take the personal view that dealing with young children and a whole lot of other things that crop up, are of equal importance, if not of greater importance. Yesterday or the day before, in a matter, nothing like the magnitude of this, but a matter somewhat similar, the Deputy Registrar appointed one of the accountants on the A. Panel of the Equity Court of New South Wales to carry out an enquiry under my direction under 99.

MR. GOLDSTEIN: We were minded either to call evidence ourselves or, if you want it done the other way?

HIS HONOUR: What is your view on this approach, Mr. Gruzman? My faculties for understanding balance sheets, interlocutory, and whether capital has been watered down, etc. is not my training.

MR. GRUZMAN: The problem is that. Who is to decide whether the truth is being told. Your Honour sees the problem. Here is a woman who alleges her husband has fabulous wealth and the man says he is virtually bankrupt. A lot of that is going to depend on deciding who is telling the truth about certain things. If there were any sort of informal arrangement where Mr. Armstrong is not subject to cross examination, and even if he were, is the Accountant to decide?

HIS HONOUR: I think that is the crunch, Mr. Gruzman. It means we cannot avoid a Court hearing and the only alternative would be to send it out to the Registrar who has the capacity under the regulations, of cross-examination, as well as the old certificate of means. But, I regard that as completely alien. It only meant when it came to the Court you went through the whole thing again. It looks as though the Court cannot escape its obligations in this regard.

MR. GRUZMAN: May I suggest a lot of the work can be done out of the Court. I would like to suggest that Your Honour direct that proper answers be given; and, that real estate is not relevant, we suggest that is not a proper answer. I would respectfully suggest that Your Honour may see fit to give directions that form 19 be complied with literally and, if it is nil, that is all right.

HIS HONOUR: We can get around it another way, Mr. Gruzman. I now draw your attention to reg. 91. What I suggest is this, and it should not be beyond your capacity, or your advisers to do so. I suggest within a very short time you draw up what is in the nature of interrogatories. We then have a clearing house hearing of these interrogatories ... [sic] originally a regulation which provided for interrogatories ... [sic] Supreme Court relies. But, unfortunately, in other States where enlightenment is not so great they have been using interrogatories for a hundred years or so and there is resistance. What 91 is is a Court trial system of interrogatories. I am not going to sit here and advise specific questions because I do not know enough about financial machinations. I would have thought you and your

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advisers would have been able to draw up a number of specific questions on interrogatories and I could rule very, very quickly whether I thought they were relevant or not and that would average out the information that we should have. On that day, or perhaps at some subsequent date, and time is moving on because we have a hearing date of 25th May, subsequent to that date and before the actual hearing, you could make a return day for subpoenas and summonses, some day before the hearing. A week before if you like. Except for the small inconvenience of counsel and solicitors having to go to this Court precincts and look at the documents here, it means you can do all your work before you start instead of the Judge sitting around all day while you go through reams of paper.

MR. GRUZMAN: We will undertake to prepare both interrogatories and subpoenas. Would Your Honour indicate a date.

HIS HONOUR: You would want to do those simultaneously. You can do it in two steps. You can submit your interrogatories for my approval and also your main bodies of summonses on the one day and, having regard to the answers given to those specific questions, you can have a second bite at summonses two or three days before the hearing. Can you see any objection to that approach, Mr. Goldstein.

MR. GOLDSTEIN: No Your Honour. It seems unfortunate that, in the light of an offer which really amounts to about $500,000, that we are going ahead with all this.

HIS HONOUR: Mr. Goldstein, I cannot control that. If I come to the conclusion at the end of this case that the case ought not to have been fought, that the offer was sufficiently generous, albeit, an amount upwards of half-a-million dollars of a man otherwise insolvent!

MR. GOLDSTEIN: That is what has been said.

HIS HONOUR: Mr. Goldstein, the situation is this, that you have made an open offer. This is obviously a case where a claim is being made. If it is rightly made probably costs do not come with it under the general regulation relating to cost; if it is wrongly made and if it is falsely based, and if your client has been put to expense which he ought not to have been put, then the Court has some control over costs. The cost rule gets away from the old preferred position of the wife's costs. That has gone forever and it provides for each party to pay his own costs. It covers matters of dissolution and custody. If I am of the opinion in a particular case that circumstances justify costs and if it is shown that a great deal of time has been wasted over false issues and seeking unjust claims, the Court has its powers.

MR. GRUZMAN: May I invite Your Honour's attention to one aspect? The wife's affidavit of 22nd March, dealing with her husband's assets, is not in general terms, but in very specific terms, dealing with specific properties, the actual cost prices, and so on. There is no answer by the husband to that

affidavit. It is not a case of the wife having made general allegations of her husband's position, but specific and precise. If you could see fit to direct an answer to that affidavit, and affidavits generally?

HIS HONOUR: I will not, I don't think. The respondent's application is set out in regulation 58. If he wishes to seek an order during the hearing of the application, he may file an affidavit in answer. I can't force him to file an affidavit in answer. I can draw certain conclusions, of course, if he does not.

The difficulty here is that reg. 58 is designed in a way to cut down paper work and, of course, is a regulation which covers not only a case of this nature but the issue of maintenance in the Blacktown Children's Court, and it is deliberately so designed.

I cannot require him to file an answer, but if a man has an allegation made against him and he doesn't bother to answer it, it puts you in an advantageous position and I will leave it at that.

What about the 7th May? Can you get your interrogatories ready by then? They would have to be served before then to give Mr. Goldstein a look at them.

MR. GOLDSTEIN: I would be issuing some myself.

HIS HONOUR: Can you exchange your informal interrogatories? Because they do not become formal until I approve under 91. Can you serve and exchange by 4 p.m. next Wednesday?

MR. GRUZMAN: We can.

MR. GOLDSTEIN: Yes, Your Honour.

HIS HONOUR: The application specifying the questions to be answered by each party, rather to be filed and served by each party on the other by 4 p.m. on Wednesday, 5th May. Then the hearing of the applications, the mutual applications under regulation 91, to be fixed for 2 p.m. on Friday, 7th May at 2 p.m. You will have a better chance then of getting a fairly quick hearing."

There was mention of other matters not of especial significance at this time and the proceedings were adjourned.

Hearing was resumed on 7th May. Discovery and inspection by 18th May 1976 were ordered. Then a start was made on settling the interrogatories. The transcript proceeds:

"MR. COLLINS: Yes. So far as the request, or questions, or interrogatories, or whatever one terms them, there was on Wednesday night, at 4 o'clock, served on my instructing solicitors, that bundle of documents, which comprises on a quick count, 881 questions, many of which are divided into 8 sub-questions. There are attached 346 pages of documents and it has been a sheer physical impossibility—with one set of documents needing to pass through a number of hands—for the matter to have proper consideration. To make it quite apparent, we would submit that this is not a valid

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exercise of the powers under the rules to ask questions on relative matters. Much of the material sought to be asked goes to matters which range far and wide beyond the scope of the inquiry before this court.

HIS HONOUR: Before we proceed with that, can we deal with your request which seems to be shorter. Any objections to any of the questions raised, Mr. Gruzman?"

And then the Court settled down to a detailed examination of the husband's request for interrogatories. After his Honour had indicated that the matter would be adjourned to Monday 10th May, a discussion followed on the nature of the issues which arose in the proceedings. In order to keep matters in context it is necessary to set out the transcript.

"HIS HONOUR: Mr. Gruzman, I have not finally decided, but it might be a matter for the parties to consider. It seems to me to be common sense, your lady came to this alliance in a certain financial position and with certain faculties for standing on her own feet, about which specific questions are being asked and answers will be provided. Then Mr. Armstrong went through a series of fairly notorious episodes. One was a very long case; the next was the change in his Parliamentary status; the next was a series of, I think, one divorce in which Mrs. Armstrong was in some way mentioned or involved; and, lastly, a fairly lengthy trial in respect of a company. I notice, in glancing through an extremely voluminous affidavit filed by Mrs. Armstrong, that all this matter has been re-activated. There has been nothing filed by Mr. Armstrong to attack the fact that while she certainly does not come into the category of a parent, except in relation to step-children, there is no attack made by Mr. Armstrong, as I understand it, on her general capacity as a homemaker, in so far as section 79 operates; In so far as he does not attack overall her fitness as a wife. She cannot get one extra cent either on the old law, or the new, from any misconduct of his and she is saddled with the financial position albeit whatever it is that he presently finds himself in.

My preliminary view, therefore, is that all those interim upsets are irrelevant, like a man having won the lottery the day before the hearing commences, or the man who finds the share market has collapsed. I have to deal with practical matters. The real issue is how much is he worth and what is a proper share, if any, of that worth that Mrs. Armstrong is entitled to receive. That is the simple issue, although the implications are quite profound. I can see some value in having researches as to just what his financial position presently is, or what his prospects are, particularly having regard to the rather cavalier way he answered form 19. I can see no basis on which this case can in any way be a retrial of Barton and Armstrong, or Eskell and Eskell and the alleged company fraud case or of the fact that he was

expelled from the Parliament. What we are concerned with here is with the size of the pint pot. We are concerned what is in the pot and what is the distribution of it at this time and I will need a great deal of persuading that any of that material which relates to the periods of years in between—what may have been regarded as the halcyon years—I would have a great deal of difficulty in seeing that as relative before me.

I also point out my very heavy obligation under s. 97 that these proceedings are not to be protracted.

I just throw out those for the parties to consider. It may be if we look at the absolute relatives, which is simply how much has he got and how much is she entitled to as a settlement. We will probably get to the jugular of this much more quickly.

MR. GRUZMAN: We are really anxious to present such evidence, and only such evidence as is relevant. The problem that we see is that it has been rather difficult, for us at least, to know, firstly, what are the criteria upon which a division is made, and we know the old basis of contribution by the wife, as it were, to the family fortune, was exploded, in fact, and yet it is said—what is the Section?

HIS HONOUR: Section 79?

MR. GRUZMAN: When you look at the Act to try and get some guidance of what evidence should have been used, it says you have got to look at the financial contribution made directly or indirectly to the equity, conservation or improvement of the property.

Now, what the wife says here is that if it hadn't been for her, in particular, shall we say, gross vicissitudes, that the husband passed through, there would have been no property.

HIS HONOUR: If it hadn't been for her contributions to Mr. Armstrong, he would be much worse off than he is. Now if he says that, and he doesn't deny it, we are then back at the position that we are now in?

MR. GRUZMAN: I agree. I am only indicating, not without some misapprehension, that it was truly relevant if that material was introduced.

HIS HONOUR: If Mr. Armstrong wants to put it in issue, it is a new ball game. He hasn't yet.

The line Mrs. Armstrong takes is that he would be in a far worse position today if she hadn't been such a good wife and support. He hasn't denied that at this stage.

She gets some credit from that as is available to her, having regard to the shortness of the marriage, etc., etc. She is not in the same category, of course, of a woman who has lived with a man for thirty years and brought up five or six children. She is in a different category and gets such credit as is available.

What follows from that is this proposition: that is that it would be more useful to me to examine the principal question first; the principal question of how much Mr. Armstrong got and Mrs. Armstrong got, and should there be any re-

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distribution of that financial position. That is the crucial question.

Now, if, as a corollary to that, we are then cast into a wider field of saying, yes, there is the financial balance between them and other things being equal, the just re-distribution, if any, is that if Mr. Armstrong seeks to know in argument whereby she is not entitled to that just re-distribution straight out, then we may be in a new ball game and the cost pendulum might start to swing the other way. I do invite counsel to give their attention to the ascertainment of the financial business first. In other words although it is gone, really, what I should be conducting first in this case is a certificate, something like the old Certificate of Means Inquiry, but with a little bit more finesse and flexibility. What is available in this case?

MR. GRUZMAN: If I may say, from our point of view, we are perfectly agreeable to that course, provided we know what the matter is. If Your Honour thinks it is a desirable and proper course for the proceedings on the 24 to really constitute a means inquiry to see just what there is, then we equally agree.

HIS HONOUR: Lets start that one first, Mr. Collins?

MR. COLLINS: In anticipation of Your Honour accepting that as being a central issue, issues have been put in train to acquire, collate and present before Your Honour the evidence as to the true position from the sources. (That evidence will be filed, I anticipate, very shortly.

MR. GRUZMAN: Your Honour we are going to be in the position that between 18 and 25 we are going to be faced with an enormous mass of material on which we are supposed to assist Your Honour to decide whether Mr. Armstrong is a bankrupt to the extent of $150,000 of solvent to the extent of $10,000,000 or more. That time schedule is pretty short.

What I am coming to is that my friend says he is putting on affidavits as to what he says is Mr. Armstrong's position; I would ask Your Honour that that should be put on within 7 days maximum.

HIS HONOUR: That is fair enough, you should have been on by now, Mr. Collins?

MR. COLLINS: I suppose much of the interim has been spent reading these novelettes.

HIS HONOUR: It is fair enough that if you want to put any further primary material, it ought to be on seven days from today?

MR. COLLINS: That will, of course, include material as to matters not strictly financial?

HIS HONOUR: Yes. If you want to place any primary material before the court. You have heard what I said about the affidavit, I am not foreclosing your answering that affidavit if you want to widen the area.

MR. COLLINS: It is not a case of widening the area. Your Honour would appreciate that a great deal of that material would not stand unanswered.

HIS HONOUR: I am simply suggesting you do not reply to it. If later on the option is open—that is what I am trying to say to you, that the issue before me at the moment is a financial one and that is the one we should get out of the road.

I would be quite happy to conduct this case on this basis, of saying, well, having spent the first few days of this hearing, I admit Mr. Armstrong is worth X amount of dollars, or has control of X amount of dollars and Mrs. Armstrong is worth X amount of dollars or has control of X dollars, I am now prepared either to decide that on general principles of fairness and equity, without further adieu [sic] or if anybody wants further adieu [sic], we have it.

I am trying to shorten this. Even though there are no children in this case, the basic principle of my approach to Family Law matters is still with me and that I see no reason in widening the area which a person's respect on either side can be trampled upon. In the ultimate it doesn't gain anything.

MR. COLLINS: We would respectfully adopt that as a principle, but, of course, we are not the moving party in the raising of these matters.

HIS HONOUR: A game of chess is not merely to move, it also to counter move. You will file all primary material other than conduct if I can put it that way?

MR. COLLINS: Some of the primary material may require verification from a qualified accountant. May I be granted leave beyond the seven days to file material, it would be creative. The information would certainly be before Your Honour and available to my friend in seven days.

MR. GRUZMAN: If there is some problem of getting some sworn, may we have it in the unsworn state within the seven days?

HIS HONOUR: It is your responsibility to file all primary material, other than issues of conduct, by 4 p.m. on the 14th May, Mr. Collins?

MR. COLLINS: I suppose if there is any material in reply to it—

HIS HONOUR: Primary material, and I use the word 'primary' deliberately. I am not terribly impressed with papers coming up in reply. I think that the rules and regulations intend that you see what each side generally says and we let the replies fall where they will?

MR. COLLINS: Very good, Your Honour.

HIS HONOUR: Any counsel seek any other directions today?

MR. COLLINS: No.

His HONOUR: Then I adjourn the further directions in this matter to Noon on the 10th May, 1976?

MR. COLLINS: There is one other matter, may I ask my friend, through Your Honour, if we may have another telephone book.

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MR. GRUZMAN: I don't think so, I will find out; I don't think we have got enough.

HIS HONOUR: It is a very fair request, Mr. Gruzman?

MR. GRUZMAN: I don't dispute that but—

HIS HONOUR: If you are unable to comply with this, Mr. Collins may even be able to borrow yours and you get another one?

MR. GRUZMAN: I will do that, I think I know what is in it.

THE FURTHER HEARING OF THIS MATTER IS ADJOURNED TO MONDAY, 10 MAY, 1976."

It may be observed from this transcript that his Honour had familiarized himself with the voluminous affidavits which had been sworn by the wife. I do not think that it is necessary for me to refer to them in detail. They covered at least three main subjects—the wife's assets (or lack of them) and her needs to support the claim for $2,000,000; the husband's assets which she estimated to be of a value of $15,000,000; and a history by the wife of her relationship with the husband, particularly over years of litigation, the purpose being, it would appear, to show her contribution to the acquisition of the husband's wealth. It is sufficient to say that there was nothing in them to belie fears of the far ranging and prolonged course which the litigation might take and the need for such action as was open to the Judge to attain a clarification and acceptance by the parties of the real issue which had to be determined by him on the application for a maintenance and property settlement.

The afternoons of Monday 10th May, Wednesday 12th May and Friday 14th May were all devoted to going through the requests for interrogatories, the size of which appears from the transcript which I have set out. On 18th May the questions on discovery and inspection were investigated by the Deputy Registrar.

On 20th May accountants engaged by the wife were examining documents produced by the Reserve Bank of Australia when they discovered an application under Exchange Control Regulations. The details need not be stated but they led Watson J. to grant an immediate ex parte injunction on the application of the wife restraining a number, if not all, of the transactions indicated in the application to the Reserve Bank. The injunctions were to operate until further order of the Court and further hearing was fixed for 21st May at 5.30 p.m. in Sydney.

I can find no transcript of proceedings of this date but the matter came before his Honour at 10 a.m. on 24th May. Reluctant though I am to overload my reasons with transcript I have come to the conclusion that there is no alternative but to set it out

in full, omitting only that part where there was a call on subpoena and later a discussion of the place of sitting.

"HIS HONOUR: Why is this matter before me today?

MR. GRUZMAN: This is the return of an application for an interim ex parte injunction which was sought from your Honour as a matter of extreme urgency on Thursday by telephone.

HIS HONOUR: I granted that application until further order, and the hearing is tomorrow. What is the attitude until tomorrow.

MR. COLLINS: So far as the application is concerned, naturally enough our first notice came by telephone after it had been granted. The documents were served on Friday. My instructions are these: that there was no prior application for any undertakings to be given in respect of the matters, the subject of the application. Had such a request been made, the undertakings would have been given.

I am now instructed as I have always been, to give any undertakings pending the determination of this suit and the implementation of whatever orders your Honour may see fit to make. No action will be taken in respect of any of the matters in dispute and my further instructions are that if such undertakings had been requested prior to the making of this application then they would have been given.

HIS HONOUR: That is a matter that would go to costs.

MR. GRUZMAN: So far as I can see Mr. Armstrong is not in Court.

HIS HONOUR: I do not propose to lift the injunction on this case. The case is listed for tomorrow, and application can be made at any time during the case. If the injunction was obtained without proper approach having regard to its urgency, you have your protection as to costs. I do not have to make any further order. What else is there?

MR. GRUZMAN: I would like to bring before your Honour two matters.

MR. COLLINS: May I say that I was told about this only at two minutes to 10 o'clock.

MR. GRUZMAN: One matter I am about to raise first, is the subject of a letter last week and numerous conversations with my friend, and that is the question of the interrogatories and questions directed by the Court and which the Court permitted to have directed to Mr. Armstrong and directed to be answered. I have had no answers.

HIS HONOUR: I think the answer given is that simply if the answers are not given and there is a great deal of difficulty in this case because of the early hearing I gave you, and that these are in a special form in an attempt to cut down the hearing time of the trial, well if the information is not available within a reasonable time before trial, and if it has to be obtained during the trial viva voce, then again it is a matter of costs.

MR. GRUZMAN: May I point out what Mr. Armstrong has succeeded in doing is to put in an affidavit of discovery, and

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that is a matter I mentioned to my friend just before 10 o'clock. It only has just come to my knowledge, and the affidavit of discovery in this case is in a form which we suggest is illusory. Perhaps your Honour would care to read it.

HIS HONOUR: I have it in front of me.

MR. GRUZMAN: Your Honour will see by some legalistic means, Mr. Armstrong makes out an affidavit disposing of discovery of financial documents. The whole purpose of the proceedings tomorrow is to determine the financial position of both parties.

HIS HONOUR: I think you have used your pre-trial proceedings up as far as you can take them. If they are either directly aborted or misrepresented, one must deal with the situation as it arises. What can I do today to change the situation between now and 10 o'clock tomorrow?

MR. GRUZMAN: The affairs of Mr. Armstrong are not only complicated, but we have a leading firm of accountants, who have three or four accountants with your Honour's permission, looking at the books. They are finding extreme difficulty in knowing just what has occurred. The answers to those questions were sought in order to elucidate the matter so that we can present a case to the Court. As we understood the *Family Law Act*, it is not the intention of that Act that a husband can in one legal way or another conceal things so that the wife is left in a position of not knowing about. The intention of the Act, as we understand it, the husband has failed to disclose.

HIS HONOUR: I am not certain that this is a complete statement. There are three cases with regard to this under the *Matrimonial Causes Act*.

The first one was *Hains* v. *Hains* (52) in which it was held that the husband said he had sufficient to meet the wife's claim. An investigation of the husband's interests then became irrelevant.

But that is not the case here, of course, because the husband has not offered to meet either the wife's first or second claim, the second claim being greater than the first claim.

The second one is *Aboud* v. *Aboud* (53) in which there again it was more or less said that as the husband had indicated there was sufficient to meet the wife's prior claim, then there was not any question of examination of financial responsibility.

The third case, *Simmonds* v. *Simmonds* (54) in which the Court of Appeal said the husband had refused to disclose his financial position, the wife got an order for $25,000 for, emergencies, and it lasted for about 200 days. The Court of Appeal used the non-disclosure in the exercise of discretion against him.

(52) (1970) 16 F.L.R. 185; (1970) 91 W.N. (N.S.W.) 600.

(53) 1972; unreported.

(54) [1973] 1 N.S.W.L.R. 647.

None of those cases go to the situation here, but I would not at this stage accept the broad proposition that s. 75 automatically requires the Court to trace down before every trial the complete financial records between spouses. All s. 75 obliges the Court to do is to have regard to the income, property and financial resources of each of the parties.

If one of the parties does not put in issue his capacity to meet a reasonable order, or even a quite generous order by the Court, and it says they have that capacity to meet it, and if, secondly, the Court accepts that admission, and I underline that because the Court may not, and I certainly would not in this case accept any admission without corroboration on either side—let me say on this point, in amplification of what I have said, it might assist you in handling this matter, I propose to conduct this case having regard to the inadequacies of both sides of the case upon the basis I will not find in my own mind that I am satisfied on either side unless there is corroboration of a particular matter. That will mean that there will be no great value to either counsel in cross-examination of credit because credit is a non-event in this case.

MR. GRUZMAN: I can only say with respect I do not accept that so far as my client is concerned.

HIS HONOUR: One great problem that goes to your client's credit Mr. Gruzman, and there is authority for this in Selby J.'s judgment some years ago where a spouse makes out an entirely different set of claims which are set out in her petition which might be described in the category of moderately generous in her own view and another set later on which is so far beyond that you wonder whether you have the same case before you. When both are made on oath it presents a threshold problem of credit, exactly the same as the conduct of the respondent here which I think, to put it at its lowest, is the combination of companies.

MR. COLLINS: I would like you to hear me on the interrogatories.

HIS HONOUR: I simply as the judge of the facts in this matter propose to proceed on the basis that credit is a non-issue because I require corroboration of any issues. I have to be satisfied on that.

MR. GRUZMAN: I do not want to take up your time but your Honour we have a very real problem here and one which unless it can be solved, will lead in our submission to a complete miscarriage of justice. May I start this way. The wife put in an affidavit showing that the husband was worth $10 million to $15 million, which is an enormous sum of money.

HIS HONOUR: She believed her husband as to that amount?

MR. GRUZMAN: The husband put in form 19 which showed that he had a minus quality—$250,000 minus. What the examination of the books has shown is that

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in the course of these complicated affaits there have been created, I am told, thirty-seven trusts, so that even after one has examined, as the accountant is seeking to do at the moment, the twenty or so companies which are concerned, all that means nothing because one then has to go to the thirty-seven trusts. We did not even know of the existence of those trusts when this case commenced. It is only on subpoena that they have produced them.

So far we have not had access to them and we cannot say we blame anyone for it but we did not know of the existence of the trusts. In respect of each trust I am informed there will be minutes, ledgers and books of accounts, balance sheets, profit and loss accounts, and private ledgers, and it will not be until we look at these that we will for the first ime be able to get some idea of the position. It may be that Mr. Armstrong has completely got out of his possession every penny. That may be the position in a technical sense.

We are presently preparing with great difficulty an application to Your Honour to set aside those transactions, to even know what to seek, what orders to seek and to put before the court requires an examination of these additional documents. The accountant is doing his best at the moment to prepare the answer to formulate an application to the court. The object of the discovery was to have produced relevant documents. The relevant documents relating to his financial position have not been produced.

HIS HONOUR: Were they produced on summons.

MR. GRUZMAN: A summons, yes.

HIS HONOUR: Talking about summonses, I understand there are a few this morning, are these people outside.

MR. GRUZMAN: Mr. Lovell is outside."

There then follows the call on subpoena of Kenneth Eric Lovell solicitor for the respondent's daughters and thereafter the transcript proceeds:

"HIS HONOUR: You claim privilege in respect of these documents?

MR. LOVELL: Yes, I do.

HIS HONOUR: You may leave. In respect of your next application Mr. Gruzman which is to inspect these documents—

MR. GRUZMAN: May I tell Your Honour the position.

HIS HONOUR: Just a moment. I think we are in a bit of a bind and that is this. Until the case proceeds a certain way, Mr. Armstrong by virtue of his involvement in this case in probably a direct or implied way as to privilege in many regards but in respect of the three parties even though they are officially formal the privilege is put on a different basis. I propose to retain these documents not to inspect them myself at this stage and when there is a sufficient nexus created from the evidence you can renew your application.

MR. GRUZMAN: Would Your Honour just reserve a little on this at the moment until Your Honour has heard the rest of what I want to submit because Your Honour may come to a different view.

HIS HONOUR: I have no nexus.

MR. COLLINS: Your Honour has no evidence.

MR. GRUZMAN: At this rate if I may say so, the wife is never going to be in a position to present a case. The husband has successfully defied every order of this Court.

MR. COLLINS: I object to this statement being made.

HIS HONOUR: When you say present a case Mr. Gruzman, this will sound a strange comment but the proceedings in this Court are not strictly adversary proceedings. The matter in which I am involved is more in the nature of an inquiry, an inquisition followed by an arbitration. If it is an inquiry into the available funds of both parties, there is no such thing as your client's case and Mr. Armstrong's case. There is a general inquiry. I would have thought the way the matter should be conducted is as follows. First tomorrow morning we look at the affidavit evidence, a great deal of which will be objected to and there will be rulings upon a substantial part. I have already indicated your client's long affidavits. The next thing is that Mrs. Armstrong gives evidence and is cross-examined on it and she calls such witnesses if any that she has to support her claim. It is obvious that there is another side of this claim. It then falls into the area of the husband's willingness to disclose. I would not listen to any application at the end of Mrs. Armstrong's evidence that because there were weaknesses in the case she is unable to prove it. I would not allow any tactics to prevail in this court where somebody said I am not going to call that particular person because I have nothing to answer. I would make that particular witness my witness. I think the rather interesting battle of tactics that seems to be going on, the answer to these problems is that we are starting tomorrow as best we can. While we are involved in presenting Mrs. Armstrong's evidence and the evidence in support that she may have, the work of discovering what is in the documents produced can continue.

If then at the end of a certain part of the case we have reached a point where you are able to show me it is impossible to carry on until further material is given, I will have to make decisions and concern myself as to further restraints. At the back of mind is the fact that Mr. Armstrong is in two restraints, a personal restraint and an economic restraint in relation to matters outside Australia. We do the best we can as we can and look upon this procedure, at this stage until we have all the information in, look upon it generally as an inquiry rather than an adversary procedure.

MR. GRUZMAN: Accepting everything that falls from Your Honour it is an inquiry, but surely the husband cannot be

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allowed to prejudice the wife by defying an order that the court has made that he answer certain questions—

HIS HONOUR: I am not certain that it is yet defying having regard to the time schedule. The first thing you can do when he goes into the witness box and I would possibly be prepared to allow this to happen, the first thing you can do is ask him orally and then having asked him orally you are then in the position that having got you answers, you are in the situation you should have been a week ago.

MR. GRUZMAN: Would Your Honour allow that to be done tomorrow morning at 10 o'clock.

HIS HONOUR: I am not making a decision on that now. I am hoping that something will turn up.

MR. COLLINS: If Your Honour knew how many hours and how many people have been involved—Saturdays, Sundays, nights after midnight in answering these questions, these remarks of my friend would fall very flat.

MR. GRUZMAN: They promised us some answers last week.

HIS HONOUR: You can only do so much.

MR. GRUZMAN: I suggest and this is the way we see it. The affidavit evidence will be dealt with at great length, Mrs. Armstrong will be cross-examined at great length and the nine days which Your Honour has set aside for this case will expire, your Honour's personal movements are known to everyone concerned and the general tactics of the opposition as we see it, Mr. Armstrong will not enter the witness box at all.

Up to this moment Your Honour we have had absolutely nothing. This affidavit of discovery is a disgrace. It is not an answer to the court's order at all.

HIS HONOUR: You still have your injunction Mr. Gruzman. The case will commence tomorrow morning. The affidavits will be read. They will be dealt with expeditiously—if I can get through a telephone book of interlocutories—the affidavits having been read you can call your client and any other evidence you have. You say that the cross-examination of Mrs. Armstrong will be lengthy, I can't say it won't be but I don't propose to let this case go outside the normal parameters which I believe is my area of decision. I don't anticipate the cross-examination will be lengthy. As soon as that is concluded if there are any problems over interlocutories at that stage before anything further is done Mr. Armstrong can go into the witness box and answer the interlocutories on oath. If that means that you will then be in a position where you have to apply for an adjournment because of lack of material, we will deal with this as it arises. Of course you have a great volume of material and you obviously from your previous remarks have had discovery of matters which have led to the injunction. You are not as bereft of material as you were a week ago.

MR. GRUZMAN: We have only in the last day or so become aware of the trust situation. Instead of formally issuing a summons I wonder if my friend would undertake to Your Honour that there would be produced as on summons the minute books, ledgers, books of account, balance sheets and profit and loss acounts, private ledgers and taxation returns of the thirty-seven trusts in respect of each, which are referred to in the books of account which have been produced.

MR. COLLINS: I cannot answer that Your Honour (a) I have not seen the books of account, (b) I have no instructions—I can only give a general undertaking that proper revelations will be made to the court. Those are my instructions.

HIS HONOUR: With respect Mr. Collins I need a little bit more convincing than that. I am trying to be fair to you. I would not make such an order now. Those summonses of course can be issued. The recommendation I make is that you produce tomorrow morning as much of that material—

MR. COLLINS: If it exists—if that is as accurate as a number of my friend's other statements this morning.

HIS HONOUR: I regard what he has just said to you as a notice to produce. Let's have a look at the regulation.

MR. GRUZMAN: Regulation 95.

HIS HONOUR: I am regarding what he has just raised—I am waiving so much of the regulations on what Mr. Gruzman has just raised as a notice to produce those documents.

MR. GRUZMAN: At 10.00 a.m. tomorrow morning.

HIS HONOUR: At 10.00 a.m. The regulation takes its own force because you can't produce matters that are not within you power. If you are able to produce them all the better. I could order 95 (4) if necessary. I am not making that order at the moment. I am regarding what Mr. Gruzman has just put to me as a written notice served on you to require you to produce those documents.

MR. COLLINS: Might I inquire as to the whereabouts of the affidavits of discovery and the discovery order.

MR. GRUZMAN: It will be filed and served this morning.

HIS HONOUR: We can approach it in pari deliquito [sic].

MR. GRUZMAN: There is no pari.

HIS HONOUR: I am unable to say at this stage where we will be sitting."

Then followed the discussion of the place of sitting and the proceedings ended with the following:

"HIS HONOUR: . . . The transcript up to now has not been taken out fully at my discretion. I did not require any transcript when I dealt with the interlocutories as I felt the answers were clear enough.

MR. GRUZMAN: There is just one thing. I must say at one stage I was under the impression that your Honour set down four days of this week?

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HIS HONOUR: I have reserved all of next week too, with one possible exception to that, I may be required to go to Adelaide on 3rd June.

MR. GRUZMAN: I have a commitment I cannot get out of on 4th June.

HIS HONOUR: If you still have me here on 4th June, I think you will be glad to get out of this Court. I hope it will be finished before then.

MR. GRUZMAN: Supposing it does not in the time available, what does your Honour propose to do?

HIS HONOUR: My trip to Adelaide can be moved as it is partly for the purpose of an inspection. The Parramatta Court is to be opened shortly and we are hoping to learn from the mistakes made, so therefore, this presents no problems.

MR. COLLINS: Your Honour, Mr. Hughes will be in the matter as from tomorrow.

HIS HONOUR: You have fully briefed him I hope with the various idiosyncrasies of the matters so far?

MR. COLLINS: He will be thoroughly briefed.

MR. GRUZMAN: Supposing it does not end next week?

HIS HONOUR: We shall look at that matter if and when it arises. Is there anything more?

MR. GRUZMAN: We took the liberty of having brought into Court the Reserve Bank documents to support the application.

HIS HONOUR: They can be returned from the office. There is a box of documents upstairs which I think are all claiming privilege; they are in my chambers.

MR. GRUZMAN: That is another set of documents.

HIS HONOUR: You can only see them when the case starts and we have had proper argument on it."

At 2.25 p.m. the same day counsel appeared again before his Honour:

"HIS HONOUR: Why is this matter back before me.

MR. GRUZMAN: At my request.

MR. HUGHES: May I announce my appearance with Mr. Collins and Mr. Goldstein.

HIS HONOUR: Yes, Mr. Hughes.

MR. GRUZMAN: This application arises out of two matters: one, the question that we find ourselves unable to proceed tomorrow; and, secondly, as a result of certain comments made by Your Honour from the Bench this morning. At the time, in view of the seriousness of the matter, I refrained from comment so that I could take proper instructions.

The first aspect is this . . .

HIS HONOUR: The second aspect is more germane, is it not?

MR. GRUZMAN: Perhaps, Your Honour. Your Honour's comments this morning—I do not think I need to preface my remarks, however, I do say I speak with the greatest respect to Your Honour and the Court. Were such as to lead Mrs.

Armstrong and her advisers to the point that this case could not be properly tried before your Honour. Your Honour's comments included several matters. I must say so far as your Honour's precise comments are concerned, we have not committed them to writing, but what I am about to say is to be taken as generally noted. The effect of what your Honour said was this: firstly, that neither party was entitled to any credit in these proceedings.

HIS HONOUR: I did not say that. What I did say, having regard to the nature of your client's application on one side, and the variations of applications, and having regard to the way the respondent had conducted his case to date, it was my view in any matter about which my mind has to be satisfied on either side, I would require corroboration of any particular fact, which is entirely what you have just put to me.

I then went on to say that the situation was I would have thought we would not be wasting many days on Court time in this case on the examination of credit. I think the proposition is a very simple one. Do you understand that as an accurate paraphrasing of what I said?

MR. GRUZMAN: I think your Honour went further than that. You said that credit was a non issue or words to that effect?

HIS HONOUR: I might have used the words non issue. What I intended to say is namely where I have to satisfy my own mind in the issue I would require corroboration of the issue; I would have thought in the circumstances that credit may have been a non issue.

MR. GRUZMAN: I would wish to expand on that and say in this case we believe that our client is entitled to the highest credibility. If your Honour decided that her credit was of value to Mr. Armstrong, your Honour has prejudged a vital issue in these proceedings.

The second point is the basis upon which your Honour found, as I understand it your Honour will require corroboration of anything Mrs. Armstrong said that there had been a substantial alteration in the amount she claimed in the petition.

HIS HONOUR: Do you not understand the meaning of an affidavit? Both applications you verified on affidavit, that she was the applicant to this Court and so verified.

MR. GRUZMAN: One was an application as to how much she wanted.

HIS HONOUR: Both were verified by affidavit and both were on oath surely?

MR. GRUZMAN: Your Honour has to decide whether it ruins her credit and puts her on an equal with Mr. Armstrong.

HIS HONOUR: I did not say that Mrs. Armstrong's credit was ruined at this stage.

MR. GRUZMAN: We understand that the judge says he is not prepared to accept anything unless it is corroborated and if credit is a non issue, that both parties start equally at

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scratch on that issue. To us one is the vital issue in the proceedings which has been prejudged.

Secondly, there is a detailed explanation on affidavit by Mrs. Armstrong which shows that the first application for $182,000, a capital sum together with other ancillary relief was made because of fear and harm of destruction in Court.

HIS HONOUR: That is a matter which can be dealt with during the hearing. I am holding up a very deserving case. I suggest you make the point you want to make and make them quickly. I may be forced to cut down entirely and let the other people come on. What is the other heading?

MR. GRUZMAN: The reason we are making this application is that we feel we are duty bound to do so.

HIS HONOUR: Are there any other headings of argument?

MR. GRUZMAN: The next matter is that your Honour found before having heard a word of evidence in the case that her original application was moderatley generous, slightly generous, or something of that kind, by reason of the second application her credit had gone. Therefore, she is obviously in the position of having no chance whatever before your Honour. If your Honour accepted as a proper basis to consider her claim, the amount of the application which your Honour has to consider, that means there is no chance for Mrs. Armstrong to receive the amount of the order she has applied for and she believes she is entitled to.

HIS HONOUR: I have that point.

MR. GRUZMAN: Well your Honour the next matter is your Honour's failure to take proper steps to secure for Mrs. Armstrong the rights of a wife before this Court and compliance with orders made by the Court designed to reveal to the wife what the husband's assets revealed to the wife and to the Court. I do not need to do more than mention the fact that there was a specious answer to our submissions, and a complete failure to answer interrogatories to the question.

I might mention that my friend Mr. Hughes had at 2 o'clock handed to me an unsworn draft of replies to practically one half.

HIS HONOUR: Are there any other matters?

MR. GRUZMAN: Those are the only matters I can recall to mind. I will deal with the question of the adjournment.

HIS HONOUR: Those are the headings under which you rely?

MR. GRUZMAN: There is another matter. Although this matter comes last, I overlooked it when mentioning other matters. It is very important so far as my client is concerned.

In an early stage in these proceedings your Honour directed that Mrs. Armstrong file an affidavit in respect of her financial affairs during the two years before the marriage. Mrs. Armstrong is very mindful of the fact that as a result of a lot of publicity her husband received in an earlier

case, there have been a lot of vicious rumours floating around as to what she did before her marriage.

We would, therefore, like to add that we were taken back at the form of your Honour's direction. An affidavit was filed, your Honour having made the direction.

HIS HONOUR: You complied without demur even when I rejected the first one and answered another one.

MR. GRUZMAN: When we were here before the Court your Honour made it clear you wanted that affidavit. There was so much discretion in a matter like this.

HIS HONOUR: Are you putting that as a ground?

MR. GRUZMAN: I contend that the first affidavit did not apply, because it showed you requested what she had done a further twelve months before she met Mr. Armstrong; it was irrelevant.

HIS HONOUR: That goes to the hearing.

MR. GRUZMAN: I am suggesting it is using knowledge outside the evidence.

HIS HONOUR: Is there any other evidence outside this application?

MR. GRUZMAN: This has happened with a bit of a rush so far as I can recall at the moment, subject to a transcript of your Honour's remarks.

HIS HONOUR: Are you continuing?

MR. HUGHES: We are opposing.

HIS HONOUR: The application is rejected. You now want an adjournment?

MR. GRUZMAN: Mr. Armstrong's affairs are extraordinarily complicated. Probably the most complicated set of financial affairs ever to come before this Court or any other Court of which I am aware. The amounts involved are extremely large.

HIS HONOUR: This matter was partly dealt with this morning. I do have another case which I have interrupted to allow you to make this application for an adjournment. The best time to do this is at 10 o'clock tomorrow morning. The case is specially fixed for then, and Mr. Armstrong is under both personal and economic restraint because of the orders made by His Honour Carmichael J. and repeated by myself. I have constantly delayed my other work in this Court and made myself available by starting in Melbourne to meet the demands to get this case ready. This Court has gone to an extraordinary length to try your application in this case and I do not see that I should continually interrupt my other work in respect of this matter, having made it the best part of a fortnight's special fixture.

I think if you want to make an application for an adjournment, that should be done at the time of the fixed hearing of the case which is at 10 o'clock tomorrow morning.

MR. GRUZMAN: We thought you would prefer to have the application now.

HIS HONOUR: I have another case to deal with and I do not see why I should become part heard in that second case,

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because I have been dealing with an application made out of turn. If you want to make an application for an adjournment you make that application.

MR. GRUZMAN: Would you take this as notice?

HIS HONOUR: It is not a question of my taking notice. The matter will be heard in this Court tomorrow. We will not be adjourning to Lasalle. This Court room will be made available throughout. One of the reasons is in order to maintain some security over documents which is not available at Lasalle.

I have already indicated that I will be doing a few short matters at 11 o'clock. I do not propose to adjourn for the morning break.

MR. GRUZMAN: May I file in Court the affidavit of discovery of Mrs. Armstrong, a copy of which has been handed to my friend.

MR. HUGHES: I have no application, your Honour."

Later the same afternoon the application was made to this Court. In support an affidavit was sworn by the wife. The course of events is summarized and there is some argumentative commentary thereon. Paragraph 54 states the grounds on which the application was made:

> "54. I respectfully submit to this Honourable Court:
> (a) that His Honour has pre-judged the issue as to my credit;
> (b) that His Honour has pre-judged the issue as to the propriety of making a claim with respect to the sum of $2 Million Dollars;
> (c) that His Honour has had regard to rumours about my life prior to my meeting Mr. Armstrong and is and intends to have regard to such rumours when making findings adverse to me;
> (d) that His Honour declined to hear an application today for an adjournment notwithstanding that I am unable at this stage without the knowledge as to the detailed issues which will arise and without the benefit of detailed investigation thereof to present evidence to support my case. And further to his Honour's finding as to credit His Honour has ruled that the normal inferences which follow from the failure to answer allegations properly made will not apply to these proceedings."

The statement of this last ground in the affidavit shows that a purpose of the application to this Court was in order to ensure that the hearing did not proceed the next day. If that were the primary purpose, the situation would be a grave one indeed. However, with such a purpose to impute bias to a judge would be so serious a misdemeanour that an inference of such a purpose is not enough to permit any conclusion that it was the primary purpose of the application.

The first objection of the applicant wife is that in the words spoken by the judge he indicated that he would require corroboration and there would be "no great value to either counsel in cross examination of credit because credit is a non-event in this case". Her attitude is expressed in par. 43 of her affidavit of 24th May:

> "43. I believe that if His Honour puts my credit on no higher basis than my husband's credit, I am gravely prejudiced before the taking of evidence has commenced."

This is a most extraordinary proposition—that the judge is biased because he approaches the two parties without bias, because he does not regard the credit of one as higher than the credit of the other! A party obsessed with his or her own case may perhaps be forgiven for such a distortion of reality but it is difficult to understand how it could be made the basis of an application to this Court for a writ of prohibition. When all the events relied upon occurred, as they did, in court, it is difficult to regard the advice given to her to commence these proceedings on such a ground as free from that same obsession. I so state because I will not assume that there was any ulterior and quite impermissible purpose.

What I have said is itself sufficient to dispose of the allegation of bias. But in view of the allegations generally something more should be said. It was the judge's view that an element in the case which might but did not necessarily need to be established was the assets position of the respective parties. His view was that if capacity to meet any order was not raised, there was no such need. His comments on an earlier day, which I have set out and which I shall not repeat, show this clearly but they also show that he was aware that other questions of fact would or could arise. It being recognized that there could be a need to get the assets position established, the judge was anxious to establish this by an inquiry which he recognized would be not unlike the inquiry into means under the prior legislation. His view was that such an inquiry was best not regarded as an adversary procedure. He may have been right or wrong but the error, if it was an error, could be corrected in the Family Court itself. On any view of the availability of the remedy of prohibition directed to a superior court, such a matter, going to procedure only, could not ground a writ of prohibition.

Next, though the remarks of the judge made on 24th May were, I would say, unwise, they were nevertheless remarks which he was entitled to make without suffering the imputations which have been made. He had spent days dealing with preliminary

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stages of the application and was no doubt fully apprised of the affidavits and other documents which had been filed by each party. On the one hand he had a husband who swore that, far from possessing any assets, he was in fact insolvent—an insolvent who could however offer a lump sum of $350,000 in settlement of the maintenance and property settlement claim. On the other hand, he had a wife who swore that her husband had assets worth $15,000,000; that her support and a just and equitable settlement of property upon her required the making of an order in an amount of $2,000,000; that her requirements apart from anything else were a residence in Sydney which would cost $175,000 to $200,000 (in addition to her residence in England estimated by her to be worth in all $100,000) and, as well, a residence in Monte Carlo which would cost in all $250,000 and a residence in the United States which would cost $75,000; and, further, that the cost of upkeep of the residence in England, with food and staff will be $40,000 per year and of the other residences $15,000 per year plus $175 per week for staff. It is understandable that the judge should approach the matter with a determination to concentrate his attention on independent evidence. Whether he should have said so is another matter but to say so does not remotely ground a writ of prohibition.

The next matter alleged to show bias is the fact that his Honour on 20th April required the applicant wife to file an affidavit giving details of her financial position, her working capacity and her usual way of life in the two years before her marriage; that on 30th April he reprimanded her legal advisers for filing an affidavit by the wife swearing her information or belief that the information so required by the judge was irrelevant; that, on discovering that in the two years nominated by him the applicant had been kept by the respondent husband, he required an affidavit on the same matters as previously required but in respect of the period of twelve months prior to the time when she became part of a permanent relationship with her later husband, before she was able to rely on him for any financial benefits.

No suggestion that this requirement was extraordinary was made until the application made to the judge not to hear the case on the afternoon of 24th May. Mr. Gruzman for the wife referred to this requirement of his Honour and said "Mrs. Armstrong is very mindful of the fact that as a result of a lot of publicity her husband received in an earlier case, there have been a lot of vicious rumours floating around as to what she did before her marriage". He then suggested that the judge was using

knowledge outside the evidence the only inference being that he was referring back to the last mentioned matter. The suggestion was impertinent on any view of the matter and contemptuous of the court's dignity, whether or not it amounted to criminal contempt. Here again it may be possible to explain the wife's attitude, stated thus in court and repeated in her affidavit, in terms of her obsession with her own case. But I find it difficult to explain the conduct of the adviser, who must be taken to have known the terms of s. 72 of the *Family Law Act* 1975 whereby a party to a marriage is liable to maintain the other party "if, and only if, that other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage who has not attained the age of 18 years" (not relevant in the present case) "or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason having regard to any relevant matter referred to in sub-section 75 (2)". The judge had referred specifically to s. 75 (2) (b) when he first required the affidavit on 20th April. The suggestion that he had any matter in mind other than his obligation under s. 72 is more than far-fetched. It is the product either of obsession or of ulterior purpose. I shall assume that it is the former rather than give it the grave implications which would attend the latter.

After the order nisi was granted a further event occurred in the judge's court. In the course of another matter on the day following the granting of the order nisi the judge is reported to have said words to the following effect:

> "I have caused the High Court enough trouble in the last twenty-four hours . . . [then some comment which is not recollected] . . . They have prohibited me—I think it is something about calling a character witness from Paraguay".

On reading the affidavit of the person who deposed to these words being said, the applicant swore an affidavit containing the following paragraphs:

> "2. I believe that the reference to a character witness from Paraguay must refer to Mr Alexander Barton who has received wide publicity as an alleged fugitive residing in that country.
> 3. I have had no connection with or knowledge of Mr Barton except from what I have read in the newspapers since the termination of the Barton and Armstrong proceedings before His Honour Mr Justice Street in 1969.
> 4. In these proceedings Mr Barton was opposed to my husband and I believe that His Honour's comment

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> suggests that in his opinion my credit worthiness is such that I would propose to call Mr Barton as a witness as to my character."

It may fairly be inferred that his Honour had in mind a member of the Barton family in view of the litigation between Barton and Armstrong and the notorious presence of Alexander Barton in Paraguay. What else the comment meant it is impossible to say. Certainly it is impossible to construct out of it that which the applicant wife deposes to be her belief. The judge may have been mistaken or he may have been attempting inadequately to recollect in his mind what possible ground there was for an application to this Court. It would have been better not to have said anything of the sort, but that is not a ground for prohibition. The aphorism that justice must appear to be done can do more harm than good if its application is extended to areas of conjecture and speculation.

In saying what I have said I think that I have made it sufficiently clear that I do not regard the course of events before Watson J. as a model course. The lesson to be learned is that the dialogue commonly accepted between Bench and Bar has dangers which no doubt make silence the counsel of perfection. It is a counsel which is hard to learn and, to speak of my own experience, is never fully learned. But it will be a sad day when the comments of a judge, during pre-trial procedures or during the course of a trial, are taken to reflect on that integrity which has fitted him for the office which he holds. He is justified in proceeding upon the basis and in the confidence that his integrity is beyond question. That confidence may lead him into words or conduct in court which fall short of that model of conduct we would all aspire to but which none of us attain. Then it is fair and right that his words or conduct should be disapproved. But let it be remembered that it is confidence in his own integrity which supports him not only in his judgment but in all his words and conduct, both that which may be approved and that which may be disapproved. Let none by conjecture or base imputation undermine that confidence, however much they may criticize his judgment or the way he conducts his court. To do so is to shake the foundations of justice.

Lastly, I would state that whether or not Watson J. continues to deal with the application is a matter for him and for him alone. It would be an easy course for him, discomforted as he must be by the course of events, to decide not to deal further with the application but to hand it over to another judge. But what

must be borne in mind is that so to decide would be to enable these proceedings to achieve that result which was the purpose of their institution, a result which is not achieved by the conclusion which I reach in these proceedings.

I would discharge the order nisi with costs, including the costs of the husband who was not made a party to the application but who was served with notice pursuant to the order nisi and who was given leave to appear.

Order absolute in terms of order nisi. Alexander Ewan Armstrong who, as the respondent in Application No. S. 4811 *of* 1976 *in the Family Court of Australia, was heard in these proceedings in opposition to this application, to pay prosecutrix's costs.*

Solicitor for the prosecutrix, *Cedric R. Symonds.*

Solicitor for the respondent, *Alan R. Neaves* Crown Solicitor for the Commonwealth.

Solicitors for A. E. Armstrong, *Dare, Reed, Martin & Grant.*

R.C.M.