APPREHENDED BIAS AND ADJUDICATION DETERMINATIONS

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The adjudication process enshrined in Security of Payment legislation in New South Wales, Victoria, Queensland and Western Australia seeks a trade off between speed and efficiency. Despite the 'rough and ready' nature of the process, parties involved might seek some comfort that adjudicators will act according to principles of natural justice.

One such principle of natural justice is the doctrine of bias, which provides that justice should not only be done, but should manifestly be seen to be done (*R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256). In the adjudication process, this would mean that the adjudicator should not only make the correct decision, but should also not engage in any sort of behaviour which might raise a suspicion of unfairness or bias in the mind of a 'fair–minded lay observer with knowledge of the material objective facts' (*Gascor v Ellicott*).

An apprehension of bias has been known to arise in several instances, including where:

- the decision–maker has a pecuniary interest in the outcome of the matter, such as by owning shares in a party which is a company;
- the decision–maker has appeared to pre–judge the case prior to hearing both parties on the matter, which might be apparent through prejudicial comments made by the decision–maker; and
- where the decision–maker reads 'without prejudice' correspondence between the parties, which evinces how far a party might be willing to go to settle the dispute.

In *Ace Constructions & Rigging Pty Ltd v ECR International Pty Ltd*, an adjudication application was brought by Ace Constructions pursuant to the provisions of the *Construction Contracts Act 2004* (WA), which contained 'without prejudice' correspondence relevant to the dispute the subject of the adjudication. It became apparent to the parties that the adjudicator had read the 'without prejudice' correspondence. ERC asked the adjudicator to disqualify himself on the grounds of apprehended bias, which he refused to do, and the adjudicator went on to determine the dispute.

The determination was enforced as a judgement of the Local Court of New South Wales. ERC appealed the enforcement of the determination on the grounds that, amongst other things, the determination was a nullity because ECR was denied natural justice by the adjudicator refusing to disqualify himself after having read the 'without prejudice' correspondence.

The Court stated that:

The pragmatic commercial considerations that parties take into their settlement discussions are irrelevant and apt to mislead or to distort the court's decision–making processes, or to give rise to the impression that they may do so, if revealed in the course of the proceedings.

There will be no automatic finding of bias where particular events, such as a decision maker reading 'without prejudice' correspondence, occur. Apprehended bias will only be found if, on a consideration of all the circumstances, 'a fair minded lay observer might reasonably apprehend that [the decision maker] might not bring an impartial mind to the resolution of the question they are required to decide.'

Parties to an adjudication should therefore be careful not to include 'without prejudice' correspondence in their submissions. In the event that 'without prejudice' correspondence is included and is considered by the adjudicator, an allegation of bias should be made at the earliest possible moment so that the adjudicator has an opportunity to consider and comment on the allegations.

Anna Ledley's article was previously published in Deacons' *Critical Path*—June 2009. Reprinted with permission.