

LAWYERLY

Class action judge grills Fletcher Building on recusal bid



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A judge who was previously the head of class actions at Maurice Blackburn has questioned a bid by Fletcher Building that he recuse himself from presiding over a shareholder case against the construction company.

Fletcher is arguing Victorian Supreme Court Justice Andrew Watson, the law firm's national head of class actions before his appointment to the bench in late 2023, [should be disqualified](#) for apprehended bias because of his association with the director of funder CASL, John Walker. CASL is bankrolling the class action against Fletcher.

Counsel for Fletcher, Robert Craig KC, argued on Tuesday that Justice Watson should recuse himself because of his [previous dealings with Walker](#), who was a director at IMF Bentham, which worked with Maurice Blackburn on 24 filed class actions

Craig argued that a fair minded lay observer might think the judge had investigated up to 800 potential actions that were subject to collaboration between IMF and Maurice Blackburn, and that he worked directly with Walker on investigating up to 112 potential actions.

But Justice Watson said the numbers were a conclusory “leap”.

“That is a leap, I think. It is one thing for Maurice Blackburn to have its own internal processes and another thing for there to be an acceptance that when litigation funders are involved there’s a separate process of working with the litigation funder. But I don’t think it follows...that there will have been a large number of cases worked up with litigation funders that are unsuccessful,” the judge said.

“I’m tempted to say a firm such as Maurice Blackburn would have gone broke if it had a 5 per cent hit rate.”

Litigation funder ‘akin to a client’, court told

Craig argued that the litigation funder entities associated with Walker, which funded cases run by Maurice Blackburn, was “akin to a client” because it could give instructions.

“The fair minded lay observer would know the litigation funder not only funded the proceedings for reward and was wholly dependent upon the receipt of revenues by reference to that success but they were giving the day to day instructions to drive that outcome,” he said.

But Justice Watson questioned the contention, saying he took the view that litigation funders were not clients, although they might have the ability as agents for the client to give instructions.

Maurice Blackburn would have breached its professional obligations if it ever put the funder’s interests above the client, he said.

“The fair minded lay observer must know that,” the judge said.

What about barristers and other firms of solicitors, judge asks

The judge also questioned whether there was a similar issue with counsel appearing before him, if they had previous retainers with Maurice Blackburn.

“Am I not to permit counsel with whom I entered into such arrangements to appear before me or am I to recuse myself if I see counsel with whom I entered such arrangements? What about firms of solicitors which Maurice Blackburn ended up forming cooperative arrangements with? Do they fall into the same category?”

But Craig said Walker fell into a different category because he was a previous business partner who has a direct financial interest in the outcome of the Fletcher proceeding.

“I am a professional who owes my duties to the court to advocate for my client’s interests in circumstances where I am rewarded irrespective of the outcome,” said Craig.

Financial health of Maurice Blackburn and CASL ‘intertwined’, court told

Craig argued that an arrangement between Maurice Blackburn and CASL in a consolidated class action against Downer EDI meant their financial health was ‘intertwined’.

“The fair minded observer would recognise that the financial health of CASL was important to your Honour at Maurice Blackburn because it would ensure Maurice Blackburn did not have to meet any additional expenses which it had provided or contracted for,” he said.

But Justice Watson questioned why that meant Maurice Blackburn had an interest in the financial health of CASL.

“Maurice Blackburn started that action wanting to fund the entirety and was prepared to fund the entirety and...says that in event of a default [by CASL] is prepared to fund the entirety. Why do you draw from that there’s any interest particularly by Maurice Blackburn in CASL’s ongoing financial health?”

The recusal hearing continues on Wednesday.

The class action, [filed in September 2022](#) by Mayweathers, alleges the company failed to disclose material information about its construction division.

New Zealand-based Fletcher allegedly failed to correct an August 17, 2016 revenue forecast for the 2017 financial year until the following March. The company said in an ASX statement it intended to defend itself.

The class action is represented by William Edwards SC and Paul O'Rourke, instructed by Mayweathers. Fletcher is represented by Robert Craig KC and Roman Rozenberg.

The case is *Gerald Fuller v Fletcher Building Limited*.