SUPREME COURT OF QUEENSLAND

CITATION: *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 213

PARTIES:

STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ)
ACN 009 842 068
(first plaintiffs)

QUEENSLAND NICKEL PTY LTD (IN LIQ)
ACN 009 842 068
(second plaintiff)

JOHN RICHARD PARK, KELLY-ANNE LAVINA TRENFIELD & QUENTIN JAMES OLDE AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)
ACN 009 842 068
(third plaintiffs)

v

QNI METALS PTY LTD
ACN 066 656 175
(first defendant)

QNI RESOURCES PTY LTD
ACN 054 117 921
(second defendant)

QUEENSLAND NICKEL SALES PTY LTD
ACN 009 872 566
(third defendant)

CLIVE FREDERICK PALMER
(fourth defendant)

CLIVE THEODORE MENSINK
(fifth defendant)

IAN MAURICE FERGUSON
(sixth defendant)

MINERALOGY PTY LTD
ACN 010 582 680
(seventh defendant)

PALMER LEISURE AUSTRALIA PTY LTD
ACN 152 386 617
(eighth defendant)

PALMER LEISURE COOLUM PTY LTD
ACN 146 828 122
(ninth defendant)

FAIRWAY COAL PTY LTD

ACN 127 220 642
(tenth defendant)

CART PROVIDER PTY LTD
ACN 119 455 837
(eleventh defendant)

COEUR DE LION INVESTMENTS PTY LTD
ACN 006 334 872
(twelfth defendant)

COEUR DE LION HOLDINGS PTY LTD
ACN 003 209 934
(thirteenth defendant)

CLOSERIDGE PTY LTD
ACN 010 560 157
(fourteenth defendant)

WARATAH COAL PTY LTD
ACN 114 165 669
(fifteenth defendant)

CHINA FIRST PTY LTD
ACN 135 588 411
(sixteenth defendant)

COLD MOUNTAIN STUD PTY LTD
ACN 119 455 248
(seventeenth defendant)

EVGENIA BEDNOVA
(eighteenth defendant)

ALEXANDER GUEORGUIEV SOKOLOV
(nineteenth defendant)

ZHENGHONG ZHANG
(twentieth defendant)

SCI LE COEUR DE L'OCEAN
(twenty-first defendant)

DOMENIC MARTINO
(twenty-second defendant)

MARCUS WILLIAM AYRES
(first defendant added by counterclaim)

STEFAN DOPKING
(second defendant added by counterclaim)

FILE NO/S:	SC No 6593 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	17 September 2018
DELIVERED AT:	Brisbane

HEARING DATE: 12 September 2018

JUDGE: Bond J

ORDER:

The orders of the Court are as follows:

1. **Bond J be recused from hearing the trial of this proceeding.**
2. **The proceeding will remain on the Commercial List but Jackson J will now be the Commercial List judge responsible for the management of the proceeding.**
3. **Order 16 of the orders made on 27 July 2018 regarding the 3 day hearing before Bond J commencing on 8 October 2018 be varied to delete the reference to "Bond J" and to insert in lieu thereof "Jackson J".**
4. **As to the orders made on 3 August 2018 –**
   (a) **Order 11 regarding the trial date be varied to add, at the end of the sentence, "before Jackson J".**
   (b) **Direction 13 be varied to delete the reference to "Bond J" and to insert in lieu thereof "Jackson J".**
   (c) **Items 18, 23 and 28 of Schedule 2 to the order be varied to delete the reference to "Bond J" and to insert in lieu thereof "Jackson J".**

CATCHWORDS: COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – PARTICULAR GROUNDS – PREJUDGMENT – where the proceeding is managed by a judge on the commercial list – where the plaintiffs previously brought an interlocutory application seeking freezing orders against the defendants – where judgment was entered into for the plaintiffs and certain of the defendants' assets were frozen – where, in the course of reasoning, the judge was required to make an assessment as to the credibility of the fourth defendant's evidence – where the credibility of the fourth defendant's evidence will likely be an important issue at the trial of the proceeding – where the defendants now bring an application for the judge to disqualify himself on the ground of apprehended bias due to prejudgment – whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the determination of issues at the trial – whether the judge should disqualify himself from hearing the trial of the proceeding – whether the judge should transfer the further management of the proceeding to another judge – whether, in any event, the judge should, as a matter of prudence, exercise a discretion not to sit, if such a discretion exists

COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – PARTICULAR GROUNDS – OTHER PARTICULAR CASES – where the proceeding is managed by a judge on the commercial list – where the plaintiffs previously brought an interlocutory application seeking freezing orders against the defendants – where judgment was entered into for the plaintiffs and certain of the defendants' assets were frozen – where the fourth defendant is self-represented – where the fourth defendant contends that the judge is actually biased against him and failed to provide him, as a self-represented litigant, the requisite assistance or consideration – whether there is any basis for a finding of actual bias

British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283, applied

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, applied

Isbester v Knox City Council (2015) 255 CLR 135, applied

Johnson v Johnson (2000) 201 CLR 488, applied

Livesey v New South Wales Bar Association (1983) 151 CLR 288, cited

Mandie v Memart Nominees Pty Ltd [2017] VSCA 177, applied

Michael Wilson & Partners v Nicholls (2011) 244 CLR 427, cited

Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507, cited

Parbery v QNI Metals Pty Ltd (2018) 127 ACSR 582, related

Parbery v QNI Metals Pty Ltd [2018] QSC 125, related

Parbery v QNI Metals Pty Ltd [2018] QSC 141, related

Parbery v QNI Metals Pty Ltd [2018] QSC 176, related

Parbery v QNI Metals Pty Ltd [2018] QSC 177, related

Parbery v QNI Metals Pty Ltd [2018] QSC 178, related

Parbery v QNI Metals Pty Ltd [2018] QSC 180, related

Parbery v QNI Metals Pty Ltd [2017] QSC 231, related

QNI Resources Pty Ltd v Park (2016) 116 ACSR 321, related

QNI Resources Pty Ltd v Queensland Nickel Pty Ltd (in liq) [2017] QCA 167, related

Re JRL; Ex parte CJL (1986) 161 CLR 342, cited

Re Polites; Ex parte Hoyts Corporation Pty Ltd (1991) 173 CLR 78, cited

Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98,

applied

Southern Equities Corp v Bond (2000) 78 SASR 339, cited

Vakauta v Kelly (1988) 13 NSWLR 502, cited

COUNSEL: S Doyle QC, with M Hickey and M Doyle, for the plaintiffs

T R March for the first and second defendants

K S Byrne for the third defendant, fifth to nineteenth defendants, and twenty-second defendant

The fourth defendant appeared on his own behalf

SOLICITORS: King & Wood Mallesons for the plaintiffs

Alexander Law for the first and second defendants, third defendant, fifth to nineteenth defendants, and twenty-second defendant

The fourth defendant appeared on his own behalf

Introduction

[1] As ultimately advanced, the present applications were for orders that I recuse myself from hearing the trial of this proceeding, which had been listed to commence before me on 29 April 2019.

[2] It became common ground that if I was so persuaded, I should make orders the effect of which would be to transfer the further management of this proceeding, including the hearing of the trial of this proceeding and of upcoming interlocutory disputes, to another judge of this Court.

The procedural context of the present applications

[3] Before identifying in further detail the orders which have been sought and the bases on which they have been sought, it is appropriate to record the present procedural context. That is necessary to understand the significance of certain parts of the applications before me which were not ultimately pressed. It is also necessary so as to understand my response to the suggestion that I should exercise a discretion not to sit. It also provides some relevant background to Mr Palmer's actual bias arguments.

[4] This proceeding is a consolidated proceeding being managed by me on the Commercial List, the nature of which is sufficiently described for present purposes in *Parbery v QNI Metals Pty Ltd* (2018) 127 ACSR 582. That judgment was published on 25 May 2018 and may be referred to as "the freezing order judgment". It will be necessary to return that judgment in a little more detail, but for present purposes it suffices to say that it was a very lengthy judgment in which I explained my reasons for making freezing orders against Mr Palmer and several of his companies, on the application of Queensland Nickel Pty Ltd and its special purpose liquidators. This judgment will use the same terms as those used in the freezing order judgment.

[5] The issues which, at least as may presently be forecast,[1] are likely to arise at the trial of this proceeding are described in the freezing order judgment at [1] to [10] and in the lengthy analysis of whether the plaintiffs have a good arguable case at [76] to [261]. It is likely that there will be very many issues at trial in which the question whether Mr Palmer should be believed will need to be resolved. That much was common ground before me.

[1] Various interlocutory proceedings capable of affecting the issues to be resolved at trial are scheduled to be heard at a 3 day hearing commencing 8 October 2018.

[6] There had been an earlier judgment in a related proceeding, the significance of which was discussed in the freezing order judgment at [131] to [133]. That was *QNI Resources Pty Ltd v Park* (2016) 116 ACSR 321. In that judgment I dismissed an application by the joint venturers for leave to proceed against Queensland Nickel, a company in liquidation. It is convenient to refer to that judgment as "the leave to proceed judgment". My judgment was affirmed on appeal in *QNI Resources Pty Ltd v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167. For present purposes the only reason to refer to the leave to proceed judgment is that Mr Palmer now discerns actual bias in the manner in which I dealt with the issues. The joint venturers (companies of which he was then and is still the ultimate owner) did not before me, or, at least as far as one can discern from the appeal judgment, on appeal, make any such complaint. I will return to Mr Palmer's contention.

[7] Each of the defendants[2] have appealed the freezing order judgment and the appeals are to be heard on 20 and 21 September 2018.

[8] Since the freezing order judgment was published, I have made the following five decisions in this proceeding.

[9] **First**, on 25 May 2018, I dismissed an application for interim stay of the operative parts of the freezing orders, except in respect of orders 16 and 17: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 125 (25 May 2018).

[10] **Second**, on 11 June 2018, I discharged the stay in respect of orders 16 and 17 made on 25 May 2018, amended the terms of order 16, and dismissed a further application for stay of orders 16 and 17: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 141 (11 June 2018).

[11] **Third**, I made a number of decisions at a review hearing on 27 July 2018.

[12] Before identifying what I decided, it is necessary to record some background:

(a) I had on 18 April 2018 made directions[3] (amongst other things) that by 13 July 2018 the parties were to meet with each other to discuss and subsequently prepare a joint report concerning:

(i) the directions which should be made to permit the Court to determine any applications for strike out or summary disposition, which applications would necessarily have been filed pursuant to other directions I had made;

(ii) the directions which should be made to permit the Court to determine any disputes concerning disclosure or document management protocol, which disputes would have been identified consequent upon compliance with other directions I had made;

(iii) whether there were any issues appropriate for separate and preliminary determination; and

(iv) whether the proceeding should be set down for trial for a period commencing in mid-February 2019 (or some subsequent fixed trial date) and, if so, for how long.

(b) I had also on 18 April 2018 directed that on a date to be fixed in the week commencing 23 July 2018, the proceeding would be listed for review to consider, amongst other things, the orders or directions which should be made in relation to the matters dealt with in the joint report which I had required to be prepared.

(c) Later in April, the date for the July review was fixed as 27 July 2018.

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[2] Except the twentieth and twenty-first defendants, who are not active participants in this proceeding.

[3] Formalised in an order dated 19 April 2018: CFI 248.

[13] At the review on 27 July 2018:

(a) I dismissed an argument advanced to me by the defendants that I should make no directions in the proceeding until I had given the defendants further time to decide whether they would advance an application that I should recuse myself from further involvement in the proceeding: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 176 (27 July 2018). I did, however, make directions requiring the filing of any recusal applications, supporting material and written submissions within a specified timeframe leading up to a hearing of any applications filed: see order made 27 July 2018 at [10] to [15].

(b) At the request of the defendants, I adjourned to 3 August 2018 an application by the plaintiffs for orders concerning disclosure and a document management protocol to enable the defendants to make informed submissions on that subject matter: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 177 (27 July 2018) and order made 27 July 2018 at [4] to [6]. It had become apparent that the defendants had not properly complied with my previous directions, and had simply taken it upon themselves to regard it to be "premature" to do so. I did not accede to the plaintiffs' submission that I should simply make the orders sought, but adjourned the application so that I could get proper assistance from the defendants.

(c) I listed for a 3 day hearing before me commencing on 8 October 2018 various applications for strike out and for leave to proceed: see order made 27 July 2018 at [16] to [23].

(d) I listed this consolidated proceeding for trial for 60 days commencing in April 2019, but adjourned the question of the particular start date in April 2019 and of the making of associated trial directions to 3 August 2018: see order made 27 July 2018 at [24] and [25]. That adjournment was necessary because those representing the defendants told me that they had no instructions to advance submissions on those questions. No explanation was given as to why that position obtained. The following exchange with counsel representing the defendants,[4] which occurred after I had intimated that I was minded to have the trial start at the beginning of April 2019, but was concerned to test the viability of that proposition against a practical consideration of whether that would provide sufficient time to fit in all the requisite directions, is demonstrative:

> HIS HONOUR: Well, what's the attitude of the defendants?
>
> MR KABILAFKAS: Your Honour, we don't have instructions to make submissions about these [indistinct]
>
> HIS HONOUR: Why not?
>
> MR KABILAFKAS: Because [indistinct] our instructions are, unfortunately, limited to what your Honour has decided against. One possible suggestion - - -
>
> HIS HONOUR: But – well, look, they are your instructions, but truly, what do the defendants think is occurring here?
>
> MR KABILAFKAS: Your Honour, I appreciate the difficulty. One way – one possible way to get around it would be this: would be, given that you have this hearing on the 3rd, if the defendants replied to my friends on Tuesday with – given that your Honour has fixed a date now, if your Honour's fixing that date, we can work - - -
>
> HIS HONOUR: Well, I'm – what I'm sensitive to is I want to see what I'm requiring people to do, and if – at the moment, my impression is the approximately eight or nine months are easily

[4] The exchange occurred after the lunch adjournment on 27 July 2018. Mr Palmer, who had appeared for himself before lunch, had not returned, apparently leaving his interests to be represented by the lawyers who appeared for his companies.

> doable – but if, when I look at the directions to get it ready for trial, there's some aspect of it that looks too tight, then I might push the commencement date out a bit. So I'm really talking actually figures and dates and particularity and trying to make it happens, and that has been clear to everyone on both sides of the bar table since April.
>
> MR KABILAFKAS: Yes, it has, your Honour. Yes, it has. I accept that. But I [indistinct] for example, haven't - - -
>
> HIS HONOUR: Well, what will happen if the defendants persist in this uncooperative approach, eventually, we'll get to a stage where they won't have complied with something, but the trial will be upcoming and I will say, "Well, I won't let that additional affidavit in. I won't let you do that. We've got a trial. It's been prepared and you haven't complied, so too bad". Now, we're not at that yet, but really, a more realistic approach to the management of cases – I say this for your clients – is required in cases of this nature.
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> MR KABILAFKAS: I – your Honour, I fully accept that. My instructing solicitors and those of my friends here are here. I'm sure it'll be conveyed to the client in the strongest terms.
>
> HIS HONOUR: Thank you.
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> MR KABILAFKAS: The only thing I could suggest is – I don't have instructions at present – but if, now that your Honour is in the process of fixing a hearing date, over the weekend, those instructions could be obtained so that, hopefully, a – as close to consent a position can be put to you in a week's time, as to what will be doable or not, in what timeframe. For example, I haven't got instructions about a Scott Schedule.

[14] I observe that:

(a) As at the conclusion of the directions hearing on 27 July 2018, the further hearing on 3 August 2018 was to be a hearing at which I would deal with disclosure and document management issues, make associated trial directions, and finalise when in April 2019 the trial would start.

(b) However, between 27 July 2018 and 3 August 2018, the defendants lodged an appeal from the orders I made on 27 July 2018. Mr Palmer and the joint venturers then filed separate applications that I should recuse myself, the former on the grounds of actual bias and apprehended bias and the latter on the grounds of apprehended bias only. Those applications were the applications which had, on 27 July 2018, been scheduled to be heard on 12 September 2018.

(c) The result was that the first application I dealt with on 3 August 2018 was an application by the joint venturers and by Mr Palmer that I stay all the orders I had made on 27 July 2018, except those which set a timetable for the hearing of the recusal applications on 12 September 2018. Extraordinarily – particularly in light of the exchange which occurred the previous week and which I have quoted above – at the outset of the application I was told by counsel for the joint venturers that if I rejected the stay application his instructions were to not make any further submissions on the other matters which had been listed for resolution on that day. No explanation was advanced for this conduct either.

[15] **Fourth**, at the adjourned hearing on 3 August 2018, I dismissed applications for stay pending the hearing of the recusal applications: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 178 (3 August 2018). In those reasons I explained that there was no merit in Mr Palmer's contention of actual bias and that whilst I was prepared to proceed on the assumption that there was a good arguable case for apprehended bias, I thought the stay application was entirely misconceived because there was no connection between the matters that were said to support the contention of apprehended bias and the question whether I could bring the requisite state of mind to bear on the considerations dealt with on commercial list directions hearings and which would be dealt with in the event that I did not accede to the stay application: namely, what orders should be made in relation to document handling protocol, disclosure, trial dates and trial directions.

[16] **Fifth**, after hearing submissions from the plaintiffs (but not from any of the defendants because they – still without any explanation – told me that their instructions were to not advance any submissions if I refused the stay), I decided that the trial would commence before me on 29 April 2019, made the orders sought by the plaintiffs on disclosure and document management and made other trial directions: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 180 (3 August 2018) and orders made 3 August 2018.[5] An appeal has been lodged in respect of the orders I made on 3 August 2018.

The orders sought by the present applications

[17] At the outset of the hearing of the applications, I informed the parties that the Court had made contingency plans such that if I was persuaded to recuse myself, another judge of this Court was available to be appointed to manage this proceeding in my stead; was available for a 3 day hearing commencing 8 October 2018; and was available for a 60 day trial commencing 29 April 2019.[6]

[18] Precisely what orders had been sought?

[19] **First**, the joint venturers had applied for orders that –

(a) I be recused from further involvement in the proceeding;

(b) that the orders and directions made by the Court on 25 May 2018,[7] 4 June 2018 and 27 July 2018 (other than the orders providing directions for the hearing of the recusal application), be set aside; and

(c) the proceeding be removed from the Commercial List and admitted to the Supervised Case List for further case management.

[20] The joint venturers, who were represented by counsel, had in their written submissions filed before the present hearing abandoned that part of their application which sought to have previous orders and directions set aside.

[21] **Second**, the third, fifth to nineteenth, and twenty-second defendants, who were also represented by counsel, sought the same orders by separate application. At the outset of the hearing before me, they also abandoned that part of their application which sought to have previous orders and directions set aside.

[22] **Third**, Mr Palmer, who represented himself, by separate application sought the same orders as the other defendants. He also abandoned that part of his application which sought to have previous orders and directions set aside.

[23] All of the applicants supported their claims for relief on the grounds that the terms of the freezing order judgment gave rise to a reasonable apprehension of bias in that a fair-minded lay observer might conclude that I might not bring an impartial mind to the determination of any future hearings which might turn on the credibility of evidence to be given by Mr Palmer.

[24] A suggestion was made by the applicants that issues involving Mr Palmer's credit might also arise at the 3 day hearing presently commencing on 8 October 2018 at which strike out applications and an application for leave to proceed will be heard. During the course of argument I expressed some scepticism as to that contention. It became unnecessary to determine the issue when the plaintiffs indicated that, if I concluded I should recuse myself from hearing the trial, they would not contend for any order other than orders which had

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[5] CFI 341.

[6] I did not identify the particular judge who the Court had made available for appointment.

[7] These orders and directions were not those made in the freezing order application, but were case management orders and directions in relation to the consolidated proceeding.

the effect of the other judge of this Court being appointed to manage this proceeding in my stead and the 3 day hearing commencing 8 October 2018 and the 60 day trial commencing 29 April 2019 being heard by that judge.

[25] As I have mentioned, Mr Palmer also contended that I am actually biased against him and his companies. Neither the companies concerned nor any of the other applicants sought to support that argument. I will deal with Mr Palmer's actual bias argument separately.

[26] One point may be dealt with at the outset, however. Mr Palmer also sought "a declaration that [the freezing order judgment] is affected by actual bias". If the freezing order judgment was affected by actual bias, then that should be an argument which is raised on appeal as a reason to have the orders set aside. Indeed, I note that Mr Palmer has already told me that he has done so: see appeal ground 2(m) referred to in *Parbery v QNI Metals Pty Ltd* [2018] QSC 178. Whilst it may be doubted that that appeal ground is an adequate basis to permit Mr Palmer to raise on appeal all the matters of which Mr Palmer complains in the present application, that is not an issue for me. The issue of present significance is that a collateral attack on the judgment I have already made by the subsequent pursuit before me of this form of declaratory relief cannot be permitted. Of course, that is not to say that a litigant before me could not, in a proper case, seek to persuade me that I had demonstrated actual bias against the litigant. Rather it is to say that in such circumstances, the only order which I could make, upon my being so persuaded, would be an order disqualifying myself from further involvement in the proceeding.

[27] The plaintiffs resist each of the applications.

The relevant law

[28] The applicable law is uncontroversial.

[29] High Court authority[8] establishes that there is one test to be applied in determining whether a judge should be disqualified for apprehended bias, namely the objective test of whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.

[30] The application of the test requires two steps:

(a) first, the identification of what it is said might lead the judge to decide the question otherwise than on its legal and factual merits; and

(b) second, the articulation of the logical connection between that matter and the risk that the judge will decide the matter otherwise than on its legal and factual merits.

[31] The application of the test uses the touchstone of the "fair-minded lay observer" and that person's reasonable apprehension. The law contemplates the following in the application of that test:

(a) The fair-minded lay observer has attributed to him or her awareness of and a fair understanding of the nature of the decision, the context in which it was made, and the circumstances leading up to the decision.[9]

(b) The fair-minded lay observer has attributed to him or her knowledge that the judge is a professional lawyer, whose training, tradition and oath or affirmation require him or her to discard the irrelevant, the immaterial and the prejudicial, with the result that

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[8] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427.

[9] *Isbester v Knox City Council* (2015) 255 CLR 135 at [23] per Kiefel, Bell, Keane and Nettle JJ.

a conclusion that there is a reasonable apprehension that the judge might be biased should not be drawn lightly.[10] The observer does not have attributed to him or her knowledge of the character or the ability of the particular judge concerned.[11]

(c) The fair-minded lay observer does not have attributed to him or her a detailed knowledge of the law, but the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice, taking into account the exigencies of modern litigation.[12]

[32] What is required for justice to be seen to be done is that it must be apparent to the fair-minded lay observer that the judge will bring to the resolution of the issues an impartial and unprejudiced mind which will decide the issues according to their factual and legal merits. If such an observer **might** reasonably apprehend that the judge **might** not do that, then a case of apprehended bias is established. But if the possibility of such a reasonable apprehension does not exist, it will not suffice that there might be a reasonable apprehension that the judge will decide an issue or issues adversely to one party.[13]

[33] Although the test is expressed in terms of a reasonable apprehension that the judge **might** not bring an impartial and unprejudiced mind, it is also clear that the law requires that proposition to be "firmly established" before the judge should disqualify himself or herself. In *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, Gummow J[14] at [71] to [72] made this observation (footnotes omitted):

> [71] To that perception of the role of the hypothetical observer must be added the consideration that "the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party". The words are those of Mason J in *Re JRL; Ex parte CJL*, in a passage adopted by Callinan J in *Johnson v Johnson*. Mason J also said in that passage, using words later said by the English Court of Appeal to have "great persuasive force", and adopted by the New Zealand Court of Appeal:
>
> > "In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*; *Watson*; *Re Lusink; Ex parte Shaw*. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."
>
> [72] The references in JRL to the phrase "firmly established" in the joint reasons of all seven Justices of this Court in *Angliss* and to the subsequent authorities is important. …

[34] The judge's ordinary duty to sit unless convinced otherwise was also discussed in the earlier decision of *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [19] to [21]:

> [19] Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or 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.

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[10] *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527-528 per McHugh JA and at 535 per Clarke JA.
[11] *Johnson v Johnson* (2000) 201 CLR 488 at [13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[12] Ibid.
[13] *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 per Mason J; *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 86 per Brennan, Gaudron and McHugh JJ.; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [72] per Gleeson CJ and Gummow J.
[14] His Honour was in dissent in the result, but there is no reason to doubt the continued validity of his statement of the law.

[20] This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

[21] It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly decline to sit. Circumstances vary, and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise.

[35] So far as the law concerning disqualification for actual bias, it is necessary only to quote from *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98, where Gleeson JA (Emmett JA and Tobias AJA agreeing) summarised the relevant principles as follows:

[68] A finding of actual bias is a grave matter: *Sun v Minister for Immigration and Ethnic Affairs* (1997) (***Sun v Minister***) 81 FCR 71 at 127 per Burchett J. Authority requires that an allegation of actual bias must be distinctly made and clearly proved; that such a finding should not be made lightly; and that cogent evidence is required: *South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16 at [97] and the authorities there cited.

[69] Where the issue is actual bias in the form of prejudgment, the appellant had to establish that the primary judge was "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented": *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [72] per Gleeson CJ and Gummow J (Hayne J agreeing at [176]). See also Kirby J at [127].

[70] As Gleeson CJ and Gummow J observed in that case at [71]:

> "The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion."

[71] In the same case, Hayne J noted at [185] the several distinct elements underlying the assertion that a decision-maker has prejudged or will prejudge an issue, or the assertion that there is a real likelihood that a reasonable observer might reach that conclusion. The first is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. The second is the contention that the decision-maker will apply that opinion to the matter in issue. The third is the contention that a decision-maker will do so without giving the matter fresh consideration in light of whatever may be the facts and arguments relevant to the particular case.

[72] His Honour observed at [186] that allegations of actual bias through prejudgment often fail at the third step he had identified. This was because notwithstanding whatever expression of preconceived opinions by the decision-maker, it does not follow that the evidence will be disregarded.

[73] The test of actual bias in the form of prejudgment requires an assessment of the state of mind of the judge in question: *Michael Wilson & Partners Limited v Nicholls & Others* [2011] HCA 48; 244 CLR 427 at 437 [33]. However, actual bias need not be confined to an intentional state of mind. Bias may be subconscious, provided it is real: *Bilgin v Minister for Immigration and Multicultural Affairs* (***Bilgin v Minister***) (1997) 149 ALR 281 at 289-290 per Finkelstein J; *Sun v Minister* at 127 per Burchett J and 135 per North J. As Finkelstein J said in *Bilgin v Minister* at 290:

> "The wrong involved is the failure to decide a case impartially. Whether that failure was deliberate or not should be beside the point insofar as the validity of the decision is concerned."

[74] The circumstances in which actual bias can be demonstrated solely from the published reasons for decision must be considered to be rare and exceptional: *SCAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2000] FCA 668 at [38] per von Doussa J, who explained:

> "... Reasons for decision reflect conclusions reached at the end of the decision making process, and if the decision is against the party complaining, the expression of adverse findings on credit and fact are an inevitable part of the expression of the reasons. The mere fact of adverse findings at the end of the matter give rise to no inference as to the state of mind of the decision maker

> before and whilst the matter was under consideration, nor of prejudgment of the issues that fell for decision. Even where it is possible to show that the adverse findings or some of them are contrary to the evidence or unreasonable, or that the reasoning process is hopelessly flawed, that without more is unlikely to demonstrate that the decision maker had embarked on the case with a closed mind, not open to persuasion. However, where the party alleging actual bias can point not only to an adverse judgment containing demonstrable error but also to conduct by the decision maker antithetical to that party's interests such as a hostile attitude throughout the hearing or ... an inference of actual bias by prejudgment might then be more readily drawn. But even then the circumstances are likely to be rare and exceptional that the combination of factors and circumstances will clearly prove actual bias." [Citations omitted.]

The suggestion that I should exercise a discretion not to sit

[36] Counsel for the third, fifth to nineteenth, and twenty-second defendants invited me to exercise a discretion not to sit, as a matter of prudence, even if otherwise I was not persuaded affirmatively to conclude that I should disqualify myself on the grounds of apprehended bias. Although other cases were cited in support of the argument, it principally relied on the remarks made in *Ebner* at [20] and [21] quoted at [34] above. The essence of the submission was if I was not persuaded I should recuse myself, but thought there was enough in the argument to regard it as a case of "real doubt", then, because it is better to be safe than sorry, I should decide to transfer the management of the proceeding and the hearing of the trial to another judge.

[37] The remarks in *Ebner* were considered by the Victorian Court of Appeal in *Mandie v Memart Nominees Pty Ltd* [2017] VSCA 177 per Whelan and McLeish JJA and Cameron AJA at [79] to [85]. There the Court of Appeal dealt with an argument that in *Ebner* the High Court sought to describe some form of "residual discretion" not to continue to sit, which should be exercised whenever the judge had real doubt as to whether the judge should recuse himself or herself. The Court of Appeal rejected that proposition as amounting to an unwarranted modification of the test for recusal. The Court concluded that "a judge's decision not to sit, after rejecting a recusal application, would involve an exceptional departure from the ordinary duty of a judge to sit on a case to which the judge had been assigned".[15] If the exercise of such a decision were to be reviewable on appeal, the Court concluded that it would be necessary to establish that the discretion to make the decision miscarried by reference to the usual *House v The King*[16] calculus, having regard to the proposition that the circumstances must be exceptional in order to displace the judge's ordinary duty to sit.

[38] Senior counsel for the plaintiffs submitted, and I agree, that if the applicants do not persuade me that I should recuse myself then the recusal application should fail. I would then find myself as a judge managing a case on the Commercial List in the procedural context which I have earlier identified. The proper expectation of the parties to cases on that list is that identified in the applicable practice direction, namely that the judge managing the case will be the judge who hears the trial.

[39] On what basis would I exercise some form of case management discretion not to fulfil those expectations, if the recusal application failed?

[40] The following matters would be relevant:

(a) Any decision not to sit, after rejecting a recusal application, would involve an exceptional departure from the ordinary duty of a judge to sit on a case to which the judge had been assigned.

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[15] *Mandie v Memart Nominees Pty Ltd* [2017] VSCA 177 at [82] per Whelan and McLeish JJA and Cameron AJA.
[16] (1936) 55 CLR 499 at 504–5 per Dixon, Evatt and McTiernan JJ.

(b) In addition, the proceeding is being managed on the Commercial List, which gives rise to the expectations to which I have adverted.

(c) I have had the management of the proceedings which have been consolidated into this proceeding for a long time. I have a degree of familiarity with the case, its procedural history and the nuances of the issues which arise in it, that would be difficult for another judge to replicate.

(d) The fact that the Court had made available another judge who was available to take over the management of this proceeding from me, and who was also available on the days presently allocated for the hearing of upcoming interlocutory applications and for the trial.

(e) The possibility that an erroneous rejection of the recusal application might form the basis of a successful appeal, and the risk such an outcome might pose to the Court's and the parties' resources which would have been devoted to the continued prosecution of the case before me in the interim.

(f) Whether to exercise a discretion not to sit would promote the public perception of the proper administration of justice.

[41] As to the latter proposition, the applicants' submissions assumed that it would be inevitable that, in the hypothesized circumstances, deciding not to sit would promote that perception. I am not so sure. The procedural context of this case, to which I have adverted above, and particularly the unexplained refusal of the defendants to make submissions on important and long-scheduled matters at the directions hearings on 27 July 2018 and 3 August 2018, might be thought to make it necessary to consider whether there could be a public perception that they had in fact been implementing an impermissible tactical agenda, to which the judge had acquiesced.

[42] It will only be necessary to return to these considerations and to the proper exercise of any discretion I might have, if I determine I should refuse the recusal application. That is a question to which I now turn.

The core contention concerning apprehended bias

[43] The applicants contended, correctly, that there was always an inherent risk in my being asked to determine an application for freezing orders that I might have to make findings which impacted on the appropriateness of my acting as the trial judge. As Olsson J noted in *Southern Equities Corp v Bond* (2000) 78 SASR 339 at [46] "…there are inherent dangers in a judicial officer assigned as trial judge entertaining and ruling on a pre-trial application for a Mareva injunction".

[44] The core contention made by each of the applicants was that the terms of the freezing order judgment involved such an apparently adverse assessment of Mr Palmer's credit and reliability, that the fair-minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of any future hearing which might turn on whether Mr Palmer should be believed.

[45] The applicants' principal argument was that that conclusion was justified because of the way in which I reasoned to the eventual conclusion (at [312] of the freezing order judgment) that there were –

> … particular aspects of Mr Palmer's previous conduct and decision making which would lead a prudent, sensible commercial person to infer that there is a real risk that he would take, or cause to be taken, steps outside court processes to attempt to frustrate or inhibit the prospects of enforcement or execution of any significant judgment against him or any of his companies.

[46] For their part, the plaintiffs accepted the truth of the observations about the inherent risk involved in a putative trial judge determining an interlocutory freezing order application, but contended, also correctly, that the application of orthodox principle to any particular case turns very much on the particular circumstances of the case, the issues determined, and the way in which the judge concerned has gone about the determination. The plaintiffs submitted, correctly, that it does not necessarily follow that the fact that there might be some observations by a judge apparently adverse to the credit of a witness will automatically give rise to the need for that judge to disqualify himself or herself from any subsequent hearing involving the credit of the witness.

[47] All of that may be accepted.

[48] But what is important here is an examination of how I went about determining the issues before me in the freezing order judgment and what conclusions the fair-minded lay observer might reach about the idea that having made those determinations and written that judgment, I should also be the trial judge in the proceeding. It is appropriate therefore to explain the relevant aspects of the reasoning contained in the freezing order judgment.

The reasoning in the freezing order judgment

[49] In my view the considerations which I identify under this heading would be knowledge which should be attributed to the fair-minded lay observer for the purpose of the application of the test for apprehended bias.

The structure of the judgment

[50] The structure of the judgment was apparent from the table of contents forming part of the judgment.[17] The following matters are notable for present purposes.

[51] **First**, I examined the applicable law under the heading "The considerations which inform the exercise of the jurisdiction".[18] That section identified my reasons for concluding that there were three broad considerations which informed the exercise of the jurisdiction which the plaintiffs had asked me to exercise, namely –

(a) whether the plaintiff had a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Court believed to have a better than 50% chance of success;[19]

(b) whether I could conclude on the balance of probabilities that there was a real risk of steps being taken which would have the effect of frustrating the prospective Court processes of execution and enforcement in respect of any judgment in the plaintiffs' favour;[20] and

(c) whether it was in the interests of justice that the power be exercised, in particular bearing in mind that the jurisdiction must be exercised with a high degree of caution and with proper consideration for the nature of the impact on the persons affected,[21]

and that the judicial exercise of discretion required a consideration of all three matters and any other relevant discretionary factors together.[22]

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[17] The table of contents has not been reproduced in the reported version of the decision but was contained in the judgment as published with the medium neutral citation [2018] QSC 107: see https://www.sclqld.org.au/caselaw/QSC/2018/107.
[18] Freezing order judgment at [15]-[70].
[19] Freezing order judgment at [46].
[20] Freezing order judgment at [47].
[21] Freezing order judgment at [48].
[22] Freezing order judgment at [49].

[52] **Second**, before embarking upon an analysis of those three considerations I identified "The proper approach to the evaluation of the evidence", under that heading.[23] That section was significant because it provided the explicit intellectual foundation for the process I was about to undertake. All of the statements concerning evidence which appeared in the subsequent sections of the judgment and which referred to the evidence would have to be assessed against (1) the context of the particular consideration being evaluated and within which the discussion occurred, and (2) the fact that I had made it clear the approach which I was taking.

[53] In this section of the judgment I made it clear that –

(a) The application before me was an application for alternative forms of interlocutory orders.[24] Its determination would not finally dispose of the rights of the parties. I was not making findings of fact at a trial or other hearing in which final relief is sought.

(b) I was required to undertake a qualitative evaluation of all evidence available to decide whether the three broad considerations were established.[25]

(c) The application was not, in general, an occasion to determine contested questions of fact and conflicts in affidavit evidence.[26] It was not a preliminary trial. Rather, the approach which should be taken was analogous to the approach to be taken in applications for interlocutory injunctions.

(d) That meant that the use which could be made of the defendants' evidence when determining the strength of the plaintiffs' case was limited, for example, to the considering whether it operated to explain away apparently persuasive evidence of the plaintiffs, or, by its juxtaposition against the plaintiffs' evidence to demonstrate that the plaintiffs have in reality no case.

(e) That in performing my task, I thought I was not "bound to accept uncritically … every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be".[27]

(f) I regarded my function in the same way as had been described in *Taylor v Diamand & Zikos Developments Pty Ltd* (1997) 6 NTLR 164 per Martin CJ, Angel and Priestley JJ at 170 (emphasis added):[28]

> **Although the court's function is not to make findings of fact, nevertheless it is to take into account the apparent strength or weakness of the respective cases in order to decide whether a plaintiff's principal claim for monetary relief is sufficiently strong on the merits. So too, when considering whether a plaintiff is sufficiently at risk to warrant relief by way of *Mareva* injunction. The task includes assessing the apparent plausibility of statements in affidavits and, if necessary and warranted, drawing adverse inferences. The court is entitled to look at the credibility of affidavit evidenc**e just as on an application for summary judgment: see *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341; *National Westminster Bank Plc v Daniel* [1995] 1 WLR 1453. **The function of the judge hearing an application for *Mareva* relief upon affidavits is to make a realistic assessment of the merits**.

[54] **Third**, and sequentially, I examined each of the three broad considerations which my discussion of the law had identified as being requisite, under the following headings:

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[23] Freezing order judgment at [71]-[75].
[24] Freezing order judgment at [72].
[25] Freezing order judgment at [73].
[26] Freezing order judgment at [73].
[27] Freezing order judgment at [75].
[28] Freezing order judgment at [75].

(a) "Do the plaintiffs have a good arguable case?"[29]

(b) "Does the relevant risk exist?"[30]

(c) "Do the interests of justice favour the making of the orders sought?"[31]

[55] **Fourth**, under the heading "overall evaluation",[32] I sought to conduct the overall evaluation which my discussion of the law had identified as being requisite. I concluded as follows (emphasis added):

> [311] The plaintiffs have a good arguable case that they will recover significant judgments against Mr Palmer and his various companies.
>
> [312] For the reasons I have articulated, **there are particular aspects of Mr Palmer's previous conduct and decision making which would lead a prudent, sensible commercial person to infer that there is a real risk that he would take, or cause to be taken, steps outside court processes to attempt to frustrate or inhibit the prospects of enforcement or execution of any significant judgment against him or any of his companies**.
>
> [313] **There is no certainty that that is what would occur. Indeed, I am not in a position to conclude that it is more probable than not that that is what Mr Palmer would do.** But, endeavouring to take account of all the evidence before me, and conscious of the degree of care that I am obliged to take in applications of this nature, **I nevertheless conclude that there is a real risk that he would.**
>
> [314] I think it is a risk against which the plaintiffs should be protected, notwithstanding the risk of harm to Mr Palmer, his companies, and the people involved in the businesses they conduct. Indeed, in assessing which course carries with it the lower risk of injustice, I am comforted, in reaching the conclusion I have, by the evidence which has been adduced touching upon the extent of Mr Palmer's wealth and that of his companies.

The way in which I reasoned through to the conclusion as to real risk

[56] Obviously enough, I did not make a finding that it was more probable than not that Mr Palmer would take, or cause to be taken, steps outside court processes to attempt to frustrate or inhibit the prospects of enforcement or execution of any significant judgment against him or any of his companies.

[57] But, on the other hand, the conclusion as to the existence of the real risk of that occurring was a conclusion which must have been reached on the balance of probabilities, albeit by a process of drawing objective inferences.

[58] To see how I got there, one would have to go back to the reasoning which justified the overall evaluation.

[59] The first step backwards from the overall evaluation would take one to the analysis under the heading "Does the relevant risk exist".[33] The relevant parts of that analysis were as follows (emphasis added):

> [265] But the plaintiffs' case does not rely on mere assertion or speculation. **In this case, there are particular aspects of Mr Palmer's previous conduct which would lead a prudent, sensible commercial person to infer that there is a real risk that he would take, or cause to be taken, steps outside court processes to attempt to frustrate or inhibit the prospects of enforcement or execution of any significant judgment against him or any of his companies**.
>
> [266] **The evidence** does not support the conclusion that there is a real risk that Mr Palmer would abscond, but it **does support the conclusion that there is a real risk of Mr Palmer entering into colourable transactions which, when discovered, would operate to inhibit or to frustrate enforcement or execution processes.** I do not think that it is any answer to this concern to say

[29] Freezing order judgment at [76]-[261].
[30] Freezing order judgment at [262]-[287].
[31] Freezing order judgment at [288]-[310].
[32] Freezing order judgment at [311]-[314].
[33] Freezing order judgment at [262]-[287].

that if the transactions were colourable, they might, or even should, be capable of being unwound by lengthy and expensive insolvency processes, in which evidentiary difficulties might abound. Nor am I troubled by the failure of the plaintiffs to identify particular transactions which might be entered into, because the point they make as to the ingenuity of schemes which a potential judgment debtor might devise is correct.

[267] **The relevant aspects of Mr Palmer's previous conduct which justify this conclusion have either been proved before me in this application, or to the extent that the facts or their proper characterization are disputed, my qualitative evaluation of the evidence as a whole supports the conclusion I have expressed. In my view, this is a case in which the evidence which justifies the evaluations which I have expressed in the previous section of these reasons as to the underlying strength of some aspects of the plaintiffs' case should be taken to have a strong bearing on the assessment of the risk which exists to the integrity of the Court's processes: cf. [38] above.**

[268] **First**, there is evidence which suggests that Mr Palmer's relationship to all of the corporate defendants against whom a freezing order is sought is such that he regards himself as the person who can make decisions on their behalf, including in relation to this proceeding. That much is clear from the fact and terms of exhibit 5, referred to at [238] above. Further, his ownership position and his directorships support the argument that he has both de facto and de jure control over the companies and their assets. They are effectively assets which he owns and the protection of their wealth is the protection of his wealth. Regard should also be had to the evidence which justified my conclusions as to the extent of Mr Palmer's actual influence over Queensland Nickel: see [103]-[121] above. I think a prudent, sensible commercial person would regard it to be legitimate to draw inferences about the risk of how the corporate defendants would conduct themselves, by reference to an assessment of the risk of how Mr Palmer would conduct himself.

[269] **Second**, I have explained why I have concluded that **the plaintiffs' case in relation to the Martino appointment and the Martino settlement deeds is a good arguable case and** why **my qualitative evaluation of that case is that it is a strong case: see [214]-[239] above**. **A prudent, sensible commercial person informed by the evidence presently before me would be gravely concerned about what Mr Palmer's involvement in the Martino appointment and the Martino settlement deeds reveals concerning the risks of his future behaviour. A prudent, sensible commercial person could properly infer that the evidence suggested Mr Palmer had, and acted on, a positive intention to frustrate the possibility of any judgment against himself, Mineralogy and any of the other natural and corporate defendants within the ambit of the releases contained in the Martino settlement deeds and that he had, and acted on, a willingness to do so by illegitimate means.**

[270] **In my view those considerations alone are sufficient to justify a conclusion that the plaintiffs have demonstrated the existence of the requisite risk, assessed by reference to the conclusion which a prudent, sensible commercial person would reach**. It will be recalled that whilst it is not essential to prove that a defendant's purpose or intention is to frustrate any potential judgment against the defendant, evidence of intention might well be very significant: see [36] above.

[60] Obviously the matters referred to in [269] of the above quote were an important part of the reasoning process by which I reached the overall conclusion as to "real risk". The importance I had attributed to them was made clear by the opening sentence in [270] of the above quote. The second step backwards then would require reference to the paragraphs to which cross-reference had been made in [269].

[61] Paragraphs [214] to [239] cover some 8 pages of the freezing order judgment and I will not quote them here. At the risk of some over-simplification, it suffices to note that they discuss the process by which Mr Palmer acted on behalf of his company China First pursuant to a security instrument which he knew to have been impugned as voidable by the present plaintiffs. He acted to purport to appoint Mr Martino as a controller of Queensland Nickel on 3 March 2017, which was well after issues had been joined between the two principal sides of the present litigation. On the same day as he appointed Mr Martino, Mr Palmer secured Mr Martino's agreement to successive versions of a settlement deed which purported to record an agreement to discontinue proceedings against Mr Palmer's company, Mineralogy, and otherwise to grant releases destructive of proceedings which had been commenced by the present plaintiffs. Mr Palmer contended that the settlement he

secured gave him and his companies a complete defence to the plaintiffs' claims. I concluded that the plaintiffs had a good arguable case for final relief which would defeat that contention.

[62] For present purposes, what is significant is that I dealt in detail with evidence which had been placed before me by Mr Palmer and by Mr Martino which sought to explain their conduct in relation to the Martino appointment and the successive Martino settlement deeds. Each explanation had sought, amongst other things, to convey that there had been nothing untoward in either the appointment of Mr Martino or the process by which the Martino settlement deeds were made. I summarised their respective evidence as to their explanations of what had happened.[34] I then wrote (emphasis added):

> [229] On the present state of the evidence, the plaintiffs have a good arguable case that the conduct of Mr Martino may be impugned on at least the bases which I set out below.
>
> [230] First, Mr Martino acted in a way which attributed no value to the Mineralogy proceeding which claimed in excess of $105 million from Mineralogy –
>
> (a) apparently without obtaining or reading the legal process by which the proceeding was commenced;
>
> (b) without making any enquiries of Queensland Nickel's liquidators or the lawyers who had been acting for Queensland Nickel as to the facts and law on which they relied;
>
> (c) without conducting his own diligent investigations into the merits of the claim; and
>
> (d) without obtaining his own legal advice on that question.
>
> [231] Second, Mr Martino executed a deed recording the debt purportedly owed by Queensland Nickel to China First was immediately due and payable –
>
> (a) without making enquiries of Queensland Nickel's liquidators or the lawyers who had been acting for Queensland Nickel as to whether there were any reasons to form a contrary view;
>
> (b) without conducting his own diligent investigations on that question; and
>
> (c) without obtaining his own legal advice on that question.
>
> [232] Third, Mr Martino acted as though he had formed a positive view on the merits of the settlement contained in the first version of the Martino settlement deed within 7 minutes of receiving it for the first time on 3 May 2017 and without –
>
> (a) making any enquiries of Queensland Nickel's liquidators or the lawyers who had been acting for Queensland Nickel as to whether in the context of the liquidation, a reduction in the debt owed to China First had any value at all;
>
> (b) making any enquiries of Queensland Nickel's liquidators or the lawyers who had been acting for Queensland Nickel as to the nature, merits or value of any of the claims released;
>
> (c) without conducting his own diligent investigations on those questions; and
>
> (d) without obtaining his own legal advice on those questions.
>
> [233] Fourth, the same points can be made in relation to Mr Martino's actions in entering into the second version of the Martino settlement deed within hours of receiving it on 4 May 2017. And, further, because he did so without –
>
> (a) making any enquiries of Queensland Nickel's liquidators or the lawyers who had been acting for Queensland Nickel as to the nature, merits or value of the extension to the claims released which was created by the alteration to the first version;
>
> (b) conducting his own diligent investigations on those questions; and
>
> (c) obtaining his own legal advice on those questions.

[34] Freezing order judgment at [226]-[228].

[234] Fifth, Mr Martino made his decisions about the benefit of the transaction to Queensland Nickel on the basis of information provided to him (whether directly or indirectly) from parties whose interests were opposed to Queensland Nickel and obviously aligned with the parties who obtained advantage from the releases given by the deeds (namely China First, Mineralogy and Mr Palmer).

[235] Sixth, Mr Martino's acts and omissions give rise to the inference that Mr Martino did not act in good faith and that he wilfully or recklessly acted to sacrifice the interests of Queensland Nickel.

[236] **As to the evidence placed before me by Mr Martino and Mr Palmer which sought to explain their conduct, I express the following conclusions:**

(a) **As the evidence presently stands, both their explanations strike me as apparently implausible**.

(b) **The problems with the apparent plausibility of Mr Martino's evidence are relatively obvious. Even on the face of his affidavit, it is difficult to reconcile the way in which he deposed that he conducted himself with a good faith exercise of power, especially given the qualifications and experience that he says he had**.

(c) **And, for the following reasons, the apparent plausibility of Mr Palmer's explanation of his conduct as a good faith exercise of power on behalf of China First is low**.

(d) First, Mr Palmer said that the motivating factor for the appointment of a controller was his concern as to the possibility that the liquidators of China First would sell the shares in China First. But, if that were so, it might be thought to be surprising that the first thing which Mr Palmer would ask the controller to do was something else entirely, namely to strike a settlement the apparent goal of which was to manufacture a complete defence to all the proceedings which could or might be brought against he and his companies by Queensland Nickel.

(e) Second, and in any event –

(i) my attention has not been drawn to any evidence that the liquidators had even considered selling the shares, much less threatened to do so;

(ii) further, by that time, it was clear that the validity of the transaction by which the shares were acquired was disputed by the general purpose liquidators and Mr Palmer and his lawyer must have known that;

(iii) how Mr Palmer and his lawyer might have concluded, given the liquidators' position in relation to the transactions, there could sensibly be said to have been any risk that the liquidators would act in a manner inconsistent with that position is unclear;

(iv) there is no material which suggests either of them ever considered taking what might be thought to be the orthodox course of communicating with the liquidators to see if an undertaking could be obtained, failing which a threat could be established sufficient to authorize approaching the court for injunctive relief.

(f) **Third, I am conscious that Mr Palmer has deposed that he sought, obtained and acted on legal advice and the legal advice should be regarded as independent legal advice. But, the manner in which the lawyer was briefed and the assumptions and instructions on which he was asked to act were not contained in the material. Further, despite giving multiple affidavits on other aspects of the application, the lawyer concerned did not address those questions or address the advice which he is said to have given. Absent that detail, I am not presently prepared to accept the proposition at face value**.

(g) **The plaintiffs invited me to find that the Martino Appointment and the Martino settlement deeds were all part of a concocted charade, which attempted to give the appearance of independence to a scheme over which Mr Palmer retained control. No such finding of fact should be made at this juncture, because (for reasons I have already explained) the present application is not the occasion for making anything other than a qualitative evaluation of the current state of the evidence, in advance of a full trial**.

(h) For present purposes it suffices to say that I conclude that the plaintiffs' case passes the threshold of being a good arguable case. My present qualitative evaluation of the strength of the case in favour of that relief is that it is a strong case.

Analysis of the correctness of the core contention

[63] The critical question for present purposes is what conclusions the fair-minded lay observer might reach about the idea that having reasoned in the way just revealed, I should also be the trial judge in the proceeding. It is significant that the trial of the proceeding will involve a consideration of the very matters in respect of which I had recorded that I found Mr Palmer's sworn evidence to be implausible. As had been foreshadowed, the defendants have in fact pleaded reliance on the Martino settlement deeds as giving rise to complete defences in this proceeding.

[64] The plaintiffs correctly identify the clarity with which I stated that I was undertaking a qualitative evaluation only; that I stated I was not making final determinations of fact in the way I would at a trial; and that I had made perfectly clear that I was assessing risk based on the evidence as it stood at a particular time. They contend, correctly, that I specifically declined to find that the Martino appointment and the Martino settlement deeds were all part of a concocted charade.

[65] The plaintiffs contend that it would inevitably be apparent to the fair-minded lay observer that I would bring to the resolution of any future issues an impartial and unprejudiced mind which would decide the issues according to their factual and legal merits.

[66] I would not have in fact had any difficulty in deciding the case at trial according to the factual and legal merits demonstrated at trial. The trial would be a different occasion from the previous interlocutory freezing order application and the outcome would necessarily turn on an examination of what happened on that different occasion. Experience tells me that perceptions of the facts reached at an earlier occasion are not necessarily those which ultimately obtain. One's appreciation of the facts can completely change at a trial after there has been a full opportunity for all parties to adduce evidence and a full opportunity to examine and cross-examine witnesses.

[67] But my own views as to my ability to decide each case on the factual and legal merits which exist based on the evidence before me on the occasion concerned are irrelevant, for present purposes. As the High Court observed in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 299, "What is in issue in the present case is the appearance and not the actuality of bias by reason of prejudgment". The question is whether the fair-minded lay observer **might** reasonably apprehend that I **might** not be able to bring the appropriate mindset to an issue or issues in the future.

[68] In my view the fair-minded lay observer might reasonably apprehend from the passages of the freezing order judgment discussed above that:

(a) I had found to be implausible (in the sense of not appearing to be true or credible[35]) Mr Palmer's sworn explanation of his conduct concerning the Martino appointment and the Martino settlement deeds.

(b) This finding was strongly adverse to Mr Palmer on an important issue.

(c) It was apparent that I had regarded that finding as an important part of the reasoning which led to my finding that a prudent, sensible commercial person could properly infer that the evidence suggested –

[35] The Macquarie Dictionary defines "implausible" as "not plausible; not having the appearance of truth or credibility".

(i) Mr Palmer had, and acted on, a positive intention to frustrate the possibility of any judgment against him, Mineralogy and other relevant defendants; and

(ii) Mr Palmer had, and acted on, a willingness to do so by illegitimate means.

(d) In turn those findings formed an important part of my reasoning leading up to the finding of the existence of the requisite real risk of frustration, which was a finding which I had said needed to be made on the balance of probabilities.

(e) Finally, the existence of the real risk formed an important part of my justification for the making of the freezing orders against Mr Palmer and his companies.

[69] In this case such an observer might reasonably apprehend that having expressed the view that I expressed about Mr Palmer's evidence in the passages I have identified, and given the significance of those particular passages to my conclusion, I might not bring an impartial and unprejudiced mind to the determination of future issues which involve whether Mr Palmer should be believed.[36] Particularly might that be so in relation to issues concerning the validity of the Martino appointment and the Martino settlement deeds and the credibility of Mr Palmer's evidence in relation thereto when those issues arose for full consideration at trial.

[70] That conclusion is sufficient to justify my recusal from hearing the trial.

Conclusion

[71] I accept the applicants' core contention concerning apprehended bias.

Other contentions concerning apprehended bias

[72] The applicants had other and subsidiary contentions concerning apprehended bias. In view of the fact that I have accepted their core contention, it is not necessary to deal with them.

Mr Palmer's separate submissions concerning actual bias

[73] Mr Palmer's submissions are a combination of a recapitulation of complaints previously made that I have not given him, as a self-represented litigant, the requisite assistance or consideration, and some new complaints, including that I must be taken to have prejudged issues which arise in the proceeding.

Issues connected with the fact that Mr Palmer is usually a self-represented litigant

[74] This is not the first time that Mr Palmer has contended that I should recuse myself from this proceeding, or that I have not given him, as a self-represented litigant, the requisite assistance or consideration.

[75] The relevant background is set out in two of my previous judgements:

(a) First, on 29 September 2017, during the course of the resolution of the application for a freezing order, Mr Palmer and other parties made an application for leave to adduce further evidence which I refused. I gave *ex tempore* reasons for that course. They have not been published online, but are contained in a revised transcript dated 29 September 2017.

(b) Second, on 17 October 2017, I dealt with two separate applications by Mr Palmer, again during the course of the resolution of the application for a freezing order. The first was an application that I should recuse myself from further involvement in the proceeding.[37] The second was an application that the further hearing of the freezing

[36] The same propositions apply in relation to the evidence of Mr Martino, but for the purposes of analysis it suffices to refer only to Mr Palmer.
[37] CFI 171.

order application scheduled to be heard on that and the following day be adjourned to a date to be fixed.[38] The second application was partially based on a contention that Mr Palmer should be permitted to adduce part of the evidence leave for which I had refused on 29 September 2017. I refused both the recusal application and the adjournment application: see *Parbery v QNI Metals Pty Ltd* [2017] QSC 231. It is convenient to refer to that decision as "the first recusal judgment". Mr Palmer lodged appeals in respect of those decisions, but subsequently agreed to orders dismissing the appeals. Submissions which he has previously made to me[39] suggest he might be revisiting complaints about those judgments on appeal from the freezing order judgment, but that is a concern for the Court of Appeal not me.

[76] Nothing which has been raised by Mr Palmer in written or oral submissions on his present application has caused me to form the view that I dealt with the applications other than fairly and appropriately, or that I denied him proper assistance. I remain of the views expressed in those two judgments. I particularly remain of the views I there expressed as to the peculiar nature of Mr Palmer's position as a self-represented litigant in this case. The decisions I made do not provide any foundation for a contention of actual bias.

[77] I add only the following observations.

[78] Mr Palmer's submissions regarded as emblematic of my actual bias and failure to give him proper assistance the incident dealt with in the first recusal judgment, namely that during the course of Mr Palmer's cross-examination in the hearing of the freezing order application, I raised a matter with counsel in the absence of Mr Palmer (who, as the witness being cross-examined, I had asked to step outside momentarily). The facts are explained in detail in the first recusal judgment and I will not repeat them here. Mr Palmer's argument then and now ignores these considerations:

(a) First, although he (being the witness) was, at my request, absent when I raised a matter in court, two sets of counsel representing two groups of his companies were present, all of whom, relevantly, had the same or substantially the same interest as Mr Palmer in the issues on which he was being cross-examined.

(b) Second, I mentioned the matter at the commencement of the following day of my own motion to address my expressed concern to ensure fair treatment to Mr Palmer and to seek submissions as to a proposal I had made in that regard.[40] No complaint had been made by Mr Palmer or anyone else about the incident the previous day.

(c) Third, I acceded to the proposal advanced by senior counsel for the joint venturers (with which Mr Palmer was apparently happy because he was present and made no complaint) that he could confer with Mr Palmer, and "effectively take instructions from him about the issue and then re-examine him on the topic". The joint venturers were the first two defendants and their interest was, as I have said, the same or substantially the same interest as Mr Palmer and Mr Palmer, after all, was a director and ultimate beneficial owner of each of them. No doubt that is why senior counsel expressed his proposal as "effectively taking instructions" from Mr Palmer.

(d) Fourth, my proposal, modified in the way suggested by the joint venturers, was implemented without complaint at the time.

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[38] CFI 173.

[39] For the purposes of the application which I dealt with in *Parbery v QNI Metals Pty Ltd* [2018] QSC 178, he placed before me his appeal submissions in respect of the freezing order judgment.

[40] See transcript (15 September 2017) T2-2 at lines 5-29.

[79] To my mind, rather than being emblematic of my actual bias and failure to give Mr Palmer proper assistance, the incident is emblematic of my bringing to bear a fair and unbiased mind to the issues before me and of my rendering proper assistance to Mr Palmer.

Mr Palmer's other arguments

[80] As the plaintiffs have emphasised, to support a finding of actual bias Mr Palmer must clearly prove by cogent evidence that I have an opinion relevant to a matter in issue in the proceeding and, critically, that I will apply that opinion without giving the matter fresh consideration in light of whatever may be the relevant facts and arguments.

[81] I agree with the plaintiffs' submission that there is no evidence from which any such finding could be properly made.

[82] It is necessary to deal specifically with only a few points.

[83] Mr Palmer submits, correctly, that I received a great deal of evidence and submissions between the leave to proceed judgment and the freezing order judgment. He then points to a consistency of language between what I wrote in some aspects of each judgment in order to justify the conclusion that I must be taken to have prejudged matters. The submission was in some respects bizarre (insofar as it relied on the instance in each judgment in which I used the same words to describe the same uncontroversial facts) and in other respects reflective of a failure to understand either judgment. As to the latter point, it was in fact clear from the freezing order judgment (at [133(d)]) that I explained that the leave to proceed judgment addressed a question which was different to that dealt with in the freezing order judgment. It was also clear from the freezing order judgment (at [123] to [128] read with [133(d)]) that, in reaching the conclusion I expressed in the freezing order judgment, I was in fact addressing some evidence that had been before me in the previous judgment and which was before me again in the freezing order judgment, but that I also was taking into account the further evidence since received, but now within the intellectual framework of the evaluation of whether the plaintiffs had established a good arguable case. Mr Palmer's argument must be rejected.

[84] Mr Palmer now discerns actual bias in the manner in which I dealt with the issues during the course of argument in relation to the leave to proceed judgment. He complains that an intervention I made in which I requested further submissions from the parties on whether the joint venturers had established a serious question to be tried, was emblematic of my actual bias. He argues that I invited the respondents to withdraw a concession they had made as to the existence of a serious question to be tried. What actually occurred was recorded by me in the leave to proceed judgment: see *QNI Resources Pty Ltd v Park* (2016) 116 ACSR 321 at [119] to [129]. Mr Palmer's submissions mischaracterize the events. But, in any event, as the plaintiffs correctly submit, I could not be bound by the concession, because of the very nature of the application. Moreover, the Court of Appeal judgment demonstrates the concession was correctly withdrawn. Finally, as I have already mentioned, the joint venturers (companies of which Mr Palmer was then and is still the ultimate owner) were represented by senior counsel and did not make any complaint that I had overstepped the bounds of propriety either to me, or, at least as far as one can discern from the appeal judgment, on appeal. Mr Palmer's argument must be rejected.

[85] Mr Palmer complains that I refused an adjournment sought by the joint venturers during the leave to proceed argument, that I allowed an adjournment sought by the plaintiffs during the freezing order argument, but that I refused an adjournment sought by him during the freezing order argument. The problem with that complaint is that it ignores the fact that the circumstances affecting the exercise of my discretion were different in each case. As to the first occasion, see *QNI Resources Pty Ltd v Park* (2016) 116 ACSR 321 at [128]. As to the second occasion, the plaintiffs correctly submit that the request for an

adjournment was properly made and granted in view of the fact that, on the day before the commencement of the application, the plaintiffs received from the defendants a further 16 affidavits, comprising many thousands of pages which senior counsel for the plaintiffs had not yet had the opportunity to read. As to the third occasion, that was dealt with in the first recusal judgment. The circumstances do not arguably support Mr Palmer's contentions.

[86] In my view, Mr Palmer's contentions concerning actual bias are baseless.

Conclusion

[87] I had, in my freezing order judgment, expressed a conclusion that Mr Palmer's sworn evidence on an important issue was implausible. I had, in that judgment, regarded that conclusion as an important part of the reasoning which justified an adverse outcome for Mr Palmer and his companies.

[88] Because it is likely that there will be very many issues at trial in which the question whether Mr Palmer should be believed will need to be resolved, including in relation to the very matters on which I thought Mr Palmer's evidence had been implausible, and in order to ensure that justice be seen to be done at the trial, I have decided that I should recuse myself from hearing the trial.

[89] I have done so, not because I have been persuaded by Mr Palmer's contentions that I am actually biased against him and his companies. Those contentions are baseless. I have done so, not because I have thought I should, as I was invited to do, exercise some form of discretion not to sit. No occasion to exercise a discretion presently arises and I express no view on how I would have exercised the discretion if it had arisen. I have done so, because in all the circumstances I have concluded it is my duty to do so, in order to ensure that justice be seen to be done at the trial of this proceeding.

[90] The judge who the Court has made available to take over this proceeding in the event that I recused myself is Jackson J, who is the other Commercial List judge. Although the applicants sought an order that the case be removed from the Commercial List and placed on the Supervised Case List, given the availability of Jackson J, no such order is appropriate.

[91] I make the following orders:

(a) Bond J be recused from hearing the trial of this proceeding.

(b) The proceeding will remain on the Commercial List but Jackson J will now be the Commercial List judge responsible for the management of the proceeding.

(c) Order 16 of the orders made on 27 July 2018 regarding the 3 day hearing before Bond J commencing on 8 October 2018 be varied to delete the reference to "Bond J" and to insert in lieu thereof "Jackson J".

(d) As to the orders made on 3 August 2018 –

(i) Order 11 regarding the trial date be varied to add, at the end of the sentence, "before Jackson J".

(ii) Direction 13 be varied to delete the reference to "Bond J" and to insert in lieu thereof "Jackson J".

(iii) Items 18, 23 and 28 of Schedule 2 to the order be varied to delete the reference to "Bond J" and to insert in lieu thereof "Jackson J".