COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: 7082/13
6041/13

Appellant: **PETER MARKAN**

AND

Respondent: **BAR ASSOCIATION OF QUEENSLAND**

OUTLINE OF SUBMISSIONS ON BEHALF OF THE RESPONDENT

Introduction

1. The appellant has commenced an appeal against the orders of the primary judge (Fryberg J) dismissing the appellant's application for an order that the primary judge be recused from hearing the respondent's application to strike out the proceeding.

The factual background, the proceeding, the related proceedings and some history

2. On 4 February 2013 the appellant commenced proceedings against the respondent. The proceedings stemmed from the respondent's investigation under the *Legal Profession Act* 2007, following referral from the Legal Services Commissioner, of complaints made by the appellant against 3 barristers who formerly represented him. In each case the respondent recommended to the Legal Services Commissioner that the complaint be dismissed and the Legal Services Commissioner adopted that course. In consequence, the appellant commenced the first set of proceedings against the respondent alleging (amongst other things) breach of contract, contraventions of provisions of the *Fair Trading Act* 1989, contraventions of provisions of the *Australian Consumer Law* (incorrectly pleaded as the *Competition and Consumer Act* 2010 (Cth)) and criminal and other misconduct.

3. The proceedings were ultimately struck out by Atkinson J: *Markan v. Bar Association of Queensland* [2013] QSC 146. The matters the subject of that decision are the subject of an appeal set down for hearing in this Court on 8 October 2013. Written outlines have been filed by each party.

4. On 3 July 2013, following the decision of Atkinson J, the plaintiff filed further proceedings BS6041 of 2013.

5. The proceedings sought orders that the respondent pay an invoice (a copy of which is appended for convenience) which the appellant delivered to the respondent. The invoice, in the amount of $11,000,000.13, is silent as to whether it includes GST.

6. The 'obligation' of the respondent to pay the invoice was pleaded in paragraph 1 of the statement of claim where the appellant alleged he provided to the respondent "the service of 'public ridicule' and 'public humiliation'" as a result an "understanding". The precise basis for the understanding was unclear. Upon an examination of the invoice (which contains 16 entries) it is apparent that what the appellant sought payment for was time he claims to have devoted to defending the applications which ultimately resulted in claim BS928 of 2013 being struck out by Atkinson J. Evidently, such matters were incapable of being claimed against the defendant in contract or otherwise. Indeed on no view of matters could it be said that the appellant provided the respondent with services for which the appellant should be compensated.

7. The respondent applied to have the matter struck out. The application was heard and determined in the respondent's favour by Fryberg J on 27 July 2013. The appellant does not offer any grounds of appeal relevant to the striking out of the claim but rather simply appeals the primary judge's decision not to recuse himself from hearing the matter.

8. Upon the primary judge refusing the application to disqualify, the appellant purported to exercise his "common law rights and ... human rights" and informed the Court that he did not wish to participate in the proceedings. He then left the court room. The proceedings were determined in his absence.

9. The respondent's attitude to the appeal follows that adopted by it at first instance; it takes no adversarial stance on the application and offers these submissions to assist the court with the relevant authority. That approach is consistent with what was said by Callinan J in *Kartinyeri v Commonwealth of Australia* (1998) 156 ALR 306 at [2]. The Respondent did not join with the appellant's application before the primary judge and does not do so in the appeal.

10. The grounds advanced by the appellant (under the heading "Grounds" in the Notice of Appeal) seem to have a common theme, that the learned primary judge was not independent and impartial. The outline of argument points to three particular features to which the appellant contends were sufficient cause for the primary judge to recuse himself: that the primary judge had participated in an annual conference held by the respondent as a "facilitator/organiser" (and had his accommodation paid for by the respondent); that the learned primary judge's son is a barrister and member of the respondent; and finally, that the

learned primary judge had run a course at the Bar Practice Centre at the Queensland University of Technology for a considerable period of time. The Outline also makes other, quite scandalous, allegations against the primary judge (and another retired member of the Court). It is unnecessary to rehearse the detail.

11. The relevant test for apprehended bias is, as Fraser JA (with whom McMurdo P and McMeekin J agreed) observed in *Mbuzi v University of Queensland* [2010] QCA 336 at [46] " ... whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". His Honour cited the High Court's decision in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 where at [6] and [8] Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> "Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
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> ...
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> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. 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."
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> [underlining added]

12. Also relevant are paragraphs [19] to [20] of *Ebner*:

> "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.
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> 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."

13. That is the relevant test that the primary judge was required to apply. While the respondent does not take an adversarial stance on the appeal, its position is that it is difficult to find error in the primary judge's application of the relevant principles.

14. One final matter should, for completeness, be addressed. An argument is advanced by the appellant that upon the exercise of his decision to refuse to participate in the proceedings the primary judge was not authorised to "act as the arbiter" and as such the continued court hearing was "illegal" and any decision made "illegal and invalid". The argument is wholly without foundation. There is nothing unorthodox about the primary judge proceeding with the respondent's application following the appellant's walk out. Indeed, he was bound to do so. The only means by which the orders striking out the claim can be impeached is if the appellant succeeds in demonstrating that the primary judge's decision not to recuse himself from hearing the application is attended by error.

15. For the above reasons, the appeal should be dismissed. As the respondent has been named as such and served with the appeal, it should have its costs of the appeal.

Dated: 27 September 2013
PATRICK McCAFFERTY
Counsel for the Respondent