SUPREME COURT OF QUEENSLAND

CITATION: *Palmer v Parbery & Ors* [2018] QCA 302

PARTIES: **In Appeal No 8282 of 2018:**

CLIVE FREDERICK PALMER
(appellant)
v
STEPHEN JAMES PARBERRY AND MICHAEL OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (CONTROLLER APPOINTED) (IN LIQ)
(first respondent)
QUEENSLAND NICKEL PTY LTD (IN LIQ)
ACN 009 842 068
(second respondent)

In Appeal No 9296 of 2018:

QNI METALS PTY LTD
ACN 066 656 175
(first appellant)
QNI RESOURCES PTY LTD
ACN 054 117 921
(second appellant)
QUEENSLAND NICKEL SALES PTY LTD
ACN 009 872 566
(third appellant)
CLIVE FREDERICK PALMER
(fourth appellant)
CLIVE THEODORE MENSINK
(fifth appellant)
IAN MAURICE FERGUSON
(sixth appellant)
MINERALOGY PTY LTD
ACN 010 582 680
(seventh appellant)
PALMER LEISURE AUSTRALIA PTY LTD
ACN 152 386 617
(eighth appellant)
PALMER LEISURE COOLUM PTY LTD
ACN 146 828 122
(ninth appellant)
FAIRWAY COAL PTY LTD
ACN 127 220 642
(tenth appellant)
CART PROVIDER PTY LTD
ACN 119 455 837
(eleventh appellant)

	COEUR DE LION INVESTMENTS PTY LTD ACN 006 334 872 (twelfth appellant) **COEUR DE LION HOLDINGS PTY LTD** ACN 003 209 934 (thirteenth appellant) **CLOSERIDGE PTY LTD** ACN 010 560 157 (fourteenth appellant) **WARATAH COAL PTY LTD** ACN 114 165 669 (fifteenth appellant) **CHINA FIRST PTY LTD** ACN 135 588 411 (sixteenth appellant) **COLD MOUNTAIN STUD PTY LTD** ACN 119 455 248 (seventeenth appellant) **EVGENIA BEDNOVA** (eighteenth appellant) **ALEXANDER GUEORGUIEV SOKOLOV** (nineteenth appellant) **DOMENIC MARTINO** (twentieth appellant) **v** **STEPHEN JAMES PARBERRY AND MICHAEL OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (CONTROLLER APPOINTED) (IN LIQ)** (first respondent) **QUEENSLAND NICKEL PTY LTD (IN LIQ)** ACN 009 842 068 (second respondent)
FILE NO/S:	Appeal No 8282 of 2018 Appeal No 9296 of 2018 SC No 6593 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 176 (Bond J); [2018] QSC 178 (Bond J)
DELIVERED EX TEMPORE ON:	5 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2018
JUDGES:	Fraser and Gotterson JJA and Boddice J
ORDER:	**The appeals are dismissed with costs to be assessed on an indemnity basis.**

CATCHWORDS: COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – GENERALLY – where the primary judge made freezing orders against some of the appellants – where those orders included provisional findings of facts that might reasonably be argued to reflect adversely upon the credibility of an appellant – where the primary judge was then informed of the possibility of a recusal application – where the appellants did not file that application for over a month – where the appellants had argued that no orders, other than for the management of the recusal application, should have been made until the recusal application was determined – where both before and after the filing of the recusal application, but before the application was heard, the primary judge made case management orders for proceedings on the commercial list in the trial division – whether the primary judge should have abstained from making any case management orders pending a decision whether to recuse himself from the hearings

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appeal was dismissed – where the parties agreed that costs should follow the event – where the appellant disputed that indemnity costs should be awarded – where the primary judge's decision and two interlocutory decisions by judges of appeal indicated that the appeals lacked merits – where the appellants argued these decisions were not made with the benefit of a later judgment – where the appellants argued that parties to litigation should not be deterred by the prospect of indemnity costs orders from appealing decisions upon the ground of apprehended bias – whether indemnity costs should be awarded

British American Tobacco Australia Ltd v Gordon [2007] NSWSC 109, cited
Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577; [2006] HCA 55, distinguished
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, approved
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48, cited
Palmer v Parbery & Ors [2018] QCA 268, related
Parbery v QNI Metals Pty Ltd (2018) 127 ACSR 582; [2018] QSC 107, related
Parbery v QNI Metals Pty Ltd [2018] QSC 178, related
Parbery v QNI Metals Pty Ltd [2018] QSC 180, related
Parbery v QNI Metals Pty Ltd [2018] QSC 213, related
QNI Metals Pty Ltd & Ors v Parbery & Ors [2018] QCA 287, related

COUNSEL: K S Byrne for the appellants
D J Butler for the respondents

SOLICITORS: Alexander Law for the appellants
King & Wood Mallesons, with HWL Ebsworth, for the respondents

[1] **THE COURT:** The Court has before it two appeals, Appeal No 8282 of 2018 and Appeal No 9296 of 2018, from case management orders made by Justice Bond in proceedings on the commercial list in the trial division at review hearings on 27 July and 3 August 2018 respectively. The appropriateness of the orders is not in issue. The appeals turn instead upon the question whether the primary judge should have abstained from making any case management orders pending a decision whether to recuse himself from the hearings.

[2] In May 2018 the primary judge made freezing orders against some of the defendants, including Mr Palmer.[1] In the reasons for those orders the primary judge made provisional findings of fact, necessarily with reference to incomplete evidence, that might reasonably be argued to reflect adversely upon the credibility of Mr Palmer and, to a lesser extent, another defendant, Mr Martino. In early June the primary judge was informed of the possibility of a recusal application.[2] At a hearing on 11 June the primary judge inquired about the defendants' intentions in that respect. On 20 June the primary judge's associate inquired of the parties by email whether a recusal application was to be made. On 26 June the associate sent an email to the parties informing them that the judge would deal with any application to vacate the review hearing appointed for 27 July if such an application were made, and until then it was expected that the parties would continue to comply with the existing orders and directions, including for the review hearing.

[3] On 19 July the defendants filed an application for directions for the filing and hearing of any proposed applications for recusal. In a supporting affidavit Mr Palmer referred to correspondence advising of his intention to bring a recusal application by 7 August and that the defendants would consider advices by counsel indicating that there was merit for recusal applications to be made. He expressed the view that seven days was required for that purpose.

[4] At the 27 July review hearing the primary judge gave directions for the subsequent hearing of any recusal application. The defendants contended that no other case management orders should be considered until after the hearing of recusal applications which, they submitted, were likely to be made in the future. They argued that if case management orders were made, they would be wasted in the event of a successful recusal application.

[5] The primary judge tested that argument by reference to the example of a direction setting the matters down before his Honour in 2019; if the primary judge was persuaded to make such a direction but subsequently recused himself, that would not mean that the direction was wasted or that the trial could not proceed on the scheduled date, the most likely course being that some other judge would be scheduled to consider any further timetabling directions. The primary judge observed that the parties had known for some months that important matters, including the question whether the proceedings should be set down for trial in mid-February 2019 or some other date, would be dealt with on 27 July. No application

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1 *Parbery v QNI Metals Pty Ltd* (2018) 127 ACSR 582.
2 *Parbery v QNI Metals* [2018] QSC 176 at p 3.

to recuse the judge from case management decisions had been made despite the fact that the possibility that the judge would see it as his duty to continue to manage the litigation had been flagged before the review.

[6] The primary judge therefore rejected the defendants' argument and made case management orders listing the proceedings for trial for 60 days commencing in April 2019, adjourning to 3 August 2018 consideration of trial directions and the question of the date in April 2019 on which the trial would commence, and about pleadings, disclosure, subpoenas, listing of interlocutory applications for hearing and the adjournment of a related proceeding.

[7] The appeal in Appeal No 8282 is against those orders. Mr Palmer is the only appellant. It is convenient at this point to consider one of his arguments in that appeal, namely, that the primary judge erred by making case management orders in circumstances which, so Mr Palmer contends, were, in substance, no different from a case in which an application had been made that the primary judge recuse himself from the proceeding.

[8] The contention upon which the ground is premised is manifestly wrong. The terms of the defendants' own application for directions about "any" recusal application reflected the fact that no such application had been made despite the basis for the foreshadowed application having arisen some two months earlier and despite the primary judge's inquiries about whether a recusal application would be made. The fact that such an application might never be made was not inconsistent with the submission by Mr Palmer that there was a strong likelihood that in the following week he would bring a recusal application and with a similar submission made on behalf of the other defendants. Furthermore, when the absence of any such application was specifically brought to Mr Palmer's attention, he expressly declined to make a submission at that hearing that there was a reasonable apprehension that the primary judge would not deal with the review hearing issues on their merits.

[9] On 31 July and 2 August some of the defendants filed applications for orders that the primary judge recuse himself from further involvement in the proceeding. Other defendants subsequently filed such applications.

[10] At the 3 August hearing some of the defendants applied for a stay of the orders made on 27 July, other than the directions for hearing of any recusal application, until the later of the determination of the recusal application and the determination of Appeal No 8282 (which had been commenced on 31 July). Mr Palmer advanced his application for recusal on the bases of actual and apprehended bias. The other defendants advanced their applications only on the basis of apprehended bias. The primary judge rejected Mr Palmer's submission that there was a good arguable case for actual bias, finding that there was "not the slightest support" for that contention.[3] Mr Palmer does not challenge that finding in these appeals. It is only apprehended bias that is in issue.

[11] The primary judge concluded that his reasoning and findings in the freezing application decision reflected so adversely in many respects on Mr Palmer that, when it came to the final trial of the proceedings, it should be assumed that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions he was required to decide.[4] Upon

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3 *Parbery v QNI Metals Pty Ltd* [2018] QSC 178 at p 8.

4 *Parbery v QNI Metals Pty Ltd* [2018] QSC 178 at p 7.

that assumption the primary judge held that the stay application was entirely misconceived because of the absence of any connection between the matters said to support the contention of apprehended bias and the question whether the primary judge could bring the required state of mind to bear upon the commercial list directions which would be dealt with if the stay were refused; the good arguable case assumed in the defendants' favour concerned only matters that might affect the question whether the primary judge should hear matters that involved a determination of questions of credit concerning Mr Palmer and possibly also Mr Martino, but that had nothing to do with the matters for decision on 3 August.

[12] The primary judge held that another flaw in the stay application in so far as it relied upon the outstanding recusal application lay in the defendants' proposition that the timetabling decisions would be wasted. The primary judge observed that the matter would come to trial, disclosure would occur, and timetabling directions would have to be met. If the judge ultimately determined that he should not handle the trial, the earlier directions would not lead to waste. A judge who subsequently managed the case would have the benefit of those earlier directions and the parties' compliance with them. Amongst other matters, the primary judge also noted that a refusal of the stay pending determination of the appeal in Appeal No 8282 would not lead to the appeal rights being rendered nugatory because the timetabling orders would not be wasted or result in irretrievable prejudice if the first appeal were upheld. Another consideration to which the primary judge referred was that a stay would delay the resolution of the litigation.

[13] The primary judge therefore refused the defendants' applications[5] and made additional case management orders.[6] That refusal and the case management orders made on 3 August are challenged by 20 of the 22 defendants in Appeal No 9296.

[14] At the heart of the arguments in support of both appeals is the appellants' contention that in a case concerning possible apprehension of bias "a judge faced with the real possibility of an application being made for his or her recusal (Appeal CA8282), or with a filed recusal application (Appeal CA9296), should or is obliged to give precedence to the hearing of the recusal application and refrain from conducting a commercial list review and making other directions or orders in the proceeding until the recusal application is heard and determined".[7]

[15] The respondents argued that neither appeal could succeed because there was no logical connection between the primary judge's findings in the reasons for the freezing orders and the question whether the primary judge could bring an impartial mind to bear when making case management directions. For the following reasons, the respondents' argument must be accepted.

[16] The appellants' proposition that a judge must not conduct any review or make any order before the determination of any filed or possible recusal application is irreconcilable with established principles concerning apprehended bias. In a passage in *Ebner v Official Trustee*[8] that was approved in *Michael Wilson & Partners Ltd v Nicholls*,[9] the majority in the High Court confirmed that the apprehension of bias principle, so far as is presently relevant, is that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial

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5 *Parbery v QNI Metals Pty Ltd* [2018] QSC 178.
6 *Parbery v QNI Metals Pty Ltd* [2018] QSC 180.
7 Outline of submissions for the appellants in both appeals dated 3 October 2018.
8 (2000) 205 CLR 337 at 344-345 [6], [8].
9 (2011) 244 CLR 427 at 437 [31], 445 [63].

mind to the resolution of the question the judge is required to decide". The majority went on to explain that the apprehension of bias principle is to be applied by a two-step process:

> "First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

[17] As the majority in *Ebner* also explained, it is the duty of judges "to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong"; judges "do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause", and an objection by one party to a judge continuing to sit should be rejected "unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case".[10]

[18] The "case" listed for decision before the primary judge on 27 July and 3 August 2018 involved only case management questions. There was no impediment to the primary judge hearing and deciding those questions unless a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the decision of them. The apprehension of bias the primary judge assumed in the defendants' favour at the 3 August hearing and ultimately accepted in September 2018,[11] concerned only a proceeding such as a trial in which the primary judge would be required to resolve questions in relation to which the credibility of Mr Palmer or Mr Martino might be relevant. No question about the credibility of either defendant arose in the review hearings.

[19] Accordingly, there was no logical connection between the matters relied upon for the suggested apprehension of bias and any postulated deviation from the course of deciding the review hearings on their merits, and there was therefore no substantial ground for the defendants' contentions at the review hearings that the primary judge should not hear and decide the questions arising at those hearings.

[20] In Appeal No 8282, no ground of appeal contends that the primary judge should have found that there was such a connection, and in Appeal No 9296 the appellants abandoned the only ground of appeal (ground 2(b)(iv)) that asserted there was such a connection. Despite the absence of any relevant ground of appeal, the appellants contend in relation to Mr Palmer as a litigant in person that the "veracity" or otherwise of his submissions and evidence was intrinsic to the conduct of the review so that a hypothetical bystander would have concluded that the primary judge might not bring an impartial and unprejudiced mind to the review. But neither Mr Palmer nor Mr Martino gave any contentious evidence about the questions arising in either review hearing. The credibility of neither of them was in issue. In what way the

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10 (2000) 205 CLR 337 at 348 [19].

11 *Parbery v QNI Metals Pty Ltd* [2018] QSC 213 at [69].

credibility of either of them was arguably material to consideration of any of the challenged orders made at the review was not explained. It was not material.

[21] The appellants argued that the primary judge's statement in the reasons for the freezing orders that an observer might apprehend that the primary judge "might not bring an impartial and unprejudiced mind to the determination of future issues which involve whether Mr Palmer should be believed"[12] disqualified the primary judge from making case management orders in reviews where it was necessary to consider Mr Palmer's submissions. The quoted sentence plainly does not refer to the acceptance or rejection of submissions about case management orders. So much is clear upon the text and it is confirmed by the context of the statement that it involved only the question whether the primary judge should preside at a trial.[13]

[22] The primary judge was correct in finding that there was no connection between the assumed apprehension of bias and the primary judge's decisions about the case management questions. It follows that both appeals must fail.

[23] The appellants relied upon a passage in the reasons of Kirby and Crennan JJ in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*[14] for the proposition that the primary judge should have determined whether or not to recuse himself before conducting the review hearings or making any orders. That passage concerns the obligation of an intermediate appellate court to deal with a ground of appeal alleging apprehended bias from a decision at trial before dealing with other grounds of appeal. The conclusion was that the appellate court should put the party making such an allegation to an election upon the basis that if the apprehended bias application is established, a retrial will be ordered irrespective of possible findings on other issues. That does not bear upon the duty of a judge conducting a case management hearing which does not involve any credibility issue where there is or may be an outstanding question whether the judge should recuse himself or herself from subsequently deciding credibility issues.

[24] The appellants refer to a statement by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner* that where there is a real doubt: "it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification".[15] That is a counsel of prudence, not a statement of legal principle. The appellants also argue that a reason for hearing a recusal application before making case management orders might be found in a convention that where there is a real possibility of an application being made for a judge to be disqualified, administrative arrangements should be made before the hearing that another judge would hear the case. As Brereton J observed in one of the cases upon which the appellants rely, *British American Tobacco Australia Ltd v Gordon*,[16] such administrative arrangements will "often" be made in such cases. That is not always practicable and appropriate. If such arrangements are not made, the judge assigned to the hearing will be obliged to address any possible apprehension of bias by applying the established legal principles. If, as in this case, the basis of the possible apprehension of bias has no logical connection with any postulated departure from a

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12 *Parbery v QNI Metals Pty Ltd* [2018] QSC 213 at [69].
13 See *Parbery v QNI Metals Pty Ltd* [2018] QSC 213 at [1], [63].
14 (2006) 229 CLR 577 at 611-612 [117].
15 (2000) 205 CLR 337 at 348 [20].
16 [2007] NSWSC 109 at [71].

judge's impartial decision-making at a particular hearing, the judge is not obliged to refrain from hearing and deciding the matter.

[25] In Appeal No 9296, the appellants argued that the inquiry conducted by the primary judge in accordance with *Ebner* was misdirected because the principal relief sought was that the primary judge be recused from further involvement in the proceeding. This argument incorrectly assumes in the appellants' favour that a decision by the primary judge not to exercise his jurisdiction at the review hearing should have been determined, not by the principles expressed in *Ebner*, but instead by the nature of the relief sought by the defendants. The appellants also refer to the suggested practical consequence of a decision by the primary judge to recuse himself from the trial that he would not continue to manage the proceedings towards the trial. That was a possible consequence only because the usual practice in the commercial list is that the trial will be heard by the judge who manages the proceeding towards trial. It does not follow that a judge who is precluded by apprehended bias from hearing a trial is necessarily obliged to recuse himself or herself from making any case management orders.

[26] The appellants argue that the primary judge's exercise of discretion at both hearings miscarried in various ways because the importance of an impartial hearing was overlooked or given insufficient weight. The fundamental importance of impartiality is taken into account in the principles established by decisions of the High Court including *Ebner* which the primary judge applied. Accordingly, the Court orders that each appeal be dismissed and now invites submissions about costs.

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[27] The parties agree that costs should follow the event in the appeal, so that the appellants should be ordered to pay the respondents' costs of the appeal. The issue is whether those costs should be assessed on the indemnity basis rather than the standard basis.

[28] The primary judge's reasons of 3 August clearly explained why the recusal applications lacked merit. That was because, as the respondents successfully argued in these appeals, there was no logical connection between the primary judge's findings in the reasons for the freezing orders and the question whether the primary judge could bring an impartial mind to bear when making case management directions. This was again explained in two interlocutory decisions by Judges of Appeal, Justice Morrison[17] and Justice Philippides.[18] The respondents therefore have a good argument that the appellants pursued the appeal when they knew or should have known that the appeals were without merit.

[29] The appellants argued that those decisions were not made with the benefit of Justice Bond's recusal reasons. That is of no particular significance to the present issue. The appellants also argued that parties to litigation should not be deterred by the prospect of indemnity costs orders from appealing decisions upon the ground of apprehended bias. When such an appeal is hopeless, it is appropriate that it should be deterred by such a prospect.

[30] The appellants also argued that the absence of the required logical connection was not relevant to two arguments they advanced on appeal, one being based upon the

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17 *Palmer v Parbery & Ors* [2018] QCA 268.

18 *QNI Metals Pty Ltd & Ors v Parbery & Ors* [2018] QCA 287.

passage in *Concrete Proprietary Limited v Parramatta* mentioned in the Court's reasons for dismissing the appeals, and the other being based upon the counsel of prudence in *Ebner*, also mentioned in the Court's reasons for dismissing the appeals. Neither argument had merit. In these circumstances, it is appropriate to order that the costs be assessed on the indemnity basis.

[31] Accordingly, the orders of the Court are that the appeals are dismissed with costs to be assessed on the indemnity basis.