

# Case Note:

## Kilpatrick Green Pty Ltd v. Leading Synthetics Pty Ltd

Supreme Court of Victoria

McDonald J.

22 July 1997 (unreported)

**Special referee, apprehended bias, special referee retained by solicitors for party as counsel.**

### Introduction

This was an application for an order to restrain a special referee from continuing to act in a proceeding.

The rules of the Supreme Court of Victoria permit the Court, in an appropriate case, to appoint an appropriately qualified and experienced person to assist it in the disposition of a proceeding by giving an opinion in relation to a specific issue or issues in that proceeding. The Court applied to a person appointed by the Court as a special referee the rules relating to bias which govern members of the Court itself. In doing so, the Court held that where the special referee is a barrister the rules relating to bias do not prevent the special referee from accepting a brief from the solicitors acting on behalf of one of the parties in the special reference, where such brief is in a matter unrelated to the special reference or not connected to the parties involved in the special reference.

### History of the proceeding

In a proceeding in the Building Cases List the Court ordered that the proceedings be referred to a special referee for his opinion. The order by consent nominated G as the special referee.

Before G was appointed as special referee he was asked by the defendant's solicitors whether he would be available and willing to act. He was asked to advise whether he knew of any circumstances which would prevent him from so acting. G replied that he was available to act as a special referee and that he was not aware of any circumstances which would prevent or restrict his ability to act.

At a Preliminary Conference into the matter, G informed the parties that he had

been briefed as counsel in an unrelated matter by the solicitors acting on behalf of the plaintiff in the special reference, however, the matter in which he had been retained had no connection to the special reference or the parties to the special reference. G was retained in his appointment as special referee.

The defendant's solicitors wrote to G requesting that he disqualify himself. G replied that he was not aware of any matters which could give rise to a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the consideration of the issues before him. G subsequently wrote to the solicitors acting for both parties and stated that if he continued as a special referee he would terminate his retainer from the plaintiff's solicitors in the other matter, he would not receive instructions from any of the solicitors involved in the reference in relation to the other matter or any other matter during the hearing of the special reference and he would not render charges or receive payment for acting professionally as counsel in relation to the other matter during the hearing of the special reference.

### **Application before the Court**

Before the Supreme Court, it was stated by counsel for the defendant that it was not contended that actual bias existed on the part of G. Rather, it was submitted that there was evidence of facts and matters that could give rise to a reasonable apprehension or suspicion that G might not bring to his task as special referee an unbiased and impartial mind.

Mr Justice McDonald held that a person appointed by a court to act as a special referee and to provide the court with an opinion on a matter or issue the subject of proceedings before the court takes upon himself or herself a special function and position with the court and also with respect to the parties in the proceeding. The rules which govern a judicial officer of the court with respect to bias or the reasonable apprehension or suspicion of bias also govern a special referee in the performance of his functions and duties. If there exists a reasonable apprehension of bias, on the part of a special referee in the performance of his or her appointed function, these would be grounds for the disqualification of that person as the special referee and his removal from that position.

McDonald J. applied the test articulated by the courts in determining whether apprehended bias exists in a given case. That test is whether, in all the circumstances, a fair-minded lay observer with knowledge of the material facts might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him. This test is identical to that which has been applied in determining whether an arbitrator should be disqualified from participating in an arbitration.

His Honour applied to the position of a special referee the rule that every judicial officer, arbitrator and tribunal member should be obliged to bring to the

attention of the parties as soon as practical any fact or circumstance which might create a reasonable apprehension of bias. The failure to disclose relevant facts to parties within a reasonable time or as soon as practical might cause a lay observer to entertain a reasonable apprehension of partiality or bias.

### **Findings by the Court**

His Honour found that the disclosure by G of his retainer by the solicitors acting on behalf of one of the parties in the special reference could not reasonably be considered a late disclosure. His Honour also found that a fair-minded observer would be aware and would have knowledge that G was a barrister in addition to acting as a mediator and special referee and in that capacity acted for clients in a professional capacity.

His Honour was reinforced in his conclusion that no reasonable apprehension of bias had been established by the special referee's conduct subsequent to being asked to withdraw as special referee. His Honour referred in particular to frank letters written by G to both solicitors and his open canvassing of the issues raised on behalf of the defendant at a Directions Hearing called by him.

On the basis of all these considerations, McDonald J. concluded that a fair-minded observer would be justified in finding that G would approach his task as special referee dispassionately and impartially and declined the application.

**T. Di Lallo, Barrister at Law**

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