JUDGES, JOURNALS AND THE PERILS OF PREJUDGMENT

On 14-16 July 2000, Darwin will host the 18th Annual Conference of the Australian Institute of Judicial Administration. In presenting their papers at the conference, members of the judiciary (and those perhaps ambitious for such an appointment) might take heed of the recent decision of the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65.

Locabail involved five applications for permission to appeal. They were heard together because they raised common questions concerning the disqualification of judges on grounds of bias. While the case is interesting in a number of respects, it is the decision in respect of only one of the five applications, *Timmins v Gormley*, to which this note is directed. The defendant, Gormley, sought permission to appeal from the judgment of Mr Recorder Braithwaite QC in a personal injuries case on a number of grounds, but relevantly for apparent or ostensible bias.

It should be noted that the Court of Appeal was applying in this context the test of a "real danger or possibility" of bias on the part of the recorder. In Australia, of course, the test is formulated as one of a "reasonable apprehension or suspicion" of bias: "the proper test is whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case" (*Webb v The Queen* (1994) 181 CLR 41 at 47, per Mason CJ and McHugh J). While the Court of Appeal noted that the High Court of Australia in *Webb* had pointed to there being difference in substance between the two tests, it equally concluded that "[i]n the overwhelming majority of cases ... application of the two tests would anyway lead to the same outcome" (at 74). Indeed, in their analysis in *Timmins v Gormley*, the Court of Appeal drew assistance (at 91, see also at 78) from the decision of the High Court in *Vakauta v Kelly* (1989) 167 CLR 568, especially at 570-571.

Vakauta v Kelly concerned an allegation of bias, whether actual or at least a reasonable apprehension of bias, flowing from certain remarks made by the trial judge during the trial. While it was stressed in that case that "[t]he

requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation" (at 570, per Brennan, Deane and Gaudron JJ), it was recognised that "there is an ill-defined line beyond which the expression by a trial judge of preconceived views ... could threaten the appearance of impartial justice" (at 571). In the circumstances of that case, the Court found that the trial judge's comments were such as to give rise to a reasonable apprehension of bias in the mind of a lay observer. The High Court has also found ostensible bias in other circumstances, for example where the appearance of prejudgment arose from the expression of views by a judge in a previous case (see eg *Livesey v New South Wales Bar Association* (1983) 151 CLR 288) (although the appearance of pre-judgment requires more than merely that a particular outcome of the litigation appears likely based on previous decisions of the judicial officer: *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302).

In *Locabail*, the defendant's case on bias in the application in *Timmins v Gormley* "turned" on statements made by the recorder in articles he had published (at 91). Indeed, the recorder was noted to have "written extensively" on personal injury topics, and to have "lectured, appeared on television and acted abroad as an expert on English personal injury law" (at 89).

The Court emphasised that "[it] is not inappropriate for a judge to write in [such] publications" and that there is in fact "a long-established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions" (at 91). However, the Court reminded that "[a]nyone writing in an area in which he [or she] sits judicially has to exercise considerable care not to express himself [or herself] in terms which indicate that he [or she] has preconceived views which are so firmly held that it may not be possible for him [or her] to try a case with an open mind" (at 91).

In the case before the Court, the recorder's publications showed "pronounced pro-claimant anti-insurer views" (at 92). The Court warned that "[i]t is always inappropriate for a judge to use intemperate language about subjects on which he [or she] has adjudicated or will have to adjudicate" (at 91). While acknowledging that the application caused it "particular concern" (at 88) and was "a difficult and anxious application to resolve" (at 92), the Court concluded that "taking a broad commonsense approach" neither the Court nor a lay observer could have excluded the possibility in these circumstances that "a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leant in favour of the claimant and against the defendant in resolving the factual issues between them" (at 92). Permission to appeal was granted, the defendant's appeal allowed and a retrial ordered.

Of course, as the Court recognised, whether or not the test of ostensible bias is met will always depend on the facts, in the particular circumstances of each case (at 77, 78). Indeed, the Court noted that at least ordinarily an objection could not be soundly based on a judge's extra-curricular utterances, whether in textbooks, lectures, speeches or articles (at 77). However, the decision of the Court emphasises that the test might nevertheless well be met "if on any question at issue in the proceedings before him [or her] the judge had expressed views ... in such extreme and unbalanced terms as to throw doubt on his [or her] ability to try the issue with an objective judicial mind" (at 78).

The decision in *Locabail* is a salutary reminder that in extra-curial papers and articles judges may need to be cautious to remain "circumspect" in the language they use and the tone in which they express themselves (at 91). As Justice Thomas in *Judicial Ethics in Australia* (2nd ed, LBC Information Services, Sydney, 1997 at 101) remarked (citing another author):

Judges are paid to be judges, not to do things which disqualify them from acting as judges.

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