Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 4159 v Wolff
Medium Neutral Citation:	[2021] NSWCATAP 135
Hearing Date(s):	20 April 2021
Date of Orders:	14 May 2021
Decision Date:	14 May 2021
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Deputy President A Bell SC, Senior Member
Decision:	(1) Leave to appeal is granted. (2) The appeal is dismissed.
Catchwords:	ADMINISTRATIVE LAW – Bias – apprehended bias – interest or association bias – Member of Tribunal providing lay and expert evidence in support of a claim brought by his domestic partner in proceedings in the Tribunal – application to transfer proceedings to a court pursuant to Sch 4 cl 6 of the Civil and Administrative Tribunal Act 2013 – appeal against refusal – whether all Members of the Tribunal affected by apprehended bias so as to necessitate the transfer of the proceedings to a court – challenge to exercise of discretion – principles applicable in claim for apprehended bias
Cases Cited:	Attorney General for New South Wales v Gatsby [2018] NSWCA 254 Chamoun v District Court of NSW [2018] NSWCA 187 Champion Homes Pty Ltd v Guirgis [2018] NSWCATAP 54 Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337 Fingleton v Christian Ivanoff Pty Ltd (1976) 14 SASR 530

	Hot Holdings Pty Ltd v Creasy [2002] HCA 51; 210 CLR 438 Johnson v Johnson [2000] HCA 48; 201 CLR 488 Laws v Australian Broadcasting Tribunal [1990] HCA 31; (1990) 170 CLR 70 Lunn v The Commissioner for Public Employment [2009] NSWSC 19 McGovern v Ku-ring-gai Council [2008] NSWCA 209; (2008) 72 NSW LR 504 Minister for Immigration and Multicultural Affairs v Jia Legeng [2001] HCA 17; (2001) 205 CLR 507 McLean v Nicholson [2002] VSC 446; (2002) 172 FLR 90 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 O'Connor v Nationwide News Pty Ltd (1995) 128 FLR 61 Rouvinetis v Knoll [2013] NSWCA 24 Rouvinetis v Knoll [2009] NSWSC 1212 Tarrant v R [2018] NSWCCA 21 Trustees of Christian Bros v Cardone (1995) 57 FCR 327 Vakauta v Kelly (1988) 13 NSWLR 502 at 527 Vakauta v Kelly [1989] HCA 44; (1989) 167 CLR 568 Webb v The Queen [1994] HCA 30; (1993) 181 CLR 41
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 4159 (Appellant) Dianne Wolff (Respondent)
Representation:	Counsel: N Li (Appellant) Solicitors: Kerin Benson Lawyers (Appellant) JS Mueller and Co Lawyers (Respondent)
File Number(s):	2021/00065930
Publication Restriction:	Nil
Decision under appeal:	

Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	10 February 2021
Before:	G Blake SC, Senior Member
File Number(s):	SC 20/21046

REASONS FOR DECISION

Introduction

1 This appeal concerns the dismissal by the Tribunal of an application under Sch 4 cl 6 of the *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act) to transfer strata proceedings SC 20/21046 (proceedings) to the District Court of New South Wales.

2 The respondent in this appeal, Ms Wolff, is the applicant in the proceedings. She is the owner of Lot 2 in strata scheme SP 4159. Relevantly, she is seeking orders for the carrying out by the appellant of works to common property in the strata scheme. The application is made under s 106 of the *Strata Schemes Management Act 2015 (NSW)* (SSMA). Originally, she also sought compensation under s 106(5) of the SSMA arising from the appellant's failure to comply with its duty under s 106(1), however this claim was withdrawn.

3 The appellant is the respondent in the proceedings and is the Owners Corporation of Strata Plan No. 4159.

4 The application to transfer was made by the appellant because one of the witnesses for Ms Wolff is Mr Topolinsky. Mr Topolinsky is the domestic partner of Ms Wolff, a structural engineer who has apparently provided an expert opinion in relation to this dispute and a General Member of this Tribunal. The application for transfer was made on the basis of apprehended bias. It was said that by reason of Mr Topolinsky's association with the Tribunal and its Members it was inappropriate for any Member of the Tribunal to hear the proceedings.

5 The application for transfer was dismissed on 10 February 2021 (decision). The Tribunal determined the application "on the papers". The Tribunal provided reasons for its decision (reasons).

6 Having considered the evidence provided by the parties, the Tribunal found that the respondent had established four matters of factual concern in relation to apprehended bias. Mr Topolinsky is personally concerned in the outcome of the proceedings brought by his domestic partner, Ms Wolff. He is a General Member of the Tribunal and gives expert and lay evidence in support of Ms Wolff's claim. The Tribunal found that the evidence of Mr Topolinsky "is controversial because he has a different account in material respects of several relevant conversations to Mr Bowen, and he has a different opinion to the cause of the cracking in lot 2 than Mr Hadley and Mr Bunt: reasons at [47].

7 Mr Bowen and Mr Bunt are expert witnesses for the appellant, Mr Bowen being a building consultant and Mr Bunt being a structural engineer. Mr Hadley is an expert witness for Ms Wolff, being a structural engineer.

8 However, the Tribunal concluded that the appellant had failed to establish any of the "four logical connections" the appellant had asserted to support the claim of apprehended bias: reasons at [48]. While the Tribunal accepted potential embarrassment might be caused to a Member of the Tribunal hearing a case in which Mr Topolinsky was a witness, that did not "mean that a hearing of the proceedings in the Tribunal would be affected by apprehended bias": reasons at [50].

9 The Tribunal said that if it was wrong in this conclusion, it would have held the Tribunal could not take steps to avoid any such apprehension of bias and the Tribunal would have transferred the proceedings to a court: reasons at [51] and [53]. In expressing this opinion, the Tribunal distinguished the case of *Rouvinetis v Knoll* [2013] NSWCA 24 (*Rouvinetis*).

Notice of Appeal and history of appeal proceedings

10 The appellant filed a Notice of Appeal on 8 March 2021. The appeal was filed in time.

11 Because the decision is an interlocutory decision, leave to appeal is sought. Initially leave was opposed by Ms Wolff. However, during the hearing of the appeal, following discussions with the Appeal Panel, opposition to the grant of leave was withdrawn.

12 The Notice of Appeal raises two grounds:

> 1. The Tribunal erred in acting upon an incorrect principle by applying a narrower test of apprehended bias characterised as "pre-judgment bias".
>
> **Particulars**
>
> The alleged apprehended bias does not arise from an apprehension of pre-judgment for which the test is whether the relevant Tribunal member would bring a mind open to persuasion.
>
> The alleged apprehended bias arises from an apprehension that the tribunal would not be impartial if it were asked to make adverse findings against a Member of the Tribunal.
>
> 2. The Tribunal erred by failing to consider paragraphs 22 to 24 of the [appellant's] submissions dated 30 November 2020.
>
> **Particulars**
>
> The showing of apprehended bias is not a necessary condition to the transfer of proceedings being in the interests of justice.
>
> The possibility that a hearing could be affected by apparent bias is a strong discretionary consideration in favour of transfer.

13 The appellant filed written submissions in support of its appeal.

14 In relation to ground 1, the appellant made the following submissions:

(1) The appellant challenges the conclusion of the Tribunal in its reasons at [48] and said that the "open to persuasion" test applied by the Tribunal was "inapposite because it is directed towards an apprehension of bias by reason of prejudgment. Reference was made to the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 and [71]-[72] as to the nature of the pre-judgment bias test.

(2) The appellant said it did not allege the Tribunal was likely to give undue weight to Mr Topolinsky's evidence. Rather, the appellant said that "even if the Tribunal were open to persuasion with respect to the matters upon which Mr Topolinsky gives evidence, it would nonetheless tread more lightly in its criticisms of Mr Topolinsky's evidence than what otherwise might be the case". Reference was made to the appellant's submissions at first instance dated 30 November 2020 at [17]-[20].

(3) The "open to persuasion" test masks a legitimate concern arising from the decision of the High Court in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337. That is, the appellant submitted

> Justice having to both be done and be seen to be done; would a fair minded lay observer have reservations that Mr Topolinsky's membership of this Tribunal might prevent the Tribunal from unrestrained criticism of him were it otherwise warranted?

(4) Consequently, the Tribunal was in error in substituting the narrower "open to persuasion" test for the more general test found in *Ebner*.

15 In relation to ground 2 the appellant made the following submissions.

16 Contrary to the reasons at [52], the transfer application was not presented "on the basis that it stood or fell on the showing of an actual apprehension of bias. At [52] the Tribunal said:

> 52 In view of the fact that the transfer application is premised on a finding that a hearing of the proceedings in the Tribunal would be affected by apparent bias on account of the association of Mr Topolinsky with the Tribunal in his capacity as a General Member and I have not made such a finding, this issue does not arise for determination.

17 Rather, the appellant said the application was advanced on what the appellant described as a "3 mights test".

18 Reliance was placed on the submissions of the appellant dated 30 November 2020 in the proceedings at first instance. At [12]-[13] of those submissions the appellant had said:

> 12 If this Tribunal were to find that a hearing of these proceedings before the Tribunal in which a member of the Tribunal were to give evidence might be attended by apprehended bias, the interests of justice would necessitate a transfer.
>
> 13 In this way, this a 3 mights test – because the facilitation of the "quick and cheap" resolution of the real issues in the proceedings would not be advanced by the risk of this Tribunal having to entertain appeals on the grounds of apparent bias where that risk could be effectively negated by ordering the transfer.

19 At [21]-[24] of those submissions, under the heading "The exercise of discretion", the appellant continued:

> *The existence of the apparent bias is made out*

> 21 Were this Tribunal to find that hearing these proceedings would inevitably be affected by apparent bias, the Tribunal should transfer the proceedings without further weighing any other discretionary factors.
>
> *Alternatively, the possibility that the hearing would be affected by apparent bias is a strong discretionary consideration in favour of transfer*
>
> 22 Were this Tribunal to find that hearing these proceedings might be affected by apparent bias, that is a factor that weighs heavily in favour of transferring the proceedings.
>
> 23 It should only be by strong countervailing considerations that the proceedings remain in this Tribunal.
>
> 24 Relevantly, the Tribunal's confidence that it could determine the proceedings on the merits impartially is not a relevant consideration: [*Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342] at 356.

20 By reference to [23] and [24] above, the appellant then reiterated on appeal that the "discretionary factors weighed in favour of transfer if there were a real risk that the proceedings might be vitiated by apprehended bias".

21 These submissions were developed by Mr Li, Counsel for the appellant, at the hearing of the appeal on 20 April 2021. The appellant noted that Mr Topolinsky gave expert evidence concerning structural defects and that his evidence might be used to impeach his own witness. Reference was made to the particular defects for which repair were sought. The appellant submitted a fair-minded member of the public could come to a view that the Tribunal would not make an adverse finding and that the Tribunal might be concerned as an entity to maintain its reputation, Mr Topolinsky being a Member of the Tribunal who is an expert, facilitating conclaves.

22 The Appeal Panel raised a number of issues with the parties. They included that Members of the Tribunal, who are Members of the Consumer and Commercial Division, regularly sit on appeals from decisions made in that Division. Secondly, there were other Divisions from which a Member might be appointed to hear the proceedings and it was also open to the President of the Tribunal to appoint an Occasional Member for this purpose under s 11 of the NCAT Act. Thirdly, there may be an issue of necessity as that term is used in the context of consideration of questions of bias.

23 The appellant submitted that the issue was one of the association of Mr Topolinsky with the Tribunal and the possible concern that the Member constituted to hear the proceedings might have about the effect on the reputation of the Tribunal.

24 Reference was again made to the appellant's submissions on its application at first instance. In those submissions, the appellant referred to various "logical connections" between "the matter and the feared deviation from the cause of deciding the case on its merits". Having regard to Mr Topolinsky's position as a General Member of the Tribunal and his role in conclaves ordered by the Tribunal, the appellant had submitted at first instance that a fair minded lay observer might reasonably apprehend:

(1) undue weight might be given to Mr Topolinsky's evidence although the appellant's submissions on appeal at [13] stated that it did not allege that the Tribunal is likely to give undue weight to Mr Topolinsky's evidence);

(2) the Tribunal would be less likely to criticise the expert evidence given by Mr Topolinsky because the Tribunal "would be motivated to preserve (or mitigate the damage to) the reputation of Mr Topolinsky and the institutional integrity of this Tribunal".

(3) the integrity of the Tribunal would not be advanced by doubt being cast as to Mr Topolinsky's credibility as a lay witness and the Tribunal might be reluctant to make adverse findings; and

(4) the Tribunal might be more sympathetic to Mr Topolinsky when giving weight to the evidence that Mr Topolinsky might give.

25 The appellant submitted that Tribunal should have concluded:

(1) that a reasonable apprehension of bias was made out and constituted a factor "that weighs heavily in favour of transferring the proceedings";

(2) Ms Wolff would not "suffer any procedural or cost disadvantage by reason of the transfer";

(3) there was no evidence that "the transfer would result in undue delay or expense", the hearing date having been vacated;

(4) the parties presently have adequate representation which would be available if the proceedings were transferred to the District Court; and

(5) the granting of the transfer application would remove the possibility of any decision subsequently made by the Tribunal being set aside on appeal by reason of any apparent bias.

26 Otherwise, the appellant submitted, there is no issue of delay by the appellant that would warrant disentitling it to an order the proceedings being transferred.

Consideration

27 This is an appeal against an interlocutory decision. Consequently, leave is required on all grounds: s 80(2)(a) of the NCAT Act. The principles applicable to the grant of leave are set out in *Champion Homes Pty Ltd v Guirgis* [2018] NSWCATAP 54 at [35].

28 As stated above, at the hearing of the appeal the respondent withdrew her objection to the grant of leave. We are satisfied leave should be granted, this appeal raising a question of general importance and being a matter which does not appear to have been the subject of earlier Appeal Panel decisions.

29 The central question in this appeal is whether, by reason of Mr Topolinsky's association with the Tribunal as a General Member and his association with the applicant, the Tribunal ought properly to have made an order transferring these proceedings to a court because Mr Topolinsky was a witness in the proceedings which might give rise to a reasonable apprehension of bias.

30 The Tribunal rejected the claim of apprehended bias, and the application to transfer, because the Tribunal was "not satisfied that the [appellant] had established any of the four logical connections said to exist between the factual concerns and the feared deviation from the course of deciding the proceedings on the merits": reasons at [48]. In doing so, the Tribunal referred to what it described as the "dual might test of apprehended bias" set out in *Ebner* and the test of bias for pre-judgment "that an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion". Reference was made to the decision of *McGovern v Ku-ring-gai Council* [2008] NSWCA 209; (2008) 72 NSW LR 504 at [14], [16] and [13] in respect of pre-judgment bias.

31 At [48] the Tribunal set out its reasons for rejecting the "logical connections" as follows:

> (1) the fair-minded hypothetical observer is one who is properly informed of the actual circumstances of Mr Topolinsky's role as a

> General Member of the Tribunal would (sic) understand that he is not involved in making decisions;
>
> (2) the fair-minded hypothetical observer would understand that the member of the Tribunal would (sic) decides the proceedings "is open to persuasion" as to the matters on which Mr Topolinsky gives evidence having regard to the whole of the evidence presented and would not be persuaded to prefer this evidence either because of his status as a General Member of the Tribunal or a desire to preserve or mitigate the damage to his reputation and the institutional integrity of the Tribunal;
>
> (3) the fair-minded hypothetical observer would understand that the member of the Tribunal would decides (sic) the proceedings "is open to persuasion" as to the matters on which Mr Topolinsky in gives evidence notwithstanding he has a personal interest in the outcome of the proceedings as a the (sic) domestic partner of the applicant and a collegiate relationship with six other members of the Tribunal.

32 As set out in the grounds of appeal, the appellant contends that the Tribunal acted upon an incorrect principle by applying a narrower test of apprehended bias which the Tribunal characterised as pre-judgment bias.

33 It is not in dispute that the test for apprehended bias in Australia is as stated by the High Court in *Ebner*. There, referring to earlier authorities, the plurality (Gleeson CJ, McHugh, Gummow and Hayne JJ) said at [6] (citations omitted):

> Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualification relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified 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 principle gives effect to the requirement that justice should be done and seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. …

34 Application of the test "requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits". It also requires "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits". The mere assertion of interest of a judge "will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can reasonableness of the asserted apprehension of bias be assessed": *Ebner* at [8]

35 As stated by Deane J in *Webb v The Queen* [1994] HCA 30; (1993) 181 CLR 41 (*Webb*) at 74 (citations omitted), there are at least four categories of apprehended bias:

> The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, give rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consist of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap with the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third and consist of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.

36 These four categories framed by Deane J were described in *Ebner* at [24] as " providing a convenient frame of reference". It was not necessary in *Ebner* to decide if these categories were comprehensive and the High Court stated that the utility of the categorisation "may depend upon the context on which it is employed".

37 Presently, we are concerned with issues of apprehended bias of Members of the Tribunal by interest or association arising from Mr Topolinsky being a General Member of the Tribunal. It is to be observed from Deane J's analysis in *Webb* that the bias which is apprehended may take various forms, including "a reasonable apprehension of prejudice, partiality or prejudgment". Deane J stated that association can give rise to apprehension of "prejudgment or other bias".

38 In applying the test in *Ebner* the following matters are relevant:

(1) The test of bias to be applied is an objective one: *Johnson v Johnson* [2000] HCA 48; 201 CLR 488 (*Johnson*) at [12] p 493.

(2) the fair-minded lay observer is taken to be reasonable: *Johnson* at [12] p 493;

(3) 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": *Johnson* at [12] p 493 referring to *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, per McHugh JA (as he then was), adopted in *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568 at 584-585, per Toohey J.

(4) the fair-minded lay observer is a person who is properly informed: *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; 210 CLR 438 per McHugh J at 459 [68] and 462 [76].

(5) The fair-minded lay observer has attributed to them knowledge of the actual circumstances of the case: *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 CLR 70 per Mason CJ and Brennan J at [37], but is not assumed to have a detailed knowledge of the law or the character or ability of a particular judge: *Johnson* at [13] p 393.

39 In the present case, the application to transfer was made as a preliminary application, prior to the Tribunal being constituted for the purpose of finally hearing the dispute. In essence, it is an application underpinned by an assertion that no Member of the Tribunal could hear the application by reason of Mr Topolinsky's association with the Tribunal arising from him being a part-time General Member and the consequential reasonable apprehension of bias that would arise in a fair-minded lay observer.

40 The Tribunal assessed whether there was a reasonable apprehension of bias by considering whether the fair-minded lay observer might conclude the Tribunal would prejudge the dispute in consequence of Mr Topolinsky's association with the Tribunal. In doing so, it had evidence from Mr Topolinsky concerning his work at the Tribunal and his association with particular Members both in the course of carrying out his duties as a General Member and in the course of carrying on his separate business as an engineer.

41 The authorities make clear that a reasonable apprehension of bias may arise by association in circumstances where a party to the dispute required to be determined by a court is also a member of that court. This was recognised in *Rouvinetis* by Basten JA at [28], a case in which Rothman J, a judge in the Common Law Division of the Supreme Court of New South Wales, was a defendant.

42 In *Rouvinetis*, Basten JA referred to "potential embarrassment", noting that the proceedings before the Court of Appeal dealt with a different application, namely whether there was bias on the basis that it was asserted that the trial judge was Jewish and a Zionist. In doing so, Basten JA referred to a separate decision in the proceedings at first instance (not the subject of appeal in *Rouvinetis*), which concerned an application to have the proceedings at first instance determined by a jury as was permitted under the relevant legislation. In that decision, *Rouvinetis v Knoll* [2009] NSWSC 1212, Hulme J said at [51]-[52]:

> 51 There is force in the submission on behalf of the defendants that trial by jury would not be the cure for which the plaintiff contends. A judge would still be required to making rulings and give directions on a variety of questions of law, including the existence and scope of any duty of care and the applicability of any exclusion of liability under the *Civil Liability Act*.
>
> 52 The position of each of the defendants was that nothing was required to be done in the interests of justice in this case but that if it did emerge that the Judges of this Court were embarrassed in any way by the prospect of presiding at the hearing of the matter then a judge from another State or Territory could be appointed to preside. Reference was made to the judgment of Gummow, Hayne and Crennan JJ in *Forge & Ors v Australian Securities & Investment Commission & Ors* [2006] HCA 44; (2006) 228 CLR 45 at [94] – [96] where their Honours referred to such a practice as having no adverse effect on the institutional integrity of the court.

43 Embarrassment and apprehended bias have also been considered in cases involving applications to transfer proceedings between courts under relevant cross-vesting legislation.

44 First is the case of *Lunn v The Commissioner for Public Employment* [2009] NSWSC 19 (*Lunn*). In that case, Hislop J dealt with an application to transfer proceedings that had been commenced in New South Wales to the Northern Territory Supreme Court. The proceedings related to a claim of bullying in the workplace which had been first commenced in the Supreme Court of New South Wales. The defendant, a statutory body of the Northern Territory, had employed Ms Lunn as a lawyer in the Northern Territory.

45 In opposing that application, the plaintiff conceded that the Northern Territory Supreme Court would be the more appropriate forum. However, the plaintiff

resisted the application on the basis there was an association between those said to have engaged in inappropriate conduct and Judges of the Northern Territory Supreme Court. Of the evidence provided by the plaintiff Hislop J said at [10]:

> The plaintiff produced evidence that the legal profession of the Northern Territory was small; that the person is of whose action or inaction she complained now occupied senior positions in the Northern Territory legal profession (Mr Shields is Executive Director of Policy in the Chief Minister's Department, Ms Oliver is a magistrate of the Northern Territory, Mr Kate is Director of Public Prosecutions for the Northern Territory, Mr Shanahan has been appointed as Chief Executive Officer of the Department of Justice) and that there were professional and social ties between those persons and members of the Northern Territory judiciary of varying degrees.

46 Hislop J then referred to various authorities relied on by the parties including *Trustees of the Christian Brothers v Cardone* (1995) 57 FCR 327 (*Trustees of Christian Brothers*), a decision the Full Federal Court and the reasons of Wilcox J, *McLean v Nicholson* [2002] VSC 446; (2002] 172 FLR 90 (*McLean*), a decision of Bongiorno J and *O'Connor v Nationwide News Pty Ltd* (1995) 128 FLR 61(*O'Connor*), a decision of Higgins J

47 In *Lunn*, Hislop J said at [23] that it was inappropriate for him to determine whether Justices of the Supreme Court of the Northern Territory should disqualify themselves, His Honour accepting that "the circumstances are such that the issue is arguable". Having looked at the possibility for future applications in the Supreme Court of the Northern Territory if the proceedings were transferred, His Honour concluded at [27]-[28]:

> 27 The retention of the matter in the New South Wales Supreme Court will remove all questions of embarrassment and apprehended bias. The only inconvenience if the matter remains in the New South Wales Supreme Court would appear to relate to witnesses travelling to and being accommodated in Sydney for the hearing. The cost of such travel and accommodation and any associated inconvenience to witnesses will be alleviated if the evidence is taken on commission in Darwin to which course the plaintiff would consent.
>
> 28 In my opinion the balancing of the relative considerations leads to the conclusion that, in the particular circumstances of this case, the interests of justice are such that the proceedings should remain in the Supreme Court of New South Wales. Accordingly the application to

transfer the proceedings to the Supreme Court of the Northern Territory is refused.

48 *Trustees of the Christian Brothers* was an appeal to the Full Court of the Federal Court of Australia in connection with a claim in negligence against a school operated by the Trustees. Part of the appeal involved a challenge to the trial judge's decision not to disqualify himself on the grounds of apprehended bias. The trial judge was a former pupil of the school and "at the date of the hearing, the chairman of the School Board". The Trustees had asserted that "issues of credit might arise in the conduct of the hearing" concerning the claimant and the teachers at the school: per Gallop J at [4]. The Full Court dismissed the appeal against the decision of the trial judge not to disqualify himself.

49 In dealing with this issue, Wilcox J said at 335-336:

> … The case comes down to a question of possible embarrassment because of the Judge's acquaintance with witnesses to be called on behalf of the defendant.
>
> There is no general rule that a judge is disqualified from hearing a case in which a witness known to him or her will be called. If there were such a rule, it would frequently cause difficulties in a small jurisdiction such as the Australian Capital Territory. There must be many Territory residents known to all three resident Judges. On the other hand, except perhaps in an emergency situation, it is clearly undesirable for a Judge to hear a case in which a person well-known to him or her is to give important and controversial evidence, especially if the witness' credit may be in issue. It might be difficult for the Judge to bring an open mind to the evaluation of that person's evidence.
>
> Between these two extremes lie countless intermediate points. The question whether a particular judge should hear a case, having regard to the judge's knowledge of a potential witness, is a matter to be evaluated in the light of the whole of the circumstances. …

50 *McLean* was a case which had been commenced in the Supreme Court of Victoria, in which the plaintiff claimed on behalf of herself and nine other persons that they had "suffered injuries as a result of their being poisoned by eating Spanish Mackerel at Hervey Bay, Queensland": *McLean* at [1]. The proceedings were what the Court described as "a group proceeding". The plaintiff, a minor, was the daughter of the Chief Executive Officer of the Supreme Court of Victoria. She sued through her mother, as litigation guardian.

51 At [4] Bongiorno J describe the issues for determination in the application before him in the following terms:

> Two issues arise for determination at this very early interlocutory stage of the proceeding. The first arises from a summons filed by the defendant seeking an order pursuant to s.33N of the Act that the proceeding not continue under Part 4A of the Act; the second from the fact that the Chief Executive Officer of this Court, although not a party to the proceeding in the ordinary sense, is a group member on whose behalf the proceeding is brought. He is, accordingly, a person interested in the outcome of the group proceeding to the same extent, as a matter of practical reality, as if he were a plaintiff. This issue was not raised by the defendant. It was raised by the Court.

52 Bongiorno J made an order transferring the proceedings to the Supreme Court of Queensland pursuant to the relevant cross-vesting legislation. He did so on the basis of apprehended bias.

53 As to the circumstances of the Chief Executive Officer relevant to the issue of apprehended bias, Bongiorno J said at [16]-[17]:

> 16 As I have already noted the plaintiff's father is, with his wife (the plaintiff's litigation guardian), a group member in this action as it is presently constituted. It is a reasonable inference from the endorsement on the writ that he will also be a material witness in the plaintiff's claim, probably on the issues of both liability and quantum. He is interested in the outcome of this litigation.
>
> 17 As the Chief Executive Officer of this Court the plaintiff's father is the person principally responsible for the day to day operation of the Court in its non-judicial activities. He is responsible, through his staff, for the accommodation of the judges and for the provision of all of their requirements ranging from information technology to stationery. He is responsible for the security, cleaning, heating and maintenance of the Court's buildings, including every judge's chambers, the courts in which the judges sit and the library. He arranges the supply of the judges' cars. He performs many other functions necessary to the comfort of the judges and the smooth operation of the Court.

54 In reaching the conclusion that there was a “logical connection” in the sense used in *Ebner* which gave rise to a reasonable apprehension of bias, Bongiorno J said at [20]:

> In the instant case every judge of this Court has, to a greater or lesser degree, an association with the Court's Chief Executive Officer even if, as may well be the case, some judges do not know him personally. That association necessarily involves, as a matter of practical reality, some degree of reliance and dependence. Whilst the

> judge may retain the ultimate power of direction, in the day to day work which a judge undertakes his or her relationship with the Chief Executive Officer and his staff is an important one. It is this relationship or association between the judge and the person interested in the outcome of proceedings in the Court that provides the logical connection between the matter and the feared deviation from the course of deciding the case on its merits to which the High Court was referring in the passage quoted. A fair minded lay observer *might* reasonably apprehend that a judge of this Court *might not* bring an impartial mind to the resolution of the question he or she was required to decide in this litigation having regard to the association described.

55 In making the transfer order, His Honour noted at [25] that "a Queensland court may well have been a more appropriate forum for determination of this litigation" and that "even if the matter were tried in Victoria it would be tried according to the law of Queensland".

56 In the case of *O'Connor*, the plaintiff was a Federal Court judge and President of the Industrial Relations Commission who had sued for damages in defamation in the Supreme Court of the Australian Capital Territory. The defendant had applied to transfer the proceedings to the Supreme Court of New South Wales to avoid an alleged reasonable apprehension of bias resulting from the collegiality between the plaintiff and the judges of the Federal Court. At 65-6 Higgins J described the basis for the application in the following terms:

> The defendant's main contention was that it was inappropriate for any member of this Court to conduct the trial of this matter. The plaintiff, in addition to holding office as President of the Industrial Relations Commission, holds a commission as a judge of the Federal Court of Australia.
>
> Each of the judges of this Court also holds a commission as a judge of the Federal Court of Australia. Any appeal from a decision of this Court in this matter would be heard by a Full Court of the Federal Court of Australia.
>
> It is suggested that these circumstances might lead members of the public, including members of the defendant company, to apprehend bias on the part of the judge or judges who may be assigned to preside over the trial or any appeal therefrom to the Federal Court.
>
> Alternatively, the defendant contends that even if there would not be an apprehension of bias, there would be serious potential embarrassment to the judges of this Court and of the Federal Court which it would be proper to avoid by transferring the proceedings to the Supreme Court of New South Wales.

57 His Honour set out the test for apprehended bias and relevant authorities, some of which we have set out above. His Honour then referred to *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530, a case involving magistrates, who were then public servants, and came under the departmental authority of the Crown Solicitor as their formal departmental head. *Fingleton* concerned a decision of a magistrate to disqualify himself by reason of that association. His Honour said of *Fingleton* at 67:

> That case is, of course, different from the present one. It is not suggested that the plaintiff is in a position to exercise authority over any judge of this Court or of the Federal Court. It is the collegiality of the plaintiff with those judges which is said to found the apprehension of bias or pre-judgment.

58 Higgins J then referred to the decision of Wilcox J in *Trustees of the Christian Brothers,* which we have set out above, and continued at [70]:

> It would, in my opinion, be inappropriate to approach this application any differently from any other case in which there is a litigant who is, or may be, personally known to the present members of this Court and of any relevant appellate court.
>
> The degree of that knowledge and the extent of it will determine whether any particular judge considers that he or she should not preside over this case if assigned to him or her by the usual listing processes. The nature of the case and the issues raised by it will be of great significance in that consideration.
>
> I do not consider that the judges of this or of the Federal Court are necessarily disqualified for apprehended bias merely by reason of their common membership with the plaintiff on the Federal Court.
>
> On that basis, it does not appear to me that it is "in the interests of justice" for this Court to decline to exercise a jurisdiction properly invoked by the plaintiff.
>
> I therefore refuse the application for transfer of the proceedings.

59 In the present case, the Tribunal analysed the evidence by reference to principles of prejudgment bias. As made clear by Deane J in *Webb*, the concept of prejudgment is relevant in assessing bias arising from association. As such, there was no error in principle as to the approach adopted by the Tribunal.

60 The appellant says that the Tribunal took too narrow an approach in assessing whether there was a reasonable apprehension of bias arising from the facts as found.

61 In considering this submission, care must be taken to consider the reasons as a whole and not read the reasons "with a fine tooth-comb attuned to identifying error": *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231 per Bell P at [77].

62 At first blush, the appellant's submission appears to have some force. This is because the Tribunal's analysis in the reasons at [48] appears to only focus on whether, when considering the possible Member who might hear the dispute, a fair-minded lay observer might reasonably apprehend that such Member was not open to persuasion when considering the evidence of Mr Topolinsky by reason of association or interest..

63 However, in our view, when the reasons are read as a whole, it seems to us that the Tribunal considered all factual matters relied upon by the appellant arising from Mr Topolinsky's evidence and his association with the Tribunal as a General Member. The Tribunal considered whether a Member, inferentially not one of those six with whom Mr Topolinsky said he had a collegiate relationship, would consider the evidence and determine the case on its merits and whether the fair-minded lay observer might reasonably apprehend this would not occur. The Tribunal considered whether the fair-minded lay observer might reasonably apprehend that such a Member might make a decision with a view to protecting the reputation of Mr Topolinsky or the Tribunal as an institution. Seen in this light, the reference by the Tribunal to "open to persuasion" is not limited to the issue of prejudgment but rather is an explanation how the Tribunal analysed the mind of the fair-minded lay observer in deciding that no reasonable apprehension of bias arose in the case before it.

64 Further, correctness of the decision must be considered in the context of the Tribunal (as opposed to individual Members who might have an association with Mr Topolinsky), the NCAT Act and having regard to the principles we have set out above. This is because the claim of apprehended bias was not directed to a particular Member but rather the Tribunal as a whole. That context is:

(1) When constituted as the Tribunal, a Member is an independent decision maker.

(2) The Tribunal sitting in the Consumer and Commercial Division when constituted to hear the present proceedings is exercising judicial power: *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254 per Bathurst CJ at [121] and following;

(3) There are about 120 Members assigned to the Consumer and Commercial Division who can hear and determine the present application.

(4) There are three other Divisions of the Tribunal, with a total membership of the Tribunal of more than 275 Members.

(5) There was no evidence suggesting Mr Topolinsky has an association with all Members of the Consumer and Commercial Division, let alone the whole of the Tribunal.

(6) Subject to applicable limitations, the President of the Tribunal may assign any Member of the Tribunal to the Consumer and Commercial Division: s 18 NCAT Act.

(7) The President may also appoint an "occasional member" from outside the Tribunal to hear and determine particular proceedings "if it is necessary to enable the Tribunal to be properly constituted to exercise its functions in the proceedings": s 11 NCAT Act.

65 In this regard, the present case is similar to *O'Connor*, the assertion being that a reasonable apprehension of bias is said to arise against the whole of the Members of the Tribunal, including those who might be appointed as Occasional Members.

66 Whether the appellant's submissions are considered under the category of apprehended bias arising from interest or association, it seems to us that the proposition that a reasonable apprehension of bias arises in the present case in respect of the class constituted by all Members of the Tribunal is unsustainable. In our view, the fair-minded lay observer properly informed would accept:

(1) in making a decision, Members of the Tribunal are trained and have obligations "to discard the irrelevant, immaterial and prejudicial";

(2) many Members of the Tribunal have no association with Mr Topolinsky other than being Members of the Tribunal, whether in the same or different Divisions;

(3) many Members have had no dealings with Mr Topolinsky whatsoever;

(4) Members regularly review decisions of other Members of the Tribunal in determining cases and evaluate whether the Member has correctly

decided a case. In appeals, this review can include whether a Member has exhibited actual bias. The fact one Member may be called on to make such a ruling does not undermine or effect the reputation or integrity of the Tribunal and does not, of itself, give rise to a reasonable apprehension of bias in respect of the Member carrying out such a review. The Federal Court and the constitution of the Full Court illustrates this point.

(5) There is no hierarchical issue of a Member who might decide this case being subservient to Mr Topolinsky in circumstance such as those that arose in *Fingleton*;

(6) There is no connection between Mr Topolinsky and all Members of the Tribunal of the type identified in *McLean*.

Consequently, the fair-minded lay observer properly informed in this case would not hold a reasonable apprehension that the class of all members of the Tribunal (as opposed to some other identifiable subset or particular individuals) "might not bring an impartial mind to the resolution of a question the [Member] is required to decide".

67 Further, while it can be accepted that there is a possibility of bias arising from particular Members being appointed to constitute the Tribunal to hear the present dispute, it seems to us that the proposition such possibility in this case can only be addressed by transfer of the proceedings to a court is also unsustainable having regard to the powers of the Tribunal which we have set out above.

68 Consequently, the conclusion of the Tribunal in this case that a Member could be appointed who was open to persuasion and not affected by any reasonable apprehension of bias is not shown to be wrong.

69 As to the second ground of appeal, the appellant said that the Tribunal's reasons at [52] reveal relevant error in that the Tribunal did not consider the "3 mights test" put forward by the appellant in the proceedings at first instance.

70 The test of apprehended bias confirmed in *Ebner* has been described as the "two mights" test or "double might" test: *Tarrant v R* [2018] NSWCCA 21 at [9]; *Chamoun v District Court of NSW* [2018] NSWCA 187 at [39]. That is to say, the question is whether 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 (emphasis added). As we understood it, the

appellant's posited " 3 mights test" was to the effect that the proceedings should be transferred to a court if they *might* be affected by apprehended bias.

71 As is apparent from the submissions which we have set out above, in effect appellant says that if a reasonable apprehension of bias might be established, the proper exercise of a discretion in respect of an application made pursuant to Sch 4 cl 8 of the NCAT Act would be to transfer the proceedings to a court despite any countervailing considerations weighed against such a transfer.

72 The appellant did not identify any authorities which supported this approach.

73 We doubt such an approach is apposite. Even if it were, there is no basis to conclude that all members of the Tribunal might be affected by apprehended bias in the present case.

74 The Tribunal rejected the proposition that no member of the Tribunal could hear this dispute by reason of apprehended bias arising from interest or association. For the reasons stated above, it was correct to do so in circumstances where the Tribunal had not then been constituted and steps could be taken to avoid any reasonable apprehension of bias that might arise in connection with particular Members.

75 Even if it is accepted that there are Members with whom Mr Topolinsky has an association which might give rise to a reasonable apprehension of bias, this possibility, when considered in the context of the membership of Tribunal as a whole and the options for constituting the Tribunal for the purpose of hearing the proceedings, is not a factor on its own which would have any significant weight let alone be a matter which should be given heavy weight so as to justify the making of an order transferring the proceedings to a court.

76 The proceedings have been commenced in the Tribunal, which is a proper forum, and there is no reason why in the present case the proceedings should be transferred to a court.

77 It follows that we are not satisfied any error has been established.

78 In reaching this conclusion we should note in passing that it is unnecessary for present purposes to consider the issue of necessity as an exception the bias rule. Further, we do not accept the submission that Ms Wolff would not "suffer

any procedural or cost disadvantage by reason of transfer". The Tribunal is established to operate in a manner different to courts in respect of practice and procedure (for example the rules of evidence do not generally apply: s 38(2) NCAT Act) and in respect of representation (where parties generally have the carriage of their own case: s 45 NCAT Act) and costs (where parties generally pay their own costs: s 60(1) NCAT Act). Finally, it would be a curious result if parties who call Members as witnesses were deprived from bringing proceedings in the Tribunal (which has specialist skills and, in some cases, unique order making powers) merely because the witness was a Member of the Tribunal.

79 Having regard to the above, the appeal should be dismissed.

Orders

80 The Appeal Panel makes the following orders:

(1) Leave to appeal is granted.

(2) The appeal is dismissed.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar