

**COURT OF APPEAL**

**MARGARET McMURDO P  
PHILIPPIDES JA  
JACKSON J**

**Appeal No 3950 of 2016  
DC No 224 of 2016**

**OLGA DAY**

**Appellant**

**v**

**WOOLWORTHS LIMITED  
ACN 000 014 675**

**CPM AUSTRALIA PTY LTD  
ACN 063 244 824**

**RETAIL ACTIVATION PTY LTD  
ACN 111 852 129**

**Respondents**

**BRISBANE**

**MONDAY, 28 NOVEMBER 2016**

**JUDGMENT**

**THE PRESIDENT:** This Court heard this appeal on 11 October 2016, reserving its decision and ordering that the first respondent was to file any further submissions by 4.00 pm that day, limited to two pages, with the appellant to file any further submissions in response by 4.00 pm the following Wednesday, again limited to two pages. The Court also noted that a transcript was required. The appellant and the first respondent each filed further submissions in accordance with those orders.

On 12 October 2016 the registry, at the direction of the Court, emailed the parties informing them that the Court wished to bring the parties' attention to the case of *Cleary v Rinaudo* (2013) 278 FLR 231 and that if they wished to make any further submissions on that case, they must do so by 4.00 pm on the following Friday, with submissions limited to one page. On 14 and 17 October 2016 the first respondent and the appellant, respectively, filed the further one page submissions. I note that, earlier, on 13 October, the appellant unsuccessfully asked this Court for leave to file a four page submission. The Court did, however, extend the time for the filing of her one page submission to 17 October. And on 16 October 2016 she filed an affidavit containing further submissions to this Court and annexing emails and letters.

On 4 November 2016 she wrote to the registry, with copies to the judges' associates, stating:

“Please be advised that in 2002 the High Court of Australia granted pro-bono legal assistance to my husband for representation of the matter before the High Court of Australia. As a result, his Honour Philip McMurdo (then the Queen's Counsel) was appointed to act in that matter.

However, due to failure to act upon our instructions, we declined such legal assistance and Mr Phillip McMurdo's appearance before the High Court of Australia. As a result, my husband represented the matter himself with my assistance at the bar table during the Court hearing in February 2003. Thanks to God, on 8 May 2003 the Full Bench of the High Court of Australia granted an order absolute issuing writs of certiorari, prohibition and mandamus under section 75 of the Constitution of Australia.

In this regard, please advise whether her Honour Margaret McMurdo, wife of his Honour Philip McMurdo, was aware about her husband's involvement in the said matter.”

She then filed another affidavit on 7 November 2016 headed “FURTHER EVIDENCE RE: PROCEDURAL FAIRNESS ISSUES”. She deposed that on 3 November she wrote to the Executive Director of Courts, copied to the associates of the judges who heard the appeal, inquiring about obtaining a transcript or an electronic record of the appeal proceeding. She also referred to her letter of 4 November and annexed correspondence showing that Phillip McMurdo QC acted pro bono for her and her husband in 2002 until they terminated his retainer. She further provided another medical certificate, dated 7 November, from Dr Robert Taylor, stating she had a medical condition and would be unfit for work until 12 November 2016.

Later that day the registry informed the parties that the matter would be mentioned in court on 10 November, with the parties to file any submissions, limited to five pages, by close of business the following day, 8 November. The first respondent filed its submissions. The appellant sent a medical certificate to the registry from Dr Mahmood Nekooee, stating that the appellant was “not able to attend court hearing (even over the phone) for another week until/inclusive 14/11/16 due to her severe back pain and [palpitation]. During this time she will not be able to provide legal submission to the court.”

Further, in a letter dated 7 November, emailed to the registry and the first respondent, the appellant stated:

“Please be advised that on 7 November 2016 the affidavit was filed with the Court of Appeal and served upon other parties concerning involvement of his Honour Philip McMurdo (then Queen’s Counsel) into our matter before the High Court of Australia. As a matter of fact, we declined such legal representation due to a number of reasons outlined in my affidavit sworn 6 November 2016 which attaches the relevant documents.

As it appears from the documents available prior to and during the hearing of the above matter held on 11 October 2016, her Honour Margaret McMurdo was well aware about the particulars of our matter which was heard by the High Court of Australia in 2003. Therefore, I believe her Honour was aware about a conflict of interest involving her Honour’s husband.

Therefore, I ask this respectable Court to provide the opportunity to submit any submission addressing the issue of breach of procedural fairness in handling the above matter.”

On 9 November the parties were advised that the hearing on 10 November was de-listed and the matter would be mentioned again on 28 November 2016. The appellant was given until close of business on 23 November 2016 to file any submissions for that hearing. On 23 November 2016 she filed another affidavit headed “RE: PROCEDURAL FAIRNESS THE COURT DIRECTIONS (PRESIDING JUDGE HER HONOUR MARGARET MCMURDO)”. She claimed this Court’s refusal to allow her to file submissions of more than one page was a breach of natural justice. She claimed that the Court ordered that she be provided with the transcript of the appeal hearing and that on 18 October the registry wrongly refused to provide her with a copy of the transcript.

She also filed that day submissions contending that she was denied procedural fairness when the Court directed her to provide submissions at short notice. She claimed that I was biased by:

“... exercising excessive judicial intervention in bringing the matter of *Cleary v Rinaudo* (post hearing) to the first respondent’s counsels’ attention, which seemed to be in the first respondent’s favour. The Presiding Judge also showed prejudice by giving the appellant unfair directions during the course of making a decision, including very short notices to provide legal submissions and unreasonable restrictions on the length of the submissions, which imposed on the appellant unnecessary stress and anxiety.”

On Friday 25 November 2016 the appellant emailed the registry, again requesting an extension of time to file submissions up to 10 pages in length to address *Cleary v Rinaudo*. She also requested that the hearing date of 28 November be vacated, and she provided another medical certificate from Dr Paul Efimoff stating that she was unfit to attend Court today. The medical certificate stated she was:

“...suffering from a medical condition namely severe back pain and exhaustion from stress.

And in my opinion, She should be excused from a Supreme Court appearance on Monday the 28th of November because this will exacerbate her stress and anxiety and that all communication with the court be done by Email.”

The registry invited the appellant to appear by telephone today. She informed the registry that any communication with the Court would be by email. I understand she was informed the matter would remain listed for hearing today and when she enquired which matters were to be dealt with, she was informed that the matters of apprehended bias and her application to file submissions of 10 pages on *Cleary v Rinaudo* would be dealt with.

It is not entirely clear from the appellant’s material whether she is asking me to recuse myself for apprehended bias because of her and her husband’s past instructions to Philip McMurdo. In case she is, I place on the record that when hearing this appeal I was unaware that my husband, Philip McMurdo, in 2002 or 2003, when a barrister, appeared for the appellant and the appellant’s husband. I note that it is curious that the appellant did not raise this matter earlier, as she could have done, were she concerned about bias or apprehended bias. I note that

I became aware that Philip McMurdo had acted for the appellant only when she informed the Court through the registry of this after the hearing.

Before I deal with the question of whether I should recuse myself from hearing this matter on the grounds of apprehended bias, I should ask you, Mr O'Driscoll, if there's anything you wish to add.

...

**THE PRESIDENT:** I note, also, that I have not discussed this appeal with Philip McMurdo, and certainly will not do so until judgment is delivered. I firmly reject any contention of actual bias in the matter. As to apprehended bias, as the first respondent points out, the matter came before the High Court under a different name entirely, so it is not surprising that, when I sat on this appeal, I was completely unaware of the fact that my husband had acted for Ms Day and her husband many years ago. I consider that in light of that matter and of all the other relevant circumstances of the case, an objective, reasonable lay person, knowing all the relevant facts, would not reasonably apprehend that I would not bring an independent mind to bear in this case: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6].

There is, therefore, no reason for me to recuse myself from the case. I also reject the contention that apprehended bias arises from this Court's orders for the delivery of post-hearing submissions. Those orders were, of course, not solely my orders. They were the orders of all the judges constituting the Court and they were reasonable orders in the circumstances.

I turn now to the application. As I apprehend it the only other application which is before the Court, is the appellant's application to file a 10 page submission in respect of *Cleary v Rinaudo*.

Now, the preliminary view of the Court, Mr O'Driscoll, is that given, that the appellant has been unwell and she is self-represented, it would not be unreasonable to give her until close of business Friday to make a four page submission on the case, and that any response you might have to that submission would be filed by 4.00 pm the following Monday.

MR O'DRISCOLL: We consent to that course, your Honour. We have instructions.

**THE PRESIDENT:** In those circumstances, the order from me alone is that if the appellant has brought an application for me to recuse myself from the hearing of this appeal, it is rejected.

The order of the Court is that the appellant has until 4.00 pm Friday to file a four page submission as to the effect of *Cleary v Rinaudo*, and the respondent has until 4.00 pm the following Monday to file a two page submission in response.

Nothing further you're requesting, Mr O'Driscoll?

MR O'DRISCOLL: Excuse me one moment. Costs reserved.

**THE PRESIDENT:** All right. The costs of today's hearing are reserved.