HIGH COURT OF NEW ZEALAND

TE KŌTI MATUA O AOTEAROA

RECUSAL GUIDELINES

Introduction

Section 171 of the Senior Courts Act 2016 requires the Chief High Court Judge, in consultation with the Chief Justice, to develop and publish recusal guidelines for the High Court. These recusal guidelines are issued after consultation with the Chief Justice.

1. General principles

1.1 A judge has an obligation to sit on any case allocated to him or her unless grounds for recusal exist.

1.2 A judge should recuse him or herself if, in the circumstances, a fair-minded, fully informed observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

1.3 The standard for recusal is one of "real and not remote possibility", rather than probability.

1.4 The test is a two-stage one. The judge must consider

1.4.1 First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and

1.4.2 Second, whether there is a "logical and sufficient connection" between those circumstances and that apprehension.[1]

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[1] See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35; *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122,

1.5 The question of recusal is for the judge hearing the case. Some of the matters the judge should consider are:

1.5.1 A judge should apply the above principles firmly and fairly and not accede too readily to suggestions of bias.

1.5.2 A judge should be mindful of the burden that passes to other judges if the judge recuses him or herself unnecessarily.

1.5.3 A judge is not required to recuse him or herself merely because the issues involved in a case are in some indirect way related to the judge's personal experience or that the judge has previously dealt with the case.

1.5.4 The making of a complaint to the Judicial Conduct Commissioner against a judge does not of itself serve to disqualify the judge from hearing cases involving the complainant.[2]

1.5.5 If, after considering all relevant circumstances, there is doubt about whether there may properly be an appearance of bias, it may be prudent for the judge to decline to sit in that case.

1.6 Conflicts of interest can arise in a number of different situations. A judge should be alert to any appearance of bias arising out of connections with litigants, their legal advisors or witnesses.

1.7 The apprehension of bias is case dependent. The fact that a particular relationship falls outside the examples in these guidelines does not automatically mean that there cannot be a reasonable apprehension of bias in the particular circumstances of the case at hand.

2. Recusal where relationship exists

2.1 The existence of a relationship with a party, lawyer or witness will not in itself create a reasonable apprehension of bias. There must be some logical connection between the relationship and its capacity to influence the judge to deviate from the course of deciding a case on its merits alone.

2.2 A judge should recuse himself or herself where a party, lawyer or witness of disputed facts is a close relative or domestic partner of the judge.

[2010] 1 NZLR 76; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337; and *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 135 ALR 753. See also: Grant Hammond, *Judicial Recusal Principles, Process and Problems* (Hart Publishing, Oxford and Portland Oregon, 2009).

2 See *Slavich v Attorney-General* [2013] NZSC 130 at [6].

2.3 Other situations are not so clear cut. Some examples of common relationships that a judge should consider as they may give rise to the apprehension of bias are:

2.3.1 A party or witness of disputed facts is a close friend of the judge;

2.3.2 A witness of disputed facts is someone known to the judge or someone about whom he or she has formed a view, such as a former client; or

2.3.3. A party, lawyer or witness of disputed facts is a business associate of the judge. Much will depend on the nature and extent of the association. For example, if the judge is directly or indirectly financially dependent on or indebted or otherwise beholden to a party, lawyer, or witness, the judge should recuse himself or herself unless that dependence or indebtedness is so minimal as to be immaterial.

2.4 The fact a judge has a friendship or past professional association with lawyers engaged in the case, will not generally be sufficient to require recusal. The test as always is whether a fair minded fully informed observer would reasonably apprehend the judge might not be impartial in the circumstances of the case.

3. Recusal arising from legal practice

3.1 A judge should recuse himself or herself if he or she served as a legal advisor in respect of the matter in issue when in practice.

3.2 If the matter in issue was dealt with by the firm at a time when the judge was a member of the firm, the judge may need to consider recusal even if the judge had no personal involvement in providing advice about it if the Judge obtained relevant knowledge about the matter in issue or had formed a view of the parties.

4. Recusal where economic interest

4.1 A judge should recuse him or herself if he or she, or a close relative or member of the judge's household, directly or indirectly has an economic interest in the outcome of the proceedings. Such conflicts may arise out of current commercial or business activities, financial investments (including shareholding in public or private companies) or membership or involvement with educational, charitable or other community organisations which may be interested in the litigation.

4.2 An economic interest may also arise in another situation. That is where the case is to decide a point of law which may affect a judge in his or her personal capacity beyond that of the public generally. In deciding whether to recuse him or herself, a judge should have regard to the point of law, to the nature and extent of his or her interest, and the effect of the decision on others with whom the judge has a relationship, actual or foreseeable.

4.3 Shareholdings in litigant companies or companies associated with litigants should be disclosed even where the shareholding is small. They should lead to recusal if the value of the shareholding would be affected by the outcome of the litigation.

5. Recusal where opinions earlier expressed

5.1 A judge should consider recusing him or herself if the case concerns a matter upon which the judge has made public statements of firm opinion on the issue before the court.

5.2 An expression of opinion in an earlier case or in an earlier stage of a proceeding is not of itself a ground for recusal.

6. Disclosure of conflict of interest: principles

6.1 Adequate disclosure protects the integrity of the judicial process and is also a defence against later challenges to the decision.

6.2 Disclosure does not constitute an acknowledgement that the circumstances give rise to a reasonable apprehension of bias.

6.3 Disclosure of any matter which might give rise to objection should be undertaken even if the judge has formed the view that there is no basis for recusal. There may be circumstances not known to the judge which may be raised by the parties consequentially upon such disclosure.

7. Disclosure of conflict of interest: practice

7.1 Disclosure should be made as early as possible before the hearing.

7.2 When making disclosure, the judge should issue a minute through the Registrar to counsel for all parties.

7.3 The judge should ensure that the minute contains sufficient information, without unnecessary detail, to enable the parties to decide whether to make a recusal application. It is undesirable for parties to be placed in the position of having to seek further information from the judge.

7.4 On occasion advance disclosure often may not be possible in light of listing arrangements. In this situation, disclosure on the day of the hearing may be unavoidable. If this occurs:

7.4.1 Discussion between the judge and the parties about whether to proceed should normally be in open court, unless the case itself is to be heard in chambers.

7.4.2 The parties should be given an opportunity to make submissions on recusal after full disclosure of the circumstances giving rise to the question of recusal.

7.4.3 The judge should be particularly mindful of the difficult position that the parties and their advisors are placed in by disclosure on the day of the hearing. Late disclosure puts the parties in a situation where it might appear to them that consent is sought even although a ground of recusal actually exists.

7.5 The consent of the parties to a judge sitting is important but not determinative, as the subjective perceptions of the parties are not relevant to whether there is a reasonable apprehension of bias.

7.5.1 Even where parties consent, the judge should nonetheless recuse himself or herself where he or she is satisfied recusal is required.

7.5.2 In other cases, where the judge has disclosed a matter which might give rise to objection and has heard and considered submissions, he or she may form the view that the hearing may proceed notwithstanding the lack of consent.

7.6 In circumstances of urgency, where the judge cannot be replaced for practical reasons, he or she may need to hear the case, notwithstanding that there may exist arguable grounds in favour of recusal. Consent will be a particularly relevant consideration in this situation.

Hon Justice G J Venning
Chief High Court Judge – Te Kaiwhakawā Matua

12 June 2017