SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Woolworths Limited & Ors* [2019] QSC 40
PARTIES:	**OLGA DAY** (plaintiff) **v** **WOOLWORTHS LIMITED** ACN 000 014 675 (first defendant) **CPM AUSTRALIA PTY LTD** ACN 063 244 824 (second defendant) **RETAIL ACTIVATION PTY LTD** ACN 111 852 129 (third defendant)
FILE NO:	No 6016 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	1 March 2019 Order made on 8 January 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 December 2018; 8 January 2019
JUDGE:	Davis J
ORDER:	**Paragraph 1 of the application filed 13 November 2018 is dismissed.**
CATCHWORDS:	COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – PARTICULAR GROUNDS – where the applicant brought an application for the presiding judge to be recused from any further involvement in the proceedings on numerous grounds, including but not limited to perception of bias, prejudgment of the case and professional and personal relationships – whether there were any grounds that would require the judge to recuse himself from the matter – where the application was refused *Supreme Court of Queensland Act 1991* (Qld), s 8 *Uniform Civil Procedure Rules 1999* (Qld), r 367 *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, cited *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, followed

Carruthers v Connolly [1998] 1 Qd R 339, cited
Day v Woolworths Limited & Ors [2018] QSC 266, related
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, followed
Isbester v Knox City Council (2015) 255 CLR 135, followed
Keating v Morris [2005] QSC 243, cited
Koowarta v Bjelke-Petersen (1982) 153 CLR 168, cited
Livesey v New South Wales Bar Association (1983) 151 CLR 288, cited
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, cited
Parbery & Ors v QNI Metals Pty Ltd [2018] QSC 213, followed
R v Lars (1994) 73 A Crim R 91, cited
R v Masters (1992) 26 NSWLR 450, cited
R v Watson; Ex parte Armstrong (1976) 136 CLR 248, cited
Re JRL; Ex parte CJL (1986) 161 CLR 342, cited

COUNSEL: The plaintiff appeared in person
G W Diehm QC and G O'Driscoll for the first defendant and for themselves
R Morton for the second and third defendants

SOLICITORS: The plaintiff for herself
Ashurst Australia for the first defendant and for Mr Diehm QC and Mr O'Driscoll
Mills Oakley for the second and third defendants

[1] The plaintiff, Mrs Day, by application filed 13 November 2018, applied for the following orders:

> "1. Pursuant to Rule 367 of the *Uniform Civil Procedure Rules* 1999 (Qld), and/or the inherent jurisdiction of the Court, Davis J be recused from any further involvement in the above proceedings.[1]
>
> 2. Pursuant to the inherent jurisdiction of the Court:
>
> 1) Mr Geoffrey Diehm, the Queen's Counsel of Jeddart Chambers, to be restrained from acting for Woolworths Limited (self-insured) in the interests of protecting the integrity of the judicial process and the due administration of justice;
>
> 2) Mr Gerard O'Driscoll, the Counsel of Clashfern Chambers to be restrained from acting for Woolworths Limited (self-insured) in the interests of protecting the integrity of the judicial process and the due administration of justice;
>
> 3. The defendants pay the plaintiff's disbursements and outlays of and incidental to this application."

[1] A reference to the proceedings in which the application was filed.

[2] On 16 November 2018, I delivered judgment on an earlier application.[2] I ordered that unless Mrs Day notified the solicitors for the defendants in writing of her selection of medical professionals to conduct assessments of her medical condition pursuant to an earlier order of Douglas J, the claim was permanently stayed.

[3] This application was filed with a return date of 17 December 2018. Mrs Day did not appear on that day. Her husband wrote to my Associate that morning enclosing a medical certificate,[3] the effect of which was that Mrs Day was not at that time medically fit to proceed with the application. I adjourned the application to 8 January 2019 for hearing.

[4] At the hearing of the application on 8 January 2019, Mrs Day accepted that she had not notified the solicitors for the defendants of her selection of medical professionals. Mrs Day conceded that in those circumstances the effect of my order of 16 November 2018 was that her claim was permanently stayed,[4] subject to her appeal against the order. At the hearing Mrs Day sought to press the current application, notwithstanding the concession that the proceedings were permanently stayed.[5] Mr Diehm QC, who appeared with Mr O'Driscoll for both themselves as respondents and also for the first defendant, submitted that I ought to hear the application because there is an appeal on foot and the orders sought by the application would, if made, restrain him and Mr O'Driscoll from acting for the first defendant in that appeal.[6] Mr Diehm QC pressed me to decide the issue. One option was to refuse to hear the application and allow Mrs Day to make submissions to the Court of Appeal that Mr Diehm QC and Mr O'Driscoll be restrained from appearing for the first defendant in the appeal. I formed the view that a more orderly way of dealing with Mrs Day's application was for me to hear and determine it, leaving her with her rights then to appeal from that judgment. I therefore gave Mrs Day leave to proceed with the current application despite the stay.[7]

[5] The defendants cross-applied for costs of the application and of the proceedings. They were given leave, to the extent it was necessary, to bring those applications.

[6] The application that I "be recused from any further involvement" in the case needed to be determined before I embarked on any hearing of the applications against Mr Diehm QC and Mr O'Driscoll. After hearing submissions I dismissed Mrs Day's application that I recuse myself and reserved my reasons. I indicated that I would deliver reasons on the recusal application when giving judgment on the other claims for relief made by the parties. I then turned to the remainder of Mrs Day's application and the defendants' applications.

[7] Mrs Day then applied for an adjournment of the further hearing of the applications as she was feeling unwell. I granted the adjournment, directed the parties to file written submissions in relation to the outstanding matters, and ordered that the remainder of the applications and the issue of costs be determined without further oral hearing.

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2 *Day v Woolworths Limited & Ors* [2018] QSC 266.
3 Exhibit 20 in the application.
4 Transcript of the hearing at 1-6.
5 At 1-7 to 1-8.
6 At 1-10.
7 At 1-17.

[8] Written submissions have been filed by the parties on the outstanding issues. Mrs Day has sent various emails to the Court requesting that I deliver reasons for declining to recuse myself as she wished to consider an appeal from that decision and she said that time was running against her to lodge an appeal. She has now filed a notice of appeal against my decision refusing to recuse myself. No decision has yet been made on the application against Mr Diehm QC and Mr O'Driscoll or on the defendants' cross applications. Surely, if Mrs Day is unhappy with my decision to hear the remaining applications then she would raise any complaints she has with that decision as grounds of appeal from any orders which might be made against her interests in the final disposal of the applications. In any event, given that Mrs Day has appealed, it is best if I deliver reasons now on the recusal application.

[9] These reasons deal with my refusal to recuse myself. Decisions on all the remaining issues, including costs, will be given in due course.

The recusal application

[10] Mrs Day particularised through her correspondence to the Court[8] and, later, through her oral submissions, that she sought my disqualification on the basis of apprehended bias, but not actual bias.[9]

[11] The grounds I have discerned upon which Mrs Day alleges apprehended bias are the following:

(i) I failed to consider the present application before delivering judgment on 16 November 2018;

(ii) Even if I was unaware of the present application as at 16 November 2018, I was aware of the factors that gave rise to a perception of bias and I should have disclosed and considered those.[10]

(iii) I heard the application heard on 8 November 2018 instead of Martin J;

(iv) My conduct of the hearing on 8 November 2018; interrupting Mrs Day when she was making submissions,[11] making statements which Mrs Day says suggested that I had prejudged the case against her, and failing to adjourn the hearing when she was ill.

(v) I have or had professional and personal connections with Sofronoff P;

(vi) Comments I made while I was President of the Bar Association of Queensland;

(vii) I was a director of the Bar Association of Queensland and so were each of Mr Diehm QC, Mr O'Driscoll, and Douglas J (when his Honour was JS Douglas QC). In her oral submissions, Mrs Day continued to rely on the fact of Mr Diehm QC, Mr O'Driscoll and me all being directors of the Bar Association of Queensland but withdrew reliance on the fact that JS Douglas QC (as his Honour then was) was once a director[12];

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8 In particular exhibits 5, 8, 13, 14, 18 and 20.
9 Mrs Day said she did not allege actual bias: Transcript of the hearing at 1-50.
10 Transcript 1-23.
11 Transcript 1-49.
12 Transcript of the hearing at 1-21.

(viii) Comments I made on 16 November 2018 in Mrs Day's absence;

(ix) In my reasons published on 16 November 2018 I said I would hear the parties on costs but then in Mrs Day's absence made costs orders against her.

(x) That on 17 December 2018, I made a comment that Mr O'Driscoll should not be criticised for not, on 16 November 2018, drawing to my attention to the fact that Mrs Day had made applications for an order that I recuse myself from hearing the present proceedings.[13]

[12] I will deal with each of these grounds. Mrs Day correctly submitted during the hearing that apprehended bias may be established by an accumulation of factors.[14] Upon considering each of the grounds separately, and all together, I declined to recuse myself because, for the reasons which follow, apprehended bias is not established.

[13] In *Parbery & Ors v QNI Metals Pty Ltd & Ors*[15] Bond J analysed the principles relevant to the determination of an application that a judge recuse himself or herself on the grounds of apprehended bias. His Honour said:

> "[28] The applicable law is uncontroversial.
>
> [29] High Court authority establishes that there is one test to be applied in determining whether a judge should be disqualified for apprehended bias, namely the objective test of whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.
>
> [30] The application of the test requires two steps:
>
> (a) first, the identification of what it is said might lead the judge to decide the question otherwise than on its legal and factual merits; and
>
> (b) second, the articulation of the logical connection between that matter and the risk that the judge will decide the matter otherwise than on its legal and factual merits.
>
> [31] The application of the test uses the touchstone of the "fair-minded lay observer" and that person's reasonable apprehension. The law contemplates the following in the application of that test:
>
> (a) The fair-minded lay observer has attributed to him or her awareness of and a fair understanding of the nature of the decision, the context in which it was made, and the circumstances leading up to the decision.
>
> (b) The fair-minded lay observer has attributed to him or her knowledge that the judge is a professional lawyer, whose training, tradition and oath or affirmation require him or her to discard the irrelevant, the immaterial and the prejudicial, with

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[13] Transcript 1-55.
[14] See, eg, *Carruthers v Connolly* [1998] 1 Qd R 339 at 376.
[15] [2018] QSC 213.

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

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

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

[33] Although the test is expressed in terms of a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind, it is also clear that the law requires that proposition to be "firmly established" before the judge should disqualify himself or herself. In *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; (2011) 242 CLR 283, Gummow J [14] at [71] to [72] made this observation (footnotes omitted):

> '[71] To that perception of the role of the hypothetical observer must be added the consideration that "the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party". The words are those of Mason J in *Re JRL; Ex parte CJL*, in a passage adopted by Callinan J in *Johnson v Johnson*. Mason J also said in that passage, using words later said by the English Court of Appeal to have "great persuasive force", and adopted by the New Zealand Court of Appeal:
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> > 'In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group; Watson; Re Lusink; Ex parte Shaw*. Although it is important that justice must be seen to be done, it is equally

> important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.'

[72] The references in JRL to the phrase "firmly established" in the joint reasons of all seven Justices of this Court in Angliss and to the subsequent authorities is important. ...'

[34] The judge's ordinary duty to sit unless convinced otherwise was also discussed in the earlier decision of E*bner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [19] to [21]:

> '[19] Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.
>
> [20] This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.
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> [21] It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly decline to sit. Circumstances vary, and may include such factors as the stage at which an

> objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise.'" (footnotes omitted)

[14] I adopt and follow his Honour's analysis. I will now deal with the individual complaints.

I failed to consider the present application before delivering judgment

[15] The issue is whether the failure to determine the allegations of apprehended bias before delivering judgment on 16 November 2018 is, in itself, a ground for recusing myself from the present applications as raising an apprehension of bias. As a matter of fact the application which was filed on 13 November 2018 did not come to my attention until after I had delivered judgment on 16 November 2018. The application was brought to my attention by Mr O'Driscoll on the day the judgment was delivered but after judgment had been delivered. Even then he only mentioned the relief sought against himself and Mr Diehm QC, not the fact that the application also sought that I recuse myself from hearing any matter relating to the present proceedings.

[16] However, Mrs Day submitted during the hearing that I had at least constructive knowledge of the application, because court registry staff knew of the application.[16]

[17] There is no logical correlation between the fact that I delivered judgment in one application before determining another application (about which I knew nothing), and any risk that I would decide the current applications against Mr Diehm QC and Mr O'Driscoll other than on the merits. No fair minded lay observer might reasonably apprehend that I would not bring an impartial mind to the resolution of the matters raised against Mr Diehm QC and Mr O'Driscoll as a result of delivering judgment on 16 November 2018 before firstly determining the present application that I recuse myself.

Even if I was unaware of the application as at 16 November 2018, I was aware of the factors that gave rise to a perception of bias and I should have disclosed and considered those

[18] As I understand Mrs Day's argument, the factors I ought to have disclosed are:

(i) any professional and personal connections with Sofronoff P;

(ii) comments I made when I was the President of the Bar Association of Queensland;

(iii) the fact that I was a director of the Bar Association of Queensland and so had been Mr Diehm QC and Mr O'Driscoll.

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[16] Transcript of the hearing at 1-25.

[19] I have concluded for the reasons which follow that none of these factors give rise to an apprehension of bias. It follows then that no fair minded lay observer might reasonably apprehend, on the basis that I did not make the disclosures, that I might decide the present applications against Mr Diehm QC and Mr O'Driscoll other than on the merits.

I heard the application on 8 November 2018 instead of Martin J

[20] On the law list on 8 November 2018, I was shown as sitting with Martin J in the applications list and the law list showed that a number of matters had been specifically listed before me. The other matters were all listed before Martin J, who, between us, is the senior judge. That is the practice of the Court and Martin J sent Mrs Day's matter to me once I became available.

[21] Mrs Day's submission is that the matter being transferred from one courtroom to another interfered with her ability to have a fair hearing. She submitted that she was not afforded a fair hearing or open justice, contravening provisions of the *International Covenant on Civil and Political Rights* (ICCPR).[17] As I observed in my reasons for judgment in November,[18] the ICCPR does not form part of the Australian domestic law.[19] Of course, the principle of open justice is part of Australian law,[20] and Mrs Day is entitled to a fair hearing of any matter in which she is involved.

[22] The courtroom in which I heard the matter on 8 November 2018 was an open courtroom. All parties were present and made submissions.

[23] When I pressed Mrs Day in argument to explain how considerations of apprehended bias arose from the way in which the application I heard on 8 November 2018 came before me, this exchange occurred:

> "HIS HONOUR: Why would – why would a reasonable, fair-minded person apprehend that I would be biased because Justice Martin sent the matter to me rather than dealing with it himself?
>
> PLAINTIFF: But I think – I suppose – I submit that your Honour should not be dealing with this mater without prior notice given to the parties, because the issue of issuing the prior notice to allow the party – any party to litigation – to raise the issue of apprehended or actual bias prior to the hearing."

[24] Mrs Day's complaint then is really that the way the matter came before me denied her the opportunity to raise issues of apprehended bias on other grounds. There is no correlation between the circumstances which led to me hearing the application which was heard on 8 November 2018, and any perceivable risk that I would decide the applications against Mr Diehm QC and Mr O'Driscoll other than on the merits.

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[17] Article 14 in particular: Transcript at 1-35.

[18] *Day v Woolworths Limited & Ors* [2018] QSC 266.

[19] At [15], and the authorities cited there: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 224–225; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

[20] *Supreme Court of Queensland Act 1991* (Qld) s 8.

My conduct of the hearing of 8 November 2018

[25] Mrs Day submitted that during the hearing of the applications on 8 November 2018, I interrupted her while she was making submissions. Mrs Day's submission is, that demonstrates some prejudgment of her earlier applications and therefore, there is a perceived risk of me determining the present applications against Mr Diehm QC and Mr O'Driscoll other than on the merits.

[26] Mrs Day made lengthy oral submissions on both 8 November 2018 and 8 January 2019. Often the submissions were disjointed, rambling, repetitive, and sometimes simply irrelevant. Mrs Day has a right to fairly put her case. She was given ample opportunity to do so. The fact that she was interrupted to dissuade her from making irrelevant or repetitive submissions, or was interrupted by questions designed to achieve clarification of submissions that Mrs Day was making, would not lead any fair-minded lay observer to reasonably apprehend bias.

[27] Mrs Day submitted[21] further that I demonstrated a prejudgment of the application heard on 8 November 2018 by saying the following:

> "I should tell you that I am contemplating striking that claim out, dismissing that claim, because they are presently stayed until you undergo an independent medico-legal examination and you are refusing to do so."

[28] Mrs Day submitted that I had on other occasions used similar expressions but these instances were not identified.

[29] Mrs Day's complaint was that my use of the word "contemplating" would lead a fair-minded lay observer to apprehend that I had already decided the outcome of the application heard on 8 November 2018 before hearing all her submissions. That, so it was submitted by Mrs Day, would lead to an apprehension of bias with respect to the current applications against Mr Diehm QC and Mr O'Driscoll.

[30] As the majority observed in ***R v Watson; Ex parte Armstrong***:[22]

> "During the course of argument a judge will often follow the common, and sometimes necessary, course of formulating propositions for the purpose of enabling their correctness to be tested, and as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory."[23]

[31] Mrs Day's contention that by identifying orders which I "contemplated" making was indicative of prejudgment cannot be accepted. Indeed the conduct is indicative of offering her procedural fairness, in that Mrs Day was being given clear opportunity to make submissions in opposition to orders sought by the defendants. A fair-minded lay observer would not apprehend bias.

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21 Transcript at 1-27.
22 (1976) 136 CLR 248.
23 At 264.

[32] Mrs Day submitted that my refusal of her request for an adjournment of the hearing on 8 November 2018 gives rise to an apprehension of bias with respect to the current application against Mr Diehm QC and Mr O'Driscoll. The circumstances of Mrs Day applying for an adjournment of the hearing on 8 November 2018 are explained in *Day v Woolworths Limited & Ors*.[24] In essence:

(i) Mrs Day sought to adjourn the hearing of her application seeking orders against three lawyers who had acted for the defendants;[25]

(ii) the adjournment was sought because she was ill;

(iii) Mrs Day had filed detailed written submissions in support of her applications against the lawyers;

(iv) when asked to identify any submissions she wished to advance beyond the written submissions she was unable to identify a single further submission against any of the lawyers.

(v) I directed that the applications should be decided on the parties' written submissions.

[33] The connection which Mrs Day alleges between the refusal of the adjournment and the risk that I will not decide the current applications against two different lawyers is unclear. Presumably, she submits that I may not give her a proper opportunity to advance full submissions in the present applications.

[34] Mrs Day was given a full opportunity to advance submissions on both the application heard on 8 November 2018 and the current applications. The refusal to adjourn the hearing of the application heard on 8 November 2018 would not give rise to an apprehension of bias in the mind of a fair minded lay observer.

My professional and personal connections with Sofronoff P

[35] Sofronoff P wrote the judgment of the Court of Appeal, with whom Morrison JA and Atkinson J agreed, dismissing Mrs Day's appeal from the order of Douglas J.[26] In her affidavit sworn 3 November 2018, Mrs Day makes various complaints about Sofronoff P and about the dismissal of her appeal. These included:

(i) the appeal was heard in her absence;

(ii) when in practice as a barrister, Sofronoff QC (as his Honour then was) had some contact with Mrs Day;

(iii) when in practice as a barrister, Sofronoff QC made statements concerning the appointment of Chief Magistrate Carmody QC (as his Honour then was) as Chief Justice of Queensland; and

(iv) she has sent various letters to Sofronoff P to which she has not received (in her view) satisfactory responses.

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[24] [2018] QSC 266 at [46].
[25] Not Mr Diehm QC or Mr O'Driscoll who are the subject of the present applications.
[26] *Day v Woolworth Group Limited & Ors* [2018] QCA 105.

[36] In her affidavit of 11 November 2018 Mrs Day exhibits and refers to various documents which show that:

(i) I have known Sofronoff P for decades;

(ii) we are friends;

(iii) we were both directors of a company, Smiler Pty Ltd. That was a company that operated the barristers' chambers group of which we were both members while practising at the Bar; and

(iv) I was the president of the Bar Association at the time of the appointment of Carmondy CJ (as his Honour then became) and in that capacity had not supported that appointment.

[37] Mrs Day's argument stems from the fact that Sofronoff P wrote the judgment dismissing her appeal from the orders of Douglas J. Further, on 16 November 2018, I made orders adverse to her where the defendants were relying upon the orders made by Douglas J. It follows so submitted Mrs Day, that any connection between Sofronoff P and me raises an apprehension of bias.

[38] Mrs Day's argument is misconceived. The orders made by me on 16 November 2018 were orders made upon application by the defendants relying upon the orders of Douglas J. Those orders had survived appeal and an application for special leave to appeal to the High Court and I did no more than recognise the validity of the orders as I was bound to do.[27] I did not sit in support of, or in review of, any decision that was made by Sofronoff P or Douglas J. I had no discretion to refuse to follow the judgment of the Court of Appeal.

[39] No fair minded lay observer might reasonably apprehend, as a result of my association with Sofronoff P, that I might decide the present applications against Mr Diehm QC and Mr O'Driscoll other than on the merits.

Comments I made as President of the Bar Association

[40] Mrs Day points to public comments I made while I was practising as a barrister about the appointment of Justice Carmody (as his Honour now is) to the office of Chief Justice. I was the President of the Bar Association of Queensland at the time of his Honour's appointment and resigned on 13 July 2014. I made public comments about his Honour's appointment both before and after my resignation.

[41] No fair-minded lay observer could reasonably apprehend bias against Mrs Day because of past comments made by me four years ago concerning the process by which the government of the day appointed the Chief Justice of Queensland.

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[27] *Day v Woolworths Limited & Ors* [2018] QSC 266 at [5], [6], [7], [13], [17]-[18], [21]-[22].

Directorships of the Bar Association

[42] Mr Diehm QC was a director of the Bar Association of Queensland between 27 November 2013 and 25 November 2015. I was a director of the Bar Association between 13 March 2008 and 16 June 2014.

[43] The Bar Association is a professional association of barristers in Queensland. It operates through a council. Members of the Association are elected to the council. If elected to the council, the barrister becomes a director of the Bar Association over the period that he or she holds office as a council member. For a period of seven or eight months, Mr Diehm QC and I were both council members together and, therefore, directors of the Bar Association. I have not socialised with Mr Diehm QC. My only contact with him has been professional, apart from a couple of occasions when I met him at functions held at a school our respective daughters attended. Mrs Day's submission, I think, is that because of that past association it could be thought that I could be biased in favour of Mr Diehm QC against Mrs Day. The fact that we were both at the one time directors of the Bar Association would not raise a reasonable apprehension of bias in a fair minded lay observer.

[44] Mr O'Driscoll has also been a director of the Bar Association of Queensland. He held a position on the council and was a director between 15 November 2004 and 20 November 2006. That was a period before I became a director. My only connection with Mr O'Driscoll has been a professional one and there is no reasonable apprehension of bias which could be held by a fair minded lay observer by virtue of the fact that Mr O'Driscoll served on the Bar Council two years before I did.

Comments I made on 16 November 2018

[45] Mrs Day did not appear on 16 November 2018 when I delivered judgment in the applications I heard on 8 November 2018. On that occasion, I directed that the papers be sent to the Legal Practitioners Admission Board. In the course of doing that, I said:

> "HIS HONOUR: Three applications were brought before me. Two were by the defendants in Mrs Day's proceeding. The third application was brought by her. The defendants' applications were to dismiss the proceedings because Mrs Day refused to submit to independent medical examinations. Mrs Day's application was to restrain three legal practitioners from further acting for the defendants. In the application brought against her, Mrs Day belligerently refused to acknowledge the authority of the Court exercised through the order of Justice Douglas. She continues to assert that the order was, in some way, defective notwithstanding that it had survived appeal and an application for special leave to appeal to the High Court.
>
> Mrs Day's application can be described as mischievous. It involved an unjustified attack upon three legal practitioners. The application was completely

> misconceived. Mrs Day is apparently engaged in legal studies and there is, therefore, a prospect that she will one day seek admission as a legal practitioner of the Court. Mrs Day's conduct in these proceedings raises very serious concerns as to her fitness for admission as a legal practitioner. Had she appeared this morning to receive judgment I would have given her the opportunity to make submissions as to why I ought not send the papers to the Legal Practitioners Admissions Board, together with my remarks. She chose not to appear this morning. She can make submissions to the Legal Practitioners Admission Board in due course."

[46] At the hearing on 8 January 2019, Mrs Day took particular issue with this because she said that she had not been duly notified of the judgment delivery. The comments were therefore made without Mrs Day having an opportunity to respond. Apparently, there was some confusion about the email address to which notification of delivery of judgment was sent. In any event, on 8 January 2019 I believed that Mrs Day had been notified and elected not to appear.

[47] The fact that a judge has decided particular issues or has been critical of the credit of a party may give rise to an apprehension of bias in subsequent proceedings where the same or similar issues will arise or the credit of the party or a witness is in issue. *Australian National Industries Ltd v Spedley Securities Ltd (in liq)*[28] is an example. So are *Livesey v New South Wales Bar Association*[29] and *Re JRL; Ex parte CJL*.[30]

[48] However, whether an apprehension of bias arises very much turns on the facts of the particular case.[31]

[49] In *British American Tobacco Australia Services Ltd v Laurie*[32] a judge sitting in the Dust Diseases Tribunal in New South Wales made findings of fraud against a party in relation to the way in which the party dealt with documents. In subsequent proceedings, an objection was taken to the judge sitting. The judge dismissed the objection. The New South Wales Court of Appeal dismissed an appeal from that order.[33] Special leave to appeal to the High Court was granted. A majority (Heydon J, Kiefel J (as her Honour then was) and Bell J; French CJ and Gummow J dissenting) held that there was an apprehension of bias. The majority held:

> " … a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the

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28 (1992) 26 NSWLR 411.
29 (1983) 151 CLR 288.
30 (1986) 161 CLR 342.
31 *R v Masters* (1992) 26 NSWLR 450; *R v Lars* (1994) 73 A Crim R 91.
32 (2010) 242 CLR 283.
33 [2009] NSWCA 414.

> possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding."[34]

[50] French CJ and Gummow J held that an apprehension of bias was not established notwithstanding the prior finding of fraud.[35] *British American Tobacco v Laurie* and other cases show that in assessing whether a fair-minded lay observer might reasonably apprehend bias, it is necessary to look at the previous findings made, and the issues in the later case to assess the impact of the previous findings upon perceptions of the reasonable lay observer.

[51] In *Isbester v Knox City Council* (2015) 255 CLR 135, the High Court said that:

> "20. The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made."

[52] On 16 November 2018 I found that Mrs Day's application was improperly motivated. That application was brought against three legal practitioners involved in the case. Her current application is brought against different practitioners on different grounds. There is no suggestion that Mrs Day's application argued on 8 November 2018 is relevant to the determination of any allegations against Mr Diehm QC or Mr O'Driscoll. No fair-minded lay observer would apprehend bias in the hearing and determination of the applications against Mr Diehm QC and Mr O'Driscoll by virtue of my comments made on 16 November 2018.

In my reasons published on 16 November 2018 I said I would hear the parties on costs and in Mrs Day's absence made a costs order against her.

[53] It is true that:

(i) In the written judgment delivered on 16 November 2018 I said that I would hear the parties on costs.[36]

(ii) I heard costs submissions, and made a costs order against Mrs Day in her absence.

[54] Mrs Day has not sought to reopen the costs issue. She says though that she failed to appear on 16 November 2018 because she was unaware that judgment was being delivered on that day. The alleged connection between the making of the costs order on 16 November 2018 and the risk that I will decide the current applications against Mr Diehm QC and Mr O'Driscoll other than on the merits is, it seems, that I disadvantaged

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34 At 333.
35 At 308-309 and 320-321.
36 *Day v Woolworths Limited & Ors* [2018] QSC 266 at [68].

Mrs Day by not giving her an opportunity to be heard. This, I think it is submitted shows an adverse attitude towards her which she submits raises an apprehension of bias.

[55] When judgment was delivered on 16 November 2018, I did not know that Mrs Day had not received notification of my intention to deliver judgment on that day. Therefore, when Mrs Day did not appear I drew the conclusion that she had chosen not to appear and I proceeded in her absence.

[56] No fair minded lay observer might reasonably apprehend that, because I determined the costs issue against her (in the circumstances I have explained) that I might determine the present applications against Mr Diehm QC and Mr O'Driscoll other than on the merits.

That on 17 December 2018 I made a comment that Mr O'Driscoll should not be criticised for not, on 16 November 2018, drawing to my attention that Mrs Day had made an application for an order that I recuse myself from further hearing the present proceedings.

[57] After I delivered judgment on 16 November 2018 the following exchange occurred with Mr O'Driscoll:

> "MR O'DRISCOLL: Your Honour, just a note as well, there's an application listed before your Honour on the 17th of December against Mr Diehm and myself. So depending upon your Honour's order, that matter is to be opposed and argued.
>
> HIS HONOUR: Yes. Well, we'll deal with that."

[58] Between 16 November 2018 and 17 December 2018, various correspondence passed between Mrs Day and the Court, some of which was directed to my chambers. On 17 December 2017, I explained in open court, for the record, what had transpired and marked various documents as exhibits. In the course of that exercise I said:

> "HIS HONOUR: Again, that exhibit will be in two parts as the ex tempore remarks are extracted from the transcript of the hearing. During the delivery of judgment, this exchange occurred. Mr O'Driscoll said to me:
>
> *Your Honour, just a note as well, there's an application listed before your Honour on 17th December 2018 against Mr Diehm and myself. So depending upon your Honour's order, that matter is to be opposed and argued.*
>
> I said:
>
> *Yes, well, we'll deal with that.*
>
> Mr Driscoll said:
>
> *Thank you, your Honour.*
>
> I then said:
>
> *I'll deal with that in due course.*

> The first I knew of an application being listed before me on 17 December 2018 was when Mr O'Driscoll told me about it in open court on 16 November 2018. It can be seen from the transcript which is exhibit 10 that Mr O'Driscoll did not mention that the application sought an order [that I be recused][37] from Mrs Day's case. By[38] making that observation, I mean no criticism of Mr O'Driscoll. When I returned from court to my chambers after delivering judgment on 16 November I saw that the Chief Justice had forwarded me a copy of Mrs Day's email at 8.42 am. That email was received by at 9.37 am. Attached to Mrs Day's email was a copy of the current application. Upon reading that, I learned for the first time that Mrs Day sought my recusal from further involvement in the proceedings. At 10.11 am on 16 November 2018, Mrs Day sent an email to the applications list manager. That email was forwarded to my associate at 10.25 am to confirm that my associate would exhibit a copy – would email a copy of the judgment to Mrs Day as I had directed. I will mark a copy of that as exhibit 11."[39]

[59] Mrs Day takes issue with my comment that "by making that observation, I mean no criticism of Mr O'Driscoll". Mrs Day submits that shows some favouritism to Mr O'Driscoll which leads to an apprehension of bias.

[60] At the time I made the comment I was simply recording what had happened. I did not invite Mr O'Driscoll to make submissions and simply observed that I meant no criticism from the bare facts that I stated. If Mrs Day wished to mount some criticism of Mr O'Driscoll based on the exchange on 16 November 2018 then she was free to do so. Nothing I said indicates that I had prejudged some submission, critical of Mr O'Driscoll which Mrs Day had not at that stage made.

[61] On 8 January 2019 Mrs Day raised my comment and I put it to her that the obvious inference to draw is that when Mr O'Driscoll, on 16 November 2018 mentioned the application returnable on 17 December 2018, he thought I had seen it. This exchange occurred:

> "HIS HONOUR: If you look at what Mr O'Driscoll has said, in hindsight – and I've gone back and had a look at this – Mr O'Driscoll obviously thinks I know what he's talking about. That's the point.
>
> PLAINTIFF: Could you - - -
>
> HIS HONOUR: So Mr O'Driscoll – I mean, it's obvious, I would have thought. Mr O'Driscoll is just simply saying, "Well, there's the application of 17 December". He thinks I've

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[37] These words are mistakenly omitted from the transcript.
[38] Erroneously recorded in the transcript as "My" not "By".
[39] Transcript 17 December 2018 1-8.

got it. That's obvious. That's what's happened. And that's why he hasn't bothered - - -

PLAINTIFF: Then the issue raised of why you didn't know that – why you Honour didn't know about that very important document.

HIS HONOUR: And we've gone either that, and I think - - -

PLAINTIFF: Yeah.

HIS HONOUR: - - - you understood - - -

PLAINTIFF: Yeah. But - - -

HIS HONOUR: You understand how that's happened.

PLAINTIFF: But my point is that – my submission is that the material of the case and the transcripts and the conduct of the hearing would allege preferential treatment for the other party, for the other counsels, who representing Woolworths and Zurich Insurance.

HIS HONOUR: All right. I understand that.

PLAINTIFF: That is my submission. This is my allegation.

HIS HONOUR: No, I understand that's your submission. I understand that."[40]

[62] It can be seen that Mrs Day didn't submit that the inference which I suggested should be drawn about Mr O'Driscoll's state of mind ought not to be drawn. Instead, she launched into an unrelated submission to the effect that the application ought to have been brought to my attention before 16 November 2019.

[63] No fair minded lay observer might apprehend from the comment I made about Mr O'Driscoll that there might be a danger that I would decide the present applications against Mr Diehm QC and Mr O'Driscoll other than on the merits.

Cumulative effect

[64] *Carruthers v Connolly*[41] is an example of a case where the cumulative effect of the actions of a person in the position of a decision maker was considered in determining apprehended bias. *Keating v Morris*[42] is another example. There is no doubt that all statements and acts should be considered individually and cumulatively when applying the test of the reasonable lay observer.

[65] For the reasons I have given, none of the individual matters raised by Mrs Day give rise to an apprehension of bias. Her submissions arise from a series of misunderstandings of

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40 Transcript 1-57.
41 [1998] 1 Qd R 339.
42 [2005] QSC 243.

the Court's practice, the true facts underlying her allegations and established legal principle. Taking all the alleged conduct together, no fair minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of the issues raised in the applications against Mr Diehm QC and Mr O'Driscoll.

[66] For these reasons, I refused to recuse myself from hearing the application against Mr Diehm QC and Mr O'Driscoll.