

THE SUPREME COURT OF
NEW SOUTH WALES
COURT OF APPEAL

CA40083/96

COLE JA Monday, 11 March 1996

John Herbert BANNISTER v Merrilyn WALTON & ANOR

JUDGMENT

HIS HONOUR: Application has been made by notice of motion brought on behalf of John Herbert Bannister that proceedings be expedited. The proceedings are those numbered 40083/96 in which a declaration is sought that a decision of the Medical Tribunal, having the effect of removing his name from the Register of Medical Practitioners, was null and void.

The decision of the Tribunal was upheld by the Court of Appeal, but I am informed that that was only in relation to matters of law.

The basis of the application is set forth in a statement of Dr Mario Benanzio, undated February 1996. In par6 thereof he deposes to a conversation with Dr Ellis. Dr Ellis

was a member of the Medical Tribunal which sat on the hearing of the complaints against Dr Bannister.

In essence it is to be contended that in accordance with the principles enunciated in Vakauta v Kelly¹ there is a reasonable apprehension of bias infecting the decision of the Medical Tribunal and accordingly the determination should be quashed.

The first question involves whether this case should be given expedition. The initial decision of the Tribunal was given in April 1992. There were some sixty-one days of hearing time prior to that date, the hearing taking place between September 1991 and March 1992.

A stay was sought on 30 April 1992 and a temporary stay was granted until 31 May 1992.

The appeal was dismissed on 4 June 1993. Leave to appeal was unsuccessfully sought from the High Court on 4 June 1993. In consequence since May 1992 the claimant has been unable to practise his profession as an orthopaedic surgeon. In consequence he has suffered financial hardship and has entered into a deed of arrangement under Pt10 of the Bankruptcy Act 1966.

On 31 July 1995 he lodged a claim for a review of readmission before the Medical Tribunal under the Medical Practice Act 1992.

¹

(1989) 167 CLR 568.

It was in preparing for that hearing which has commenced and which has been adjourned until 27 May 1996, that it is said there was a conversation with Dr Benanzio, to which I have referred, which is said to give rise to the apprehension of bias infecting the original proceedings.

I have been informed from the Bar table that the substance of the matter referred to in the statement of Mario Benanzio will be in contest, and accordingly it will be necessary that evidence be taken from Dr Benanzio, probably from Dr Ellis, and it may well be that if those two are in conflict, others including senior counsel and a solicitor may be required to give evidence.

Those circumstances make it clear, in my view, that the circumstances fall within the category enumerated as nol at p11 of the decision of this Court in Elders Rural Finance v Smith & Ors². That category is "Cases of judicial review, conduct of public officials, and in particular where such conduct has implications for others or for the due administration of the law."

Here there is a challenge to the integrity, based on grounds of bias, of a decision of the Medical Tribunal. Accordingly the matter is entitled to significant expedition. In addition the matter falls within that category of case where significant financial hardship is occasioned to the person subject to orders.

I propose to briefly adjourn to consult the President regarding a proposed hearing time table. In the meantime the parties might give consideration to whether they would

² (Unreported, Court of Appeal, 22 December, 1995).

consent to a single Judge of Appeal taking the evidence on the basis that that Judge of Appeal may or may not sit on the hearing of the appeal. Certainly, if that is not able to be accommodated within the Court's calendar, the parties should agree on some terms for a single Judge of the Common Law Division taking the evidence.

SHORT ADJOURNMENT

ON RESUMPTION

HIS HONOUR: What is the view of the parties concerning whether they are prepared to accept the evidence being taken by a single Judge with the parties being bound by that single Judge's determination of the facts, including any issues of credit.

SLATTERY: That is acceptable, if it will lead to an earlier hearing.

LEGGATT: That is suitable.

SLATTERY: If that were to be a single Judge of the Court of Appeal, that is acceptable to my client. If it were to be a Judge of the Common Law Division that is also acceptable.

HIS HONOUR: I think I will need to consider, in consultation with the President, whether or not it really is desirable that this be heard by a single Judge or three Judges. There is likely to be a conflict on the question of credit between Dr Ellis and Dr Benanzio and possibly involving a QC and solicitor. If that is right, as much may turn on the outcome of that, it may be preferable for three Judges of Appeal to hear it. That is not a decision that I would like to take immediately.

I have in mind to lay down a time table for the filing of evidence, and when that is complete I will list it before me at 9.30 one morning and I will be in a better position to tell you when it is likely to be heard.

SLATTERY: Although evidence of my instructing solicitor and myself would be contingent, depending on what Dr Benanzio said, it is desirable the other parties have access to what that evidence would be. We don't know what Dr Benanzio is going to say.

HIS HONOUR: It is important to know the scope of the debate before deciding whether one Judge or three Judge hear it. -

SLATTERY: I and my instructing solicitor are in a position to file relevant affidavits by 4 o'clock tomorrow.

HIS HONOUR: There is a matter that I should raise. In the initial Court of Appeal proceedings the Bench comprised Mahoney JA, Priestley JA and Clarke JA. You told me that that was an appeal on a question of law. In one sense that means there is no question

but that they are entitled to sit if they wish to sit on the matter. Has anyone any objection to any of those three sitting.

SLATTERY: I don't believe so.

HIS HONOUR: I need to know only because it will increase or decrease the difficulties of constituting a court. Each Judge may indicate he does not wish to sit anyway.

LEGGATT: The second opponent does not take issue with any of those Judges. My recollection is that Mahoney JA made a reflection on the facts to the effect that were he required to make a finding of fact, he would make a finding as did the Tribunal.

HIS HONOUR: I will have it cleared up before I approach the President about constituting a court. I will stand the matter until 10.15 am Thursday.

I give these directions:

It seems to me appropriate that the scope of the evidentiary debate be understood by the Court prior to the decision being taken as to whether it is desirable for the evidence to be taken before a single Judge or before the Court of Appeal sitting with a Bench of three. I note that all parties agree to a single Judge taking that evidence, if that is the decision of the Court, on the basis that the parties do accept to be bound by any findings of fact made by that single Judge in relation to the conversations in question and in relation to any aspects of credit.

I shall direct that Dr Mario Benanzio swear an affidavit in relation to discussions he has indicated he had with Dr James Ellis on 23 February 1996, such affidavit to be filed and served by 4pm on Wednesday.

I direct that any other affidavit on behalf of the claimant be filed and served by 4pm Tuesday, 12 March 1996.

I direct that any affidavit in reply by any witness on behalf of any opponent be filed by 4pm Wednesday, 13 March.

I stand the matter over before me at 2.15pm on Thursday, 14 March. I grant leave to issue subpoenas to Dr James Ellis, to the proper officer of the Australian Orthopaedics Association, to Telstra and to Optus, such subpoenas to be filed and served not later than noon tomorrow. They are to be returnable before me at 2.15pm on Thursday, 14 March 1996.

I certify that this and the ⁵ preceding pages are a true copy of the reasons for judgment herein of The Hon. Mr. Justice Cole

N Smalley
Associate
Dated 11 March 1996.

COURT OF APPEAL

RECORD SHEET

**NATURE OF
JURISDICTION:**

Summons

FILE NO/S:

CA 40083/96

DELIVERED:

1 April 1996

HEARING DATE:

19 March 1996

PARTIES:

BANNISTER v WALTON & ANOR

JUDGMENT OF:

SHELLER, POWELL, COLE JJA

COUNSEL:

Claimant:

RR Stitt QC/GB Evans

First and Second Opponents:

TK Tobin QC/CWJ Leggat

Third Opponent:

Submitting appearance

SOLICITORS:

Claimant:

Kaufmann Peters

First and Second Opponents:

DM Swain

Third Opponent:

-

CATCHWORDS:

**PROCEDURAL FAIRNESS - certiorari -
statutory tribunal - s32M of *Medical
Practitioners Act 1938* - bias -**

EX TEMPORE/RESERVED:

Reserved

ALLOWED/DISMISSED:

Dismissed with costs

NO OF PAGES:

16

THE SUPREME COURT OF
NEW SOUTH WALES
COURT OF APPEAL

CA 40083/96

SHELLER JA
POWELL JA
COLE JA

BANNISTER v WALTON & ORS

In 1992, by order of a Medical Tribunal which had been appointed pursuant to s32M of the *Medical Practitioners Act 1938* to inquire into complaints against him, the claimant's name was removed from the register of medical practitioners. The claimant had been an associate member of the Australian Orthopaedic Association. Dr Ellis, a consultant orthopaedic surgeon who sat on the Tribunal, was also a member of the Australian Orthopaedic Association.

The claimant filed a summons in February 1996, seeking a declaration that the decision of the Tribunal was null and void, and an order in the nature of certiorari quashing the decision. The claimant did not allege actual bias, but argued that a fair minded and informed observer might reasonably apprehend a lack of impartiality on the Tribunal's part, because it was known to Dr Ellis

that the Association had been trying to get rid of the claimant for a very long time.

HELD

A fair minded and informed observer would not have equated the views of the Association with those of one of its members in the absence of any actual connection. Nor would a fair minded observer apprehend that because Dr Ellis was a member of the Australian Orthopaedic Association and because he knew of the Association's attempts to get rid of the claimant, he would bring an unfair or prejudiced mind to the inquiry. The fair minded observer would recognise that members of a profession are bound to associate with, and hear both fact and rumour about, other members.

Webb v The Queen (1994) 181 CLR 41 at 73 per Deane J; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 90 per Deane J; *S & M Motor Repairs v Caltex Oil (Australia) Pty Limited* (1988) 12 NSWLR 358 at 375-6 per Priestley and Clarke JJA.

ORDER

Summons dismissed with costs.

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40083196

SHELLER JA
POWELL JA
COLE JA

Monday, 1 April 1996

BANNISTER v WALTON & ORS
JUDGMENT

SHELLER JA:
PROCEEDINGS

On 28 April 1992 the Medical Tribunal (the Tribunal) appointed to inquire into complaints against John. Herbert Bannister (the claimant) and consisting of his Honour Judge Cooper of the District Court, Dr Child, Dr James Morrison Ellis, a consultant orthopaedic surgeon, and Mrs Ellard, after a hearing which lasted sixty-one days, made an order directing that the claimant's name be removed from the register of medical practitioners. The most serious finding against Dr Bannister was that his conduct in relation to charging for hospital attendances and consultations involved deliberate deceit perpetrated with the motive of financial gain which indicated within his character a marked degree of moral turpitude and, to use the words of s28 (1) (1) of the *Medical Practitioners Act 1938* (the 1938 Act), since repealed, that he was not of good character. The Tribunal found his explanation of his system of charging "quite incredible".

By summons filed in February 1996 the claimant sought declarations that the decision of the Tribunal, the second opponent, was null and void and of no force and effect and an order in the nature of certiorari quashing the decision. In addition the claimant sought an order directing the third opponent, the New South Wales Medical Board (the Board), to restore his name to the register as a medical practitioner under the Medical Practice Act 1992 (the 1992 Act). The claimant contended that the possibility of operative bias being present in respect of Dr Ellis made the decision at all times a nullity. The first opponent, Merrilyn Walton, who prosecuted the proceedings before Tribunal, and the Tribunal appeared in opposition to the claim. The Board filed a submitting appearance.

EVENTS LEADING TO THE CLAIMANTS APPLICATION

On 31 July 1995 the claimant lodged an application for review of the decision of the Tribunal under s92 of the 1992 Act and sought his re-registration. The review proceedings were 'listed for hearing before the Tribunal on 19 February 1996 for two weeks and proceeded on that day. On 23 February 1996, in the afternoon, Robert Kaufmann, the claimant's solicitor, learnt for the first time of possible evidence that Dr Mario Benanzio, a consultant orthopaedic surgeon, might give of a conversation he had had with Dr Ellis. After conferring with Dr Benanzio an application was made on 26 February 1996 for an adjournment of the review proceedings to enable an application to be made to this Court to quash the decision of 28 April 1992. The Tribunal granted the adjournment and fixed dates for a resumption of the review proceedings in late May 1996.

The claimant relied on affidavits by Mr Kaufmann and Dr Benanzio, who deposed to an occasion on 21 February 1996 when, after a short conversation with the claimant, he agreed to the claimant's then Queens' Counsel, Mr

Michael John Slattery, ringing him. Later that day he spoke by telephone to Mr Slattery about appropriate supervision if the claimant were to be re-registered. Dr Benanzio suggested that the Australian Orthopaedic Association should be asked for advice about it. He offered to contact some members of the Association and mentioned three names, Dr Ellis, Dr Harrison and Dr Bates. The following morning he spoke by telephone to Dr Ellis. His evidence of that conversation was as follows:

"After some short discussion [regarding Dr Ellis' recent hospitalisation] I said to him, 'I have been asked to give some advice about the-procedures that should be adopted in case John Bannister is re-registered,' I continued to say, 'I understand Seaton and Professor Dan have given evidence yesterday about the matter and some program for surgical retraining and a panel of surgeons to follow him up for a period is being considered.' Dr Ellis said, 'Dan's the Neurosurgeon isn't he?' I said, 'Yes.' He said, 'Seaton's the Orthopaedic Surgeon?' I said, 'Yes, I have suggested that the Australian Orthopaedic Association should be asked for guidance in this program. They are the ones responsible for supervising orthopaedic activities.' Dr Ellis said, 'Alright but I would suggest an accounting supervision as well.' I took this to be some supervision of the manner in which he rendered his professional accounts. He continued to say, 'The Orthopaedic Association has been trying to get rid of John Bannister for years. Now that's happened I don't know what their attitude would be. What I suggest is that a letter be written by the Medical Board to the Orthopaedic Association asking their advice.' I said something to the effect of 'Yes' and he then continued, 'If the Tribunal do re-admit John Bannister he could take up medico-legal work. He is experienced in that and could make a good income out of that.' There was then a jocular exchange between us and our conversation concluded. I estimate our discussion would not have lasted more than about 10 minutes."

Dr Benanzio added:

"When Dr Ellis spoke of the Orthopaedic Association I cannot now recall with certainty whether he said 'they' or 'we' and I would not have attached any significance to these terms as I was aware that Dr Ellis is a member of the Association as am I. Almost all practising Orthopaedic Surgeons in New South Wales are members of the Association."

Dr Benanzio said that on 23 February 1996 at about 1 o'clock he received a telephone call from Mr Slattery. During the telephone conversation he said he had been speaking to Dr Ellis about the panel and told Mr Slattery briefly about his conversation with Dr Ellis. Although Dr Benanzio gave oral evidence he was not questioned about the terms of his conversation with Dr Ellis.

The Tribunal relied on an affidavit by Dr Ellis who gave the following account of the material part of his conversation with Dr Benanzio:

"JE: Well Mario what does Bannister want today? You know that Judge Cooper said he can apply to get back any time he likes provided he satisfies three requirements. He has to have passed his exams, he has to have training and he must be of good character. Judge Cooper said Bannister could come back in twelve months if he wanted and seek re-registration if he could satisfy the requirement to show good character.'

MB: 'If he come; back it has been suggested to me that he might reasonably have to have some training to bring himself up to an adequate standard.'

JE: 'What is the situation?'

MB The thought is that he might get someone or a panel of people to supervise his refresher training. Perhaps Professor Dan and Doctor Seaton. What do you think about it?'

JE: 'It would depend on whether Bannister wanted to come back to do any cutting. I recall seeing something in the newspaper about Bannister saying he could cars \$500,000 per year to pay off his debts and salvage his reputation. He has the option of doing medico-legal work or consulting practice without going back into cutting at all. I think he is in his fifties and is a strong healthy fellow who keeps himself fit. I think there are plenty of us older than John Bannister who would still raise a knife if necessary. If he is going to get refresher training, where is he going to get it? He could get it overseas, no doubt, but to get it here in Australia, the best way to get it would be to apply to the Orthopaedic Association. The Orthopaedic Association runs a continual orthopaedic re-education program and have a schedule every year for this. I think it might be difficult for Bannister to get on to that

because it is only people who are members of the Association who can do that. I cannot guarantee what they will say. It is a well known fact that the Orthopaedic Association were trying to get rid of him as an Associate member for a long time before he was de-registered, Once he is de-registered he is off their list I can't tell you what their official attitude will be - you will have to ask them.'

MB: Thank you. That sounds like common sense. Goodbye.' "

Both Mr Tobin QC, who appeared for the first opponent, and Mr Stitt QC, who appeared for the claimant, cross examined Dr Ellis. His account of the conversation and in particular that part of it, pivotal to this claim, in which he said: "It is a well known fact that the Orthopaedic Association were trying to get rid of him as an associate member for a long time before he was deregistered", was not challenged. Dr Benanzio is a native of Italy. At times I found his English difficult to understand. His uncertainty about whether Dr Ellis spoke of the Orthopaedic Association as "they" or "we" is understandable. However it raises no real, doubt about Dr Ellis' account of the conversation with him which I accept and, subject to that uncertainty, Dr Benanzio substantially confirmed.

Dr Ellis gave evidence that while he was sitting on the Medical Tribunal, colleagues, associates and friends would occasionally make unsolicited comments to him about Dr Bannister. Some comments were favourable, some comments were not favourable. He adopted a practice of interrupting such unsolicited comments with a standard response to the following effect:

"Please don't say anything to me. My part in this procedure is to make sure that Dr Bannister gets a fair deal - that's all, to ensure that he gets a fair deal."

He did not recall during the period before he sat as a member of the Tribunal or the period during which he sat as a member of the Tribunal having at any time

been involved in any meeting or deliberations of the Association with regard to the associate membership of Dr Bannister. He had not at any time ever proposed by way of motion or for discussion a suggestion relating to the membership of the Association by Dr Bannister nor voted or in any other way dealt with the formal question as to whether Dr Bannister's associate membership of the Association might be terminated. His knowledge that the Association were trying to get rid of Dr Bannister as an associate member was in part at least the result of a story that "went the rounds". The story was that the Association had tried to get rid of Dr Bannister as an associate but the office staff had made a mistake by sending him a form in response to which he sent back a cheque and they sent him a receipt.

MR SLATTERY'S AFFIDAVIT

In his case in chief for the, claimant Mr Stitt, after reading the affidavit of Mr Kaufmann, tendered the affidavit of Mr Slattery, to which Mr Tobin objected. In a nutshell Mr Slattery gave an account about a conversation with Dr Benanzio at lunch time on 23 February 1996. According to Mr Slattery, Dr Benanzio gave Mr Slattery a different version of his conversation with Dr Ellis. Mr Stitt tendered Mr Slattery's affidavit in reliance upon s55 of the Evidence Act 1995 (the Evidence Act). Since Mr Stitt told the Court that he intended to call Dr Benanzio, the tender of Mr Slattery's affidavit was premature and better dealt with after Dr Benanzio's evidence was given. Accordingly Mr Stitt withdrew the tender. Dr Benanzio's affidavit was read and he was cross examined. Mr Stitt then closed his case, Mr Tobin called no evidence and Mr Leggat, who appeared for the Tribunal, read the affidavit of Dr Ellis who was cross examined. In his case in reply Mr Stitt re-tendered Mr Slattery's affidavit. The Court rejected it.

By the stage that Mr Slattery's affidavit was re-tendered in reply, Dr Benanzio and Dr Ellis had given evidence in substantially the same terms of their conversation. The only real difference between the two accounts was that Dr Benanzio could not recall with certainty whether Dr Ellis, when speaking of the Orthopaedic Association, used the pronoun "they" or "we". Mr Stitt did not seek leave under s38 of the *Evidence Act* to treat Dr Benanzio as an unfavourable witness on the basis of a prior inconsistent statement. Nor did he put to Dr Ellis that his account of the conversation with Dr Benanzio was wrong or inaccurate. Having led Dr Benanzio's evidence, whose account substantially agreed with that of Dr Ellis, it was not open to Mr Stitt to suggest to Dr Ellis that his recollection of the conversation was not accurate. Furthermore Mr Stitt, having withdrawn the tender of Mr Slattery's affidavit in his case in chief, now sought to tender it in reply. At its best the evidence was a hearsay account of a conversation about which the deponent, Mr Slattery, could give no direct evidence, as he did not hear it. The purpose of the tender was to contradict, in part, the evidence of the claimant's own witness Dr Benanzio. Even if the tender had been pressed during the claimant's case in chief, it was objectionable in the absence of any application to treat Dr Benanzio as an unfavourable witness and put to him that he had made a prior inconsistent statement. On the evidence there was no issue about whether the conversation had taken place or, but for the use of the word "they" as distinct from "we", about its terms. For all these reasons the Court regarded the essential part of Mr Slattery's affidavit as inadmissible and the tender of the whole affidavit was rejected.

CERTIORARI

The application to quash was based on the contention that Dr Ellis was disqualified from sitting as a member of the Tribunal inquiring into the

complaints against Dr Bannister because of the reasonable apprehension that, in his deliberations, he might be actuated by bias. Dr Bannister did not allege actual bias. The point of distinction is very important. No one suggested that Dr Ellis was, in anything he did while sitting as a member of the Tribunal or participating in the decision making process, actuated by actual bias. But the maintenance of public confidence in the administration of justice requires that persons exercising a judicial or quasi judicial function should not only be impartial but also should appear to be impartial to members of the public. Justice must not only be done but must "manifestly and undoubtedly be seen to be done"; *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259. In *Metropolitan Properties CO (FGC) Limited v Lannon* [1969] 1 QB 577 at 599, Lord Denning MR said that the Court looks at the impression which would be given to other people. "The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: 'The judge was biased' "

In Australia the High Court in *Webb v The Queen* (1994) 181 CLR 41 has reiterated the test. A person in a judicial or quasi judicial position will be disqualified if a party to the proceedings or a fair minded and informed lay observer might in the circumstances reasonably apprehend a lack of impartiality on the part of that person. A number of comments relevant to this case can be made about the application of this test. Mr Stitt referred to *Australian National Industries Limited v Spedley Securities Limited (In Liquidation)* (1992) 26 NSWLR 411 at 438 where Mahoney JA, one of the majority, said that one of the things that emerged from *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 and the cases which succeeded it was that the relevant impressions were those of a lay person who did not know the facts, that is to say, as the heading at 440 in his Honour's judgment suggests, the "uninformed rather than informed observer", "a person who does not know, for example, the

integrity of the Court, the capacity of a judge, or the full facts of the case". In *Webb v The Queen* four members of the Court stated the test in terms of an informed observer (47, 57 and 68). Earlier, in *Vakauta v Kelly* (1989) 167 CLR 568 at 585, the other member of the Court, Toohey J, speaking of the level of sophistication that should be attributed to the reasonable or fair minded observer, referred to *S & M Motor Repairs Pty Limited v Caltex Oil (Australia) Pty Limited* (1988) 12 NSWLR 358 at 375-6 where Kirby P criticised any imputation to the observer of a sophistication and knowledge about the law and its ways which were quite atypical of the general community. In *Webb v The Queen* Deane J said, at 73:

"While the question is not settled by any decision of the Court, it appears to me that the knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court. The material objective facts include, of course, any published statement, whether prior, contemporaneous or subsequent, of the person concerned. If, in the particular case, the proper conclusion is that a fair minded lay observer with a broad knowledge of those facts would not entertain a reasonable apprehension of bias, that is the end of the issue of disqualification by reason of an appearance of bias."

Deane J referred, inter alia, to what was said by Mason CJ and Brennan J in *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87: "(We) must attribute to him or her knowledge of the actual circumstances of the case" and by Kirby P in *S & M Motor Repairs v Caltex Oil* at 368-9 and by Priestley and Clarke JJA who, at 381, said:

"We think, in a case such as the present, where some particular knowledge is needed for a sensible opinion to be formed, the only apprehension of possible bias worth considering is that of the moderately informed observer rather than an observer at first uninformed, and when informed unable to explain adherence to his or her first opinion, This conclusion is related to our earlier comment that the reasonable observer would want to know, at least an outline, the

relevant information, before deciding whether or not to be apprehensive of possible bias."

Deane J referred also to a dictum of Farquharson L J in *Morris* [1991] 93 Cr App R 102 at 106: "(A). reasonable and fair minded person sitting in the court and knowing all the relevant facts." This last dictum seems to me a helpful one, provided "the relevant facts" are taken to refer to the material objective facts as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant Court or Tribunal.

The second matter to be mentioned is that a party may waive any entitlement to have a person hearing the case disqualified; *Vakauta v Kelly* at 573. At 587 Toohey J said:

"There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case."

There was no evidence that, at the time the complaints against him were heard, Dr Bannister knew that the Association had for a long time been trying to get rid of him or that Dr Ellis was a member of the Association. It would be surprising if he did not. I am inclined to think that an application, made four years after the Tribunal's decision, to quash its orders, required Dr Bannister to give evidence of his state of knowledge at the date of the hearing. However, as will appear, it is not necessary that I explore this further.

When he sat as a member of the Tribunal, Dr Ellis had been a member of the Australian Orthopaedic Association since 1964 and for two years in the late 1980s a member of the New South Wales State Committee. Between 1993 and 1994, after the Tribunal's decision, he was vice-president of the Association.

What he said to Dr Benanzio was evidence of his knowledge or belief, at the time he spoke, of a well known fact that the Orthopaedic Association was trying to get rid of Dr Bannister as an associate member for a long time before he was de-registered. The cross examination of Dr Ellis disclosed that this was his state of knowledge before the Tribunal began its hearing. His statement to Dr Benanzio may be evidence not only of his knowledge and belief but also of the fact that the Orthopaedic Association was trying to get rid of Dr Bannister. For present purposes I think it must be assumed that the fair minded observer would understand it to be a fact well known to Dr Ellis at the time the Tribunal began its hearing. The opponents did not suggest that it was not the fact. We are not therefore concerned to investigate whether the fair minded observer should be concerned with the fact of what the Association had been doing rather than Dr Ellis' belief. This Court must determine whether the fair minded observer knowing what the Association had been doing might apprehend bias. In the circumstances of this case, might the fact that Dr Ellis was a member of the Association, who had for a time been a member of the New South Wales State Committee, and that the Association had been trying to get rid of Dr Bannister as an associate member for a long time, give rise to such an apprehension?

PROCEDURAL FAIRNESS

The principles of procedural fairness do not impose inflexible standards. Particularly in the case of a statutory tribunal the standards are flexible enough to be adapted to the statutory framework under which the tribunal is constituted. In *Mobil Oil Australia Pty Limited v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504 Kitto J spoke of the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place. By statutory framework his Honour meant "the express

and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject matter". His Honour quoted with approval what Tucker LJ had said in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118. There are no words which are of universal application to every kind of inquiry and every kind of tribunal: "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth." in *Laws v Australian Broadcasting Tribunal* at 90 Deane J said:

"It has long been settled that the content of the requirements of procedural fairness may vary according to the particular circumstances of a case, including the nature and general functions of the entity required to observe them and the relationship between that entity and the person to whom procedural fairness must be accorded. Plainly, such variations may occur in the content of the requirement that a tribunal required to observe procedural fairness be not tainted by either the actuality or the appearance of disqualifying bias. Thus, acquaintanceship with or preconceived views about a party of a kind which would create the appearance of disqualifying bias in a judge exercising the judicial power of a court of law may be permissible and unobjectionable in a statutory body which, while required to accord procedural fairness in the discharge of a particular function, is entrusted with other functions which necessitate a continuing relationship with those engaged in a particular industry."

After examining the provisions of the Act constituting the tribunal in that case his Honour said at 91:

"In the performance of those functions, it is unavoidable that the Tribunal and its members will have an ongoing relationship with licensees under the Act and will also have recurrent contact and dealings with at least some individuals engaged in television or radio broadcasting. Inevitably, all or some of the members of the Tribunal will, over a period of time, form general views about such licensees, and about the character, responsibility and standards of at least some individuals engaged in the broadcasting of television or radio programmes. The fact that some or all members of the Tribunal entertain such general views about a licensee or an individual involved

in broadcasting would not of itself constitute disqualifying bias for the purposes of a s 17C inquiry concerning the conduct of particular broadcasting activities by that licensee or individual. That follows, in my view, from the need to adjust the content of the requirements of procedural fairness to what is appropriate to the circumstances of the particular case. Even if the requirements of procedural fairness were not to be so adjusted, it would nonetheless be possible to discern in the Act an overriding statutory intent that preconceived general views of a type which must almost inevitably result from the performance by members of the Tribunal of functions under the Act should not, of themselves, constitute disqualifying bias.

On the other hand, such preconceived general views about a licensee or an employee of a licensee must be distinguished from prejudgment of the very issue involved in an inquiry under the Act."

CONCLUSION

The Tribunal, of which Dr Ellis was a member, was constituted pursuant to s32M of the 1938 Act. Section 32M (5) provided that for the purpose of conducting an inquiry the tribunal should consist of:

- (a) the Chairperson or a Deputy Chairperson;
- (b) two registered medical practitioners having such qualifications as may be prescribed, appointed by the Board; and
- (c) one lay person (that is, a person who is not a medical practitioner) appointed by the Board from among a panel of lay persons for the time being nominated by the Minister.

The Chairperson or Deputy Chairperson was a Judge of the District Court. As part of the statutory framework two members of the Tribunal were members of the medical profession. As it happens Dr Ellis was also a member of the Australian Orthopaedic Association. This was not a necessary qualification for his appointment though , consistently with what is generally regarded as being one of the advantages of appointing a professional tribunal to hear complaints

against members of the profession, it would not be surprising if Dr Ellis were chosen because his speciality was the same as Dr Bannister's. No doubt the legislature recognised, as would the fair minded observer, that members of a profession associate with and hear both fact and rumour about other members. In the present case Dr Ellis had heard that the Association had been trying to get rid of Dr Bannister for a long time.

I am not persuaded that a fair minded and informed observer might apprehend that because Dr Ellis was, a member of the Australian Orthopaedic Association and because, as was known to Dr Ellis, the Association had been trying to get rid of Dr Bannister for a long time, Dr Ellis might bring an unfair or prejudiced mind to the inquiry. No fair minded observer would equate the views of a member of an association with the views of the association itself unless some connection were apparent, such as a statement that Dr Ellis had supported the Associations actions or taken part in the deliberations of the Association which led to them. It is an every day experience that the ruling bodies of professional associations make decisions about the activities of individual members of which other individual members are not aware and about which they have no opinion.

In my opinion the summons should be dismissed with costs.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40083196

SHELLER JA
POWELL JA
COLE JA

I April 1996

BANNISTER v. WALTON & ORS.

JUDGMENT

POWELL JA: I agree with Sheller JA.

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA40083/96

SHELLER IA
POWELL JA
COLE J.4

Monday, 1 April 1996

John Herbert BANNISTER v Merilyn WALTON

JUDGMENT

COLE JA: I agree with the reasons of and orders proposed by Sheller JA.

In my opinion no reasonable, informed observer would apprehend bias in the exercise of quasi judicial functions as a member of the medical board in 1992 merely because, in responding to an enquiry in 1996 regarding the attitude of the Orthopaedic Association to the supervision of Dr Bannister should he be re-admitted to practice, Dr Ellis responded:

"The Orthopaedic Association has been trying to get rid of John Banister for years. Now that's happened I don't know what their attitude would be. What I suggest is that a letter be written by the Medical Board to the Orthopaedic Association asking their advice."