SUPREME COURT OF QUEENSLAND

CITATION: *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 249

PARTIES:

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

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

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

v

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

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

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

CLIVE FREDERICK PALMER
(fourth defendant)

CLIVE THEODORE MENSINK
(fifth defendant)

IAN MAURICE FERGUSON
(sixth defendant)

MINERALOGY PTY LTD ACN 010 582 680
(seventh defendant)

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

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

FAIRWAY COAL PTY LTD ACN 127 220 642

(tenth defendant)

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

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

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

CLOSERIDGE PTY LTD ACN 010 560 157
(fourteenth defendant)

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

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

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

EVGENIA BEDNOVA
(eighteenth defendant)

ALEXANDER GUEORGUIEV SOKOLOV
(nineteenth defendant)

ZHENGHONG ZHANG
(twentieth defendant)

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

DOMENIC MARTINO
(twenty-second defendant)

and

MARCUS WILLIAM AYRES
(first defendant added by counterclaim)

STEFAN DOPKING
(second defendant added by counterclaim)

FILE NO: SC No 6593 of 2017

DIVISION: Trial Division

PROCEEDING: Applications filed 19 October 2018 (CFI 378 and CFI 381)

DELIVERED ON: 5 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 26 October 2018 and 2 November 2018

JUDGE: Jackson J

ORDER: **The order of the court (on each of the applications) is that:**

1. **Jackson J will not sit to hear the trial of the proceeding set down to start on 29 April 2019.**

2. **Otherwise, the application is dismissed.**

CATCHWORDS: COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – PARTICULAR GROUNDS – PREJUDGMENT – where submitted findings made in previous case about credit of fourth defendant give rise to a reasonable apprehension of bias – where common ground that credit of fourth defendant will be in issue at trial – whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the credit of the fourth defendant – whether a case of real doubt where prudent for judge not to sit

COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – GENERALLY – whether other miscellaneous grounds give rise to apprehended bias

Bahonko v Sterjov (2008) 166 FCR 415, cited
British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283, considered
British American Tobacco Australia Services Ltd v Laurie [2009] NSWCA 414, cited
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, applied
Johnson v Johnson (2000) 201 CLR 488, considered
Kowalski v Chief Executive Officer of Medicare Australia (2010) 185 FCR 42, cited
Laurie v Amaca Pty Ltd [2009] NSWDDT 14, cited
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70, cited
McKenzie v McKenzie [1971] P 33 (CA), cited
Minister for Immigration & Multicultural Affairs v Jia Legeng (2001) 205 CLR 507, cited
Parbery & Ors v QNI Metals Pty Ltd & Ors [2018] QSC 107, related
Parbery & Ors v QNI Metals Pty Ltd & Ors [2018] QSC 213, related
Parbery & Ors v QNI Metals Pty Ltd & Ors [2018] QSC 245, related
R v Commonwealth Conciliation and Arbitration Commission; *Ex parte Angliss Group* (1969) 122 CLR 546, cited
R v Watson; *Ex parte Armstrong* (1976) 136 CLR 248, cited
Re JRL; Ex parte CJL (1986) 161 CLR 342, cited
Tarrant v Australian Securities & Investments Commission (2015) 317 ALR 328, cited

COUNSEL:	T Sullivan QC and P McQuade QC, with M Hickey and N Derrington, for the plaintiffs K Byrne for the defendants except the fourth, twentieth and twenty-first defendants Fourth defendant in person
SOLICITORS:	King & Wood Mallesons and HWL Ebsworth for the plaintiffs Alexander Law and Robinson Nielsen for the defendants except the fourth, twentieth and twenty-first defendants Sophocles Lawyers for the second and seventh defendants (on 26 October 2018)

JACKSON J:

[1] These two applications are for orders that I "be recused", meaning recuse myself or be disqualified from further hearing the proceeding, including any interlocutory applications in the proceeding before trial, on the grounds of apprehended bias and actual bias.

[2] One application is brought by the fourth defendant who represents himself. He does so purely by choice, not by necessity. He is a wealthy man who has available to him any legal assistance he desires or could need. In court, he is assisted by lawyers who sit nearby (although not at the bar table as a "McKenzie friend"[1]) and provide him with documents and information as he needs them. He files and relies on documents in the form of affidavits sworn by him and detailed written legal submissions, that are on their face prepared by a person or persons with legal training, who he says are not employed in house by his group of companies known as the "Mineralogy Group", but are external lawyers who provide him with assistance but are not appointed to act as solicitors or otherwise appear in the proceeding. He describes himself as a "self-represented litigant". In a literal sense, he is. However, he has that status because he chooses to have it, and unlike nearly all self-represented litigants, he has had considerable legal assistance both in and out of court in connection with these applications.

[3] There is also no question that the counsel and solicitors who appear for the corporate defendant applicants in these applications do so on the instructions of those abstract legal personalities that are controlled by, and give instructions through, the fourth defendant. In a practical sense, on the face of it, he thereby receives the full benefit of their assistance and advice on questions that are relevant to these applications, but chooses not to have them represent him personally in the proceeding.

[4] The other application is brought by the first to third, fifth to nineteenth and twenty-second defendants for the same relief. I will call them the "other defendants", to distinguish them from the fourth defendant.

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1 *McKenzie v McKenzie* [1971] P 33 (CA), 38, 41 and 42.

[5] An illustration of the close relationship between the fourth defendant and the other defendants and their lawyers may assist. Paragraph 6 of the fourth defendant's first written submissions in support of his application for disqualification says that there are "a number of matters" which give rise to a reasonable apprehension of bias in the case and "they are identified and addressed under the **headings** below". The first heading below is "Findings made by his Honour in previous litigation". Three other headings follow, based on other grounds for the disqualification sought.

[6] The same paragraph 6 appears in the other defendants first written submissions. However, the only heading below paragraph 6 in that document is the first heading, "Findings made by his Honour in previous litigation", followed by almost identical paragraphs through to paragraph 47. It is plain that the other defendants' first written submissions were made by copying part of the fourth defendant's first written submissions. They were to that extent prepared by the same legally trained person or persons. It is also clear that the documents filed by the fourth defendant and read by him on the hearing of this application are prepared by a legally trained person or persons. The fourth defendant is not a lawyer.

[7] When this unusual feature was pointed out to him, the fourth respondent replied, even more unusually, that he had made his submissions available to the other defendants, so that they could use them.

[8] On 26 October 2018, I directed that the hearing of these two applications commence *instanter*.[2] The applicants read their affidavit material, written submissions and supplementary written submissions and made oral submissions. I then adjourned the further hearing of the applications until 1 November 2018 with directions as to any affidavit material and written submissions by the respondents and a direction as to any further affidavit material by the fourth defendant on a specific subject matter. On 1 November 2018, the hearing of the applications continued and concluded.

[9] For brevity, I will consider the applications by reference to the grounds of the applications as summarised in my reasons for the order that the hearing of the applications commence *instanter* on 26 October 2018.[3]

First ground

[10] As will appear from these reasons, in my view, the only reasonably arguable ground of these applications for disqualification is that findings I made in *Sino Iron Pty Ltd v Palmer (No 3)* [2015] 2 Qd R 574 ("*Sino No 3*") give rise to a reasonable apprehension of bias, because the findings are relevant to the "credit"[4] of the fourth defendant, which will be in issue at the trial

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2 *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 245.

3 *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 245.

4 I take it that the reference to "credit" should be understood in the sense used in the *Evidence Act* 1977 (Qld), s 20 and to include the personal credibility of the fourth defendant and the credit to be given to material emanating from him as a source, because of other alleged untruthfulness or acts of bad character, but it is the latter aspect that is more directly relevant here.

of this proceeding. See paragraphs 7 to 47 of the fourth defendant's first written submissions and the other defendants' separate first written submissions, both filed on 19 October 2018.

[11] The findings relied on by the defendants are those made in paragraphs [115] and [202] to [204] of the reasons as follows:

> "[115] The defendants dispute that the first defendant knew there was a breach of trust, on the ground that he did not know Mineralogy held the Administrative Fund contributions on trust. Following their abandonment of the defence pleaded in para 23 of the defence, they do not submit that the payments were not made in breach of contract. They do not go so far as to suggest that the first defendant did not know that the payments were made in breach of contract. **His allegation and withdrawal of the allegation that there was a contractual basis for the payments or that they were made for port management services are completely unexplained. So was his apparent attempt to manufacture evidence to show that there was a written contract of a similar kind**, **although neither of the defendants relied on that document in defence of the plaintiffs' claim**. There is circumstantial evidence to support the finding by inference, which I make, that the first defendant knew that the payments were made in breach of Mineralogy's promises to pay only the authorised costs and reimbursements under cl 5 of the Facilities Deeds.
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> …
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> [202] The defendants allege that the plaintiffs have persisted in making allegations of fraud or dishonesty that are unnecessary for the plaintiffs to obtain relief. In my view, to the extent that these allegations suggest misconduct by the plaintiffs in the conduct of their case, they should be rejected. From my earlier reasons, it appears that as a matter of law the required state of knowledge for some of the alleged causes of action was not clear. The plaintiffs should not be criticised for alleging fraudulent knowledge when that would or may have been required proof on some of the alternative available causes of action. I specifically find that the plaintiffs had a reasonable basis for making those allegations, although it has not been necessary to decide some of them.
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> [203] The defendants sought to avoid their exposure to findings upon those allegations by making the concessions I mentioned towards the beginning of these reasons at the outset of the hearing on 26 November 2014. I reject the defendants' allegation that the plaintiffs' failure to desist from their allegations of fraudulent conduct on that day or on the next day when the hearing of the issues of the defendants' liabilities based on the first defendant's knowledge in fact was reserved for decision, is conduct for which the plaintiffs can be criticised. Up to the morning of 26 November 2014, on the evidence, the defendants had made no such concessions and had persisted in an apparently unsustainable and possibly deliberately false plea that Mineralogy had made the challenged payments for an authorised purpose under an oral contract made between Mineralogy and QNI for the provision of port management services.
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> [204] In a similar vein, I reject outright the defendants' allegations that the plaintiffs acted in any improper way in alleging in support of their case that at one

> point, probably in about May 2014, the first defendant falsely manufactured a document described as the "Port Management Services Agreement" to support a contention that there was a contract with QNI. **The defendants allege that since they did not seek to deploy the document as genuine in any court proceeding, the plaintiffs' conduct was in some way improper in seeking to rely on its false manufacture in support of their case in this proceeding. I reject that assertion. The unexplained creation of an apparently false contract of that kind was always relevant to the plaintiffs' case as pleaded and considered above, in my view**." (emphasis added)

[12] The defendants submit that the findings give rise to a reasonable apprehension of bias. They submit that is "because of the particular nature of those findings and because the credit of the fourth defendant will be very much in issue at trial in these proceedings." In particular, they rely on the issue in the present proceeding as to whether the fourth defendant fabricated evidence described as the "green notebook".[5] It is common ground that the fourth defendant's credit and credibility will be challenged at the trial, if he gives evidence.[6]

[13] In addition, the defendants submit that there is a connection between some of the facts in issue in the present proceeding and those which were the subject of the findings in *Sino No 3*. In *Sino No 3*, there were two payments made by Mineralogy Pty Ltd ("Mineralogy"), by cheques signed by Mr Palmer, totalling $12,167,165.60, that were alleged to have been paid in breach of trust ("original payments"). Of that amount, $10 million was paid to Cosmo Developments Pty Ltd and the balance was paid to Media Circus Network Pty Ltd.[7]

[14] I made findings in *Sino No 3* that Mr Palmer knew that the terms of the facilities deeds relevant to that case included that the relevant fund was to be "used solely for the authorised costs and reimbursements", that he knew that each of the original payments "was not an authorised payment"[8] and that, as a matter of factual causation, Mr Palmer "procured or induced" Mineralogy to make the original payments.[9]

[15] By the time of the trial in *Sino No 3*, the sum of $12,167,165.60 had been repaid to the relevant account from which Mineralogy had originally paid it.[10] It appears in this proceeding (but not from the reasons in *Sino No 3*) that the repayment was made by QNI to Mineralogy.[11]

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5 *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 107, [115]-[122].

6 *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 213, [5].

7 *Sino Iron Pty Ltd v Palmer (No 3)* [2015] 2 Qd R 574, 576 [1]-[5].

8 *Sino Iron Pty Ltd v Palmer (No 3)* [2015] 2 Qd R 574, 597 [115].

9 *Sino Iron Pty Ltd v Palmer (No 3)* [2015] 2 Qd R 574, 597-598 [117].

10 *Sino Iron Pty Ltd v Palmer (No 3)* [2015] 2 Qd R 574, 577 [10] and 612 [199].

11 Amended Consolidated Statement of Claim filed 6 August 2018, paragraphs 136(b) and 183-186; Consolidated Defence and Counterclaim filed 12 April 2018, paragraphs 133 and 168-172.

The repayment by QNI is alleged in this proceeding to have been made by QNI in breach of trust.[12]

[16] No issue is raised on the pleadings in this proceeding as to whether QNI was obliged to repay $12,167,165.60, or any part thereof, because of the circumstances in which Mineralogy made the original payments. No finding was made in *Sino No 3* as to the circumstances of QNI's repayment of the original payments. Accordingly, although this proceeding includes an issue as to whether the payment by QNI to Mineralogy was a proper use of the funds held by QNI in its accounts, it is not concerned with whether the original payments were properly made by Mineralogy.

[17] Nevertheless, there is no question that in this proceeding the fourth defendant's credit and credibility will be in issue, if he gives evidence. In addition to the matters relied on by the defendants in that respect, namely whether the fourth defendant fabricated the "green book" after the fact,[13] the plaintiffs submit that his credit and credibility will be in issue in relation to his conduct in the appointment of the twenty-second defendant as a controller of QNI[14] and in relation to his knowledge as to whether QNI was insolvent or likely to be insolvent.[15] I do not discount that there may be other questions upon which the fourth defendant's credit and credibility may be in issue.

[18] Accordingly, simply put, the defendants' applications for disqualification are based, first, on the proposition that the findings I made in *Sino No 3* are such that were I to hear the trial in this proceeding the fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to the assessment of the credit and credibility of the fourth defendant's evidence, if he gives evidence.[16]

[19] The defendants identify those findings as the matter that might lead me to decide that question and thereby the case other than on its legal and factual merits.[17] The logical connection between that matter and the feared deviation from the course of deciding the case on its merits,[18] is that I "may not be inclined to depart from"[19] those findings in the current proceeding.

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12 Amended Consolidated Statement of Claim filed 6 August 2018, paragraph 449.

13 Consolidated Defence and Counterclaim filed 12 April 2018, paragraphs 30(c) and 47(b)(ii); Reply filed 8 June 2018, paragraphs 30 and 47(b).

14 Amended Consolidated Statement of Claim filed 6 August 2018, paragraph 435(j).

15 Amended Consolidated Statement of Claim filed 6 August 2018, paragraph 490; Consolidated Defence and Counterclaim filed 12 April 2018, paragraphs 480-481.

16 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 [6].

17 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [8].

18 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [8].

19 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 331 [139].

[20] In a pre-judgment case, the necessary logical connection is established for "a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness".[20] Whether a judge's finding or view is of that kind can be a matter on which reasonable minds differ, as the judgments in the leading case of *British American Tobacco Australia Services Ltd v Laurie* illustrate, both in the High Court[21] and in the courts below.[22] This may be so, notwithstanding that the finding of a reasonable apprehension of bias in a pre-judgment case must be "firmly established"[23] before recusal is required.

[21] The plaintiffs in the present case submit that the findings in *Sino No 3* were not of that kind. They submit that the findings at paragraphs [202]-[204] did not entail a clear finding that Mr Palmer was dishonest and went no further, in effect, than a finding that the plaintiffs in *Sino No 3* had not acted improperly in advancing the case that they did. They submit that the lay observer is to be attributed with a fair understanding of the decision made in the case and the context in which the findings were made.

[22] I agree. An illustration of the lay observer being attributed with a comparable degree of knowledge may be seen in *Johnson v Johnson*.[24] In that case, the judge had used words that could possibly have created an impression that the judge was discounting the credit of the respondent, whose evidence he had heard, and the appellant, whose evidence he had not heard. The court said:

> "[15] The comment made by Anderson J at the conclusion of proceedings on 19 March 1997 has to be considered in the context in which it was made. The judge was ruling on an application to vacate an order requiring discovery of certain documents. Counsel was urging that the obligations of discovery which had been imposed on his client were unduly onerous. In response, the judge reminded counsel that, early in the case, having read the written statements of the parties and other witnesses, he had said that he expected that, in determining where the truth lay, he would be looking to independent evidence, including documentary material. Hence the importance he attached to discovery. He repeated that view. He was making a point about the significance of documentary evidence, which was the subject of the application on which he was ruling.
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> [16] If one were to remove some of the words used by Anderson J from the context of the ruling on discovery, and the reference back to earlier statements, then, upon parsing and analysis, they could possibly have created an impression that the judge was discounting the credit of the respondent (whose evidence he

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20 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 331 [139].

21 (2011) 242 CLR 283.

22 *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414; *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14.

23 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352; *R v Commonwealth Conciliation and Arbitration Commission*; *Ex parte Angliss Group* (1969) 122 CLR 546, 553-554; *R v Watson*; *Ex parte Armstrong* (1976) 136 CLR 248, 262.

24 (2000) 201 CLR 488.

> had heard) and of the appellant (whose evidence he had not heard). To isolate the words in that way would not have been reasonable. When, on the following day, the judge gave an explanation of what he had intended to convey by his earlier remarks, there was no reasonable ground for not accepting that explanation. A reasonable observer would not have imputed to Anderson J, who had not yet heard the appellant give evidence, a view that the appellant was a person whose credit was of no worth."

[23] In the present case, the defendants urge the findings in paragraphs [202]-[204] of *Sino No 3*, as a clear view, but do so by removing them from their context. As the plaintiffs submit, it is apparent from paragraphs [148], [199]-[201] of the *Sino No 3* reasons, that the context was an application by Mr Palmer and Cosmo Developments Pty Ltd to amend their defence to plead a defence of unclean hands. It was appropriate to consider that question because of the prospect of an appeal, notwithstanding that they were the successful parties in *Sino No 3*, on other grounds. That raised the question whether the amendment sought by the defendants should be allowed to allege that the plaintiffs had acted improperly by pleading that Mr Palmer had engaged in particular conduct. No finding was made in paragraphs [202]-[204] that he had in fact engaged in that conduct.

[24] However, although not at the forefront of the defendants' submissions, in my view, paragraph [115] raises a more difficult question. In that paragraph, I made final findings as to the extent of Mr Palmer's knowledge, for the purpose of giving a final judgment on the plaintiffs' claim as to his involvement in alleged breaches of trust by Mineralogy. The plaintiffs alleged that Mr Palmer was personally liable either because he knowingly procured or induced Mineralogy's breach of trust or because Cosmo Developments Pty Ltd, through Mr Palmer's knowledge, was a knowing recipient of $10 million of the alleged payments in breach of trust. I held that Mr Palmer's knowledge was enough to establish liability on each of those equities or causes of action but that it was not necessary to make a specific finding of dishonest or fraudulent design by Mineralogy, through Mr Palmer, or of dishonest assistance by Mr Palmer.

[25] The findings as to knowledge in paragraph [115] include the central finding that Mr Palmer "knew that the [original] payments were made in breach of Mineralogy's promises to pay only the authorised costs and reimbursements under cl 5 of the Facilities Deeds", and further specific findings that supported that conclusion. A reason that supported the findings was that the defendants in that proceeding had left completely unexplained Mr Palmer's "**apparent** attempt to manufacture evidence to show that there was a written contract… although neither of the defendants relied on that document in defence of the plaintiffs' claim."

[26] The potential difficulty raised by that reasoning is that "apparent" has two alternative ordinary meanings: first, that the apparent thing is "clearly visible or understood"; and second, "seeming real or true, but not necessarily so".[25] Like most words of alternative ordinary meanings, it is the context that will determine which of the meanings is conveyed. The second meaning is illustrated in the Duke's address to Shylock in *The Merchant of Venice*:

> "Shylock, the world thinks, and I think so too,

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[25] Oxford Dictionary of English (3 ed), 2015, definition "apparent".

> That thou but lead'st this fashion of thy malice
> To the last hour of act; and then 'tis thought
> Thou'lt show thy mercy and remorse more strange
> Than is thy strange apparent cruelty".[26]

[27] It is not clear which ordinary meaning is deployed in paragraph [115]. The second ordinary meaning, in the context in paragraph [115], would correspond to "possible". If that was what was meant, it would have been better to say so.

[28] This lack of clarity in paragraph [115] is not resolved by paragraph [204]. Although the latter paragraph was not concerned with final findings of fact, the reference to an "apparently false contract" could mean either clearly visible false contract or seemingly false contract. Another possible connotation is that the document on the face of things appeared to be false. The resolution of those possible meanings, in the context of the earlier reference to "seeking to rely on its false manufacture" tends towards the latter alternative, but the reason why paragraph [204] is not as troublesome as paragraph [115] is that the findings in paragraph [204] are not final findings as to the facts, but findings as to the plaintiffs' justification for alleging those facts.

[29] Nor is the identified lack of clarity in paragraph [115] resolved by paragraph [145]. Properly understood, paragraph [145] is directed to whether Mineralogy, through Mr Palmer, had a fraudulent design in making the original payments, or he engaged in dishonest assistance with knowledge in making those payments at the time. Strictly speaking, the refusal to make those findings does not deny the possibility of a finding that Mr Palmer later engaged in an attempt to manufacture evidence to show there was a written contract to justify the payments, when there was not one at the time of the payments.

[30] The defendants submit, rightly, in my view, that the possibly available meaning of paragraph [115] that Mr Palmer's "clearly visible" attempt to manufacture evidence was unexplained, must be assessed as a statement or reason contained in written and considered reasons for judgment, and is not to be viewed as a statement made during argument in the course of an oral hearing, but this point should not be taken too far.[27]

[31] As well, in my view, it is important to keep in mind that the fair-minded lay observer would know of the two possible meanings to be given to the word "apparent", that the statement of concern was made as to an unexplained "apparent" state of affairs, that Mr Palmer had not given evidence in *Sino No 3*, and that in other respects I had refused to make a finding of fraudulent design or dishonest assistance by Mr Palmer.

[32] The defendants submit that the fair-minded lay observer is not to be attributed an ability to engage in sophisticated reasoning to draw fine distinctions in a legal context. But while it is important that that the hypothetical fair-minded observer is a lay observer, not a trained lawyer, that does not mean that they are not to be taken to understand the ordinary processes of litigation in order to be able to ascertain the meaning or significance of a judge's statements

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[26] Act IV Scene I.

[27] Cf *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 303 [39].

or statements made in the context of a court proceeding. For example, in *Laws v Australian Broadcasting Tribunal*,[28] it was said that:

> "In assessing what the hypothetical reaction of a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances of the case. In other words, the observer would take account of the circumstances which led to the bringing of the defamation action and the filing of the defences. While it would not be proper to attribute to the fair-minded observer the understanding that a lawyer would have of the capacity of the members of the Tribunal to make an independent decision uninfluenced by previously expressed opinions and conflicting interests, such an observer must be taken to appreciate that the defences filed by the Tribunal do not amount to assertions of belief or admissions."[29] (footnote omitted)

[33] And in *Johnson v Johnson*,[30] the High Court said:

> "Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice."[31] (footnote omitted)

[34] In my view, the fair-minded lay observer would not conclude that the findings in paragraphs [115] and [202]-[204] amount to findings that a state of affairs existed, or amount to a clear view about the credit of the fourth defendant, so that they might reasonably apprehend that I might not bring an impartial mind to the credit of the fourth defendant as a witness in the present proceeding.

[35] However, in my view, once carefully analysed, this is a "case of real doubt", and it is "prudent" for me "to decide not to sit [to hear the trial] in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification" in relation to deciding upon the fourth defendant's credit as a witness.[32]

Second ground

[36] The fourth defendant submits that "emails and discussions between judges regarding the fourth defendant and related entities" give rise to a reasonable apprehension of bias by me. See paragraphs 48 to 64 in the fourth defendant's first written submissions.

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28 (1990) 170 CLR 70.

29 (1990) 170 CLR 70, 87-88; see also 101.

30 (2000) 201 CLR 488.

31 (2000) 201 CLR 488, 493 [13].

32 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 [20].

[37] On 30 August 2017, I heard the last day of the trial of the proceeding in *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* ("*BGP Geoexplorer*").[33] On the prior day, without prior notice to the court, Mineralogy filed an affidavit of Mr Palmer raising an allegation of apprehended bias against me based on a statement that had been made by Chaney J in the Supreme Court of Western Australia on 8 August 2016.

[38] On the morning of 30 August 2017, a solicitor who had filed a notice of appointment to act for Mineralogy in the proceeding on the day before (without notice to me as the judge who was hearing the case), sent a copy of submissions in support of an application for an order of disqualification on the ground of apprehended bias to my associate by email. Shortly after the resumed hearing of the trial began on 30 August 2017, the solicitor announced that he appeared for Mineralogy (notwithstanding that counsel who had not been instructed by the solicitor's firm were continuing to appear in the case otherwise) and made an oral application for an order for disqualification.

[39] As appears from those facts, the application was made late and without proper notice. It was also made without any explanation for not doing so beforehand in the written material. When I asked the solicitor appearing on the application why that was so, the proffered explanation was that I had not disclosed any communications of the kind mentioned by Chaney J.

[40] After formally receiving the affidavit of Mr Palmer and written submissions from the solicitor, and tendering 10 documents that I had received by email from judges of other courts (mostly comprising copies of documents passing between others), I heard oral argument in support of the application.

[41] I rejected that there was any failure to disclose by me which raised any possible question of apprehended bias.[34] I dismissed the application for disqualification on the ground that Mineralogy had not shown that a fair minded lay observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the questions I was required to decide in *BGP Geoexplorer*. In support of this ground of the present application, based on the same ground and evidence rejected in *BGP Geoexplorer*, the fourth defendant submits that the question of my apprehended bias on this ground is still alive because the emails concerned him, not just Mineralogy, and because apprehended bias is of such a nature that it develops over time.

[42] In my view, there is nothing in either of those points. No new communication to me or from me is raised. The receipt by me of the documents that were sent by email by other judges in 2016, to which I did not respond, is not a continuing matter. There is no difference of substance raised because the fourth defendant is the applicant on this ground, as opposed to the seventh defendant.

[43] The fourth defendant did not articulate any logical connection between the matter of the receipt of the emails by me and the feared deviation from the course of my further hearing

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33 [2017] QSC 219.

34 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 359-361 [66]-[73].

this case on its merits by reason of prejudgment on my part because I received and read those emails.

[44] I reject this ground of the fourth defendant's application.

Third ground

[45] The fourth defendant submits that "discussions" between myself and Bond J as to my becoming the judge to manage this proceeding, in the event that Bond J recused himself, give rise to a reasonable apprehension of bias by me. See paragraphs 65 to 69 of the fourth defendant's first written submissions.

[46] There is no evidence of any such discussions.

[47] In oral submissions, the fourth defendant referred to statements made by Bond J during the hearing of the application that he recuse himself, that he had discussions with Judge "X" about the case and that Judge "X" would be available to hear it at some time. The fourth defendant said in submissions that he "put an inference" that the discussions would also have dealt with the findings that Bond J had made about him as to credit.

[48] I find there is no basis, in fact, for the fourth defendant's submission as to the alleged discussions about Bond J's findings as to the fourth defendant's credit.[35] There is no relevant matter of that kind to found an allegation of apprehended bias on this ground.

[49] This ground of the fourth defendant's application should be rejected.

Fourth ground

[50] On 2 October 2018, I refused to give leave to permit the fourth defendant to appear by a lawyer who had not filed a notice of appointment to act as a solicitor[36] and who did not have instructions from him otherwise in the proceeding. The fourth defendant submits that my refusal gives rise to a reasonable apprehension of bias by me. See paragraphs 70 to 79 in the fourth defendant's first written submissions.

[51] In written and oral submissions, the fourth defendant appears to rely on three points in support of this ground. First, he submits that when the lawyer sought to appear for the fourth defendant on 2 October 2018, he was met with a hostile response. There is no evidence that I behaved in a hostile fashion. I asked the lawyer whether he or the firm had filed a notice of appointment to act for the fourth defendant, (which would have given a right of appearance to

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35 Compare, for example, *Tarrant v Australian Securities & Investments Commission* (2015) 317 ALR 328, 362-363 [138]-[144].

36 *Uniform Civil Procedure Rules* 1999 (Qld), r 986.

an Australian legal practitioner[37]). He said that they had not. I refused leave for the reason that I would not grant indulgences to the fourth defendant on the basis that he could appear by a lawyer when it suits him without the lawyer or firm filing a notice of appointment.

[52] I add that the occasion on 2 October 2018 was to make directions for the hearing of the application filed by the other defendants for orders in relation to disclosure, directions and to vacate the trial dates. At that time, the fourth defendant had not filed such an application, although he subsequently did so.

[53] It is the fourth defendant's right to appear as a self-represented litigant. It is not his right to appear by a solicitor who has not filed a notice of appointment as solicitor.

[54] The fourth defendant relies on the circumstance that on other occasions in this proceeding or in an appeal, he has been permitted to appear by a lawyer who has not filed a notice of appearance. I was not aware of that at the time, but in my view, in any event, that does not inform any right on the part of the fourth defendant to do so in this proceeding before me.

[55] In my view, the fourth defendant has not identified any matter in relation to this ground which might lead me to decide any matter on the further hearing of this case other than on its legal and factual merits. He also has not articulated any logical connection between my refusal to grant a lawyer leave to appear for him on 2 October 2018 (or 8 October 2018) and any feared deviation by me from the course of deciding on the merits.

[56] I reject this ground of the fourth defendant's application.

Fifth ground

[57] The fourth defendant submits that my "previous dealings" with members of Hall Chadwick give rise to a reasonable apprehension of bias by me. See paragraphs 80 to 88 of the fourth defendant's first written submissions.

[58] The reason why it was submitted that I might deviate from deciding this proceeding impartially is that the fourth defendant (but not the other defendants) says that Richard Albarran, a partner of Hall Chadwick, "may" be called to give evidence as to QNI's solvency. The fourth defendant submits that I have had some unspecified dealings with Mr Albarran that would raise apparent bias if I were to hear evidence from him in the present case.

[59] The factual basis on which this submission was originally based is that I have had dealings with Mr Albarran. The alleged fact was not proved and there is no basis for it. So it is unnecessary to consider the submission on this ground further.

[60] Second, the fourth defendant submits that (even though I have had no dealings with Mr Albarran) because Mr Albarran is a liquidator of Equititrust Limited (in liquidation) I must have

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[37] *Supreme Court of Queensland Act* 1991 (Qld), s 90 and Schedule 5, definition of "lawyer"; *Legal Profession Act* 2007 (Qld) ss 6(1), 24(1); *Uniform Civil Procedure Rules* 1999 (Qld), rr 136(1) and 986(1).

formed some view of Mr Albarran's conduct as a liquidator that would compromise my ability to consider his evidence if he were called as a witness, because of my appointment as a director of that company for a little over two months from August 2011. I reject that contention as not raising a matter that might lead me to decide the present proceeding other than on its legal or factual merits and as not articulating a logical connection between that matter and the feared deviation from the course of deciding this case on its merits.

[61] In any event, the fourth defendant does not say that Mr Albarran will be called as a witness, only that he "may" be called, and also does not say that Mr Albaran's credit or credibility would be in issue, if he were called as a witness.

[62] I reject the fifth ground raised by the fourth defendant.

Sixth ground

[63] The fourth defendant submits that the fact that I am a friend of Mark McIvor gives rise to reasonable apprehension of bias by me. See paragraph 89 of the fourth defendant's first written submissions.

[64] As in the case of the fourth defendant's assertions of that Bond J "discussed" with me his Honour's findings as to credit in relation to the fourth defendant, there is no evidence of any conversation between Mr McIvor and me concerning the fourth defendant.

[65] I find there is no basis, in fact, for the fourth defendant's submissions as to any alleged discussion with Mr McIvor as to the fourth defendant. There is no relevant matter of that kind to found the allegation of apprehended bias on this ground.

[66] In my view, this ground of the fourth defendant's application must be rejected.

Seventh ground

[67] The fourth defendant submits that I made findings about Mineralogy's conduct in another proceeding that give rise to a reasonable apprehension of bias by me, in two decisions. See *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 18 and *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 219 and paragraph 30(b) and 30(c) of the fourth defendant's supplementary written submissions.

[68] *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 219 is previously mentioned in these reasons as *BGP Geoexplorer*, being the reasons for judgment given after trial.

[69] In paragraph 30(b) of his supplementary submissions, the fourth defendant extracts findings that I made in the reasons for decision in an earlier interlocutory application in that proceeding, [2017] QSC 18, in paragraphs [68], [130], [143], [147] and [150] of the reasons. That was an application to vacate the first set of trial dates set down in that proceeding. However, notwithstanding the concerns I had as to the manner in which Mineralogy, as plaintiff, was failing to proceed with expedition, as stated in those findings, I granted Mineralogy's application to vacate the first set of dates for the trial.

[70] The fourth defendant also relies on a finding I made in the reasons for judgment given after the trial, [2017] QSC 219, in paragraph [34]. On that occasion, I refused to permit Mineralogy to rely on an additional ground of defence that had not been pleaded, having regard to the prior interlocutory processes that had taken place in the proceeding.

[71] In my view, the fourth defendant has not identified any matter or articulated any logical connection between that matter and the feared result that I might decide the present case other than on its legal and factual merits, merely by pointing to some of the findings that were made in those two decisions.

[72] At one point in his oral submissions the fourth defendant referred to a concern that because of my findings of unsatisfactory progress by Mineralogy in the interlocutory stages in the *BGP Geoexplorer* proceeding, I would be inclined to grant a shorter period for interlocutory steps in the present case than I might otherwise do.

[73] Whether or not the fourth defendant holds that concern, in my view, it is not a matter upon which the fair minded lay observer might reasonably apprehend I might not bring an impartial mind to resolving any questions to be decided.

[74] I reject this ground of the fourth defendant's application.

Eighth ground

[75] The fourth defendant also alleges actual bias against me. See paragraph 3 of the fourth defendant's supplementary submissions. The basis of the contention appears in paragraph 12 of those submissions, namely that:

> "the making of highly adverse findings referred to in paragraph [6] of these submissions, despite the making of concessions referred to in paragraph [8] of these submissions and the strong objections referred to in paragraph [11] of these submissions, was entirely gratuitous and thus evinces actual prejudice and bias."

[76] The findings referred to in paragraph 6 are those that I made in paragraphs [202]-[204] of *Sino No 3*.[38] I have previously set out paragraphs [202]-[204] of those reasons, in which I made findings in response to submissions made by the defendants in that case that the plaintiffs in that case had acted improperly in alleging and persisting in allegations of fraud or dishonesty against the defendants.

[77] In paragraph 8 of the fourth defendant's supplementary written submissions, reference is made to my findings in paragraphs [10] and [13] in that case that it had "curious" and "unusual" features.

[78] The essence of the fourth defendant's contention of actual bias is that those findings were "entirely gratuitous" and therefore evinced actual prejudice and bias. The defendant's submission that the findings were "gratuitous" ignores the context in which they were made.

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[38] [2015] 2 Qd R 574.

[79] Paragraphs [202]-[204] appear in a section of the reasons that deal with the defendants' application to amend the defence, in that case, to raise unclean hands by reason of the alleged conduct of the plaintiffs in starting and conducting the proceeding. There was nothing gratuitous about those findings.

[80] Paragraph [115] appears in the context of the section of my reasons that dealt with the required knowledge for a breach of trust and was not gratuitous either.

[81] The fourth defendant's submissions also fail to take into account that in paragraph [145] of the reasons in that case, I held that it was not necessary to make a specific finding of dishonest or fraudulent design my Mineralogy through Mr Palmer or of dishonest assistance with knowledge of Cosmo Developments Pty Ltd through Mr Palmer and set out the reasons why I should not do so.

[82] In the leading Australian case relating to actual bias, *Minister for Immigration & Multicultural Affairs v Jia Legeng*,[39] Gleeson CJ and Gummow J stressed that a party asserting actual bias on the part of a decision maker carries a heavy onus. The allegation must be "distinctly made and clearly proved."[40]

[83] In my view, the fourth defendant does not establish any case of actual bias.

Scandalising conduct

[84] A subject that should not be allowed to pass unremarked is that the fourth defendant has engaged in conduct that tends to scandalise members of the court and others. They include:

(a) the allegation that Bond J discussed his findings about the fourth defendant's conduct in this proceeding with me in such a way as to compromise my impartiality;

(b) the allegation that communications in 2016 between other judges copied to me by email about the prospective listing of the many cases involving the fourth defendant contained improper statements by those judges;

(c) the allegation made against me that Mr McIvor had told me things privately about the fourth defendant that were unfavourable, in such a way as to compromise my impartiality (and impliedly that I had remained quiet about those things, whatever they were supposed to have been); and

(d) the allegations that I have exhibited and do have actual bias against the fourth defendant.

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39 (2001) 205 CLR 507.

40 (2001) 205 CLR 507, 531 [69].

[85] There is also matter sworn in and exhibited to the fourth defendant's first affidavit in support of his application that has no real connection to this proceeding, and was not admissible evidence of anything, but may have been intended to embarrass me personally.

[86] In addition, on 26 October 2018, I heard argument as to whether these applications should be heard *instanter*, particularly having regard to the fourth defendant's allegation of actual bias and the contention that I was thereby disqualified from hearing any application in this proceeding. He alleged, in open court, that there was evidence that in the "couple of weeks"[41] before then I had made "unfavourable comments" about him to "members of the court" that he wished to obtain evidence about. He quickly shifted ground from "members of the court" to "mainly… officers of the court, barristers and solicitors, not judges". Although I proceeded to hear the applications for disqualification *instanter*, I directed the fourth defendant to file any affidavit he wished to rely upon on that question by 31 October 2018.

[87] No affidavit answering that description was filed. Instead, on 1 November 2018, the fourth respondent sought to rely on an affidavit filed on 31 October 2018 claiming that he was unable to obtain evidence of the kind foreshadowed because he personally had been too busy otherwise to obtain the evidence. I asked him carefully about whether there was anything that stopped him from employing others, including lawyers, to assist him to obtain any evidence. He answered, in effect, that he had not wished to do so. His assertion of further possible serious disqualifying conduct on my part was left in that state, unsupported by any evidence.

[88] These are mostly matters of a scandalising tendency that should not have been raised, if there was no reasonable basis for them,[42] particularly having regard to the fact that, throughout these applications, although the fourth defendant is a "self-represented litigant", he has had the benefit of assistance from legally trained persons.

[89] However, in my view, they are not matters I should consider further.

Conclusion

[90] In the result, I have formed the view that I should not sit to hear the trial of the proceeding because the fourth defendant's credit and credibility will be in issue at the trial and an appellate court might take a different view on the matter of my disqualification for apprehended bias on that ground.

[91] I take that view, as well, because the trial of the proceeding is listed to take 12 weeks and is a significant commitment of resources by the court, as well as the parties, and practically speaking needs to be listed well in advance of the hearing dates in any court calendar. Accordingly, it is not only a question whether it is satisfactory for the parties not to know that

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41 Of course, if the alleged comments had been made earlier, they should have been investigated and included in the material filed on 19 October 2018 in support of the fourth defendant's application for disqualification.

42 Compare, for example, *Bahonko v Sterjov* (2008) 166 FCR 415, 419 [10] and *Kowalski v Chief Executive Officer of Medicare Australia* (2010) 185 FCR 42, 50 [34].

the trial will proceed on the allotted dates because of any remaining question of my disqualification on appeal.

[92] However, in my view, there is no reason why I am unable to continue to manage the case towards the trial set down to start on 29 April 2019 and to hear any questions of directions or interlocutory applications not requiring a finding as to the fourth defendant's credit or credibility as a witness. I reject that there is any ground raised or established that shows I should recuse myself or be disqualified from hearing such questions of directions or interlocutory applications.