HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY
BETWEEN:

G CHARISTEAS
Appellant

and

Z V CHARISTEAS
First Respondent

YWB Pty Ltd
Second Respondent

L W BANDY
Third Respondent

A CHARISTEAS (by her Case Guardian R Elias)
Fourth Respondent

E A CHARISTEAS
Fifth Respondent

K A SOTIROSKI
Sixth Respondent

S M MANOLAS
Seventh Respondent

L W BANDY & A CHARISTEAS (as Executors of the Estate of D Charisteas)
Eighth Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

GROUND 1:

2. Much of the First Respondent's submissions proceed on the incorrect premise that the gravamen of the Appellant's contentions below was (and before this Court is) the undisclosed "relationship" between the trial Judge and trial Counsel for the First Respondent. That is incorrect: the gravamen of the Appellant's contentions below (and now before this Court) is the undisclosed private communications between the

trial Judge and trial Counsel for the First Respondent, particularly those between the commencement of the trial and the delivery of judgment.

3. Accordingly, statements such that "*the Appellant's contentions would, if accepted, result in almost an absolute prohibition on private contact between judicial officers and counsel who regularly appear before them*" are, with respect, nonsense. The Appellant does not suggest that there is some overarching objection to "*private contact between judicial officers and counsel who regularly appear before them*". Rather, the short point is that, as is well established by ample authority[1] (with which the First Respondent has not taken issue), such contact needs to be put "on hold" once a trial commences and continue "on hold" through to and including judgment.

4. As to her submissions with respect to the first step in *Ebner*[2], the First Respondent overlooks that the majority also found that the first step is established where there is undisclosed contact between a trial Judge and trial Counsel during the period after the commencement of the trial until after judgment is delivered.[3]

5. The Appellant disputes that the hypothetical fair-minded observer is taken to be aware of the matter referred to in paragraph 11(g) of the First Respondent's submissions (and notes that what is referenced at footnote 27 was not in evidence below).[4]

6. As to paragraph 14 of the First Respondent's submissions, to suggest (as the First Respondent does) that to satisfy the first step of Ebner the Appellant needed to effectively impeach the statements made by the Appellant's trial Counsel in her letter is to raise the bar far higher than that established in *Ebner* (which the First Respondent "*does not challenge*" as being "*the test for apprehended bias*"). Moreover, the First Respondent's criticism of the statement by Alstergren CJ is

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[1] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162 at [34] to [38] (Alstergren CJ) and [134]-[137] (Strickland & Ryan JJ).
[2] Paragraphs 12 to 18.
[3] See, for example, ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162 at [137] and [170].
[4] First Respondent's Submissions, paragraph [8].

entirely without foundation: one need go no further than the Reasons for Decision of the majority below to establish the existence of such obligations.[5]

7. Paragraph 15 of the First Respondent's submissions misrepresents both the Reasons for Decision of Alstergren CJ and the Appellant's submissions: neither his Honour nor the Appellant say that there is something "sinister" in the lack of detail or the use of the word "substance" in trial Counsel's letter. Moreover, the bald assertion that "*there is prohibition on all private communications how so ever unrelated to the case they may be*" is inconsistent with the authorities (as to which see footnote 1 above).

8. Paragraph 16 of the First Respondent's submissions misrepresents both the Reasons for Decision of Alstergren CJ and the Appellant's submissions: the disclosure provided by trial Counsel was "*unsatisfactory*" because the Chief Justice considered them to be "*hardly candid*"[6] and that is was "*striking that counsel for the wife has not sought to explain the content or substance of their communications*", and instead limited the disclosure to the assertion that "*the communications did not concern the substance of the Costopoulos case*". As his Honour rightly noted: "*Such an assertion, with respect, begs more questions than it answers. One obvious question left unanswered is: not the 'substance' of the case, what precisely was said about it?*".

9. Also, the reference to "*deliberate concealment*" is a strawman: that has not formed part of the Appellant's case below or here. Moreover, it is to misrepresent the evidence to say "*contact between the learned trial judge and trial counsel seems to have been in public for coffee and drinks*" as that simply ignores the texts and emails, and it is entirely wrong to assert that the "*contact*" appears "*to have been widely known in the profession*": there is simply no evidentiary basis for that assertion.

10. As to paragraphs 17 and 18 of the First Respondent's submissions, "*the real problem*" is "*the contact*": "*the relationship*" would not have been objectionable had there been no contact between the commencement of the trial and judgment.

11. Paragraph 20 of the First Respondent's submissions seems to suggest that absent positive proof of extraneous information having been communicated or some pecuniary interest in the outcome on the part of trial Counsel, the second step in

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[5] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162 at [134]-[136]; see also [32]-[36].
[6] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [48].

Ebner can never be satisfied. That is patently incorrect and illustrates a clear misunderstanding as to the second step of *Ebner*. Indeed, even the majority acknowledged that the hypothetical observer would give the matter anxious consideration because "*the fact that there was any discussion about the case is troubling*".[7] The majority therefore went on to consider whether in all the circumstances the hypothetical observer's anxiety would be allayed by other considerations.

12. As to paragraph 21 of the First Respondent's submissions, again, the Appellant's objection is not the "*social relationship*", but is to the "*private contact between them*". Nothing in *Taylor v Lawrence*[8] provides any basis to countenance such communications.

GROUNDS 2 - 4

13. Implicit in the submission that "[t]*he appeal clearly changed the "characterisation" of Crisford J's orders*"[9] must be an acceptance that her Honour finally exercised, to exhaustion, the s 79 power. The First Respondent's case otherwise depends on the acceptance of the proposition that the nature of jurisdiction exercised (i.e. interim or final), can be changed *ex post facto* by subsequent events.

14. Acceptance of that proposition would introduce uncertainty. It would permit repeated applications for s 79 relief, even after the application for that relief had been heard and determined after a trial. The ability to re-open the earlier proceeding(s) would be enlivened by no more than a finding that *any* aspect of the property of the parties, or either of them, had not been dealt with *by the orders*. The earlier findings and orders could then be entirely substituted. That rests uncomfortably with: (a) existing authority which requires consideration of the legal rather than practical effect of orders;[10] (b) the doctrine of *res judicata*; (c) considerations of finality; (d) the fact that the Court already has a similar power, albeit a qualified, in s 79A.

Waiver

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[7] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [176].
[8] ***Taylor v Lawrence*** [2002] EWCA Civ 90, [61]-[63].
[9] First Respondent's submissions, paragraph [39].
[10] See ***Licul v Corney*** [1976] HCA 6; (1976) 180 CLR 213, 219 – 220 (Barwick CJ); 225 (Gibbs J with Mason J agreeing); ***Carr v Finance Corporation of Australia Ltd (No 1)*** [1981] HCA 20; (1981) 147 CLR 246; 248 (Gibbs CJ); 256 – 257 (Mason J); ***Bienstein v Bienstein*** [2003] HCA 7; (2003) 30 Fam LR 488 at [25] (McHugh, Kirby & Callinan JJ).

15. The submissions of the First Respondent (wrongly) assume that the Appellant could have competently appealed the interpretation decision. Such a contention ignores the observations of the Full Court of the Federal Court in ***Landsal Pty Ltd (In liq) v REI Building Society***[11]:

> *...It is not to the point that the litigant desirous of appealing is able, by a process of appropriate drafting, to reflect the effect of the ruling or determination in the form of a declaration. That does not assist in conferring a right of appeal where the judge himself, not being bound to do so, has declined to make such a declaration.*

16. The primary judge regarded his interpretation reasons and the trial that was to follow it as all being a continuation of the 2011 trial.[12] Whether a right of appeal arises from reasons delivered as part of a trial will depend on whether there was a formal order or an intention that there be a formal order to that effect.[13] If it can be seen that the judge did not intend to make an order reflecting conclusions he has reached part way through conducting the matter, then there is nothing that can be the subject of an appeal, whether by leave or as of right.[14] Here, the judge expressly dismissed the application for orders giving effect to this reasons.

PART III: EXTENSION OF TIME FOR FILING OF NOTICE OF CONTENTION

17. The First Respondent's application for leave to file a Notice of Contention out of time should be dismissed for the following reasons: (**a**) no sufficient explanation is proffered as to why a Notice of Contention was not filed on time. The affidavit in support does no more than explain why the solicitors appointed after the time for a Notice of Contention had expired (as is acknowledged in paragraph 4 of the affidavit) took until when they did to first raise the matter. Nothing in the affidavit explains why a Notice of Contention was not dealt with in accordance with the time prescribed by the Rules; (**b**) Ground 1 seeks to advance a contention that was the subject of a concession made by the First Respondent before the Full Court[15]. She cannot now resile from that concession; and (**c**) for the reasons set out below, the grounds of contention are without merit.

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[11] ***Landsal Pty Ltd (In liq) v REI Building Society*** [1993] FCA 171; 41 FCR 421 at (430 – 431) (‘***Landsal***’)
[12] See CAB 164 at [156]; CAB 293 at [135]. Additionally, the First Respondent makes this point at [38] of her submissions.
[13] ***Landsal*** at 430 – 431.
[14] ***Landsal*** at 430 – 431.
[15] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162 at [185] – [186].

PART IV: RESPONSE TO NOTICE OF CONTENTION

18. **Ground 1**: In addition to repeating paragraph 15.2 above, this ground proceeds on the false premise identified in paragraph 1 above. When one appreciates (as all Judges below did) that the Appellant's complaints were not simply as to the existence of a relationship, but were with respect to the private communications between them, particularly from when the trial commenced, the result must be as determined by the majority at [186].

19. **Ground 2:** It was unnecessary to challenge the conclusions made by the primary judge in relation to s 79A in the interpretation judgment. That is because: (1) the primary judge had already dismissed the application insofar as it relied on s 79A(1)(b)[16] (which the First Respondent did not appeal); and (2) the primary judge did not rely on s 79A(1)(b) as the source of his jurisdiction in making the orders.

Ground 3: A writ of prohibition is only available in a clear case. If not *clearly* established, relief will be refused.[17] The availability of appeal rights are relevant and although not a bar to relief, may provide reason to refuse relief on discretionary grounds.[18] It cannot be said that there was a sufficiently 'clear case' on the jurisdictional question.

Dated: 4 June 2021

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[16] CAB 178, (2) read with AFM 20, (4).
[17] ***R v Ross-Jones; ex parte Green*** [1984] HCA 82; 156 CLR 185.
[18] ***R v Ross-Jones; ex parte Green*** [1984] HCA 82; 156 CLR 185; ***Reg. v. Watson; Ex parte Armstrong*** (1976) 136 CLR 248; ***Reg. v. Cook; Ex parte Twigg*** (1980) 147 CLR 15, 29, 30, 34; ***Re Baker and Wilkie; Ex parte Johnston*** (1980) 55 ALJR 191; ***Reg. v. Ross-Jones; Ex parte Beaumont*** (1979) 141 CLR 504, 513, 518, 522.