VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D395/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – stay application – alleged bias – apprehended bias.

APPLICANT	Dr Jennifer Marie Martin
RESPONDENT	Fasham Johnson Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	31 May 2006
DATE OF ORDER	26 October 2006

Martin v Fasham Johnston No 1 (Domestic Building) [2006] VCAT 2194

ORDER

1 The application to disqualify myself is dismissed.

2 I decline a stay.

3 Referred to a continuing hearing on 26 October 2006.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr J. Gray of Counsel
For the Respondent	Mr A.J. Laird of Counsel

REASONS

1 In this matter I delivered Reasons for Decision on 21 April 2006 and made orders and directions. I gave leave to file and serve Amended Points of Claim amongst other things.

2 That followed a hearing on the matter which took place the day before.

3 As I recall, that hearing concluded at about 3.55 p.m. I did not, in such circumstances, have time to determine the Applicant's application which was being heard at the same time. I, in effect, adjourned it over. As I recall though, in respect of the matter I *did* manage to hear (the strike out application of the Respondent) I did not give leave to file further submissions. Yet the same were filed after the hearing. This is not permissible: see *Wright v Kingston City Council* [2006] VCAT 1697 at [49].

4 I shall not comment further about that hearing. Application for leave to appeal was made to the Supreme Court. I understand that, ultimately, on 21 July 2006, the application was dismissed by Gillard J on appeal from Mahoney S M. Thereafter, leave to appeal from Gillard J was dismissed by the Court of Appeal on 22 September 2006 as I understand it. From that point, consideration, I believe, was given to applying for special leave to the High Court but the period for making such an application has now expired.

5 One of the grounds of the application made to the Supreme Court was apprehended bias.

6 The Tribunal received correspondence asking for me to stay my orders. I declined to do so (because I had been accused of bias and it did not seem proper for me to act) but apparently the (then) Senior Registrar arranged with the Applicant's solicitor for me, nonetheless, to hear the same. That file note is as follows:

> "Date: 26 May 2006
>
> I rang today and spoke to solicitor, Gabriel Kuek, Access Law to discuss their letter of 19 May 2006 wherein he seeks a stay of the orders made by Senior Member Cremean on 21 April 2006 pending an appeal against those orders now before the Supreme Court.
>
> The VCAT matter is listed as a directions hearing before Senior Member Cremean on 31 May 2006.
>
> Mr Kuek and I agreed that the best course he could take was to appear before Senior Member Cremean on 31 May 2006 and ask for the following orders:
>
> - Seek a stay of the tribunal's orders and directions made on 21 April 2006 pending a decision of the Supreme Court; and
> - Ask that Senior Member Cremean disqualify himself from any future hearings of this proceeding.

Richard O'Keefe
Senior Registrar"

I say "apparently" because the contents of the file note do not equate to the letter sent by the Applicant's solicitor to the Respondent's solicitor. That letter is as follows:

"19 May 2006

Yesterday we posted you documents relating to an application by Jennifer Martin for leave to appeal against the Orders made by Senior Member Dr. Cremean on 21 April 2006.

The Respondent's solicitors have declined our request for a stay of the Orders of 21 April 2006 pending the hearing and resolution of our client's application to the Supreme Court. We would, accordingly, be grateful if you could arrange a telephone conference with the respondent's solicitors and us to enable arrangements to be made to list the matter for an urgent stay application.

If you have any further queries in relation to the above matter, please do not hesitate to call Mr Gabriel Kuek of this office at any time".

7 As to such letter I should indicate I was aware that an Application for leave to appeal had been made and I considered it better that the matter be held in abeyance until the outcome of that was known.

8 As to stay of my orders I must make it clear I directed I should not determine that question since one of the grounds alleged against me was apprehended bias. For, if the Applicant was considering I was biased, how could I bring an unbiased mind to the question of a stay while an appeal was heard and determined against my own decision? In any event, as of the day of the directions hearing in May, I learned that application had been made to the Master for a stay.

9 On the day of this directions hearing the Applicant's Counsel made no application for a stay of my orders. He did, however, ask that I no longer participate in the hearing because of apprehended bias. He referred me to authorities where he apparently had made a successful application of that kind before. I confess some surprise at this, having seen the application. The matter was before the Supreme Court, so why should I determine it? I understand though that it may have been made in answer to the Respondent's application for orders filed on 21 March 2006.

10 In any event the Applicant's Counsel has now claimed that I was biased on this further day of a directions hearing in May. I said then that I would reserve my decision on that question and on costs as well.

11 The authorities are very clear: a judge or tribunal member ought not lightly accede to a submission of bias. See *Brown v DML Resources* [2001] NSW

SC 250. Counsel for the Applicant appeared taken aback when I challenged him to identify the alleged basis of my perceived bias. I even read to him extracts at length from a judgement in the Federal Court in a matter dealing with this question. I was, I consider, entitled to inform myself (having regard to s98(1)(c) of the *Victorian Civil and Administrative Tribunal Act* 1998) about whether the application of the appearance of bias against me was or was not reasonably or fancifully entertained: see *Trustees of Christian Brothers v Cardone* (1995) 130 ALR 345. For that is the test which applied, and I am entitled in hearing the stay application, brought with the agreement of the Applicant's solicitors, to decide whether it would have any chance of success. As it happens, the whole matter failed, as I note, in the Supreme Court.

12 No judge or tribunal member doing their job conscientiously wants to be regarded as apparently biased. I resolved I should press the Applicant's Counsel to state his grounds. It ends up the grounds include the perceived bias grounds alleged on 21 April 2006 (which I reject and which were rejected later by the Supreme Court) and also my conduct of the hearing on this further day. I reject that I was hostile to him. I was very concerned though that he should see fit to be making this allegation about me. I, therefore, was more robust than usual. I reject that anything I said or did on this further directions day could reasonably give rise to an apprehension of bias. I allowed him to make his submissions despite forming a tentative view that perhaps I should not do so in the sense that he could never be satisfied with my consideration of his submissions if he was alleging I was biased at the outset.

13 I entirely reject the submission that on 31 May 2006 (or, as is established, on 21 April 2006) I was biased – actually or apprehendedly. Bias is not shown by a lack of nicety: *R v Commonwealth Conciliation and Arbitration Commission*; *ex parte The Anglis Group* (1969) 122 CLR 546 at 553 or by robust replies. Judges, for example, are entitled to give robust and forceful reasons when determining matters and the day when colour goes out of the law will be a sad day: *State of Victoria v Bradto Pty Ltd* [2005] VCAT 2512 at [23] per Morris J. I consider I was entitled not to accede to his submissions in unhesitating terms in the light of the authorities.

14 Accordingly I decline to disqualify myself and that application is dismissed as meritless.

15 I shall now hear the parties on costs on this point. The history of the proceeding to this point, in its carriage by the Applicant and her husband who is her solicitor, is not irrelevant, I should have thought, in that regard.

16 I intend to continue hearing the matter.

SENIOR MEMBER D. CREMEAN