

**Presentation by The Hon. Justice Brian J Preston
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‘Natural justice by the courts: some recent cases’

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In administering justice, courts are required to uphold principles of procedural fairness or natural justice. These principles include ensuring hearings are conducted in open court, are fair and there is no bias, either actual or apprehended, by the judicial officer hearing the proceedings. This paper illustrates how these principles operate in the courts by examining a selection of recent cases from Australia and the United Kingdom. It emphasises the importance of judicial officers observing procedural fairness in hearing and determining cases.

Introduction

I have been charged with the task of providing an update on recent developments in the practice and procedure of courts in conducting proceedings. In discharge of this task, I have selected some recent judicial decisions in Australia and England regarding the duties of courts to afford natural justice.

A core attribute of the rule of law is that the adjudicative procedures used by courts to determine cases should be fair. This requires the courts to observe the principles of natural justice or procedural fairness. The principles of natural justice are manifold but include, when applied to a court administering justice: an open hearing; a fair hearing; and the absence of bias, both actual and apprehended, by the judicial officer hearing the proceedings. I have, therefore, grouped my selected recent judicial decisions under four topics:

1. Hearings are to be in open court.
2. Hearings are to be fair.
3. Ensuring fair hearings when dealing with litigants in person and their agents.
4. No reasonable apprehension of bias of the hearing judge.

Hearings to be in open court

The first of the principles of natural justice with which I will deal is the common law principle that courts conduct their proceedings, including hearings, publicly and in open view.¹ The open-court principle provides a visible assurance of independence and impartiality. It is an essential characteristic of all courts.² The general rule of open administration of justice and the reasons for it were summarised in *Russell v Russell*.³

It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted publicly and in open view (*Scott v Scott* [1913] AC 417 at 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure' (*McPherson v McPherson* [1936] AC 177 at 200).⁴

The common law, open-court principle is sometimes clarified by specific court legislation. For example, s 62 of the *Land and Environment Court Act 1979* (NSW) provides '[a]ll proceedings before the Court shall, unless the Court otherwise orders, be heard in open court.'

Both the common law and legislation admit certain exceptions to the general rule of open administration of justice. Kirby P summarised exceptions accepted by the courts as including:

cases where a court is charged with the responsibility for a child invoked by the Queen as *parens patriae*; cases where the court is charged with the responsibility for the mentally ill; cases where trade secrets, secret documents or communications or secret processes are involved; cases where disclosure in a public trial would defeat the whole object of the action (as in blackmail cases or cases involving police informers); to keep order in court; in certain circumstances of national security and in the performance of administrative or other action that may properly be dealt with in Chambers.⁵

¹ *Scott v Scott* [1913] AC 417 at 441.

² *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at [62].

³ (1976) 134 CLR 495 at 520 per Gibbs J. See also at 505 per Barwick CJ and at 532 per Stephen J.

⁴ See also *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50-53 per Kirby P.

⁵ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 54.

Again, legislatures have commonly enacted specific laws designed to permit courts to proceed in camera (not in open court) and to control the circumstances in which they may do so. An example of such a legislative provision is s 71 of the *Civil Procedure Act 2005* (NSW).⁶ This provision catalogues a limited number of circumstances in which a court may conduct its proceedings in the absence of the public:

Subject to any Act, the business of a court in relation to any proceedings may be conducted in the absence of the public in any of the following circumstances:

- (a) on the hearing of an interlocutory application, except while a witness is giving oral evidence,
- (b) if the presence of the public would defeat the ends of justice,
- (c) if the business concerns the guardianship, custody or maintenance of a minor,
- (d) if the proceedings are not before a jury and are formal or non-contentious,
- (e) if the business does not involve the appearance before the court of any person,
- (f) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit,
- (g) if the uniform rules so provide.

The reference to the uniform rules is to the *Uniform Civil Procedure Rules 2005* (NSW). These rules do provide particular circumstances where a court may conduct its business in the absence of the public.⁷

One of the accepted exceptions to the general rule that courts and court hearings be open to the public is for security reasons. Again, legislatures have commonly clarified both the general rule of openness to the public and the exception of closure to the public or certain persons for security reasons. An example is the *Court Security Act 2005* (NSW). Section 6(1) of the *Court Security Act 2005* (NSW) provides that:

⁶ Formerly s 80 of the *Supreme Court Act 1970* (NSW).

⁷ UCPR r 7.36 (referral of a litigant to a barrister or solicitor); r 29.16 (offers to make amends for defamatory publications: determination of questions); r 32.4 (application for notice under the *Evidence and Procedure (New Zealand) Act 1994* (Cth) for failure to comply with subpoena); r 38.5 (examination of judgment debtor); r 42.31 (recovery of assessed costs in Supreme Court); r 51.14 (concurrent hearings in relation to applications for leave to appeal); r 51.15 (application for leave to appeal); r 51.57 (application for order that appeal or other proceedings be heard during fixed vacation); r 53.2 (proceedings for registration of a judgment under *Foreign Judgments Act 1991* (Cth)); r 56.4 (application for adoption order); and r 56A.4 (application for parentage order).

- (1) A person has a right to enter and remain in an area of court premises that is open to the public if:
 - (a) the person has complied with all relevant orders made by a judicial officer (whether under this Act or another law) in respect of the person, and
 - (b) the person has complied with all directions or requirements made by a security officer under this Act in respect of the person.

The right extends to journalists making a media report outside court premises.

Section 6(2) provides:

- (2) Without limiting subsection (1), a journalist has a right to enter and remain in an area of court premises open to the public that is located outside of a building in which the court is housed or is sitting for the purpose of making a media report if the journalist is not obstructing or otherwise impeding access to the building.

These rights of access are subject to the exceptions in s 6(3):

- (3) This section has effect subject to the following:
 - (a) the provisions of this Act,
 - (b) any inherent or implied jurisdiction of a court to regulate its proceedings,
 - (c) any other Act or law about persons who may be present in a court or court premises.

Three recent judicial decisions deal with different aspects of the general rule of open administration of justice and the limited exceptions where there can be derogation from the general rule. The first case deals with the exclusion of a particular person from a courtroom and from court premises under the Court Security Act; the second case with the exclusion of the public generally from a coronial inquest for reasons of national security; and the third with the exclusion of an officer of a corporate party from the hearing because he was also to be a witness. The three decisions, although factually very different, are similar in affirming the importance of the general rule of the open administration of justice and the reluctance to derogate from the general rule by expanding the field of secret justice.

Exclusion of a particular person from court premises

In *Attorney-General v Bar-Mordecai*,⁸ a person declared a vexatious litigant wished to obtain leave to file an initiating notice of motion for leave under s 14 of the *Vexatious Proceedings Act 2008* (NSW) to file an application for leave to institute proceedings. The registry of the Supreme Court of NSW refused to allow him to file his initiating notice of motion. He therefore attended the court in which the duty judge was sitting that week for the purpose of filing his notice of motion. The court officer presented him with a form to complete, which he did. He took a seat and waited for the duty judge to come on to the bench. At five minutes before 10.00am, the duty judge's tipstaff asked the litigant where the documents were that he wished to file. He said he had them with him in a bundle. He said that shortly after that conversation, three Sheriff's officers and two court security officers entered the courtroom and surrounded him. He said they threatened him with force and physical harm.

Subsequently, the litigant said that the tipstaff took the documents to the duty judge and returned shortly afterwards. He said the tipstaff said to him that 'the judge has refused to adjudicate your matter' and returned the documents to him. The tipstaff then asked the litigant to leave the court. He said he would not leave the court as he had a right to be heard and the judge was obliged to deal with his ex parte application under s 14(2) of the *Vexatious Proceedings Act*. The tipstaff reiterated that 'you will have to leave' and indicated to the security officers and Sheriff's officers that she required the litigant to be removed from the court by force in view of his refusal to leave. The litigant said he was then forcefully ejected or removed from the courtroom.

Two days later, the litigant again presented himself in the duty judge's court to file his notice of motion. The Sheriff's officers and court security officers again attended the court. The litigant said that, whilst he was seated at the bar table, the duty judge's associate approached him and they conversed. The litigant said he was seeking to file the documents in court in an ex parte hearing. The associate said to him that the

⁸ [2010] NSWSC 1410.

judge 'has refused to see you'. The Sheriff's officer then approached the litigant. The Sheriff's officer said they had been called by court security who in turn had been called by 'the judge or the associate'. The Sheriff's officer said to the litigant 'you will have to leave or we will have to throw you out forcefully'. The litigant replied that he would leave the premises. The litigant claimed that the Sheriff's officers detained him and accompanied him to see the Duty Registrar before accompanying him to the ground level of the court building where the litigant left the building for the day.

The litigant subsequently filed a further initiating notice of motion for leave to file an application to institute proceedings against the State of NSW for two causes of action in assault arising out of the two occasions in court and a cause of action in wrongful detention. This was the notice of motion dealt with by McCallum J of the Supreme Court of NSW.

In the course of her judgment, McCallum J noted that no explanation had been given as to why, after the duty judge's refusal to entertain the litigant's application, he was asked to leave the courtroom. McCallum J noted that he was entitled to remain in court as any member of the public was.⁹

Nevertheless, McCallum J concluded that it had not been established that the security officer and Sheriff's officers acted unlawfully. The right of a person to enter and remain in court is subject to the Court's inherent or implied jurisdiction to regulate its proceedings¹⁰ and the power of a judicial officer to order a particular person to leave the court premises.¹¹

The litigant's case was that the security officers and the Sheriff's officers were summoned by the judge or the judge's staff and implemented the decision of the judge to remove him. The basis upon which the litigant alleged that his removal from the courtroom was unlawful and amounted to an assault was that the Sheriff's officers and security officers did not show him a warrant or court order authorising them to remove the litigant. Section 17 of the Court Security Act, however, provided

⁹ *Attorney-General v Bar-Mordecai* [2010] NSWSC 1410 at [43].

¹⁰ *Court Security Act 2005* (NSW) s 6(3).

¹¹ *Court Security Act 2005* (NSW) s 7.

that no such instrument was required. The removal was therefore lawful and they could use such force as was reasonably necessary.¹²

Accordingly, although the decision to remove the litigant remained unexplained, there was not a prima facie ground for prosecuting proceedings for assault or unlawful detention against the State of NSW on the strength of the acts of the security officers and the Sheriff's officers in aid of that decision.¹³ Hence, the litigant's application for leave to institute those proceedings was dismissed.¹⁴

The case, although quirky, emphasises the importance of the open-court principle. A court is to conduct its business in open court and any person has a right to enter and remain in an area of the court premises open to the public. The persons entitled to be present in a court or on court premises include vexatious litigants and the media. Persons may only be excluded from court premises by a specific court order. There needs to be a specific order of a judicial officer that, for the purposes of securing order and safety in court premises or a part of court premises such as a courtroom, the public generally or a specified member of the public should leave or not be admitted to the court premises or courtroom.¹⁵ What was unexplained in this case was whether there was actually an order of the judge that the litigant leave the courtroom and court premises (rather than of the judge's staff) and, if so, what were the reasons for such an order (including whether they related to securing order and safety).

The open-court principle extends not only to hearings conducted by a court in a courtroom but to wherever a court hears proceedings. Some courts, such as the Land and Environment Court of NSW, conduct hearings of proceedings wholly or in part on the site of the dispute in the proceedings, such as the site of the proposed development the subject of an appeal against a decision of a public authority refusing consent to carry out such development, or in council chambers, town halls, or other buildings.

¹² *Court Security Act 2005* (NSW) s 17.

¹³ *Attorney-General v Bar-Mordecai* [2010] NSWSC 1410 at [47].

¹⁴ *Ibid* at [48].

¹⁵ *Court Security Act 2005* (NSW) s 7(1).

Wherever a court hears proceedings, it must ensure that the common law and statutory duty to hear proceedings publicly and in open view is discharged. If the venue for the hearing does not permit all persons who have a right to be present while the court conducts the hearing of the proceedings to enter and remain in the venue, and to actually observe and hear the proceedings, then the court needs to adjourn the hearing of the proceedings to another venue where their right can be upheld.

Exclusion of the public generally from a hearing

I have mentioned that the open-court principle is subject to statutory exceptions. Section 71 of the *Civil Procedure Act 2005* (NSW) is such a statutory exception. It provides that the business of a court (including the Land and Environment Court) in relation to any proceeding, may be conducted in the absence of the public in any of the particular circumstances listed.

Where a statutory provision, such as s 71 of the Civil Procedure Act, permits the court to conduct business in the absence of the public, a question of construction arises as to the meaning of ‘the public’ who can be excluded. Does ‘the public’ mean ‘any person’ or does it mean those persons of the wider public who are not properly interested persons and their legal representatives? This question of construction of ‘the public’ in court rules allowing a court to conduct the business of the court in the absence of the public arose in the English decision of *Regina (Secretary of State for the Home Department) v Inner West London Assistant Deputy Coroner*.¹⁶

A coroner was conducting an inquest into the deaths of the victims of the bombings in London in 2005, including investigating whether the bombings could have been prevented by the police or Security Service. The Home Secretary requested the coroner to direct, pursuant to rule 17 of the *Coroner’s Rules 1984*, that the public, including the bereaved families and their legal representatives, be excluded from hearings at which sensitive evidence relating to the Security Service would be received. Rule 17 provided: ‘Every inquest shall be held in public: Provided the

¹⁶ [2010] EWHC 3098 (Admin); [2011] 1 WLR 2564.

coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interests of national security so to do.’

The coroner refused the Home Secretary’s application on the ground that the power in rule 17 to exclude ‘the public’ in the interests of national security did not extend to properly interested persons and their legal representatives. The Home Secretary’s claim for judicial review of the coroner’s decision was dismissed by the Administrative Court, a specialised court in the Queen’s Bench Division of the High Court of England and Wales. Maurice Kay LJ noted that ‘open justice has been established as a fundamental principle applicable to judicial proceedings. It is not an absolute rule but exceptions to it are essentially for Parliament to create.’¹⁷ Maurice Kay LJ accepted that a coronial inquest is by definition an inquisitorial process and is different in kind from adversarial civil and criminal litigation. ‘However’ he noted, ‘the fact that inquests are inquisitorial does not diminish their context as essentially judicial procedures which are governed by the principle of open justice except to the extent that that principle is limited by statutory provision.’¹⁸

Maurice Kay LJ held that the statutory provision in question, rule 17, did not have the exclusionary effect for which the Home Secretary contended. The rule in its first sentence recognises that legal proceedings should be open to the public. The proviso permits the coroner to exclude ‘the public’. This means members of the public in a wider sense, meaning all those who are not properly interested persons and their legal representatives. To exclude also properly interested persons and their legal representatives would be in conflict with the principle of open justice and its aims of transparency and participation. Clear language to that effect would be needed before such a construction should be adopted. The legislature has not used such clear language.¹⁹

¹⁷ *Regina (Secretary of State for the Home Department) v Inner West London Assistance Deputy Coroner* [2010] EWHC 3098 (Admin); [2011] 1 WLR 2564 at [10] citing *Scott v Scott* [1913] AC 417 at 485 and *Al Rawi v Security Service (Liberty intervening)* [2010] 3 WLR 1069 at [38].

¹⁸ *Ibid* at [24].

¹⁹ *Ibid* at [11], [14], [15], [23] and [25].

Stanley Burnton LJ agreed with Maurice Kay LJ, adding:

Rule 17, in its first sentence, recognises the fundamental principle of our legal proceedings, namely that they should be public unless there is good reason for them not to be. Quite apart from this, however, in the first part of rule 17 the natural meaning of 'public' is persons other than properly interested persons. There is no reason to ascribe any other meaning to 'public' in the proviso... Like Maurice Kay LJ, I consider that specific and clear words would have been required to qualify the rights of properly interested persons...in order to achieve what is sought by the claimant.²⁰

Exclusion of parties from a hearing

The third of the recent decisions on the open-court principle is another English decision. In *R (on the application of Elvington Park Ltd and Elvington Events Ltd) v The Crown Court at York and the City of York Council*,²¹ two companies appealed against noise abatement notices issued by a local council in respect of excessive noise emitting from the companies' premises affecting nearby residential properties. The appeal was dismissed by the Magistrates' Court and the companies appealed to the Crown Court. At the hearing of the appeal in the Crown Court, a witness who was also the company secretary of the appellant companies was asked by the usher, a court officer, to remain outside the court during the hearing until being called as a witness to give evidence. As a consequence, the companies' lawyer was left without a person in court from whom he could take instructions as the hearing proceeded. In contrast, officers of the respondent local council, who were also to be called as witnesses, did sit in court during the hearing and provided instructions to the respondent's lawyer. The hearing judge of the Crown Court agreed to the council officers being in court. The Crown Court dismissed the companies' appeal.

The companies sought judicial review to quash the decision of the Crown Court on the ground that their witnesses, and in particular their company secretary, were excluded from the court, whilst other persons who were giving evidence were allowed to remain in court, with the resulting unfairness in the proceedings.

The Administrative Court dismissed the claim for judicial review but made some relevant observations on open and fair hearings. First, the exclusion of witnesses of

²⁰ Ibid at [36], [37].

²¹ [2011] EWHC 2213 (Admin); [2012] JPL 173.

fact from the hearing before giving evidence does not apply to the parties themselves, or their solicitors or their expert witnesses, who are never excluded from the court. For corporate parties, an officer of the company who is to be called to give evidence cannot be excluded from the hearing.²²

Secondly, the court officer's direction that all witnesses should stay outside was not established to be based on a ruling by the hearing judge. The court officer seemed to have taken upon himself the task of excluding witnesses. However, no one asked the court officer whether parties (which would include officers of a corporate litigant) could come in to the court or drew the court officer's attention to the fact that one of the witnesses was the corporate secretary of the corporate appellants.²³

Thirdly, the companies' lawyer should have raised the question of the company secretary's absence from the court, and hence the absence of a person from whom instructions could be obtained during the hearing, with the hearing judge. The failure to take the obvious point was properly to be regarded as an election not to take it. The companies could not later complain of procedural unfairness in the conduct of the hearing by the exclusion of the company secretary from the hearing.²⁴

Hearings to be fair

The second principle of natural justice I wish to address concerns the hearing rule of natural justice. It is incumbent on the judicial officer hearing proceedings to ensure that the proceedings are conducted fairly and that all parties receive a fair hearing. There are many ways in which these duties might be breached. I will identify two ways that have arisen in recent cases. The first concerns the judicial officer hearing the proceedings not permitting a party to present evidence and make submissions in support of the party's case. The second concerns the judicial officer failing to

²² *R (on the application of Elvington Park Ltd and Elvington Events Ltd) v The Crown Court at York and the City of York Council* [2011] EWHC 2213 (Admin); [2012] JPL 173 at [31] citing *Tomlinson v Tomlinson* [1980] 1 WLR 322; [1980] 1 All ER 593 at 596; *Mobile Export 365 Ltd v Commissioners for HMRC* [2010] UKFTT 367 (TC) at [52], [53].

²³ *R (on the application of Elvington Park Ltd and Elvington Events Ltd) v The Crown Court at York and the City of York Council* [2011] EWHC 2213 (Admin); [2012] JPL 173 at [34] and [35].

²⁴ *Ibid* at [36].

consider the evidence and submissions of a party in determining the proceedings.²⁵ Both result in a breach of the hearing rule.

Not permitting a party to call evidence

The first way in which the hearing rule can be breached is illustrated by the recent decision in *Director of Public Prosecutions (NSW) v Elskaf*.²⁶ A magistrate had refused to permit a prosecutor to adduce evidence from two police officers, which the prosecutor submitted was relevant to making out the charge against the defendant. The defendant had been charged with driving his black Ferrari through a red traffic signal in Kings Cross. The defendant denied the charge. He said that there must have been a second black Ferrari at that time and place and the police officers were mistaken in identifying his black Ferrari. The prosecutor sought to call evidence from police officers which would have been relevant to establishing that the defendant's black Ferrari was the same car that had been seen turning against the red light signal, and not some other black Ferrari. The magistrate refused to permit this evidence and so ruled even before the witnesses had been called, before the statements of those witnesses had been tendered and before reading the statements to ascertain the nature and content of the proposed evidence. The magistrate had evidently formed a view about her decision in the case before so ruling because she was able to say that the proposed evidence would not assist the prosecution even though the prosecutor had not closed his case; the prosecutor had not had any opportunity to make submissions at all as to whether the charges had been proved, either on a prima facie case, or on the basis of final submissions; and the defendant had not given any indication whatever as to what course, either with respect to any application or the calling of any evidence, he intended to follow.²⁷

Garling J of the Supreme Court of NSW held that the magistrate had denied the prosecution procedural fairness by not permitting the prosecutor to call such witnesses as he required. Garling J stated:

²⁵ In *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 200 ALR 447 Gleeson CJ, McHugh and Gummow JJ stated that a failure of a trial judge to properly consider a party's case is to fail to discharge a paramount judicial duty: at [63].

²⁶ [2012] NSWSC 21.

²⁷ *DPP (NSW) v Elskaf* [2012] NSWSC 21 at [32].

The obligation of a judicial officer hearing a defended case is to hear it fairly and to judge it according to law, upon such evidence as either party to the proceedings might wish to adduce, and which is admitted. It is no part of a presiding judicial officer's function to take over the conduct of the case of one or other party and, in effect, summarily to prevent the calling by the prosecutor of any evidence where the prosecutor considered the evidence to be relevant to making out the charge: see *Director of Public Prosecutions v Wunderwald* [2004] NSWSC 182 at [21] per Sully J.

Dawson J in *Whitehorn v The Queen* [1983] HCA 42; 152 CLR 657, said at 682:

'A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. ... It is no part of the function of the trial judge to ... [don] the mantle of prosecution or defence counsel. He is not equipped to do so, particularly in making a decision whether a witness should be called.'

It is clear that the Magistrate should have, but did not, permit the prosecution to call the witnesses who the prosecutor submitted were relevant. If the evidence of the witness was not relevant, then after the witness was called, it was a matter for the defendant's counsel to object to the evidence on the basis of a lack of relevance: s 56 *Evidence Act 1995*. Alternatively, if it was thought to be an appropriate course, the evidence could have been tested as to its relevance on a voir dire. Neither of these courses was adopted. Rather, the Magistrate peremptorily refused to permit the prosecutor to call one or more witnesses.

In that respect, her Honour's conduct of this matter fell short of the required standard of a trial judge acting properly and I conclude that there has been, as submitted by the prosecution, a denial of procedural fairness.²⁸

As Garling J observed, this was not the first occasion that the magistrate concerned had intervened in criminal proceedings in the trial process and prevented witnesses being called by the prosecution in defended trials.

In *Director of Public Prosecutions (NSW) v Wunderwald*,²⁹ Sully J of the Supreme Court of NSW found that the same magistrate had closed off the calling by the prosecutor of any evidence the prosecutor considered to be potentially relevant to the making out of the charge. Sully J held:

it was not for her Worship, in effect, to take over herself the conduct of the prosecution case, and, in effect, peremptorily to close off the calling by the prosecutor of any evidence that the prosecutor considered to be potentially relevant to the making out of the charge. Her Worship's duty was to hear fairly, and to judge

²⁸ *Ibid* at [42]-[45].

²⁹ [2004] NSWSC 182.

according to law, such evidence as either party to the proceedings before her Worship might wish to adduce.

...

It seems to me ... that her Worship was obliged at least to hear any evidence that the prosecutor wished to call; to rule properly upon any objection based upon relevance; or, indeed, based upon any other proper and available ground as to either the admissibility at law or the admission in fact of any such item of evidence tendered by the prosecution; and then to establish clearly whether the prosecutor had in fact closed his case.

...

I would add ... that there was a clear failure of procedural fairness in the way in which her Worship dealt with the prosecution and with the prosecutor. No doubt it is the fashion to speak, as indeed the rules of this very Court speak, in terms of the 'just, quick and cheap disposal' of matters; but as the present Chief Justice of the High Court has pointed out: in that formula, the most important part of the formula is the comma after the word 'just'.³⁰

Finding facts without evidence

The second way the hearing rule can be breached is for a court to resolve disputed issues of fact without first permitting a party to call evidence and then considering and basing factual findings on the evidence called by the parties. The necessity for the court's factual findings to be founded on evidence before the court is linked to the requirement that parties be permitted to call evidence. For a court to make findings or draw inferences of fact without considering the evidence adduced by a party at the hearing has the same consequence as not permitting a party to adduce evidence. Either way, the court's adjudicative decision is not based on the party's evidence and the party has been denied a fair hearing.

Courts have held that 'it is an incident of judicial duty for the judge to consider all the evidence in the case.'³¹ The means by which a judge demonstrates consideration of the evidence in the case is in the judge's reasons for judgment. The duty to give reasons is also an incident of the judicial process or function.³² The duty is a function

³⁰ *DPP (NSW) v Wunderwald* [2004] NSWSC 182 at [21], [23], [31].

³¹ *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728.

³² *Housing Commission (NSW) v Tatmar Pastoral Co* [1983] 3 NSWLR 378 at 386; *Public Service Board of NSW v Osmond* [1987] HCA 7; (1986) 159 CLR 656 at 667; *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 at [54], [55], [58].

of due process and therefore of justice.³³ As was held in *Wainohu v New South Wales*:³⁴

The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.

Where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the judge, an appellate court may infer that the judge overlooked the evidence or failed to give consideration to it.³⁵ As Samuels JA said in *Mifsud v Campbell*:³⁶

for a judge to ignore evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge ... may promote a sense of grievance in the adversary and create a litigant who is not only 'disappointed' but 'disturbed' – to use the words which appear in the New Zealand case of *Connell v Auckland City Council* [1977] 1 NZLR 630 at 634. It tends to deny both the fact and the appearance of justice having been done.'

Furthermore, there is a judicial duty to make findings of fact and draw inferences of fact on the evidence before the court. A court that makes a finding of fact or draws an inference of fact when there is no evidence in support of that finding or inference makes an error of law.³⁷

The judicial duty to base findings of fact on some evidence in the proceedings was affirmed in *Kostas v HIA Insurance Services Pty Ltd*.³⁸ Mr and Mrs Kostas had entered into a building contract with a builder to carry out building works at their residence. They alleged that the builder had breached the contract by its inability and unwillingness to complete the work, suspension of work without reasonable cause and failure to proceed diligently with the work. After giving notice, they purported to terminate the contract. The builder denied their entitlement to terminate

³³ *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377; [2000] 1 All ER 373 at 377.

³⁴ [2011] HCA 24; (2011) 243 CLR 181 at [58] per French CJ and Kiefel J.

³⁵ *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435 at 442; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443.

³⁶ (1991) 21 NSWLR 725 at 728.

³⁷ *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 at [90], [91] but see [34].

³⁸ [2010] HCA 32; (2010) 241 CLR 390.

and treated the purported termination as a repudiation. The Consumer, Trader and Tenancy Tribunal of NSW found that Mr and Mrs Kostas' purported termination was ineffective and that they had repudiated the contract. Critical to the Tribunal's conclusion was a finding adverse to Mr and Mrs Kostas that the builder had properly given notice of claims for extensions of time. That was a finding for which there was no evidence before the Tribunal.³⁹

The various appeals to a single judge of the Supreme Court of NSW, the NSW Court of Appeal and the High Court of Australia primarily concerned the scope of the appeal from the decision of the Tribunal, which was limited to an appeal from a decision of 'a question with respect to a matter of law.' The High Court held that a decision of the Tribunal for which there was no evidence could be characterised as a decision of a question with respect to a matter of law.⁴⁰

Finding facts for which there is no evidence breaches the judicial duty to observe procedural fairness and is incompatible with a rational process of decision-making. As French CJ observed, the Tribunal's procedural freedom to determine its own procedure, not be bound by the rules of evidence, and inquire into and inform itself on any matter in such manner as it thinks fit, is not without qualification:

There are qualifications upon the Tribunal's procedural freedom. One, which is explicit, is the requirement to observe procedural fairness. The Tribunal's *modus operandi* must also serve its function, which, in this case, was to hear and determine a building claim. That function implies a rational process of decision-making according to law. A decision based on no information at all, or based on findings of fact which are not open on information before the Tribunal, is not compatible with a rational process.⁴¹

The magistrate's conduct in the two cases to which I have earlier referred also involved this error of determining proceedings without making findings of fact from evidence adduced by the parties, an error the same magistrate committed in yet another case. *Director of Public Prosecutions (NSW) v Lee*⁴² was a rather bizarre case where a funeral director was charged with the offence of obtaining money by

³⁹ *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 at [3], [6], [8].

⁴⁰ *Ibid* at [59], [90], [91].

⁴¹ *Ibid* at [16].

⁴² [2003] NSWSC 612.

deception. The funeral director charged the relatives of a woman for the funeral service of cremating the woman's body and charged the relatives of a man for the funeral services of burying the man's body. By mistake, the woman was put in the wrong coffin and it was the man's body that was cremated. Upon realising his mistake, the funeral director put pavers and bricks in the coffin with the woman's body to make it heavier so that the pall bearing relatives of the man would not notice that the coffin was lighter than it ought to have been. The woman's body was then buried.

The magistrate delivered judgment without hearing any evidence and merely on the facts stated by the defendant and prosecutor from the bar table. James J of the Supreme Court of NSW held that the magistrate had erred in law in giving judgment and determining questions of fact which were contentious without having heard any evidence.⁴³

In yet another case, *Director of Public Prosecutions (NSW) v Armstrong*,⁴⁴ the same magistrate gave judgment dismissing information for an offence without making appropriate findings of fact from the evidence.⁴⁵ Instead, the magistrate used intemperate language that inappropriately denigrated the evidence of the police officers called by the prosecutor.⁴⁶

These cases emphasise the need for judicial officers, first, to permit parties to call relevant evidence to make out their case and, secondly, to consider and to make appropriate findings of fact and draw appropriate inferences of fact based on the evidence before the court. Compliance with these duties is essential in order to ensure parties have a fair hearing.

Ensuring fair hearings when dealing with litigants in person and agents

Upholding the principle of natural justice of providing a fair hearing to parties is particularly important where one of the parties is not represented by a legal

⁴³ *DPP (NSW) v Lee* [2003] NSWSC 612, at [36], [37].

⁴⁴ [2010] NSWSC 885.

⁴⁵ *DPP (NSW) v Armstrong* [2010] NSWSC 885 at [27].

⁴⁶ *Ibid* at [40].

practitioner, but rather is self-represented or represented by an unqualified agent. Two recent cases deal with this issue of providing a fair hearing to a litigant who is unrepresented or represented by an unqualified agent.

In *Jeray v Blue Mountains City Council (No 2)*,⁴⁷ an unrepresented litigant, Mr Jeray, on the fourth day of a hearing in the Land and Environment Court of a judicial review challenge to development consents, brought a motion for the trial judge to recuse himself.

Mr Jeray argued that the trial judge ought not sit on the recusal application as it concerned himself. The trial judge said it was proper for him to hear the application for recusal. The judge dealt with the motion and dismissed it. He then asked Mr Jeray to proceed with his judicial review challenge, but Mr Jeray protested that he could not. The judge heard submissions from the respondents to the effect that if Mr Jeray did not continue, the judge would have no choice but to dismiss the case. After asking Mr Jeray for his response, the trial judge held that, as Mr Jeray had declined to proceed with the matter, he was in substance discontinuing the proceedings. Accordingly, the trial judge dismissed Mr Jeray's case with costs. The NSW Court of Appeal granted leave to appeal on the question of whether Mr Jeray was denied procedural fairness.

The Court of Appeal, by majority, allowed the appeal. Allsop P (Macfarlan JA agreeing) stated that:

[a]t the root of procedural fairness is the provision of a fair hearing to a litigant and the basal notion that the litigant has understood the proceedings before him or her and had an adequate opportunity given to him or her, considering his or her attributes, qualities and deficiencies which render the litigant more or less able to vindicate his or her rights in court. A sharp line between rules and consequences cannot be drawn in this respect ... [E]ach circumstance has to be analysed and evaluated to see whether, in a human context, a fair hearing has been provided.⁴⁸

Allsop P held that the trial judge had failed to afford Mr Jeray the fairness required by the unusual circumstances of the case.⁴⁹ He failed to ascertain if Mr Jeray was

⁴⁷ [2010] NSWCA 367; (2010) 180 LGERA 1.

⁴⁸ *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367; (2010) 180 LGERA 1 at [6].

⁴⁹ *Ibid* at [24].

asking for an adjournment by his ambiguous response ('I cannot proceed' but not 'I will not proceed').⁵⁰ In the light of the character of the consequences of dismissing the action with costs, the ascertainment of whether Mr Jeray was obstinately refusing to proceed with the case had to be put to him squarely. The trial judge did not indicate to Mr Jeray prior to dismissing the matter with costs that the dismissal would be with costs, and the significance of the costs consequences were not explained.⁵¹ The necessarily interlocutory nature of the dismissal was not specified.⁵² Mr Jeray's conduct and the surrounding circumstances were insufficiently clear, in the absence of clear warnings from the trial judge, to draw the implication that Mr Jeray was refusing to proceed or impliedly discontinuing his case.⁵³ It was no answer to a complaint of procedural fairness that once the proceedings were dismissed with costs the litigant did not of his own motion seek to have the orders withdrawn.⁵⁴

Fairness to Mr Jeray required that he be told what the trial judge considered to be the effect of his conduct and the possible consequences of his discontinuing the proceedings, particularly regarding his liability to pay the respondents' costs and the probable requirement to pay these costs before commencing further proceedings. Mr Jeray did not have these matters sufficiently explained to him for it to be concluded legitimately that he had a fair hearing on the fourth day.⁵⁵

Young JA dissented. Young JA noted that the question for consideration was not what might have been the wisest course, but whether the course the trial judge did in fact take was a denial of a fair trial. The fact that a short adjournment and a slower explanation of matters may have been wise was not determinative. Whether a trial was fair was to be measured by consideration of the whole of what occurred, not by analysis of whether the trial judge complied with every piece of advice from prior decisions. There were some factors pointing towards a denial of procedural fairness. Further, it was unclear how the situation could in substance amount to Mr Jeray discontinuing the proceedings, as Mr Jeray made clear that he never intended to

⁵⁰ Ibid.

⁵¹ Ibid at [25].

⁵² Ibid at [26].

⁵³ Ibid at [28].

⁵⁴ Ibid at [29].

⁵⁵ Ibid at [30].

discontinue, but was merely 'on strike'.⁵⁶ However, although the case was borderline,⁵⁷ Young JA considered the trial judge did not cross the line of denying a fair trial. The scenario was caused by Mr Jeray's behaviour; warnings were given as to the consequences of persisting with that behaviour; it was in the public interest that litigation come to an end; Mr Jeray did not rely on some of the possible confusions that may have arisen; and Mr Jeray was a man of intelligence fully capable of understanding what was going on.⁵⁸

I note in subsequent hearings in Mr Jeray's judicial review proceedings in the Land and Environment Court, the Court was punctilious in explaining to Mr Jeray the consequences of his actions in not attending hearings and prosecuting his claim. In *Jeray v Blue Mountains City Council*,⁵⁹ Moore AJ noted that he had earlier treated Mr Jeray's letter sent to the Court's registry saying he was unable to attend the final hearing of his proceedings as a notice of motion to vacate the hearing dates and had fixed the notice of motion for hearing. The Court ordered the Council to give written notice of the orders, including the date fixed for hearing the notice of motion to vacate the hearing dates, to Mr Jeray. Mr Jeray failed to attend the hearing of the notice of motion to vacate the final hearing. Moore AJ nevertheless heard it and considered the redacted and untested medical certificate sent by Mr Jeray to the Court saying that Mr Jeray was unfit. He found it to be unpersuasive as a piece of evidence.⁶⁰ (I note here similar comments and findings were made with respect to a medical certificate by Lloyd AJ in *Palerang Council v Banfield*).⁶¹ Moore AJ refused the application to vacate the final hearing dates and ordered his reasons to be served on Mr Jeray. These reasons set out clearly what would be the consequences if Mr Jeray failed to attend and prosecute his claim at the final hearing.⁶²

At the final hearing of his judicial review claim, Mr Jeray still did not attend and Moore AJ dismissed the proceedings: see *Jeray v Blue Mountains City Council*.⁶³ Again, the judge set out the consequences of his orders in the judgment and the

⁵⁶ *Ibid* at [77].

⁵⁷ *Ibid* at [84].

⁵⁸ *Ibid* at [86].

⁵⁹ [2011] NSWLEC 218 (23 November 2011).

⁶⁰ *Jeray v Blue Mountains City Council* [2011] NSWLEC 218 at [9], [10].

⁶¹ [2012] NSWLEC 85 at [11], [12].

⁶² *Jeray v Blue Mountains City Council* [2011] NSWLEC 218 (23 November 2011) at [12]-[14].

⁶³ [2011] NSWLEC 228 (29 November 2011).

remedies available for Mr Jeray. A copy of the judgment and orders were served on Mr Jeray.

In the recent case of *Hudson v Director General, Department of Environment Climate Change and Water ('Hudson')*,⁶⁴ the defendant in a criminal prosecution in the Land and Environment Court for the offence of clearing native vegetation on land was represented by an unqualified agent, Mr Walters. The trial judge had granted Mr Walters leave to represent the defendant. After finding the charge proven, the trial judge proceeded to sentence the defendant. The agent called no evidence on the sentencing hearing and the agent's submissions on sentence were perfunctory and of no assistance. The defendant was convicted, fined a large sum, and ordered to pay the prosecutor's costs. One of the questions on the defendant's appeal against conviction and sentence was whether there was a denial of procedural fairness in the sense that the proceedings on the question of sentence were not conducted fairly.

The NSW Court of Criminal Appeal (Bathurst CJ, Whealy JA and McClellan CJ at CL agreeing) held:

I have set out above Mr Walters' submissions on sentence. They were plainly inept and should have confirmed to the trial judge what was probably already apparent to him from the conduct of the trial, namely, that Mr Walters was quite incapable of representing the appellant.

The primary judge in those circumstances was obliged, in my opinion, to take steps to ensure that the sentencing procedure was conducted fairly. Whether or not he should have revoked Mr Walters' leave to appear at that stage, he should at least have ensured that the appellant knew that he was exposed to significant pecuniary penalties and of his right to make submissions and to adduce evidence in mitigation of the penalty: see *Cooling v Steel* [(1971) 2 SASR 249]; *Wood v Marsh* [(2003) 139 A Crim R 475]. The primary judge made no such attempt.

In my opinion, the respondent was correct in stating that the appellant was in the same position as an unrepresented litigant. In these circumstances the primary judge was under an obligation to ensure that the trial including the proceedings so far as they related to sentence, was conducted fairly: *Macpherson v The Queen* [[1981] HCA 46; (1981) 147 CLR 512] at 546; *R v Zorad* [(1990) 19 NSWLR 91] at 108; *Frawley v The Queen* [(1993) 69 A Crim R 208] at 212.

The result of such failure was that the appellant was not made aware of the opportunity to put before the Court matters of mitigation including his belief that he

⁶⁴ [2012] NSWCCA 92.

was entitled to clear the land and the evidence which gave rise to the belief summarised in pars [33], [44]-[47] and [50]-[52] above. These matters were capable of having significant impact on the penalty to be imposed.

In my opinion, therefore, the trial judge erred in failing to ensure that that part of the proceedings which dealt with the question of sentence was conducted fairly and the accused thereby lost the opportunity of putting before the Court matters which could have impacted on the penalty imposed. In these circumstances the penalties imposed should be set aside.⁶⁵

The Court of Criminal Appeal's decision in *Hudson* also dealt with the question of whether leave ought to have been granted to the agent to represent the defendant.

Section 63(1) of the *Land and Environment Court Act 1979* (NSW) entitled a litigant as of right to appear by an authorised agent in civil proceedings in Classes 1 to 4 of the Land and Environment Court's jurisdiction, but not in criminal proceedings in Classes 5, 6 or 7 of the Court's jurisdiction or civil mining matters in Class 8 of the Court's jurisdiction. However, the Court is not prohibited from giving leave to a person to be represented by an unqualified agent. This is explicit for proceedings in Class 8, as a result of the legislative amendment in 2008, but implicit for proceedings in Classes 5, 6 and 7.

There is a reform proposal to be considered by the NSW Parliament this session which would require leave to be obtained for a person to be represented by an agent for all proceedings.

The requirement to afford parties a fair hearing extends not only to a litigant who is unrepresented or represented by an unqualified agent, but also to the other party who is represented by a legal practitioner. The presiding judicial officer has a duty to ensure that both parties in proceedings have an equal opportunity to present their evidence and make submissions in support of their case. As Allsop P noted in *Jeray v Blue Mountains City Council (No 2)*:

None of the above is to underestimate the ability of some litigants in person ... to manipulate the legal system for ulterior motives, often to the great cost and strain of their opponent parties and to the system of justice itself. Litigation almost always has

⁶⁵ *Hudson v Director General, Department of Environment Climate Change and Water* [2012] NSWCCA 92 at [94]-[98].

at least two sides and to indulge any whim of a litigant in person in an expensive, stressful and complex undertaking that is litigation is a step that is unwise. To indulge unthinkingly any whim of a litigant in person can cause great hardship to parties who oppose them.

The balance of fairness, procedural rigour and wise and practical indulgence in managing litigation by a judge is no simple task. Too indulgent an attitude to a litigant in person will unfairly burden the other side. An absence of proper regard for the needs of the litigant in person may cause injustice.

The balance can be a fine one. Sometimes the difference is one of evaluative assessment about which minds can differ. Though the ultimate question of whether a tribunal has afforded procedural fairness is a judgment of the satisfaction of an essential legal and Constitutional standard, it is decided principally by reference to a factual evaluation of a normative consideration of fairness in the judicial process. It is unnecessary to consider further any philosophical or legal consideration as to the character of the judgment or evaluation involved.⁶⁶

Young JA also noted:

The authorities do say that the courts must take particular care to see that there is a fair trial, when there is a litigant in person. However, that does not mean giving the litigant in person carte blanche, to conduct the case according to his or her own whims.⁶⁷

A case study of a complaint made to the Judicial Commission of NSW against a judicial officer, noted in one of its annual reports,⁶⁸ dealt with this duty to give a fair hearing to all parties. The complainant was a solicitor appearing before a magistrate who conducted himself during the hearing in a way which favoured the litigant in person and denied the party for whom the solicitor appeared a fair hearing. The Judicial Commission's evaluation of the complaint revealed that the magistrate did not adequately discharge his responsibilities as a judicial officer regarding the evaluation of the evidence or the necessity to be impartial and fair when presiding over the court. The magistrate did not give both parties an equal opportunity to put their evidence and made no real effort to intervene in order to have the unrepresented defendant comply with normal standards of courtesy. The magistrate did not control the proceedings but rather allowed the unrepresented litigant to interrupt to the detriment of the other party.

⁶⁶ *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367; (2010) 180 LGERA 1 at [9]-[11].

⁶⁷ *Ibid* at [81].

⁶⁸ Judicial Commission of NSW, *2008-2009 Annual Report* at p 35.

No reasonable apprehension of bias of hearing judge

The absence of bias, both actual and apprehended, in the judicial decision-maker is a third principle of natural justice. It too is designed to ensure impartiality and objectivity.

It has been said that there are four main categories of cases involving apprehended bias:

- interest — where the judge has an interest in the proceedings, whether pecuniary or otherwise, giving rise to a reasonable apprehension of prejudice, partiality or prejudgement;
- conduct — where the judge has engaged in conduct in the course of, or outside, the proceedings, giving rise to such an apprehension of bias;
- association — where the judge has a direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings;
- extraneous information — where the judge has knowledge of some prejudicial but inadmissible fact or circumstance giving rise to the apprehension of bias.⁶⁹

I will address two of these categories of apprehended bias with my selection of recent cases: first, the conduct of a judge in proceedings, and second, the association the judge has with persons involved in the proceedings.

Conduct of judge

A judicial officer's conduct can give rise to a reasonable apprehension of bias, either in the course of the proceedings themselves or outside those proceedings such as in earlier proceedings or on other occasions. One of the recent cases I will discuss concerned conduct of a judge in the course of the proceedings, while two other cases concerned conduct of a judge in different proceedings or at an unrelated social function before the hearing of the proceedings in which the judge was to preside.

⁶⁹ *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; (2011) 242 CLR 283 at [38], citing Deane J in *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41 at 74. In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, the High Court did not decide on the comprehensive of this categorisation but described it as 'a convenient frame of reference': at [24].

*Michael Wilson & Partners Ltd v Nicholls*⁷⁰ concerned the conduct of the trial judge in dealing with interlocutory applications in the proceedings. The judge, who ultimately became the trial judge, had heard and determined numerous interlocutory applications in the proceedings. These applications were heard *ex parte* and in closed court and orders were made preventing the respondents from knowing about the applications. The applications concerned use of the respondents' affidavits for foreign proceedings and criminal investigations in other countries. The respondents applied at the final hearing for the judge to recuse himself. They submitted that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to resolution of the issues the judge was required to decide at the trial of the action (this being the test).⁷¹ The judge refused to recuse himself and the trial proceeded. The judge gave judgment, finding against the respondents and ordering them to pay damages.

The High Court unanimously dismissed the respondents' appeal in relation to apprehended bias. The majority judgment (Gummow ACJ, Hayne, Crennan and Bell JJ) noted that:

an allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge might not bring an impartial mind to bear upon the issues that are to be decided. An allegation of apprehended bias does not direct attention to, or permit consideration of, whether the judge had *in fact* prejudged an issue.⁷²

The majority then embarked on that objective assessment of the facts and circumstances said to give rise to the apprehension of bias and concluded that those facts and circumstances did not found a reasonable apprehension of prejudgment of the issues that were to be fought at the trial:

All of the applications MWP [the applicant] made to Einstein J [the trial judge] without notice to the opposite parties were applications about the use that MWP or Mr Wilson could make of the disclosure affidavits made by Messrs Nicholls and Slater [MWP's witnesses] and associated correspondence or of documents produced on subpoena. More particularly, a central question in each application was whether that material could be supplied to others.

⁷⁰ [2011] HCA 48; (2011) 282 ALR 685.

⁷¹ *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; (2011) 282 ALR 685 at [31].

⁷² *Ibid* at [67].

In none of the applications was Einstein J required to make, and in none of the applications did he make, any determination of any issue that was to be decided at trial. Einstein J did decide that the disclosure affidavits could be made available for use in applications made to another court (for freezing orders and appointment of receivers) and for use by investigating authorities in other countries. And he decided that the proceedings which yielded those orders and the orders themselves should not be disclosed to the present respondents. But in none of the applications was it necessary for Einstein J to make any finding about the reliability of any party or witness, and in none did he make such a finding. Nor was Einstein J required to make any choice between competing versions of events. All that was required, and all that was found, was that there was apparently credible evidence of a sufficient risk of dissipation of assets to warrant making the confidentiality orders that were made.

Neither the hearing nor the disposition of any of the ex parte applications could found a reasonable apprehension of prejudgment of the credit of those who gave evidence in support of the applications. Their credit was not challenged in the ex parte hearings and no decision had to be made about their credit beyond determining that the unchallenged evidence they gave was apparently credible. Nor could the hearing or the disposition of the applications found a reasonable apprehension of prejudgment of the credit of those who had given no evidence in relation to the applications and who first were heard to give evidence at trial. There was, therefore, no sufficient basis to conclude that there was reasonable apprehension that Einstein J might have, as Young JA [in the NSW Court of Appeal] said, 'put himself into the mindset of accepting that [MWP or MWP's witness] is the "good guy" and thus the opponent is otherwise'. And the Court of Appeal concluded that there was such a reasonable apprehension only by (impermissibly) reasoning backwards from what was decided at trial, and how it was decided, to the conclusion that it might reasonably be apprehended that the judge might have prejudged those matters [citations omitted].⁷³

Another High Court decision delivered earlier in 2011, *British American Tobacco Australia Services Ltd v Laurie*,⁷⁴ is an illustration of an allegation of apprehended bias arising out of a judge's conduct in other proceedings. The trial judge for proceedings in the Dust Diseases Tribunal ('DDT') had made findings in an interlocutory application in different proceedings and between different parties that British American Tobacco Australia Services Pty Ltd ('BATAS') had developed a fraudulent business policy with respect to the retention of documents, namely, that it had a policy whereby it destroyed documents that may have provided evidence adverse to its interests in litigation. In the subject DDT proceedings, one of the plaintiffs had pleaded similar allegations against BATAS. BATAS applied for the trial judge to recuse himself on the basis that there was a real apprehension of bias by reason of prejudgment. The trial judge refused to recuse himself.

⁷³ Ibid at [71]-[73].

⁷⁴ *British American Tobacco Australia Services Ltd v Lauri* [2011] HCA 2; (2011) 242 CLR 283.

The High Court split 3:2 on the issue, the majority allowing the appeal and ordering that the trial judge be prohibited from further hearing the DDT proceedings. The majority (Heydon, Kiefel and Bell JJ) first emphasised that the test is concerned with the appearance of bias and not the actuality:

It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification. Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned. In *Livesey*⁷⁵ it was recognised that the lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.

Of course judges are equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence. Trial judges are frequently required to make rulings excluding irrelevant and prejudicial material from evidence. Routine rulings of this nature are unlikely to disqualify the judge from further hearing the proceeding. This is not a case of that kind. It does not raise considerations of case management and the active role of the judge in the identification of issues with which *Johnson*⁷⁶ was concerned. At issue is not the incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knows that Judge Curtis [the trial judge] has found that BATAS engaged in fraud and who has read his Honour's reasons for that finding. Some further reference should be made to those reasons [citations omitted].⁷⁷

The majority then considered the reasons the trial judge had given in the other proceedings and the adverse inferences he had drawn against BATAS. The majority continued:

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

Whenever a judge is asked to try an issue which he or she has previously determined, whether in the same proceedings or in different proceedings, and whether between the same parties or different parties, the judge will be aware that different evidence may be led at the later trial. Judge Curtis's express acknowledgment of that circumstance does not remove the impression created by reading the judgment that the clear views there stated *might* influence his determination of the same issue in the Laurie proceedings. Allsop P's conclusion was correct. In addition to the possibility of the evidentiary position changing, a

⁷⁵ *Livesey v NSW Bar Association* [1983] HCA 17; (1983) 151 CLR 288.

⁷⁶ *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488.

⁷⁷ *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; (2010) 242 CLR 283 at [139], [140].

reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding. *Johnson v Johnson*⁷⁸ is distinguishable.⁷⁹

The recent NSW Court of Appeal decision in *CUR24 v Director of Public Prosecutions (NSW)*⁸⁰ is another illustration of a case raising an allegation that conduct of a judge outside the proceedings has given rise to a reasonable apprehension of bias. This time the conduct was out of court statements at a social function. The judge was allocated to preside at a prosecution for a paedophile offence. The solicitor for the defendant had earlier attended a social function at which the judge was also present. The solicitor alleged the judge made statements to the solicitor at the social function indicating preconceived views with respect to the guilt of paedophile offenders and that an extreme sentence should be given to paedophile offenders. The judge disputed making the statements in the terms alleged. The defendant applied at the trial of the defendant for the judge to recuse himself for reasonable apprehension of bias. The trial judge refused.

The Court of Appeal rejected the defendant's appeal. Meagher JA (with whom Whealy JA and Basten JA agreed) held, first, that where there was plausible evidence as to an out of court statement or other conduct of a judicial officer, it was not necessary in order to determine whether there was a reasonable apprehension of bias to resolve, by making findings of fact, any dispute as to what was said or done before applying the fair-minded bystander test. That test would take account of the fact of the dispute and whether that evidence, if accepted, was sufficient to give rise to a reasonable apprehension of bias.⁸¹

⁷⁸ [2000] HCA 48; (2000) 201 CLR 488.

⁷⁹ *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; (2011) 242 CLR 283 at [144], [145].

⁸⁰ [2012] NSWCA 65.

⁸¹ *CUR24 v DPP (NSW)* [2012] NSWCA 65 at [52].

The Court of Appeal, applying the fair-minded bystander test in the case, however, concluded that reasonable apprehension of bias had not been established.⁸² Basten JA agreed with the reasons of Meagher JA and added that the comments of the judge were intended to be flippant and would have been so understood by the fair-minded lay observer. This inference was justified by not merely the words used (which had a high degree of hyperbole and were not the law) but also the social setting in which the conversation took place.⁸³

Association of judge

The other category of apprehended bias case with which I wish to deal is that of association, where the judicial officer has a direct or indirect relationship, experience or contact with a person interested in, or otherwise involved in, the proceedings. Two decisions of the Land and Environment Court last year illustrate this category of case. Both concerned an acting commissioner who had been allocated to assist a judge in hearing and disposing of an Aboriginal land claim appeal. The nature and extent of the association between the acting commissioner and persons involved in the proceedings differed between the two cases and led to different conclusions as to whether the acting commissioner should be disqualified from assisting the judge in the hearing and disposing of the case.

In the first in time of the cases, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*,⁸⁴ the acting commissioner was one member of a sub-committee of the Expert Panel on Constitutional Recognition of Indigenous Australians tasked with writing a report. Counsel for one of the parties in the proceedings, the claimant NSW Aboriginal Land Council, had been engaged by the sub-committee to assist it in the writing of the report. As a consequence, there would be many face to face meetings and email communications between the acting commissioner and the counsel. This degree of association led the judge (Pepper J) to conclude that 'a fair-minded lay observer might reasonably apprehend that the decision-maker, in this instance Davis AC, might not bring an impartial mind to the

⁸² Ibid at [58]-[62].

⁸³ Ibid at [24], [25].

⁸⁴ [2011] NSWLEC 147 (26 August 2011).

exercise of the functions before her'.⁸⁵ Accordingly, the acting commissioner was precluded from assisting the Court in respect of the appeal.

In the second in time of the cases, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*,⁸⁶ the association was different. The acting commissioner was a barrister who was briefed to appear for the applicant in Federal Court native title proceedings. The counsel for the respondent Crown Lands Minister in the Land and Environment Court proceedings was briefed to appear for the respondent Minister of State in those Federal Court proceedings. In short, the acting commissioner and counsel for the respondent were engaged to appear against each other in different proceedings. This association was not sufficient to persuade the judge (Pain J) that there was a reasonable apprehension of bias:

In this case that fair-minded lay observer would be assumed to know generally about the nature of the adversarial process and the professional and impartial role of barristers engaged on behalf of parties in such processes (here the Federal Court native title proceedings). I consider that person should also be assumed to be informed about the different role of an acting commissioner in this Court as an advisor to the judge hearing a particular matter. There is a clear and important distinction between those two professional roles. In light of the knowledge to be assumed by the fair-minded lay observer in this case I do not consider the apprehension of bias applying the *Ebner*⁸⁷ test of there being a real possibility that he or she might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the proceedings, is made out in relation to Acting Commissioner McAvoy.⁸⁸

Conclusion

My remarks have had as their focus the need for courts to ensure fair adjudicative procedures. Judicial officers hearing and determining cases need to observe the principles of procedural fairness or natural justice. I have emphasised the need for hearings to be open and fair and determined by a judicial officer who is free from bias, both actual and apprehended. As was observed in *South Australia v Totani*,

⁸⁵ *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2011] NSWLEC 147 at [9].

⁸⁶ [2011] NSWLEC 233 (1 December 2011).

⁸⁷ *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337.

⁸⁸ *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2011] NSWLEC 233 (1 December 2011) at [7].

'[p]rocedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process.'⁸⁹

⁸⁹ *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at [62].