CRIME AND MISCONDUCT COMMISS

CRIME & MISCONDUCT COMMISSION
No 2005 - 5 Date 7 FEB06
IN THE MATTER OF:

GOLD COAST CITY COUNC OF GRAND

EXHIBIT No 339
CLERK

RESPONSE ON BEHALF OF COUNCILLOR SHEPHERD

Preliminary

1. This response is delivered subsequent to receipt of the 92 page Submission of Counsel assisting the Crime and Misconduct Enquiry into the Gold Coast City Council ("the Mullholland Submissions").

2. As a consequence of the directions given concerning conclusion of the hearing, the Mullholland Submissions must be construed as provisional only, as the Commission is still to receive written submissions from other interested parties, final oral submissions from Counsel assisting, and other responses.

3. While the Mullholland Submissions assist in directing those interested as to the content of any written submission, Councillor Shepherd is compelled to address certain aspects of the Mullholland Submissions

4. Should further submissions as to his involvement in matters the subject of investigation arise, those matters will be addressed either orally, or by a brief supplement in writing.

Issues

1. The Mullholland Submissions identify four discrete areas of criticism of Councillor Shepherd. They are:

   (a) Operations of the Group – Quadrant – pages 10 to 15;

   (b) Secrecy of the Group (the Emails) - pages 20 to 23;

   (c) Campaign Fundraising Functions – pages 69 to 70; and

   (d) Conflicts of interest – pages 76 to 85.

1. This response addresses only these parts of the Mullholland Submissions.

Operations of the Group – Quadrant

Pages 10 – 15

1. The Mullholland Submissions implicate Shepherd only in the immediate events leading to, and part of, the meeting of 16 December 2003. (The emails will be addressed under the next heading).

2. At page 10, emphasis is placed on the e-mail wherein the presumption of "Bob and Ted" is raised. By this it is suggested that Shepherd is a participant to some degree in the machinations of the Common Sense/Quadrant/Bardon Trust events.

3. Looking just at the e-mail, one can infer that Shepherd is thought by Morgan to be a participant in what is about to occur.

4. However, Morgan frequently came to have baseless presumptions; he was prone to jump to conclusions. That epitomises the work he does. His cavalier approach to "shooting from the hip" makes reliance upon anything he says or does quite dangerous.

5. Many examples of this are found:

T 825.40

> *"Now, could you just, in a very brief sentence, tell me when a new account is contemplated what you do in preparation for the selling or pitching your services?" – "Everyone's different, of course. In this particular instance we were still trying to get a feel for just how this particular exercise was going to evolve. There was a meeting planned with Councillors Power and Robbins. Prior to that I set about really trying to acquaint myself more fully with basically the nature and requirements of the candidate, or candidates for that matter."*

T 825.50

> *"And were you relying then on what Mr Ray had in mind to formulate how you might pitch to the prospective clients?" – "What we look for is a brief."*

T 828.45

"That's the interpretation I put on it."

T 829.10

CHAIRMAN: "But the word "Commonsense", did that come from you or out of your brain-----?" — "I basically introduced that." "It was--------or did you take up something that someone else said?" — "I just - it was a phrase that I actually introduced for the purposes of giving us some indication as to a title in terms of how we were going to refer to it within - within the company."

T 830.10

"Okay?-- And we discussed in general terms what was required. This is where the term "Commonsense Candidate Resource" came up and----- Well, you say you suggested that?" – "Yes, I wrote that."

T 832.05

"Could you just explain the context of that." "The purpose of that exercise was I left that meeting on the 10th and basically started to prepare myself with as much information and background material as I possibly could relative to speaking to a group of potential new candidates - sorry, new clients more to the point."

T 832.25

"And why were you forwarding it (the Tetley email) to Mr Power and Ms Robbins?" – "To acquaint them as to what we were approaching - or the way we were approaching the business basically. And also, I suspect, what you could do if you were?" – "Oh, basically it was a demonstration of what we were capable of."

T 833.55

"Did you envisage that those two people (Ted and Bob) would be at the next meeting?" – "I anticipated they probably would be, yes."

T 834.10

"Okay. You speak about the draft objectives strategy, et cetera. Did you ultimately prepare a document (exhibit 14) for the purposes of the meeting on - that took place on the 16th?" – "Yes, I did. That was a briefing document. "Okay, we'll get to that in a minute. Now, was that an internal document that you were constructing from your perception of what was needed in this brief?" – "Absolutely."

T 834.15

"Did you consult anybody about the construction of that document?" – "No, I didn't."

T 842.01

"The perception that I had developed over period proved to be incorrect in that whereas I was anticipating that we were looking at probably some broad brushed or broad based campaign, the specifics really came down to which individual candidates in the room would employ Quadrant and to the extent of services that they would be required - sorry, that we would be required to present to them."

T 850.10

"The whole premise, as I understood it, for the actual fund to be established was an absolute and complete frustration on the part of Councillors Power and Robbins and I imagine Shepherd and La Castra and those associated with them to achieve a situation that you could work with."

(NB - This "imagination" is wholly without foundation. See T1004 below)

T 858.30

"And what was the first undertaking professionally that Quadrant did for Mr Shepherd?" – "I recommended to Ted, as part of his campaign, that he focus on a - the production of a colour brochure or a leaflet, I should say, for distribution within division 9 rather than going into press because there was too much wastage. The local distributions made a lot more sense. We-----"

(NB - This was not his role – others in the Shepherd campaign committee were responsible for these matters)

T 908.35

"Now, just go to the other notation on this page from the top tell us what that is. Is that your handwriting?" – "That's my handwriting, Nifsan, Ted to call Ian McLean. The suggestion was to be made to Ted Shepherd to call Ian McLean. That's N-I-F-S-A-N?" – "Correct. Whether he subsequently did so or not, I've no idea. "Yes. So, who was going to get Ted to do that?" – "I don't know. I would– – And Ted-----?-- Sorry. Ted's a reference to Mr Shepherd?" – "Ted Shepherd, correct. Well, that might have been you?-- It could have been, I don't - I don't remember discussing that with him."

(NB - But there is no evidence that this was carried through, or that anyone even spoke to Shepherd – see T1006 below)

T 1004.20

"Now, I hark back to your words there. It was - and I'll split this up - "The whole premise for the actual fund to be established was an absolute and complete frustration on the part of Councillors Power and Robbins". Were they actually the people who were setting up the fund or-----?" – "The short answer to your question is I don't know. They would have been party to it. Whether they specifically did so my understanding was that Brian Ray was very much involved in establishing that as well. It's a question really I'd suggest you address to Mr Hickey. And I'm worried about your words that follow, and you go no to qualify that by saying, "frustration on the part of Councillors and Robbins and I imagine Shepherd and La Castra"?-- Correct. That was my understanding of the situation. By those words "and I imagine Shepherd and La Castra," are we to take it that you just don't know?-- I didn't know specifically. I assume that was the case. As I said, it was an assumption, what I understood to be the premise of the fund and the reason for it being established." "And that is what it - what your evidence on that day was. It was an assumption on your part?" – "Correct. Of those involved. I ask you to read that passage once again. You see, I'm not interested in what you imagine the circumstance to be and that's what you predicate my client's name with. You say "Councillors Robbins and Power," and then you go on after that to say, "and I imagine Shepherd and La Castra"?-- "And I imagine Shepherd and La Castra and those associated with them to achieve a situation," et cetera. Yes, I imagine, I---- So pause for a moment. You really don't know what my client's knowledge of that set of circumstances was?-- That's why I used the word "imagine". and therefore we should ignore what you say after the words "Robbins and Power" because you just don't know anything about it?-- That's

why I used the word "imagine". It's pure presumption on your part and with respect it will cause this inquiry to go down a dry gully?-- It is a presumption on my part. You don't know at all?-- Not specifically. I hadn't spoken to Bob La Castra, correct. Yes. And you don't know of Mr Shepherd's involvement at all?-- Only that he was there at that meeting on the 16th. And you don't know why, because you didn't ask him there?—It was - no, I had no specific discussions with Ted Shepherd relative to exactly why he was at that meeting. All right. That can be returned, thank you. Now, the $9,999.13 was paid by the Shepherd campaign fund, not by Mr Shepherd himself?" – "I think it was the Division 9 campaign fund. It wasn't a personal cheque though. There was no assistance given by Quadrant in any other fashion to Mr Shepherd?" – "Not at all, no."

T 1006.40

"All right. At page 908 of the transcript you talk about another document in respect of which there is a notation in your handwriting, "NIFSAN, Ted called Ian McLean?" – "Correct." "And you then go on to say, "The suggestion was to be made to Ted to call Ian McLean?" – "Mmm-hmm." "Did you ask Mr Shepherd to contact Ian McLean?" – "No, I didn't ask Ted to contact anybody. Two other people that were in the room at that time I believe from memory were Brian Ray and - and Tony Hickey, and that would have been a notation for one of them to - to do so. There's subsequent information here - which I saw another spreadsheet today that also indicates follow-ups, responsibilities subsequent to that meeting. Follow up - can you identify that document to me?-- It was circulated here earlier today. I think it was today. I can't recall whose file it came from. It's not something we compiled but it had a list of donors or potential donors and the individuals who had been designated or nominated to – to make follow-up phone calls."

T 1007.05

"At the time of your handwriting that, you would have known, would you not, that Councillor Shepherd would not have approached NIFSAN about anything to do with the election?"—"I have no idea." "You have no idea. Well, I put it to you-----?"—"That was a notation I made at that meeting. Whether Ted would do that or not, something you'd really have to discuss with Ted."

"All right. Well, I won't - there were issues before the Council at that time which would lead Councillor Shepherd

to refuse to communicate with NIFSAN about anything to do with the election. You have no idea?"—"I have no idea."

6. Further evidence of Morgan's penchant to go on follies of his own are seen in that part of Exhibit 135 which relates to the Shepherd account. There were many activities on his part, including preparation of agendas, timelines, and advertising material, in respect of which he was not instructed. His presumptions about his position are obvious.

7. These are only some examples of Morgan's demeanour, conduct in life, and business, of making rash assumptions about what was occurring and what he was to do. His pattern was not to do what he was told, but to invent work for himself based upon his own perceptions.

8. In cross-examination, about the very words in the e-mail, ("Ted and Bob") he states:

> *"Once again those words are of presumption on your part, "including Ted and Bob, I presume?" – "That's correct, that was a presumption on my part, that's right."*
>
> *"Therefore, do we take it that there is nothing that was told to you by Sue and David about Ted and Bob or what is the relevance of this presumption on your part?" – "I was under the impression that they would be meeting with us at some particular point. I can't recall the specifics as to why or who indicated that they were involved. It was an assumption that I had made. I can't give you specifics as to why or who told me that they were going to be there or that I needed to communicate with them."*
>
> *"So your present recollection is, you don't know anything about why you put those words in there, is that what you're trying to say to us?" – "I was under the impression, a presumption..."*

"Why were you under this impression? Who gave you this impression?" – "Well the only people who could have given me that impression would have been David and Sue."

"I see?" – "I can't remember specific discussion to that effect but that's why I would have made that statement." "Yes, your evidence prior to today has been that you had no communication with Ted?" – " Mmm..."

"So put at its highest Sue and or David may have told you something which lead you to put those words "including Ted and Bob I presume?" – "That's correct, I can't recall specifically."

"It wasn't sourced from Ted?" – "No, no, it wasn't, no."

9. It is submitted that the evidence at page 833 of his "presumption" is either as a result of a passing comment made by Power or Robbins as to Shepherd's likely attendance at the meeting, or alternatively, another invention by Morgan.

10. The evidence most certainly does not implicate Shepherd beyond being an attendee at the meeting. It certainly cannot be elevated to make him a participant in the Quadrant/Bardon events (if that is what is being suggested by the Mullholland Submissions).

11. Shepherd's role was attendance at one meeting for a short part of it, and then only as a guest speaker. Those who were there say:

T 845.01

Morgan: "*What role did he play?" – "Very little actually. Ted had a little to say with respect to some of his experiences in terms of campaigning. Other than that very little frankly."*

"Did you have any prior discussion with Shepherd as to what role he would play in the meeting?" – "None at all."

T 58, T 67

Molhoek: (NB - This witness mistakes the date of the first meeting, but says that Shepherd was there). *"There was general conversation about the satisfaction with the present Councillors..."* *"Robbins did most of the speaking* (NB - No reference to Shepherd speaking).

T 224

Pforr: "*Shepherd wasn't present.*"

T 445.30

Pforr: (About Exhibit 14) "*Councillor Shepherd happened to pass comments.*"

T 345

Scott: "*His name was mentioned* (at the meeting) *but I don't think he was there.*"

T 465.50

Betts: (Shepherd in attendance)

T 469.30

Betts: "*They* (Shepherd) *just talked about successful techniques in running a campaign.*"

T 1055

Rowe: "*I can remember Sue Robbins talking a lot... Ted Shepherd saying very little.*

T 1109

Rowe: "*I think Ted struggled to get a word in – it was really Sue.*"

T 2071

Shepherd: (Referring to Exhibit 14) "*Was not discussed while I was there. I left the meeting early. But this is a thing Chris Morgan would do – prepare as a discussion topic.*"

12. Power says that Shepherd's role was providing advice to the candidates regarding their campaigns for election – see para 24 of Powers Statement.

13. Therefore, the submission made in the fourth paragraph on page 14 of the Mullholland Submission:

> "*All this suggests a collegiate atmosphere of shared interests and shared goals, even to the extent of candidates sharing their electoral material and strategies with others at the meeting. It would indicate, at least, that the candidates were willing to give each other assistance with planning and strategy for the election.*"

cannot be said about Shepherd.

14. The contention on page 15:

> *"In our submission, the Commission could be satisfied that the "independence" of the candidates was to be for public display only."*

similarly, cannot be said in respect of Shepherd.

Secrecy of the Group (the Emails)

Pages 20 – 23

15. For the reasons explained in the previously, Shepherd took no part in the Common Sense/Lionel Bardon Trust activities other than a "cameo" role at the meeting of 16 December 2003.

16. The emails have been elevated to that of formal communications, by the Mullholland submissions. They are not. They are, by design, notes on the run.

17. Put in their context, and upon consideration of all the evidence, it is submitted that they can be sensibly viewed one of two ways:

    1. Shepherd knew nothing of, and like many others (such as Hackwood and Grew) denies absolutely, the existence of a group, or bloc.
    2. Alternatively, Shepherd, like others in the community heard rumours about so-called allegiances between groups (particularly Quadrant based rumours) and he did not wish to be caught up in this rumour mill.

18. It is submitted that the second scenario is a more cogent explanation of what took place, because:

    a. at the early stages, Morgan had no idea what he was to do – see previous Submissions;

    b. Morgan was a "loose cannon" – see, once again, previous Submissions;

    c. Shepherd can be believed about his wish to remain independent;

d. Shepherd, because of his relationship over years with Morgan as a friend, did not want to offend Morgan by severing ties with him entirely;

e. because of this relationship with Morgan, Shepherd could easily be found to be a member of the group – guilt by mere association;

f. the Gold Coast City Council, at election time, and, for that matter, at most times, is a hot-bed of gossip – an example of this is the infamous Young/Power/Shepherd lunch room incident;

g. Shepherd was fearful not only of the Quadrant relationship, but also of those who Quadrant represented, or who Quadrant was about to represent – see T2055.20 – reference to Molhoek.

h. There was a high level, well orchestrated campaign being waged against Shepherd by "green" factions, with spies everywhere.

19. It is admitted the emails are clumsy. They were written at a time of frenetic activity and would undoubtedly be stated differently, with hindsight. However, to submit that they represent some attempt by Shepherd to hide from the public something real and tangible, is, with respect, perverse.

20. Read in the context suggested by Shepherd, they are an attempt by him to remove himself from the rumour mill, and nothing more.

21. It is not suggested by Mullholland, for proper reasons, that Shepherd's conduct evinced by the emails can in any way be elevated to a reportable issue.

22. In the absence of any further submission, the emails should be treated by the Commission as background evidence only.

Campaign Fundraising Functions

Pages 69 – 70

23. The three Councillors' functions have distinctly different factual scenarios and results. The submission in conclusion on this issue in the Mullholland Submissions (on page 70) is adopted.

24. Further, the Chairman's comments at T2061.10 to T2061.30 are noted:

> Chairman: "*Well, I agree you conformed with what is set out in the Local Government booklet about it, you conform with that to the hilt. I must say I find their part about not needing to disclose fundraising functions a little bit hard to understand on my reading of the legislation but putting that aside... you did comply with what they said... and I can't criticise you for doing that... and I won't.*"

25. That should be the end of the matter - save for clarifying a brief area of evidence.

26. Treasure at T1857.10, and in his Statement (Exhibit 261) says:

> "*I accepted an invitation to attend a function organised on behalf of Councillor Ted Shepherd in connection with his campaign for re-election... the company chose to make a donation to the campaign in the sum of $2,000.00.*"

27. The reference to his considering the $2,000.00 to be a donation (referred to in the fifth paragraph of page 69 of the Mullholland Submissions) arises directly as a result of a question from the Chairman (at T1885.50).

28. With the greatest respect, the question is somewhat unfair in the face of the questions and answers at T1884.30 to T1885.40.

29. Abedian, the Chairman of the board of the company, which directly employs something in excess of fifty people and has forty to fifty subsidiary companies (with presumably hundreds more employees) says that his company bought fifty tickets to a function that the company then offered to its employees and associates to use – T1920.20.

30. Abedian had nothing to do with Shepherd before of after the function – T1920.50.

31. Abedian says that it is "ridiculous to even suggest" that the purchase of those tickets would provide his company with any benefit – T1921.50.

32. Bearing in mind the size of the Sunland group of companies, fifty tickets is not an unusual purchase. Shepherd catered for that many attendees.

33. Lastly, the other developer examples at paragraph 5 of page 69 of Mullholland's Submissions are, with respect, irrelevant. The percentage expressed in this paragraph is without proper foundation. There is no evidence as to whether those named attended or not.

Conflicts of Interest

Pages 76 – 85

34. The submission at page 78, paragraph 4 is incorrect.

35. Section 229 of the Local Government Act speaks of a Councillor's role and in sub-Sections (2) and (3) it is provided:

> *"(2) In performing the role, a Councillor:*
>
> *a. must serve the overall interest of the area and, if the Councillor is a Councillor for a Division, the public interest of the Division; and*
>
> *b. if conflict arises between the public interest and the private interest of the Councillor and another person – must give preference to the public interest.*
>
> *(3) A Councillor must ensure there is no conflict, or possible conflict, between the Councillor's private interest and the honest performance of the Councillor's role of serving the public interest."*

36. What is stated in the Mullholland Submissions about the "error" in Shepherd's approach needs careful examination. It is stated:

> *"The error of their approach is to prefer their own personal view as to whether a conflict exists at the expense of considering whether the circumstances give rise to a reasonable apprehension that they may not be able to act impartially in carrying out their public responsibilities."*

37. There are, in the writer's opinion, three tests which are appropriate when considering whether or not there is a conflict of interest:

a. the subjective test;

b. the objective test; and

c. perceptive test.

38. The subjective test is one where the person merely decides whether there is a conflict based solely upon considerations of his own circumstances.

39. The objective test is perhaps best explained as the "reasonable man" test and of necessity requires considerations as to the subjective test as well. What would a reasonable man do, if faced with this conundrum?

40. The perceptive test requires not only a consideration of both the subjective and objective tests, but superimposes upon that a consideration of the perception of what the community or an independent by-stander would think if a decision such as that were made by a person in such a position – similar to the "perception of bias" principle. See, for example, Bainton v. Rajski (1992) 29 NSWLR 539 –relevant parts attached.

41. Prevention pointer number 3 in the Crime and Misconduct Commission's publication "A Guide for Councillors and CEO's" states:

> "*The test is*:
>
> - *whether you could be (not whether you are) influenced by your private interests in carrying out your official duties; or*
> - *whether people are likely to believe that you could be influenced.*
>
> *The latter – that is, the public perception of the situation – is as important to consider as the situation itself.*"

42. With respect, that statement in the Guide is wrong; and if the test in the Guide is what the Mullholland Submissions attempts to say is the appropriate test, then, with respect, its authors are wrong. The perceptive test does not form part of a Councillor's decision making process when it comes to conflicts of interest.

43. If the Mullholland Submissions are meant by the words quoted above to state that the objective test is appropriate, then the writer concurs with that view.

44. Reconsidering now what Shepherd said, it is apparent that his words describe the objective test:

> "...*a conflict of interest is one where if you can vote in your mind on the public interest on the public good then the conflict doesn't exist.*"

45. On this analysis, the criticism of Shepherd's definition in the Mullholland submissions that he lacks a fundamental appreciation of what constitutes a conflict of interest, is incorrect.

46. Lastly, on page 84 of the Mullholland Submissions it is stated:

> "*It is unprovable what might have occurred if these events had not coincided, but it is appropriate to reject any notion that the lack of established corruption in relation to Gold Coast City Councillors means that proper standards of public conduct were not placed in serious jeopardy.*"

47. That hypothesis is improper and demeaning of all Councillors. Its foundation is utterly flawed; it is insulting to suggest that but for publicity about corruption the Councillors were likely to have acted in an illegal manner.

DATED: 3.2.06

GARY J RADCLIFF
Barrister at Law

autrefois convict" is erroneous in point of law. Such a plea, in terms, is not strictly, or technically available, in summary proceedings. Further, the determination would also be erroneous in point of law, if the question posed in the case stated is properly to be understood and interpreted to mean whether the magistrate erred in law, in "accepting the defendant's plea in the nature of autrefois convict" or plea in bar "analogous to a plea of autrefois convict". The question asked in par 5 of the case stated should be answered "Yes".

The magistrate did not, further or alternatively, decide the case in terms, by the application of the principle in *Wemyss* or by the application of the rule against double jeopardy. The magistrate did not uphold the defendant's defence on the basis of it being one based upon a plea in the nature of a plea of autrefois convict, or a plea in bar, analogous to a plea of autrefois convict, or upon a plea in bar based upon the "well-established rule at common law" as referred to in *Wemyss*. As the cases make clear, the rule against double jeopardy extends to summary trials. So does the *Wemyss* principle which gives effect to such a rule, and would permit a defence, or a plea of in bar, to be raised in order to give effect to the rule, in circumstances where the rule may be found to properly apply.

However, for reasons given, in the circumstances of this case, I do not consider that the case offends the rule against double jeopardy, or, that a defence or plea based upon the decision in *Wemyss* is available.

For all the above reasons I would answer the question in the stated case as follows:

"Q. ... whether my determination in accepting the defendant's plea of autrefois convict was erroneous in point of law. A. Yes."

I remit the case to the Local Court to be heard according to law. I order the defendant to pay the plaintiff's costs. The exhibit may be returned.

Questions so answered

Solicitor for the plaintiff: *H K Roberts* (State Crown Solicitor).

Solicitors for the defendant: *Stewart Cuddy & Mockler.*

B A GRAY,
Barrister.

BAINTON v RAJSKI

Court of Appeal: Mahoney JA, Priestley JA and Cripps JA

22 June, 3 August 1992

Courts and Judges — Judges — Disqualification for bias — Procedure — Judge to determine own case — Formalities unnecessary — Risks in formal hearing and statement — Bias irrelevant in procedural matters.

Contempt — What constitutes — Litigant seeking disqualification of judge — Allegations of bias — Whether contempt of court.

(Per Mahoney JA and Cripps JA) (1) When a litigant seeks the disqualification of a judge from hearing a proceeding on grounds of bias, the judge in question must decide whether he or she should continue to sit (and this may be done without formalities). (544D, 548C)

Barton v Walker [1979] 2 NSWLR 740, followed.

Observations by Mahoney JA on the difficulties inherent in determining the issue of bias in a formal hearing or inviting a statement of allegations, including the possibility of contempt of court. (541C-543F, 545C-E)

(2) There will not usually be any reason why a judge should disqualify himself or herself from hearing an interlocutory application of a procedural matter. (545G, 548D)

Note:

A Digest — COURTS AND JUDGES (2nd ed) [4], [8]; CONTEMPT, ATTACHMENT AND SEQUESTRATION (2nd ed) [1]-[3]

CASES CITED

The following cases are cited in the reasons given:

Attorney-General, Ex parte; Re Goodwin (1969) 70 SR (NSW) 413; 91 WN (NSW) 29.
Attorney-General for New South Wales v Mundey [1972] 2 NSWLR 887.
Attorney-General of Canada and Alexander, Re (1975) 65 DLR (3d) 608.
Australian National Industries Ltd v Spedley Securities Ltd (In Liq) (1992) 26 NSWLR 411.
Barton v Walker [1979] 2 NSWLR 740.
Gallagher v Durack (1983) 152 CLR 238.
JRL, Re; Ex parte CJL (1986) 161 CLR 342.
Lewis v Judge Ogden (1984) 153 CLR 682.
Livesey v New South Wales Bar Association (1983) 151 CLR 288.
Macgroarty v Clauson (1989) 167 CLR 251.
Polites, Re; Ex parte Hoyts Corporation Pty Ltd (1991) 173 CLR 78.
R v Dunbabin; Ex parte Williams (1935) 53 CLR 434.
R v Editor of New Statesman; Ex parte Director of Public Prosecutions (1928) 44 TLR 301.
R v Gray [1900] 2 QB 36.
Rajski v Wood (1989) 18 NSWLR 512.

Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [No 9] (Court of Appeal, 27 November 1990, unreported).
Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd (1986) 6 NSWLR 272.
St James's Evening Post Case: Roach v Garvan (or Hall) (1742) 2 Atk 469; 26 ER 683.

APPLICATION FOR REVIEW

This was an interlocutory application to the Court of Appeal under s 46(4) of the *Supreme Court Act* 1970 to review the stay of an order for taxation of costs. At the hearing the respondent sought the disqualification of two of the judges on grounds of bias. Each judge subsequently gave his reasons for not disqualifying themselves.

P M Jacobson, for the appellant.

The respondent in person.

Cur adv vult

3 August 1992

MAHONEY JA. On 22 June 1992, an interlocutory application was made to the Court to set aside an order made by Kirby P on 11 November 1991. The order directed a stay of taxation of costs. That application was made by Mr Jacobson of counsel on behalf of the defendant Mr Bainton. It was opposed by Mr Rajski who appeared in person. The application was refused with costs. Reasons for the refusal of it were then delivered.

When the application was called on for hearing, Mr Rajski objected to two members of the Court (Cripps JA and myself) sitting to determine it. Cripps JA and I each concluded that we should sit to determine the application. It was then stated that reasons would subsequently be given for these conclusions.

What occurred raises issues of principle which are of significance. I shall refer to the principles involved and the issues which arose leading to my conclusion.

The question whether a judge should sit to determine a proceeding has been raised in a number of proceedings. It requires the consideration of, inter alia, two matters: the principles according to which the question is to be answered; and the procedure which should be followed in answering it.

1. The principles:

The principles for determining whether a judge should hear a proceeding have been stated for this Court by the decision of the High Court in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 and the cases in which that decision has been examined and applied. The reasons why a judge should refrain from hearing a proceeding are various. They involve both objective grounds and (as I shall describe them) apprehensions. The *Livesey* decision established high standards in this regard. The High Court adopted, in the sense to which I have elsewhere referred, standards based upon the possibility rather than the likelihood of the apprehension that, if the judge sits, justice may not be done: see *Australian National Industries Ltd v Spedley Securities Ltd (In Liq)* (1992) 26 NSWLR 411. In *Australian National Industries Ltd*, a specially convened court of five judges of appeal considered and applied the principles which the High Court has established. What was

there decided has, in accordance with the rules of precedent, binding force upon the judges of the Supreme Court.

2. The procedure:

What is here in question is the procedure which should be followed by a judge when the question arises whether he should hear and determine a proceeding. The procedure must be one which will, in a practical way, accommodate competing and, in some cases, inconsistent considerations.

Where a party contends that a judge should not sit, the procedures which, at least in principle, he may follow in deciding whether he should withdraw range from a full formal hearing of the facts alleged to disqualify him, the determination of them, and the hearing of argument in relation to them, at one end to, at the other end, a determination of the matter by him without a hearing.

Difficulties arise if the first course is adopted. As practical experience has shown, in a full hearing these difficulties may involve: contested facts; induced apprehensions; and contempt of court.

The claim that a judge should not sit may depend upon facts the accuracy of which is in question. The fact that facts are alleged by a party cannot, in my opinion, be enough to require that the judge withdraw. If it were, a party could secure the judge of his choice by the allegation against the others of disqualifying facts. Facts may be alleged dishonestly. They may be alleged because of paranoia and the distortion of facts which that produces. They may be alleged because of a mental or intellectual incapacity to understand what is done, in court or out of it. And they may result from honest mistake or lack of information. I am conscious that in some overseas jurisdictions a partial examination or admission of facts has been seen as appropriate: cf *Barton v Walker* [1979] 2 NSWLR 740 at 750. But, in my opinion, experience in this Court has shown clearly that, where the disqualifying facts alleged are in contest, the matter cannot or should not be determined in such a way.

It is accepted that justice must be done in fact and that the appearance of justice must be maintained. But that, and particularly the latter, does not require that, if a party alleges or even believes in the disqualifying facts alleged, the judge should withdraw. If that were so, the administration of justice and the rights of other parties would be governed by the allegation of or the belief in facts, however dishonest, paranoiac, unbalanced or honestly wrong. However, the alternative, the trial of the contested facts, would be equally unacceptable. The contest could hardly be determined by the judge himself. The proposition "that one judge of this Court has authority to declare that another is disqualified from sitting" was described by Samuels JA as "quite absurd": *Barton v Walker* (at 756A). A contest as to the disputed facts, with allegations and counter-allegations and perhaps cross-examination, would alone, at least in many cases, achieve the purpose of disqualifying the judge from the case.

That leads to what I have described as induced apprehensions. If there were a hearing to determine the accuracy of the allegations of disqualifying facts or if the procedure involved allegation or counter-allegation in respect of the judge, that alone would, in many cases, produce the result that, within the *Livesey* principles and indeed beyond them, the apprehension of a reasonable bystander would be that the judge, if he then sat to determine the

proceeding, might possibly be biased or prejudiced towards a party to the extent that would require that he not sit. It is to be expected of a judge that that will not happen but, given certain kinds of factual contest, the possibility cannot be excluded.

There is a further matter: the possibility that allegations made to disqualify a judge or in the course of such a full hearing may constitute contempt of court by the party making them.

It has been long established: see, eg, the *St James's Evening Post Case; Roach v Garvan (or Hall)* (1742) 2 Atk 469; 26 ER 683; that "any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court": *R v Gray* [1900] 2 QB 36 at 40 per Lord Russell of Killowen CJ. Contempt of this kind may be committed by what is said or done in the court as well as outside it: see generally, *Lewis v Judge Ogden* (1984) 153 CLR 682 at 688; *Macgroarty v Clauson* (1989) 167 CLR 251. The jurisdiction to punish for contempt exists for the purpose of preventing interference with the course of justice. In *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 442, Rich J, in a judgment concurred in by the majority of the court, said:

> "... Such interferences may arise from publications which are calculated to embarrass a tribunal in arriving at its decisions. Any matter is a contempt which has a tendency to deflect the Court from a strict and unhesitating application of the letter of the law or, in questions of fact, from determining them exclusively by reference to the evidence. But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."

Allegations in respect of a judge of partiality, impropriety, improper motive and the like have been seen as of particular concern. In *Borrie and Lowe's Law of Contempt*, 2nd ed (1983) at 238, it is said:

> "Allegations of partiality or impropriety are probably the most common way in which the court has been held to be 'scandalised'. The courts are particularly sensitive to allegations of partiality, it being a basic function of a judge to make an impartial judgment. The law goes to some lengths to ensure that a judge has no personal interest in the case, his decision being considered void and of no effect if bias is proved: *nemo judex in sua causa*. Allegations of partiality are treated seriously because they tend to undermine confidence in the basic function of a judge."

See *Re Attorney-General of Canada and Alexander* (1975) 65 DLR (3d) 608 at 622.

In *Gallagher v Durack* (1983) 152 CLR 238, Gallagher alleged that "the main reason for" the Federal Court of Australia determining as it did had been the actions of union members "in demonstrating in walking off jobs" (at 239). The Federal Court of Australia held the statement to constitute contempt and sentenced Gallagher to three months imprisonment. The High Court refused leave to appeal against the order. In *Ex parte Attorney-General; Re Goodwin* (1969) 70 SR (NSW) 413; 91 WN (NSW) 29,

Mr Goodwin made a malicious and unwarranted attack upon the character of a District Court judge who had found against him in civil proceedings and alleged that the judge had been activated by an ulterior motive. The Court of Appeal (Wallace P, Jacobs JA and Holmes JA) held that the allegations made were scandalous and outrageous "and cannot be tolerated" (at 417; 32). Mr Goodwin made an apology for what he had done. The court said that were it not for the apology "the decision of this Court would undoubtedly have been to impose a substantial term of imprisonment, but" in the circumstances imposed a fine of $2,000.

In *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887 at 888, Mr Mundey's statement that industrial action by union members had "stopped the racist judge from sending these two men to jail" constituted contempt of court in suggesting that the judge had been influenced in what he had done otherwise than by proper matters.

It is generally accepted that contempt of this kind may be committed without there being the intention to impair public confidence in the administration of justice; it is sufficient that the statements made be made intentionally and have such a tendency: see, eg, *Lewis v Judge Ogden*, *Attorney-General for New South Wales v Mundey* (at 911-912); *R v Editor of the New Statesmen; Ex parte Director of Public Prosecutions* (1928) 44 TLR 301 at 303. It is no defence that the party may subjectively have held the belief that, for example, the judge was bribed, that he acted dishonestly or that he was partial. Such matters, if they exist, are to be dealt with in other ways.

Accordingly, if a procedure were adopted for dealing with disqualification which invited or was apt to produce allegations of this kind in court against the individual judge, serious and practical difficulties would be apt to arise. Damage would be apt to be done to the institution of the courts and so to the administration of justice. And it would be wrong for a party without reason to be put in jeopardy of being dealt with for contempt in that regard. It would, in my opinion, be wrong to do so in respect of parties appearing in person. Such parties may sometimes do what they do deliberately. But they may sometimes, for emotional or other reasons, not fully appreciate the consequences of what they are doing or be unable fully to control what they say. It is, I think, not appropriate that they be, in such cases, put unnecessarily in a position where, if honest but mistaken, they be in jeopardy of being dealt with for contempt. If they do what they do deliberately they may of course be dealt with. But it is, in the formulation of procedure in this regard, proper that regard he had to other possibilities.

I have referred to the difficulties with which an accepted form of procedure must cope and which will be likely to arise if the procedure of a full hearing be adopted. But it is, on the other hand, necessary that the procedure adopted be such as to provide a remedy in cases where the judge should not sit. There is a felt injustice where a judge decides a case in circumstances of apprehension that he may not have been completely impartial. As I have said, the decision in the *Livesey* case requires the observance of high standards in this regard. The procedure which, as a matter of principle, a judge should follow must ensure that these standards are observed.

There is, I think, no procedural solution which, in every case and without

qualification in the application of it, will achieve both justice and the appearance of justice on the one hand and, on the other, the due administration of court business and unnecessary cost to the other party involved.

In *Barton v Walker*, this Court considered the procedure which, as a matter of principle and in the light of considerations of this kind, should be followed by a judge in this regard. In that case, objection was taken to the determination of a proceeding by O'Brien J, Chief Judge of the Criminal Division. The judge had refused a request made in open court that he not determine a civil proceeding in which the Attorney-General was a party; the request was made on the ground that there was actual or apprehended bias "from the judge's appointment" (as Chief Judge of the Criminal Division of the court) "said to be by, or at the invitation of, the Attorney-General" (at 741); see also (at 756D-F). Proceedings were brought to test his Honour's rejection of the request and those proceedings were determined by this Court (Reynolds, Glass and Samuels JJA). The court upheld what the judge had done and in principle the procedure he had followed.

Samuels JA, in a judgment with which the other members of the court agreed, referred to the "informal practice which requires the individual judge to determine his own disqualification" (at 749D); which, in the experience of the court "is seen to work well" (ibid). His Honour held that "a motion to disqualify a judge of the Supreme Court is not cognizable" (at 750B). He said that "the proposition that one judge of this Court has authority to declare that another is disqualified from sitting in particular proceedings seems to me, if I may say so, quite absurd" (at 756A).

Barton v Walker establishes two things: that it is, in principle, for the judge in question to determine whether he should hear a particular proceeding; and that that decision may be made without formalities such as a motion for his disqualification, the hearing of evidence, or the like.

The decision in *Barton v Walker* has been applied by this Court in a number of cases during the past twelve years and more. Reported instances of its application include: *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272 at 273 (Hope, Glass and Priestley JJA); *Rajski v Wood* (1989) 18 NSWLR 512 (Kirby P, Priestley JA and Hope A-JA): see also the *Australian National Industries Ltd* case.

But, as a rule of principle, the rule is necessarily subject to exceptions or qualifications. Reference may be made to three of these.

The first relates to review on appeal of what the judge has done. If the judge decides to determine the proceeding it is, of course, open to the relevant party or parties, on appeal from his final judgment in the proceeding, to urge as a ground of appeal the actual or apprehended injustice arising from his determination of the proceeding. The right to take such objection on appeal is well recognised. It is not necessary to consider whether the judge's decision to sit involves an error of law or merely a miscarriage of the trial.

It is, I think, questionable whether the decision of a judge not to hear a proceeding is reviewable in this way. Where the judge or judicial officer has a statutory duty to hear or continue to hear a proceeding or is otherwise subject to orders in the nature of mandamus or the like, he may, in some cases, be ordered to take up or continue the hearing of the proceeding: this, it may be, was the basis of the decision in *Re Polites; Ex parte Hoyts Corporation Pty Ltd*: (1991) 173 CLR 78 at 93. But where, as in the case of a judge of the Supreme Court of New South Wales, the judge is a judge of a superior court it is arguable that different considerations apply. That question need not be pursued.

Secondly, in some cases expediency or the circumstances of the case may warrant the question whether a judge should hear a case being determined on appeal before the hearing of the case proceeds. This occurred in *Australian National Industries Ltd*. The court treated an interlocutory order made by the trial judge as an appealable decision involving consideration of the relevant principles. There was in that matter no significant contest as to the relevant facts and, for reasons of expediency, the parties were anxious that the right of the judge to hear the proceeding should be determined before he embarked upon, as it was anticipated to be, a very long proceeding.

The third matter is more complicated. It involves the procedure to be adopted where it is not immediately apparent to the judge what are the reasons advanced against his determining the proceeding. In such a case the judge may feel it appropriate to adopt a procedure whereby he can be informed of what, in principle, is urged against his determining the proceeding. In my opinion, within the limits of the principle established by *Barton v Walker*, it is open to a judge to adopt a procedure appropriate to determine what in principle are the matters urged against his determining the proceeding. There are, of course, dangers inherent in such a procedure. If the judge invites such a statement, he may invite, or provide the occasion for the allegation of matters which, by the fact of their allegation, may produce embarrassment or apprehension of the kind referred to in the *Livesey* decision. It may provide the occasion for the allegation of matters which are inaccurate or manipulative, or which constitute contempt of court. If a procedure is adopted which invites a statement of such matters, experience has suggested that it may be necessary to provide formal sanctions which will deter the making of allegations which are untrue or worse. In some cases, a course which requires a prior statement of such matters on affidavit will provide the safeguard of penalties for perjury, false swearing or the like. In other cases, the sanction of contempt of court may be available. But, I think, the proper conclusion is that such a procedure will ordinarily be inapt if the facts in question are contested facts.

I have indicated my views in relation to this matter for two main reasons: because of the effect which increasingly such applications are having upon the administration of justice, the expenditure of public time and money and the cost to other litigants; and because of what occurred in the present case. In my opinion, it is appropriate that attention be given to the application of the principles which have now been established, the procedures which can and should be adopted in dealing with issues of this kind, and the safeguards that are available to prevent abuse.

In this matter, the proceeding was an interlocutory proceeding of a procedural nature. It was not apparent that there were reasons why members of the court as constituted should not sit to determine an application of that kind. It was therefore felt necessary to seek the statement, as a matter of principle, of what were the grounds of objection raised. The statement

extended over some twenty pages of transcript. It did not disclose matters warranting the withdrawal of a judge from the proceeding. However the allegations made included matters which might ordinarily involve action by the court, by way of contempt or otherwise. They have raised for consideration issues of principle to which I have referred. It is proper that reference be made to what has occurred so that the procedure to be adopted in such cases and the safeguards to be adopted in matters of this kind can be considered.

In the present case, as was indicated, I concluded that I should sit to determine the application. I concluded that, in this instance, it was unnecessary to take action in respect of what had been said. I am conscious of the duty of a judge to determine matters which come before him for decision and that it is his duty not to withdraw unless there be reasons which require him to do so. This has been emphasised by the Chief Justice of the High Court. In *Re JRL; Ex parte CJL* (1986) 161 CLR 342, Mason J said (at 352):

> "It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson* (1976) 136 CLR 248 and *Livesey* (1983) 151 CLR 288 has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': *Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554; *Watson* (1976) 136 CLR at 262; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 14; 32 ALR 47 at 50-51. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

In the circumstances of this case, I saw no reason why I should decline to determine the application.

CRIPPS JA. Before the Court is an application by Mr Bainton for a review of a decision of Kirby P made on 12 November 1991 ordering a stay

of taxation of costs. Upon the matter coming on for hearing, Dr Rajski made application that I disqualify myself. Dr Rajski's stated ground is that my continued participation in the proceedings would raise a reasonable apprehension of bias by reason of what he says was my earlier involvement in the decision of the Legal Services Commission refusing him legal aid. He also says that in 1984 I spoke to Mr Dowd, then Shadow Attorney-General and, I think, to two solicitors acting for him with respect to representations made on his behalf for legal aid. He has handed me two letters. The first dated 19 April 1984 is from Garland Seaborne and Abbott and refers to a conversation I had with Mr Dowd and Mr Kershaw. The reference to Mr Kershaw is, I assume, a reference to a person who was then employed by the Legal Services Commission of New South Wales, as it then was. The letter requested a meeting with me to discuss Dr Rajski's application for legal aid. The second letter is dated 8 May 1984 and was written to Dr Rajski by me. It reads:

> "Receipt is acknowledged of your letter dated 27 April 1984, the contents of which I have carefully noted. I felt it appropriate to bring your comments to the attention of the Legal Services Commission and tabled your letter at its last meeting held on 2nd May 1984.
>
> As you are aware, the *Legal Services Commission Act 1979* provides for a right of appeal to the Legal Aid Review Committee against any decision relating to an application for legal aid. The Commission noted that you had availed yourself of this right of appeal to the Review Committee.
>
> As your application has been dealt with in accordance with the procedures laid down by the Act, the Commission is not in a position to intervene.
>
> Yours sincerely,
> (Signed)
> J S Cripps
> Chairman."

I do not know the contents of Dr Rajski's letter dated 27 April 1984 and I have made no inquiries about it. Dr Rajski says he was told by Mr Dowd that I had said that he had legal aid to pursue his claim against Tectran Corporation Pty Ltd and that he should "forget such cases like against Allens and other lawyers". He further alleges that in a conversation with Mr Garling, a solicitor to whom he said I had spoken, Mr Garling said:

> "How do you expect to get help from Mr Cripps. He is a client of Allens. Is doing all the conveyancing for him. What do you want? I mean get realistic. You would not get any friend in Legal Aid to get Allens moving."

Further he says that Mr Dowd said to him: "You have two problems in legal aid, Mr Cripps, which you will not overcome, and Mr White."

Other than Dr Rajski's statements, I have no other information about what I might have said to Mr Dowd and/or Mr Garling or what they said to Dr Rajski. I have a recollection of speaking to Mr Dowd and telling him that Dr Rajski's application had been dealt with by one or more of the committees set up under the *Legal Services Commission Act 1979*. I have no independent recollection of anything said by any of us about Dr Rajski's case. I have never seen Dr Rajski until he appeared in Court today.

Dr Rajski says he attended the Land and Environment Court on some unspecified occasion but I do not understand him to claim that we have ever met. I record that, in or about 1983, Allen Allen & Hemsley acted for me on the sale of my home at Collaroy. I believe the solicitor to have been the late Mr Adrian Henchman but it may have been another partner.

Dr Rajski has referred to a decision of the Court of Appeal in *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [No 9]* (Court of Appeal, 27 November 1990, unreported). In *Raybos*, the Court of Appeal, by a majority, held that Badgery-Parker J erred in law in failing to disqualify himself from hearing certain litigation involving Dr Rajski by reason of his earlier involvement in the decision of the Legal Services Commission and of his access to certain documents in the file of the Commission.

I have approached Dr Rajski's application in accordance with the decision of the Court in *Barton v Walker* [1979] 2 NSWLR 740. That is, I have determined for myself whether I should continue to sit. In so doing, I adopt as correct the majority decision in *Raybos*. However, I am bound to say that if I were at liberty to do so, I would follow the reasoning and reach the conclusions of Mahoney JA, who dissented. The reason for my adopting the view that I am not free to depart from the majority in *Raybos* is, first, that I am deciding whether I should disqualify myself in my capacity as a judge and only incidentally as a member of the Court, and secondly, my decision is, for practical purposes, non justiciable.

Adopting a view most favourable to the submission put by Dr Rajski from *Raybos*, I do not think I should disqualify myself. The present application seeks an order for a review of the decision of the learned President staying an order for the taxation of costs. As I have said, the order was made by Kirby P pursuant to s 46 of the *Supreme Court Act* 1970 and the application for review is made pursuant to s 46(4) of the Act. I am not asked to consider any aspect of Dr Rajski's claim in the principal proceedings. I have never formed any view about the merits of the application now before the Court and I do not think that an ordinary sensible person would think I had. I do not understand the authorities have yet gone so far as to attribute to the hypothetical observer the notion that statements made by a judicial officer with respect to his probity are prima facie to be disbelieved. Accordingly, I reject Dr Rajski's application.

Solicitors for the appellant: *Bruce & Stewart Turton.*

C SAKKAS,
Solicitor.

SUPER PTY LTD (formerly known as LEDA CONSTRUCTIONS PTY LTD) v SJP FORMWORK (AUST) PTY LTD

Court of Appeal: Gleeson CJ, Mahoney JA and Clarke JA

22 September, 18 December 1992

Practice — Reference by court — Powers of court — In respect of factual findings of referee — In respect of findings of law by referee — Reconsideration of evidence — When appropriate — Exercise of discretion by court — Supreme Court Rules 1970, Pt 72, r 13.

Practice — Trial of issues — Right to judicial determination — Governed by Rules of Court.

The *Supreme Court Rules* 1970, Pt 72, r 13, provides that where a report of a referee is made under the Part, the Court may:

"(1)(a) adopt, vary or reject the report in whole or in part;
(b) require an explanation by way of report from the referee;
(c) on any ground, remit for further consideration by the referee the whole or any part of the matter referred for a further report:
(d) decide any matter of the evidence taken before the referee, with or without additional evidence,

and shall give such judgment or make such order as the Court thinks fit.

(2) Evidence additional to the evidence taken before the referee may not be adduced before the Court except with the leave of the Court."

Held: (1) The proposition that all litigants are entitled to have a judge or a master decide all issues of fact and law that arise in any litigation is untenable and the extent to which judicial intervention is permissible is to be governed, inter alia, by the Rules of the Court. (558C, 566A)

(2) Part 72, r 13 of the *Supreme Court Rules* 1970 does not establish a procedure of appeal from a referee to judge. (563D)

(By Mahoney JA) Whilst procedures before a referee are ancillary to and not a substitution for the determination of the dispute by the court, the right to have the matter determined by the court is not to be equated with a right that the matter be heard afresh by the court. (568A-B, D)

(3) A judge in reviewing a report submitted under Pt 72 of the *Supreme Court Rules* has a judicial discretion to exercise in reviewing the report and deciding whether to adopt, vary or reject it. (563D, 567B)

(4) The manner in which the discretion is to be exercised should not be closely confined. Relevant considerations which may give rise to the exercise of the discretion as to whether a report should be reviewed and the manner in which the discretion is to be exercised, include the nature of the complaints made about the report, the type of litigation involved and the length and complexity of the proceedings. (563F)

(5) In so far as the subject matter of dissatisfaction with a referee's report is a question of law or the application of legal standards to established facts, then a proper exercise of discretion would require a judge to consider and determine the matter afresh. (563E)

Homebush Abattoir Corporation v Bermria Pty Ltd (1991) 22 NSWLR 605, followed.

(6) Ordinarily, reasons for the rejection of a referee's report would include