REASONS, RESTRAINT AND REASONABLE APPREHENSIONS

(or … what you should say, what you shouldn't, and why it *might* matter)

MAGISTRATES COURT CONFERENCE

31 MAY 2018

Justice Helen Bowskill

Madam Attorney, judicial colleagues and friends, ladies and gentlemen, I am very pleased to be here this morning and have the opportunity to participate in your conference. My thanks to Judge Rinaudo, the Chief Magistrate, for the invitation to speak. It is an honour and a pleasure to do so.

May I also acknowledge with respect the traditional owners of the land on which this court building stands, and pay my respects to their elders, those who have spoken for this land in the past, and the present.

It was Sir Gerard Brennan, on the occasion of his Honour's swearing in as Chief Justice of the High Court in 1995, who spoke of a judicial officer deciding a case "in the lonely room of his or her own conscience, but in accordance with the law". It can be a lonely room, and a very onerous task at times, which makes occasions such as this, when judicial colleagues come together to discuss a range of issues, so important.

When the Chief Magistrate asked if I would speak this morning, I asked him if he had a particular topic in mind. He said he did not. I was at that time buried in considering some issues in relation to a judgment I was working on. I asked him whether he thought perhaps the topic of reasons for decision and apprehended bias might be appropriate, and he agreed. You will all perhaps be relieved that I had not just finished a judgment on something to do with the income tax provisions, or perhaps the law of assignment of obligations.

The obligation to give reasons

In *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [67] French CJ observed that the defining characteristics of courts include:

- the reality and appearance of decisional independence and impartiality;
- the application of procedural fairness;
- adherence as a general rule to the open court principle; and
- the provision of reasons for the courts' decisions.

As his Honour also observed (at [68]) these characteristics are not absolutes:

> "Decisional independence operates within the framework of the rule of law and not outside it. Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters."

Similarly, whilst the requirement to give reasons is acknowledged as an incident of the judicial function and process,[1] there is no absolute rule – the content of the requirement will vary according to the circumstances.

As explained by French CJ and Kiefel J (as her Honour then was) in *Wainohu v New South Wales* (2011) 243 CLR 181 the rationale for the duty upon judicial officers to give reasons for their decisions (both final decisions and important interlocutory rulings) is not limited to the availability of rights of appeal; a wider rationale can be derived from the nature of the judicial

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[1] See also *Wainohu v New South Wales* (2011) 243 CLR 181 at [54]-[58] per French CJ and Kiefel J.

function. Their Honours referred at [56] to the following summary of the objectives underlying the duty:[2]

> "First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions."

French CJ and Kiefel J also said, at [58]:

> "The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny **that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion**."[3]

But there is no "inflexible rule of universal application" that reasons be given for judicial decisions (at [54]). As French CJ and Kiefel J said at [56]:

> "The duty does not apply to every interlocutory decision, however minor. Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision."

This point was also emphasised by the Court of Appeal in *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 482, in the reasons of McPherson and Davies JJA; and

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2 From an extra-curial statement by Gleeson CJ, referred to by Heydon J in *AK v Western Australia* (2008) 232 CLR 438 at [89].

3 Emphasis added.

more recently in *Re Kay; Ex parte Attorney-General* [2017] 2 Qd R 522 at [28] and [34], per McMurdo JA, with whom Fraser and Morrison JJA agreed.

That is an important qualification. The Magistrates Court is expected to deal with a large volume of cases on a regular basis, and it is in the interests of justice, the parties, the broader community, the Court and the Magistrates themselves, that the disposition of those cases occurs in a timely and efficient way. The content of the obligation to give reasons, and indeed whether there is any obligation to give reasons in particular circumstances, must be viewed in that context.

Whether reasons are required at all depends upon what you are doing: "it all depends on the importance of the point involved and its likely effect on the outcome of the case".[4] Acknowledging that there are no absolutes, if the decision constitutes what is in fact, or in substance, a final order, reasons ought to be given. But particularly in the context of a busy court such as this, where reasons are required, oral reasons will frequently be appropriate.

Inadequacy of reasons is a reasonably common complaint made by a dissatisfied party on an appeal. It may be to some extent a fall-back, or catch-all complaint. But nevertheless, I am sure that you, like me, would find it more palatable to be overruled on the basis of some matter of law, on which minds might reasonably differ, than on the basis of a failure to give adequate reasons. That distinction is important for present purposes: as McPherson and Davies JJA said in *Cypressvale* (at 482), "adequacy of reasons refers to their sufficiency in content and form, and not to their validity in point of law, or the correctness of matters of fact".

So the aim of this paper is to provide some, hopefully practical, assistance in relation to the content of the duty to provide reasons, with a view to avoiding successful appeals on this basis.

The cases emphasise the need to focus on the **purpose** for giving reasons, which in turn determines the content of them. It is also emphasised that the purpose must be weighed against other considerations, including the burden that the provision of reasons imposes on the judicial system. As explained by Meagher JA in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 444:

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4 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279 per McHugh JA.

> "The reason for this is that the giving of overly elaborate reasons can serve to undermine public confidence in the judiciary and in the judicial system in the same way that insufficient reasons can. On the one hand, the provision of inadequate reasons can lead to a sense of injustice and a reduced appreciation or understanding of legal rights and obligations. On the other hand, an overly onerous duty to provide reasons increases costs and delay in the judicial system… In the end, the **balancing act** which needs to be undertaken in considering the sufficiency of a statement of reasons involves the adoption of, at the least, a **minimum standard which places the parties in a position to understand why the decision was made** sufficiently to allow them to exercise any right of appeal."[5]

Nothing that I say today is intended to suggest to you that you should reserve cases, which you otherwise would not. There are some cases which you just have to reserve. But many others, you can deal with straight away, or after a short adjournment to collect your thoughts, and all of the various interests – the parties, the public, the Court and your own – are benefited by swift, but fair and reasoned disposition of cases, especially given the significant work load that you deal with on a regular basis.

The starting point, I think, is to keep in mind that reasons are exactly that – **your reasons for making the order(s)** that you make, whether that be a conviction or acquittal of a criminal offence, or a finding as to liability in a negligence case, or determination of a contractual dispute, or another kind of decision.

The next point that is useful to keep in mind is that, first and foremost, you are **explaining your reasons to the parties** – in particular, explaining to **the losing party** why they have lost.

As Muir JA said in *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [58]:

> "The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing party with 'a justifiable sense of grievance' through not knowing or understanding why that party lost; to facilitate or not frustrate a right of appeal; as an attribute or

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[5] Emphasis added.

> incident of the judicial process; to afford natural justice or procedural fairness; to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further 'judicial accountability'."[6]

Your reasons **do not need to be elaborate or lengthy**. Without suggesting there is any rigid rule or mechanical formula to be applied, in most cases, your reasons will be adequate and sufficient if you:

1. Set out briefly your understanding of **the relevant law**, including:

   (a) the standard of proof that applies;

   (b) the relevant legislation;

   (c) the relevant legal principles that apply to the issue you have to determine (unless there is a controversy you need to resolve by reference to different cases, you only need to refer to the main case for any particular principle, not other cases that are just examples of the application of the principle);

2. Set out any **material findings of fact** – that is, findings of fact on which your conclusions depend (especially where those facts have been in dispute). In this regard:

   (a) whilst you are required to *consider* all of the evidence in reaching your decision, you do not need to refer to all the evidence and the arguments before you in your reasons;

   (b) but you are obliged to deal with evidence, and arguments, **on central or critical issues**, in order to explain how a case has been decided in a particular way[7] (if you do not, it may be inferred on appeal that you overlooked it);

   (c) where conflicting evidence of a significant nature is given, you should refer to both sets of evidence, and explain how you resolved the conflict;[8]

   (d) express your findings clearly, by reference to the standard of proof that applies (avoid saying things like "I tend to believe.." or "I am inclined to believe…").

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6 Footnotes omitted.

7 *Camden v McKenzie* [2008] 1 Qd R 39 at [35] and [38] per Keane JA.

8 *Camden v McKenzie* [2008] 1 Qd R 39 at [29] per Keane JA.

3. Set out your **reasoning process**: that is, provide your **reasons** for making those findings of fact, and your conclusions, and your reasons in applying the law to the facts you have found.[9] A **basic explanation of the fundamental reasons which led you to your conclusions is sufficient** – there is "no requirement … that reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given".[10]

A few further practical tips

Evidence and arguments

As already noted, you do not need to refer to *all* the evidence and arguments made by the parties. But your reasons need to demonstrate that you have "grappled with the case as presented by each party",[11] and you are obliged to deal with evidence, and arguments, on central or critical issues, to explain why the case has been decided in a particular way.

You should deal with evidence which is significant, in the sense that, unless disposed of, it stands in the way of the court's conclusions.[12] You should not ignore evidence which is critical to an issue in the case and which is contrary to an assertion of fact made by one party and accepted by you.[13]

Discharging the obligation to refer to the evidence, on central or critical issues, requires more than saying "I have taken into account all the evidence", or referring to "the state of the evidence" without analysis.[14] As Kirby P said in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259, "[w]here nothing exists but an assertion of satisfaction on undifferentiated evidence the judicial obligation has not been discharged. Justice has not been done and it has not been seen to be done." It also requires more than simply saying you adopt

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9 *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [62]-[64] per Muir JA (Holmes JA (as her Honour then was) and Daubney J agreeing), referring, inter alia, to *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443-444 per Meagher JA.

10 See *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [61], referring to *Strbak v Newton*, an unreported decision of the New South Wales Court of Appeal.

11 *Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads* (2014) 201 LGERA 395 at [50] per Peter Lyons J.

12 *Camden v McKenzie* [2008] 1 Qd R 39 at [35] per Keane JA, referring to *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1 at 43 [157].

13 *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 per Samuels JA.

14 See *Commissioner of Police v Stehbens* [2013] QCA 81 at [36] per Margaret Wilson J (Gotterson JA and Douglas J agreeing): "[m]erely referring to 'the state of the evidence' before the [Magistrate], without any analysis of that evidence, did not satisfy his Honour's obligation to give reasons…".

the submissions of one party, a course described by Keane JA in *Camden v McKenzie* at [36] as one "distinctly apt to give an impression to the losing party that the case has been decided without proper consideration".

Credibility

There have been statements in cases that where the resolution of the case depends *entirely* on credibility, it is probably enough that the judge or magistrate has said that he or she believed one witness in preference to another.[15] Perhaps a (civil) case which is simply one of "word against word", as between two parties, may be able to be resolved, and explained in that way. Although I would suggest that, even in such a case, you ought to articulate ***why*** you prefer the evidence of one witness to another – you must have a reason(s), so fairness means you should articulate what those reason(s) are. But it is, I would suggest, a rare case where that is the situation. Frequently, there will be other evidence (whether of other witnesses, or documents), and probabilities, to be considered. As Keane JA observed in *Camden v McKenzie* at [34]:

> "Usually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation. In *Goodrich Aerospace Pty Ltd v Arsic*, Ipp JA, with whom Mason P and Tobias JA agreed, explained:[16]
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> > 'It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: 'I believe Mr X but not Mr Y and judgment follows accordingly'. That is not the way in which our legal system operates…'"

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15 See, for example, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280 per McHugh JA.

16 (2006) 66 NSWLR 186 at 191-192.

As to the role of demeanour in the assessment of a witness' evidence, in *Fox v Percy* (2003) 214 CLR 118 at [30] and [31] Gleeson CJ, Gummow and Kirby JJ reiterated the caution to be exercised in assessing the credibility of witnesses, observing that, over a long period of time:

> "… judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. Thus, in 1924 Atkin LJ observed in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')*:
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> > '… I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.'
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> Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, **to limit their reliance on the appearance of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events**. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."[17]

Once again, explaining your reservations about the credibility of a witness simply by adopting the submissions of the opposing party, is not appropriate.[18]

In a criminal case, of course, where there is defence evidence, it is not a matter of "word against word" – it is not a question of making a choice between the evidence of the prosecution's main witness(es), and the evidence of, or on behalf of, the accused. The prosecution case depends upon you accepting the evidence of its principal witness(es) as true and accurate, beyond reasonable doubt, *despite* the contradictory defence evidence. You do not have to believe the

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17 References omitted; emphasis added. See also the recent decision of McMeekin J in *Souz v CC Pty Ltd* [2018] QSC 36 at [97], where his Honour sets out a summary of the authorities on the assessment of credibility of witnesses, by reference to objective facts and probabilities.

18 *Camden v McKenzie* [2008] 1 Qd R 39 at [36] per Keane JA.

accused is telling the truth before he or she is entitled to be acquitted.[19] You are all well familiar with that principle, but it is worth emphasising because there have been cases in which a ground of appeal sought to be agitated is that the Magistrate erred by applying the wrong standard of proof, where they have used the language of preferring the evidence of the prosecution witness to that of the defence.[20] There is nothing wrong with that, as part of your reasoning process, provided you also make it clear, before finding an accused guilty of an offence, that you are satisfied, beyond reasonable doubt, on such of the prosecution evidence as you accept, that all the elements of the offence have been proved.

Expert evidence

In *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [65] Muir JA endorsed with approval observations in earlier authorities as to the need for a judicial officer to be "more explicit in giving reasons", requiring that they enter into the issues canvassed before them and explain why they prefer one case over the other.

Concluding remarks

I conclude this part of the paper by reiterating the observations of Pritchard J in *Gartner v Brennan* [2016] WASC 89 at [58], which I have previously commented apply equally in the Queensland context:[21]

> "Many cases have confirmed that magistrates are expected to undertake the work of that busy Court with expedition and with a degree of informality appropriate to the disposition of a large volume of cases. Consequently, appeal courts should not scrutinise the reasons for decision given by magistrates with an eye keenly attuned to the identification of error, and errors should not be inferred from mere infelicities of language. The essential requirement is that the reasons of a magistrate **must disclose the underlying intellectual process which has given rise to the conclusions reached**. The adequacy of a magistrate's reasons must

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19 *R v E* (1995) 89 A Crim R 325 at 330 per Hunt CJ at CL, Kirby P and Dunford J agreeing; see also for a recent application of this principle, on a s 222 appeal to the District Court, *Harris v Griffin* [2017] QDC 164 at [22] per Dick SC DCJ.

20 See for example, *McDonald v Queensland Police Service* [2017] QCA 255 at [42]-[43]; see also *Hurley v The Commissioner of the Queensland Police Service* [2017] QDC 297 at [84]-[85] per Muir DCJ.

21 *Hickey v Chief Executive Officer of Customs* [2017] QDC 27 at [28].

> be assessed by looking at the reasons as a whole, including not only findings expressly made but findings to be inferred from the findings expressly made, and having regard to the particular context (including the manner in which the case was conducted and the evidence adduced)."

I emphasise this passage, both to reassure you in terms of what is required of your reasons, but also as to the approach that hopefully will be taken in the event there is an appeal. The work of this Court is unrelenting. It is important to recognise and acknowledge the important role that Magistrates play in dispensing reasoned justice to members of the Queensland community on a daily basis, and equally important to acknowledge the practical exigencies of the circumstances in which you are expected to do that.

So having dealt with what you should say, I turn to what, in my respectful view, you should not, and why it *might* matter.

Restraint and Reasonable Apprehensions

There was a recent article in the news, about the secrets of a long and happy marriage. One of those "secrets" was that it hinges on the five things a day that you do **not** say. You might wonder whether there could really be **five** such things in a happy marriage – but in any event, the analogy is an apt one for a long and happy judicial career.

Despite the perception of some media outlets, and perhaps some within the community, judicial officers are human beings. We get annoyed, frustrated, impatient, or sometimes even outraged, by things said or done in court.

But levity aside, restraint in a judicial officer is important. The restraint that is relevant in the present context is not concerned with avoiding the odd grumpy outburst. Rather, it is concerned with avoiding saying things that might give rise to a reasonable apprehension that you might not bring an impartial mind to your task.

The test of apprehended bias is well-established. It was stated by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]-[7]:

> "[6] Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer

> or juror), as here, the governing principle is that [subject to qualifications relating to waiver and necessity]… a judge is disqualified **if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide**. That principle gives effect to the requirement that **justice should both be done and be seen to be done**, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
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> [7] The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be **independent and impartial**. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror."[22]

An apprehension of bias may arise due to a perception of interest in the outcome, affection or enmity towards a party or other participant in the proceeding (for example a legal representative) or prejudgment. Whatever its cause, "the result that is asserted or feared is a deviation from the true course of decision-making".[23] That true course is set by the fundamental principle of procedural fairness of the system of decision-making which applies to courts and tribunals, that the decision-maker be independent and impartial.

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[22] References omitted; emphasis added.

[23] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

My comments today are not directed to the question of interest (real or apparent) in the outcome,[24] but rather to the possibility of things that are said by a judicial officer in the course of a proceeding giving rise to a reasonable apprehension of bias, whether that is on the basis of "affection or enmity", prejudgment, or otherwise. I also record that my comments are not directed to the question of *actual* bias, although that too can be established by reference to the attitude and conduct of the decision-maker in the course of a hearing.[25]

A useful starting point is a reminder of the Guide to Judicial Conduct, published by the Australian Institute of Judicial Administration, which includes the following, in chapter 4 in relation to conduct in court (at 4.1):

> "It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.
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> Nevertheless, the entitlement of everyone who comes to court – counsel, litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind. Bullying by the judge is unacceptable…"

The Guide includes the following, in relation to critical comments (at 4.8):

> "Particular care should be taken to avoid causing unnecessary hurt in the exercise of the judicial function. This includes taking care about comments made in court (see 4.1 above) and observations made in reasons for judgment or in remarks on sentence."

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24 This was the contention in *Ebner v Official Trustee* (2001) 205 CLR 337, as the trial judge was a director of the trustee of a family trust that owned shares in a bank which was not a party to the proceeding, but had a pecuniary interest in the outcome and, after the trial but before judgment was delivered, the judge inherited more shares in the bank. The conclusion reached by the majority in *Ebner* was that the judge was not disqualified from hearing the matter.

25 See for example *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 102 at [18]-[23] per Kenny J (and the authorities there referred to).

This is a topical issue. As you may be aware, there has recently been a survey conducted of practising barristers in New South Wales, enquiring as to their wellbeing and quality of working life. The survey found two in three respondents had experienced judicial bullying. There is a survey underway in Victoria. I am not aware of any such survey in Queensland, although the Bar Association has published policies in relation to workplace bullying, directed to the Bar Association itself, and barrister members of the Association. In an opinion piece published in The Australian newspaper earlier this month, by Arthur Moses SC, the president of the NSW Bar Association, he suggested there may be a correlation between judicial bullying and the poor quality of working life resulting from the crippling pressures on courts, and said that the bar must be mindful of the fact that judicial officers are under significant pressure too. That is a truism if ever there was one.

In a case in which a Magistrate's decision not to disqualify themselves, following exchanges between the Magistrate and defence counsel, about his client, and then with the defendant himself, was set aside, the former Chief Justice, de Jersey CJ observed that:

> "Judicial officers are human beings and not expected to be paragons of restraint, but … the expectation (relevantly for the present, of the 'fair-minded lay observer') is they will come close to that ideal."[26]

It has also been observed that:

> "Knowledge of his or her own integrity can sometimes lead a judge to fail to appreciate that particular comments made in the course of a trial may wrongly convey to one or other of the parties to the litigation or to a lay observer an impression of bias."[27]

So in our quest to become paragons of restraint, where is the line drawn?

There is some assistance to be gained from a Federal Court decision of *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 102 in which Kenny J at [81] made the following observations as to what would <u>not</u> constitute a reasonable apprehension of bias:

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[26] *Leisemann v Cornack* [2011] QSC 410 at [9], [17] and [35].

[27] *Vakauta v Kelly* (1989) 167 CLR 568 at 571 per Brennan, Deane and Gaudron JJ.

"**Occasional** displays of impatience and irritation, whether justified or not, will not amount to disqualifying bias. As Kirby J said in *Minister for Immigration and Multicultural Affairs; Ex parte AB* (2000) 177 ALR 225 at 230:

> While sustained ill-temper can give rise to a reasonable apprehension of bias, **momentary** outbursts and misunderstandings in the often stressful world of adjudication must be tolerated, so long as they pass and do not affect the functions of the adjudicator: *Galea v Galea* (1990) 90 NSWLR 263 at 279-80, 283.

As noted earlier, if a Member is sarcastic, mocking or rude, he or she fails to act in conformity with proper standards, but this conduct will not **of itself** constitute disqualifying bias. **Mere** insensitivity to an applicant, whether about his personal situation or otherwise, will also not amount to such error."[28]

In *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [100] Robertson J (with whom Allsop CJ agreed) emphasised that this paragraph is not to be read as if the qualifiers "occasional", "momentary", "of itself" and "mere" were not there.

In the *VFAB* case itself, Kenny J described the Tribunal member as having "overstepped the boundary" in the manner in which she questioned the applicant (at [82]). Her Honour said the vice was not that the Member had an adverse opinion about the applicant's claim before the hearing began or that she put adverse matters to him in the course of the hearing. The vice in this case was that by the Member's conduct during the hearing, "a fair-minded observer might well infer that there was nothing the applicant could give by way of evidence or submit by way of argument that might change her mind about his claim… As well as repeated expressions of disbelief, there were her constant adverse comments on his evidence; and **numerous displays of irritation, impatience, frustration and, sometimes, sarcasm**."[29]

That passage highlights another important point. We are expected to have open minds, not empty minds. Or as it was put, more eloquently, by Gleeson CJ and Gummow J: "the question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion".[30] The

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[28] Emphasis added. See also *AZAEY v Minister for Immigration and Border Protection* (2015) 238 FCR 341 at [20]-[22] per North, Besanko and Flick JJ.

[29] Emphasis added.

[30] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [71].

dialogue that takes place between the bench and legal representatives (or unrepresented persons) has regularly been acknowledged to be helpful in the identification of the real issues and real problems in a case. We know that from our daily experience. As the High Court in *Johnson v Johnson* (2000) 201 CLR 488 at [13] said, judicial officers:

> "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."

What is important, however, is that those views are not fixed, and that "the importance of actual and apparent fairness, and the need for actual and apparent abstention from prejudgment are repeatedly stressed".[31]

The case of *Antoun v R* is a stark example of the appearance of prejudgment. In that case, the appellants were jointly charged with demanding money with menaces. A trial was conducted in the District Court of New South Wales, before a judge sitting without a jury. The appellants were convicted. They appealed unsuccessfully to the Court of Criminal Appeal. The sole ground of appeal to the High Court was that two aspects of the trial judge's conduct gave rise to a reasonable apprehension of bias, in the form of prejudgment.

The first aspect was the following exchange which it seems took place at the end of the Crown case, when counsel for one of the accused foreshadowed he would make a no case submission the following day, and counsel for the other accused said he would join in the submission:

> "MR STEIRN: Well your Honour there will be an application tomorrow for no case to answer.
>
> HIS HONOUR: I see, well that application will be refused. So how long then will the defence case take?

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[31] *Antoun v R* (2006) 224 ALR 51 at [81] per Callinan J.

> MR STEIRN: How can your Honour possibly come to that view without having heard one word from either me or Mr Wilkinson?
>
> HIS HONOUR: Because I've closed the Crown case, and I have just said it.
>
> MR STEIRN: But you've heard not one word of any submission by either of us upon either the law or the fact.
>
> HIS HONOUR: No, I'm simply telling you the application will be refused. I perceive what's in the Crown case, I perceive there's a case to answer. Whether it be answered or not is entirely for –
>
> MR STEIRN: Might I ask your Honour to stay your Honour's judicial hand –
>
> HIS HONOUR: All right –
>
> MR STEIRN: – until such time – and please let me finish. Until such time as you've heard submissions by both defence counsel.
>
> HIS HONOUR: Right, now when I've heard those submissions will you be in a position to proceed with the defence case?
>
> MR STEIRN: Does that mean by that comment your Honour that your Honour has already considered the position without a word of submissions by –
>
> HIS HONOUR: I'll consider any submissions you put. I'm obliged to consider any position you put."[32]

An application for the judge to disqualify himself was made the following morning, which was refused. Before actually hearing the no case submission the trial judge said:

> "I simply point out in relation to whatever application is about to be made in relation to a no case that I have a very, very firm view that as a matter of law … an application for a no case cannot succeed in this particular trial …"[33]

A second application for the judge to disqualify himself was made, and again refused.

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32 *Antoun v R* at [68].

33 *Antoun v R* at [70].

The no case submission was then made, in writing. It was refused.

The case proceeded. The second aspect of the judge's conduct occurred after one of the accused had given evidence in his defence but before the defence case had closed. The trial judge said he had formed:

> "… a very strong preliminary view in this case, very, very strong, to a stage where I am considering, indeed have almost made up my mind of my own motion, to revoke bail."[34]

Mr Steirn of counsel strongly argued against that. Unsuccessfully.[35]

Although the appeal to the Court of Criminal Appeal was unsuccessful, the High Court (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) held that the trial judge's conduct presented an appearance of prejudgment (in Callinan J's words, an unmistakable one).

Gleeson CJ said that the judge's "peremptory announcement, as soon as the application was mentioned, that he would dismiss it, was a departure from the standards of fairness and detachment required of a trial judge" (at [21]). Further, at [22], Gleeson CJ said:

> "Judges do not have to devote unlimited time to listening to unmeritorious arguments. Sometimes, a brief hearing will suffice. Judges may anticipate events at trial, and foresee lines of argument that may be developed. Here, the appellants made it clear from the outset that they hoped to be able to secure acquittal without giving evidence themselves. Perhaps the judge felt indignant about the conduct disclosed by the evidence, or about the tactics adopted by the appellants. Indignation is a natural reaction to some facts that are disclosed, or some events that occur, at a criminal trial or, for that matter, on an appeal. It should never be permitted to compromise the appearance of impartiality that is required of judges."

Kirby J endorsed the view that judicial indignation may on occasion be understandable. His Honour also said, at [27]:

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34 *Antoun v R* at [73].

35 *Antoun v R* at [74].

> "For centuries in courts of our tradition, judges have been telling parties and their lawyers, sometimes in quite robust terms, that they consider that a particular submission or course of action is hopeless, a waste of the court's time or doomed to fail. I would not want to say anything that needlessly mollycoddled candid judicial speech addressed to trained advocates."

But, as Kirby J went on to say, at [29]:

> "A line is drawn between forthright and robust indications of a trial judge's tentative views on a point of importance in a trial and an impermissible indication of prejudgment that has the effect of disqualifying the judge from further conduct of the proceedings. Sometimes, that line will be hard to discern. But, in this case, I agree with the other members of this court that the trial judge crossed it."[36]

The exercise of reasonable restraint, as counselled by the former Chief Justice, whilst not diminishing the importance of candid judicial indications, is perhaps as sure a guide as any that you will stay on the right side of the line, and avoid what might reasonably be perceived otherwise.

May I leave you with a quote, attributed to Aristotle (although recently revived by its use in the movie, Legally Blonde): the law is reason, free from passion. What I hope to have imparted to you today is the significance in our role of administering justice according to law, of fair, impartial and reasoned, decision-making, free from the passion that paragons of less restraint may have the liberty to display.

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[36] Another example in which the appearance of bias, by prejudgment was found, as a result of comments made by the trial judge in the course of a hearing, and then revived in the reasons for judgment, is *Vakauta v Kelly* (1989) 167 CLR 568. The trial judge in a personal injuries case made adverse comments critical of the evidence of some of the medical witnesses, given in previous cases, which were held by the majority to be such as to give rise to a reasonable apprehension that the trial judge might not bring an unprejudiced mind to the resolution of the matter before him. In relation to one of the witnesses, those comments were repeated in the judgment.