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**
Respondent

Hearing:	3 March 2009
Court:	Blanchard J Tipping J McGrath J Gault J Anderson J
Appearances:	C M Owen with S Grey and S Goodall for the Appellants J S Kós QC with J L Bates and J L Verbiesen for the Respondent D B Collins QC with K Muller and C Brown for Interveners

CIVIL APPEAL

MS OWEN:

May it please the Court, my name is Owen and I appear with my friends Ms Grey and Ms Goodall, for all four appellants.

BLANCHARD J:

Yes, Ms Owen.

MR KÓS QC:

May it please the Court I appear with my learned friends Mr Bates and Ms Verbiesen for the respondents.

BLANCHARD J:

Yes, Mr Kós.

SOLICITOR-GENERAL:

Ms Muller and Ms Brown appear with me for the Intervener, Your Honours.

BLANCHARD J:

Yes, Mr Solicitor. Yes, Ms Owen.

MS OWEN:

Thank you Sirs. The only matter of housekeeping which I briefly wish to refer Your Honours to –

BLANCHARD J:

Could you address from the lectern please?

MS OWEN:

Certainly, I apologise, I'll start again. The only matter which I wish to briefly address in housekeeping terms is there was an affidavit from FrancIs Morland Robin Cooke filed on Friday which Your Honours should have and that is a matter of clarification in regard to His Honour's first affidavit. All other materials of course have been filed as per the Supreme Court rules.

BLANCHARD J:

Yes I think we all have that affidavit.

MS OWEN:

And my friends have as well Sir. So I may now if I could turn to our submissions and in summary I wish to say that this case is about the appearance of impartiality and the importance of impartiality in our judicial process. It's been described as a defining feature of judicial power and it is fundamental to our understanding of the rule of law in New Zealand. The question before Your Honours today is how the two stage approach in *Muir* should be applied to the factual circumstances as we now know them.

The situation we have is one of a Judge who was one of three in the Court of Appeal whom we say made a partial disclosure in terms of a potential conflict and that disclosure was given by way of telephone to Mr Cooke. There is some disagreement between exactly what was said between Mr Cooke and His Honour. In terms of any levels of disagreement in that regard I would suggest to this Court, with respect, that it is not a matter of credibility between one or the other. You do not need to make a choice as to who is believable. We have a situation where there has been time that has passed and no file notes, there's nothing contemporaneous which can assist us in this regard. There are subsequent emails and correspondence which may cast some light one way or the other. But what we have is a statement from His Honour which says, "I refer to a horse stud," and what we have from Mr Cooke is a statement where he said, "I recall His Honour referred to horse racing interests."

Now the differences may be more apparent than real in that regard because of course there are a variety of interests here which His Honour has. He has made it clear through his statement filed with the court that he has three partnerships with Sian Elias, Hugh Fletcher and Alan Galbraith. He raises one or two horses a year with Mr Galbraith and he also has a horse stud and when I say that the horse stud is known as Rich Hill. However, there is no legal entity known as Rich Hill. What we have instead is a triumvirate of

Rich Hill Limited which is a company with a 50/50 share between Alan Galbraith QC and Justice Wilson. That's one leg of the triumvirate.

The second leg is Rich Hill Thoroughbreds Limited which is a shareholding which Justice Wilson is not involved in. Rich Hill Thoroughbreds Limited is again Alan Galbraith and with him this time is Mr Colin Thompson, his son John Thompson and Irene Thompson whom I think is Colin Thompson's wife.

The third leg is a land holding between Alan Galbraith and the Thompsons which is not in the form of a company at all. Rich Hill Thoroughbreds Limited is a 50/50 shareholding as well between Alan Galbraith and the Thompsons I think you'll find. The end result is we have three parcels of land, I know there's a subdivision in the offing, I'll come to that in a moment, but there are three parcels of land in the Waikato. They are broadly speaking an L shape. One is owned by Rich Hill Limited. One is owned by the Thompsons and Mr Galbraith and there is a third which is owned two ninths by Colin and Irene Thompson, one third by Rich Hill Limited and four ninths by Rich Hill Thoroughbreds, so it's a mix of all three if you like.

Justice Wilson has said in his statement to the court that there is a subdivision in the offing and the subdivision will end up in an amalgamation of land for Rich Hill Limited. I have a background as an environmental lawyer and I have further enquired into the status of the subdivision. There is no consent issued as yet. I can advise the Court from the bar however that there is a draft consent.

The term "amalgamation" is being used by His Honour in a general sense. There is a technical meaning to an environmental lawyer such as myself to mean that your land will be amalgamated with another title, so there will be one title. That is not the meaning of this use of the word by His Honour. You will have out of two titles, four created. If it will assist the bench I can show you one of the diagrams.

BLANCHARD J:

How material is this particular point?

MS OWEN:

It is one aspect of His Honour's ongoing involvement to Rich Hill as in the stud as opposed to Rich Hill Thoroughbreds or Rich Hill Limited. One of the issues for this Court to determine, and I submit it's a very important one, is the extent of the business linkages between Mr Galbraith and Justice Wilson because we say it is an extraordinary relationship. To make that allegation factually we must establish what is extraordinary about it.

TIPPING J:

By extraordinary do you simply mean outside the normal?

MS OWEN:

I do. So I'm not in any way suggesting that if there is a business relationship of any kind whatsoever between a Judge and senior counsel, or indeed any counsel, that you would fail the test in *Muir* and you wouldn't get over the line. There has to be something here, I submit, that makes this different, in some way unacceptable in terms of it raises the apprehension of bias.

So in terms of the subdivision it is one illustration of the way the Rich Hill Stud works. It is also germane to the fact that His Honour has also said in his statement to the Court, how he generates his income, for want of a better word, from the present Rich Hill Stud. So that His Honour has said Rich Hill Stud agists horses, takes care of horses and it charges a fee for doing so. In terms of horses which are agisted on Rich Hill Limited's land the fee that I might pay to Rich Hill Thoroughbreds Limited will be in part recompensed to Rich Hill Limited. I cannot tell the bench what "in part" means, does it mean 10 percent, does it mean 90 percent of the fees, I don't know. It's never been stated. However, there is that money loop if you can refer to it as that in short term. So that is one source of His Honour's income.

Another source of His Honour's income is the raising of one or two horses a year with Mr Galbraith. I cannot tell you whether there is any relationship with Rich Hill Thoroughbreds Ltd in terms of stallion's fees or anything of that nature but I understand that if those horses are agisted through Rich Hill Thoroughbreds, Mr Galbraith and Justice Wilson would pay, the normal fee as I understand it, to Rich Hill Thoroughbreds Limited and Rich Hill Thoroughbreds would then recompense them, presumably the same amount of money as they do for any other person's horses. So there is also that linkage.

Thus the amount of land which Rich Hill Limited controls in terms of the three parcels will effect, naturally, how much money they may get and other factors such as how many horses are on a property at any one time. It would also affect how much money they –

TIPPING J:

Are you suggesting that in some way this subdivision to which you made reference a few moments ago, has got a kind of commercial aspect to it or is it just an internal rearrangement aspect which is rather the impression I had before benefiting from your submission?

MS OWEN:

I read His Honour's paragraph and I looked at it carefully Sir because it wasn't clear to me whether it was a rearrangement or whether there was a commercial aspect. All I can tell you is that there's two blocks of land under the Matamata/Piako District Council Plan. You can carve off per one block –

TIPPING J:

It's just that I'd like to either understand why it adds to the problem or if it doesn't just put it to one side?

MS OWEN:

It adds to the problem because it indicates that Rich Hill Limited will obtain out of one block a 31.1 hectare control. So it will carve off one block which will go

to, we are told, Colin and Irene Thompson. Off the other block which Rich Hill already owns, it will go to Rich Hill Thoroughbreds. So there are two lifestyle blocks, for want of a better term, which are cut off. And they are quite small. Rich Hill owns the – it's like an L. It owns the chunks so you imagine a little chunk taken out, Rich Hill already owns that big chunk. This big chunk has another little chunk taken out and it has at the moment the multiple ownership. The two ninths ownership and all that goes with it. That will be transferred, we are told, "amalgamated" is His Honour's words, with Rich Hill. So that indicates to me that there is an increase in control by Rich Hill Ltd and there is an increase in terms of His Honour's involvement in the Rich Hill Stud because there will be more land which is Rich Hill Limited owned and thus there would be a greater control. At present, Mr Galbraith has a higher involvement compared to Justice Wilson. And I say that because of course that third block of land Justice Wilson has no interest in that at all and that's clear from the titles. Justice Wilson is merely involved in Rich Hill Limited and of course in the wider Rich Hill Stud.

TIPPING J:

Are you suggesting that this adjustment, I'll use the word to try and be neutral, is advantaging the Judge as against Mr Galbraith?

MS OWEN:

Mr Galbraith and the Judge are 50/50 owners so it advantages both of them. It indicates –

TIPPING J:

But does it advantage them both equally?

MS OWEN:

I would presume so because I'm assuming there's no change in the controlling shares of each –

TIPPING J:

I'm still struggling to see how this adds to the problem, Ms Owen.

MS OWEN:

It indicates to me Sir that His Honour has a business commitment to Rich Hill Stud and to Rich Hill Limited.

BLANCHARD J:

I don't see how you can say that. The natural meaning of this is that they're doing a rearrangement to sort out the ownerships of the land. But there's nothing in here to suggest that the percentage ownership of the whole block, that's looking at all the land, that the Judge has an interest in, is changing.

MS OWEN:

I've taken it Sir from his statement that the land adjacent to Rich Hill Limited will be amalgamated with Rich Hill Limited.

BLANCHARD J:

Yes, but the impression I have is that it's all operated as one entity by Rich Hill Thoroughbreds for its business purposes now and that the underlying ownerships of the land will not be changed.

MS OWEN:

I would agree with Your Honour that it does seem to be all operated as one entity by Rich Hill Thoroughbreds Ltd at present. The underlying ownership I think will change as His Honour has indicated there is that, what he calls an amalgamation. But where I do struggle with His Honour's statement is that it's never been exactly clear what His Honour's recompense is for his advertising of Rich Hill Stud. So that we have a series of involvements in the horse racing or horse breeding industry but His Honour is nevertheless on a website with three other men. You can see him there. He's referred to by his judicial title and he has always held himself out as promoting Rich Hill Stud. So it is not just about Rich Hill Thoroughbreds Limited in terms of your reasonable, informed lay observer. What would the reasonable, informed lay observer think? And so we can go under and we can look at the titles and work out the relationship between Rich Hill Thoroughbreds Limited and Rich Hill Limited and other individuals but there's this entity overall called Rich Hill Stud and

that's the holding out that is apparent on the website. So that's the one thing that someone coming in cold is going to have a look at. Oh, what is this about, oh it's Rich Hill Stud. It's all about Rich Hill Stud. So His Honour mentioned the stud, he said he did, but he didn't mention the name of the stud because he said he considered that to be irrelevant but in my –

MCGRATH J:

In terms of the title adjustments I understand that you're drawing on paragraph 5 of the Judge's statement. Now are you saying that the website has any relevance to title adjustments or is –

MS OWEN:

No.

MCGRATH J:

- that just to what you refer to as promotion?

MS OWEN:

The website has no reference at all to title adjustments. It has no reference at all to land ownership.

MCGRATH J:

Is it the case then that the only material we have before us on the title adjustment matter, is in paragraph 5 of the Judge's statement?

MS OWEN:

Yes it is and what I've said from the bar Sir. That's absolutely right.

BLANCHARD J:

Are you going to take us to the website material?

MS OWEN:

I can do that now Sir if that would assist. If I can just locate myself in the correct volume Sir. In terms of the index of case on appeal it is volume 3 and it is tab 34, page 318.

TIPPING J:

To the extent that the photograph has any relevance, it is not a very good one in my copy.

MS OWEN:

Indeed Sir, if you turn over the page. So I have given you the sworn copy and I thought it was pretty much unreadable.

TIPPING J:

Sorry, I hadn't turned over the page, thank you.

MS OWEN:

And so you have an unsworn copy which is the colour copy. In terms of the website if you went on it today, because this is a static image you'll appreciate, the website today actually has a rolling image so you'll get a beautiful photographs of horses and then of pasture and then of this photograph and so on and so forth. But this is the static image so what we have is Justice Wilson on your immediate left standing next to Alan Galbraith QC and then Mr Colin Thompson I understand and then Mr John Thompson, and the website refers to a showpiece property founded in 1994 in the heart of the fertile Waikato Basin. It is owned by a partnership consisting of respective QC and horse enthusiasts Alan Galbraith and Justice Bill Wilson. And then it mentions the other members, retired leading Matamata veterinarian Colin Thompson, his son John Thompson along with his wife Colleen who oversees the management of the business. So that's Rich Hill and it's on the title next to the photograph you'll see there it refers to Rich Hill Thoroughbreds. It's commonly referred to as Rich Hill Stud.

The holding out we say that His Honour has therefore undertaken, is in terms of Rich Hill Stud, in terms of an ongoing business relationship with the stud overall and of course in terms of his title and the photograph promotional aspect. We are unclear how far beyond this the promotional aspect goes. I can tell you that Rich Hill sponsors a very good horse race, apparently, in January, 125,000 so there is –

BLANCHARD J:

Wait a minute, are you telling us that from the bar?

MS OWEN:

I am Sir.

BLANCHARD J:

Well I don't think you're entitled to do that.

MS OWEN:

Well then I apologise to the Court Sir. I have had difficulty in terms of – His Honour's statement goes as far as it goes and there are not too many details in terms of level of income, in fact there's none, or in terms of parity of income between His Honour and for example his judicial role. One of the issues we suggest that is important to this Court is scale of the activity. In terms of the relationship when you are looking at an ordinary informed lay observer, is it going to make a difference to that person if it's a small operation, it's a family owned company, it's a closely held company, or it's a small arrangement regarding chambers perhaps which is some of the cases, or a commercial enterprise. If it's a commercial enterprise is it going to be a publicly listed company? Is it going to be a private company? In terms of commercial, we say this is a commercial company, solely for profit, and it's a large commercial company and my friend Mr Kós has made the submission that in fact there's no indication that His Honour's income from Rich Hill Stud is in any way greater than his income as a magistrate – sorry, a judicial officer, not a magistrate.

TIPPING J:

He doesn't deserve to be demoted.

MS OWEN:

I really put my foot in it there. It's one of scale and size, of relativity and I think it's a significant matter.

ANDERSON J:

Is there a difference legally, between a smaller commercial enterprise and a larger commercial enterprise and if so, why?

MS OWEN:

Legally – I'll take Your Honour's question in terms of reasonable apprehension of bias. I don't think there's absolutes here, each case is case by case. So, I would answer Your Honour's question by saying yes, there may be. Yes in terms of degree of involvement, might be one of the reasons why. Yes in terms of level, if any, of – I'm sure this isn't a grammatical term, beholdedness, how beholden am I to my fellow directors or my fellow shareholders or whatever the relationship is. Have I, obviously got fiduciary duties whether I'm a small company or a large company but is there any personal guarantees involved here? We don't know. What size are they? We don't know. They could be significant.

ANDERSON J:

In cases of actual bias, it doesn't matter whether it's large or small, so why should it be different in terms of apparent bias?

MS OWEN:

In terms of apparent bias I think it might be different because of the degree of inter-relationship. So, if you think of a person looking in towards the Judge and counsel and trying to come to an opinion as to whether there's anything in that relationship which might give rise to His Honour not being neutral, then the degree of inter-relatedness might assist in that regard. Larger companies may have either less inter-relatedness or more. So, if you were a publicly

listed company, you can imagine a massive publicly listed company where His Honour's involvement is absolutely minimal and was never ever going to be anything other then minimal. Even in those cases, there have been situations where there might be an appearance of bias and shares have been raised, Auckland Casino was an example, and the issue thrashed out as to whether or not there was an apprehension of bias.

TIPPING J:

Ms Owen, you've mentioned the word, or the concept of beholden. I wonder whether the idea of dependency has any merit in this field? In other words, to what extent would the reasonable observer regard the judicial officer as being in any way or sense in a dependency situation vis a vis counsel? It might be financial, it might be emotional, it might be social, does that help at all?

MS OWEN:

I think it does Sir because it informs us and we come back always to first principles in my mind. Why are we doing this? Why are we so worried about this? It's all about the importance of the judiciary being seen to be independent and so that independence must necessarily carry with it an assessment from the reasonable lay observer of, is that independence there? Therefore, if you have a series of links, you look at the types of links and the degree of linkage, so that you end up with, is there a suggestion that His Honour might be beholden to another party?

GAULT J:

I think it's important, isn't it, to be precise about the language here. When you talk about the other party, we're not here concerned with parties to the litigation.

MS OWEN:

I absolutely accept that Sir.

GAULT J:

It seems to me that we must be careful about that because we are here talking about a relationship with counsel, not with a party to the litigation.

MS OWEN:

You're absolutely correct Sir. I should have said, the inter-relationship of His Honour with counsel for one of the parties because it is about that relationship between counsel and His Honour.

TIPPING J:

It's also, isn't it, a relationship which might be thought to produce a risk at least, of unconscious bias?

MS OWEN:

Yes.

TIPPING J:

That's quite a difficult factor to work in, isn't it, what risk is there, not of the Judge being actually biased but some perception that he might unconsciously favour.

MS OWEN:

What I've said in our submissions Sir, is subconscious bias and I have based that on the concept that if, as the case law says, in different circumstances, a Judge can be biased against a counsel, then it must naturally follow that a Judge can be biased towards a counsel. In the present circumstances of the case, I am suggesting that the long relationship between Mr Galbraith and Justice Wilson in fact has led to – and His Honour hasn't, clearly doesn't consider it and hasn't even thought about it – a relationship which is unconsciously favouring Mr Galbraith.

GAULT J:

You can't escape the fact that Judges have views about counsel and their competence all the time?

MS OWEN:

Of course they do.

GAULT J:

Judges also have varying degrees of personal relationships with members of the legal profession.

MS OWEN:

Yes.

McGrath J:

Necessarily. So, it's important to try to define some boundaries here and generalisations aren't going to help.

MS OWEN:

Sir, I opened by saying that we were not suggesting – perhaps I didn't make it clear and I should restate our position. We are not suggesting that the personal relationship between Mr Galbraith and Mr Wilson is enough to cause the reasonable apprehension of bias. What we said in our submissions as filed, was that it was either the business relationship on its own, or the business relationship plus the personal relationship. That latter submission might be characterised as a cumulative approach. In other words, cumulatively, when you look at things in the round –

TIPPING J:

In any event, it is the addition of the business relationship which you say is the fulcrum point here.

MS OWEN:

Yes, it takes you over the line. It differentiates this relationship from other relationships which the judiciary may have.

TIPPING J:

Why, could you tell us, at this relatively early stage but it would be helpful to me at least, what aspect of the business addition is it that takes it over the line? If you've got a close personal friendship or a professional friendship or both, that's all right but if you add something commercial, it's not all right. I think we really need to focus quite sharply on why that is said to be not all right, in the mind of the observer.

MS OWEN:

Yes. It's potentially scale and I come back to degree of inter-relatedness. So, if you have a close personal relationship, one can imagine there's a series of social inter-connections over the course of a lifetime, perhaps you attend one another's birthdays or god-daughters' birthdays or anything of that nature, we're talking about close personal relationship. You then add the business relationship. At that point, there is a level of reliance on one another's judgment over and above any social aspect which may have preceded it. There is a reliance on, potentially funding, or sources of income because there's that inter-relatedness.

TIPPING J:

Sorry, I don't quite understand what you mean by that?

MS OWEN:

Funding, one must presume that the establishment of this organisation, Rich Hill Stud, took money and each will have, in terms of Mr Galbraith –

TIPPING J:

Are you saying there's a reliance on the counter party's financial security if you like, or stability?

MS OWEN:

Yes.

TIPPING J:

Is that what you're saying?

MS OWEN:

Yes.

TIPPING J:

They're in this together, so each has an interest in the financial position of the other?

MS OWEN:

Yes. Each has an interest –

GAULT J:

That would be the same with just joint ownership of horse races, racing horses.

MS OWEN:

Yes, that would be the case Your Honour. That I have to come up with a certain amount of money I understand to raise my horse, as do you and whoever else is in the syndicate but this is not merely, I understand, a horse racing syndicate.

GAULT J:

I understand that but I'm just looking for boundaries and –

MS OWEN:

The degrees of difference?

GAULT J:

– it seems that the point you make about reliance on financial contribution is no different in simply sharing in horse racing, ownership of a horse. To home ownership, training and racing of a horse.

MS OWEN:

I don’t understand that a syndicate would have obligations towards staff or the level of obligations and duties and responsibilities.

GAULT J:

That’s just scale isn't it?

MS OWEN:

Yes, it’s all aspects of scale.

TIPPING J:

But I suppose you can say that it takes it beyond the social because of this financial element, however you precisely define it?

MS OWEN:

Yes.

TIPPING J:

It takes it into another category if you like?

MS OWEN:

It does.

TIPPING J:

Without prejudice to whether that’s good or bad.

MS OWEN:

It’s different.

TIPPING J:

It’s different.

MS OWEN:

So my understanding is that if it's different it would be naturally viewed differently by the reasonable informed observer.

BLANCHARD J:

Well I think we've got to come back to the Judge's statement on which he has not been challenged. On my reading of it, and correct me if I'm wrong, his interest in breeding and racing horses is quite confined. Apparently the company Rich Hill Limited breeds one or two horses a year and the Judge is also a member with four or five other people including Mr Galbraith of three syndicates, each of which has one brood mare.

MS OWEN:

That's my understanding Sir.

BLANCHARD J:

So that's on a relatively small scale.

MS OWEN:

That does not, however, take into account whatever His Honour's involvement is in promoting Rich Hill Stud. So if for example His Honour had –

BLANCHARD J:

Well wait a minute. Before we get to promoting he has made a statement about what his financial interests are and what he says is he has no financial interest in Rich Hill Thoroughbreds Limited which is the company that does the business operation. His interest is confined, apart from the matters that I have already mentioned, to ownership of shares and a directorship in Rich Hill Limited which is a land owning company and which apparently gains income in the nature of rental from horses which are agisted on its land.

MS OWEN:

And there's your causal nexus Sir because the – I accept that he has no financial interest in Rich Hill Thoroughbreds. He's not a director, he's not a

shareholder. However, the number of horses agisted by Rich Hill Thoroughbreds will directly impact on His Honour's income depending of course on how many horses there are, and of course on what amount of land His Honour and Mr Galbraith have, because that's the link. So it's in his interests to promote, actively promote, Rich Hill Thoroughbreds Ltd because he will get a benefit from it. The more people that agist their horses with Rich Hill Thoroughbreds, the more there are going to be on His Honour's and Mr Galbraith's land. Rich Hill Limited's land.

BLANCHARD J:

That's really the nub of your complaint?

MS OWEN:

It is, although there is an aspect I'm of – what I'm essentially assuming Your Honour is if he is using – held himself out with his title and his photograph, he must not have done so lightly. One must assume he would have a good reason for doing so. He must have a benefit coming from it and one can see why.

BLANCHARD J:

Well he has said what the benefits are and I think you have to accept that statement. You didn't seek to cross-examine him.

MS OWEN:

That is correct Sir. I don't feel it would assist the Court if we tried to improve on an understanding of the factual situation. You'll end up with more facts no doubt but the ordinary reasonable informed observer has to be informed with a set of facts but when does one stop and what really worries me about this is the role that it puts on counsel to essentially investigate a Judge's affairs and that makes me intensely uncomfortable.

GAULT J:

We do know the extent of the land holding interest don't we?

MS OWEN:

We do Sir.

GAULT J:

By the exhibits to the third affidavit of Mr Radford which are cross-referenced in Justice Wilson's statement.

MS OWEN:

Yes Sir.

GAULT J:

And of the 320 acres making up the whole area, Rich Hill Limited's title is of 38 hectares and a one third interest in 42 hectares I think.

MS OWEN:

Forty-seven point seven Sir.

GAULT J:

Yes that's right, 47.7.

MS OWEN:

That is pre-subdivision yes.

GAULT J:

We know precisely that Rich Hill Ltd has a third interest in nearly 48 hectares and owns 38 hectares.

MS OWEN:

And the 47.7 hectares Sir will end up as 31.1 in Rich Hill Limited.

GAULT J:

How do we know that?

MS OWEN:

Because I had a look at the draft consent.

GAULT J:

You can't tell us that.

MS OWEN:

I suppose Sir my point is that the word “amalgamation” to me means something legally that I don’t think His Honour has used it in that sense.

TIPPING J:

Well you’ve got a conceptual point but we have here a case of a financial inter-relationship if you like on top of a purely personal or professional relationship. But if you’re relying on that you have to demonstrate, I think, that this is a material ingredient from the point of view of the informed observer, why would that financial inter-relationship cause the independent observer to have reservations, putting it colloquially? Now can you articulate that? What is the thought process, if you like, of the independent observer?

MS OWEN:

The independent observer I believe would start from the point of view that the judiciary needs to be impartial and I understand that to be the starting point Sir not the judicial oath because it’s a question of not an assumption that His Honour will be impartial but rather the need to be impartial. So we’re not starting from he will be impartial, we’re starting from the need to be impartial. So you start –

TIPPING J:

Need to be and be seen to be impartial?

MS OWEN:

Yes. Thank you for that clarification Sir, it’s very important.

TIPPING J:

I.e., not susceptible to subtle pressures?

MS OWEN:

Yes. And so therefore when you look in towards the relationship under scrutiny at the present time, you are looking for degrees of inter-relatedness or if one prefers to look at it the other way, levels of separation and here we have no separation that I can see. We have a close personal friendship and we have importantly, just focusing on the business relationship and setting the close personal friendship to one side, we have a company which is a 50/50 share, so there's equality in that regard. It's been set up for a number of years. Rich Hill Stud was set up in 1994 but Rich Hill Limited was incorporated in 1998.

MCGRATH J:

We're looking for why it is that these features are corrosive of impartiality or apparent impartiality and I think you've mentioned funding requirements. I think you've mentioned overall commitments, both of which create some dependence which is, as you put it, the antithesis of independence and impartiality, so what further is there in, for example, the lack of separateness, the 50/50 element that is corrosive of apparent impartiality?

MS OWEN:

You owe one another fiduciary obligations. You may owe one another –

MCGRATH J:

But only in relation to the business interests that they're jointly involved in?

MS OWEN:

Well there would be fiduciary obligations in terms of a partnership Sir, the 50/50.

BLANCHARD J:

But that's an obligation of loyalty within the partnership between the partners in relation to partnership matters. How does that affect the relationship between Judge and counsel in a particular case where counsel is appearing for a party? The party has no involvement whatever.

MS OWEN:

I understand that Sir but it's not about actual bias. We don't have to say –

BLANCHARD J:

I understand that but in order to see what unconscious bias there is one needs to explore how it might lead to actual bias.

MS OWEN:

Yes and –

BLANCHARD J:

Because if you can't see it in terms of actual bias, there won't be any unconscious bias.

MS OWEN:

I think though that actual bias might go further because there might be something expressed which we don't have here and so my worry was approaching it from the angle of actual bias is that we're setting the bar too high. The test is not to establish an actual bias and so therefore you need to look at what is the degree of affectation or linkages, the cogent link as the case law puts it. I said to Your Honour that the fiduciary duty was one aspect. There is a financial inter-dependence, one must assume, over and above a fiduciary duty. That will relate Sir to, for example, how you breed your horses so presumably in terms of the Galbraith/Wilson partnership and their one or two horses or year, there would be some intense discussion and ongoing monitoring of the behaviour of their dams and Sires and their progeny, possibly over a number of years. There is going to be regular contact between each of the men on the basis not only of occasional social contact or

even a semi-regular social contact, there will be important decisions being made because their income in relation to what Justice Wilson has described as not a hobby is reliant on the level of how well they communicate amongst other things, their mutual goals and how they reach those goals.

GAULT J:

I can understand all that in relation to their activities but it's the linkage or the connection to a Judge hearing argument from counsel in a case wholly unrelated to those particular interests seemingly being influenced. That seems to me to be the crux of this case. Drawing that connection between these unrelated matters.

MS OWEN:

Sir, I do not understand there to be a requirement in the law to have a linkage in terms of the subject of this case, the Saxmere Wool case, and horse racing. So although the two matters I accept are different, although obviously breeding a progeny –

GAULT J:

I can understand that if there are different sorts of relationships but I'm just seeking to see the immediate linkage between the reality of a piece of litigation in which counsel are arguing for a party because they have instructions to argue for that party, and a Judge seeking to determine that case and the horse racing interests.

MS OWEN:

That's not the degree of relationship as I would put it between the cases. It's the degree of relationship between the individuals.

GAULT J:

I understand that.

MS OWEN:

And if you look at the individuals concerned as a reasonable informed lay observer, would you gain an impression that there isn't the necessary distance to ensure that the bench is impartial? Because we all come back to the first principle of everybody is entitled to a fair and –

GAULT J:

The impartiality must be between as to the parties interest in the litigation. It must be impartial as between those parties.

MS OWEN:

But if you are giving an impression that you are in some way not impartial, that will effect the view of the bench and the view of law in New Zealand because it will be seen as it's not separate. It's not above enough, it's not standing separate from. The level is too connected.

GAULT J:

Have you had a look at the case of *Laker Airways v FLS Aerospace*, that was an English case in which there was a question of whether an arbitrator should have been disqualified because counsel for one of the parties in the arbitration came from the same set of chambers.

MS OWEN:

Sir, I haven't had a look at *Laker Airways* but there are several cases involved, particularly Australian ones, where the judicial officer concerned was from the same set of chambers and the –

GAULT J:

There are lots of interdependencies in the operation of a set of chambers, aren't there?

MS OWEN:

There are. Having come from a set of chambers previously there are a, for example, there might be a financial nexus there. I might have to have a share

of chambers which I sell out for example if I was appointed to a position on the bench. Where those cases differentiate from the present one is that it is a, well, there's a variety of differentiations. Some of them may be efluction of time so that counsel may have shared chambers with somebody else. He then appears on the bench and somebody else is the counsel involved or somebody's partner is. He may have received instructions, for example, from a firm that is involved in some way. The separation comes in, in terms of time, in terms of financial commitment, so if His Honour is required to sell out of his share of chambers for example it is a clear – one thing to say that, it's another thing to have an ongoing business relationship with a counsel appearing in front of you.

GAULT J:

Well in *Laker* they were both members of the same chambers, the arbitrator and the counsel.

MS OWEN:

I would put –

GAULT J:

At the same time.

MS OWEN:

I'd have to say Sir that in terms of the English law the English, and in particular the Canadian, have taken a different approach, as I see it, from potentially in New Zealand and definitely from Australia. So they take it, of course they've got a different test. They don't have the reasonable apprehension of bias, they have the real danger test and it seems to me there's a difference there. They're looking at it particularly in terms now of the observer coming in. They take a more legalistic view in terms of this is how it should work and this is how it be seen to work in terms of the separation between Judge and counsel. And therefore it is not open to assume that that will not work. Whereas the Australians tend to take a much harder look at whether or not in fact that separation exists.

GAULT J:

Might it have something to do with the values and rules relating to legal practitioners, barristers and …

MS OWEN:

I expect Sir that is the exactly correct explanation and I say that because, as I've expressed in the submission, it's a cultural aspect. So the rule of law in England has a series of very strict and long-standing traditions, over hundreds of years. The rule of law in Australia and New Zealand although having its genesis in the same cradle, has taken a slightly different route and of course we don't have the separation of the barristers and solicitors in quite the same way as England.

MCGRATH J:

Is there almost a policy dimension in relation to perhaps the traditional legal arrangements that's recognised here but if it brings so much that's positive to the administration of justice to maintain the cordial relationships within the legal profession, within the bench, between bench and bar in terms of the smooth functioning of justice that the Court's not prepared to see that as a reason for generating an apparent bias situation?

MS OWEN:

I would say that is correct Sir and in fact I think it's in *Taylor v Lawrence*. That is particularly well expressed in terms of, I've said this in our submissions, there's actually a benefit to having that, although His Honour doesn't express it this way, that free and easy inter-relationship between the bench and the bar. The counter to that of course is if you want to establish a very firm rule of separation, a clear concept in terms of not only the understanding of the judiciary but counsel coming through, how do you separate out, in other words, where's your line in the sand and this is an opportunity to do so. To say certain business relationships may be acceptable, social relationships are, but when you mix a certain level of business with social or you have that business on its own, that takes it out of the policy benefit and in fact is a policy detriment to the understanding of law in New Zealand and how the judiciary

has held in such high regard by members of the public. It's that need for separation so that people clearly look up and think, Judges are different. They stand above and they should.

ANDERSON J:

Would your argument be the same in the case of two Judges sitting together in a collegiate court who had a business arrangement with each other?

MS OWEN:

No, it would not Sir. Because in those circumstances, whether or not I know of that business relationship for example –

ANDERSON J:

Just putting it hypothetically.

MS OWEN:

Let's assume I don't know of it. Actually I don't think it would matter if I did or didn't know because the difference to me isn't the fact that I do or don't know, it's the fact that that's the bench and the two Judges have the relationship between themselves. I consider that they would have the training and the knowledge to be able to – the strength to be able to find their own views of the law and to if necessary give dissenting judgments.

ANDERSON J:

Why would they be susceptible of being suborn by counsel but not by another Judge when in each case the Judge must come to an individual decision on the merits of the case.

MS OWEN:

Because the, sorry?

ANDERSON J:

Why is it different?

MS OWEN:

There the relationship is taking it, I don't want to say down a level in terms of – there's no implication that there's a loss in any way but it's getting it involved in the arena as it were. It's no longer a above the bench judicial matter. It's now taking it down to link it to a counsel who necessarily must act for a party and at that point there becomes a correlation associated with, or potentially associated with, one party, because it's one counsel, it's not the party, but it is down here not up there.

ANDERSON J:

Well counsel might be associated with the party but counsel and client or lay client as the case may be, don't have the same interests.

MS OWEN:

I accept that it is a neutral role and we are trained to present objectively and to first and foremost be an officer of the Court. So I'm accepting what Your Honour is saying but I would that even though counsel don't have the same interests, the question is how is His Honour viewing those submissions coming forward from the person who is significantly involved on several levels with the Judge and that's where the unconscious bias comes in.

ANDERSON J:

There's a suggestion in the cases that if there is a clear actual – or potential financial dependency between the tribunal and the counsel, that can create apparent bias, but what's clear about this case in terms of financial dependency?

MS OWEN:

His Honour had the opportunity to make a statement to this court and availed himself of that opportunity. He didn't – what he said is what he said. He may not have been as forthcoming as we'd, in hindsight, one may wish. The – clear from the inter-dependency is that you have people in shares in company together. You have them making decisions on breeding on an ongoing basis

and you have them involved in the inter-relationship with Rich Hill Thoroughbreds Limited –

ANDERSON J:

I think you expressed this view earlier anyway. It's summed up in your words more or less to this effect, that each has an interest in the financial circumstances of the other because they are in a financial venture together.

MS OWEN:

They are. I haven't mentioned taxation implications. His Honour didn't mention them either. One must necessarily assume that there are taxation benefits from being involved in horses. They could be significant.

TIPPING J:

I'm not sure that I'm sufficiently versed in matters of tax to make that assumption without assistance.

MS OWEN:

Again this is an area Sir where the – it's not clear on his statement. I didn't know so I went and asked my tax partner.

TIPPING J:

I thought horses were the best way to lose money.

MS OWEN:

Losing money can be an advantage in tax I understand Sir.

BLANCHARD J:

Well I think we have to stick with the facts we actually know about. In the authorities that you've cited, the closest case that I've seen, and I may have overlooked something, is the Australian case of *Aussie Airlines*?

MS OWEN:

Yes.

BLANCHARD J:

And in that there was a close and long-standing personal relationship with counsel for one of the parties. They had been Trustees of one another's family trusts, although that had ceased. There was a close and long-standing professional relationship which included the sharing of chambers. Now we don't have that here, nor do we have the family trusts as far as I'm aware. There was a property interest in relation to the chambers. There were interests in a number of tenanted investment properties together so that the Judge and counsel appear to have been landlords together of a number of properties and each had a one eighth interest in a hotel freehold and business. None of those investments involved any active day-to-day role or decision making and they didn't have any role in the conduct of the hotel business or freehold.

Now, with that factual background the Judge said that an objection might have substance if the association was such that the Judge was for some reason beholden to counsel or if there was a situation of fear, favour or some capacity to exercise power in relation to the association such as if the Judge was indebted to counsel or has otherwise been financially assisted by counsel in respect of significant sums payable at call. But there was none of that kind of relationship nor would it appear is there any of that kind of relationship here.

MS OWEN:

Aussie Airlines Sir took the approach of considering the factors one by one and it's ultimate holding was of course that individually it failed to meet the test or crossed the line and Their Honours said that it's difficult to see how you could therefore meet it cumulatively. So I have an issue with *Aussie Airlines* in terms of it doesn't put any weight on the cumulative aspect. But apart from that point, I add to Your Honour's accurate summary that the contributions to the financing and servicing, as I understand it, came from their own assets and they were completely independent of each other in that regard. We are not as clear here in terms of relative contributions to Mr Galbraith and Justice Wilson, we don't know.

We can say that we have a level of association which is in many ways could be parallel to *Aussie Airlines* although as Your Honour pointed out we don't have the family trust share directorships but of course here we have company shared directorships.

TIPPING J:

When was *Aussie Airlines* decided? Was it the mid-90s?

MS OWEN:

1996. And there was a very clear disclosure by Justice Merkel in those circumstances and in fact counsel then filed a memorandum in court outlining further the details which His Honour kindly summarised. So the matter was well discussed.

One of the issues with the level of business here, as opposed to the level of business inter-relationship at *Aussie Airlines*, is the question of *Aussie Airlines* almost had a little pockets of an interest here and an interest here. So it had the tenancy here, it had the chambers here, there was no integration as a business unit if I may put it in those terms. Here we have a clear business which is a significant business, and we have a vertical integration so at one point His Honour is a land owner. At another His Honour is attaining income equivalent to rental. At another he is involved in horse breeding. At another he is involved in marketing. So there's a level of repeated relationships which all go towards the promotion and success of this business, Rich Hill Stud.

BLANCHARD J:

Well your suggestions about the marketing is based simply on that page from the website. Is that correct?

MS OWEN:

In terms of the absolute evidence in front of you Sir, yes there are comments in Mr Radford's affidavit but the website is what I call the primary evidence of marketing, of what I've described as holding out to the public at large.

BLANCHARD J:

When you say there are comments in Mr Radford's affidavit, are you going to take us to those?

MS OWEN:

I think Sir it's more in terms – Mr Radford's view is one of a person who is involved in the proceedings and I appreciate that the difference here is that you must have an objective as opposed to subjective view.

BLANCHARD J:

Yes, no I thought you might be going to take us to some factual matter rather than an expression of an opinion.

MS OWEN:

No, Sir.

TIPPING J:

When it all boils down Ms Owen, what this is about is why this relationship would cause the Judge, albeit unconsciously, to favour Galbraith's client?

MS OWEN:

Yes.

TIPPING J:

Shorn of all the trimmings –

MS OWEN:

That's it.

TIPPING J:

That's it. Now why would the person through whose eyes we must look at this, think that unconsciously the Judge might favour Galbraith's client? I think that's the most crucial and perhaps the most difficult part of the case because that's the ultimate question isn't it?

MS OWEN:

Yes.

TIPPING J:

All you say is well said but in the end the Court looking at it through the right eyes has to make that call, doesn't it?

MS OWEN

It does.

TIPPING J:

Now why might a counsel be unconsciously inclined to – sorry the Judge, be unconsciously inclined to favour counsel's client in this situation?

MS OWEN:

Why would a reasonable informed lay observer think –

TIPPING J:

Think.

MS OWEN:

That the Judge might –

TIPPING J:

Might.

MS OWEN:

– be inclined to unconsciously favour.

MCGRATH J:

Might possibly be inclined?

MS OWEN:

Might possibly, yes, because I don't have to go into probabilities so thank you for that Sir. My friend's added reasonable, reasonable possibility, if it's not a possibility that's out there –

TIPPING J:

It's not a fanciful possibility –

MS OWEN:

Yes.

TIPPING J:

The might is a real risk.

MS OWEN:

Yes.

BLANCHARD J:

But it also has to be something that's logical.

MS OWEN:

It does. So if I may, Your Honours, take you to His Honour's statement which is in index case on appeal volume 1 and the particular page I want to take you to is page 242. Paragraph 17 actually begins on page 241 and on page 242 His Honour says that, "I have ensured that Mr Cooke was aware that Mr Galbraith and I shared in the ownership of a horse stud." And His Honour's footnotes, that reference.

TIPPING J:

I've got a loose copy, would you mind saying which paragraph this is?

MS OWEN:

I do apologise Sir, it's paragraph 17. And it's over the page, the actual exhibit isn't page numbered Sir I'm sorry. It's seven lines down so if you find footnote

13, “I have not done so because I thought that that created a conflict I did not, but because I thought that Mr Radford might be concerned about the association.” Why or where did His Honour get the impression that Mr Radford, who wasn’t a party but who was involved with in particular the first and second appellant, might have been in terms of a conflict, the one who would be worried about it? Where did the information come from? And that statement to me is a particularly worrying one because it indicates that the system of deciding conflicts is varied based on the Judge’s personal views of a litigant, a litigant who he hasn’t yet heard. And when you – I thought well maybe an explanation is the cases. Maybe there’s something in the High Court decision or the Court of Appeal decision which would lend His Honour to that view ahead of hearing the matter in the Court of Appeal, sorry – was there something in the High Court decision which led him to that? I could not find anything. Where did that view come from? Well looking from an ordinary reasonable lay observer, had he talked to somebody? It just seems an extremely unusual statement to make on His Honour’s behalf. It indicates with respect that there might be an issue in terms of there having been some discussion perhaps with Mr Galbraith, I do not know.

GAULT J:

Isn't that reading a bit much into it? Every Judge must think, “Should I make a disclosure? Why should I make a disclosure? Because the person to whom I’m going to disclose might have a concern.” Isn't it any more than that?

MS OWEN:

No, I think it is Sir.

GAULT J:

Well what justification do you have for reading more than that into it?

MS OWEN:

Because you’ve got four defendants here. Francis Cooke represented all of them. Why is Peter Radford being singled out who was the representative of Escorial and Saxmere so you could say he’s the representative of two

defendants. What about Russell Emmerson? What about Mr King? Why did they have no role, no interest, no apparent right to disclosure? It does not sit well because the concept is impartiality. The concept is, if there's going to be disclosure, surely it should have been to all the defendants.

BLANCHARD J:

You'll have to acquaint me with the dramatis personae because I don't know who all these people are.

MS OWEN:

The possible best way Sir would be to take you to the judgment of Justice Miller in the High Court which is actually tab 1 of volume 1. Justice Miller has briefly outlined for us the parties, in particular paragraph 7. Saxmere and the Escorial Company Limited were essentially organisations set up to market Saxon Wool, which is a particular brand of a very fine wool. Mr Radford was and is the owner of Saxmere and the differentiation between the first two and Mr King as the third appellant and Mr Emmerson as the fourth appellant is that Mr King was a representative. He represented 13 wool growers. They were actual suppliers by the two Saxmere, the first defendant, or in fact to overseas suppliers. In contrast to that, the fourth defendant was a group, up to 60 I think it was, individuals who had wished or believed they could have marketed, had the Wool Board enabled this. So in other words they could have sold their wool, for example, to Saxmere and in fact did not do so.

GAULT J:

Are any of those other people mentioned in the Court of Appeal judgment because when I read that Mr Radford's name seemed to be the only name identified?

MS OWEN:

In the case on appeal given to the Court of Appeal obviously the witnesses were involved and Mr Emmerson and Mr Radford gave evidence and also Mr King.

GAULT J:

But I understand the first thing a Judge does when he has to consider an appeal is to look at the papers and certainly the impression from the Court of Appeal judgment was that Mr Radford was the leading figure.

MS OWEN:

And at the time that the statement, which I've drawn Your Honour to, was related to, His Honour's statement about "I thought Mr Radford might have a concern", the Court hadn't yet heard, entirely I accept based on the papers, but the papers wouldn't have given any, I submit, pre-eminence to Mr Radford ahead of any of the other parties. I accept it was all about Saxon Wool and how you market it –

TIPPING J:

I'm having difficulty understanding where this actually helps us. The Judge may be arguably a little illogical here or he may have picked out one person where he should have picked them all or he may have not expressed himself as well as he might have but in the end it's not Mr Radford's concerns that are determinative, it is those of the independent observer –

MS OWEN:

Yes.

TIPPING J:

– that are determinative. I'm not entirely sure what force this has, Ms Owen. You'll have to persuade me that it's got more force than I can see at the moment for the ultimate issue in the case.

MS OWEN:

In terms of the ultimate issue which is what is that reasonable and informed lay observer's viewpoint coming in, would it look unusual, would it look out of the ordinary, to see this statement by the Judge. In other words, does it give an impression in the lay observer's mind that the Judge might have formed a

view of one of the parties ahead of hearing the appeal? Does it in fact assist in an impression of impartiality or does it detract from an impression of impartiality?

TIPPING J:

The fact that the Judge may have formed a view about a party before sitting, is quite different from saying that he shouldn't have sat because of his association with Mr Galbraith. I mean, are we sort of shifting ground now?

MS OWEN:

We are in some circumstances Your Honour, in that I'd say that it's, I mentioned before, it's a cumulative effect. So, you might say that you've got an accumulation of a personal relationship between Mr Galbraith –

TIPPING J:

One, I think it's very speculative, reading all this into it and two, I just don't think this is the point on which you've got leave.

MS OWEN:

It's part of the whole package Sir. One of the aspects –

TIPPING J:

He only gets the – he reads this no earlier than when he got Justice Wilson's statement.

MS OWEN:

Put it this way, what information do we assume the reasonable informed observer is making his decision on? Is this not part of the factual matrix –

TIPPING J:

When the complaint is about Mr Galbraith, the association with Mr Galbraith, it is everything that could reasonably be relevant to the relationship between the two men. It's nothing to do with whether Justice Wilson might, according to your somewhat speculative proposition, have a snitcher on Mr Radford.

MS OWEN:

But the linkage between the two Sir, is how did he give the information? Why did he form this view? Does it insert into the mind of the reasonable observer the thought that he may have been –

GAULT J:

You should have cross-examined. If you want to take this point, you should have cross-examined him.

BLANCHARD J:

I thought that you were making the legitimate point that the reasonable observer might have been concerned that the Judge had thought it necessary to make some kind of disclosure to one of the parties on the other side.

MS OWEN:

One of the parties?

BLANCHARD J:

I really don't see that the fact that there are other parties adds much to it. The short answer to that point, is that it's not an infrequent occurrence for a Judge, either at first instance level or on appeal, to read the papers and to think "Gee, I have such and such an interest, it's probably perfectly okay but it's better that the people going into this case know about it in advance so I'll disclose it and if there's an objection raised then I'll consider more deeply whether in fact there's anything that means that I should recuse myself." So, I wouldn't see the fact that the Judge chose to make a disclosure and you would say a clumsy disclosure, really has much impact at all. It's pretty common.

MS OWEN:

As Your Honour just put it, you yourself said, a Judge would make a disclosure to the parties. So the differentiation here, in my mind is, he wasn't thinking of making a disclosure to the parties, he was thinking of making it to one person.

BLANCHARD J:

Because, I imagine, he thought that it was Mr Radford who was effectively calling the shots for one side of the case which is the impression I had too.

MS OWEN:

I can't say definitively no, that's not the case, obviously I can't. It may be an explanation.

BLANCHARD J:

It seems to me, that's the most likely reason why the disclosure was made to Mr Radford. Were they all represented by the same solicitors?

MS OWEN:

They were.

BLANCHARD J:

Well, again, the disclosure was made to counsel to go back through solicitors.

MS OWEN:

Yes.

BLANCHARD J:

Reasonable enough for the Judge to think that all other things being equal, it was sufficient to notify his interests in that way.

MS OWEN:

Your Honour, do you wish me to turn to the manner of the disclosure because that is one aspect that I've also raised?

BLANCHARD J:

I'm very happy that you do so but I'm not wanting to hurry you on if there are other things you –

MS OWEN:

I'm happy to have a further discussion in terms of the linkages between the business and Justice Wilson and Mr Galbraith. I suppose what I'm really saying is that what you have is a team spirit coming through. You look at that website, you think of four men and now we know that in particular Justice Wilson and Mr Galbraith are a team they are together, they have Rich Hill Limited. So, there is that loss of independence by the holding out of a team. Can that be in some way cured, in the mind of a lay observer or even not raised, by the fact that one is a counsel and one is a Judge. With respect, I would say to the Court that the appearance of independence is utterly crucial and that it is eroded with due respect, by the website and the image that it is given. The message that Wilson, Galbraith and the two Thompsons are a team and then we find out further on –

BLANCHARD J:

But they are a team in relation to a business which has got nothing whatever to do with the particular case.

MS OWEN:

How do you break your team links? Because the question that must arise is, will they always be a team? What does it take for them not to be a team? It's the independence and the impartiality and the separation of the judiciary and if there's not a sufficient separation of the judiciary and counsel because of the factual circumstances, then that's where you're going to get the loss of faith and the loss of the independence and the right to a fair and impartial tribunal because there you'll get a reasonable apprehension of bias.

BLANCHARD J:

If you are going to use analogies with sports, I don't think you get very far because sportsmen play for various teams and they play both with and against one another.

MS OWEN:

I wasn't thinking of a sports analogy Your Honour, I was thinking in terms of a working relationship, a team, a business relationship.

BLANCHARD J:

It's a business relationship for a confined purpose. Loyalties are only supposed to go as far as the business is concerned. The relationship between the Judge and counsel had nothing to do with that.

MS OWEN:

Loyalties are only supposed to go as far as the business is concerned. When you look in from the outside as a reasonable informed observer, how would you know when they go further or would you suspect that they might go further? That's what it's about. When and where do you cross the line between a business relationship which necessarily has loyalties and the separation being lost between counsel and the Judge?

BLANCHARD J:

We need to bear in mind that this was a Judge who had been a Queen's Counsel, Mr Galbraith was a Queen's Counsel. Like any members of the senior bar in New Zealand, they had fought countless cases against one another over the years.

MS OWEN:

I accept that Sir and it's something that is also raised in the case law. The issue again, is one of the understanding of the law and the knowledge you attribute to your reasonable lay observer and again, in England –

BLANCHARD J:

Well the reasonable lay observer would know that Mr Galbraith was a senior counsel and would know that Justice Wilson had been a senior counsel.

MS OWEN:

I think that's a fair assumption Sir, that we could put that knowledge into the mind of the reasonable lay observer. Does it then follow that when you are against one another and you are in a situation of an adversarial situation, you would then treat it the same manner as you would as a Judge and counsel? Are you still in an adversarial situation? I would have said no. You've changed your relationship in that regard, you're no longer adversarial, you're in a decision making role in the terms of the Judge and again, an advocate's role, so Mr Galbraith's role hasn't in any way changed but the relationship between the two have. So, you don't have that strongly adversarial with the concept of, dare I say it in a Court of law, a winner and a loser. Someone who will get a judgment perhaps more of a win than a loss again, you've got the difference with the bench. It's not a win or a lose for the bench.

TIPPING J:

I'm not sure you can add much more to what you've said about this business relationship. You just say it goes too far.

MS OWEN:

Yes.

TIPPING J:

Unless there is some specific dimension that you haven't yet addressed, for my part I would have thought that the ground has been very well covered and if you're wanting to make something out of the manner of disclosure – but, I mean, if there's something demonstrably more about this relationship, then I'd be only too pleased to listen to you.

MS OWEN:

Thank you Sir. No, as long as the bench is satisfied that we've traversed that, I'm satisfied and can move on.

McGrath J:

Can I just ask you one – *Aussie Airlines*. Was the business relationship continuing at the time the case was decided? Talking about ownership of hotels and that sort of thing. The Judge used the words "had had" and I just wasn't sure whether he was referring to an arrangement – to business associations that had concluded or were continuing.

MS OWEN:

My recollection of the case Sir and I'll just check my notes, are that in terms of the chambers' relationship His Honour had bought out and that that was gone, so that aspect had gone. However, in terms of the tenancy aspect, I'm not – there was a third interest each in the hotel, they were going to sell the hotel, they were in the process of selling the hotel. I'm obliged to my friend for pointing that out, but there was –

McGrath J:

They were in the process of selling the hotel?

MS OWEN:

Of this hotel but there were other investments. The phrase had recorded was, "Had share interests with others in a number of tenanted properties." My understanding is, is that aspect continued on.

McGrath J:

Was going on. Now, is there any other case that deals with Judge, counsel and common business interests, apart from *Aussie Airlines*?

MS OWEN:

Aussie Airlines would –

McGrath J:

Sorry, I should say other business interests outside the ownership of chambers, legal partnerships and that sort of thing?

MS OWEN:

I actually summarise them Sir, at the end of – in terms of business interests only. *Ivory* was one where it was a shared – it's not business interests, it's in terms of representation. *Aussie Airlines, Kennedy v Cahill* was a personal one, *Raybos* again was one where you had previous instructions and *Fingleton v Christian Ivanoff* was an employment matter more than a business interest. So, I think I could distinguish that one as well Sir.

McGrath J:

Thank you.

MS OWEN:

I'm indebted to Ms Grey, she's pointed out that in fact the reason we have this dearth of case law in this regard, it could be because that business interests are not encouraged in other jurisdictions and there are – the UK Department for Constitutional Affairs has a longstanding rule that no Judge should hold a commercial directorship. I've footnoted this at footnote 2 of my submissions Sir. It refers to, "This applies to a directorship in any organisation whose primary purpose is profit related. It applies whether the directorship is in a public or a private company." So, it might be that there's a deterrent effect which has led to not so much case law and certainly in California there's a, I think it's a statutory bar, there's a statutory control in any event in California.

TIPPING J:

In some of the American states there's very prescriptive sort of codes, aren't there, as to what you're allowed to do and what you're not, whereas ours is rather more amorphous?

MS OWEN:

Ours is very amorphous Sir and part of the reason we're all here today, I think is because it's somewhat amorphous and perhaps it isn't as well understood as it could be.

McGrath J:

Those ethical codes or understandings, whatever you call them, do take wider values into account, don't they? They'd be including, no doubt, factors that Judges should be giving their full time and attention to their judicial duties.

MS OWEN:

And no doubt be appropriately remunerated as well, one would assume.

McGrath J:

The point I'm making is that, you cannot assume that those rules are necessarily there solely to protect against this sort of situation, this sort of concern that you're raising with us.

MS OWEN:

They could have a multiplicity of roles. I would say that they are guidance and indeed as our own, guidance is formatted in terms of a guidance not a rule. They are also, I would suggest, culturally originating so that whether you're in England or America or indeed New Zealand, the role of New Zealand and how it looks at its judiciary and the role of Australia or America would also play a role. So, it's a question today of how separate do you want to be? How separate should you be? That is certainly a policy consideration. It may even form that guidance, it may not. I can't take that any further because of course, I wasn't involved.

ANDERSON J:

The strongest argument in terms of impartiality, is the Wisconsin code, isn't it?

MS OWEN:

Ah, the –

ANDERSON J:

The one that says, you shouldn't have business relationships in effect with people who might appear before you in Court?

MS OWEN:

Yes.

ANDERSON J:

Frequently.

MS OWEN:

The reason for doing so would be appearance, separation. Should I, Your Honours, move on to – sorry, I'm not keeping a track of the time, so if you would like to break, please let me know.

BLANCHARD J:

No, no. We won't be breaking for another five minutes.

MS OWEN:

Would it assist if I moved on to the manner of the disclosure?

BLANCHARD J:

Yes.

MS OWEN:

One of the issues before Your Honours today, as I've expressed in my original submissions, was the concept that the manner and the content of a disclosure could in fact play in to whether there is a reasonable apprehension of bias which arises. The Judge was a new Judge, he'd been in his position I think about a month and I can't tell you whether he was – had been trained in, you'd know more than I would on that aspect, the guidance, whether he'd even been aware of it. The other issue we have is that a new edition of the guide was coming out and it was coming out in March 2008 and I'm not actually sure whether it was out at the time. I haven't been able to precisely identify when. So, there was one edition of the guide but it mightn't been the edition that is currently being quoted. What we do know is His Honour telephoned Justice Cooke in what he's described – oh, pardon me, Francis Cooke QC in, what he's described as an informal disclosure and that

there was no, it was never taken any further, it wasn't in Court or anything of that nature, there were no submissions or anything of that nature because Mr Cooke came back and as he said in his second affidavit, although the arrangement was let it lie unless there's going to be an objection, he actually recalls that yes he did ring the registrar as a courtesy because he didn't want His Honour thinking oh, you know, "What is going on, I haven't heard." So he rang the registrar to confirm that in that regard there had been no objection raised by his clients. So, the concept of, perhaps my paragraph 16 of my original submissions, I should, in there I said, any waiver of the objection had to have been by way of silence.

TIPPING J:

Is this submission in support of the apparent bias, or is it in support of waiver?

MS OWEN:

As I expressed it there because that paragraph 16 was in my summary, it related to waiver but –

TIPPING J:

No but are you saying it has got a dual relevance?

MS OWEN:

It has, yes.

TIPPING J:

You are, at the moment, saying why this would have affected the mind of the independent observer?

MS OWEN:

At the moment Sir, I'm just correcting my position –

TIPPING J:

Yes, I know that but I just want to know more broadly.

MS OWEN:

Broadly, yes. Why it might have affected the mind of the independent observer –

TIPPING J:

Can you tell us in a sentence or two why this informality would have affected the mind of the independent observer?

MS OWEN:

Because it's a similar situation to case law where it's indicated that if it's not forthcoming and public and detailed, there might be an impression, a somewhat unfortunate impression, that it's not accurate or it's not –

TIPPING J:

Candid, is that what you're saying?

MS OWEN:

Yes.

TIPPING J:

Not candid?

MS OWEN:

Yes. I think the case Sir, that raised it, I can't remember the exact quote but I'm aware some of Your Honours sat on it, it was *Man O'War*. It gave the, I think it's *Man O'War* number 2 –

BLANCHARD J:

I did more than sit on it.

TIPPING J:

He was sat upon.

MS OWEN:

That raised – obiter and those sort of acts I think it was Sir, that there might be an impression given by the manner of the disclosure.

TIPPING J:

That will come out in the wash. Surely what we have to go on is what we now know, rather than some supposedly incomplete statement.

MS OWEN:

What we now know doesn't cure in any way with respect Sir, the manner in which it was done. So, if there is –

TIPPING J:

No, no, I know but – perhaps we'll have to come back to this but I'm a bit puzzled about this aspect of your submissions. I've followed completely all the rest but I'm finding this a bit elusive, this idea that – once everything is on the table, as we have in the statement now before us, then isn't that what we have to base it on? Of course, if there was something very odd about the manner of disclosure that might – I would have thought it would go more to actual bias than to an appearance of bias but perhaps we better come back to that. The fact that it might not be candid might lead to the view that there actually was bias rather than an unconscious bias. We've got to make that very clear distinction.

MS OWEN:

Well, one of the ways you could put it and I think it was put in, I think it's *Taylor v Lawrence*. It's the one where they didn't find bias in the end but the, I think they described the facts as dribbling out and it gave an unfortunate perspective that in fact there might be something that His Honour was uncomfortable about. Some level of concern or relationship that wasn't being willingly revealed, so there were implications or assumptions in the mind of your reasonable observer. He's going oh, what's going on here? Now, you have to – you can't just have oh, what's going on here, you've got to have the

step back and the assessment and the objective analysis. It's not just an emotive response.

McGrath J:

I think what's being said is that the investigation can take place later. I mean, of course it's better if it takes place earlier but the investigation can take place later, as is happening in this case and that that is fully sufficient because it can be a complete investigation.

MS OWEN:

You end up with what is being said, I don't know whether it's a complete investigation because it's all hindsight. However, you still have the manner in which it was done, so even if you've got all your facts which is stage one of your newer test of course –

McGrath J:

All of the circumstances which is said would give rise for a reasonable person having an apprehension of bias. It can be put out on the table and considered in retrospect.

MS OWEN:

Yes, they can. In fact, we now know today that Justice Wilson has told us in his statement that there is also a relationship, personal relationship with Keith Sutton which wasn't clear initially.

McGrath J:

Can I just ask you this Ms Owen, what's the – why do you put stress on the public aspect? I think what you're saying is that any of these disclosures should always be in public at Court. Now, I can see that you – what you're really saying is it's not adequate for example, through the registrar by emails or letter or something like that, for the disclosure to be made. I'm just speaking hypothetically now I know. Is there some concern you have about that being done other than in open Court?

MS OWEN:

No, I should clarify that for you Your Honours and I appreciate the question because it's the impression left in the mind of the public and how it might be done is important. Here it was, what His Honour has described as an informal telephone call however, in other circumstances I can imagine it going through a registrar for example. I wouldn't have thought it's normal to go via email to counsel because again, that's separation.

BLANCHARD J:

There is only one proper way of doing it and that is through the registrar and the Judge didn't do that but it's quite clear that he anticipated that any response would go through the registrar.

TIPPING J:

He was putting out a feeler and he was going to respond according to how the feeler, what the response was to that. I really think you're on a weak point here. I don't think it enhances your client's argument to say that – because in the end, we've got it all out and we have to say, those are the facts, would a reasonable observer have thought there was a real risk of bias?

MS OWEN:

Setting aside waiver which we can come too –

TIPPING J:

Yes, absolutely, we haven't got anywhere near waiver yet.

BLANCHARD J:

Perhaps we can come back to waiver after the morning adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.53 AM

MS OWEN:

Thank you Sir. I think before the break, we were going to come to the aspect of waiver, unless there's anything Your Honours wish to go back on prior to turning to that topic. The submissions have said that waiver is a possibility and I set aside in this regard criminal cases, so that the assumption we're proceeding from is that in a civil case waiver of a potential conflict would be available. However, before you can say that it was available in this case, we need to ascertain whether the appellants had been put in the place of being fully informed and in short we say they were not fully informed and therefore they could not give any form of waiver.

The situation, as we understand it, is that the Judge has said that there was a horse stud and Francis Cooke QC said they were in the nature of horse racing interests. Now, of course, we know that Justice Wilson has more than just a horse stud, he does have horse racing interests including the partnerships with other individuals and also his partnerships with Mr Galbraith in terms of breeding. So in fact, the phrase horse racing interest is a more encompassing phrase and one could understand why His Honour indeed might have used that phrase. So, it's not to suggest that His Honour in any way misinterpreted or misled anybody, if in fact he did use that phrase. It's perfectly understandable indeed how he could have used it but what we end up with which ever phrase is used, and I said in opening that we didn't need to pick a winner in this regard, the important point is that Mr Cooke QC went back to Ms Grey who then went to her client and the impression which is very well established in Francis Cooke's response is that, it was no big deal, I think was his phrase indeed, because he thought it was in the nature of small scale, it wasn't anything out of the ordinary.

BLANCHARD J:

Small scale commercial operation?

MS OWEN:

He didn't use the word commercial, no.

BLANCHARD J:

Or business?

MS OWEN:

Ah, no, he didn't –

BLANCHARD J:

Ms Grey later referred to business.

MS OWEN:

Yes, Ms Grey has referred to business and in the context of her letter which in fact Justice Wilson refers to, when you look at that letter, I'll just go back to what His Honour said. The matter is addressed Your Honours in paragraph 16 of Justice Wilson's statement and Ms Grey's reference to business interests can be found in volume 3 of the case on appeal at tab 35. So it's volume 3, tab 35 and it's actually page 384 and you'll see there that Ms Grey has in her first paragraph, sorry to bother you, has referred to, "They had business interests together. I did not know any detail but gained the impression at the time that this was a technical conflict rather than anything of substance." In fact, the response from Francis Cooke is D3 and that's page 385 and that's where Mr Cooke first refers to the phrase "horse racing interests", so that's in paragraph 2. He explained however, that Alan Galbraith QC was not only a personal friend but that they were joint owners of horse racing interests. Paragraph 3, "The fact that this extended to shared ownership interests in the horse racing industry did not seem to me to matter." Then in paragraph 4, "My view was and still is, the relationship would have no bearing on the case." So, Your Honour, he didn't refer to business and he didn't refer to commercial. So, the impression gained was that it was nothing out of the ordinary, it was interests in the horse racing industry.

It is not clear that there was – nothing suggested in fact, that there was any understanding of the degree of business relationships, the size of the business, or in fact that it was a commercial relationship.

BLANCHARD J:

It was at least a business relationship.

MS OWEN:

In that, if I was a syndicate owner for example, the horse, that's a business. In that regard, yes but it's fair and far off, I'd submit with respect, in comparison to Rich Hill Stud. Then you have and I appreciate this is a subjective point, which is Mr Radford's recollection is that it was of little or no consequence. Again, the view was, relying on his counsel's advice, oh well, it's ordinary, nothing out of the usual, no problem, and so the no objection was communicated to the registrar. Therein lies the difficulty we all have that the manner here of the disclosure has led to some degree of uncertainty as to exactly who said what and we are where we are.

Be that as it may, I'd submit to this Court that in terms of the appellants they are very clear that they did not understand the level of relationship in the business component in terms of a significant horse stud between Justice Wilson and Mr Galbraith. Nothing Mr Cooke has said in that D3 which I've just referred you to, indicates that he had taken it any further or had thought any further enquiries were necessary for example. Nothing had alerted him to the fact that this might be more than he assumed in ordinary horse racing syndicate for example. So, the question I come back to is, in terms of the disclosure, was it enough to indicate to the parties, "This is the potential issue, this is what we're asking, being asked to waive an objection to" and I submit, the answer is no. It was not sufficiently detailed to alert the parties to what they were really being asked to waive which was a conflict of interest in terms of Mr Galbraith's relationship with Justice Wilson.

TIPPING J:

I suppose you would say that on the hypothesis which we're discussing i.e. that there was a reasonable appearance of bias because we don't get to waiver it otherwise, it's quite important in the public interest to be strict about the requirements of disclosure before there can be a valid waiver.

MS OWEN:

Open and transparent, yes. Strict, clear, no doubt, you know, what are you doing and why are you doing it and why are you being asked to do it. I'm assuming here that you can give a waiver –

TIPPING J:

Oh of course, yes.

MS OWEN:

It all comes back to, how does waiver play into this? It all comes back to first principles. What is all about? It's about confidence in the judiciary, it's about the strength of standing independent and being impartial so that if you are not advised of the correct situation then you're in a situation where you don't know what you're being asked to waive.

TIPPING J:

Or you don't know the full extent of what you're being asked to waive is probably a better way of putting it.

MS OWEN:

Yes, yes it is. I think that is appropriate Sir. *Taylor v Lawrence* is one of the cases that refers to waiver and it does refer to, if disclosure is made, full disclosure must be made. And *Taylor v Lawrence* itself was the case where it demonstrated the danger of a partial disclosure. And of course in this aspect of the case finding the facts out afterwards can't cure the waiver.

Justice Wilson has made it clear that he didn't mention the words Rich Hill. We do know from his statement that he only mentioned the Rich Hill Stud and

he's even said it's irrelevant or it seemed to me to be irrelevant and he thought, this is in his paragraph 15, "I thought that if Mr Cooke or Mr Radford wanted more detail about the interest I shared with Mr Galbraith they would have asked." And that I have some difficulty with, with respect Your Honours because that is then flipping the duty over to make due enquiry onto the party and the question is, of course, can you make due enquiry when you haven't actually realised what it is you're supposed to be making due enquiry about.

BLANCHARD J:

Or should you indeed have to make enquiry?

MS OWEN:

Yes. Because it again it comes back to investigating a Judge's personal or financial aspects, business aspects. I don't like that.

I don't think there's anything I need to say further. We've already discussed or traversed the issue about Mr Radford being concerned about the association. The items that Justice Wilson has gone through I think we've already addressed. We're clear that the Judge didn't consider himself to have a hobby but the word hobby came from Mr Radford. He thought, he got the impression it was a hobby so that's indicative of the scale difference between the two. We've gone through Ms Grey's email. What we haven't gone through is the Judicial Conduct Commissioner's letter which was – Justice Wilson wrote to the Judicial Conduct Commissioner and it was in relation to the complaint regarding Justice Wilson's conduct and Professor Webb noted, there had been prior to the hearing some meeting of the existence of a common shareholding but if you look at that letter you'll see that that was in hindsight now that all the information had come out.

MCGRATH J:

What page are you at?

MS OWEN:

That is referred to Sir at paragraph 15 of His Honour's statement and I was quoting his last line in paragraph 15. The actual exhibit, which is cross-referenced in footnote 8, is Mr Radford's exhibit C on his first affidavit which is found in volume 1 on page 31, it's under tab 34. And you'll see from that it's the letter on University of Canterbury letterhead, paragraph 2 of that makes clear that the – by the stage this letter was written the nature of the relationship is that both Justice Wilson and Mr Galbraith are equal shareholders and directors of Rich Hill Limited which is a very substantial thoroughbred stud so that was the context in which the statement was made, looking back with additional knowledge or, if you like, the benefit of hindsight.

And so the specific reference in the letter to the common shareholder which Justice Wilson referred to in his paragraph15 is found on page 322 and it's the third to last paragraph, in other words the last paragraph's a one liner. And that's the one, the start of the paragraph, "It should be noted that some mention of the existence of the common shareholding was made to counsel for Saxmere Company Limited immediately prior to the hearing commencing."

Now you could say that was made with hindsight. You could also say that what the Commissioner understood by the phrase common shareholding might have been, for example, common shareholding in a horse racing syndicate so I don't actually think it takes us any further. It doesn't really cast a spotlight or a particular illumination on how the parties understood the situation at the time the partial disclosure was made.

Your Honours I've now traversed the main issues in our submissions and the matters I come back to again and again is the concept that we have a question here for you which is, where would you draw the line? So it's a question of philosophy, if you like. It's a question clearly of law. We know there is a line and that the line varies in location depending on the contextual, in other words, the factual circumstances. So yes, there is a line. Why do we have a line? The line is there to create that impartial judicial tribunal.

Here I suggest with respect that there is an appropriate location to draw the line and that line is the commercial business relationship between Justice Wilson and Mr Galbraith. It's not an inevitable aspect of a judicial appointment, it is separate from it. That's a deliberate choice and so it's not going to apply to everybody. It's not – if you draw the line here it's not going to bring the judiciary and the law in New Zealand to a screaming halt. It is a pragmatic and realistic line in terms of application. It is understandable in terms of the principles on which we are deciding the case. It's the differentiation, I suppose I could say, between your normal expectation of independence, that's that separation distance, and the holding, as I've referred to it before, of a team. So we respectfully ask that the line be drawn in this case to say that business aspect took Justice Wilson over the line so that there was a reasonable apprehension of bias. That's an appearance of bias. It's all about how it looks. It's all about confidence in the judiciary. I don't think there's anything I need to add but I'm happy to answer any further questions and I appreciate the questions from the bench.

TIPPING J:

As to relief you're seeking the judgment below be set aside and the matter remitted for rehearing –

MS OWEN:

Yes.

TIPPING J:

– before a differently constituted panel.

MS OWEN:

Indeed, yes. Yes. We've taken the expression in the early minute of the Court to heart and recall is now – it wasn't our original relief but it's now sought.

BLANCHARD J:

Well it wouldn't be recall, it would just be setting the decision aside.

MS OWEN:

Aside. That would be a new hearing then.

BLANCHARD J:

Yes, yes.

MS OWEN:

That's definitely preferred. Is there any other ways I can assist Your Honours. I appreciate we haven't gone through the cases in detail. I can –

BLANCHARD J:

Yes, no thank you Ms Owen, you've been very helpful. Mr Kós?

MR KÓS QC:

If the Court pleases I think I appear strictly as the second leg of the trifecta and the issue in this case is to some extent as my friend has said, a question of where you draw the line. But there was, in my submission, a somewhat disembodied character to her submissions because they played down the role that the appellants themselves had in where the line should be drawn. That is because of the manner of their response to the information provided by the Court and their acceptance that the Judge should sit despite their appreciation of not only that His Honour had a close personal friendship with counsel, Mr Galbraith QC, but also that that relationship had extended into a form of business relationship. Now I'll come back to that.

So it's not simply a question of asking in a kind of academic lecture hall way where the line is drawn but it must be drawn against the information provided in this case and the reaction of the appellants to it. That is of some importance to the party for whom I appear because they were not party to any of these communications. They succeeded three to nil in the Court of Appeal in a case where submissions by Mr Galbraith were in any event disregarded by the Court who at paragraph 73 to 74 of the judgment said they didn't need to consider what he had said because they were content to decide the matter

on the basis of the arguments presented by Mr Dobson who was, in practical terms, senior counsel in the conduct of the Court of Appeal hearing.

Now it is with that background possible for me to reduce my argument to seven succinct points and it may be simpler if I simply provide to the Court a summary of what those are. Madam Registrar? Just to go through them quickly and together. My first submission that, as a general rule, close personal friendships with counsel are not disqualifying. Secondly, if I'm incorrect in that respect then the close personal friendship in this case was disclosed and any right of objection was waived. Thirdly, turning to business relationships, Judges may and do hold limited commercial interests. Fourthly, there is no material difference in terms of risk of bias between a close personal friendship with counsel and one which involves a commercial interest such as a horse breeding or racing partnership. Fifthly, if I'm incorrect on the last point, then such a commercial interest in this case was disclosed and any right of objection to that was waived.

Now I turn to the farm. Sixthly, there is no material difference in terms of risk of bias between a close personal friendship involving a commercial interest such as a horse breeding or racing partnership which is what we've just dealt with on the first, the third, the fourth and fifth propositions, and one that involves the ownership of a small farm and I'll come back to that characterisation later because in my submission that's in reality what we glean from the evidence, this description of it as a stud is somewhat grandiloquent when one actually ascertains in terms of the titles and the Judge's own description of what occurs on the land that he and Mr Galbraith own. It is a small farm which involves in the agistment of horses to the stud on the adjacent property.

Seventhly, and finally, even if I'm incorrect on the last proposition then not withstanding the possible non-disclosure of the farm, my submission will be that the fair minded and informed observer would not consider that there was a real possibility of bias in the determination of the 2007 appeal. And I have then provided, as I habitually do, in visual form a short account of what I say

are the factors adjusted by that last proposition. But I will come to that in due course.

There seems on the first proposition to be a consensus between the parties that a close personal friendship with counsel is not disqualifying. Such relationships commonly exist, Judges are drawn from the senior bar and such friendships already exist at the time of appointment. As a matter of policy, Judges are not to be disembodied from their community and nor are they to be divorced from their friends. In the judgment of the English Court of Appeal in *Taylor* and particularly also in the judgment of the British Columbia Court of Appeal in the *Wellesley* decision, both of which I've noted the references to at the second arrowhead, the Courts there made the point that such relationships are not to be discouraged. That they are in fact a good feature of the professional relationship between the bench and bar.

In New Zealand such a connection is in any case, in my submission, inevitable because there was a very small senior bar from which the judiciary is drawn and it is quite natural that friendships will be established between members of the bar and those friendships are not, as I say, to be divorced or split upon appointment of one or other to the bench.

The position of counsel, as I submit at paragraphs 49 to 51 of my submissions, is quite distinct from that of a party or a witness. A party is judged by the Court. A witness in a sense is also judged because his or her credibility is assessed. Counsel, as my friend Ms Owen acknowledged, has a neutral role. Counsel is not judged. Counsel is trusted. But my submission is that the trust that is associated with senior counsel appearing before the Court is not impacted on by whether one of the members of the bench has a friendship or a friendship that is extended into some form of commercial activity.

That is the difficulty, in my submission, with argument presented by the appellants. They cannot identify what the greater degree of trust that would result in an unconscious bias would be particularly when they have

acknowledged in this case and accepted that the Judge should sit despite the disclosed close personal friendship. Despite the disclosed existence of a horse breeding or racing interest in conjunction with Mr Galbraith. That's all I really want to say to Your Honours on the first point.

The second point is simply made, you will have seen the evidence and Mr Cooke is quite frank about this in his account there's no difference on this point. At tab 31 of the case on appeal at page 287 at paragraph 8 he acknowledges that there was disclosed to him the existence of a close personal friendship with the Judge, that's volume 2, tab 31 and at the bottom of page 287, paragraph 8, the second sentence, "He explained to me that he was a close personal friend of Mr Galbraith." So there's at least clear in this case that any disqualification that could be contended for because of the existence of a close personal friendship, because of the trust and confidence associated with that close personal friendship, was disclosed and waived by the appellants.

So that then takes me to the third proposition which turns into the commercial quality of this particular relationship. Again I start with a general proposition, as I did with number 1, and I note that Judges may and do hold limited commercial interests. The position in the United Kingdom is not as absolute as my friend would suggest and that is shown in the Crown's authorities, which is the rather large volume, right towards the end there is tab 24 which is from the Department of Constitutional Affairs. It's an additional guidance note for Judges. The UK Judges Guide is somewhat elliptical, that's at tab 22, the very last page of the Crown's extract there, page 37, paragraph 8.3.1, helpfully tells the Judge that they should get further guidance on that – on what commercial interests they should have, that's –

BLANCHARD J:

I'm sorry I'm not sure what you're referring to.

MR KÓS QC:

I'm at tab 22 Sir.

BLANCHARD J:

Oh 22.

MR KÓS QC:

The Crown's – I've gone back to the broader document. Page 37, the last page in the extract, that begins by – the statement that the requirements of office clearly place constraints, severe restraints on the permissible scope of the Judge's involvement in commercial enterprises but more clarification is given at the document from the UK Department of Constitutional Affairs which is at tab 24, the second page of that particular document has under the heading "Financial Interests" guidance in relation to what the position in New Zealand is, sorry, the position in the United Kingdom is, but notes as an exception to the rule that a Judge may take part in the management of family assets, family land or family businesses. May hold a directorship in a private company for that purpose. Now that seems to be the sort of thing that Mr Justice Dyson was involved in, in the *Locabail* case. In a fifth of the *Locabail* cases where Justice Dyson seemed to own a large part of Northern England in conjunction with his family.

BLANCHARD J:

I should tell you he's a friend of mine.

MR KÓS QC:

Well Your Honour it does keep coming up in these cases. And so there Sir is the United Kingdom position. The Australian position is less severe and that's at tab 21 and again the last page of the Crown's extract at tab 21, in fact the second to last page, it talks about commercial activities. Directorships, at the very bottom, directorships of public companies should be resigned on appointment. Of course Justice Wilson did that in this case because he was a director of a bank owned company, Accounts New Zealand Limited and he talks about that in his evidence. He resigned that on appointment.

On the next page, page 28, "A Judge should not engage in any financial or business dealings that might reasonably be perceived to exploit the Judge's judicial position or would involve the Judge in frequent transactions or business relationships with persons likely to come before the Judge in court." Taken in a somewhat facile way that might suggest that a Judge shouldn't have a commercial relationship with counsel but, in my submission, what that is talking about is persons whom the Judge has to form a view about in appearing before. In other words, is it talking about litigants or persons that might frequently be witnesses before the judge. There's no reason to read that more broadly than that.

Then it goes on to say, "Some small scale non-judicial activities that might be perceived as commercial are quite common and not objectionable particularly if they're primarily recreational." Examples are given, hobby farms and other agricultural enterprises and other ones that don't require hands on responsibility and then the one that is explicitly allowed in the English context, directorship of small family companies.

Now what we know from the case law at least in this part of the world is that Judges have had and do obtain limited commercial interests. In the situation in *Aussie Airlines,* of course, the Judge had an interest in the hotel, continued to have an interest and tenanted properties as we've already heard. In the *Muir* case one of the issues at stake there was Justice Venning's partnership in the forestry venture and the issue there was whether his ownership of that in conjunction with two gentlemen who had written a report on which the Judge had had to form a view meant that he was the subject of apparent bias. And there is ample evidence in this case of Judges being involved in bloodstock partnerships with each other and with counsel. And I've referred, I think, there to exhibit P of Mr Radford's second affidavit which was the Hall of Fame page from the Rich Hill Stud, I'll find the reference to that in a moment and give that to the Court.

So against that background, that Judges may and do hold limited commercial interests, I turn then to my fourth proposition which is that there is no material

difference, in my submission, in terms of a risk of bias between a close personal friendship with counsel and one that involves a commercial interest such as horse breeding or horse racing partnership. Such relationships are not extraordinary but – in New Zealand at all as we can see. In my submission, such a form of association is simply the natural evolution of a friendship. It involves no greater level of trust and confidence from the friendship itself.

The Crown has a useful way of analysing this at the middle of its submissions, I'll just find the reference. At page 18 at paragraph 40 of the Crown's submissions they talk about there being two potential types of concern. One the prospect of subconscious favour and the other one that the Judge would have a particular interest in keeping the relationship intact.

Now if one looked at this situation, I respectfully agree with the Crown's submission that the issue here seems to be the second kind, in other words there might be a tendency to want to keep the relationship intact and therefore not to take a step in terms of a judgment, which might be adverse to one's – the person one has that relationship with. But the question is, why is that any greater in the context of a commercial relationship than simply in a friendship of very, very long standing? And that if one looks at this particular relationship there is simply no basis to say that there is any greater sensitivity or great sensitivity in it because this relationship, the fair minded and independent observer who has an enquiring mind would know, and can see from the evidence, and in particular from Justice Wilson's statement, that this relationship has weathered all the vicissitudes of two senior Queen's Counsel who have opposed each other on a regular basis in court and hasn't been shown to be sensitive to that. Nor is there any suggestion on the evidence that counsel of the seniority of Mr Galbraith would somehow benefit from a positive determination in this case. It would be a matter of absolute indifference to senior counsel whether he won or lost a case of this nature. Well it should be if, if we are following my friend Ms Owen's –

TIPPING J:

A financial indifference perhaps.

MR KÓS QC:

Financial indifference, well –

TIPPING J:

I don't think you can say total indifference.

MR KÓS QC:

Perhaps not total indifference but nonetheless in terms of whether – if the test is whether there is some aspect here that would mean the Judge would want to favour his associate or his friend because of keeping the relationship intact, he is plainly going to weather an adverse outcome. No senior counsel sadly appearing before these Courts has a perfect record. Occasionally you find against all counsel and therefore that's why –

BLANCHARD J:

That's the most enjoyable day.

MR KÓS QC:

Yes.

ANDERSON J:

Especially in the same case.

MR KÓS QC:

And many of us of course rather suspect that that might be the case. And nor in my submission is there any suggestion of any kind of economic or emotional dependence. Now, Your Honour Justice Tipping used the expression dependency before, as a short hand for what is involved. Again, coming to this from the perspective of the innocent, that is to say the respondent was not party to these exchanges and rather thought it had won in the Court of Appeal. In my submission, if the appellants are going to try and

suggest that there is some basis for economic or emotional dependence then it behoved them to ask the question more clearly. There's two reasons for that. The first is, that – and it's a point I'll come to a little later, the appellants were explicitly aware that they were not certain what the extent of the relationship between these two people was. We see that from paragraph 11, page 289, tab 31 of the case on appeal, that is Mr Cooke's first affidavit. At paragraph 11, he talks about having rung his instructing solicitor, Ms Grey and describing the telephone conversation, passing on the information that Justice Wilson had raised and here's the passage I rely on, "Ms Grey asked me what the shared interests in horses was and I replied that I was not sure but I thought that they owned one or more horse racers together." I accept that in the ordinary course, a party that has received disclosure can take it at face value and is not required to enquire further but where the party then makes a judgment to respond to that, when it is explicitly uncertain of the position then, in my submission, it is different particularly when that has implications for other persons –

TIPPING J:

Is this going more to waiver than to appearance of bias?

MR KÓS QC:

No Sir, it goes to the question of appearance of bias because the second point I was going to come to, was that the Court of Appeal in *Muir* abjured against drawing inferences from the evidence in the absence of proper enquiry. In other words, in *Muir*'s case there were all sorts of allegations about whether Justice Venning might have had conversations with the two writers of the report and the Court of Appeal said well, there's no evidence of that, you simply can't conjure these sorts of inferences out of the ether. Now, the point I'm submitting here is, in this case, my submission is that if the appellants want to submit to this Court that there was a great degree of reliance, or dependency to use Your Honour's expression, then first at the stage where they were explicitly unsure of the position and secondly, when they had the Judge's statement and say that that is less than complete, they

had the opportunity, in my submission, the obligation to enquire. If they want the Court to infer that there is such a dependency –

BLANCHARD J:

Surely, the obligation is the other way round. The obligation is on the Judge to make a full enough disclosure.

MR KÓS QC:

Yes, and the Judge has given his disclosure. That indicates no basis for a finding of dependency. My friend wants you to infer that there is such, I say to the Court that following *Muir* they had the opportunity to enquire. They could have either sought to cross-examine the Judge here, or else they could simply, if that was palatable, simply have written a letter via the registrar asking the Judge to clarify one or two or three issues. So, the submission I'm simply making is, there is no basis on the evidence in this context to infer that there was a degree of economic or emotional dependence –

BLANCHARD J:

Can't you just stop at that?

MR KÓS QC:

Yes.

TIPPING J:

You don't need to gloss it by this business about they should have made further enquiries. There is simply not, on the evidence, any basis for inferring dependency.

MR KÓS QC:

I'm not sure I'd quite agree that it was a gloss –

TIPPING J:

I'll withdraw any pejorative overtones there were in that word, Mr Kós.

MR KÓS QC:

Your Honour, I'm quite capable of dealing with them. But in this situation, in my submission, the opportunity for clarification existed, hasn't been taken and *Muir* would say well, that's that. That's all I want to say on that.

I then turn Sir, to my fifth point which is that even if I'm incorrect in terms of there being no material difference in terms of risk of bias between a close personal friendship and one involving a commercial interest such as horse breeding or horse racing, in my submission, the evidence shows that there was clearly a disclosure of the horse breeding and racing partnership elements of the relationship between Justice Wilson and Mr Galbraith, so the appellants were well aware, both that they were close personal friends and that that friendship extended to horse racing and horse breeding interests. I've given the Court the references there, they were just reviewed a moment ago by my learned friend and I don't need to go back there again. They clearly cover all aspects of the relationship except for the farm. It's to that I now turn with my sixth proposition.

In my submission again, there is no material difference in terms of risk of bias between a close personal friendship involving a commercial interest such as horse breeding or racing and one that involves the ownership of a small farm. In answer to questions from the bench, my friend this morning accepted that in the operation of a horse racing or breeding partnership there would intense discussions and important decisions that would be required to be made. The question then is, if the farm is, on the evidence, the one thing that was not disclosed, or at least not clearly disclosed, then what difference does that additional fact make to whether there is a degree of dependency? There has to be shown, using the test in *Ebner* in the High Court of Australia, it has to be shown a cogent link between the difference between the acceptable state of affairs which was the close personal friendship plus the horse racing and breeding partnership and the apparently unacceptable state of affairs which is those elements plus the farm. So what, for the purposes of assessing apprehended bias, is the material difference between a bloodstock partnership and a farm when both involve an intense relationship and both

involve important decisions. How does that additional fact, in terms of *Ebner*, pose a materially greater risk of deviation from determination on merits? Now, in my submission, even if in this case the position was that waiver became irrelevant in relation to the farm because the existence of the farm was not clearly disclosed, then notwithstanding that possible non-disclosure, the fair minded and informed observer would still not consider that there was a real possibility of bias in the determination of the 2007 appeal. One thing that's very important in that context to note, and it's come up a couple of times today already in submissions, is that the Court looks at this question ex post, not ex ante and this is made absolutely clear by the High Court of Australia decision in *Ebner* which is in the appellants' authorities volume 2 at tab 14. At page 345 of that judgment, the judgment there being of Chief Justice Gleeson and Justices McHugh, Gummow and Hayne –

TIPPING J:
Volume 2?

MR KÓS QC:
Two of the appellants' bundle Sir.

TIPPING J:
Tab?

MR KÓS QC:
Tab 14, page 345.

TIPPING J:
Thank you.

MR KÓS QC:
There are two passages I want to refer to, the first just in passing, it's paragraph 8. You will see there the passage that I referred to before about the articulation of a logical connection between the matter complained of and a fair deviation, that's what they call the second step. This, of course, being

the same test as is applied in *Muir* and while I'm dealing with that point, there is no jurisprudential distinction between the position in New Zealand, Australia and the United Kingdom. You could put a blanket, a horse blanket across the judgments in *Muir*, in *Porter v Magill*, and in *Ebner*. *Muir* referring directly to and following both *Porter v Magill* in House of Lords and *Ebner* in the High Court of Australia. So the same two step test applies now in all three jurisdictions.

Now the other passage that I wanted to refer to is higher up on the page, paragraph 7, and it's the last four lines at paragraph 7 where the four Judges there concerned say, similarly. "If the matter has already been decided the test is one which requires no conclusion about what factors actually influence the outcome. No attempt need be made to enquire into the actual thought processes of the Judge and juror." It is clear that that case, *Muir*'s case at paragraph 54, the *Man O'War* decision at page 557 and the Court of Appeal's decision in *Ngati Tahinga* at page 884 all say that one looks at the question of what the fair minded and informed observer would conclude with the benefit of all the facts that are now available. That makes sense because the fair minded and informed observer is of an enquiring mind and that much, I think, is accepted between all counsel in this case because I agree entirely with my friend's, and said this in my submission, my friend's characterisation in her paragraph 45 of what the fair minded and informed observer would be, someone aware of legal traditions and culture, the knowledge of the legal process and the law of counsel.

So with that background which is to say that one looks at the position ex post and that the tests in the three jurisdictions are identical, I then look at what, in my submission, the fair minded and informed observer would look at when he or she weighed in the scales the question of whether there was a reasonable possibility of a deviation from determination on the merits. I've tried to do that visually in the second page of my small skeleton.

Now it is true that the fair minded and informed observer would know the four points noted on the right hand side, that they own a farm and horses together,

that there might have been incomplete disclosure of the farm, that there might be the possibility of unconsciously favouring a friend and there might be some form of economic dependence. That's what the fair minded and informed observer would at least put in that side.

In my submission, he or she would also weigh the other factors. The first is, the Judge opted to disclose. It might have been an excessive caution on his part but he opted to disclose. Secondly, it is clear from Mr Cooke's affidavit at paragraph 9 that the Judge insisted that Mr Cooke obtain his client's views regardless of his own expression of a lack of difficulty, lack of issue at the time. That doesn't sound like what a Judge that was inclined to a bias view would do. Thirdly, there was here ample time to obtain informed instructions in contrast with the position in *Smith v Kvaerner* where the poor old litigant turned up at court on the morning of trial to discover that there was an issue and his counsel, the Court of Appeal rather suggests, slightly bullied him into accepting that there wasn't any basis for objection.

Here there was plenty of time. What the evidence shows in Mr Cooke's affidavit is that he had to jolly along Ms Grey to get a response and I presume the jollying along wouldn't have occurred over a very short period of time. It suggests that there were many days or several days at least in which the appellants were considering their position, and just for the record I'll find the reference. The reference is in Mr Cooke's affidavit which is tab 31, page 289, at paragraph 13, "Instructions were not immediately forthcoming and I followed the matter up with Ms Grey on a couple of occasions by telephone particularly as time went on." So it's not a situation such as in *Smith v Kvaerner*.

Fourthly, a fair minded and informed observer because he would be imbued with those qualities that my friend accepts of familiarity with legal process and legal culture, would understand that Judges may continue to enjoy friendships with barristers. And again my friend accepts the fifth proposition, that there are ethical rules governing contact and that Judges and senior counsel may

be expected to obey them and there's plenty of authority that says the same thing, I think it's said in *Ebner*, amongst others, and in *Taylor v Lawrence*.

Sixthly, in my submission, they would take into account the fact that Mr Galbraith was very senior and, if not perhaps as insouciantly indifferent as I might have suggested to a win or a loss, would at least be unaffected by an adverse outcome.

MCGRATH J:

How much should we be taking into account with what you've described, you've described Mr Galbraith as very senior? I'm just really wondering how subjective we should get in this.

MR KÓS QC:

I don't think it's a question of being subjective Sir. It's a question of how informed you are. In my submission, the informed observer would consider who the participants were. They might reach a different conclusion where counsel was a very young person, a starting barrister, as opposed to the counsel was very senior and had a history of acting against the Judge when he too was counsel. In my submission, that would be fair –

TIPPING J:

They'd actually appeared in front of each other in an arbitral context.

MR KÓS QC:

Yes both, both ways.

TIPPING J:

Both ways.

MR KÓS QC:

Yes quite.

BLANCHARD J:

If we take into account too many of these individual factors, aren't we going to make life very complicated, particularly for Judges who are deciding whether they should sit or not?

MR KÓS QC:

There's a logic to that point, one has to be careful I think about how fine –

BLANCHARD J:

The informed observer would certainly know that Mr Galbraith was a senior counsel but I'm not sure how much further we should go than that.

MR KÓS QC:

The informed observer might though not simply sit on the basis of what he received but enquire further and the question is how far he would enquire, it would seem to be relevant to that question of whether there was a real possibility that the Judge would be biased in favour of his friend to ask whether they had appeared against each other because there is, as all counsel and all – all former counsel or Judges will know nothing quite as dramatic through a relationship as appearing against each other in a courtroom. I'm sure there are probably worse occasions, probably mountaineering, but that's about the next step to it. So in my submission, that would be a relevant enquiry. I don't know how much further past it you would go but you would certainly look at some of the other things that are on the scales, so that's picked up my point number 7.

Then because the fair minded and independent observer would be familiar with legal process and culture they would know the Judges can hold commercial interests so they wouldn't find it extraordinary, for instance, that the Judge owned a farm. Of course the informed observer would take into account the fact that the appellants in this case had had a hand themselves in drawing the line because they were aware of and had no issue with the disclosed, should be disclosed not discussed, disclosed close personal friendship and the bloodstock partnership.

In my submission the fair minded and informed observer might well consider that the appellants were themselves explicitly aware of the uncertainty as to the extent of relationship but opted not to enquire further. And that's important –

ANDERSON J:
But that doesn't go to appellant bias, that goes to waiver.

MR KÓS QC:
Well not entirely Sir, in my submission, but – although, I won't press the point, I can see the sense of that.

BLANCHARD J:
So we can cross that one out?

MR KÓS QC:
Well, I may have not have much longer so I'll try –

TIPPING J:
I have an exclamation mark and a query beside that Mr Kós.

MR KÓS QC:
Well I'm going to try and think of a way of restoring it to the scales but its absence may not make much difference. In my submission he would certainly or she would certainly pick up the point that the ownership of this small horse farm, and it is in my submission on any view of the title, a small farm, is irrelevant to the issues in the appeal itself. That he or she would enquire as to whether there was evidence of associated emotional or economic dependence if I'd known.

They might take into account the fact that no party in the subsequent proceedings in *Ngai Tahu*, one in which I was present in the capacity that the Solicitor is present today, or the *Big Game Fishing* case, saw it as an issue.

So that's, in my submission, something of an insight into what the fair minded and informed observer would think about the relationship between Justice Wilson and Mr Galbraith extending to the farm.

The next point is the one that my friend and Mr Solicitor and I disagree somewhat one but we come at this from different points, and that is that the Judge was one of only three in the Court of Appeal. Now he quite rightly says, citing the Bill of Rights Act, but that doesn't absolve a question of bias, apprehension or otherwise, and I agree with that looking at it from the perspective of a lawyer. But looking at it from the perspective of a lay person, which is what we are doing, and in my submission they might well take into account, particularly in what might be a very marginal case, that there will be a difference between the relationship where the Judge was the Judge alone and the significance of the relationship where the Judge was only one of three.

ANDERSON J:

I have difficulty with that because it then becomes a matter of process. The parties were entitled to have the appeal heard by a bench of three, not by a bench of two.

MR KÓS QC:

I accept that and I also accept that the other qualifications that are probably even more stringent, that my friend Mr Solicitor makes in relation to that point, but I still submit that from the perspective of the fair minded observer they would not necessarily look at it in the same eyes that Your Honour is looking at it.

ANDERSON J:

Well I think they'd be wrong.

MR KÓS QC:

I'm grateful to Your Honour for the directness of the observation and I can probably put a question mark beside that one as well. But I'm not going to accept the removal of my last point from this case because it is, in my

submission, something that the fair minded observer would weight. That Mr Galbraith who supposedly has infected this court, came along to it and his appearance was a complete waste of time.

ANDERSON J:

That goes to actual bias. I mean the 15 and 16 both are really more relevant to whether there was actual bias but we're dealing with apparent bias.

MR KÓS QC:

No I don't accept that, because from the perspective of the observer they would ask how would, or could, in light of the way the judgment went, the Judge have in any sense directed his mind towards favouring his friend?

BLANCHARD J:

But were Mr Galbraith's submissions significantly different from the submissions being made by whoever was, was it Mr Dobson?

MR KÓS QC:

Yes, absolutely they were. Because the way the case – may I just answer two points at once, while I remember it. There was this question before – can I deal with a different point and then come back to it, in terms of the record. There's this question before about why Mr Radford was singled out in the Judge's statement. If one read the record, which is what the Judge has read, Mr Radford is over it all over the place. Mr Emmerson and Mr King hardly appear. So I go back to the record. When one looks at the record what Mr Galbraith submitted on were the tortious causes of action and damages and he argued second. Remember Mr Dobson and Mr Galbraith both appeared for the same party, the party that I'm appearing for today. Mr Dobson appeared first, he argued first, and he argued the issues of the facts and also of the statutory interpretation causes of action.

BLANCHARD J:

Was Mr Galbraith's client not relying on those as well?

MR KÓS QC:

Mr Galbraith was counsel for the same client. There's only one respondent.

TIPPING J:

But it was in his interests in a sense that they had a common cause?

MR KÓS QC:

Well it's not common cause. They were counsel for the same party.

TIPPING J:

Yes.

MR KÓS QC:

Mr Dobson in fact was senior counsel, he argued the first issues and Mr Galbraith argued the second issues.

MCGRATH J:

Which was a liability issue –

MR KÓS QC:

Correct and which the Court of Appeal –

MCGRATH J:

Whatever caused him to come in was focused solely on the liability aspect?

MR KÓS QC:

Yes and the Court of Appeal said, "Well we've found on the factual and statutory interpretation causes of action argued by Mr Dobson, we do not need to consider the other arguments that are presented to us." So the point I'm simply making is that in terms of apparent bias the judgment rendered the participation of Mr Galbraith in a sense irrelevant.

TIPPING J:

If they had known that in advance, he needn't have been there?

MR KÓS QC:

Correct and viewed ex post, the judgment could not have had any impact on Mr Galbraith in any material way.

ANDERSON J:

I doubt that he waived his fee in view of the fact that his arguments weren't addressed.

MR KÓS QC:

But that's not the issue, that's not the issue the fair minded and independent informed observer would look at.

GAULT J:

I'm troubled by this one I'm afraid, Mr Kós. If there's an apprehension that the appearance of counsel before the Judge may unconsciously lead the Judge to decide in favour of that counsel's client, it doesn't seem to me to be a matter of what arguments are presented or what succeed, but it is the appearance before the Judge in the case.

MR KÓS QC:

I'm sure would be the argument my friend Ms Owen would advance. I simply submit to Your Honour that in this case if the question is one of the potential for unconscious favour, then to the extent that the counsel's arguments have been wholly disregarded, then that diminishes that prospect and that's all I submit, that's as far as I'll take that point.

MCGRATH J:

Is that finished on this? Because I'd like to go back to number 13 for a moment, Mr Kós.

MR KÓS QC:

Can I indicate to Your Honour that it's finished, my list, and finished my submissions subject to questions from the Court.

MCGRATH J:

In terms of the factor if we can put it this way of the litigant being concerned at the possibility of financial inter-dependence between counsel and the Judge, economic dependence as you call it. Do I understand your point there is that if the litigant has that sort of concern, the litigant has to raise it to the point of getting the Judge to express himself on it? Is that what you're saying? Because you talk about here no evidence of associated emotional or economic dependence. Now, from the litigant's point of view, the litigant might have a concern about that necessarily. I'm talking now subjectively litigant, I'm not talking about the reasonable observer. So what does the, this is going back to your earlier argument, are you saying that something active has to be done by the litigant in those circumstances to get that matter into the scales?

MR KÓS QC:

Yes Sir because in my submission it's not in the scales per se. In other words, the fact that there is a business relationship does not mean that one infers from the existence of that business relationship a situation of economic or other dependence. So that if – and if that is the status quo of the per se position, then that can only change by enquiring and if in that situation the enquiry exposes that dependence then obviously the fact – the position shifts.

MCGRATH J:

I can see that this authority *Taylor v Lawrence* and other cases in relation to personal friendships, in relation to matters that are covered by the traditional legal relationships, those sort of associations, that would basically say prima facie just got to be something more than that, but in terms of business associations is it – I just really wonder whether the onus may not rather be on the Judge to do something to bring that forward?

MR KÓS QC:

Although in that context the English Court of Appeal in the *Jones v DAS* case, which is one of the authorities cited in the Crown's submissions, said there

that all that the Judge is required to do is to disclose the core facts, the essential facts.

MCGRATH J:

That's a direct pecuniary interest case, isn't it?

MR KÓS QC:

No, not in that case because if I recall in that case it was a question of the relationship between the Judge or the chair of the tribunal and her husband who had –

MCGRATH J:

I'm sorry you're not talking – you're talking about a different case. This is Lord Phillips –

MR KÓS QC:

No I think that's a different authority. *Jones* is number 18 in the Crown's bundle. It's the judgment of Lord Justice – Lord Justice Waller and issuing was Lord Justice Hale and the issue there was simply that the tribunal member's husband was a barrister who did work for the defendant company and that was disclosed. The question then was, was that disclosure adequate and the relevant passages found at paragraph 36 where in the middle of the paragraph the Court says, "In this case and on the particular facts it seems to me to have been sufficient for Mr Jones to have been told that Mr Harper was a barrister in chambers which did DAS work and that he had himself done such work. It's not necessary for Mr Jones to know on how many occasions he'd been instructed and how much he had been paid for that work."

So that authority which is from 2003 suggests that what is disclosed is the core information, that is to say what the nature of the business relationship is but one doesn't have to go beyond that in terms of detailed financial information and, in my submission, that would apply here.

So the question is simply does the fact – it's a double question. The first one is, does the fact that there is a farm here create an inference of dependence? In my submission, as a matter per se, it doesn't. But more to –

BLANCHARD J:

There is the –

MR KÓS QC:

I make a second point. The second point Sir is that one has to take that in the facts of this particular case where what has been disclosed is the close friendship and the breeding partnership. And so the question becomes what does that additional fact make – difference make against the acceptable position. I'm sorry, I cut Your Honour off obviously.

BLANCHARD J:

There is the element that Rich Hill Limited's income was dependent to some extent it appears on the success of Rich Hill Thoroughbreds' operations on the properties because of the arrangement over agistment fees. What do you say about that?

MR KÓS QC:

That was simply the source of income of the farm. It's only stated source of income by the Judge is that it, he used its paddocks for agistment by the adjacent stud and also of course they grazed their own horses on it. So there's an economic relationship with the stud but I don't, in my submission, that doesn't take you to a point of inferring anything as to the economic standing or relativity between the client, the stud and the landlord, the farmers.

BLANCHARD J:

What do you say about the point being made concerning Justice Wilson becoming involved in promotion of the stud?

MR KÓS QC:

I don't have any submission to make on that if Your Honour pleases. There are guidelines – there are no guidelines obviously expressed in New Zealand in any formal sense. Those guidelines that exist in other jurisdictions would suggest that the use of a judicial title isn't what would be the norm but in my submission it doesn't lend any evidential weight to the question of a greater or lesser degree of dependency.

MCGRATH J:

If anything it's possibly an ethical question which doesn't turn on the issue that you have to satisfy?

MR KÓS QC:

That's my submission. Those are my submissions if Your Honours please unless I can assist further.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.19 PM

MR KÓS QC:

Your Honour, if I might just make one correction to my submissions this morning. Ms Grey has pointed out to me, and I accept that in relation to item 16 in my diagram, which was the disregard of Mr Galbraith, that Mr Galbraith did make an opening statement of general import for 30 minutes at the beginning of the Court of Appeal case. Subject to that correction, I adhere to my earlier submissions.

BLANCHARD J:

Mr Solicitor, we have had the benefit of your written submissions for which we are grateful but we've decided that we don't need to hear from you orally.

SOLICITOR-GENERAL:

Thank you very much Your Honours.

BLANCHARD J:

Ms Owen, did you wish to reply?

MS OWEN:

Thank you Your Honour. As you may expect, having had the benefit of three sets of submissions and a large degree of agreement on the law, this reply will be very short indeed. I'm grateful to my friend's acknowledgement in terms of Mr Galbraith's role in the case and I would say that the opening submissions are important because they set the tenor and indeed the ambit of a case, so that quite apart from any other reason to disagree with item 16 of Mr Kós' scales of justice, there is the potential to say that Mr Galbraith was in fact critical to the case, he was very important and merely because his submissions on one point were not addressed by the Court, they didn't feel they needed to turn their minds to that, does not in any way diminish his involvement in the overall case.

In terms of Mr Kós' diagram, I would note, I don't think my friend wants to make an implication that it is a matter of weight, if you get a certain number of factors here you'll go down and if you don't you'll go up, I don't think that's the implication. It's a very well drawn diagram I must say. There are several items on it that I don't necessarily agree with but I'm not going to take the Court through them one by one, I don't think that we need to traverse ground we've already gone over. However, in terms of the limited commercial interests which is my friend's point 8 and he orally added, "So, you would not find it extraordinary", I would submit that in fact you would and one of the items or reasons why you would find this extraordinary, is the holding out aspect and Your Honour Justice McGrath mentioned that it may be an ethical question. You don't need submissions from me on that point but irrespective of whether it is an ethical question, you nevertheless have an aspect which I would submit is not normal, would not be expected by your reasonable fair minded lay observer. That alone, makes the relationship extraordinary. It differentiates it from the case law where you've seen some examples of what might be acceptable.

BLANCHARD J:

It might not be normal but how does it translate into something that suggests an unconscious bias?

MS OWEN:

I come back to my point earlier Sir, that it is a team item, it's the concept of not the separation that's required to keep the judiciary impartial, it is a perception aspect, it's the reasonable apprehension of bias.

In terms of the "small horse farm" which my friend mentioned at several points and it turns up again at item 12, I suggest with respect, that you check the website form your own views. Quite part from everything, we have three titles which are for a stud farm, they are contiguous –

BLANCHARD J:

Is this in the evidence?

MS OWEN:

Yes, in fact it's exhibit – it was used Sir, I'll just check.

BLANCHARD J:

It would be helpful to have the references.

MS OWEN:

Indeed. Volume 3 of 3, for the index of the case on appeal Sir, has at tab 38, and the certificates of title begin at page 454 and there are three certificates of title and they conclude at page 460. If you look at page 460, you'll see there are three titles which are the L shape I referred to earlier. I just happen to have referred them to your three certificates of title. So, the first one is 47.735 hectares, 38.096 hectares, that's the Rich Hill one –

McGrath J:

Sorry, would you mind, just as you turn your head away, we're losing you from the microphone. Do you mind just starting there again?

MS OWEN:

I'm sorry Your Honour. The first title which is the bottom one, is Colin and Irene Thompson, Rich Hill Limited, Rich Hill Thoroughbreds Limited, that's SA220/4 and that is a 47.735 hectare title. The second one which is Rich Hill Ltd is SA940/224 and that is 38.0961 hectares. Those are the two titles which the subdivision refers to as well. The third and final title is SA955/88 and that is Galbraith and the three Thompsons, it is 42.555 hectares.

BLANCHARD J:

I notice that that one doesn't seem to have a mortgage on it and there's one mortgage on the 38 hectare property, is that correct?

MS OWEN:

Yes Sir, there's a mortgage on two of the titles but not on, as Your Honour has pointed out, that third title.

BLANCHARD J:

Yes.

MS OWEN:

One is a 1999 mortgage which is on page 454 of the volume and then the SA955/88 title is –

BLANCHARD J:

That's the one in which Justice Wilson has no interest?

MS OWEN:

That is correct. In terms of the small farm, the indicator, possibly the best indicator, or certainly an indicator of the value associated with the farm, is the

yearling sales which is on volume 3 at page 430 and that relates to sale fees in Rich Hill Stud, it doesn't relate to agistment fees Your Honour. It indicates certainly the amount of horses passing through but you can't clearly or directly relate it to number of young being raised on the farm or agistment fees but it does indicate, in my submission, that we're not talking about a small horse farm. There is a list of foals raised on the stud farm at page 428 of volume 3 of 3. Again, they relate to Rich Hill Stud.

BLANCHARD J:

That's the thoroughbred company?

MS OWEN:

It's Rich Hill Stud, it may be Rich Hill Thoroughbreds Limited or it may include, I'm not sure whether it does include Justice Wilson's and Mr Galbraith's own horses in it which are Rich Hill also but they're Rich Hill Limited.

BLANCHARD J:

They are only one or two a year.

MS OWEN:

Indeed, the vast bulk of those would be Rich Hill Thoroughbreds Limited. The link is perhaps the marketing Sir, rather than the – whose horses they are. I don't think I need to say anything further regarding the small horse farm but it is probably the point at which we depart most strongly factually from our friends.

There is another item that my friend referred you to, he was making the point that Judges may and do hold limited commercial interests and I do acknowledge that there are certain circumstances illustrated for example by the case law where that is the case and family companies have been one such. The suggestion my friend made in relation to the Australian guide to judicial conduct and this you may recall was tab 21 of the Intervener's authorities and I'm grateful to my friend Mr Collins for including it, I think it's helpful. That's the Australian guide and that's the one that refers in, well it's

the very last page of that tab in paragraph 2 which Mr Kós referred you to. His interpretation, where it says, "Or that will involve the Judge in frequent transactions or business relationships with persons likely to come before the Judge in Court," my friend suggested that could be, and this is my wording, read down to say that actually only refers to persons whom the Judge form a view about. With respect, although my friend said there's no reason to read it wider than that, I would say in fact that there's every reason to read it wider and the reason is the public importance and impartiality and faith in the judiciary. With respect to my friend, that submission could in fact help to erode that independence.

TIPPING J:

Don't you think the words "come before" rather suggest litigants? If it had been and I'm not trying to be pedantic but I must confess, I didn't think it would naturally cover people appearing before.

MS OWEN:

The words "come before" could include only litigants, it's not clear. Again, I think it is one of those items where you need to make the judgment, where is your line going to be drawn and why. So is the why is to keep absolute, that independence of the judiciary –

TIPPING J:

I can understand the policy argument. I was just rather, perhaps unhelpfully, cavilling with you on the linguistics of it all.

MS OWEN:

No, I don't think it's unhelpful at all Your Honour. I'm not saying my friend's made an outrageous submission at all, it's just that it could be clearer –

TIPPING J:

You would prefer it to be read the other way?

MS OWEN:

It could be, as indeed my friend has read it. So now I'm putting the counter to it.

TIPPING J:

Yes.

MS OWEN:

I think we've already addressed the material difference between a close personal friend and a friendship and a horse breeding or racing partnership. Unless there's an item you wish me to go over again, I think we don't need to address it further.

TIPPING J:

What level of possibility do you say is involved in the concept of – the possibility that the Judge might be unconsciously bias?

MS OWEN:

I have approached the question of possibility in terms of when the real danger test was around, there was a discussion in case law about is it a risk, is it a probability? We know it's a possibility not a probability, so it's not an exact science approach but nevertheless it must be reasonable, so there must be something there to give rise to reasonable apprehension of bias.

TIPPING J:

There is, albeit in a different field, a fairly recognised test of real risk. I'm thinking of the criminal appellant field, does that capture the sort of level?

MS OWEN:

No.

TIPPING J:

No?

MS OWEN:

No. I think that the real risk test, if the Courts had chosen to adopt that, they would have used words like that. So, reasonable apprehension to me is in fact a higher standard –

TIPPING J:

No, no, no, you misunderstand me, I'm at a step later. It's a reasonable apprehension but what does the lay observer have to reasonably apprehend with in this concept of the possibility of unconscious bias? Is it the merest possibility, is it quite a high possibility or is that concept of possibility captured by the idea of real risk? Not the real risk of bias, no, no, no, not that at all. I'm seeking to get some help from you as to what level of possibility the authorities suggest because some of them just use the word possibility and that may be the best way because that sort of gives a bit of flexibility but I just wonder whether it is possible to articulate more sharply the level of possibility because possibility is quite a slippery word, as is the word probability. Are we able to be more precise and if so, what would capture it? I don't think it means a mere fanciful possibility.

MS OWEN:

I would agree with that. I think, of that range, the mere possibility to me is not enough to equate to reasonable –

TIPPING J:

A reasonable possibility is what you would –

MS OWEN:

Yes.

TIPPING J:

Well, if the reasonable observer sees it as a possibility, does that equate a reasonable possibility?

MS OWEN:

It may do and I think this is where we get slippery with the case law because I don't think the case law wants to pin it down because it's all case by case –

TIPPING J:

You've got to have – for intellectual honesty, you've got to have in your own mind some sort of standard. It's no good sort of having Judges all over the place on what's meant by possibility.

MS OWEN:

I agree with that Your Honour and when I did the submissions I was looking at should I do a comparison of what happens if you have a child appearing in front of you or related in some way to the judiciary, are there any useful comparisons we can draw so that we've that level of consistency. I wasn't able to and I notice none of my friends have taken that approach either apart from Mr Kós' line, there's no absolute where one goes in here and not in here because on a certain factual situation this one which might be a familial relationship might be here on the line and then slip down further on down here for another reason. So that, in terms of intellectual rigour, perhaps if I can put it that way, yes, I agree we should have a clear view in our minds but I can't percentage wise it and I can only say to you, if it's reasonable and it need only be one factor, it could be heavy enough to say that's enough to tip it over the line. Or it might be a series of small factors cumulatively which again –

TIPPING J:

It's not how you get there, it's what conception you're seeking to satisfy that I'm interested in at the moment. You might get there in one big hit, you might get there in a series of little bites but it's what you're actually looking for.

MS OWEN:

Yes, yes. When you look at *Muir*, it says "might" and – I think Your Honour is asking me to put a gloss on that, when will "might" mean "might" and when will it not.

TIPPING J:

I'm not asking you really to do anything other than indicate whether you have anything you want to say on that subject which the case may well not turn on it but, for my part anyway, I'm interested in the conceptual level at which one has to set this concept of possibility.

MS OWEN:

What I will say in that regard and I hope it is of assistance to the Court, is that where – the conceptual level that you set it at depends greatly on the way you are looking at it. So, if you're thinking of it as a policy to not only protect the judiciary and make it clear, you've got that separation, you've got the judiciary here and clearly impartial, that's one way of looking at it. Or, whether you look at it in terms of, it's the importance of the public having faith in the system, then that is a way of setting it potentially higher than saying well, actually we have this series of facts, do we pass a line or not because it depends how pure you are in policy terms where you set your line. I'm not sure that that really assists you.

TIPPING J:

No, well, it's quite a difficult issue. I do think, this may not be one of those cases but there may be cases that could turn on the level of possibility if you like that is involved in this concept.

MS OWEN:

I'm sure there would be because you look at some of the cases and you look at some of the Australian cases where they've had a split majority and you think, they could turn on something like that. You've got three Judges saying one thing and two saying no, we don't agree with that.

TIPPING J:

May be in the end, it's not wise to be too precise.

MS OWEN:

I think that's why the judgments I've read have not been explicit in those circumstances, it is case by case.

TIPPING J:

Thank you very much.

MS OWEN:

In terms of other items in reply, my friend has suggested that from his perspective of his innocent respondent, the appellants should have asked more clearly what the questions were. If they had issues and they didn't know what the details were, we should have asked. With respect, I suggest that it is the duty of the Judge to give us enough information and I've made it clear why I don't want to take the reverse position.

My friend may have misunderstood my submission at one point. In relation to his item 6, may not relate directly to that – my friend was talking about the material difference between the friendship and the ownership of the small farm and he said I'd accepted that horse racing or breeding partnerships resulted in intense discussions and important decisions needed to be made. Yes, but I was thinking in terms of this particular farm. I'm not suggesting every breeding partnership has, I don't know, how ever many in the syndicate all getting in to say, we have to have this horse, or not. I don't know. Whether you just put your money in to your syndicate and get what you get, or whether you're actively involved. I think in the circumstances of this, where you've got this vertically integrated large stud, I think there's more of an involvement and more of an opportunity to have the very best breeding and to put it in to Mr Galbraith's and Justice Wilson's own one or two horses a year. So, I hope I haven't confused the Court on that point.

In terms of the degree of dependency, yes, there must be a link. I think we would submit, we would submit that there is a link here. It is a link in terms of land ownership and in terms of several levels of involvement which I've referred to as vertical integration. Although my friend has sought to

distinguish the farm, without that land there would be no stud. The land is absolutely fundamental to the stud and to Justice Wilson's income.

I don't think there's any other items I need to raise Your Honours. I'm happy to answer any further questions if there are any.

BLANCHARD J:

Yes, thank you Ms Owen. We're grateful to counsel for their submissions. We'll take time and reserve our judgment.

COURT ADJOURNS: 2.41 PM