PARTIES:	RICHARD WHITE
	v
	PINK BATTS INSULATION P/L formerly known as DIMET CORROSION PREVENTION P/L and COMMERCIAL UNION ASSURANCE CO OF AUST LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	138/93 (9315534)
DELIVERED:	9 June 1998
HEARING DATE:	22 May 1998
JUDGMENT OF:	THOMAS J

CATCHWORDS:

Courts and judges – judges – application to disqualify for apparent bias following receipt in Chambers of prejudicial material – whether reasonable apprehension of bias – material irrelevant and inadmissible – application dismissed.

Livesey v NSW Bar Association (1983) 151 CLR 288, applied.
Re J.R.L.; Ex parte C.J.L. (1986) 161 CLR 343, applied.

REPRESENTATION:

Counsel:

Plaintiff:	D. Farquar
1st Defendant:	T. Riley QC
2nd Defendant:	I. Morris

Solicitors:

Plaintiff:	Cridlands
1st Defendant:	De Silva Hebron
2nd Defendant:	Hunt and Hunt

Judgment category classification:	C
Judgment ID Number:	tho98010
Number of pages:	9

tho98010
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 138/93 (9315534)

BETWEEN:

RICHARD WHITE
Plaintiff

AND:

PINK BATTS INSULATION PTY LTD formerly known as DIVIC PTY LTD formerly known as DIMET CORROSION PTY LTD formerly known as DIMET CORROSION PREVENTION PTY LTD
First Defendant

AND:

COMMERCIAL UNION ASSURANCE COMPANY OF AUSTRALIA LIMITED
Second Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 9 June 1998)

This is an application by Mr Riley QC, counsel for the first defendant, which is supported by Mr Morris, counsel for the second defendant, that I disqualify myself from hearing this matter and from further proceeding with the case management of the action.

The basis for the application is set out in the affidavit of Jodie Patrice Gerritsen sworn 21 May 1998.

Briefly the background to this application is as follows:

On 22 April 1998, I received through the ordinary course of mail a letter dated 17 April 1998 from a psychologist, Mr Tom Sutton. Immediately upon receipt of this letter with the attached report, I asked my Associate to arrange to send complete copies of everything I had received to the solicitors for all parties.

A copy of the letter from my Associate dated 22 April 1998, together with a copy of the letter from Mr Sutton and copy of his report are annexure "A" to the affidavit of Jodie Patrice Gerritsen sworn 21 May 1998.

At the time of receipt of the letter it was obvious from a cursory reading of the letter that it was quite improper that the letter had been forwarded to me. I did not read the attached report. However, I do not now seek to rely on the fact that I did not at that time read the report as a reason for refusing the application to disqualify myself. During the course of the application I was referred to various parts of the reports and I have now read it.

I did read the letter from Mr Sutton in which he makes reference to Mr White's deteriorating psychological condition and is in essence an exhortation to have the matter listed for trial as a matter of urgency.

During the course of the application, Mr Riley QC referred to certain matters in the report. I can well understand the concerns raised by him as to the emotive and prejudicial matters that are raised in this report.

There are a number of matters in the report which justify the defendant's concerns. These are not limited to but include the following:

(1) Mr Sutton has expressed an opinion as to the credibility of Mr White. The credibility of Mr White will be an issue in the subsequent trial.

(2) The report contains emotive and irrelevant material relating to the death of other persons who were members of Mr White's "original team".

(3) There is the clear implication in the report that if I do not take steps to have the trial listed for hearing as a matter of urgency then I may have to bear the consequences for Mr White whatever they may be.

(4) There is material as to Mr White's physical condition without evidence that Mr Sutton has any qualifications to make comments on Mr White's physical symptoms or their causes.

(5) There are detailed findings about Mr White's psychological condition and various other matters which will never be tested in cross-examination, either as to its content or to Mr Sutton's qualifications to make such comments, because Mr White will not be called as a witness in these proceedings.

(6) There are numerous emotive, prejudicial and irrelevant statements in the report.

The application that I disqualify myself is on the basis there would be "a reasonable apprehension of bias" both in respect of the substantive hearing and in respect of the directions hearing under this Court's case flow management rules (Order 48). Bias occurs if a party cannot be fairly heard. I accept the test is as expressed in *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-4:

> "…. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. …."

This principle was cited with approval in the authority to which Mr Riley QC referred me: *Re J.R.L; Ex parte C.J.L.* (1986) 161 CLR 343. Mason J stated in respect of this principle at 351-2:

> "…. This principle, which has evolved from the fundamental rule of natural justice that a judicial officer should be free from bias, reflects a concern with the need to maintain public confidence in the administration of justice. This concern is expressed in the cognate

> principle that, not only must justice be done, it must be seen to be done."

In the course of the same decision, Mason J discusses a private communication made to a judge for the purpose of influencing his decision as being a contempt of court because it may affect the course of justice. He went on to state at 351:

> "As McInerney J. pointed out, the receipt by a judge of a private communication seeking to influence the outcome of litigation before him places the integrity of the judicial process at risk. A failure to disclose that communication will seriously compromise the integrity of that process. On the other hand, although the terms of a subsequent disclosure by the judge of the communication and a statement of its effect in some, perhaps many, situations will be sufficient to dispel any reasonable apprehension that he might be influenced improperly in some way or other, subsequent disclosure will not always have this result. The circumstances of each case are all important. They will include the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge."

With those principles in mind I turn to consider the facts of this case and commence with a summary of the proceedings to date.

This case was assigned to me as what is referred to as a Category "C" matter under the Supreme Court Rules. This means I take responsibility for the case management and will eventually be the trial judge.

I have to date made a number of interlocutory orders. I have also made certain directions relating to the progress of the proceedings and its case management. One of the matters which was the subject of a recent direction

was an application by the plaintiff to amend his Statement of Claim. A direction was made enabling this to occur and further orders made as a consequence of this amendment.

The matter has not been allocated a date for hearing although my associate has been looking at the possibility of listing the matter for hearing in February or March of 1999. The summons was listed for hearing on 19 May 1998. On 11 May 1998, the plaintiff filed an affidavit sworn on 7 May 1998 stating reasons why he sought the allocation of a hearing date. By summons filed 7 May 1998, the plaintiff sought the allocation of a hearing date notwithstanding that no Certificate of Readiness has been filed or that there are other matters with priority over this proceeding in the list. The defendants have not, as yet, signed Certificates of Readiness.

At the request of the defendants this summons was adjourned at the hearing on 19 May 1998. The first defendant then brought on an application by summons dated 20 May 1998 that I disqualify myself from these proceedings. This application was heard on 22 May 1998 and I reserved my decision on the application. The plaintiff's application for allocation of a hearing date was adjourned pending my decision on the application that I disqualify myself.

At the present time the matter has not been listed for hearing. It could be listed for hearing in February or March 1999 as already indicated. An allocation of a hearing date at this time would not be giving the matter

priority over other proceedings. I have not yet addressed the issue of whether it should be given a priority date. Neither have I addressed the plaintiff's submission that the matter be listed for hearing even though the defendants have not filed a Certificate of Readiness.

Dealing with the merits of the application that I should disqualify myself from these proceedings I will summarise the matters I consider of relevance to the application.

The letter and report from Mr Sutton came through the ordinary course of mail. The communication from Mr Sutton was unsolicited on my part. I have not met with or spoken to Mr Sutton. A copy of everything communicated to me was forwarded immediately to all parties.

Mr Farquar, solicitor for the plaintiff, has confirmed that the plaintiff is not making a claim for psychological damage. There is no claim for psychological damage in the amended statement of claim and there never has been such a claim. Mr Sutton will not be called as a witness in the plaintiff's case.

The statements and opinions of Mr Sutton are irrelevant and inadmissible.

The receipt of the letter and report bears some similarity to the situation where a judge is asked to rule on inadmissible or irrelevant

material in an affidavit, that one party or the other may seek to rely on as evidence. Certainly the statements made by Mr Sutton are emotive and prejudicial to the defendant's interests. However, they are also irrelevant and inadmissible and could not form the basis for any finding by the Court.

In *Re J.R.L; Ex parte C.J.L.* (supra) Mason J also stated at 352:

> "…. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. …."

and further on 352:

> "…. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

I am confident that I can continue to hear this matter impartially. However, that is not the test. As Mason J stated in the decision of *Re J.R.L; Ex parte C.J.L.* (supra) at 357 the question is: "… how the matter would appear, viewed reasonably, to the public and the parties."

I am satisfied that "viewed reasonably" in the circumstance of this case, the communication from Mr Sutton would not sustain an apprehension of bias in the minds of the parties or the public.

Accordingly, the application that I disqualify myself from these proceedings is dismissed.

_____