12/10; [2010] VSC 97

SUPREME COURT OF VICTORIA

SLAVESKI v VICTORIA

Kyrou J

29, 30 March 2010

PROCEDURE – APPLICATION FOR RECUSAL OF JUDGE ON 58TH DAY OF TRIAL – JUDGE HAD PREVIOUSLY ACTED FOR THE STATE OF VICTORIA AND THE POLICE ASSOCIATION – APPROACH TO BE ADOPTED WHERE A JUDICIAL OFFICER HAS PREVIOUSLY ACTED FOR ONE OF THE PARTIES – NO PROPER BASIS ADVANCED FOR DISQUALIFICATION OF THE JUDGE.

1. A judge is disqualified if there is actual bias or if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That is often called apprehended bias to distinguish it from actual bias, where the judge is actually biased.

Ebner v Official Trustee in Bankruptcy **[2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13, applied.**

2. A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. Further, when the parties have been engaged in a proceeding for some time, with the inevitable commitment of resources and costs that that entails, a member should not disqualify himself or herself unless there is – not may be – an issue to which a disqualifying factor is relevant.

Re Polites; Ex parte Hoyts Corporation Pty Ltd **[1991] HCA 31; (1991) 173 CLR 78; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114, applied.**

3. A fair-minded lay observer would not reasonably apprehend that, because the judge in the present case advised some government departments or the Police Association while he was in practice, he might not bring an impartial mind to the resolution of the questions in this case. If that were the position, there would be few judges of the Supreme Court who would be able to hear any case involving the State. Further, the fact that the judge made several rulings which were adverse to the applicant party did not demonstrate bias or a reasonable apprehension of bias.

KYROU J:

1. On 29 March 2010, the fifty-eighth day of the trial, Mrs Slaveska applied for me to disqualify myself from further hearing this case on the following grounds:

(a) while in practice, I acted for the State of Victoria ('State') and advised the Police Association; and

(b) I have made a number of rulings which demonstrated bias against Mr Slaveski.[1]

2. I refused the application on the same day and said that I would deliver my reasons at a later time. These are my reasons. They should be read in conjunction with the comments I made on 29 March 2010 prior to and in response to Mrs Slaveska's application.[2]

3. In accordance with my usual practice, when I was allocated this case, I considered whether there was any reason why I could not hear it. I concluded then that there was no such reason. I remain of that view.

4. The hearing commenced on 3 August 2009. It continued during September 2009, parts of December 2009 and recommenced on 1 February 2010.

5. On the twenty-fourth day of the trial, namely 24 September 2009, during a discussion about

whether a particular psychiatrist should be appointed to examine Mr Slaveski, Mr Slaveski asked whether the psychiatrist had previously acted for the State. I replied that, even if the psychiatrist had done so, that would not affect the psychiatrist's independence. In that context, I mentioned that while I was in practice, I had acted for the State on numerous occasions. None of the parties asked me to provide any details or raised any objection to my continuing to hear the case.

6. On the morning of 24 March 2010, Mrs Slaveska reminded me that I had previously stated that I had acted for the State. Although she did not make an application that I disqualify myself, she said that she was concerned about my having previously acted for the State and wanted to obtain legal advice. In order to ensure that Mrs Slaveska obtained informed legal advice, I told her that when I was in practice as a solicitor, the main government departments for which I had acted were the Education Department and the Transport Department. I said that I gave them advice about their legislation and various issues that came up from time to time.

7. I informed Mrs Slaveska that I have not acted for Victoria Police, the Police Department or the Minister for Police. I said that, about 22 years ago, I advised the Police Association about an internal matter. I said that, although I could not remember the details, it is possible that the advice related to the Association's constitution.

8. Mrs Slaveska requested an adjournment so that she could obtain legal advice. At 12.35pm on 24 March 2010, I adjourned the matter until 10.15am on 25 March 2010 to enable Mrs Slaveska to obtain legal advice. I informed her that, if she desired to make an application that I disqualify myself, the application would have to be made on the morning of 25 March 2010. For reasons which are not presently relevant, the hearing did not proceed on 25 and 26 March 2010.

9. When Mrs Slaveska eventually made her application on 29 March 2010, she relied principally on the ground that I had previously acted for the State and the Police Association. I will deal with that ground first.

10. According to *Ebner v Official Trustee in Bankruptcy*,[3] a judge is disqualified if there is actual bias or 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.'[4] That is often called apprehended bias to distinguish it from actual bias, where the judge is actually biased.

11. The approach to be adopted where a judge has previously acted for one of the parties before him or her was discussed in *Re Polites; Ex parte Hoyts Corporation Pty Ltd*[5] In that case, Mr Polites, while a solicitor, provided a letter of advice to Hoyts about some industrial relations issues. He was later appointed a Deputy President of the Australian Industrial Relations Commission. He sat as a member of a full bench of three to hear an industrial dispute between Hoyts and a union which touched on some of the issues that were covered in the letter of advice.

12. On the twenty-seventh day of the hearing, after 96 exhibits had been tendered and the transcript had numbered some 2500 pages, the union objected to Mr Polites continuing to participate in the hearing because of his letter of advice. The High Court held that the fact that Mr Polites had previously given legal advice to Hoyts did not prevent him from continuing to participate in the hearing.

13. The High Court said:

> A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit.[6]

14. The High Court added:

> when the parties have been engaged in a proceeding for some time, with the inevitable commitment of resources and costs that that entails, a member should not disqualify himself or herself unless there is – not may be – an issue to which a disqualifying factor is relevant.[7]

15. In my opinion, the principle in *Hoyts* applies with greater force where, as in this case, the judge's former client is not a single individual or company but a government, which has many departments and agencies, with different roles and legal issues.

16. The circumstances of this case point more strongly than the circumstances in the *Hoyts case* to there being no basis for any suggestion of my having to disqualify myself. I have not provided any letter of advice or oral advice to any of the police defendants or the State on the kinds of issues that are raised for determination in this case in any context that is remotely comparable to this case. The advice that I have given has nothing to do with the claims against the police or the claim against the State in this case. Furthermore, as at the time of the application, the trial had reached the fifty-eighth day, the transcript had reached page 7448 and 153 exhibits had been tendered.

17. A fair-minded lay observer would not reasonably apprehend that, because I advised some government departments while I was in practice, I might not bring an impartial mind to the resolution of the questions in every case involving the State. If that were the position, there would be few judges of this Court who would be able to hear any case involving the State.

18. There is simply no connection between the parties and issues in this case and the advice I have previously given to the State, and therefore there is no basis for arguing that there would be a reasonable apprehension that I might not be capable of impartially resolving the issues in this case.

19. The same considerations apply to the advice that I provided to the Police Association around 1988. That was so long ago that, irrespective of its subject matter, the advice has no relevance to the parties in this case or to the issues that I have to determine in order to resolve it.

20. As I do not know the police defendants or their witnesses and have not advised them or Victoria Police on the issues that arise for resolution in this case, a fair-minded lay observer would not apprehend that I might not bring an impartial mind to the resolution of this case.

21. As for the second ground advanced in support of Mrs Slaveska's application, namely that several rulings I have made demonstrated bias against Mr Slaveski, I will say only that the rulings were made on their merits after hearing submissions. The reasons I have given for each ruling speak for themselves. It would be inappropriate for me to seek to further explain or justify the rulings. The fact that they were adverse to Mr Slaveski does not demonstrate bias or a reasonable apprehension of bias.

22. As Mrs Slaveska failed to establish any proper basis for me to disqualify myself, I refused to do so.

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[1] For background on the proceeding, see *Slaveski v Victoria* [2009] VSC 423; *Slaveski v Victoria* [2009] VSC 596.
[2] See Transcript pages 7474-93.
[3] [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13.
[4] [2000 HCA 63; (2000) 205 CLR 337, 344 [6]; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13.
[5] [1991] HCA 31; (1991) 173 CLR 78; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114 ('*Hoyts*').
[6] [1991] HCA 31; (1991) 173 CLR 78, 87-8; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114.
[7] [1991] HCA 31; (1991) 173 CLR 78, 92; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114.

APPEARANCES: For the plaintiff Lupco Slaveski: Mrs Slaveska, as Litigation Guardian. For the first defendant State of Victoria: Mr B Ihle, counsel. Victorian Government Solicitor. For the second to twenty-fourth defendants: Mr R Gipp, counsel. Russell Kennedy, solicitors.
