SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Humphrey & Ors* [2017] QCA 104
PARTIES:	**OLGA DAY** (applicant) **v** **PROFESSOR JOHN HUMPHREY** (first defendant/first respondent) **ASSOCIATE PROFESSOR TINA COCKBURN** (second defendant/second respondent) **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (third defendant/third respondent) **WESLEY LERCH, DIRECTOR OF QUEENSLAND COMPENSATION LAWYERS PTY LTD** ACN 135 360 119 (fourth defendant/fourth respondent) **DAVID BRAY, DIRECTOR OF QUEENSLAND COMPENSATION LAWYERS PTY LTD** ACN 135 360 119 (fifth defendant/fifth respondent) **QUEENSLAND COMPENSATION LAWYERS PTY LTD** ACN 135 360 119 (sixth defendant/sixth respondent)
FILE NO/S:	Appeal No 3799 of 2017 SC No 5774 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 23 March 2017
DELIVERED ON:	Orders delivered ex tempore 15 May 2017 Reasons delivered 26 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2017
JUDGE:	Morrison JA
ORDERS:	**Delivered ex tempore on 15 May 2017:** **1. The application is dismissed.** **2. The applicant is to pay the respondent's costs of the application to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where orders were made in the Supreme Court Trial Division on 23 March

2017 relating to an application by the fourth, fifth and sixth respondents to strike out the applicant's claim – where a cross-application by the applicant sought to have the learned primary judge disqualify himself from hearing the application on the ground of apprehended bias – where the orders on 23 March refused the cross-application and made directions for the application – where the current application seeks to stay the proceedings below pending an appeal of the learned primary judge's refusal to disqualify himself – where the proceedings in the trial division have been subject to delay – where the delay is due to a number of adjournments requested by the applicant – where the applicant contends that she is at a special disadvantage due to being of a non-English speaking background, having a disability and being a woman – where the applicant submits that the learned primary judge was unfair to the point that she was denied procedural fairness – where the application for stay requires an assessment of the prospects of success of the appeal – whether the learned primary judge showed apprehended bias – whether the applicant was denied procedural fairness – whether there are prospects of a successful appeal – whether case is an appropriate one for a stay

Civil Proceedings Act 2011 (Qld), s 7

Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] 2 Qd R 453; [2008] QCA 322, applied
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited

COUNSEL:	No appearance for the applicant D Schneidewin for the first, second, and third respondents M J Drysdale for the fourth, fifth, and sixth respondents
SOLICITORS:	The applicant appeared on her own behalf Barry Nilsson for the first, second, and third respondents Queensland Compensation Lawyers for the fourth, fifth, and sixth respondents

[1] **MORRISON JA:** Ms Day applies to stay orders made by the primary judge on 23 March 2017, pending the determination of an appeal against those orders.

[2] The orders in question were to have the learned primary judge disqualify himself from continuing to hear an application to strike out Ms Day's pleading (or parts of it) on the ground of apprehended bias. I shall shortly refer to the history in a little more detail.

[3] A second order is sought, pursuant to s 7 of the *Civil Proceedings Act* 2011 (Qld), staying the entire proceedings below, pending determination of the appeal. That relief has significance for three parties[1] who are not involved in the strikeout application before the learned primary judge.

[4] At the conclusion of the hearing on 15 May 2017 I made orders dismissing the application, and reserving the question of costs until these reasons were delivered.

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1 The first, second and third respondent.

Applicable legal principles

[5] An applicant for a stay must demonstrate some reason why a judgment should not be given immediate effect. The test applicable on an application to stay a judgment pending an appeal is simply expressed as being whether the case is an appropriate one for a stay.[2]

[6] The test reflects a wide discretion reposed in the Court and authority establishes that there are some traditional factors to be taken into account on the application, namely whether:

(a) there is a good arguable case;

(b) the applicant will be disadvantaged if the stay is not granted; and

(c) there is some compelling disadvantage to the respondent if a stay is granted, which outweighs the disadvantage suffered by the applicant.[3]

[7] In *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd*[4] this Court said:

> "[I]t will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders."

[8] The Court went on to state, in relation to the assessment of the prospects on appeal, and a conclusion that the prospects may be poor:

> "In cases where this Court is able to come to a preliminary assessment of the strength of the appellant's case, the prospects of success on appeal may weigh significantly in the balance of relevant considerations. The prospects of success will obviously tend to favour the refusal of a stay if the prospects of the appeal can be seen to be very poor."[5]

The Court in *Cook's Construction* also referred to the relevant considerations that are applicable on a stay application, in these terms:

> "The decision of this Court in *Berry v Green* suggests that it is not necessary for an applicant for a stay pending appeal to show 'special or exceptional circumstances' which warrant the grant of the stay. Nevertheless it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment."[6]

[9] In determining the relevant factors, the Court identified the prospects of success, the question whether the appeal would be rendered nugatory, and whether there was irremediable harm if that should occur.

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2 *Williams v Chesterman* [1992] QCA 198; *Crony v Nand* [1999] 2 Qd R 342; [1998] QCA 367.

3 *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685; *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453; *Raschilla v Westpac Banking Corporation* [2010] QCA 255.

4 *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] QCA 322, per Keane JA (with whom McMurdo P and White AJA agreed) at [12].

5 *Cook's Construction* at [13].

6 *Cook's Construction* at [12]; internal footnotes omitted.

[10] The principle that poor prospects would favour the refusal of a stay is because "if there is obviously little prospect of ultimate reversal of existing orders, the concern to ensure that the existing orders can be overturned without residual injustice will have less claim on the discretion than might otherwise be the case".[7]

The proceedings below

[11] As there are two distinct sets of respondents to this application as currently framed, I will refer to them as the QCL respondents,[8] and the QUT respondents.[9] The QCL respondents are those who applied to strike out Ms Day's pleading. The QUT respondents were not party to that application. They have only become a party on the application for stay because paragraph 2 of Ms Day's application seeks to stay the entire proceedings below. Thus the QUT respondents have an interest in the stay application, but not the pending application to strike out.

Hearing on 25 January 2017

[12] On 25 January, the application to strike out came before Dalton J in the applications jurisdiction. Her Honour decided she could not hear the matter given that she knew some of the people involved, and the matter was referred to the learned primary judge, where the matter has stayed since.

[13] The learned primary judge embarked upon the application to strike out. On that occasion, and all since, Ms Day has represented herself.

[14] In the course of the hearing it became apparent that Ms Day was seeking further time to put in an additional submission on the strike-out. Responding to the learned primary judge's observation that she had been on notice that the application would be heard on 25 January and had plenty of notice, Ms Day responded that she had not been provided with the QCL respondents' outline of submissions until that morning, English was not her first language, and she was "quite not well today" because she was on pain killers. She sought an adjournment so that she could research the issues further and put in a further response. That included ascertaining whether or not she would amend the statement of claim which was the subject of the application.[10]

[15] In the course of discussion, Ms Day requested that she be permitted to put her submissions wholly in writing without appearing. His Honour demurred:

> "No. Ms Day, this is a serious business … and this is self-protection now, I'll frankly say … - I will not even run the risk of you contending that you weren't given every opportunity to say everything that you want to say. All right. You have the right to natural justice. You have the right to be heard. And I'm not going to even risk an allegation that things were said in your absence. If you want to be here to argue your case, you're here to argue your case. That's the way the system works."[11]

[16] The application was adjourned for two days, to 27 January 2017.

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7 *Cook's Construction* at [13].
8 The fourth, fifth and sixth defendants in the main proceeding.
9 The first, second and third defendants in the main proceeding.
10 Transcript 25 January 2017, T1-13 line 42.
11 Transcript 25 January 2017, T1-17.

Hearing on 27 January 2017

[17] The further hearing of the application did not proceed because Ms Day sent a medical certificate indicating she was unable to attend, and seeking an adjournment. The application was adjourned to 10 February 2017, the learned primary judge observing, as he did on 25 January, that he would be conducting a criminal sitting at that time.

Hearing on 10 February 2017

[18] On 10 February the application came on again before the learned primary judge, at 2.00 pm. Each side provided outlines and read the affidavits upon which they relied. There was an unsuccessful attempt by the QCL respondents to rely on an affidavit which had not been served on Ms Day.

[19] Shortly into the hearing two questions arose. The learned primary judge was expecting that an amended statement of claim would have been filed, as that had been foreshadowed on 25 January. However, there was no amended statement of claim. Secondly, in Ms Day's outline filed that day, the learned trial judge identified that paragraph 5 was factually wrong.[12] Ms Day's response was to try and refer the learned primary judge to the transcript of the proceedings and to ask the learned primary judge to take a copy so she could read from it. His Honour then said:

> "Just sit down, please. Look, listen to me, please. At the moment, I'm in the middle of a murder trial and I'm going to resume the murder trial at 2.30. You can all wait around until 6 o'clock tonight as far as I'm concerned. I'm not having the criminal jurisdiction of this Court interrupted by this sort of nonsense. Have I made myself clear? Ms Day, have I made myself clear? Do you understand what I'm saying to you? Please stand up and respond to me Ms Day.
>
> MS DAY: Have I understood, you – you're just saying that my case is a nonsense?
>
> HIS HONOUR: Ms Day, please do not deliberately misrepresent what I'm saying to you.
>
> MS DAY: Yes. I would just like to reiterate, as I understood ---
>
> HIS HONOUR: I'm making the point to you that I'm in the middle of a murder trial, which I'm resuming at 2.30. Please do not delay the hearing of this matter with the sort of nonsense that has been going on so far."[13]

[20] Ms Day referred to the fact that she had filed a cross-application which was listed for 10 March 2017.[14] It emerged that the application had not made it to the Court file, nor had the QCL respondents been served. Ms Day identified the relief sought in it which included a declaration that misrepresentations had been made by the QCL respondents' filing of the application to strike out.[15] Ms Day continued:

> "I also seeking their – to afford procedural fairness. … I'm seeking to provide a reasonable time for the parties to provide their submissions

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12 Transcript 10 February 2017, T1-5. Paragraph 5 read: "Justice Daubney refused the Plaintiff's motion to file a written submission".

13 T1-5.

14 T1-6.

15 T1-6.

> in advance and to provide the opportunity to the plaintiff [Ms Day] to provide response to their submissions. I'm also seeking ---."[16]

[21] At that point the learned primary judge interrupted to point out that 10 February was the day for the hearing of the application. In response, Ms Day sought that the present application and that which was returnable on 10 March, be heard together.[17]

[22] When the learned primary judge told Ms Day that she had already had an indulgence from the Court in terms of an adjournment to consider matters, and that 10 February was the day for the hearing, Ms Day objected that she had only just been given the outline of the submissions on the strike-out and needed time to read it. That time was granted to her.

[23] The QCL respondents then sought to rely on an email sent to Ms Day (via her husband), and Ms Day objected. In the course of discussion, Ms Day seemed to assert that she had objected that morning to the further hearing being brought before the learned primary judge.[18] She asserted that the learned primary judge had shown apprehended bias and had not afforded her procedural fairness.[19] She referred to the hearing on 25 January contending that she had been arguing with the learned primary judge on that day, that his Honour had "took up for the defendants", and refused to allow her to put further submissions in writing.[20]

[24] The learned primary judge then reiterated that 10 February was the day for the hearing of the application, and by that, Ms Day was receiving procedural fairness given that she had been granted an adjournment on 25 January and had not shown up on 27 January. Ms Day insisted that she needed to go through the new outline of submissions to make a response. At 2.22 pm the learned primary judge adjourned the further hearing until 5.00 pm to enable that to happen. At that point Ms Day said that she did not know "whether or not I will be feeling all right because I'm here in the courts from 9 o'clock today". The learned primary judge responded:

> "No, no, no, no. No, enough. Enough, Ms Day. The Supreme Court of Queensland does not exist to revolve around your personal convenience. This is the third occasion on which the Court's time [has] been taken up with this matter. Today is the last occasion on which this application will be before the Court. We'll be back at 5 o'clock. We'll stand this matter down until 5 o'clock."[21]

[25] The hearing resumed at 5.00 pm. The learned primary judge referred to the factually incorrect aspect of Ms Day's outline, namely that on 25 January she had been refused leave to file written submissions. After a short time discussion resumed in relation to a letter which the QCL respondents had sought to tender at the 2.00 pm hearing. The objection by Ms Day to its tender was maintained in this exchange:

> "HIS HONOUR: Ms Day, do you say you will suffer prejudice if Mr Drysdale tenders ---
>
> MS DAY: I'm already – yeah ---

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16 T1-7 lines 1-4.
17 T1-7 lines 33-42.
18 T1-10 line 27.
19 T1-10 lines 24-43.
20 T1-11 lines 13-15.
21 T1-13 lines 34-39.

HIS HONOUR: --- this document?

MS DAY: Your Honour, I'm already suffering prejudice.

HIS HONOUR: No, no, tell me what's the prejudice that you will suffer?

MS DAY: Well, the prejudice – because it's their practice of filing and serving of the documents to the Court and serving on the plaintiff is – I consider is appalling.

HIS HONOUR: No, no, please ---

MS DAY: Yes.

HIS HONOUR: We'll get – well, you and I will get on much better, Ms Day, if you would please listen to my questions and answer my questions instead of giving me speeches. My question to you is what prejudice will you suffer if Mr Drysdale tenders a letter that you admit you're well familiar with? What is the prejudice that you will suffer?

MS DAY: Because, your Honour, just providing this – you are just giving some favours to the other party – to the defendants.

…

HIS HONOUR: Just – just for now, I'm going to pretend you didn't say because what you've said was actually a contempt of Court, Ms Day, but ---

MS DAY: Sorry?

HIS HONOUR: What you've just said was a contempt of Court.

MS DAY: On what basis please?

HIS HONOUR: By asserting that I was giving favours to Mr Drysdale. So I understand you're self-represented and I understand that you can get emotional about these things, but, as I say, rather than getting emotional about it, as a formally trained lawyer, albeit it in another country, I would be grateful if you would concentrate on the task at hand and answer my question and the question is what prejudice do you suffer by them tendering a letter, the contents of which you are well familiar with?"[22]

[26] There were exchanges between the learned primary judge and Ms Day in the course of the submissions being made on the application to strike out. A few examples need to be mentioned given the nature of the current application.

[27] At one point the learned primary judge was questioning Ms Day about the statement of claim. Ms Day perceived that to be in some way partisan:

"MS DAY: Your Honour, I – I think it's – it's not right that I'm just keep arguing with you. I have to argue with the defendants ---

HIS HONOUR: No, that's ---

MS DAY: --- but you just ---

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22 T1-17 line 12 to T1-18 line 18.

HIS HONOUR: No, that's not the way the system works.

MS DAY: Yes it does.

HIS HONOUR: No, please don't lecture me on how our legal system works Ms Day.

MS DAY: It's our legal, too, because I'm Australian citizen.

HIS HONOUR: That's quite right, how our legal system works.

MS DAY: Yes, yes.

HIS HONOUR: So, please, if you don't mind, don't argue with me about how our legal system works. I do have some passing familiarity with it. Now, perhaps if we get to the fundamental issue, which is for you to explain to me – if you look at your statement of claim, please … starting at paragraph 43 …"[23]

[28] Shortly after that Ms Day complained that it was then after 5.00 pm and she had been at the court more than eight hours. Submissions contained on the nature of the cause of action which Ms Day had pleaded. That discussion then centred on the date when, according to Ms Day's pleaded case or the case she wanted to advance, her employment had terminated. His Honour pressed for an answer:

"HIS HONOUR: In that case, just for once, please answer my question. When do you say your employment was terminated?

MS DAY: In accordance with the defendant's.

HIS HONOUR: So you agree that your employment was terminated in August 2013?

MS DAY: He backdated that date.

HIS HONOUR: Is – you agree with that, do you? I just want to be very clear about this.

MS DAY: I think the Court should decide on the evidence.

HIS HONOUR: I want to know what you assert.

MS DAY: Your Honour, why are you just keeping interrogate me?

HIS HONOUR: Sorry?

MS DAY: You just – I don't know. I just feel just intimidated."[24]

[29] Ms Day's submissions continued as to the nature of her claim. During the course of that, Ms Day mentioned again that she was surprised that she "keep arguing with" the learned primary judge, and Ms Day raised again the question of procedural fairness.[25]

[30] In the course of submissions Ms Day complained that she had been at Court since 2.00 pm, with no access to a computer and therefore no ability to research some points of law arising out of the opposition submissions. The learned primary judge pointed

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23 T1-22 lines 8-35.
24 T1-32 lines 6-27.
25 T1-35 line 29, T1-36 line 1.

out that she had three hours, from 2.00 pm to 5.00 pm, to deal with the submissions, and that the hearing under way was the opportunity to make submissions. Ms Day responded that she was not able to provide submissions on some points. She went on to say that it was "so hard to function after 6 o'clock".[26]

[31] The learned primary judge then sought to ascertain which part of the submissions it was that Ms Day said she could not respond. Ms Day's initial answer was that she would like to provide further submissions.[27] The following exchange took place:

> "MS DAY: … but I need to provide my response to the submission, and I can't.
>
> HIS HONOUR: Well, now is your opportunity to respond.
>
> MS DAY: … make my response from my head because I had no resources.
>
> HIS HONOUR: You've had three hours to do that this afternoon.
>
> MS DAY: I had no resources.
>
> HIS HONOUR: No.
>
> MS DAY: I had no access to my computer.
>
> HIS HONOUR: Ms Day, if you think that the Court will simply adjourn and adjourn and adjourn …
>
> MS DAY: No. No.
>
> HIS HONOUR: … that's not going to happen.
>
> MS DAY: I'm not going to ask you're (sic) an adjournment. I am going to ask you to provide some time for my submission in reply to some points which …
>
> HIS HONOUR: No. Ms Day, I need to give a judgment in this matter.
>
> MS DAY: It's up to you.
>
> HIS HONOUR: No. No. No.
>
> MS DAY: It's up to you, your Honour. You can do everything. But I feel I was not afforded any procedural fairness in conduct of this hearing."[28]

[32] Ms Day persisted with her submission that she needed further time, at the same time complaining that she had never seen a practice whereby an outline of submissions could be given to another party several hours before the court, and that party required to answer them "from the head".[29] His Honour then proceeded to identify which paragraphs of the opposing outline to which she intended to respond, and by what time. It is apparent from the transcript that at that point his Honour intended to adjourn the further hearing to a suitable day which would permit the lodging of further written submissions on disputed paragraphs, with those then to be addressed at a further hearing.[30]

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26 The entire exchange is at T1-43 to T1-44.
27 T1-47 line 1.
28 T1-47 line 31 to T1-48 line 15.
29 T1-49 line 41.
30 T1-50 to T1-52.

[33] In the course of trying to ascertain precisely which paragraphs were those to which a response was needed, Ms Day complained that she was being treated harshly by counsel for the QCL respondents, and that the learned primary judge's proposal to go through the submissions to identify those paragraphs was "unprecedented" and something she had never seen before.[31]

[34] As his Honour worked through the paragraphs, Ms Day also complained that she had been promised "procedural justice" and that she was feeling tired.[32] When the learned primary judge said that he was trying to help her by identifying the new paragraphs to which she needed to respond, Ms Day answered "No. I don't think so. You're just trying to make my life harder by …".

[35] Ultimately the relevant paragraphs were identified, and directions were made for submissions to be filed the following week. The further hearing was adjourned.

Hearing on 23 March 2017

[36] On 23 March 2017, Ms Day's application for the learned primary judge to recuse himself from continuing to hear the strike-out application, on the grounds of apprehended bias, was heard, commencing at 11.35 am.

[37] At the commencement of the hearing Ms Day sought to tender letters of complaint by her husband to the Chief Justice and others, complaining about the conduct of the learned primary judge at the earlier hearings. Submissions were made as to the relevance of those documents, the absence from the tender of the responses to those complaints, and the fact that one of the complaints wrongly asserted that the hearing on 10 February 2017 "was in closed court from 5.00pm to 7.00pm". Ultimately the learned primary judge refused the tender of the documents on the grounds of relevance, but marked them for identification.

[38] In the course of her submissions, Ms Day characterised the conduct of the previous hearings as "excessive judicial intervention".[33] She characterised the disparity between herself and the applicants in this way:

> "… it's usually, as you know, that first of all you have to look at two parties. The fourth, fifth and sixth defendants, they are represented by their counsel. They are represented by their legal practitioner. The fifth defendant, their directors of the insurance company. And from the other side, I'm self-represented. I'm a woman. I'm a refugee. I am a person with a disability. And instead of providing me some assistance, as usually the rule of procedural fairness prescribes, you started unreasonably, your Honour, with respect, interrogating me. You started to raise the other issues which were not raised by the defendants.
>
> When I ask you it was detrimental for my health, you know that – you can see that I got the problems with my heart – you didn't provide me with the indulgence which I ask you to provide a written submission to – to fully concentrate on the issues you raised. So I feel sick this evening and the next day it was Australia Day. Of course, I had to seek the medical assistance. I was provided with a medical certificate

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31 T1-52 line 45, T1-53 line 9.

32 T1-54 line 25. The time was then 6.43 pm.

33 Transcript 23 March 2017, T1-16.

> because my condition was aggravated by this conduct of the hearing. Then I send the medical certificate and an application for an adjournment to your chambers and to the counsel and to the defendants. Instead of making a simple adjournment by law which, you know, that is as prescribed by the UCPR Rules, the hearing was held in my absence."[34]

[39] At that point the learned primary judge intervened to correct the misstatement as to the hearing on 27 January. His Honour pointed out that no hearing of the application was conducted in her absence. Ms Day sought to contest that by reference to the transcript. As it happened, the transcript had not been exhibited to any affidavit. Ms Day maintained her position that a hearing had occurred, and contended that the matter should have been adjourned simply by noting it in the registry file. When the learned primary judge pointed out that Ms Day's submission exhibited a misunderstanding about the Court's processes and procedures, Ms Day responded "I don't think so, with respect".[35]

[40] The hearing was adjourned until 2.32 pm, at which point Ms Day asked if she could provide the rest of her submissions in writing "because English is not my first language and I feel a bit tired because it was many interruptions".[36] The learned primary judge maintained the position that there had been ample opportunity to respond to the submissions and that her opportunity to respond was in the hearing that day. Then followed this passage:

> "PLAINTIFF: It was not my fault or it was not my, I don't know, just – you just kept saying, unfortunately that I'm self-represented. Yes, I am self-represented but you have to consider – you have to take into your consideration the equality between the parties. You understand that I am just [indistinct] some needs because, as I said, I am a person from non-English speaking [indistinct] and I'm an injured person. And I am a woman. You are males here and I am standing here in the Court and for – for …
>
> HIS HONOUR: Now, with the very, very greatest respect, what you have just said to me is highly personally offensive to me. It is grossly personally offensive to me to slander me in that way by alleging that I have engaged in sexual discrimination in the conduct of this hearing. And, with the very greatest respect, I simply will not tolerate that sort of unsubstantiated allegation.
>
> PLAINTIFF: But it is …
>
> HIS HONOUR: Your gender – your gender is completely irrelevant to the conduct of the hearing.
>
> PLAINTIFF: I have less capacity as a woman to be in the Court proceedings – provoked Court proceedings because I'm a woman.
>
> HIS HONOUR: I don't – that, with the very greatest respect, is a submission that I cannot, as a judge of this Court, accept. That is a submission which is demeaning to all women who are members of this Court and who appear before this Court on a regular basis.

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34 T1-16 lines 17-36.
35 T1-20 line 36.
36 T1-29 line 36.

…

> PLAINTIFF: I didn't offend anyone. I'm just stating as a matter of fact harder I feel as a woman … and as a person.
>
> HIS HONOUR: How you feel is different from your submission as to objective fact. And, as I said, when you submit to me as a matter of objective fact – matters that you submitted to me a few moments ago – they are offensive to me personally, they are offensive to me as a judge of this Court, and they are offensive to the profession generally. Your gender is irrelevant."[37]

[41] At the end of submissions the learned primary judge delivered his reasons for dismissing the application that he disqualify himself. The learned primary judge then entertained submissions on the question of costs and gave his judgment on that issue as well. His Honour then resumed consideration of the directions needed to bring the part-heard strike-out hearing to a resolution. Those directions provided for various steps to be taken, and the adjourned hearing to be resumed in the week commencing 15 May 2017.

Discussion

[42] Consideration of Ms Day's application for a stay is most conveniently carried out by commencing with a preliminary assessment of the prospects of success of the appeal or, in other words, whether there is a good arguable case. In the course of doing that I intend to refer to Ms Day's submissions on the application.

Prospects of success

[43] The learned primary judge identified early in his reasons that the application for his disqualification was brought while the particular proceedings were still part heard. His Honour identified the fact that the first day of hearing was 25 January 2017, and the second on 10 February 2017. Thus, the application for the disqualification was from continuing to hear the application to finality.

[44] The learned primary judge identified that the relevant principles were those in *Ebner v Official Trustee in Bankruptcy*:[38]

(a) the test is whether "a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide";

(b) the application for disqualification required two steps, the first of which was the identification of what was said that might lead a judge to decide a case other than on its legal and factual merit, and the second of which was an articulation of the logical connection between the matter and the feared deviation from the proper course;[39] and

(c) where objection was taken to a judge continuing to sit, then that objection "should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case".[40]

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37 T1-31 line 33 to T1-32 line 31.
38 (2000) 205 CLR 337 at [6].
39 *Ebner* at [8].
40 *Ebner* at [19]-[20].

[45] Thus it is relatively clear that the learned primary judge did not proceed upon any error about the applicable principles. Nor do I understand Ms Day to contend that there was any error in the application of legal principle case; her own outline cited *Ebner* as well as similar authorities.[41]

[46] In her outline on this application Ms Day identified 10 specific points central to her contention that she had an arguable case on the appeal. In summary they were:

(a) breaching the rule of procedural fairness and displaying apprehended bias and prejudice towards her;

(b) concluding that the strikeout application did not concern the QUT respondents;

(c) failing to disclose a conflict of interest with the QUT respondents;

(d) concluding that his Honour, as a member of the University of Queensland Senate, did not have a management role in the University of Queensland, contrary to what is revealed in s 9 of the *University of Queensland Act* 1998 (Qld);

(e) (related to the previous point), that his Honour may have an interest in the outcome of the case because of his involvement in the academic and teaching community and in the management of the University of Queensland;

(f) failing to consider and accept as exhibits, the complaints made by Mr Day to the Chief Justice and Attorney-General of Queensland;

(g) failing to conclude that a report to the Parliamentary Crime and Misconduct Commission (2013) in relation to the learned primary judge's complaint concerning the enrolment of the daughter of the University of Queensland Vice-Chancellor, was irrelevant to the application for disqualification;

(h) ordering, on 23 March 2017, that the QCL respondents file a new application to strike out the statement of claim;

(i) failing to permit Ms Day to provide her submission on costs, and failing to take into consideration the objections about the lack of impartiality on the part of the costs assessors; and

(j) failing to publish the judgment online and the reasons for awarding costs.

Complaints about the conduct of the proceedings

[47] These various contentions encompassed grounds 2-4 of the notice of appeal. Ground 4 of the notice of appeal contained 15 particular instances where it was said that the learned primary judge had unduly intervened in the hearing of the application, or denied an opportunity to make proper submissions, displayed a lack of impartiality or discriminated against Ms Day.

[48] I have carefully read through each transcript for the hearings of 25 January, 27 January, 10 February and 23 March. I do not consider that the transcripts bear out the complaints made by Ms Day.

[49] It is true to say that the learned primary judge's patience was tested on a number of occasions leading to responses which, if taken out of context, might be seen as displaying a degree of exasperation, and in other cases forcing Ms Day to the point

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41 Applicant's outline, paragraphs 22-26.

in issue. However, what is equally plain is that Ms Day found it difficult during the hearings to focus on the points in issue, and articulate her case on those points without complaint as to the fact that she was required to do so orally, rather than wholly in writing.

[50] Furthermore, some of the matters which Ms Day asserted during the course of the hearings were plainly wrong and, not surprisingly, brought forth a stern response from the learned primary judge. For example, Ms Day persisted with the contention that if a hearing went beyond 4.30 pm, it was therefore conducted in a closed court. As his Honour pointed out at the time, and in his reasons, that view demonstrated a misapprehension as to the nature and manner in which interlocutory hearings are conducted in the Supreme Court. Similarly, Ms Day's complaints during the hearing that she was being forced to respond orally, and to outlines of submissions delivered only at the start of the hearing, are misplaced. Both are fundamental aspects of the way in which interlocutory applications are dealt with in the Supreme Court. Finally, Ms Day's repeated request to provide all her submissions in writing, with no oral hearing, also misapprehended the way in which interlocutory applications are dealt with. As the learned primary judge pointed out to her at one point, even if she provided her own submissions wholly in writing, it would still necessitate a further hearing to permit her opponents to respond.

[51] Ms Day complained that the learned primary judge engaged in hostile, intimidating and discriminatory conduct against her. I do not consider that to be so. It is true that the transcript reveals occasions of robust exchange, but largely they involved the learned primary judge questioning the submissions being made and seeking to clarify what the precise response was to the strike-out application. On some occasions Ms Day misconstrued the learned primary judge's conduct as being contrary to her interests, when that was not the case. In my respectful view, his Honour was trying to identify precisely what the issues were, to then being able to consider their worth.

[52] Ms Day also contended that the learned primary judge used an offensive and intimidating tone, contrary to that used for the QCL respondents. The prime examples put forward were matters said on 10 February 2017. The extracts are set out in paragraphs [19], [24] and [25] above. Before this Court Ms Day also placed reliance on the passage in paragraph [40] above.

[53] In the first, his Honour made a comment about not having the criminal jurisdiction of the Court interrupted by "this sort of nonsense". It must be borne in mind that his Honour had resumed the hearing from 25 January, in the middle of when his Honour was conducting a criminal trial, as he had foreshadowed at that time. The hearing resumed at 2.00 pm, when his Honour had to be back in Court for the trial at 2.30 pm. The resumed hearing commenced with this sequence of events:

(a) time being wasted on disputes about affidavits not served, and objections to letters that had no relevance to the issues;

(b) the learned primary judge enquired about the amended statement of claim, which he evidently thought would be produced, but none was forthcoming;

(c) his Honour pointed out that paragraph 5 of Ms Day's outline was in error,[42] and Ms Day wished to contest it by reference to the transcript; that point had no relevance to the further hearing of the strike-out application, as an outline had been filed for the 10 February hearing.

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42 It said that she had been refused permission to file a written submission.

[54] It was in that context that the learned primary judge referred to "nonsense". As his Honour's reasons below reveal, that was directed at the "significant toing and froing between the parties … with respect to how the further argument on the matter would proceed".[43]

[55] I have reviewed the transcript carefully and his Honour was right to say that he did not refuse any motion to file a written submission. It is true that Ms Day asked for an indulgence to provide an additional submission and that at first his Honour insisted on oral submissions continuing. However, shortly thereafter his Honour granted an adjournment to permit time to further respond. His Honour did not accede to a request that the response be wholly in writing without a further hearing, but he did not refuse permission to file a written submission.

[56] The second and third examples (paragraphs [24] and [25] above) reveal no more than a judge trying to ensure that submissions on the issues were focussed and relevant. They do not, in my respectful opinion, reveal anything that would indicate that the learned primary judge could not bring an impartial mind to the issues on the application to strike out.

[57] Ms Day's reliance on the extract set out at paragraph [40] above is misplaced as that exchange occurred in the course of submissions on the application for the learned primary judge to disqualify himself, and not during the course of the hearing concerning the strikeout. The basis of the application to disqualify was the conduct of the learned primary judge in the hearing of the strike-out application. In any event, his Honour's response was entirely understandable given that Ms Day was making a submission that because she was a woman in a proceeding dominated by men, and because of her "less capacity as a woman to be in the Court proceedings", it was more difficult for her to conduct a case and she was being discriminated against in terms of the Equal Treatment Benchbook. Ms Day made a similar submission before this Court on the application for stay. It is not surprising that his Honour rejected the propositions, as did I, that because Ms Day was a woman she had a lesser capacity to conduct the proceedings, and that her gender was relevant to the way in which the hearing should be conducted.

[58] Other points raised in Ms Day's notice of appeal were to the same effect, namely that the learned primary judge had intervened in a way which showed partiality to the QCL respondents and overbearing conduct towards her. The transcript does not bear that out. There was undoubtedly a degree of intervention by the learned primary judge and, where appropriate, Ms Day was confronted with the consequences of her submissions. But I do not, respectfully, consider that the judicial intervention was undue, too enthusiastic, such as to deprive Ms Day of an opportunity to make her submissions, lacking impartiality, or otherwise going beyond the bounds of propriety in terms of testing the arguments presented with a view to elucidating that which was genuinely in issue.

Procedural fairness

[59] For the reasons articulated above, I do not consider that there is a credible basis upon which Ms Day could assert that she was denied procedural fairness. The application on 25 January was adjourned so that she could make a further response. When the application resumed on 10 February, Ms Day had ample opportunity to make her

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[43] Reasons page 7.

points, and that hearing was also adjourned in order to give her a further chance to respond. On each occasion of adjournment Ms Day was in a position where she could put in a further written submissions, and address the points orally.

[60] The hearing of the strikeout application is yet to be completed. On 10 February, directions were made to bring the hearing to a conclusion. Orders 3-6 that were made on that day were for steps in relation to the filing of any application, affidavits and submissions to achieve that end. At the hearing of this application, I was informed that all of those steps had been complied with, and that the remaining steps were that Ms Day had to file submissions by 4.00 pm on 15 May,[44] and that the further hearing had been set for 17 May.

[61] In the circumstances I do not consider that Ms Day will be able to make out a ground of lack of procedural fairness.

Conflict of interest

[62] Ms Day's complaints in this regard do not have merit. As the learned primary judge stated in his Reasons, his Honour's participation as a member of the University of Queensland Senate does not lead to any conflict of interest concerning the outcome of the strike-out application in this case. The Senate is a governing body, not a management body. The fact that the overall proceedings involve a claim against the QUT respondents is irrelevant to the strike-out application, given that they were not made parties to the application. Ms Day's generalised assertions that somehow there was a conflict of interest because the University of Queensland and QUT had some joint projects, or close connections between their respective representatives, rises no further than mere assertion, wholly devoid of evidence.

[63] In this respect, as with many others, Ms Day did not focus upon the necessity to identify, as part of the test for apprehended bias, that there was a substantial reason to think that the learned primary judge could not bring an impartial mind **to the question at issue**, namely whether the pleading should be struck out. That is a limited question which, at this stage at least, focusses on whether the pleadings sufficiently identify a justiciable cause of action.

Complaints and the CMC Report

[64] There is simply no merit to the assertions by Ms Day in these areas. Ms Day's husband sent letters of complaint about the conduct of the learned primary judge to the Chief Justice and the Attorney-General, and perhaps others. The fact that those complaints were made hardly identifies, in an evidentiary sense, anything that might assist in determining the views of the fair minded lay observer. As Ms Day's husband and supporter Mr Day is obviously quite the antithesis to a fair minded lay observer. That he made a complaint would not cause a fair minded lay observer to think that the learned primary judge could not bring an impartial mind to the issue in question.

[65] Similarly, the complaint about the report by the Parliamentary Crime and Misconduct Commission is misplaced. As the learned primary judge pointed out in the course of argument, the report was consequent upon a complaint that the learned primary judge made, that the then Crime and Misconduct Commission was impermissibly conducting an investigation into him.[45] In my view, it is completely irrelevant in terms of considering the

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44 The day on which the stay application was heard.

45 Transcript 23 March 2017, T1-43.

question of a strike-out of a pleading, and cannot suggest that the learned primary judge is unable to bring an impartial mind to that question.

Orders on 23 March 2017, and publishing the judgment

[66] Ms Day's points in this respect are completely without merit. They proceeded initially on a misapprehension as to the proper construction of the orders. Order 3 was that by a particular date the QCL respondents "shall file and serve any application by [them] to strike out the amended statement of claim filed 22 February 2017". Ms Day asserted that order displayed bias because it was the learned primary judge directing the QCL respondents to file a new application. It was not. It was simply an order that if those parties wished to bring an application in respect of the amended statement of claim, that application had to be filed by a certain time.

[67] On the issue of costs, the transcript reveals that Ms Day was given an opportunity to say what she wanted to say about costs. True it is that she asked for time to put in a submission about that, and that the learned primary judge insisted that she make her submissions on costs during that hearing. That does not constitute an error of law on the part of the learned primary judge, given that the apprehended bias hearing was the consequence of Ms Day's application filed on 9 February, and the hearing was 23 March.

[68] Ms Day contended that the learned primary judge did not take into consideration her objections about the lack of impartiality on the part of the costs assessors, which were proposed by the QCL respondents when they sought costs of the failed application to disqualify. That contention is not correct. Ms Day asserted before the learned primary judge that she would "like to enquire … whether or not they are independent", and said that she knew from her employment by the QCL respondents that the assessors were "in commercial relationships" with the QCL respondents. As the argument progressed, it became clear that the only relationship was that the QCL respondents used that firm of cost assessors to undertake assessments on other files.[46]

[69] Ms Day's complaint that the learned primary judge erred in law by failing to publish the judgment online, together with the reasons for awarding costs, is misplaced. Even if those reasons were not published online, that was something which occurred in the context of the application to disqualify, not in the hearing of the application to strike out.

Other complaints in the notice of appeal

[70] There is no need to set out all the grounds in the notice of appeal. One way or the other they are encompassed within those that I have dealt with above, or they are determined by the conclusions reached above. There are only a couple remaining.

[71] One is that the learned primary judge erred in law "in finding against Mr Day, who was not a party to litigation and who has had no opportunity to answer the allegation in question".[47] The ground of appeal has no substance. There was no finding against Mr Day. What Ms Day was referring to was part of the reasons of the learned primary judge for rejecting the application to disqualify. His Honour said, in respect of Ms Day's attempt to tender her husband's complaints:

> "I should also mention that the applicant has put on a variety of other material seeing to besmirch my judicial character generally and

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46 Transcript 23 March 2017, T1-4 to T1-5.

47 Notice of appeal ground 11.

> specifically. So, for example, she sought to tender copies of complaints made by her husband to the Chief Justice and to the Attorney-General of Queensland."[48]

[72] As pointed out to Ms Day in the hearing before this Court, that was not a finding against her husband, but if anything, against her. In any event, it is part of the judgment in the application to disqualify, and not part of the conduct by the learned primary judge in dealing with the strike-out application.

[73] Ms Day also contended that the learned primary judge erred "by deleting a part of the transcript from the transcript of the judgment containing the judge's reasons for awarding the costs against the appellant". This was a reference to the fact that as Auscript transcribed the hearing on 23 March 2017, the transcript in respect of the argument on costs was separate from that which recorded the reasons for judgment. There is nothing in this point.

Conclusion – prospects of success

[74] For the reasons set out above, it is my view that the appeal has very poor prospects of success.

Disadvantage if a stay is not granted

[75] Apart from the fact that the learned primary judge will be the judge deciding the application for strike-out, there is no disadvantage if a stay is not granted. The hearing is part-heard. Directions were given on 23 March to bring the matter on for 17 May. Each party complied with the steps necessary to do so. Ms Day still has a full opportunity to resist the strike-out of the pleading.

Disadvantage to the QCL respondents

[76] If the stay is granted, there will inevitably be a period of delay until the appeal is resolved. One alternative is for the application to strike out to begin again with a new judge hearing it. That is an unpalatable prospect, and not one readily sanctioned under the *Uniform Civil Procedure Rules*. The current hearing is part-heard. It should continue unless stayed.

Disadvantage to the QUT respondents

[77] The QUT respondents were heard before me because paragraph 2 of the application brought by Ms Day seeks an order staying the entire proceedings pending the appeal. Of course, the QUT respondents are not involved in the appeal. In that respect, there is a clear prospect of disadvantage to them because it means that proceedings will stop for a time. The proceedings should not continue piecemeal while the appeal is heard, however, that is a reason for refusing a stay, rather than granting one. There is no issue warranting a stay to be granted against the QUT respondents. They should not be disadvantaged by an issue that concerns only Ms Day and the QCL respondents.

Conclusion

[78] The foregoing reasons were those which caused me to dismiss the application for a stay on 15 May 2017.

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48 Reasons for judgment page 8.

[79] On the question of costs, each of the QCL and QUT respondents sought their costs. Mrs Day's response was to suggest that they be made part of those parties' costs in the proceedings. I do not consider that that is an appropriate outcome, given that this is a discrete application, which has failed. The applicant is to pay the respondents' costs of the application, to be assessed on the standard basis.