

## Contract Mining Services Pty Ltd v Adelaide Brighton Cement Limited [2020] SASC 69

<https://lawcasesummaries.com/knowledge-base/contract-mining-services-pty-ltd-v-adelaide-brighton-cement-limited-2020-sasc-69/>

### Facts

- Contract Mining Services Pty Ltd ("**CMS**") filed an application for an order that a Judge of the Supreme Court disqualify himself from hearing the trial.
- CMS contended that a lay observer might reasonably believe that the Judge would not be impartial to the case because before the Judge's appointment he represented Adelaide Brighton Cement Limited ("**ABL**") in two matters where there were issues similar to those arising in these proceedings:
  - He called one of its directors as a witness at the trial of one of those matters; and
  - The ABL's solicitor had sent two emails to the Judge's chambers without copying in CMS's solicitors - the emails largely related to procedural issues around COVID-19.
- In response to one of those emails, the Judge had intimated that ABL's interstate witnesses in this action could appear via audiovisual link at the trial.
- CMS said it had not had an opportunity to be heard on this issue.

### Issues

- Did the fact that the Judge had represented ABL in similar matters give rise to an apprehension of bias?
- Did the emails from ABL's solicitors which did not copy in CMS's solicitors give rise to an apprehension of bias?

### Held

- The fact that the Judge represented the ABL's interests in other litigation which came to an end the day before the Judge's appointment to the Supreme Court, is capable of giving rise to an apprehension of bias.
- However the two emails from ABL's solicitors gave no support to CMS's application for disqualification, though the Judge lamented that it was "*regrettable*" that ABL's solicitors had not copied in CMS's lawyers.

## Appropriate Protocol for Communicating With Court

- Any communication with the Court should usually be made with the advance knowledge and consent of the other parties.
- On occasions, particularly when urgent, or where practical or administrative matters are being addressed, it may not be necessary to do so other than ensure that all other parties are apprised of the communication with the Court, for example by being given a copy of it, together with any material supplied.
- Where the communication concerns urgent *ex parte* relief it will be necessary to provide the parties with copies of all communications and materials at an appropriate time after the application is made. Where there has been a hearing, that will include a transcript of what was submitted to the Court.
- It is *never* appropriate to communicate unilaterally with the Court without proper notice and consent on material, substantive issues in contention between the parties with a view to influencing the decision-making of the court.

## Quotes

*"However, in this case the representation of Adelaide Brighton was in relatively long-running litigation which only came to an end immediately before my appointment to this Court. It seems to me that it is the combination of representation for a period exceeding two years, and its subsistence until immediately before my appointment, that may be capable of giving rise to the requisite apprehension: namely, the fair-minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of the case because it appears that I represented the interests of Adelaide Brighton until a day before my appointment in January of this year."*

(Livesey J at paragraph [67])

## Full Text

The full text is available here:

<http://www.courts.sa.gov.au/Judgments/Lists/Judgments/Attachments/4995/2020%20SASC%2069.pdf>

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