Reiby Street Apartments P/L v Winterton Constructions P/L & George Zakos [2005] Adj.L.R. 06/15

JUDGMENT : Master Macready : Supreme Court of New South Wales. 16th June 2005

1 This is the hearing of proceedings concerning the adjudication determination made by the second defendant pursuant to the **Building and Construction Industry Security of Payment Act** 1999. The plaintiff is the principal and the first defendant the contractor for the construction of a two-level basement car park, 23 residential apartments and four shops in Newtown, Sydney.

2 In its amended summons filed 24 March 2005 the plaintiff seeks a declaration that the determination of the second defendant is void with consequential orders restraining the first defendant from taking any steps in relation to the determination. It is submitted by the plaintiff that the second defendant adjudicated upon the application in circumstances where there was apprehended bias. The apprehended bias is said to arise as a result of what was alleged to be a dispute between the second defendant and the plaintiff in respect of the second defendant's fees for an earlier determination under the same contract. There is no allegation of actual bias.

3 The plaintiff also seeks an order in the nature of certiorari quashing the determination pursuant to section 69 **Supreme Court Act** 1970. The plaintiff acknowledges that by reason of the decisions of the Court of Appeal in ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394 at [58] and ***Transgrid v Siemens Ltd*** [2004] NSWCA 395 such relief is not available in the context of the Act. However, the plaintiff wishes to preserve its position in the event that the Court of Appeal reconsiders this issue. An application is to be made to the Court of Appeal in June 2005 to reargue the matter. In these circumstances I note the matters referred to by the plaintiff and in accordance with present authority will not consider this claim for relief.

Short chronology of events

4 The works the subject of the contract between the plaintiff and first defendant reached practical completion on 28 November 2003. Accordingly the defects liability period commenced. On 2 July 2004 the first defendant served an adjudication application relating to a payment claim. The second defendant was nominated as the adjudicator. By a letter dated 6 July 2004 and served that day the second defendant accepted the nomination as adjudicator and informed the parties of his fees.

5 In a letter dated 20 July 2004 addressed to the plaintiff and the first defendant the second defendant advised that he had completed his adjudication. He advised the amount of his fees and requested payment. He stated that upon payment of his total fees he would then be in a position to release the adjudication determination. The evidence before me discloses that the letter was served on the parties by facsimile on 21 July 2004.

6 Shortly thereafter the second defendant's fees for the adjudication were paid and on 27 August 2004 the adjudicator gave his determination to the parties.

7 On 7 September 2000 the plaintiff received written legal advice about the adjudication which included advice that the adjudication had not been issued within the time required by the Act.

8 On 5 October 2004 the first defendant served another payment claim for $242,195 plus GST. It was this payment claim that gave rise to the determination, which is the subject of these proceedings. On 20 October 2004 Mr Christofidellis of the plaintiff company says that he was informed that the second defendant was not entitled to be paid his fees for the earlier adjudication, as the adjudication was late.

9 On 27 October 2004 the plaintiff sent a letter to the second defendant referring to his invoice for his fees for the earlier adjudication and requested a full refund of the adjudication fee paid. The claim was on the basis of clause 29 (4) of the **Building and Construction Industry Security of Payment Act** 1999 which is in the following form:

> '*(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21 (3).'*

10 After quoting the terms of the section the letter went on to enclose the plaintiff's invoice for the reimbursement of the adjudication fees.

11 The first defendant filed an adjudication application in respect of the current payment claim dated 5 October 2004 on 1 November 2004. On 3 November 2004 the Master Builders Association notified the parties that the second defendant was nominated as the adjudicator for the payment claim dated 5 October 2004.

12 On the following day, namely, 4 November 2004 the plaintiff wrote to the Master Builders Association asking that the second defendant's nomination as adjudicator be reviewed for the following expressed reasons: *"G. Zakos has previously adjudicated on this project and because the matter was not adjudicated on time, Reiby Street apartments were not bound by his adjudication and have consequently requested a refund of their adjudication fee. Refer to the attached documents.*

Whilst G. Zakos is a professional, there may be an inference of bias against Reiby Street apartments as a consequence of the above."

13 A copy of the letter was forwarded to the second defendant

14 On 5 November 2004 the second defendant wrote two letters. One of them was addressed to the President of the Master Builders Association, with a copy to the plaintiff, in which the second defendant denied the suggestion

that he had not completed his determination in time. He pointed out that in fact he made his determination on 20 July which was within the ten business days allowed under the Act. He noted the matters in the plaintiff's letter and advised that no bias existed on his part towards the plaintiff as a result of the plaintiff's application to seek a refund of their fees in the earlier determination.

15 The other letter written on 5 November 2004 was addressed to the plaintiff and the defendant and constituted an acceptance of his nomination as adjudicator.

16 On 11 November 2004 the plaintiff served its adjudication response and wrote to the Master Builders Association notifying them that it relied on the payment schedule issued in respect of the 18 October 2000 payment claim a copy of which the first defendant's had received. On 15 November 2004 the plaintiff received a response from the Master Builders Association noting that its executive recommended no further action in respect of the plaintiff's letter of 4 November 2004.

17 On 19 November 2004 the second defendant completed his determination and notified the parties of that fact on the same day. This was within the time-limited under the Act and thus did not involve what was said to be the underlying dispute in respect of the earlier adjudication.

The underlying dispute

18 The plaintiff submits that there is an underlying dispute that arises out of the circumstances of the earlier adjudication. Section 21(3)(a) of the Act provides:

> ***"21 Adjudication procedures***
>
> *(3) Subject to subjections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:*
>
> *(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application".*

19 As I have already noted Section 29(4) of the Act provides:

> ***"29 Adjudicator's fees***
>
> *(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3).*"

20 The plaintiff's case with respect to the adjudicator fees is that on the proper construction of section 29 (4) the adjudicator is required to both make his decision on the application and communicate the making of that decision to the parties within the period of ten days. It is apparent that the second defendant was of the view that the section only required him to make the decision on the application within the time-limited and that he could thereafter advise the parties of his decision.

The matters raised by the defendants

21 The second defendant did not appear and the first defendant raised the following matters in answer to the plaintiff's claim:

1. On a proper analysis of the relevant facts there was no dispute between the plaintiff and the second defendant as to the payment of his fees on the earlier adjudication.
2. Alternatively on the facts there was no apprehended bias
3. Estoppel
4. Election
5. Waiver

The relevant law

22 Adjudicators making decisions under the Act are bound by the rules of natural justice. Such rules require that the person making the decision should not be biased. There has been debate as to whether or not such a breach of the rules of natural justice would lead to a decision of adjudicator being void not merely avoidable. At present the matter is settled in New South Wales by the decision of ***Brodyn Pty Ltd v Davenport*** (2004) NSWCA 394. Hodgson JA, who gave the decision of the court, concluded in respect of matters under this Act as follows: *"In my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void."*

23 Earlier after an analysis of the problem he listed the basic conditions for the existence of adjudicator's determination in paragraph 53. In paragraph 55 when discussing them he said: *"If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination."*

24 In argument it was suggested that the use by his honour of the word "substantial" inserted some quantitative notion into the extent of any apprehended bias. There is some suggestion that not all the rules of natural justice will lead to a remedy. See **Aronson on Judicial Review** Third Edition page 457. That may be the case with some of the rules as to natural justice. However, I would have thought that in the case of apprehended bias either one would conclude that it would exist in accordance with the test to which I am about to refer or that it did not.

25 There was no dispute about the general principles in respect of apprehended bias. In ***Johnson v Johnson*** (2000) 201 CLR 488 at [11], Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said: *"It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias… is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the Judge is required to decide.*

26 After referring to that test in paragraph the majority continued: *"That test has been adopted, in preference to a differently expressed test that has been applied in England, for the reason that it gives due recognition to the fundamental principle that justice must both be done, and be seen to be done. It is based upon the need for public confidence in the administration of justice. 'If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision.' The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial."*

27 The last matter to which their Honours referred was the subject of some submissions in respect of the position of arbitrators under the Act. In ***Ebner v Official Trustee in Bankruptcy*** (2000) 205 CLR 337 at [4] the High Court said: *"The application of the principle in connection with decision makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making."*

28 The plaintiff's submission was that the principle relating to apprehended bias was to be applied with greater rigor in the context of adjudications under the act compared to judicial proceedings. The first reason was said to be the fact that judges by their training are conscious of these matters and have taken a judicial oath and secondly that appeals do not lie from decisions of adjudicators under the act. Reference was made to ***Commonwealth Coatings Corp. v Continental Casualty Co.*** 393 US 145 at 149 (1968) (21 L. Ed. 2d 301 at 305), where the court said: *"[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review"*

29 The force of the last proposition is negated by the provisions of section 32 of the Act which will allow the dispute resolution procedures in an ordinary building contract to be used as a medium for adjusting the parties' rights following upon the interim determinations of the adjudicator during the course of the contract. The first proposition is certainly true and I feel that it is appropriate to be somewhat more particular in the case of an adjudicator rather than a judicial officer although this must depend upon the community's continued general acceptance of the role of judicial decisions in our society.

On a proper analysis of the relevant facts there was no dispute between the plaintiff and the second defendant as to the payment of his fees on the earlier adjudication

30 The submissions of the defendant were to the effect that by the time the adjudicator accepted his nomination there was no dispute between him and the plaintiff. It was said that all that occurred was that the plaintiff had requested the adjudicator to refund his fees for a stated reason and soon after it was told of his nomination, the plaintiff requested the Masters Builders Association to review the nomination. The submissions pointed out that the adjudicator's response dealt with both matters and gave reasons. In the defendants' submissions the failure of the plaintiff to dispute the adjudicator's explanation or to take steps to prevent him from continuing with the adjudication was consistent only with an acceptance of the explanation and an acceptance of the Master Builders Association's nomination of him as the adjudicator.

31 In effect the defendant suggested that the requested disqualification is not evidence of a dispute. There may be some force in what is the substance of these submissions when dealing later with election and waiver. Although the plaintiff's letter requested a refund of the fees it is plain that despite the courteous language it is a demand for repayment of these on the basis of a particular view of the obligations that bound the adjudicator.

Alternatively on the facts there was no apprehended bias

32 The defendant's submissions on this aspect were as follows:

Even without attempting to characterise the events to determine whether a dispute existed, the facts do not allow one to conclude that there could be an apprehension of bias. That is, there is nothing that would reasonably cause the fair minded lay bystander to think that the Adjudicator would not bring to the determination an impartial and unprejudiced mind.

RSA requested a refund of the Adjudicator's fees. The Adjudicator then explained why a refund was not necessary. The Adjudicator had been paid all that he was owed. He had no interest in the result. There was no reason why he would not approach the task in an impartial manner.

This is not a case where the Adjudicator has indicated that he had prejudged any issues. Nor is it a case where the Adjudicator had any interest, either financial or otherwise in the outcome. There is no connection between either of the parties and the Adjudicator that would give rise to any apprehension.

The request for a refund was entirely RSA's doing. On a proper construction of the Act it had no substance. The Adjudicator had a reasonable basis for declining the request. Simply because the request was declined does not mean

he would be incapable of bringing to the task an open and impartial mind. More importantly, a fair minded bystander could form no other view.

To accept RSA's argument would allow every disgruntled party to a determination under the Act to avoid the effect of the determination simply by taking some fairly simple steps, such as those taken in this case. If it is not appropriate or necessary for the Court in these types of actions to consider the underlying dispute then all that a party need do is make a request (reasonable or otherwise) such as the one made in the present case. If that request is declined the party will have an immediate escape mechanism in the event that the determination is unfavourable.

There needs to be something more than a request that is subsequently declined. That would not be enough to give rise to an apprehension of bias.

33 The views of the fair-minded bystander as to what was alleged by the plaintiff to be the underlying dispute should not be considered as if that fair-minded bystander was a Judge. Also it does not require me to decide the underlying dispute. This being so the strength or otherwise of each party's contentions should not be subject to careful legal analysis but instead be directed to what a lay person might perceive from the extent of the correspondence and the circumstances relevant in this case.

34 In this context I do not think it appropriate to characterise the plaintiff's letter as a request but as I have indicated above it was a courteous demand for a refund of fees. The adjudicator did have an interest in the result because he was facing a demand to return his fees.

35 In the circumstances I think there was a reasonable apprehension of bias.

Estoppel

36 The defendant submitted that the plaintiffs conduct in:
(a) serving and relying on an adjudication response;
(b) taking no step to qualify its participation in the adjudication; and
(c) its failure to take any step to have the nomination set aside;
was clear and unequivocal. It was conduct that was only consistent with its acceptance of the adjudicator's nomination and the acceptance of that nomination. It submitted that such conduct was capable of amounting to a representation. The precise representation was not spelled out in the submissions but presumably it was to the effect that the plaintiffs accepted the nomination of the adjudicator and did not object to the adjudicator carrying out his task.

37 The plaintiff submitted that it relied on that representation and participated in the adjudication. It incurred costs in doing so including the costs of the determination itself. It lost time that could have been avoided. The submissions went on to suggest that in circumstances of an Act designed to allow contractors to recover progress payments quickly and inexpensively – to give contractors cash flow – lost time is significant. A project manager employed by the defendant gave evidence that if he had known that the adjudicator was acting in circumstances where there was an apprehension of bias on his part he would have taken steps to have a change of adjudicator, or withdraw the application and make a fresh payment claim. Whether it could have done this is a matter of some dispute. As is plain on the evidence the defendant was not aware of the alleged dispute until after these proceedings had been commenced.

38 It is trite law that a representation must be clear and unequivocal in order to found a valid claim of estoppel. See ***Legione v Hateley*** (1983) 152 CLR 406 at 435 and ***Foran v Wight*** (1989) 168 CLR 385 at 410. In this case we are of course concerned with what are alleged to be representations arising from the silence, namely, the failure of the plaintiff to make known to the defendant that it was concerned about the independence of the adjudicator.

39 In **Metalcorp Recyclers Pty Limited v Metal Manufactures Limited** [2003] NSWCA 213 the Court of Appeal said the following about representations by silence.

"*14 A finding of misleading or deceptive conduct is open where that conduct, by word or deed, conveyed a misrepresentation (**Wardley Australia Ltd v Western Australia** (1992) 175 CLR 514). In this case the misrepresentation is said to have been conveyed by silence but that is an inadequate and incomplete description. The relevant principles were felicitously summarised by Black CJ in **Demagogue Pty Limited v Ramensky** (1992) 39 FCR 31, 32:*

"Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive ... to speak of 'mere silence' or a duty of disclosure can divert attention from that primary question. Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such thing as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed".

15 The misleading and deceptive conduct relied upon was that of Mr Cook during the critical conversation. As Black CJ said, silence that is capable of being misleading or deceptive never stands alone. In the absence of some positive duty to speak, silence can only be misleading or deceptive against a background of other facts known to both parties which make what is actually said so incomplete that it conveys a misrepresentation."

40 In the present case there is no positive duty to speak. We are here concerned with whether the facts known to the parties are such that the failure to speak and raise the doubts about the adjudication process conveys a

misrepresentation. There is authority that if a party anticipates that an adjudication determination will be void; it should wait until the adjudication determination is handed down. See ***Paynter Dixon Constructions Pty Ltd v J F & C G Tilton Pty Ltd*** [2003] NSWSC 869 and ***Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*** [2005] NSWSC 362. However, these were not cases of apprehended bias which have their own special concerns to which I will refer later.

41 On 11 November 2004 for the plaintiff notified the second defendant that it relied on the payment schedule issued to the first defendant on 18 October 2004 as its adjudication response. It was at this point of time that it was suggested that the plaintiff could pursue any objection in relation to the adjudicator. It had received a response from the adjudicator stating that he believed there was no bias and it did not do so.

42 It is of course clear that there must be reliance for there to be estoppel based upon representation. I have earlier spoken of the facts which are said to constitute reliance. In section 26 of the Act there is a right to withdraw an adjudication application in certain circumstances. These relate to a situation where the adjudicator fails to accept the nomination or does not determine the application within time. Neither of these applied in the present case.

43 In these circumstances the defendant would have had great difficulty in taking steps by itself to withdraw the adjudication application and proceed with a fresh payment schedule. The provisions of s 13(5) of the Act prevent the service of more the one payment claim in respect of each reference date under the construction contract. Given the final date for making a payment claim was 28 November 2004, or at least that was the time the defendant believed it could make such claim, it might be difficult for the defendant to make such a claim. This may well depend upon the terms of the contract which is not in evidence before me.

44 Effectively there was little the defendant could do of its own volition and probably the true answer to the question of whether there was a representation by silence lies in either election or waiver.

Election

45 The common law meaning of the term "election" is discussed expansively by Jordan C J in ***O'Connor v S P Bray Limited*** 1936 36 SR (NSW) 248 at 257-63 and more succinctly by Mason J in ***Sargent v ASL Developments Limited*** (1974) 131 CLR 634. At 655 he observed: *"A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, ie when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach -- in each instance the alternative right to insist on performance creates a right of election."*

46 Election is concerned with the choice of a party with alternative remedies already open to him where neither of these rights or remedies may be enjoyed without the extinction of the other. See ***Commonwealth of Australia v Verwayen*** (1990) 170 CLR 394 at 408-9, 481. In the present case it is said that the plaintiff was faced with the choice of either participating in the adjudication process or, alternatively, declining to do so and going to court to prevent the adjudication process from proceeding.

47 The application to court might not succeed in setting aside the adjudication application. Plainly, it was necessary for the plaintiff to indicate to the arbitrator that it relied on the payment schedule as its adjudication response or make any further submissions for the consideration by the arbitrator. All this should have occurred on 11 November 2004. Its failure to make any submissions would mean that if it had lost its challenge in court it would not have had the benefit of those being considered by the adjudicator for the purposes of his decision. The question is whether it could have made any necessary submissions as well as proceedings with a court challenge. If the plaintiff made it plain at the time that it still maintained its concern about bias and was challenging the continuing hearing, then its submissions could be on this basis. Given the tight time structures in the Act this may be a reasonable approach on the plaintiff's part. It is thus arguable that it was not facing an either or choice and thus did not need to make an election.

48 It is, of course, important to realise that an election must be made between the two inconsistent and alternative rights. No difficulty arises where the election is made expressly but that is not the case in the present matter. Election can of course be implied from conduct. The decisions on this aspect were summarised by Story in "**Equity Jurisprudence"** para 1097 in the following terms: *"Upon such a subject no general rule can be laid down; but every case must be left to be decided upon its own particular circumstances rather than upon any definite abstract doctrine. Lapse of time alone is not sufficient to conclude a party, for until he is called upon to elect he may enjoy all proprietary rights over the respective properties; and before he can be called upon to elect he is entitled to have the respective values of the properties ascertained to enable him to form a correct opinion as to his rights. To conclude a party by his extra-judicial acts it is necessary to show that he knew all the facts, that the fact that he was called upon to exercise his choice was present to his mind, and that these two circumstances concurring he deliberately made his choice ... When this is ascertained affirmatively, it may be further necessary to consider, whether the party was competent to make an election; whether he can restore the other persons affected by his claim to the same situation, as if the acts had not been performed, or the acquiescence had not existed; and, whether there has been such a lapse of time as ought to preclude the court from entering upon such inquiries, upon its general doctrine of not entertaining suits upon stale demands, or after long delays."*

49 Mr Christofidellis, a director of the plaintiff, gave evidence on behalf of the plaintiff. His affidavit was read but he was not cross examined upon it. Although it is abundantly plain that he knew of the circumstances of the

dispute at an early stage, in the absence of any cross examination, I would be reluctant to conclude that he had deliberately made the choice.

Waiver

50 There is much debate in the authorities upon the true nature of the difference between waiver, election and estoppel. Much of the debate centres upon the relationship between these concepts and the doctrine of contract. The nature of waiver was described by J S Ewart in his book "**Waiver Distributed"** in these terms: *"Commencing with `waiver', we may say that (if it is anything) it is (it certainly used to be) of unilateral character. The possessor of some property throws it away. The effect may be that someone else is benefited, but `waiver' has no relation to benefits. A watch is thrown away, and some functionary or finder is so much the richer (if the true owner do not intervene). But the `waiver' is complete although the watch be never found, although it be flung into the ocean.*

Election is `waiver's' nearest neighbor, for it, too, is unilateral. But in election, the act has a legal effect upon the relationship between two persons, or upon the legal right of some party. `Waiver' has no such effect. `Waiver' implies that you have something, and that you are throwing it away. Election, upon the other hand, implies that you have a right to get one of two things, or to occupy one of two positions, by choosing between them. Release comes next in order; but it is bilateral, inasmuch as it requires concurring acceptance by someone else. Estoppel is also bilateral, and depends, not (as in release) merely upon the concurrence of the estoppel-asserter, but upon his consequential action.

Contract is the furthest removed from `waiver' and unilateralism, for it connotes the equal action of the two interested parties. `Waiver' cannot be all, or like all, of these. If it be identical with any one of them, let us say so, and we shall understand that we have two names for the one thing. And if it be not identical with any one, let us so declare, and ascertain, if we can, whether it has any separate and independent existence."

51 In ***Commonwealth of Australia v Verwayen*** there was extensive discussion of waiver and Brennan J at 422-4 discussed the abandonment of a right in terms of the point being thrown away during a trial where there was no election between inconsistent rights. In the present case we are concerned with waiver in the context of a failure to make an application to court to set aside the proposed adjudication by the adjudicator.

52 An example of a case where waiver was applied is ***Vakauta v Kelly*** (1989) 167 CLR 568. That was a case of apprehended bias in the course of a trial for personal injuries where the Judge made comments critical of the Government Insurance Office and the doctors it employed. An application was not made to the Judge to disqualify himself and, in due course, after a reserved judgment an appeal was brought on grounds which included bias both actual and ostensible. The majority dealt with the need to raise the matter in the case of apprehended bias before the trial judge at page 572 in these terms: *"Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her."*

53 Dawson J also dealt with the matter by reference to authority and concluded: *"In my view, where a party in civil litigation, being aware of the circumstances giving rise to a right to object, allows the case to continue for a sufficient time to show that he does not presently intend to exercise that right, he may be held to have waived it."*

54 The reasoning by the majority clearly illustrates why it is necessary to take the appropriate objection rather than wait to see whether the verdict is favourable. I have already indicated that the appropriate time to have made some application was by 11 November 2004. The adjudicator in his letter had rejected any suggestion of bias and given the lack of a right to make oral submissions to the adjudicator, the matter could not be pursued any further before the adjudicator. The plaintiff could have approached this court for appropriate orders but the question is whether it was necessary for it to do so. The adjudication was completed on 19 November 2004 and the certificate was issued on 16 December 2004. The plaintiff eventually obtained a copy of the adjudication certificate on 16 December 2004 and a copy of the decision on 21 January 2005. The proceedings were commenced on 1 March 2005 and, on the evidence before me, this is the first time that the plaintiff had taken any proceedings in relation to the allegation of apprehended bias.

55 In ***Bilgin v Minister for Immigration and Multicultural Affairs*** (1997) 149 ALR 281, the respondent contended that despite the fact that the applicant had objected to the member sitting on the review, the applicant's failure to challenge the Tribunal until after its decision was handed down constituted a waiver. Finkelstein J rejected this argument. He said at 294: *The true position is that where a party is aware of his or her right to object to a decision-maker deciding a case on account of bias that right will be waived if the party acquiesces in the decision-maker determining the case. Acquiescence will be shown if a party with knowledge of all relevant facts makes no objection to the decision-maker taking part in the proceeding [references to cases omitted]. Once an objection is taken, a party's right to complain will not be waived for the reason that the party continues to participate in the case. If waiver is to*

be established after an objection is taken there must be some other conduct that amounts to acquiescence. To suggest that it is a requirement that a party should refuse to participate in a case or apply for a writ of prohibition or an interlocutory injunction or take some other legal proceeding against the Tribunal in order to avoid the defence of waiver is to impose an unreasonable if not intolerable burden.

56 This approach was adopted by Powell and Giles JJA (with Meagher JA agreeing) in **Hutchinson v Roads and Traffic Authority & Anor** [2000] NSW CA 332. Mr Hutchinson appealed against his dismissal by the RTA to the relevant Tribunal. He objected to Mr Lynn's participation in the hearing on the basis of apprehended bias. Mr Lynn gave reasons and declined to disqualify himself. Parties continued with the hearing and Mr Lynn ultimately ruled against Mr Hutchinson. In the Court of Appeal Giles JA after noting **Vakauta v Kelly,** concluded that there was nothing which amounted to waiver in this case. He observed [28]: *Perhaps he could have applied for an adjournment and sought to overturn the ruling or otherwise bring about a situation in which Mr Lynn did not sit on the Tribunal hearing his appeal, but he was not required to do so on pain of imputer waiver: see the explanation by Finkelstein J in **Bilgin v Minister for Immigration and Multicultural Affairs** (1997) 149 ALR 281 at 294, with which I respectfully agree. In the circumstances of the present case, proceeding with the hearing was not a waiver such that Mr Hutchinson can not in the appeal, or the summons, raise the reasonable apprehension.*

57 It necessarily follows that in the present circumstances the plaintiff has not waived his right to object by continuing to participate in the adjudication and not immediately commencing proceedings in this Court.

58 In these circumstances there is no waiver and no reason to refuse to set aside the determination on the ground of a breach of natural justice. I will make a declaration in terms of paragraph 1 of the Summons and I will hear the parties on any other orders.

Mr M Christie and JM White for plaintiff instructed by JS Mueller & Co for plaintiff
IG Roberts for defendants instructed by Sachs Gerace Lawyers for defendants