The High Court sends trial judges to Coventry

By Anthony Cheshire SC

In *JKB Holdings Pty Ltd v Alejandro De La Vega* [2011] NSWSC 836, Brereton J expressed an admirable empathy for the legal profession and their wellbeing when he said:

> '…notwithstanding the notorious work hours and practices of lawyers, I do not believe that courts should operate on the assumption that lawyers must work during weekends and holidays.'

As I was reading the recent decision in *Charisteas v Charisteas* [2021] HCA 29, it struck me that, although the result was unexceptional, the High Court had displayed a surprising lack of empathy for trial judges and their wellbeing. I wondered if that made it a 'bad case', which set me thinking.

The problem with sayings is that everyone seems to disagree: what do they mean, do they reflect some universal truth, are they anything more than trite, are they clichés, do they instead reflect the prejudices of the user and so on...

Nevertheless, there is a well worn legal 'adage', 'aphorism' or 'catchphrase' that bad cases do not make good law. It appears to have its origins in the English speaking world at least as far back as the mid 19th Century (see for instance *Hodgens v Hodgens* (1837) 4 CI Fin 323 and *Winterbottom v Wright* (1842) 10 M&W 109); although its most cited occurrence is in the dissenting opinion of US Supreme Court Justice Oliver Wendell Holmes, Jr in *Northern Securities Co v United States* (1904) 193 US 197 at 400-401.

In its traditional form, it is used to warn that the clarity and consistency of the law should be derived from 'average cases' and should not be obscured or diminished by exceptions or strained interpretations derived from cases where hardship would result from the application of the ordinary rule.

It has been applied in several different ways and variations have included 'bad law makes hard cases' and 'hard cases make good law'. Even the concept of a 'hard case' has at least three potential and differing meanings: being one involving hardship, importance or difficulty.

Glanville Williams questioned the adage's use, while asserting 'what is certain is that cases in which the moral indignation of the judge is aroused frequently make bad law'; and Ronald Dworkin considered it at some length, defining a hard case as being one where 'no settled rule dictates a decision either way'.

It has also been the subject of considerable criticism. For instance, in *Re Vandervell's Trusts* (No 2) [1974] Ch 308, Lord Denning MR said that the adage amounted to a contention that 'unjust decisions make good law' and, as such, was 'quite misleading' and 'should be deleted from our vocabulary'.

I have, however, yet to come across 'courts can use easy cases to make bad law' and I suspect that the descendants of the luminaries mentioned above would have little interest in it, but that is what the High Court has achieved in its recent decision in the long-running matrimonial dispute of *Charisteas v Charisteas* [2021] HCA 29.

In its decision, the High Court set aside the decision of the trial judge on the basis of apprehended bias. Given the facts, the decision is unremarkable and unsurprising, but in eschewing its general approach of addressing only the facts of the case and not attempting to set out general principles, the High Court has set out dicta that are potentially damaging not only to the development of the law but also to the wellbeing of judicial officers.

In *Charisteas*, the proceedings were commenced in 2006. In February 2015, the trial judge published an interlocutory judgment holding that the court retained power to make property settlement orders; in March 2016, he listed the trial in relation to the property settlement orders for August 2016; the trial ran for two weeks in August 2016; submissions were received in September 2016; and judgment was delivered in February 2018.

In response to a request from the husband's solicitor, apparently prompted by 'gossip' within the profession, the wife's barrister disclosed that:

> '…she had met with the judge for a drink or coffee on approximately four occasions between 22 March 2016 and 12 February 2018; had spoken with the judge by telephone on five occasions between January 2017 and August 2017; had exchanged 'numerous' text messages with the judge between 20 June 2016 and 15 September 2017 (except for a brief hiatus during the evidence stage of the trial); and had exchanged 'occasional' text messages with the judge from 15 September 2017 until 12 February 2018.

The wife's barrister concluded:

> '…by stating that the 'communications' with the trial judge did not concern 'the substance of the ... case.'

As the High Court noted at [19], 'the ambiguity inherent in that statement' was of itself a matter of some concern: it was not disclosed what the wife's barrister and the trial judge might have discussed about the case, even if not its substance.

The High Court commenced its analysis at [11] by holding that the applicable principles in relation to ostensible bias of judicial officers are 'well established', having been set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337:

> 'The apprehension of bias principle is 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.''

The High Court in *Charisteas* held at [14] to [15] that the communications between the trial judge and the wife's barrister, being without the prior informed consent of the husband, should not have taken place; and, as a result, a fair-minded observer 'would reasonably apprehend that the trial judge might not bring an impartial mind to the resolutions of the questions his Honour was required to decide'. On that basis, the trial judge's decision was overturned and the matter remitted for a re-hearing.

Given the extensive and undisclosed personal contact between the trial judge and the wife's barrister, continuing from when the matter was set down for final hearing and right up until the delivery of judgment (save for a short hiatus during the period when evidence was being given in August 2016) and the unsatisfactory nature of the evidence about the detail of that contact, the decision is perhaps not surprising.

My concern, however, is as to the absolute terms in which the High Court expressed itself.

At [13] to [14], the High Court approved the dicta of Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 346, 350-351, adopting the dicta of McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 at 127 that:

> …save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party) otherwise than in the presence of or with the previous knowledge and consent of the other party.

This passage in *Re JRL* described the position 'once the case is under way, or about to get under way' and at [16] the High Court in *Charisteas* noted that the communications resumed before final submissions and continued while judgment was reserved. At the same time, however, the High Court held that 'nothing…limits the period necessary to avoid communications to after the commencement of the trial' and its analysis accepted that the ostensible bias finding encompassed the period from the inception of the communications, which the evidence disclosed was in March 2016 when the matter was first set down for trial five months later.

Finally, the High Court at [20] to [21] addressed the reasoning of the majority in the Full Court of the Family Court that the fair-minded lay observer would be properly informed as to relationship between the independent Bar and the judiciary generally and thus 'would be 'able to tolerate' some degree of private communication between a judge and the legal representative of only one party, even if undisclosed'. The Full Court's reasoning was rejected as 'erroneous' and the High Court held:

> The hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts. It would defy logic and render nugatory the principle to imbue the hypothetical observer with professional self-appreciation of this kind.

The High Court has thus taken the position that, 'save in the most exceptional circumstances' there must be 'no communication or association' between a judge and one party (or its legal advisers or witnesses) without the prior informed consent of the other party; there is no exception for 'some degree of private [or indeed professional] communication'; and this runs not from when the trial commences but at least (apparently) from when it is clear that the judge is to be the trial judge (the communications here having begun around the time when the matter was set down for trial).

Is a trial judge now expected to keep a list of all the barristers who appeared in matters that have not been properly disposed of and to eschew all contact, even if wholly unrelated and in the presence of others and however trivial?

The appeal in *Charisteas* could have been determined on the basis that while some degree of private communication might be acceptable, the frequency, degree and apparent nature of what occurred here went well beyond acceptable limits.

Instead, by approaching the matter in such absolute terms, the High Court has apparently forbidden a polite conversation about the weather, sharing thoughts about a concert or a play, a communication of congratulations for a marriage or a birth, a letter of condolences about a death or congratulations for being appointed silk. None would seem to amount to 'the most exceptional circumstances'.

There has been much written in recent times about the issue of mental health problems in the legal profession and the judiciary and, with the COVID-19 lockdowns, the general population. There have been important efforts to foster and strengthen links and to provide mutual support between the Bar and the Bench. Both often attend Bar Association functions (including the Bar and Bench dinner), floor drinks and other functions, court user groups and other professional organisations and groups; and these are important functions to both the Bar and the Bench.

Is a trial judge now expected to keep a list of all the barristers who appeared in matters that have not been properly disposed of and to eschew all contact, even if wholly unrelated and in the presence of others and however trivial? It appears that the answer is yes. Given that many cases involve multiple counsel and judgments that may take many months to write, this may put the judge in a very difficult position. Presumably this would be even harder in a smaller jurisdiction than New South Wales where the effect of the High Court's prohibition may be to remove a judge almost entirely from the local legal profession.

I cannot see that this is healthy for judges, who are already largely removed from the profession of which they formerly formed an integral part (whether solicitors or barristers) and when they are often accused of being out of touch.

But the position is worse, since according to the High Court the judge must depart to his or her ivory tower not only from the commencement of the trial, but at least from when the judge is seized of the matter in the sense that it is clear that the judge will (or even perhaps may) be the trial judge. Thus, in *Charisteas* the relevant period began at least when the trial judge set the matter down for hearing. Many cases are, however, set down for trial many months in advance, so it seems that the trial judge's list of people to avoid will have to extend to include counsel briefed to appear in forthcoming trials.

Furthermore, modern case management has made this position impossible. The docket system in the Federal Court means that a judge will usually know something about a case and the likely trial counsel on the first return date. On the High Court's reasoning, contact between the judge and those practitioners is forbidden from that point on and up until judgment is delivered, although of course it may then be prolonged indefinitely if the barrister by then has another matter in the same judge's list.

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In the Supreme Court, many specialist lists are now managed by judges, who will often be the trial judge; and trial counsel are often encouraged to appear at an early stage. Apart from those judges' lists of people to avoid becoming unmanageable, it is difficult to see how, consistently with the High Court's decision, judges managing such lists could ever be involved in court user groups, since in order to achieve their purpose those groups will involve practitioners who appear regularly in those lists (and who therefore by definition should have no contact with the judge).

The High Court seems to have thought that it could offer a solution at [22]:

> It may be accepted that many judges and lawyers, barristers in particular, may have continuing professional and personal connections. The means by which their contact may be resumed is by a judge making orders and publishing reasons, thereby bringing the litigation to an end. It is obviously in everyone's interests, the litigants in particular, that this is done in a timely way.

This feels like a side-swipe at trial judges, suggesting that if there is a problem then it is their fault for taking so long to write their judgments. This ignores the very great pressures put upon trial judges, not only from the volume of cases and tendered material but also from appeal courts ready to criticise them if relevant evidence or arguments are not addressed explicitly.

More significantly, however, this ignores the High Court's own finding in *Charisteas* that the period of separation does not commence only with the trial, but extends back apparently to when the judge is first seized of the matter. The delivery of a judgment does not address the issue of contact with lawyers who have already appeared in matters progressing in dockets or in specialist lists, but which have not yet proceeded to a final hearing.

There is one final aspect of the High Court's decision that gives me some concern. In my experience, clients (and the general public) are often inherently suspicious about the system and about any hint of possible bias or favouritism. If, as the High Court held, the fair-minded lay observer is not to be taken to have any appreciation of the internal workings of the legal system, then it is difficult to see how the fact that a judge has acted for a party should not be sufficient to satisfy the double 'might' of the *Ebner* test; and likewise if the judge has ever had a close personal or professional relationship with either counsel (for instance from having been on the same floor). The same would seem to follow if the judge has made a decision concerning one of the parties, even if in separate proceedings and even in the absence of credit findings. The High Court's decision in *Charisteas* would seem to provide scope to revisit areas where challenges to judicial officers on the basis of ostensible bias have previously failed and which were thought to be largely settled.

Further, although the High Court was addressing contact between a trial judge and trial counsel, why should the position between appellate judges and primary judges be any different? A fair-minded lay observer might well fear a stitch-up behind the scenes (and clients have often voiced such concerns), which could only be avoided (consistently with the High Court's decision) by there being 'no communication or association' between them, whether personal or professional.

These practical problems may have little impact upon the High Court with its limited case load and its advocates appearing from across the various States and Territories, but they risk weakening the important bonds between Bar and Bench and driving judges into a solitary, unhappy existence.

In the 17th Century English Civil War, the king's soldiers were sent to Coventry, which was a Parliamentary stronghold, where they would be ostracised and ignored. Although I am familiar with many of its delights, it is neither fair nor healthy for the High Court to insist that trial judges send themselves to Coventry.

This position could easily have been avoided in *Charisteas* by the application of a degree of commonsense and moderation, accepting that some contact could be tolerated but that the instant case went far beyond the limits of acceptability. No doubt the High Court will now be called upon to determine harder cases than *Charisteas*. I hope that they will take the opportunity to create better law. BN