

LAWYERLY

Fletcher can't pry into judge's background as law firm class action head



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Evidence sought by Fletcher Building from a judge's former law firm as part of the construction company's recusal bid is inadmissible, a court has ruled.

Quashing two "unusual" subpoenas served on Maurice Blackburn — where Supreme Court of Victoria Justice Andrew Watson was formerly national head of class actions —

the court said Monday evidence could not be tendered in a recusal application at first instance.

“Consistent with the judge determining a recusal application through the lens of the fair-minded lay observer based on disclosure, the ordinary and correct practice does not contemplate evidence, let alone evidence on subpoena,” said Justice Jim Delany, who heard the subpoena dispute.

Subpoenas in recusal bid a rare move, court notes

Fletcher is facing a shareholder class action, [filed in September 2022](#) by Mayweathers and financed by funder CASL, alleging the company failed to disclose material information about its construction division.

The class action was reallocated in June to Justice Watson, [a recent appointee to the court](#). But Fletcher argues the judge should be disqualified for apprehended bias because of his association with CASL director John Walker and his previous public statements against the class action reforms of the former federal government. Justice Watson will hear the recusal application in late January.

In an unusual move, Fletcher subpoenaed Maurice Blackburn for documents to bolster its disqualification bid, seeking records of Justice Watson’s billable hours on actions funded by Walker; communications between the judge and Walker; and cost agreements signed by the law firm and the funder.

Fletcher argued Justice Watson and Walker had a longstanding business relationship “where the lawyer, the funder and the manager are collectively investigating, instructing, prosecuting a case for their mutual financial return, and where that return is dependent upon the success of the action”. It also submitted that Justice Watson has inside knowledge of the finances of CASL.

Other documents sought related to Justice Watson’s previous association with the Keep Corporations Honest industry group, which was critical of the Morrison-era reforms. Walker was also linked to the group.

The builder’s solicitor, Herbert Smith Freehills partner Jason Betts, pointed in his affidavit to public comments by the judge at the time, including his statement that “Class actions happen because companies break the law and cause significant losses for thousands of everyday Australians”, and “Corporations use their power and size to hurt people”.

Maurice Blackburn and the class action plaintiff objected to the subpoenas. The law firm argued Fletcher could not point to a critical nexus showing how Justice Watson's previous association with the funder could impact on his impartiality.

The plaintiff argued among other things that the test for disqualification did not require the court to "examine his Honour's personal involvement in the relevant actions" and to "determine his Honour's closeness, involvement, and direct association with those matters that were funded, managed or the subject of instructions by Mr Walker or the Walker entities". These matters went to actual, not apprehended bias, the plaintiff said.

Litigant can't venture on fishing expedition, judge says

Siding with the plaintiff, Justice Delany noted that counsel for the parties could not identify any decision by an Australian court in which a subpoena had been issued for documents to back a recusal application for apprehended bias. A single ruling in a criminal case in Victoria was subsequently found, but the court had refused to allow the evidence caught by the subpoena.

Justice Delany said Justice Watson was ethically bound to point to any material evidence, whether publicly available or not, in hearing a bid for his recusal.

"It is for the judge to decide whether disclosure should be made and not for a litigant to venture upon a 'fishing expedition'," Justice Delany said, citing another case.

"It is not for the litigant to pry into the judge's background as was sought to be done in some of the earlier cases previously discussed."

Justice Delany noted that Justice Watson, standing in the shoes of the fair-minded observer as the test required, could not himself adduce evidence on the recusal application. He raised the prospect of a "proliferation of subpoenas" if subpoenas were permitted in such applications.

The judge said that even if he were wrong about the admissibility of evidence, the subpoenas in this case would be set aside as irrelevant.

"The defendant has failed to demonstrate why the documents are relevant to the task to be performed by the judge through the eyes of the fair-minded reasonably informed lay observer," he said.

“The defendant has failed to show that it is ‘on the cards’ that the documents will materially assist its case upon the application of the ‘double might’ test, whether based on association, conduct or extraneous information.”

‘Absolutely nothing wrong’ with saying corporations should be honest, court told

In opposing the subpoenas, counsel for the class action William Edwards KC told the court last month that Fletcher Builing’s arguments for recusal on the basis of Justice Watson’s previous public statements had a “significant lack of reality”.

“No one could rationally think there is something wrong with judges hearing a case simply because they expressed views about law reform in their past lives,” said Edwards.

“A reasonable objective bystander knows that judges apply the law as is, despite expressing a view.”

Edwards said there was “absolutely nothing wrong” with someone saying corporations should be honest and it was not relevant to the case since there was no allegation Fletcher acted dishonestly.

“We’ll say it’s frankly ludicrous, the fact the judge said corporations should act honestly is a cause for concern...judges say that in judgments all the time,” said Edwards.

While Fletcher argued it should be able to subpoena personal communications between Justice Watson and Walker because of those public statements, Edwards said that was “beside the point”.

“We really do press a pretty significant relevance objection to that,” the barrister said.

Fletcher’s claim about Justice Watson’s former professional dealings with Walker was misconceived, Edwards said.

“The reasonable bystander would not think a solicitor who obtains funding to bring a case is engaging in some commercial business relationship with the funder as distinct from ensuring the client can bring a case,” he said.

“[The idea] that the funder is the real client of the solicitor is somewhat absurd and offensive.”

There was also an “enormous air of unreality” in the notion that Justice Watson should be disqualified because he might have seen CASL’s financial statements, Edwards argued.

The class action is represented by William Edwards KC, Alexander Edwards and Lara O’Rorke, instructed by Mayweathers. Fletcher Building is represented by Robert Craig KC and Roman Rozenberg.

The case is Gerald Fuller v Fletcher Building Limited.