IN THE SUPREME COURT OF NEW ZEALAND SC 48/2009

BETWEEN **VINCENT ROSS SIEMER**

Appellant

AND **SOLICITOR-GENERAL**

Respondent

Hearing: 26 February 2010

Court: Blanchard J
McGrath J

Appearances: R M Lithgow QC for the Appellant
M F Laracy and B C L Charmley for the Respondent

APPLICATION FOR RECUSAL

MR LITHGOW QC:

I appear for the applicant, may it please the Court.

BLANCHARD J:

Yes, Mr Lithgow.

SOLICITOR-GENERAL:

May it please the Court, counsel's name is Ms Laracy and I appear with my learned friend, Ms Charmley, for the Solicitor-General.

BLANCHARD J:

Yes, Ms Laracy. Yes, Mr Lithgow.

MR LITHGOW QC:

Thank you, Your Honour. Firstly, I wish to deal briefly with aspects of the quorum and the procedure as things have evolved. There are two Judges sitting, and I say at the outset that there is no, the appellant applicant has no objection to that. However, I invite you to consider, in the circumstance that three Judges had been intended and for various reasons that's not possible, but, and I'm not expressing an opinion, I simply refer Your Honours to chapter 14 of the monograph by Hammond J on that chapter of his book, *Judicial Recusal: Principles, Process and Problems,* chapter 14 is about the recusal procedure in appellate Courts, and the proposition is that it's really dealing with whether the Judge, his or herself, should deal with it, but it uses the broad expression taken from the Australian position that it's for the Court itself to be satisfied that it's constituted in such a way that will exercise its judicial functions both impartially and with the appearance of impartiality. And therefore I simply invite the Court to consider possibly for guidance in the judgment whether the Court does identify this as a interlocutory matter, a preliminary matter, when it really is about ultimate circumstances, because there's no appeal for the final Court, and whether a preferred procedure will be identified and made public. Now, that's of course against the background that in the circumstances of this case we don't have any objection to two Judges, but whether it would be appropriate for one Judge, for example, as is possible with an – so that if it's a truly interlocutory matter and the signal that having two Judges may give if there's no explanation, that's something I invite you to consider.

The second proposition is the procedure and, again, we're not seeking to alter that, it will be heard and decided based on this morning's application. But the parties are not advised whether the subject Judge has been invited to consider the submissions or whether she's isolated herself from the process. Because if she was to consider the submissions, that would give the opportunity to either provide further material or to reflect on whether or not she should remove herself. Of course, the contrary argument is that, depending on the way in which the submissions are written, the unhappy position may arise where she becomes a decision-maker and has been exposed to all

kinds of things said, which don't help in staying out of it all. I put it in that way because when you look at what happened in *Saxmere Company Limited v Wool Board Disestablishment Company Ltd ,* as the second judgment says and, I hope, not just to be diplomatic, that the poor old subject Judge making disclosure, that may not be able to guess and know, until the jurisprudence develops, exactly how the decision might focus. So they may make disclosure that they consider appropriate and then the recusal decision itself, as happens, becomes impeached because other information can be given. And, as set out in the submissions that I've made, it is obviously possible to seek from such a prominent family as the Elias-Fletcher household, a range of information which is, may bear on the matter, it may genuinely bear on the matter, it may lead to all kinds of insights about financial arrangements, but is that appropriate and is that the way we want to go in this kind of situation? Because, looking at this case, where I am going to obviously submit that the focus has to be on the apparentness of the bias and apparent bias taken literally, that perhaps the passages in Your Honours' first judgment, that the applicant must establish some kind of a factual basis, as set out and emphasised or refereed to helpfully in the submissions of the Solicitor-General at paragraph 7, whether that really fits this kind of situation. It certainly is, and you can see the way in which it fits perfectly well with the proposition that there's something between counsel and the Judge, because that's not really something that instinctively we think, historically we thought, mattered much. And so if you're going to say that it does really matter, it's better to do it from finding out exactly what the position is. But both Justice Tipping and Your Honour Justice McGrath had propositions in the first case that there may be something unsatisfactory about impressionistic reasoning and, although I think Your Honour Justice McGrath called it "superficial impressionistic reasoning", but the idea of impression, in my submission, is inextricably linked to apparent bias, because if you get too far into it then you've either excluded or accepted an actual disqualifying proposition that doesn't deal with appearance. Likewise, at paragraph 42, Tipping's J decision, "There should no longer be any distinction between cases in which the allegation of apparent bias rests on financial interest, as against those involving other matters, the same test should apply generally," and that may in itself overstate what we

are facing and it may perhaps, for this case, be more useful perhaps to say that in the *Saxmere* kind of case there's no longer any distinction between cases in which the allegation of apparent bias rests on financial interest, as against those involving other matters, and the test should generally apply rather than apply generally, as in always.

The proposition is apparent bias, and I just invite Your Honours to reflect on what "apparent" means in ordinary English, because it has a number of meanings. Obviously the legal technical meaning of a thing being certain, as in, "An heir apparent", is almost an antiquity form. But it has the meaning, the first meaning, of being able to be seen, as in "manifest". But it also has the second meaning which, I submit, is the meaning that's intended in this kind of situation, that "apparent" means, "seemingly real but not necessarily so," and that is absolutely appropriate to this situation, that we say, because we're dealing with appearance and because our culture does make the distinction between things which are provable and the world which is seemingly real but not necessarily so, as not a delusional or a obsessive thing but something always to keep one eye on, that that is the correct proposition we've got to look at. And so the Crown references to the *Saxmere* decision may, with respect, require rather more proof here than is appropriate.

The starting point has been in earlier cases, that's referred to in *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759, which is also referred to in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480, and was talking about the Lord Chancellor, that it is useful to take the Judge out of it and refer to any judicial decision-maker, because that then allows the Court to say, "Would this Court allow a juror to sit, would this Court allow a tribunal to sit, would this Court allow a different form of judicial officer, say, from an inferior Court?" rather than having the kind of deference, the unconscious deference, to a Judge of a higher Court or an appellate Court or, in this case, a Chief Justice. And the utility of that is it takes the focus off the individual Judge. So I invite Your Honours to start from the position that if a juror had told a Judge presiding in this case that – and I use the New Zealand vernacular, and I'm not trying to be disrespectful, but I'm

using the New Zealand vernacular and I'll come to what I say it involves – if a juror gets up, as they do in Court, and asked to give an explanation for what they want to, think the Judge should know, and they tell the Judge that their husband is mates with one of the two main protagonists in the case to be heard –

BLANCHARD J:

I'm sorry, where is this word "mates" relevant in this case?

MR LITHGOW QC:

Well, this is what I'm coming to, because I said that I'm using the New Zealand vernacular, and this expression of enormous variation is an English London expression which came to New Zealand in colonial times and it relates to, it's a variation of French for "shipmate", for "matelot", and it relates to those who share a common interest in peril. It tells you nothing about whether they like each other, it doesn't say whether they're friends, it doesn't say whether they socialise outside of the obligation by which they're joined. They share the common perils of the commercial enterprise, because that was very common in fishing and in ships, commercial ships, and even in naval ships, where prize money was –

BLANCHARD J:

But in this enterprise, there is no common peril.

MR LITHGOW QC:

Well, the enterprise that has, Mr Stiassny –

BLANCHARD J:

But Vector has nothing to do with this case.

MR LITHGOW QC:

Well, the original propositions against Mr Stiassny were part of a long, they say abusive, campaign by Mr Siemer against Stiassny, which included Vector. Because Vector was the subject, because of its public shareholding through a

complicated trust situation, Vector was the subject so-called shareholder activists as to the way in which Mr Stiassny was attempting to restructure the company, good, bad or indifferent –

BLANCHARD J:

I'm sorry, I don't understand what this has to do with this case. We haven't any material before us which brings that in, and it's all complete news to me.

MR LITHGOW QC:

Well, it's set out in the submissions briefly, but remember, this is what the Chief Justice said was the connection.

McGRATH J:

But Mr Lithgow, as you've pointed out, and as the Crown pointed out in their submissions, it's really for your client to establish the factual basis on which it makes a clear connection that it says gives rise to apparent bias. You're referring to your submissions. The Crown have pointed out, as you've said, in paragraph 7, the onus on you to establish these matters. We don't have the facts. As my brother says, it's very hard even accepting what you say in your submissions to see that there's anything more than superficial impression here.

MR LITHGOW QC:

Well, that is why I say that that test cannot meet this situation. And if it is to meet this situation, and if the Court is to make a decision that it's only a superficial impression of a connection, then what does that then require? The net result is that it requires the Chief Justice to provide disclosure about how much she knows about her husband's role with Mr Stiassny, the degree to which their circumstances are interconnected, the degree to which their financial circumstances –

BLANCHARD J:

Well, the only suggestion being made is that they sit on the board of Vector together.

MR LITHGOW QC:

Yes.

BLANCHARD J:

I know of no other suggestion of any involvement of the two of them.

MR LITHGOW QC:

Well, the Vector board, the Vector company and the Vector board has been subjected to an unusual level of shareholder – well, people who say they're shareholders – aggression –

BLANCHARD J:

Well, even assuming that was before us in a factual form, what's it got to do with this? It escapes me completely at the moment.

MR LITHGOW QC:

Let's say if all that is literally true, and that Mr Fletcher depends for his future on this task, what's that got to do with the decision that Her Honour has to make. Is that what you're asking?

BLANCHARD J:

No. You seem to be bringing in something to do with what has gone on within Vector, which we know nothing about. And it doesn't seem to have any relevance.

MR LITHGOW QC:

But we do know that Stiassny and Mr Siemer are the two protagonists.

BLANCHARD J:

But their dispute has nothing to do with Vector.

MR LITHGOW QC:

Their dispute is Mr Siemer's proposition that Mr Stiassny behaves in a high-handed and self-interested way in relation to his life and company, and that the Court system is allowing him to do so. That's his proposition, isn't it?

BLANCHARD J:

I don't know.

MR LITHGOW QC:

Well, that's the proposition that's gone through the various Courts, that by the use, the wrongful use of injunction et cetera and defamation case, which is a gross injustice et cetera.

BLANCHARD J:

But what's that got to do with the current application?

MR LITHGOW QC:

Stiassny is at every aspect of this case, of the underlying contempt.

McGRATH J:

Mr Lithgow, I think that you've started out on an explanation, I think, when you were saying that, you're referring to antagonism between Mr Stiassny and Mr Siemer. You've used words about Mr Stiassny being high-handed. But could you just go on in summary to say why you consider it's reasonable to be concerned that objectively this might lead the Chief Justice to decide the case other than on its merits. Can you just go through the headings to the logic that you wish to advance to us.

MR LITHGOW QC:

Well, I've set out in my main submissions the proposition firstly that her husband appears, on the face of it, to earn $100,000 in director's fees from a company which we say it can be asserted, and nobody's disputed, that is politicised, and that's because of its local government trust holding,

shareholder holding. And Mr Stiassny, as chairman, has a reputation for controlling it. Now, the next step is –

BLANCHARD J:

We have nothing before us about that, even assuming that that statement is true.

MR LITHGOW QC:

Well, it has been asserted based on material that has been given, and is on websites, et cetera. We state that.

BLANCHARD J:

Well, it's not material that's before this Court.

MR LITHGOW QC:

Yes, but what I have said in my submissions, I have stated those in the submissions as propositions. What I've said is that if there is going to be any rational examination of this issue, beyond the appearance, then that requires a degree of disclosure from the Chief Justice which I say is distasteful, and is wrong. So unless it can be –

BLANCHARD J:

What do you expect the Chief Justice to say about suggestions that Mr Stiassny, to use the vernacular, throws his weight around on the board of Vector? How can she possibly start making so-called disclosures about that?

MR LITHGOW QC:

Well, what if it is as set out, being on the board of Vector is, in the public perception, that you can get on with Mr Stiassny in his propositions.

BLANCHARD J:

How can she possibly be called upon to make a comment about that?

MR LITHGOW QC:

Well, we don't know – what if Mr – I don't think Mr Siemer is coming.

BLANCHARD J:

I'm not worried whether he is coming. He's welcome to come.

MR LITHGOW QC:

If the financial position of Mr Fletcher is affected by his continuing board membership of a public company, then that is something that his wife would be naturally concerned about.

BLANCHARD J:

But the missing link is any suggestion, is anything which would suggest that Mr Stiassny, in the event that the Chief Justice sits on the case and Mr Siemer is successful, will in some way be minded to remove Mr Fletcher from the board, even assuming that he has that ability. We know nothing about any of these things. It is complete speculation.

MR LITHGOW QC:

Well, you say complete speculation. It is a relationship like neighbours, for example, or extended family relationships.

BLANCHARD J:

Is it? Having been on boards, I wouldn't characterise it in that way.

MR LITHGOW QC:

Well, this is the difficulty, that Your Honour has been on boards with Mr –

BLANCHARD J:

But how can you possibly expect the Chief Justice to start making statements of that kind? She wouldn't know where to begin.

MR LITHGOW QC:

Well, we don't know that.

BLANCHARD J:

Because they're all based on vague assertions.

MR LITHGOW QC:

We don't know where she would begin.

BLANCHARD J:

And they're not based on vague assertions on her and her husband. They're vague assertions about Mr Stiassny.

MR LITHGOW QC:

Let's not forget that Her Honour did begin all this. She started it. She asserted that it was necessary for us to know that her husband sat on a board with Mr Stiassny.

BLANCHARD J:

Are you criticising her for that?

MR LITHGOW QC:

No. And it has many times been said that that, in itself, the fact that a Judge thinks of something that might be relevant doesn't make it relevant.

BLANCHARD J:

We said in *Saxmere* that that's an improper process of reasoning, that it's highly desirable that Judges should disclose things that they feel might possibly be of relevance, but that you shouldn't read into the fact that they make a disclosure that they actually feel any need for a recusal. It's a matter of making sure people are aware of certain facts.

MR LITHGOW QC:

All right, well, that's what my submission was.

BLANCHARD J:

I mean, you're putting Judges in a damned-if-you-do, damned-if-you-don't situation with that argument.

MR LITHGOW QC:

No, you're, with respect, putting Judges in the difficult position if you require detailed disclosure when we say when we are prepared to leave it on the basis that the appearance, the apparent circumstances of this, would mean that to the character that the judicial system has created, another one from the virtual world, the reasonable and fair-minded and informed observer. Now, let's just stick with fair-minded for a moment, because your very reaction, with respect, indicates that we don't want to go down the too-informed track because it's a complete unknown. But is it appropriate for a Judge to sit where their partner has a connection with one of the key protagonists in the underlying case?

McGRATH J:

We did say in *Saxmere* that it is not merely enough to show the existence of association, and that it's on the objecting party to spell out why it's reasonable to be concerned. Now, as the presiding Judge has pointed out, that involves you putting the facts before the Court to the extent that the facts go beyond matters that are entirely within the knowledge of the Judge concerned. And that's not there. But just trying to go past this to the merits of what you say, by you've introduced in your submissions, is there anything else, really, apart from the concern you've said Mr Siemer has that in some way, Mr Stiassny, given his past record, may move to cause the removal of the Chief Justice's husband from the board of Vector. Is there anything else you want to say as to why that type of scenario might lead the Judge concerned to decide the case other than on the true merits? Because that's, in the end, what you'll have to satisfy us of. If we just forget about the problem of not having facts properly before the Court.

MR LITHGOW QC:

My first proposition was, Your Honour, that this test was stated perhaps appropriately for financial interests between a counsel and a Judge, because as the Court indicated, that isn't an unusual thing to be at a low level, particularly hobby-type financial intertwining. And so although there's no reason to critique that analysis in that case, my submission is that that's inappropriate for this kind of case, where we're talking about a key protagonist in the case. We're not talking about counsel, who are one step removed, always.

McGRATH J:

Well, what you're saying, I think, is that what the Court said in *Saxmere* is to be distinguished in this type of case.

MR LITHGOW QC:

Yes, because Mr Stiassny really is an underlying party to all this. It's true that the Solicitor-General took over the contempt aspect, and the way in which contempt is organised. He does it as an independent obligation to uphold, et cetera, the Court aspects of all this, and the administration of justice. But a win for the Solicitor-General is a win for Mr Stiassny, because it's exactly what Mr Stiassny did previously –

McGRATH J:

I understand, then, your argument to be on this problem of there being no facts before the Court, that we shouldn't apply *Saxmere* here, it's an unusual case. Mr Stiassny is involved. He's in litigation and dispute with Mr Siemer, and that we should not expect you to be putting forward the facts. There should be some other form of getting them before the Court. Now, I'm happy to put that aside just for the moment. I think it's a problem that we'll have to address, and I understand what you're saying on it. But what I really want to come to do is to say, is there anything more that, if we just accept the facts are as you've suggested they may well be, why it is that the Court can reasonably be concerned that this might lead the Chief Justice to decide the case other than on the true merits. And I think what you're saying is that if the

concern transpires, and if Mr Fletcher were to be forced out of the company's directorship that he holds, there is a financial implication. And what are you saying, that this may – I think you've got to tell me why it is, to complete the picture, this indicates apparent bias in the case if the Chief Justice sits. I want this in your words, Mr Lithgow. I think I know what you're going to say, but I'd far rather you put it in your words, because I'm sure then that the argument will be put as best it can be.

MR LITHGOW QC:

Well, we've got to start further back, because Your Honour has moved this ahead to why the Court thinks that Her Honour may decide. But that's not the test. The Court has to think about what, bluntly, a fair-minded New Zealander, who's got a general insight into the way judicial process should work. That's about the level of it.

McGRATH J:

Yes, I understand that –

MR LITHGOW QC:

Would they think it was all right for a juror to sit on this case? Take the Chief Justice out of it, because there's all kinds of mythology surrounding her financial independence, et cetera, about which we know nothing. And we don't want to know.

McGRATH J:

Mr Lithgow, it would really help me if we put aside the rhetorical questions, and you just stated, as simply as you can, why it is, applying the test you've just articulated, that the Court objectively – why it's reasonable for the fair-minded observer to be concerned objectively that the Chief Justice might decide this case other than on the merits.

MR LITHGOW QC:

Because her husband works with one of the effective parties into the case. The beneficiary of the Solicitor-General's success. Stiassny will be the

beneficiary of the Solicitor-General's success in this case. Mr Siemer will go to jail, and Mr Siemer will –

McGRATH J:

I understand that. Is there anything else?

MR LITHGOW QC:

Well, are you – I'm not sure if Your Honour's inviting me to just look at what it is that this judicial officer is being called upon to decide, and how that could track back.

McGRATH J:

I think I know and understand, already, enough about the nature of the case. I don't want to sidetrack you off on that. What I'm more concerned with is the basis on which you are putting to us that this situation may give rise to apparent bias, which isn't concerned with the issues in the case so much. It's the potential interaction of the co-board membership in the particular circumstances of this company. Now, if you could just focus on that, and tell me, in addition, you've made one point already, and I think if you just want to make anything else you can, we'll have as much as we need to know.

MR LITHGOW QC:

Well, it's the – Your Honours, if I correctly understand what you're wanting, we have the proposition about the blunt financial effect if Mr Stiassny is lord of all he surveys and Mr Fletcher is vulnerable to his whim, if that's overstating it, but that's proposition –

BLANCHARD J:

Well, you shouldn't think that I'm going to accept that proposition without any factual material before the Court. Because it seems to me that it is completely speculative. I mean, we don't know the extent to which Mr Stiassny does control that board. I've no idea.

MR LITHGOW QC:

Well, if that is correct, if that is the way to do it, then as a matter of procedure it becomes inevitable that once the objection is made, that it is appropriate, bearing in mind what happened in *Saxmere,* that the subject Judge be invited to give a further and broader disclosure, saying what they know about this kind of relationship. Because otherwise, what are we – to make private investigations about our Chief Justice? That's quite – I think that's quite inappropriate to this.

BLANCHARD J:

Well, it wouldn't be about the Chief Justice, Mr Lithgow. It would be about Vector.

MR LITHGOW QC:

And her husband.

BLANCHARD J:

For all I know, she knows nothing about Vector.

MR LITHGOW QC:

"For all I know", that's correct. For all we know, she can't even remember the companies that he's a director of. But she mentioned it, so she did. She had remembered that one. But this is the relationship of husband and wife. They know things about each other's circumstances, hopes, dreams, futures, pasts, that nobody else knows. And they're traditionally a) not required to discuss it with anybody else, and b) they are very subtle in nature, because we all share hopes and fears for somebody as closely connected which may not be either based on fact or rational, but are very real.

BLANCHARD J:

Well, what I'm hearing from you is all something based on a series of assertions about what Mr Stiassny has done in Vector, and I know nothing about that, and speculation about what he might do in Vector in a situation

which I imagine is totally different from anything that has been in Vector previously. I think this is just hopelessly speculative.

MR LITHGOW QC:

Hopelessly speculative?

BLANCHARD J:

Yes.

MR LITHGOW QC:

All right. Now, it's like hindsight, Your Honour.

BLANCHARD J:

Look, the boards that I was on, the chair didn't normally control in public companies. Some cases, maybe, but Vector is a huge public company.

MR LITHGOW QC:

Yes.

BLANCHARD J:

We can't just accept your client's say-so that Mr Stiassny controls that board and can have people removed at whim.

MR LITHGOW QC:

Well, we cannot accept my client's say-so that he controls the board and that people can be removed at whim, but we can take notice of the proposition in national newspapers and in business newspapers that that is the allegation, that he removed a number of directors.

BLANCHARD J:

Well, I'm sorry, I'm unaware of that.

MR LITHGOW QC:

Well, I have stated it, so who's got to show? And you say, well –

BLANCHARD J:

You can't just come along here and make a statement of that kind, essentially giving evidence from the bar, with nothing to back it up.

MR LITHGOW QC:

Then we need further and better particulars from the Chief Justice, which I've stated –

BLANCHARD J:

How would she know?

MR LITHGOW QC:

How would she? In an answer, you ask her. I mean, that's what we –

McGRATH J:

You've endeavouring to get away from the fact that in *Saxmere*, the Court made it very plain, as the Crown have said in their submissions, that the onus rests on you to establish why the identified relationship would cause the Judge from deviating from the duty to decide the case on anything but the merits as a matter of apparent perception of the reasonable fair-minded observer. Now, you're saying, oh, it doesn't work, so we need disclosure from the Judge concerned. I think we've heard that, but you still don't have any of the basic facts before us, and what we'll have to decide is whether this is the sort of matter that should be dealt with by the Judge in a statement. For my part, Mr Lithgow, I think you are getting to the stage now of repeating things. I've certainly made it clear that I'm prepared to try and look beyond, to the merits, and you have, I think, probably said everything you can, haven't you, as to spelling out why the fair-minded observer would have a concern in these circumstances, if your client's factual concerns, perception, have been shown.

MR LITHGOW QC:

That is what you said in *Saxmere* Number 1. But how, as a matter of fact, was the problem relationship determined? And the answer to that was from further disclosure from the Judge. It didn't come –

McGRATH J:

You're just repeating, I think, the point you've made. You're saying what was said in *Saxmere*, the onus being on the party objecting doesn't apply here. And, you know, I hear that. I understand what you're saying. You've also, I think, gone into the merits and said everything I think it's possible for you to say, although I'm certainly happy to listen to anything more, as to what's – of those circumstances, why it is those circumstances would give rise to concern by the fair-minded observer, but please don't go back and try and reformulate exactly the points you've been making thus far.

MR LITHGOW QC:

Well, I know Your Honour is trying to move it ahead, but they are two separate aspects, with respect. One is the formulation of a general way of going about it, a general test, as was in *Saxmere* 1, and then we see what happened by episode 2. The Court says to counsel, "Where are the facts? It's for you to put them before the Court." –

BLANCHARD J:

Well, you haven't put anything before the Court.

MR LITHGOW QC:

That's what was said in *Saxmere (No 1)*.

BLANCHARD J:

I'm sorry?

MR LITHGOW QC:

"It's just superficial, it's just a hobby, it's just nothing much, we all know about Judges and their horses," so that's *Saxmere (No 1)*. But who provided the material that made it different, further, deeper, intrusive disclosure? And if that's the way it has to be then apparent bias becomes difficult and has to become a kind of an actual situation, a factually-based situation, gets away from the essence of apparent bias, which is a reasonable apprehension of

circumstances that are not appropriate for a judicial officer, whether juror or Judge.

BLANCHARD J:

But they're apprehension of circumstances which are established. Here, nothing is established. Now, there are certain things that one can perhaps take without requiring evidence. The fact of the directorship, the fact that there will be directors' fees, which will be substantial. But when it gets into other allegations about what may or may not have gone on in different situations within Vector, the Court can't just accept assertion and reference to what has appeared in the newspapers, particularly newspapers that members of the Court may well not have seen.

MR LITHGOW QC:

Well, as I've said in the original submissions, if there is a situation in which a reasonable person could fear that one of the judicial officers could be anxious for quite how this could impact on their spouse's circumstances, then that is poisonous to the appearance of justice and it's poisonous to them without them even knowing it. And so I rely, in this case, on the proposition of Lord Devlin, which is repeated – sorry, Lord Bingham - which was repeated in *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, which cuts through all this and puts it in the way in which I think it should be viewed, that any District Court Judge would not allow a juror who made such a disclosure to be on the jury, it would just be better not, and that is, that proposition is set out in *Muir* from Lord Bingham, that "The social service which the Judge renders to the community is the removal of a sense of injustice. To perform the service the essential quality which he or she needs is impartiality, and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because with the reality the appearance would not endure. In truth, within the context of service to the community the appearance is the more important of the two. The Judge who gives the right judgment while appearing not to do so may be thrice blessed in Heaven, but on Earth he is no use at all," and that must be correct in the New Zealand mind, that's an egalitarian, democratic society, that has to look at relationships

which people have and say, “Should that be the person that decides these things?”

BLANCHARD J:

Well, that would be so, if you were able to point to some kind of connection between the case and the situation to which you are referring, which logically would suggest to a fair-minded person that there might be a problem. But, in the absence of – with the sort of factual vacuum that we’ve got here, it’s all complete speculation.

MR LITHGOW QC:

Well, if it’s a factual vacuum then I formally seek that the Chief Justice makes, in view of our objection to her sitting, makes further, fuller and better disclosure of the circumstances.

BLANCHARD J:

Well, the factual vacuum is about Vector. She is not a board member of Vector and she wouldn't be privy to material about the board room of Vector.

MR LITHGOW QC:

Well, we don’t know and, with respect, for these purposes Your Honour must be deemed to not to know that.

BLANCHARD J:

Not to know what?

MR LITHGOW QC:

What she’s privy to and what she’s not. That's the very nature of the marriage relationship, is we don’t enquire as to what people are privy to. That's a fundamental of the relationship. Now you have been an experienced director and you say to yourself, “Well, wives aren’t interested in this kind of stuff,” it’s just not, you don’t do it like that.

McGRATH J:

I think the problem, Mr Lithgow, is you're really seeking that Mr Fletcher provide information.

MR LITHGOW QC:

Well, Her Honour has to decide who could provide the information, bearing in mind it's the facts that apparently have to determine the matter, rather than the appearance. So, if it's facts that have got to determine it, Her Honour has to identify from where those facts will emerge.

McGRATH J:

No, if the information is not apparently in the Judge's hands and you're going to third parties, even if they're the spouse of the Judge, we're right into the area in which the onus falls on you, if you're acting for an objector, to put facts before the Court.

MR LITHGOW QC:

But is that appropriate that a party makes a direct enquiry, presumably by a independent investigator, and attempts to brief the partner of a judicial officer as to what the circumstances are? Is that really appropriate, does that serve any useful purpose? All that would make things unpleasant –

BLANCHARD J:

But we know the circumstance, that Mr Fletcher is a director of Vector. What more can he say?

MR LITHGOW QC:

Well, exactly.

BLANCHARD J:

Assuming that he were minded to say anything. The speculation is about Mr Stiassny and what Mr Stiassny might or might not do.

MR LITHGOW QC:

Well, we don't know that, do we?

BLANCHARD J:

I'm sorry?

MR LITHGOW QC:

We don't know that. But if we spoke to –

BLANCHARD J:

Well, it's the speculation that your client is advancing.

MR LITHGOW QC:

If you want us to interview Mr Fletcher in order to –

BLANCHARD J:

I have not said that.

MR LITHGOW QC:

Yes, but if the process, not Your Honour personally, obviously, but if the process requires that in this kind of challenge we are to interview the spouses or family members of sitting judicial officers, that would be quite wrong.

McGRATH J:

No-one's saying that –

BLANCHARD J:

Nobody came close to saying that, Mr Lithgow.

McGRATH J:

You're talking about problems you may encounter in endeavouring to get facts as to what happened, apparently some time ago, in relation to a particular issue between shareholders and board in Vector. And don't transform that into saying the Court's requiring you to interview particular people. You may

have a difficulty in establishing those facts, and where those facts would lead you is yet another difficulty. But those, those are the problems –

BLANCHARD J:

We don't even know whether Mr Fletcher was on –

McGRATH J:

– for anyone who has to prove something, he has the burden of proof in Court. And I don't really think it helps to try and transform that into an assertion that the Chief Justice must disclose something or that you would have to go and talk to Mr Fletcher. You've got a problem. You would presumably try to get evidence from sources that were happy to talk to you, it might be difficult. But in the end it's your onus of proof.

MR LITHGOW QC:

Well, my submission was that started all this, that Her Honour, if that is the position, should be asked for further and better particulars, and the Court opined that this information would have to come from Mr Fletcher and that that was the client's responsibility.

McGRATH J:

No, what I opined was you were seeking that Mr Fletcher made a statement. But in the end, you know, you're going round in circles, Mr Lithgow, I mean, is there something new you've got to say on this?

MR LITHGOW QC:

There is, there's this onus of proof, we've got to get rid of that. There is no onus of proof, it's the Court that is preserving its own appearance of impartiality. A proposition was –

BLANCHARD J:

All right. Well, that's not a new proposition, we've heard that from you already.

MR LITHGOW QC:

But we were given a limited disclosure, we chose to deal with it on that basis, on apparent, that is, the appearance of this is not appropriate, because no other level of judicial –

BLANCHARD J:

Well, that's your argument?

MR LITHGOW QC:

Yes, that's an argument. If it has to be dealt with on a factual basis, that leads to a procedure which is unnecessarily intrusive for this kind of situation.

BLANCHARD J:

I'm sorry, if your client were required, in order to substantiate what he's saying, to provide information about Mr Stiassny and Vector, how is that unnecessarily intrusive?

MR LITHGOW QC:

Well, because we've moved on from the Court's first proposition, that the next step would be Mr Fletcher, but we've got away from that. But that would be it, because it is Mr Fletcher's position that is the one – I doubt if the Chief Justice, we have no information that the Chief Justice concerns herself directly with Mr Stiassny, but she has given the information that –

BLANCHARD J:

Well, she has indicated, I believe, -

MR LITHGOW QC:

– via –

BLANCHARD J:

– that she's only met him once.

MR LITHGOW QC:

Well, exactly. So it's the relationship with her husband that has caused the light to go on, and it should, and I don't know how much of the file Your Honours have read, but you may like to consider the kind of material that Mr Siemer would put forward if called upon to make direct criticisms of people and whether that's in fact the kind of material that the Court wants, because it is highly personalised and the Court would have to plough through it. My proposition is an attempt to assist this process to be – I know it's inconvenient to the Court, not in a trivial way but in a genuine way, at this precise moment, we know that, but the Chief Justice should find someone else in this case, that's all, it shouldn't be made into a big drama, shouldn't have to face a Judge whose husband knows the guy, knows the man that's behind all this. It's as simple as that, you just open the paper and you see, "Chief Justice's husband in business with Siemer's enemy." Now, that's not –

BLANCHARD J:

To say he's "in business" is rather misleading. He has a directorship.

MR LITHGOW QC:

Well, Your Honour makes a legal distinction. He's in a business, he's got the stewardship of Vector, which is a huge company, in their joint hands. Big, big – it means nothing in Wellington perhaps, but it's big business in Auckland and affects a huge number of people. And they share that stewardship, and one of them's married to one of the Judges. That shouldn't happen, it doesn't require all this fancy legal analysis, with respect. I think *Saxmere's* made too many complications, appropriate to *Saxmere's* circumstances, but not helping here.

McGRATH J:

Okay, I understand that.

BLANCHARD J:

Thank you, Mr Lithgow. Mr Laracy, I think the Crown's position is one of neutrality in this particular application. Do you want to be heard?

SOLICITOR-GENERAL:

Sir, the Solicitor-General does abide the ultimate decision of the Court on whether the Chief Justice should recuse herself in this case, but consistent with the position we've taken, which is to set out the legal principles which apply, it was my intention on behalf of the Solicitor-General to make a number of observations about the law, in the context of this case, as they apply to the appellant's submissions.

BLANCHARD J:

This is beyond what you've already put in writing, very helpfully, for us?

SOLICITOR-GENERAL:

What I've put – yes, Sir. What I've put in writing is perhaps best described as a bare summary of the legal principles, but not applied to the appellant's submissions. But, especially in light of some of the matters that have been discussed today and, indeed, in response to some of the legal propositions in my learned friend's written submissions, I did intend to make a few observations to the Court.

Before I do that, can I just check with the Bench what Your Honours were anticipating in terms of time and the next – were you intending to break?

BLANCHARD J:

We might as well take the morning tea break now, I think –

SOLICITOR-GENERAL:

Thank you, Sir.

BLANCHARD J:

– before you begin.

SOLICITOR-GENERAL:

Thank you, Sir.

BLANCHARD J:

Fifteen minutes.

COURT ADJOURNS: 11.26 PM

COURT RESUMES: 11.38 AM

SOLICITOR-GENERAL:

Thank you. As the Court has identified in the discussion this morning, the appellant has to do two things. One is establish the relationship matter, and the second is to establish why it's reasonable to believe objectively that that association might possibly lead the Judge to determine the case other than on its merits. And the submission from the Solicitor-General is that the challenge in this case is for the appellant to clearly articulate the reasoning to establish that second limb of the test. Paragraph 7 of my submissions does use the word "onus". That might be putting it too high, but the references that I have in the footnote there are to paragraphs 42 and 94 of this Court's decision in the first *Saxmere* case. In paragraph 42, which is part of the decision of Tipping J, the Judge says, "The law's approach to apparent bias immediately invites the party making the allegation to answer the questions in the language of invitation" and paragraph 94, which is in Your Honour's decision, McGrath J, the language there is, "It is always for the person who asserts there is a situation giving rise to a reasonable apprehension of bias firmly to establish that that is the case". And Your Honour also refers to a decision of Mason J in the High Court of Australia.

If that line of reasoning which establishes the necessary second limb of the test can't be articulated in a compelling way which would make sense to the reasonable lay observer, then the law, as set out in *Saxmere*, is that the test is not made out. The law, as Your Honour McGrath J, again, put it in the *Saxmere* decision is that "the Court is looking for sound reason, as against impressionistic reasoning". So what has to be identified here is how might the chain which starts with Mr Stiassny and then goes to the board of Vector, and

then involves Mr Fletcher and then involves the Chief Justice, how might that chain reasonably be believed to impact upon how the Judge in question might approach this case.

The only other things I wanted to say are, just to address a number of discreet, legal principles. These are not directed at any particular argument, but they do respond to propositions in my learned friend's written submissions. The point is made a number of times, really on the pragmatic level, as I believe it, that other Judges are, or may be, available to sit. The fact that there may be other Judges available needs to be consigned to its proper place in the law. It is not part of the test for recusal, and in my submission, it cannot be, that there are other Judges available. If that fact inches its way in at the point where the Court is considering whether a Judge should recuse themselves, in my submission, it does skew the test. If the test is not made out, the Judge must not accede to the request, regardless of the practical considerations, such as other Judges being around, because to accede in those circumstances does risk undermining the principles that the test has been carefully designed to preserve, namely, the random allocation of Judges to cases, an allocation which is independent of the wishes of the parties.

BLANCHARD J:

Well, it's not exactly random in this case, because there are only five of us, and we're expected to sit on all cases.

SOLICITOR-GENERAL:

Yes. It's random in the sense, though, that – perhaps random becomes misplaced.

BLANCHARD J:

It is random in the High Court, for example.

SOLICITOR-GENERAL:

Yes. But it is independent of the parties, and that is the important factor.

McGRATH J:

In this Court, the general principle is that all permanent Judges should sit as part of their constitutional function in the Supreme Court, to determine the law finally in New Zealand.

SOLICITOR-GENERAL:

Certainly. Another submission which is made in the written submissions which I did want to just reiterate is the submission of the Solicitor-General that in marginal cases, where there is a real uncertainty as to whether the test has been made out, in our submission, the Judge in that situation should decline to sit. The counsel for the appellant has also made the point today, as well as in his submissions, that in the appellant's mind it's of some significance that the Chief Justice drew attention to this issue in the first place. As he put it today, "She started it". As Your Honours have identified, that very issue was before the Court in *Saxmere*, and was dealt with comprehensively there. I refer the Court to paragraphs 31 and 32 of Your Honour Blanchard J's decision, and paragraph 48 of Tipping J's decision.

Another point I would like to comment on is the submission made by my learned friend that it's appropriate to consider what would happen if a juror were in the same position as the Judge in this case. The Solicitor-General's submission is that the comparison with the juror is not a fair one. The way that jurors approach judging may be quite different in fact from the way Judges approach it, and as a matter of legal supposition, it is, indeed, quite different. The one is a trained professional, the other is a member of the public. And what's interesting about this is that they are just a member of the public, a juror. They are not necessarily – indeed, probably not – the reasonable lay observer. One of the links in the chain of reasoning that the appellant puts before the Court is the fact that Mr Fletcher, according to the Vector website, which I, too, have checked, appears to be paid an annual fee of $100,000 in directorship fees. In my submission, the *Saxmere* decision suggests that a mere contribution to the Judge or the family's finance is not enough. *Saxmere* talks about the Judge being beholden, talks about

concepts of dependency and indebtedness, not merely a financial contribution. So something more than merely receiving a fee which contributes to the family's no doubt significant income already is unlikely to meet that *Saxmere* test for financial benefit.

BLANCHARD J:

Well, we don't have any evidence about the family finances, so I would personally be inclined to discount the submission you're just making.

SOLICITOR-GENERAL:

I think the final point that I can make is that while the present case, the one that is to be heard next Tuesday, is, in a sense, connected to the original contempt and defamation in contract proceedings which arose between Mr Stiassny and Mr Siemer, it is not part of those, or in any way co-dependent on those proceedings. I think, unless there's anything in particular I can assist the Court with, those are the submissions of the Solicitor-General.

BLANCHARD J:

Thank you, Ms Laracy. Mr Lithgow?

MR LITHGOW QC:

Thank you. Of course, my submission was that paragraphs 42, 93 and 94, whilst appropriate to the facts in *Saxmere*, are overstating the situation in respect of this kind of conflict. It is really like a conflict, and could the Chief Justice, in practice, act for Mr Siemer in this matter when her husband sits on a board with Mr Stiassny? And the key to all this is if there appears to be the beginnings of a conflict, then there is. The submission about some kind of constitutional obligation to sit once able to sit, once down to sit, when a potential conflict can be so easily avoided has got a hold on the case, in my submission, which it doesn't deserve.

BLANCHARD J:

I think that's probably a little bit of a distraction.

MR LITHGOW QC:

In this Court.

BLANCHARD J:

I'd agree with you to that extent, although in the particular circumstances, which you're aware of, there is a difficulty. But in fact, at least one case in the High Court in Australia, a Judge sat where his wife was a party – was a counsel in the case, because of the constitutional necessity. However.

MR LITHGOW QC:

That certainly happened in the High Court in New Zealand, obviously, with Goddard J. But some states of Australia do literally have a random lottery system, I think Western Australia, of allocating cases. So they're talking about a process, sometimes these Judges talk about a process they're familiar with, which is absolutely randomised for historical reasons. And it's considered inappropriate to try and muck about with that in any way at all. Ours isn't quite like that –

BLANCHARD J:

Well, it isn't in this Court.

MR LITHGOW QC:

And in the High Court, you presumably take your cases by the weeks of sitting you're allocated to tasks. But I don't know. So could the Chief Justice, for example, have acted for Siemer? I say the answer is no. The underlying proposition that once a Judge is lined up for a case you sort of have to crowbar them out, I think rather overstates it. But the most useful modern propositions I invite Your Honours to re-read the opening pages related to the general idea of apparent bias in *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451,480*. If I just start at paragraph 3. I'm not going to read large passages.

BLANCHARD J:

Is this a reply?

MR LITHGOW QC:

Yes, because this is directly something that the Solicitor-General raised.

BLANCHARD J:

All right.

MR LITHGOW QC:

"Any Judge (for convenience, we shall, in this judgment, use the term Judge to embrace every judicial decision-maker whether Judge, lay Justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred", then it goes on to deal with the proof of actual bias, "It's very difficult, because the law does not countenance the questioning of a Judge about extraneous influences affecting his mind. And the policy of the common law is to protect litigants who can discharge a lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists". Then it goes on to the passages to which I've already quoted, Your Honour, and it deals with the case of the previous Lord Chancellor, who was known to be a very wealthy man, or assumed to be a very wealthy man, and how they all knew that in reality, it was unlikely to affect him. They all knew that. But what does it look like?

BLANCHARD J:

That was a case about a direct financial interest in a litigant, wasn't it?

MR LITHGOW QC:

Well, the thing about that is that the Lord Chancellor had a very few shares in the Grand Canal company, and that's variously been described in cases emphasising the very few shares, but as analysed in Hammond J's book, the shares were, in fact, worth an enormous amount of money. So that gets turned up and turned down, depending on how Judges wanted to use it. In fact, an objective assessment would be there was a significant amount of money, even for a wealthy man.

BLANCHARD J:

Yes, but that's not the point I was making. The point I was making was that was a case involving the Judge having a shareholding in the litigant.

MR LITHGOW QC:

A shareholding in the company litigant, yes.

BLANCHARD J:

Well, we're not in that territory. It's several removes.

MR LITHGOW QC:

Where her husband's got $100,000 in the business that he stewards with the litigant.

BLANCHARD J:

Which business has nothing to do with the case.

MR LITHGOW QC:

Well, it's not the subject of the case.

BLANCHARD J:

Yes.

MR LITHGOW QC:

But that's where the connection is made.

BLANCHARD J:

All right.

MR LITHGOW QC:

Thank you. Was there any other matter?

BLANCHARD J:

I don't think so. McGrath J and I will retire for a short time to see whether we're able to give you a decision at this stage, bearing in mind that the case is due for hearing on Tuesday. If you'll just bear with us for a few minutes.

COURT ADJOURNS: 11.55 AM

COURT RESUMES: 12.02 PM

BLANCHARD J:

Thank you. We have decided that the application will be dismissed, and reasons will be given in due course.

COURT ADJOURNS: 12.03 PM