IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2007
[2009] NZSC 72

BETWEEN	SAXMERE COMPANY LIMITED First Appellant
AND	THE ESCORIAL COMPANY LIMITED Second Appellant
AND	RICHARD KING Third Appellant
AND	RUSSELL STEWART EMMERSON AND FOREST RANGE LIMITED Fourth Appellants
AND	WOOL BOARD DISESTABLISHMENT COMPANY LIMITED Respondent

Hearing: 3 March 2009

Court: Blanchard, Tipping, McGrath, Gault and Anderson JJ

Counsel: C C M Owen, S Grey and S Goodall for Appellants
J S Kós QC, J L Bates and J L Verbiesen for Respondent
D B Collins QC, K Muller and C Brown for Attorney-General as Intervener

Judgment: 3 July 2009

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay costs of $15,000 to the respondent together with its reasonable disbursements as fixed by the Registrar.

REASONS

BLANCHARD J

Introduction

[1] After the Court of Appeal delivered a decision which was adverse to Saxmere Co Ltd and the other appellants in this Court (who can conveniently be together called "the Saxmere interests" although they are in fact separate entities or persons), and indeed after this Court had dismissed an application for leave to appeal against that decision, the Saxmere interests raised a separate and new argument. They alleged that the Hon Justice Wilson, one of the panel of three Court of Appeal Judges, should not have sat on the appeal because of an appearance of bias on his part arising from his relationship with Mr Alan Galbraith QC, who was one of the counsel for the opposing party in the case, Wool Board Disestablishment Co Ltd (the Wool Board). This Court then exercised the inherent jurisdiction any senior court, whether established by statute or not, must have to reopen an appeal or a proposed appeal where there may have been an unfair process in order to avoid a possible injustice[1] and granted leave to appeal on that ground.

[2] It should be emphasised at once that this is not a case in which it is suggested that the Judge had any apparent bias in favour of the Wool Board or against any of the Saxmere interests because of a personal financial interest or an association with any of the parties or any witness or deponent. Nor was there even the remotest connection between the Judge and the subject matter of the litigation. Moreover, it is not suggested that the Judge was actually motivated by any bias. Instead, the

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1 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at p 132, *Taylor v Lawrence* [2003] QB 528 at pp 544 – 547 (CA), *Payne v Payne* (2005) 17 PRNZ 518 at para [13] (CA) and *R v Bain* [2009] UKPC 4 at para [6].

allegation is that, because of his connection with counsel for the Wool Board, his judicial independence may have been affected by an unconscious bias in favour of Mr Galbraith and, through him, of counsel's client. Mr Galbraith and the Judge are close friends and share an association in a horse stud and some broodmare partnerships. The Saxmere interests did not become aware of the full extent of that association until after their first application to this Court, on other grounds, had been dismissed.

How issues of bias are tested

[3] There was no disagreement before us concerning the test for apparent bias. After some semantic differences, the test in the United Kingdom[2] and the test in Australia[3] have become essentially the same. In *Muir v Commissioner of Inland Revenue*,[4] the Court of Appeal brought New Zealand law into line.[5] In the Australian case of *Ebner v Official Trustee in Bankruptcy*[6] the leading judgment was given by Gleeson CJ and McHugh, Gummow and Hayne JJ. They stated the governing principle that, subject to qualifications relating to waiver or necessity, a Judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". As that judgment proceeds to observe, that principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal (in the present case, the Court of Appeal) be independent and impartial.[7] Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.

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2 *Porter v Magill* [2002] 2 AC 357.

3 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

4 [2007] 3 NZLR 495 (CA).

5 The distinction between the previous position in New Zealand based on *R v Gough* [1993] AC 646 and the position eventually reached in the United Kingdom and Australia had been said by the Privy Council to be a fine one: *Man O'War Station Ltd v Auckland City Council (Judgment No 1)* [2002] 3 NZLR 577 at para [10] (PC). Earlier, in *Porter v Magill*, the House of Lords said it was making "a modest adjustment" rather than changing the law: at para [103].

6 (2000) 205 CLR 337.

7 At para [6].

[4] It was pointed out in *Ebner* that the question is one of possibility ("real and not remote"), not probability.[8] The High Court of Australia also warned against any attempt to predict or inquire into the actual thought processes of the judge. Two steps are required:[9]

(a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and

(b) Secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

[5] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision.[10] He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. Lord Hope of Craighead commented in *Helow v Secretary of State for the Home Department* that:[11]

> before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[6] The elaboration of the features of the objective observer is, as Kirby J remarked in *Smits v Roach*,[12] a reminder to judges, the parties and the community

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8 At para [7].
9 At para [8].
10 *Johnson v Johnson* (2000) 201 CLR 488 at para [33] and *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031 at para [2] (HL).
11 [2009] 2 All ER 1031 at para [3].
12 (2006) 228 ALR 262 (HCA).

reading their reasons that the standard that is applied is not simply the reaction of the judges to a particular complaint:[13]

> It is, as far as it can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters. As the cases show, in such decisions different judges can reflect different assessments and reach different conclusions. The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case.

The courts must be careful not to subvert the hypothesis by ascribing too much legal knowledge to the lay observer. To do so might mean that justice is not both done and seen to be done by a notional representative of the public.[14] On the other hand, if the court does not impute to the observer some knowledge about how barristers and judges commonly interact it may arrive at a hypothetical opinion of a hypothetical observer which does not reflect reality.

[7] There therefore need to be added to the facts about the case known to the observer, which I will shortly describe, some basic knowledge of how counsel and judges are expected to act and interact. That information is conveniently set out in *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd*:[15]

> (a) when barristers act on a client's behalf they do so in a professional capacity as their client's legal advocate selected to act in the case for that purpose. Any barrister so selected could have been briefed to fulfil the same task for the opposite side;
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> (b) in accepting a brief to act for a client in a particular commercial case, the barrister does not become part of or identified with the client and has no direct or indirect financial interest in the outcome of the case;
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> (c) the barrister acts as such as a member of an independent bar. The barrister is instructed by a solicitor or a firm of solicitors to present the client's case and in doing so is bound by a professional code of ethics ensuring that the barrister's conduct is in accordance with his or her professional standards;

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13 At para [97].

14 In *Johnson v Johnson* (2000) 201 CLR 488 at para [49], Kirby J commented that it would be a mistake for a court simply to impute all that was eventually known to the court to an imaginary reasonable person because to do so would be only to hold up a mirror to itself.

15 (1996) 135 ALR 753 at p 767 (Fed CA).

(d) it is common place for barristers who are close associates, or friends and who may even be from the same set of chambers, to fight on opposite sides of a case without compromising their professional duties to act in the interests of their clients;

(e) as judges are usually appointed from the senior ranks of the profession, particularly the bar, it is likely that they will be well acquainted, and have formed close associations, with senior counsel appearing before them. It is also likely that they will have personal and professional associations with many of the counsel appearing before them.

Those associations between judges and the profession have been said by Lord Woolf CJ, speaking for a Bench of five in the Court of Appeal of England and Wales, to promote an atmosphere which is totally inimical to the existence of bias.[16]

[8] The observer must also be taken to understand three matters relating to the conduct of judges. The first is that a judge is expected to be independent in decision-making and has taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".[17] Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated. Making this point in *Muir*,[18] the Court of Appeal referred to the following passage from the judgment of Mason J in *Re JRL; ex p CJL*:[19]

> [I]t 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.

Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel. As Mr Kós QC said in his argument for the respondent, counsel are not judged. They are, rather, a trusted element of the judicial system.

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16 *Taylor v Lawrence* [2003] QB 528 at para [63].
17 Section 18 Oaths and Declarations Act 1957.
18 At para [35].
19 (1986) 161 CLR 342 at p 352.

[9] It is important to bear in mind also, as Merkel J pointed out in *Aussie Airlines*,[20] that the issue is not whether it would be better that another judge should have heard the case, but whether the judge who sat may not have brought an impartial and unprejudiced mind to the resolution of the questions for decision. Nor is it simply a matter of whether a judge has conducted himself in accordance with guidelines for judicial conduct. A failure to do so, though it may be open to criticism, may well have no bearing on a question of apparent bias.

[10] Finally, and perhaps most obviously, the matter is not to be tested by reference to the perhaps individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all. Nor is it to be tested by reference to any statements by the judge as to what did or did not have an influence. The Court is not making a judgment on whether it is possible or likely that the particular judge was in fact affected by disqualifying bias[21] and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously.

Facts known to objective observer in this case

[11] The case between the Saxmere interests and the Wool Board concerned the Board's refusal on several occasions to provide funding for Saxmere and some Merino wool marketing organisations. In the High Court[22] it was found that the Board acted in breach of its statutory duty and also negligently, rendering it liable to pay damages. However, the Court concluded that the Board had not acted unlawfully in making another such decision on a different occasion.

[12] The Wool Board appealed. Mr Galbraith, who had not appeared in the High Court, led for the Board with Mr Dobson QC, who in fact presented most of the oral

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20 At p 767.

21 *Webb v The Queen* (1994) 181 CLR 41 at p 71.

22 *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* (unreported, High Court, Wellington, CIV 2003-485-2724, 6 December 2005, Miller J).

argument for the Board. The Saxmere interests cross-appealed. Mr Francis Cooke QC led for them.

[13] The Court of Appeal,[23] consisting of William Young P, Glazebrook and Wilson JJ, unanimously concluded that there was neither any breach of statutory duty nor any negligence, for reasons given by the President. The Court allowed the Board's appeal and dismissed the Saxmere interests' cross-appeal.

[14] In this Court, affidavit evidence was filed concerning Wilson J's relationship with Mr Galbraith and an oral disclosure made by him to the Saxmere interests, through Mr Cooke, before the Court of Appeal hearing. Wilson J provided the Court with a written statement replying to the affidavits. The procedure followed by this Court was that adopted in *Man O'War Station Ltd v Auckland City Council*.[24] Neither party sought leave to cross-examine.

[15] Wilson J was a Queen's Counsel until being appointed a Judge of the Court of Appeal on 1 February 2008. Mr Galbraith has been a Queen's Counsel for many years.

[16] The affidavits and the Judge's statement reveal that:

(a) Mr Galbraith and the Judge are close personal friends of long-standing. They share an interest in thoroughbred horse breeding and racing.

(b) In 1994 they became involved in the establishment of Rich Hill Stud in the Waikato along with Mr and Mrs John Thompson and Mr and Mrs Colin Thompson.

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23 *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2007] NZCA 345.
24 [2001] 1 NZLR 552 (CA).

(c) Mr Galbraith has a 50 per cent shareholding and is a director of two companies, Rich Hill Ltd and Rich Hill Thoroughbreds Ltd (Thoroughbreds). Wilson J is also a 50 per cent shareholder and a director of the former but has no shareholding or board position in Thoroughbreds.

(d) Rich Hill Ltd owns, in two titles, about 41 per cent of the land[25] on which Thoroughbreds carries on a substantial business of agisting, breeding and selling horses.

(e) Payments for agistment of horses at Rich Hill Stud are made by their owners to Thoroughbreds. A part of these agistment charges is paid by Thoroughbreds to Rich Hill Ltd in the nature of a rental for the use of its land as part of the stud.

(f) Rich Hill Ltd breeds one or two horses a year.

(g) Wilson J is also a member of three partnerships, each of which owns one broodmare and breeds from that mare. The partners include Mr Galbraith.

[17] Some days prior to the Court of Appeal hearing, Wilson J telephoned Mr Cooke and gave him certain information. Exactly what was said is not entirely clear. There is no doubt that Mr Cooke was informed that Wilson J and Mr Galbraith were close personal friends, which Mr Cooke already knew. Wilson J believes that he also told Mr Cooke that they shared "ownership of a horse stud". Mr Cooke's recollection is that he was told only of shared "horse racing interests" or perhaps "bloodstock interests". He understood these to be ownership interests.

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[25] There are three titles: (a) 38 hectares approximately in the name of Rich Hill Ltd; (b) 48 hectares approximately in the names of Thoroughbreds (4/9ths share), Mr and Mrs Colin Thompson (2/9ths share) and Rich Hill Ltd (1/3rd share); and (c) 42.5 hectares approximately in the names of Mr Galbraith (1/3rd share) and the Thompson interests (2/3rd share). A sub-division and amalgamation is apparently planned but it does not appear that this will significantly alter the overall position of Rich Hill Ltd's land interests.

[18] For reasons which will appear, there is no need to resolve these differences but it should be noted that some time later the Saxmere interests' solicitor, Ms Grey, to whom Mr Cooke passed on the advice he received, described the advice as being that the Judge and Mr Galbraith "had business interests together". So it seems that the commercial nature of the horse interests must have been made apparent to the appellants before the hearing, although not their extent.

[19] In any event, Ms Grey took instructions from Mr Radford, the person who was really driving the case for the Saxmere interests, and subsequently Mr Cooke communicated with the Registrar of the Court of Appeal saying that there was no difficulty with Wilson J sitting on the appeal.

Discussion

[20] I turn to the application of the two steps referred to in *Ebner* and set out in para [4] above. The appellants accept that the friendship between Wilson J and Mr Galbraith is not in itself a matter of concern. They contend that it is the combination of that friendship with the existence of an identified business relationship between the Judge and Mr Galbraith which might have led Wilson J unconsciously to decide the case other than on its factual and legal merits. But, as *Ebner* makes plain, it is not enough merely to identify some relationship. The party alleging apparent bias must also articulate a logical connection between the identified relationship and the "feared deviation" from the course of deciding the appeal on its merits.

[21] In order to determine whether there was such a logical connection it is helpful to ask how Wilson J could have been unconsciously influenced by the possible effect of the outcome of the appeal on his relationship with Mr Galbraith. To answer this question one needs to inquire what that effect could possibly be. It is at this point, at the High Court of Australia's second step, that the appellants' argument breaks down.

[22] How can it sensibly be suspected, by the informed objective observer, that the relationship might have been damaged if the Wool Board's appeal were lost? It is to

be borne in mind, in answering this question, that prior to the Judge's appointment to the Bench he and Mr Galbraith had been members of a small pool of Queen's Counsel in New Zealand who would have been briefed on opposite sides of many cases, some of great significance to their respective clients. (Members of this Bench have personal knowledge that this perception is correct, having presided over numerous of these encounters.)

[23] It is against such a background that Mr Galbraith would have come before Wilson J in this case. Although they are close friends of long-standing, the history of their roles as opposing counsel would lead an objective observer to conclude that Mr Galbraith would not expect any favour, which would in any event have been contrary to the Judge's oath. Nor would there be a perception that the Judge could believe that there might be any such expectation. It is realistically accepted by the appellants that the existence of a friendship such as the two men enjoyed, common among counsel and Judges both in New Zealand and in other jurisdictions, is not alone any cause for recusal. Case law confirms that such relationships between counsel and between counsel and the members of the Bench, engendering mutual trust and confidence, are positively regarded.[26]

[24] But in this case there was more than their close personal friendship. Did the existence also of the Rich Hill business relationship give legitimate cause for concern? How might that dimension of the total relationship be affected by an adverse result for the Wool Board? The observer might perhaps wonder whether Mr Galbraith's fee in relation to the appeal was conditional upon a successful outcome. But that has never been suggested on behalf of the appellants and would be most unlikely in litigation of this character and for a client of this kind. The observer would quickly reject that view. Then the observer might ponder whether a loss in the case might affect Mr Galbraith's standing at the bar and with present and prospective clients and might diminish his future returns from his practice. Again, however, the observer would surely conclude after but a moment's thought that counsel, even very senior counsel, frequently are seen to lose some of their cases and

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[26] *Taylor v Lawrence* [2003] QB 528 at para [61] (CA).

could never be expected by prospective clients to win on every occasion. The loss in a particular case is hardly likely to have any adverse financial impact on a senior counsel who is far from making his early way in the profession. The conclusion which would be drawn, therefore, is that a loss for the Wool Board would have no financial consequences for Mr Galbraith or, indirectly, for Rich Hill Stud through his ability to support its financial requirements. And, equally obviously, a win for the Wool Board will have had no immediate or future financial benefit for him or for the stud.

[25] The objective observer might then turn attention to whether the Judge might in some way be beholden to Mr Galbraith because of the business dimension of their relationship and might unconsciously favour the side represented by Mr Galbraith because of some fear of disadvantage to himself (the Judge) if Mr Galbraith's client were to lose the case. Such a situation might theoretically exist if, for example, the Judge had been lent money by counsel or was dependent on counsel in order to meet some liability. However, the materials placed before the Court reveal nothing of this kind. There is nothing to indicate any indebtedness by the Judge to Mr Galbraith, nor any indication of any inability of their joint company, Rich Hill Ltd, to meet its obligations. It is in fact, save for a breeding operation confined to one or two horses per year, a passive land holding vehicle and does not appear to have any significant indebtedness. The three broodmare partnerships would appear to any observer to be small in scale and quite unremarkable.

[26] The one aspect of Rich Hill Ltd which might at first sight give cause for concern is the fact that the level of the property company's "rental" income depends upon the agistment charges earned by Thoroughbreds, which evidently carries on business in quite a large way. But, in the absence of any financial impact on Mr Galbraith in the event the case were lost by the Wool Board, and taking into account the fact that Mr Galbraith also owns 50 per cent of the property company and would wish to support it for that reason, this could not reasonably be said to be something which might possibly cause Wilson J unconsciously to have decided the case other than on its merits.

[27] Much was made in argument by Ms Owen, for the appellants, about the existence of fiduciary duties between the Judge and Mr Galbraith in relation to the affairs of the stud. A "team spirit" was said to exist in that connection. Counsel also referred to the scale of the business operations of the stud. Because of the business, it was submitted, there would be additional levels of communication between the Judge and Mr Galbraith and additional reliance on each other's judgment and the Judge may have been subconsciously influenced by a fear of straining that business relationship. It can be accepted that the two men did owe each other obligations of loyalty, that their relationship was one of trust and confidence, in relation to decisions pertaining to the stud. But such obligations related only to the affairs of Rich Hill Ltd and the broodmare partnerships. They were not general obligations. And, in the absence of any financial impact, the outcome of the appeal had no logical connection with the affairs of the stud, particularly as Wilson J was not a director or shareholder of the company which conducted the breeding operations. There was therefore, in relation to something Mr Galbraith did as a barrister, no added dimension of trust and confidence between himself and Wilson J beyond that which always exists between a judge and someone known to the judge, even a close friend, who comes before the judge as a barrister. The business dimension, which was more limited than Ms Owen portrayed in referring to a "team", added nothing to the trust and confidence the two men already had in each other as professionals and close friends, which the appellants accepted did not give rise to a reasonable apprehension of bias. There is just no sound basis for the argument that in some unarticulated way the fiduciary duties, limited to the affairs of Rich Hill Ltd and the horse partnerships, translated into a more general influence on the Judge which the hypothetical observer could reasonably think gave rise to an apprehension of bias, especially when viewed against the background of their professional relationship as senior counsel before Wilson J's appointment as a Judge. There was also nothing in the particular case which could support the suggestion that a loss for counsel might have disturbed that trust and confidence and so disturbed the business relationship. It appears to have been, for Mr Galbraith, a routine appeal.

[28] Ms Owen also drew attention to a website on which Wilson J appears to be joining in the promotion of the stud and to be using his judicial title when doing so. Assuming that is a fair interpretation of the website, and even accepting that such

conduct appears to be inappropriate for a judge, it provides no basis at all for a conclusion that Wilson J was or might be beholden to Mr Galbraith or that Mr Galbraith had some capacity to exercise power in relation to their association.

[29] Counsel also referred to the *Guide to Judicial Conduct* published by the Council of Chief Justices of Australia[27] which states:[28]

> A judge should not engage in any financial or business dealing that might reasonably be perceived to exploit the judge's judicial position, or that will involve the judge in frequent transactions or business relationships with person likely to come before the judge in court.
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> Some small-scale non-judicial activities that might be perceived as commercial are quite common and not objectionable, particularly if they are primarily recreational. Examples (and there are many others) are:
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> - Hobby farms and other agricultural enterprises;
> - Larger managed enterprises that do not require "hands on" responsibility;
> - Directorship of small family companies.

But, while the reference to "persons likely to come before the judge in court" may arguably extend to counsel, it does not follow that a particular business relationship with counsel which goes beyond the guideline will necessarily give rise to a reasonable apprehension of bias. The advice in the guideline seems, in any event, more concerned with connections with prospective litigants and with limiting activities which may distract a judge from his or her sitting obligations.

[30] Upon analysis, then, there is no cogent or rational link between the identified friendship plus business association between the two men and its capacity to influence a decision in a case in which Mr Galbraith was appearing before Wilson J. An informed objective observer would conclude that there was no possibility, "real and not remote," that Wilson J might be subject to the unconscious influence of bias so that he would not determine the appeal on its merits.

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[27] (2nd ed, 2007). The Guide has not been formally adopted in New Zealand but it is an appropriate reference point as the Chief Justice of New Zealand is a member of the Council.

[28] Paragraph [6.2].

[31] It was suggested for the appellants that Wilson J's disclosure to Mr Cooke particularly because it was not a full disclosure, gave some support for the view that bias could reasonably be apprehended. The Judge himself must have considered this was so, it was said, for otherwise he would not have said anything to counsel for the appellants. This argument has no force. It seeks to make something of the Judge's consciousness that an observer might query the existence of the business relationship before having enough information to enable the observer properly to analyse its potential for influencing the Judge's approach to the case. It is frequently the position that a judge will think it appropriate to alert counsel and their clients to some circumstance which might at first blush, without sufficient information, attract attention. The judge does so in order that the parties to the case can consider the situation and either indicate a lack of concern or, if thought fit, make a recusal application, upon which full consideration can be given to the validity of the objection to the judge's sitting in the particular case.

[32] Notwithstanding what is said in *Taylor v Lawrence*[29] about English practice, such disclosure is to be encouraged in a small jurisdiction like New Zealand where the limited number of available replacement judges reinforces the general obligation for a judge to sit on all cases to which he or she has been assigned. It is not fairly to be taken as an acknowledgement that the circumstances give rise to a reasonable apprehension of bias. It merely indicates the need for the matter to be considered, on an informed basis, by counsel and client. The practice of giving the parties prior advice about a connection with a party, a witness or a counsel is actually, as Kirby P remarked in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*,[30] a protection of the manifest integrity of the judicial process and also a defence against later applications for disqualification.

[33] That of course assumes the prior disclosure is properly and adequately made. I should not be taken to be approving the manner in which Wilson J made his disclosure in this case. He himself no doubt would be the first to agree that it was unfortunate that, early in his judicial life, he did not follow the proper course of making the disclosure in writing and through the Registrar to counsel for both

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29 [2003] QB 528 at para [64] (CA).
30 (1988) 12 NSWLR 358 at p 369 (CA).

parties. His disclosure should also have been fuller. He should have disclosed that he owned land with Mr Galbraith on which the Thoroughbreds business was operating, although he would also have pointed out that he had no financial interest in that business save through a rental taking the form of a share of agistment charges. Without at least this amount of information a picture of the situation sufficient for the appellants properly to consider did not emerge. The Judge should also have disclosed some detail about his broodmare and other limited breeding interests shared with Mr Galbraith, although if that had been the only connection with counsel other than their friendship it would seem unlikely that any objection could have been anticipated, let alone warranted.

[34] In this connection I reject the argument made for the respondent that there was an obligation on the appellants, if in doubt, to seek more information from the Judge in response to his disclosure. Quite the reverse; it is for a judge who makes a disclosure to ensure that the parties have enough information, shorn of unnecessary detail, to make up their minds about whether to make a recusal application. They and their counsel should not be placed in the embarrassing position of having to seek further information from the judge.

Conclusion

[35] I conclude that a fair-minded observer would not have had a reasonable apprehension of bias arising from Wilson J's personal and business relationship with Mr Galbraith. The appeal must therefore fail. It is strictly unnecessary to say anything concerning possible waiver by the appellants but it will be clear that, if any basis for disqualification had existed, the disclosure actually made would not have been adequate, and so the appellants' indication to the Registrar would not have been a fully informed consent to the Judge sitting. Accordingly there would not have been a waiver.

[36] I would dismiss the appeal and order the appellants to pay costs of $15,000 to the respondent, together with its reasonable disbursements as fixed by the Registrar.

TIPPING J

[37] The crucial question in this appeal is whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased in favour of the party represented by Mr Galbraith QC. I agree with Blanchard and McGrath JJ that the answer to this question must be in the negative. Before turning to the facts of the case I make the following points about the test for what is conventionally called apparent bias.

[38] The first concerns the attributes of the observer. That person is brought into the inquiry to ensure that the court, which makes the ultimate assessment, does so from the right perspective. Justice must appear to have been done and the question is not how the matter appears to a professional judge, but how it would appear to an ordinary sensible member of the public with appropriate knowledge of all the relevant circumstances including the general workings of the legal system. The rationale for the rule against apparent bias is to ensure that public confidence in the legal system and the impartiality of judges is maintained. It is therefore how the matter would appear to a member of the public with the necessary knowledge and attributes that is important.

[39] The concept of the observer being properly informed is preferable to that of the observer being fully informed. There may, for example, be circumstances in which it would be inappropriate to regard the observer as being informed about certain matters for the understanding of which a measure of legal expertise is necessary. On the other hand the observer must be treated as having an understanding of the relationships which conventionally exist between judges and members of the legal profession and of the fact that they enhance the administration of justice and generally encourage proper conduct on both sides.

[40] In the end the key aspect of the test is the word “reasonably” in the phrase “could reasonably have thought”. This is the control by means of which justified allegations of apparent bias are distinguished from those which are not justified.

[41] The reference in the test to the judge being unconsciously biased reflects the difference between apparent bias and actual bias. That difference is captured well in the expression "more apparent than real". If the judge or other decision maker is said to have been consciously biased, the case, if established, will amount to one of actual bias. Hence, in cases like the present, when, appropriately, there is no allegation of actual bias, the proposition must be that the bias which is said to be apparent was of an unconscious kind.

[42] The law's approach to apparent bias immediately invites the party making the allegation to answer the question why the observer could reasonably think the judge might have been unconsciously biased. That question must be answered in an analytical way rather than as a matter of general impression or presumption. Whatever the grounds for the allegation of apparent bias may be the reconciliation of a judge's duty to sit with the need sometimes to recuse depends on a careful and logical factual examination rather than one relying on instinctive reactions to facts superficially addressed. For this reason 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.[31]

[43] It goes without saying that the subjective perceptions of the litigant claiming apparent bias are not relevant to the inquiry. As a facet of the necessary analytical approach the observer must be taken as appreciating what was in dispute between the parties. Was it a matter of fact (with or without credibility issues) or a matter of law? The observer appreciates the role of appellate courts, including the differences between first and second levels of appeal.

[44] In this case we are concerned with the relationship between a Judge of the Court of Appeal and one of New Zealand's most senior Queen's Counsel. That relationship comprises a long and close personal friendship with associated shared business interests. None of those interests was in any way affected by the litigation

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[31] See Joseph, *Constitutional & Administrative Law in New Zealand* (3rd ed, 2007), pp 991 – 996; *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA); and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

on which the Judge sat. The words of the Judge's oath provide a useful general framework within which to examine the issue. Why in this case might the Judge have been unconsciously biased on account of fear or favour, affection or ill will? There can be no suggestion of ill will towards the Saxmere interests but can there be any reasonable perception that the Judge had such fear of or affection towards Mr Galbraith that he may have been unconsciously minded to favour Mr Galbraith's client? Another way of asking the same question is to ask whether it could reasonably be thought that the Judge was dependant on Mr Galbraith's continuing friendship and association in the shared business interests to the extent that he may have unconsciously favoured Mr Galbraith's client.

[45] When the Judge was a senior member of the profession, prior to his appointment to the Bench, he and Mr Galbraith were frequent opponents in the courts on behalf of their respective clients. Their friendship and business association has obviously survived that potential challenge. Similarly, the evidence indicates that both Mr Galbraith and the Judge, while he was in practice, appeared in front of each other as arbitrator. Again, their relationship has survived that experience unscathed.

[46] Counsel for Saxmere appropriately accepted that the longstanding friendship between Judge and counsel did not in itself give rise to any bias concerns. It is the addition of the business relationship, as described by Blanchard J, which is said to have been the factor that turns the case into one of apparent bias. There can, however, be no suggestion that the Judge was dependent on or beholden to Mr Galbraith in relation to their shared business interests in anything other than the most general and neutral sense. It is hard to see how the trust and loyalty which existed between close personal friends was somehow made different in kind or extent by the sort of business relationship which existed in this case; certainly not to such a degree that the business aspect turns an otherwise unobjectionable relationship into one which satisfies the test for apparent bias.

[47] I can find no basis for concluding that the nature of the business relationship gave rise to any reasonable apprehension that the Judge's shared business interests

might incline him unconsciously to favour Mr Galbraith's client. There can be no rational suggestion that Mr Galbraith's career and reputation, already well and firmly established, might be materially assisted or enhanced by a win in this particular litigation; nor that his career and reputation might be damaged by a loss. Any suggestion or apprehension that the Judge might have been biased, albeit unconsciously, in favour of Mr Galbraith's client would, I am sure, be viewed as unreasonable by the independent observer when regard is had to the compass of and background to the relationship between the two men. There is simply no rational reason for the observer to think the Judge might have been unconsciously biased.

[48] Before closing, I wish to address one further point. It concerns the circumstances in which a judge or other decision-maker should make disclosure. I do not consider that the making of disclosure carries with it any implication that the very making of the disclosure indicates that the judge's impartiality is compromised. In that respect I disagree with the view expressed by the Court of Appeal for England and Wales in *Taylor v Lawrence*.[32] A matter should be disclosed in any case where it is possible that the observer might reasonably think the judge could be biased as a consequence of it. The judge or the court can then consider the responses of all the parties to the disclosure and assess what course to take on that fully informed basis.

[49] For these various reasons I would answer the crucial question in the negative and dismiss the appeal, with costs as proposed by Blanchard J.

McGRATH J

Introduction

[50] This appeal is brought on the ground that one of the Judges who sat as a member of the Court of Appeal was disqualified by reason of his association with counsel appearing for a party in that Court. The association involved ties of friendship, professional interaction and jointly owned business interests. It is not suggested by the appellants that the Judge was actually biased in favour of the party

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32 [2003] QB 528 at para [64].

represented by counsel. Rather, the contention of Saxmere Company Ltd and other appellants is that the nature of Wilson J's association with Mr Galbraith QC, and Mr Galbraith's interest and involvement as counsel before the Court of Appeal, brought the case within the rule that judges should not sit when the circumstances, viewed objectively, give rise to an apprehension that the judge might not be impartial.

[51] The appellants also contend that an out of Court oral disclosure by the Judge of his association with Mr Galbraith which was made to the appellants' counsel shortly before the Court of Appeal hearing, was not in sufficient detail to give rise to a waiver of his disqualification by the appellants. They raised their objection to the Judge sitting when further information concerning the association came to their knowledge following delivery of judgment.

Circumstances

[52] The first and second appellants, Saxmere Company Ltd and The Escorial Company Ltd are saxon wool marketers. The third and fourth appellants represent growers who supplied or wanted to supply their wool to Saxmere. The respondent is the Wool Board Disestablishment Company Ltd, formerly known as the New Zealand Wool Board. The case in the Court of Appeal concerned the respondent's refusal on several occasions to provide funding for Saxmere. The High Court found that the respondent had acted in breach of its statutory duty to the appellants and was negligent. On appeal, the Court of Appeal reversed these findings. Following an unsuccessful application for leave to appeal to this Court against the Court of Appeal's judgment, the appellants made a fresh application to this Court for leave. They then raised a new ground of appeal alleging the appearance of bias on the part of Wilson J, who was one of the three Judges who was party to the Court of Appeal's judgment. Leave to appeal was given on that ground.

[53] At all relevant times Wilson J was a Judge of the Court of Appeal, having been appointed to that office from the bar at the beginning of 2007. The allegation of an appearance of bias arises from Wilson J's close relationship as a senior barrister in private practice, and his longstanding professional association in that

capacity with Mr Alan Galbraith, also Queen's Counsel, and one of the counsel appearing for the respondent in the case. As well as being friends, Wilson J and Mr Galbraith had a financial association. For 14 years they have had joint financial interests. They own equally the share capital of Rich Hill Limited. That company owns a property which is part of the land on which a substantial horse stud venture is undertaken by another company, Rich Hill Thoroughbreds Ltd. The Judge has no interest in the latter company other than being a client in the breeding and selling of horses. Mr Galbraith is a shareholder. Justice Wilson and Mr Galbraith QC are jointly involved in the breeding, selling and racing of horses as members of three other partnerships. They also breed one or two horses a year together, through Rich Hill Ltd. The monetary value of their business relationships is unknown but substantial.

[54] Shortly before the commencement of the Court of Appeal hearing early in April 2007, Wilson J made an oral disclosure to counsel appearing for the appellants of his association with Mr Galbraith. On the material before us there is some uncertainty of the extent of the disclosure insofar as it related to their common financial interests. The appellants' position is that they did not become aware of the full extent of the relationship between Wilson J and Mr Galbraith until after their first application for leave to appeal to this Court had been dismissed. I will proceed on that basis. The first issue for this Court is whether the relationship between Mr Galbraith and Wilson J is such that Wilson J was disqualified from sitting in the Court of Appeal. If the Judge was disqualified, a second question arises over whether there was a waiver by the appellants, which would require further consideration and resolution of the factual position.

Common law on disqualification for bias

[55] The common law has long recognised that a firm and realistic rule of disqualification from exercise of judicial functions is necessary in cases involving those adjudicating having a conflicting interest. Such a rule is necessary to public confidence in the administration of justice. There has been uncertainty, however, over the appropriate test for determining what circumstances raise sufficient

concerns over impartiality to require disqualification. The question has increasingly come before the courts of Commonwealth jurisdictions over the past 30 years in a variety of contexts. Although there is now common agreement on a test involving an objective assessment of whether there is a reasonable apprehension of bias on the part of the adjudicator in the circumstances, there are underlying complexities in relation to how that test is to be applied. These are not yet finally resolved. The relevant considerations are best understood by considering the differing approaches taken in common law countries, in particular in Australia and England, over this period. This provides a sound basis for setting the principles and how they are to be applied in New Zealand.

[56] The rule for disqualification of judges and those exercising judicial functions, where there is a reasonable apprehension of bias is long established in Australia. A convenient starting point is *R v Watson; ex p Armstrong*,[33] where the High Court of Australia held that where it might reasonably be suspected by a fair-minded person that the judge could not resolve the questions before him with a fair and unprejudiced mind, the judge could not sit, even though a judge was not actually biased against a party before him.

[57] At this time it appeared that this rule for disqualification was being applied in England. The High Court of Australia referred to a judgment of Lord Denning MR in 1969 which said that there had to be:[34]

> circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did.

[58] The following year in England the Court of Appeal had emphasised to similar effect the objective nature of the Court's inquiry, saying:[35]

> If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some members of the tribunal and one of the parties would think that there might well be bias, then there is in his opinion a real likelihood of bias. Of course, someone else with

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33 (1976) 136 CLR 248 at p 264.
34 *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at p 599 (CA).
35 *Hannam v Bradford Corporation* [1970] 1 WLR 937 at p 949 per Cross LJ.

> inside knowledge of the characters of the members in question might say: "Although things don't look very well, in fact there is no real likelihood of bias". That, however, would be beside the point, because the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well think that it might be biased.

[59] In 1993 in *R v Gough*,[36] the House of Lords altered the test. The rule for disqualification was no longer to be based on the perception of the reasonable man objectively deciding there was a likelihood of bias. The question was rather whether, in all the circumstances of the case, in the opinion of the reviewing court, there was a real danger or a real likelihood of bias on the part of the judicial officer concerned. That test was to apply to all cases of apparent bias, whether by judges, jurors or members of tribunals. The reasons for the change in the test and whose perception was to be determinative, were given in the judgment of Lord Goff:[37]

> I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

[60] In *Gough* the House of Lords made it clear they were not formulating a test based purely on superficial impression. They referred to *R v Sussex Justices ex p McCarthy*,[38] the case where Lord Hewart CJ famously said:[39]

> [I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

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36 [1993] AC 646.
37 At p 670.
38 [1924] 1 KB 256.
39 At p 259.

And later:[40]

> … the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

[61] In relation to the passages in *ex p McCarthy*, Lord Woolf, in his judgment in *Gough*, said:[41]

> It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but seen to be done applies. When considering whether there is a real danger of injustice, the court gives effect to the maxim, *but does so by examining all the material available and giving its conclusion on that material*. If the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash the decision should be dismissed.

[62] The House of Lords substitution of a test of "real danger of bias" in *Gough* was considered by the High Court of Australia in *Webb v The Queen*[42] That Court was not persuaded to the House of Lords' view. Mason CJ and McHugh J said that the reasonable apprehension of bias test was to be preferred because a real danger of bias test insufficiently recognised the public importance of the perception of regularity in the administration of justice, which was more likely to be maintained through a test which reflected the reaction of ordinary members of the public to the irregularity.[43] Public perception of the judiciary was not advanced by attributing to fair-minded members of the public a knowledge of law and judicial process that ordinary experience suggested was not the case.[44] Brennan J agreed with them.

[63] Deane J generally agreed on the test. The rationale for it was:[45]

> … that it is of fundamental importance that the parties to litigation and the general public have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice. However,

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40 At p 259.
41 At p 673 (emphasis added).
42 (1994) 181 CLR 41.
43 At pp 50 – 52.
44 At p 52.
45 At p 68 (emphasis added).

> the test is an objective one and the standard to be observed in its application is that of a hypothetical fair-minded and *informed* lay observer.

[64] Deane J recognised that the High Court of Australia was differing from the House of Lords not only concerning the substance of the test for disqualifying bias (a reasonable apprehension rather than a real danger of bias) but also as to whose perception was to be the reference point (a reasonable observer rather than the court itself). In expressing his reasons for adhering to the previous Australian approach he made a further important criticism of the new English development. He said that applying a real danger of bias test, with the appellate court or trial judge making the determination, would go a long way towards substituting for a doctrine of disqualification for *appearance* of bias one of disqualification for *actual* bias. A real danger inquiry, to his mind, would end up being into the possibility of actual bias. By contrast, the test of a reasonable apprehension of bias, as perceived by a fair-minded and informed observer, would not. The real danger test would be likely at times to be unfairly damaging to the reputation of judicial officer concerned and that of the whole judiciary.[46] This would wrongly undermine public confidence in the judge's integrity, and would be contrary to the principal reason for having a doctrine of disqualification in situations of possible bias.

[65] In expressing his conclusion in favour of the fair-minded observer's perception, Deane J emphasised that it was to be assumed that the observer was informed of the relevant circumstances:[47]

> If the test of a reasonable apprehension on the part of a fair-minded observer with knowledge of the material objective facts fell to be applied by reference only to those facts which were apparent at the time, there would be much to be said for the view that the real likelihood or real danger test should be retained to be applied in cases where some of the damaging material facts – whether prior, contemporaneous or subsequent – as ascertained by the appellate court were not known at the time of the proceedings. In my view, however, the material objective facts are not so confined for the purposes of the test. The fair-minded observer is a hypothetical figure. While the question is not settled by any decision of the court, it appears to me that the knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court. The material objective facts include, of course, any published statement, whether prior, contemporaneous or

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[46] At pp 71 – 72.
[47] At pp 73 – 74.

> subsequent, of the person concerned. If, in the particular case, the proper conclusion is that a fair-minded lay observer with a broad knowledge of those facts would not entertain a reasonable apprehension of bias, that is the end of the issue of disqualification by reason of an appearance of bias.

[66] The Australian courts' approach to the rule of disqualification, based on apparent bias has been a settled one for many years during which there has been extensive litigation before federal and state courts over how the rule is to be applied. There are a number of judgments of the High Court of Australia. As well, a number of judgments delivered in other courts, both before and since *Webb* was decided, have applied the apparent bias test in a variety of circumstances.[48] One of these, referred to by Deane J in *Webb*, is *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*,[49] which involved whether the trial judge was disqualified from sitting because, when in practice, he had been "a Caltex barrister". The judgment is helpful on what information is to be attributed to the fair-minded observer whose perspective determines whether the test for apparent bias is met. On appeal the majority, Priestley and Clarke JJA, said that in order for an apprehension of bias by a member of the public to be reasonable, it was necessary that the person understood, in general outline, the way in which barristers carried out their work on instructions of solicitors for clients.[50] As well, all the circumstances of the particular case had to be looked at. Kirby P, in dissent, agreed on the latter point. He said that whether there was an apprehension of bias depended upon "a full understanding of the facts from which it is suggested that such apprehension [of bias] arises".[51] Where such facts involved a family, financial or professional relationship, its duration, intensity and nature were all relevant.

[67] Kirby J has, however, in a number of judgments expressed caution in relation to what contextual information is attributed to the fair-minded observer. In

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48 Other such judgments since *Webb* which provide particular assistance in clarifying the principles are: *IOOF Australia Trustees Ltd v Seas Sapfor Forests Ltd Pty Ltd* (1999) 78 SASR 151 (SC) per Doyle CJ; and *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 135 ALR 753 (Fed CA) per Merkel J.

49 (1988) 12 NSWLR 358 (CA).

50 At pp 379 – 381.

51 At pp 368 – 369.

Australian National Industries Ltd v Spedley Securities Ltd (in liq),[52] he said that the Court should not attribute:[53]

> to the hypothetical reasonable observer a level of sophistication which may be enjoyed by judges and other lawyers (or by specially educated or informed citizens …).

[68] Following the High Court of Australia's decision in *Webb*, the question of which test to apply in cases of possible bias came before the New Zealand Court of Appeal in *Auckland Casino Ltd v Casino Control Authority*.[54] Cooke P delivered the judgment of the Court which concluded that, despite appearances, there was much in common in the approaches to disqualifying bias that had been taken by the House of Lords and the High Court of Australia:[55]

> The approach that has been adopted in this Court in recent years, however, has been to emphasise that there is little if any practical difference between the tests. See *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146, 153; *R v Te Pou* [1992] 1 NZLR 522, 527; *Matua Finance Ltd v Equiticorp Industries Group Ltd* [1993] 3 NZLR 650, 654. References to earlier New Zealand cases will be found in the three cases cited. In some of them the possibility of a genuine distinction has been recognised. But once it is granted that the hypothetical reasonable observer must be informed, so that as indicated by the House of Lords in *Gough* at pp 664 and 673 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 is a dubious authority, the distinction becomes very thin. If a reasonable person knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless he or she would reasonably suspect bias. One must query whether the law should countenance such refinements. In the result we accept the real danger test as satisfactory.

[69] The Court of Appeal saw little point in ascertaining the perspective of a reasonable observer given that it was common ground that it was necessary to attribute knowledge of all material facts to that person. That aspect made the two tests closely similar. This meant that there would be little difference between the view of a reasonable person and the court's own view.

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52 (1992) 26 NSWLR 411 (CA). In *S & M Motors* at p 376 he dissented from the majority which in his opinion had attributed excessive "sophistication and knowledge about the law and its ways which I believe to be quite atypical of the general community".

53 At p 419.

54 [1995] 1 NZLR 142.

55 At p 149.

[70] The Court of Appeal's judgment also said that once it was appreciated that the fair-minded observer was informed of all material facts, *ex p McCarthy* could be distinguished so that the test of apparent bias was not to be merely one of outward appearances.[56] That test became closely similar to the test of there being a real danger of bias in the eyes of the court. Each was to be determined on the probabilities in light of the ascertained relevant circumstances. Hence the Court of Appeal's conclusion that the distinction between the real danger of bias (in the eyes of the court) and the reasonable apprehension of bias (on the part of a fair-minded and informed) member of the public, was "very thin". It was on this basis that the Court concluded the real danger test was satisfactory.

[71] In pointing out that the degree of information attributed to a hypothetical reasonable person can bring his or her perceptions into line with those of the Court, Cooke P was questioning with some justification the argument that the apprehension of bias test is more likely to generate public confidence in the administration of justice. The Court of Appeal did not, however, in *Auckland Casino*, address the important criticism of the "real danger" test that had been advanced by Deane J in *Webb*, being the concern that, despite the Law Lords' assertion that the court was not concerned to investigate whether bias had been established, examining if there was a real danger would lead to an inquiry into possible *actual* bias.

[72] The same concern about the test laid down in *Gough* was raised in England by the Court of Appeal in 2001. In delivering the valuable judgment of the Court in *Re Medicaments and Related Classes of Goods (No 2)*,[57] Lord Phillips MR said:[58]

> A finding that in a particular case there is a real danger that a particular judge was biased inevitably carries with it a slur on the judge in question, albeit that the reviewing court may take pains to emphasise that the bias may have been unconscious.

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56 See the passage in Lord Woolf's judgment in *Gough* cited in para [61] above.
57 [2001] 1 WLR 700.
58 At para [68], citing Deane J in *Webb*.

And later added:[59]

> The problem with the "real danger" test is particularly acute where a judge is invited to recuse himself. In such a situation it is invidious to expect a judge to rule on the danger that he may actually be influenced by partiality. The test of whether an objective onlooker might have a reasonable apprehension of bias is manifestly more satisfactory in such circumstances.

[73] The Court of Appeal in *Re Medicaments* was also required, in light of the enactment of the Human Rights Act 1998 (UK), to consider if the decision in *R v Gough* was "in conflict with Strasbourg jurisprudence".[60] Lord Phillips said that the reasonable apprehension of bias test was plainly that applied by the Strasbourg Court, which was:[61]

> concerned to look at the reality behind a situation that might give to the litigant an appearance of injustice and supports the approach of the English court in reviewing the risk of bias having regard to material circumstances that may not be apparent to those observing the trial. It does not go so far, however, as to formulate a test of real danger that the tribunal under review was actually biased.

And later:

> [85] When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.
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> [86] The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced.

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59 At para [69].
60 At para [35].
61 At para [74].

[74] The following year, in *Porter v Magill*,[62] the House of Lords finally overruled *R v Gough*. The Court of Appeal's judgment in *Re Medicaments* was approved.[63] Lord Hope, whose judgment on the point was approved by the other Judges, said:[64]

> The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

[75] One aspect of the rule in England is that while the standpoint of the individual litigant concerning the possibility of bias is treated as relevant, it is not decisive; whether that person's fear can objectively be justified determines the issue. In England it is also clear that a broad knowledge of the relevant facts of the case by the observer is to be assumed. This includes knowledge of the specialist adversarial context of actual litigation, including the role that judges and barristers undertake in litigation. The English Court of Appeal has said:[65]

> The fact that the observer has to be "fair-minded and informed" is important. The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction. Those legal traditions and that culture have played an important role in ensuring the high standards of integrity on the part of both the judiciary and the profession which happily still exist in this jurisdiction. Our experience over centuries is that this integrity is enhanced, not damaged, by the close relations that exist between the judiciary and the legal profession.

But awareness of traditions and culture is subject to the rider that the fair-minded and informed observer "may not be wholly uncritical of this culture".[66]

[76] Although in England the test is expressed as one of real possibility of bias, whereas in Australia it is a reasonable apprehension of bias, in reality there is no significant difference between them. What is important is that the tests in those two jurisdictions have come together on a basis that emphasises the need for the fair-minded observer to be fully informed of all relevant circumstances.

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62 [2002] 2 AC 357.

63 At para [103]. The House of Lords dropped the reference in the Court of Appeal's test to "a real danger".

64 At para [103].

65 *Taylor v Lawrence* [2003] QB 528 at para [61] per Lord Woolf CJ.

66 *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at para [22] (HL) per Lord Steyn.

[77] At this point it is convenient to refer to the approach to apparent bias that has been taken in the Supreme Court of Canada. In 1978, in setting out a test for disqualification based on apprehension of bias, de Grandpre J said:[67]

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the judge], whether consciously or unconsciously, would not decide fairly."
>
> I can see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[78] This test was endorsed by the Supreme Court in *RDS v R*.[68] The Court added that a real likelihood or probability of bias must be demonstrated and that mere suspicion was not enough. L'Heureux-Dube and McLachlin JJ considered the threshold for a finding of bias is high, starting from a presumption of impartiality which carries "considerable weight".[69] Presence or absence of bias is evaluated by reference to a reasonable, informed, practical and realistic person who considers the matter in some detail. That person is not being "sensitive or scrupulous" but is a right-minded person familiar with the circumstances of the case.[70] The reasonable person approaches the question with a "complex and contextualized understanding of the issues in the case".[71]

[79] Cory and Iacobucci JJ said that the reasonable person must be an informed person with knowledge of all the relevant circumstances including the background of the tradition of integrity and impartiality in the judiciary.[72] The oath taken by judges

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67 *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 at pp 394 – 395. Justice de Grandpre's test, expressed in a dissenting judgment, was adopted by a majority of the Court.

68 [1997] 3 SCR 484.

69 At para [32].

70 At para [36].

71 At para [48].

72 At para [111].

in which they swear to uphold impartiality is also an important part of the background.[73]

[80] The High Court of Australia revisited apparent bias in 2001 in *Ebner v Official Trustee in Bankruptcy*.[74] Its judgment in *Ebner* is the current leading statement in Australia of the principles to be applied and reflects the substantial experience in Australia of litigation of this kind. The circumstances said to give rise to apparent bias in *Ebner* involved trial Judges in two separate cases having a financial interest in the form of shareholdings in a litigant. The majority of the Court confirmed the principle in *Webb* that:[75]

> Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject of qualifications relating to waiver … or necessity …, a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[81] The Court also confirmed that the question is one of possibility (real and not remote), rather than probability and, importantly, if applied after the event, requires no examination of factors which actually influenced the judge's decision.[76] Application of the apprehension of bias principle requires two steps:[77]

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

[82] When discussing situations where apparent bias is said to arise from an association the judge has, the High Court of Australia observed that the potential

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73 At para [116].
74 (2000) 205 CLR 337.
75 At para [6] per Gleeson CJ and McHugh, Gummow and Hayne JJ.
76 At para [7].
77 At para [8].

forms of association between a judge and a litigant are "manifold",[78] importantly for the present case adding:[79]

> It is not only association with a party to litigation that may be incompatible with the appearance of impartiality. There may be a disqualifying association with a party's lawyer, or a witness, or some other person concerned with the case. In each case, however, the question must be how it is said that the existence of the "association" or "interest" might be thought (by the reasonable observer) possibly to divert the judge from deciding the case on its merits. As has been pointed out earlier, unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies. Similarly, the bare identification of an "association" will not suffice to answer the relevant question. Having a mortgage with a bank, or knowing a party's lawyer, may (and in many cases will) have no logical connection with the disposition of the case on its merits.

[83] The High Court has since had further occasion to emphasise the importance of articulating the connection between the matter complained of and the feared deviation in a case involving a trial judge's association with a person said to have an interest in the litigation. It was not sufficient to move directly from a finding of a close relationship to conclude that the judge might not bring an impartial mind to the case.[80]

[84] As well, in his separate judgment in *Smits v Roach*, Kirby J has made some perceptive observations concerning the limits on the utility of the concept of the hypothetical "fair-minded lay observer":[81]

> Of course, the elaboration of such features is provided by judges to remind themselves, the parties and the community reading their reasons that the standard that is applied is not simply the reaction of the judges, at trial or on appeal, to a particular complaint. It is, as far as it can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters. As the cases show, in such decisions different judges can reflect different assessments and reach different conclusions. The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case.

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78 At para [29].

79 At para [30].

80 *Smits v Roach* (2006) 228 ALR 262 at para [54] per Gleeson CJ and Heydon and Crennan JJ and at para [58] per Gummow and Hayne JJ.

81 (2006) 228 ALR 262 at para [97].

[85] Two recent New Zealand decisions should now be mentioned. In *Erris Promotions Ltd v Commissioner of Inland Revenue*,[82] the Court of Appeal discussed these cases, saying that the adjustment in *Porter v Magill* of the test in *Gough* meant that the New Zealand courts would also have to consider whether to depart from the *Gough* test. In *Erris*, and some subsequent decisions of the Court of Appeal where apparent bias was raised, it was not necessary for the Court to decide whether to adopt that test. However, in *Muir v Commissioner of Inland Revenue*,[83] the Court of Appeal, conscious that New Zealand law was not in line with the position in other jurisdictions, took the further step:[84]

> In our view, the correct inquiry is a two-stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct.

[86] This approach is not materially different from that of the majority judgment in *Ebner*. The Court of Appeal also expressly adopted the passage in *Ebner*, requiring the "logical connection" between the matter complained of and the "feared deviation" from impartiality to be identified and stated.[85]

The test for disqualification

[87] The issue of when a judge should not sit in a case, where the circumstances may give rise to a concern that the judge might not determine the matter with an impartial and unprejudiced mind, raises a question of fundamental rights. The right to an independent and impartial judiciary is protected by the New Zealand Bill of Rights Act 1990 in both criminal and civil jurisdictions.[86] Addressing the issue also commonly raises other aspects of public interest and in particular that of the due

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82 (2003) 16 PRNZ 1014 at para [32] per Anderson J.
83 [2007] 3 NZLR 495.
84 At para [62].
85 At para [94].
86 Under ss 25(a) and 27.

administration of justice. The case law indicates that the contacts between judges and lawyers appearing before them, and those between such lawyers themselves, emanate from the organisation of the legal profession and in general serve the public interest in the due administration of justice without detracting from impartiality of judicial officers. This is not, however, necessarily always the case.

[88] An aspect of the administration of justice which is of particular relevance is that judges should not automatically disqualify themselves in response to litigants' suggestions that there is an appearance of lack of impartiality. Judges allocated to sit in a case have a duty to do so unless they are disqualified. If a practice were to emerge in New Zealand of judges disqualifying themselves without having good reason, litigants may be encouraged to raise objections which are based solely on their desire to have their case determined by a different judge who they think is more likely to decide in their favour.[87] Such a development would soon raise legitimate questions concerning breach of the rights of other parties.

[89] The experience of the common law of other jurisdictions over the past 30 years has established that there is now a generally accepted standard for disqualification on account of bias. A judge should not sit if a fair-minded and informed lay 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.[88] There are three main reasons why I consider this test should be applied in New Zealand in all circumstances where a question arises over whether a judge is disqualified from sitting because of considerations of bias.

[90] First, a reasonable apprehension of bias is a test of broad scope. It would appear to be of sufficient width to cover every situation in which actual bias could conceivably be raised. The circumstances in which it would be proper for actual bias to be alleged would accordingly be highly exceptional.[89] Unless such exceptional circumstances were present, it would be appropriate for a court addressing the

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87 As pointed out in *Re JRL; ex p CJL* (1986) 161 CLR 342 at p 352 per Mason J.

88 As stated in *Ebner* per Gleeson CJ, McHugh, Gummow and Hayne JJ at paras [6] and [33].

89 *IOOF Australia Trustees Ltd v Seas Sapfor Forests Ltd Pty Ltd* (1999) 78 SASR 151 (SC) at para [211] per Doyle CJ. Compare *Webb* at p 74 per Deane J.

question, on an application by a party or on appeal, to go directly to the question of apparent bias and not consider that of actual bias at all. This provides appropriate protection for and is also convenient for the administration of justice. The main alternative, the "real danger of actual bias" test, is highly difficult for a judge to apply in relation to his or her own situation. It also carries the risk of unfair damage to the reputation of the judge in question if the judge is reversed on appeal. On the other hand, if a judge decides that the circumstances are not disqualifying on the reasonable apprehension test, and an appellate court disagrees, that will simply reflect the appellate court's disagreement with what the circumstances objectively require. Such disagreement involves no criticism of the judge's actual impartiality.

[91] Secondly, and importantly, the breadth of the common law reasonable apprehension test is likely to ensure compliance with fundamental rights to a hearing by an independent and impartial court and to observance of principles of natural justice. The test aligns the common law with the international human rights jurisprudence.[90] Decisions of the European Court of Human Rights on the equivalent provision in the European Convention[91] stress the requirement of an objective appraisal of the material facts to see if they give rise to a legitimate fear that the judge might not have been impartial.[92] Compliance of the common law test with human rights norms means that a separate Bill of Rights analysis is not required.

[92] The third advantage of the apparent bias test is that its wide scope, coupled with its objective approach gives significant weight to the need for public confidence in the integrity of the judicial system. The test, being objective, excludes subjective considerations such as perceptions of the character and legal ability of the particular judge. The perspective of the public is part of the test, albeit it is that of an informed public. I shall further consider the need for public confidence in addressing the perspective from which the test is to be applied, that of the informed, fair-minded observer.

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90 *Porter v Magill* at paras [102] – [103].

91 Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

92 *Pullar v United Kingdom* (1996) 22 EHRR 391; *Re Medicaments* at para [83].

[93] An important aspect of meeting the reasonable apprehension test which bears on its support of public confidence in the system, is the requirement to be specific concerning the perceived connection between the circumstances giving rise to concern and whether they establish reasonable apprehension of impartiality. In this case the facts in relation to the association relied on must be spelt out, as well as why it is reasonable to be concerned that they, objectively, might lead the Judge to decide the case other than on its true merits. Establishing the existence of an association is never of itself enough to disqualify the Judge. It must be shown that its nature is such as to cause concern objectively that it may influence the Judge's decision making.[93] This requirement of articulation of the connection ensures that disqualification is not established through a superficial impressionistic reasoning. In other words, the public can be reassured that parties to litigation are not able to change composition of the court, or to have cases reheard following an unfavourable decision unless there is sound reason, based on principle, for that course.

[94] While the test is one of possibility, not probability, it is not enough that the circumstances create a vague sense of unease or disquiet.[94] It is always for the person who asserts there is a situation giving rise to a reasonable apprehension of bias firmly to establish that is the case.[95]

The fair-minded observer

[95] That brings me to the question of the process by which the reasonable apprehension of bias test is to be applied. It is now established in the Commonwealth jurisdictions that its application should be by ascertaining the perspective of the fair-minded lay observer. There remains, however, considerable uncertainty as to the inputs into this hypothetical person's decision making. Ms Owen has argued that if too much knowledge is imputed there is a risk that the reality will be that the perspective is not that of a lay observer at all.

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93 *Aussie Airlines Pty Ltd* at pp 760 and 763 approved in *IOOF Australia Trustees Ltd v Seas Sapfor Forests Ltd Pty Ltd* (1999) 78 SASR 151 (SC) at para [181].

94 *Minister of Immigration v Jia Legeng* (2001) 205 CLR 507 at para [135].

95 *Re JRL; ex p CJL* (1986) 161 CLR 342 at p 352 per Mason J.

[96] As already indicated, some matters are clear. As the person is a lay observer, rather than a lawyer, no detailed knowledge of the law is to be imputed. And as the test is an objective one, the observer is not to be taken to be aware of any attributes, such as integrity and judicial ability, of the individual judge in question.

[97] The Commonwealth case law does recognise that in this area attributing knowledge of information to the hypothetical observer may transform the process from one of ascertaining the perception of a member of the general public, so that it becomes that of an insider in the legal world. I accept that common law technique of looking at an issue through the eyes of a reasonable person is amenable to that sort of transformation. For example, the common law standard of care in the law of negligence is that expected of a reasonable person. But where a situation involves use of special skill, the standard ceases to be that of the ordinary citizen and becomes that of a skilled one.[96] The overall trend in the cases I have discussed recognises, to my mind correctly, that the perception that there is a reasonable apprehension of bias must be both a rational and reasonable one before a judge is disqualified. A sufficient level of knowledge of the context in which the justice system operates is required to make such an assessment. The reasonable person must have a knowledge and understanding of the judicial process and the nature of judging.[97] I am accordingly satisfied that the hypothetical observer must be sufficiently appraised of these matters to reach a decision on whether the circumstances of the particular case give rise to a reasonable apprehension of bias, that is an apprehension which is not a matter of superficial impression. Nothing less will provide a reasonable decision. There should, however, be no greater degree of sophistication attributed than is required for that end. It should also be borne in mind that in those cases which are said to involve a material pecuniary interest, contextual knowledge is unlikely to be of significance.

[98] Consistent with this approach, the fair-minded observer should take a balanced and intelligent view, being, as Kirby J has put it, "neither complacent nor unduly sensitive or suspicious".[98] And while informed of matters of legal tradition

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96 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at p 586 (QB) per McNair J.

97 *RDS v R* at paras [36] – [40] per L'Heureux-Dube and McLachlin JJ.

98 *Johnson v Johnson* (2000) 201 CLR 488 at para [53].

and culture, the fair-minded observer will in appropriate circumstances be prepared to question them.

[99] This approach to ascertaining if there is disqualifying bias is a principled one which will require judges to be guided by reasonable public perspectives. Properly administered by the courts, it will be capable of engendering the necessary public confidence in the integrity of the judicial system in this aspect of administration of justice.

Application of principles

[100] As Lord Steyn has emphasised, in applying the test for apparent bias both the context and the particular circumstances said to give rise to a reasonable apprehension are of supreme importance.[99] In this case it is convenient to start with matters of context. These matters concern the legal structures and environment in which judges and counsel involved in litigation work. The focus will be on the appellate stage of litigation.

[101] In New Zealand judges are appointed almost entirely from the practising legal profession. Most were senior barristers in active practice at the time of their appointment. Following their appointment judges regularly have lawyers appearing before them whom they knew when in practice and with whom they have sometimes had long associations. These associations have arisen from a variety of circumstances which include having been partners in the same law firm, practising barristers in the same chambers, or simply through appearing regularly in the same cases for different parties before courts and tribunals over the years. They regularly develop into personal friendships within this relatively small sector of the New Zealand legal community.

[102] These collegial associations serve the public interest as they are supportive of the smooth functioning of the administration of justice. They are conducive to the conduct of legal practice in the courts according to high ethical standards. As such

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[99] *Man O' War Station Ltd v Auckland City Council* [2002] 3 NZLR 577 at para [11] (PC).

they foster principled and effective advocacy which is for the benefit of the justice system. They are not in general regarded by anyone in the legal profession, or wider community they represent, as inhibiting counsel from discharging to the full their adversarial responsibilities to their clients in particular cases.

[103] Barristers receive instructions to appear in litigation to represent parties. At the appellate stage, their principal role is to make submissions on behalf of appellants or respondents to the appeal. Such submissions may or may not happen to reflect any personal views counsel may have on the merits of their clients' position in the case and it is not appropriate for them to communicate any personal views to the court. Barristers do not identify themselves with their clients in that way.

[104] On the other hand, it is the task of judges to determine all issues before the court on their legal and factual merits as the judge sees them. In doing so, the judge is not assessing the performance of counsel. Judges will obviously over time form views of the ability of individual counsel but these views are not relevant to their decisions. Judges' associations with and favourable or unfavourable views of counsel have no place in their decision making. A judge, through training, professional experience and commitment to proper exercise of the judicial function will decide a case, at all stages, impartially according to the merits of what is put to the court as the judge sees it.

[105] On taking up an appointment, a judge is required to take an oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".[100] The importance of that solemn commitment to independence and impartiality during judicial service is substantial. Adherence to that responsibility is a fundamental aspect of judicial integrity, commitment to which is the guiding principle in every decision that a judge takes. The oath is accordingly a continuous strong force for judicial neutrality.

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[100] Section 18 of the Oaths and Declarations Act 1957.

[106] The position was recently well summarised by the British Columbia Court of Appeal:[101]

> The legal community and the public benefit from proper relationships between judges and members of the bar. Judges should not work in professional isolation or live in social isolation from lawyers. They do not leave existing friendships with lawyers behind them when they assume judicial office; nor are they prevented from forming new friendships. In a general way, professional and social interactions between judges and lawyers outside the courtroom with properly proscribed exchanges of ideas about substantive law and procedural law is a healthy thing. Personal relationships are often by-products of such exchanges and vice versa. A reasonable person assessing the present complaint should have this in mind.

The position is seen the same way in England[102] and there is no reason to take a different view in New Zealand. In this context, and for these reasons, a fair-minded lay observer would accept that friendships and professional associations between judges and counsel will not give rise to a reasonable apprehension of bias.

[107] The argument advanced by the appellants does not, however, depend solely on facts connected with friendship and professional association. Ms Owen indeed accepted that apparent bias does not exist where an association between a judge and counsel is simply one of friendship coupled with a professional relationship. Her submissions focused on the additional element in the present case of a financial relationship. She argues that the circumstances of the financial aspects of the relationship, on their own or cumulatively with the other aspects, make the association between the Judge and counsel extraordinary and give rise to a reasonable apprehension of bias.

[108] The Court must accordingly examine the circumstances of the business relationship to decide if its nature is such as to give it the capacity on its own or together with other aspects to influence the decision making of the Judge in such a way. This requires identification of what incidents of that business association might be thought to have the capacity to divert the Judge from his fundamental obligation. The key facts are that the Judge and the barrister own Rich Hill Ltd, which owns the land on part of which Rich Hill Thoroughbreds Ltd conducts its substantial horse

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101 *Wellesley Lake Trophy Lodge Inc v BLD Silviculture Ltd* [2006] 10 WWR 82 at para [18] per Low JA.

102 *Taylor v Lawrence* [2003] QB 528 at para [63] (CA).

stud business. The latter company pays agistment fees in respect of horses it agists on Rich Hill Ltd's land. The nature of the business is akin to that of an owner of property which receives rental. The trading company paying the rental includes Mr Galbraith among its members but not Wilson J. There are also joint horse breeding interests.

[109] The financial association is a joint business interest involving substantial investment in rural land and no doubt improvements. It is not entirely a passive investment in that administration of the ownership interest would require considerable joint decision making as opposed to daily management activity and the venture is in an area in which they each have a strong personal interest. The association is also of a kind that gives rise to a need for reliance, trust and confidence of the joint owners in each other in relation to the affairs of Rich Hill Ltd. In that context they have obligations to each other in relation to their joint interests which I accept are fiduciary in character.

[110] The question then is what it is about this personal, professional and business association between the Judge and counsel appearing before him that might reasonably be thought to divert the Judge from deciding the case on the merits.

[111] A financial association can have elements that introduce a degree of dependency which will provide the necessary logical connection between the association between a judge and counsel and its capacity to influence the decision in a particular case. The requirement to establish this sort of connection was aptly expressed in *Aussie Airlines Pty Ltd*:[103]

> Such an objection may well have substance if the association was such that the judge was for some reason "beholden" to counsel or if there was a situation of fear, favour or some capacity to exercise power in relation to the association. Such situations may arise if, for example, a judge is indebted to counsel, or has otherwise been financially assisted by counsel, in respect of significant sums payable at call … However, such cases are to be approached by reference to the realities rather than niceties or remote or hypothetical possibilities.

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[103] At p 768 per Merkel J.

[112] The appellants emphasise the long duration of the relationship, its closeness and its character, including the aspects of trust, confidence and fiduciary obligation. The dependence of the Judge and counsel on each other in their common business venture, however, does not indicate any feature having potential to impact on the Judge's decisions in court in the case concerned.

[113] There is emphasis also on the unusual nature of the business element in the association which is coupled with a submission critical of its appropriateness. Ms Owen referred to various guidelines for judges' conduct, including one of the Council of Chief Justices of Australia,[104] in whose meetings the Chief Justice of New Zealand participates. The views of such bodies do, of course, provide important guidance as to appropriate standards of judicial conduct but departure from them by a judge in respect of an association with a person having an involvement in litigation does not establish that the nature of the association is such that it has the capacity to influence the judge away from impartial decision making. The appellants submitted that permitting use of his image and biographical information, in association with that of Mr Galbraith and others, on the Rich Hill Stud website, was inappropriate marketing activity by the Judge. Those circumstances also would not be seen as of a nature that would divert the Judge from the merits of the case.

[114] The appellants also criticised the manner, form and lack of detail of the Judge's disclosure of his association with Mr Galbraith prior to the Court of Appeal hearing. There is some validity in the criticisms of the procedure followed but the circumstances having been fully examined, I am satisfied that there is nothing in this aspect of the appellants' concerns which supports the implication that there was apparent bias. The appellants also suggest there is doubt concerning the exact nature and extent of the financial relationship between the Judge and counsel but I am satisfied that, in following the approved procedure of making a written statement to

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[104] *Guide to Judicial Conduct* (2nd ed, 2007).

this Court concerning the complaint,[105] the Judge will have disclosed to the Court all facts that might be relevant to the issue we have to address.

[115] Aspects of the business relationship are relied on as having the effect, objectively, of potentially influencing the Judge to be more receptive to Mr Galbraith's arguments in Court, so that there is a reasonable apprehension the Judge would subconsciously favour them in order to maintain the closeness of the association. I am satisfied that the feature of mutual trust and confidence and mutual financial interest cannot be perceived to have such an influence over a judge in the circumstances of Wilson J. Objectively these aspects add nothing to what is present in ties of friendship and personal association. In particular, there is nothing which indicates that the financial aspect could make the Judge beholden to Mr Galbraith. A fair-minded and informed observer would accept that the Judge's professional obligations are more than sufficient to keep aspects of the business association from diverting the Judge and that their presence does not alter the position in respect of the personal friendship and professional association aspects. This is not, of course, a case in which the Judge has any financial interest in the outcome of the litigation.

[116] It will often be possible to envisage that there might be aspects in the situation of the other party to a business arrangement, who is a barrister, that could raise reasonable concerns about apparent bias of a judge before whom the barrister appears. For example the remuneration of the barrister might be contingent on success in the litigation. But in the absence of clear facts demonstrating that is the case, and that objectively the nature of their association is such that there is potential for implicit pressure to be placed on the judge, the proposition will be speculative and will not provide a basis for reasoning that there is a realistic possibility of apparent bias.

[117] Viewing the matter overall, in terms of the common law test, I am satisfied that a fair-minded and informed lay observer would consider that the circumstances of the personal, professional and financial association of Wilson J with Mr Galbraith

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[105] *Man O' War Station Ltd v Auckland City Council* [2001] 1 NZLR 552 at para [14] (CA) per Gault J.

do not provide a logical connection with the assertion that there is a capacity in the association to divert the Judge from the merits of the case.

[118] In those circumstances it is unnecessary to consider the second question, which was whether the appellants waived disqualification.

Conclusion

[119] In conclusion, I wish to record my view that the adoption by this Court of a test for disqualification that is based on a reasonable apprehension of bias makes it unavoidable that, on occasion, judges who were genuinely confident that their ability to judge a case was unaffected by particular circumstances causing a litigant concern, and who as a result decided it was their duty to sit despite a request that they do not, will find that a different view is taken on appeal. That a different view is taken by an appellate court on the presence of apparent bias casts no personal aspersion on the judge concerned. It is simply an ordinary consequence of appellate judges reaching a different conclusion in the course of the administration of justice. In the present case, however, the appellants have been unable to meet the test under the common law to establish apparent bias.

[120] For these reasons I would dismiss the appeal and make the orders as to costs set out in the judgment of the Court.

GAULT J

[121] I have read in draft the reasons of Blanchard, Tipping and McGrath JJ and agree with them that in this case apparent bias should not be attributed to Wilson J because he sat as a member of the Court of Appeal when Mr Galbraith QC appeared as counsel.

[122] This was not an easy case for Ms Owen to argue for the appellant. She fully understood and accepted the responsibilities and obligations of judges and counsel in our judicial system. She acknowledged the inevitability of close relations existing among those who practise or have practised in the legal profession, and particularly

at the bar in this country. She accepted, rightly, that close friendships among judges and counsel do not give rise to concerns for apparent bias. She accepted also that sharing in "hobby" farming or racehorse ownership between judges and counsel similarly would not do so. The difficulty for her clients was in articulating just what in the relationship between Wilson J and Mr Galbraith takes this case into the area where an informed member of the public might have a real concern.

[123] There is, of course, the obvious point that, according to circumstances, what might be a hobby to some might amount to a major financial venture for others. The land-holding and racehorse involvement shared by Wilson J and Mr Galbraith, as accurately analysed be Blanchard J, while substantial, reflects the pursuit of a common interest by two senior counsel while heavily engaged in legal practice at the top of their profession. They acted for opposing parties to important litigation while maintaining their relationship, plainly appreciating the role of counsel as independent from the client. There is no suggestion that their shared interests have any connection with the subject matter of this litigation. No basis has been laid for any assertion that their circumstances are such that the Judge was, or is, beholden to or dependent upon Mr Galbraith in any material way that might induce favour. Certainly any fiduciary obligations they have to one another attach only to the duties they have in the specific partnership or similar relationship to which they are parties.

[124] I am quite unable to find any factor in the shared land-owning and racehorse activities that an observer reasonably could consider more likely to give rise to some unconscious preference in a particular case than would mere close personal friendship between a judge and a member of the bar.

[125] I refrain from expressing any view on the issue of waiver, first because it is unnecessary to do so and, more particularly, because to do so would involve making findings of fact as to the precise disclosure that was made by the Judge. In the absence of more definite recollections and without the assistance of cross-examination I am content to leave that undetermined.

ANDERSON J

[126] I agree with the other members of the Court that this appeal should be dismissed with costs.

[127] For decades courts in different common law jurisdictions have attempted to formulate a test for apparent bias, distinguishing it, for good reasons, from actual bias and reconciling the possibly different perceptions of those who are familiar with the way a legal system functions and those who are not. The leading judgment in *Ebner v Official Trustee in Bankruptcy*[106] articulates the approach in terms of whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". This approach has been endorsed by the New Zealand Court of Appeal in *Muir v Commissioner of Inland Revenue*.[107] I also endorse it.

[128] The juridical technique involves certain assumptions and qualifications. These are explained at paras [4] – [10] of the reasons of Blanchard J and I agree with his exposition.

[129] For the reasons given by the other members of the Court I am of the opinion that there are no grounds for a fair-minded lay observer reasonably to apprehend that the personal and business relationship of the Judge and Mr Galbraith QC might affect the Judge's impartiality.

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Crown Law for Intervener

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106 (2000) 205 CLR 337 at para [6] per Gleeson CJ and McHugh, Gummow and Hayne JJ.
107 [2007] 3 NZLR 495.