20/04; [2004] VSC 125

SUPREME COURT OF VICTORIA

NATIONAL EXCHANGE PTY LTD v FOSTER

Dodds-Streeton, J

31 March, 5 April 2004

NATURAL JUSTICE – CIVIL PROCEEDINGS – CLAIM FOR DAMAGES FOR BREACH OF CONTRACT – NO APPEARANCE OF DEFENDANT AT HEARING – ADVERSE INFORMATION DERIVED BY MAGISTRATE FROM DOCUMENTS WHICH WERE NOT PRODUCED NOR CONTENTS DISCLOSED – NO OPPORTUNITY GIVEN TO PLAINTIFF'S COUNSEL TO READ OR ANSWER THE ADVERSE MATERIAL – WHETHER MAGISTRATE IN ERROR IN REFERRING TO AND APPARENTLY RELYING ON SUCH MATERIAL – WHETHER MAGISTRATE'S REFUSAL OF AN APPLICATION FOR ADJOURNMENT AND HIS GENERAL APPROACH GAVE RISE TO A REASONABLE APPREHENSION OF BIAS – WAIVER – WHETHER THE RIGHT TO OBJECT WAS WAIVED IN THE CIRCUMSTANCES.

NEP/L claimed damages from F. for breach of contract. At the hearing, the magistrate in dismissing the claim took into account material which was not in evidence before the Court namely, an unidentified newspaper article and a statutory declaration from F. The magistrate raised with NEP/Ls counsel that NEP/L was guilty of a crime but refused an application for an adjournment by counsel to address the question of the illegality raised by the magistrate. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for determination by another magistrate.

1. A general and fundamental requirement of procedural fairness is that a party subject to the possibility of an adverse determination to be made on the basis of particular documents or material, should know the case against it and be afforded an opportunity to respond. In the present case, the magistrate had apparently derived adverse information concerning NEP/L from vaguely identified source documents which were not produced, nor their contents disclosed, to NEP/Ls legal representative. No opportunity to read or answer the adverse material was afforded. The magistrate's approach, and his reference to and apparent reliance on such material, did not accord with the requirements of natural justice.

2. The magistrate's statements, his general approach and his refusal of an adjournment (in circumstances where the court had raised illegality of its own motion without notice and concluded that the appellant was guilty of a crime on the basis of unidentified extraneous material) would give rise to a reasonable apprehension in a fair-minded observer, knowing the relevant circumstances of the case, that the magistrate had prejudged the case, and did not bring an impartial and unprejudiced mind to the resolution of the matters before him.

3. The right to object on the ground of bias or conduct giving rise to an apprehension of bias may, in certain circumstances, be waived. In the present case, counsel did not, in terms, make a formal objection or an application that the magistrate disqualify himself for bias. However, NEP/L did not continue to participate in the hearing of the case following the impugned conduct, and subsequently awaited judgment without making any protest. The entire case was disposed of speedily. Accordingly, despite the absence of a formal objection or application, the right to object was not waived in all the circumstances.

DODDS-STREETON, J:

THE APPEAL

1. This is an appeal pursuant to s109(1) of the *Magistrates' Court Act* 1989 (Vic) from a final order of the Magistrates' Court on questions of law.

2. Section 109 of the *Magistrates' Court Act* provides: *[After setting out this provision, Her Honour continued]: ...*

3. At the hearing of the appeal on 30 March 2004 there was no appearance for Ms Foster.

4. The final order appealed against is the order of Mr RL Crisp, Magistrate, made on 10 October 2003.

5. Mr Crisp on 10 October 2003 made orders dismissing the Magistrates' Court complaint of the appellant, National Exchange Pty Ltd ("National Exchange") pursuant to which, as plaintiff, it claimed damages of $697.23 from the respondent, Helen Foster, as defendant, arising from Ms Foster's failure to complete a contract under which she had agreed to sell the National Exchange 691 shares in AXA Pacific Holdings Ltd.

6. Master Wheeler by order made on 10 November 2003 granted National Exchange leave to appeal from the order of Mr Crisp.

The Questions of Law

7. The questions of law were identified by Master Wheeler in his order made on 10 November 2003 as:

> (a) Did the Magistrate err in taking into account, in reaching his decision, material which was not in evidence before the Court (and the contents of which the Appellant was not advised), namely -
> (i) an unidentified newspaper article;
> (ii) a statutory declaration of the Respondent (Mrs Foster)
>
> (b) was the conduct of the learned Magistrate such as to lead to an "apprehension of bias"?
>
> (c) In circumstances where the Respondent had not raised the question of legality, was it open for the learned Magistrate to dismiss the Appellant's complaint on the basis that the Appellant's offer to buy the Respondent's shares constituted a crime, namely, an attempt to obtain a financial advantage by deception?
>
> (d) Did the learned Magistrate err in holding that the Appellant's offer to buy the Respondent's shares constituted a crime, namely an attempt to obtain a financial advantage by deception?

Relief Sought

8. Mr Waller, counsel for National Exchange, submitted that all the questions of law identified in the order of Master Wheeler made on 10 November 2003 should be answered affirmatively.

9. Mr Waller conceded that if it were to be found that the conduct of the learned Magistrate was such as to give rise to a reasonable apprehension of bias, it would be unnecessary to determine the other questions of law, as their determination would make no difference to the relief sought by National Exchange, namely, remission of the claim for hearing and determination by a differently constituted Magistrates' Court.

10. Mr Waller submitted that it would not be appropriate for this court to determine the contractual claim, as it did not have before it evidence of all relevant matters For example, there was no evidence before the court of the price of AXA Pacific Holdings Ltd shares at the relevant time.

Affidavit in Support of the Appeal

11. The affidavit in support of the appeal of James Anthony Griffin sworn 10 November 2003 deposes that he was present at the Magistrates' Court hearing of National Exchange's claim for $697.23 damages, arising from Ms Foster's refusal to complete a contract under which she agreed to sell National Exchange 691 shares in AXA Pacific Holding Ltd.

12. Mr Griffin deposes that at the hearing of the matter before Mr Crisp, he appeared on behalf of National Exchange. There was no appearance for Ms Foster. The proceedings were relatively short. When the matter was called on, Mr Griffin opened National Exchange's case. He called as a witness Mr David Tweed, the sole director and secretary of National Exchange. The transcript of the Magistrates' Court hearing is exhibited to Mr Griffin's affidavit.

Did the Magistrate err in taking into account, in reaching his decision, material which was not in evidence before the Court (and the contents of which the Appellant was not advised), namely: an unidentified newspaper article; and a statutory declaration of the Respondent (Mrs Foster).

13. Mr Waller submitted that the learned Magistrate erred in taking into account an unidentified newspaper article and a statutory declaration (which was not in evidence before the Magistrates' Court, and the contents of which were not disclosed to National Exchange's counsel) in reaching his decision.

14. The Transcript of the Magistrates' Court Hearing which is Exhibit "JG-6" to the affidavit of James Griffin, reveals that, on Mr Tweed being called, the learned Magistrate stated:

> "I've read about this Mr Tweed is notorious"

He made reference to "a complaint" about Mr Tweed and on being asked by Mr Griffin to identify the complaint, stated:

> "There was only one in the paper there."

15. The learned Magistrate then referred to a document which he described as a "sub-statutory declaration". Mr Griffin requested the Magistrate to identify the document.
The Transcript reveals the following exchange –

> Mr Griffin: Is that the defence Your Worships reading from? His Worship: No, it's the stat dec. Mr Griffin: Your Worship, I don't have the stat dec. I object to that being read. It hasn't been supplied to myself and therefore its not properly before the Court. His Worship: Well, your client doesn't have anything to worry about he (indistinct) hasn't he? Mr Griffin: Of course he is His Worship: What she says doesn't matter but it may fill me in on – and I should be asking I suppose – Mr Griffin: She has filed a defence, Your Worship. His Worship: Yes, I know that. Well, let's see what happens and I won't worry about this Here it just says she gets confused. Well, what's the present status of your client's business, is he regarded as legitimate or not?

16. The learned Magistrate made no further specific reference to the statutory declaration. Subsequently, he again referred to having read "the paper" and that he had immediately thought that a criminal offence was identified. Neither the statutory declaration, nor any newspaper, was at any stage produced to Mr Griffin and the learned Magistrate did not further or more specifically disclose to Mr Griffin the contents of the documents to which he had referred.

17. While, at one point, Mr Crisp's observations suggest that he would not take account any of the above material to which he had referred, he subsequently made observations which were apparently based on it. Further, the tenor of his remarks throughout the hearing indicated that the learned Magistrate was prepossessed by negative information concerning Mr Tweed's alleged activities, the source of which was not clearly identified. It would appear that such information was derived from the newspaper or newspapers, the statutory declaration or from other material not in evidence or served upon National Exchange.

18. Mr Waller submitted that although in a Magistrates' Court arbitration, the Court is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit, it is expressly bound by the rules of natural justice. The rules of natural justice require that if the tribunal or court is to draw an adverse inference from a particular document, the document should be put squarely before the party affected, to enable the party to deal with it by way of argument or evidence.

19. In this context, he relied on *Kioa & Ors v West & Anor*[1] in which Gibbs CJ stated that

> "if the rules of natural justice were applicable, the appellants were entitled to a fair opportunity to correct or contradict any relevant material prejudicial to them[2]."

20. Mason J also acknowledged that a fundamental rule of natural justice required that a party "is entitled to know the case sought to be made against him and to be given an opportunity of replying to it[3]", and

> "if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter"[4].

21. Brennan J observed :

> "A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters to his interests which the repository of the power proposes to take into account in deciding upon its exercise."[5]

22. Although *Kioa v West*[6] involved a consideration of the requirements of natural justice in the context of the exercise of ministerial power under a particular statute, a general and fundamental requirement of procedural fairness is that a party subject to the possibility of an adverse determination to be made on the basis of particular documents or material, should know the case against it, and be afforded an opportunity to respond.

23. In the present case, the learned Magistrate had apparently derived adverse information concerning National Exchange from vaguely identified source documents which were not produced, nor their contents disclosed, to National Exchange's legal representative. No opportunity to read or answer the adverse material was afforded.

24. In my opinion, the learned Magistrate's approach, and his reference to and apparent reliance on such material, did not accord with the requirements of natural justice. The first question of law should be answered in the affirmative.

Was the conduct of the learned Magistrate such as to lead to an "apprehension of bias"?

25. Mr Waller also submitted that a number of specific comments by the learned Magistrate and the general tenor of his observations throughout the course of the hearing, gave rise to a reasonable apprehension of bias, which, (despite the failure of Mr Griffin to make a formal objection or an application that the learned Magistrate disqualify himself) was not, in the circumstances, waived.

Apprehension of Bias

26. The test for determining whether the conduct or observations of a court or tribunal give rise to a reasonable apprehension of bias is well established. I recently considered the principal authorities in *Mond & Mond v Dayan Rabbi Isaac Dov Berger*[7] and for convenience, set out an extract from the reasons for judgment.

27. In *Webb v R,*[8] Mason CJ and McHugh J stated:

> "When it is alleged that a judge has been or might be actuated by bias, this Court has held that the proper test is whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case. ... The Court has specifically rejected the real likelihood of bias test. The principle behind the reasonable apprehension or suspicion test is that it is of `fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[9]"

28. In *Livesey v New South Wales Bar Association,*[10] the High Court stated:

> "It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in *R v Watson; Ex parte Armstrong* [[1976] HCA 39; (1976) 136 CLR 248 at pp258-263; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11]. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.[11]"

29. In *Grassby v R*[12], Dawson J observed that the test is:

> " ... whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him. See *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420; *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at pp258-263; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11."

30. As recognised by Toohey J in *Webb v R*[13], "the underlying principle is the same whether judges, jurors or members of a tribunal are concerned, though naturally its application will differ in those cases"[14]

31. In *Gascor v Ellicott*[15] the Court of Appeal upheld the trial judge's rejection of an application to remove an arbitrator for misconduct pursuant to s44 of the Act.

32. The appellant sought to remove the arbitrator appointed to determine a payment due

by the appellant to the respondent under an agreement for the purchase of natural gas. The appellant alleged that the arbitrator had previously acted as counsel for the producers of the gas product in an earlier arbitration involving some similar issues and had cross-examined expert witnesses whom the appellant intended to call; had acted as an arbitrator in another arbitration and had rejected evidence of persons to be called as expert witnesses for the appellant; and had not disclosed those matters. It alleged that the arbitrator's conduct gave rise to a reasonable apprehension of bias.

33. Tadgell JA observed:

> "There is no suggestion in this case of actual bias. The question of apprehended bias as a disqualification from adjudication in a court of law was most recently considered by this court in *Rozenes v Kelly* [1996] VicRp 20; [1996] 1 VR 320. As it was there stated at 329 the essential issue in such a case is whether in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matters before him."[16]

34. His Honour further stated:

> "Although the criterion of apprehension of partiality or prejudice is [sic] possibility, not likelihood, a reasonable apprehension is to be established to the court's satisfaction: it is a reasonable and not a fanciful or fantastic apprehension that is to be established; and the apprehension is to be attributed to an observer who is 'fair-minded' - which means 'reasonable.'. . . ... Moreover, it is for the court to determine what knowledge the fair-minded or reasonable lay observer is to apply to an appraisal of the situation."[17]

35. He referred to *Laws v Australian Broadcasting Tribunal*[18] where Mason CJ and Brennan J said:

> "In assessing what the hypothetical reaction of a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances of the case[19]."

36. Tadgell JA also referred to *Webb v R*[20] where Deane J considered that the hypothetical figure should have:

> "A broad knowledge of the material objective facts as ascertained by the appellate court[21]."

37. His Honour concluded:

> "However one describes the knowledge, the observer whose view the court is to seek is in my opinion to be fastened with sufficient knowledge to enable a rational and reasonable view – not just a perfunctory or superficial view – to be formed. Of course that is really to say no more than that there must be attributed to the fair-minded observer knowledge which would afford an opportunity to consider all the relevant circumstances of the case . . . "[22]

38. In *Victorian Workcare*[23] McDonald J stated:

> "The question as to whether a judicial officer of an inferior court has demonstrated bias against one party to the favour or advantage of the opposing side or that the officer is unable to bring an unprejudiced mind to the resolution of the matter goes to the jurisdiction of the inferior court. It is a question of law to be determined by this court on the facts – *Sankey v Whitlam & Ors* (1977) 29 FLR 346; (1977) 21 ALR 457; (1977) 1 NSWLR 333."

The Statements

39. The transcript reveals that the learned Magistrate's statements at the hearing on 10 October 2003 included the following:

> "I've read about this, Mr Tweed's notorious" [Transcript page1, line 15].
>
> "Aren't you embarrassed about mentioning that, your client's notorious for - the suggestion is that these people are all deceived but I think that's what she's complaining about, isn't it." [Transcript page 1, line 30; page 2, line 2].
>
> "Well, what's the present status of your client's business, is he regarded as legitimate or not?"

> [Transcript page 2, line 18].
> "I don't want to fall under the trap of being party to or even - the immoral transaction. No offence but I gather that at the very least it's reasonably immoral what he does". [Transcript page 3, line 2].
> "It's obtaining property by deception not to disclose the real value, attempting to obtain by deception". [Transcript page 8, line 9].
>
> "If I am right there's no possibility of getting an order from this court, if I am wrong I'm spared the odium of people having to deal with one of these cases again". [Transcript page 12, line 8].

40. His Worship also expressed the view that, although illegality was not raised on the pleadings, the contract the subject of the claim involved 'obtaining by deception' in terms of the *Theft Act*. He observed:

> "The clause [sic] [Court] can't lend itself to this sort of thing. There's a higher purpose here and that is that I've made no secret of the fact that your client is notorious, everyone knows, and that won't disqualify himself. The other point is that it's probably appropriate that in these sorts of cases the courts look closely at the transaction, when I look at it I see an attempt to commit a crime by your client".

41. Mr Griffin at that point sought an adjournment to prepare and make submissions on the law of theft in support of his dissent from the learned Magistrate's conclusion.

42. Mr Griffin observed that the claim against his client was misrepresentation. The transcript reveals the following exchange:

> Mr Griffin: "There is no crime here, Your Worship". His Worship: "There is. There's an attempt to obtain the natural advantage of deception".

43. Mr Griffin again sought an adjournment "to come back and address Your Worship on these matters which haven't been raised before today". The learned Magistrate observed that "it was a $690 case and it would be a waste of public money to have the hearing twice through and it's text book stuff. You can go away and read a textbook, I'll give you that opportunity".

44. The transcript reveals the following exchange:

> Mr Griffin: "Your Worship, I suggest that it's more that this, given the amount of matters my client has before the court, that to simplify..." His Worship: Well, we won't worry. Well, look, this is your test case, why don't you appeal the matter because it's morally abhorrent to be allowing your client to recover...Once I identify a criminal offence – and I might add in that I thought that immediately, when I read the newspaper, of course, it seems pretty obvious to me once that happens it's inappropriate to make an order in favour of your client...so I suggest we use this as a test case. I don't mind if I'm wrong because it's a $697 – it's at least highly immoral (indistinct) not happy about this sort of thing taking place...".

45. His Worship further observed that an appeal was appropriate as 'If I am right, there's no possibility of getting an order from this court. If I am wrong, I am spared the odium of people having to deal with one of these cases again".

46. The learned Magistrate then formally refused the application for an adjournment. He dismissed the claim.

47. I am satisfied that the learned Magistrate's statements, his general approach and his refusal of an adjournment (in circumstances where the court had raised illegality of its own motion without notice and concluded that the appellant was guilty of a crime on the basis of unidentified extraneous material) would give rise to a reasonable apprehension in a fair-minded observer, knowing the relevant circumstances of the case, that the learned Magistrate had prejudged the case, and did not bring an impartial and unprejudiced mind to the resolution of the matters before him.

Waiver

48. The right to object on the ground of bias or conduct giving rise to an apprehension of bias may, in certain circumstances, be waived. I recently considered the principles relevant to waiver

in that context in *Mond and Mond v Dayan Rabbi Isaac Dov Berger.*[24] For convenience, I set out the relevant extract from my reasons for judgment in that case.

49. In *R v Magistrates' Court at Lilydale; Ex parte Ciccone*[25] McInerney J found that a magistrate's conduct in accepting transport to and from a view in a car with the respondents' barrister and witness constituted grounds on which reasonable people might conclude that the applicant might not receive a fair and unbiased hearing.[26] His Honour nevertheless held that the applicant had lost whatever right he had to have the decision quashed "by reason of the failure of his counsel to object to the magistrate's continuing to hear the matter".[27]

50. McInerney J found that the applicant's counsel who (knowing of the right to object to the magistrate's continuing to hear the case) "did not in fact take any objection but proceeded to open his case, present his evidence as well as cross-examining the witnesses called for [the respondent] and make a final address to the magistrate".[28] Counsel "neither said nor did anything at the hearing to indicate that he had any objection to the magistrate's conduct in relation to the view or to the magistrate hearing the case on his return from the view".[29]

51. McInerney J considered the competing rationales for the loss of a right to object on the ground of bias. On one view, it is justified by breach of a duty to take objection immediately in fairness to the magistrate and to the other party.[30] McInerney J apparently rejected that view. On another view, loss of the right is based on the applicant knowing of the facts giving rise to the right to object but going on with the case down to judgment, or with knowledge of the facts, going on with the case "nursing a secret intention to save [the] objection for later if needed".[31] Ultimately, his Honour doubted whether "any one test should be regarded as the exclusive test".[32]

52. The crucial determinant in McInerney J's refusal of relief was the applicant's conduct (with knowledge of the facts entitling him to object to the continuance of the legal proceeding) in not objecting and in taking an active part in the proceedings right down to judgment. His Honour referred to cases[33] in which it was stated that a litigant who knows that there may be some objection to the constitution of the Bench is bound to mention it at once; but he was principally influenced by the fact that rather than objecting, the applicant in the case before him "instead ... went on, seeking to win on the evidence presented"[34].

53. McInerney J concluded that even "if the evidence did not establish a case of 'lying by' or 'nursing a point' ...it would be wrong to allow the applicant – his advisers having chosen to go on with the hearing up to judgment, before the magistrate – to raise this point now. I do not think that they should be allowed thus to eat their cake and have it, to approbate and reprobate".[35]

54. In *Hayden Merrett v The Director of Public Prosecutions and His Honour Judge Dyett,*[36] on which the defendants also rely in this context, O'Bryan J ultimately found that there was no reasonable apprehension of bias in the judge as alleged by the appellant. His Honour observed: "I find it curious indeed that experienced defence counsel did not request the learned Judge to disqualify himself before he delivered reasons for decision. If it was obviously clear ... that the learned Judge had pre-judged the appeals ... counsel could have politely asked him to stand aside".[37] He also noted that, as in *R v Magistrates' Court at Lilydale*[38], the applicant had waited until the judge delivered an adverse determination prior to making a complaint.

55. In *Vakauta v Kelly*[39] a party's counsel took no objection to a trial judge's comments (which the majority held to give rise to an appearance of bias) and made no application in relation to it. The matter proceeded to judgment in which similar comments were repeated. Dawson J (dissenting on some issues) agreed with the majority that a party could waive a right to object by "standing by". He considered that waiver would occur where *"no objection was taken to the continuation of the trial before His Honour, either formally or in effect...I do not mean to suggest that an objection will be waived if it is not made in formal or even explicit terms. The circumstances may be such that it is plain, without it being put into words, that a judge is being asked to consider his position having regard to the requirement of impartiality"*[40].

56. In *The Marriage of EM and GT Stiffle,*[41] a trial judge in the course of a custody dispute hearing intervened and indicated in strong terms that the appellant wife had no real prospects of

success in the proceeding. The trial was by affidavit. The wife's case was at that stage completed although cross-examination of the husband's witnesses was not complete. The wife's counsel did not make an application to the trial judge but the wife effectively withdrew from the case. Fogarty and Joske JJ observed that in the exercise of the court's general supervisory jurisdiction, the ultimate determinant was whether a miscarriage of justice had occurred. In that context, they observed:

> "The failure of counsel to make an application to the trial judge to disqualify himself is an important consideration in the exercise of that power but we do not consider that it is necessarily fatal in every case, particularly when the trial did not proceed further after a judge's intervention which gave rise to the complaint"[42].

They concluded that in the circumstances, a retrial should be ordered.

57. In the present case, Mr Griffin did not, in terms, make a formal objection or an application that the learned Magistrate disqualify himself for bias. He formally protested that the documents referred to by the Magistrate were not properly before the court. Further, when the issue of illegality[43] was raised by the Magistrate, Mr Griffin sought an adjournment, which was refused as being a waste of public moneys over a small sum. The Magistrate expressly invited that the matter be appealed[44]. The claim appears to have been cursorily dismissed.

58. This is not a case where the appellant continued to participate in the hearing of the case following the impugned conduct, and subsequently awaited judgment without making any protest. There was no interval between the hearing of the case and its disposition. The entire case was disposed of speedily. Mr Griffin had sought an adjournment to consider the implications of the newly-raised issue of criminal conduct, which had been refused. He had objected, to no avail, to the learned Magistrate's reference to or reliance on unidentified material to which the appellant had no access.

59. I am satisfied that despite the absence of a formal objection or application, the right to object was not waived in all the circumstances, where the matter proceeded to a summary conclusion although the appellant's legal representative had formally sought, and had been refused, an adjournment to consider the implications of the learned Magistrate's views on illegality.

60. In my opinion, the conduct of the learned Magistrate gave rise to a reasonable apprehension of bias, and the appellant's right to object was not waived. The second question should be answered in the affirmative.

CONCLUSION

61. Having found that the first two questions should be answered in the affirmative, it is unnecessary for me to determine the remaining questions. In *National Exchange Pty Ltd v Vane*[45] Osborn J considered that acceptance of the appellant's offer to purchase shares (similar to that in the present case) required the return of both the transfer form and the issuer sponsored holding statement. It is, however, unnecessary for me to form or express any view on the merits of the appellant's claim. It remains crucial to the attainment of justice that the claim of any litigant (whatever its reputation or the attendant publicity) be determined only upon evidence. Prejudgment, or the appearance of it, is fatal to the integrity of the judicial process. The matter should be remitted for hearing and determination by a differently constituted Magistrates' Court.

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[1] [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.
[2] *Ibid*, at 569.
[3] *Ibid*, at 582.
[4] *Ibid*, at 587.
[5] *Ibid*, at 628.
[6] [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.
[7] [2004] VSC 45; (2004) 10 VR 534.
[8] [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258.
[9] *Ibid*, at 47.
[10] [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420.
[11] *Ibid*, at 293-294.
[12] [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.
[13] [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258.

[14] *Ibid*, at 87.
[15] [1997] 1 VR 332.
[16] *Ibid*, at 340.
[17] *Ibid*, at 342.
[18] [1990] HCA 31; (1990) 170 CLR 70; (1990) 93 ALR 435; (1990) 64 ALJR 412.
[19] *Ibid*, at 87.
[20] [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258.
[21] *Ibid*, at 73.
[22] [1997] 1 VR 332 at 342.
[23] *Victoria Workcare Authority v Hillgrove* (SC (Vic), McDonald J, No 5065/94, 29 August 1994, unreported).
[24] [2004] VSC 45; (2004) 10 VR 534.
[25] [1973] VicRp 10; (1973) VR 122.
[26] *Ibid*, at 131.
[27] *Ibid.*
[28] *Ibid*, at 131-132.
[29] *Ibid* at 132.
[30] *Ibid*, at 133.
[31] *Ibid.*
[32] *Ibid*, at 134.
[33] See: *Re McCrory Ex parte Rivett* [1895] VicLawRp 2; (1895) 21 VLR 3 at 6
[34] [1973] VicRp 10; (1973) VR 122 at 135
[35] *Ibid.*
[36] No. 6362 of 1996 SCV. O'Bryan J, 18 October 1996.
[37] Ibid, at 8.
[38] [1973] VicRp 10; (1973) VR 122.
[39] [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-27.
[40] Ibid, at 577.
[41] (1988) 12 FLR 620.
[42] Ibid, at 631.
[43] Transcript at 10, line 14-17.
[44] Transcript at 10, line 14-17.
[45] BC200306177.

APPEARANCES: For the plaintiff National Exchange Pty Ltd: Mr IG Waller, counsel.
