Accusation and adjudication don't mix

Brodie Buckland reports on apprehended bias and incompatibility of roles in *Isbester v Knox City Council* [2015] HCA 20; (2015) 89 ALJR 609.

Introduction

In *Isbester*, the High Court considered whether the test for apprehension of bias was fulfilled where one member of a three-person panel reviewing whether a dog should be destroyed had earlier brought charges in her official capacity concerning that dog. In so doing, the High Court applied the *Ebner* test[1] to circumstances where the apprehension of bias was said to arise as a result of that panel member occupying two incompatible roles.

The facts

Ms Isbester, the appellant, was the owner of a Staffordshire terrier named Izzy, and was charged in the Ringwood Magistrates' Court with an offence relating to Izzy having attacked a person and caused serious injury. The appellant pleaded guilty. While it was open to the Magistrates' Court to order the destruction of the appellant's dog, no such order was sought or made.

The charges in the Magistrates' Court were brought by Ms Kristen Hughes, an employee of the respondent, Knox City Council. Ms Hughes was the informant on record in the Magistrates' Court proceedings, and instructed solicitors to prosecute the charges and negotiate pleas with the appellant. The day after the appellant was convicted, Ms Hughes drafted a letter to the appellant informing her that the council was convening a Panel to consider an order for destruction of Izzy. That Panel, it was said, would consist of three Council officers: a chairperson, who would make the relevant decision, Ms Hughes, and a third officer who had not had any prior involvement in the matter.

The material before the Panel included material that was the result of Ms Hughes' investigations, and Ms Hughes accepted in cross-examination at trial that she played a major role in the Panel's decision-making process. The order for Izzy's destruction was, however, made by the chairperson and not Ms Hughes.

The appellant sought judicial review of the order for Izzy's destruction.

First instance

The appellant sought orders in the nature of certiorari and prohibition from the Supreme Court of Victoria on a number of grounds, including apprehended bias. Emerton J identified the 'double-might' test for apprehended bias from *Ebner v Official Trustee in Bankruptcy*, namely, that, '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.'[2]

Her Honour observed that the required standard of freedom from apprehended bias is not the same for a decision-maker that is not a judicial officer:[3] what amounts to apprehended bias depends upon the circumstances.

In assessing the standard required in the instant case, Emerton J had regard to *McGovern v Ku-ring-gai Council,*[4] which concerned an apprehension of bias in the approval of a development application by a local council. As Basten JA observed in *McGovern*, a local council was quite different from a court, and, given the difference in context, 'the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers.'[5]

Emerton J held that none of the indicia of bias were present in circumstances where a decision-maker had been involved in an earlier prosecution, as a fair-minded observer would not apprehend that there might be bias based on that fact alone. The appellant's action was dismissed.

Appeal to the Court of Appeal

The appellant's appeal to the Victorian Court of Appeal was limited to the ground of apprehended bias. The Court of Appeal distinguished, on three bases, earlier cases[6] in which apprehended bias was made out in relation to members of decision-making panels who had acted as accusers of the person before those panels: first, that the Panel in the instant case had not conducted a quasi-judicial hearing; second, that Ms Hughes, despite her role as informant in the Magistrates' Court, did not occupy the role of the accuser in the Panel proceedings; and, third, that Ms Hughes had no personal interest in the matters before the Panel.

The appellant's appeal to the Court of Appeal was dismissed, and the appellant appealed to the High Court.

Appeal to the High Court

The question before the High Court was whether Ms Hughes' participation in the prosecution of the charges in the Magistrates' Court and subsequent Panel process led to an apprehension of bias. In answering that question, the majority (Kiefel, Bell, Keane and Nettle JJ) described the *Ebner* test as requiring two steps: first, 'the identification of what it is said might lead a decision-maker to decide a case on other than its legal or factual merits', with the nature of any interest in the outcome of litigation clearly spelled out; second, 'the logical

connection between that interest and the feared deviation from the course of deciding the case on its merits.'[7]

As an aspect of wider principles of natural justice, how the *Ebner* test is applied depends upon the circumstances in which the power is exercised, including:

- the nature of the decision and its statutory context;
- what is involved in making the decision; and
- the identity of the decision-maker.[8]

The majority considered that *Minister for Immigration v Jia Legeng* [9] and *McGovern*,[10] central to the decisions of Emerton J and the Court of Appeal, had limited application in the instant case, as those cases did not concern a situation where a person's involvement in a decision-making process might be inappropriate because of that person's involvements in prior events.[11] Rather, the majority relied upon cases that the Court of Appeal had distinguished,[12] and upon statements made in obiter in *Ebner*,[13] for the proposition that a person who has performed the role of accuser or prosecutor cannot then act as a member of a tribunal hearing that charge.

Occupying both roles in relation to the same matter was incompatible with the rules of natural justice. Ms Hughes' role as prosecutor or moving party before the Magistrates' Court, although at an end before the Panel process began, could not be separated from her presence on the Panel.[14] Ms Hughes had a personal investment, based upon her earlier role in the prosecution, in ensuring the Panel made an order for the destruction of Izzy[15] – if a person has acted as both accuser and adjudicator, then the logical connection between that person's interest and a deviation from a decision made on the merits is obvious.[16] The majority held that Ms Hughes's involvement in the Panel process gave rise to an apprehension of bias justifying relief, even though Ms Hughes did not herself make the order for destruction. The appeal was allowed, and the council's order was quashed.

Gageler J, concurring in the result, opined that the test for the appearance of a disqualifying bias should focus on the overall integrity of the decision-making process, especially in circumstances where the process involved multiple stages or decision-makers.[17]

Overall, this case makes two points clear. First, an apprehension of bias can arise as a result of the position a decision-maker has occupied prior to undertaking a particular decision. Second, what constitutes a disqualifying bias is to be judged in the circumstances enumerated above without undue reliance on precedent.

Endnotes

1. *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
2. Ibid, at 344.
3. Relying upon the majority in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 563, which afforded a wider scope for possible bias to the Minister due to his political position and democratic oversight of his position.
4. (2008) 72 NSWLR 504.
5. Ibid, at [80] per Basten JA.
6. *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509; and *Dickason v Edwards* (1910) 10 CLR 243.
7. *Isbester*, at [21].
8. Ibid, at [23].
9. (2001) 205 CLR 507.
10. (2008) 72 NSWLR 504.
11. Ibid, at [28].
12. Ibid, at [34–37], citing S*tollery and Dickason*, above n vi.
13. *Isbester,* at [38].
14. Ibid, at [42].
15. Ibid, at [46].
16. Ibid, at [49].
17. Ibid, at [58].