SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Lerch & Ors* [2018] QCA 224
PARTIES:	**In Appeal No 3799 of 2017:** **OLGA DAY** (appellant) **v** **PROFESSOR JOHN HUMPHREY** (first respondent) **ASSOCIATE PROFESSOR TINA COCKBURN** (second respondent) **QUEENSLAND UNIVERSITY OF TECHNOLOGY** ACN 135 360 119 (third respondent) **WESLEY LERCH** (fourth respondent) **DAVID BRAY** (fifth respondent) **QUEENSLAND COMPENSATION LAWYERS PTY LTD** ACN 135 360 119 (sixth respondent) **In Appeal No 12360 of 2017:** **OLGA DAY** (appellant) **v** **PROFESSOR JOHN HUMPHREY** (first respondent/not a party to the appeal) **ASSOCIATE PROFESSOR TINA COCKBURN** (second respondent/not a party to the appeal) **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (third respondent/not a party to the appeal) **WESLEY LERCH** (fourth respondent) **DAVID BRAY** (fifth respondent) **QUEENSLAND COMPENSATION LAWYERS PTY LTD** ACN 135 360 119 (sixth respondent)
FILE NO/S:	Appeal No 3799 of 2017 Appeal No 12360 of 2017 SC No 5774 of 2016

DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – Appeal No 3799 of 2017: Unreported, 23 March 2017 (Daubney J); Appeal No 12360 of 2017: [2017] QSC 236
DELIVERED ON:	18 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2018
JUDGES:	Morrison and Philippides JJA and Brown J

ORDERS:

In Appeal No 3799 of 2017:

1. **The appeal is dismissed.**
2. **The appellant is to pay the respondents' costs of and incidental to the appeal.**

In Appeal No 12360 of 2017:

1. **The appeal is allowed.**
2. **Orders 3 and 4 made on 26 October 2017 are set aside.**
3. **The parties are to file any submissions on the appropriate costs order that should follow, limited to two pages, within 14 days of this order.**

CATCHWORDS: COURTS AND JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – REASONABLE APPREHENSION OF BIAS GENERALLY – where the appellant appealed against the decision of the learned primary judge to dismiss an application that his Honour recuse himself in the course of a protracted hearing of an application to strike out a claim and statement of claim on the basis of apprehended bias – where the appellant was self-represented – where there is no contention that the primary judge applied the wrong legal principles – where there were a number of complaints by the appellant about the conduct of the proceeding – where it is plain that the learned primary judge's patience was sorely tested on a number of occasions leading to responses which, if taken out of context, might be seen by a fair-minded lay observer as displaying a degree of exasperation, and in other cases forcing the appellant to the point in issue – where, however, the fair-minded lay observer would also be aware of the conduct of the appellant as the counterpoint to what was driving the learned primary judge's responses – where further, some of the matters which the appellant asserted during the course of the hearings were plainly wrong and, not surprisingly, resulted in a stern response from the learned primary judge – whether the learned primary judge was in error in not recusing himself from the hearing

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SETTING ASIDE – where the respondents were successful in receiving summary judgment in their favour in relation to an employment dispute with the appellant – where his Honour identified the basis for the application for summary judgment, namely that, apart from the claim for fraudulent misrepresentation, the claim against the respondents sought to recover damages for personal injuries which arose out of the appellant's employment with Queensland Compensation Lawyers, and that she was precluded from bringing such a proceeding because of her failure to comply with the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (WCRA) prior to instituting the proceeding – where at the hearing below, and before this Court, the appellant contended that there were factual disputes as to when her employment terminated and she contended that those disputes should be resolved at a trial – where given that the application was focussed on the fact that the appellant's case was restricted to being an employed worker as at 4 November 2013, the factual dispute affects the question whether it was appropriate to grant summary judgment – where there was no way that dispute could be resolved short of a trial, where the evidence could be tested, particularly as to the QCL parties' documents that stipulated that her employment ceased before 4 November 2013 – whether this was an appropriate case to grant summary judgment

Uniform Civil Procedure Rules 1999 (Qld), r 293

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited

COUNSEL: The appellant appeared on her own behalf
M Drysdale for the respondent

SOLICITORS: The appellant appeared on her own behalf
Queensland Compensation Lawyers Pty Ltd for the respondents

[1] **MORRISON JA:** Ms Day appeals against two orders made in the one set of proceedings. There were two distinct sets of defendants in those proceedings. I will

refer to them as the QCL parties,[1] and the QUT parties.[2] The QCL parties applied to strike out Ms Day's statement of claim. The QUT respondents were not party to that application.

[2] The first order appealed was the learned primary judge's dismissal of an application that his Honour recuse himself on the basis of apprehended bias. The second was to dismiss the proceedings against the QCL parties on a summary basis.

[3] The application to recuse was made in the course of a protracted hearing of an application to strike out the claim and statement of claim. I will deal with the full history of that hearing below, but for present purposes it suffices to say that on 21 February 2017, after two days upon which the application had been partly heard and a third when it was due to be continued but was adjourned because of Ms Day's illness, Ms Day filed an application that the learned primary judge recuse himself from the further hearing of the application on the basis of apprehended bias. On 23 March 2017, the learned primary judge dismissed that application, giving *ex tempore* reasons. The appeal against that order is CA No. 3799 of 2017.

[4] The application to strike out continued under various directions made by the learned primary judge, which included the hearing of an application for summary judgment by the QCL parties, and a further application that the learned primary judge recuse himself for apprehended bias. Those applications were eventually heard on 22 August 2017. The reasons for dismissing the proceedings against the QCL parties were delivered on 26 October 2017.[3] The appeal against that order is CA No. 12360 of 2017.[4]

[5] The grounds of appeal in each case are numerous, Ms Day's outlines are complicated and include affidavits with exhibits. Therefore it is not appropriate that the grounds be set out at this point. Rather, I will deal with such of them as are relevant in the course of the discussion of the various issues.

The nature of the proceedings

[6] The learned primary judge accurately set out the nature of the claims made in the proceedings, against the QCL parties as well as the QUT parties. It is convenient to adopt what was said:[5]

> "[1] This proceeding was commenced by a claim and statement of claim filed on 13 June 2016 by the plaintiff against the first, second and third defendants (collectively, "The QUT parties") and the fourth, fifth and sixth defendants (collectively, "The QCL parties"). The plaintiff claimed for:
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> '1. Damages for personal injuries, financial losses and damages caused by breach of contract and/or the negligence for which the first, second and third defendants are liable.

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1 The fourth, fifth and sixth defendants.

2 The first, second and third defendants.

3 *Day v Humphreys & Ors* [2017] QSC 236. (**Reasons below**)

4 That notice of appeal also included a ground that the learned primary judge erred in failing to recuse himself.

5 Reasons below, [1]-[2].

6. Damages for personal injuries, financial losses and damages caused by the misfeasance of the first defendant.

7. Damages for personal injuries, financial losses and damages for breach of contract and/or the negligence and/or breach of statutory duty for which the fourth, fifth and sixth defendants are liable.

8. Interest pursuant to the provisions of s 47 of the *Supreme Court Act* 1995 (Qld).

9. Costs.'

[2] As appeared on the face of this prayer for relief, the proceeding sought to pursue distinct claims against the QUT parties and the QCL parties respectively. So much is confirmed by reference to the statement of claim filed on 13 June 2016 which, under the heading "Incident 1", purported to plead a case for damages arising out of circumstances which were alleged to have occurred in the course of the plaintiff's enrolment as an external student in the Faculty of Law at the third defendant, and, quite separately under the heading 'Incident 2', purported to plead a case for damages caused by matters which allegedly occurred in the course of her employment by the sixth defendant."

The application to strike out

[7] On 15 May 2017 I heard an application by Ms Day for a stay of the proceedings pending her appeal in CA No. 3799 of 2017. That application was dismissed that day, with reasons delivered on 26 May 2017.[6] In those reasons I sought to comprehensively set out those parts of the hearings that would be relevant to a final consideration of that appeal, and therefore what appears below borrows heavily from those reasons. The learned primary judge's reasons are included where necessary.

Hearing on 25 January 2017[7]

[8] On 25 January, the application to strike out came before Dalton J in the applications jurisdiction. Her Honour decided she could not hear the matter, and it was referred to the learned primary judge.

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

[10] In the course of the hearing it became apparent that Ms Day was seeking further time to put in an additional submission on the strike-out. Responding to the learned

6 *Day v Humphrey & Ors* [2017] QCA 104.

7 Reasons below, [4]-[5].

primary judge's observation that she had been on notice that the application would be heard on 25 January and therefore had had plenty of time, Ms Day responded that she had not been provided with the QCL parties' outline of submissions until that morning, English was not her first language, and she was "quite not well today" because she was on painkillers. She sought an adjournment so that she could research the issues further and put in a further response. That included ascertaining whether or not she would amend the statement of claim which was the subject of the application.[8]

[11] In the course of discussion, Ms Day requested that she be permitted to put her submissions wholly in writing without appearing. His Honour demurred:[9]

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

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

Hearing on 27 January 2017[10]

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

Hearing on 10 February 2017[11]

[14] On 10 February, as had been previously foreshadowed, the learned primary judge was sitting in a criminal trial. The application came on again before his Honour at 2.00 pm. Each side provided outlines and read the affidavits upon which they relied. There was an unsuccessful attempt by the QCL parties to rely on an affidavit which had not been served on Ms Day.

[15] Shortly into the hearing two questions arose. First, contrary to what had been foreshadowed by Ms Day on 25 January, and contrary to his Honour's expectation, no amended statement of claim had been filed. Secondly, in Ms Day's outline filed that day, the learned trial judge identified that paragraph 5 was factually wrong.[12] Ms Day's response was to try and refer the learned primary judge to the transcript

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8 Appeal Book in 3799 of 2017 (**AB 3799**), 13 line 42.

9 AB 3799, 17.

10 Reasons below, [6].

11 Reasons below, [8].

12 AB 3799, 31. Paragraph 5 read: "Justice Daubney refused the Plaintiff's motion to file a written submission".

of the proceedings and to ask the learned primary judge to take a copy so she could read from it. His Honour then said:[13]

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

[16] Ms Day referred to the fact that she had filed a cross-application which was listed for 10 March 2017.[14] It emerged that the application had not made it to the Court file, nor had the QCL parties been served. Ms Day identified the relief sought in it which included a declaration that misrepresentations had been made by the QCL parties' filing of the application to strike out.[15] Ms Day continued:[16]

> "I also seeking their – to afford procedural fairness. … I'm seeking to provide a reasonable time for the parties to provide their submission in advance and to provide the opportunity to the plaintiff [Ms Day] to provide response to their submissions. I'm also seeking ---."

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

[18] The QCL parties then sought to rely on an email sent to Ms Day (via her husband), and Ms Day objected. In the course of discussion, Ms Day seemed to assert that she had objected that morning to the further hearing being brought before the learned

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13 AB 3799, 31 lines 29-45.

14 AB 3799, 32.

15 AB 3799, 32.

16 AB 3799, 33, lines 1-4.

primary judge.[17] She asserted that the learned primary judge had shown apprehended bias and had not afforded her procedural fairness.[18] She referred to the hearing on 25 January contending that she had been arguing with the learned primary judge on that day, that his Honour had "took up for the defendants", and refused to allow her to put further submissions in writing.[19]

[19] The learned primary judge then reiterated that 10 February was the day for the hearing of the application, and by that, Ms Day was receiving procedural fairness given that she had been granted an adjournment on 25 January and had not shown up on 27 January. Ms Day insisted that she needed to go through the new outline of submissions to make a response. At 2.22 pm the learned primary judge adjourned the further hearing until 5.00 pm to enable that to happen. At that point Ms Day said that she did not know "whether or not I will be feeling all right because I'm here in the courts from 9 o'clock [today]". The learned primary judge responded:[20]

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

[20] The hearing resumed at 5.00 pm. The learned primary judge referred to the factually incorrect aspect of Ms Day's outline, namely that on 25 January she had been refused leave to file written submissions. After a short time discussion resumed in relation to a letter which the QCL parties had sought to tender at the 2.00 pm hearing. The objection by Ms Day to its tender was maintained in this exchange:[21]

> "HIS HONOUR: Ms Day, do you say you will suffer prejudice if Mr Drysdale tenders ---
>
> MS DAY: I'm already – yeah ---
>
> HIS HONOUR: --- this document?
>
> MS DAY: Your Honour, I'm already suffering prejudice.
>
> HIS HONOUR: No, no, tell me what's the prejudice that you will suffer?
>
> MS DAY: Well, the prejudice – because it's their practice of filing and serving of the documents to the Court and serving on the plaintiff is – I consider is appalling.

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17 AB 3799, 36 line 27.

18 AB 3799, 36 lines 24-43.

19 AB 3799, 37 lines 13-15.

20 AB 3799, 39 lines 34-39.

21 AB 3799, 43 line 12 to 44 line 18.

HIS HONOUR: No, no, please ---

MS DAY: Yes.

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

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

…

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

MS DAY: Sorry?

HIS HONOUR: What you just said was a contempt of court.

MS DAY: On what basis, please?

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

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

[22] At one point the learned primary judge was questioning Ms Day about the statement of claim. Ms Day perceived that to be in some way partisan:[22]

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

HIS HONOUR: No, that's ---

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

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

MS DAY: Yes, it does.

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22 AB 3799, 48 lines 8-35.

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

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

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

MS DAY: Yes, yes.

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

[23] Shortly after that Ms Day complained that it was then after 5.00 pm and she had been at the court more than eight hours. Submissions continued on the nature of the cause of action which Ms Day had pleaded. That discussion then centred on the date when, according to Ms Day's pleaded case or the case she wanted to advance, her employment had terminated. His Honour pressed for an answer:[23]

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

MS DAY: In accordance with the defendant's.

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

MS DAY: He backdated that date.

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

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

HIS HONOUR: I want to know what you assert.

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

HIS HONOUR: Sorry?

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

[24] Ms Day's submissions continued as to the nature of her claim. During the course of that, Ms Day mentioned again that she was surprised that she "keep arguing with" the learned primary judge, and Ms Day raised again the question of procedural fairness.[24]

[25] In the course of submissions Ms Day complained that she had been at court since 2.00 pm, with no access to a computer and therefore no ability to research some

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23 AB 3799, 58 lines 6-27.

24 AB 3799, 61 line 29; 62 line 1.

points of law arising out of the opposition submissions. The learned primary judge pointed out that she had three hours, from 2.00 pm to 5.00 pm, to deal with the submissions, and that the hearing under way was the opportunity to make submissions. Ms Day responded that she was not able to provide submissions on some points. She went on to say that it was "so hard to function after 6 o'clock".[25]

[26] The learned primary judge then sought to ascertain the part of the submissions to which Ms Day said that she could not respond. Ms Day's initial answer was that she would like to provide further submissions.[26] The following exchange took place:[27]

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

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25 The entire exchange is at AB 3799, 69-70.

26 AB 3799, 73 line 1.

27 AB 3799, 73 line 31 to 74 line 15.

[27] Ms Day persisted with her submission that she needed further time, at the same time complaining that she had never seen a practice whereby an outline of submissions could be given to another party several hours before the court, and that party required to answer them "from the head".[28] His Honour then proceeded to identify which paragraphs of the opposing outline to which she intended to respond, and by what time. It is apparent from the transcript that at that point his Honour intended to adjourn the further hearing to a suitable day which would permit the lodging of further written submissions on disputed paragraphs, with those then to be addressed at a further hearing.[29]

[28] In the course of trying to ascertain precisely which paragraphs were those to which a response was needed, Ms Day complained that she was being treated harshly by counsel for the QCL parties, and that the learned primary judge's proposal to go through the submissions to identify those paragraphs was "unprecedented" and something she had never seen before.[30]

[29] As his Honour worked through the paragraphs, Ms Day also complained that she had been promised "procedural justice" and that she was feeling tired.[31] When the learned primary judge said that he was trying to help her by identifying the new paragraphs to which she needed to respond, Ms Day answered "No. I don't think so. You're just trying to make my life even harder …".[32]

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

[31] The steps that followed between then and the resumed hearing on 23 March are dealt with in the Reasons below, at paragraphs [9]-[12]. They included extensions of time limits, an amended statement of claim filed by Ms Day, and a directions hearing on 2 March 2017.

Hearing on 23 March 2017[33]

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

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

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28 AB 3799, 75 line 41.

29 AB 3799, 76-78.

30 AB 3799, 78 line 45, 79 line 9.

31 AB 3799, 80 line 25. The time was then 6.43 pm.

32 AB 3799, 82 line 4.

33 Reasons below, [14].

Ultimately the learned primary judge refused the tender of the documents on the grounds of relevance, but marked them for identification.

[34] In the course of her submissions, Ms Day characterised the conduct of the previous hearings as "excessive judicial intervention".[34] She characterised the disparity between herself and the applicants in this way:[35]

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

[35] At that point the learned primary judge intervened to correct the misstatement as to the hearing on 27 February. His Honour pointed out that no hearing of the application was conducted in her absence. Ms Day sought to contest that by reference to the transcript. As it happened, the transcript had not been exhibited to any affidavit. Ms Day maintained her position that a hearing had occurred, and contended that the matter should have been adjourned simply by noting it in the registry file. When the learned primary judge pointed out that Ms Day's submission exhibited a misunderstanding about the court's processes and procedures, Ms Day responded "I don't think so, with respect".[36]

[36] The hearing was adjourned until 2.32 pm, at which point Ms Day asked if she could provide the rest of her submissions in writing "because English is not my first language and I feel a bit tired because it was many interruptions".[37] The learned

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34 AB 3799, 101.

35 AB 3799, 101 lines 17-36.

36 AB 3799, 105 line 36.

37 AB 3799, 114 line 36.

primary judge maintained the position that there had been ample opportunity to respond to the submissions and that her opportunity to respond was in the hearing that day. Then followed this passage:[38]

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

[37] At the end of submissions the learned primary judge delivered his reasons for dismissing the application that he disqualify himself.[39] The learned primary judge then entertained submissions on the question of costs and gave his judgment on that

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[38] AB 3799, 116 line 33 to 117 line 31.

[39] AB 3799, 453.

issue as well. His Honour then resumed consideration of the directions needed to bring the part-heard strike-out hearing to a resolution. Those directions provided for various steps to be taken, and the adjourned hearing to be resumed in the week commencing 15 May 2017.

[38] As paragraphs [15]-[28] of the Reasons below reveal, following the hearing on 23 March 2017 there were further steps, which included:

(a) directions to the strikeout and any other application to be filed;

(b) the QCL parties filed an application seeking further orders as to the strikeout, and summary judgment as an alternative;

(c) Ms Day lodged the appeal in CA No. 3799 of 2017;

(d) two further hearing days (on 17 May and 12 July) were adjourned due to Ms Day's illness; and

(e) Ms Day filed a further application seeking that the learned primary judge recuse himself for apprehended bias.

[39] On 12 July 2017 directions were made to bring the applications on for final hearing on 22 August, and in the course of giving reasons for granting the opposed adjournment the learned primary judge said:[40]

> "… The history of the matter has now reached the point where enough is enough. The plaintiff has, as I have already noted, been given repeated indulgences by way of adjournments. This will be the last occasion on which that indulgence will be extended. I have already identified the prejudice being suffered by the other parties to this litigation and the more general prejudice being suffered as a consequence of the interference with the Court list and the blocking of other matters being listed for hearing."

[40] Ms Day then announced on 21 August that she could not attend on 22 August due to illness and she did not appear on the final hearing.[41]

Approach of the learned primary judge – *ex tempore* reasons 23 March 2017

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

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40 Reasons below, [26].

41 Reasons below, [27]-[30].

[42] The learned primary judge identified that the relevant principles were those in *Ebner v Official Trustee*:[42]

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

(b) the application for disqualification required two steps, the first of which was the identification of what was said that might lead a judge to decide a case other than on its legal and factual merit, and the second of which was an articulation of the logical connection between the matter and the feared deviation from the proper course;[43] and

(c) where objection was taken to a judge continuing to sit, then that objection "should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case".[44]

[43] The learned primary judge then identified the main points raised by Ms Day, reviewing each in turn:[45]

(a) that his Honour was a member of the Senate of the University of Queensland, and engaged in the management of the University; thereby his Honour had an interest in the outcome because the QUT parties were in the proceedings;

(b) his Honour had been an after dinner speaker at a conference where, at a different time, one of the QUT parties had presented;

(c) there was some kind of improper association between counsel for the QCL parties and his Honour because they had once been presenters at the same Queensland Law Society symposium;

(d) complaints about the conduct of the hearings, such as: (i) the hearing on 10 February was, from 5 pm, in closed court; (ii) the insistence on appearances to argue the application, rather than dealing with it on the papers; (iii) that his Honour was arguing the case for the QCL parties; (iv) improper interrogation of her; and (v) his Honour's use of improper tone and tenor in the hearings; and (vi) all of the foregoing demonstrating a lack of impartiality;

(e) denial of procedural fairness because a hearing was conducted on 27 January in her absence; and

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42 (2000) 205 CLR 337 at [6]; [2000] HCA 63. His Honour also relied upon *Isbester v Knox City Council* (2015) 255 CLR 135; [2015] HCA 20.

43 *Ebner* at [8].

44 *Ebner* at [19]-[20].

45 AB 3977, 456-460.

(f) that the learned primary judge's knowledge that Ms Day had made complaints about him to the Chief Justice and the Attorney-General would mean he could not fairly and impartially hear the application.

[44] The learned primary judge observed several times that Ms Day's complaints about the way the hearings were conducted exhibited a fundamental misapprehension as to the way in which courts operated, for example:

> "Much of the applicant's complaint as articulated in her argument before me today turns on the applicant's dissatisfaction with the manner in which she perceives the hearings of the other application have been conducted. As will appear from the transcript even of today's hearing, the applicant unfortunately labours under a number of fundamental misconceptions in relation to the way in which litigation is conducted in this Court.
>
> So, for example, the applicant herself and others connected with the applicant have asserted and repeatedly asserted, notwithstanding having been disabused about this notion, that a hearing that I conducted on 10 February from about 5 pm was conducted in closed Court. The applicant is simply wrong about that. She has been told that the hearing was not in closed Court. She has been told why it is that the hearing was not in closed Court; nevertheless, she continues to assert that and assert that fallaciously. For the record, it is apparent from the face of the transcript of the hearing of 10 February that the hearing that occurred from 5 pm that afternoon was not in closed Court.
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> The applicant also labours under a continuing misapprehension as to the nature and manner in which interlocutory hearings are conducted by this Court. The applicant appears to labour under a belief that, to suit her own convenience, matters will be conducted by rolling directions hearings with interlocutory applications such as this determined on the papers.[46]
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> …
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> The applicant also makes wide-ranging assertions variously described as questioning my degree of intervention in the course of her making submissions over the various hearings, asserting that I, amongst other things, was arguing the other side's case for them and that I was improperly interrogating her by descending into the arena. Once again, the applicant misapprehends and misunderstands the nature and purpose of oral argument as it is conducted before these Courts. On any application, it is for the applicant and the respondent to put their arguments. It is the duty of the Judge to ensure that the Judge understands the nature and extent of the submissions that are

46 AB 3977, 456 lines 15-36.

> being put by each party. That necessarily involves a Socratic dialogue between the Judge and the representatives of the parties or in the case of self-represented litigants the parties themselves.[47]

[45] The learned primary judge also dealt with Ms Day's criticisms of the way the hearings were conducted, and the assertion of lack of procedural fairness in this way:[48]

> "It is quite clear that the applicant does not like the tone or the tenor that has been used in the course of her interaction with me in the hearings to date. That is regrettable from the applicant's perspective, but it does not diminish, as I have already said, the necessity for a Judge in my position to understand and have a proper understanding of precisely what position a party is seeking to adopt and what submissions a party is seeking to make. If that means that I have needed to ask direct questions and that I have sought to be provided with direct answers, then, with respect, that is completely consistent with my performance of my role in adjudicating between the parties.
>
> In short, the applicant, despite repeatedly asserting that she had been the subject of procedural unfairness, failed, in fact, to point to any fact which supported that bold assertion. On the contrary, as I have already mentioned, the applicant has been given every opportunity that she asked for in the course of the hearing of the application to make further submissions.
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> Indeed, as I reminded the applicant in the course of argument today, on 25 January 2017, when I gave her the opportunity to make further submissions, I pointed out to her the fact that I was doing that in order to guard against even the possibility of her saying that she had not had the opportunity or that she had been denied the opportunity to say everything that she wanted to say. Accordingly, I do not consider that the applicant's assertions in relation to having suffered procedural unfairness have any proper basis for the purposes of the present application."

[46] As to the contention that lack of impartiality had been demonstrated by the manner in which the hearings had been conducted, the learned primary judge rejected it:[49]

> "Beyond that, the applicant made general allegations against me contending a lack of partiality and asserting that I did not and could not have an open mind with respect to the disposition of the pending application. She said that was manifested by the way in which argument was conducted in the course of the hearings to which I

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47 AB 3977, 456 line 43 to 457 line 7.

48 AB 3977, 458 line 25 to 459 line 1.

49 AB 3977, 460 lines 17-29.

> have referred. I have already addressed that, but again confirm that the applicant labours under a misapprehension in relation to the way in which hearings are conducted in this Court and the proper role adopted by Judges in ensuring that they, the Judges, have an understanding of what it is that the parties are actually seeking to submit in the course of their cases.
>
> To the extent that it is necessary for me to say it, I reject absolutely the notion that I am anything but completely impartial in dealing with the matters between … these parties, that is, the applicant and the QCL parties."

[47] His Honour concluded that he was satisfied that Ms Day "has not demonstrated any basis, let alone any proper basis, on which a fair-minded, lay observer might reasonably apprehend that I am not able to bring an impartial mind to the resolution of the matters which are pending before me".[50]

Discussion – CA No. 3977 of 2017

[48] There is no contention that the learned primary judge applied the wrong legal principles. Indeed, Ms Day's outline relies on *Ebner* and other authorities all to the same effect.[51]

[49] In her amended outline Ms Day identified a number of contentions as to the lack of impartiality:

(a) in the hearings on 25 January, 10 February and 23 March 2017 the learned primary judge displayed a "hostile, intimidating and discriminatory attitude towards the self-represented appellant, a refugee-woman from a non-English speaking background and a person who uses a waking [sic] aid";[52]

(b) his Honour used an offensive and intimidating tone, in marked contrast to that used with the QCL parties;[53]

(c) after the hearing on 10 February complaints were made to the Chief Justice, the Attorney-General and the Governor of Queensland about the learned primary judge; those complaints were not allowed to be tendered, and the learned primary judge was wrong to suggest that the responses to those complaints might be relevant;[54]

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50 AB 3977, 460 lines 37-40.

51 Appellant's amended outline, paragraphs 8-10.

52 Paragraphs 12 and 28.

53 Paragraphs 13 and 29.

54 Paragraphs 14-15, 43-44 and 50.

(d) the learned primary judge revealed he was favourably disposed to the QCL parties at the hearing on 25 January 2017, by interrogating Ms Day and giving guidance to counsel for the QCL parties;[55]

(e) the hearing on 10 February was held in closed court, and the learned primary judge's *ex tempore* reasons were not provided for publication to the general public;[56]

(f) during the hearings the learned primary judge expressed numerous disparaging comments towards Ms Day and a predisposition in respect of the matter;[57]

(g) his Honour failed to disclose a conflict of interest because of his Honour's role as a member of the Senate of the University of Queensland; concluding that his Honour did not have a management role in the University of Queensland, contrary to s 9 of the *University of Queensland Act* 1998 (Qld); and that his Honour may have an interest in the outcome of the case because of his involvement in the academic and teaching community and in the management of the University of Queensland ;[58]

(h) failing to conclude that a 2013 report to the Parliamentary Crime and Misconduct Commission in relation to the learned primary judge's complaint concerning the enrolment of the daughter of the University of Queensland Vice-Chancellor, was relevant to the application for disqualification;[59]

(i) ordering on 23 March 2017 that the QCL parties file a new application to strike out the statement of claim;[60] and

(j) failing to permit Ms Day to provide her submission on costs, and failing to take into consideration the objections about the lack of impartiality on the part of the costs assessors.[61]

Complaints about the conduct of the proceedings

[50] The contentions concerned with this area of complaint are encompassed in grounds 2-4 of the Notice of Appeal. Ground 4 contains 15 particular instances where it was said that the learned primary judge unduly intervened in the hearing of the application, or denied an opportunity to make proper submissions, displayed a lack of impartiality or discriminated against Ms Day. Summarised, Ms Day contended that the learned primary judge's conduct was hostile, intimidating, offensive, displayed

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55 Paragraphs 17-20.

56 Paragraphs 26-27 and 30.

57 Paragraph 35.

58 Paragraphs 40-42 and 48-49.

59 Paragraph 45.

60 Paragraphs 46 and 51.

61 Paragraph 47.

a discriminatory attitude, contained insulting and disparaging comments, and his Honour was constantly interrupting, chastising, and refuting her arguments.

[51] At the time of the application for a stay I carefully read through each transcript for the hearings of 25 January, 27 January, 10 February and 23 March 2017. I have done so again for the purposes of this appeal. I do not consider that the transcripts support the contentions made by Ms Day. In my reasons on the stay application I expressed my provisional conclusions on these issues. Having now heard the appeal and the arguments advanced by Ms Day, I consider my provisional views are largely applicable to the resolution of the appeal. That will be evident from what follows, where I have drawn upon what I then said.

[52] It is plain that the learned primary judge's patience was sorely tested on a number of occasions leading to responses which, if taken out of context, might be seen by a fair-minded lay observer as displaying a degree of exasperation, and in other cases forcing Ms Day to the point in issue. However, the fair-minded lay observer would also be aware of the conduct of Ms Day as the counterpoint to what was driving the learned primary judge's responses. It is plain that Ms Day found it difficult during the hearings to focus on the points in issue, and articulate her case on those points without complaint as to the fact that she was required to do so orally, rather than wholly in writing.

[53] Further, some of the matters which Ms Day asserted during the course of the hearings were plainly wrong and, not surprisingly, resulted in a stern response from the learned primary judge. For example, Ms Day persisted (then, as she did before this Court as well) with the contention that if a hearing went beyond 4.30 pm, it was therefore conducted in a closed court. As his Honour pointed out at the time, and in his reasons,[62] that view demonstrated a misapprehension as to the nature and manner in which interlocutory hearings are conducted in the Supreme Court.

[54] Another example was Ms Day's complaints during the hearing before the learned primary judge,[63] that she was being forced to respond orally, and to outlines of submissions delivered only at the start of the hearing, were entirely misplaced. Both are fundamental to the way in which the Supreme Court deals with interlocutory applications and manages its business, so that matters are heard in a fair, timely and cost effective way, consistently with the principles underlying the *Uniform Civil Procedure Rules* 1999 (Qld).

[55] Finally, Ms Day's repeated request to provide all her submissions in writing, with no oral hearing, also misapprehended the way in which interlocutory applications are dealt with. As the learned primary judge pointed out to her at one point, even if she provided her own submissions wholly in writing, it would still necessitate a further hearing to permit her opponents to respond. That Ms Day did not seem to be able to grasp that fundamental point, necessary to affording procedural fairness to her opponents, can only have been a source of frustration to his Honour.

[56] Ms Day contended that the learned primary judge engaged in hostile, intimidating and discriminatory conduct against her. I do not consider that to be so, nor do

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62 And as was done in the course of oral submissions on the appeal.

63 And repeated on the appeal.

I consider that a fair-minded lay observer, being aware of all that took place during the hearing and not taking comments out of context, would consider it so. It is true that the transcript reveals occasions of robust and even terse exchanges, but they usually related to the learned primary judge's questioning of Ms Day's submissions, seeking to clarify what her precise response was to the strike-out application. On some occasions Ms Day misconstrued the learned primary judge's conduct as being contrary to her interests, when that was not the case. In my respectful view, the fair-minded lay observer would conclude that his Honour was trying, albeit with differing and even increasing levels of frustration, to identify precisely what the issues were, so as to be able to consider their merit.

[57] Ms Day also contended that the learned primary judge used an offensive and intimidating tone, contrary to that used for the QCL parties. The prime examples put forward were matters said on 10 February 2017. The extracts are set out in paragraphs [15], [19], [20] above and [36] above.

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

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

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

(c) his Honour pointing out that paragraph 5 of Ms Day's outline was in error,[64] and Ms Day wished to contest it by reference to the transcript; that point had no relevance to the further hearing of the strike-out application as an outline had been filed for the 10 February hearing.

[59] It was in that context that the learned primary judge used the term "nonsense". As his Honour's reasons below reveal, that was directed at the "significant toing and froing between the parties … with respect to how the further argument on the matter would proceed".[65]

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

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64 It said that she had been refused permission to file a written submission when that was not the case.

65 Reasons, [7].

[61] Given these matters I do not consider that a fair-minded lay observer would conclude that there was any lack of impartiality in the exchange.

[62] The second and third examples (paragraphs [19] and [20] above) reveal no more than a judge trying to ensure that submissions on the issues were focussed and relevant. My provisional view at the time of the stay application was that those exchanges did not reveal anything that would indicate that the learned primary judge could not bring an impartial mind to the issues on the application to strike out. I adhere to that view, and I do not consider that a fair-minded lay observer would come to a different conclusion.

[63] Ms Day's contention as to the extract set out at paragraph [36] above should be rejected. That exchange occurred in the course of submissions on the application for the learned primary judge to recuse himself, and not during the course of the hearing concerning the strike-out. The basis of the application to recuse was the conduct of the learned primary judge in the hearing of the strike-out application. The fair-minded lay observer would appreciate that distinction. In any event, in my respectful view, the fair-minded lay observer would not draw an adverse conclusion based on that exchange given that Ms Day was making a submission that because she was a woman in a proceeding dominated by men, and because of her "less capacity as a woman to be in the court proceedings", it was more difficult for her to conduct a case and she was being discriminated against in terms of the Equal Treatment Benchbook. Ms Day made a similar submission before me on the application for stay and before this Court on the appeal. It is not surprising that his Honour rejected the proposition that because Ms Day was a woman she had a lesser capacity to conduct the proceedings, and that her gender was relevant to the way in which the hearing should be conducted. I am in no doubt that a fair-minded lay observer would come to the same view. Further, that sort of proposition and conduct on the part of Ms Day would be part of what the fair-minded lay observer would be aware, and therefore part of the context in which the learned primary judge's responses would be assessed.

[64] The other points raised by the notice of appeal were to the same effect, namely that the learned primary judge had intervened in a way which showed partiality to the QCL parties and exhibited overbearing and intimidatory conduct towards her. Having reviewed the transcript again I adhere to the provisional view formed at the time of the stay application. The transcript does not bear that out. There was undoubtedly a degree of intervention by the learned primary judge and, where appropriate, Ms Day was confronted with the consequences of her submissions. But a fair-minded lay observer would not, in my view, consider that the judicial intervention was intimidatory, undue, too enthusiastic such as to deprive Ms Day of an opportunity to make her submissions, lacking impartiality, or otherwise going beyond the bounds of propriety in terms of testing the arguments presented with a view to elucidating that which was genuinely in issue. Relevant to that assessment is that the fair-minded lay observer would have been aware of the conduct of Ms Day in advancing her points and resisting arguments put against her.

Procedural fairness

[65] For the reasons given above, I reject the contention that Ms Day was denied procedural fairness. The application on 25 January was adjourned so that she could make a further response. When the application resumed on 10 February, Ms Day had ample opportunity to make her points, and that hearing was also adjourned in

order to give her a further chance to respond. On each adjournment Ms Day was in a position where she could put in further written submissions and then address all relevant points orally.

[66] At the time of the *ex tempore* reasons on the recusal application the hearing of the strikeout application was yet to occur. On 10 February 2017 directions were made to bring the hearing to a conclusion. Orders 3-6 that were made on that day were for steps in relation to the filing of any application, affidavits and submissions to achieve that end. As paragraphs [14]-[28] of the Reasons below reveal, the application was the subject of further directions to bring it to a hearing, and on each occasion Ms Day was heard or given the chance to be heard.

[67] It is also to be noted that Ms Day represented herself on all occasions even though it seems she does not lack the capacity to engage legal representation. As the learned primary judge said:[66]

> "[28] The plaintiff did not appear at the hearing before me on 22 August 2017, either in person or by legal representative. The plaintiff has never suggested before me that she is unable to retain legal representation. Indeed, in an affidavit sworn on 24 January 2017 (Court document 6), the plaintiff said:
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> '55. On or about 20 June 2016 I advised Mr Lerch that I will be seeking the solicitors who will represent myself in the above matter. Since that time, I have made a number of enquiries to the solicitors who would not have any conflict of interest with the respondents and/or their legal representatives. I was not able to retain the solicitors who agreed to act on my behalf due to the fact that I was not satisfied with the terms of their agreements.'"

Conflict of interest

[68] Ms Day's contentions on this point are wholly without merit. As the learned primary judge stated in his *ex tempore* reasons, participation as a member of the University of Queensland Senate does not lead to any conflict of interest concerning the outcome of the strike-out application in this case. The Senate is a governing body, and whilst it has overall responsibility for the management of the University's affairs, it is not the executive management body. The fact that the overall proceedings involve a claim against the QUT parties is irrelevant to the issues on the strike-out application, given that they were never parties to that application. Ms Day's generalised assertions, made on the stay application and again on appeal, that somehow there was a conflict of interest because the University of Queensland and QUT had some joint projects, or close connections between their respective representatives, rises no further than mere assertion, wholly devoid of evidence.

[69] In this respect, as with many others, Ms Day did not focus upon the necessity to identify, as part of the test for apprehended bias, that there was a substantial reason

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[66] Reasons below, [28].

to think that the learned primary judge could not bring an impartial mind **to the question at issue**, namely whether the pleading should be struck out. That is a limited question which focusses on whether the pleading sufficiently identifies a justiciable cause of action.

[70] I do not consider that a fair-minded lay observer would conclude that the learned primary judge's membership of the University of Queensland Senate had any impact at all on his Honour's ability to bring an impartial mind to the issues on the application.

Letters of complaint and the CMC Report

[71] Ms Day's contentions on these points are wholly without merit. Ms Day's husband sent letters of complaint about the conduct of the learned primary judge to the Chief Justice, the Attorney-General, and the Governor. The fact that those complaints were made by Mr Day, not Ms Day, would be something known by the fair-minded lay observer. As Ms Day's husband and supporter, Mr Day is obviously partisan. That the learned primary judge knew that Mr Day had made a complaint would not, in my view, cause a fair-minded lay observer to think that the learned primary judge could not bring an impartial mind to the issue in question.

[72] Similarly, the complaint about the report by the Parliamentary Crime and Misconduct Commission lacks merit. As the learned primary judge pointed out in the course of argument, the report was consequent upon a complaint that the learned primary judge made, that the then Crime and Misconduct Commission was impermissibly conducting an investigation into him.[67] In my view, the fair-minded lay observer would consider the fact of the complaint to be completely irrelevant to whether the learned primary judge would bring an impartial mind to the issues on the strikeout.

Orders on 23 March 2017, and publishing the judgment

[73] Ms Day's contentions on these points lack merit. Though I pointed out in the reasons for refusing a stay that the contentions proceeded on a misapprehension as to the proper construction of the orders, they were maintained on appeal. Order 3 was that by a particular date the QCL parties "shall file and serve any application by [them] to strike out the amended statement of claim filed 22 February 2017". Ms Day contended that order displayed bias because it was the learned primary judge directing the QCL parties to file a new application, or giving guidance to them to do so. It was no such thing. It was simply an order that if the QCL parties intended to bring an application in respect of the amended statement of claim, that application had to be filed by a certain time.

[74] Ms Day's contention, that being forced to make oral submissions on costs rather than being allowed to do so in writing later reveals apprehended bias, should be rejected. The transcript reveals that Ms Day was given an opportunity to say what she wanted to say about costs. It is the case that she asked for time to put in a written submission about costs and that the learned primary judge insisted that she make her submissions on costs during that hearing. That does not constitute an error of law on the part of the learned primary judge, given that the apprehended

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[67] Transcript 23 March 2017, T1-43.

bias hearing was the consequence of Ms Day's application filed on 9 February, and the hearing was 23 March. Nor would, in my view, a fair-minded lay observer conclude that that shows an inability to bring an impartial mind to the issues.

[75] Ms Day contended that the learned primary judge did not permit her to make submissions about the lack of impartiality on the part of the costs assessors proposed by the QCL parties when they sought costs of the failed application to disqualify.[68] That contention cannot be sustained. Ms Day asserted before the learned primary judge that she would "like to enquire … whether or not they are independent", and said that she knew from her employment by the QCL parties that the assessors were "in commercial relationships" with the QCL parties. As the argument progressed, it became clear that the only relationship was that the QCL parties used that firm of cost assessors to undertake assessments on other files.[69]

[76] In my view, there was no reasonable basis to assert that the costs assessors might not perform their professional duty simply because they had been used by that firm of solicitors before. Nor would a fair-minded lay observer consider that the learned primary judge's rejection of that complaint exhibited a lack of impartiality. As his Honour observed at the time, if that were a proper basis for objection then no costs assessing firm in Queensland would be available.

[77] The contention that the learned primary judge erred in law by failing to publish the judgment online, together with the reasons for awarding costs, should be rejected as without merit. Even if those reasons were not published online, that was something which occurred in the context of the application to disqualify, not in the hearing of the application to strike out. In any event, Ms Day received the reasons. There is no possibility that a fair-minded lay observer would think it showed lack of impartiality.

Other grounds and the application to adduce further evidence

[78] There is no need to deal with the remaining grounds in the notice of appeal. They are either encompassed within the reasons above, or are such that they are even more meretricious than some dealt with above.

[79] Ms Day applied to adduce further evidence. The topic was dealt with in her amended outline under the heading "Allegations of Collusion and Corrupt Conduct". That which was sought to be tendered was said to be "documents and correspondence re: the allegations of the involvement of the court and judicial officers in collusion and corrupt conduct". The amended outline then named two solicitors (the fourth and fifth defendants) and the learned primary judge as those involved.[70] The material consisted of emails from the fourth defendant to Ms Day on 29 May 2017: (i) predicting that costs would be ordered against her; (ii) saying what the total of those costs might be, and that such orders would be enforced; and (iii) requesting that she pay the costs.

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68 Appellant's amended outline, paragraphs 52-58.

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

70 Appellant's amended outline, paragraph 2.1.

[80] Ms Day contended that some of the costs had not been assessed by an assessor with a practising certificate, but by an accountant in a firm (QCIS) which provided cost consulting services to the fourth defendant, that accountant being someone who regularly assessed costs for the sixth defendant, QCL. It was said that the fourth defendant's statement "was made in conformity with [the learned primary judge's] threats made to [Ms Day] at the court hearing on 23 March 2017 that she will be paying the costs of the respondents".[71]

[81] There is nothing in the point sought to be made. The "threat" on 23 March 2017 was no such thing. In the course of submissions by Ms Day, seeking an adjournment of the hearing, the learned primary judge put to the QCL parties[72] that the only prejudice they might suffer by reason of the adjournment would sound in costs.[73] Then his Honour said to Ms Day:[74]

> "HIS HONOUR: Well, Ms Day, what do you say about – you see, you can't have it always, Ms Day. Sooner or later things start to come back on you, in a practical sense. You are now asking for a further indulgence. The other side, if I grant that indulgence, will be put to extra costs. Why shouldn't you have to pay for that?"

[82] Plainly his Honour was simply asking whether or not Ms Day could provide a reason (or had a submission) as to why she should not have to pay the costs incurred by the QCL parties due to the adjournment. What was said then has, in any event, no connection with the emails sent on 29 May 2017. Regardless of other issues, the further evidence was irrelevant. That application should be dismissed.

Conclusion on CA No. 3799 of 2017

[83] All grounds having failed, the appeal in CA No. 3799 of 2017 should be dismissed, with costs.

Appeal in CA No. 12360 of 2017

[84] There were two aspects to the final hearing which resulted in the claim against the QCL parties being dismissed. The first was the second application that the learned primary judge recuse himself. The second was the application to strike out the claim, or for summary judgment. I intend to deal with the issues in that order.

Second application to recuse

Approach of the learned primary judge

[85] The learned primary judge once again applied *Ebner* as setting out the applicable principles. As to that there was no challenge from Ms Day.

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71 Appellant's amended outline, paragraphs 2.2, 47.

72 Who opposed the adjournment.

73 AB 3799, 118 lines 25-37.

74 AB 3799, 118 lines 43-46.

[86] As the learned primary judge acknowledged, in the second application there was a considerable degree of repetition of contentions from the first application.[75] His Honour correctly identified the only distinct additional matter:[76]

> "[33] The only further distinct matter raised on the present application concerned allegations made by the plaintiff in relation to my extra-judicial activities. In particular, the plaintiff referred to the fact that some years ago, in my then capacity as Queensland chair of a particular charitable organisation, I attended a fundraising function for the charity. The guest speaker at that function was the then mayor of a local authority who announced, in the course of his speech, a generous donation by the local authority to the homeless-relief works being undertaken by the charity. A media report of the fundraising event recorded that I had said that the generous donation left me "speechless". It also recorded me saying, in effect, that the reality was that the donation would help the charity in assisting the homeless people of the particular local authority.
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> [34] That former mayor is now facing criminal charges in another court, and has recently been the subject of extensive media scrutiny. In advancing this argument, the plaintiff also referred to the content of documents tabled in State Parliament under parliamentary privilege by a certain Member of Parliament."

[87] Ms Day had filed an affidavit which referred to her having lived within the former mayor's local authority area, and having corresponded with him on "quite serious issues" about excessive rates. She contended that "… in such circumstances the fair minded lay observer might reasonably apprehend that the judge might be prejudiced or not acting impartially … and that his Honour might not decide the case on its legal and factual merits due to his Honour's personal involvement in such fundraising activity."[77]

[88] However, his Honour recorded that:[78]

> "[36] Clearly, I had no knowledge of that previous contact between the plaintiff and the former mayor before it was raised in the context of the current application. Nor does the plaintiff assert that I had, or would have had any reason to have, such knowledge. And it is equally clear that any such correspondence between the plaintiff and the local authority in relation to such matters is completely irrelevant to the

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75 Reasons below, [32].

76 Reasons below, [33]-[34].

77 Reasons below, [35] and [37].

78 Reasons below, [36].

> proceeding which she has commenced against the QCL parties."

[89] The learned primary judge held that there was no basis upon which a fair minded lay observer would conclude that he could not bring an impartial mind to the issues in the applications.

Discussion – second application to recuse

[90] There was no contest as to the fact that the learned primary judge applied the correct legal principles.

[91] In coming to a view about impartiality, the fair minded lay observer must be taken to know that: (i) his Honour was at the function in his capacity as Chair of the charitable organisation; (ii) as such he responded to the donation from the local authority; and (iii) his Honour had no knowledge, until Ms Day mentioned it, that she had some dealings with the former mayor over rates issues prior to the proceedings before him. In such circumstances it is, in my view, impossible that the fair minded lay observer would conclude that the learned primary judge could not bring an impartial mind to the issues on the applications before him.

[92] In a passage with which I respectfully agree, the learned primary judge said:[79]

> "[40] Applying these principles to the present case, in order properly to seek my disqualification for apprehended bias, the first step would be for the plaintiff to identify what it is said might lead me to decide this case other than on its legal and factual merits. The highest that this goes is the plaintiff's bald assertion that I might not decide the case on its legal and factual merits because of my 'personal involvement in such fundraising activity'. The plaintiff does not, however, even attempt to advance an argument as to how it is that my personal involvement, on my own time, in a charitable endeavour could possibly cause any apprehension that I might be prejudiced or not acting impartially in relation to the determination of the current dispute between the plaintiff and the QCL parties. Nor has the plaintiff advanced any argument as to how the single incident of my involvement with the former mayor, in the circumstances described above, could possibly cause any apprehension to any person, let alone a 'fair-minded lay observer', that I might not bring an impartial mind to the resolution of the questions raised on the applications pending before me. In other words, the plaintiff has not identified what it is said might lead me to decide the applications before me other than on their legal and factual merits.

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[79] Reasons below, [40]-[41].

> [41] Nor, having regard to the second step identified by the High Court, has the plaintiff articulated any logical connection between the applications pending between her and the QCL parties and the 'feared deviation from the course of deciding the case on its merits'. There is simply no logical connection between my personal involvement in the charitable activity described above and the issues for determination between the plaintiff and the QCL parties."

[93] In my respectful view, the second application to recuse was correctly dismissed.

Further contentions on the appeal in CA No. 12360 of 2017

[94] On the appeal Ms Day also relied upon a contention that there was a denial of procedural fairness because the learned primary judge had not referred the applications to the "Supervised Case List Involving Self-Represented Parties".[80]

[95] The contention should be rejected. First, referral to that list is not mandatory. Secondly, the hearing was, at all relevant times, part-heard. Thirdly, ample opportunity was afforded to Ms Day to present her case. There was no denial of procedural fairness.

[96] Ms Day also contended that procedural fairness was denied by the learned primary judge: (i) ignoring a medical certificate, (ii) refusing her the chance to give a written reply to the QCL parties' oral submissions, and (iii) not providing her with a transcript of the hearing.[81]

[97] The contention based on medical certificates concerned the hearings on 27 January, 17 May and 12 July 2017. On each of 27 January and 17 May the learned primary judge adjourned the further hearing because Ms Day had sent a certificate in saying she was ill.[82] His Honour did not ignore the certificates. The hearing on 12 July was preceded by the course of steps, directions and adjournments referred to in the Reasons below at [15]-[24]. On 11 July Ms Day sent a certificate in saying she was unwell and could not appear on 12 July. The adjournment she sought was opposed. As a result further directions were made on 12 July, granting Ms Day the indulgence of another adjournment and for the eventual hearing on 22 August. Plainly the certificate was not ignored.

[98] The contention as to being denied the chance to address a written reply to the QCL parties' oral submissions relates to the hearing on 23 March 2017.[83] Ms Day sought to respond to the QCL oral submissions by a further written submission. That was opposed by the QCL parties. The learned primary judge pointed out that the consequence of granting that request would be a further adjournment because the QCL parties might need to respond, and there were cost implications if an adjournment were granted. Ms Day then agreed to continue with submissions orally, and did so. Even

80 Appellant's outline in CA No. 12360, paragraphs 3-6.

81 Appellant's Supplementary outline, paragraph 4.

82 Reasons below, [6], [20]-[21].

83 The relevant passages are at AB 3799, 114-121.

accepting that Ms Day is not as fluent in English as in Russian, she made her points. In the circumstances there was no denial of procedural fairness.

[99] The contention that she was not provided with the transcript seems to relate to the hearing on 23 March 2017. It could have been obtained if it was needed, but in any event it did not hinder the filing of a notice of appeal. This contention does not give rise to a lack of procedural fairness.

[100] These additional grounds are without merit.

Application for summary judgment

[101] On 22 August 2017 the QCL parties sought summary judgment on the claim against them, pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld). The submission advanced was that on any view the causes of action against the QCL parties had no prospect, or no real prospect, of success.

The pleaded claim

[102] The pleaded cause of actions against the QCL parties were summarised by the learned primary judge in a way not criticised on the appeal, and which I am able to adapt below.[84]

[103] The fourth defendant (**Lerch**) and fifth defendant (**Bray**), who were solicitors practising in personal injuries law, were directors of the sixth defendant (**QCL**) and involved in its daily management, including decisions in relation to human resources.[85]

[104] QCL, a company, employed Ms Day pursuant to a contract of employment.[86] Ms Day was employed "on a part time or continuous basis as a precedent manager", worked on Tuesdays and Thursdays due to her study commitments, created, updated and developed a system of legal precedents for QCL, and was involved in marketing with Russian-speaking clients.[87]

[105] Paragraph 47.1 of the ASOC then pleaded:[88]

> "47.1
>
> (a) From 3 October 2012 until 5 December 2012 Ms Day was employed by QCL on a casual basis.
>
> (b) The employment contract dated 3 October 2012 contained the essential term requiring either party upon termination of employment to give one (1) week termination notice.

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84 Reasons below, [61].

85 Amended Statement of Claim (**ASOC**) paragraphs 43, 44 and 45.

86 ASOC paragraph 46.

87 ASOC paragraph 47.

88 Adopting identifying names.

(c) On or about 6 December 2012 Lerch offered Ms Day an ongoing (part-time) employment with a pay rise and commendations.

(d) In or about December 2013 Ms Day accepted Lerch's offer for further employment with QCL

(e) On or about 18 July 2013 Lerch provided specific terms of the ongoing contract with Ms Day by her request.

(f) On or about 19 July 2013 Ms Day accepted Lerch's specified terms of a part-time employment with the following terms:

(i) starting and finishing time, being 8:30am to 5:00pm;

(ii) Ms Day's hours of work were determined in advance, being 2 days a week – every Tuesday and Thursday.

(g) There was a mutual expectation of continued employment by amending and developing QCL's system of precedents and attracting Russian speaking clients.

(h) In or about 13 June 2013 Lerch requested Ms Day to participate in QCL's staff performance review, which was held for the permanent employees, with the appointed next date for review in one year period, i.e. on 13 June 2014.

(i) By request of Lerch, Ms Day was actively involved in marketing among Russian-speaking population in Queensland.

(j) By request of Lerch, Ms Day:

(i) translated the whole content of QCL's website into the Russian language;

(ii) translated and placed a number of QCL's advertisements in English and Russian language among a number of Russian businesses and communities in Brisbane, Gold Coast and Sunshine Coast;

(iii) organised the meeting for Lerch with the President of the Queensland Russian Community Centre ("the QRCC");

(iv) organised QCL's corporate membership with the QRCC;

(v) organised and scheduled the interview with Mr Gosse, the convenor of the Russian Radio SBS for promoting QCL's business interests among the Russian-speaking population in Queensland;

(vi) compiled a list of the Russian-speaking doctors practising in Queensland;

(vii) tried to organise the personal meetings of Lerch with the Russian-speaking doctors with purpose of seeking referrals of the Russian-speaking injured people to Lerch's and Bray's business;

(viii) assisted Lerch with interpretation and organising the meetings with a number of the Russian-speaking injured people, i.e. Lerch's clients.

(k) Lerch's advertisements contained the statement that QCL's business has a Russian-speaking employee.

(l) QCL did not have any other Russian-speaking employees employed in 2012-2013 other than Ms Day, who speaks Russian."

[106] On 19 August 2013, Ms Day advised Lerch that she was suffering a reoccurrence of PTSD due to her dispute with the first defendant.[89]

[107] In August 2013, while on sick leave, Ms Day emailed to Lerch her "notice of resignation due to her sickness".[90] Lerch invited Ms Day to reconsider her decision to resign.[91] Ms Day accepted that invitation and retracted her resignation notice.[92]

[108] Ms Day advised Lerch that, due to her sickness, she was unable to return to work until 16 September 2013 and provided a medical certificate.[93] Lerch assured Ms Day that he would not say anything to anyone and confirmed that Ms Day could return to work on or about 16 September 2013.[94]

[109] The ASOC then pleaded the terms which Ms Day contends were implied in her contract of employment, namely:[95]

"(a) act in good faith toward Ms Day;

89 ASOC paragraph 48.

90 ASOC paragraph 49.

91 ASOC paragraph 49.

92 ASOC paragraph 51.

93 ASOC paragraph 52.

94 ASOC paragraph 53.

95 ASOC paragraph 55; adopting identifying names.

> (b) take all reasonable precautions for the safety of Ms Day while she was engaged upon her employment;
>
> (c) not expose Ms Day to any risk of damage or injury of which it knew or ought to have known;
>
> (d) adopt necessary changes in work methods;
>
> (e) take reasonable care for Ms Day's safety while she was working including to guard against the possibility that Ms Day might act inadvertently or through misjudgement;
>
> (f) adopt obvious and inexpensive remedial measures to avoid foreseeable risks of injury to Ms Day."

[110] The ASOC then pleaded, in addition or alternatively, other duties Ms Day relied upon. One was that the QCL parties owed her a duty of care to the same effect as the terms implied in her employment contract.[96] The second was that the QCL parties owed her a duty of care:[97]

> "… pursuant to section 19 of the *Workplace Health and Safety Act 2011* (Qld)", namely:
>
> (a) to provide any information, training, instruction or supervision that is necessary to protect all persons from risk to their health and safety arising from work carried out as part of the conduct of the business or undertaking;
>
> (b) to ensure the workplace health and safety of the plaintiff in the conduct of the business or undertaking;
>
> (c) to provide information, instruction, training and supervision to ensure health and safety."

[111] On 4 November 2013, while Ms Day was on sick leave, Lerch "advised Ms Day that her employment contract was terminated without providing any exact date of termination and/or notice of termination".[98]

[112] Ms Day then asserted that her injury, namely an aggravation of her existing PTSD and depression disorders that occurred on 4 November 2013 when she was advised her employment contract had been terminated, "was caused by breach of contract and fraudulent misrepresentation by [Lerch] and [QCL]", and provided the following details of such alleged breaches:[99]

> "1) failing to take all reasonable precautions for the safety of Ms Day and adopt necessary changes in work methods by

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96 ASOC paragraph 56.

97 ASOC paragraph 57.

98 ASOC paragraph 54.

99 ASOC paragraph 58; struck through words in original; again adopting identifying names.

failure to offer to the sick Ms Day any reasonable adjustments to Ms Day's work conditions, including changes for Ms Day's working time, tasks and demands.

2) acting in disregard of Ms Day's legitimate interests by terminating her employment contract during her sick leave without providing Ms Day any termination notice.

3) failing to act in good faith by providing Ms Day with a number of the employment separation certificates containing misleading statements, which prevented Ms Day from pursuing her rights under the industrial legislation.

~~Particulars~~

a) The employment separation certificate issued by Lerch on 24 January 2014 shows that the date of Ms Day's termination of employment was 12 August 2013.

b) The employment separation certificate issued by Lerch on 30 January 2014 shows that the date of Ms Day's termination of employment was 13 November 2013.

c) The employment separation certificate issued by Lerch on 17 February 2014 shows that the date of Ms Day's termination of employment was 23 August 2013.

d) Lerch kept Ms Day's profile on the company's website at least until mid-January 2014, even though the company's website was updated on a regular basis by removing old and adding new employees' public profiles.

4) failing to avoid an exposure of Ms Day to a risk of damage and injury of which Lerch knew or ought to have known by terminating Ms Day's employment at the time of her suffering a psychiatric injury.

~~Particulars~~

a) On 19 August 2013 at the personal meeting with Lerch Ms Day advised him about a reoccurrence of the plaintiff's PTSD which occurred when her husband was stabbed and provided the medical certificate certifying that condition.

b) On 25 August 2013 Ms Day sent a copy of the same medical certificate to Lerch by email.

c) In November 2013 Lerch was warned that it was unlawful to terminate Ms Day's employment due to her absence because of her illness.

d) Lerch was and is a personal injury lawyer who was working with the injured clients and ought to have known that the injured Ms Day was extremely vulnerable to any further psychiatric injury.

5) failing to take any positive steps towards incident's (sic) prevention by failing to keep Ms Day's employment until her recovery and/or by engaging another person on a temporary basis or by allocating Ms Day's tasks to other workers.

6) failing to adopt obvious and inexpensive remedial measures to avoid foreseeable risks of injury to Ms Day by providing necessary support to Ms Day, and/or providing the truthful information in the employment separation certificates and/or reinstating Ms Day to her former position."

[113] The ASOC then pleaded:[100]

"1) On 23 August 2013 Lerch invited Ms Day to reconsider her resignation of 23 August 2013 by stating: '… You are a very valuable member of our team. Would you like some time [to] reconsider? I won't say anything to anyone for now.'

2) On 25 August 2013 Ms Day effectively retracted resignation by stating: 'Thank you very much for your kind email of last Friday, 2 August 2013. Yes, indeed, I would like to continue to work for your company.'

3) On 25 August 2013 Ms Day enclosed a copy of the medical certificate of Dr Efimoff and stated that Ms Day would not be able to work until 16 September 2013.

4) On 27 August 2013 Lerch confirmed that Ms Day would return back to work by stating: 'Ok, thanks Olga, I will not say anything to anyone (except Jess Stewart) in the interim. Hopefully you will be ok to return on or about 16 Sept.'

5) On 29 August 2013 Ms Stewart, [the legal practice manager of Lerch, Bray and QCL], sent her email to Ms Day stating: 'Wes told me that you were still unwell … I hope you will be alright. Make sure you take some time out to look after yourself and you will be back on track in no time!'

6) On 16 September 2013 Lerch stated in his email: '… I am really sorry to hear that you are still unwell. Please do keep me posted on your recovery. If there is anything we can do than please let us know.'

[100] ASOC paragraph 58.1. Again adopting identifying names.

7) On 16 September 2013 Ms Day stated in her email to Lerch: ‘Thank you very much for your kind email. I’ll keep you informed on my recovery. I hope my health will improve soon.’

8) On 25 September 2013 Lerch asked Ms Day: ‘Olga, would you understand if I was to advertise for a precedents manager?’

9) On 1 November 2013 Ms Day sent to Lerch the medical certificate dated 27 October 2013 certifying that she would be not able to work until 27 January 2014.

10) On 4 November 2013 Lerch sent the email stating: ‘There is no need for Olga to provide these medical certificates, because as I understand things Olga’s employment with QCL has ended.’

11) Lerch made a number of the misleading statements described in paragraphs a), d), e), f), k) above and provided misleading documents described in paragraphs 3)a); 3)b); 3c) and 3)d) above.

12) The misleading statements or representations are affected by malice and ill will in order to induce Ms Day into believing that her employment was continued after 23 August 2013, i.e. after the date when Lerch, Bray and QCL terminated (or backdated) the employment with Ms Day.

13) Lerch acted in a manner which involves misrepresentation of facts, dishonesty, fraud and deceit.

14) Lerch had knowledge of the falsity of his statements or representations to Ms Day.

15) The misleading statements and representation were made by Lerch with the intention that Ms Day will rely on it.

16) Ms Day relied on such misleading statements and representation.

17) Ms Day suffered damages and financial losses, including damages for physiological injuries suffered as a result of such misrepresentations.”

[114] Ms Day averred that the risk of her injury was foreseeable because Lerch and Bray knew or ought to have known of the “risk of aggravation of [Ms Day’s] psychiatric injuries”,[101] that the risk of injury was not insignificant, and that the QCL parties failed to take reasonable precautions against a risk of harm to her.

[115] Further or alternatively, Ms Day pleaded her injury was caused by a breach of duty by the QCL parties, namely “in breach of section 19 of the [*Workplace Health &*

[101] ASOC paragraphs 59, 60 and 61.

Safety Act 2011 (Qld)] to ensure the safety of the plaintiff is not put at risk from work carried out as part of the conduct of the defendants' business or undertaking".[102]

[116] It was pleaded that as a result of the breach of the implied terms of the employment contract and/or the negligence and/or the breach of statutory duty, Ms Day "sustained further aggravation of her PTSD symptoms, major depression and anxiety disorders".[103]

[117] The ASOC then pleaded that the parties had complied with all of the requirements of the *Personal Injuries Proceedings Act* 2002 (Qld) (**PIPA**).[104]

[118] Ms Day claimed in the alternative, "the financial loss and damage against the fourth, fifth and sixth defendants occurred as a result of breach of the employment contract".[105] Under this claim, she contended that Lerch terminated her contract in August 2013, and claimed for the money she says she would have earned in employment with QCL from that time until January 2030, being the time when she would have retired at the age of 67. On a discounted basis, she assessed that lost income at $307,479.

Approach of the learned primary judge

[119] The learned primary judge set out the relevant correspondence between the QCL parties and Ms Day in chronological order and at some length.[106] His Honour then identified the basis for the application for summary judgment, namely that, apart from the claim for fraudulent misrepresentation, the claim against the QCL parties sought to recover damages for personal injuries which arose out of Ms Day's employment with QCL, and that she was precluded from bringing such a proceeding because of her failure to comply with the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (**WCRA**) prior to instituting the proceeding.[107]

[120] His Honour also identified the basis of Ms Day's opposition to the application:[108]

(a) when she sustained her injury she was not a "worker" within the meaning of that term under the WCRA, and it was not an "injury" within the meaning of that term under the WCRA;

(b) the QCL parties terminated her employment on 23 August 2013, but she suffered her injury as a result of the "incident" on 4 November 2013 when Lerch notified her that her employment had ended;

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102 ASOC paragraph 62.

103 ASOC paragraph 64.

104 ASOC paragraph 65-66.

105 ASOC paragraph 68.

106 Reasons below, [65]-[101].

107 Reasons below, [103].

108 Reasons below, [104].

(c) in any event, the parties having engaged in and completed the procedures prescribed by PIPA, the QCL parties were estopped from asserting that "*PIPA* does not apply to the plaintiff's proceedings as she should have complied with the pre-court proceedings under the *WCRA*".

[121] The learned primary judge examined the WCRA and concluded that it applied and that Ms Day had not complied with it before instituting the proceedings. His Honour held, relying on *Glenco Manufacturing Pty Ltd v Ferrari & Anor*,[109] that there was no estoppel available.[110] On the fraud claim, his Honour noted that Ms Day's case did not assert any oral misrepresentation, but confined the case to what was said in the correspondence. His Honour concluded that a review of the correspondence revealed that none of the statements by the QCL parties could be described as false representations.[111]

[122] His Honour expressed his ultimate conclusion in these terms:[112]

> "[154] The QCL parties have now moved for summary judgment. In considering this matter, I am well aware of the appropriate caution with which one should approach consideration of summary judgment applications, which should only be allowed under the *UCPR* if the Court is satisfied that the respondent (in this case, the plaintiff) has no real prospect of succeeding on her claim. For the reasons given above, and to adopt the words used by the High Court[113], I consider that there is a high degree of certainty that the ultimate outcome of the proceeding against the QCL parties if it were allowed to go to trial in the ordinary way would be that the plaintiff would not succeed against those parties."

Submissions

[123] Ms Day submitted that the relevant test for summary judgment was that identified in authorities such as *Spencer v The Commonwealth*,[114] *Fancourt v Mercantile Credits Ltd*,[115] and *General Steel Industries Inc v Commissioner for Railways (NSW)*.[116] That required that there be no real question to be tried, or that the case was so

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109 [2005] 2 Qd R 129 at [7]; [2005] QSC 5.

110 Reasons below, [139].

111 Reasons below, [145]-[152].

112 Reasons below, [154].

113 *Agar v Hyde* (2000) 201 CLR 552, per Gaudron, McHugh, Gummow and Hayne JJ at [57]; [2000] HCA 41; *Rich v CGU Insurance Ltd* (2005) 79 ALJR 856 at [18]; [2005] HCA 16.

114 (2010) 241 CLR 118; [2010] HCA 28.

115 (1993) 154 CLR 87; [1993] HCA 25.

116 (1964) 112 CLR 125 at 130.

untenable that it cannot possibly succeed. Put another way, the test is that there be no need for a trial.[117]

[124] It was submitted that there were a number of facts in dispute that prevented summary judgment being appropriate and warranted a trial. They included the date when her employment was terminated, and whether that was in November 2013 or earlier. Ms Day pointed to what she said were contradictory submissions, affidavits and Employment Certificates issued or filed by the QCL parties. Further, whether Lerch was aware that Ms Day suffered from PTSD. In that regard she pointed to contradictory evidence from Lerch and herself.

[125] For the QCL parties, it was submitted that there was no error as: (i) the finding on the applicability of the WCRA turned on the case as pleaded, there was no contention that his Honour misstated the facts, and no contention that the Act had been complied with; (ii) no error of law was made with reference to the estoppel finding or the finding on the fraud claim; (iii) there was no dispute that the relevant facts were documentary, not oral; and (iv) the correct legal principles had been applied, referring to *Agar v Hyde*,[118] *Deputy Commissioner of Taxation v Salcedo*[119] and *Palermo v National Australia Bank Ltd*.[120]

Discussion

[126] The primary basis upon which the learned primary judge disposed of the summary judgment application was that upon Ms Day's pleaded case her claim was one for personal injuries arising out of her employment, and therefore she was prevented from pursuing it because she had admittedly not complied with the WCRA. His Honour noted that to be the basis of the application by the QCL parties.[121]

[127] As the learned primary judge observed, the case pleaded by Ms Day was (at least in part) based upon her contract of employment with QCL. Thus the ASOC pleaded:

(a) at all material times to the action she was employed by QCL: paragraph 3(b);

(b) she was employed on a part-time or continuous basis; on a casual basis from 3 October 2012 until 19 July 2013, and then continuous part-time: paragraphs 47 and 47.1(a) and (f);

(c) during her sick leave she emailed a resignation notice, but then retracted it on Lerch's invitation to do so: paragraphs 49-51 and 58.1(2);

(d) during her sick leave, on 4 November 2013 QCL advised that her employment was terminated: paragraph 54;

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117 *Mirvac Queensland Pty Ltd v Horne & Ors* [2009] QSC 269 at [18]; *Bolton Properties Pty Ltd v J K Investments (Australia) Pty Ltd* [2009] 2 Qd R 202; [2009] QCA 135 at [2].

118 (2000) 201 CLR 552; [2000] HCA 41.

119 [2006] QCA 227; [2005] 2 Qd R 232, at [11]-[17].

120 [2017] QCA 321.

121 Reasons below, [112].

(e) the contract of employment contained implied duties to take care for her safety: paragraph 55;

(f) her injury was caused by a breach of the contract; particulars of that were that her employment was terminated during her sick leave, and separation certificates issued showing three different dates of termination (12 August 2013, 23 August 2013 and 13 November 2013): paragraph 58;

(g) misleading statements were made so as to induce her to believe that her employment had continued after the date when it was terminated, namely 23 August 2013.

(h) the termination of her employment during sick leave had a detrimental effect on her health: paragraphs 60 and 61(2);

(i) the personal injury was caused by a breach of the implied terms of the employment contract: paragraph 64; and

(j) alternatively, financial loss was caused by a breach of the employment contract: paragraph 68.

[128] That said, there were other causes of action pleaded, such as breach of the statutory duty imposed under s 19 of the *Workplace Health and Safety Act* 2011 (Qld): paragraphs 57, 62, 64 and 67. The learned primary judge did not deal with those claims separately but treated them as part of the claim arising out of employment.[122]

[129] For present purposes it may be accepted that if the claim brought by Ms Day was one for damages arising out of her contract of employment, i.e. against her employer as such, then she would be prevented from bringing that claim if she did not comply with the relevant provisions of the WCRA. However, that does not, in my respectful view, dispose of the application for summary judgment nor the appeal.

[130] Ms Day's submissions on the hearing below advanced a case that at the relevant time of injury, 4 November 2013, she was not then employed by QCL. Though that was inconsistent with the pleading, and with other parts of her written submissions below, nonetheless she urged that she wished to pursue that case. The learned primary judge noted her submission that she did not have to comply with the WCRA,[123] and, as part of her contentions on that issue, the submission made on 27 January 2017:[124]

> "The date of the incident is 4 November 2013 when [Lerch] notified [Ms Day] that her employment has ended despite the fact that on 25 August 2013 [Ms Day] withdrew her resignation upon [Lerch's] invitation made on 23 August 2013."

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122 Reasons below, [118].

123 Reasons below, [113].

124 Reasons below, [114]. Citations omitted.

[131] Then, the submissions referred to documents from QCL, including a statutory declaration, naming 23 August 2013 as the date when her employment terminated. The submission went on:[125]

> "1.13. The injury suffered by [Ms Day] on or about 4 November 2013 does not 'an injury' in the meaning of section 32 of the WCRA and section 6 of the PIPA as:
>
> 1) [Ms Day's] injury is not arising out of, or in the course of employment;
>
> 2) [Ms Day's] employment is not the major significant contributing factor to the injury as her aggravation of the PTSD was a secondary precipitant.
>
> 1.14. The date of the incident is 4 November 2013 when [Lerch] notified [Ms Day] that her employment had ended despite the fact that on 25 August 2013 [Ms Day] withdrew her resignation upon [Lerch's] invitation made on 23 August 2013."

[132] Then, under the heading "Does the WCRA apply to the Plaintiff's Claim", the submission was made:

> "2.1. The Statutory Declaration sworn by [Lerch] on 9 January 2015 in response to [Ms Day's] request under section 27 of the PIPA states that the employment contract with Ms Day ceased on 23 August 2013.
>
> …
>
> 2.4. The Employment Separation Certificate, which was issued on 14 February 2014, also confirmed that [Ms Day's] employment contract was terminated on 23 August 2013. Therefore, at the date of the incident, i.e. 4 September 2013, [Ms Day] was not 'a worker' in the meaning of the WCRA. Therefore, the WCRA does not apply to [Ms Day].
>
> 2.5. The relevant Act is the PIPA, with which [Ms Day] and [Lerch, Bray and QCL] duly complied.
>
> 2.6. Therefore, [Ms Day] was not 'a worker' in the meaning of section 11 of the WCRA as her employment was terminated by the [respondents] on their own motion on or about 23 August 2013."

[133] The learned primary judge noted a later submission filed on 15 May 2017 which referred to the claims as being breach of the employment contract, negligence and

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125 Reasons below, [115]. Citations omitted.

fraud.[126] However, that submission said the loss and damage was for "breach of the employment contract which occurred at an unknown date in 2013".

[134] The learned primary judge then summarised Ms Day's contentions as:[127]

> "(a) She suffered her relevant personal injury, i.e. aggravation of her psychiatric condition, on 4 November 2013 when she was informed that her employment had been terminated;
>
> (b) In fact, however, she had ceased being a 'worker' for the purposes of the *WCRA* on 23 August 2013, being the date nominated by the sixth defendant as the date when her employment ceased;
>
> (c) Her employment with the sixth defendant was not the major contributing factor to the aggravation of her psychiatric condition, and the aggravation was therefore not an 'injury' for the purposes of s 32 of the *WCRA*;
>
> (d) Because she was not a 'worker' as at 4 November 2013 and because she did not suffer an 'injury' under the *WCRA* on that date, the passing to her of the information that her employment had been terminated was not an 'event', as that term is defined in s 31 of the *WCRA*."

[135] His Honour noted the inconsistency between that and the pleaded case.[128] His Honour resolved that inconsistency by finding that the application had to be determined on the case as pleaded.[129] Ordinarily that would not be something to which objection could be taken, especially if that pleaded case had been adhered to during the hearing below. However, here there is a self-represented litigant who had expressed the desire to run the case on a different or alternate basis, namely that she was not employed as at 4 November 2013, and therefore not a "worker" within the meaning of the WCRA. In her outline relied upon at the hearing below, Ms Day expressly relied upon the earlier submissions noted in paragraphs [114] and [115] of the Reasons below. And, she was not present during the hearing on 22 August 2017.

[136] True it is that such a case was somewhat inarticulately expressed, and inconsistent with the case as it stood pleaded at the time of the hearing. However, it is a case which Ms Day had expressed during the various hearings prior to that in August. For example, on 25 January 2017 she had said her case was that her employment ceased on 23 August 2013 and she intended to amend the pleading to reflect that.[130] Then, on 10 February 2017, in a disordered response, she said that her case as to

126 Reasons below, [116].

127 Reasons below, [117].

128 Reasons below, [119].

129 Reasons below, [123]-[125].

130 AB 3799, 7-9.

when the employments ceased was in August 2013, or that the court should rule on the date.[131]

[137] Further, that case is in conformity with the facts pleaded by the QCL parties. Their defence expressly pleads that Ms Day's employment terminated on 23 August 2013 when she resigned.[132] On that basis Ms Day could not have been employed or a "worker" as at 4 November 2013. Before this Court counsel for the QCL parties conceded that if Ms Day was not an employee as at 4 November 2013 then the WCRA did not apply.[133]

[138] The learned primary judge took the view that it was not to the point that the QCL parties contended that her employment had ceased in August 2013.[134] That is true in terms of the case as pleaded, but in my respectful view, that does not detract from the fact that the pleadings raised a disputed fact, namely at what date was the employment terminated. Only by resolving that factual dispute one way could the claim be dismissed for non-compliance with the WCRA. So much is evident from the learned primary judge's reasons:[135]

> "[123] Remembering again that the plaintiff's claim for personal injuries is premised on the proposition that she was still employed by the sixth defendant as at 4 November 2013, there is no suggestion by her that the contractual and employment relationship was in any way varied or altered between August and November 2013. On the contrary, as is clear from the correspondence sent by the plaintiff and, on her behalf, by her husband, her position was that employment status ensured through to November 2013.
>
> [124] On the plaintiff's own case, then, she must still have been a "worker" for the purposes of the *WCRA* at the time of the claimed incident on 4 November 2013. It is not to the point that the sixth defendant contended that her employment had ceased in August 2013. What is relevant is that a fundamental element of the plaintiff's own case is that she was still employed by the sixth defendant as at November 2013. It must also, therefore, be an inherent part of her case that she was a "worker" within the meaning of that term in the *WCRA* as at November 2013."

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131 AB 3799, 57-58.

132 Appeal Book 12360 of 2017 (**AB (12360)**), 420, paragraphs 3(b), 6(b), 7(a), 11, and 14(a) and (b).

133 Appeal transcript T1-41 lines 4-7.

134 Reasons below, [124].

135 Reasons below, [123]-[124].

[139] Thus at the hearing below, and before this Court,[136] Ms Day contended that there were factual disputes as to when her employment terminated and she contended that those disputes should be resolved at a trial.

[140] Given that the application was focussed on the fact that Ms Day's case was restricted to being an employed worker as at 4 November 2013, the factual dispute affects, in my respectful view, the question whether it was appropriate to grant summary judgment. There was no way that dispute could be resolved short of a trial, where the evidence can be tested, particularly as to the QCL parties' documents that stipulated that her employment ceased before 4 November 2013. As well, even though the focus at the hearing was on documentary exchanges, a question may well arise as to whether the withdrawal of the resignation was efficacious at all, and whether it was understood that way by QCL and Lerch. It seems likely that Lerch would give evidence that he understood that it was not withdrawn.

[141] Further, because the QCL parties elected to pursue summary judgment and not the previous strike-out application, the result was that two questions not explored before the learned primary judge, nor before this Court, were: (i) whether Ms Day wished to amend the pleading so as to reflect the case that her employment was terminated prior to 4 November 2013; and (ii) whether such a claim had prospects of success in the *Palermo* sense.

[142] In my view, this was not a case where it was appropriate to grant summary judgment. There are factual disputes that preclude a finding that there is no need for a trial, or, put another way, there is no real question to be tried.[137]

[143] That being so, there is no need to examine the findings on the fraud claim or the alleged estoppel. As to the former, the comments by the learned primary judge may be right and that might result in that part of the pleading being struck out, but that was not urged as alternative relief. As to the latter, the estoppel is only contended to apply if the WCRA was otherwise applicable.

Conclusion on CA No. 12360 of 2017

[144] For the reasons expressed above Ms Day has failed upon that part of the appeal contesting the dismissal of the second application to recuse. However, the appeal against the summary judgment has succeeded.

Disposition of the appeals

[145] I propose the following orders in CA No. 3799 of 2017:

1. The appeal is dismissed.
2. The appellant is to pay the respondents' costs of and incidental to the appeal.

[146] I propose the following orders in CA No. 12360 of 2017:

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136 During oral submissions and in her appeal outline, paragraph 23.

137 *Palermo v National Bank Ltd* [2017] QCA 321 at [68]-[70]; *Bolton Properties Pty Ltd v J K Investments (Australia) Pty Ltd* [2009] 2 Qd R 202; [2009] QCA 135 at [2].

1. The appeal is allowed.
2. Orders 3 and 4 made on 26 October 2017 are set aside.
3. The parties are to file any submissions on the appropriate costs order that should follow, limited to two pages, within 14 days of this order.

[147] **PHILIPPIDES JA:** I have had the advantage of reading the reasons for judgment of Morrison JA. I agree with his Honour's reasons and the orders proposed.

[148] **BROWN J:** I agree with the reasons given by Morrison JA, and the orders proposed by his Honour.