

***British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2**

(9 February 2011)

Note

While a range of other issues are dealt with in the judgment, including a consideration of the attributes of the ‘reasonable observer’ in cases dealing with apprehended bias, I shall limit myself here to a summary of the findings that relate to s 125 of the Evidence Act and client legal privilege.

Background

This decision was concerned with the question of apprehended bias: whether an interlocutory finding against a party in an separate proceeding is sufficient to cause an apprehension that the Judge would be biased in hearing another dispute where the subject of that finding is in issue.

This decision is relevant for our purposes at CLP Watch because the matter arises from s 125 of the *Evidence Act* 1995, which deals with the fraud exception to client legal privilege. Section 125(1) permits evidence to be adduced of a communication that is the subject of a claim for client legal privilege if the communication is made ‘in furtherance of the commission of a fraud’. According to s 125(2), if the commission of fraud is a fact in issue in the case the court ‘may find that the communication was so made or the document so prepared’ if there are reasonable grounds for finding the fraud was committed.

In 2002, in separate proceedings (the ‘Mowbray litigation’) against the respondent British American Tobacco (‘BATAS’) in the Dust Diseases Tribunal of NSW, Judge Curtis made an interlocutory finding that BATAS had dishonestly concealed a policy of destroying prejudicial documents, and that the evidence in question constituted communications ‘in furtherance of the commission of a fraud’. On this basis and according to s 125 of the Evidence Act BATAS could not rely upon client legal privilege to resist production of the documents.

The present proceedings against BATAS were commenced in the Dust Diseases Tribunal in 2006, and the matter was allocated to Judge Curtis. In 2009, BATAS argued that Judge Curtis should be disqualified from hearing the proceedings on the basis that his earlier interlocutory finding in the Mowbray litigation was sufficient to give rise to a reasonable apprehension of prejudgment. Judge Curtis dismissed the application, and his Honour’s decision was upheld in the Court of Appeal. BATAS was granted special leave to appeal the matter to the High Court.

Apprehension of bias

The majority of the High Court – Heydon, Kiefel and Bell JJ – accepted BATAS’s argument that Judge Curtis’s interlocutory finding in the Mowbray litigation gave rise to a reasonable

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apprehension of bias (at [145]). It was held, at [117], that Judge Curtis's ruling overstepped the requirements of s 125(2) of the Evidence Act, because it failed to frame the findings as being made merely because there were 'reasonable grounds' for finding fraud. According to the majority, the finding was made under s 125(1).

Their Honours held that a reasonable bystander might apprehend that Judge Curtis had prejudged the issue of fraud because the interlocutory finding was expressed without qualification or doubt; it was based on actual persuasion of the correctness of that conclusion; the Judge had expressed extreme scepticism about the BATAS's arguments; and the alleged fraud was extremely serious in nature (at [145]).

For the majority, it was immaterial that the Judge had pointed out that the finding was made on the available evidence, and that a different finding may emerge at trial after more evidence was put on. According to their Honours, 'express acknowledgment of that circumstance does not remove the impression created by reading the judgment that the clear views there stated *might* influence his determination of the same issue' in later proceedings (at [145]).

Dissenting judgments

A key distinction between the views of the majority and those of the two dissenting Judges was in their treatment of Judge Curtis's qualifying statements.

Justice French held the view that no relevant distinction was demonstrated between the finding of fraud that was made by Judge Curtis – which was expressly based upon limited and possibly incomplete evidence – and a finding of fraud on the basis of 'reasonable grounds' (at [19]).

His Honour said that a conclusion that the judge might be led to decide the case other than on its merits 'would require the observer to give no account to the express qualifications made by the judge in his findings' (at [51]).

Similarly, Gummow J concludes at [101]:

'if the evidence later adduced is different the court in question may be persuaded to a different conclusion and that, Judge Curtis made clear in the 2006 reasons, might be the outcome at a later trial. The reasons on the recusal application underscore the point that there was not the ineradicable apprehension of prejudgment of which BATAS complains.

The full text of the decision can be found here:

<http://www.austlii.edu.au/au/cases/cth/HCA/2011/2.html>.

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