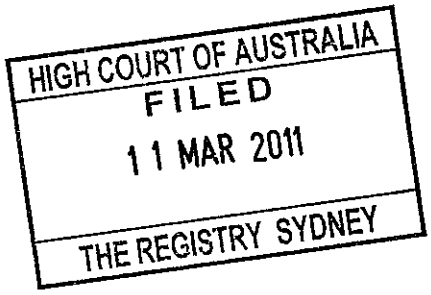
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S67 of 2011

BETWEEN: **MICHAEL WILSON & PARTNERS LIMITED**
Appellant

AND:



ROBERT COLIN NICHOLLS
First Respondent

DAVID ROSS SLATER
Second Respondent

TEMUJIN SERVICES LIMITED
Third Respondent

TEMUJIN INTERNATIONAL LIMITED
Fourth Respondent

TEMUJIN INTERNATIONAL FZE
Fifth Respondent

APPELLANT'S SUBMISSIONS

PART I: INTERNET PUBLICATION CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES IN THE APPEAL

2. The appeal raises three primary, and distinct, issues:

   (a) **Abuse of process**: the appellant obtained judgment against the respondents in the NSW Supreme Court for knowingly participating in breaches of fiduciary duty carried out by a non-party. After judgment was delivered, London arbitrators issued an interim award in which they relevantly found that the non-party had breached his duties but that the appellant was not entitled to compensation. The respondents were not a party to the award.

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Was it an abuse of process for the appellant to seek to recover against the respondents in the face of the London award?

(b) **Waiver:** some two weeks prior to the commencement of a trial scheduled to last for 6 weeks, the respondents asked the trial judge to recuse himself on the ground of apprehended bias. The trial judge refused to recuse himself but invited the respondents immediately to appeal his decision to the Court of Appeal.

Did the respondents' failure to take that course constitute a waiver of, or otherwise preclude them from exercising, any right they had to challenge the final judgment for apprehended bias? Which of the three competing lines of authority as to the amenability to appeal of a refusal of a judge to recuse himself or herself should apply in Australia?

(c) **Apprehended Bias**: is the hypothetical lay observer test laid down by this Court in *Johnson v Johnson* (2000) 201 CLR 488 and other cases "unnecessary" and "wholly artificial" where the Court of Appeal personally apprehends bias on the part of the trial judge? Did the facts properly give rise to a finding of apprehended bias?

PART III: SECTION 78B, JUDICIARY ACT 1903 (CTH)

3. The appellant has considered whether any notices should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and considers that no notice is necessary.

PART IV: CITATION OF JUDGMENTS BELOW

4. Trial judge (Einstein J): *Michael Wilson & Partners Ltd v Nicholls* [2009] NSWSC 1033; [2009] 1377 (Supplementary Judgment). Court of Appeal: *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222.

PART V: STATEMENT OF RELEVANT FACTS

5. The facts on which this appeal is based solely comprise steps in the NSW litigation and London arbitration. Accordingly, there are no facts relevantly in dispute.

6. **Abuse of process.** The NSW proceedings and London arbitration arise out of a dispute between former partners (and associates) of a Kazakhstan firm. Each of the relevant individual participants in the litigation is an Australian citizen.

7. On 7 August 2006, the appellant commenced an arbitration in London against a Mr Emmott for breach of fiduciary duty pursuant to an arbitration agreement in force between them. On 9 October 2006, the appellant commenced the Supreme Court proceedings

against the respondents for, relevantly, knowingly assisting in Mr Emmott's breach of duty (the respondents could not have been joined to the London arbitration).

8. On 5 December 2006, the appellant invited Mr Emmott to become a party to the NSW proceedings: at [293].[1] Mr Emmott declined and threatened an anti-suit injunction if the appellant took steps to join him to the proceedings: at [293].

9. The trial in Sydney commenced on 15 June 2009 and concluded on 10 September 2009. During the trial, the respondents elected to call Mr Emmott as a witness in their defence and he was extensively cross-examined. On 11 December 2009, final judgment was delivered and orders made. The trial judge found that the individual respondents had knowingly participated in breaches of fiduciary duty carried out by Mr Emmott and awarded compensation in favour of the appellant: see [2009] NSWSC 1377 at [96].

10. On 14 December 2009, the respondents filed a Notice of Appeal in the NSW Court of Appeal. On 22 February 2010, the London arbitral tribunal published an interim award (on liability only): at [375]. The award found breaches of fiduciary duty by Mr Emmott but concluded that those breaches did not cause the appellant compensable loss: at [401].

11. **Waiver**. The relevant facts are set out at [39] below.

12. **Apprehended bias**. The matters relied upon by the Court of Appeal to find apprehended bias by the trial judge are conveniently listed at [80] and [93] of the judgment: see also [68] – [80] of these submissions. Each of those matters relates to a step in, or the conduct of, the NSW proceedings and, principally, to the hearing by the primary judge of applications brought by the appellant *ex parte* some two years prior to the trial.

13. In connection with the commencement of the proceedings in 2006, the appellant (as plaintiff) had obtained freezing orders against the assets of the respondents: at [11]. Pursuant to orders made on 9 October 2006, the first and second respondents were required to swear affidavits disclosing their assets in Australia and overseas ("**disclosure affidavits**"): at [11]. Orders limiting access to the disclosure affidavits to the parties' legal representatives were made by consent on 20 October 2006.

14. By motion dated 26 March 2007, the appellant sought *ex parte* orders permitting, *inter alia*: (a) the dissemination of the disclosure affidavits to Mr Wilson (the controller of the appellant) and his UK, British Virgin Island and Bahamas legal representatives; (b) the use

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[1] Paragraph references are to the Court of Appeal's judgment unless otherwise stated.

of the disclosure affidavits in *ex parte* proceedings to be brought by the appellant in the Eastern Caribbean Supreme Court; and (c) the use of the disclosure affidavits in possible criminal proceedings in Switzerland: at [12] – [27]. On 26 March, the primary judge made orders broadly in accordance with those sought by the appellant: at [29]. A revised version of *ex tempore* reasons for judgment was completed on 5 April 2007 ([2007] NSWSC 317).

15. Confidentiality orders were made by the judge, at the request of the appellant, in relation to, *inter alia*, the Notice of Motion filed by the appellant and the orders made by his Honour: at [31]. On 5 April 2007, the confidentiality orders were removed over all materials before the Court in connection with the appellant's motion, save for any reference to the possibility of a criminal complaint being made in Switzerland, and the appellant was ordered to serve the material on the solicitors for the respondents: at [33].

16. Further *ex parte* relief was requested on 10 April 2007, in which the appellant sought leave, *inter alia*, to make criminal complaints to the Swiss and UK authorities and to provide those authorities with the disclosure affidavits, if necessary: at [34]. The confidentiality regime previously in existence in relation to the possible Swiss proceedings was continued in relation to this motion: at [35]. On 10 April, orders were made by the trial judge in the terms requested: at [37]. Reasons for judgment were delivered on 12 April 2007.

17. On 6 June 2007, the trial judge requested the attendance of counsel for the appellant on an *ex parte* basis in order to "ensure that the Court was kept entirely informed as to the extent to which and reasons for which the existing confidentiality regime or regimes need to be continued": at [44]. The appellant successfully requested that the confidentiality regime remain in place until further evidence could be filed in support of the regime: at [44].

18. The confidentiality regime was lifted in its entirety on 13 June 2008 with the result that the respondents obtained access to the motions, evidence, orders and reasons for judgment respectively filed and made in connection with the appellant's motions concerning the Swiss proceedings: at [51], [56]. One month previously - on 12 May 2008 – the respondents had unsuccessfully requested the trial judge to recuse himself: at [52]. (The judge's refusal to recuse himself on this occasion was not the subject of challenge before the Court of Appeal.) A second recusal application was made over a year later (4 June 2009): at [57]. The trial judge declined to recuse himself on that occasion: [2009] NSWSC 505. After final judgment, the respondents appealed to the Court of Appeal on the ground, *inter alia*, that the trial judge suffered from a reasonable apprehension of bias.

PART VI: SUMMARY OF APPELLANT'S ARGUMENT

A - ABUSE OF PROCESS

19. Lindgren AJA held that it would be "vexatious, oppressive and unfair" to the individual respondents and would "bring the administration of justice into disrepute" if the appellant were permitted to recover against the respondents in the face of the arbitral award.[2] With respect, that conclusion (which Basten JA shared)[3] was wrong both as a matter of principle and by reference to the facts of this case.

Contrary to principle

20. Eight matters may be noted.

10 21. *First*, the decision does not reflect previous authority.[4] The doctrine of abuse of process developed in *Reichel v Magrath* (1889) 14 App Cas 665 has consistently been limited to conduct that is inconsistent with prior *court* proceedings. In *Reichel* itself, a defeated litigant was prevented from raising the same question which "the Court has decided in a separate action".[5] A large number of other authorities have proceeded on the same basis.[6] For example, in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541, the principle was limited to collateral attacks upon the "final decision" of "another court of competent jurisdiction in previous proceedings". The reference to a "court of competent jurisdiction" would be meaningless if a prior arbitration could enliven the doctrine. More generally, the doctrine of abuse of process prevents re-litigation. There "cannot be 're-
20 litigation' if there has not been litigation": *R v O'Halloran* (2000) 182 ALR 431 at [103] (Heydon JA, Spigelman CJ and Mason P agreeing).

22. Lindgren AJA was therefore incorrect when he stated at [399] that the appellant was in the same position as the precluded party in each of *Reichel*, *Haines v Australian Broadcasting Corporation* (1995) 43 NSWLR 404, and *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198. Each of those cases concerned attempts to act inconsistently with prior court proceedings

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[2] At [401] (Lindgren AJA).
[3] Basten JA at [104]. Young JA did not deal with the issue of abuse of process.
[4] So far as the appellant is aware, the decision below is the first in Anglo-Australian law in which *Reichel v Magrath* (1889) 14 App Cas 665 abuse of process has been applied with respect to arbitral proceedings.
[5] At 668.
[6] See also *Stephenson v Garnett* [1898] 1 QB 677 at 680-681: "the identical question sought to be raised has been already decided by a competent court"; *Walton v Gardiner* (1993) 177 CLR 378 at 393: "[P]roceedings before a court should be stayed as an abuse of process ... for the reason that it is sought to litigate anew a case which had already been disposed of by earlier proceedings"; *Aon Risk Services v ANU* (2009) 239 CLR 175 at [33] (French CJ).

and, for the reasons set out below, it is wrong to equate such proceedings with an arbitration.

23. *Secondly*, an extension of the doctrine of abuse of process to arbitral proceedings has not been accepted in England. In *Sun Life Assurance Company v Lincoln National Life Insurance Company* [2005] 1 Lloyds Rep 606 at [64], Mance LJ[7] held that there was "no foundation in legal principle" for the contention that a party to an arbitral award is precluded, in a separate arbitration against a third-party, from resiling from the award. Jacob LJ held that it would be "obviously wrong" if a non-party to an arbitral award could rely upon it in defending an inconsistent claim made by a party to the award: [87].

10 24. Although abuse of process was not expressly raised by the claimant in that case, Mance LJ observed that such a doctrine could not be relied upon with respect to arbitral proceedings: at [63], read with [66] – [68]. This was because, *inter alia*, it was not "obviously just or even convenient" to allow a stranger to enjoy a "one-sided entitlement to hold a party to the [arbitral] award or judgment to its terms, with a concomitant right to challenge its correctness whenever it appears favourable to do so": [66]. (A range of other reasons identified by Mance, Longmore and Jacob LJJ are referred to below).

25. *Sun Life* was approved by the English Court of Appeal in *Simms v Dadourian Group International Inc* [2009] EWCA 169, where the Court considered whether a prior arbitral award was binding in subsequent legal proceedings as between a party to the award and a
20 non-party.[8] The Court answered that question in the negative, noting that an arbitral award is only enforceable as between the parties to the arbitration agreement.[9]

26. *Thirdly*, the extension of *Reichel* abuse of process to arbitral awards is contrary to the policy underpinning the doctrine. The doctrine was developed to ensure that public confidence in the administration of justice was not jeopardised by the "scandal of conflicting decisions": eg *Rogers v The Queen* (1994) 181 CLR 251 at 280.[10] As the New Zealand Court of Appeal has recognised:[11] "if an unappealed or unsuccessfully appealed final decision of one Court may be reopened by another Court any resulting inconsistency can only bring the administration of justice into disrepute."

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[7] Longmore and Jacob LJJ agreeing in separate judgments: [73], [83], [87].
[8] The decision is not on all fours with the present case because a party to the award sought, in the court proceedings, to rely upon factual findings made in the award as against a non-party to the award.
[9] *Simms v Dadourian Group International Inc* [2009] EWCA 169 at [143].
[10] See also *Rogers v The Queen* (1994) 181 CLR 251 at 288; *Reichel* at 668.
[11] *Bryant v Collector of Customs* [1984] 1 NZLR 280 at 284.

27. Those concerns do not arise where the prior 'proceeding' is an arbitration. Arbitration is a "consensual, private affair between the particular parties to a particular arbitration agreement": *Sun Life* at [68]. No exercise of judicial power is involved in making an arbitral award and, *prima facie*, the award has no effect other than between the parties to the arbitration agreement.

28. Far from protecting "confidence in and respect for authority of the courts",[12] the Court of Appeal's decision uses the court's inherent powers to maintain respect for the authority of foreign arbitrators. It follows that a separate policy or concern must underpin the Court of Appeal's extension of the doctrine of abuse of process in this way. However, that policy or concern was not identified.

29. *Fourthly*, *Reichel* abuse of process is predicated on the assumption that any inconsistency between judgments could be avoided by, for example, a joinder application or the consolidation of proceedings. This was one of the principal reasons supporting a finding of abuse of process in *Rippon v Chilcotin Pty Ltd*, upon which both Basten JA and Lindgren AJA relied.[13] However, no such mechanisms are available in arbitral proceedings. It is therefore inevitable that "[d]ifferent arbitrations on closely inter-linked issues may as a result lead to different results": *Sun Life* at [68]; see also at [83].[14] This is a significant reason why abuse of process should not be extended in the manner proposed by the Court of Appeal. The reliance placed by Basten JA and Lindgren AJA on *Rippon v Chilcotin Pty Ltd* was inappropriate given the inability of the appellant to join the respondents to the London arbitration.

30. *Fifthly*, the extension of the doctrine of abuse of process to arbitral proceedings is contrary to basic principles of contractual privity. *Prima facie*, an arbitral award only has effect by virtue of the arbitration agreement itself and only to the extent that the agreement remains effective. While the agreement may be enforced by the parties to it, there are significant conceptual difficulties in allowing a third-party to rely on the agreement and an associated award in subsequent proceedings.[15] An arbitration "is in its nature not intended to be available to third parties for any purpose": *Sun Life* at [87(b)].

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[12] *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279 (French J).
[13] (2001) 53 NSWLR 198 at [22] (Handley JA).
[14] "The sad truth is that in the absence of any third-party or consolidation procedure in arbitration, parties may be put into the position of making inconsistent cases in different proceedings": [83].
[15] *Simms v Dadourian Group International Inc* [2009] EWCA 169 at [142] – [143]; *Sun Life* at [68].

31. The issue of privity arises directly in the present case. It would be absurd to suggest that the respondents could be bound by the London arbitration insofar as it found that Mr Emmott *had* breached his fiduciary duties. Yet, the effect of the Court of Appeal's decision is to allow the respondents to take the benefit of arbitral findings that Mr Emmott was *not* liable to the appellant. To allow doctrines of preclusion to "operate only one-way is contrary to ordinary principle": *Sun Life* at [65].

32. *Sixthly*, the extension of *Reichel* abuse of process to arbitrations ignores other important differences between the two forms of dispute resolution. Limitations on the ordinary rules of evidence, the extent of oral submissions, rights of appeal and the extent of reasons for an award are all common features of arbitrations. For Mance LJ, the restrictions on appeals from arbitral awards, in particular, suggested a "general need for caution" before assuming that traditional principles of abuse of process could be applied to arbitrations: at [66]. At bottom, courts and arbitrations "represent fundamentally different mechanisms" for resolving disputes, with the result that the "underlying difference between arbitration and court litigation should be borne in mind at all times".[16]

33. *Seventhly*, the approach adopted by the Court of Appeal is unworkable on at least two bases:

    (a) arbitral awards are generally confidential to the parties to the dispute: see *Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd Rep 616 at [60] – [70] (Lawrence Collins LJ). In many cases, there will be no way of knowing that a party to legal proceedings is acting inconsistently with a prior arbitral award. In contrast, prior legal proceedings will almost always be publicly available for review: *Sun Life* at [87(b)];

    (b) the doctrine of abuse of process, if it is to be applied to arbitral proceedings, depends upon being able to identify a finding of fact or law made by the arbitrator from which a party may not resile in subsequent proceedings. However, the extent to which arbitrators are required to give reasons for an award differs depending on the terms of the particular agreement and practice in the applicable jurisdiction.[17]

34. *Eighthly*, the power to dismiss or stay proceedings as an abuse of process has traditionally been exercised sparingly, with great caution and only in exceptional cases.[18] There needs to be an "exceptional or extreme circumstance which would justify shutting out the

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[16] *Gordian Runoff Limited v Westport Insurance Corporation* (2010) 267 ALR 74 at [216].
[17] See Lord Bingham, "Reasons and Reasons for Reason: Differences between Court Judgment and an Arbitration Award" (1998) 4 Arb Int'l 141.
[18] Eg *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279 (French J).

[plaintiff's] claims".[19] This reluctance is explained by: (a) the *prima facie* right of a litigant to access the Courts; and (b) the availability of the doctrines such as issue estoppel and *res judicata* to protect the court's processes. No reasons were given by the Court of Appeal as to why the present case gave rise to exceptional or extreme circumstances.

Facts of this case

35. Even if, contrary to the above submissions, Australian law permits the doctrine of abuse of process to apply to arbitral proceedings, the doctrine could not apply in the present case.

36. *First*, the doctrine only prohibits a party to legal proceedings from resiling from an *earlier* determination. The London arbitrators handed down their Interim Award some two months after the trial judge handed down his judgment.

37. *Secondly*, the doctrine is only enlivened where the prior determination is final in nature. At present, the only award handed down is an interim award. That award is presently the subject of challenge. The Court of Appeal's attempt to deal with this problem by staying the appellant's proceedings until such time as the arbitration award is finalised turns the doctrine of abuse of process on its head.

38. *Thirdly*, the Court of Appeal's conclusion that the appellant's conduct was "vexatious, oppressive and unfair" cannot be sustained:

    (a) the respondents chose to call Mr Emmott as a witness in their defence rather than merely put the appellant to proof. Mr Emmott gave evidence about the substantive issues in the proceedings and was extensively cross-examined. In addition, Mr Wilson gave evidence for the appellant. The primary judge therefore had the benefit of direct evidence from both the claimant and the alleged principal wrongdoer for the purposes of determining the latter's liability. In these circumstances, it is hardly vexatious, oppressive or unfair for the appellant to seek to enforce a judgment in its favour; and

    (b) there is nothing fair about a situation in which the respondents enjoy a "one sided entitlement" to the benefit of those parts of the London arbitration which favour them while being able to ignore those parts of the arbitration that are contrary to their interest: *Sun Life* at [66]. In *Rippon*, Handley JA similarly noted that oppression

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[19] *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 at [205].

and unfairness do not arise in a *Reichel* abuse of process case unless the respondents were parties to both proceedings.[20]

B - WAIVER OF RIGHT TO SEEK RECUSAL OF TRIAL JUDGE

39. The appellant contends that the respondents waived any entitlement they otherwise had to challenge the final judgment on the ground of apprehended bias by reason of the following circumstances:[21]

    (a) on 4 June 2009, the respondents requested that the trial judge recuse himself on the ground of apprehended bias. After delivering reasons for rejecting the application, the trial judge invited the respondents' counsel to formulate an order which the judge could make so as to found a "principled application to the Court of Appeal."[22] Counsel for the respondents indicated that he would need to take instructions because "[i]t may well be the case that my clients would wish to test" the judge's reasons. After this exchange, the trial judge proceeded to make a number of procedural directions regarding the upcoming hearing;

    (b) by letter dated 9 June 2009 to the appellant, the respondents indicated that they maintained their objection to Einstein J hearing the trial and would appeal to the Court of Appeal on the ground of apprehended bias if "any final orders are made by Einstein J adverse to the [respondents]". No attempt was made by the respondents to take up the trial judge's invitation to make an order that would found a right of appeal before the trial commenced. Nor was any attempt otherwise made to appeal from procedural orders and directions made by Einstein J on 4 June. The trial lasted some 33 days.

40. In the circumstances, this Court should find that the refusal of the respondents to accept the invitation of the trial judge to appeal his decision to the Court of Appeal prior to trial constituted a waiver of any entitlement which the respondents enjoyed to do so after final judgment, or otherwise precluded the respondents from agitating the matter before the Court of Appeal.

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[20] "There is no question here of oppression and unfairness because the accountants were not parties to the earlier action": at [36].

[21] The waiver asserted by the appellant is restricted to the right to challenge the final judgment on the basis of facts and matters occurring prior to the trial.

[22] Tpt 4.6.09, 9.42ff. Einstein J was apparently proceeding on the basis that *Barton v Walker* [1979] 2 NSWLR 740 governed the situation: see further below.

Amenability to appeal

41. The Court of Appeal rejected the appellant's argument because, *inter alia*, the trial judge's refusal to recuse himself did not amount to an "order" from which the respondents could seek leave to appeal.[23] That conclusion should not be accepted.

42. **Current state of the law.** The amenability to appeal of a judge's refusal to recuse himself or herself has not been directly considered by this Court. However, the issue was considered in passing in *The Queen v Watson; ex parte Armstrong* (1976) 136 CLR 248, a decision concerning the extent to which a writ of prohibition could be issued against a judge of the Family Court in respect of whom there was a reasonable apprehension of bias. Four justices observed that "a judge who simply continues to sit after it has been submitted that he is disqualified does not thereby make a 'decree'" within the meaning of s 94(1) of the *Family Law Act 1975* (Cth).[24]

43. In New South Wales, authority is largely to the effect that a judge's refusal to recuse himself or herself does not give rise to a judgment or order on which an appeal may be founded: *Barton v Walker* [1979] 2 NSWLR 740 at 747 – 751.[25]

44. It has been recognised that the reasoning in *Barton*, if applied strictly, can cause "great inconvenience": *Rajski v Rood* (1989) 18 NSWLR 512 at 518. As a result, it is accepted that an appeal may lie where, fortuitously, a collateral order or direction is made by the primary judge when refusing to recuse himself or herself (for example, an order for costs): eg *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 601. An appeal may also lie against a subsequent interlocutory order made in the proceedings on the basis that that order is necessarily infected by apprehended bias.

45. In addition, a practice has developed whereby judges have "invited" the Court of Appeal to review their refusal to recuse through the making of an anodyne order such as fixing a date for trial: cf *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 436-7; *Idoport Pty Ltd v National Australia Bank Ltd* [2004] NSWSC 270 at [9]. Such an order is said to "provide a vehicle" to ground an appeal on the question of bias in the face of the limitation in *Barton*: *Rajski v Rood* (1989) 18 NSWLR 512 at 518.

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[23] Basten JA at [77] (with whom Young JA ([119]) and Lindgren AJA (317] agreed).
[24] (1976) 136 CLR 248 at 266 (Barwick CJ, Gibbs, Stephen and Mason JJ). "Decree" was defined in the *Family Law Act 1975* to mean a "decree, judgment or order".
[25] See also *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272 at 273; *Lee v Cha* [2008] NSWCA 13 at [3], [13] – [25]; Sir Anthony Mason, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review', (1998) vol 1.2 *Constitutional Law and Policy Review* 21 at 22.

46. The reasoning in *Barton* has been adopted in a number of other State jurisdictions.[26]

47. In contrast, the Federal Court has rejected the reasoning in *Barton v Walker*, with the result that an appeal may be brought in that jurisdiction irrespective of whether a collateral order was made by the primary judge: *Brooks v The Upjohn Company* (1998) 85 FCR 469 at 476.[27] A subsidiary line of authority which distinguishes *Barton* and permits an appeal where the judge: (a) refuses the application with an order for costs; (b) refuses to list the matter before another judge; or (c) makes a consequential "procedural direction", also exists: cf *Gas and Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48 at 58-64 (Gummow and Heerey JJ).

10 48. The conflict in authority conflict cannot be justified by differences in the right of appeal provided for in Australian States and the Federal Court.[28]

49. ***Barton v Walker* should be overruled.** This Court should hold that the refusal by a judge to accede to a request by a party to disqualify himself or herself constitutes a judgment or order that is amenable to appeal under s 101 of the *Supreme Court Act 1970* (NSW). Four matters may be noted.

50. *First*, the conclusion in *Barton* has been criticised on a number of occasions. It was described as "controversial" by Heydon JA in *Witness v Marsden* (2000) 49 NSWLR 429 at [96]; the possibility of reconsidering the decision has been noted: *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 609; and the decision of a five member NSW Court of
20 Appeal in *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 is inconsistent with its reasoning (see *Brooks v The Upjohn Company* (1998) 85 FCR 469 at 476; *Lee* at [20]). In these circumstances, *Barton* is ripe for reconsideration.

51. *Secondly*, the position in NSW as a result of *Barton* is highly artificial. If a judge happens to make an order for costs or a procedural direction, an appeal is available with leave. If no such order or direction is made, an appeal is not available until final judgment. There is no practical justification for such a distinction. At least one judge of appeal has noted that this approach gives triumph to 'form over substance' and that "the law ... would be perceived

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[26] Eg *Southern Equities Corp Ltd v Bond* (2000) 22 SASR 339 at 340; *Kapetanos v Selig* (1984) 37 SASR 493; *IOOF Australia Trustees Ltd v Seas Sapfor Forests Pty Ltd* (1999) 78 SASR 151; *GEM v The Queen* [2010] VSCA 168 at [12].
[27] *Kirby v Centro Properties Limited No 2* (2008) 68 ACSR 439 at [22]; see also *Margarula v Northern Territory* (2009) 175 FCR 333 at [32].
[28] For example, each of the *Supreme Court Act 1970* (NSW), s 101 and *Federal Court of Australia Act 1976* (Cth), s 24 relevantly provides for appeals from judgments and orders.

to be no more than an ass" if a litigant lacked a right of appeal before a long trial simply because the judge omitted to make an order for costs or a procedural direction.[29]

52. *Thirdly*, there are clear practical difficulties with the current NSW approach. This Court has noted that it is "obviously inconvenient" to allow a judge to complete a trial where he or she is disqualified to hear it.[30] This inconvenience is particularly acute where, as here, a party raised the issue of disqualification before a trial that was scheduled to last for some six weeks.[31] If the bias issue is not determined authoritatively prior to the commencement of the trial, significant costs and resources may be wasted.[32] The practical difficulties with the current approach have also been noted extra-judicially.[33] It has been observed, in a report commissioned by the Australian Institute of Judicial Administration, that it is "not surprising that there has been increasing dissatisfaction with the decision in *Barton v Walker*".[34] English practice appears to favour the amenability to appeal of decisions to recuse (at least where they are made prior to trial).[35]

53. *Fourthly*, the effect of *Barton v Walker* is inconsistent with modern case management principles. Section 56(1) of the *Civil Procedure Act 2005* (NSW) identifies the "just, quick and cheap resolution of the real issues in the proceedings" as the overriding purpose of that Act and the rules of court. Proceedings in NSW courts are to be managed having regard to, *inter alia*, "the efficient disposal of the business of the court", "the efficient use of available judicial and administrative resources" and the "timely disposal of the proceedings ... at a cost affordable by the respective parties".[36] Equivalent provisions now apply in other State courts and in the Federal Court.[37]

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[29] *Southern Equities Corp Ltd v Bond* (2000) 22 SASR at [116]; see also at [118]: "The present position could well give rise to unfortunate anomalies ... ."

[30] *R v R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 266: "No doubt an appeal could have been brought if the learned judge had finally given judgment in the matter, but it would be obviously inconvenient to allow him to complete the proceedings when he is disqualified to sit."

[31] "[T]here is obvious convenience in there being available a method for determining an issue of this kind before the judge enters upon the hearing of a case, particularly a long case": *Spedley* at 436.

[32] "It seems plain that once the principal litigation commences it will take a very long time. It will thus involve a substantial public and private cost. Clearly, it would be a misfortune if the principal proceedings ... were to advance for a long time only to be invalidated later by an appellate decision that [the trial judge's] conclusion on the application for disqualification was wrong": *Rajski v Wood* (1989) 18 NSWLR 512 at 515-516.

[33] Justice Hammond, *Judicial Recusal: Principles, Process and Problems* (2009) at 104-105: "These sorts of contortions over appeal rights are quite inappropriate. The merit issue should be able to be addressed more directly and timeously."

[34] MA Perry, *Disqualification of Judges: Practice and Procedure* (2001) at [3.30].

[35] See eg *AWG Group Ltd v Morrison* [2006] 1 All ER 967 at [1], [17].

[36] *Civil Procedure Act 2005* (NSW), s 57.

[37] See eg *Federal Court of Australia Act 1976* (Cth), ss 37M, 37N.

54. These statutory provisions are not mere motherhood statements. They have substantive operation and justify a "different approach" to the management and resolution of issues raised in legal proceedings: cf *Aon Risk Services Aust Ltd v Australian National University* (2009) 239 CLR 175 at [92].

55. *Fifthly*, the approach adopted in *Brooks* is consistent with the now general practice of hearing applications for disqualification in open court and publishing reasons for decision where the judge proposes to continue sitting.[38] Reasons for the trial judge's refusal to recuse himself in this case were delivered and are publicly available: [2009] NSWSC 505.

56. For these reasons, the appellant submits that the approach adopted by the Federal Court in *Brooks* is to be preferred to that set out in *Barton*. A refusal by a judge to recuse himself or herself should be amenable to appeal without having to wait either for a collateral order to be made or for final judgment.

57. **Procedural directions existed in any event.** Even if the Court declines to approve the approach set out in *Brooks*, in preference to that in *Barton*, the primary judge made a number of procedural directions and orders immediately after declining to recuse himself.[39] On the authorities identified at [44] above,[40] it was open to the respondents to appeal from the making of those directions and orders and thereby authoritatively determine the issue of bias prior to the commencement of the trial.

Conduct of the respondents ought to have precluded them from raising bias on appeal

58. The respondents were expressly invited by the trial judge to review his refusal to recuse himself before the Court of Appeal prior to trial. The judge also offered to make an order that would avoid the jurisdictional questions discussed above. The respondents considered their position and refused the judge's invitation, preferring instead to appeal on the question of bias only if a final judgment was made against them.

59. The conduct on the part of the respondents is analogous to that considered by this Court in *Smits v Roach* (2006) 227 CLR 423 at [43], where Gleeson CJ, Heydon and Crennan JJ noted, with reference to *Vakauta v Kelly* (1989) 167 CLR 568:

> "It has been held in this Court, on a number of occasions, that an objection to the constitution of a court or tribunal on the ground of apprehended bias may be

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[38] The Council of Chief Justices of Australia, *Guide to Judicial Conduct*, 2nd ed (2007) at 3.5(d) and (f).
[39] Tpt 10.16 – 50 (4 June 2009). The directions and orders were made by consent.
[40] See also *Gas and Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48 at 64.

waived, and that, if a litigant who is aware of the circumstances constituting a ground for such objection fails to object, then waiver will result."

60. In the present case, the respondents should be held to have waived their entitlement to appeal from the final judgment of the trial judge on the ground of apprehended bias by reason of the conduct summarised above. 'Waiver', in this sense, is grounded in the need to ensure fair dealing in the conduct of litigation and promote the finality of litigation.[41]

61. More generally, the notion that the respondents were permitted to maintain their objection to the trial judge despite having had (and/or been offered) the opportunity to test their objection in the Court of Appeal before the trial commenced is contrary to modern principles of case management and efficiency: cf *Aon Risk Services Aust Ltd v Australian National University* (2009) 239 CLR 175 at [92]. The trial in the present case lasted for over six weeks, no doubt at substantial expense to all parties. If the respondents had succeeded, they would have taken the benefit of the judgment yet, because they failed, they were allowed to contend that the judgment was infected with apprehended bias. With respect, it cannot be right for a litigant in these circumstances to choose to bide its time in this way in the hope of a favourable outcome on the merits and then reiterate its complaint if it loses the trial.[42]

C - APPREHENDED BIAS

62. **Refusal to follow High Court test.** This Court has repeatedly stated that the test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: eg *Johnson v Johnson* (2000) 201 CLR 488 at [11].[43]

63. That test was not applied by the Court of Appeal. Basten JA (with whom Young JA and Lindgren AJA agreed on the recusal issue) said that the test was both "unnecessary" and "wholly artificial" where the Court of Appeal personally possessed an apprehension that the trial judge was biased.[44] In doing so, the Court equated the position of the "reviewing judge" with that of the fictional lay observer and assumed that a conclusion by the reviewing judge personally of apprehended bias was determinative. Basten JA also accepted that a finding of apprehended bias could be made in these circumstances even

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[41] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 485.
[42] Cf *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2 at [75].
[43] See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6].
[44] At [10]. Young JA agreed with Basten JA at [118]; Lindgren AJA agreed at [317].

though the lay observer would be untroubled by the trial judge's conduct.[45] His Honour concluded his remarks by noting:[46]

> "To reiterate, the role of the lay observer may be critical in the reasoning process where the **reviewing judge** does not **personally** entertain a relevant apprehension." (emphasis added)

64. Although Basten JA subsequently referred to the fair-minded lay observer, it is clear that his Honour's doubts regarding the relevance of that construct remained. For example, Basten JA concluded his analysis of the facts with the remark that, in his view, the primary judge suffered from a reasonable apprehension of bias and he did "not see any reason to think that the fair-minded lay observer would not share that view".[47]

65. The Court of Appeal's approach is not only contrary to numerous decisions of this Court but also fails to reflect the three rationales underlying the lay fictional observer standard:

(a) the lay observer is used as the applicable yardstick to ensure that the test is *not* "based purely upon the assessment by some judges of the capacity or performance of their colleagues": *Johnson v Johnson* at [12];

(b) the reliance on a lay observer recognises that, in the absence of actual bias, the only relevant concern is to ensure that the *public* retains confidence in the judicial system.[48] If a court concludes that the lay observer's confidence will be unaffected by a judge's conduct, then no apprehension of bias (in the relevant sense) can exist; and

(c) an objective test is necessary because recusal applications will usually be heard by the judge against whom the apprehended bias is alleged: *Ebner* at [74]. With respect, it is absurd to suggest that a trial judge could determine such an application on the basis of whether he personally believes he appears to be biased. If the Court of Appeal's approach only applies on an appeal then different tests will be applied at the trial and appellate levels – a result that is practically unworkable and invites every appellant to appeal an unsuccessful bias application.

66. Moreover, for an appellate judge to conclude that he or she personally apprehends bias on the part of a trial judge is the practical equivalent of holding that the trial judge *was* biased.[49]

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[45] At [10].
[46] At [10].
[47] At [94].
[48] *Johnson v Johnson* at [12]; *R v Watson; ex parte Armstrong* (1976) 136 CLR 248 at 263.
[49] It is noteworthy that Basten JA indicated a willingness to conclude that the primary judge demonstrated "actual prejudgment": at [91].

It is only the interposition of the lay observer which allows for a distinction between actual and apprehended bias to be maintained.[50]

67. The Court of Appeal's considered refusal to apply the test in *Johnson* and subsequent cases means that its conclusion on apprehended bias miscarried.

68. **No apprehended bias on the facts.** The circumstances relied upon by Basten JA in finding apprehended bias are identified at [80] and repeated in different terms at [93] of the judgment. The core conduct relied upon concerned the trial judge's determination of several *ex parte* applications for freezing orders and associated relief in the period 26 March to 18 October 2007. With respect, his Honour was wrong to conclude that apprehended bias existed with respect to those matters.

69. *First*, the *ex parte* hearings occurred almost two years before the trial commenced.[51]

70. *Secondly*, the fact that the material placed before the trial judge was "not entirely supportive" of the interlocutory orders sought by the appellant should rarely, if ever, support a finding of bias: [80(e)]. It is almost inevitable, and consistently with the appellant's obligation of full disclosure, that the judge will be required to weigh competing material on an *ex parte* application. Similarly, the mere fact that the orders sought were "contestable" cannot support a finding of apprehended bias: [80(f)]. Many forms of interlocutory relief will be highly contestable.

71. *Thirdly*, it is, with respect, wrong to require a judge delivering an *ex parte* judgment to "reveal ... disclosure" of the weaknesses of the applications: [80(g)]. The onus was upon the appellant, not the judge hearing the application, to comply with the duty to provide full and frank disclosure of arguments both for and against the application. Nor was any attempt made by Basten JA, either in this paragraph or the balance of his reasons, to identify in what respects the primary judge failed to 'consider' what Basten JA apparently believed to be weaknesses in the applications.

72. *Fourthly*, the fact that Basten JA personally considered that the confidentiality regime imposed by the primary judge "might" have been maintained "beyond a justifiable period" does not support a finding of apprehended bias: [80(h)]. No attempt was made by Basten

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[50] *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2 at [33]: "A standard for apparent bias dependent upon how the matter appeared to judges and lawyers would be difficult to distinguish, in practical effect, from a standard of actual bias."

[51] The hearings occurred in March and October 2007: see [79(b)].

JA to identify a period of time that was justified and no suggestion was made that the lay observer would necessarily share the same view as his Honour on this question.

73. *Fifthly*, no attempt was made by Basten JA to explain in what way the trial judge "acted on a basis as to the credibility ... of the individual [respondents], which they had no opportunity to rebut": [80(i)]. Given that his Honour's remarks were directed to *ex parte* applications brought by the appellant, it may be doubted whether the credibility of the respondents was likely to be a significant focus of inquiry. In any event, it is a necessary characteristic of *ex parte* relief that the judge reaches a *prima facie* view that will often be inconsistent with arguments and evidence that a respondent may wish to put forward at a contested final hearing. It has not previously been suggested that this circumstance in itself justifies a finding of apprehended bias.

74. *Sixthly*, it is artificial to suggest that a trial judge would be 'embarrassed' if, having accepted a person's evidence for the purposes of an *ex parte* application, he was asked to reject it by an opposing party at trial: [80(j)]. A judge hearing an *ex parte* application is, by definition, not determining the substantive rights and liabilities of the parties and will necessarily proceed in the absence of evidence from a contradictor. If Basten JA's reasoning stands, the same 'embarrassment' is likely to be shared by every judge who presides at both the *ex parte* and trial stages of a proceeding.

75. *Seventhly*, Basten JA's "broader approach", which involved his Honour reviewing the primary judge's reasons on final judgment and final orders in an attempt to discern apprehended bias, led him into error.[52] Basten JA appears to have accepted the respondent's contention that the reasons for judgment, and final orders, "demonstrated a [judicial] mind which had been, at least subconsciously, influenced to accept the "case theory" presented by Mr Wilson in his affidavits during the interlocutory proceedings".[53] This 'subconscious' influence was said to have resulted in the primary judge "simply ignoring aspects of Mr Wilson's cross-examination which were adverse to his credit". Basten JA proceeded to note that it was "quite possible" that the "mind" of a judge in the position of the trial judge in the present case "will become familiar with the character of the plaintiff's case to an extent that, consciously or subconsciously, there will be a tendency to place the further evidence within the pre-existing mental structure."[54] His Honour also observed that the judge's failure to address certain matters relied upon by the respondents

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[52] At [82] – [90].
[53] At [82].
[54] At [85].

in his final judgment "may" "be thought to have revealed a conscious or subconscious reluctance to consider the possibility that the evidence on which the interlocutory orders had been made might not have withstood proper scrutiny."[55]

76. No attempt was made by Basten JA to explain in what respects the primary judge's mind or mental structure was 'consciously' or 'subconsciously' influenced. The "actual thought processes of the judge" are irrelevant to the question of apprehended bias: *Ebner* at [7]. Moreover, to reason in this way, and at this level of generality, involves concluding that the primary judge was actually biased. So much was recognised by Basten JA himself when he observed that the considerations identified above "might ... demonstrate not merely an apprehension of bias by way of prejudgment, but the crystallisation of that apprehension in a demonstration of actual prejudgment".[56] Yet, such an allegation was never put forward by the respondents.

77. This elision of actual and apprehended bias was reinforced by Basten JA's acceptance that what he considered to be errors in the final reasons "confirmed" the existence of apprehended bias.[57] It is submitted that caution must be exercised before concluding that an error of law on the part of a trial judge in his or her final reasons justifies a finding of apprehended bias. Judges regularly make errors which are reviewed, and corrected, on appeal. The reasonable lay observer can be expected to be aware of that circumstance and to be in a position to discount it.

78. *Eighthly*, it is circular to rely upon a failure by the trial judge to recuse himself as evidence that he suffers from apprehended bias: [86].[58] The act of refusing to recuse himself can only support a finding of bias if it is concluded that the refusal was itself incorrect.

79. *Ninthly*, Basten JA placed insufficient weight on numerous statements and conduct by the trial judge that indicated an absence of prejudgement. For example:

(a) the trial judge noted that it was important for the court to "scrutinise very closely" the application made by the appellant to vary consent orders so as to permit third-party disclosure of evidence filed by the respondents: [30];

(b) on at least one occasion, the trial judge brought the appellant's counsel back before him because of his "anxiety to ensure that the Court was kept entirely informed as to

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[55] At [88].
[56] At [91].
[57] At [91], read with [87] – [90].
[58] "[T]he impressions of the observer would also be affected by the refusal of the recusal application on 23 May 2008 (without giving reasons) and the further refusal on 4 June 2009 ...".

the extent to which and reasons for which the existing confidentiality regime or regimes need to be continued": [44];

(c) the trial judge ordered the appellant to pay costs on an indemnity basis in connection with a failure to comply with pre-trial directions and adjourned the trial at the request of the respondents to give them additional time to deal with issues raised by the appellant's evidence.

80. *Finally*, no attempt was made by Basten JA to identify a "logical connection" between the matters identified by him and a feared deviation by the trial judge from the course of deciding the case on the merits, as required by this Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8]. His Honour thereby repeated the error committed by the NSW Court of Appeal in *Smits v Roach*: see (2006) 227 CLR 423 at [58] – [59].[59]

PART VII: APPLICABLE STATUTORY PROVISIONS

81. Not applicable.

PART VIII: ORDERS SOUGHT

82. The Appellant seeks the following orders:

1. Appeal allowed with costs.
2. Set aside orders 3, 4, 5, 6 and 7 of the Court of Appeal dated 15 September 2010.
3. Remit the matter, including the cross-appeal brought by the appellant against the orders of Einstein J, to the Court of Appeal for further consideration.

DATED: 11 March 2011

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[59] "That treatment of the issue failed to articulate a logical connection between the matter complained of and the feared deviation by McClellan J from the course of deciding on its merits the proceeding before him. That is to say, the Court of Appeal fixed its attention upon the first of the two necessary steps required by *Ebner* at the expense of the second."