SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0092

ALEXANDER CHRISTOPHER ELLIOTT — Applicant

v

JOHN ROSS LINDHOLM in his capacity as special purpose receiver of BANKSIA SECURITIES LIMITED (recs & mgrs apptd) (in liq) & ORS (ACCORDING TO THE ATTACHED SCHEDULE) — Respondents

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| JUDGES: | McLEISH, FORREST, and WEINBERG JJA |
| WHERE HELD: | MELBOURNE |
| DATE OF HEARING: | 23 September 2020 |
| DATE OF JUDGMENT: | 2 October 2020 |
| MEDIUM NEUTRAL CITATION: | [2020] VSCA 260 |
| JUDGMENT APPEALED FROM: | [2020] VSC 567 (John Dixon J) |

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COURTS AND JUDGES — Apprehended bias – Recusal application – Statements by trial judge as to whether overarching obligations breached by practitioner – Practitioner joined on Court's own motion – Whether correct principle for apprehended bias applied – *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, applied – *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, distinguished – Whether basis of joinder gave rise to apprehended bias – Where person's contravention of overarching obligations at issue but not subject of finding, Court may join person under *Supreme Court (General Civil Procedure) Rules 2015* r 9.06 or *Civil Procedure Act 2010* s 29(2)(b) – Neither basis could have given rise to apprehended bias – Whether judge's statements gave rise to apprehended bias – No apprehended bias in context – Leave to appeal refused.

LEGAL PRACTITIONERS — Obligation of candour – Privilege against self-incrimination – Order that practitioner depose to 'full and frank' explanation of impugned conduct, unconfined to specific allegations – Whether Court has power to require practitioner to give evidence – Supervisory jurisdiction empowers Court to require practitioner whose conduct is impugned to give evidence – Whether power properly exercised – Order sought prematurely to resolve relationship between obligation of candour and privilege against self-incrimination – Resolution to occur once practitioner gives or refuses to give evidence – *NSW Bar Association v Meakes* [2006] NSWCA 340, considered – Order improperly resolved relationship by treating candour as overriding privilege against self-incrimination – *Health Care Complaints Commission v Wingate* (2007) 70 NSWLR 323, applied – Order overly broad – Leave to appeal granted – Appeal allowed.

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| APPEARANCES: | Counsel | Solicitors |
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| For the Applicant | Dr C Button QC with<br>Mr G Kozminksy and<br>Mr A Christophersen | Garland Hawthorn Brahe Lawyers |
| For the First Respondent | Mr R Dick SC with<br>Mr J Redwood | Maddocks |

McLEISH JA
FORREST JA
WEINBERG JA:

1 This application for leave to appeal arises from ongoing litigation in a group proceeding. The plaintiff to that proceeding, Mr Bolitho, commenced it on his own behalf and on behalf of debenture holders who suffered loss on the collapse of Banksia Securities Ltd ('Banksia'), a non-bank lender. The proceeding was funded by the second plaintiff, Australian Funding Partners Pty Ltd ('AFPL'), a litigation funder.

2 The group proceeding was commenced against a number of parties said to be responsible for allowing Banksia to undertake the acquisition of a competitor which was in a weak financial position. The merger caused the collapse of Banksia. The defendants included Banksia itself, the trustee company that had been retained to oversee investments on behalf of the debenture holders, officers of Banksia and some external advisers.

3 The claims against the officers and external advisers were settled and the settlement was approved by a judge in the Trial Division in March 2017.[1] The remaining claims were also settled, approval being given in February 2018.[2] However, one of the debenture holder class members appealed against the approval order and that appeal was allowed in part by this Court in November 2018.[3] This Court found that, while the amount of the settlement sum was reasonable, the approval of the claimed legal costs and disbursements, together with the litigation fund's commission, should be remitted to a judge in the Trial Division for further consideration.

4 It is the hearing of that remitted matter which gives rise to the present

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1 *Re Banksia Securities Ltd (rec & mgr apptd) (in liq)* [2017] VSC 148.

2 *Re Banksia Securities Ltd (rec & mgr apptd) (in liq) [No 2]* [2018] VSC 47.

3 *Botsman v Bolitho* [2018] VSCA 278.

application.

5 In order to hear the remitter, the trial judge appointed senior and junior counsel as contradictor. In due course, the contradictor filed a list of issues, and successive revisions including a revised list on 21 July 2020 comprising 196 pages. The list of issues raised the possibility that several lawyers involved in the proceeding had breached the overarching obligations imposed on them by the *Civil Procedure Act 2010*. They were joined as defendants and known as the 'lawyer parties'. It was not then suggested that the present applicant had acted improperly in any way. However, such allegations were made in a further list of issues filed by the contradictor on 10 September 2020, in circumstances described further below.

6 The hearing of the remitter commenced on 27 July 2020 and so far has occupied nine hearing days.

7 On 17 August 2020, senior counsel for the first respondent, being the special purpose receiver of Banksia ('SPR') foreshadowed that he would seek a non-party costs order in relation to the costs he had incurred in the remitter, including the costs of the contradictor which were being funded by the SPR. It was said that costs would be sought against several persons including the applicant. Counsel also informed the Court that discovery would be sought against AFPL, but not against non-parties at that time.

8 On 18 August 2020, the SPR duly filed a summons seeking non-party costs against the applicant. The affidavit of Mr David Newman, the SPR's solicitor, in support of the summons deposed that the evidence revealed grounds for the Court to conclude that the applicant, as one of the officers of AFPL, knowingly participated in and assisted with the conduct alleged by the contradictor, including a fraudulent scheme to enrich AFPL and the lawyer parties at the expense of debenture holders.

***19 August 2020 — hearing***

9 The SPR's non-party costs summons was returnable on 19 August 2020. On

the morning of the hearing, the solicitors for the SPR informed the applicant's solicitor that the orders to be sought on that day would be related to timetabling and discovery. They later sent him an email attaching proposed orders that the SPR was seeking to have made at the hearing. Those included orders that the applicant make discovery. The applicant's solicitor sent an email to the Court and to the parties attaching the orders sought by the applicant. They included orders for particulars to be given to the applicant of the fraud allegations made against him.

10 During the course of the hearing on 19 August 2020, counsel for the applicant confirmed that he was seeking 'some further information about what in substance are allegations of fraud' which counsel, recently briefed, understood had been raised 'for the first time' against the applicant. The judge replied:

> It's very interesting that that's raised … because it seems to me that I have to reflect on [the applicant's] position in relation to the fact that he's an officer of this court and the manner in which he may have been involved in this matter and the extent to which he may or may not have observed his obligations under the *Civil Procedure Act*.

11 The judge then said that he would first deal with the other matters raised. Senior counsel for the SPR duly contended that discovery should be ordered against the applicant in relation to his financial circumstances and entities through which he might potentially have transferred funds.

12 In response, counsel for the applicant said that he understood that a non-party costs order might be sought against his client on the basis that it was said that there were 'grounds for the Court to conclude' that he 'knowingly participated in and assisted with the conduct alleged by the contradictor in the remitter, including the fraudulent scheme to enrich AFPL and the lawyer parties at the expense of debenture-holders'. Counsel submitted that the discovery sought did not go to these issues, only to the question of financial capacity to pay. The judge then said:

> [A]s I've reflected upon the evidence that I've heard, I'm considering the position of [the applicant] as a primary responder to the claims. It seems to me that he was in a position where he owed overarching obligations that he may well have breached. I haven't made any findings about that, and I can't make any findings about that because he's not a party to the proceeding. But

> what we are really looking at here is a very real prospect that [the applicant] may come into this proceeding as a party, not on the basis of a fraudulent allegation … but on the basis of a liability to orders under s 29 of the *Civil Procedure Act*.

13 Counsel for the applicant stated that he would need to be heard in relation to joinder, but was not then in a position to address the court on the point. The judge then said:

> I'm not asking you to address that … It's not something that you would get a say about. The court can of its own motion direct that a party appear before it and explain whether or not there's been a breach of overarching obligations, and that may well occur. I have not had the opportunity to make findings in relation [to] this matter, I have not yet heard final submissions. However, I have heard the evidence.

14 The judge also noted the 'the groundwork has been laid over and over again' for a *Jones v Dunkel*[4] inference in relation to the applicant's absence from the proceeding.

15 After hearing submissions from other parties, the judge said:

> I think that there is some merit in [the applicant's counsel's] contention that there is presently no issue directly involving [the applicant]. Although there is an application that the court consider whether he would be liable for a non-party costs order, and I understand the reasons why that application has been issued anticipating costs orders which I have not yet come to consider because I haven't made any findings on the primary issue, I think there nevertheless does remain an issue as to whether or not it is appropriate to make discovery orders against [the applicant].
>
> My preference is to adopt a different course. The Court has power to act under its own motion under s 30, I think off the top of my head, s 30(2) of the *Civil Procedure Act*, and in the circumstances that's what I'm going to do. I'm going to join [the applicant] as a party to this proceeding on the basis that he is in breach of overarching obligations and that it is necessary to consider the extent to which he might be liable to pay compensation.

16 The parties accept that the reference to s 30 is in error and should have been a reference to s 29.

17 The judge went on to say that, following the joinder of the applicant, the

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4 (1959) 101 CLR 298.

applicant 'can be in a clearer position to understand precisely what it is that's being put against him and to understand the nature of those allegations', and that 'we can then work out the procedure for dealing with making findings against [the applicant] in all of these circumstances'.

18 Counsel appearing for the applicant submitted to the judge that it was not possible to deal with the joinder issue, the applicant not having been represented in the hearing previously or played any role in it, and no findings having been made against him. The judge responded:

> No. Well, at some point, [counsel], [the applicant] can come to court and can tell me that he never heard it constantly suggested by the contradictor, 'Where is he; why isn't he giving evidence to explain all this', he was hiding behind a tree somewhere and didn't know what was going on, and we'll see whether that's a reasonable position to advance.

19 The judge stated that he would adjourn the discovery application against the applicant and told counsel for the applicant that he would 'get procedural fairness' and 'will know what application it is you are meeting and … the material allegations of fact that are being made against your client'.

20 Counsel then renewed his application for details of the allegations of fraud and the judge stated that he did not consider that to be a desirable course. He continued:

> [T]he duty which I have, as was explained by the Court of Appeal in relation to the *Civil Procedure Act*, is that where these breaches come before the court the court has got a duty to deal with them. That is the situation and that's what will occur.

21 The judge did not make formal orders regarding the applicant on 19 August 2020.

***20 August 2020 — Joinder Reasons and orders***

22 On 20 August 2020, the trial judge published reasons on the question of

joinder.[5] In those reasons, he stated that he had been concerned, since the close of evidence, 'whether there were grounds for the court, of its own motion and on the basis of the evidence adduced', to consider making orders against the applicant.[6] He said that the evidence 'supports a *prima facie* conclusion' that the applicant was bound by the overarching obligations in the *Civil Procedure Act* by virtue of s 10.[7] He went on to identify, by way of example, conduct identified in the affidavit of Mr Newman about the applicant's participation in conduct of AFPL and Mr Mark Elliott that was 'the foundation of the allegations made' by the contradictor.[8] He observed that AFPL had not explained the applicant's 'role in the proceeding', despite clear invitations having been made to the Court to draw a *Jones v Dunkel* inference against AFPL in that regard.[9]

23 The judge referred to considerations of the administration of justice, as follows:

> It is premature for me to now set out my findings on the evidence adduced before me, and I do not intend to do so. However, the evidentiary references to [the applicant] being involved in the dealings, some of which were highlighted by Mr Newman in his affidavit, draw my attention to my responsibilities to the proper administration of justice. There is a basis for the court's obligation to more carefully examine the conduct of one of its officers in the dealings and circumstances that will be proved in this proceeding.
>
> Those matters are sufficient to suggest that, *prima facie*, [the applicant] may have a case to answer that he has engaged in conduct in breach of the overarching obligations.[10]

24 After referring to authorities, the judge stated that he was satisfied that the Court had 'jurisdiction to determine, on its own motion, whether it is appropriate to make orders under s 29' of the *Civil Procedure Act* in respect of the applicant's

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5 *Bolitho v Banksia Securities Ltd [No 10]* [2020] VSC 524 ('Joinder Reasons').

6 Ibid [12].

7 Ibid [13]–[14].

8 Ibid [18].

9 Ibid [19].

10 Ibid [21]–[22].

conduct.[11]

25 The trial judge went on to say that he was 'not presently inclined to the view' that it was incumbent on the Court to articulate comprehensive particulars of the alleged contraventions by the applicant, that not being 'consistent with the paramount duty owed to the court by its officers'.[12] He stated that the Court was entitled to a 'full, frank and honest explanation from its officers' and that any unwillingness by the applicant to give evidence in the proceeding 'may be a relevant consideration casting doubt on whether a person is fit and proper to be an officer of the court'.[13]

26 The judge said that 'the matters to be explained by [the applicant] are to be found in the trial record of the remitter, with guidance through that material from the Revised List of Issues and the opening addresses of counsel for the contradictor and the SPR.'[14] At the time, the trial record of the remitter included 1,013 pages of transcript and 4,396 exhibits which ran to more than 45,000 pages. The judge added:

> Presently, I cannot see any difficulty with proceeding in this manner. Subject to any further submission that he may wish to proffer, rather than demand further particulars, as an officer of the court who is subject to the highest duty of fidelity to the court, [the applicant] should provide an affidavit giving a full and proper explanation of the circumstances of his involvement in the group proceeding. If proffered, his explanation can be considered and evaluated. In that context, the court will be sufficiently informed to invite submissions and give direction on whether, why and how ss 28 and 29 of the [*Civil Procedure Act*] apply.[15]

27 The judge stated that he would list the proceeding for directions to consider whether, and when, the applicant should provide such an explanation or call other evidence.[16]

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11 Ibid [28].

12 Ibid [30].

13 Ibid [31].

14 Ibid [32].

15 Ibid [34].

16 Ibid [35].

28 The judge concluded:

> I will order that [the applicant] be added as the fifth defendant … pursuant to s 29(2)(b) of the [*Civil Procedure Act*] for consideration by the court, on its own motion, whether any, and if so what, order under ss 28 or 29(1) of the [*Civil Procedure Act*] should now be made in the interests of justice.[17]

29 The order made on 20 August 2020 included the following:

> 1. [The applicant is] joined to the proceeding as the fifth … defendant …
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> 2. [The applicant] shall attend before the court at 9.30am on 27 August 2020 for further directions in respect of the future hearing and determination of whether the court should of its own motion make any, and if so, what orders under ss 28 or 29(1) of the *Civil Procedure Act 2010* (Vic) against [him] in the proceeding.

30 Orders were also made for the service of a copy of the order and accompanying reasons on the applicant, and for him to have access to the online review book in the proceeding.

***7 September 2020 — recusal reasons***

31 On 26 August 2020, the applicant filed a summons in the proceeding seeking orders that the trial judge recuse himself from hearing and determining (a) any application against the applicant for orders under s 29 of the *Civil Procedure Act* in respect of any matter the subject of or connected with the contradictor's revised list of issues, (b) any application in which it is alleged in relation to the proceeding that the applicant had breached any overarching obligation imposed by the *Civil Procedure Act* and (c) the summons seeking discovery against the applicant.

32 The summons was heard on 2 September 2020.

33 On 7 September 2020, the trial judge dismissed the application that he recuse himself in respect of the matters involving the applicant and published his reasons.[18]

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17 Ibid [41].

18 *Bolitho v Banksia Securities Ltd [No 11]* [2020] VSC 567 ('Recusal Reasons').

He started by setting out the applicable principles, about which he noted that the parties were in agreement. After setting out extracts from the decisions of the High Court in *Ebner v Official Trustee in Bankruptcy*,[19] *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[20] *Isbester v Knox City Council*[21] and *CNY17 v Minister for Immigration*,[22] the judge continued as follows:

> [The applicant] expressly stated that he made no allegation of actual bias. In substance, he submitted that my impartiality might appear to be compromised through an apprehension of prejudgment.
>
> A fair minded lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view. What is required is prejudgment incapable of being altered by evidence or argument.[23] As Gleeson CJ and Gummow J observed in *Jia Legeng*:
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> > The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion … Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.
>
> In their joint reasons in *Isbester*, Kiefel, Bell, Keane and Nettle JJ said:
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> > 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.[24]

34 The judge emphasised the importance of context, noting that the fair-minded lay observer was taken to be aware of the nature of the decision in question and the context in which it was made, and to have knowledge of the circumstances leading to it.[25]

35 The judge also set out extracts from the reasons of members of the High Court

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19 (2000) 205 CLR 337, 344–5 [6], 345 [8] (Gleeson, McHugh, Gummow and Hayne JJ) ('*Ebner*').

20 (2001) 205 CLR 507, 564 [185] (Hayne J) ('*Jia Legeng*').

21 (2015) 255 CLR 135, 155 [59] (Gageler J) ('*Isbester*').

22 (2019) 94 ALJR 140, 147 [21] (Kiefel CJ and Gageler J).

23 *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2011) 195 FCR 318, 361–2 [58] (Keane CJ, Lander and Foster JJ).

24 Recusal Reasons [13]–[15] (citations omitted).

25 Ibid [16]–[17].

in *Johnson v Johnson*.[26] These included the observation by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ to the effect that, while the fair-minded lay observer is not to be assumed to have a detailed knowledge of the law, the test for apprehension of bias was to be applied in the context of ordinary judicial practice, including the fact that judges may express tentative views during a trial and were not expected to wait until the end of a case before starting to think about the issues, or to 'sit mute' irrespective of what evidence is advanced or arguments are presented.

36 The judge then considered a number of statements which he had made during the hearing on 19 August 2020, which the applicant had submitted gave rise to a reasonable apprehension of bias according to the *Ebner* test. Having characterised much of the applicant's submissions as involving 'decontextualising statements made at the hearing',[27] the judge set out the statements in question and placed them in a wider context. That included consideration of the Joinder Reasons. The judge then set out the submissions of the parties in summary form.

37 In short, the judge found that, applying the principles he had stated, the fair-minded lay observer would not reasonably apprehend that he might not bring an impartial mind to the question whether the applicant had breached the overarching obligations in the *Civil Procedure Act*.[28] The judge addressed the contentions advanced by the applicant in turn, and it will be necessary to return to some of these matters later in these reasons.

38 Among the submissions with which the trial judge dealt was one advanced by the applicant to the effect that the fair-minded lay observer might anticipate prejudgment from the suggestion made by the judge in the Joinder Reasons that the Court need not specify the breaches of the overarching obligations that were alleged

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26 (2000) 201 CLR 488, 493–4 [13]–[14] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 508–9 [53] (Kirby J) ('*Johnson*').

27 Recusal Reasons [16].

28 Ibid [78]–[79].

and was entitled to demand a full, frank and honest explanation of how the applicant had discharged his paramount duty to further the proper administration of justice.[29] The applicant relied also on the judge's statement that, in general terms, the unwillingness of an officer to provide such an explanation may be a relevant consideration as to whether they are and will remain a fit and proper person.[30]

39 Among other things, the judge observed that his statements were made expressly on the basis that the applicant was 'yet to be afforded an opportunity to address the court as to how the matter should now proceed, speaking generally and in advance of any submissions'.[31] The judge continued:

> In case it assists in the future conduct of this remitter, I may be assisted by submissions as to the proper view to adopt about the interrelationship between the duty of candour owed by officers of the court and the principle that the court must always ensure the proper and due administration of justice. The High Court has consistently recognised that the public interest in the due administration of justice is foundational. The interests which may be presumed to require balancing in this proceeding are the public interest in due administration of justice and, presumably, the public interest that those who allege criminality or conduct that is otherwise illegal or capable of invoking disciplinary processes should prove it, although I am not presently persuaded that the latter public interest is relevantly engaged. Critical to the public interest in the due administration of justice is the duty of candour owed by officers of the court. That duty is of utmost importance. The public interest underlying the privilege against self-incrimination and penalty privilege may be subservient to that duty. In a context such as the present proceeding, it may become necessary to make the assessment, although the point has not been reached.[32]

40 In conclusion, the judge stated that the applicant's summons was dismissed and made orders in respect of the question of costs.

***9 September 2020 — stay application and orders***

41 On 8 September 2020, the applicant filed a summons seeking a stay of the proceeding pending the hearing and determination of an application for leave to

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29 See [25]–[26] above.

30 Recusal Reasons [103].

31 Ibid [105].

32 Ibid [106] (citations omitted).

appeal against the dismissal of his summons seeking recusal.

42 On the same day, the solicitors for the contradictor wrote to the other parties proposing a series of directions. Relevantly for present purposes, the first proposed direction was that the contradictor 'will provide a further revised list of issues setting out particulars relevant to' the applicant.

43 The stay application was heard on 9 September 2020. The judge dismissed that application in the course of the hearing and submissions were then made as to the future conduct of the case. Senior counsel for the contradictor confirmed to the Court that a further revised list of issues would be ready later that day, which would make plain the matters the contradictor sought to articulate as against the applicant. The contradictor suggested that the applicant be ordered to provide discovery according to certain categories identified in the letter dated 8 September 2020, and that there be an affidavit from the applicant by 30 September 2020.

44 In reply, counsel for the applicant raised a number of issues. In respect of the proposed affidavit, counsel said 'I'm at the moment not making a submission that [the applicant] will give evidence or won't give evidence'. He said that he did not have instructions in regard to that matter. The judge said 'I follow that. He may decline to make an affidavit'. Counsel then suggested that the order be framed in terms of 'any evidence [the applicant] may elect to give'.

45 The judge asked whether counsel wished to address the issue whether the Court was entitled to an explanation from one of its officers before it finally decided what breaches and on what evidence the person was required to make submissions. The judge agreed to permit counsel to defer addressing that question. The judge said that 'it would be more properly addressed [to] perhaps if there's a dispute about discovery or if you want to bring it on'.

46 Attention then turned to the form of the orders. It appears that a form of order that had been adopted in respect of the sixth defendant (without objection) was proposed as a template. That order had obliged the sixth defendant to file and

serve an affidavit. Counsel for the applicant submitted:

> Just in the first line the word 'shall', if it could be replaced with the word 'may'.

The judge replied:

> Yes, all right.

The matter did not arise further during the hearing.

47 Later on 9 September 2020 (the same day), orders were made. Apart from dismissing the summons for a stay, the orders relevantly included:

> …
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> 3. By 4.00pm on 10 September 2020, the Contradictor shall file and serve a further Revised List of Issues setting out particulars relevant to the [applicant].
>
> …
>
> 6. By 4.00pm on 30 September 2020, the [applicant] file and serve an affidavit deposing to a full and frank explanation of the circumstances pertaining to his involvement in the application before Croft J for approval of the settlement, Mrs Bateman's appeal against that approval and the subsequent remitter, including but not limited to the matters and facts identified by:
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> (a) the Court in the [Joinder Reasons];
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> (b) alleged by the SPR in paragraphs 60 to 68 of the affidavit of David Charles Newman sworn 17 August 2020; and
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> (c) any particulars of conduct identified by the Contradictor by notice to the [applicant] on or by 10 September 2020.

***10 September 2020 — confirmation of orders***

48 The following day, the applicant's solicitors wrote to the judge's associate in respect of the orders. That letter, sent by email, relevantly stated:

> We believe that Order 6 does not accurately reflect his Honour's intentions. Yesterday, there was discussion about [the applicant] giving evidence … [a]t one point, it was suggested that the Order be framed to require [the applicant] to give evidence. However, when his counsel suggested that any Order not be obligatory, his Honour acknowledged that [the applicant] may 'decline' to give evidence.
>
> The current form of the Order does not reflect that position. According to the transcript … his Honour indicated that the word 'may' was to be included

between the words 'defendant' and 'file'.

We ask that his Honour amend the Authenticated Orders made on 9 September 2020 in accordance with the 'Slip Rule'.

49 The associate responded by email dated 14 September 2020, evidently with the authority of the judge. He relevantly stated:

> His Honour settled the order and when doing so further reflected on [the applicant's] submission that the word 'shall' be replaced with 'may'. There was no slip. It is a matter for [the applicant] to take advice as to how he complies with the Order.

***Proposed grounds of appeal***

50 The applicant seeks leave to appeal on six proposed grounds. The first five are directed to the recusal issue. The sixth is a discrete challenge to the order requiring the applicant to file an affidavit of full and frank explanation. The proposed grounds are as follows:

1. In all the circumstances, the trial judge erred in failing to recuse himself on the grounds of apprehension of bias.

2. The trial judge erred in not applying the legal principles applicable to apprehended bias.

3. The trial judge erred in:

    a. holding that the fair-minded lay observer would or might appreciate that the applicant had been joined under rule 9 of the *Supreme Court (General Civil Procedure) Rules 2015*;

    b. holding that unqualified statements made by the trial judge to the effect that the applicant breached his overarching obligations were selective and out of context and that they would not give rise to apprehended bias in the mind of the fair-minded lay observer;

    c. holding that the fair-minded lay observer would not have apprehended bias by reason of the trial judge's failure to furnish the applicant with particulars of his alleged fraudulent conduct, including because the trial judge said the conduct raised the question of whether the applicant was fit and proper to be an officer of the court;

    d. failing to deal, alternatively to adequately deal, with the submission below that the fair-minded lay observer might perceive that the judge had formed an adverse view about the applicant.

4. The trial judge erred in distinguishing, and in not applying, the controlling authority *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

5. The trial judge erred in isolating the several matters relied upon to establish apprehended bias, rather than considering the combined and cumulative effect of those matters on the fair-minded lay observer.

6. The trial judge erred by making an order compelling the applicant to file and serve an affidavit containing a 'full and frank explanation' of certain matters (paragraph 6 of the orders made 9 September 2020) in circumstances where:

    a. the order was beyond power or an improper exercise of power;

    b. the order was embarrassing in that it was not clear and unambiguous.

***Proposed ground 1 — wrong conclusion***

51 Senior counsel for the applicant described the first proposed ground as an 'omnibus' ground. The reasons why it was submitted that a reasonable apprehension of bias arose, contrary to the conclusion of the judge, are encompassed in proposed grounds 3 to 5. It is therefore convenient to defer consideration of the first proposed ground.

***Proposed ground 2 — incorrect principles***

52 The applicant submitted that the trial judge applied the test for actual bias rather than apprehended bias. It was submitted that the following passage from the judgment of Gleeson CJ and Gummow J in *Jia Legeng* stated the test for actual bias:

> The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion … Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.[33]

The judge's citation of this passage immediately followed the statement 'what is required is prejudgment incapable of being altered by evidence or argument'.[34] The applicant submits that the case cited by the judge as authority for this last

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[33] *Jia Legeng* (2001) 205 CLR 507, 531–2 [71]–[72], cited at Recusal Reasons [14].

[34] Recusal Reasons [14].

proposition concerned a non-judicial decision maker. It was also said that the statement of the test had been incorrectly paraphrased by the trial judge.

53 The applicant submitted that a series of statements made later in the Recusal Reasons showed that the judge had applied an incorrect principle. Rather than decide whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the question, it was said that the judge had looked to see whether statements he had made had 'firmly established an ineradicable apprehension of prejudgment',[35] whether 'the court had closed its mind',[36] whether the court 'had definitively concluded' that fraud had taken place[37] and whether the court had 'reached a judgment incapable of being altered by evidence or argument'.[38]

54 In our opinion there is no substance in this proposed ground. The judge commenced discussion of the relevant principles by setting out the well-known 'double might' test articulated by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner*.[39] The judge went on to consider whether there were two or three steps involved in applying that test. He then observed that the applicant had expressly stated that he made no allegation of actual bias. The judge identified that the reason why the applicant alleged that his impartiality might appear to be compromised was 'through an apprehension of prejudgment'. [40]

55 It was then necessary for the judge to consider what constituted 'prejudgment' for these purposes. In that context, it was relevant to make the point that the question was not whether the judge might be thought to have a mind which was blank, rather it was whether the judge's mind might not be open to persuasion.

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35 Ibid [35], [80].

36 Ibid [65(b)].

37 Ibid [85].

38 Ibid [94].

39 *Ebner* (2000) 205 CLR 337, 344–5 [6], cited in Recusal Reasons [7].

40 Recusal Reasons [13].

In that context, the observations of Gleeson CJ and Gummow J in *Jia Legeng* to which the judge referred were entirely apt.

56 Likewise, given that the case concerned an allegation of a perception of prejudgment, it was also entirely apt for the judge to cite the joint reasons in *Johnson*, to the effect that judges need not 'sit mute' while a case proceeds and, on the contrary, will often form tentative opinions on matters in issue and assist counsel by articulating those opinions and giving them an opportunity to deal with them.[41]

57 In that context, when applying the *Ebner* test, the question is whether a fair-minded lay observer might reasonably apprehend that the judge might have a mind incapable of being altered by evidence or argument. The question is plainly not whether the fair-minded lay observer might reasonably apprehend that the judge's mind is not blank. In our opinion, the trial judge was saying no more nor less than this. In particular, he was not confusing the tests of actual and apprehended bias.

58 As to the particular occasions upon which it is submitted by the applicant that the judge applied too strict a test, we reject the applicant's submissions for the same reasons. The use of the expression 'ineradicable apprehension of prejudgment' does not point to the adoption of a more stringent test. As used in the joint reasons in *Johnson*,[42] it describes the situation where a judicial statement is so clearly indicative of prejudgment that no later statement can displace that impression and the *Ebner* test is met. In any event, the trial judge first used the expression in the course of a summary of the applicant's submissions. His only other use of the phrase is to be seen as rejecting the submission in question. The fact that the applicant expressed the strength of his case in emphatic terms does not indicate that the judge went on to apply such a higher standard as the applicable test.

59 For these reasons, we would not grant leave in respect of proposed ground 2.

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41 *Johnson* (2000) 201 CLR 488, 492 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

42 Ibid 494 [14].

***Proposed ground 3(a) — basis for joinder***

60 The applicant contended that the basis upon which the judge had joined him as a defendant to the proceeding was a significant aspect of the context in which the fair-minded lay observer might have apprehended that the judge might not bring an impartial mind to his case. It will be recalled that when the judge first raised the question of joining the applicant on his own motion, he referred to s 30(2) of the *Civil Procedure Act* (intended as a reference to s 29). In the Joinder Reasons published the following day, the judge stated that he made the joinder under s 29(2)(b) of the *Civil Procedure Act*. The order itself did not refer to the source of power for the joinder.

61 The applicant contended that the power to make any order under s 29 is conditioned on the judge first finding on the balance of probabilities that there has been a contravention of the overarching obligations. Once such a finding is made, it was submitted, the judge may then make any order he or she considers appropriate, including an order for joinder.

62 The judge stated in the Recusal Reasons that the joinder order was in fact made under r 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2015*.[43] However, the applicant submitted that the fair-minded lay observer would read the order in conjunction with the Joinder Reasons.

63 Section 29 of the *Civil Procedure Act* is relevantly in the following terms:

> **Court may make certain orders**
>
> (1) If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to—
>
> (a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;
>
> (b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable

[43] Recusal Reasons [25].

immediately;

(c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation … ;

(d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;

(e) an order that the person not be permitted to take specified steps in the civil proceeding;

(f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.

(2) An order under this section may be made —

(a) on the application of —

(i) any party to the civil proceeding; or

(ii) any other person who, in the opinion of the court, has a sufficient interest in the proceeding; or

(b) on the court's own motion.

(3) This section does not limit any other power of a court to make any order, including any order as to costs.

64 It can be seen that the power to make orders in the interests of justice contained in sub-s (1) is conditioned on the court first being satisfied that a person has contravened any overarching obligation. The applicant contends that, if he was joined as a defendant pursuant to s 29(1), then it necessarily follows that the Court was already satisfied that he had contravened an overarching obligation.

65 The respondent submitted that s 29(1) was not the source of a power of joinder under the provision. Rather, it was submitted that it was implied from the power of the court to make an order on its own motion under s 29(2)(b) that the court had the power to join a person for the purpose of considering whether to make an order under s 29(1). In other words, the grant of power to proceed on the court's own motion necessarily included a grant of power to order joinder for the purpose of deciding whether to make an order under sub-s (1).

66 The respondent's submission should be accepted. The fact that the court has power to proceed on its own motion necessarily means that the court may make procedural orders for the purpose of determining the issue before it. The court's powers in this regard include those found in the Rules, as sub-s (3) makes clear, but extend also to powers necessary to give effect to the specific power conferred by sub-s (2)(b).

67 Joinder will often not be necessary in a matter arising under s 29, because the person said to have contravened an overarching obligation will often have been a person who has taken part in the proceeding in which the contravention is said to have taken place. Being on notice of the proceeding, and having an opportunity to address the court in relation to the alleged contravention, it may not be necessary for such a person to be formally joined as a party.

68 In other cases, joinder may be necessary. At the very least, the Rules provide for that possibility. As we indicate above, we also consider that the power is conferred by s 29(2)(b). It is clear, however, that s 29(1) cannot confer a power of joinder in cases where the question of whether a person has contravened any overarching obligation is in issue. The powers in that provision are conditioned on the making of a finding to that effect, which self-evidently cannot be made while the point is in issue.

69 In our view, the fair-minded lay observer could not have regarded the judge as having ordered joinder under s 29(1). The judge acknowledged that no findings against the applicant had been made, so the section was not attracted. To the contrary, the fair-minded lay observer would have considered that the order was made pursuant to s 29(2)(b), as the judge stated in the Joinder Reasons.[44]

70 In the Recusal Reasons, the judge stated that the order was made under the Rules rather than s 29. Even if this was the view taken by the fair-minded lay

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[44] Joinder Reasons [41].

observer, no different result applies. On any view, the making by the judge of the order for joinder would not have conveyed to the fair-minded lay observer that the judge had already determined that the applicant had contravened any overarching obligation. We therefore reject proposed ground 3(a).

***Proposed ground 3(b) — unqualified statements***

71 The applicant drew attention to a series of comments made by the trial judge in the course of the hearing on 19 August 2020. The judge had said on that occasion that he was going to join the applicant 'on the basis that he is in breach of overarching obligations'. He had referred to a 'procedure for dealing with making findings against' the applicant. In addition, the judge had observed that the applicant could come to court and say that he had not been aware that his name had been raised 'constantly' in the proceeding and that he had been 'hiding behind a tree somewhere', whereupon the court could 'see whether that's a reasonable position to advance'. The applicant also relied on a statement by the judge that 'where these breaches come before the court, the court had got a duty to deal with them'.

72 In the Recusal Reasons, the judge held that the concentration by the applicant on these statements was selective and out of context.[45] The applicant submits that statements to which the judge pointed, and which he held showed that he had not formed an unqualified opinion about the applicant's conduct, did not support that conclusion. It was submitted that some of the judge's statements explained only that he could not make findings against the applicant while he was not a party. The applicant submits that such comments explain why the judge made the joinder order, namely to allow him to make findings against the applicant.

73 There is no substance in this ground. The judge was at pains in his Recusal Reasons to explain the importance of context. In that regard, the passage in the judgment of Kiefel, Bell, Keane and Nettle JJ in *Isbester* which the judge set out early

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[45] Recusal Reasons [16].

in his Recusal Reasons is instructive.[46] In stating that he could not make findings regarding the applicant because he was not a party to the proceeding, the judge was doing no more than pointing to a procedural matter that needed to be addressed. As the quoted passage from *Isbester* makes clear, the fair-minded lay observer does not take isolated statements made by a judge and form an apprehension that the judge might not bring an impartial mind to bear on the case without first placing those statements in their wider context.[47] A key element of that context is that the judge made it plain that he wished to hear evidence from the applicant. The fair-minded lay observer would not think that that exercise was intended to be a charade. To the contrary, the obvious purpose of the exercise would be to inform any decision which the judge might make in respect of the applicant and the overarching obligations. In that context, the fair-minded lay observer would regard statements about 'making findings against' the applicant or the applicant being 'in breach of overarching obligations', together with the other statements identified as, at most, infelicitous ways of describing the issue with which the Court would need to deal.

74 The judge pointed to numerous points in the hearing at which he had confirmed the foregoing understanding of the procedure which he proposed to adopt.[48] Those observations included the following:

(a) 'I have to reflect on [the applicant's] position … and the extent to which he may or may not have observed his obligations';

(b) 'I haven't made any findings, and I can't make any findings about that because he's not a party to the proceeding';

(c) 'I haven't made any findings on the primary issue';

(d) 'I have not heard final submissions';

(e) 'I will give detailed reasons [for the decision to instigate a s 29 inquiry] when I publish my reasons';

(f) 'The Court can of its own motion direct a that a party appear before it

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46 Ibid [15]; see para [33] above.

47 *Isbester* (2015) 255 CLR 135, 146 [20].

48 Recusal Reasons [79].

and explain whether or not there has been a breach of overarching obligations, and that may well occur';

(g) '[The applicant] can be in a clearer position to understand precisely what it is that's being put against him and to understand the nature of those allegations'; and

(h) '[The applicant] will get procedural fairness … and [the applicant] will know what application it is [he is] meeting and [he] will know the material allegations of fact that have been made against [him]'.

75 The applicant submitted that, when the judge referred to having not made 'findings' or 'findings on the primary issue' in this context, he was referring to the fact that he had not made findings in relation to defendants other than the applicant, and in particular the lawyer parties. Strictly speaking, that may be so. However, in the context of an allegation of reasonable apprehension of bias, the distinction is artificial and unhelpful. The judge was making the broader point that he had not yet made any findings at all. This emphasised that it would be similarly premature to make findings in respect of the applicant.

76 For these reasons, proposed ground 3(b) should also be rejected.

***Proposed ground 3(c) — failure to provide particulars***

77 Ground 3(c) concerns the refusal of the trial judge to require the provision of particulars of the applicant's alleged fraudulent conduct.

78 It was submitted to the trial judge that the fact that he referred the applicant to the record of the remitter, which then comprised over 1,000 pages of transcript and over 45,000 pages of exhibits, might have led the fair-minded lay observer to think that this indicated that the judge regarded the applicant as so obviously involved in the wrongdoing that he needed no assistance in identifying the allegations against him.

79 It was also contended before the trial judge that he had declined to provide particulars to the applicant at a time when he had already formed the view that the applicant was in breach of the overarching obligations. The judge was therefore said

to have possessed, but withheld, the very information which the applicant was seeking. This would, it was said, cause the fair-minded lay observer particular concern because of the possible severe disciplinary consequences for the applicant.

80 The applicant notes that, in the Recusal Reasons, the trial judge did not accept that he had declined to provide particulars of the applicant's alleged wrongdoing as requested. The judge said, in effect, that the applicant would have the opportunity to make submissions that the allegations against him be refined, and that directions would be made in due course so that the applicant 'might efficiently navigate through the trial record to be better informed about the nature of the inquiry, and the matters he might address'.[49]

81 The applicant submits that the fair-minded lay observer would not reach any such view, but would be influenced by what the trial judge had said in the Joinder Reasons. He had there said that he was not presently inclined to provide material particulars of the contraventions alleged before the applicant was required to explain his conduct.[50] The applicant submits that the orders dismissing the recusal summons made no reference to the applicant being afforded an opportunity to make submissions that the allegations against him should be refined. It is submitted that the fair-minded lay observer would have thought that the purpose of the directions hearing would be, as the judge said in the Joinder Reasons, to 'consider whether, and when, [the applicant] should provide [an] explanation and whether he seeks to cross-examine … or call any other evidence'.[51]

82 The question whether the applicant was entitled to particulars of the allegations made against him has in one sense become moot as a result of the provision by the contradictor of such particulars as foreshadowed in the letter of 8 September 2020 and provided for in paragraph 3 of the judge's orders dated

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49 Ibid [87]–[88].

50 Joinder Reasons [30], [34].

51 Ibid [35].

9 September 2020. The question raised under proposed ground 3(c) is not, however, concerned with whether particulars are required so much as with the question of whether the judge's approach to that question gave rise to a reasonable apprehension of bias.

83 Leaving to one side the fact that, after dismissing the recusal application, the judge did make provision for the provision of particulars, it is plain that the course taken by the judge reflected an understanding on his part of the obligations of officers of the court and in particular their obligation of candour. The judge made it clear in the Joinder Reasons that he was motivated to address the questions that arose concerning the applicant of his own motion because of considerations relevant to the proper administration of justice. As the judge pointed out, the administration of justice is among the responsibilities of judges of the Court. The judge referred to this Court's decision in *Yara Australia Pty Ltd v Oswal* in this respect.[52] The judge made it clear also that he regarded it as inappropriate for an officer of the court to demand further particulars rather than, being 'subject to the highest duty of fidelity to the court', providing a 'full and proper explanation' as to the relevant conduct.[53]

84 In our opinion, the approach taken by the trial judge reflects a view as to the proper relationship between the obligations of an officer of the court, on the one hand, and the entitlement of an officer of the court against whom allegations of breach of the overarching obligations have been made, on the other. The fair-minded lay observer is to be taken to understand that the judge was called upon to weigh these competing obligations and to form a view as to how they should be managed in the future conduct of the proceeding. The fact that the judge placed emphasis upon the obligation of candour of an officer of the court could not have given rise to an apprehension on the part of a fair-minded lay observer that the judge might not bring an impartial mind to bear in determining the ultimate issues.

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52 (2013) 41 VR 302, 311–2 [27] (Redlich and Priest JJA and Macaulay AJA), cited in Joinder Reasons [26].

53 Joinder Reasons [34].

85 In light of that conclusion, it is not necessary to decide whether the view of the judge as to the applicant's entitlement to particulars was provisional or final. In either case, the judge was doing no more than expressing his conclusion as to a difficult question of law.

86 Proposed ground 3(c) must therefore be rejected.

***Proposed ground 3(d) — adverse view of the applicant***

87 The applicant submitted that the trial judge had failed to address an argument put to him that the fair-minded lay observer might perceive that he had formed an adverse view about the applicant based on the exchange in which the judge had speculated that the applicant might be 'hiding behind a tree somewhere'. It was submitted that the fair-minded lay observer might conclude that the judge had formed the view that the applicant had committed wrongdoing, was aware that he had done so, and was seeking to hide that wrongdoing from the court.

88 In our opinion there is no substance in this submission. The judge observed that the groundwork had been laid on many occasions during the trial for an inference to be drawn in accordance with *Jones v Dunkel* against AFPL as a result of the fact that it had not called the applicant to give evidence. It is apparent that the applicant featured to a significant degree in the course of the evidence before the Court. To the extent that the judge was drawing attention to that fact, any expression of opinion on his part could involve no more than a statement of his current view as to the validity of a submission that might be made inviting him to draw a *Jones v Dunkel* inference against AFPL. To the extent that the observations might be taken to suggest that the applicant himself should have come forward, such a suggestion would be consistent with the conclusion the judge had expressed as to the obligations of officers of the Court as to full and frank disclosure.

89 In our opinion, the fair-minded lay observer would understand the judge's observations to be drawing attention to the absence to that point in the trial of a

significant figure in the history of the matter, and would not regard those observations as suggesting that the judge might not bring an impartial mind to bear on the question whether the applicant had in fact engaged in wrongdoing, when the time came to determine that question.

90 We would therefore also reject proposed ground 3(d).

***Proposed ground 4 — misapplication of authority***

91 The applicant next submits that the trial judge misapplied the decision of the High Court in *British American Tobacco Australia Services Limited v Laurie*.[54] The applicant submits that this case is controlling authority, and stands for the proposition that, if a judge makes an interlocutory finding of fraud against a person, that judge should not sit in final judgment of that person in the same proceeding, or in a different proceeding.[55]

92 The applicant points out that the judge in *BATAS* stated in his interlocutory reasons that his findings were based on the present state of the evidence and 'in the absence of evidence to the contrary', and that his interlocutory findings of fraud might be explained at trial. These qualifications did not prevent a reasonable apprehension of bias from arising.

93 The applicant says that in the present case, the judge has made statements similar to those which founded a reasonable apprehension of bias in *BATAS*. These include the statement that many documentary references 'absent explanation, permit an inference that [the applicant] was actively involved, or was complicit, in the conduct of AFPL under Mark Elliott'.[56] The applicant further submits that, because the evidence is 'closed on a final basis', the views expressed by the judge in the present case are likely to be less qualified and more concluded than in *BATAS*.

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54 (2011) 242 CLR 283 ('*BATAS*').

55 Ibid 333 [143]–[145] (Heydon, Kiefel and Bell JJ).

56 Joinder Reasons [18]; Recusal Reasons 47(a); 65(b).

94 The respondent submits that *BATAS* is merely a particular example of the application of the settled test for reasonable apprehension of bias to the particular facts and circumstances of that case. The respondent notes that the High Court was divided in its application of the test to those facts. It is submitted that *BATAS* does not have controlling precedential quality of the kind suggested by the applicant. In any event, the respondent submits that on no view has the trial judge made any finding as to fraud with any legal consequences. Moreover, the reason for the judge not having made any findings is because he was concerned to join the applicant and give him the opportunity to provide an explanation and rely on any further evidence and cross-examination of other witnesses before any such findings might be made.

95 The applicant's submissions in respect of this proposed ground proceed on two fundamental misconceptions. The first is that the judge has made a finding of fraud, either in respect of AFPL or any of the lawyer parties, or in respect of the applicant. It is plain from the statements made by the trial judge to which reference has been made earlier in these reasons that the judge did not consider himself to have made any findings, including on an interlocutory basis.[57] As the respondent pointed out, the judge recognised that no such finding could be made in respect of the applicant, at least before he had been joined as a party.

96 Secondly, the applicant's submissions refer to the evidence having closed. While that is so, in the sense that, before the applicant and the sixth defendant were joined as parties, the evidence in relation to the remaining parties had closed, there is no reason to think that the trial judge regards the evidence as having closed in respect of the applicant (or, for that matter, the sixth defendant). The order for the applicant to file an affidavit demonstrates the contrary. In addition, the judge should not be taken to have foreclosed the applicant from seeking to call other evidence or from seeking the recall of witnesses who have already given evidence so that they may be cross-examined on his behalf.

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[57] See [12], [13], [15], [17], [23] above.

97 It is not necessary to determine, in these circumstances, the legal principle for which the High Court's decision in *BATAS* is authority. Even if the applicant is correct, and it stands for a proposition regarding interlocutory findings of fraud, no such principle is attracted in the present case.

98 For these reasons, there is no substance in proposed ground 4.

***Proposed grounds 1 and 5 — application of whole of evidence***

99 Proposed ground 5 contends that the trial judge isolated and separately analysed each of the matters about which the applicant complained, without taking into account the effect on the fair-minded lay observer of the 'combined and cumulative effect' of those matters. This argument is conveniently dealt with along with proposed ground 1, the 'omnibus' ground by which the applicant contends that application of the *Ebner* test required the judge to disqualify himself from hearing matters concerning the applicant.

100 We have dealt, in the context of grounds 2 to 4, with the bases upon which the applicant contends that the fair-minded lay observer might think that the judge might not bring an impartial mind to bear in the determination of his case. Like the trial judge, we have rejected each of the individual arguments relied upon by the applicant. In our opinion, this is not a case where the sum of those arguments is greater than its parts. In our view, taken in their full context, the remarks of the judge and the procedural steps which he took are explicable, and would be understood by the fair-minded lay observer, as being intended to bring about a situation in which the question whether the applicant was in breach of the overarching obligations under the *Civil Procedure Act*, and, if so, what consequences should follow, could properly and fairly be heard and determined. The fact that the judge acted on his own motion is quite consistent with that understanding. In our view, it speaks no partiality on the part of the judge. Similarly, the fact that the judge required the applicant to give an explanation of his conduct, for the reasons we have given, merely reveals the judge's understanding of the way in which the

law operates in this area, rather than any possible prejudgment of the case involving the applicant. The correctness or otherwise of that understanding is the subject of proposed ground 6.

101 For these reasons, we would reject proposed ground 1. As far as proposed ground 5 is concerned, it is true that the judge did not, in terms, state that he stood back from the evidence and reconsidered it as a whole, after having rejected the individual arguments which had been put to him. However, in light of our conclusion in relation to proposed ground 1, there is no point in considering whether or not anything is to be drawn from that circumstance. For that reason, leave in respect of proposed ground 5 should be refused.

***Proposed ground 6 — requirement to file affidavit***

102 Under proposed ground 6, the applicant challenges the order made on 9 September 2020, by which he was ordered to file and serve an affidavit giving a full and frank explanation of his conduct. Leave was given for this ground to be added to the application for leave to appeal. It was not the subject of any written case until the applicant filed a short supplementary written case two days before the hearing. The respondent did not file a written case in response, but had made preliminary written submissions in respect of this ground and did not oppose the Court considering the question whether the judge had power to make such an order. While counsel for the respondent stated at the hearing that the respondent had some reservations as to the remainder of the ground, namely whether the power to make the order, if it existed, was properly exercised, the matter was the subject of full argument and the respondent did not point to any particular prejudice which would prevent the whole ground being heard and determined.

103 At the end of the hearing on 23 September 2020, the Court indicated that it would uphold proposed ground 6 and made orders accordingly setting aside paragraph 6 of the order of 9 September 2020. We set out our reasons for that decision below.

104 The first part of the applicant's submissions was directed to the question whether the judge had power to make an order compelling the applicant to swear an affidavit. While accepting that the Court had broad powers in its inherent supervisory jurisdiction, the applicant submitted that the Court lacks power to call witnesses.[58] It was submitted that the same position applies in the supervisory jurisdiction. The applicant relied on a statement made by this Court in *Stirling v Legal Services Commissioner*,[59] to the effect that there is no authority to suggest that a legal practitioner has a duty to give evidence in a disciplinary tribunal.

105 The respondent submitted that, in disciplinary proceedings against a legal practitioner, the appropriate procedure was entirely in the hands of the Court, subject only to statutory directions and the requirements of procedural fairness.[60] The respondent submitted that, in exceptional circumstances, courts have the power to call witnesses.[61] In addition, the respondent submitted that a power to call witnesses was to be derived from the own motion power of the Court under s 29, read together with s 16 of the *Civil Procedure Act*, which imposes the paramount duty to further the administration of justice.[62]

106 It is not necessary, in order to address this aspect of the argument, to seek to define the circumstances in which a court may call a witness to give evidence. In particular, the principles governing the calling of witnesses in criminal trials do not arise for consideration in this case. The issue concerns only the scope of the Court's supervisory jurisdiction in respect of the conduct of legal practitioners.

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58 *Titheradge v The King* (1917) 24 CLR 107, 118 (Isaacs and Rich JJ).

59 [2013] VSCA 374, [155] (Warren CJ, Neave JA and Dixon AJA); see also *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540, 569 [146] (Warren CJ, Osborn JA and Ginnane AJA) ('*Kyriackou*').

60 *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 246 (Brennan J), 251–2 (Deane, Dawson, Toohey and Gaudron JJ) ('*Wentworth*'); *Sharp v Rangott* (2008) 167 FCR 225, 227 [3] (Gray and North JJ) ('*Sharp*').

61 *Sharp* (2008) 167 FCR 225, 241 [59] (Besanko J); *Smith v Western Australia [No 2]* (2016) 263 A Crim R 449, 452 [8], 455 [23] (Martin CJ); [2016] WASCA 136.

62 See also *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, 311–2 [25]–[27] (Redlich and Priest JJA and Macaulay AJA).

107 In that regard, it is plain that the jurisdiction and powers of the Court are very broad. The joint judgment in *Wentworth* made this clear:

> Disciplinary proceedings have been described as proceedings concerned with the protection of the public. And it has been said that, because they have the protection of the public as one of their primary objects, they cannot necessarily be determined on the same basis as adversarial proceedings. That is also true of admission proceedings, although that may be more obvious in cases concerned with readmission. In any event, the right to practise in the courts is such that, on an application for admission, the court concerned must ensure, so far as possible, that the public is protected from those who are not properly qualified ... And the consequence is that, as with disciplinary proceedings, admission proceedings are not automatically determined in accordance with rules and procedures applied in ordinary adversarial proceedings.
>
> Both the nature and purpose of admission and disciplinary proceedings indicate that, unless and save to the extent that specific procedures are laid down by statute or by rules of court, and subject, of course, to the requirements of procedural fairness, they may be conducted in whatever manner the court considers appropriate to the matter before it.[63]

108 As Brennan J put it, agreeing with the rest of the Court, 'in admission and disciplinary proceedings, the procedure is entirely in the hands of the court subject only to statutory directions and the requirements of procedural fairness'.[64]

109 The applicant submitted that, even so, the Court's powers do not extend to compelling a practitioner to appear before it to give evidence. He relied on the observation of Warren CJ, Neave JA and Dixon AJA in *Stirling* that 'there is no authority to suggest it is a duty of a legal practitioner to give evidence in a disciplinary tribunal'.[65] However, that case was concerned with the consequences that may flow when a practitioner declines to give evidence.[66] It did not concern the anterior question whether the practitioner may be called as a witness, but the question what relevance may lie, in terms of findings of fact and penalty, in a practitioner's failure to give evidence.

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63 (1992) 176 CLR 239, 251 (Deane, Dawson, Toohey and Gaudron JJ) (citations omitted).

64 Ibid 246.

65 [2013] VSCA 374, [155].

66 See also *Kyriackou* (2014) 45 VR 540, 569 [146]–[148] (Warren CJ, Osborn JA and Ginnane AJA).

110 The question of power to call a practitioner as a witness stands distinct from the question what happens when the practitioner duly attends as a witness. As is clear from *Wentworth*, the powers of the Court remain subject to the requirements of statute and procedural fairness.

111 The fact that the Court's powers are subject to the requirements of procedural fairness may have consequences for how events unfold when a practitioner is called to give evidence. But it does not have implications for the Court's power to require the practitioner to appear as a witness in the first place. In our view, the supervisory jurisdiction of the Court necessarily entails that, in a case where the conduct of a practitioner has been called into question, the Court has power to require that practitioner to give evidence. Whether the practitioner, once called, may decline to answer questions, and what might flow from any such refusal, are separate questions.

112 That conclusion is reinforced by s 29(2)(b) of the *Civil Procedure Act*. Just as the supervisory jurisdiction is subject to statutory limits, so also it may be confirmed or expanded by statute. The specific power to act on the Court's own motion serves to confirm that, in so acting, the Court may require the practitioner in question to give evidence. The own motion power would be hollow if the Court could not compel the practitioner to appear to give evidence unless another party took the steps necessary to achieve that result.

113 The next aspect of the applicant's argument under this ground concerned the manner in which the power was exercised. The argument had two parts. First, it was submitted that the judge's order disregarded the privilege against self-incrimination. That fault was said to be especially significant in circumstances where fraud was alleged. Secondly, the order was said to be vague and imprecise. Although particulars had, in the event, been furnished, the order called for an explanation without limitation to those particulars. It was pointed out that failure to comply with the terms of the order would constitute a contempt of court.

114 The respondent accepted that the case attracted the privilege against self-incrimination but submitted that the applicant had at no stage invoked the privilege, such that the effect of the order in that regard was hypothetical. It was contended that the importance of candour on the part of legal practitioners and the interests of the administration of justice meant that it was appropriate for the order to be expressed in mandatory terms. The respondent submitted that the order did not prevent the applicant from relying on the privilege against self-incrimination, or approaching the Court for further orders if he proposed to invoke the privilege, which would constitute a reasonable excuse for non-compliance with the order.

115 A legal practitioner's obligation of candour to the Court is not in doubt. Nor is the potential operation of the privilege against self-incrimination, in that context. The tension between those principles will call for resolution in a case where they compete. As mentioned earlier, that resolution only arises for decision once the practitioner's evidence has been heard (or once the practitioner refuses to give evidence). So much is clear from the conclusions of the New South Wales Court of Appeal in *NSW Bar Association v Meakes*,[67] endorsed by this Court in *Kyriackou*:

> Notwithstanding the advice of his then senior counsel, the respondent's refusal to enter the witness box and provide evidence with respect to the matters referred to should have been the subject of harsh criticism by the Tribunal. Moreover, if that evidence had otherwise been relevant to the issue, his refusal to provide it would have significantly detracted from the weight to be attached to the tendered character references. In these circumstances, the only inferences one can draw from the respondent's refusal to give sworn testimony in this matter was that his evidence would not have assisted his case in resisting a finding of professional misconduct. [68]

116 As the respondent submits, it is premature to seek to apply any such approach in the present case. The applicant has neither refused to give evidence nor given his evidence. Likewise, it is not necessary or desirable for this Court now to explore the possible differences between what was said in *Meakes* and observations

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67 [2006] NSWCA 340, [77] (Tobias JA, Bryson JA agreeing at [97], Basten JA relevantly agreeing at [9]) ('*Meakes*').

68 (2014) 45 VR 540, 569 [148]–[149] (Warren CJ, Osborn JA and Ginnane AJA); see also *Stirling* [2013] VSCA 374, [155]–[157] (Warren CJ, Neave JA and Dixon AJA).

of the New South Wales Court of Appeal in the subsequent case of *Council of the NSW Bar Association v Power*,[69] which appeared to place a greater weight on the privilege against self-incrimination. The proper conclusions to be drawn from any failure on the part of the applicant to give evidence or answer questions, if that transpires, are matters for another day.

117 The problem in the present case is that the impugned order has the effect of bringing those matters forward and deciding, adversely to the applicant, that he is obliged to give substantive evidence. Not only has the occasion for deciding that point not arisen, but critically, the order to give a 'full and frank explanation' is fundamentally inconsistent with the privilege against self-incrimination. The order purports to resolve the potential tension between the applicant's obligation of candour and his privilege against self-incrimination in favour of the former at the expense of the latter.

118 The relationship between these potentially competing principles is the same as that identified by Basten JA in the context of health care professionals in *Health Care Complaints Commission v Wingate*,[70] applied to a legal practitioner in *Power*.[71] In *Wingate*, after referring to some comments made by the relevant tribunal, Basten JA continued:

> At a general level, these comments may be said to reflect the duty of full and frank disclosure of misconduct which applies both to members and applicants for membership of professions such as law and medicine. However, the scope of this obligation requires more detailed attention as to its application in particular circumstances. One well-known example is the case of *Re Davis*, involving an applicant for admission as a barrister who many years before, as a young man, had been convicted of house-breaking for the purpose of theft. His application was refused at least in part upon the basis that he had failed to disclose the conviction to the Barristers Admission Board. Dixon J, after noting the difficulty of establishing good character in the light of such a crime, stated:

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69 (2008) 71 NSWLR 451, 467 [26] (Hodgson JA, Beazley JA agreeing at 453 [1], McColl agreeing at 470 [44]) ('*Power*').

70 (2007) 70 NSWLR 323, 333–5 [44]–[50] (Basten JA, Harrison J agreeing at 353 [81]) ('*Wingate*').

71 (2008) 71 NSWLR 451, 460–1 [16] (Hodgson JA).

> But a prerequisite, in any case, would be a complete realization by the party concerned of his obligation of candour to the court in which he desired to serve as an agent of justice. The fulfilment of that obligation of candour with its attendant risks proved too painful for the appellant, and when he applied to the Board for his certificate he withheld the fact that he had been convicted.

A further well-known example of the obligation may be found in *Re Veron; Ex parte Law Society of New South Wales* where the Court (Heron CJ, Sugerman JA and McLelland JA), after noting that the solicitor had not filed an affidavit or offered to give oral evidence, described the course as 'irregular' and continued:

> The respondent is an officer of the Court. The Full Court of the Supreme Court held in November 1965 that on the material presented to it by the Law Society, a prima facie case of misconduct was made out and called upon the respondent to show cause why he should not be dealt with. The matter arises within the disciplinary jurisdiction of the Court and if the respondent, after consideration, declines to give his account on oath of the matters charged he cannot complain if the Court holds against him that the facts as deposed to … are substantially true. … The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and to engage in a battle of tactics, as was the case here, and to endeavour to meet the charges by mere argument.

*It may be noted that neither of these examples involves any suggestion that the obligation of candour overrides the general law privilege against self-incrimination.* Absent an express statutory provision, or a necessary implication arising from statute, to that effect, the privilege will generally be available. On the other hand, *the privilege does not entitle a practitioner to make untruthful or misleading statements nor, if the practitioner declines to answer particular questions, will it prevent the Board or a tribunal taking steps in order to protect a relevant public interest*.[72]

119 As is clear from the final paragraph set out above, the obligation of candour does not displace the privilege against self-incrimination. At the same time, as discussed earlier, claiming the privilege may have consequences when the Court comes to make findings.

120 In our view, the making of the order had the effect of blurring these considerations. The order displaced the privilege by insisting upon the obligation of candour. Moreover, it did so in wide and general terms which were not confined to the allegations which were being made against the applicant. It is no answer to these difficulties to say that the applicant might approach the Court or would have had a reasonable excuse for non-compliance with the order. For the reasons given above,

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[72] (2007) 70 NSWLR 323, 333–4 [43]–[45] (emphasis added) (citations omitted).

the order should not have been made.

121 We set aside the order for these reasons. It is not necessary for this Court to make any order in its place. The applicant remains subject to a practitioner's obligation of candour. How he addresses the case against him remains to be seen. Questions such as discovery (having regard to the privilege against self-incrimination), the admissibility against the applicant of evidence already given, the calling of any further evidence including the recall of witnesses, and the inferences available to be drawn if the privilege against self-incrimination is relied upon, are all matters upon which the trial judge will no doubt hear argument at the appropriate time. It is not appropriate for this Court to determine any of these matters or make orders for the further conduct of the trial against the applicant.

***Stay application***

122 In light of our decision in relation to ground 6, and the fact that it has been possible to deliver our reasons at this time, no purpose would be served by granting the stay sought be the applicant. The application for a stay will therefore be dismissed.

***Conclusion***

123 In relation to the appeal, in addition to the orders previously made in respect of ground 6, it will be ordered that leave to appeal be refused in respect of proposed grounds 1 to 5 inclusive.

124 The parties will be invited to make short submissions as to costs, to be determined on the papers.

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**SCHEDULE OF PARTIES**

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| ALEXANDER CHRISTOPHER ELLIOTT | Applicant |
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| JOHN ROSS LINDHOLM in his capacity as special purpose receiver of BANKSIA SECURITIES LIMITED (recs & mgrs apptd) (in liq) | First Respondent |
| | |
| LAURENCE JOHN BOLITHO | Second Respondent |
| | |
| AUSTRALIAN FUNDING PARTNERS PTY LIMITED | Third Respondent |
| | |
| NORMAN O'BRYAN SC | Fourth Respondent |
| | |
| MICHAEL SYMONS | Fifth Respondent |
| | |
| ANTHONY ZITA AND PORTFOLIO LAW PTY LTD | Sixth Respondent |
| | |
| PETER TRIMBOS | Seventh Respondent |