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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 57/2019
[2019] NZSC Trans 33

MINISTER OF JUSTICE
First Appellant

ATTORNEY-GENERAL
Second Appellant
v

KYUNG YUP KIM
Respondent

Hearing: 4 December 2019

Coram: Glazebrook J
O'Regan J
Ellen France J

Appearances: U R Jagose QC, A F Todd and G M Taylor for the Appellants
A J Ellis and B J R Keith for the Respondent

ORAL HEARING

SOLICITOR-GENERAL:
E ngā Kaiwhakawā tēnā koutou. Kei kōnei mātou ko Ms Todd, ko Ms Taylor, mō te Karauna.

GLAZEBROOK J:
Tēnā koutou.

MR ELLIS:
Kia ora. Ellis and Keith for Mr Kim.

GLAZEBROOK J:
Mr Ellis, Mr Keith. Madam Solicitor?

SOLICITOR-GENERAL:
Your Honours, by your minute of the 14th of October the question before us is whether it's appropriate for a Supreme Court Judge to sit while that Judge is a member of a Royal Commission, and whether the same position applies to an Acting Judge as a member of a Government inquiry. In the Crown submission the starting point is whether there is anything about the appointment of those Judges to those inquiries, In terms of the *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 test, that would lead a fair-minded, well-informed, lay observer to reasonably think there was a real risk that the Judge might come to the question before the Court on anything other than the merits.

I emphasise that that's the Crown's starting point because it seems that the issues that my friends have raised in their written submissions tend to go the

other way. Is it ever appropriate for a sitting Judge to be appointed on an inquiry, and with respect that isn't before the Court. This Court must determine, in the setting of the panel to hear this appeal, whether that *Saxmere* test is met, and that brings everything back to this Court and this appeal. So the two-stage test, what is it that is said to bring up the apparent disqualification, and is there a logical connection between the issue before the Court and the feared deviation from dealing with the matter on its merits. Once that analysis is done, and I will take Your Honours through the Crown's analysis, that analysis must be done, it can't, as this Court has cautioned in *Saxmere*, can't be just a general impression or an assumption but we need to go through the workings of the analysis. Once we go through that analysis, in my submission, there is no reason for either of the Judges of this Court that we are talking about being disqualified from sitting on this appeal, and I won't address the question as I understand Your Honours don't want the question addressed, or don't need the question addressed, as to the issue of the counsel assisting the Royal Commission. So the question is being appointed as a member of the commission, that is what my analysis covers.

So the first point of that is to say that New Zealand law anticipates that Judges may undertake paid employment, other paid employment, or hold other office in New Zealand, provided that, of course, the Chief Justice in this case has approved that appointment. So in my submission it is a matter of permission in the statute, albeit with controls in place, controlled in this case by the Head of Bench, the Chief Justice. It's at sections 142 and 143 of the Senior Courts Act 2016. I draw a contrast with section 144 of the Senior Courts Act which simply prohibits, "A Judge must not practise as a lawyer." Which is why I say that 142 and 143 are permissive.

The protocol that covers the Chief Justice's determination is at tab 2 of the additional bundle. So this is the *Protocol Containing Guidance on Extra-Judicial Employment and Offices*. Can I take Your Honours through parts of that protocol, in particular if we start with the general, it's in the additional small volume filed.

O'REGAN J:

I don't have an additional small volume.

GLAZEBROOK J:

We can probably bring it up here. Yes we can.

O'REGAN J:

I've got it now.

SOLICITOR-GENERAL:

Thank you. So section 143 of the Senior Courts Act requires the Chief Justice to develop and publish this protocol. The protocol is to contain guidance on, I'd say for the purposes of this, it's the offices or types of offices that the Chief Justice considers may be held consistent with being a Judge or an Associate Judge. So that protocol, which Your Honours have just turned up, is at page 3 which is the starting provision, the general provision. It's page 3 that I just want to start with emphasising. This general provision, as it says at the bottom of page 3, qualifies all other provisions of the protocol. At paragraph (b) at the top of the page, it is generally not consistent with judicial office for a Judge to undertake employment or hold an office if the amount of time required to carry that out would interfere with the Judge's discharge of their judicial duties. I emphasise that because it does imply, or it doesn't say so expressly, but it does imply a co-extensive sitting as a Judge and being appointed to another office. Then at (d) "The holding of any office by a Judge (such as a member of an inquiry)," expressly anticipated by this protocol, "Will not be treated as interfering with the Judge's discharge of his or her duties if arrangements have been made… for those duties to be carried out by an acting Judge or Judges or otherwise."

Now I emphasise "or otherwise" because in my submission that is also allowing for a co-extensive holding of an office and sitting as a Judge. Your Honours, of course, will be aware that a sixth Judge of this Court was appointed at about the same time as Justice Young was appointed as a member of the Royal Commission. Those are the two parts I just wanted to

emphasise because over the other two pages, clause 8 deals specifically with, "Service on Government commissions and inquiries." The starting proposition being, "It is not consistent with judicial office for a Judge to accept appointment by Executive Government… to conduct any inquiry," just to come to the point that's before us. The exceptions are where that appointment has been approved by the Chief Justice. So again I say that's permissive because while it was written in prohibitory language in the beginning, there is an exception where approvals can be given.

This might be the right time to point out a matter to Your Honours, that in the joint bundle of authorities at tab 13 we have included the guidelines for judicial conduct. We discovered yesterday that they have been updated as of last month and we have copies if Your Honours want them handed up, because they are different in some material respects which I might just cover now if I may. I've given copies to my friends but Madam Registrar could hand these up. The relevant differences that we have identified is that there is no longer part F that deals with, "Disqualification of Judges," in those guidelines. But at paragraph 28 of the new guidelines they simply refer to the topic being deal with in the recusal guidelines published for each Court. So that's where that material is. The other relevant change is that in the old guidelines, chapter H, "Activities outside the courtroom," had a specific section on service on Government committees and inquiries. Subparagraph (d). That is no longer in the guidelines as of November 2019 and so the place where that is dealt with is the protocol that I have just been referring to.

So I'm on my way through my analysis as to why we say there is no disqualifying aspect to hear, the first being that New Zealand law anticipates that this appointment might be made, and is controlled by the Chief Justice. The second point is that the Bangalore Principles are explicitly permissive on this question. A Judge may, subject to proper performance of judicial duties, sit on an inquiry. So again this is not something that is prohibited but rather with the proper controls around it may be allowed.

The Inquiries Act 2013 itself is relevant too and of course the test that we are applying here is the fair-minded, well-informed lay observer. In my submission the content of the Inquiries Act is relevant to that person's understanding of what we're talking about. Section 10 of that Act, these sections are in our bundle, section 10 of that Act requires and imposes, it's at tab 1, the obligation that an inquiry acts independently, impartially and fairly. So the inquiry is while appointed by the Governor-General by Order in Council on the recommendation of the Executive, must then act independently. Section 12, the report of the conclusions of the inquiry in a Royal Commission are to be presented to the Governor-General and thereafter as soon as practicable presented to the House of representatives. In a Government inquiry the report is to go to the appointing Minister. So there's a difference there between Royal Commission and Government inquiry as to the end point. But in my submission there is no difference in the independence of either of those inquiries to come to their own conclusions in accordance with the terms of reference.

Sections 14 to 16 provide that the inquiry is entirely in control of its own processes and therefore, in my submission, doesn't need to come back to, or rely on, the Executive for any of its powers. It has all of the powers to regulate its own procedure to impose restrictions to take evidence.

Section 20 provides the immunity – sorry, it's not section 20. Section 26. The inquiry is held immune from civil or criminal liability other than in – I'm still not reading you the right section, I'm sorry Your Honours. I beg your pardon, yes I am, 26, other than in bad faith. Also relevant, section 35, is that if there was to be a judicial review of an inquiry it is the inquiry and not the members or the chairperson that is cited as the respondent.

So the other point of that analysis, of course, is the judicial oath that when, well, of course is sitting as the Judge, the Judge has the judicial oath to do. Your Honours will know how that goes better than I do standing here, to do justice to all people without fear or favour…

O'REGAN J:
Affection or ill-will.

SOLICITOR-GENERAL:
Thank you. So that's clearly part of the analysis too when sitting as a Judge. So coming then to the well-informed lay observer. Mr Kim appears to say, and Your Honours will hear from Mr Kim's counsel, that it is unseemly for, I understand, only Justice William Young, to sit because he might be judicially reviewed. There appear to be questions faintly raised about perceived judicial independence.

O'REGAN J:
You mean to sit on the inquiry or to sit on the case? To sit on the inquiry?

SOLICITOR-GENERAL:
Well, to sit on the inquiry.

O'REGAN J:
Because that's not really before us. The position we find ourselves in is he is a Commissioner. The only issue is can he sit in a case in the Court while he is a Commissioner.

SOLICITOR-GENERAL:
Yes, quite.

O'REGAN J:
Whether he should be or not is not really relevant.

GLAZEBROOK J:
No, but I think the argument might be that it's not appropriate to sit because you might, at the same time, be subject to proceedings in a court.

SOLICITOR-GENERAL:
And that would be unseemly, yes.

GLAZEBROOK J:
And that would be a reason that you don't sit.

SOLICITOR-GENERAL:
Well the submission is that that would be unseemly, yes.

GLAZEBROOK J:
That's my understanding, although it is a bit difficult because the submissions of the respondent do tend to slightly swing between the two.

SOLICITOR-GENERAL:
There is a question about, sorry, there is a submission made by Mr Kim as to the judicial workload being adversely impacted. In my submission that isn't actually a matter for Mr Kim, or for the parties, that is a matter for the Chief Justice to have considered.

Then the fourth reason that the Crown can understand from those submissions is that there's no means of appellate correction. If that is about sitting in this Court, well plainly that is so. Any matter that is determined by this Court there is no method of appellate correction, and that's not a criticism, that's just plainly a matter of the Court being the apex Court. But if that's a question of it is, if that becomes the submission that there is the risk that a bias or a disqualifying matter is present in a sitting Judge of this Court, and that cannot be corrected, in my submission, that is not so, because this Court could take that matter again, and *Saxmere* tells us something of that, although of course *Saxmere* was dealing with the Court of Appeal, but it came to this Court in a bias challenge appeal. This Court first said there is no issue, and then on new information said, there is a matter for which we want to refer that back to the Court of Appeal. So this Court is capable of, if the concern is there might be something disqualifying that we don't know about until later, this Court is competent to deal with that, not by appellate correction but by its own correction.

My friends have raised the question of a disclosure, and of course it is accepted that this Court has told us again in *Saxmere*, but also in *Muir*, it also comes from *Muir* that full disclosure is to be given in order to answer the questions, is there something here that's disqualifying. But in my submission, and picking up the point from Justice O'Regan, the issue that is to be disclosed is that the Judge is a Commissioner. My friend's criticism of the lack of disclosure of what went on in order to appoint the Judges to those commissions of inquiry, is not relevant in our submission, because that would be akin to a challenge to that appointment. All that the parties need to know to determine is there a disqualifying feature here, is that the Judge is a Commissioner. What the inquiry is, what it is about, which we get through its terms of reference, and what the matter before the Court is, in order to fully ask and answer those questions, what is it that is said to bring up the disqualification and is there a logical connection between that and the issue before the Court that gives real fear of a deviation from determining the matter on its merits.

GLAZEBROOK J:

So, for example, just to put it in concrete terms, if the Commission of Inquiry was a Commission of Inquiry into extradition matters, even just in terms of whether the Act is working in an appropriate fashion, then one could perhaps see a link between that subject matter and the subject matter of this case, such as somebody may think, a well-informed member of the public may think it wasn't appropriate to sit on this appropriate case in those circumstances.

SOLICITOR-GENERAL:

And while that would require an analysis of the terms of reference and how close it really is, I accept that that might be the sort of thing that gives rise to a question about should the Judge be doing both things.

GLAZEBROOK J:

So the submission, as I understand it, is there has to be that sort of connection before – and there may be other reasons to do with the inquiry itself.

SOLICITOR-GENERAL:

Yes, and to put the question in concrete terms, as Your Honour says, what is it about Justice William Young or Justice Arnold's appointment as a member and chair or either a Royal Commission or a Government inquiry, that might have the real affect, not a fanciful or paranoid, but a real effect of causing a Judge to determine Mr Kim's appeal other than on its merits. It is a high threshold.

GLAZEBROOK J:

Or a perception, a proper perception of that.

SOLICITOR-GENERAL:

But it must be real, yes. So what is so far said about, what is it about that appointment, seemed to be generalities about whether or not it is wise for sitting Judges to be on inquiries, but that isn't the question, and in my submission there is no logical connection between either of those Judges on either of those types of inquiry and any logical connection to the matters that come up before Your Honours in this appeal.

In particular I'm picking up Your Honour Justice Glazebrook's question to me just now, it is particularly relevant that the nature of the inquiry is not something that one might mount an argument that is particularly an Executive function. The Inquiries Act pretty much puts paid to that sort of argument now anyway by making it clear that all inquiries are independent and have independently exercise or powers to control their own process, but it isn't the sort of function that bothered the Court in the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18, (1996) 189 CLR 1 in Australia, or *Grollo v Palmer* [1995] HCA 26, (1995) 184 CLR 348 where the real questions there, I mean admittedly the Australia jurisprudence is about lawfulness and whether the appointment is inconsistent with the Constitution Act, but in any event the discussion there, both those cases, is about is this really an Executive function in *Wilson* a pre-condition report for a Ministerial decision about the, not qualification, but the identification of special Aboriginal land. In *Grollo* the issuing of an intersection permit. That analysis,

in *Grollo*, there was no issue, in fact, it wasn't an Executive function but I can see that we might in a different situation be faced with the sort of inquiry where it's content is not like, what happened here and what can we learn, which is the sort of inquiries we have in this challenge. Perhaps the one Your Honour Justice Glazebrook put to me, analysis of is the, does the Extradition Act work. Should New Zealand enter into an extradition treaty with a certain country. Those sorts of, more akin to executive policy questions. There might be a question then asked, or I would anticipate that the Chief Justice and the relevant Head of Bench would have already undertaken that analysis in determining, in agreeing or otherwise to that appointment.

It's also relevant that the Judges who are Commissioners are not sole Commissioners. My friends raised the very, well, relevant naturally, on account of the 40th anniversary of the Erebus disaster, they raised the Erebus Inquiry and the criticisms that were made of Justice Mahon and the unlawfulness that was found, including and confirmed in the Privy Council, of his determinations in relation to natural justice. Here we have, in both cases, the Judge is not the sole Commissioner and while they are both the chair, they form part of an inquiry, and it is the inquiry that is the respondent.

ELLEN FRANCE J:
I'm not quite sure why you say having more than one Commissioner would make a difference in this, in terms of the *Saxmere* test?

SOLICITOR-GENERAL:
No it doesn't because the *Saxmere* test is, of course, specific about the Judge. I was responding to my friend's submission about the unseemliness of a Judge being challenged in a judicial review. But as Justice O'Regan says, that's sort of going the other way, the problem with him being on the inquiry. So thank you Your Honour, that is not relevant to the *Saxmere* question.

In my submission there is no distinction that needs to be drawn between an Acting Judge and a permanent Judge of this Court. My friends, as I understand it, take no issue with Justice Arnold sitting on this appeal for

reasons that, again as I understand, relate to the proposition that an Acting Judge is less beholden to the Executive. This is as I understand the submission, and therefore there's no real problem with him, or no reason to refuse them the ability to sit on inquires. Now I suspect that submission is going the other way as well. Is it appropriate for a Judge to be appointed to an inquiry rather than should that Judge sit on this Court. But in any event, in my submission, the proposition that you can have a part of the judiciary, Acting Judges that for whom we don't also hold very strong to the value of independence and separation of powers, in my submission it's quite wrong to say that there is any difference in a permanent Judge and an Acting Judge in that regard. So the same analysis, in my submission, applies and I don't think we need to draw any distinction on the *Saxmere* test, as to the status of the Judge.

GLAZEBROOK J:
I was just double-checking that there isn't any objection in terms of Mr Keith being involved with Justice Arnold's inquiry on the part of the Crown?

SOLICITOR-GENERAL:
There is no objection, that's right, as I understand –

GLAZEBROOK J:
Thank you, that's what we'd understood. My understanding is that unlike Mr Butler in respect of the Royal Commission, Mr Keith, and just correct me if I'm wrong, is only involved with a small portion of the, of Justice Arnold's inquiry and so is in a different position? But of course the Crown may not –

SOLICITOR-GENERAL:
Well Mr Keith might disagree that it's small but, yes, it is a different part about classification of material and there are other counsel that are in Mr Butler's position in relation to the Burnham, Justice Arnold's inquiry.

GLAZEBROOK J:
Yes, I mean the Crown may not have objected anyway, but just to double check on that point.

SOLICITOR-GENERAL:
Thank you. The Crown doesn't object, of course, as I'm sure it's clear to the Court, on Justice William Young sitting in this appeal either. Even with the relationship –

GLAZEBROOK J:
No, no, that's why I said I'm sure that you wouldn't have objected no matter how wide the role was, although of course it is slightly different acting for an intervenor rather than one of the other parties, one would have thought, because there is that much more of a difference of an intervenor's role.

SOLICITOR-GENERAL:
Yes, and the difference also being that Mr Keith's function is to assist in a process for which there are counsel to assist the inquiry, so there is that gap. But in any event the Crown takes no issue with either because it, as I've said already, it is a high bar to say that there is something about those appointments or processes that mean that Judges of this Court would come to Mr Kim's appeal with anything other than the merits in mind.

There is a question, too, about perception. How that does look because not only, obviously compliance with the rule of law is important but, as always, it needs to be seen to be complied with, and that's where we come to the well-informed observer with those matters of public information about protocol, the terms of reference for the inquiry, the judicial oath.

Your Honours, those are the submissions that the Crown wants to make on this question. I was just coming to the point that my colleagues have just reminded me of, that my friends for Mr Kim raise a jurisdictional question for the Court as to whether this Court can determine this matter. Are Your Honours assisted by my addressing that or not?

GLAZEBROOK J:

Can I say that the way we see it, and we'd certainly be happy to hear submissions obviously from both counsel on that, is that we're operating in terms of the recusal protocol because an issue was raised about whether Justice Young would be able to sit or not, and that was raised on the grounds of the Royal Commission issue. Certainly, and this is subject to hearing, obviously, from Mr Ellis, we took the view that the same issues arose with Justice Arnold and because, as counsel will know, there isn't an ability to field a Court if either Justice Young or Justice Arnold can't sit, because there isn't any ability to have more than one person from the Court of Appeal, and we don't have anybody else who is not conflicted. So it obviously was an important issue and the protocol says that it's decided by the other members of the Court for obvious reasons because otherwise people would be, once it had got to that stage, and in terms of the protocol. So I don't know whether you wanted to say anything further on that, but it was an issue that had been raised and we considered it was an issue that we did need to deal with.

SOLICITOR-GENERAL:

Yes. With respect I agree Your Honour. It's not inconsistent with the Act to sit as a Bench of three to hear those submissions to determine this question. The Supreme Court Rules allow that. If there was no specific procedure for a matter that's before you to deal with it in the way that is necessary for just and expeditious resolution, so the Crown takes no issue with the jurisdiction.

Just something Your Honour Justice Glazebrook just said to me, it might be worth my emphasising that the Crown takes no issue with either of the Judges sitting, but it does seem to me that if one Judge is disqualified for the reason that he sits on an appeal, then both Judges are disqualified. Now I appreciate that makes – my friends take a different point. They say they take no issue with Justice Arnold sitting on this appeal, but for two reasons I say that's problematic. One is that I can't understand the consistency of that argument. I don't think it is consistent to make the distinction. But I referred earlier to how things look as also being important. Unless there is a principled basis to distinguish between an Acting Judge and a permanent Judge, and in my

submission there isn't one, a party that takes an inconsistent to one Judge sitting in another, risks being seen as trying to set a Bench that it wants, and I need to be clear that I'm not making that challenge to my colleagues, but that might be how it looks to how the Court sits if there is no obvious distinction, and yet one is drawn on a disqualification question.

GLAZEBROOK J:

Yes, certainly. And, as I say, we couldn't see that there was a distinction between the two and therefore did consider we had to hear this, and the fact that there might be a problem fielding a Bench, because one might have said, well, in that case we'll have the next available Judge but we actually at this stage don't have a next available Judge. And it really had to be determined as well because it's as important that people who are eligible to sit do sit, because otherwise there is that issue of at least an appearance of forum shopping either on the part of the Court or on the part of counsel.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

None of which is conducive to the administration of justice.

SOLICITOR-GENERAL:

Thank you, Your Honour. Koutou kei te pai o Te Kōti . As the Court pleases, those are the Crown's submissions.

GLAZEBROOK J:

Thank you. Mr Ellis.

MR ELLIS:

Your Honours, I'm a little more confused than I was when I arrived. I just take it for granted that you've read the submissions in full and I'm not going to need to traverse them. I would like to say that I am going to deal with jurisdiction and independence and Mr Keith is going to address you on the disclosure

issue. And we had a position from the very beginning when Justice Glazebrook's first minute arrived and we said, "Yes, there is a problem with a Royal Commissioner concurrently sitting on the Court," and later on, having thought about it, it didn't even matter if it was concurrent because, even if the Commissioner had finished, the proposition, as my learned friend said from Mahon, you might be judicially reviewed, would still be live for some time after.

I do want to deal though firstly with the jurisdiction issue, which I suppose logically should have been what we dealt with first, but grateful for the additional information that Justice Glazebrook has given us, and this is operating under the recusal protocol and the issue appears to have also come into play as if is there a question of the same question in respect of permanent or acting Judges, but I don't know that that's necessarily a jurisdictional point. Well, my proposition to the Court is it doesn't matter is what the recusal protocol says, it matters what the Senior Courts Act says, and that's where the Court's jurisdiction comes from, a protocol obviously doesn't trump an Act. And then our additional submissions of the 28th of November we've set out sections 81 and 82 of the Senior Courts Act. It might also be in bundle. And the proposition in section 81 of the Act is, 81(1), for the purposes of the hearing and determination of a proceeding the Supreme Court comprises five Judges. Now we can all see there's three. Two or more Judges in subsection (2) may act as the Court to determine an oral application for leave to appeal or whether it should be on the basis of written submissions or to determine an application for leave, that's the only jurisdiction for two or more Judges to sit, and in section 82 interlocutory applications maybe made or given by one Judge. So I am assuming, as you can't be sitting under 81(2), the only possibility is you're sitting on some sort of interlocutory application that you've made yourself, it's a no motion application.

As you'll recall our position was, yes, there is a problem. The Crown said, no, there's no issue at all. We're not going to make any submissions and we said, well, it would be helpful if they did, and they then made 20 pages of submissions which said there isn't an issue, after saying it in a paragraph, which seemed to be a case of, I think she protesteth too much. But our

position moved on, as we understood the additional question that was put to us about Arnold J sitting at an inquiry, but nevertheless if this Court was sitting in an interlocutory fashion, which it seems to be the only way it can be sitting, then in section 82(4) “The Judges of the Supreme Court who together… discharge or vary an order… given under subsection (1) or… (3).”

So if Mr Kim doesn’t like your decision, the he can seek a review before a Court of five, and you haven't got a Court of five that is available because the Executive on this occasion hasn’t supplied sufficient Judges for the Court to function in the circumstances that have somewhat unusually arisen. But it’s not incapable of amending the law and conferring –

O’REGAN J:
The Executive can't amend an Act.

MR ELLIS:
The Executive branch and the Parliamentary branch together. The Executive branch putting forward the legislative amendment and Parliament to enact that. So my proposition to you is you’ve got no jurisdiction to be hearing this, whatever the question is, unless –

GLAZEBROOK J:
So is the submission because it can't be reviewed by five Judges you have no jurisdiction to hear the interlocutory application in the first place?

MR ELLIS:
No. No it’s saying that –

GLAZEBROOK J:
Well what is, can I just get what the submission is then?

MR ELLIS:
Yes, sure, the submission is that whether or not you say you’re acting under the recusal protocol, you must act under the provisions of the Senior Courts

Act, and the only possible way that you could be sitting is that you're sitting under section 82, you're one Judge or obviously more using the Interpretation Act, and that if you do make a decision that either party thinks is wrong, then they have the option, not requiring leave, simply have the option to seek a review before a Court of five, which is going to cause more problems, and it emphasises why Judges in the situation that we found ourselves at the start of all this, Justice William Young accepting an appointment on a Royal Commission, which I have no doubt he did because he thought it was an important public issue and in the public interest to do so, I make no criticism of him personally, but it shouldn't happen because there aren't enough Judges in this Court.

GLAZEBROOK J:

So is the submission that if – because obviously the composition of Courts is not dealt with in the protocol or in the Act itself. At the moment we've got six Judges. We have Acting Judges. We have other Judges. So the composition of the Court. Now if somebody objects to the composition of the Court on a matter which could be seen as a technical issue here, and because of being a technical issue may be incapable of being waived. So the conflict issue in terms of Mr Keith for example, I would have thought was in a different category and is able to be waived by a party. But if there's an issue which seems to me an issue of principle, like this, it seems difficult to say that can be waived by a party, and especially since I don't think it has necessarily been waived, it's just said there's no objection because it said that a Commission of Inquiry is different from a Royal Commission. Now if the Court doesn't think that's the case and thinks in fact that you're right, that there is an issue about Royal Commissioners sitting concurrently with sitting, then it does become difficult to say the Court doesn't have the ability to sit to work that out just because counsel might have made a mistake as to differences.

MR ELLIS:

I'm not sure that I quite understood that.

GLAZEBROOK J:

Well, you say there's a difference between an Commission of Inquiry and a Royal Commission.

MR ELLIS:

Yes.

GLAZEBROOK J:

If you're wrong in respect of that and you're right however that Commissioners can't sit concurrently with when they're sitting and, if I understand it, for some time afterwards because of the judicial review issue, then if there isn't a valid distinction between the two then in fact Justice Arnold can't sit either, and you're saying as a Court we don't have jurisdiction to decide that matter and that's because what, because you've made an interlocutory application in respect of Justice Young but say on grounds that might wrong it doesn't apply to Justice Arnold.

MR ELLIS:

Well, let's assume I have made interlocutory application then –

GLAZEBROOK J:

Well, you did object, which presumably it's interlocutory to Justice Young sitting.

MR ELLIS:

Yes, I did. I'm just saying let's assume I did.

GLAZEBROOK J:

Whatever that is. And it might be that it's totally outside of being an interlocutory application because it's actually more fundamental and back from there in terms of the composition of the Court, which is where the recusal protocols in fact come in I think.

MR ELLIS:

Yes, well, I thought it was far more fundamental than an interlocutory –

GLAZEBROOK J:

Yes, exactly.

MR ELLIS:

– because it goes to the heart of what the Court can do. And when you say –

GLAZEBROOK J:

And it would be odd then to say we can't sit on something that is more fundamental than a relatively minor interlocutory application which might have to do with a minor issue of name suppression.

MR ELLIS:

Yes.

GLAZEBROOK J:

Not that name suppression is particularly minor, but in terms of the overall issue it might be a relatively constrained issue.

MR ELLIS:

Well, yes. So for instance the discussion about the minutes being suppressed, one could have asked a Court of five to say, "Well, that's wrong," and that's simple, but in the current circumstances it's a far more fundamental problem and it should be being heard by a Court of five Judges, not by a Court of three. This isn't an interlocutory in spirit, even if it is in letter.

GLAZEBROOK J:

But in the sensible fashion you have a Court of five, and usually let's assume we only have a Court of five, the five permanent members of the Court. If objection is taken to one of them sitting that person can't sit on that case, one would have thought, which is why – I mean obviously the protocol and the recusal protocol goes through a number of stages, but if it gets to the stage of

an argument the idea is that the person who is being asked to recuse themselves and has decided not to is not part of that panel. Now that would seem just self-evident..

MR ELLIS:

Well, yes, let's backtrack a little to something you said a moment ago when you gave the example of Mr Keith and said, "Well, that's a fairly minor matter and it could be waived," and illustrated what I took to mean that it's not possible to waive a more substantive issue, and there are certainly European Court of Human Rights cases which say that whilst there's a right to a fair trial in Article 6 it is not possible to waive matters that are of significant public interest so that you can say, well never mind that, I'm going to go ahead anyway, and that's the situation here. I think you're correct that it is not possible for us to waive the proposition of whether a particular Judge can sit, however inconvenient that might be for yourselves or ourselves, but I mean that must be the principal position that the Court has got to determine. But which Court? What you're doing, with respect, is you're taking the pragmatic way, right we've only got three of us so we've got to deal with it and we know, and members of the public might not appreciate this, why we haven't got the Chief Justice and Justice Williams capable of sitting is because they sat in the Court of Appeal on the judgment that is under appeal, so they're disqualified, so that is unusual. Perhaps not too unusual for the year after they've been appointed to this Bench, and then we've then got the problem Justice William Young who is sitting as a Royal Commissioner actively and had a problem with the Intervenor, and we didn't think in the first place of Justice Arnold until it was drawn to our attention. But I still say that we are in a position to take a different view, despite the criticism of the Solicitor, but if we take a different view that there's something wrong with that. Well there isn't something wrong with it because we took the position that what we were being forced to do, as a matter of practice, was we have to decide whether or not we take an Acting Judge of the Supreme Court, who hasn't been a member of the Supreme Court, and is "a Supreme Court Judge" as opposed to taking somebody who is not a Supreme Court Judge but could be an acting one from the Court of Appeal.

GLAZEBROOK J:

Can I just note that we can't have two Judges from the Court of Appeal on any appeal.

MR ELLIS:

Yes.

GLAZEBROOK J:

So we already will have a Judge from the Court of Appeal but we cannot have two. So if we can't have Justice Arnold we've only got four.

MR ELLIS:

You've only got four Judges?

GLAZEBROOK J:

Because we cannot have two Judges from the Court of Appeal. The statute only allows one. Now one might ask why there would be that restriction, but there is.

MR ELLIS:

I understand that, and we've done the mathematics, but the point I'm saying is I don't think it's fair to criticise us for suggesting, somewhat veiledly, that we're forum shopping. We're not. We were saying, no, we want the best Judge available.

GLAZEBROOK J:

Sorry, nobody is suggesting that effectively. I think the Solicitor-General was just making the point that that could be something that an outside person perceiving might think was happening. But the real issue here is that you have to address us on is whether in fact there's a difference between a Commission of Inquiry and a Royal Commission because that's what interests us in respect of this particular argument, and then in terms of what the Solicitor-General noted, how that actually affects either the perception or the ability to sit impartially in this case.

MR ELLIS:

Well we're saying that we address the issue in terms of the question of why the question of judicial independence in saying is a Judge who is firstly a Royal Commissioner going to be, have the appearance of having impartiality, particularly when it's a Government inquiry on a matter of some political interest, and that the Executive branch appoints a member of the judiciary, and we say the literature says you shouldn't do this.

ELLEN FRANCE J:

Sorry, who are you talking about in that respect?

MR ELLIS:

The Royal Commissioner, Justice William Young.

ELLEN FRANCE J:

Well, are you right then about the appointment?

MR ELLIS:

I don't know. How do you mean, am I right about the appointment?

ELLEN FRANCE J:

Well, that appointment is done by letters patent, isn't it?

MR ELLIS:

Yes, but the issue of how it happened, the methodology of the appointment and the disclosure of it is not within our knowledge. But we're saying as a principle – forget the methodology for a moment – as a principle no Royal Commissioner should be appointed from this Bench because it has problems with the appearance of independence of a Supreme Court Judge being judicially reviewed by a High Court Judge, and we also say there are problems with the ability to release a Judge, and it's obviously a problem otherwise we wouldn't be here today, and for those reasons –

GLAZEBROOK J:

Sorry, I don't quite understand that.

MR ELLIS:

Which part don't you understand, the independence or the…

GLAZEBROOK J:

To release a Judge.

MR ELLIS:

Ah, because of the workload of the Judge, you shouldn't release one because it causes a problem for the availability of the other Judges on the Bench to form a quorum.

O'REGAN J:

But it's happened now. We're just addressing the question whether Justice Young can sit or not. Whether he should have been appointed or not is for other people to decide, it's not a decision for us to make.

MR ELLIS:

Well, it's a decision of interest to us because we say that –

O'REGAN J:

But the fact it's a decision of interest to you doesn't help us in deciding the issue that's before us on which we're seeking your assistance.

MR ELLIS:

Well, I think it does, Sir, because it goes to the question of a Judge's independence if you say he can't sit because he's not perceived to be independent.

O'REGAN J:

Well, okay, that's your submission but…

MR ELLIS:

Yes.

GLAZEBROOK J:

I don't really understand the workload anyway because there's no workload issue in respect of this.

MR ELLIS:

Well, it's workload in the sense that there's a case to be heard and he's not available for one reason or another.

O'REGAN J:

Well, he could be available but you objected to him.

GLAZEBROOK J:

Well, he's made himself, he would have made himself available on these dates if in fact there hadn't been an objection and the case could have gone ahead.

MR ELLIS:

Yes, but if we start with a premise that there's six Judges and two are disqualified, you shouldn't have any less unavailable because it cause a problem for the functioning of this Court.

O'REGAN J:

Yes, but it's a completely circular argument. It only causes a problem if you're right that a Royal Commissioner can't sit.

MR ELLIS:

Well, I'm entitled to make submissions that I am right, and I'm supported by the academics in this, Professor Shetreet, the Canadian Judicial Council.

O'REGAN J:

Yes, but you're making a submission on a point that we can't do anything about, because he is appointed, he already is a Royal Commissioner. So making a submission to us that he should be takes us absolutely nowhere.

MR ELLIS:

No, I'm not suggesting he shouldn't be a Royal Commissioner for the purposes of this hearing, I'm saying he shouldn't be a Judge in the five Judge hearing that will be occurring on the 24th of February, that must be the submission I make.

GLAZEBROOK J:

All right, well, perhaps if we go down to the reasons for that. It's just I didn't understand the workload one because he was actually available and would have made himself available for a hearing on this day and tomorrow had we gone ahead, and now of course we didn't because there was this objection, and that's now happened.

MR ELLIS:

Well, yes, that has happened and, as I understood it, I thought we'd moved on from that, he wasn't going to sit if the Intervener's choice of counsel…

GLAZEBROOK J:

Well, as I say, we've explained that we didn't see the difference in principle between a Commission of Inquiry and a Royal Commission. So once you've told us why Justice Young shouldn't have been able to sit you can then go on and say why that's different for Justice Arnold –

MR ELLIS:

Well, I don't –

GLAZEBROOK J:

– and if you're right, well…

MR ELLIS:

Yes, we've got a problem.

GLAZEBROOK J:

Well, either there isn't a problem with a Royal Commissioner or a Commission of Inquiry sitting or there is a problem with a Royal Commissioner sitting but not someone on a Commission of Inquiry sitting. At the end of this hearing we'll have to decide that.

MR ELLIS:

Well I'm not making a distinction between a Royal Commission and a Commission of Inquiry, I'm making a distinction between whether a permanent Judge or an Acting Judge can sit.

GLAZEBROOK J:

Okay, I understand.

MR ELLIS:

And it is Mr Kim's proposition that arguably an Acting Judge is about as independent as one can get, is the apex of it, because that Judge has retired, won't be expecting the appearance, this is an appearance issue, won't be expecting any favours, or doesn't owe anything to the Government. There might be that perception with somebody who is a permanent Judge, which is why the textbook writers on this say it may bring the administration of justice into disrepute. It won't –

GLAZEBROOK J:

Not that I'm wanting to put any words in your mouth, but people sometimes argue in respect of Acting Judges who don't have security of tenure, but in fact they are beholden to the Executive because of the appointment process, both as an Acting Judge and the possibility of other appointments to Commissions of Inquiry. So in fact they would say that a sitting Judge is less likely to be influenced because of security of tenure than an Acting Judge. Do you have a comment on that?

MR ELLIS:

Yes, yes I do. In other cases, particularly *Wikio v Attorney-General* (2008) 8 HRNZ 544(HC). I mean I've argued as counsel for Mr Wikio and I've forgotten who the other person was, two of them, that temporary Judges, it was High Court Judges rather than Supreme Court Judges, lacked independence because of the short periods of tenure and the Court rejected that and that, I think, is about as far as it's been argued in New Zealand. I mean certainly in terms of the UN jurisprudence, and some of the Europeans, the best example is probably recorded in, I think that would be England and Wales not the United Kingdom, who are now appointment for five years rather than one or two, and the Acting Judge, forgive me if I'm wrong, I'm sure you'll know the age of retirement better than I do for Judges, I think it's 70, and then you can sit until you're 75, so it's a five year appointment as an Acting Judge, potentially.

GLAZEBROOK J:

I'm actually not sure that's how it's done is it.

MR ELLIS:

Potentially.

GLAZEBROOK J:

I'm not sure that's how it's done but…

MR ELLIS:

No, I don't think it's how it is done, but it is the maximum time that you can be a – so I think that –

ELLEN FRANCE J:

The Act says, section 111, you're eligible for appointment if you're retired and under the age of 75, and then the Chief Justice may authorise an Acting Judge to act as a member to hear and determine any proceeding within a specified period, or to hear and determine one or more specified proceedings. So it would depend a little on the basis of the appointment.

MR ELLIS:

Yes, but the maximum tenure is five years.

O'REGAN J:

Well that's assuming the Judge retired at 70 and not earlier.

MR ELLIS:

Correct, then it might be longer, but then I say the European and the UN jurisprudence is, well the UN jurisprudence is you shouldn't be appointed as a Judge for less than 10 years, and the European way is the Recorder position where it is five years. But the other factors that are involved with the concept of judicial independence include not just 10 year but include whether you have financial security, and Judges are, when they've retired, they've got their judicial pension and whatever other resources they may have. There's no real issue about their financial security and having to curry favour to be reappointed to another commission or not, and then there was the point I think that we put in our submissions that, well, can we really expect Judges who retire to say, no I'm not going to accept any Commission of Inquiry or whatever. It is my submission we could expect that of somebody who hasn't retired because you'll keep the Court working with five available Judges. But I don't think we could ask Judges who have retired the same thing, so that's why I see it as different. Plus I wasn't going into the position, the impossible position, of forum shopping, so it's just as well we're not getting into that. Justice Young isn't sitting, as far as I understood, and we had no problem with Justice Arnold sitting. But you're trying to ask me, or you were asking me, is there a difference between a Commissioner of Inquiry and a Royal Commissioner? I don't see one, but that isn't the way we've approached the issue.

GLAZEBROOK J:

So it's acting and permanent and Judges. Well, perhaps we can then go ahead and say what the problem is with a Royal Commissioner and a Commission of Inquiry and it's the judicial independence issue, is that right?

MR ELLIS:

Yes, that's correct. And my learned friend when she was addressing you mentioned the Bangalore Principles and saying they were permissive about Judges sitting, and we have in the joint bundle at tab 18 there's a copy of a commentary on the Bangalore Principles, and it's a lengthy document but we need page 107, the page numbers are at the bottom, and the topic there is 4.11.3,and the topic number 4 is propriety, and the subpart is 4.11.3. And it says, "Serve as a member of an official body or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a Judge." So it's not quite as simple as to say it's permissive, it's permissive if there isn't a conflict. That's, with respect, a different…

O'REGAN J:

But it does contemplate, doesn't it, that there will be circumstances where it's not inconsistent?

MR ELLIS:

Yes, it does. But looking at the commentary there in 161(a), "The legitimate function of a Judge is to judge," and (b), "The function of a commission of inquiry ordinarily belongs not to the judicial but to the executive sphere," and then there's a commentary on what the Canadian Judicial Council found in 162, and over the page on 109 in the first full paragraph, "In the absence of extraordinary circumstances it is the position of the Canadian Judicial Council that no federally appointed Judge should accept appointment to a commission of inquiry," until the Chief Justice and the Judge have had opportunity to consider all the matters or the future judicial work of the Judge. So there's…

GLAZEBROOK J:

Just looking at what they've put, the two matters seem to be will the inquiry adversely affect the current work of the Court, and then the second one is future work of the Court, and that seems to be future conflicts that might arise.

MR ELLIS:

Yes, I think that's right.

GLAZEBROOK J:

So it, I would suggest, seeing the appointment has already been made, as Justice O'Regan said, the first part is irrelevant at the moment, and so the issue really is whether you can identify particular conflicts. Now I know you've identified a more generic one that says – but that seems to be a submission that a Judge should never be appointed to a Commission of Inquiry or a Royal Commission because that will give an appearance of being part of the Executive, as I understand.

MR ELLIS:

Yes, that …

GLAZEBROOK J:

But all of these commentaries suggest that there will certainly at least be exceptions to that.

MR ELLIS:

Well, yes, I agree there are exceptions and I recall, as I think is included in our written submissions, when a similar argument was raised in respect of Justice Robertson who was the President of the Law Commission and from time to time sitting in the Court of Appeal, the objection was taken at the Privy Council on the appeal grounds that you couldn't sit as an Executive and a judicial member at the same time, and of course this was special leave to appeal, being a criminal case, so the odds of winning are remote, and miraculously I suppose, looking back, it was the first day that Baroness Hale sat in the Privy Council and 20 minutes on in the submission she said, "You do know that I was a Law Commissioner for 15 years?" which I didn't know, because I mean she'd only been appointed two days before. But Justice Robertson was stood down from sitting in the Court of Appeal for nine months while the issue was taken up, but because the substantive question of leave wasn't granted we never got an answer to it. But, I mean,

these issues are not simple, and certainly the Australians have a different view and you saw our report from the Melbourne *Argus* of a hundred years ago where the Premier of Victoria advised the Parliament that the Chief Justice of Victoria and the entire Supreme Court Bench were against the appointment of Judges on Commissions of Inquiry some hundred years ago and that's not – the Indians have the largest common law jurisdiction in the world, they have a problem with it too in I think *T Fenn Walter v Union of India* [2002] 3 LRI 210. So there's not insignificant support in the common law world for the proposition that Judges should not sit as Royal Commissioners or Commissioners of Inquiry, and the Solicitor said, quite rightly, citing from *Wilson v Minister for Aboriginal Affairs* and *Grollo* also, that those situations are brought in the context of the different constitutional structure of Australia and the different views the High Court of Australia have about what is a judicial Act and what is an executive Act. But I'm certainly not resiling from the proposition that I say a Judge of this Court, whilst there are only six Judges, should not sit on a Royal Inquiry, a Royal Commission or an Inquiry, because –

GLAZEBROOK J:
So you say they shouldn't sit, which isn't before us, but are you saying that if they do sit then because of perceptions of judicial independence they shouldn't sit on a case in front of this Court?

MR ELLIS:
Yes, Ma'am, I am saying that. And I don't know –

GLAZEBROOK J:
And that is for the duration of the appointment and some time afterwards because of judicial review, is that the submission?

MR ELLIS:
Yes, whilst there's active litigation or contemplated litigation that the Crown have noted itself.

GLAZEBROOK J:

So what's the next submission, if we reject that submission, in terms of this particular case and these particular inquiries?

MR ELLIS:

Well, I don't know that I can advance to you any further differentiation between an acting or a permanent Judge, so I can't really advance that one any more, any further.

GLAZEBROOK J:

Just to be clear, is it just a Judge of this Court or is it of any Court? I mean we've only got this Court in front of us at the moment, but I was just checking whether the submission was broader or narrower?

MR ELLIS:

No. It is limited to this Court. We haven't turned our mind to the question of the other Courts so I can see there's pros and cons for other Judges sitting. It's not as crucial when there's a limited number of, as when there's a limited number of Judges, which is not the case with the Court of Appeal or the High Court. I'm not quite sure why here was a discussion about two members of commissions, but I think I'm right in saying that on both of them there's a judicial and non-judicial person and so obviously commissioners and inquirers can be, the role can be fulfilled by somebody who is not a Judge, I mean that's quite possible and quite proper, and I say it's an acceptable role for an Acting Judge.

O'REGAN J:

If the permanent Judge and the Acting Judge were on the same Royal Commission, would you still say it's okay for the Acting Judge to sit but not for the permanent Judge to sit on the Court?

MR ELLIS:

Now that's an interesting question.

O'REGAN J:

I'm just trying to get what it is about the distinction that gets you to where you are.

MR ELLIS:

Well the distinction is because the proposition I put is that there's a greater appearance of independence of the Acting Judge than of permanent Judges because the litigation that is constantly before you is from the Government, as this case itself is. So one has to be seen to be treading the road that a Judge's duty is to judge, not as the Bangalore Principles say as to engage in the inquisitorial role, which is the function of the Executive. To put it at its highest, it's constitutionally improper because it breaches the appearance of judicial independence and/or impartiality.

GLAZEBROOK J:

Although civil law jurisdictions would be quite upset that an inquisitorial role is not a judicial role and that it's not an impartial role.

MR ELLIS:

Well it is quite possible that some civil jurisdictions would find that difficult to accept. I mean certainly in discussions with several members of the European Court of Human Rights on the question of whether a Judge can be a Law Commissioner and a sitting Judge at the same time, there was some surprise expressed that that was possible. So I don't necessarily think you can lump all civil law countries –

GLAZEBROOK J:

No, it was the submission that an inquisitorial role is not a proper judicial role that I was challenging.

MR ELLIS:

Oh I see. Yes. Well, it's nuancing the role of a commissioner a little far, isn't it, I suppose. I mean but certainly you're quite right in some jurisdictions that nobody would raise an eyebrow, but it certainly wouldn't be the general

proposition in all civil law countries that you can't do it. But I guess, apart from Australia, Canada, India and the articles that have been cited from the United Kingdom, they're all common law countries. I'm not quite sure how I would describe Israel. I am not familiar whether it's common law or a civil law country. I imagine it functions, from having read one or two Supreme Court judgments, it appears to be very common law orientated, but I couldn't guarantee that that was correct, but that's what the commentators say. So, I mean, I'm not dreaming this up out of mid-air, there's a sound proposition in the literature that this is an incorrect way to behave, having a Judge sit as a Judge and as a Commissioner at the same time.

Unless there's any questions I'll surrender to Mr Keith.

GLAZEBROOK J:
Thank you, Mr Ellis.

MR KEITH:
Rau rangatira mā, tēnā koutou, may it please the Court. Mr Ellis having addressed the point of independence I will speak to disclosure. I will just make two short points just to follow points that Mr Ellis has made

One – and I do note with some concern the criticisms made the Solicitor-General about the distinction made between acting and permanent Judges of this Court. As Mr Ellis, she said she could not understand it, that it had no basis in principle, and those are strong submissions from the junior Law Officer and I do feel we need to address them. Mr Ellis has said – and I will just give Your Honours the references – that there is a distinction drawn in the literature, and it is that literature and that practice in other jurisdictions upon which we rely.

So just briefly on that point, there were some pages missing from the authorities handed up by the, filed by the Crown, and I've handed copies of those to Madam Registrar. One of those is the Law Commission full, or the balance of the Law Commission's text, the other are excerpts from the

collection of essays across Commonwealth jurisdictions in the Lee volume, and if Your Honours could be handed those now that would be most helpful.

So the point is the distinction which is the critical distinction, in our view, in answer to the question raised by the Court about these two inquiries and these two Judges and, as I say, there has been some not especially restrained criticism of the distinction attempted to be drawn. But if one turns to the Lee text – and I'm not proposing to take Your Honours to it, although I will if Your Honours would be assisted – but if one goes to the Lee text we have at page 451 the Canadian comment about retired Judges being a different class, at page 492 – sorry, Your Honour.

GLAZEBROOK J:
I'm just checking whether their talking about their supernumerary Judges or just fully retired Judges, because supernumerary are Judges who are sitting.

MR KEITH:
Yes, they do both, Ma'am. So the Canadian Judicial – sorry.

GLAZEBROOK J:
So perhaps if you just show us exactly where you're reading from?

MR KEITH:
Well the Canadian position is more clearly put in the Canadian Judicial Council position paper, which I was also going to take Your Honour to. That does refer to a retired Judge or a supernumerary Judge.

ELLEN FRANCE J:
Where is the point on 451?

MR KEITH:
So the position paper is in the –

GLAZEBROOK J:

No, no –

O'REGAN J:

We're on page 451.

GLAZEBROOK J:

Just show us where?

MR KEITH:

Sorry, I'll just grab my copy Your Honours, one moment. So the point that I'm pointing to from Canada is that there is a reference at page 451 in the third bullet point to the sitting of a retired Judge just as well.

GLAZEBROOK J:

Well it seems to me that might be in respect of the first question as to workload of the Court, and if it's only in respect of workload of the Court one can understand, and it doesn't say supernumerary, but one can understand one might add a supernumerary there because they don't sit all the time.

MR KEITH:

Yes Ma'am. It's not only as to workload and I can take Your Honour to the, perhaps the shortest reference to that, which is at page 40 –

GLAZEBROOK J:

What is it because – do you agree that there seem to be two concerns in Canada.

MR KEITH:

Yes.

GLAZEBROOK J:

One was workload and one was future conflict, or do you say there's another concern in Canada apart from those two?

MR KEITH:

I think workload and future conflicts are the two ways in which the Court has looked to concrete risks to the Court's independence or impartiality or function. My reason for saying it that way is that, and we may need to go back into this a little, all of this commentary says that a judicial appointment of this kind to an inquiry raises a question of the Court's perceived independence, impartiality or function. That's why, as Mr Ellis was saying, we have a presumption against it. It is not permissive as the Solicitor-General said. It is permitted only if the Chief Justice in New Zealand is so satisfied and the other jurisdictions are similar, those jurisdictions that permit this at all.

GLAZEBROOK J:

I suppose the problem is we have to assume in this case that the Chief Justice was so satisfied. So we have to assume in this case, I would suggest, that the issue is whether having been so satisfied is there something that says, while they're a part of a Commission of Inquiry, or there's a possibility of judicial review, the person should not sit on any case, because that was the proposition that we got to with Mr Ellis I understood.

MR KEITH:

Yes. So I did want to finish off the point about retired Judges very briefly but I will come to that point if that's all right Your Honour.

GLAZEBROOK J:

Certainly. Sorry.

MR KEITH:

So on the retired Judges the shortest reference, and I'll just give you the page numbers of the others, but the shortest reference is the very back page of the Lee textbook that we did hand up. So this is page 540 to 541 on the hand up bundle.

GLAZEBROOK J:

So that's in our bundle?

MR KEITH:

That's in the thing we handed up. It was missing from the Crown bundle.

GLAZEBROOK J:

I think it would be useful if we actually look at what you're talking about in case we do have questions.

MR KEITH:

Yes. I'm going to take Your Honour right to it. I do want to look right at this.

GLAZEBROOK J:

Sorry, I thought you were just giving us references.

MR KEITH:

No, no. So if Your Honours turn to that last page, 540 to 541 headed "H P Lee The Judiciary". So these are Professor Lee's summary conclusions from the conspectus in this volume and you will have gathered that there are essays about Canada and New Zealand and included other jurisdictions and about 15 lines down from the top of page 540 Professor Lee's summary conclusion is, "There is hardly any objection to the use of retired Judges to perform this role." That is the conduct of inquiries. So I do just want to make the point very clearly that the distinction that we have sought to draw is not one that we have dreamt up, let alone one that might appear or be suggested to invite some suggestion of forum or Judge shopping.

ELLEN FRANCE J:

But if that's talking about retired Judges who don't sit, then that's one thing, isn't it, as opposed to retired Judges who do sit from time to time.

MR KEITH:

Yes Your Honour but we do have two distinctions drawn here. One is the distinction between a retired Judge who may from time to time sit, and we say that that person is in a different position for the question before Your Honours, from the permanent Judge of this Court, the retirement for reasons Mr Ellis

has already pointed to makes a difference. The other is as Her Honour Justice Glazebrook was canvassing, the same point or much the same point is made in some of the jurisdictions about supernumerary Judges. The two seem to be treated as raising essentially the same way out of this sort of problem. So a supernumerary Judge I think, Your Honour, is in the same position that they may sit from time to time.

GLAZEBROOK J:
So are you going to take us to those references? Perhaps you can take us to those references to supernumerary after the adjournment.

MR KEITH:
Yes, so the simplest most accessible reference to those two being treated in the same way is in the Canadian Judicial Council position statement. That is at tab 3 of our supplementary bundle and at paragraph 6, subparagraph (e) we have those two categories of Judges being lumped together.

GLAZEBROOK J:
Yes I can understand that's in that sense I suppose a supernumerary Judge could just be not put on future conflict cases.

MR KEITH:
Yes Your Honour and our point about not being put on cases does go to Mr Ellis' point, and it's one I do just want to come back to too, that our submission that there is an issue that arises, and I'll come to why we put it as an issue that arises, is particular to this Court which is statutorily capped, which was intended at its establishment to sit as a full Bench. It is a particular Court, it has a particular difficulty and when we looked at apex Courts in other jurisdictions with capped numbers that do sit as full Benches, the Supreme Court of Canada we could find one instance of a member of that Court sitting on any kind of inquiry or review. That was something into the Ontario school system in the 1970s and doesn't seem to raise any of the sorts of controversies that we might point to. The High Court of Australia and the United States Supreme Court just won't do this at all.

I'm sorry Your Honours, I was rather caught up in the moment. Is now a convenient time?

O'REGAN J:
Thank you Mr Ellis.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.49 AM

MR KEITH:
Thank you, Your Honours. I think at the adjournment I was just coming to the point about the issue arising in respect of this Court, and I did just want to touch on that before I get into disclosure because it does go particularly to what disclosure might do and to His Honour Justice O'Regan's point about what bearing does it have here anyway.

So just to clarify, or to conclude the point about this Court, as Mr Ellis has said, that is our point. Your Honour Justice Glazebrook said earlier, perhaps as a shorthand, that our submission was that a Royal Commissioner couldn't sit as a Judge. That's certainly what the Solicitor-General has told you our submission is, but we didn't say it. Our written submissions at paragraph 7 onwards of 26 November explain that, and we had not taken that position before.

O'REGAN J:
Well, what's the difference between the way the Solicitor-General put it and the way you want to put it?

GLAZEBROOK J:
And anyway, the way I put it to Mr Ellis and he said that was the submission.

MR KEITH:

No, the submission is that a Judge of this Court, one ought not to be appointed, and that question, as Your Honours have emphasised, is not before the Court, but to having been so appointed should not sit, we say that is particular to this Court, that problem is particular to this Court because of its size.

GLAZEBROOK J:

Well, that's what I went through with Mr Ellis and we got to the stage where he said a Judge of this shouldn't be appointed but if appointed shouldn't sit as a Judge for the period of sitting and for an appreciable period afterwards while a judicial review might be there, that's what I'd understood the submission to be.

MR KEITH:

Yes, Your Honour, and I want to make two points from that. One is just to emphasise that we are not making a general point about Judges sitting as Royal Commissioners or Members of Inquiries, that's not the question that we sought to raise, it's not the question that we have pursued in submissions. The second, I think one of the members of the Court asked what the further submission, if we were wrong about that, is, and that is what I want to come to.

Our further submission – and this is where it matters for the question of disclosure – is if we are then looking at whether a Judge of this Court, a sitting Judge or acting, but we've covered some of that, a Judge of this Court having been so appointed, when is it appropriate for that Judge to sit, notwithstanding that appointment? And there is common ground, at least as between the Attorney-General and ourselves, that there are inquiries to which a Judge ought not to be appointed or, if appointed, ought not to continue because the appointment goes to the Judge's or the Court's independence and impartiality, and that isn't really open to argument. Al of the commentary, all of the case law, says that there are categories of inquiries to which Judges should not be appointed or, if they turn in this direction, ought not to continue.

The corollary, and this is to answer Justice O'Regan's point, or at least attempt to answer it, is if such an appointment is made what follows? If a Judge is appointed to an inquiry of this prescribed kind, this kind that undermines independence or impartiality, and then is required or is proposed to sit, what happens in that Court, in the Court hearing that case? And it's our simple submission, I think, one, that if there has been such an appointment, a prescribed or inappropriate appointment, then there is an issue for that Judge sitting. So that's the connection between the two. The appointment is not before Your Honours. The consequences of it, potential consequences, and I'll come to that, are. Because it does not seem to me that one can say on the one hand, as everyone seems to, that there are these inappropriate appointments or there is the potential for inappropriate appointments because of independence and impartiality, or perceived independence and impartiality, and then not ask, well, if an appointment has been made and the Judge proposes to sit, does that question arise?

O'REGAN J:

Just bringing that, grounding that back in this case, are you saying that the appointment in this case is of that kind?

MR KEITH:

No Your Honour and that's where we're in a slightly awkward position. Again I don't mean to go on about things that my learned friend Ms Jagose said, but it does go to some of the discussion Your Honours had with my friend Mr Ellis about the nature of this hearing, and the relative positions of the parties. When this question arose we said these several difficult issues arise. We do think you need to consider them, the Court needs to consider them, and we sought various forms of disclosure to inform that consideration and, if need be, argument. We didn't get it and as events have moved on we're not pressing the point. There is no longer the issue, any of the issues as a live matter because of the advice the Court has since given about His Honour Justice Young and so on. So that issue is no longer concrete and we haven't attempted to address it, nor could we because we didn't, in our submission,

have the disclosure we needed. What we've done instead, and this is why our submissions –

GLAZEBROOK J:

What I'm having difficulty with is what disclosure because you know what the inquiry is about. The terms of reference, the public –

MR KEITH:

Yes, I'll come to exactly what we mean.

GLAZEBROOK J:

And we know what the inquiry is including so –

O'REGAN J:

If you're not pressing the point…

MR KEITH:

No, well there are two different things –

GLAZEBROOK J:

Well there seem to be –

MR KEITH:

There's the particular inquiry in answer to Justice O'Regan's question. We haven't said anything about it. What we have made are submissions which we thought were of general assistance to the Court addressing what we think is an unprecedented question. So we haven't said anything specific, nor could we have, nor I don't think we had, there isn't occasion. The different question that Your Honour Justice Glazebrook raises is what would the disclosure be, and I do want to speak to that, that's my main topic today.

O'REGAN J:

But if you're not pressing the point why are you making submissions on it?

MR KEITH:

Because the Court – Your Honour we did say by memorandum about three weeks ago that we have no live issue. The Court indicated by minute that it nonetheless would be assisted by submissions on these questions, and we have approached them as questions of law, and that leads into –

O'REGAN J:

What are you expecting us to do with the submissions on disclosure?

MR KEITH:

Well Your Honour asked for them, well the Court asked for submissions on these points. We say that disclosure, as a general proposition not particular to any given inquiry, but disclosure as a general proposition is bound up in the very questions that the Court has asked. That is all I'm speaking to today. So as a general point, and partly in answer to Her Honour Justice Glazebrook's question, what would that disclosure be, why is it needed, what purpose would it serve, that's what I was going to come to. We have spoken to it a bit in the submissions but I was going to go further to that point now, albeit briefly.

O'REGAN J:

I thought the purpose of today's hearing was really to deal with the issue of the appropriateness of a Judge sitting or not sitting?

MR KEITH:

Yes, and we said that the Court could only decide that question if the Court and the parties have disclosure and I will come to what that disclosure would be.

O'REGAN J:

Who are you expecting to disclose?

MR KEITH:

We are expecting, the indication from the Court was that the Court had some information concerning this appointment, other information we know –

O'REGAN J:

The Chief Justice would have had to consent to it presumably but she's not here. She's one of the Judges that can't sit.

MR KEITH:

Yes Sir. I maybe in a slightly difficult position because we are saying that this is now an abstract question, and we said that three weeks ago, but our submission on the appropriateness as a general legal proposition, notwithstanding we say there is no live issue, is that the appropriateness of a Judge sitting, having been appointed, is the general question. We know where appropriateness questions arise that there needs to be disclosure and then we have a question on which Justice Glazebrook has asked the question, what would that disclosure look up. What more is there to disclose. In answer to Your Honour's question, so it's not a question of the Court or the Chief Justice disclosing information because they made the decision, it's because they may have the information. So far as they don't, and the Court has indicated that in part it doesn't, then it would fall to the Crown as the party that made the appointment.

And the reason we say that disclosure is integral is, as I say, this is what *Saxmere* and the other authorities tell us about any issue arising, that as to what and why we start with the proposition that there are some inquiries to which sitting Judges should not be appointed and the following proposition, which again is not objected to, that the Chief Justice's role and the Crown's role in making that appointment is the safeguard against those inappropriate inquiries or, rather, inappropriate appointments. The operation of those safeguards would ordinarily only arise if a party, an affected party in an inquiry, brought review proceedings or something like that, and we don't have those. But for the reasons I have already touched on, we say where a Judge concurrently sits on both then there is a live issue because of all of the

concerns about inappropriate appointments, because of the concerns about independence and impartiality. Sometimes that concern will be very easily dealt with, and we say in the submission that, for example, the instance taken by the Crown of Sir Ivor Richardson sitting on the Royal Commission on Social Policy while also a very active member of the Court of Appeal is unlikely to raise such an issue because it's self-evident, it's certainly not a fraught inquiry in terms of the standards and commentary that we've touched on.

GLAZEBROOK J:
Well, to be honest that's very much more a policy inquiry than an inquiry specifically into a particular incident I would have thought.

MR KEITH:
It is a policy –

GLAZEBROOK J:
And much less part of a judicial role, one might argue, not that I'm suggesting there was anything wrong in sitting on that, but it's certainly much more of an Executive role than saying what happened in this particular case.

MR KEITH:
Yes, Your Honour. But when we go to, for example, the Canadian Judicial Council position statement and the criteria set out, they give indications of the kinds of inquiries that are particularly sensitive from the point of view of impartiality and independence, and those include, for example, where there is a potential that the Crown will be found to have done wrong, those include inquiries where matters might be issues of real public controversy, and so we say as a general proposition there are tricky inquiries and less so, and I've just tried to give a couple of example of a less so in terms of those criteria.

GLAZEBROOK J:
So the submission is if we have a tricky inquiry somehow, even if the trickiness is not in the least bit related to the particular case in front of the

Court, the Judge shouldn't be sitting on anything for at least a period after that?

MR KEITH:
No, Ma'am, that's not the submission.

GLAZEBROOK J:
Well, perhaps I can understand what the, just have a better understanding then of the submission?

MR KEITH:
Yes, Your Honour. There are two points. The first is, with everything we've said about the caveats and cautions and necessary pre-conditions for a Judge accepting such appointment and continuing in such appointment, if that process has not been followed or not been followed well and it is – I'm going to regret the phrase now – but it is a trick inquiry, then yes, there may be a general objection to that Judge sitting. We have all sorts of examples, and they're in the material, of Judges refusing particular appointments, of whole Benches refusing particular appointments, and of instances where people said in hindsight, "Well, that appointment ought not to have occurred," either at a point of resignation of the Judge from the inquiry or subsequently, and we have numerous examples of those. So we say as a general proposition that where an inquiry, where a Judge proposes to sit concurrently with appointment, first up there may be instances of appointments that are so self-evidently benign no real issue arises, also so self-evidently transparent no real issue arises, and we advert in the written submissions to the Law Commission as an instance of that. It is a statutory appointment dealing with law reform issues, its work programme is public and the like. So it's perhaps a better example, taking Your Honour Justice Glazebrook's point, than the social policy commission. But where in terms of, say, the Canadian criteria, we have an inquiry that deals with real public controversy with potentially partisan issues with wrongdoing or a potential wrongdoing by the Crown, this is where those criteria say this is particularly sensitive –

O'REGAN J:

So what would be the disclosure? Would you expect an affidavit from the Chief Justice as to what she took into account?

MR KEITH:

Well, one would think that, given all of the caution, there is some documented process that we would see, and we don't know because we don't have it, but we would see that there had been an approach from the Executive Government go the Chief Justice seeking appointment of a Judge or of a particular Judge with some draft terms of reference, because that is something that all the commentary seems to suggest is critical, that the Court has not been, the Chief Justice and the individual Judge had not been given a fait accompli with the other information that all of the commentary and guidance talks about about the scale of the inquiry and what is intended, and then there would be a reply to that, for example if the terms of reference were thought to be amended.

O'REGAN J:

Well, what if it was done verbally, would you expect the Attorney-General and the Chief Justice to – I mean, I'm just trying to get a, I mean, what are you expecting? It just seems to me that the idea of having a safeguard is because the Chief Justice is the right person to make those judgments.

MR KEITH:

Yes.

O'REGAN J:

What you're saying is effectively you want to review them.

MR KEITH:

No, I – well, I'm saying that surely a, the appointment, in a review proceeding that might well be, that would be the case. It's not non-reviewable. But we're not there today.

O'REGAN J:

But why would you be reviewing it?

MR KEITH:

If you said that this was a completely, if as a party to an inquiry you said, "This is one of these ones that should not go to a Judge," and we have a whole lot of examples of that and, yes, the Chief Justice, I'm sure, most conscientiously tries to assess whether that is the case.

O'REGAN J:

Yes, but what we – let's just orient it back in this case – what we're trying to establish is is it okay for Justice Young to sit on this case, and why does it matter at all what the Chief Justice thought about the appointment at the time? Either he can sit on the case or he can't.

MR KEITH:

Because the point of the safeguard is that everyone agrees that judicial raise the question.

O'REGAN J:

But that's the safeguard. The safeguard is the Chief Justice's judgment on that.

MR KEITH:

Yes.

O'REGAN J:

And we know because we've got provisions which tell us she had to have done that, so we know that that safeguard was applied in this case. What else do we need to know?

MR KEITH:

What the commentary suggests is a very careful, considered, specific assessment.

O'REGAN J:

Well, are you suggesting that she didn't do that? I mean, that's just, you know, that's…

MR KEITH:

No, I'm saying that the Court is – Your Honour, the short point, we say, is we can't take the safeguard, this Court cannot take the safeguard any more than any other independence case simply on the basis of an assertion or simply on a presumption of regularity.

GLAZEBROOK J:

But the issue is not independence in relation to this, because it's assumed, and in fact they have to act independently under the statute, don't they, both in Court and on the inquiry?

MR KEITH:

Yes.

GLAZEBROOK J:

Where you have the safeguards is saying sometimes for workload and, if you're looking at the Canadian ones because it will actually have an affect on the future workload as well because conflicts might arise because of the subject matter of the inquiry and what's happened, this seems to be more of a, that if they're outside of those aspects they're not acting independently, and I just don't understand the submission I have to say.

MR KEITH:

I'm sorry, Your Honour, to not have been clear.

GLAZEBROOK J:

Because the submissions are there to say there will be times when it's not appropriate that a Judge act. They are not independence issues between the Government except at those very types of inquiry that people think is moving too far over into the Executive field. What I don't understand is that if it's

moving over into the Executive field, that will be obvious from the terms of reference, and actually will probably have been nipped in the bud because no one would allow a Judge to do it.

MR KEITH:

Well to take, I think, those three points in succession. So the first, it's not only about workload.

GLAZEBROOK J:

No, no, it's about workload and possible conflicts in the future and at the very margins inquiries that are inappropriate for a Judge to do. What I don't understand, in relation to those margins, is that will be obvious from the terms of reference, won't it, so if you say it's not, can you explain why?

MR KEITH:

Yes Your Honour. So first I don't think one can say this is at the margins. The very premise is that one question before the Chief Justice on any inquiry, any appointment, is whether this goes to the independence or impartiality of the Judge or the Court. So the question is always going to have to be asked. As we say, sometimes the answer is going to be blindingly obvious, but the question always has to be asked. If it is that obvious then that Judge sitting, as with Sir Ivor, raises no question, no point requiring disclosure or likely argument. So that's one –

O'REGAN J:

He was a Judge of the final court at that time, wasn't he?

MR KEITH:

Well yes, and this is why we – well, he was a Judge of a, for practical purposes, a final court.

O'REGAN J:

Well he was also a Privy Councillor, I think wasn't he?

MR KEITH:

Yes he was. But he didn't, and if I can deal with Justice Glazebrook's point and then came back to Your Honour that would be perhaps most useful. So first up on this margins question, no, the question is always there. That maybe that it only makes a difference in some exceptional cases, and I fully accept that in most cases, if not all, the safeguards will work. The independent, the inappropriate appointment will be averted. And it's not just about conflicts either. It is saying that there are inquiries that by their very nature, it's not that a particular case will come up, it's that this particular appointment, and this is not our point alone, this is what all of this commentary says, there are particular appointments that cause that problem.

GLAZEBROOK J:

My point is, what does disclosure add to the terms of reference in those circumstances?

MR KEITH:

Yes, what we would have, in whatever form, and I take Justice O'Regan's point about the practicalities of it, I suspect it may partly be that the question hasn't actually arisen in this context before, and I'll come to that too. But we would have, the Court, and it is the Court determining its composition here, it's the Court determining whether an issue of independence or perceived independence or impartiality arises, it would have some evidential basis, whether by way of affidavit, by way of correspondence, it doesn't really matter. But it would have an evidential basis beyond simply the fiat that this has happened.

ELLEN FRANCE J:

I must say I struggle to see why that won't be apparent from the terms of reference.

MR KEITH:

Well to take one concrete example, and we have the difficulty that we are talking in the abstract. I have historical examples of inept, or I think I called

them tricky inquiries and appointments that were problematic. One point that again comes up in the commentary constantly is that the approach, the request for the approval of the Chief Justice should be accompanied by draft terms of reference and there be an opportunity to consider and engage on those. That, to my mind, is an important part of that check, both so that the Chief Justice has an effective role, but also if the issue is ever scrutinised, and it would be scrutinised in a case of this kind, the public can see that that was a meaningful informed empowered, if you like, assessment. It wasn't a fait accompli.

ELLEN FRANCE J:

That doesn't have any bearing on what this Court would be doing in that situation in determining whether or not the *Saxmere* test is met.

MR KEITH:

Well, except in one respect Your Honour, which is if one is saying the question is is the appointment to this particular inquiry of a kind that places independence or impartiality or perceived independence impartiality in doubt and that step, that engagement over draft terms of reference, is a very good answer to whether there is doubt because it shows that there was real engagement. It shows that this wasn't a fait accompli.

GLAZEBROOK J:

Does that matter, though, because the terms of reference are the final terms of reference, that's what's going to happen and it'll be the link between that inquiry and the final terms of reference that will determine whether it was an appropriate inquiry or not, won't it? You can consult all you like but if you still land up with an inappropriate inquiry, you've landed up with an inappropriate inquiry, which will be something that'll be shown from the terms of reference, and to say well we consulted and engaged isn't going to help if you've made a mistake.

MR KEITH:

But if you say we didn't consult and engage, then there is a grave concern.

GLAZEBROOK J:

Well we looked at them and we thought they looked fine and so we said it was fine.

MR KEITH:

And if there was that consultation and engagement that is an important plank. If there wasn't then there wasn't.

O'REGAN J:

It doesn't make the blindest bit of difference what the first draft said. The only issue is what do the final terms of reference say.

MR KEITH:

No, Your Honour. My submission that these – but I may not be able to assist Your Honours much further, but my point is simply in all of this commentary, which is extremely cautious, the word "caution" gets used a great deal about these appointments, there are various criteria, various steps set out along the way to try to avoid the wrong appointment, to try to avoid an inappropriate appointment going to the Judges or the Court's independence, impartiality or perceived such. There is a question, a substantive question about whether the terms of reference are nonetheless incompatible either with the Judge sitting at all or with the Judge sitting in a particular case, and I will come to that. Those are the final terms of reference and I accept that that's what matters there. But the safeguards, the caution are all at the process side of it. They are all about can we be confident in this process, what check on this being an inappropriate appointment was there.

O'REGAN J:

But why does that require disclosure to someone who is objecting to the sitting of a Judge in a particular case? I mean either the test in *Saxmere* is made out or it's not. There could have been a perfect process or there could have been a terrible process. But the only issue the Court has to decide is, is the *Saxmere* test met or not.

MR KEITH:

Yes.

O'REGAN J:

And the process that led to the ultimate terms of reference seems to me to be completely irrelevant to that.

MR KEITH:

Well Your Honour may well decide that, but if the objection is that there was a terrible process, and that goes to –

O'REGAN J:

But if there was a terrible process that ended up with a really good answer, it doesn't matter. so you just look at the answer, don't you? You look at the terms of reference and you make your judgment. The *Saxmere* test is met, or the *Saxmere* test is not met, and that doesn't require disclosure of anything because they're a public document.

MR KEITH:

But the terrible – I may not be able to take Your Honour much further, but if the process is terrible, and we have instances of fraught appointments in the commentary, and so on, and I'm making no comment on this particular one.

O'REGAN J:

But the commentaries are the commentaries. What we're applying is the law.

MR KEITH:

Well we – the commentaries are by variously new Judges saying here was an instance of an inappropriate appointment, or here was an appointment which was a fait accompli, or here was an appointment in which the judiciary should have had a more active part, didn't, and bad things resulted. So –

O'REGAN J:

But we now have a law that requires the Chief Justice to be involved in these appointments so we have our own safeguards to prevent exactly those things occurring.

MR KEITH:

Yes.

O'REGAN J:

That's all we need to know, isn't it?

MR KEITH:

Well our point is *Saxmere* says to assess whether there's an issue we need to know what happened.

O'REGAN J:

No it doesn't. You need to know whether a well-informed observer would see that it was an appearance of bias, that's what you need to know.

MR KEITH:

But that's step 2, we need the facts first.

O'REGAN J:

The process doesn't inform that judgment at all.

MR KEITH:

What if it is a terrible process Sir.

O'REGAN J:

But if the inquiry does not create the appearance of bias to a well-informed observer, the *Saxmere* test isn't met. If it does, the *Saxmere* test is met. That's the question. Not how the inquiry came to be born but what the inquiry actually involves the Judge in doing.

MR KEITH:

If the –

O'REGAN J:

Whether what you're saying would apply in a judicial review is a different issue all together, but in the inquiry that we're engaged in, and I know you don't think we should be what we are, we're trying to determine whether the *Saxmere* test is met or not. I mean all of the, everything you've said to us so far doesn't help me at all in determining that.

MR KEITH:

Well in that case can I move to the second point about the final terms because my submission has been that the process matters, and the process may matter in part answering doubts as to public confidence as well as possibly disclosing reasons for doubt, and that's why I say the process is important.

But as to the substance, and again we are making the submissions as general legal points, the commentary and guidance, again, and including the protocols and so on in Canada and elsewhere, say that this is what, this is when a particular inquiry, particular appointment does put in question, or may put in question independence or impartiality and so we would be engaged then in an exercise, as Your Honour has said, of holding up the terms of reference, possibly holding up whatever else is known publicly about the conduct of the inquiry against those criteria and saying, is this an inquiry or has it become an inquiry of a kind going to the perceived independence or impartiality of that Judge, and I make that submission in two parts.

One is as a general proposition, is there an inquiry that is so problematic generally that that Judge sitting in it during its term would be perceived not to be independent or impartial. Then two, and this is a point that Your Honours have already touched on a little, but I will come to, are there particular attributes of the inquiry, particular subject matter, particular other incidents that raise a problem.

But on the first, just to round out that point, it seems to me that if a Judge so appointed is proposed to sit again the question needs to be asked, the question may be self-evidently answered, but we do have questions, we do have points of sensitivity set out in the judicial guidance and in the commentary.

GLAZEBROOK J:

I'm probably prepared to accept both of those, it's just that I don't understand why that isn't obvious from the terms of reference. Now it might be in particular circumstances it's not, and in particular circumstances something more is needed, especially if the second of your propositions is true, that it's become an inquiry that might create that.

MR KEITH:

Yes.

GLAZEBROOK J:

But surely there has to be something that would point to that in the first place?

MR KEITH:

So I had moved to, I'm no longer dealing with disclosure of the appointment process. So we are solely talking about whether disclosure in other circumstances is so warranted.

GLAZEBROOK J:

I think we're not, I think we're getting far away from the actual case that we've got at the moment.

MR KEITH:

Well I'm trying to assist on what we understand to be a general question as framed and –

GLAZEBROOK J:

Well, it wasn't really a general question that we were asking, we were just saying we want to have submissions on why there is an issue and in what circumstances there might be an issue with Judges either sitting or continuing to sit while they're conducting the inquiry and for some time afterwards.

MR KEITH:

Yes.

GLAZEBROOK J:

And one of the answer is, well, one of the answers seems to be there is that difficulty no matter what the subject matter of the inquiry is, that seems to be the submission taken at its highest, and then this seems to be a slightly lower submission, probably as a backup, which says there may be particular inquiries that that applies to, and I can understand that submission and probably accept it.

MR KEITH:

Yes. It's not really a backup, Your Honour, so much as two different points. But I think the first is we have all these instances of tricky inquiries. As Your Honour says, those will probably become self-evident if we're talking about conduct of the inquiry. If an inquiry is under a programme, as has happened here, as has happened elsewhere, then there would have to be some assessment, it would be extraordinarily difficult, of what that means for the responsible Judge sitting while that difficult inquiry is going on. We don't say that arises here, but that must be the question. The second question – and that would apply no matter what the case was, by the way, or at least if it was a case involving, for example, the Crown, if it's an inquiry that is coming under attack for criticism or perceived criticism of the Crown, and that's happened here and it's happened everywhere else. So that general proposition is there. And I think Your Honour was suggesting, and I think I'd agree, that in that scenario there might have to be some kind of evidential basis put forward, we would need to know what was happening with the inquiry or whether there was the issue suggested, because otherwise we

might just be going on press criticism and scuttlebutt and that's not really going to work, thinking of some of the prominent UK inquiries and how those have been attacked. So there would be a disclosure issue or there could well be a disclosure issue there simply so that the Court and the parties are properly informed, and there is a proper evidential basis for that assessment in the round about that inquiry and about the, probably in a very real sense, unfortunate Judge concerned. So that is one submission.

The other is is there a particular clash between the conduct in between the terms of reference or conduct of an inquiry and a particular case? And Your Honours in discussion with the Solicitor said, well, you know, if there were for example in this case an inquiry into extradition, yes, that would seem to be pretty straightforward as a problem. There might also – and we are having to deal with this hypothetically or in the abstract – there might also be instances in which the subject matter doesn't cause the problem but the conduct of the inquiry does. If, for example, in the course of an inquiry particular agencies or particular officials were under scrutiny…

GLAZEBROOK J:
Well, the Crown accepts that, and in fact that is the main Crown submission in response to the submissions that were made is that nothing of that nature has been identified. But the Crown, as I understood it, would totally accept that if, for instance, there was scrutiny, I'm sure, if there was scrutiny of a particular official's actions and that person had given evidence, controversial evidence, in the particular case at issue, then obviously there'd be a clear conflict, just on any sort of normal grounds.

MR KEITH:
Yes. And all we're saying is that in those cases there would need to be, there could well need to be disclosure of what had happened because we might not know, a party might not know, the Court might well not know. So we are talking about how this Court or a Court deals with a potentially very difficult issue and how I think everyone, including Your Honours, agree that there will be occasions on which it is inappropriate for a Judge to sit. The one point on

which I have been particularly pressing is that in some scenarios, yes, that will be self-evident, in some scenarios it will not and there will need to be some sort of disclosure, in answer to Justice O'Regan's point.

O'REGAN J:
But in most cases if this sort of thing happened the Judge would just recuse themselves, so the Court would never have to determine anything.

MR KEITH:
Yes. And this was the other point I was going to make, Your Honour. This is an exceptional issue. I did look, because I thought I should, at the Crown's table of Judges sitting, of Judges appointed to inquiries, and while Sir Ivor did – and we've touched on this already – sit while on the rather long Royal Commission into social policy, the three most recent judicial appointments listed in that table are Justices Pankhurst, Cooper and Robertson. When I went to look – and this is dependent on my use of a search engine, so I'll take it with a grain of salt – but when I went to look those Judges simply didn't sit while appointed, they were probably a bit busy.

ELLEN FRANCE J:
I'm not sure that's right actually, on my own enquiries.

MR KEITH:
Well, at least anything that's recorded in a judgment with a hearing date – I couldn't find a hearing date in that window – Justice Robertson did do, there was a costs judgment issued by one of those three Judges without a hearing following on from a matter that had concluded. But my point is not to say that there's some general principle or that all of those Judges somehow didn't, it's that this is just not going to happen very often.

GLAZEBROOK J:
Well, it depends a bit on the nature of the inquiry and how that operates, because some inquiries will be very intensive, other inquiries might have initially thought they might be intensive but turn out for various reason not to

actually be so intensive and perhaps availability of witnesses or something of that nature or evidence so that they're more spread out with more time between, one can't tell in advance.

MR KEITH:

Yes, I think that's certainly true, and that would go to any question on workload to take that point.

GLAZEBROOK J:

Yes, exactly.

MR KEITH:

But the simpler point too, and it does just go to this, the exceptional nature of the question having been raised here, it is not often going to arise. It appears in practice, and I take both Justice France and Justice Glazebrook's point that whether a Judge while appointed may sit on things or not it does look as though often anyway it's just practically avoided, they probably have enough to do. But the question is when it does happen, and the Court has emphasised it's very much forced to this position here. The question is what checks are there, what question is asked, and so we are not, just to be clear, saying a Judge can never sit, we are not saying that there always has to be disclosure, we are saying that as a general proposition, and that is all we can make submissions on at this point, there will need to be or there may need to be disclosure.

GLAZEBROOK J:

I'm not sure we can take this much further.

MR KEITH:

No, Your Honour.

GLAZEBROOK J:

And probably in the abstract it could well be there might need to be other things but…

MR KEITH:

Yes. I think those are all the points that I wish to cover, Your Honour. Of course if Your Honours have any other questions, but those are my submissions.

GLAZEBROOK J:

Thank you very much, Mr Keith. Madam Solicitor in reply?

SOLICITOR-GENERAL:

Your Honours, in light of my friend's clarification that a lot of his submission is general proposition in the abstract I'm needing to touch on one thing, unless Your Honours want to ask me anything in particular, but I would touch on jurisdiction, which does appear to be a live question from my friends. So obviously the Senior Courts Act at section 81 requires five Judges to hear and determine a proceeding, and that's not what this question is, not hearing and determining a proceeding.

Section 81(2) requires two Judges to determine a leave application, also not what Your Honours have here. The Court has the general power, in section 79, to make any ancillary order or to make a decision on an interlocutory application for which only one Judge is required, that's section 82. So in fact there is nothing written in the Act, and in my submission no prohibition or inconsistency for Your Honours to sit as a Bench of three to make directions about how the panel should be formed to hear the appeal and if more support to that is needed the Supreme Court Rules, rule 5, gives the Court the power to make directions that are necessary for the just and expeditious resolution of matters, and rule 7, a power conferred on the Court by these Rules to give directions or to decide a matter other than the determination of an application for leave, or an appeal, maybe exercised by a permanent Judge. So in my submission it's well within Your Honours' authority and jurisdiction to determine the question as three of the objection possibly now not taken to Judges who are members of those two inquiries sitting in this Court.

Section 84 of the Senior Courts Act does anticipate that the Court might have to sit as three or four in the permanent determination of a case. I suspect that doesn't arise here but on the death or unavailability of one or two Judges section 84 authorises in some circumstances the determination of the case by three or four Judges. The question would arise then, what does it mean in section 84 when it says, can I just have a look at it sorry. I've written it down but not very clearly obviously. If because of the death or unavailability of one or two of the Judges who are about to begin or have begun hearing a proceeding, if only three or four of those Judges remain available to hear and determine the proceeding, then they may either adjourn or continue. So in fact the proposition that Your Honours were addressing to my friend that raised the proposition or the spectre that this Court might not be able to hear this appeal at all, section 84 does contemplate that the death or unavailability of one or two of the Judges will allow three or four to be available to hear and determine the proceeding, and all of that will turn on which of those Judges who have either died or unavailable, were they about to begin or have begun hearing the appeal. Sorry, hearing a proceeding.

Then that section sets out how the Court proceeds in that situation that the three or four Judges act as the Supreme Court, may hear and determine the proceeding, make any decision on interlocutory applications and so on. So my first submission is that there is no question that the Bench of three of this Court may determine the composition of the Court. It is at best, I would say, an ancillary matter about how the appeal will go ahead. There is no prohibition to that and the Rules say one Judge can do that. But also just touching on the ultimate appeal, it might be that this Court has to sit as three or four to hear and determine the ultimate appeal. Where my submissions haven't made submissions on that point, maybe that point isn't going to arise, as I say I think the question is about what does it mean to be about to begin hearing a proceeding. That question might not arise depending on how Your Honours determine the question of composition but I just pointed it out to you. And also to note that this Court sat as four in *Saxmere No 2*. I don't know why Justice Gault didn't sit in *Saxmere No 2* when he did in 1, but I just noticed that yesterday as I was reading the cases that they sat as four, and I

don't think there is mention of that in the judgment but they sat and determined that substantive matter. Or they recalled the judgment and referred it back to the Court of Appeal.

GLAZEBROOK J:
Yes, there may also be the principle of necessity that arises in a matter of this kind.

O'REGAN J:
We'll leave that until we get to that point.

GLAZEBROOK J:
Yes.

O'REGAN J:
We're not there yet.

GLAZEBROOK J:
Just to be totally complete on that, that it may not be totally statutory because unavailability may have to take into account the principle of necessity in certain cases.

SOLICITOR-GENERAL:
So Your Honours, I don't think there is any point in my addressing those questions that my friends have raised about all of the commentary urging caution because of my earlier submissions which I understood the Court to accept, or at least understand, that that all points the other way. So I don't anticipate going back into that. So unless Your Honours have got any further questions that was all I wanted to say in reply.

GLAZEBROOK J:
Thank you very much. The Court will take time to consider. We won't take very much time to consider obviously because we've got the hearing date for the appeal set and we again obviously want to have the composition of

the Court set well before that time so we will not take very much time to consider, but we will take time to consider and give judgment in due course. Thank you counsel.

COURT ADJOURNS: 12.41 PM