SUPREME COURT
OF QUEENSLAND

Mention Remarks

Banco Court, Level 3
Thursday 7 May 2015, 11:15AM

The Hon Tim Carmody
Chief Justice

At 4:52PM last night I received email correspondence from Justice of Appeal Fraser, with whom the President of the Court of Appeal agreed, requesting that I disclose certain memoranda circulated on 24 April 2015 and 29 April 2015 within which I evinced a strong view that the judicial officer subject to the alleged disqualifying circumstance determine the application for bias. At 7:02PM last night I also received correspondence from the President of the Court of Appeal, requesting that I disclose a memorandum circulated on 22 April 2015 wherein I stated that any allegation that I was biased by reason of my meeting with Ms Hetty Johnston on 15 April 2015 was "utterly preposterous".

Justice of Appeal Fraser and the President of the Court of Appeal are suggesting, at least by implication on my interpretation, that there is a serious possibility that I may have prejudged the procedure governing an application for recusal for bias regarding my own alleged bias. The President of the Court of Appeal is also suggesting, at least by implication, that I may be biased in relation to the substantive merits of the determination of the application for my recusal for bias. One might be forgiven for thinking that both such propositions are as confounding as they are unprecedented. Nonetheless, this absurd distraction must end. Therefore, I **publish** the documentation, and invite the Director of Public Prosecutions to tender them for the record.

The disclosed correspondence comprises of private and ordinarily confidential exchanges between judicial officers. Robust – and sometimes strongly expressed – communications

are essential to the efficient administration of the Court. This does not mean that the relevant judge has completely or substantially closed their mind in respect of the relevant issue before the Court. Rather, such communications are an expression of preliminary or tentative opinion, especially where the application to which the opinion relates has not yet been filed.

As such remarks occur within an ostensibly confidential and private environment, a judicial officer will sometimes express his or her opinion in vigorous terms to ascertain the weaknesses in their arguments or contentions. As the judge has not formed a concluded view, and does not anticipate that their comments will be publicly disclosed, they will not feel ethically, intellectually or emotionally bound by their previously expressed remarks. For this reason, rarely will an exchange of private and confidential opinion among judicial officers be sufficient grounds to form a legitimate basis for recusal for bias.

Turning to the content of the relevant memoranda, I feel obliged to offer further explanation.

The context of the correspondence on 22 April 2015 related to the President of the Court of Appeal's expressed "grave concerns", with whom Justice of Appeal Fraser apparently agreed, regarding my meeting with Ms Johnston and an unaffiliated third party to discuss information management solutions on 15 April 2015. It also related to subsequent correspondence exchanged between the President of the Court of Appeal and Queen's Counsel for the applicant on 21 April 2015 whereby the President made certain disclosures regarding the benign circumstances of my appointment to this appeal. In this memoranda, I relevantly stated that any suggestion the meeting would give rise to a reasonable apprehension of bias or prejudice was "utterly preposterous". I further stated

that it would be entirely inappropriate for other judges to independently argue for disclosure or disqualification of another judge. I stand by those comments.

The correspondence on 24 April 2015 related to the procedure governing disclosure of allegedly disqualifying circumstances. Indeed, the proposed procedure governing the application for disqualification had not yet been formally raised with the Court. Insofar as I obliquely referred to the procedure governing disqualification, I merely observed that the traditional practice was for the relevant judicial officer to determine their own application for disqualification. This does not express an opinion on the correctness of the established practice or whether a new practice should be adopted.

The correspondence on 29 April 2015 also preceded any formal application made to the Court regarding my proposed disqualification. I stated that the "the proposition that the originating application, which is yet to be filed by the appellant, should be determined by the whole Court of Appeal is manifestly inconsistent with established precedent and practice in Queensland and other Australian jurisdictions." This comment merely acknowledged the established practice within Australia. It does not suggest that that the established precedent was necessarily correct and should not be reconsidered.

Indeed, in my final sentence of the relevant paragraph I stated that "I propose to hear and determine the application for disqualification sitting alone." The Oxford English Dictionary defines "propose" to mean "something proposed for discussion or consideration." Consistently, the term "propose" was intended to signal that the question of my sitting alone to determine the application should be raised for consideration, not for final resolution. My intention to mention the matter on Thursday 30 April 2015 was to give

further directions to facilitate the expeditious resolution of the application, whether before whole Court of Appeal or myself sitting alone.

I would also refer the Court to my recorded statement in the Transcript for the mention held on 24 April 2015 at lines 20 – 28, where I said that:

> I can see from my – well, from anyone's point [of view] – you would prefer someone else to decide it rather than… decide something like that about yourself. It seems strange but that's the way it has been done...

This statement appears incompatible with the proposition that I had "closed my mind" to the question of the constitution of the tribunal properly responsible for the determination of an application for recusal. Indeed, it suggests that I was open to persuasion regarding the proper constitution of the Court to determine an application for recusal despite the established practice which had previously been employed in Queensland and other jurisdictions.

Similarly, I made no objection to the whole Court of Appeal sitting for the purposes of hearing the mention on 1 May 2015 on the basis that it constituted an incorrect procedure. At the mention on 1 May 2015, I did not object to the proposed course of action whereby the procedure governing an application for recusal was to be determined by the Court of Appeal as currently constituted. One would have thought that, had I prejudged the proper constitution of the tribunal properly responsible for determining an application for bias, I would have objected to either procedure.

In any event, my strongly expressed view that the judicial officer subject to the alleged disqualifying circumstance is responsible for determining the application for bias is

consistent with established practice and precedent within the Queensland Court of Appeal, other Australian jurisdictions, and the High Court of Australia. It was, and remains, my view that High Court or Legislature should be responsible for modifying any such entrenched practice, not an intermediate appellate court.

Regardless of the merits of this application – for which I see none – I note that the circumstances of this application possess certain unprecedented and unusual features. There are allegations that I am disqualified by reason of bias in respect of the substantive appeal. There are also suggestions that I am disqualified from determining whether I am disqualified by reason of bias. There are even further suggestions that I am disqualified from determining the procedure governing my own disqualification for bias.

The rule of law requires public confidence in the administration of justice. In this respect, justice must not only be done, but manifestly be *seen* to be done. Throughout this process, I have done all that I can to preserve transparency in the administration of justice. However, this is apparently not enough. As Head of Jurisdiction, I must take steps – which sometimes seem extraordinary and, in this case, regrettable in the extreme – to preserve public confidence in the administration of justice and the institutional integrity of the system.

If this absurd and extraordinary application continues, there will be further hearings on applications of prejudgment regarding the procedure governing bias or prejudgment regarding whether or not I am disqualified for bias. This will result in an exorbitant waste of public time and money, and the only persons who will benefit are the legal practitioners involved. The parents of the victim of this dreadful crime will have justice delayed, and be

placed in a position of continued uncertainty until these applications are resolved. The appellant has also been left with considerable uncertainty.

I will not allow this Court to become a Dickensian *Bleak House*, where parties will be "tripping one another upon precedents, groping knee deep in technicalities [and making mountains of costly nonsense]." Otherwise, to cite Dickens, it will become a "scarecrow of a suit… so complicated that no man [or woman] alive knows what it means."

Although judicial officers should not too readily disqualify themselves, to prevent this unmeritorious application from continuing for generations, it is in the best interests of this Court and overall public confidence in the administration of justice that I withdraw instead of prolonging this bizarre sideshow. I do so with great reluctance, a heavy heart and the deepest feeling of regret, for I do not wish to delay even further, if avoidable, justice to the Morcombes or the appellant. Perhaps it is for this very reason that the Courts of Australia have held to the principle that the judicial officer subject to the alleged disqualifying circumstance should determine their own application for recusal according to the dictates of their oath, duty and conscience.

As a parting comment, I hope that the parties can find it in themselves to take the sensible route and permit the President of the Court of Appeal and Justice of Appeal Fraser to determine the substantive appeal, as a matter of necessity, in my absence to avoid any further wholly unnecessary delay.

Adjourn the court.