Equity Division
Supreme Court
New South Wales

Case Name:	Mackinnon as plaintiff representative of 153 plaintiff group members v Partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 4)
Medium Neutral Citation:	[2018] NSWSC 147
Hearing Date(s):	12 February 2018
Date of Orders:	12 February 2018
Date of Decision:	22 February 2018
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Application for recusal refused
Catchwords:	PROCEDURE - courts and judges generally – judges – recusal application – on grounds of apprehended bias – whether fair minded lay observer might reasonably apprehend judge might not bring an impartial and unprejudiced mind – application made on sixth day of hearing – whether judge had intervened in cross-examination – whether judge "closed down" avenues of cross-examination
Legislation Cited:	Civil Procedure Act 2005 (NSW) Partnership Act 1892 (NSW)
Cases Cited:	Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3) [2013] FCA 984 British American Tobacco v Laurie (2011) 242 CLR 283; [2011] HCA 2 Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63 Helow v Secretary of State for the Home Department [2008] 1 WLR 2416 Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20 Johnson v Johnson (2000) 201 CLR 488; [2000] HCA 48

	Marlinspike Debt Acquisitions Pty Ltd v The Undone Pty Ltd (No 2) [2018] NSWSC 71 Michael Wilson & Partners v Nicholls (2011) 244 CLR 427; [2011] HCA 48 Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; [2001] HCA 17 Slavin v Owners Corporation Strata Plan 16857 [2006] NSWCA 71
Category:	Procedural and other rulings
Parties:	Ian Henry Mackinnon as plaintiff representative of 153 plaintiff group members (Plaintiff) The partnership of Anne Patricia Larter, Alan Jones, Miraleste Pty Ltd trading as USG Partner and Leigh Johnson, trading as "STC Sports Trading Club" (First Defendant) Anne Patricia Larter (Second Defendant) Alan Jones (Third Defendant) Miraleste Pty Ltd trading as USG Partner (Fourth Defendant) Leigh Johnson (Fifth Defendant) Sports Trading Club Limited (Sixth Defendant) Bella Development Limited (Seventh Defendant) East Ocean Capital Limited (Eighth Defendant) Arabella Racing Pty Ltd (Ninth Defendant) Banksia Holdings (Tenth Defendant) Arabella Louise Foster (Eleventh Defendant) Peter Foster (Twelfth Defendant)
Representation:	Counsel: T J Dixon (Plaintiff) Solicitors: Nelson McKinnon Lawyers (Plaintiff) P N Argy (Fifth Defendant)
File Number(s):	SC 2015/332497

JUDGMENT

1 Shortly after the matter was called on for hearing on Monday 12 February 2018, the sixth day of the hearing of these proceedings, Mr Argy, who appears for the fifth defendant, Ms Leigh Johnson, applied for an order that I recuse myself from the further hearing of the proceedings.

2 At that stage, Ms Johnson was still under cross-examination. The cross-examination commenced on Friday 9 February 2017.

3 Immediately before making that application Mr Argy informed me that Ms Johnson was in any event unable to attend Court on 12 February 2018 for medical reasons. Ms Johnson was not able to return to Court that week. The matter has now been adjourned to 14 March 2018, when Ms Johnson's cross-examination is scheduled to continue and the matter to conclude.

4 I invited Mr Argy to make submissions in support of the application. He did so.

5 Having considered those submissions during the day, I declined to recuse myself.

6 I said I would give my reasons later. These are those reasons.

7 This is a class action.

8 The plaintiff, Mr Ian Mackinnon, brings the proceedings as a representative of 153 group members, each of whom made an investment in a purported sports betting and trading scheme. The investments were made by way of loans to a partnership which was originally styled "The STC Sports Trading Club". On or about 21 January 2014 that partnership purportedly changed its name to "STC Sports Trading Club". There is a dispute as to whether a new partnership was thereby formed.

9 The amount invested by group members was in the order of $12.3 million.

10 On 30 December 2012, Ms Johnson (who is a solicitor) and the second defendant, Ms Anne Larter, executed a document called "Limited Partnership Agreement". That document stated that the name of the partnership was "The Sports Trading Club Partnership".

11 In that document Ms Larter was described as a “General Partner” with “unlimited liability for the obligations, debts and liabilities of the Partnership”.

12 Ms Johnson was described as a “Limited Partner” with “limited liability to the amount of [her] invested capital”. Ms Johnson invested $182,500 in the venture.

13 The Limited Partnership Agreement was not registered for the purposes of s 50A of the *Partnership Act 1892* (NSW).

14 Ms Johnson resigned as partner on 21 January 2014.

15 In the meantime, on 28 October 2013 and 4 November 2013, Mr Mackinnon and his wife, Mrs Belinda Mackinnon, executed documents entitled “Loan & Profit Sharing Agreement” pursuant to which they loaned a total of $200,000 to the partnership. That money was to be “applied by the Partnership for trading on financial markets including but not limited to sports and prediction markets”.

16 Mr Mackinnon alleges that the Sports Trading Club (which I will call “STC”) was a fraudulent scheme masterminded by the twelfth defendant, Mr Peter Foster, who is said to be a notorious confidence trickster. Mr Mackinnon alleges that none of the funds invested was used for sports betting or trading and that, instead, the funds were misappropriated by Mr Foster and transferred to offshore companies and bank accounts associated with him and his niece, Ms Arabella Foster, in Hong Kong, the Cayman Islands and Vanuatu.

17 Ms Johnson is the only active defendant.

18 Ms Larter entered a submitting appearance. Mr Foster, who is presently in custody, has not appeared. He has stated, through his solicitor, that he does not propose to appear nor seek an adjournment of these proceedings pending the outcome of criminal charges pending against him.

19 The third and fourth defendants, Mr Alan Jones and a company associated with him, are alleged to have been partners in STC following Ms Johnson's resignation. They did not appear when the matter was called on for hearing.

20 The sixth to eleventh defendants, to or through whom it is alleged investors' funds passed, have either not appeared, or have consented to judgment.

21 The allegations made against Ms Johnson are very serious.

22 They include that Ms Johnson made representations, including by silence, concerning STC that were misleading or deceptive, and made with the knowledge that they were false.

23 Mr Mackinnon alleges that Ms Johnson:

(a) provided "seed capital" in the amount of $182,500 to the STC venture;

(b) knew Mr Foster immediately prior to the commencement of the STC business, and was aware of his criminal history;

(c) knew that STC was the alter ego of, and was at all material times controlled by, Mr Foster;

(d) allowed her name and profile to be used by STC whilst simultaneously masking the involvement of Mr Foster (who, it is alleged, Ms Johnson knew was passing himself off to investors as "Mark Hughes"); and

(e) did not report her concerns to authorities or prospective investors despite engaging with Mr Foster in correspondence about allegations she had heard that the venture was a "Ponzi" scheme.

24 Ms Johnson denies each of these allegations.

25 Mr Mackinnon also seeks to recover from Ms Johnson, as one of the investors, the amount he advanced as a debt.

26 On 12 February 2018, the proceedings had reached the stage where Mr Mackinnon's case had closed. He called a number of witnesses. Those witnesses included Mr Kenneth Gamble, a private investigator, who gave evidence of the result of his investigation into this scheme, and Mr Pieter de Klerk, who is one of the group members and who also, separately, advanced US$1 million to acquire what was said to be the "South African rights" to conduct the STC scheme.

27 Ms Johnson has sworn an affidavit dated 3 August 2017 which contains 986 paragraphs and is 466 pages long. She prepared it at a time when she was self-represented.

28 Mr Dixon, who appears for Mr Mackinnon, commenced to cross-examine Ms Johnson on that affidavit on 9 February 2018 (the fifth day of the proceedings).

The recusal application

29 Mr Argy submitted that the basis for his application that I recuse myself was "that your Honour has unduly intervened in questioning parties and witnesses, taking up the arguments of the plaintiff, [and] expressing opinions on matters where there is still evidence and submissions to be had".

30 Although Mr Argy made no reference to authority, he submitted that a fair minded lay observer of the proceedings might conclude that I had formed the view that Ms Johnson "was complicit in the masking of Peter Foster's identity in furtherance of the alleged fraudulent scheme, and really, I think, your Honour, your Honour appeared not open to carefully hearing Ms Johnson's side of the story and [to be] approaching it with a greater degree of overt scepticism than one might expect".

31 Mr Argy also submitted that "your Honour has not given me the latitude to cross-examine witnesses" and that I had "closed down" aspects of his cross-examination on what Mr Argy described as "the partnerships defence". I understand this defence to involve the contention that, upon Ms Johnson's resignation from the partnership in January 2014, that partnership ceased to exist and a new partnership came into being.

32 The test for determining whether a judge should disqualify himself or herself by reason of 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": *Johnson v Johnson* (2000) 201 CLR 488; [2000] HCA 48 at [11]; followed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 at [6], *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427; [2011] HCA 48 at [2]).

33 I must therefore determine whether bias would be apprehended by a "fair minded lay observer".

34 The attribute of 'fair mindedness' is described by Lord Hope of Craighead in *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [2], recently cited with approval by Davies J in *Marlinspike Debt Acquisitions Pty Ltd v The Undone Pty Ltd (No 2)* [2018] NSWSC 72:

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious... Her approach must not be confused with that of the person who has brought the complaint. ... The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses."

35 The characteristics of a "lay" observer were described by French CJ in *British American Tobacco v Laurie* (2011) 242 CLR 283; [2011] HCA 2 at 300:

> "[The fair minded lay observer's] judgments are made on a subset of the available information. That is because the reasonable apprehension of bias goes to the confidence in the courts on the part of litigants and the public, who will not have access to the details of the substantive law and all the relevant aspects of the practice and procedure of the courts".

36 Nevertheless, the "fair minded lay observer is an informed observer who takes into account the circumstances in which those observations were made and the totality of what the judge said" (*Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71 at [27] (Giles JA)). Thus in considering whether the fair minded lay observed would have formed the requisite apprehension, the observer must be considered to have "taken the trouble to inform himself or herself to the extent necessary to make a fair judgment" (*British American Tobacco v Laurie* at [47] (French CJ), and "to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of the relevant circumstances" (*Johnson v Johnson* at [125] (Kirby J)).

37 In *Isbester v Knox City Council* (2015) 255 CLR 135; [2015] HCA 20 at [23], Kiefel, Bell, Keane and Nettle JJ considered that this observer is "taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision".

38 Agreeing with the plurality, Gageler J said at [59] that the test for apprehended bias in the curial context necessarily involved three analytical steps. He went on to say:

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

39 Stating the matter in the terms articulated by Gageler J, I understood Mr Argy to contend that:

(a) there are factors (my "intervention" during cross-examination, my taking up of the plaintiff's arguments, my expressing

opinions on matters, and my "closing off" of Mr Argy's cross-examination), that are identified by the various transcript references to which Mr Argy drew attention ("step one");

(b) those factors showed that I was approaching Ms Johnson's case with a "greater degree of scepticism than one might expect" and "not open to carefully hearing Ms Johnson side of the story" and that there may therefore be a "deviation from a neutral evaluation of the merits" ("step two"); and

(c) it was reasonable to apprehend that such a deviation would be caused that way ("step three").

The "interventions"

40 Mr Argy cross-examined each of the witnesses called on behalf of Mr Mackinnon. They included Mr Gamble and Mr de Klerk.

41 The impression I gained was that Mr Argy is not an experienced cross-examiner. At times, I found it hard to see the relevance of Mr Argy's questions and the direction his cross-examination was taking. For example, Mr Argy spent much time asking witnesses to confirm the contents of documents when their meaning was clear and uncontroversial.

42 The Court had allocated five days for the hearing of this matter.

43 During the course of Mr Argy's cross-examination, it became clear that the proceedings would not finish in anything like five days. In those circumstances, from time to time, I felt obliged to intervene to ensure that the matter progressed at a reasonable rate and that time was not unnecessarily wasted, bearing in mind my obligation under s 56 of the *Civil Procedure Act 2005* (NSW) to conduct proceedings consistently with the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings.

44 Mr Argy identified points in the transcript which, he submitted, show "interventions" by me that suggest I had a closed mind to Ms Johnson's case and was unduly sceptical of it. To explain why I declined to recuse myself, it is necessary to go to each of those instances.

45 I must also explain the context in which each of the "interventions" took place. That does mean that these reasons are lengthy.

Letter from Pikes & Verekers

46 Ms Johnson's evidence is that she agreed to become a "limited partner of the new business" as a result of a proposal made to her by Mr Foster, for whom she had acted in earlier proceedings.

47 In her affidavit, Ms Johnson said that Mr Foster "stressed that he wouldn't involve himself in any more scams", that he had "wasted too much of his life getting into trouble", that "the business would be a legitimate business" and that "he would not be involved at all in the management or operation of the proposed new business but would only be involved in setting up and operating the business's website and similar technological aspects".

48 In April 2013, about four months after Ms Larter and Ms Johnson executed the Limited Partnership Agreement, Mr Tassell of the law firm Pikes & Verekers wrote to two private investigators stating that he acted for Ms Johnson and Ms Larter. Mr Tassell referred to two emails that those investigators had sent to a Dr Alan Snyder. The letter stated:

> "The second email conveys a imputation that our clients are operating the Sports Trading Club as a <u>mere front for the notorious conman Peter Foster</u>.
>
> These are very serious allegations to make about persons of our clients' standing and are calculated to undermine their relationship with Dr Snyder, and their business.
>
> We are instructed that the imputations are quite without foundation." [Emphasis added]

49 On that topic the following exchange occurred in cross-examination at T378:

“HIS HONOUR

Q. Is your evidence that you - that Ms Larter gave instructions to Pikes & Verekers to the effect that is set forth in this letter in a phone call that you were listening to. Is that what you said?

A. Yes, your Honour. I put her on the phone. I rang her and put her on the phone.

Q. Did you take any part in giving these instructions to the solicitors?

A. I went and saw the solicitors your Honour, but they insisted on speaking to Anne Larter because she was the general partner.

Q. So you gave Mr Tassle the instructions in this letter, did you?

A. No, she did.

Q. I thought you said you went to see the solicitor?

A. Your Honour, I went and saw them and they didn't want to take instructions from me. They took - they wanted to speak to her because she was the general partner.

DIXON: If I could your Honour, unless your Honour had other questions.

Q. Just on that, this is a letter written on behalf of both you and Ms Larter, correct?

A. Yes.

Q. And the reason why the lawyers wanted to speak to Ms Larter was because they wanted to take instructions from both of the people that were making the threats concerning defamation?

A. Probably.

Q. Yes and --

A. But in April - you see, this is right in the beginning of the business and that's right, he wasn't running it or not meant to be.

HIS HONOUR

Q. Did you understand Mr Foster to be a notorious conman as at 5 April 2013?

A. I certainly have - probably aware that people called him that, but I never saw any evidence for it.

Q. Did you give Mr Tassle [instructions] to write the last sentence on page 304?

A. ‘The second email composing an imputation’?

> Q. Yes?
>
> A. Well I went and saw the lawyers so - I mean I saw the letter so, I mean, I'm aware of it. I must have been aware of it."

50 During that exchange, Ms Johnson gave evidence that it was Ms Larter, and not Ms Johnson, who gave Mr Tassell instructions about the letter ("[n]o, she did").

51 Mr Argy submitted that the questions I asked at the end of the passage showed that I was "seeking to support a prospective finding that Ms Johnson had given such instructions by virtue of being present" and that this was "completely contrary" to the evidence that Ms Johnson had given a few moments earlier.

52 I do not accept that a fair minded lay observer would apprehend from the questions I asked that I formed any view about this matter. I was merely seeking to ascertain Ms Johnson's position about the description in the letter of Mr Foster as a "notorious conman", which I considered to be a critical aspect of the letter. In my opinion, that is how a fair minded lay observer would have seen matters. My questions led Ms Johnson to agree that she had seen the letter and "must have been aware of it".

Relevance of "personal matters"

53 Mr de Klerk gave evidence in cross-examination that he met Ms Johnson when he travelled to Sydney from Perth on 13 and 14 March 2013, and again on 30 May 2013.

54 In his affidavit of 27 October 2016, Mr de Klerk said that during his March 2013 visit to Sydney, he met with Ms Johnson and Mr Kevin Joseph at Catalina restaurant and that:

> "We had lunch and discussed personal matters".

55 In relation to that matter, the transcript records at T180:

"Q. Thank you. Then you say you had lunch and discussed personal matters?

A. That's correct.

Q. Can you tell us what personal matters you discussed and with whom?

HIS HONOUR: Mr Argy, of what possible relevance could that be?

ARGY: Well, your Honour, I'm trying to understand whether it related to something to do with the Sports Trading Club partnership or whether Mr de Klerk regards the South African matters as personal matters or some third category of topic.

HIS HONOUR

Q. Did you discuss the South African investment or the investment in the partnership?

A. Yes.

Q. As personal matters?

A. Look, I mean, what I meant by personal matter, we start off as I said, not knowing her well, we broke the ice, so what was my interest, what made me invest in STC, et cetera, et cetera.

HIS HONOUR: Mr Argy, I'm sorry, you go ahead. I withdraw my intervention.

ARGY: I appreciate that your Honour hasn't seen the method in my madness in some of what I'm doing, and I wish I could at some stage --

HIS HONOUR: Just proceed and ask the next question.

ARGY: Thank you, your Honour.

Q. Yes, can you outline to his Honour what the topics discussed were?

HIS HONOUR

Q. What was said? Can you remember what was said?

ARGY

Q: What was said and by whom?"

56 Thereafter Mr de Klerk gave evidence of a discussion at the meeting concerning the possibility of Mr de Klerk acquiring the STC "South African rights". Mr de Klerk also gave evidence that he asked questions of Ms Johnson concerning a document "Sports Trading Club Associate Member

Proposal" that Mr Mackinnon, and evidently, the other investors, received before advancing funds to the Partnership.

57 Mr Argy submitted that my "intervention", asking what possible relevance a discussion of "personal matters" could have to the issues, "suggested a closed mind to possible relevance despite it being earlier in the evidence and having heard no submissions".

58 I do not accept that a fair minded lay observer would have that apprehension.

59 In his affidavit, Mr de Klerk said that the discussion was about "personal matters" and did not elaborate. That suggested the matters discussed did not relate to Mr de Klerk's investment and were thus not relevant to the issues in the proceedings. Mr Argy asked what "personal" matters were discussed. On the face of it, that question was not directed to a relevant matter; hence my inquiry. After Mr de Klerk made clear that, despite his description of that conversation, the "South African investment or the investment in the Partnership" was discussed, I permitted the cross-examination to continue. I do not see how a fair minded lay observer would apprehend that I had a closed mind from this exchange.

Discussions concerning the 13 March 2013 meeting

60 Mr de Klerk also gave evidence in his affidavit of 27 October 2016 that prior to 13 March 2013:

> "I received a phone call from Mark Hughes and he arranged for us to meet on 13 March 2013 at their offices."

61 The following exchange occurred in relation to that sentence at T227:

> "Q. I put it to you the reason you don't give any details of the conversation in your paragraph 19 of your first affidavit is because it was nothing more than a conversation to agree on a mutually convenient date for the meeting, wasn't it?
>
> A. No. Not true. It was more than that.

Q. Well, that's the impression one gets from your first affidavit, isn't it?

HIS HONOUR: I reject the question. Mr de Klerk yesterday said that in that meeting he discussed technical and operational - the technical and operational trading side of the proposed South Africa venture.

WITNESS: That's correct.

ARGY: With respect, your Honour --

HIS HONOUR: You've asked him for some reason about matters which are not revealed and that's what he said. You've asked him for some reason about matters which are not revealed in terms of the affidavit and that's what he said. So it's a bit rich to now put it that he's - that nothing more was said than that which he swore to yesterday.

ARGY: Well, no. With respect, your Honour, your Honour may have the wrong conversation. I'm referring to the conversation in which it was simply arranged to meet on 13 March.

HIS HONOUR: Yes. Read the transcript. Let's move on. Next question?"

62 Mr Argy submitted that, in rejecting his question, I had confused the discussion which took place at the 13 March 2013 meeting with the conversation (the subject of his questions) that occurred in the arranging of that meeting.

63 That is not correct. The preceding day Mr de Klerk gave this evidence at T178:

"Q. You say, 'I received a phone call from Mark Hughes and he arranged for us to meet on 13 March 2013 at their offices'?

A. That's right.

Q. Can you recall in any detail that conversation?

A. Yeah, I think that the volume of that conversation was about how we would - or how the operation in South Africa, the technical stuff of the operation in South Africa. It means not about the licensing and whatever, but the operational side; and who is going to play what role and training, and facilitating, et cetera.

Q. Yes, I understand that. Who was going to do the training and facilitating?

A. Okay, first of all it was said that Mark Hughes will go with me to South Africa for three weeks/four weeks to launch. Leigh Johnson will do all the legal stuff associated with my legal representative in South Africa. Anne Larter would be there for the launching week or two, and then Tom Nolen was

> employed by them at that time to then, when Mark has finished then Tom Nolen and myself would take the whole - for the future term.
>
> Q. To be quite clear, in this phone call referred to in the last sentence of your paragraph 19, Mr Hughes told you that Leigh Johnson would be involved in the legal work for establishing the South African operation?
>
> A. Yeah, we had to discuss and there was a couple of things like the trading because the trading part was the most important part, and because I have trust or had trust because of my personal involvement in the couple of months' trading prior to that, we - well I would never - went on with that agreement if I haven't had that back up as the trading, and then of course the legal part as Leigh, when she introduced me, the very first time in Sydney office, that she was taking care of the legal part of that business, so my question was who's going to orchestrate the legal part between South Africa and Australia, and Mark said that she will handle that, and then the business part Anne Larter will be available or, if I need assistance on that side."

64 There was no confusion on my part. Mr de Klerk did give the evidence to which I referred in rejecting Mr Argy's question. Mr de Klerk was clearly of the same opinion, hence his answer "that's correct" after my statement.

65 In any event, Mr Argy's question "[w]ell, that's the impression one gets from your first affidavit, isn't it?" is one I would have rejected.

The Skype video call

66 Before each of these visits, Mr de Klerk had received correspondence from "Mark Hughes" who described himself as the "National Sales Manager of the Sports Trading Club Partnership".

67 In his affidavit of 31 August 2017, Mr de Klerk said that during the March 2013 visit he asked to meet "Mark Hughes" and was told by Ms Johnson that:

> "He stuck in Melbourne, he's negotiating with the university to buy a program that will help STC to trade, to work out games' results more accurately".

68 Mr de Klerk also gave evidence that when he attended the STC premises on 30 May 2013 he asked to speak to "Mark Hughes" and that, in Ms Johnson's presence, a person who introduced himself to Mr de Klerk as "Kevin Joseph" said (of "Mark Hughes") (at T251):

> "He can't make it today. Mark had to rush off to Hong Kong, but we can talk to him via Skype".

69 Mr de Klerk gave evidence that Ms Johnson was present during some of the Skype video call to "Mark Hughes". Mr de Klerk's evidence is that he has since recognised the person he understood to be "Mark Hughes" on the Skype video call as Mr Foster.

70 Although Ms Johnson does not dispute that she knew who Mr Foster was (indeed, as I have said, her evidence is that Mr Foster invited her to become involved in the STC venture) she denies appreciating that the person "Mark Hughes" on the Skype video call was Mr Foster and, as I understand it, denies being present during the Skype video call and thus denies that she could have appreciated that "Mark Hughes" was Mr Foster.

71 In that context, Mr de Klerk gave this evidence in answer to questions from Mr Argy (at T255):

> "Q. So you assumed that Ms Johnson had actually met a person called Mark Hughes?
>
> A. I don't assume, I was confident that being partners in a company like that, there's no point, no way that that would have not been, you know even the proposals in everything it is from black and white."

72 Mr de Klerk then gave this evidence in response to questions from me:

> "HIS HONOUR: Did she ever say to you, 'I have met Mark Hughes'?
>
> A. No, I mean I didn't expect to say she met Mark Hughes, but I mean, Mark Hughes was running the division of STC and I that was I was introduced like, I'm the say legal partner or taking care of legal aspects of the business. That was the introduction or introduce and I accepted it. I never in my wild dreams thought that these two people would be working in the same company or towards the same goals, never met each other, it's impossible."

73 Following on that was the following passage of evidence at T256:

> "Q. And you're basing that on what you've been told by Mr Hughes?
>
> A. That's correct.

HIS HONOUR: And the fact that twice she'd apologised for him not being there?

A. Exactly.

HIS HONOUR: And then on the last occasion, there he was on the screen and

A. And the name was used and I've used it

HIS HONOUR: She could see him on the screen too and you were calling him Mark?

A. Exactly.

HIS HONOUR: That's what you say?

A. So I never had any doubt that was not even a part of my thinking pattern."

74 Mr Argy submitted that, during this passage, I was "leading" Mr de Klerk thereby revealing that I had formed a view about the question of whether or not Ms Johnson had concealed from Mr de Klerk that she knew that "Mark Hughes" was Mr Foster.

75 I do not think a fair minded lay observer would form this apprehension.

76 I was merely reciting to the witness the evidence he had given. I made that clear by my question "[t]hat's what you say?".

Later in the Skype video call

77 At the end of his cross-examination of Mr de Klerk, Mr Argy suggested that during the Skype video call "Mark Hughes" said something to the effect that "Anne Larter and Leigh Johnson would never agree" to a particular matter. Mr de Klerk agreed that "Mark Hughes" had said something to that effect.

78 The cross-examination continued (at T281):

"Q. And what I'm putting to you is that's when Ms Johnson piped up and said, 'It's fine by me if Pieter uses his profits here to pay for South Africa'?

A. Yes, that's correct.

Q. And did Mr Hughes then say, 'Who is that'?

A. No, never.

Q. And I put to you, Mr Hughes said, 'Who is that'?

A. No.

Q. And Mr Nolan said, 'It's Leigh, she's just walked in'?

A. No, untrue.

Q. And Mr Foster said, 'How long has she been there'?

A. No, not at all.

Q. And that's when Mr Hughes terminated the call?

A. No, definitely not. Totally wrong information."

79 Immediately following those questions the following exchange took place between me and Mr Argy at T282:

> "HIS HONOUR: Are you putting these questions upon the basis that Ms Johnson thought that the person who asked that question was a Mark Hughes?
>
> ARGY: I'm sorry your Honour.
>
> HIS HONOUR: Are you putting that last question on the basis that Ms Johnson thought that the person who said, who is that, was a person called Mark Hughes?
>
> ARGY: Not at all your Honour, the person that Mr de Klerk believed to be Mark Hughes.
>
> HIS HONOUR: Yes.
>
> ARGY: No, I mean I should say I think it's plain I have to call Ms Johnson. And I propose to do that. But I think it's, no, the case is absolutely that Ms Johnson knew it was Mr Foster, she didn't, from the voice, but she didn't know that was the person that Mr de Klerk thought was Mark Hughes. But anyway, I won't give evidence from the bar table.
>
> HIS HONOUR: I look forward to hearing that evidence.
>
> ARGY: Yes, your Honour.
>
> HIS HONOUR: That's your cross-examination?"

80 I understood Mr Argy to be foreshadowing that Ms Johnson's evidence would be that, although she recognised the voice on the Skype video call as being

that of Mr Foster, she did not know that Mr de Klerk thought that the voice belonged to “Mark Hughes”.

81 That evidence, if given, would appear to be inconsistent with the evidence that Mr de Klerk had given and that prompted me to say “I look forward to hearing that evidence”.

82 I do not accept that a fair minded lay observer would apprehend from those words that I had formed any view about the case. Rather, that I was curious to see how the evidence would play out.

SMS Exchange

83 In August 2013 Mr de Klerk had an SMS exchange with Ms Johnson.

84 On 16 August 2016 Ms Johnson sent Mr de Klerk an SMS:

> “Hi Pieter how [are] things going? If [you are] in Sydney we [should] meet up”.

85 Mr de Klerk replied on 20 August 2013 saying:

> “Trust everything is well with you. Will speak to you tomorrow”.

86 Ms Johnson replied:

> “I look forward but [please] but don’t tell anyone else [you are] talking to me. Thank you”.

87 In relation to that message Mr de Klerk gave evidence in cross-examination at T207:

> “…that concerned me because I wasn't - I didn't know what it was all about, because, as I said, I was out of circulation. So then I tried to find out what's going on, without pushing the wrong buttons, if I can put it that way.”

88 On 30 August 2013 Ms Johnson sent a further SMS to Mr de Klerk:

> “Pieter I am no longer associated [with] STC”.

89 Mr de Klerk replied:

> "A bit shocked to hear that, any reason I should be concerned about my future with STC? Don't worry this will stay between us!"

90 In that context I asked the following questions of Mr de Klerk at T209:

> "HIS HONOUR: You were alarmed to hear, weren't you, that Ms Johnson was saying she was no longer associated with STC?
>
> A. Sorry, just repeat that, Judge?
>
> HIS HONOUR: You were alarmed, I would think, to hear that Ms Johnson was saying she was no longer associated with STC?
>
> A. Yes, of course. That's correct.
>
> HIS HONOUR: Especially when it wasn't true."

91 Mr Argy submitted that my comment "[e]specially when it wasn't true" might cause a fair minded lay observer to apprehend that I was not open to considering Ms Johnson's "side of the story".

92 I do not accept that submission. There is no dispute that on 30 August 2013, Ms Johnson was still "associated" with STC. It is common ground that Ms Johnson did not resign from the STC Partnership until January 2014.

93 In an email Ms Johnson sent to Ms Larter and Mr Foster on 10 September 2013, Ms Johnson expressed concerns at a report she received from "Kevin McMullen" that:

> "● Peter [Foster] was improperly using the [investors'] money to place large bets on sporting events for himself and was losing a lot of money
>
> ● Peter [Foster] was operating STC as a giant Ponzi scheme using new money from [investors] to make up for his losses of previous money from [investors]."

94 Later in that email Ms Johnson listed a number of concerns that she insisted "be satisfactorily addressed" if she was to "remain associated with STC as the limited partner". These included security of the monies of investors,

ascertainment of STC's financial position and payment to her of the amounts "owed to me by STC".

95 Still later in the email, Ms Johnson said that:

> "…in view of my concerns and the improper behaviour of both of you, I further notify STC and both of you that I can take no responsibility for any actions taken by STC or either of you in circumstances where STC and/or either of you are in breach of:
>
> • the STC agreement,
> • the Partnership Act 1892, and
> • possibly the criminal law".

96 Nonetheless, Ms Johnson did not resign from the partnership until January 2014.

97 Thus, the email makes clear that Ms Johnson was then still "associated with STC", albeit expressing serious concerns about that association.

98 A fair minded lay observer, properly informed of that context, in which I made the remark "especially when it wasn't true", would not in my opinion apprehend that it bespoke some kind of prejudgment about Ms Johnson's case generally.

Mr de Klerk's silence

99 Later in Mr Argy's cross-examination of Mr de Klerk, he asked what steps Mr de Klerk had taken to make public his concerns about the STC venture.

100 Mr de Klerk gave the following evidence at T264:

> "Q. So you knew that as at September 2013 people were still being invited to make loans to STC?
>
> A. Yes. And that was one of the problems I had, and I decided to step up to stop STC because they were drawing innocent people and people that are not even aware of what's behind the scenes and that was my main - not my main aim, but one of my thought patterns was if it can happen to me, it can happen to anybody, and I didn't want anybody to - you know, any further - what do you call?

Q. I understand.

A. Yep.

Q. What were the steps that you took?

A. When?

Q. Well, you say you took steps. What

DIXON: Your Honour, I object to that. It seems to be that

HIS HONOUR: What relevance is there? There's no issue in this case -

WITNESS: Yeah, please.

HIS HONOUR: - that Mr De Klerk was advised to take some steps. It's a fairly rich question coming from Ms Johnson's advocate I must say.

ARGY: Well, with respect, not, your Honour. To the extent to which something has come to notice and there's a suggestion on the part of the plaintiff that further people loaned money because they didn't know what was going on, I'm entitled to explore other means by which this could have come to public attention."

101 Mr Argy submitted that my comment that it was "rich" of Mr Argy, as Ms Johnson's advocate, to ask Mr de Klerk of the steps he had taken, would convey to a fair minded lay observer that I was not open to considering Ms Johnson's "side of the story" and was approaching her case with some scepticism.

102 One of the allegations made by Mr Mackinnon in the Further Amended Commercial List Statement, and one which Mr Dixon has emphasised, is that Ms Johnson (and others) concealed from investors their knowledge that the STC operation was not a legitimate sports betting or trading business but was a fraudulent scheme in which loans from investors were being misappropriated.

103 My observation was merely intended to convey that, in the context of that claim, it was remarkable that, on Ms Johnson's behalf, Mr Argy ask what steps Mr de Klerk, himself an investor, would take to warn other investors.

104 However, as the subsequent passage in the transcript shows I was persuaded that Mr Argy's questions might be relevant and allowed him to continue.

105 Thus the matter continued:

> "HIS HONOUR: It might go to credit.
>
> DIXON: I -
>
> HIS HONOUR: Keep going. You've got till 1 o'clock.
>
> ARGY: I understand, your Honour.
>
> HIS HONOUR: If you think this is helpful to your case, keep going.
>
> ARGY: I think it's important, your Honour. Yes.
>
> WITNESS: Okay. Steps that I take - because I knew there was people much more capable than I am investigating and kept me up to date with information as they're progressing, that this would come in to the public via media. So that was the reason. The only other reason - the only other I did - was to apply or to to go through the - the system that was in place to inform STC that I required my - there was like a form you have to fill in and stop your - how could I put it? - to recall your funds that was given to me - or given to them. There was a procedure to follow and that."

106 In the context in which my "fairly rich" comment was made, I do not consider that a fair minded lay observer would apprehend that I was not open to fairly considering Ms Johnson's case.

Anonymous contact with authorities

107 In the course of her cross-examination, Ms Johnson gave evidence that in late August 2013 she had received an aggressive telephone call from Ms Larter (who hitherto Ms Johnson said she regarded as a close friend). Ms Johnson described the conversation at T395:

> "A. Sorry, Anne rang, and it started like this, 'Look, what is your problem with this business?' and so I started saying, you know, my concerns, and she said, 'This business is totally above board. None of your concerns are founded. I have looked at everything. Everything is above board and you're paranoid, you're stupid. Everybody is happy with this. Everyone is happy, the associate members are happy, they're making money, you're the only one with a problem.' And then I started saying something else and then Peter Foster came in and

Q. Came onto the phone call, do you mean?

A. Yes. Clearly I was on loudspeaker and clearly he was there. I thought that I was speaking to her in Western Australia, because that's where I thought she was, and I was sort of well, I was shocked because he was really abusive, but I was also shocked at that betrayal, because I thought that I was speaking to her. And he said, you know, 'You're a C U N T and I'm going to put a bullet in your head', and just, you know, the most horrific abuse."

108 Ms Johnson gave evidence that by now, she had formed the view that Mr Foster and Ms Larter were "interchangeable".

109 Ms Johnson then gave this evidence, initially in answer to a question from Mr Dixon, and then in answer to questions from me at T398:

"Q. You didn't resign at this point in time?

A. Good point. I could have. And probably I should have walked out a lot earlier than I did. But I held out hope that I could have gone in and managed it, with Anne, and repaired any damage that Foster had done. Because it was a good business.

HIS HONOUR

Q. Even after you started, formed the view that Foster and Larter were interchangeable?

A. Well, yes, your Honour, because I did think that if he went to gaol, that she would, the influence would be gone, and I could then deal with her. To this day, I can't understand what happened with Anne, to this day.

Q. But you understood at this time investors were still putting money into this venture?

A. Well, I didn't know.

Q. Really?

A. Really. I know it was still running.

Q. You must have believed, surely, that they were still putting their money in, and my question is, why didn't you, didn't you think that you should do something to warn them?

A. Your Honour, had I, that's part of the reason I wanted the associate members' contracts, so that I could be in contact with the people who put their money in. But the only person I knew was [Pieter] de Klerk. As soon as I had that call with Anne, until I had that call with Anne, where Peter was listening in, I held out hope that I could encourage her to get in and take over the

running of the business, and whatever damage he had done, get him out, and it could be repaired.

Q. Even though she was present during the phone call where Foster threatened to put a bullet to your head?

A. After this phone call, I became very, very, after this phone call, I treated them as the same, and that's why I wrote to both of them, as if one person. But I still did think, your Honour, that after he got locked up, which I prayed every day that he'd be getting locked up, that the influence that he had on her would be, would be gone. And

Q. A few days later, you heard about Logan J's decision, and the fact that Foster had a warrant out for his arrest, and he'd absconded?

A. That's right.

Q. Didn't you think you should go to ASIC, for example, then?

A. Go to them?

Q. Yes?

A. To say?

Q. What you feared was going on?

A. Your Honour, I

Q. A person, you had instructed solicitors to call a 'notorious conman', in April of that year, had threatened you, as you've described it. Had absconded?

A. I, look, I made terrible decisions in this. But it was like, it was like I was in quicksand, and I really wanted to get out, not just, I'm out of it, tough luck. I wanted to get out of it and make sure everyone was okay. I really wanted, it was a good business, and I really wanted it to keep trading, so that whatever problems had happened for anyone, they could be sorted out. And on my understanding, the contracts, I've heard in this case that it was run differently, but my understanding was that the money was invested and wasn't repayable for two years. So I thought, if I can just get in and get her to take charge of it, it, you could trade out of any problems, any financial problems that had happened in that time. Before the two years was up. It was when I saw that I just was getting nowhere, and then absconded. I did try to have him arrested -

Q. Anne went to Hong Kong?

A. Yeah, that's right.

Q. For a birthday or something?

A. Yeah, she went to Hong Kong. But I did try to have him arrested, your Honour. I did provide, secretly, whatever information I could. I sent, or I caused to be sent, anonymous emails to the lawyers for ASIC, and Justice Logan, Justice Logan's Associate, and -

Q. When did you do that?

A. After he absconded.

Q. Have you ever mentioned that before?

A. I don't know, did I put it in my affidavit? Is that in my affidavit? I don't have copies of the, I don't have copies of them, because they were sent anonymously, from my, I was terrified of course.

Q. Did you just make up that evidence you gave?

A. Absolutely not, your Honour. Absolutely not. Check with the, check with the judges' associates. I sent it to two judges' associates. And to ASIC. And I said, because I assumed that Tom Nolan knew where he was, and I met with Tom. I met with Tom Nolan a number of times, and he, he continually reassured me as well.

Q. Do you mention anywhere in your affidavit any communication with ASIC?

A. I don't know if I put it in or not.

Q. We can look for that overnight. I'm going to adjourn now until Monday at 10 o'clock."

110 Mr Argy submitted that my questions "[h]ave you ever mentioned that before?" and "[d]id you just make up that evidence you gave?" also showed that I was not open to considering Ms Johnson's "side of the story".

111 Ms Johnson's reference to "Justice Logan's Associate" was an allusion to the fact that on 27 September 2013 Logan J published his judgment in *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)* [2013] FCA 984. In that judgment, his Honour held that two charges of contempt of court against Mr Foster had been proved.

112 In that context, there is an email from Ms Johnson to Ms Larter in evidence, dated 29 September 2013, in which Ms Johnson stated:

> "1 Justice Logan of the Federal Court handed down his judgment in the Chaste Corporation case and found against Peter [Foster] holding that Peter [Foster] was an unreliable witness and was in contempt of court for being involved in the SensaSlim weight loss scam thus breach 2005 court orders.

> 2 Justice Logan adjourned the matter till 24 October 2013 for the hearing of submissions regarding penalties against Peter [Foster] which were likely to include a gaol term. Her ordered that Peter [Foster] be held in prison until 24 October 2013.
>
> 3 Peter [Foster] failed to appear in court for the judgment.
>
> 4 Justice Logan ordered that a warrant for the arrest of Peter [Foster] be issued if Peter [Foster] did not turn himself in to police by 5pm yesterday.
>
> 5 Peter [Foster] did not do so thus the warrant was issued.
>
> 6 A manhunt has begun for Peter [Foster]…".

113 In circumstances where Ms Johnson's affidavit is 466 pages long, where the answer to my question "have you ever mentioned that before?" was "I don't know, did I put it in my affidavit?", where it is clear that Ms Johnson knew of Logan J's judgment and of the circumstances of Mr Foster's arrest, I asked the question "did you just make up that evidence you gave?".

114 Contrary to Mr Argy's submission, I did not 'put' to Ms Johnson that she made the evidence up. A fair minded lay observer would not apprehend in those circumstances that I would not bring an impartial mind to the resolution of the real issues of the case.

115 Mr Argy submitted that I had adopted an "aggressive demeanour" when I asked that question. That is not my recollection.

116 I did find it strange that Ms Johnson did not know whether she had, in her affidavit, mentioned sending anonymous emails to "the lawyers for ASIC" and Justice Logan's Associate. My tone may have reflected that fact.

117 Nonetheless, I do not consider that a fair minded lay observer, understanding this context, would apprehend that I might not bring an impartial and unprejudiced mind to resolution of the issues in the proceedings. The matter concluded with my remark that "[w]e can look for that overnight" at T400.

118 As it turns out, the evidence that Ms Johnson did give in her affidavit about these matters was as follows:

> "552. As a result of the above gradual unfolding process, I had nothing concrete to go on, no proof of anything specific, by the time I resigned. Even though the death threat [that Ms Johnson alleges Mr Foster made to her] had scared me, I nevertheless tried to anonymously tip off some people about my concerns. I was also concerned that I would be sued for defamation if I publicised unsubstantiated allegations of wrongdoing.
>
> 553. I know from my experience as a criminal lawyer that it is not so easy as people think to get the police to act. That is not a criticism but an acknowledgment that the police have their own methods, standards and protocols."

119 There is no reference in that passage to either ASIC or Logan J's Associate. This is a further matter that will doubtless be addressed in final submissions.

Other matters

120 In the note that Mr Argy sent me late on the afternoon of 12 February 2018, he referred to a number of other transcript references. I will deal with them in the order set out in Mr Argy's note.

Cross-examination of Mr Mackinnon

121 During Mr Argy's cross-examination of Mr Mackinnon, the following exchange occurred at T99:

> "Q. What I'm trying to understand, Mr Mackinnon, is what you had contemplated would happen to the money you loaned the partnership?
>
> A. I assumed it would be handled in the way that the ensuing correspondence indicated it was being handled, and that's in a trading room with fish tanks and lots of brilliant people, and all sorts of benefits for all these brilliant traders who are bringing us such excellent returns.
>
> Q. Yes, Mr Mackinnon, what I'm asking you is, the trading was going to be done through the Sports Trading Club Limited, that's what it says in clause 2, doesn't it?
>
> A. Yes.
>
> HIS HONOUR: Including but not limited to.
>
> ARGY: Yes, your Honour.
>
> HIS HONOUR: Are you suggesting that this scheme was fair dinkum?

> ARGY: Your Honour, with respect there's a claim of breach of contract, and I'm entitled to ask the witness -
>
> HIS HONOUR: Well it'd be better for your case if this money was not misappropriated, wouldn't it?
>
> ARGY: Your Honour, I don't want to have the discussion in the presence of the witness, but -
>
> HIS HONOUR: I want to know whether this is relevant. Mr Mackinnon, would you mind taking these off and just popping outside for a moment?"

122 In his note, Mr Argy did not articulate how this aspect of the transcript would create an apprehension in the fair minded lay observer that I might deviate from a neutral evaluation of the facts.

123 Immediately after Mr Mackinnon left the Court, I had this exchange with Mr Argy:

> "HIS HONOUR: Well it is just one thing, but I want to know - I will want to know what case you'll be putting generally as to whether this scheme was real, whether there was ever any intention by those behind it that this money would be invested in some sports trading.
>
> ARGY: It's absolutely our case, your Honour, that from Ms Johnson's perspective what she had appreciated would be happening would be that funds would be traded by the Hong Kong entity, that profits from that would manifest themselves in the account of the partnership and that those profits would in turn accrue proportionately to the people who've loaned the money.
>
> HIS HONOUR: Very well. Ask Mr Mackinnon to come back." [At T99-T 100]

124 In my opinion, a fair minded lay observer of the proceedings would appreciate that I was simply seeking to ascertain from Mr Argy what case Ms Johnson proposed to make concerning her knowledge of the bona fides of the STC scheme.

The Proposal

125 During his cross-examination of Mr de Klerk, Mr Argy asked questions about the "Sports Trading Club Associate Member Proposal" to which I have referred at [56]. At one point Mr Argy was asking Mr de Klerk questions about the proper construction of that document. Thus at T159 this exchange occurred:

> "Q. So if you go back to the top paragraph, do you agree that the word, capital M, 'Member', in the second paragraph, means the club member referred to in the first paragraph?
>
> HIS HONOUR: What you're doing is cross examining this man on someone else's document.
>
> ARGY: Well, only his understanding.
>
> HIS HONOUR: You mean, do you -
>
> WITNESS: Yeah, look, I mean, to be honest with you -
>
> HIS HONOUR: Are you meaning to ask this witness what he understood then these things meant? I mean, we can all read it.
>
> ARGY: Yes. No, with respect, your Honour -
>
> HIS HONOUR: Where are we going? I just don't follow what the point of these questions is. Go on."

126 This is not an occasion where I "shut down" cross-examination. After I said "[g]o on", Mr Argy continued to question Mr de Klerk as to his understanding of the meaning of the clause in question.

127 In that regard Mr Argy's submission was:

> "His Honour's failure to appreciate that Mr Argy was entitled to cross-examine on misleading conduct by the partnership. Apprehended bias not dissipated by 'Go on'."

128 I do not accept that a fair minded lay observer would apprehend that I had displayed bias by enquiring of Mr Argy "[w]here are we going?".

The trading floor

129 Mr de Klerk gave evidence that once he understood that the "trading floor" was at premises in Market Street, Sydney, but that, ultimately, he was told it was located within an apartment occupied by a Mr Holmes (who Mr Gamble said was a "real trader") on the Gold Coast. Later, Mr de Klerk visited that apartment.

130 At T168 I asked Mr de Klerk about that visit:

> "Q. Were there traders there? Were there people there who you were - in Mr Holmes TV room, whatever it was, were there people who he was saying were the traders?
>
> A. Look, the at that time and point the - some of the expertise they were not all in that premises that they day when I visited. That's a reason Mr [Mark] Hughes explained to me that they are moving that trading office to Sydney to have everybody under one roof, so I assumed that at that time they were like, you know, speak on mobile phone or computer or whatever.
>
> Q. The day of your visit to this so called trading floor, was anyone present beyond Richard Holmes and Kevin Joseph?
>
> A. Not at that day. No, and that was one of my concerns, and then they explained to me that some of the expertise they are all linked by telephone or Internet and they working in - that's why they bought - or they bought at that time said that they are going to buy, they were busy buying a building in Sydney to have all those people under one roof.
>
> Q. You never saw those people?
>
> A. I never saw them. Except for Mark Hughes was one of the team, but I haven't seen him in Richard [Holmes' TV room], I've [sic] never saw him at the time, no."

131 Mr Argy submitted that my reference to "this so called trading floor" was "partisan". Mr Argy did not elaborate on that submission.

132 I do not accept that my words would create an apprehension that I was in any way "partisan". There is an issue in this case as to whether STC ever operated a legitimate "trading floor". A fair minded lay observer of these proceedings would know that, and would understand that my words "so called" merely reflected the fact that I understood there to be an issue in the proceedings as to whether STC operated any legitimate trading floor.

133 In a similar context I later asked Mr de Klerk these questions (at T169):

> "Q. Did you assume the trading floor was at the Market Street premises when-
>
> A. I assumed that at that point in time, yes, because -
>
> Q. You asked Ms Johnson where it was and she said it's currently on the Gold Coast?
>
> A. That's correct. That's when the next day when I had the opportunity to because I mean all those questions and stuff I was trying to be polite, like

> step in and say, look, I want to see your stuff. I was like, start to - or first know the people that I'm dealing with, and then of course those stuff will flow out of that, but then the next day when nobody was there, and only Mrs Leigh Johnson, yeah, was there, Leigh Johnson sorry, I've started asking that questions, and then she said at that time and point that the trading is done from Gold Coast and it's no problem, she would arrange with Mr Mark Hughes that he's in control of that section, if I can put it that way, to arrange a visit. Sorry, to Gold Coast."

134 Mr Argy submitted that this passage showed that I was "leading" Mr de Klerk "to identify Ms Johnson as source of Gold Coast location of trading floor".

135 I was doing no such thing. Mr de Klerk had given evidence, in his affidavit of 31 August 2017 that, at the lunch at Catalina on 14 March 2013, he had said to Ms Johnson "I still want to meet Anne [Larter] and Mark [Hughes] and I want to physically visit your trading floor" and that Ms Johnson replied:

> "That's not a problem. It can be arranged. But Mark is in charge of the trading team. I'll speak with Mark and he will arrange the visit for you."

136 In the passages from the transcript at T169 I was doing no more than reciting to Mr de Klerk the evidence he had given. A fair minded lay observer of the proceedings would understand that and would understand that I was not "leading" Mr de Klerk to do anything.

The email from London

137 During his cross-examination of Mr de Klerk, Mr Argy asked him questions about an email that someone from "STC London" had sent to "Leigh and Mark" (that is Ms Johnson and "Mark Hughes").

138 On 4 June 2013 Ms Johnson forwarded that email to Mr de Klerk with a note "please call Mark to discuss at your convenience".

139 In that regard the following exchange took place at T194:

> "Q. It would be fair to say that having regard to the terms of the email that says, "Dear Leigh and Mark", it ostensibly was not intended for your eyes, is that a fair comment?
>
> HIS HONOUR: I reject the question I don't understand it.

WITNESS: Yeah, I also don't understand.

[HIS HONOUR]

Q. It appears to be an email sent from [STC London] to Leigh Johnson addressed to you and she and it looks as if she's forwarding it on to you?

A. Exactly.

Q. That's what it looks like and sorry that's how you read it at the time?

A. Exactly. I had no reason what to doubt it because she was as I said, I did discuss some of those matters with her and on more than one occasion.

ARGY: With respect your Honour, I think your Honour might be mistaken, I think your Honour's characterised this as I think your Honour used the words, "To you and she", with respect that's not right your Honour, this purports to be an email from Howard Robin to Leigh Johnson and Mark Hughes. 'Mr de Klerk

HIS HONOUR: You're quite right sorry.

ARGY: is not an addressee of this email.'

HIS HONOUR: Thank you.

ARGY: And

HIS HONOUR: You're quite right.

ARGY: Your Honour can see it refers to Mr de Klerk in the third person.

WITNESS: If I may.

HIS HONOUR: No, quite right, I've got that."

140 Leaving aside the fact that Mr Argy was seeking to cross-examine Mr de Klerk about an email to which he was a stranger, my rejection of his question did, I accept, flow in part from my misreading of the document.

141 The transcript reveals that I made that clear and permitted Mr Argy to continue. After I rejected Mr Argy's question, he cleared the matter up with the witness, explained to me that I had misread the document, following which I acknowledged that fact.

142 In that regard Mr Argy's submission was:

"Intervention proven erroneous but apprehended bias not dissipated".

143 I do not accept that a fair minded lay observer, seeing this exchange, would have "apprehended bias" on my part.

"Mark Hughes"

144 I have referred above to the SMS exchange between Ms Johnson and Mr de Klerk. Following Mr de Klerk's message referred to at [89] Leigh Johnson sent Mr de Klerk a message in which she said that Ms Larter was "in [with] Peter Foster".

145 As the evidence stands to date, this appears to be the first time that Mr Foster's name is mentioned in any document associated with STC and the first time that Ms Johnson had said anything to Mr de Klerk about Mr Foster. Mr Argy did not suggest to Mr de Klerk that, prior to receiving this SMS, Mr de Klerk knew who Mr Foster was.

146 At T272 Mr Argy asked Mr de Klerk:

> "Q. Mr de Klerk, did it ever occur to you that the reason Mark Hughes never appeared at a meeting with Leigh Johnson is that she would immediately have identified him as the person she knew as Peter Foster?"

147 Mr de Klerk answered that question "no".

148 I then had this exchange with Mr de Klerk at T272:

> "HIS HONOUR: Did it ever occur to you before you got the email [sic: SMS] saying that Ms [Larter] was in with Peter Foster and you then did some searches. Before then, did it ever occur to you that Mark Hughes wasn't actually a person called Mark Hughes?
>
> WITNESS: No, not at all.
>
> HIS HONOUR: Did it ever occur to you that Ms Johnson knew that the person who was saying [he] was Mark Hughes, might be someone else before you did your searches?
>
> WITNESS: Yes, I think she -
>
> HIS HONOUR: I withdraw that question."

149 In regard to that passage Mr Argy submitted:

> "Leading witness in plaintiff's favour. Withdrawn but apprehension of bias not thereby dissipated".

150 I do not accept that I was "leading" Mr de Klerk. I was seeking to clarify what his understanding then was as to Ms Johnson's knowledge of "Mark Hughes". I do not accept that a fair minded lay observer would have apprehended that I had formed any view about the merits of the case based on that question.

"Closing down" cross-examination

151 Mr Argy submitted that I had refused to give him "latitude" in relation to his cross-examination of Mr Gamble concerning matters concerning the STC Partnership and that this might also create an apprehension in a fair minded lay observer that I had a closed mind concerning Ms Johnson's case.

The STC website screenshot

152 During his cross-examination of Mr Gamble, Mr Argy asked questions about a screenshot that Mr Gamble had taken of the STC website. Mr Gamble had used a computer program known as "Internet Archive: Wayback Machine" to obtain an image of the STC website as at 18 June 2013.

153 Mr Argy commenced asking Mr Gamble questions as to what other dates could be accessed using the Wayback Machine, which led to this exchange at T125:

> "HIS HONOUR: Are we going somewhere relevant, have you got a plan or is this just a ramble? I mean, this has been received without objection.
>
> Q. This is what it looked like on that day, that's right, 18 June 2013?
>
> A. That's right.
>
> Q. So far as it can be accessed through the Wayback Machine, is that right?
>
> A. That's correct, your Honour.
>
> Q. This is all you could look at, through the Wayback Machine, as at 18 June 2013, at this website?

A. That's correct, your Honour.

HIS HONOUR: Let's move on, I think you were asking Mr Gamble about page 1 of the clarifiers?

ARGY: Yes, your Honour.

HIS HONOUR: Move onto that."

154 Mr Argy submitted that I had precluded him from "asking Mr Gamble why he did not reproduce available snapshots from more relevant dates". That is true, and that is because I did not see that issue as being relevant or capable of casting any light on any issue which was relevant.

The Loan and Profit Sharing Agreement

155 Later Mr Argy asked Mr Gamble questions about a clause in the Loan and Profit Sharing Agreement executed by Mr and Mrs Mackinnon.

156 The following appears at T130:

"Q. You accept that what that clause contemplates is that the money loaned to the Sports Trading Club Partnership by associate members would be sent to, or could be sent to, or is at least within the contemplation of that clause that it be sent to, the Sports Trading Club Limited?

HIS HONOUR: I reject that question. I won't be assisted by having this witness tell me what he thinks those English words mean. Your client's going to give evidence that she relied upon that clause as part of her understanding of what's happened. No doubt she'll

ARGY: No, I

HIS HONOUR: The question is rejected, let's move on.

ARGY: Thank you, your Honour."

157 Mr Argy submitted that I had precluded him testing "Mr Gamble's theory of the case in terms of breach of contract and misleading conduct alternatives".

158 In his affidavit, Mr Gamble did express opinions as to what he said was the fraudulent nature of the STC scheme. I received Mr Gamble's affidavit only as evidence of the objective facts that his affidavit proved (for example, as to

the movement of funds). I did not consider that I would be assisted by hearing Mr Gamble's view as to what the relevant clause in the Loan and Profit Sharing Agreement "contemplates". Accordingly, I do not accept Mr Argy's submission that "cross-examination [on Mr Gamble's] understanding of the contract is germane".

Mr Gamble

159 Mr Gamble made clear that he had an interest in the result of the proceedings. The organisation of which he is a member was charging a fee for his services and stood to earn a commission if the proceedings are successful.

160 In that context, Mr Argy drew attention to the following exchange I had with Mr Gamble at T139:

> "HIS HONOUR
>
> Q. You formed a strong view about what happened in this case, haven't you?
>
> A. A very strong view.
>
> Q. And you've agreed with Mr Argy, very candidly, if I may say so, that you have an interest in proving there was a fraud and leading to a result that leads to a recovery of money, because you'll get your fair slice of it?
>
> A. Well, that's correct.
>
> Q. So, you don't come here as an objective witness that is impartial, you have an interest in the result?
>
> A. I have an interest in the result, of course."

161 Mr Argy submitted that, accordingly, "the foundation for Mr Gamble's 'very strong view' that fraud pervaded everything was entitled to be tested".

162 I do not accept it follows that Mr Argy was entitled to ask unlimited questions of Mr Gamble about Mr Gamble's "theory of the case". I made it clear that I did not propose to accept Mr Gamble's "theory of the case" merely because he has proposed it. He is a private investigator with a clear interest in a successful outcome of these proceedings. I propose to treat his evidence

accordingly and do not consider that his "theories" are relevant merely because, absent objection from Mr Argy, they have been admitted into evidence. It did not assist me to have Mr Argy cross-examine him on every aspect of it.

The ASIC records

163 There are in evidence documents lodged with ASIC concerning the Partnership. I understand there to be a dispute as to whether all of the information on those records is accurate.

164 Mr Argy spent time cross-examining Mr Gamble about those entries. As I have said, Mr Gamble is a private investigator. He made clear that he has no personal knowledge of the accuracy of the information in the documents lodged with ASIC and that, for the purpose of his investigation, he had assumed that that information was accurate.

165 An example of an exchange concerning that issue is at T337:

> "HIS HONOUR: Mr Argy, the document at p 872/3 reflects the information in the application for a business name at 865. Now, maybe it's incorrect because it names Ms Johnson as a partner and thus as the owner of the business name. Anyway, it says what it says.
>
> ARGY: With respect, your Honour, that's not right. If your Honour goes to p 866, the top of the page, your Honour, 'Partnership or joint venture name,' which is the details of the proposed business name holder, and your Honour sees, 'A P Larter and C D Slyn'.
>
> HIS HONOUR: Yes, and then below that, 'Details of partner,' inconsistently with that, is Larter and Johnson.
>
> ARGY: With respect, if your Honour comes to p 873, halfway down the page, 'Business name holder,' is given as, 'L D Johnson and A P Larter,' and, your Honour, with respect, what I'm putting to Mr Gamble is that on the face of it that's an inexplicable discrepancy, and Mr Gamble has given what he thinks is an explanation.
>
> HIS HONOUR: Yes, go on. I mean, both Johnson and Larter are named as partners on 866. Inconsistently, perhaps, with the partnership or joint venture name Larter/Slyn. Apparently ASIC has adopted the names of the partners rather than adopted Larter/Johnson, not Larter/Slyn.
>
> ARGY: That's right, your Honour.

HIS HONOUR: Well, there it is. What light can Mr Gamble cast on that? Now, let's move on.

ARGY

Q. We next go to the document at page 851 of the Court Book, and to make sure we've got the right one, this one has in the top right hand corner, '1 4BG8ZXV'?

A. Yes, I have that.

Q. This one is, 'Change business name details,' another record of online transaction?

A. Yes.

Q. Again lodged 22 January 2014, purportedly by Anne Larter?

A. Yes.

Q. And it's in respect of the business name 'The Sports Trading Club Partnership'?

A. Yes, I see that.

Q. On the next page, 'Change business name holder details'; do you see that?

A. Yes.

Q. In the field that says, 'Current partnership name,' that's left blank?

A. Yes.

Q. And the ABN field is left blank, and under, 'New partnership name,' it says, 'A P Larter and C D Slyn'.

HIS HONOUR: Mr Argy, we can read these. I'm not going to permit you to ask this witness any more questions about these documents, so move on to another subject, please.

ARGY: Well, with respect, your Honour, Mr Gamble is able to fill in little gaps and

HIS HONOUR: That's my ruling. Move on to another subject.

ARGY: Yes, your Honour."

166 I did close down Mr Argy's cross-examination on this subject at that point because, as I saw it, Mr Argy was doing no more than asking Mr Gamble what

Mr Gamble made of the various documents lodged with ASIC. I could not see how those questions would assist me resolving the issues in the proceedings.

167 In my opinion, a fair minded lay observer hearing what passed between me and Mr Argy on this subject would apprehend that I was doing no more than endeavouring efficiently to case manage the proceedings. I do not accept that any fair minded lay observer would conclude that I had formed any view about the merits of the case based on these interventions.

The South African rights

168 During his cross-examination of Mr de Klerk, Mr Argy raised the question of a proposal that had evidently been made to Mr de Klerk that he acquire the rights to operate an STC venture in South Africa. In the course of doing so Mr Argy showed Mr de Klerk an unexecuted document purporting to be a "National Licence for Australia" between a company called Sports Traders Limited and Ms Larter and Ms Johnson (Exhibit 5D-1).

169 The following exchange occurred:

> "EXHIBIT 5D-1 SHOWN TO WITNESS
>
> Q. Just before you look at that, Mr de Klerk, you haven't put anywhere in your evidence, have you, a copy of the joint venture agreement?
>
> A. I honestly can't say.
>
> Q. Would you like to have a look at that document. Can you just have a look through that. Does that resemble so, to be clear, the one I've given you is the licence agreement for Australia between Sports Trading Club Limited and the Sports Trading Club partnership. My question is, does that bear any resemblance to the joint venture agreement that you signed in relation to the South African rights?
>
> DIXON: I object to that question, your Honour. Two grounds for that objection. "Bear any resemblance" is not a meaningful question, it doesn't inform us of anything. The second objection is this: it seems to be along the lines that Mr Argy was exploring yesterday, that there might be some legitimate agreement between an entity overseas that involved the payment of money, which might explain movements out of the Australian bank account, for example. I understand that that's where Mr Argy was going with that, but that does not appear anywhere in the defence. That does not appear anywhere in Ms Johnson's evidence. She does not say, I saw moneys moving out and I thought it was pursuant to a legitimate agreement

> that was entered into. This is an area which hasn't been telegraphed at all, as far as the defence goes, so I'm completely unprepared for any of it. I have never seen this document before yesterday.
>
> HIS HONOUR: Okay. I reject the question."

170 Mr Argy submitted that, by rejecting question, I had "precluded pursuit of cross-examination which could have established legitimacy of initial structure and commencement of Australian business".

171 I do not agree and do not consider a fair minded lay observer of these proceedings would have apprehended that my rejecting the question meant I would apply an impartial mind to the resolution of the proceedings. Mr Argy's question as to whether Exhibit 5D-1 bore "any resemblance" to a joint venture agreement signed by Mr de Klerk concerning South African rights was plainly objectionable, was objected to and properly rejected.

"In with Peter Foster"

172 As I have discussed, Mr de Klerk's evidence was that he thought he was dealing with someone called "Mark Hughes" and that he had had a Skype video call with "Mark Hughes" on 30 May 2013.

173 Ms Johnson replied to Mr de Klerk's SMS set out at [89] (in which he said he was "a bit shocked to hear that" Ms Johnson was "no longer associated" with STC) as follows:

> "I'm very upset. I don't know where to start but I am worried about [you]. Anne Larter is not to be trusted.
>
> I believe she's in [with] Peter Foster".

174 That caused Mr de Klerk to make enquires of third parties as to who "Peter Foster" was. Those enquiries quickly led him to conclude that Mr Foster was the person who had been introduced to him as "Mark Hughes".

175 Mr de Klerk's 27 October 2016 affidavit evidence is:

"Had I known that Mark Hughes was not this person's real name or that my funds would not be applied as promised, I would not have transferred any funds. I certainly would not have invested any monies if I had known the conman Peter Foster was involved in any way".

176 In that regard Mr Argy submitted that I was "leading" Mr Argy "in favour of the plaintiff" in this passage of evidence. The following appears at T211:

"ARGY

Q. I think you told me that when you first heard of Mark Hughes you 'Googled' him to see what you could find, is that what you told me?

A. Yes, correct.

Q. I think you found nothing either way?

A. Nothing no negative. There was a as I said, it was very - because I haven't had his like any background of what he did or whatever, there is a zillion MOD uses, but there was a Mark

HIS HONOUR

Q. I thought you said you found no severe negatives in relation to Ms Johnson, that's why I noted what you said this morning

A. That's correct.

Q. But when you did a search about 'Mark Hughes', did anything come up at all?

A. Nothing negative. A lot of people by that name, with a lot of credentials and like company directors and, you know, but no - nothing related to I would say negative, bad or associated with any scams, anything that would have awared me or made me aware of -

Q. You weren't sure whether the 'Mark Hughes' that came up when you did your search were the Mark Hughes you were speaking to -

A. Exactly.

Q. - But none of the Mark Hughes you saw mentioned -

A. There was no - that's right, there was no - I couldn't find any Mark Hughes with a no good or with a -

Q. If the person with whom you were dealing at STC said their name was Peter Foster, you would have looked that up?

A. Of course I would have searched him as well.

Q. We all know what would have happened then?

> A. Of course. Then I wouldn't have been we all wouldn't have been here today."

177 Mr Argy submitted that I was "leading" Mr de Klerk when I said that "we all know what would have happened then".

178 I do not accept that submission. I do not consider that a fair minded lay observer of the proceedings would apprehend that I might not bring an impartial mind to Ms Johnson's defence in these proceedings. Mr de Klerk's unchallenged evidence was that, had he known that "Mark Hughes" was Mr Foster, he would not have advanced funds to the Partnership. I was merely reciting to Mr de Klerk what I understood to be his unchallenged position, hence his response "of course".

Inducement of Mr de Klerk

179 In his 27 October 2016 affidavit, Mr de Klerk had said that his decision to invest in STC "was based solely on information I was given by Mark Hughes". Two paragraphs later, in his affidavit, Mr de Klerk made the statement I have set out at [175] above that had he known that "Mark Hughes" was "the conman Peter Foster" he would not have advanced funds.

180 Mr de Klerk made the same statement to the Police. Mr Argy sought to cross-examine Mr de Klerk on that part of his statement to the Police where he said that his decision to invest in STC was "based solely" on information given to him by "Mark Hughes".

181 Thus the following exchange took place at T218:

> "Q. Anyway, for present purposes, the first sentence of paragraph 27 of the version that's in the Court Book, 'My decision to invest in any form with STC was based solely on the information I was given by Mark Hughes only'; do you see those words?
>
> A. Yes.
>
> HIS HONOUR

> Q. Can you see the last sentence in that paragraph, 'Had I known that Mark Hughes was not this person's real name, I would not have transferred any funds.'
>
> A. That's correct.
>
> Q. Which is what you say in paragraph 60 of your affidavit also.
>
> A. That's correct.
>
> HIS HONOUR: I think they both have to be read together. All right, it's 4 o'clock."

182 In that regard Mr Argy submitted that I was "leading witness with partisan evidence despite previous questions being intended to undermine credit".

183 I do not accept that a fair minded lay observer would have this apprehension. As the passage reveals, these questions were asked at 4pm on 7 February 2013. Mr Argy had been cross-examining Mr de Klerk since 10:40am that morning.

184 Mr Argy was seeking to isolate Mr de Klerk's statement that his decision to invest "was based solely on the information I was given by Mark Hughes" from the obvious qualifications that Mr de Klerk made in both his affidavit and in his Police statement that he would not have invested had he known that "Mark Hughes" was not the real name of the person with whom he was dealing.

185 I do not accept that a fair minded lay observer of the proceedings would apprehend I was "leading" Mr de Klerk with "partisan evidence" or, as Mr Argy also submitted, "conflating two questions when first one went to credit".

The progress of cross-examination

186 On 8 February 2018, by which time Mr Argy's cross-examination of Mr de Klerk had occupied over 100 pages of the transcript, Mr Argy and I had this exchange after, once again, Mr Argy had asked Mr de Klerk to confirm something to which he had deposed at T249:

> "Q. Then you say, we're now at the bottom of page 3, halfway through paragraph 8 of your second affidavit. 'Anne is my best friend, if she could attend she would.' You say that Ms Johnson said those words?
>
> HIS HONOUR: Mr Argy, we're going to have to move on a bit more quickly, it's there, we know it's there, you don't have to ask the witness to confirm that the words on the page are there. Are you going to challenge this evidence or not?
>
> ARGY: Yes, well with respect your Honour, there are enough inconsistencies that I'm entitled to put the inconsistencies to him.
>
> HIS HONOUR: You've been a day and a half with this witness and it's time to move on please.
>
> ARGY: Yes, your Honour, I'll do my best."

187 In regard to this passage, Mr Argy submitted that I was "precluding legitimate cross-examination of Mr de Klerk".

188 I was doing no such thing and no fair minded lay observer of the proceedings would have thought I was. I was merely pointing out to Mr Argy that there was no need for him to continually ask Mr de Klerk to confirm evidence he had already given.

189 As the transcript reveals, Mr Argy continued asking questions about Ms Larter.

The 1pm deadline

190 I was dissatisfied at the pace and manner at which Mr Argy's cross-examination of Mr de Klerk was proceeding. At around midday on 8 February 2018 I directed Mr Argy to finish his cross-examination at 1pm that day. I did so because this matter, which had been allocated five days, was then in its fourth day. Mr de Klerk had then been in the witness box for well over a day.

191 Ultimately, immediately before the luncheon adjournment, Mr Argy and I had this exchange at T271:

> "HIS HONOUR: Mr Argy are you telling me that your client will be prejudiced, I don't [permit] you to continue your cross examination at 2 o'clock.

> ARGY: I am your Honour, with respect, but your Honour I'll be probably five or ten minutes to be honest, it will be very quick.
>
> HIS HONOUR: In view of that position I have no option but to permit you to continue but can I ask you to gather your thoughts over lunch and do it as concisely as you can.
>
> ARGY: Thank your Honour."

192 In this regard Mr Argy submitted "time limit on cross-examination of Mr de Klerk was extended but apprehension of bad [sic] not thereby dissipated".

193 I do not consider a fair minded lay observer would apprehend, from my placing a time limit on Mr Argy's cross-examination of Mr de Klerk, that I would deviate from a neutral evaluation of the matters on which he sought to cross-examine, let alone from the issues in dispute in these proceedings. The fact that I relented in the circumstances clearly indicates otherwise.

194 I was doing no more than endeavouring to manage the progress of a case that seemed destined to run beyond the time originally allocated for it. A fair minded lay observer would have understood this to be the case.

The timing of the recusal application

195 Mr Argy's application that I recuse myself was made part way through Ms Johnson's cross-examination.

196 The evidence is not yet concluded and, obviously, I have not yet heard final submissions.

197 Assuming, contrary to my own view, that the first step identified by Gageler J has been established, namely identification of factors which might cause questions in the proceedings to be resolved otherwise than as a result of a neutral evaluation of the merits, the second and third steps must also be addressed.

198 They are the articulation of how the identified factor might cause, in the ultimate determination of the case, a deviation from a neutral evaluation of its

merits and the reasonableness of an apprehension that this will be the outcome of the case.

199 Inherent in the application before me is the unstated proposition that, to adopt the language of Hayne J in *The Minister for Immigration v Legeng* (2001) 205 CLR 507; [2001] HCA 17, at [185], I "will [apply any preconceived opinion] without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case".

200 I do not accept that the fair minded lay observer of these proceedings would, having heard the matters I have set out above, form an apprehension that, no matter how the balance of the case proceeds, and no matter what submissions were put to me in final address, I would, come what may, adhere to any preconceived opinions to which I may have come. Of course, as I have sought to emphasise, I do not accept that I have come to any such opinions, nor that any fair minded lay observer would apprehend I had done so.

201 Accordingly, my conclusion was that even if the first step identified by Gageler J had been established, the second and third steps had not.

Conclusion

202 It is for these reasons that I refused to recuse myself.

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