IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S CI 2012 07185

LAURENCE JOHN BOLITHO — First Plaintiff

AUSTRALIAN FUNDING PARTNERS PTY LIMITED (ACN 167 628 597) — Second Plaintiff

v

BANKSIA SECURITIES LIMITED (ACN 004 736 458) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) & ORS (according to the attached Schedule) — Defendants

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JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	2 September 2020
DATE OF RULING:	7 September 2020
CASE MAY BE CITED AS:	Bolitho & Anor v Banksia Securities Limited & Ors (No 11)
MEDIUM NEUTRAL CITATION:	[2020] VSC 567

COURTS AND JUDGES – Bias – Reasonable apprehension of bias – Application for recusal – Statements by trial judge during hearing about whether overarching obligations breached by non-party in context of commencement of inquiry on the court's own motion on that question – Subsequent reasons for decision published and orders pronounced – Order for joinder of party and for directions hearing – Whether statements gave rise to reasonable apprehension of bias – *Civil Procedure Act 2010* (Vic) ss 28, 29; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 9.06.

Appearances	Counsel	Solicitors
For the Applicant/Fifth Defendant	Mr N Hutley QC with Mr A Aleksov and Mr G Kozminsky of counsel	Garland Hawthorn Brahe Lawyers
For the First Defendant	Mr R Dick SC with Mr M Grady of counsel	Maddocks

Appearances	Counsel	Solicitors
As Contradictor	Mr P Jopling QC with Ms J Collins of counsel	Corrs Chambers Westgarth

HIS HONOUR:

Introduction

1 On 20 August 2020, I ordered that Alexander Christopher Elliott ('**Mr Elliott**') be joined to the proceeding as the fifth defendant. I further ordered that Mr Elliott attend before the court at 9.35am on 27 August 2020 for directions in respect of the future hearing and determination of whether the court ought 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.

2 This order was made following a hearing on 19 August 2020 and was pronounced with accompanying reasons for ruling ('**Ruling No. 10**')[1] on 20 August 2020.

3 On 26 August 2020, Mr Elliott applied for orders that I recuse myself from hearing and determining:

(a) any application against him 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 dated 21 July 2020;

(b) any application in which it is alleged that in relation to this proceeding Mr Elliott has breached any overarching obligation imposed on him by the *Civil Procedure Act;* or

(c) the summons filed by the first defendant ('**SPR**') on 17 August 2020 insofar as it seeks orders against Mr Elliott.

4 The gravamen of Mr Elliott's complaint is that a fair minded lay observer would apprehend that I might not bring an impartial mind to the resolution of questions relating to him, by reason of comments that I made during the hearing on 19 August 2020 and in my reasons for ruling, and in my refusal to provide 'particulars of the allegations of fraud made against him'.

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1 *Bolitho & Anor v Banksia Securities Limited & Ors* (No 10) [2020] VSC 524 ('**Ruling No. 10**').

5 The application will be dismissed.

Relevant principles

6 The parties agreed about the applicable principles. Their submissions merely reflected differences in emphasis.

7 The applicable test for apprehension of bias was set out in *Ebner v Official Trustee in Bankruptcy* ('***Ebner***'). Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> … a judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[2]

8 Mr Elliott submitted that the test is applied in two steps, as their Honours stated:

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.[3]

9 Since *Ebner*, some High Court judges have suggested there are three steps to the *Ebner* test.

10 In *Minister for Immigration and Multicultural Affairs v Jia Legeng* ('***Jia Legeng***'), Hayne J set out a three-step analysis:

> Saying that a decision-maker has prejudged or will prejudge an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots. First, there is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision-maker will apply that opinion to that matter in issue. Thirdly, there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.[4]

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2 (2000) 205 CLR 337, 344–5 [6] ('***Ebner***').
3 *Ebner*, 345 [8].
4 (2001) 205 CLR 507, 564 [185] ('***Jia Legeng***').

11 In *Isbester v Knox City Council* (‘***Isbester***’), Gageler J set out three steps as follows:

> Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.[5]

12 Kiefel CJ and Gaegler J in *CNY17 v Minister for Immigration* identified the third step as critical when they observed:

> Taking those two steps is necessary to provide the foundation for the third and critical step in the application of the bias rule. That is the step of assessing whether the fair-minded lay observer might reasonably apprehend in the totality of the circumstances that the articulated departure might have occurred. In taking that third step, “it is the court's view of the public's view, not the court's own view, which is determinative”.[6]

13 Mr Elliott 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.

14 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 pre-judgment incapable of being altered by evidence or argument.[7] As Gleeson CJ and Gummow J observed in *Jia Legeng*:

> 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.[8]

15 In their joint reasons in *Isbester*, Kiefel, Bell, Keane and Nettle JJ said:

> 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

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5 (2015) 255 CLR 135, 155 [59] (‘***Isbester***’).

6 (2019) 94 ALJR 140, 147 [21] (footnotes omitted).

7 *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2010) 195 FCR 318, 361–2 [58].

8 *Jia Legeng*, 531–2 [71]–[72].

factual contexts in which the decision is made.[9]

16 The importance of context, emphasised in that passage, is presently relevant. Notwithstanding counsel's express denial of it when put to him, Mr Elliott's submissions are predicated on decontextualising statements made at the hearing, a technique of advocacy on bias applications that the High Court has rejected. Importantly, the form of the order pronounced, which is the formal record of the exercise of judicial power,[10] is not to be overlooked. Additionally, the considered reasons published to explain the basis for that order can explain a statement made in argument with counsel that, in isolation, might suggest that a judge had made up his mind about a matter. These sources are of particular significance.

17 The fair minded lay observer is one of the law's fictional characters that reside in a village of perceived objectivity.[11] It is through the eyes of this fictional person that I judge the application, so it is pertinent to remind myself of the observer's characteristics. The earlier extract from *Isbester* identifies that the hypothetical fair minded lay observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision.

18 As both the SPR and the Contradictor submitted, the characteristics of modern litigation must be borne in mind, particularly when assessing the logical connection between the matter complained of and any possible deviation from deciding the case on its merits. The legal and statutory context is, as I will note later in these reasons, of particular significance.

19 In *Johnson v Johnson* ('***Johnson***'), in their joint reasons, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated:

> Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested

9 *Isbester*, 146 [20].
10 *Director of Consumer Affairs Victoria v Gibson (No 4)* [2018] FCA 1868, [47].
11 With companions that include the reasonable person, the officious bystander, and the ordinary reasonable reader, to name a trinity.

> apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. … Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.
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> There was argument in this Court, prompted by Anderson J's explanation of what he intended to communicate, about whether the effect of a statement that might indicate prejudgment can be removed by a later statement which withdraws or qualifies it. Clearly, in some cases it can. So much has been expressly acknowledged in the cases. No doubt some statements, or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement. It depends upon the circumstances of the particular case. The hypothetical observer is no more entitled to make snap judgments than the person under observation. [12]

20 Kirby J stated:

> The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted . The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.[13]

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12 (2000) 201 CLR 488, 492–3 [13]–[14] (citations omitted) ('***Johnson***').

13 Ibid, 508–9 [53].

21 Mr Elliott submitted that a judge ought to act 'prudently' where there is 'a case of real doubt'.[14] However, on the present application, the more fulsome analysis found in *Hamod v New South Wales* ('***Hamod***') provided appropriate guidance through the many authorities that have collected on the test for determining whether a reasonable apprehension of bias exists. The New South Wales Court of Appeal said:

> The authorities emphasise that any "reasonable apprehension of bias" must be "firmly established" before it is appropriate for a judge to disqualify himself or herself from participating in the proceedings. The question of the hypothetical observer's reasonable apprehension falls to be decided against the standards of ordinary judicial practice. The "reasonable apprehension" criterion means that neither an expectation about the way the judge is likely to decide the case, nor an express allegation of bias, is necessarily sufficient to generate a reasonable apprehension of partiality.
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> It is a fundamental rule that every judicial tribunal must be, and be seen to be, impartial. Even in the absence of direct personal interest, a judge ought not to hear a case if a fair minded lay observer might reasonably apprehend an impartial judicial mind might not be brought to bear on the resolution of the proceedings. The reference to the fair minded observer has been described as in reality "no more than a personification of an objective test".
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> In deciding the question of "reasonable apprehension" it is important that judicial officers discharge their duty to sit, and do not accede too readily to suggestions of the appearance of bias. The issue in each case is whether the judge appointed to hear the matter might not bring an impartial and unprejudiced mind to its resolution. A necessary corollary of this criterion is that a judge ought not to disqualify himself or herself except for proper reason. The criterion of "reasonable apprehension" should not be subverted into a lesser enquiry as to whether it would be "better" for another judge to hear the case. Applying such an imprecise and impressionistic criterion could encourage a belief that a party can, by making disqualification applications, obtain a hearing before a judge thought to be more favourable.
>
> The limitation of reasonableness is particularly important in deciding whether a judge's interlocutory rulings, or preliminary views of the likely outcome, indicate bias — irrespective of whether they are expressed at an early or late stage of the proceedings. Such interlocutory rulings or expressions ought not to be regarded as giving rise to a reasonable apprehension of bias unless they indicate a significant level of prejudgment in relation to matters relevant to the final resolution of the proceedings. Generally speaking, because of the nature of the issues and the limited factual investigation that interlocutory proceedings involve, rulings on interlocutory matters are unlikely to justify a reasonable apprehension of bias.
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> To these statements I would only add the following. In dealing with an application for apprehended bias, the fair minded lay observer is taken to know of all the relevant circumstances. This statement finds confirmation in

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[14] Citing *Ebner*, 348 [20]; *Parbery v QNI Metals Pty Ltd* [2018] QSC 249, [35]; *Pier (WA) Pty Ltd v Jean Maurice Pty Ltd (in liq) [No 8]* [2019] WASC 477, [53].

> relatively recent times in the High Court. In *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* Callinan J observed that the notional lay person should not be taken to be completely unaware of the way in which cases are brought to trial and tried. Callinan J also considered it appropriate, when determining whether there was apprehended bias, to have regard to the transcript and reasons for judgment to see whether the cumulative effect was one of bias, or alternatively, whether any statement which may have caused concern was later corrected or modified so as to remove the perception of bias.[15]

22 The Contradictor drew my attention to the Court of Appeal's decision in *Melbourne City Investments v UGL* ('***MCI***'), where the court observed:

> **…** [O]nce the trial judge had concerns about abuse of process and possible breaches of the *Civil Procedure Act*, it was appropriate for him to raise them, even though UGL had not agitated those matters**.** It was also appropriate for him to explain those concerns in the Strike out Reasons by setting out questions and analogies. This assisted the parties to understand the judge's concerns and will enable them to craft submissions accordingly. It would be less than helpful for a judge simply to say he or she had concerns about *Civil Procedure Act* compliance and/or abuse of process but not elaborate.
>
> In *Yara* the Court of Appeal sanctioned the approach of inviting the parties to make oral submissions as to why there should not be a finding that the Act was contravened. That suggests a reverse onus. On one view, what the trial judge did in the Strike out Reasons was more favourable to MCI than the suggested approach in *Yara*. In this case the judge was not asking to be persuaded that there was not an abuse of process or breach of the Civil Procedure Act; he was asking for submissions on those issues.[16]

Relevant context

23 On 17 August 2020, I completed hearing the evidence on the questions remitted by the Court of Appeal.[17] The proceeding presently stands adjourned for the parties to file written final submissions and for final oral addresses presently scheduled to commence on 17 September 2020.

24 The record that is relevant for this recusal application is the transcript from the hearing on 19 August 2020, my authenticated order of 20 August 2020 and Ruling No. 10.

My order

25 My order joining Mr Elliott to the proceeding was made under r 9.06(b) of the *Supreme*

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15 [2011] NSWCA 375, [258]–[259] (citations omitted).

16 [2017] VSCA 128, [111]–[112] ('***MCI***').

17 *Botsman v Bolitho* (2018) 57 VR 68. See *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 and *Bolitho v Banksia Securities Ltd (No 8)* [2020] VSC 174 for details of the subject matter of the remitter.

Court (General Civil Procedure) Rules 2015 (Vic) ('**Rules**') and both sub-paragraphs provide an appropriate source of power for joinder in this case. On its own motion, the court may consider whether it ought to make orders under s 29(1) of the *Civil Procedure Act* against any person subject to overarching obligations. Such an inquiry necessarily requires the joinder of the relevant person to the proceeding, as does the claim for a proportionate judgment under s 29 contended for by Mr Zita. In this case, the joinder of Mr Elliott is both necessary to 'ensure that all of the questions in the proceeding are effectually and completely determined and adjudicated on',[18] and to enable the determination of 'a question arising out of, or relating to, or connected with'[19] the matters that are the subject of the remitter.

26 Mr Elliott disputed that the Rules were the source of power for the joinder , contending that the joinder it was made under s 29(2) of the *Civil Procedure Act* instead. This contention was the glue of Mr Elliott's submission, because he contended that the power of joinder was only exercisable if the court was satisfied of a contravention of an overarching obligation.

27 Section 29 relevantly states:

> **29 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 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, including—
>
> (i) an order for penalty interest in accordance with

[18] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 9.06(b)(i).
[19] Ibid r 9.06(b)(ii).

> the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or
>
> (ii) an order for no interest or reduced interest;
>
> (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.

28 Mr Elliott's submission avoided analysis of the text of my authenticated order. He found it convenient to isolate paragraph 41 of Ruling No. 10 as the basis for his contention as to what was ordered. There I said:

> I will order that Alexander Christopher Elliott be added as the fifth defendant and Peter Trimbos be added as the sixth defendant, pursuant to s 29(2)(b) of the CPA for consideration by the court, on its own motion, whether any, and if so what, order under ss 28 or 29(1) of the CPA should now be made in the interests of justice.

29 I accept that this sentence is open to criticism for its inelegance and consequent uncertainty, and in that respect Mr Elliott forcefully put a fulsome submission. However, any uncertainty experienced by the fair minded lay observer in discerning my meaning must be reasonable and the reasonableness of the notion of prejudgment is dispelled when my order is interpreted in its full context.

30 There was no suggestion of uncertainty in the authenticated order, which stated:

> 1. Alexander Christopher Elliott and Peter Trimbos are joined to the proceeding as the fifth and sixth defendants respectively and the title to the proceeding is amended accordingly.
>
> 2. Alexander Christopher Elliott and Peter Trimbos shall attend before the court at 9:30am on 27 August 2020 for directions in respect of the future hearing and determination of whether the court ought 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 them or any of them in the proceeding.

31 The categories of orders identified by s 29 do not include procedural orders like joinder of parties. Orders dealing with amendment of the title to a proceeding are readily recognisable as being drawn from the powers conferred by the Rules. In the applicable legal and statutory context, the fair minded lay observer would readily appreciate that power under the usual rule for joinder of parties was being invoked. The reference to s 29 explained the context in which that joinder was ordered. It was appropriate for the court to set out in Ruling No. 10 its reasons for initiating a s 29 inquiry and why it thought it was just and convenient to join Mr Elliott into the proceeding. However, the emphasis in Mr Elliott's application was on remarks made during the course of the application by the SPR for discovery in connection with its summons, rather than on the reasons that explained the order made.

32 I pause to note that Mr Elliott chose not to engage directly with the absence of a reference to s 29(2) in the order when invited to address a submission to what conclusion the fair minded lay observer may have drawn when noting the text of the court's order.

33 I will return to further discuss this contention, as it was a central tenet of Mr Elliott's application.

The hearing on 19 August 2020

34 On 18 August 2020, the SPR filed a summons seeking non-party cost orders against several persons and entities, including Mr Elliott. The hearing on 19 August 2020 was the initial return date fixed for that summons, where the SPR sought orders including that Mr Elliott make discovery of certain documents.

35 Mr Elliott submitted that what might lead me, in the eyes of the fair minded lay observer, to decide this case against him other than on its legal and factual merits, were three statements made during the hearing said to have firmly established an ineradicable apprehension of prejudgement that he had breached overarching obligations.

36 During that hearing, Mr Elliott's counsel explained that the non-party costs order sought against him was, in substance, on the basis of allegations of fraud, drawing my attention to his proposed order that the SPR provide further particulars of these allegations. I then stated:

> Yes. It's very interesting that that's raised, Mr Kozminsky, because it seems to me that I have to reflect on Mr Alex Elliott'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*.
>
> I have the same thoughts in relation to Mr Trimbos, I might put it on record, as well too and it seems to me that each of those two parties may well find themselves involved in the substantive hearings. I'm just not quite sure what position the Contradictor is going to be in in relation to that. That's something that I'll need to consider.

37 Mr Elliott relied on the following statements made in the hearing (emphasised in **bold**, but presented in their full context).

38 First, once Mr Elliott's counsel began to address the discovery sought from him and the basis for the application for costs against him, I said:

> It seems to me that [Mr Elliott] 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 Mr Alex Elliott may come into this proceeding as a party, not on the basis of a fraudulent allegation as is suggested by Mr Newman in his affidavit, but **on the basis of a liability to orders under s 29 of the *Civil Procedure Act***.

39 Counsel for Mr Elliott responded that he would need time to consider the position and would want to make submissions about whether his client should be joined. In this context, I stated:

> 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 in this matter, I have not yet heard final submissions. However, I have heard the evidence.
>
> The second matter about that is that I have heard it suggested on numerous occasions it's been pointed out that Mr Alex Elliott has had direct involvement in transactions, and the groundwork has been laid over and over again for a *Jones v Dunkel* inference in relation to his absence from this proceedings. Again, it's not a matter I'm asking you to explain. I'm just suggesting that it may become hypothetical to consider the submissions that you're raising and it may be better, Mr Dick, in the context of these matters to defer this particular application…

40 Later in the hearing, I stated:

> 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.[20]
>
> I'm going to join Mr Alex Elliott 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**.

41 This passage is central to Mr Elliott's application. In particular, he contended that my statement demonstrated the question of whether Mr Elliott was in breach of overarching obligations had been predetermined. Yet, almost immediately after making that statement, I explained that I would give detailed reasons (meaning written reasons) for my decision. I also stated:

> Mr Alex Elliott 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 we can then work out the procedure for **dealing with making findings against Mr Alex Elliott** in all of these circumstances.

42 Mr Elliott paused in the narrative at this point to submit that a fair minded lay observer would, at this point, conclude that I had decided to exercise a power that was predicated on being satisfied, on the balance of probabilities, that he had contravened the overarching obligations in respect of serious allegations going to his integrity and honesty. Mr Elliott paid lip service to the notion that the totality of the material must be considered. He submitted that once I determined to and exercised a power that was predicated on being satisfied that he had breached his obligations to the court, the fair minded lay observer might take the view that I might be constrained, in the relevant

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20 The references to s 30 ought properly to have been references to s 29.

sense, in coming to a determination free from or uncontrolled by the view I had expressed. In other words, Mr Elliott submitted that the circumstances of ostensible bias were established, because the fair minded lay observer would know that I am learned in the law as a judge of this court and would know that I would not exercise a power unless I was satisfied that the power had been engaged.

43 The exchange with Mr Elliott's counsel in the hearing then moved to the issue of discovery against a related corporation (Decoland Holdings Pty Ltd), during which it was suggested that Mr Elliott had not played a role in the proceeding to date. I then said:

> Well, at some point, Mr Kozminsky, **Mr Alex Elliott 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**.

44 The following exchange then occurred.

> MR KOZMINSKY: But are our friends going to put us on notice of - it would be helpful if we knew what application we were meeting when we came back, your Honour.
>
> HIS HONOUR: You will get procedural fairness, Mr Kozminsky, and you will know what application it is you are meeting and you will know the material allegations of fact that are being made against your clients.
>
> MR KOZMINSKY: Thank you, your Honour. In light of what's fallen from your Honour, my clients put forward some orders in respect of what we were asking for insofar as the allegations of fraud against Mr Alex Elliott and Elliott Legal were concerned. I'm just not sure whether or not that's something your Honour wants to deal with now or your Honour wants to defer that as well.
>
> HIS HONOUR: No, I don't want to deal with that in that way. I don't think that it's desirable to simply do it by providing particulars of an allegation made in an affidavit when it seems to me that the proper course – the 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. The necessary paperwork can be produced and be distributed, and then when we are in a position to move forward we'll deal further with this application.

45 Mr Elliott submitted that my published reasons (being Ruling No. 10) lent support to his submission that a fair minded lay observer would be concerned that I might have prejudged his liability. However, apart from a different context, namely the issue of

whether a practitioner is a fit and proper person to remain on the Supreme Court roll, Mr Elliott only relied on paragraph 41 of the ruling,[21] and could not identify any other passage in those reasons that would support his submission.

Ruling No. 10

46 In my published reasons, I first explained that the evidence supported a *prima facie* conclusion that Mr Elliott is, by reason of s 10 of the *Civil Procedure Act*, bound by the overarching obligations. Secondly, I explained how the examples extracted by Mr Newman in his affidavit were evidence of conduct 'that, if proved, could establish that Alex Elliott breached each of these overarching obligations.'[22]

47 In the express context of listing the proceeding for directions, now that Mr Elliott was a party, in respect of whether the court ought of its own motion make any and if so what orders, I made three particular observations:

(a) there were many documentary references that, absent explanation, permitted an inference that Mr Elliott was actively involved, or was complicit, in the conduct of AFPL and Mark Elliott that is the foundation of the allegations made by the Contradictor in the remitter;

(b) Mr Elliott's role in the proceeding had not been explained by AFPL; and

(c) it was not appropriate for me to express my findings on the evidence at this point, save to state that the evidentiary references to Mr Elliott being involved in the dealings, some of which were highlighted by Mr Newman in his affidavit, drew my attention to my responsibilities to the proper administration of justice and formed the basis for my decision to join him into the proceeding.

48 I then stated that those matters were sufficient to suggest that, *prima facie*, Mr Elliott may have a case to answer that he has engaged in conduct in breach of the overarching obligations. Were I satisfied that Mr Elliott engaged in conduct in breach of an overarching obligation, ss 28 and 29 of the *Civil Procedure Act* could become relevant.

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21 See [28] above.

22 Ruling No. 10, [16].

I stated that I was satisfied that the court's jurisdiction to determine, on its own motion, whether it was appropriate to make orders under s 29 in respect of the conduct of Mr Elliott, had been enlivened. Throughout my written reasons, this is the only matter of judgment that is apparent. A fair minded lay observer would need to subject my language to unnatural strain to be persuaded that I went any further.

49 On any fair reading of the transcript, the order and the ruling, all that had been determined was that there was a *prima facie* basis to enliven a procedure for an inquiry into Mr Elliott's conduct and that I proposed that the next step in that inquiry be a directions hearing to hear submissions on the manner in which it should proceed, which I ordered that Mr Elliott attend.

Mr Elliott's submissions

50 Mr Elliott's primary point was that, in open court, I expressed an unqualified conclusion on the issue of whether he had breached the overarching obligations. This submission relies entirely on the statements made at an early stage of the hearing, which are set out above.

51 Mr Elliott's second submission was that the fair minded lay observer would make an assumption that I was satisfied on the balance of probabilities, because I joined him into the proceeding, that he had breached overarching obligations.

52 Mr Elliott's third contention was that the fair minded lay observer would be concerned by the fact that I declined to make an order providing particulars of the allegations of fraud made by the SPR. In oral argument, Mr Elliott expanded this submission. While accepting that the court was entitled to an explanation from its officer, he submitted that the officer had a fundamental right to know what he needed to explain from the person who had moved for that explanation to be provided. Leaving matters on the basis that Mr Elliott ought to know what the problem is would indicate to the fair minded lay observer that I might not be able to bring the necessary open mind to the question, in the way required by the *Ebner* test.

53 Next, it was submitted, by reference to *British American Tobacco Australia Services*

Limited v Laurie & Ors (‘***BATAS***’),[23] that I had made a *prima facie* or interlocutory finding that compromised my impartiality to sit in judgment of Mr Elliott in the proceeding.

54 In *BATAS*, the High Court prohibited a judge from hearing proceedings on the basis of a reasonable apprehension of bias, in circumstances where in earlier, unrelated, proceedings, that judge had made findings adverse to one party on an issue that was also likely to arise in the later proceedings. The earlier finding was interlocutory and concerned the admissibility of the evidence of Mr Gulson, a former in-house counsel and company secretary of the appellant, in those proceedings. The judge found that the appellant drafted or adopted a document management policy for the purpose of a fraud. His Honour’s findings were expressed to be without qualification or doubt, and indicated extreme scepticism about the appellant’s denials and strong doubt about the possibility of different materials leading to a different outcome. It was likely that Mr Gulson would also be called in the respondent’s proceeding to prove the allegations concerning the document management policy.

55 Mr Elliott’s fifth submission was that the statements that I made elsewhere in the material ‘cannot eradicate the perception created from the unqualified comments made by your Honour at the hearing’.

56 Mr Elliott’s sixth submission was that he was joined as a party to the proceeding without notice and without being heard. It was asserted that the fair minded lay observer would know the ‘usual judicial procedure’ would afford him those opportunities.

57 Mr Elliott’s penultimate contention was that the issue of his joinder as a party arose during argument on an unrelated matter. The point seemed to be that the question of joinder had arisen at the conclusion of the trial in the remitter, in which the Contradictor had chosen not to make any specific allegation against Mr Elliott.

58 Mr Elliott’s final contention was that a fair minded lay observer might be concerned

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23 *British American Tobacco Australia Services Limited v Laurie & Ors* (2011) 242 CLR 283 (‘***BATAS***’).

that I had formed adverse views about his credit.

The SPR's submissions

59 The SPR submitted that, in all the circumstances, no reasonable apprehension of bias arose.

60 The SPR submitted that several aspects of the legal, statutory and factual context bear emphasis in assessing whether the test of reasonable apprehension of bias by a fair minded lay observer is made out in these circumstances.

61 Firstly, the Court's supervisory jurisdiction over the conduct of its own officers[24] has been squarely engaged by the remitter generally, and more specifically in relation to the body of evidence the court has heard about the involvement of Mr Elliott in conduct that has imperilled the proper administration of justice. I agree with the SPR's submission that the fair minded lay observer would at least generally appreciate the Court's paramount responsibility to protect the integrity of the administration of justice and would appreciate that there is a body of evidence that, if proved, might support findings of a breach by Mr Elliott of overarching obligations. This body of evidence was highlighted by the Contradictor, whose submission is considered in due course.

62 Secondly, the statutory regime under the *Civil Procedure Act*, acknowledged as effecting a culture shift away from passive participation in the conduct of modern litigation, reinforces and does not displace or alter the primary consideration of the court to safeguard the administration of justice. In *Rozenblit v Vainer* ('***Rozenblit***'), Gordon and Edelman JJ observed:

> The overarching purpose of the [CPA], and the obligation for a court to give effect to and further that overarching purpose, reinforce that the power exists to enable a court to protect itself from abuse of its processes in order to safeguard the administration of justice, and that that purpose may transcend the interest of any particular party to the litigation.[25]

63 The *Civil Procedure Act* empowers the court, including by acting on its own motion, to

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24 *Myers v Elman* [1940] AC 282, 302-304; *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253 [3], [11].

25 (2018) 262 CLR 478, 500 [73] (citation omitted) ('***Rozenblit***').

make such orders as it thinks appropriate in the interests of justice when the overarching obligations, including the paramount duty to further the administration of justice, are breached. The SPR submitted, and I accept, that the fair minded lay observer would expect the Court to act to bring its officers to account in explaining whether, or to what extent, they played any material role in circumstances that may detrimentally affect the proper administration of justice.

64 Thirdly, I also accept the SPR's submission that, in the protective jurisdiction being exercised under Part 4A of the *Supreme Court Act 1986* (Vic), the possibility of improper conduct to the detriment of 16,000 debenture holders is important context when assessing the response of the fair minded lay observer in this proceeding.

65 I accept the SPR's contention that the fair minded lay observer must give appropriate weight to the unique factual context of this proceeding. That includes the following:

(a) That the order was made in the context of the evidence against other defendants having been completed. He submitted:

> The immediate context for the court's concerns was its reception of a large body of evidence in the preceding three weeks that had shocked its officers and no doubt shocked the public and debenture-holders as well. The fair-minded observer would not be oblivious to these circumstances.

(b) The context that the order was made during consideration of the SPR's summons seeking non-party costs orders, which was significant for three reasons. First, on any view, the evidence led in the remitter demonstrated a *prima facie* case that Mr Elliott was involved in the fraudulent scheme established by the Contradictor in important and material respects. Secondly, that *prima facie* case is almost exclusively founded on contemporaneous documents.[26] It was not a case of a witness giving controversial or contestable evidence impugning Mr Elliott's conduct. A reasonable apprehension of bias could only arise if the fair minded lay observer might think that the court had closed its mind to the possibility of some innocent explanation about

[26] The authenticity or provenance of which was not contested by any party.

Mr Elliott's relationship to this documentary evidence. In the context of the evidence led on the remitter, that reasonable apprehension could not possibly arise from the mere fact that the court had sought an explanation and joined Mr Elliott to the proceeding for that purpose. Thirdly, the conduct that is the subject of inquiry is substantially the same as the conduct relied on by the SPR to establish his entitlement to a non-party costs order against Mr Elliott.

(c) The SPR submitted that the fair minded lay observer would be taken to be aware of these matters and to have seen the joinder of Mr Elliott into the proceeding in that context. Further, the SPR submitted that the course adopted by the court provided a more substantial guarantee of procedural fairness to Mr Elliott than his former position as a respondent to its summons. That consequence follows because Mr Elliott has been joined to the proceeding with an invitation to provide an explanation, the opportunity to lead evidence and cross-examine witnesses, and the opportunity to address the court before final findings of fact in the remitter are made.

(d) Mr Elliott is not, on any view, a detached stranger to the proceeding. AFPL's solicitor has deposed to taking instructions from Mr Elliott. Since 19 February 2020, he has been a director of Decoland Holdings Pty Ltd, which holds approximately 34% of the issued share capital in AFPL. Since 5 March 2020, he has been a director of AMEO Investments Pty Ltd, which holds approximately 4% of the issued share capital in AFPL. In addition, Mr Elliott is an employee and, since 19 February 2020 a director, of Elliott Legal Pty Ltd ('**Elliott Legal**'). The Contradictor is likely to contend in final submissions that Mr Mark Elliott and Elliott Legal were the de facto solicitors for Mr Bolitho, disguising that position by using Anthony Zita and Portfolio Law Pty Ltd as a 'post box' so as not to appear to be in breach of the decision of Ferguson JA (as her Honour then was) in *Bolitho v Banksia Securities Limited (No 4)*.[27]

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27 [2014] VSC 582.

(e) The SPR contended that, on the existing material before the court, it would defy reality to suppose that Mr Elliott had not, at all material times, at the very least been kept abreast of the material developments in the proceeding.

The Contradictor's submissions

66 The Contradictor adopted the SPR's submissions, supporting his contention that no apprehension of bias arises and that Mr Elliott had not been denied procedural fairness. In summary, comments made at the hearing on 19 August 2020 represented the expression of tentative views, which remained subject to any explanation from Mr Elliott given in the process initiated by the court and in which Mr Elliott is to be afforded procedural fairness. It was plain that the fair minded lay observer would notice that the court has not yet made any findings.

67 The Contradictor contended that Mr Elliott has been provided with fulsome particulars of the breaches of the *Civil Procedure Act* alleged against AFPL, and the court has stated that its concern relates to his evident involvement in this conduct. In its written submission, the Contradictor provided summaries of the documents that it contends evidence that involvement, noting that AFPL has made admissions about its own breaches of the *Civil Procedure Act* and Mr Elliott's involvement in the conduct compromising those breaches. Further, those admissions were made well after Mr Mark Elliott's death.

68 The Contradictor noted that three entities associated with the Elliott family hold 76% of the shares in AFPL. One of those entities (Regent Support Pty Ltd) is in administration. The shareholding of the other two entities, Decoland Holdings Pty Ltd and AMEO Investments Pty Ltd, is noted above. AFPL presently has two directors, Mr Will Crothers and Mr Simon Tan who via Willjo Pty Ltd and 4Tops Investments Pty Ltd collectively hold 22% of the shares in AFPL. AFPL has stated in open court that it currently receives instructions from its directors, however its solicitors have previously deposed that their instructions were provided primarily by Mr Mark Elliott and in some instances by Mr Elliott.

69 The Contradictor noted that shortly prior to the trial of the remitter, AFPL made

extensive admissions in response to the Contradictor's allegations, which included:

(a) Mr Elliott was involved in the conduct of the proceeding;

(b) Mr Elliott had access to the 'Bolitho Class Action Email Account' and the 'General Class Action Email Account', which were established under the guise of Portfolio Law;

(c) Mr Elliott's involvement extended to receiving the Third Trimbos Report[28] in both draft and final forms;

(d) the Third Trimbos Report, commissioned by AFPL and filed with the court, was misleading, both of itself and in conjunction with other materials that were filed; and

(e) AFPL and the Lawyer Parties[29] breached their overarching obligations in relation to the Third Trimbos Report including their obligation not to mislead or deceive, their obligation to act honestly, and their paramount duty.

70 Following the Contradictor's opening at trial, during which much documentary evidence was tendered, Mr O'Bryan and Mr Symons abandoned their defences and consented to judgment being entered against them, while AFPL subsequently abandoned its claim to a funding commission and the substantial part of its claim for reimbursement of legal costs.

71 The evidence led by the Contradictor at trial, it submitted, included evidence that:

(a) after the court ruled that Mr Mark Elliott could not act as solicitor, having regard to his substantial financial interest in the outcome of the proceeding, he arranged for Portfolio Law to be retained and to act in a manner that enabled him to remain in control of the proceeding;

(b) from about mid-2016, Mr Elliott became involved in the conduct of the

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28 Being the report of the cost consultant retained by AFPL, Mr Peter Trimbos, that was relied on in the settlement approval hearing before Croft J.

29 Being Mr O'Bryan, Mr Symons, Mr Zita and Portfolio Law.

proceeding;

(c) Mr Elliott was included in emails pertaining to the proceeding, as if he was another solicitor acting on the matter;

(d) Mr Elliott is a solicitor and a director of Elliott Legal, Mr Mark Elliott's incorporated legal practice, and worked as Mr Mark Elliott's 'right hand man' for both AFPL and Elliott Legal; and

(e) Mr Elliot's involvement in the matter encompassed AFPL's claims for costs and commission.

72 The Contradictor submitted that the evidence is sufficient to permit the court to find that Mr Elliott owed overarching obligations as:

(a) an in-house solicitor acting for AFPL;

(b) a solicitor acting for Mr Bolitho and debenture holders pursuant to the arrangement by which Portfolio Law effectively subcontracted its duties to Elliott Legal; and/or

(c) as an employee or agent of AFPL.

73 The Contradictor provided references to the evidence that, absent further explanation, it contended could support a finding of fact that Mr Elliott's involvement in the proceeding encompassed AFPL's claim for costs and commission. In particular, the Contradictor noted the following:

- Mr Elliott was involved in procuring evidence from Mr Trimbos to support the fee claims advanced by Mr Bolitho/AFPL at the time of the Partial Settlement[30] and the settlement with Trust Co.
- Mr Elliott was involved in working up the 'Banksia expenses' spreadsheet.
- Mr Elliott had at least some knowledge of the fee arrangements between AFPL, Mr O'Bryan and Mr Symons.

30 *Re Banksia Securities Ltd (recs and mgrs apptd)* [2017] VSC 148.

- Mr Elliott was involved in the discussions about the Trust Co settlement terms.
- Mr Elliott was provided with drafts of the summons and notice to group members to review.
- Mr Elliott was provided with drafts of the First and Second Bolitho Opinion[31] to review.
- Mr Elliott was involved in working up the settlement distribution scheme and discussion about fees to be charged for the scheme.
- Mr Elliott worked up the script for Mr Zita/Portfolio Law to follow in their dealings with group members.
- Mr Elliott was involved in discussions about the objections to the settlement made by Ms Botsman and Mr Pitman.
- Mr Elliott was involved in the response to Mrs Botsman's appeal of the settlement approval.
- Mr Elliott was involved in providing AFPL's response to the 1 February 2019 discovery orders in the remitter.

74 The Contradictor submitted that Mr Elliott's present application was designed to ensure that the case against him was determined, at further expense to the debenture holders, in a new trial by a different judge at a later time rather than by this court. In substance, the Contradictor emphasised that it was important that I discharge my duty to sit and not accede too readily to a suggestion of an appearance of bias, particularly as Mr Elliott's submission that I had 'expressed an unqualified conclusion' that he was in breach of the overarching obligations should be rejected.

75 The Contradictor contended that Mr Elliott was not joined on the basis of a finding that he had breached the overarching obligations. He was joined on the basis that there was a case that he had breached those obligations, which he is expressly invited to answer by the court's orders. It was entirely appropriate for the court to start thinking about the issues, and the expression of an opinion that there was a case to answer warranting inquiry was not inconsistent with making an unbiased decision on the

31 Being the opinions of counsel in support of settlement approval authored by Mr O'Bryan and Mr Symons.

evidence and submissions later received.

Analysis

76 I refuse Mr Elliott's application for the following reasons.

77 Mr Elliott's first contention necessarily requires that the fair minded lay observer ignore not only statements made in the hearing other than those he identified, but the form of the order that I made and the terms of Ruling No. 10. As both the SPR and the Contradictor submitted, this contention was selective and sought to isolate the words 'is in breach of overarching obligations' out of context. In reality, no more was achieved than identification of the jurisdictional footing upon which Mr Elliott was being joined into the proceeding and the case that he has to answer. It was the expression of a tentative view. So much was clear from the broader context, particularly the words immediately prior to and following the observations isolated by Mr Elliott's submission.

78 Applying the principles I earlier stated, the fair minded lay observer would not reasonably apprehend that I might not bring an impartial mind to the issue when the legal, statutory and factual context in which the order that the court made is properly assessed. Fairly considering the material as a whole, it is not tenable to contend that a fair minded lay observer would understand that I might have expressed an unqualified opinion that Mr Elliott had breached the overarching obligations.

79 Examples of other statements made at the hearing that the fair minded lay observer would take into account, but were not the subject of Mr Elliott's submissions, included:

(a) 'I have to reflect on Mr Alex Elliott'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 and explain whether or not there has been a breach of overarching obligations, and that may well occur';

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

80 Likewise, with Ruling No. 10, it is clear when considered as a whole (and beyond the emphasis placed by Mr Elliott on paragraph 41), all that was being explained was the existence of a *prima facie* case that the applicant may have engaged in conduct in breach of overarching obligations. As the High Court has explained, when the isolated remarks that Mr Elliott has fastened upon are considered in their full context, together with the substantive explanation provided by the court in its reasons, it would be quite wrong to suggest that those remarks might convey to the fair minded lay observer an ineradicable apprehension of prejudgment.

81 I accept the SPR's submission, supported by the Contradictor, that the fair minded lay observer would think that the joinder of Mr Elliott was to facilitate the s 29 inquiry, and would not have concluded it was on the basis that I had already found that he had contravened any overarching obligation.

82 Textual analysis of the order actually made readily exposes the obvious fallacy in Mr Elliott's second submission. The fair minded lay observer would conclude no more than that I determined that it was just and convenient that Mr Elliott be a party to the

proceeding in order to answer allegations according to a process to be determined once he was joined. I have explained that the source of the power to add a party to a proceeding required no more than I be satisfied that Mr Elliott's presence before the court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon. That is, all that was ordered was that the proceeding was fixed:

> for directions in respect of the future hearing and determination of whether the court ought of its own motion make any, and if so what, orders under ss 28 or 29(1) of the *Civil Procedure Act* against him in the proceeding.

83 In the legal, statutory and factual contexts in which the decision was made, the reference to s 29(2)(b) of the *Civil Procedure Act* in paragraph 41 of Ruling No. 10 referred to the source of law for the consideration by the court on its own motion that comes immediately after it that reference, rather than the source of law for the joinder.

84 Both the SPR and the Contradictor submitted, and I agree, that Mr Elliott's attack on the court's impartiality preceded upon a misconception as to the operation of Part 2.4 of the *Civil Procedure Act*. The court's power to commence an own motion inquiry is not restricted to, or predicated on, an anterior finding that a person has contravened their overarching obligations. Mr Elliott submitted, in substance, that a judge can never act of his or her own motion to deal with a breach of an overarching obligation, except by referring the matter to another judge. The court's belief that there are grounds for Mr Elliott to provide it with an explanation cannot itself be a basis for recusal. That interpretation is inconsistent with Court of Appeal's approach to s 29 of the *Civil Procedure Act*.[32] The court's belief, however, is plainly is a basis for his joinder to the proceeding as a party.

85 What is predicated on the court being satisfied of a breach of overarching obligations is the power to make appropriate orders under s 29(1), which do not include joinder of parties. The present circumstances may be compared with the Contradictor's joinder of the Lawyer Parties to the remitter.[33] There is, in substance, no material

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32 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302; *MCI*.

33 *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653.

distinction between the two. At that time, the Contradictor's basis for joinder included that there was a *prima facie* case of breach of overarching obligations against each of the Lawyer Parties that required the determination of the court. There cannot be found in those circumstances a basis for thinking that a fair minded lay observer would assume that the court had definitively concluded that any of the Lawyer Parties had engaged in fraud or breach of overarching obligations merely because they had been joined to the proceeding at that time. A fair minded lay observer would reach a similar conclusion about Mr Elliott's joinder.

86 I cannot accept Mr Elliott's third submission. While it is true that I did not order the provision of particulars concerning the SPR's allegations of fraud at the same time as I ordered his joinder, the observation that I concluded that Mr Elliott should work out the allegations made against him by reading the entirety of the evidence in the remitter, said to comprise 1,013 pages of transcript and 4,396 exhibits running to more than 45,579 pages, is facile and would not be entertained by the fair minded lay observer.

87 The observer would firstly note the terms of the order that I made, in particular that I gave the opportunity for Mr Elliott to make submissions that the allegations against him be refined before they proceed.

88 Secondly, in that context, Mr Elliott is afforded the opportunity to address the appropriate directions to be given by the court, by my indication as to how he might efficiently navigate through the trial record to be better informed about the nature of the inquiry, and the matters he might address when making submissions about the further conduct of the matter. The fair minded lay observer would readily appreciate that Mr Elliott was being given assistance about the scope of the issues in advance of the scheduled directions hearing, where procedure would be determined, while the issue of particulars would remain open for future consideration.

89 Both the SPR and the Contradictor went further, submitting that Mr Elliott has now been provided with sufficient particulars to understand what matters require his

explanation. The Contradictor submitted, correctly, that the Revised List of Issues provides detailed particulars of Mr Elliott's involvement in the conduct of the proceeding from at least June 2016 onwards, and identifies AFPL's breaches (both alleged and admitted) of its overarching obligations, which are set out in specified classes of conduct and clearly articulated under distinct headings. The Contradictor has, by its submissions on this application, now also provided summaries of the documents it contends evidences Mr Elliott's involvement in that conduct.

90 The SPR, joined by the Contradictor, further submitted that the contention that Mr Elliott might experience some difficulty in digesting the volume of material cannot withstand scrutiny in light of the real and substantial connection between AFPL's prosecution of its claims on this remitter and the position of Mr Elliott. I am satisfied there is evidence of Mr Elliott's involvement in the conduct of the proceeding that supports this submission, particularly in the admissions made by AFPL shortly prior to trial and the evidence of AFPL's solicitors that they have received instructions from him in the course of the remitter. If, at the next directions hearing, Mr Elliott seeks the exercise of any discretion in his favour regarding future timetabling orders, in the context of his recent joinder, the extent to which he has observed or been kept apprised of the remitter's progress, or otherwise corresponded with AFPL's solicitors in recent months, may well be relevant evidentiary considerations.

91 In this context, Mr Elliott also submitted that I am considering, and have prejudged against him, a finding that he is not a fit and proper person to hold a practising certificate. I will deal separately with this issue later in these reasons explaining why I reject that contention, when I will say a little more about a view I expressed that Mr Elliott has an obligation to provide the court with an explanation about his involvement in what has occurred before the court settles the ambit of its inquiry whether there has been any breach of overarching obligations.

92 In response to Mr Elliott's fourth contention, I cannot be understood by the fair minded lay observer as having expressed any specific finding of fact or any conclusion of a legal consequence flowing from the statements he identified. This submission

misconceived the principle stated in *BATAS* and overstated the effect of an order for joinder of a party. Mr Elliott submitted that I 'made interlocutory findings of the relevant variety,' being those referred to in the transcript and in Ruling No. 10 identified above. I did not, like the trial judge in *BATAS*, make any finding of fraud. Pressed to identify these findings, counsel stated:

> HIS HONOUR: You are referring to just the generality? There's no finding, is there? I don't nominate an overarching obligation. I don't set out specific facts. I don't actually make what would ordinarily be called findings.
>
> MR HUTLEY: Quite. I accept that, your Honour. But the allegations against which in one sense, with respect, it's a fortiori. There has been, as your Honour observes, a large amount of water under the bridge in relation to this, and my client is - your Honour has found a prima facie case of breach of the overarching obligation, assuming it's interlocutory, and the whole context of these allegations are allegations of dishonesty.

93 Invited to explain why my reasons for exercising the power to commence an own motion inquiry and why I considered it just and convenient to join Mr Elliott into the proceeding were not quite distinct from the interlocutory findings in *BATAS*, Mr Elliott submitted that serious allegations of fraud formed the context for the joinder and the context in which I made the relevant variety of observation. Thus, the fair minded lay observer might take the view that I thought there was a *prima facie* case of the most serious variety against Mr Elliott. Mr Elliott made no relevant comparison of the findings in *BATAS* with the facts in this case.

94 . How could a judicial officer exercise the power of joinder for an own motion inquiry into alleged breaches of overarching obligations if they did not think there was a basis for that inquiry? The authorities well accept that a judge can consider that there is a case to be answered without being characterised as having reached a judgment incapable of being altered by evidence or argument. The point was made in *Hamod* in the passage cited above. The circumstances of *BATAS* are readily distinguished.

95 I reject the bald assertion that was Mr Elliott's fifth contention, being that comments made in open court could not be properly balanced against the whole of the material,

where I explained my reasons for the order for joinder that I made. From that appropriately fulsome perspective, the statements on which the application is based appear qualified and limited in their scope. The perception they might create, as made plain by the authorities discussed above, is not one by which I might appear in the eyes of the fair minded lay observer to have prejudged the issue of breach of overarching obligations.

96 Mr Elliott's sixth contention is without foundation and no authority was cited for it. It is not usual procedure for a proposed defendant to have an opportunity to be heard before being joined to a proceeding. A proposed defendant does not get to be heard about whether they should be joined nor, in the context of the order actually made, would the fair minded lay observer consider that there was any denial of procedural fairness. The relevant statutory context, of which the fair minded lay observer would be aware, is that the court is empowered by s 29 of the *Civil Procedure Act* to proceed on its own motion with an inquiry. The statute does not require that I afford Mr Elliott an opportunity to be heard about being joined, as distinct from being heard in the substantive inquiry.

97 My finding that the power to conduct a own motion inquiry had been enlivened in these circumstances was not challenged. The question of procedural fairness arises at the next stage, that is, the procedure by which Mr Elliott is required to respond to the allegations of contravention. It is open to Mr Elliott, at any time, to submit that the allegations against him have no real prospect of success and ought to be summarily dismissed. That is the usual procedure for defendants who contend that they are not properly parties to a proceeding. As the Contradictor submitted, the approach I adopted followed the procedure discussed by the Court of Appeal in *MCI*.

98 To the extent that I understand Mr Elliott's penultimate submission, as the material makes abundantly clear, I considered that my responsibility to ensure the proper administration of justice was enlivened. I stated that the procedure that I will adopt is to identify how the court will proceed to consider what findings and orders ought to be made pursuant to ss 28 and 29 of the *Civil Procedure Act*, if any. It is of no

consequence, and would not suggest a reasonable apprehension of bias to a fair minded lay observer, that the order for joinder fell out of a directions and discovery application in relation to the SPR's summons. It is evident that each of the SPR and the Contradictor are concerned that the evidence before the court may raise an entitlement, on the part of debenture holders, to relief from Mr Elliott. Joining Mr Elliott to the proceeding as soon as those concerns surfaced affords him the best opportunity for procedural fairness and a substantive response to the allegations that he will now face before the court receives final submissions.

99 Mr Elliott's final contention was that a fair minded lay observer might be concerned that I had formed adverse views about his credit. In this context, it is convenient to return to the issue that I reserved for further discussion, namely whether Mr Elliott ought to be required to provide a frank and honest explanation of his involvement in the circumstances giving rise to the court's inquiry.

100 First, it is a misconception to suggest that it is possible, applying the principles in *Jones v Dunkel* in respect of the remitter, that I have formed adverse views about Mr Elliott's credit.

101 Mr Elliott submitted that principles of fairness apply when the court is exercising its inherent statutory power to remove a practitioner from the Supreme Court roll.[34] Further, he submitted that an observation that I made about the court's entitlement to a full, frank and honest explanation from its officers made it clear that I was considering whether to strike him off the roll. Casting the net even wider, Mr Elliott relied on an observation that I made during the Contradictor's opening submissions, where I observed that if the Contradictor established the contentions being opened, the question of whether 'certain parties are fit and proper persons to remain on the roll' might arise, in which circumstance I would invite the parties at a later point in time to make submissions as to both procedure and substance on that issue. As the majority said in *Johnson*, judges are not expected to wait until the end of a case before

34 *Smith v New South Wales Bar Association* (1992) 176 CLR 256, 270; *R v Solicitors' Disciplinary Tribunal* [1988] VR 757, 770; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239.

they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented.[35] Counsel are usually assisted by hearing tentative opinions on matters in issue, and being given an opportunity to deal with them.

102 The spectre of disciplinary proceedings is, as the SPR contended, a red herring. The submission was a vehicle to introduce legal references from the exercise of the disciplinary jurisdiction that bear no relevance to the current application except in this sense. If I become troubled that a question has arisen as to whether Mr Elliott is a fit and proper person to remain on the Supreme Court roll, then as I stated during the Contradictor's opening, I will seek a submission from him about the procedure that ought to be adopted as well as about the substance of my concerns. It cannot be seriously contended that my observation during the Contradictor's opening submission was directed to Mr Elliott's position. Mr Elliott's written submissions underscored an apparent misunderstanding when referring to practising certificates or the requisite degree of fitness necessary to hold one. The court's supervisory jurisdiction to determine whether its officers (Australian lawyers) are fit and proper persons to remain on the Supreme Court roll is distinct from the statutory regime that governs the manner in which practising certificates are issued to or revoked from practising solicitors and counsel (Australian legal practitioners).

103 That said, Mr Elliott submitted that the fair minded lay observer might anticipate prejudgment from the suggestion I made in Ruling No. 10 that:[36]

(a) the identification by the court of the case for him to answer (in terms of specifying the breaches of overarching obligation being alleged and the material facts that may establish those breaches and the remedies that may be sought) was unwarranted in the first instance;

(b) the court is entitled to demand a full, frank and honest explanation of how, in the circumstances, Mr Elliott has discharged his paramount duty to further the

35 *Johnson*, 492–3 [13]–[14].
36 Ruling No. 10, [30]-[31].

proper administration of justice; and

(c) 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.

104 First, it is not evidence of prejudgment to suggest that an officer of the court should assist in the proper administration of justice by providing a full, frank, and honest explanation to the court of the circumstances giving rise to its concern.[37] Secondly, my observation, unaided by context or submissions, that an officer of the court who was reluctant or constrained by the prospect of future adverse consequences to provide such an explanation may, in some future inquiry, be found not to be a fit and proper person to remain on the Supreme Court roll could not amount to prejudgement of a breach of overarching obligations, as Mr Elliott submitted that it did.

105 Thirdly, this observation was prefixed with the statement that 'although Mr Elliott is 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'. In context, the observation involved no sense of prejudgment, it merely indicated a possibility that the flip side of the coin may be a worse call.

106 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.[38] 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

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37 See *Prothonotary v Comeskey* [2018] NSWCA 18; *Re Veron; Ex parte Law Society of New South Wales (*1966) 84 WN (PT 1) (NSW) 136, 143; *Coe v New South Wales Bar Association* [2000] NSWCA 13, [21]; *New South Wales Bar Association v Meakes* [2006] NSWCA 340; *Council of the NSW Bar Association v Power* (2008) 71 NSWLR 451.

38 See most recently *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59, where the High Court refused to permit claims to public interest immunity where the proper and due administration of justice was recognised as the greater 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.

107 The relationship between the duty of candour and the due administration of justice finds statutory expression in the *Civil Procedure Act*. Section 16 provides that each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved. Section 17 provides that a person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding, and s 21 states the norm that there must not be misleading or deceptive conduct in respect of a civil proceeding. The nature of the overarching obligations in the statute provides important context for the paramount duty identified in s 16. As I earlier noted, in *Rozenblit*, Gordon and Edelman JJ touched on this relationship in general terms in the *Civil Procedure Act*, albeit in a different context.[39]

Conclusion

108 The application failed at the first hurdle. There was no statement that, fairly understood in context, might constitute any prejudgment that Mr Elliott was in breach of any overarching obligation. The expression of an initial view in argument with counsel reflected no more than a certain tendency of mind on the question of joinder of Mr Elliott in the proceeding and the conduct of an own motion inquiry. It did not reflect any tendency of mind on the substantive question that would then follow. As was observed in *Johnson*, a preliminary impression created by what was said or done may be altered by a later statement (depending on the circumstances of the particular

39 *Rozenblit*, 500 [73].

case) because the fair minded lay observer is no more entitled, than is a judge, to make a snap judgment. Mr Elliott's application was essentially predicated on an appearance evoked by three remarks isolated from context.

109 In the full context, the proposition that a fair minded lay observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the questions I will be required to decide is not tenable.

110 Further, bald assertion, without more, cannot articulate any logical connection between statements made about the jurisdiction to be exercised in support of the decision to join Mr Elliott as a party to the proceeding and the feared deviation from the course of deciding the question of whether he has breached overarching obligations on its merits. The suggestion of such a connection could not be characterised as reasonable.

Orders

111 Mr Elliott's summons filed 26 August 2020 is dismissed.

112 I further order that:

(a) by 14 September 2020, Mr Elliott, the SPR and the Contradictor shall advise my chambers whether the question of costs arising from the application has been agreed to by consent, and, if so, provide a minute of consent order to that effect;

(b) by 18 September 2020, if the question of costs has not been resolved by consent, those parties shall file and exchange written submissions on what orders should be made in respect of costs; and

(c) unless any party contends in their written submissions, that it is necessary for an oral hearing, and I am so persuaded, the question of costs shall be determined on the papers.

CERTIFICATE

I certify that this and the 35 preceding pages are a true copy of the reasons for ruling of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 7 September 2020.

DATED this seventh day of September 2020.

.....Associate

SCHEDULE OF PARTIES

S CI 2012 07185

BETWEEN:

LAURENCE JOHN BOLITHO	First Plaintiff
AUSTRALIAN FUNDING PARTNERS PTY LIMITED	Second Plaintiff
- and -	
JOHN ROSS LINDHOLM IN HIS CAPACITY AS SPECIAL PURPOSE RECEIVER OF BANKSIA SECURITIES LIMITED (ACN 004 736 458) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)	First Defendant
NORMAN O'BRYAN SC	Second Defendant
MICHAEL SYMONS	Third Defendant
ANTHONY ZITA AND PORTFOLIO LAW PTY LTD	Fourth Defendant
ALEXANDER CHRISTOPHER ELLIOTT	Fifth Defendant
PETER TRIMBOS	Sixth Defendant