SUPREME COURT OF QUEENSLAND

CITATION:	*Markan v Bar Association of Queensland (No 2)* [2013] QSC 109
PARTIES:	**PETER MARKAN** (plaintiff/applicant) v **BAR ASSOCIATION OF QUEENSLAND** (defendant/respondent)
FILE NO:	BS 928/13
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	24 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2013
JUDGE:	Atkinson J
ORDER:	**Stay refused.**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – IN GENERAL – ORDINARY RULE – where the applicant brought an application that a particular judge be disqualified from hearing their case on the ground of apprehended bias – where the matter was adjourned so that the application for disqualification could be heard by that judge – where the judge found that there was no basis for disqualification and refused the application – where the applicant appealed to the Court of Appeal and sought a stay of the decision – where appeal has little prospect of success – whether a stay should be granted APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where appeal has little prospect of success – whether a stay should be granted *Uniform Civil Procedure Rules* 1999 (Qld), r 7 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63, followed *Markan v Legal Services Commission* [2011] QSC 338, cited *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119, considered
COUNSEL:	The plaintiff/applicant appeared on his own behalf D G Clothier with P J McCafferty for the defendant/respondent

SOLICITORS:	The plaintiff/applicant appeared on his own behalf Bartley Cohen for the defendant/respondent

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HER HONOUR: Peter Markan is the applicant or plaintiff in matter number 928/13, a claim brought in this court against the Bar Association of Queensland. The claim was filed on 4 February 2013, supported by a statement of claim. On 26 February 2013, the defendant filed an application for various orders, including an order that the claim and the statement of claim be struck out. It also sought an order extending the time for leave to file a defence. On 5 March 2013, Justice Dalton of this court ordered that the time set for the defendant to file a defence in the proceeding be extended pursuant to rule 7 of the *Uniform Civil Procedure Rules 1999* (UCPR) until seven days after the determination of the relief claimed in paragraphs 3 and 4 of the application. That relief was the relief that the claim and the statement of claim be struck out. The application was otherwise adjourned to 14 March 2013.

On 14 March 2013, the matter came on in the applications jurisdiction. It was then adjourned to the week commencing 22 April 2013. Justice Philippides, who was the judge sitting in applications on 14 March 2013, recused herself from hearing the case on the basis that she was a judicial member of the defendant. Her Honour further ordered that if there were an objection it should be advised in writing and the basis of that objection set out in that advice by 12 noon on 26 March 2013. The matter was brought before the Chief Justice on 4 April 2013, where the plaintiff Mr Markan sought to bring an application that I be disqualified from hearing the case. In accordance with the usual practice, the Chief Justice adjourned the case to be heard by me.

On 17 April 2013, I heard, in the applications jurisdiction, Mr Markan's application to me to disqualify myself from hearing the case on the grounds of apprehended bias. I heard and determined that application on 17 April 2013. I formed the conclusion that there was no basis to disqualify myself and accordingly refused the application. Mr Markan has filed a notice of appeal against that decision, as he is entitled to, to the Court of Appeal, and also has sought a stay of that decision in the Court of Appeal. The substantive application by the defendant was due to be heard today by me, and accordingly, Mr Markan made an oral application to me to stay my decision pending hearing of a stay application in the Court of Appeal or a hearing of the appeal against my decision.

Rule 761 of the UCPR states that the starting of an appeal does not stay the enforcement of a decision under appeal. However, sub-rule (2) provides that the Court of Appeal, a judge of appeal or the court that made the order appealed from may order a stay of the enforcement of all or part of a decision subject to an appeal. It is appropriate for me to consider whether or not I should grant a stay of my decision pending either the hearing of an application for a stay in the Court of Appeal or a hearing of the appeal against my decision not to recuse myself.

Mr Markan has set out in his notice of appeal what he says are the reasons why the appeal should be allowed. In oral submissions, he particularly argued that what was wrong with my decision was that it was I who decided whether or not I should be recused, and that was in breach of a fundamental principle that a person should not be a judge in that person's own cause. That well-known principle is, amongst other places, set out by Lord Goff of Chieveley, to which Mr Markan referred me, in *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119 at 137. That is a principle which I, of course, accept.

However, the question in this case was whether or not I should have determined whether or not I should be disqualified on the basis of apprehended or actual bias. The High Court of Australia in *Ebner v Official Trustee* (2000) 2005 CLR 337 at 361, [74], set out how challenges of this kind should be determined. Chief Justice Gleeson, McHugh, Gummow and Hayne JJ said the following:

"We note that Callinan J … has expressed the view that it would be preferable in future for challenges of apprehended bias to be determined, where possible, by a judge other than the one who has been asked to disqualify himself or herself. With respect, we are unable to agree. On that approach, for example, some other judge of the Federal Court would have considered the challenge made to Goldberg J in *Ebner*. Adopting such a procedure would require an examination of the power of that other judge to determine the question and the way in which the other judge's conclusion would find its expression. In particular, is the question of possible disqualification to be treated as an issue in controversy between the parties to the proceeding and is it to be resolved by some form of order? The issue is not one which was argued in the present appeals, and it is sufficient to say that, in our view, Goldberg J adopted what was both the ordinary, and correct, practice of deciding the matter himself."

It was, therefore, appropriately a question for me whether or not I should disqualify myself. Mr Markan argues that his case is about the lack of respect for human rights and the issue of racist attitudes, discrimination, and vilification of people who are not lawyers, not of Anglo origin, and who represent themselves in court. Mr Markan is able to point to no evidence that would suggest that I hold any lack of respect for human rights, have racist attitudes or support discrimination or the vilification of people who are not lawyers or not of Anglo origin, or people who represent themselves in court. He said that I should stay my decision out of respect for the legal system and my judicial colleagues on the Court of Appeal.

The High Court in *Ebner* quite clearly said that a Judge must decide the matter for him or herself. Mr Markan suggested that the Court should show respect for international standards, but could point to no way in which those standards had been abrogated in this case.

The Bar Association argued that the stay should be refused by me, for the following reasons. Firstly, the proposed appeal has no merit. Secondly, from the defendant's perspective, not proceeding today would case it prejudice. And thirdly, by proceeding today, no more prejudice would be caused to Mr Markan.

My analysis of the authorities as to whether or not I was obliged to determine whether or not I should be disqualified, demonstrate to me that the proposed appeal has no merit.

The question of prejudice to the Bar Association is, in my view, more difficult. It is true that allegations are made against the Bar Association, namely that it has behaved

dishonestly and illegally. But they are no more than allegations. Certainly, the claim and statement of claim are in very strong terms. In the claim the applicant, Mr Markan, refers to the "cold and calculated criminal conduct and unrepentant attitude" of the Bar Association. Mr Markan also requests the Court to consider issuing a recommendation that the people associated with the Bar Association of Queensland be sent to re-education facilities, where they would be subjected to hard physical labour to instil in them respect for other people in the community. So certainly the claim is in strong terms. But it is no more than a claim setting out various allegations.

However, I take note that this proceeding has been on foot for some time and the application has been listed in the ordinary way and the defendant is entitled to have its application heard, unless there is some reason for it not to be heard.

Thirdly, the defendant argues that there is a lack of prejudice to Mr Markan as he has ordinary appeal rights. If the defendant's application is heard today it may be unsuccessful, in which case there is no prejudice to Mr Markan. Or, it may be successful, in which case he could appeal that decision and the question of whether or not I should have determined whether I should disqualify myself would be determined with that appeal. That argument has validity.

Given that I am of the view that the appeal sought by Mr Markan against my decision has virtually no prospects of success, I do not regard it as an appropriate case to grant a stay, and so I am refusing the stay.

Mr Markan informed me today that I had previously heard a matter involving him, where he sought judicial review of a decision of the Legal Services Commission. That is reported as *Markan v The Legal Services Commission* [2011] QSC 338. He did not suggest that that was a reason why I would be disqualified from hearing this application today.