IN THE SUPREME COURT OF NEW ZEALAND SC 64/2007

BETWEEN **SAXMERE COMPANY LIMITED**
First Appellant

AND **THE ESCORIAL COMPANY LIMITED**
Second Appellant

AND **RICHARD KING**
Third Appellant

AND **RUSSELL STEWART EMMERSON AND FOREST RANGE LIMITED**
Fourth Appellants

AND **WOOL BOARD DISESTABLISHMENT COMPANY LIMITED**
First Respondent

AND **THE ATTORNEY-GENERAL**
Intervener

Hearing: 24 November 2009

Court: Blanchard J
Tipping J
McGrath J
Anderson J

Appearances: S Grey with M Ritchie for the Appellants
L J Taylor with J L Bates and J Orpin for the First Respondent
D B Collins QC for the Intervener

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5 **CIVIL APPEAL**

MS GREY:

May it please Your Honour, counsel's name is Ms Grey, I appear with my learned junior, Ms Ritchie.

BLANCHARD J:

Yes, thank you, Ms Grey.

MR TAYLOR:

May it please the Court, Taylor, and I appear with Mr Orpin and Mr Bates.

BLANCHARD J:

Yes, thank you, Mr Taylor.

MR COLLINS QC:

And I appear as intervener, Your Honours.

BLANCHARD J:

Yes, thank you, Mr Solicitor. Those present will realise that there are only four of us. Unfortunately, Justice Gault is indisposed and unable to sit. We have power to proceed with four, and we have met and have decided to exercise that power. Yes, Ms Grey.

MS GREY:

Just before I start, Your Honours, I just want to check you've got the right documents in front of you. You should have from this morning an oral submission for applicants, which is a summary of the submissions that have previously been filed, prepared for today. A document headed, "Apparent bias, extra restrictions from the Judicature Act section 4(2A) and the New Zealand Guidelines for Judicial Conduct," and a single page headed, "Why recall is necessary," which is a similar document to that annexed to the appellants' submissions in reply, but adjusted to take account of the New Zealand Guidelines for Judicial Conduct. I understand from the registrar

that you will have with you a copy of your own set of the Guidelines for Judicial Conduct, I hope that's…

BLANCHARD J:

Yes, I think we've got everything.

MS GREY:

Thank you, Sir.

BLANCHARD J:

I should say for the record, however, that we're reluctant to admit oral submission summaries handed up on the day. We have actually issued a practice note saying that we don't accept more than two pages and, indeed, it's a point that I'm to make at a seminar in Wellington later this week. We won't object on this occasion, but I wouldn't want other counsel to think that we find it acceptable.

MS GREY:

Sorry, Sir, I was trying to assist the Court. If you prefer, I'm happy to just rely on the two separate pages that I've got, but –

BLANCHARD J:

Yes, yes, by all means.

MS GREY:

– this is really just an outline that will hopefully ensure that we cover all the relevant points for Your Honours. So, may it please the Court, this is a case about the fundamental right to a fair hearing and what that means in practice. Last year the Court granted leave to appeal on the approved ground of whether the decision of the Court of Appeal in the *Wool Board Disestablishment Company v Saxmere* should be set aside because of a reasonable apprehension of bias arising, resulting from Justice Wilson's relationship with Mr Galbraith QC, counsel for the appellant in that Court. The reasons for granting leave, as set out in paragraph 2, were that it raises

important questions concerning the administration of justice in New Zealand. If the arguments intended to be made succeed, there would be an appearance of a miscarriage of justice. This application for recall is for much the same reasons. The appellants say that it is in the interests of justice that recall be granted, because the wrong facts were assessed against the wrong criteria, due to the failure of any counsel to point out section 4(2A) of the Judicature Act, the New Zealand Guidelines for Judicial Conduct and, due to new information disclosed by the Judge since the Supreme Court's July 2009 decision, and that –

BLANCHARD J:

We'd be really helped if you cut to the chase and moved to C, because we don't think there's much in points A and B –

MS GREY:

Yes, Sir.

BLANCHARD J:

– if at all.

MS GREY:

Well, Sir, if before you could form that conclusion, Sir, I'd be very grateful if I could take you through my summary, because my submission, Sir, for the appellants, is that section 4(2A) and the New Zealand Guidelines for Judicial Conduct are actually both highly relevant to the matters before the Court, and particularly –

BLANCHARD J:

Well, I understand that that is the argument –

MS GREY:

Yes.

BLANCHARD J:

– but bear in mind that we considered and rejected a rather similar argument in our earlier judgment, –

MS GREY:

Well, Sir, I –

BLANCHARD J:

– namely that pointing to breaches of ethical standards doesn't take you very far in establishing apparent bias in a particular case.

MS GREY:

No, Sir.

BLANCHARD J:

We have had the benefit of pretty comprehensive written submissions directed to these points, and none of the members of the Court feel that there is much in those submissions, which is of force. On the other hand, the points that you are seeking to make about the new information may have much greater cogency.

MS GREY:

Yes, Sir. Well, Sir, I would be just grateful, Sir, because the test that the Court clearly recognises, the test of what a reasonable lay observer would expect a Judge to do, and, Sir, I just want to be absolutely clear that the appellants' submission is that a reasonable lay observer would expect Judges to act in compliance with any relevant laws and –

BLANCHARD J:

Quite so, but the fact that a Judge may not have done so does not, of itself, demonstrate apparent bias in a particular case.

MS GREY:

No, I appreciate that, Sir, but –

BLANCHARD J:

And we made that point in our earlier judgment.

MS GREY:

Yes, Sir, but the difficulty, Sir, is that section 4(2A) – much of our first hearing, Sir, was about where to draw the line. I think all of the Court and all counsel accepted that there are occasions when a relationship between Judge and counsel can amount to an appearance of bias, but that a normal relationship between Judge and counsel, a friendship, a professional relationship, was a good thing and that, of itself, wouldn't amount to bias. We spent considerable time in that Court and Justice Tipping in particular asked some very incisive questions about where you draw the line. Now, the difficulty the Court had in the first hearing was we didn't have reference to section 4(2A). I apologise, Sir, the appellants were not aware of section 4(2A) –

BLANCHARD J:

And nor, I may say, were the members of the Bench. That section slid into the Judicature Act without Judges, that I'm aware of, knowing that it was there.

MS GREY:

Well, Sir, if I could just point you out, while we're talking about that, Sir, the Judges actually did make a submission –

McGRATH J:

Well, look, we've read – you have provided that for us, we've read all of that. I mean, the idea of this hearing is that we build on the written material and the written material hasn't taken us to the point where we really think there's much in this point.

TIPPING J:

What is it about the – say there has been a breach of section 4A, is it?

MS GREY:

4(2A), Sir.

TIPPING J:

4(2A), sorry. Say there has, say. What does that say about apparent bias? Now, just pause and think –

MS GREY:

Yes.

TIPPING J:

– and give me as succinct an answer as you can, please.

MS GREY:

What it says, Sir, is that Parliament has set a higher standard for judicial conduct –

BLANCHARD J:

What's that got to do with apparent bias –

MS GREY:

Because –

BLANCHARD J:

– in a particular case?

MS GREY:

Well, Sir, it's summarised – if I can take you through this one page, it may be helpful, Sir.

BLANCHARD J:

Is it any different from what you've said in your written submissions?

MS GREY:

Yes, it is, Sir, it is, Sir, because it adds with – section 4(2A) is – the interpretation is assisted by the New Zealand Guidelines for Judicial Conduct.

ANDERSON J:

Speaking for myself, I have great difficulty seeing any logical consequence in legal terms for this case.

MS GREY:

Okay, and I understand, Sirs, that you obviously have a view. However, I'm here to represent my clients and would be very grateful if I could present that view to you, because I do believe it is of extreme significant to weigh the way a lay observer would see this case.

ANDERSON J:

Why?

MS GREY:

Because a lay observer would expect the Judges to act –

TIPPING J:

If the Court and learned counsel weren't aware of 4(2A), are you saying the lay observer would have it splashing in lights above his head?

MS GREY:

No, I'm not Sir, I'm saying if – the lay observer would expect the Court to act in accordance with any applicable laws and any applicable guidelines for their conduct.

TIPPING J:

Well, that's a different issue. If your case had been mounted originally on a breach of section 4(2A), that might –

MS GREY:

4(2A), Sir.

TIPPING J:

– have been a different issue. But you're now trying to shoehorn it into the issue that you raised.

MS GREY:

No Sir, what we're saying, Sir, is the reasonable lay observer would expect the Judge to recuse himself in circumstances where there is apparent bias.

TIPPING J:

Oh, for goodness sake.

MS GREY:

The Court has drawn a line that is a more stringent line –

TIPPING J:

Look, you've got far better points than this, I don't know why you're labouring it.

MS GREY:

I'm labouring it –

TIPPING J:

You're just repeating what's in your written submissions.

MS GREY:

I'm labouring it, Sir –

TIPPING J:

If you can add something new, genuinely new on this argument, that's not in the written material, fine.

MS GREY:

Okay. Well, Sir, what's new is the New Zealand Guidelines for Judicial Conduct, and if a Judge had sought approval under 4(2A), as Parliament expected, to hold in office, and I presume – are you with me to accept, Sir, that a directorship is an office in terms of 4(2A)?

TIPPING J:

I'm prepared to assume that, for the purposes of your argument –

MS GREY:

Thank you, Sir.

TIPPING J:

– not accept it.

MS GREY:

What's your reservations about it, Sir?

TIPPING J:

I'm not here to debate it with you, I'm telling you, you can't ask us to accept something. I will assume it, for the purposes of the next step in your argument.

MS GREY:

Okay, thank you, Sir. So, if you assume that a directorship is an office for the purposes of section 4(2A), Parliament has drawn a line between Judges' extrajudicial activities, that can be undertaken as of right, and extrajudicial activities that may, may perhaps create an appearance of bias or otherwise detract from the primary obligation of being a Judge.

ANDERSON J:

Suppose approval had been obtained.

MS GREY:

Yes.

ANDERSON J:

What's the consequence then, for your argument?

MS GREY:

Well, it would have been a different argument, Sir. If approval had been obtained and there was a public register of approvals that had been granted, a reasonable lay observer would have been on notice of the Judge's relationship with counsel and the matters that the Judge hadn't disclosed. But as it turned out, my clients weren't on notice of the relationship between Judge and counsel. The second matter, Sir, is if the Chief Judge had granted approval under 4(2A), he would have had to do so in accordance with the law and relevant criteria, that's at Judicial Review, Public Law Principles. One of the criteria, surely, clearly were the words of the Act, the purpose of the Act, and surely in accordance with the New Zealand Guidelines for Judicial Conduct. They would be relevant criteria, they were clearly thought-out criteria approved by the Chief Justice and as of last, of Friday the 13th, on the Courts of New Zealand website.

ANDERSON J:

Where is that provision for a public register of approvals?

MS GREY:

There is no, currently no provision, but there's no reason why that can't occur, Sir, and it may have been one of the things that fell through the cracks when the judiciary didn't realise that section 4(2A) had become law. I can't answer that, Sir. All I can say is the Court is bound by the law, the public expect the law to be applied, a reasonable aim, Sir.

TIPPING J:

Are you saying that in all cases where 4(2A) is assumed to apply, there will be apparent bias?

MS GREY:

No, Sir.

TIPPING J:

Well, why is that, why does it help this case then?

MS GREY:

It helps this case because this case is about apparent bias and this case is where you draw the line between usual relationships between Judge and counsel and usual extrajudicial activities, and unusual –

TIPPING J:

Well, actually, it's not answering my question.

MS GREY:

I'm sorry, Sir, if you repeat the question?

TIPPING J:

Well, it's a fairly straightforward question. If it is not a per se appearance of apparent bias, why is it so in this case?

MS GREY:

Because you have to look at the situation, Sir, you have to look at the facts of the case.

BLANCHARD J:

Well, why don't we do that?

TIPPING J:

Yes.

MS GREY:

Yes, okay. But there's two parts to this recall. The first part, which is the section 4(2A) and New Zealand Guidelines for Judicial Conduct argument, is that the Court, in the 3 July decision the Court drew the line in a different place than was intended by Parliament. It drew the line, it drew a line saying there was no difference between a Judge having a business relationship with counsel and just a friendship, a normal professional relationship.

BLANCHARD J:

Well, we understand the argument.

MS GREY:

Thank you, Sir. And so the appellants' case is that in fact there is a difference, because Parliament has said there's a difference, and the Judges themselves, in their own Guidelines for Judicial Conduct, have accepted that there's a difference.

TIPPING J:

So the point is that we drew the line in the wrong place because of our ignorance of 4(2A).

MS GREY:

Well, ignorance of the law, yes, Sir, and my apologies for that, Sir, I take –

TIPPING J:

Yes, right – well, is there any more to the point than that?

MS GREY:

And because of the ignorance of 4(2A) and the failure to refer to the expectations of the New Zealand Judicial Guidelines.

TIPPING J:

All right, ignorance of 4(2A) and the Guidelines.

MS GREY:

Yes.

TIPPING J:

I don't think we were ignorant of the Guidelines.

MS GREY:

Well, no, I'd hope you wouldn't be, Sir, but I wasn't sure how to –

TIPPING J:

No.

BLANCHARD J:

The Guidelines, correct me if I'm wrong, preceded section 4(2A)?

MS GREY:

Yes, Sir, but they would help in the interpretation of 4(2A), is my submission, Sir. And the Guidelines, of themselves, are a matter that a reasonable lay observer would expect a Judge to have regard to when he's going through the process of whether to recuse himself or not, or whether it's a circumstances where he might potentially have apparent bias and might have to disclose. And in fact the Guidelines are very clear on that, Sir, at paragraph 72, sorry 78, Sir. The guideline, "A Judge should always disqualify himself or herself whenever a party, lawyer, or witness of disputed facts is a close blood relative or domestic partner of the Judge or a close relative of the Judge or where such a person is a close friend or business associate of the Judge." And my submission, Sir, is that the Guidelines set a higher standard than the common law has set. And it's very interesting to note that the overseas cases all arose before their jurisdictions had any judicial guidelines. So we spent a lot of time looking at the *Aussie Airlines* case, we've looked at the *Ebner* case, *Taylor v Lawrence*, those cases all predate their judicial guidelines, and in countries where they've had publicly available guidelines it's provided assistance for the Court to help ascertain whether Judges should recuse themselves because of apparent bias.

And just looking at the Guidelines themselves, Sir, I appreciate that they are just guidelines, however the actual introduction to the Guideline contains some very clear language. This, as paragraph 1, "This publication is intended to provide practical guidance to members of the judiciary in New Zealand. The general principles it identifies underpins the legitimacy of judicial function, which is essential to any society organised by law. As such, the general principles can readily be accepted as standards all Judges, in accepting appointment, agree to live by, and the public of New Zealand is entitled to expect in judicial conduct."

Now, Sir, I appreciate these Guidelines only became publicly available 10 days ago, however they are now publicly available and the public of New Zealand, the reasonable lay observer, would surely expect that this would set the guidance, not necessarily absolute in every case, but at least form the basis of guidance, the standards that New Zealand Judges expect for themselves. Very clear language. So that is the issue and why the appellants say that the Court didn't have the benefit of any reference to section 4(2A) and it didn't have the benefit of reference to the New Zealand Judicial Guidelines, and why it says both of those matters are relevant, because both of those matters raise the bar. They raise the bar because the Judges themselves have accepted a higher standard, to remove the very type of case that we're here for now. And it's been successful in other jurisdictions, where Judges have had very clear guidance, that it has removed these doubtful cases taking up the Court's time.

Now, does that cover –

BLANCHARD J:

Yes.

MS GREY:

At least you can understand the appellants' –

BLANCHARD J:

Yes, if you'd move to the particular facts in the disclosure –

MS GREY:

Yes, Sir.

BLANCHARD J:

– it would be helpful.

MS GREY:

On the relationship to the issues of disclosure, the Court and counsel relied on the Judge to give full and frank disclosure. It was expected by the Court and Justice McGrath summed it up very neatly in paragraph 115, 114, "The appellants also suggest there is doubt concerning the exact nature and extent of the financial relationship between Judge and counsel. But I am satisfied that, in following the approved procedure of making a written statement to the Court concerning the complaint, the Judge will have disclosed to the Court all the facts that might be relevant to the issue we have to address."

TIPPING J:

It would be much more helpful to me if you identified what new material has come to light, because everyone accepts there's some new material, and why that affects the conclusion we came to. I think that's really the essence –

MS GREY:

Yes, Sir.

TIPPING J:

– of it, isn't it, Ms Grey?

MS GREY:

Well, Sir –

TIPPING J:

You should identify for us what has since come to light and relate that to the test that is to be applied and say why, in the light of that new material, the conclusion we earlier reached –

MS GREY:

Yes, Sir.

TIPPING J:

– should be reversed.

MS GREY:

Well, the appellants' case, of course, Sir, is that the test is actually a higher threshold test than was –

TIPPING J:

Well, yes, I understand that but –

MS GREY:

But even accepting the line drawn by the Court in its 3 July decision, that a fair minded lay observer might reasonably apprehend a Judge might not bring an impartial mind. Even under that test, and the guide, the touchstones were how counsel and Judges commonly interact –

TIPPING J:

It's not so much the test that is in issue, it's the application of it –

MS GREY:

Yes, Sir.

TIPPING J:

– to a situation of a business relationship.

MS GREY:

Yes, Sir. And the first point, Sir, and it's a very important point, is that a business relationship creates obligations that may conflict with the Judge's primary obligation –

BLANCHARD J:

It would be helpful, Ms Grey, if you would do as the Court asked, and move to the facts that have come out now.

MS GREY:

Okay. Sorry, Sir, I'm trying to assist, I'm obviously not quite understanding.

BLANCHARD J:

I'm sure…

MS GREY:

The point, Sir, is the Judge and counsel were in the process of purchasing a block of land, in partnership with other entities, during the hearing of the Court of Appeal case. That purchase was fully financed by the bank, according to Justice Wilson's second statement of August 2009. The agreement for sale and purchase was entered into days after the announcement of Justice Wilson as a Judge and settlement was entered into after our hearing but before the Court of Appeal released its decision. So settlement was on, I think, the 5th of June 2007, the hearing was in April 2007 and the decision was in August 2007, so right in the middle of our case the Judge and counsel purchase another block of land, wholly financed by the bank, which would inevitably have required meetings to arrange finance to decide how to finance the land with the other partners in the land to arrange – and that type of private meeting, between Judge and counsel, is the very type of thing that an appellant and, indeed, any lay observer would have some reservations about, and in fact it's the very type of thing that is stated in the judicial code that it should not happen. It's paragraph 49 of the judicial code, "Care should be taken to avoid –

BLANCHARD J:

You've drifted back to the earlier argument. I was finding it very helpful when you were narrating the facts, and I think you're only part way through them.

MS GREY:

Yes, Sir, that was the first point, Sir.

BLANCHARD J:

Well, let's get the facts on the table.

MS GREY:

Yes, Sir, okay.

BLANCHARD J:

Then we can talk about them.

TIPPING J:

So you're saying that more is known of that factor, the buying of the land, surrounding the Court of Appeal hearing, than was known earlier?

MS GREY:

Yes, Sir.

TIPPING J:

How much more?

MS GREY:

Much more, Sir, and I'll just refer you to His Honour's statement. There was no reference to that timing in His Honour's statement that was made before the 3 March hearing. In His Honour's statement of August 28th 2009, he first disclosed, reference to that matter, in paragraph 10 of that statement, and it's a difficult paragraph for me to understand, Sir, you may understand it more clearly than I, but he says, the Judge says, "So far as I was aware, there was no material change in Rich Hill Limited between April and August 2007."

BLANCHARD J:

Which –

MS GREY:

Paragraph 10 of His Honour's statement –

BLANCHARD J:

Oh, yes.

MS GREY:

– of August –

BLANCHARD J:

I was looking at the wrong statement.

MS GREY:

– 2009. "So far as I was aware there was no material change in Rich Hill Limited between April and August 2007 when the Court of Appeal judgment was delivered." But he then goes on to say, "Settlement of the additional land being acquired by the company took place on the 1st of June 2007," which is bang in the middle of the period of time when His Honour said there was no material change. That purchase –

TIPPING J:

Well, that was disclosed, that there was settlement of the purchase –

MS GREY:

No, Sir.

TIPPING J:

– of extra land during the period that you've identified.

MS GREY:

No, Sir, there wasn't.

TIPPING J:

Well, it says it here, "Settlement of the additional land being acquired took place on 1 June 2007."

MS GREY:

Yes, Sir, this is the –

BLANCHARD J:

No, no, but this is the subsequent disclosure.

MS GREY:

This is the statement after Your Honours' decision, Sir.

TIPPING J:

Oh, I'm sorry, I thought we were invited to look at the statement.

BLANCHARD J:

Am I right in thinking that none of this was mentioned in the statement that we had at the original hearing?

TIPPING J:

Oh, I'm sorry, I thought we were looking at the statement.

MS GREY:

Yes, Sir. No, the statement of Justice Wilson for the original hearing was his December 2008 statement.

BLANCHARD J:

Does that make any mention of this purchase?

MS GREY:

No, Sir, except to say – he mentioned that there was – I'll just check his exact words, Sir. Because he refers in paragraph 10 of his August statement he does footnote, footnote 12, "As explained in paragraph 5 of my previous statement." But paragraph 5 of his previous statement doesn't say, or I can't see anywhere, Sir, that they were in the process of purchasing another block of land during my client's Court of Appeal hearing.

BLANCHARD J:

Yes, I think you're right.

TIPPING J:

Yes, well, I'm sorry, I confused myself, Ms Grey, because I thought you were actually taking us to the earlier statement.

MS GREY:

No, I'm sorry, Sir.

TIPPING J:

No, no.

BLANCHARD J:

So, paragraph 5 of the earlier statement is the only possible reference, and I agree with you, it doesn't mention the purchase.

MS GREY:

Yes, Sir.

McGRATH J:

Well, and as specifically referred to in footnote 12.

MS GREY:

Yes, well, he's referred to footnote 12, Sir, but when you go back and look at the paragraph he cross-references at two, it doesn't seem to say that.

McGRATH J:

Yes, it doesn't support the footnote, that's your point.

MS GREY:

Yes, thank you, Sir. The second point – does that make that point clear for Your Honours?

BLANCHARD J:

Yes.

TIPPING J:

Yes.

MS GREY:

The second point of significance is that it was understood in the Court of Appeal place that Rich Hill, and I'll just check the exact words again, Your Honour Justice Blanchard did a summary of the understanding of Rich Hill and in paragraph 25 of the decision suggested that the Court, the objective observer might turn attention to whether the Judge might be in some way beholden to Mr Galbraith, and went on to say, "Such a situation might theoretically exist if, for example, the Judge had been lent money by counsel or was dependent on counsel in order to meet liability. However the materials placed before the Court reveal nothing of this kind. There is nothing to indicate any indebtedness by the Judge to Mr Galbraith, nor any indication of any inability of the joint company, Rich Hill Limited, to meet its obligations. In fact save for a breeding operation confined to one or two horses per year, a passive landholding vehicle it is, it does not appear to have any significant indebtedness." Now the true situation, as His Honour has revealed in his August 2009 statement, is in fact paragraph 7, Rich Hill Limited is only minimally –

McGRATH J:

Just not too fast.

MS GREY:

I'm sorry Sir. I've spent a lot of time reading these documents Sir. I know them well.

TIPPING J:

I've read them before but you're helpfully analysing them. I agree with my brother, we must go fairly quietly here because we don't want to miss something. So you're taking us to the statement of –

MS GREY:

Paragraph 7.

TIPPING J:

– August 2009 again, yes.

MS GREY:

Yes August 2009, paragraph 7 Sir.

TIPPING J:

Yes, thank you.

MS GREY:

And he talks about, "Rich Hill Limited is only minimally capitalised. Mr Galbraith and I as shareholders have made substantial advances to the company to finance in part the acquisition and development of the land." And he talks about attempts to achieve approximate equality of contribution. "Imbalances in the level of our shareholders accounts did develop from time to time because of different payments which we made on behalf of the company." So the first point there sir is Rich Hill Limited, contrary to the assumptions in paragraph 25, Rich Hill Limited was not able to meet its obligations without financial input.

TIPPING J:

Well it had no working capital by the look of it?

MS GREY:

Yes Sir. And it had out, it had debts, it had mortgages, loans to the bank and it had very substantial loans from its shareholders.

TIPPING J:

And those loans were not precisely equal?

MS GREY:

No not precisely equal and we don't know the exact nature of the loans Sir. It would appear that they would have been shareholder advances that would have been repayable on demand but we haven't had the benefit of any shareholder's agreement being disclosed to us.

McGRATH J:

I suppose what you might be focusing on in Justice Blanchard's judgment in paragraph 25 was the sentence, it starts, "Such a situation might theoretically arise for example if the Judge had been lent money by counsel." Now are you saying that what is now being disclosed is equivalent to that?

MS GREY:

Yes Sir and I was going to move onto that aspect of it Sir. Because that aspect is captured in Justice Wilson's statement to some degree In the latter part of paragraph 7 where he continues as to – when we became aware of a significant imbalance, this is the imbalance between the shareholders accounts, usually from reading annual financial statements when these became available, we discussed and agreed on how we should return to a position of approximate equality. For example, on one occasion we agreed I should assume sole responsibility for paying the interest on and repaying part of the bank borrowing by Rich Hill Limited. Now that in itself, I submit, is an interesting statement because the borrowing is by Rich Hill Limited and Justice Wilson, as between himself and counsel, has agreed to repay the

interest on that sum, and repay the borrowing itself, but from the eyes of the bank Rich Hill Limited would still have been entitled to claim it – sorry. The bank would have been owed the money by Rich Hill Limited.

McGRATH J:

Sorry, the bank would be –

MS GREY:

Sorry, from the perspective of the bank Rich Hill Limited owed the money to the bank but as between Judge and counsel the Judge had agreed to take over responsibility for that sum. Now where that becomes interesting is Justice Wilson goes on to say that if you take that borrowing into account, his personal contributions were 6 percent behind Mr Galbraith's. So 6 percent plus the sum that he'd agreed with Mr Galbraith that he would pay back to the bank.

TIPPING J:

Is that – that was a point I wasn't entirely clear on. Is the 6 percent inclusive of the sum you've just referred to or exclusive of it? I thought it was inclusive. In other words it was an overall imbalance rather than an imbalance plus the bank –

MS GREY:

I read it differently Sir and I'll just find –

TIPPING J:

Could you just help me there?

McGRATH J:

You're looking at paragraph 8 I think.

MS GREY:

Yes it's paragraph 8. "Taking into account my responsibility for the bank debt, they showed that as at 31 March my contributions were approximately

6 percent less than those of Mr Galbraith." Now you could actually read that either way I think from the language that's been used.

TIPPING J:

Well the natural reading to me is that including that it is 6 percent. Not it's 6 percent plus that because the 6 percent figure is the key one.

MS GREY:

Well –

TIPPING J:

But it may not matter much.

MS GREY:

I think what helps is when you look at Justice Wilson's third statement which he provided at the request of Your Honours to provide some clarity on this point and at paragraph 3 of that statement he had advanced $984,176 to Rich Hill Limited and if you add to that the $168,000 that was owed to the bank by Rich Hill Limited which is the figure we've just been talking about –

TIPPING J:

Well that shows that it's the two together that represents the 6 percent doesn't it?

MS GREY:

If – yes. So the actual difference –

McGRATH J:

Just go on, okay, so we add the $984, 000 to the $168,000?

MS GREY:

And get $1,152,000 which is the total amount that the Judge owed whereas Mr Galbraith owed $1.226 million.

TIPPING J:

Yes.

MS GREY:

But what the 6 percent – the Judge has then subtracted the two numbers and come to $74,000 and said that that is 6 percent.

McGRATH J:

Of?

MS GREY:

Of – so his contribution was 6 percent less than Mr Galbraith's because $74,000 is 6 percent of the 1.2 million, that's my understanding of what he's saying Sir.

McGRATH J:

So 6.5 percent roughly of that and it will also be 6.4 percent if you – so that makes the figure?

MS GREY:

Yes so my submission there Sir is the alternative way of doing the calculation, which is what I think Justice Blanchard has suggested, is the $168,000 wasn't actually a contribution from Justice Wilson so his, his –

TIPPING J:

Well it was an indebtedness that he'd undertaken.

MS GREY:

Yes but it's an indebtedness to a different entity –

TIPPING J:

Oh certainly.

MS GREY:

– and through a different route and looking at it from – perhaps if we look at it from the beholdenment side rather than the indebtedness side, it's a beholdenment where Mr Galbraith has basically done Justice Wilson a favour. He's basically said, look you just take over that sum –

ANDERSON J:

I'm just wondering whether it's getting overcomplicated. I mean there's obviously an underlying arrangement that they would contribute equally in terms of company capital as time went on. It got to a point where Justice Wilson was behind to the extent of the bank loan plus $74,000.

MS GREY:

Yes.

ANDERSON J:

And he agrees with Mr Galbraith that he will meet those liabilities.

MS GREY:

Yes.

ANDERSON J:

So that's an arrangement that I would have thought could have been legally enforced by Mr Galbraith against Justice Wilson?

MS GREY:

Yes.

ANDERSON J:

So there was an enforceable obligation by Justice Wilson to Mr Galbraith of something like 240 or $250,000.

MS GREY:

Yes. Yes Sir and I agree with that Sir. The only complication with that perhaps is in Justice Wilson's third statement at paragraph 2 when he seems to be suggesting that the imbalance in shareholder's accounts doesn't result in indebtedness.

ANDERSON J:

It's not the imbalance in the shareholder's accounts because that's just looking at the vehicle by which they carry out their joint venture.

MS GREY:

Yes.

TIPPING J:

But if he just –

ANDERSON J:

They had an underlying arrangement, obviously, to carry out a joint venture by way of this company.

MS GREY:

Yes.

BLANCHARD J:

Well we're not really interested in what Justice Wilson thought about it. It's a question of what the objective observer would make of it.

MS GREY:

Yes. And the crux of it Sir is that there were complicated financial arrangements involving big sums of money, debts to third parties, debts to each other. We don't know the exact details but we do know that the quantums were large and we do know that Justice Wilson, and this is turning to a slightly different point but it's related to all of this, Justice Wilson was at the point where he couldn't borrow more money from his bank without a

guarantee from Rich Hill Limited. And that's what he says in the second statement at paragraph 11. He starts at, "If Rich Hill Limited was not in a position to pay director's fees dividends and then I prefer to fund my contributions" –

McGRATH J:
Sorry, this is the statement of –

MS GREY:
This is Justice Wilson's –

McGRATH J:
– the 28th of August?

MS GREY:
Yes Sir.

McGRATH J:
At paragraph?

MS GREY:
Paragraph 11 Sir. The second sentence, "I prefer to fund as much of my contribution to the company as was practicable from borrowed funds. In part I did this, as I've explained, by assuming sole responsibility for some of the company's bank debt. I also arranged with my bank to borrow on normal commercial terms against my equity in Rich Hill Limited. In order that I might do so Rich Hill Limited was required to guarantee that borrowing." And he's, the Judge says, "If I had defaulted and the guarantee had been called upon, my equity would have been reduced accordingly." He says, "In effect I was borrowing against my own money." Now that maybe correct that he was borrowing against his own money. There's two difficulties. The first difficulty is that a guarantee by Rich Hill Limited just as a mortgage by Rich Hill Limited required the signature of both directors, not just one, because it exposed all of the equity of Rich Hill Limited. The second difficulty is that section 161 of the

Companies Act requires certification by directors where a guarantee is made by a company for the benefit of a director.

BLANCHARD J:

Is your point, in part, that if Mr Galbraith had withdrawn his guarantee that Justice Wilson would have had a large obligation to pay?

MS GREY:

Yes Sir. He would - Justice Wilson wouldn't have been, according to Justice Wilson's own evidence, he wouldn't have been able to borrow the money from his bank to put his share of the funds into Rich Hill Limited unless Mr Galbraith had signed the guarantee for the bank.

BLANCHARD J:

Well I'm not sure it goes quite as far as that but I don't know that it needs to.

TIPPING J:

No. That's unless the company guaranteed, wasn't it, rather than Mr Galbraith guaranteed?

MS GREY:

Mr Galbraith was a director of the company so, I'm sorry Sir, the company guarantees but the company can't guarantee without its directors signing the guarantee and signing that they understand the implications and –

TIPPING J:

Yes, yes, of course.

MS GREY:

– and the risks.

McGRATH J:

What you really do is whether it's indebtedness or not, the Judge expressed a view on that, but whether it's indebtedness or not do you say it's the type of

transaction that the Court was concerned with in paragraph 25 of Justice Blanchard's recent judgment?

MS GREY:

Yes Sir I do and I say –

McGRATH J:

It's equivalent to it.

MS GREY:

Yes.

McGRATH J:

Whether the technicalities make it the same in form or not, in substance that's what it's all about.

MS GREY:

Thank you Sir, yes. The Judge – I would put in the words the Judge was beholden to counsel because he needed the counsel in his capacity as director of Rich Hill Limited to do something that wasn't in counsel's own personal best interests. He was doing it to help out Justice Wilson.

TIPPING J:

Although it won't matter ultimately I suspect Ms Grey I'd just like, if you'll forgive me, to get to the bottom of this arithmetic in paragraph 3 of the statement of 30 September that was put to you by my brother Anderson a few minutes ago. Tentatively, I don't know that it – that the gap is as much as 200 and something thousand. If the Judge had actually paid the bank indebtedness of $168,000, actually physically paid it on behalf of the company, that would have been added, would it not, to his current account –

MS GREY:

Yes Sir but he hadn't actually paid it Sir.

TIPPING J:

No, no, just bear with me for a moment. If he had paid it that would have made his advance to the company in effect $984,176 plus $168,555.

MS GREY:

Yes, the total of 1,152 – yes.

TIPPING J:

Exactly. So his current account would then have been his – he was in credit, vis a vis the company. The company owed him if he had paid the 168 but taking on an obligation is equivalent, I think for present purposes, to having paid it –

MS GREY:

Well, Sir, my argument there, Sir, is as between himself and the bank – well, as between himself and Mr Galbraith, I agree with you, but in the eyes of the bank it didn't excuse Mr Galbraith's share and it didn't excuse the bank from collecting that money as secured under its mortgage if –

TIPPING J:

Of course, no, no, I fully understand that, but I think the Judge's statement that the difference between those figures was $74,249, is the amount by which bringing in the 168 he is behind Mr Galbraith's –

MS GREY:

Yes.

TIPPING J:

– in current account.

MS GREY:

Yes.

BLANCHARD J:

And what that amounts to is that there was a situation, at least in relation to the $74,000 imbalance, where Mr Galbraith was entitled to demand a further payment be made to the company to equalise the shareholders' accounts.

MS GREY:

Yes.

BLANCHARD J:

And the flow of money would have been from the Judge to the company and then, as to half, out of it again –

MS GREY:

Yes.

BLANCHARD J:

– to Mr Galbraith, thereby, and thereby there was a situation where indirectly there was an indebtedness.

MS GREY:

Yes.

TIPPING J:

I think that's the proper way to analyse it, but it doesn't, precise figures aren't going to make much difference. But in effect the Judge owed the company 74,000, of which half, you could say, was indirectly owed to Mr Galbraith.

MS GREY:

Yes.

BLANCHARD J:

That was what leapt out at me when I read the statement of 26 August, and that is what motivated the Court to ask for the figure to be supplied.

MS GREY:

Yes, Sir.

TIPPING J:

Yes, we wanted to know what the 6 percent amounted to.

MS GREY:

Yes.

TIPPING J:

Because if it was two and sixpence, that would be one thing, if it's a hundred million dollars that would be another.

MS GREY:

And the question is, is it material?

TIPPING J:

Quite.

MS GREY:

And if Your Honours think it is material then we probably –

TIPPING J:

Well, isn't that the real crunch of this case?

MS GREY:

And if –

TIPPING J:

With all this – I'm not criticising you, I'm just saying, isn't that the real crunch of this case?

MS GREY:

Well that is a very clear argument for recall, yes, Sir.

TIPPING J:

From your client's point of view.

MS GREY:

Yes, Sir.

TIPPING J:

Yes. I mean, there are peripheral and surrounding issues, but if the other side can't get round this in some appropriate way, then that puts a pretty strong argument for saying there was, effectively, financial beholdenness.

MS GREY:

Well, financial indebtedness, and I would say, Sir, that beholdenment is another issue again.

TIPPING J:

Well, don't argue with me when I'm trying to help you.

MS GREY:

No, Sir, I'm sorry, Sir.

ANDERSON J:

Were you making the point –

TIPPING J:

You might have a good argument and I might go off the point.

MS GREY:

No, Sir.

ANDERSON J:

Were you making the point earlier, and I'm not sure whether you were or not, but the timing of the transactions was significant because the judgment was under consideration –

MS GREY:

Yes, Sir.

ANDERSON J:

– at the point of settlement?

MS GREY:

Yes, Sir. I think there's two points there, Sir. The timing was very significant because the judgment was under consideration at that time and, from my client's perspective, my client can't communicate with any Judge in any way except through the registrar, from a reasonable lay observer's perspective there may be seen to be an element of unfairness –

ANDERSON J:

Well, there's very likely to have been dealings between the Judge and Mr Galbraith while the judgment was under consideration –

MS GREY:

Yes.

ANDERSON J:

– relevant to settlement.

MS GREY:

Yes, Sir. And the company itself, Sir, would presumably have had to have signed documents to approve, because the full amount of that purchase was borrowed from the bank, and Justice Wilson has –

ANDERSON J:

Oh, I understand. But they were the only shareholders and directors, weren't they?

MS GREY:

Yes, Sir.

TIPPING J:

So you've got the timing point and the indirect indebtedness point.

MS GREY:

Yes, Sir.

TIPPING J:

Is there any other –

MS GREY:

Yes, Sir.

TIPPING J:

– sort of analytical point like those that you want to draw to your attention?

MS GREY:

Hopefully not as hard as that, Sir, but the third point is just the fact of the guarantee, Sir, which I've started raising, Sir. The fact of the guarantee by a company is that the words, certainly the normal terms of the guarantee, exposes the company's assets to the guarantor.

ANDERSON J:

Well, your real point on this, which I think, with respect, was stronger, is that the guarantee required the co-operation of Mr Galbraith –

MS GREY:

Yes.

ANDERSON J:

– and the guarantee was for the benefit of Justice Wilson.

MS GREY:

Yes, Sir, thank you, Sir, that's a beautiful way of capturing it. And that, Sir, I would submit, is beholdenment.

BLANCHARD J:

Do we know at what point that guarantee was put in place?

MS GREY:

No, Sir, only Justice Wilson's statement at paragraph 11, his August statement, he simply says, about where he talks about having to borrow funds, "In order that I might do so Rich Hill was required to guarantee that borrowing."

BLANCHARD J:

And you say that the settlement occurred after the hearing and before the judgment?

MS GREY:

Yes, Sir.

BLANCHARD J:

So would it be reasonable for us to assume, and this is almost a question directed at Mr Taylor rather than you, would it be reasonable for us to assume that during the period while the judgment was under consideration, that guarantee was put in place?

MS GREY:

There's no evidence on that, Sir, but that is a possible interpretation, I would submit, Sir.

TIPPING J:

Well, it may be argued that once you get this far into this sort of situation, all reasonable assumptions should be made against the person who is seeking to excuse, if you like, this situation, because one is reliant on the full disclosure.

MS GREY:

Yes.

TIPPING J:

And if one gets a sniff of it, one could say there's a big smell – forgive the metaphor –

MS GREY:

Yes.

TIPPING J:

– unless it's dispelled.

MS GREY:

Yes, exactly, Sir, and that's what the Court has said in other cases, including the *Aussie Airlines* case, Sir.

TIPPING J:

Yes, yes, we have rather, or the Courts have tended to go that way, haven't they?

MS GREY:

Yes, yes, Sir. And that –

TIPPING J:

Not as crudely as I've just put it, but to that effect.

MS GREY:

Yes, Sir. And the reasonable lay observer, Sir, of course, is one of the tests, and the lay observer would probably put it more crudely than Your Honour put it, to be fair.

TIPPING J:

But the lay observer, of course, doesn't think like a lawyer, happily, or unhappily.

MS GREY:

No, the –

TIPPING J:

That's part of the reason why we have the lay observer in the enquiry.

MS GREY:

Yes, Sir. I represent a lot of lay observers, Sir, and I can –

TIPPING J:

And I'm not being pejorative of – the importance is that this is to be looked at in a broader way than perhaps a fully trained legal mind would.

MS GREY:

Yes, Sir. If there's a hint of a smell it needs to be resolved, and the onus, in my submission, Sir, is on the Judge to provide full and frank disclosure and, if he hasn't, there's a –

TIPPING J:

Well, I'm not making any reflection on that, I'm just saying if anything remains unclear, once you've got so far, then there is an argument that the lay observer might reasonably put two and two together.

MS GREY:

Yes, Sir.

TIPPING J:

That's my point.

BLANCHARD J:

Well, does that take you through the factual material?

MS GREY:

There is one more point, Sir, and that is just in relation to the purchase of the land during the Court of Appeal hearing. That was an additional borrowing that's not covered in the Judge's explanation of the indebtedness, and his exp – he's provided his advice of what the property was valued at just around that time, but he hasn't factored in this additional borrowing. So the point there simply is that they were getting a very large debt relative to the value of their property, and they had very limited opportunities to pay off that debt, because they had the original title of land, the 38 hectare block of land that they'd owned for some years, but they had a share in the second block of land, but that was in partnership with Rich Hill Thoroughbreds and others.

TIPPING J:

The land was bought by Rich Hill Limited, wasn't it, this block that we're talking about that was acquired during the –

MS GREY:

No, Sir.

TIPPING J:

No?

MS GREY:

That block was bought one-third by Rich Hill Limited, –

TIPPING J:

Oh, one-third, that's right.

MS GREY:

– four-ninths by Rich Hill Thoroughbreds Limited and two-ninths by Mr Thompson, I think Mr and Mrs Thompson.

TIPPING J:

Right, sorry, yes, you're quite right. But looking at it from the point of view of Rich Hill Limited's – one-third, did you say?

MS GREY:

Yes, Sir.

TIPPING J:

Presumably it being minimally capitalised, the borrowing by it would have been guaranteed by the directors. I mean, no bank's going to lend unless the security is very substantial, the margin, I mean. But we don't –

MS GREY:

Yes, Sir, and we don't have information on that, Sir.

TIPPING J:

– have that clearly set out before us.

BLANCHARD J:

All we're told, I think, is in paragraph 10, that the purchase was financed in full by borrowing from the company's bank on the security of its existing land.

MS GREY:

That's correct, Sir.

TIPPING J:

Of course, it did have – yes, there could have been a sufficient margin but, again, we don't know.

MS GREY:

Well, and there is some evidence of that, Sir.

TIPPING J:

But, according to Mr Taylor, I think we do know, but –

MR TAYLOR:

Yes, we do.

MS GREY:

Do we?

MR TAYLOR:

Well, we don't – we know what the margin is, Sir, because –

TIPPING J:

Right, well, we're – sorry.

MS GREY:

Well, my submission, Sir, is the bank – Justice Wilson has provided what he says the land was valued at, but he hasn't provided the copy of the valuation report, so we don't know whether there were conditions in, as we know with –

TIPPING J:

Oh, well, I don't think that's – well, perhaps we'd better wait and see what Mr Taylor says and you'll have an opportunity to reply.

MS GREY:

But, Sir, there is more evidence on that in the second affidavit of Mr Ewen-Street, which is the Quotable Value valuations for the land, and that sets the valuation at – there were two valuations, one in July 2006 and one in July 2009, so straddling the period of June 2007. Those valuations are annexures F, G, H and I of Mr Ewen-Street's second affidavit –

TIPPING J:

Yes, I must confess, this was such a formidable bundle of exhibits, you'll have to take me, at least, to anything particular that you want rely on because…

MS GREY:

Yes, Sir. Much of it has become, I would submit, less relevant than it was since the code of judicial conduct, or guidance, has been released.

TIPPING J:

Well, could we just –

MS GREY:

But the relevant parts in this second affidavit, Sir, is simply the first document, which confirms the date that the agreement for sale and purchase was entered into for that second block of land, and that was three days after the appointment of the Judge. Document C, which –

BLANCHARD J:

Can we just go more slowly to that –

MS GREY:

Sorry, Sir.

BLANCHARD J:

– because I haven't been through all these documents.

TIPPING J:

This is –

BLANCHARD J:

Is this the one that's headed, "2062 Morrinsville-Walton Road?"

MS GREY:

Yes, Sir. Which exhibit do you have in front of you, Sir?

BLANCHARD J:

A.

MS GREY:

Exhibit A, yes, Sir. That –

BLANCHARD J:

So, it's got a sale price, $2,160,000, 22nd of December 2006.

MS GREY:

Yes, Sir. And that is the second – the title that Rich Hill Limited purchased one-third of, Rich Hill Thoroughbreds purchase four-ninths of and the other parties, the Thompsons, purchased two-ninths of.

BLANCHARD J:

So, it's looking at about a $700,000 commitment.

MS GREY:

Yes, Sir, additional commitment, Sir.

BLANCHARD J:

Okay, where do we go next?

MS GREY:

And annexure C is the historical record from that certificate of title, confirming the transfer date on the 5th of June 2007. It's the last of the interest recorded on that historical record.

TIPPING J:

Exhibit C.

BLANCHARD J:

Mine doesn't do that, it's the last entry on the second page of the certificate of title. Is that what I'm supposed to be looking at?

MS GREY:

Oh, I'm sorry, Sir, no. It's headed, "Computer freehold, register under Land Transfer Act 1952, historical record," and on that front page of that document, "SA220/4", and if you look under the interests, Sir, the last interest recorded there is, "Transfer to Colin Charles Edward Thompson and Irene Sheila Thompson two-ninths share, Rich Hill Limited one-third and Rich Hill Thoroughbreds…

TIPPING J:

Right.

BLANCHARD J:

Yes.

MS GREY:

And that's just – the relevance of this is just to confirm the sale date on the 5th of June 2007.

McGRATH J:

Is that a date of sale or registration?

BLANCHARD J:

That's a registration date, although –

MS GREY:

I'm sorry, Sir, that's – I took that as the settlement date, Sir.

BLANCHARD J:

Well, if it was done electronically it probably was, but…

McGRATH J:

Okay.

MS GREY:

Certainly around those days, and that's consistent with Justice Wilson's evidence that that occurred in June 2007. The next documents that you need – document D is a copy of the mortgage which had been provided to the Court but not annexed to any affidavit before, so it's a document that you should have on your files. I don't know if it's particularly relevant, except to say that there was a mortgage over Rich Hill's land in favour of the BNZ Bank.

BLANCHARD J:

I think we knew that at the last hearing.

MS GREY:

Yes, and what we –

TIPPING J:

But it doesn't demonstrate, at least on the face of it, any guarantee by the directors, does it?

MS GREY:

No, Sir, and my understanding from Justice Wilson's evidence is that was a separate obligation that was –

TIPPING J:

Probably secured by collateral, a general guarantee.

MR TAYLOR:

Yes, just be clear, Your Honours, that I don't think there's any evidence to suggest that Mr Galbraith or Mr Wilson have given personal guarantees, I'm not aware that there was any personal guarantee. But the company clearly guaranteed the indebtedness.

TIPPING J:

Well, it was the company's indebtedness, wasn't it?

MR TAYLOR:

Yes, yes, exactly, and it's, it's not a given.

TIPPING J:

Well, it's left unclear.

MR TAYLOR:

Yes.

MS GREY:

And the only significant of the mortgage, Sir, is that we did raise the fact of the mortgage, but until Justice Wilson's August statement we didn't know if it actually secured any money. So it was security, but we didn't know what the underlying debt was, or if indeed there was one.

TIPPING J:

Well, I don't know whether it's of any significance, but towards the back of this document, I've gone on quite a number of pages in this exhibit D, almost to the end of it, there is a form of guarantee there but it's not filled in. But, again, I doubt that this is going to make much difference in the end.

MS GREY:

No, Sir. My understanding from Justice Wilson's evidence was that the guarantee was a separate document that was required along the way, when he wanted to borrow further money from his bank.

TIPPING J:

Well, that was a guarantee –

BLANCHARD J:

Well, the deponent actually says that exhibit E, to which Justice Tipping has referred, is a standard form guarantee, which is understood by the deponent to be similar to the guarantee that Justice Wilson's bank require from Rich Hill Limited.

MS GREY:

Yes, Sir, that's exhibit E.

BLANCHARD J:

So it's not directly relevant.

MS GREY:

No, Sir, not at all, except to say that guarantees come with them a lot of warnings and instructions about the implications for people who are not the direct beneficiary, you know, the usual warnings of needing independent legal advice because of implications and that type, Sir, of which you'll be very familiar any way, Sir. We unfortunately haven't had access to the actual guarantee, to have a look at that. The documents I was taking you to is annexure F, which comes after that standard form guarantee, and annexure F is the QV valuation for the original block of land wholly owned by Rich Hill Limited for, it's the most recent valuation, it just came out on the 1st of July 2009, and the valuation there is $2.15 million. Now, the only significance of that, Sir, is it's significantly less than the valuation that Justice Wilson had from the private valuation he referred to, and I think it's the nature of valuations –

McGRATH J:

It was 2007, I think, wasn't it?

MS GREY:

Yes, Sir. And the next document is G, is the same block of land, it's the QV valuation from the 1st of July 2006, so it was a year earlier. So, there's nothing much in that except to say that, as we've all experienced, valuations

can go up and down as the market goes up and down, and the fact you might think you have equity in your land doesn't necessarily apply when it comes to it.

McGRATH J:

So, sorry, what's the point of G, if it's an earlier date?

MS GREY:

Just as an earlier – so, it's the valuation, the other valuation –

McGRATH J:

Previous valuation.

MS GREY:

– that was closer to the time.

TIPPING J:

Apart from the timing and the need for the parties to be liaising with each other over the implementation of the settlement of this extra block of land, is there anything about the price of it or anything else associated with it that you're relying on, or is it just that they were in close communication, obviously, for the purpose of implementing this transaction?

MS GREY:

Yes, Sir, that's the first point, and the second point, Sir, is Justice Wilson's evidence has explained that there was approximately over $2 million shareholders' contributions already to Rich Hill Limited, that basically the company owed to Mr Galbraith and to Justice Wilson.

TIPPING J:

That's the point about the 74,000.

MS GREY:

Yes, Sir.

TIPPING J:

Yes, I've got that firmly in my head.

MS GREY:

And so the extra 700,000 plus to purchase the one-third share of this property during settlement would have been on top of that indebtedness.

TIPPING J:

But there's nothing to suggest that they contributed in an unbalanced way, because it was all borrowed.

MS GREY:

Yes, sir, that's right. But the implication of that is more, on the beholdenment, Sir, is, if everything's working –

TIPPING J:

No, no, I'm not inviting you to have to go through it again –

MS GREY:

No, no, Sir.

TIPPING J:

– I just wanted to make sure that there was nothing there that I was missing.

MS GREY:

No, but there is a point, there is an additional point than the one I've made, I think, Sir, and that is if things fall into problem and income is insufficient to pay outgoings and they need an exit strategy, the options for the Judge were somewhat limited because they had their one main title of land, that was heavily mortgaged, up to pretty much the value of the land and also subject to a bank guarantee, and they had a share in another block of land, but that second block of land wouldn't have been readily saleable without the agreement of the other partners in that land.

BLANCHARD J:

When you say, "Was heavily mortgaged," what do you understand the level of the mortgage to have been, on the existing land?

MS GREY:

What I understood it originally to be was just the $168,000 that –

BLANCHARD J:

Yes, plus the 700,000.

MS GREY:

Plus 700,000, plus – I'm sorry, I've used incorrect – plus it was effectively providing security under the guarantee for Justice Wilson's private borrowing of one point, or almost $1 million, Sir. But if that land had had to have been sold, then the equity left was Mr Galbraith's equity. So, there's another element of beholdenment there, I'm not sure that I'm explaining it as clearly as I could, but effectively the guarantee was against all of the assets of Rich Hill, so Justice Wilson's share and Mr Galbraith's share, because Rich Hill is an entity in itself, so it would have covered all of the equity. So if they wanted to realise their assets back out of it, the guarantor, guarantee, and the bank, under the mortgage, would have come first and Justice Wilson, sorry, Mr Galbraith, would have been effectively third in line to recover his share of his contributions.

TIPPING J:

As there was no working capital in the company, really they were going to pay off the borrowings and we just don't know, do we, how much by way of shareholders' funds, if any, there were in this company. But are you saying that any that there were, in other words, any money that was actually coming free after sale and repayment of borrowings, belonged to Mr Galbraith, rather than the Judge? It's that step that I'm not entirely –

MS GREY:

Well, Sir, no, yes, almost, Sir. What I'm saying is, but Justice Wilson's contribution was actually his borrowing from his private bank, which was secured by the guarantee.

TIPPING J:

Yes, understood.

MS GREY:

So the guarantee, if exercised, would have taken that money out first, and Mr Galbraith would have been left with anything that might have been left that. So he was third in line.

TIPPING J:

Well, presumably Mr Galbraith's contribution was not in the form of share capital, because it was not capitalised, but it was in the form of an advance.

MS GREY:

And advance, yes, Sir. But I imagine his advance would have a lower security than – the bank wouldn't be secondary to Mr Galbraith's.

TIPPING J:

No, no, banks generally don't…

MS GREY:

Unless they've got a much kinder bank than I have, Sir.

BLANCHARD J:

Well, I think I follow all of that.

MS GREY:

Yes, well, thank you, that's helpful. I think those are the main points, Sir. The diagram that I've given you with the appellants' submissions in reply, I've got a

slightly updated version that I've given you today, just to reflect the additional criteria from the New Zealand Guidelines for Judicial Conduct, which, it's hopefully reasonably explanatory. But the issues that we've just been talking about are the issues in the top part of the diagram which, in my submission, Sir, would put the relationship between Judge and counsel over whichever line the Court adopted. And those matters are all matters that have come to light since the Supreme Court decision. Is there anything else I can help Your Honours with at this stage?

BLANCHARD J:

No, thank you.

MS GREY:

Thank you, Sir.

BLANCHARD J:

Thank you, Ms Grey. Yes, Mr Taylor?

MR TAYLOR:

Thank you, Sir. I would respectfully submit that the suggestion by His Honour Justice Tipping, that the only issue that is really in issue is whether the $74,000 shareholder imbalance is sufficiently material to give rise to a reasonable apprehension of bias, and I will address that issue first. But before I finish my submissions I do want to take the Court to the record of the oral argument, because these issues that were, which are now being raised again, relating to the exact financial dealings between the partners, Mr Galbraith and Mr Wilson, were matters that were raised as a concern by Ms Owen in the course of the oral argument, and I think on two occasions the Court indicated that if she had concerns about those matters they were matters that she should have cross-examined the Judge on. And I do want to suggest that in a sense what is happening here is death by a thousand cuts, because what Justice Wilson did was address the matters that were raised in the original round of affidavits in his first statement and then, following the judgment and these further issues being raised, he has responded to them.

But, as he made clear in his first statement, he was more than willing to appear and be cross-examined on the matters that he had covered in his first statement.

BLANCHARD J:

But it was his obligation to make disclosure, that's a fundamental.

MR TAYLOR:

That is absolutely a fundamental, but the issue is he is under an obligation to make disclosure of material issues, which might give rise to a reasonable apprehension of bias.

BLANCHARD J:

Well, the question is whether anything that has come out subsequently is a material matter that should have been disclosed –

MR TAYLOR:

Yes.

BLANCHARD J:

– and would have made a difference –

MR TAYLOR:

Yes.

BLANCHARD J:

– to our judgment the last time round.

MR TAYLOR:

Well, I think there's two issues. There's the issue of what should have been disclosed, and then there's the issue of whether what should have been disclosed actually gives rise to a reasonable apprehension of bias. So it is a slightly two-stage step.

BLANCHARD J:

Well, I thought that's what I was saying.

MR TAYLOR:

Yes, yes, well, perhaps you were, Sir.

McGRATH J:

The reality, of course, is that the Judge did make a further disclosure.

MR TAYLOR:

Yes.

McGRATH J:

Of his own volition, initially.

MR TAYLOR:

Yes, yes.

McGRATH J:

And that that contains new material.

MR TAYLOR:

Yes, it does.

McGRATH J:

And we have to assess that, in that light, it seems to me.

MR TAYLOR:

And we have to assess the materiality of that in that light. And what I want to suggest to the Court is that when one looks at Justice Wilson's first statement he is referring there, at paragraph 5, to the result, essentially, of the transaction, the earlier transaction where the parties had purchased the land in various shares. And what he's talking about at paragraph 5 is obviously the re-subdivision and amalgamation of the land so that each company or each

purchaser of that land ends up with their respective share of it. So, that's what referring to, he's obviously doesn't consider that the fact that a purchase has been made and borrowing has been made to effect that purchase is material, but he's really just updating the Court and saying, "Well, we've got this land, we've got this interest in this other land, and it's all in the process of being subdivided and amalgamated," so, presumably to put them into separate titles in respect of each owner. And Justice Wilson does refer to that again later in his, I think his final statement.

TIPPING J:

Are you really saying Mr Taylor that from the timing point of view, that being one of Ms Grey's headlines –

MR TAYLOR:

Yes.

TIPPING J:

– that it was perfectly apparent from the earlier material that this must have been going on at the time when the –

MR TAYLOR:

I wouldn't say it's perfectly apparent because it's not –

TIPPING J:

No, I didn't think you were putting it that high.

MR TAYLOR:

No, no I certainly wasn't but the point that I'm making is that it looks like, it certainly looks like the parties had agreed to purchase this extra block of land and various shares and then to subdivide it into various shares and this issue of subdivision and what was happening with the subdivision was a matter that was covered at some length in the oral argument but at the end –

TIPPING J:

This is not the point that really troubles me Mr Taylor.

MR TAYLOR:

No, no Sir.

TIPPING J:

The point that troubles me is the fact that there was no earlier information about the financial inter-relationship between the two parties within the company structure.

MR TAYLOR:

Yes, yes, yes.

TIPPING J:

And we now have that and we find an imbalance and to a lay mind that could well be seen as indebtedness or indirect indebtedness.

MR TAYLOR:

Yes and that's why it comes back –

TIPPING J:

Is it your argument that it is so, the amount is such –

MR TAYLOR:

Yes.

TIPPING J:

Well, I thought that would be – but it seems to me that's the crunch point.

MR TAYLOR:

Absolutely.

TIPPING J:

For me, at least provisionally.

MR TAYLOR:

Absolutely and what I hope to do is to persuade you that on what we do know now that imbalance, such as it is, is immaterial, that it's not –

BLANCHARD J:

I think I should flag that I'll take a fair amount of persuasion.

MR TAYLOR:

Well –

BLANCHARD J:

Given that it's – even if you halve it, 37,000.

MR TAYLOR:

Yes. But it's 37,000 put into perspective, in my submission, and the way we do that is to go to Justice Wilson's statement where he gives the actual figures. So he talks about, and that is the 22nd October statement.

BLANCHARD J:

22nd October?

MR TAYLOR:

2009, the last statement.

TIPPING J:

I thought it was the 30th.

BLANCHARD J:

30th of September.

McGRATH J:

Yes but it is dated 22 October if you look at it.

MR TAYLOR:

Oh I'm sorry. Yes you're quite –

BLANCHARD J:

So it is. Oh it's a response to a minute of the 30th of September.

MR TAYLOR:

Correct, yes. Yes.

TIPPING J:

22nd of October?

MR TAYLOR:

Yes, so if we go to paragraph 3, and he talks about the imbalance between the shareholder accounts and then he says that in May 2007 a registered valuer valued the land and buildings owned by Rich Hill at $2,955,000 of which $74,249 was approximately 2.5 percent. In addition the company owned brood mares that had a depreciation book value of $190,000. So he says that the assets of the company at that time are approximately $3 million dollars and we know that there's a debt at approximately that time of around $190,000 so the net equity in the assets in the company is something like $2.8 million dollars.

ANDERSON J:

Is it?

MR TAYLOR:

Yes.

ANDERSON J:

What about the shareholders' advances?

MR TAYLOR:

Well the shareholders' advances in the event of a liquidation would simply be, or a sale of the property of the assets of the company, would simply be repaid to the shareholders.

ANDERSON J:

But they're a company debt?

MR TAYLOR:

Well –

TIPPING J:

It depends what you mean by net equity Mr Taylor?

MR TAYLOR:

Well what I say the net equity is, is the difference between the borrowings to third parties and the value of the assets because essentially the shareholder funds simply reflect on a 50/50 split at the time of sale. They simply affect what the equity of each partner is in that, in that –

TIPPING J:

Well there's a difference between shareholders' funds and monies owing on shareholder accounts?

MR TAYLOR:

Well –

TIPPING J:

Is there not?

MR TAYLOR:

But –

TIPPING J:

I don't want you to start to get into the stratosphere of company accounting but –

MR TAYLOR:

But its an immaterial difference in my submission.

TIPPING J:

It may be immaterial for present purposes.

MR TAYLOR:

Yes, and that's the real point that I'm making. It is immaterial because the shareholder funds simply reflect part of the 50 percent share in the equity of the company. In other words the difference between the value of the assets and the borrowings or external borrowings that have to be repaid. Because then if you liquidated you would to a 50/50 split of whatever the balance was after that and that would partially repay the shareholder funds and then would partially provide the shareholders with the profit on the venture. And what I'm saying is that in that context a $74,000 difference in the shareholder funds is minute, as Justice Wilson puts it, at about 2.5 percent. So –

BLANCHARD J:

Well it maybe minute, using your word, in overall terms but it's still a significant sum of money?

MR TAYLOR:

Well I did –

BLANCHARD J:

Which Mr Galbraith was entitled to ask Justice Wilson to put his hand in his pocket to pay to the company.

MR TAYLOR:

Well I guess there's an issue as to the extent of that entitlement but it's not one that I want to get into because even if there's no legal entitlement, one would have thought that there is a moral obligation between the parties to contribute equally to the, to the expenses of the venture as it were. So whether it's a legal entitlement –

ANDERSON J:

You can infer that anyway from what Justice Wilson says.

MR TAYLOR:

Yes.

ANDERSON J:

They agreed that they'd top it up in a certain way.

MR TAYLOR:

Yes. And I don't think it's necessary to get tied up in ideas of whether that gives rise to some legal entitlement. Presumably if Mr Galbraith was sufficiently concerned about it and Justice Wilson was being difficult or not paying his share or whatever, Mr Galbraith's option would presumably be to seek some sort of specific performance of an agreement, of a shareholders' agreement of some kind to pay that money to the company. Presumably that's how it would work but in my submission that's not the real issue, what the precise legalities of that are. I'd accept obviously that there was at least a moral obligation and probably a legal obligation to contribute that amount.

ANDERSON J:

And it was in the interests of the two that they got on with each other –

MR TAYLOR:

Absolutely.

ANDERSON J:

– to make the venture work?

MR TAYLOR:

Yes but what I'm suggesting is that that then has to be put into perspective because what you have here is as the Court was well appraised of a relationship, a long standing relationship, of close friendship between these two where they obviously had great trust and loyalty in each other and no reason, certainly absolutely no reason, to suggest that in any way Mr Galbraith had doubts about the ability of Justice Wilson to contribute his share or that there was any debate or discussion or concern between them as to the imbalance which Justice Wilson makes clear in his later statements occur from time to time.

BLANCHARD J:

But aren't we going to make for real difficulties in subsequent cases if we say that it's okay to have a situation where a Judge hears a case at a time when there is an indirect indebtedness of this kind, such that counsel was entitled to ask for a sum of money which can't, I think, be said to be de minimis, had to be paid.

MR TAYLOR:

Well –

BLANCHARD J:

If this had been $5000 I would certainly have been with you.

MR TAYLOR:

Yes.

BLANCHARD J:

But we've got to think about the precedent that would be set in future cases if we were to say this is okay.

MR TAYLOR:

It has to be put in context. Whether it is material depends entirely on the context in which it occurs.

BLANCHARD J:

Well the question, how much context we actually want?

MR TAYLOR:

Well the context you have is that, that there is - I mean, before I go onto that point can I just digress slightly because there is this issue of the subsequent purchase and the borrowings and let's assume that the borrowings were 700,000, but what my learned friend Ms Grey's submission ignores is that that $700,000 is used to purchase an asset so that asset then adds to the security and if we assume that the 700,000 is the one third share of the market price paid at the time, then one would assume that the overall asset value goes up by another 700,000 approximately. But that's – the point I'm making is that you have a situation where you have two close friends that have been operating together over a very, very long period of time and where, because of expenditure that's been occurring, an imbalance has occurred and where, as Justice Wilson makes clear, where that has occurred previously they've sorted that out one way or another and where he actually further goes on and makes clear that he had the ability to pay that amount from his own funds and as – or as he preferred to do normally, to borrow.

BLANCHARD J:

But I don't think we can attribute all that kind of knowledge to the lay observer. This has to be assessed in a relatively rough and ready way, as the lay observer would do.

MR TAYLOR:

Yes, yes, but what the Court has to do is look at it in that context, and against that background, and then ask itself, well, when Mr Galbraith is appearing before His Honour in court, is there any real risk that the Judge is going to be

concerned in some way about an imbalance which he may or may not have even been aware of at the time –

BLANCHARD J:

Well bear in mind it's not our view as to that. We're trying to work out what the notional lay observer's view would be –

MR TAYLOR:

Yes, yes.

BLANCHARD J:

– which is a little different.

MR TAYLOR:

Yes, yes, it is but a reasonable lay observer, knowing of the background between these two, or knowing of that relationship, and the way it had operated for 14 years, and knowing also that the, as I describe it, net equity of this property was approximately 2.8 million dollars, as between the two of them, that a shareholder imbalance of that level would not be something that would prey on the mind of Justice Wilson, consciously or unconsciously, so as to raise a reasonable apprehension that he might act partially towards Mr Galbraith's client and that is the issue that has to be addressed and that necessarily has to be addressed in context because the mere –

TIPPING J:

Can I just ask you one thing Mr Taylor?

MR TAYLOR:

Yes.

TIPPING J:

And it's allied to what my brother Blanchard has just been asking you about. It's a question of underlying policy, if you like. It's not so long ago that the law

took an almost intransigent attitude towards any financial involvement as you will remember.

MR TAYLOR:

Yes.

TIPPING J:

We have liberalised that to some extent and, although the other members of the Court didn't expressly join it, I see it that I thought there should be no presumptions in a financial context. In other words it should be the same test across the board.

MR TAYLOR:

Yes –

TIPPING J:

But, but when it comes to matters of financial involvement, unless that involvement can truly intrinsically be regarded as de minimis, or not capable of being affected by the litigation, if it's a – I just have some hesitation in – I think we've gone a certain way towards liberalising the approach –

MR TAYLOR:

Yes.

TIPPING J:

– and taking away presumptions and so on –

MR TAYLOR:

Yes, yes.

TIPPING J:

– but I just wonder whether it's right in principle to accept this sort of thing and we do it – the control is through this the independent lay observer. But in the end it is a value judgement for the Court –

MR TAYLOR:

Of course Sir.

TIPPING J:

– really, in the end.

MR TAYLOR:

Yes, yes.

TIPPING J:

And, I mean I'm calling a spade a spade perhaps –

MR TAYLOR:

Well and a perfectly valid spade I would say Sir.

TIPPING J:

You see this is, it's going to look to an outsider, when they hear that there's a sort of $35,000 miss-fit if you like.

MR TAYLOR:

Yes, yes.

TIPPING J:

It's going to look a bit odd.

BLANCHARD J:

Well in a way it's not just 35,000.

MR TAYLOR:

No it is 74.

BLANCHARD J:

The 35,000 is only the portion that would flow through. The amount the Justice Wilson would have had to have paid was the 74,000 and that is not de minimis.

MR TAYLOR:

Well it, it has to be considered in context and it – because the Judge, bear in mind that the Judge, if he's considering the issue, either the Court says, look, if there's any debt owed to counsel, then it must be disclosed, which in my submission would be too rigorous a test –

TIPPING J:

I'm not sure about that.

BLANCHARD J:

No.

MR TAYLOR:

Well if –

McGRATH J:

I'm not sure that we haven't made it plain that there should be disclosure of such a debt in the judgment.

MR TAYLOR:

No.

BLANCHARD J:

The lay observer is not apprised of other financial information about Justice Wilson's personal circumstances and therefore would have to assume that $74,000, if it had to be paid, might be burdensome in particular circumstances. Now I'm not suggesting that's so. I don't –

MR TAYLOR:

No.

BLANCHARD J:

I too don't know anything about Justice Wilson's personal circumstances.

MR TAYLOR:

Well in my submission it has to be burdensome for it to raise a reasonable possibility that the Judge's mind is going to be influenced, unconsciously, by the existence of that imbalance. Now we don't even know, for instance, whether the Judge was aware of the imbalance because he says half the time we don't know until we look at the annual accounts and that's because, for instance, Mr Galbraith goes off and spends 150,000 putting in some fences and working on the property frequently as he may well do and you get to the end of the year and you look at the shareholder accounts and he hasn't pulled up or he hasn't requested that from Justice Wilson and the point here is if in a situation where there is that deep trust between the parties, where there's no question between them as to they'd each contribute equally in terms of the working capital of the venture, then one has to ask oneself why on earth would the existence of that imbalance, just assuming to take the point made by Justice Blanchard that we assume the worst, that the Judge did know about it, is it realistic to suggest that in a venture of this size with this sort of equity and that sort of relationship, it's going to have any bearing, at all, on the way the Judge approaches that case. And that's something that the lay observer, the fair minded lay observer, has to take into account and decide upon. And what I'm, suggesting to the Court is that even if this had been disclosed, but in this business venture where we have this sort of equity and we have this sort of relationship there is that imbalance, could it seriously be suggested that the Judge when hearing the case is going to be unconsciously influenced by it, or that there's a real possibility that he would be unconsciously influenced by it and my submission is, taking into account that relationship, that is so improbable as not to be something that makes it material.

ANDERSON J:

I think we have to distinguish between actual bias and apparent bias in dealing with these issues.

MR TAYLOR:

And that's the test that I'm suggesting because the question is, is there a real possibility or a reasonable apprehension that given the relationship between these two, the closeness that it had, the nature of their investment, the way in which they'd operated it, is there a reasonable apprehension that the Judge when he's sitting there hearing this case, is going to be unconsciously influenced by an imbalance of $74,000.

ANDERSON J:

Well it's not is there a reasonable question, is there a reasonable apprehension, it's would the lay observer –

MR TAYLOR:

Yes, yes.

McGRATH J:

An objective –

ANDERSON J:

He's not a millionaire.

MR TAYLOR:

But a fair minded lay observer knowing of those circumstances.

BLANCHARD J:

Would that be a convenient moment for us to take a 15 minute adjournment?

MR TAYLOR:

Yes Sir.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.54 AM

BLANCHARD J:

Yes, Mr Taylor?

MR TAYLOR:

Thank you, Sir. I think when we adjourned we were just looking at the question of how we address this issue of materiality, and my submission is that that materiality has to be judged in context. And what I would suggest to the Court is that the evidence clearly is, one, a longstanding and close personal relationship –

BLANCHARD J:

Look, what if there was no business relationship Mr Galbraith and the Judge –

MR TAYLOR:

Yes.

BLANCHARD J:

– and they were both wealthy in their own right.

MR TAYLOR:

Yes.

BLANCHARD J:

But at the time of the case the Judge owed counsel 74,000 or half of it, 37,000.

MR TAYLOR:

Yes.

BLANCHARD J:

Isn't that something that should be disclosed and wouldn't a lay person think that it was significant that it there was debt like that?

MR TAYLOR:

Well, in my submission, no, to all of those questions, and I'll address each one. The question of whether it is material is a value judgment which essentially has to be made by the Judge at the time that he makes disclosure. So he has to decide whether the nature of the relationship or something about it is material and could give rise to that inference or reasonable apprehension. So that in itself involves a value judgment by the Judge, and it cannot be that the existence of a debt in itself will always give rise to an obligation to disclose the debt and the amount of the debt. In my submission, that isn't the case. But even if the Court says, "Well, we think it was sufficiently material to at least bring it to the attention of the parties and so therefore the disclosure, we don't consider, was adequate in the circumstances," there is then the second question which has to be addressed, as to whether a reasonable observer would, knowing of the circumstances, have a reasonable apprehension that the Judge might be biased or might approach the decision in an impartial way. So that's the second leg. And what I'm submitting is that when one looks at the circumstances here, you have the circumstances of long-term friendship, you obviously have a very informal arrangement as to how each party contributes, because if we go to Justice Wilson's statement, his 28th August 2009 statement, he says at paragraph 8, "At the time that the Saxmere appeal was heard by the Court of Appeal, I thought that the shareholders' contributions of Mr Galbraith and myself were approximately equal when allowance was made for the bank debt, for which I was solely responsible. The accuracy of that belief was confirmed when the financial states of Rich Hill Limited for the year to 31st March were received from the company's accountants." And so he's saying, "I thought we were approximately equal, when we got the accounts that disclosed the shareholder imbalance of 74,000," which, clearly, Justice Wilson himself doesn't think is material because, as he says later in his statement, he had the ability to pay from his own means and he also, as was normally the case for

him, would borrow to meet those sorts of commitments. So, at that time it certainly seems apparent that from Justice Wilson's point of view he regards this, to the extent that he's even aware of an imbalance, he regards it as immaterial. And that's not an answer in itself, I fully accept that, because the Judge may think it's insignificant but other people may not. But the real question then is, having regard to what we know from that and having regard to what the relative wealth positions of the parties were, and the way in which they managed their contributions, which was obviously in a very informal way and a sort of top-up from time to time, if an imbalance became apparent, in my submission it's not credible to suggest that there is any real possibility that when Justice Wilson is hearing and dealing with this appeal he is going to be influenced in some way by what –

McGRATH J:

But you're bring to bear, in what you've just said, some subjective factors that the reasonable lay observer, looking at the matter objectively, would not know of.

MR TAYLOR:

Well, it doesn't matter that the – it's not what's subjective to the Judge, it's what the facts are, and it doesn't matter that that lay observer doesn't know all those facts, because that's not the test. The test is whether, in these circumstances, that we do know of, this would have been significant or material. In other words, it could have given rise to that inference. And that's exactly what the Court was saying in the *Aussie Airlines* case, because the example is given of the debt, where it says, "Such situations may arise if, for example, a Judge exercises power in relation to the association, such situations may arise if a Judge is indebted to counsel or has otherwise been financially assisted by a counsel in respect of significant sums payable at call." So what that's contemplating is that counsel, or the Judge, owes a debt to counsel of some sort that is significant and is payable at call. But here, when you look at the relationship between the parties –

BLANCHARD J:

I don't understand why it's qualified by being at call.

MR TAYLOR:

Well, that suggests that if the Judge doesn't play ball, you can issue your proceedings the next day and bring him to heel. I suspect that's what the at call reference is. Because there has to be something in it that gives rise to a reasonable apprehension that the Judge is going to be influenced by it in some way, which is unconscious, obviously, because we're not talking about actual bias, but he's going to be thinking, "I owe Alan $74,000 and that's a worry to me and I'd better not upset him," but it's an unconscious thought. But here there's no basis for even that inference of an unconscious thought arising, because the way they operate their affairs is obviously very informal and this amount of indebtedness, that's certainly not regarded by either Mr Galbraith or Mr Wilson as being, or Justice Wilson, as being in any way problem. And a fair minded –

McGRATH J:

The fair minded lay observer would certainly take into account the amounts, if it was –

MR TAYLOR:

Yes.

McGRATH J:

– a very small amount. But would he take into account, at least in a charitable way, the informality of dealings?

MR TAYLOR:

Yes, yes, he must do, because it's part of the factual matrix, and it's part of what a fair minded observer would take into account.

BLANCHARD J:

He doesn't know enough to know whether that degree of informality will continue. We can't start imputing to him detailed knowledge of the personalities of their people –

MR TAYLOR:

No.

BLANCHARD J:

– or the way in which they might or might not conduct their business in the future.

MR TAYLOR:

It has to be –

BLANCHARD J:

Informality goes out the window if people fall out.

MR TAYLOR:

Yes, and if there was a suggestion that there was a fall-out, then that would obviously be material and that would affect the mind of the fair minded observer. But there's no suggestion of that here, absolutely none. And the point is that it must be viewed at the time the matter is being heard and determined, that's the relevant period that we're talking about, because that's the only time within which the improper or unjust or – that's the only time the influence can have any operative effect, during that period. So one has to ask oneself, looking at that period, what is the significant of this, in the scheme of things, and it has to be a relative exercise, taking into account all of the particular facts. And it's not what the lay observer knows at the time, it's what the lay informed advisor knows now, because that's what the Court is being asked to assess, and it's all the facts.

TIPPING J:

Would the lay observer be asking him or herself anything more than, “Judge and counsel are running a business together, it’s all quite informal, but at the moment Judge owes counsel 74,000, what’s my reaction to that?”

MR TAYLOR:

Yes.

TIPPING J:

Would it go much beyond that, Mr Taylor?

MR TAYLOR:

Well, it goes beyond it only to the extent that one then looks at what the significant of $74,000 is in that overall relationship. Because it can’t simply be the monetary amount, it has to be the relative importance of it. Otherwise you say, “Well, if it’s 50,000 you have to disclose it and if it’s $10,000 you don’t.” But $10,000 may be massive if you're about to tip.

TIPPING J:

I would have thought the first step is pretty self-evident, it should be disclosed.

MR TAYLOR:

Yes.

TIPPING J:

The next, as to whether it’s a disqualification is, perhaps, more difficult.

MR TAYLOR:

And that's the one I’m addressing.

TIPPING J:

That's the one you're addressing now.

MR TAYLOR:

Yes.

TIPPING J:

But for that purpose does the independent lay observer really know much more than, or have attributed to them, much more than what I just indicated? How far are we going to, have people have to go in these cases into the intricacies of the business relationship between the parties, that's part of what's concerning me. There must come a time when the Court's got to take a fairly robust sort of broad view of this, rather than having it analysed by accountants.

MR TAYLOR:

Yes, or by the thousand cuts, as it were.

TIPPING J:

Or the 74,000 cuts one might say.

MR TAYLOR:

Yes, yes. I suppose one way of putting it in context is to say – I mean, when you're addressing that second leg of the exercise, it's not, it has to be assessed on what the facts are, not necessarily what the informed observer knows, because he's assumed to know all of the facts that are now put before the Court.

ANDERSON J:

How long would it take the Judge to disclose this?

MR TAYLOR:

Well, this is, this is part of –

ANDERSON J:

The first day would be the Judge saying, "I'm going to disclose everything relevant to the issue to you." It would take a day, we've been arguing about it for three days now.

MR TAYLOR:

Well, exactly, and it simply can't be like that. But, I mean, if you take the practical example, if they are in an operation where they operate in this informal way and they don't even know what their balances are, except for one point of time in the year, when they get the accounts. What happens, for instance, if the Judge, when he discloses the business association, doesn't go and then check immediately precisely what the exact amount of the shareholder imbalance is at that precise point in time?

ANDERSON J:

Well, the Judge will, as a matter of analysis, will know, on the basis of past history, that there's a greater chance that one or the other will be behind the eight ball –

MR TAYLOR:

Yes.

ANDERSON J:

– then there'll always be an equilibrium.

MR TAYLOR:

That's right, but that's the whole basis upon which he's proceeding, that inevitably at times in the course of that business during the year there will be imbalance, because, Mr Galbraith goes and spends some money and pays it and doesn't send an invoice or a letter to Justice Wilson telling him to pay up. So he knows that there's a possible imbalance, he knows that they actually fix it up when it becomes apparent or when it becomes needed.

ANDERSON J:

So, is your point really, put briefly, perhaps too briefly, that it doesn't matter about debts between counsel and the Judge if the Judge doesn't worry about whether he's able to pay it or not?

MR TAYLOR:

Well, I certainly say that in that situation it's very much less likely to matter. Because it's very much less likely to influence the way he approaches it.

ANDERSON J:

I think it might be quite an important issue –

MR TAYLOR:

Yes.

ANDERSON J:

– because it draws a distinction between mere indebtedness and ability to meet that debt.

MR TAYLOR:

It's the beholdenness that arises out of it. Is there any really any serious suggestion that Justice Wilson felt in some way beholden, in this situation, to Mr Galbraith at the time he was deciding this matter?

ANDERSON J:

Might the –

MR TAYLOR:

Or is there a risk that he was?

ANDERSON J:

Might the lay observer think there was a risk?

MR TAYLOR:

Yes, yes, and that has to be a relative issue, it can't be sure simply on the numbers. Unless the Court has further questions, I'm not s – unless, I don't know if Your Honours want me to address any of the other issues? It seems to me this is the –

BLANCHARD J:

No, I think you've cut to the nub of the application.

MR TAYLOR:

Yes, thank you, Sirs.

BLANCHARD J:

Thank you. Ms Grey, do you want to be heard in reply?

MS GREY:

Just a couple of small matters, Sir, which may – yes, thank you, Sir. My friend submitted that the Judge made his disclosure for the Supreme Court to address the matters raised by Mr Radford and the appellants in their appeal, and he suggested that only those matters were covered in that December 2008 statement because that was all the obligations were. If we just go back to Mr Radford's third affidavit of the 21st of November 2008, which is index for case on appeal volume 2 of three, under tab 32.

BLANCHARD J:

Well, we've got a pile of materials here, so you'll have to…

MS GREY:

I – you probably don't even need to go there, Sir, but –

TIPPING J:

Just give the reference again, would you?

MS GREY:

It's case on appeal volume 2 tab 32, the third affidavit of Peter Ewing Radford –

BLANCHARD J:

The third affidavit?

MS GREY:

Yes, Sir, dated the 21st of November 2008, and at paragraph 6 Mr Radford says, "I believe there are very significant and important differences between what was disclosed to me prior to the Court of Appeal hearing and the actual situation which can be characterised by the degree of intimacy, trust and influence inherent in the relationship, public representations about the relationship and the degree of financial relationship or reliance. Mr Radford went on to address what he then knew about those matters so they were the matters he'd uncovered himself, after the Court of Appeal decision and before the Supreme Court hearing. The issue of the degree of financial inter-relationship or reliance was on the table, was put on the table by Mr Radford and Justice Wilson did his statement of December 2008 in response to that and it is submitted that he had the opportunity to put before the Court, and should have put before the Court, a full and frank disclosure of all matters of relevance. The very fact that we're here now, arguing about different numbers, different methods of accounting, how formal or informal the relationship was, it all goes back to the very simple point that what was disclosed prior to the Court of Appeal hearing, bore no resemblance to what the Court itself has said should have been disclosed.

McGRATH J:

After the hearing, in a judgment the Court set a standard for disclosure.

MS GREY:

Set a standard Sir.

McGRATH J:

Which of course the Judge would not have appreciated prior.

MS GREY:

No Sir but the Judge in question was one of the Judges on the *Muir* case in the Court of Appeal along with Justice Hammond and Justice Young.

McGRATH J:

I think you will find, if you analyse the judgments, that a different standard was set in relation to disclosure and this Court's judgment and in the *Muir* case.

MS GREY:

Yes Sir but the fact of the matter is Sir that when you're doing a disclosure for the Supreme Court, when the very issue for the application to the Supreme Court is the question about the adequacy of disclosure, there's no issue of lack of time to prepare or lack of ability to research what's relevant –

McGRATH J:

What I'm saying is that the standard against which the Judge, and in future all Judges, will have to assess what disclosure they made, was only stated in this Court's judgment and that no doubt has been part of what's prompted the Judge to make the disclosure he has since –

MS GREY:

Yes Sir although Mr Radford in his third affidavit identified these three categories of information and he identified those categories of information from the leading precedent.

TIPPING J:

We're not really here to discuss disclosure. We're here to discuss whether the facts, as they are now known, disqualified Justice Wilson. Ms Grey you may have instructions which you have to keep faith with but let's – your reply really should be focused on the key points that Mr Taylor made in his address –

MS GREY:

Yes Sir.

TIPPING J:

– because that is what a reply is.

MS GREY:

And the key point, the key point is would a reasonable lay observer have thought that the Judge should have heard the case or not. Was the indebtedness, beholdenment and other aspects of the relationship, much of which I've heard for the first time from Mr Taylor today, the degree of trust, it's the first time we've heard of this enormous degree of trust, where one party could go out and spend $150,000 without consulting of the other, would a reasonable lay observer in that situation feel that they might not have had a fair hearing. And it's respectfully submitted that the issue is about how the accountancy is done and how the numbers are calculated and whether $30,000 or $70,000 or more is significant or not, is not the type of question that a lay observer would be concerned about. The lay observer, does it look right, does it smell right, has justice been done. If I come to court, will I get a fair hearing before an independent Judge?

BLANCHARD J:

Now wait a minute, that's the third time you've blurred the distinction between the lay observer and your own client. We tried to make the point in our earlier judgment that it's not the opinion of your client that counts.

MS GREY:

No Sir.

BLANCHARD J:

It's the objective opinion of an independent lay observer. Someone who just happens to have wandered into the back of the courtroom and is possessed of a certain amount of knowledge. What would that person think?

MS GREY:

Yes Sir. And my answer, my point Sir is a reasonable lay observer would expect a Judge to disclose, ahead of the original case, all matters that are relevant to the issue of whether there might or may not be apparent bias and if there is to be an appeal about the adequacy of disclosure, then they certainly would expect the Judge to reflect on what they had previously disclosed and ensure that everything that is relevant has been disclosed. The concern Sir is the more, the more detail that is required from the Judge the more it's expecting the lay observer to form a view on things that they don't have knowledge of. It's the impression to the lay observer, the impression of beholdenment. The impression of indebtedness and the impression that something perhaps isn't quite right.

TIPPING J:

Well one of the difficult parts of this sort of exercise is how to balance impression and analysis.

MS GREY:

Yes Sir and the answer –

TIPPING J:

That is one of the difficulties.

MS GREY:

And the answer Sir, and I'm sorry to harp back to it, but the judicial guidelines Sir –

TIPPING J:

Yes, yes, I understand.

MS GREY:

– takes – forms an objective –

ANDERSON J:

They're not even a source of law let alone law.

MS GREY:

Well Sir it's now on the Courts of New Zealand website and it's –

ANDERSON J:

Well I just don't think that's the real point of the issue.

MS GREY:

Well if we're looking for an objective standard Sir, that's a place that maybe helpful to start.

TIPPING J:

Well it may, it may not but what you're saying is that one mustn't get too analytical about it. That's what I –

MS GREY:

Yes Sir.

TIPPING J:

– is coming through to me is your submission that it's more a matter of impression or at least a substantial part of it is a matter of impression.

MS GREY:

Yes Sir, material indebtedness is material –

TIPPING J:

Whereas the argument against you is that when you really get beyond impression to analysis, then there's no problem.

MS GREY:

Well Sir the difficulty is we can't really get to proper analysis because we still don't have all the documents. If we want to –

TIPPING J:

Well analysis on what we've got. Now –

MS GREY:

Yes Sir but that's a dangerous place to be because either we have to look at it in an analytical way, with all the information, or we have to look at it as an impression. But if we start to look at it on an analytical way based on part of the information, my submission is we're straddling two very dangerous areas with a big cavern in between and it is not what – whichever way the lay observer may go, that isn't the answer.

ANDERSON J:

You can't attribute to the lay observer ability to analyse academically the minutiae of a relationship.

MS GREY:

No Sir.

ANDERSON J:

It's how it appears.

MS GREY:

Yes Sir.

TIPPING J:

Well I think we have the essence of your submission, that when looked at properly, this is not on.

MS GREY:

Thank you Sir.

TIPPING J:

Is that a fair way of…

MS GREY:

I think so Sir, yes. My client's came to Court seeking justice and they really don't feel that they've had a fair hearing –

TIPPING J:

Understood.

MS GREY:

Not in this court Sir but in the Court of Appeal because of the information they've subsequently learned.

TIPPING J:

Understood.

MS GREY:

Are there any other matters I can assist the Court with?

BLANCHARD J:

No, thank you Ms Grey. Counsel have been very helpful in what is obviously a difficult case. We'll take time to consider our decision.

COURT ADJOURNS: 12.18 PM