[2012] WASCA 93

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	GLEW -v- FRANK JASPER PTY LTD [2012] WASCA 93
CORAM	**:**	NEWNES JA MURPHY JA
HEARD	**:**	23 APRIL 2012
DELIVERED	**:**	23 APRIL 2012
PUBLISHED	**:**	30 APRIL 2012
FILE NO/S	**:**	CACV 15 of 2012
BETWEEN	**:**	WAYNE KENNETH GLEW Appellant AND FRANK JASPER PTY LTD First Respondent GLEW TECHNOLOGIES PTY LTD Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MARTIN CJ
Citation	**:**	FRANK JASPER PTY LTD -v- GLEW [No 3] [2012] WASC 24
File No	**:**	CIV 2179 of 2007

Catchwords:

Practice and procedure - Whether grounds of appeal have reasonable prospect of succeeding - *Supreme Court (Court of Appeal) Rules 2005* (WA), r 43(2)(g)(i) - Whether reasonable apprehension of bias - Trial judge briefed as counsel in unrelated action 10 years earlier by solicitors for first respondent - Ground without merit - Other grounds of appeal repeat grounds dismissed in earlier cases - Appeal dismissed

Legislation:

Supreme Court (Court of Appeal) Rules 2005 (WA), r 43(2)(g)(i)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	In person
First Respondent	:	No appearance
Second Respondent	:	No appearance

Solicitors:

Appellant	:	In person
First Respondent	:	Solomon Brothers
Second Respondent	:	No appearance

Case(s) referred to in judgment(s):

British American Tobacco Australia Services Ltd v Laurie [2011] HCA 2; (2011) 242 CLR 283
Commonwealth Bank of Australia v Ridout Nominees Pty Ltd [2000] WASC 37
Frank Jasper Pty Ltd v Glew [No 2] [2010] WASC 24
Glew Technologies Pty Ltd v Department of Planning and Infrastructure [2007] WASCA 289

Glew v City of Greater Geraldton [2012] WASCA 94
Glew v Frank Jasper Pty Ltd [2010] WASCA 87
Glew v Shire of Greenough [2006] WASCA 260
Glew v The Governor of Western Australia [2009] WASCA 123
Johnson v Johnson [2000] HCA 48; (2000) 201 CLR 488

1 **JUDGMENT OF THE COURT**: The appellant has appealed against a decision of Martin CJ of 25 January 2012 in which his Honour awarded damages to the first respondent in the sum of $1,541,982.53 plus interest of $521,527.45, a total amount of $2,063,509.98.

2 On 22 March 2012, the appellant filed an interim application seeking an order that the decision of the primary judge be 'set aside' until the hearing of the appeal.

3 Subsequently, the Court of Appeal Registrar issued a notice to the parties to attend for consideration of that application, and also to consider whether any of the grounds of appeal should be struck out because they do not have a reasonable prospect of success (*Supreme Court (Court of Appeal) Rules 2005* (WA), r 43(2)(f)) or whether the appeal should be dismissed because none of the grounds of appeal has a reasonable prospect of success (r 43(2)(g)).

4 On 23 April 2012, we dismissed the appeal, with reasons to be delivered later. The following are our reasons.

Background

5 The decision of the primary judge followed an earlier decision of his Honour in which he found that the appellant and Glew Technologies Pty Ltd had engaged in misleading and deceptive conduct: ***Frank Jasper Pty Ltd v Glew [No 2]*** [2010] WASC 24 (the liability decision). An appeal by the appellant against the liability decision was dismissed: ***Glew v Frank Jasper Pty Ltd*** [2010] WASCA 87.

6 Following the liability decision, the primary judge gave directions to facilitate the trial of the remaining issues in the action, including directions for the exchange of expert and other evidence. The appellant did not indicate that he intended to lead any evidence. The primary judge had previously ruled that the appellant was not entitled to act for the second respondent, Glew Technologies, which had to be represented by a legal practitioner. Glew Technologies did not engage legal representation and accordingly was precluded from active participation as a defendant in the action. (We would observe in passing that it is not apparent why Glew Technologies is a respondent, rather than an appellant, in this appeal.)

7 Prior to the second hearing, the first respondent filed and served affidavits, expert reports and witness statements as required by his Honour's directions. The following account of the appellant's approach is taken from his Honour's reasons for judgment:

> Shortly prior to the hearing, Mr Glew filed written submissions which dealt only with the question of my authority to determine the proceedings, and which did not deal at all with any of the substantive issues in the case. When the matter came on for hearing, Mr Glew challenged my authority to determine the claims against him by reference to those written submissions. I advised Mr Glew that I found those submissions to be incomprehensible, referring, as they did, to a schedule to the Australian Constitution which does not exist, and failing to identify any coherent basis upon which it was asserted that my appointment as a judge of the court was invalid. I advised Mr Glew that at the time of my appointment I had taken the oaths applicable to the various judicial offices which I hold in accordance with the requirements of the *Supreme Court Act 1935* (WA). I invited Mr Glew to refer me to any provision of the Australian Constitution which could support the proposition that my appointment was invalid. He was unable to identify any such provision. I therefore indicated to Mr Glew that I considered my appointment to be valid, and that I had authority to determine the case against him, and would proceed to exercise that authority.
>
> At that point Mr Glew indicated that he proposed to withdraw. I advised him clearly and unequivocally that if he did withdraw, and took no further part in the proceedings, they were likely to continue in his absence, and that judgment may be entered against him (ts 502). Mr Glew nevertheless proceeded to withdraw, and took no further part in the hearing [4] - [5].

8 The primary judge proceeded to determine the matter in the appellant's absence.

9 It is appropriate to turn first to the issues that arise under r 43(2)(f) and r 43(2)(g) of the rules.

The grounds of appeal

10 The grounds of appeal are as follows:

> 1. Justice Martin had a conflict of interest in that he had previously been employed by the solicitors for the plaintiff before being appointed a justice of the Supreme Court of Western Australia and should have disqualified himself as requested by the [appellant].
>
> 2. Justice Martin refused leave for [the appellant] to represent Glew Technologies Pty Ltd (his own company) in the proceedings which meant that the company was not represented at the trial.
>
> 3. Justice Martin has not taken the oath of allegiance and therefore does not hold a valid appointment as a justice of the Supreme Court of Western Australia and is without authority in the judgments that he has handed down in this case or any other case.

> 4. Justice Martin is an employee of the Department of the Attorney General of Western Australia (ABN 705879443) a subsidiary company of the Corporation of Western Australia (ABN 072526002) and not an officer of the Crown.
>
> 5. Despite repeated requests to the court [the appellant] was denied trial by jury.

The disposition of the appeal

11 The appellant's brief written submissions did not add a great deal. They identified, however, the basic contentions which underlie some of the grounds of appeal. The appellant's oral submissions were delivered in a belligerent and offensive manner and did not cast any light on the matter.

Ground 1

12 This ground is, in substance, a contention that there existed a reasonable apprehension of bias on the part of the primary judge. The appellant argued that the primary judge should have disqualified himself because shortly before his appointment as a judge of this court he had been briefed by Solomon Brothers, the solicitors for the current first respondent, in proceedings by the Commonwealth Bank of Australia Ltd against Ridout Nominees Pty Ltd and others: see ***Commonwealth Bank of Australia v Ridout Nominees Pty Ltd*** [2000] WASC 37 (the Ridout action). Solomon Brothers had briefed his Honour as counsel for the defendants in the Ridout action.

13 It was not suggested by the appellant that the Ridout action itself has any connection with the current proceedings. The sole basis for the appellant's contention is that the solicitors for the first respondent in these proceedings are the same solicitors who briefed his Honour as counsel for the defendants in the Ridout action.

14 The test to be applied in determining whether a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: ***Johnson v Johnson*** [2000] HCA 48; (2000) 201 CLR 488, 492; ***British American Tobacco Australia Services Ltd v Laurie*** [2011] HCA 2; (2011) 242 CLR 283 [78] - [84], [132] and [139]. In ***Johnson v Johnson***, the plurality pointed out (at 493) that in applying that test two things need to be remembered: the observer is taken to be reasonable, and the person being observed is a professional judge whose

training, tradition and oath or affirmation require the judge to discard the irrelevant, the immaterial and the prejudicial.

15 No fair-minded person could reasonably apprehend that his Honour might not bring an impartial and unprejudiced mind to the determination of the action because, some 10 years earlier when he was at the Bar, his Honour had been briefed in an unrelated matter by the same firm of solicitors who act for the first respondent in these proceedings. The ground of appeal is without merit.

Ground 2

16 The appellant submitted that his Honour knew the appellant did not have money to pay for a lawyer, so the order that Glew Technologies must be represented by a lawyer 'puts [Glew Technologies] and [the appellant] into slavery contrary to sections 268, 10, 11 and 12 of the Crimes Act 1914 (Commonweath)' [sic]. There is, however, no such provision in the *Crimes Act 1914* (Cth). It may be the appellant intended to refer to s 268.10, s 268.11 and s 268.12, in subdiv C of ch 8 of the *Criminal Code 1995* (Cth) dealing with enslavement and other crimes against humanity, although those provisions have no possible application.

17 In any event, this ground simply repeats a ground which was raised by the appellant in the appeal against the liability decision and rejected by this court: ***Glew v Frank Jasper*** [20]. The ground does not improve by repetition. It remains without merit. So far as the ground refers to Glew Technologies, we also note, as mentioned above, that Glew Technologies is not an appellant in the appeal.

Ground 3

18 Under this ground it appeared to be contended that the proceedings before the primary judge fell under ch 3 of the *Australian Constitution* and that his Honour had not taken an oath of office in accordance with the requirements of ch 3. Again, substantially the same argument has been raised by the appellant previously and rejected by this court: ***Glew Technologies Pty Ltd v Department of Planning and Infrastructure*** [2007] WASCA 289; ***Glew v Frank Jasper*** [14] and see also ***Glew v Shire of Greenough*** [2006] WASCA 260. It is without merit for the reasons set out in those earlier decisions.

Ground 4

19 A ground to the same effect was rejected in ***Glew v Frank Jasper*** [17] as being frivolous and vexatious, as this ground is.

Ground 5

20 A ground to the same effect was rejected by this court in ***Glew v Frank Jasper*** [18] - [19]. It remains without merit.

21 It follows that none of the grounds of appeal has any prospect of success and the appeal should therefore be dismissed. We would, however, note what was said by this court in ***Glew v The Governor of Western Australia*** [2009] WASCA 123:

> The appellant needs to understand that he cannot simply revisit in other guises issues that have been decided against him. The persistent reagitation of these issues is a waste of the time and resources of the court and puts the other party to significant expense and inconvenience. It cannot continue [23].

22 Regrettably, it has continued: see also ***Glew v City of Greater Geraldton*** [2012] WASCA 94. The appellant has persisted in running arguments that have already been decided against him, without regard to the inevitable waste of the time and resources of this court and of the party on the other side. No purpose can be served by repeating failed arguments and to continue to do so is an abuse of the system. The appellant should appreciate that in taking this course he is exposed to indemnity costs orders being made against him.

23 In view of our decision that the appeal should be dismissed, it is unnecessary to consider the appellant's interim application. Had it been necessary to do so, we would have dismissed it. Assuming that it is intended to be an application for an order suspending the enforcement of the judgment, pursuant to s 15 of the *Civil Judgments Enforcement Act 2004* (WA), there is nothing in the appellant's affidavit in support of the application which is capable of establishing the grounds for such an order.

Conclusion

24 It was for those reasons we ordered that the appeal be dismissed.