

### Bias and abuse of process

*Michael Wilson & Partners Limited v Robert Nicholls and Ors* (2011) 282 ALR 685; 86 ALJR 14; [2011] HCA 48

In *Michael Wilson & Partners Limited v Robert Nicholls and Ors* (2011) 282 ALR 685; 86 ALJR 14; [2011] HCA 48, the High Court held that the appellant's institution of proceedings in the Supreme Court of New South Wales did not constitute an abuse of process, even though the claims made by the appellant in those proceedings were substantially the same as claims made by it in an arbitration involving other parties. The High Court also held that the trial judge was correct in refusing to disqualify himself from hearing the Supreme Court proceedings, notwithstanding that the trial judge had heard several *ex parte* interlocutory applications before the trial without notice to the respondents.

#### Background

The appellant, MWP, operated a business consultancy and law firm from offices located in Kazakhstan. In January 2002, John Emmott joined MWP as, in effect, a partner. In 2004 and 2005, two further individuals, Robert Nicholls and David Slater (respondents to the appeal) were employed as lawyers by MWP.

By the end of 2006, Mr Emmott, Mr Nicholls and Mr Slater had left MWP. Following their departure, MWP alleged that they had conspired together to divert clients and business opportunities away from MWP for their own benefit with the assistance of various companies with which they were associated.

MWP sought relief in several different jurisdictions. In August 2006, MWP commenced an arbitration in London against Mr Emmott in accordance with an arbitration clause contained in an agreement between Mr Emmott and MWP. The central allegation made by MWP was that Mr Emmott breached fiduciary duties he owed to MWP. Later, in October 2006, MWP instituted proceedings against Mr Nicholls and Mr Slater in the Supreme Court of New South Wales in which MWP claimed that Mr Nicholls and Mr Slater had knowingly assisted Mr Emmott's breach of fiduciary duty. Mr Emmott was not a party to the Supreme Court proceedings.

Following the commencement of the Supreme Court proceedings, MWP obtained freezing orders against Mr Nicholls and Mr Slater. Both were required to file affidavits disclosing the nature and extent of their assets. Later, in 2007 and 2008, MWP made a number of applications to Einstein J for permission to use the affidavits in related foreign proceedings. Each of

the applications made by MWP was heard in closed court and a confidentiality regime imposed, which relieved MWP of the need to disclose to Mr Nicholls and Mr Slater the fact that the applications had been made. The confidentiality regime was lifted in June 2008. Shortly after, Mr Nicholls and Mr Slater made successive applications to Einstein J to disqualify himself from hearing the proceedings further. All were refused.

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MWP succeeded at trial before Einstein J.<sup>1</sup> Einstein J found that Mr Nicholls and Mr Slater had knowingly participated in breaches of fiduciary duty by Mr Emmott. Equitable compensation was awarded. On 14 December 2009, Mr Nicholls and Mr Slater appealed to the New South Wales Court of Appeal. On 22 February 2010, the London arbitrators published an interim award, finding that although Mr Emmott had breached the fiduciary duties he owed to MWP, MWP was not entitled to any relief.

#### The Court of Appeal decision

Allowing Mr Nicholls and Mr Slater's appeal,<sup>2</sup> the Court of Appeal (Basten JA, Young JA and Lindgren AJA) held that Einstein J should have disqualified himself from hearing the matter. The Court of Appeal also allowed Mr Nicholls and Mr Slater's appeal on the basis that the proceedings brought by MWP were an abuse of process. According to Basten JA, there was an abuse of process because the Supreme Court proceedings operated as a form of collateral attack upon the arbitrator's finding against MWP (notwithstanding that the arbitral award was published *after* Einstein J had delivered judgment). Lindgren AJA, on the other hand, suggested that the alleged abuse would arise out of any attempt on the part of MWP to recover against Mr Nicholls and Mr Slater in the face of the arbitral award. This was so, according to Lindgren AJA, because the liability of Mr Nicholls and Mr Slater to MWP for knowingly assisting Mr Emmott in the breach of his fiduciary duties was limited by the nature and extent of the relief sought and obtained by MWP in the arbitration of its claim against Mr Emmott.

### **The High Court's decision**

The High Court allowed MWP's appeal. It held that the Court of Appeal erred in finding that Einstein J should have disqualified himself and that the institution of the Supreme Court proceedings, and the prosecution of those proceedings to judgment, constituted an abuse of process.

### **No apprehended bias**

The High Court held that Einstein J was correct in refusing to disqualify himself. According to the plurality (Gummow ACJ; Hayne, Crennan and Bell JJ), with whom Heydon J generally agreed, the fact that Einstein J made several ex parte orders and established a confidentiality regime did not found a reasonable apprehension of prejudgment of the issues to be fought at trial. In none of the applications did Einstein J decide any issue that was to be fought at trial. Nor was Einstein J required to determine any issues of credibility in relation to any witness. The fact that Einstein J *may* have fallen into error in the way his Honour dealt with the interlocutory applications was not sufficient to found a reasonable apprehension of bias.

### **Giving up the right to complain?**

The plurality noted that Mr Nicholls and Mr Slater did not seek leave to appeal against the refusal by Einstein J of their application that he disqualify himself. Although it was unnecessary to consider the issue (given the finding of no reasonable apprehension of bias), the plurality concluded that in most cases where a party does not seek to challenge a judge's refusal to disqualify himself or herself by seeking leave to appeal, that party should be held to have given up the point. Whether a party will be able to make a complaint at a later stage about the supposed apprehension of bias turns upon whether that party's failure to seek leave to appeal immediately was reasonable. Furthermore, their Honours pointed out that, provided the judge who refuses to disqualify himself or herself makes orders effecting the decision (or indeed makes any other subsequent case management order), leave to appeal can be sought against those orders on the basis that they should not have been made.

### **Abuse of process**

The High Court held that the appellant's institution

of the Supreme Court proceedings did not constitute an abuse of process, even though the claims made by the appellant in the Supreme Court proceedings were substantially the same as claims made by it in the London arbitration.

In dealing with the issue of whether the Supreme Court proceedings constituted an abuse of process, the plurality (with whom Heydon J agreed) made a number of preliminary observations. The first related to the timing of the arbitral award. The plurality pointed out that the suggestion that the Supreme Court proceedings operated as a collateral attack on the arbitrator's findings wrongly assumed that the making of the arbitral award occurred before judgment was given in the Supreme Court proceedings. Secondly, any risk of double recovery on MWP's part that may have arisen from the institution of the Supreme Court proceedings was not relevant to the determination of whether the Supreme Court proceedings constituted an abuse of process.

According to the plurality, the argument that the Supreme Court proceedings constituted an abuse of process was fundamentally flawed in that it wrongly assumed that that extent of Mr Nicholls and Mr Slater's liability to MWP under the second limb of the rule in *Barnes v Addy*<sup>3</sup> was confined by the extent of Mr Emmott's liability (as defaulting fiduciary) to MWP. However, as the plurality made clear, although a finding that an individual has knowingly assisted in another's breach of fiduciary duty depends upon a finding of breach of fiduciary duty by that other person, 'the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum'.<sup>4</sup> As their Honours stated:

It follows that neither the nature nor the extent of any liability of the respondents to MWP for knowingly assisting Mr Emmott in a breach or breaches of his fiduciary obligations depends upon the nature or extent of the relief that MWP obtained in the arbitration against Mr Emmott.<sup>5</sup>

It followed from the fact that MWP's claim in the NSW Proceedings was not limited in the way suggested by the Court of Appeal that the rule in *Reichel v Magrath*<sup>6</sup> had no application in the circumstances. Put simply, MWP was not attempting to litigate a case which had already been disposed of in earlier proceedings.

Although it was not necessary to determine the issue,

the plurality suggested that, had the arbitrators found that Mr Emmott had not breached the fiduciary duties he owed to MWP, MWP would not have been estopped from asserting to the contrary in proceedings against Mr Nicholls and Mr Slater (who were not parties to the arbitration). However, the broader issue of whether *Reichel* abuse of process may in any circumstance operate to prevent a party to an arbitral award from advancing a contrary case in separate curial proceedings against a third party was left for consideration on another occasion.

By Martin Smith

## The 'end' of spousal privilege at common law

*Australian Crime Commission v Louise Stoddart* [2011] HCA 47

The High Court upheld an appeal by the Australian Crime Commission (ACC) against the decision of the full court of the Federal Court of Australia, which had granted a declaration that the *Australian Crime Commission Act 2002* (Cth) (Act) had not abrogated the common law privilege against spousal incrimination. By majority, it was found that the common law does not, and has never, recognised a privilege against spousal incrimination.

### The facts

Mrs Stoddart appeared pursuant to a summons under s 28(1) of the Act issued by Mr Boulton, an examiner, to give evidence of 'federally relevant criminal activity' involving named corporations and persons including Mrs Stoddart's husband.

Under Section 30(2)(b) of the Act, a person appearing as a witness before an examiner shall not refuse or fail to answer a question that he or she is required to answer by the examiner. Failure to answer questions as required is an offence punishable on conviction by penalties including imprisonment not exceeding 5 years (s 30(6)).

After being sworn in, Mrs Stoddart claimed the privilege against self-incrimination pursuant to s 30(4) and (5) of the Act. Mr Boulton extended to her what he termed a 'blanket immunity'. In the course of questioning, counsel for Mrs Stoddart objected to a

### Endnotes

1. *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 1033; *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 1377.
2. *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 222; (2010) 243 FLR 177.
3. (1874) LR9ChApp 244; (1874) 43 LJ Ch 513; (1874) 30 LT 4; (1874) 22 WR 505.
4. At [106] per Gummow AC; Hayne, Crennan and Bell JJ.
5. At [107] per Gummow AC; Hayne, Crennan and Bell JJ.
6. (1889) 14 App Cas 665.

question and claimed privilege 'on the basis of spousal incrimination'. The matter was adjourned in order to determine the validity of the objection.

### Litigation following adjournment of proceedings before the examiner

Mrs Stoddart commenced proceedings in the Federal Court, seeking an injunction restraining the examiner from asking her questions relating to her husband, as well as a declaration that the common law privilege or immunity against spousal incrimination had not been abrogated by the Act.

The application was dismissed in the Federal Court by his Honour Justice Reeves in October 2009.<sup>1</sup> On appeal to the full court of the Federal Court, Mrs Stoddart's appeal was allowed and she was granted declaratory relief, the full court holding by a majority that the common law privilege against spousal incrimination existed and that the Act had not abrogated that privilege.<sup>2</sup>

On appeal to the High Court, the ACC submitted, firstly, that the full court erred in following recent decisions of the Queensland Court of Appeal and the Full Federal Court<sup>3</sup> by recognising a distinct common law privilege against spousal incrimination, and secondly (and alternatively), that s 30 of the Act abrogates the privilege against spousal incrimination if it otherwise exists under common law.