SUPREME COURT OF QUEENSLAND

CITATION:	*Amos v Wiltshire* [2016] QCA 70
PARTIES:	**EDWARD AMOS** (applicant) **v** **CHRISTOPHER WILTSHIRE** (respondent)
FILE NO/S:	Appeal No 4199 of 2010 DC No 1527 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Brisbane – [2010] QDC 138
DELIVERED ON:	29 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2016
JUDGE:	Gotterson JA
ORDERS:	**1. Application filed on 25 February 2016 is refused.** **2. Applicant to pay the respondent's costs of the application fixed at $8,000.**
CATCHWORDS:	COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – REASONABLE APPREHENSION OF BIAS GENERALLY – where the Court of Appeal heard the applications of the applicant on 25 August 2015 – where, on the date of the hearing, orders were made that a paragraph of relief which was no longer being pursued by the applicant be struck out, and another order of an interim nature – where further orders were made on 28 August 2015, dismissing the applications, with consequential orders – where the reasons are to be published at a later date – where the applicant filed an application applying for orders that: (1) the orders made on 25 August 2015 and 28 August 2015 be vacated; (2) that the applications be relisted for a fresh hearing; and (3) that the parties' costs be allowed under the *Appeal Costs Fund Act* 1973 (Qld) – where the basis of the application is the alleged existence of evidence of apprehended bias on the part of a judge whom was a member of the Court of Appeal hearing – where the applicant submits the judge ought to have disclosed that, whilst at the Bar, his Honour was briefed to appear for another party in a proposed appeal by the applicant – where the relevant matter was heard in 1998, the applicant was not cross-examined and the Court

did not make findings with respect to the applicant's credit – 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 was required to decide in the Court of Appeal hearing

Uniform Civil Procedure Rules 1999 (Qld), r 687(2)(c)

Amos v Amos [2010] QSC 314, considered
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48, applied

COUNSEL: P G Jeffery for the applicant
K Boulton for the respondent

SOLICITORS: Keller Nall & Brown for the applicant
Sharma Lawyers for the respondent

[1] **GOTTERSON JA:** On 25 August 2015, a Court of Appeal of which I was a member, heard applications made by Mr Amos against Mr Christopher Wiltshire. The Court made two orders at the hearing. One of them was to strike out a paragraph of relief which Mr Amos' counsel no longer pursued. The other, made at the conclusion of the hearing, was of an interim nature. Later, on 28 August 2015, the Court made orders which dismissed the applications as well as consequential orders, with reasons to be published at a later date. Those reasons have not yet been published.

[2] Mr Amos filed an application on 25 February 2016 in which he applies for orders that the orders made on 25 and 28 August 2015 be vacated; that his applications be relisted for a fresh hearing; and that the parties' costs be allowed under the *Appeal Costs Fund Act*.

[3] This application was heard on 24 March 2016. It is apparent from affidavit material filed in support of it, that the basis for the relief claimed is apprehended bias on my part. The apprehended bias is said to arise out of my participation as a barrister in litigation in the Court of Appeal in 1998, Appeal No 6248 of 1997. I was briefed to appear for Mr Noel Barbi in a proposed appeal by Mr Amos to that Court.

[4] In written submissions, counsel for Mr Amos has submitted that the applicant's material discloses two grounds for the application. The first is non-disclosure by me of having acted in the matter in the Court of Appeal. The second is apprehended bias. In oral submissions, it was said by counsel that the two are interrelated.

[5] I accept that I did not refer to my involvement in the appeal in 1998 at the hearing of the applications in August 2015. It had passed from my memory that I had been briefed in the appeal. I did not then, and now do not, have any recollection of it, or of the underlying issues in it.

[6] As a matter of prudence and professional practice, a judge should make disclosure of interests and associations if there is a serious possibility that they are potentially disqualifying. This standard has the endorsement of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [69].

[7] Whether an interest or association might give rise to such a serious possibility by reason of apprehended bias can be assessed by reference to the test for apprehended bias. Most recently, Gummow A-CJ, Hayne, Crennan and Bell JJ in *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [31] enunciated the test as 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.

[8] In written submissions, counsel for Mr Amos has submitted that an apprehension might fairly arise that I had already formed a view about Mr Amos and his credibility that might cause me to deviate from deciding his applications on the merits. In support of the submission, reference was made to the course taken by Philip McMurdo J in *Amos v Amos* [2010] QSC 314. After his Honour had heard an application, objection was taken on the basis that, whilst at the Bar, he had acted against Mr Amos in quite different litigation.

[9] In ruling upon the application, his Honour observed:

> "However, I am reminded by Mr Amos's letter and its enclosures of the circumstances of that litigation which had given rise to an apprehension that documents had been forged. I think it could now be fairly perceived that from my experience in that litigation, I would have such an adverse view of Mr Amos's character that I could not bring an unprejudiced mind to the resolution of the present application, where that would require a consideration of, amongst other things, his motives in the proceedings of which his brother complains."

His Honour thought that the preferable course was for the application to be determined by a different judge.

[10] I now turn to the matter in which I acted. As to it, I am assisted by the report of the short judgment of the Court at [1999] 1 Qd R 342. Mr Amos had wished to appeal against an order made in the District Court refusing him leave to proceed in an action against Mr Barbi. I was briefed to lead Mr Applegarth of counsel in the appeal. Before the hearing of the appeal, the Court notified the parties that it wished to hear argument on whether leave was necessary for such an appeal. The matter was heard on 22 April 1998.

[11] The issue raised by the Court was one of legal characterisation of an order refusing leave to proceed: whether it is interlocutory or final. The Court heard submissions on the issue. It decided that such an order is interlocutory and that leave was therefore required.

[12] The Court also heard submissions from counsel for Mr Amos concerning circumstances which, it was submitted, supported a grant of leave to appeal. One was a statement attributed by Mr Amos to a registry official that leave was not required. No finding was sought or made as to whether the statement was made by the official. The Court thought that it was plain that such a statement, even if made, could not have misled Mr Amos, an experienced law clerk and litigant.

[13] Another circumstance was that Mr Amos contended that he had been compelled to bring an application for leave by earlier proceedings. However, his own counsel informed the Court that the transcript of those proceedings did not support the contention.

[14] The third circumstance was that errors in the judgment below meant that it would be a travesty of justice if Mr Amos could not appeal. The Court's view was that the judgment below was not plainly wrong. In any event, no important question of law or justice was involved.

[15] Thus, in the proceeding in which I participated, I was not required to advance a case of impropriety on Mr Amos' part. Of course, he did not testify; I did not cross-examine him. The Court was not required to make, and did not make, findings with respect to Mr Amos' credit.

[16] In these circumstances, I am of the view that a fair-minded lay observer would not reasonably apprehend that I had, or might have, formed any view, including an adverse view, of Mr Amos or his credibility from my participation in that proceeding. No issue going to credit arose in it. A sharp contrast may be made with the litigation in which Philip McMurdo J had been involved where it was alleged by his client the documents relied on by Mr Amos had been forged.

[17] A case of apprehended bias has not been established. Further, I am satisfied that a serious possibility that I would be potentially disqualified for apprehended bias did not arise such as would have required me, as a matter of prudence, to disclose my association with the appeal proceeding heard in April 1998, at the hearing of the applications in August 2015.

[18] For these reasons, the application filed on 25 February 2016 is refused.

[19] Written submissions on the issue of costs were received from the respondent at the hearing and from the applicant after the hearing. The applicant has submitted that in the event that the application fails, there should be no order as to costs. The argument is premised on the footing that had disclosure been made by me at the hearing in August 2015, the matter raised by this application could have been dealt with then and there. However, that premise would have been valid only if disclosure was appropriate. As I have said, in my view, it was not appropriate to the circumstances and certainly not necessary in the circumstances.

[20] The usual rule as to costs ought to apply and costs should follow the event. The respondent has asked for costs on an indemnity basis fixed in the amount of $8,536, as sworn to by his solicitor, Mr Sharma.

[21] An indemnity costs order is justified, it is submitted, by an evident absence of prospects and an intention on the part of the applicant to frustrate and inconvenience the respondent. I have been referred to an instance in the history of this litigation where a judge of the trial division ordered indemnity costs against Mr Amos for "litigation antics" which needlessly generated significant legal costs. The award was upheld by this Court. The application here is said to have similar character.

[22] The application filed on 25 February 2016 is without merit. It should have been obvious that it would fail. However, it has not delayed the litigation overall given the orders that were made on 28 August 2015. Nevertheless, it has caused unnecessary inconvenience and expense for the respondent. I make no finding as to whether or not it was intended to do so.

[23] I am persuaded that, in all the circumstances and in the interests of avoiding further disputation, I should fix costs pursuant to r 687(2)(c) of the *Uniform Civil Procedure Rules*. I do so in the amount of $8,000.

[24] The orders of the Court are:

1. Application filed on 25 February 2016 is refused.

2. Applicant to pay the respondent's costs of the application fixed at $8,000.