[2017] QSC 231

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BOND J

No 6593 of 2017

STEPHEN JAMES PARBERY and ANOTHER	**Plaintiffs**
and	
QNI METALS PTY LTD and OTHERS	**Defendants**

BRISBANE

2.34 PM, TUESDAY, 17 OCTOBER 2017

JUDGMENT

HIS HONOUR: The plaintiffs in this proceeding are Queensland Nickel Pty Ltd (in liq) and its special purpose liquidators. The defendants are:

(a) Mr Clive Palmer, who is the ultimate beneficial owner of Queensland Nickel and its alleged shadow director;
(b) other entities controlled by Mr Palmer, and also other persons to whom the plaintiffs allege money held on trust by Queensland Nickel was paid and knowingly received in breach of trust, or which parties are indebted to Queensland Nickel; and
(c) former directors of Queensland Nickel.

The plaintiffs' claim in this proceeding are complex. They concern numerous transactions over a period of years. Broadly, the statement of claim alleges:

(a) claims for indemnity for acts of Queensland Nickel in its capacity as trustee or agent, while acting as the appointed general manager of the joint venture between the first defendant and the second defendant;
(b) debt claims and claims for moneys having received;
(c) insolvent trading claims against Queensland Nickel's directors, including Mr Palmer; and
(d) breach of duty claims against Queensland Nickel's director Mr Palmer, and other former directors.

I am presently part-heard in an interlocutory application in this proceeding. It is an application by the plaintiffs for interlocutory freezing orders and ancillary orders against Mr Palmer and various defendant companies of which he is the ultimate beneficial owner.

I am also the commercial list judge managing of the order of somewhere between nine and 12 proceedings in which many but not all of the present parties are involved because they are connected in one way or another with Queensland Nickel or its insolvency.

In the hearing of this proceeding before me today and previously in relation to the interlocutory proceeding I have described, there are essentially four groups of parties:

(a) the plaintiffs - Queensland Nickel and the special purpose liquidators - who are represented by senior and junior counsel;
(b) two separate groups of the corporations of which Mr Palmer is the ultimate beneficial owner, each of which is represented by senior and junior counsel; and
(c) Mr Palmer, personally.

Mr Palmer represents himself in:

(a) this proceeding generally;
(b) the plaintiffs interlocutory application for a freezing order and ancillary relief; and

(c) the present application.

The present application is that I recuse myself from further involvement in this proceeding and the other proceedings being managed by me in which Mr Palmer personally is the party. The present application is brought on the basis of both actual and apparent bias.

Neither of the two separate groups of the corporations of which Mr Palmer is the ultimate beneficial owner support the application. They do not seek to be heard in relation to it. The application is opposed by the plaintiffs.

I should say something about Mr Palmer.

Mr Palmer is not an ordinary litigant in person. Mr Palmer is, at least on his own account, an enormously wealthy businessman. He is an intelligent man and has been an adjunct professor of tertiary institutions in areas within his expertise. Mr Palmer is also a former Federal politician who actually started his own political party. He could, one might infer, be expected to be able to look after himself in debate or any form of robust exchange involving his own interests. If he thought something was wrong or unfair, it might be inferred that he might be expected to be able to complain about it.

The conclusion that he should be regarded in that way is, however, not merely a matter of inference from the fact of his former position. I had, prior to the circumstances giving rise to the present application, received oral and written submissions from Mr Palmer in this proceeding and on more than one occasion in the course of managing the grouped proceedings before me on the commercial list. In my assessment, Mr Palmer is an intelligent businessman who is, in fact, more than capable of looking after himself in any form of robust exchange, including exchanges in court.

Mr Palmer does not always appear in person in relation to this proceeding. Sometimes he is represented by counsel and solicitors. Indeed, this very morning, he was represented at the review by junior counsel. The same junior counsel is presently, and was at all times material to the present application, engaged by one of the groups of Mr Palmer's corporations.

Mr Palmer is not a person who suffers from any disadvantages which impede his equal access to justice. To the contrary, it is apparent that Mr Palmer has access to legal advice at the highest level. Indeed, he has obtained it from time to time, including in relation to matters connected with the application, with which I am presently dealing: see exhibit 1. Mr Iskander, for instance, is a person who has acted for him from time to time. Indeed, written submissions filed on Mr Palmer's behalf to resist the freezing order either reveal an extraordinary level of sophisticated understanding of the law by a layman, or justify the inference that Mr Palmer is being assisted in the preparation of the submissions by someone with legal qualifications.

But notwithstanding all of the foregoing, the fact that Mr Palmer has chosen to represent himself means that during the course of his involvement in this proceeding, he will suffer some disadvantage because he is not legally trained.

5 My overriding duty is to ensure the fairness of the conduct of this proceeding and interlocutory proceedings conducted within it: see *Tomasevic v Travaglini* [2007] VSC 337 ('*Tomasevic*') at [86].

The result of Mr Palmer's choice to represent himself means that I come under a duty 10 to give him proper assistance because he is a self-represented litigant. I come under that duty notwithstanding the fact that he has chosen to place himself in the position of that disadvantage: see *Tomasevic* at [84].

The proper scope of the assistance required to be given, depends, as Mr Palmer's 15 written submissions before me acknowledged, on the particular litigant and the nature of the case. The position was put in this way by the Full Court of the Family Court in *In the Marriage of N and M L Johnson* (1997) 22 Fam LR 141 at [116]-[167]:

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> [116] The question of the extent to which a court should give advice or assistance to a self-represented litigant was considered by the New South Wales Court of Appeal in the case of *Rajski v Scitec Corporation Pty Ltd* (SC(NSW), CA/146 of 1986, 16 June 1986, unreported: see Butterworths unreported judgments BC8600928).

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> [117] In that case Samuels JA, after observing that the self-represented litigant in that case was "entitled to that degree of protection and advice which the court ordinarily affords to litigants in person" and, that the "extent depends upon the assistance to which the litigant appears to stand in need", proceeded to clarify the position thus:

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>> In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does 35 not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent.

> [118] On the same topic, in the same case, Mahoney JA said this:

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>> When a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to 45 claim rights or to put forward arguments which otherwise he might have done.

A similar point was made in *Tomasevic* at [99]-[101] (citations omitted):

> [99] This oft-cited passage from the judgment of the Full Court still represents the law:

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>> What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case.

> Their Honours referred to the finding of the trial judge that Mr Abram was a quick and 55 intelligent man and decided that he needed no more assistance than what the judge provided.

> [100] Abram has been followed on many occasions. For example, in *Microsoft Corporation v Ezy Loans Pty Ltd* it was held that the nature of an order necessary to maintain the balance between represented and self-represented parties varies –
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>> from case to case and requires some assessment of the difficulties confronting the individual litigant, the litigant's intelligence and his or her understanding of the case.
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> Here is what Debelle J said in *Pezos v Police*:
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>> The individual circumstances of each unrepresented litigant will have to be considered, as well as the nature of the issues, if not also the demands, of each case.
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> [101] And so I think the position here may be compared with that in Canada, as to which, in *A (JM) v Winnipeg Child & Family Services*, Scott CJM, speaking for the Manitoba Court of Appeal, said simply this:
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>> [F]airness and balance are the touchstones to enable justice to be done to all parties.

The foregoing discussion of the law forms the background to the recusal application, because the essence of Mr Palmer's point is that, in particular factual circumstances to which I will shortly come, I so failed to comply with my duty to assist him as to justify a reasonable apprehension that I was biased. He also relies on the same circumstances to justify a conclusion of actual bias in the sense that I must have actually prejudged at least some issues against him.

The legal test on these questions is well known.

As to apprehended bias, see *Ebner v Official Trustee and Bankruptcy* (2000) 205 CLR 337 at [6] and [8] (citations omitted):

> [6] Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if 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. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
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> …
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> [8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

As to prejudgment, the question is not whether there was a real likelihood that I had prejudged the issue or issues, rather, the question is whether it has been established that it might reasonably be suspected by a fair-minded person that I might not resolve the question before me with a fair and unprejudiced mind: see *R v Watson; Ex-parte Armstrong* (1976) 9 ALR 551 at 565.

The only other matter of law, which it is appropriate to mention, especially in the context of the prejudgment issue, is *Johnson v Johnson* (2000) 201 CLR 488 at [13] (citations omitted):

> [13] Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case." Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

Counsel for the plaintiffs correctly submits that there are three groups of factual circumstances on which Mr Palmer relies:

(a) first, the circumstances surrounding my request that he temporarily absent himself from the courtroom whilst he was being cross-examined by senior counsel for the plaintiffs which occurred on 14 September 2017;

(b) second, my dismissal of the defendants' application to adduce further evidence in the freezing orders application which occurred on 29 September 2017; and

(c) third, the circumstances surrounding certain communications between some judges of various courts, first disclosed by Justice Chaney of the Western Australian Supreme Court and thereafter the subject of an application in proceedings before Justice Jackson of this court.

I turn to deal with the first group of factual circumstances. Some part of the relevant circumstances was dealt with by me, in my judgment on 29 September 2017, refusing the adjournment which had been sought. I quote as follows:

> The matter first came before me on 7 August 2017. I listed the proceeding on the commercial list and gave directions setting a timetable for material being delivered aimed at a final hearing taking place on 23rd August or if necessary, 25 August.
>
> The timetable required the applicant plaintiffs to deliver a submissions and response to requests for further and better particulars. It then required the respondents to file and serve their material by 4 pm on 18 August; the applicants to file and serve any further evidence in

> submissions by 4 pm on 22 August; and the first day of hearing to be on 23 August. It transpired the plaintiffs were a little late in their material and the defendants were a little late in their material, which was extensive in relation to the matters that it encompassed. I acceded to an application by senior counsel for the plaintiffs to adjourn the hearing. Undertakings were given with the result that an application for interim freezing order, which had been sought on 23rd August, was dismissed.
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> By orders that I made on 23rd August, the applicants were required to file and serve any evidence and submissions in reply by 4 pm on 6 September, save for an affidavit from a valuation expert to be filed and served by 8 September. The matter then came before me on 14 and 15 September, which were the two days set aside for the hearing of the adjourned application for freezing order. No application was made by any party to seek an adjournment based upon the need to obtain any further material to respond to anything which had appeared in either submissions or affidavits that had been filed. In fact, between the adjourned hearing of 23rd August and 14th September, the adjourned hearing date, there was further material received from the defendants, submissions and affidavits in reply from the plaintiffs and, indeed, yet further material served by the defendants.
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> At the hearing, the parties identified for me the affidavits upon which they relied in relation to the application for a freezing order. As I said, no one sought any adjournment. Some deponents were called and cross-examination and re-examination occurred. That process took us through to the conclusion of the second day. Senior counsel for the plaintiffs sought to persuade me to make an interim order effecting the position until at or after the time of the contemplated further hearing necessary to hear oral submissions from the parties. Ultimately, I was persuaded to accept undertakings that had been proposed by the parties. And it was on those undertakings that I adjourned the application to 17 and 18 October to hear the submissions developing written submissions that had already been made.

Before touching further on what happened during the hearing on 14 and 15 September, I should step back to 23 August 2017 for a moment.

At the commencement of that hearing and before any application for adjournment had been made, I mentioned to the parties that there had been an extraordinary amount of material that had been filed: some 3501 pages for the plaintiffs, and some 3682 pages for the defendants. I requested that they deal with the size of that material in a particular way.

Some part of the material before me had touched on matters on which I had expressed views, and made some findings on different evidence, in *QNI Resources Pty Ltd v Park* [2016] QCS 222. Indeed, Mr Palmer had deposed to his agreement with some views I had expressed in that case. Amongst other things, again before the adjournment application was made, I raised a question with the parties which adverted to some findings I had made in that case, and queried whether the particular evidence before me was replicated in the present proceeding: see transcript page T1-3 at lines 30 to 36:

> HIS HONOUR: But, ultimately, that is a difficulty I've encountered in reading the material, so, one way or the other, if the matter is to proceed to seek an order as currently identified by the application, I'll need that made clear. And the other question that I'll want answered is – if you look at my judgment in the Queensland Nickel declarations proceeding, in paragraphs 21 to 33 I adverted to evidence that I thought was relevant in that proceeding – I would like to know ultimately whether that evidence is replicated in this application, and if so, where it is.

I subsequently was provided with written submissions on that question, first from one group of the corporate defendants, and then from the plaintiffs.

I return now to 14 September and 15 September. It is necessary to quote twice from
5 the transcript of events in that hearing at length.

First, the circumstances which occurred when, during the course of Mr Palmer's cross-examination, I sought to raise something in the absence of Mr Palmer as a witness:

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HIS HONOUR: There's something I want to raise.

MR DOYLE: Yes, your Honour.

15 HIS HONOUR: But not in the presence of Mr Palmer.

Would you be able

MR DOYLE: As your Honour pleases.

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HIS HONOUR: to step outside for a moment, please ? Yeah, sure.

Mr Palmer.

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WITNESS LEAVES COURTROOM [2.40 pm]

HIS HONOUR: The impression I got from questions and answers directed to what
30 happened after the calls were made was that Mr Palmer was suggesting to you that the joint venturers were saying to the administrators/liquidators, whatever they were, that they were seeking an accounting so that they could pay the money. And the reason I raise this in – not in the presence of the witness is, in the Queensland Nickel declarations proceedings, I found facts contrary to that and if – when I think about this, when I come to writing it, at – that's
35 why I raised the question which has been answered by you and by Mr O'Sullivan, I'll want to go back to the evidence that I've previously seen. The finding I made at paragraph 38 was that the joint venturers and Queensland Nickel sales contended that Queensland Nickel was obliged to comply with the demand and give its property back, and that Queensland Nickel was not entitled to use any part of joint venture property to discharge any of the debts which
40 it might have incurred, which is, kind of, contrary to the evidence of the witness. I don't want to – I'm not sure where – where the – where any of this goes. I don't want to open it up with the witness, but I want – when I think about various risks and things, I may well be thinking about that evidence, so I raise it so that either of – either your side or the other side can explore it if they need to.

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MR O'SULLIVAN: Can I just clarify the question? I'm not fully across the

HIS HONOUR: Well, I understood him to be

50 MR O'SULLIVAN: There's a contradiction, your Honour.

HIS HONOUR: the witness to be saying that – to conveying that the joint venturers and Queensland Nickel Sales had been corresponding with – with the – those representing Queensland Nickel and seeking an accounting of what was owed for the purpose of, I – I
55 took it to be, them offering to pay for it. Whereas, that was not my understanding of what actually happened. The understanding of what actually – my understanding of what actually happened was, that they were saying, new manager, give all the property over, all the debts

stay with you and that – what's more, you're not entitled to use any money at all of joint venture property for paying those debts. And that was contrary to what I was – at least, as I understood the evidence.

5 MR O'SULLIVAN: I understood him to be very clear, that saying he'd – he had sought an accounting or he understood an accounting had been sought. I heard that as well, your Honour. I – I wasn't sure that he'd said for the purpose of paying what was due.

HIS HONOUR: Well, he didn't say that but that was the only point of – of making that
10 remark in response to what Mr Doyle was cross-examining him about.

MR O'SULLIVAN: Yeah, yeah.

HIS HONOUR: In any event, that's
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MR O'SULLIVAN: I understand

HIS HONOUR: one of the issues in the fact – in my thinking about risk that I'll be exploring, I don't want to cross-examine him about it or contest with him about it. That's a
20 matter for you people to do.

MR O'SULLIVAN: Thank you, your Honour.

HIS HONOUR: Thank you. Mr Doyle.
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CLIVE FREDERICK PALMER, CONTINUING [2.43 pm]

Shortly after Mr Palmer returned for cross-examination, we took evidence from Mr
30 Parbery, via video link from overseas. His evidence was interposed in that of Mr Palmer. Mr Parbery's evidence continued for the rest of the afternoon, well past usual Court hours.

The following morning, immediately upon resumption of the hearing, I returned to
35 what had happened the previous afternoon during Mr Palmer's cross-examination, which is the subject of the second extensive quote:

HIS HONOUR: Before you start, Mr Barlow, there's a housekeeping issue that I want to raise. And I want to do so before Mr Palmer continues in his cross-examination. You recall,
40 that during the course of the cross-examination of Mr Palmer, there was a matter I wanted to raise in the absence of him as a witness, because I formed the view that it might affect the course of his cross-examination. And I asked Mr Palmer to step aside. And then I dealt with it.

45 Now, that's unremarkable in the course of trials, except for the fact that Mr Palmer's a party. So, if I subsequently dealt with the subject matter that I raised in his absence, without him being given opportunity to know what it was, that would be problematic. On the other hand, if there's a matter I wanted to raise because it would affect cross-examination, but I raised it with him present, that would be problematic as well.
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The course I propose to take, subject to hearing submissions, is, at the end of cross-examination and before the time when re-examination would normally take place, I will give Mr Palmer an opportunity to read the relevant passages of transcript, in effect, to put him in a position to re-examine, so to speak, on the subject matter that I raised. That seems to me to
55 be fair in that it gives him an opportunity to know what it was that was raised in his absence, and it wouldn't – it doesn't have the potential of affecting the course of cross-examination, because the cross-examination would be over. And, of course, it puts him in a position to

deal with it in submissions subsequently, thereby doing procedural fairness to him. That's what I presently contemplate. Does anyone have any submissions they wish to make in relation to that course?

MR O'SULLIVAN: Only would I – would – does your Honour's course – would permit me to re-examine on that question

HIS HONOUR: Before I give Mr Palmer an opportunity to read the stuff?

MR O'SULLIVAN: No, after.

HIS HONOUR: After. Okay, I understand that.

MR O'SULLIVAN: I mean, would I be able to, after he's read it, effectively take instructions from him about the issue and then re-examine him, or is the course your Honour has in mind – could – because he's a client and a witness – a different course [indistinct] I suppose that's – just so I know exactly what your Honour's expectations are.

HIS HONOUR: Well, I hadn't – I guess I hadn't really formulated a view on that question.

MR O'SULLIVAN: Yeah. I'd been thinking about that overnight, and I wasn't sure.

HIS HONOUR: I'll hear what Mr Doyle has to say.

MR O'SULLIVAN: Yes, your Honour.

MR DOYLE: I don't oppose your Honour's course. If Mr O'Sullivan is permitted to re-examine – about which I'll say something in a moment – I wouldn't oppose him talking to Mr Palmer after I finish my cross-examination.

HIS HONOUR: Right.

MR DOYLE: But he shouldn't be permitted to re-examine him. Mr Palmer called himself. I mean, there's – he in fact is his own representative. He's led his evidence. My learned friends rightly are not permitted to cross-examine him, because they also rely upon his evidence. And he should – Mr Palmer – re-examine himself, so to speak. But, if your Honour thinks it's more efficient – and I can understand you may – to permit Mr O'Sullivan to re-examine, then I wouldn't oppose him speaking first to Mr Palmer.

HIS HONOUR: I think in the course of this particular application, I'm going to take the course invited me by Mr O'Sullivan. Whether, if we ever get to a trial, I take the same course in relation to a trial will be a different consideration. All right. So, when we get to it – I know Mr Barlow wants to raise something in a moment – but, when we get to it, you can finish your cross-examination. I'll direct Mr Palmer's attention to the relevant passages of the transcript. And we'll adjourn briefly. And then – we'll adjourn to morning tea or something like that. And then we can come back after morning tea, and you can – Mr O'Sullivan can do the re-examination.

MR DOYLE: As your Honour pleases.

As to the second group of factual circumstances, they concerned, it will be recalled, my failure to accede to an application to adduce further evidence. I dealt with that in my judgment on 29 September 2017, from which I have earlier quoted. These present reasons should be understood by reference to that judgment, which described the timing of what had happened and why I refused the application.

As to the third group of factual circumstances, the evidence is, I think, at least with one exception correctly summarised in the submissions by counsel for the plaintiffs.

On 8 August 2019, Chaney J informed counsel for Mineralogy in proceeding 1808 of 2013 in the Western Australian Supreme Court, that there had been some communication between him and judges of other courts, including the Supreme Court of Queensland and that the communication had gone no further than identifying that we were all dealing with these things and there appeared to be some overlap and so the management of them may need some level of coordination so people are available, for example.

On 30 August 2017, in proceeding 3842 of 2016 in this Court, an application was made in a proceeding being heard by Jackson J by Mr Iskander on behalf of Mineralogy seeking to have his Honour recuse himself by reason of those communications to which Chaney J had referred more than a year earlier. Jackson J made certain disclosures as is recorded on the transcript which is part of Mr Palmer's affidavit before me. He provided copies of email correspondence apparently initiated by Edelman J of the Federal Court (as his Honour then was) at the suggestion of Dowsett J who proposed that the judges to whom the correspondence had been circulated should have as their goal:

> To share public information concerning litigation affecting Queensland Nickel and any associated company or companies and/or Mineralogy Pty Ltd in order to assist various courts and the parties in managing all such litigation, having in mind court resources and the resources of the parties.

The emails were disclosed by Jackson J and his Honour received submissions from Mr Iskander and others and dismissed the application for recusal. Jackson J's disclosure appears in the transcript before me and suggests that he might have discussed the correspondence with me but was not sure about that.

What counsel on behalf of the plaintiff does not advert to is that I have made disclosure to Mr Palmer at a review, which took place on 7 September 2017: see exhibit 2. In that disclosure I referred to having read Jackson J's reasons. I stated (see T1-11, line 43 through to and including T1-12, lines 37):

> HIS HONOUR: that I might be burdened with something else, but the Federal Court can determine that. Now, I have seen, and I think I have read – addressing this to Mr Palmer and Mr Byrne, there was some matter that came on before Justice Jackson last week.
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> MR PALMER: Yes, your Honour.
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> HIS HONOUR: And an application was made for him to recuse himself based upon – I've read it, and I won't try to paraphrase it. I think he had made some disclosure about there being some proposal to – emanating from WA and him receiving some emails. Can I just disclose I recall some vague mention of it by Justice Jackson to me a long time ago, which I, in my mind, shelved to wait to see if anything came of it, and nothing ever did. Does anything arise out of that disclosure?
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> MR PALMER: The only thing that I'm aware of, your Honour, was – if we go to the transcript of Justice Jackson, it seems as though he did refer to some emails, which may have gone to yourself. All right. But we're not

HIS HONOUR: [indistinct] he did.

MR PALMER: aware of that. But the main thing was that we have transparency, so I don't think there's any problem

HIS HONOUR: All right.

MR PALMER: other than that.

HIS HONOUR: I just wanted to make sure that if there was a problem

MR PALMER: Yeah.

HIS HONOUR: it was raised sooner rather than later.

MR PALMER: Yeah, well, that's right. Well, I don't think there's any likelihood of us making an application

HIS HONOUR: All right.

MR PALMER: in similar terms against your Honour.

HIS HONOUR: Thank you. All right. Anyway, I'll make a terms in – I'll make an order in terms of the draft

Before me, Mr Palmer submitted that I was a party to "secret communications". That submission seems to be based on a misapprehension that I had some communications other than were suggested by the disclosures made by Jackson J and by me. There is not the slightest case to support it.

In my view, none of the matters, either separately or cumulatively, support the view that I should recuse myself. No fair minded person would have thought I had prejudged anything.

In fact, the only conclusion which a fair-minded person could reach is that I raised the matter to ensure that Mr Palmer and those who shared his interests, namely, the corporations of which he was the ultimate beneficial owner, all of whom were represented by senior counsel, would be able to address the matters if they were relevant to the case before me.

Where is there a case for apprehended bias? In my view, there is no connection between the events which happened and the notion that I might decide the freezing application on other than its merits.

As to Mr Palmer's complaints about not being specifically informed that he could seek an adjournment, it is significant that there was no complaint by him at the time or, indeed, for some period later. At the commencement of the proceeding on 15 September, I raised the issue and sought submissions on it as is recorded in the extensive quote above. I invited submissions and received no complaint either from senior counsel on behalf of the corporations of which Mr Palmer is the ultimate beneficial owner or Mr Palmer himself.

The assistance that I am obliged to give Mr Palmer is that which is the subject of the authorities to which I have earlier adverted. It is proper assistance. It is assistance which bears in mind the nature of the self-represented litigant and the circumstances in which the question of assistance ought arise. It requires me to balance the interests of the self-represented litigant and other parties. In my view, there is not the slightest case for unfairness of which Mr Palmer can legitimately complain. It may be that days after the event, he formed the view that he should have done something else, but for present purposes, the relevant consideration is do the events which occurred and the way in which I responded to the exigencies before me support the conclusion of apparent bias, applying the *Ebner* test. In my view, they do not.

As to the complaints concerning communications from another court or courts, there is simply nothing in this evidence, whether assessed by itself or with the other evidence, which could possibly indicate that a fair-minded person would have any concerns as to the approach I would take to the issues in the case before me and specifically whether I would decide issues before me on other than their merits. I reject the application for recusal.

…

HIS HONOUR: A question arises as to whether costs should be awarded against Mr Palmer in relation to the application for recusal that I just disposed of. An application is made that I should order Mr Palmer to pay the costs of the plaintiffs to be assessed. Further, the application was that the costs should be assessed on the indemnity basis. In response, Mr Palmer resisted the costs order being made on the indemnity basis. I think it is plain that there should be an order for costs in favour of the plaintiffs. The question which causes me some concern is whether it should be on the indemnity basis or on the standard basis.

Counsel for the plaintiff complains about the lateness of the application, and the impact that because of its lateness it has on the actual conduct of the freezing application. He submits essentially that the nature of the application was such that the applicant, Mr Palmer, ought never have brought it. Whilst I understand why that submission has been made, I think on this occasion that the defects in the application do not rise to the standard in which I have sufficient certainty that it is appropriate, applying the *Colgate-Palmolive* test, that I should accede to the application. Accordingly, I will make a costs order, but only on the standard basis.

I order the fourth defendant to pay the plaintiffs' costs of the recusal application to be assessed on the standard basis.

…

HIS HONOUR: My judgment of 29 September 2017 dismissed an application by the defendants for leave to adduce further evidence. One of the defendants, Mr Palmer, but not the others, now seeks an adjournment of the hearing of the interlocutory application for a freezing order on two bases.

The first basis is to permit further evidence to be adduced. The further evidence is a subset of the evidence which was the subject of the application which I dismissed by my judgment of 29 September 2017. Unlike on the last occasion, with one exception, the evidence in respect of which the application was advanced was actually placed before me. It comprised:

(a) first, Mr Palmer's 10th affidavit which has been the subject of a confidentiality order in consequence of objections taken to alleged scandalous parts of it, and in particular, paragraphs 26 to 30, 33 to 89 with the following exceptions: 52, last two sentences; 54, last sentence; 55, last sentence; 59, last sentence; and 63;
(b) second, the affidavit of Tracey Robinson, which was the subject of the application previously dismissed;
(c) third, the first affidavit of Nui Harris, at paragraphs 36 to 39, and exhibit NH-19;
(d) fourth, the letter from Mr Mensink to Aurizon, dated 22 December 2015, which is exhibit 1 on this application; and
(e) fifth, the proposed affidavit of Mr Wolfe, the contents of which were described on the last occasion.

The evidence all appears to be new, rather than fresh, evidence. There is no particular explanation as to why it was not adduced in accordance with the original timetable, which was the subject of description in my judgment of 29 December 2017, save that Mr Palmer connects the need to adduce that evidence with the appreciation of its significance that he said he only obtained consequent upon the events of 14 and 15 September, which form the basis of his recusal application. I will not repeat what those events were. They are dealt with in the judgment that I gave today, dismissing the recusal application.

The second basis upon which the application is brought is because of difficulties caused to Mr Palmer's preparation by a death in his family. The death was the death of his wife's grandmother, who died very shortly before 5th October, which was the day that Mr Palmer and his wife found out about the death. That caused Mr Palmer difficulty in complying with the timetable I had earlier set. He instructed lawyers on his behalf to write a letter dated 5 October 2017, to the solicitors for the plaintiffs, advising of the fact of the death in his family, advising that this would interfere with the preparation of his submissions, and requesting an extension for his submissions to be granted, to permit him to file and serve the submissions by close of business on 16th October, instead of the original timetabling.

Solicitors for the plaintiffs refused that extension. Solicitors for Mr Palmer reiterated the request, and by email of 6 October, said that, when he, Mr Palmer, had originally agreed with the dates, he had anticipated being able to work on his submissions whilst overseas, but would not be able to do so because of the unanticipated death of his wife's grandmother. The solicitor on his behalf said:

> As Mr Palmer is representing himself in his own capacity, he needs the extra time to formulate his submissions. I kindly request that he be given until 10 am on 16th October 2017.

An application was foreshadowed, but by their email of 5 October the plaintiff's solicitors declined the request. Mr Palmer was able to file submissions, and he did so on 13 October. Apparently he formed the view that the submissions he was able to file were unsatisfactory. Then the need for accommodation to the timetable changed from it being satisfactory simply to get an extended time for delivery of submissions to the need for an adjournment of the hearing to take place on 17 and 18 December.

One issue relevant to my discretion is whether, in light of the events of today, namely, the very considerable time taken to hear argument on the recusal application to formulate reasons and express reasons for judgment on the recusal application and to hear argument on the adjournment application, I could, in fact, dispose of this application in the dates allocated to it, namely, today and tomorrow. It is possible to, if I determined to reject the adjournment application, to pick up all or virtually all of the time that would otherwise be available for the argument by sitting late tonight, sitting early tomorrow and late tomorrow.

The approach which I should take in relation to the application is well known in the authorities and, indeed, Mr Palmer's written submissions identify the relevant principal authorities. The course which I should take is that which suits the interest of justice, bearing in mind the interests of the litigants in the particular case. I also am permitted to take into account the effect of an adjournment on court resources, the competing claims of other litigants in other cases awaiting hearing on the commercial list, and the importance, especially in a managed list like this, of the adherence to dates fixed for hearing.

The material that Mr Palmer seeks to adduce is material, the significance to which in this litigation as part of the telling of the story of relevant events, should reasonably have been obvious to he and anyone from whom he takes advice. I do not find the need for that material as a compelling basis upon which any adjournment should be justified.

The question of the circumstances of difficulty caused by an unexpected death in the family is of greater difficulty. There is no evidence before me of any particular change in circumstances between the circumstances that justified merely the need for an extension of the time within which written submissions could be formulated to close of business yesterday and the time when suddenly the need for adjournment was of the whole proceeding. If Mr Palmer had not distracted himself and others in the advancement of applications which have failed in the Court of Appeal and before me, he might have had more success in formulating written submissions even if they were revised version of the written submissions actually delivered last week.

I am not persuaded that an adjournment is appropriate. I dismiss the application.

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HIS HONOUR: The fourth defendant must pay the plaintiff's costs of the application to be assessed on a standard basis.

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