IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

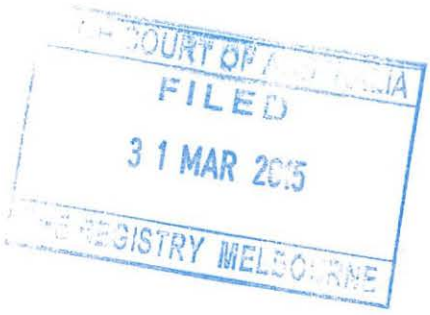
No. M19 of 2015

BETWEEN:

TANIA ISBESTER
Appellant

and

KNOX CITY COUNCIL
Respondent



APPELLANT'S REPLY

Part I: Certification

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Reply

Paragraphs 2-4 of the Respondent's Submissions

2. In paragraph 3 the Respondent seeks to describe the question at issue in restricted terms by minimizing the role played by the council officer, Ms Hughes. The role of Ms Hughes was much more than that of a mere informant. She supervised the investigation and instructed the council's solicitors concerning the plea bargain. She participated actively in the decision making process of the Respondent's panel. See further the Appellant's submissions dated 10 March 2015 ("**AS**") at [27] and [28].[1]

Paragraphs 6-23 of the Respondent's Submissions

3. The Appellant disputes the assertion by the Respondent that she "sought to bypass the trial judge's findings simply by referring to the evidence given at trial."[2] The Appellant has simply given context to the factual findings of the trial judge by referring to the evidence of Ms Hughes herself. That part of the evidence is not controversial. The Appellant also disputes the account in paragraph 16 concerning the terms of the assurance sought by the Appellant's solicitor about the fate of the dog "Izzy". In fact, the Appellant's solicitor asked,

[1] And also "Exhibit KH-10" to Ms Hughes' affidavit sworn on 19 December 2013, which is an email from Ms Hughes to Kylie Walsh of the Respondent's solicitors.
[2] Respondent's submissions (**RS**), [7].

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"'What does Council intend about the fate of the two remaining dogs, given the dog Jock has already been voluntarily euthanased (sic).'"[3]

4. In response to paragraph 21 the Appellant refers to the Respondent's letter convening the panel dated 13 September 2013 (Exhibit KH-12) which stated, "The panel consists of three Council officers who will consider all of the information prior to making any decision." Further, the Court of Appeal accepted that Ms Hughes had a material part in the decision-making process.[4]

5. In response to paragraph 22 the Appellant accepts that the assertion in its chronology is incorrect. However, Ms Hughes did put evidence before the panel during the hearing being her notes of the Magistrates' ruling.

Paragraph 24 of the Respondent's Submissions

6. The Appellant agrees that the relevant version of the Act was version 60.

Paragraphs 25-33 of the Respondent's Submissions

7. The Appellant agrees with the description of the statutory framework.

Paragraphs 34-35 of the Respondent's Submissions

8. In response to paragraph 35 the Appellant repeats its submissions in AS [45].

Paragraphs 36-45 of the Respondent's Submissions

9. In response to paragraph 36 the Appellant accepts that Deane J said that there were "....at least 4 distinct, though sometimes overlapping main categories of case."[5] (emphasis added). However, that list is not exhaustive. His Honour also recognised that:

> "……there will be cases where such a direct pecuniary interest does not exist but where the nature of the relevant interest and/or relationship is such that it is obvious that the person concerned is disqualified by reason of a reasonable apprehension of bias".[6]

10. Further, the Appellant disputes that the two-step test outlined in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8] applies to a conflict of interest of the kind alleged in this case. See further paragraphs [19] to [21] hereof.

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[3] Trial Judge, Reasons at [50].
[4] *Isbester v Knox City Council* [2014] VSCA 214 at [68]; see also T 254.26-T 258.55 and T 280.17-T 281.21 and the Council's letter of decision dated 15 October 2013 (Exhibit KH-17) in which the decision-maker, Mr Kourambas, states that he considered, inter alia, the panel's recommendation and the outcome of the Magistrates' Court proceeding.
[5] *Webb v The Queen* (1994) 181 CLR 41 at 79.
[6] *Webb v The Queen* (1994) 181 CLR 41 at 79.

11. The class of conflict of interest cases relied on by the Appellant is that identified by Spigelman CJ in *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 at 511-12 at [38] as being those in which a person has been held to be disqualified from participating in, and indeed even being present during, the decision-making process because that person was a party to the proceedings. In *Dickason v Edwards* (1910) 10 CLR 243 at 259 the same prohibition was referred to by Isaacs J as "incompatibility".
12. In *McGovern*, a "conflict of interest" is described as being a species of apprehended bias.[7] This is not a universally held view.[8] In any case, and irrespective how such "conflict of interest" cases are described or categorized, it has long been held that where a person is a party to a case (for example, as an accuser) that person is automatically disqualified from being a decision maker.[9] There is no further requirement.
13. In response to the paragraph 45, the Appellant agrees that the Council can rely "on the experience and expertise of its officers in informing itself." But this does not mean that the officer who is providing the information[10] can sit on the panel.
14. In response to paragraph 45(d), the Appellant submits that the Respondent is incorrect for three reasons. First, the rules of natural justice can only be excluded by plain words of necessary intendment.[11] Accordingly, the absence of any explicit terms in the Act abrogating a dog owner's right to procedural fairness before a council supports the view that the rules of procedural fairness should be applied to their full extent. Secondly, in her evidence Ms Hughes (1) accepted that she wanted a guilty plea to charge number 4 because that was a necessary foundation for a panel hearing under section

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[7] See also *Carver v Law Society of NSW* (1998) 43 NSWLR 71 at pages 87 and 102; *Rendell v Release on Licence Board* (1987) 10 SWLR 499 at 507-8.
[8] See for example *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 358-9 [59]-[63] where Gleeson CJ, McHugh, Gummow, and Hayne JJ referred to *Dickason* and stated that such cases "have significance apart from, and where necessary may operate independently of, problems relating to apprehension of bias."
[9] See, for example, *Dickason v Edwards* (1910) 10 CLR 253 at 259, *R v The Optical Board of Registration; Ex parte Qurban* [1933] SASR 1 at 8, *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 527.
[10] For example, Ms Hughes who read out part of her notes of the Magistrate's ruling to the panel and who negotiated a plea deal which enlivened the jurisdiction to convene a panel hearing with a view to obtaining a destruction order.
[11] See *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ, which was referred to by the Court of Appeal, Reasons at [37].

84P of the Act,[12] and (2) accepted that the Council's normal practice was to have a panel hearing rather than asking a Magistrate to destroy a dog.[13] The Council should not be able to avoid the requirements of natural justice simply because its usual practice was to convene a panel.[14] Thirdly, the Respondent has not previously raised any argument based on the doctrine of necessity, and it led no evidence to support such an argument at trial.

Paragraphs 46-47 of the Respondent's Submissions

15. No argument as to "pre-judgment" is pressed.

Paragraphs 48-59 of the Respondent's Submissions

Stollery v Greyhound Racing Control Board (1972) 128 CLR 509

16. In paragraphs 48-59 the Respondent seeks to restrict the operation of the principles concerning conflict of interest to cases where the person alleged to be the subject of the conflict is "personally involved in the incident" the subject of the inquiry. This is not the test. If it were so, this would mean that Ms Hughes could have prosecuted the matter in the Magistrates' Court *and* sat with the Magistrate as he formulated his decision.

17. Further, at paragraphs 56 and 58(b) the Respondent attempts distinguish *Stollery* on the basis that the panel and Magistrates' court decided different questions. The Appellant repeats its submissions at AS [64] and [65]. Further, the Respondent has not directly challenged the Appellant's reliance upon *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 as standing for the proposition that once a person is identified as an accuser, that person will remain an accuser in all hearings arising out of the same incident.

18. *Stollery* should not be distinguished on the grounds stated by the Respondent.

Paragraphs 60-68 of the Respondent's Submissions

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

19. *Ebner* was a case involving pecuniary interest. In *Ebner* this Court described a general principle concerning apprehended bias cases involving interest, conduct, association and extraneous information.[15] However, *Ebner* did not

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[12] Transcript at T 199, T 200-2, T 251 and T 366.
[13] *Isbester v Knox City Council* [2014] VSCA 214 at [17]; Transcript at T 218-9.
[14] The fact that the Council can choose between applying to a court for a destruction order and making the decision itself, suggests that the content of procedural fairness at it applies to the panel should not be diminished.
[15] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 350 [33].

seek to modify the principles in relation to "conflict of interest" cases generally – see 358-9 [59]-[63].

20. Relevantly, Gleeson CJ, McHugh, Gummow, and Hayne JJ said:

> [59] Although it is not material to the decision in the present cases, we note that the requirement that a judge must not be a party to the case he or she is deciding is one which may have significance apart from, and where necessary may operate independently of, problems relating to apprehension of bias.
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> [60] .....In order to maintain both the reality and the appearance of independence, as well as impartiality, there must be a prohibition upon a judge sitting in a case to which he or she is a party, and that would include a case where one of the parties on the record is a nominee or alter ego of the judge.
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> [61] There is a line of cases where the judicial officer was a party to proceedings either because the name of that officer was on the record as a necessary and proper party to the case, or because effectively or in substance the judicial officer was a moving party to the proceedings (eg as a member of a body instituting a prosecution) even though not named on the record.
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> [62] These cases were described by Isaacs J in Dickason v Edwards as instances of "incompatibility".
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> [63] .....A judge is disqualified from deciding a case to which he or she is a party, even if the judge has no pecuniary interest in the outcome of the case. Again, this rule is subject to qualifications of waiver and necessity.
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> (emphasis added, footnotes omitted)

21. It follows that once it is established that a person is an accuser, he or she is disqualified from participating in the decision making process, whether as an actual decision maker or not. The two phase test in *Ebner* does not apply.

Dated: 31 March 2015

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