IN THE SUPREME COURT OF NEW ZEALAND SC 6/2011

[2011] NZSC Trans 24

BETWEEN VINCENT ROSS SIEMER

Appellant

AND MICHAEL HERON

First Respondent

AND RUSSELL MCVEAGH

Second Respondent

AND FORCE 1 SECURITY

Third Respondent

AND SIONE TANAKI

Fourth Respondent

and PIO SAMI

Fifth Respondent

Hearing: 15 September 2011

Court: Elias CJ
Tipping J
McGrath J

Appearances: Appellant Appears in Person
T L Clarke and S P H Elliott for the First and Second Respondents
A Beck as Amicus Curiae

APPLICATION FOR RECUSAL

MR SIEMER:
Your Honour, it's Vince Siemer appearing.

ELIAS CJ:
Thank you.

MR CLARKE:
May it please the Court, my name is Clarke. I appear for the first and second respondents together with my learned junior, Mr Elliott.

ELIAS CJ:
Thank you, Mr Clarke, Mr Elliott.

MR CLARKE:
I have also been asked to record an appearance on behalf of the third to fifth respondents –

ELIAS CJ:
Yes.

MR CLARKE:
– who have endorsed and adopted the written submissions of the first and second respondents.

ELIAS CJ:
Thank you.

MR BECK:
May it please your Honours, I appear as Amicus.

ELIAS CJ:
Yes, thank you, Mr Beck. Mr Siemer, we've convened to hear first your application and we have read it and the materials that you have supplied, and if there is anything you wish to enlarge upon, we will hear you on it, but you are, of course, confined to the grounds that you put forward in this application.

MR SIEMER:

Yes, Chief Justice, I understand that, thank you very much. I suspect I assumed that you received the additional documents?

ELIAS CJ:
Yes, we did.

MR SIEMER:
Thank you. It is out of my profound respect for this institution that I begin my submissions with what possibly is a rhetorical question of why the oral submissions are needed. It is my respectful submission to this Court that as a function of law the disqualification of Justices Young and Blanchard ought to have been the effect of the written submissions. This raises a very real question of whether a practical impediment exists with the three Judges determining the substantive appeal itself, and I'm not sure –

ELIAS CJ:
We're not proposing to deal with the substantive appeal at this stage, Mr Siemer. We're hearing you on your application that Justices Young and Blanchard should not sit. That's –

MR SIEMER:
Yes, your Honour, I understand that.

ELIAS CJ:
That's what we want to hear you on at this stage.

MR SIEMER:
Is – I guess there is a question, because I'm not sure of the protocol, can three judges effectively hear and determine a substantive appeal?

ELIAS CJ:
It's an interlocutory matter and we can sit – one, I think – on an interlocutory, but we're sitting three. We're sitting all Judges who are not affected by your application.

MR SIEMER:
Okay, but as I'm not sure if it required acceptance of the parties, I certainly give my consent for the three Judges on the panel to hear that.

ELIAS CJ:

We can't hear your substantive appeal as a Court of three, your principal appeal. We are only hearing at the moment as a Court of three your application that Justices Young and Blanchard should not sit to hear the substantive appeal, and we'll consider that point first and then –

MR SIEMER:

Thank you, your Honour.

ELIAS CJ:

– we'll see where we go.

MR SIEMER:

Well, that raises a practical impediment to the proceeding today because if the Bench agrees that Justices Young and Blanchard ought to disqualify, be disqualified, then the appeal is not able to go ahead today.

ELIAS CJ:

Well, we'll see where we get to. We want to hear you on this application.

MR SIEMER:

Okay. But I realise that that's a strong deterrent from the Bench ruling on behalf of what it might otherwise consider to be a point of law simply because of the pragmatics.

ELIAS CJ:

Well, we're not into pragmatics. We're into doing what we have to do, so let's hear if there are any additional arguments you wish to place before us as to why Justices Young and Blanchard should not sit. That's what we'd like to hear you on now.

MR SIEMER:

Thank you. Then my oral submissions are that the issue of the judicial recusal is not a personal determination but rather a legal determination. As such, the determination should be founded on the rule of law, an approach from the perspective of a fair-minded, informed and impartial observer. The first obvious obstacle is that no one on this Court is an impartial observer.

The approach therefore requires your Honours to step outside your judicial robes and put yourself in someone else's shoes. It is submitted that this job is made more difficult from a personal standpoint because neither Justice Blanchard nor Justice Young has willingly disqualified themselves. The upshot of this is that the Bench is now in the personally uncomfortable position of having to state their colleagues were wrong not to have disqualified themselves if they concur with the submissions.

The written submissions provided an extensive legal and factual framework and support for why disqualification is required by law. To accentuate the legal requirements for refusal, I would like to first refer to the case authority I provided for the appeal itself, and that is the "What Do We Mean by the Rule of Law?" by Justice Dyson Heydon of the High Court of Australia. This was Justice Heydon's submissions to the Rule of Law Conference held in Auckland in the spring of 2009, and just on the first page Justice Heydon quotes Dr Walker, as I believe it was a seminal work, *The Rule of Law* published in 1988, which Justice Heydon further referred to as an admirable and insufficiently esteemed work. One could define the rule of law in terms of the values which that institution is designed to serve or on the terms, in terms of the several principles whereby those institutions are to be safeguarded, such as the rule that a legal basis must be shown for every government action interfering with the rights of the citizen, or in terms of the institution, such as the courts, basically a final – that's responsible for the safeguarding, or finally, in terms of the procedures which those institutions use for the purpose, such as public hearings, et cetera.

Justice Heydon cited two preliminary points. The other one was that a search for the characteristics of the rule of law ought to involve an attempt, at least temporarily, to transcend one's own legal system in order to search for features in other civilised systems which, while not identical with those of one's own, serve similar functions.

In keeping with that spirit, because, again, numerous legal authorities were provided in support of disqualification, I would like to refer the Court to page 25 of the additional documents supporting recusal.

The New Zealand justice system has what I submit is an unwarranted tolerance for judicial conflict, and this detrimental blind spot is actively condoned by the

so-called independent Bar, as well as recognises a self-preservation function which has no foundation in the law.

ELIAS CJ:

Sorry, what are you referring to? Page 25?

MR SIEMER:

I'm sorry, it's page 54, your Honour.

ELIAS CJ:

Thank you.

MR SIEMER:

It's marked "25" at the top so that confused me.

ELIAS CJ:

I see, yes, I –

MR SIEMER:

The context of this email is from the president, the former president, of the New Zealand Bar Association to –

ELIAS CJ:

What relevance does it have to this case?

MR SIEMER:

It's a reflection of the New Zealand system in respect of judicial conflict.

ELIAS CJ:

Well, this isn't the sort of authority we accept. We don't accept letters and personal communications. What –

MR SIEMER:

Well, I do understand that, your Honour, but this was actually evidence in the case.

ELIAS CJ:

What case?

MR SIEMER:

This was evidence – it's actually exhibited in the case of the Judicial Conduct Commissioner v Justice Bill Wilson, *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC).

ELIAS CJ:

Well, why is that relevant here?

MR SIEMER:

Because it gives an insight into the approach by the Bar, specifically its former president.

ELIAS CJ:

Well, for my part, I can't see that it's relevant.

MR SIEMER:

Well, may I read it, your Honour, and perhaps –

ELIAS CJ:

No –

MR SIEMER:

– the relevance would be –

ELIAS CJ:

– you may not read it. You may read the statement of judicial conduct, if you wish to, although we've read it, of course. You may make a submission to us, but you can't introduce material like this.

MR SIEMER:

The fact that, and I just, I appreciate your Honour, I just – but I appreciate your Honour's input on that, the clarification I would like to make is that this is actual evidence in a case.

ELIAS CJ:

Well, it's not evidence in this case, and it's not material that supports the argument that you're putting forward to us as to why Justice Young and Justice Blanchard should not sit.

MR SIEMER:

Well, thank you, your Honour, I will make it in submissions then. The position of the former Bar Association President demonstrates the interconnected features of judicial recusal, such that the former president is on Bar, is basically warning a retired Court of Appeal Judge.

ELIAS CJ:

Stop, stop. We're not interested in that case. It's not for us. Why do you say that Justices Blanchard and Young should recuse themselves, that's the issue for us.

MR SIEMER:

I agree, your Honour.

ELIAS CJ:

If you want to take us to passages which indicate that a fair-minded observer would think that either of those Judges was biased, then please take us to those passages.

MR SIEMER:

Thank you, your Honour.

ELIAS CJ:

That's all that will assist us in what we have to determine here.

MR SIEMER:

There's two elements, with all due respect, your Honour, there is the position of the Court and the ability to put itself in a position, impartial observer –

ELIAS CJ:

There is no issue, Mr Siemer, as to the correct legal tests. I think we're all in agreement with what they are. That they are the appearance to an objective, fair-minded observer, so now, what you have to do is show us what there was in

the conduct of either of the Judges which would cause a fair-minded observer to think that they should not sit on your appeal and anything else is just wasting our time.

MR SIEMER:

Thank you, your Honour, but I do believe that that was, the factual background was outlined sufficiently in respect to the legal requirements for disqualification that I didn't want to –

TIPPING J:

Why are you so anxious not to get to the heart of the matter?

MR SIEMER:

I'm sorry, Justice Tipping?

TIPPING J:

Why are you so anxious not to get to the heart of the matter? Tell us what the Judges have done, that you say, ought to lead them to disqualify themselves.

ELIAS CJ:

Or were you saying then, Mr Siemer, that you think you've sufficiently covered that in your written submissions, and don't wish to enlarge upon it any further?

MR SIEMER:

Well, your Honour, I feel I must enlarge on that further, not because it's required by law, but because the Court is not satisfied with it. With all due respect, the law was sufficiently laid out in the written submissions and the difference in the distinction that Justice Heydon makes is that to put yourself temporarily, and considering the other jurisdictions and how they handle judicial recusal, so I'm contrasting the approach of, let's say, Australia, with the approach that New Zealand is historic –

ELIAS CJ:

What's the point you're making about the difference in approach?

MR SIEMER:

The approach to judicial disqualification. There is a distinct difference in the way New Zealand has traditionally approached the question of judicial recusal versus countries such as Australia.

ELIAS CJ:

What's the difference?

MR SIEMER:

Well, the difference is that there's a higher tolerance in respect to judicial conflict, and there's a number of reasons for that, but it begins with our feeling that we're a small country and that you can have your neighbour, your relations sit on behalf of your case and without – and a Judge is able to put that aside. I'm saying that that's a distinct cultural difference that's at odds with the whole platform upon which –

ELIAS CJ:

Well, I didn't think you were talking about relationships. I thought you were talking, in the case of Justice Young, that he has, in your submission, demonstrated some sort of animus towards you, and in the case of Justice Blanchard that he disclosed to the respondents material you say he should not have disclosed. Aren't those the only two points we have to consider?

MR SIEMER:

Well, your Honour is too kind to say this is my objection to what he's done. The fact of the matter is that in accordance with the rule of the law, what each of the Judges have done in respect to the appellant's rights, have contravened the rule of law in respect to his –

ELIAS CJ:

All right, well we're interested in knowing how the rule of law has been contravened, but in your application, which is what we are dealing with, I thought that there were two grounds in respect of each of the Judges. The first that Justice Young had demonstrated in earlier decisions that he had some sort of animus towards you, which you say would give rise to a reasonable perception of bias in a fair-minded observer, and the second that Justice Blanchard presumably also has demonstrated similar animus by

referring to the respondents the material you put before the Court in terms of your wish to have the security for costs waived.

MR SIEMER:

Thank you, your Honour, and I will get those –

ELIAS CJ:

Are those, please – could you just confirm, are those the two matters –

MR SIEMER:

I was going to confirm, except for the word of the use animus which sounds more of a personal –

ELIAS CJ:

Okay.

MR SIEMER:

– quality.

ELIAS CJ:

Yes, no, you're right. I was sort of grasping for another term, and I'm happy to adopt any that you suggest.

MR SIEMER:

I prefer "bias" or "conflict", according to the –

ELIAS CJ:

Well, it's apparent bias, is the issue.

MR SIEMER:

The – if the Bench would be kind enough to turn to page 64, this is a memorandum which was placed in this proceeding to the Court to the Registrar, for lack of a better – asking which judge ordered the release of the appellant's private financial information, asking under which legal provision the release of the financial information was based, what was the specific reason for the release of the private financial information and what could legitimately be achieved by the Court's release of this private financial information to the respondents.

Now I must – I should have premised that with the statement that the sharing of declarations, financial declarations, on the part of a party to the court has always been a strict matter between the court and that person. It's never –

ELIAS CJ:
Why do you say that? I'm not sure why you say that.

MR SIEMER:
Well, because that is a matter of court practice and custom that the declaration is between the applying party and the court registrar. It never goes to the other, opposing party.

ELIAS CJ:
Well, I'm just totally unaware of any practice to that effect, Mr Siemer.

TIPPING J:
You can't conceal from the other party information which you seek to have the Court act upon, because the other party is entitled to consider it and respond to it. That's our two-party system, otherwise you're doing it in isolation of the other party. I think your proposition is entirely unfounded.

MR SIEMER:
Actually, Justice Tipping, it's the opposite. The Court's own practice is that the declarations are not shared with the other party.

TIPPING J:
Well, we'll have to agree to differ on that, Mr Siemer.

MR SIEMER:
Well, I'd like to know, with all due respect, one case where that, other than the current one before the Court, where that declaration has been shared with the opposing party.

ELIAS CJ:
But if one takes it back to first principles, Mr Siemer, you are seeking to have security for costs waived. The respondents are interested in that question because they're directly affected if security for costs is waived. That is a matter on which they are entitled also to be heard if they wish to be heard. So the

Court can't consider partial information. It cannot consider information from one party only which the other party doesn't have. It's axiomatic.

MR SIEMER:

There's no question, Chief Justice, that that's the case, and that's not in dispute here today. The fact that each party, if they choose to be heard in respect to security for costs, must be given that right, is totally separate from the issue of the personal financials. The personal financials, as a matter of court practice, are not shared with the opposing party. The elements that the party is in fact heard in respect to security for costs have to deal with the overriding issues and the, in the, and envelope of the principles of natural justice.

ELIAS CJ:

But if you pause for a moment to think about it, Mr Siemer, obviously the opposing party would have to know the basis on which you were applying to the Court for waiver of security for costs because looking at it they might say, "Sure, we accept that and we're not pressing for it." They need to have the information in order to know what stance they're going to take before the Court.

MR SIEMER:

Well, then, that begs the question, Chief Justice, as to why that's not as a matter of course that the – the business –

ELIAS CJ:

Well, we only have –

MR SIEMER:

– of the Court is –

ELIAS CJ:

We only have your –

MR SIEMER:

– that a declaration –

ELIAS CJ:

– assertion, we really only have your assertion that that is the practice. It's not a practice that I'm familiar with, and it's not a practice that Justice Tipping is familiar with, and –

MR SIEMER:

Well, I am –

ELIAS CJ:

– do you have any authority to put before us on it?

MR SIEMER:

I have simply the research that I've done, and I'm stating on the record that I know of no other case, before this one, where the declaration to the court, to the registrar –

TIPPING J:

I know of hundreds where someone puts in financial information saying, "Please waive security," and it goes to the other side. Hundreds.

MR SIEMER:

I agree, Justice Tipping, to the degree that someone submits an affidavit, that's the case, because that is open to both sides. But what we're talking here is the arbitrary direction that the declaration which is between the parties seeking security and the court registrar –

TIPPING J:

Are you seeking to make a distinction between an affidavit and material put in less formally?

MR SIEMER:

It's not a distinction I make, Justice Tipping. It is one that the court has traditionally made, that a declaration that is filed with the registrar is not, as a matter of practice, shared with the opposing party. In this case it was. Now, we must look at the question as to why that was.

McGRATH J:

I think, Mr Siemer, really the problem that we're encountering is that it's a fundamental principle of an adversary system – and that is what litigation is, an adversary system – that the adversaries are informed, and that stands in the way of the principle that you've raised. Now, I think if you're not able to actually give us a case which supports your principle, we're really got – or you can offer some argument why the adversaries in this particular case should not have been informed, we're getting into difficulty, but you can see that your complaint against Justice Blanchard really depends on the soundness of your view, of your right to privacy and a practice of respecting privacy, which as far as we're concerned is contrary to one of the fundamental tenets of the justice system. Adversaries must be informed, and you equally must be informed of the people opposing you, their case.

MR SIEMER:

Thank you, Justice McGrath. My response to that is that law has traditionally, the courts have traditionally, accepted that sharing of financial information, private financial information, between the parties is detrimental to justice because it can be used as a weapon. The courts are quite commonly used to fighting wars of attrition, financial attrition. Sharing financial information, in fact, it's not me that saying that, it's none other than Justice Robertson when he was head of the Law Commission, wrote a report that saying that this, "sharing of private financial information of one part to the opposing party actually undermines the judicial function", and I think that's common ground across the, the law.

McGRATH J:

I think we've come to an impasse on this, Mr Siemer, I really don't think we can take this any further. We've put to you the principles which we think stand in the way of what you're saying and I think, really, you've got to move on and tell us if there's anything else in relation to Justice Blanchard you can say to support your objection.

MR SIEMER:

Well, I will in a second, Justice McGrath, but again the law has long understood that giving the opposing party private information on the party that's suing it is detrimental to the judicial function, and my submission to this Court is that that is well established and understood, not only in the course of New Zealand but

around the world. So, what we have here is a deviation from that by Justice Blanchard.

ELIAS CJ:

Mr Siemer, I think what you're referring to are cases where the court makes an order for confidentiality on application to it by one of the parties and then the court deals with how, nevertheless, natural justice can be observed. We're not in the ball park here.

MR SIEMER:

Well, I think we are, with all due respect.

ELIAS CJ:

You may think you are, but this was a routine application for waiver of security of costs. Of course the material put forward in favour of it, in the absence of any application for confidentiality order made out to the satisfaction of the Court, would be provided to the other side. It's fundamental.

MR SIEMER:

Well, again, with all due respect Chief Justice, that has not been the case. The court has traditionally held as a privilege and it is a privacy, it's a matter of privacy law in New Zealand as well as elsewhere.

ELIAS CJ:

We don't, well, it's quite arguable we don't have a privacy law in New Zealand, but anyway that's probably a bigger issue than we need to address.

MR SIEMER:

Then I'll move on to the actual examples. So, 64 lays out the, on page 64, the memo.

ELIAS CJ:

Do we have your, you don't have a copy before us of what you provided to the Court, do we? I can't remember seeing it.

MR SIEMER:

The original application?

ELIAS CJ:

Yes. Is it in the –

MR SIEMER:

The actu –

ELIAS CJ:

No, your application of waiver for security of costs. Is that in the materials we've got? It doesn't matter, I don't want to hold you up on it.

MR SIEMER:

It's certainly in the case, the Court file.

ELIAS CJ:

Yes.

MR SIEMER:

I don't have it immediately in my hands, I apologise for that. In support, in a case where the same appellant was before this Court last year, and this is on page, beginning page 34, in the supplemental document list. Page 52, Justice Blanchard said in the proceeding on the transcript, "But as judge-made law, this Court could clarify it."

ELIAS CJ:

What point is this directed at?

MR SIEMER:

This is in respect to the actual, keeping in mind and this is, again, referring back to the what do we mean by the rule of law, the seminar put on by Justice Dyson Heydon.

ELIAS CJ:

No, I was trying to work out how this and, in fact, I had that query when I read the transcript, how it affects this complaint that Justice Blanchard should not have passed on the information, which is all that you have raised against Justice Blanchard.

MR SIEMER:

Well, there is a pattern which I did mention. What we have here is the rule of law can be defined as the absence of arbitrary power, so mindful that that is –

ELIAS CJ:

There's no quarrel with that here.

MR SIEMER:

Well, thank you, your Honour, I appreciate that. Then we can get right to this, what is very short on the record. Justice Blanchard says, "But as judge-made law, this Court could clarify it," in which counsel responds, "Well, they can't clarify it by writing it, it's history. They have to say we're going to make a change." Justice Blanchard says, "Well, exactly." Chief Justice responds, "The change is in the Bill of Rights Act", to which Justice Blanchard responds, "We change the law not infrequently". The position in respect to the judicial recusal is, with anything else that's based on the law is that the law does matter, that again, using the –

TIPPING J:

Is this a suggestion that Justice Blanchard shouldn't sit in this case because of what he said here?

MR SIEMER:

Well, with all due respect, Justice Tipping, I would say that's, yes, in part that's true, what we have is the –

TIPPING J:

But what's that got to do with passing on the document, which I thought was the essence of your complaint?

MR SIEMER:

I'm sorry, the passing on the?

TIPPING J:

That he's passed on your private financial information. This has got nothing to do with that.

MR SIEMER:

Well, we have the Judicial Conduct Commissioner complaint, which I will get to in a second, what we have is the –

ELIAS CJ:

But that's also based, isn't it, on the disclosure to the respondents of the material you'd filed in the Court?

TIPPING J:

I mean if your premise is unsound, as a matter of law, the proposition goes nowhere.

MR SIEMER:

Absolutely, I would absolutely agree with that.

TIPPING J:

Yes, so it's a question of law whether or not he was acting improperly, passing on this information, isn't it? We've heard you on that. What more is there to say?

MR SIEMER:

What we have here is, in respect to the same appellant, the Judge has taken more than what I would submit is an activist view –

ELIAS CJ:

But that isn't what you've raised. That's not what you've raised in your application for recusal of Justice Blanchard. You have simply said that he's passed on this financial information.

MR SIEMER:

Well, then I need, if I can direct the Court to –

TIPPING J:

I think you need to get on to Justice Young, because I don't think there's anything more you can usefully say about Justice Blanchard.

MR SIEMER:

I think we can, Justice Tipping, move to the complaint, which starts on page 67 and this is, as I stated in the application for disqualification, this is an active complaint.

TIPPING J:

I don't think we should be considering a matter such as –

ELIAS CJ:

This is your complaint.

TIPPING J:

To the Judicial Conduct Commissioner.

ELIAS CJ:

Yes.

TIPPING J:

It seems to me we must really ask you, Mr Siemer, to focus on anything further beyond what he's already said in relation to the way Justice Blanchard handled the financial information he says indicates apparent bias. Unless you can say something further, I don't – I certainly don't see how that can be helpful, the fact that you've complained to –

MR SIEMER:

Well, I think I just –

McGRATH J:

– the Judicial Conduct –

MR SIEMER:

– did. I've referred the Bench to the Judicial Conduct Commissioner complaint. Now what we have is –

ELIAS CJ:

It's the same complaint, and the fact that you have made the complaint isn't something that we, that is relevant to what we have to decide today, because if that –

MR SIEMER:

Absolutely, and that's why I –

ELIAS CJ:

If that was so, people would be able to have judges disqualified from any case they didn't want them to sit on by simply making a complaint, so there's a public policy reason why we can't look at that.

MR SIEMER:

I'm set aback by that, Chief Justice. What – I can appreciate –

ELIAS CJ:

It's a bootstraps argument.

MR SIEMER:

I can appreciate what your Honour is saying, but to say that somebody's going to file a Judicial Conduct Commissioner complaint just to get a Judge off the Bench is a little far-fetched. I'm sure it's happened on occasion.

ELIAS CJ:

Well, I'm saying if we acceded to your submission that the fact that you have made a complaint on the same basis that you're putting forward to us as justifying the removal of Justice Young from this hearing, if we accepted that submission that it was relevant, then that would be the outcome. But it's quite irrelevant. Either you have merits in the submission that you're making to us that the disclosure was improper, you also then have to go on to say that the impropriety was such that it gives rise to an appearance of bias, because, of course, judges do go wrong from time to time, so even if it was not correct, what the Judge did, that wouldn't take you all the way, but there's nothing more to be said than that, is there?

MR SIEMER:

Yes, your Honour, there is. I'm not saying by any means that this should, the determination of this Bench should be made strictly on the fact of the Judicial Conduct Commissioner complaint. That's not my submission. I am saying, contrary to what your Honour said, that it is a factor and it's recognised, from the standard of an impartial and informed observer, to know that the party before this Judge has an active judicial conduct complaint against them, is

relevant, in my submission, to an impartial observer. Whether it is to this Bench, and your Honour made it quite clear that it's not, I would implore the Court to say –

ELIAS CJ:
Well, we've heard your submission on that. If you've got any authority that you want to put before us as to why it's an appropriate submission, of course we'll consider it. But if there's nothing more to be said than the bare submission, it seems to me, that you've just made to us that it's a matter we should take into account –

MR SIEMER:
And your Honour, the response to that was that you're not going to because if you do it in this case then people will be making complaints. I'm – with all due respect, I think that goes to the heart of the issue that we have in judicial recusal applications in New Zealand, that it's the bar is so high, inordinately high, that it becomes very difficult to get a judge who has a conflict –

ELIAS CJ:
All right, well, we've heard that too. Are you going to say anything more about Justice Blanchard?

MR SIEMER:
Just one thing –

ELIAS CJ:
Yes.

MR SIEMER:
– and that's that the complaint to the Judicial Conduct Commissioner does raise that Justice Blanchard gave no legal authority or basis upon which he made the direction to the Registrar, and that part of the investigation ought to include finding out from Justice Blanchard upon what legal authority or basis and jurisdiction that he's relying upon.

The fact that in a transcript before –

ELIAS CJ:

No, we don't need to hear you on that. It's a totally unsound submission as a matter of law.

MR SIEMER:

Well, the –

McGRATH J:

I think we've heard all that Mr Siemer can possibly say in relation to the circumstances which he contends disqualified Justice Blanchard and we should ask him to move onto Justice Young.

MR SIEMER:

If that's the Court's insistence, I will do that.

ELIAS CJ:

Thank you.

MR SIEMER:

Okay, the – Justice Heydon mentioned at the rule of law speech to the New Zealand Law Society in 2009 that totalitarian regimes are characterised by retrospective laws, extensive executive discretion, secrecy, obscurity, rumours of laws rather than actual laws, and instability. Above all, citizens subject to totalitarian rule find it impossible or very difficult to get before competent, determined and independent judges. The emphasis that the rule of law places on –

ELIAS CJ:

What's the submission you're making about Justice Young? We understand about the rule of law. Nobody's quarrelling about that. We just want to know how Justice Young is disqualified from sitting in the appeal.

MR SIEMER:

I understand, your Honour, and no one is having a quarrel with the rule of law.

ELIAS CJ:

No.

MR SIEMER:

It's the application of the rule of law that's really at issue here, is there's a difference between the appellant's submissions and the acceptance of the Court as to what the approach is and the applicability of the rule of law in respect to judicial recusal.

ELIAS CJ:

Well, it depends on the facts and you have to take us to the facts, if you want to enlarge on what you've got in your memorandum, because that's where it's determined.

MR SIEMER:

Well, it's very difficult when the Court agrees with the submissions that the rule of law ought to matter, but when we talk about the approach and applying the rule of law, then –

ELIAS CJ:

Well, it's the application you have to go to, Mr Siemer. All this prefatory stuff isn't taking us anywhere, because we agree that it's important and we don't disagree about the principles to be applied, it's the application. So, you need to close on what the facts are that lead you to say that Justice Young should have recused himself.

MR SIEMER:

It is, your Honour, with all due respect, the approach that we're dealing with here, because law, in my respectful submission, is quite clear that the judges ought to have disqualified themselves without the oral submissions. The fact that we're at this stage and I'm being told that the Court will not consider the mere fact as anything relevant –

McGRATH J:

Mr Siemer, what we want to hear from you is any elaboration of that part of the submissions in which you discuss your concerns about Justice Young sitting that relates to actual conduct that you're complaining of, that's what we need to hear from you on. If you're content to rest on what you've set in writing that's fine, but if you want to elaborate it you've got the opportunity, but if you don't take that opportunity, we really can't go on hearing from you on totally tangential, highly abstract matters. You've got to come back to the conduct of

Justice Young that you're saying disqualifies him, and you've got your chance to add to what you've said in writing to persuade, and if you don't get to it and address it, we really will have to close this stage of the hearing and consider what our decision will be.

MR SIEMER:

I understand, and I think part of the problem here is to call it intangible or intangible or whatever your Honour used in respect to the fact of the Judicial Conduct Commissioner complaint. The fact that that has been lodged, that is an active complaint and it has not being responded to –

ELIAS CJ:

I thought we'd moved on to Justice Young.

MR SIEMER:

But the Court has said that it will not give any consideration to the fact of the complaint.

ELIAS CJ:

Well, we've said it doesn't add to the point that you've made against Justice Blanchard. It's all bootstraps. It all turns on whether he behaved improperly. You've said everything that you can say on that, and now we are dealing with the question of Justice Young. We don't need to hear abstract points of legal principle from you. We want to know how they should be applied to the particular case, and you've made written submissions on that. We are providing you an opportunity to add anything that you want to, to those.

MR SIEMER:

It wasn't until I gave oral submissions today that the Court informed me that it considered the fact of the un-responded-to act of the Judicial Conduct Commissioner complaint is irrelevant. I believe that that's –

ELIAS CJ:

It's exactly the same complaint as you have made about, as your substantive complaint of Justice Blanchard. That is the point we are putting to you. It adds nothing to it. Anyway, I thought we'd moved on to Justice Young.

MR SIEMER:

Well then I have the same issue with Justice Young in respect to the Judicial Conduct Commissioner complaint, and if this Court considers that irrelevant I won't even direct the Court to it.

ELIAS CJ:

Well let's – tell us, you've put in a transcript which we've had a chance to look at this morning, it only came in this morning, if there's anything in that that you particularly want to highlight, you might want to take us to that.

MR SIEMER:

It begins on page 11, in the cross-examination of the witness Mr Gear, it's difficult to, in a written transcript, determine how many times he interrupted in the cross-examination of a witness, but I believe it was somewhere around 20 times that Justice Young interrupted. I don't think there were 20 answers to the questions put to the – but what we have here is basically the first –

TIPPING J:

Is the essence of this argument that the Judge interrupted too much during cross-examination?

MR SIEMER:

In the context that the Judge even ultimately agreed that –

TIPPING J:

The answer is yes.

MR SIEMER:

– he was interrupting.

TIPPING J:

The answer is yes, that is the essence of the complaint.

MR SIEMER:

No, no, Sir, it's not. It has to be in the overall context –

TIPPING J:

Yes, of course.

MR SIEMER:

– of the Judge admitting –

TIPPING J:

Of course, but that's what you're saying, he interrupted too much.

MR SIEMER:

But that's not what I'm hinging on. The actual interruption, in and of itself, could be for a number of reasons.

TIPPING J:

All right. You say it was –

MR SIEMER:

It could be because I was asking –

TIPPING J:

– wasn't for –

MR SIEMER:

– inappropriate questions.

TIPPING J:

– wasn't for satisfactory reasons. Now, it behoves you now to a point to put the interruptions to lead you to submit that.

MR SIEMER:

Okay, the first question was, "Have you witnessed a contempt behaviour yourself, Mr Garrett," of which the witness said, "Yes," and then Justice Young interrupted.

TIPPING J:

Where's all this? Page 11?

McGRATH J:

Top of page 11.

MR SIEMER:

This is the top of page 11. Mr Siemer says, "Yes, your Honour, you" –

TIPPING J:

Yes, I see, yes, sorry. There are two page 11s here.

ELIAS CJ:

There's a lot of discussion between the Bench and you as to whether you are reopening the findings made in the High Court with which they're not concerned.

MR SIEMER:

Obviously the Court did say that, and that was –

ELIAS CJ:

Yes.

MR SIEMER:

– part of the reasons for some of the interruptions.

ELIAS CJ:

Yes.

MR SIEMER:

But beginning here, your Honour, well, Chief Justice, what we have at the very beginning is a very appropriate question because the credibility of the witness was in question. That's the whole reason for the cross-examination. There was a cross-examination in the context of these questions. The first question was, "Have you personally witnessed a contempt behaviour?" And he said, "Yes," to which Justice Young interrupts, "Well, you see, Mr Siemer, again I don't want to stop you all the time, but what he says in his affidavit is a matter of record. He didn't see, he doesn't claim to have seen you do anything, as I understand his, this breach." Well, clearly Justice Young has, had read the witness's affidavit, and what the witness had just said on the stand impeached his own affidavit by saying he did personally witness it, and then Justice Young is interrupting and covering up for the witness.

ELIAS CJ:

But for our purposes, because we're not dealing with the substance of what was going on in this hearing, for our purposes what you have to do is show that this demonstrates some sort of bias against you, the approach that's been taken by the Judge in trying to keep matters on track as he saw it in that case.

MR SIEMER:

In my respectful submission to this Court, it's never appropriate for a Judge to change a witness's answer under cross-examination, and what the record shows is the Judge is doing that.

ELIAS CJ:

Where do you show that? Where's that, because I –

MR SIEMER:

Well, there –

ELIAS CJ:

– thought he was really interrupting the questions you were asking?

MR SIEMER:

Well, he says, "I don't want to stop you all the time but what he says", meaning the witness, "in his affidavit is a matter of record. He didn't see, he doesn't claim to have seen you do anything, as I understand this breach." The fact is the Court recognised that the witness was lying under oath, or contradicting himself. If he's contradicting a sworn affidavit that he'd earlier given the Court, it's – he's perjuring himself on the stand, to which the Judge is correcting, in effect, the witness's answer. He says, "All right," in the next line down, "Well, he is going to say," and then he, he catches himself and he says, "Well, ask the question to Mr Garrett," and I respond, "It is an entirely innocent question. Have you witnessed any contempt, Mr Garrett?" And the witness starts, "Justice Potter found –". "Sorry, I'm not asking you what Justice Potter found."

ELIAS CJ:

But the Court –

MR SIEMER:

"I will give you an answer."

ELIAS CJ:

The Court was only concerned with what Justice Potter found. That's really the point, isn't it, and –

MR SIEMER:

If that was the case, your Honour, with all due respect, there would be no cross-examination of a witness.

ELIAS CJ:

Well, one wonders why there was, reading this.

MR SIEMER:

Well, for that very reason, because it was, the credibility of a witness was at issue. And then Justice Young said, "You have asked a question. It is a very open question. You are probably going to get a rather open answer, I suspect," to which my response was, "I was asking a yes or no question, with all due respect, your Honour."

ELIAS CJ:

Well, often that's quite improper, and that's really what the Judge was saying to you perhaps.

MR SIEMER:

And as numerous –

ELIAS CJ:

I mean, what comes through –

MR SIEMER:

Page –

ELIAS CJ:

What comes through this transcript surely is that the Court thought that your cross-examination was irrelevant to the issues they had to determine. So, you were being interrupted with that end in view. Would that be a fair way to characterise it?

MR SIEMER:

No, I don't believe it is a fair characterisation.

ELIAS CJ:

Well, what's the fair way to characterise it?

MR SIEMER:

Certainly there's that element involved.

ELIAS CJ:

I thought that Justice O'Regan actually seemed to sum it up very well, yes, he says at page 28, he points out to you that "your cross-examination was being directed at the rightness or wrongness of the injunction, which we've just told you is irrelevant".

MR SIEMER:

My response to that, your Honour, would be that –

ELIAS CJ:

Yes.

MR SIEMER:

– 28 is quite different from page 11, which was not the page of the transcript I was on.

ELIAS CJ:

I know, but it's all, it's all on the same theme, isn't it, it's not just Justice Young, Justice Glazebrook is also trying to point out to you that none of this is really what the Court is dealing with, but it does –

MR SIEMER:

Well actually, if I can show your Honour that that's not the case. Let's look at page 13, where Justice Young says, "We understand that." I mean that is actually, that is new and this is the third line down from the top of page 13 and then I – when I had to set the framework in which case your Honour's interrupted me. Justice Young responds, "That is a new point then, and we can read that against what Mr Thompson said". And then the second example is on page 14, where Justice Young says, "Look, it is in the record, isn't it?" again, an

interruption. To which I respond, “Sir, with all due respect it is not. On the record it says six foot two, it is a mistype, it should say five foot two”. This is in the context of a witness who was five foot two saying that it was a tall person that they witnessed, with blonde hair.

ELIAS CJ:

But doesn’t that go to, maybe it’s because we’ve only just received this material and its context, you’ve lived with it, and its context to us may not be immediately apparent, but isn’t all of this directed at whether the injunction was correctly made, rather than the contempt issue?

MR SIEMER:

No, your Honour, it doesn’t, it doesn’t. Certainly that was opened up and, in fact, the Court does, and I will get to that, actually concede to cross-examination on that topic. Once the Court concedes to it, it doesn’t seem like it’s off-base to ask those questions. The Court did give express permission but I, I agree that your Honour doesn’t understand the context in which it’s given before the Court today, and that’s why I'm doing my best to show the context and on page 14, we have the second example and that is, oh, that’s good to know, basically, again you’ve corrected the record and then example 3 was on –

ELIAS CJ:

Sorry, could I just ask, was this the record in front of Justice Potter that is being corrected?

MR SIEMER:

In respect to that, it is, yes.

ELIAS CJ:

And that’s the record on which she made her injunction determination of her contempt finding?

MR SIEMER:

Contempt finding, your Honour.

ELIAS CJ:

Right, thank you.

MR SIEMER:

So what we have here is this witness knows that witness personally and can attest that the man isn't six food two, the man is five foot two, it's a huge difference, because he actually said in his testimony, "Everybody is tall to me because I'm five foot two". What the record said, in Justice Potter's courtroom, "I'm six foot two". The third example is on the bottom of page 17, in respect to an envelope, whether it was shown to the handwriting expert, Justice Potter had said that it had not been, but the witness, Mr Gear, had actually undertaken that exercise personally, so he had firsthand knowledge and then I mentioned, "Is it correct to this witness that the official record correct, that the envelope of Shale Chambers, was not sent to the handwriting expert?" And then Justice Young interrupts, to which I say, "You asked me to refer to the record." And he said, "Well, I did", very neatly, but in substance he has a problem with it, but the bottom line is that he's interrupting an answer from the witness who had firsthand knowledge in respect to the record being wrong and he knew that, he understood that. Your Honour asked about the scope of the cross-examination and I believe that's on the middle of page 19, that the Court says, "On the basis that the points of appeal that are of a miscarriage of justice, I would like to ask this witness just a few questions that would, I am sure, help the Bench and would certainly truncate the proceedings if we could get these questions across to this witness". Justice Young asked, "What are the questions?" Ultimately Mr Miles does not object, and the Court allows cross-examination along those lines. So, when your Honour looks at page 28, I don't argue with the Court's use of discretion, although I might disagree with the effect of it, in retroactively discounting the answers, but to interrupt, once the Court has given its approval to the line of questioning, to interrupt the witness' answering of those questions, seems quite inappropriate and Justice Young did that quite often.

ELIAS CJ:

All right, well, I think we've got the flavour now, so there were too many interruptions in your submission, and what else is there?

MR SIEMER:

I don't mind the interruptions, your Honour, I've been interrupted a lot here today.

ELIAS CJ:

Yes.

MR SIEMER:

The mere fact of the interruptions is not the crux of the argument here today for recusal –

ELIAS CJ:

No.

MR SIEMER:

And I hope that the Court fully understands that.

ELIAS CJ:

Yes, we do.

MR SIEMER:

It is the context of those interruptions and what they actually, in the full context of the cross-examination of the witness and approved line of questioning that the Judge took and what an impartial observer would view, in my submission, to be a somewhat jaded approach and apparently biased, either in favour of the respondents or against the appellant. Either way it forms a sound basis along with the judicial conduct complaint for the Judge's subsequent conduct in refusing to release a transcript, it provides multiple support, and on that we'll see on page 30, now this was just three months ago in respect to the Supreme Court leave to appeal of that same related case, in a minute Justice William Young says, "A decision on Mr Siemer's request for this Court to request a copy of the transcript of the hearing in the Court of Appeal will be made after receipt of the leave submissions". Of course, proper context must be given that the transcripts were required and notably identified in the notice of appeal required for the purposes of the making submissions. So what we have here is Justice William Young, again, without any reasons and no legal authorities, that such a deferral was tantamount to denial, a denial which contravened the rule of law, and there particularly were no reasons for the effect of refusal we're giving. For the Court to say, and in fact the transcript was never released, the submissions were made to this Court under duress, having not had the availability of the official court transcript to support, which was expressly needed to support the appeal, so what appears an arbitrary judicial action with no support in law and again the context is that on my website, KiwisFirst, I had actually – and this is in the written submissions – I've exposed what, I think, most lawyers would believe is unethical.

ELIAS CJ:

You've said a number of intemperate things, which you say, you submit, mean that Justice Young would reasonably be biased against you, is that the submission that's being made?

MR SIEMER:

Absolutely, your Honour, I have on my website KiwisFirst in respect to Justice Young's background –

ELIAS CJ:

We've read what you put. We read what you put on it.

MR SIEMER:

Well, there is an issue, was when he was as lawyer with the Serious Fraud Office.

ELIAS CJ:

Well, we're not going to hear you further on that. We've seen that submission and we understand the submission you've making that because you have made remarks about Justice Young, he may be, or there is an appearance that he's, biased against you.

MR SIEMER:

That's perfectly reasonable.

ELIAS CJ:

Do you want to add to why that should be so?

MR SIEMER:

Well…

ELIAS CJ:

Why we should –

MR SIEMER:

I sense an –

ELIAS CJ:

– draw that inference.

MR SIEMER:

Well, I sense an aversion by the Court to actually deal with it. Your Honour's has your arms crossed and seem quite resistant to the whole submissions. What we have here is a popular legal news website, KiwisFirst, has actually given background on Justice Young's behaviour which is unethical if not –

ELIAS CJ:

That's your conduct, Mr Siemer, not Justice Young's conduct.

MR SIEMER:

I'm sorry?

ELIAS CJ:

That's your conduct. What's on your website is your conduct. We're concerned here with how Justice Young has conducted himself so that a fair-minded observer would think he's biased against you.

MR SIEMER:

Well, I think in the context of not what, so much what I've done, the mere fact that I've exposed his conduct when he was a Serious Fraud Office –

ELIAS CJ:

All right, we understand that submission.

MR SIEMER:

– lawyer –

ELIAS CJ:

We understand that submission and we don't need to hear you further on it.

MR SIEMER:

I get the sense that your Honour is –

ELIAS CJ:

I don't mind what sense –

MR SIEMER:

– offended by it.

ELIAS CJ:

I don't mind what sense you get from me.

MR SIEMER:

So there is an issue that Justice Young, having been personally exposed in such a manner, would feel a little bit more – your Honour's shaking your head "yes", I don't know if that's in agreement with what I'm saying.

ELIAS CJ:

No, no, I'm just saying that your argument is that because you have exposed, as you say, Justice Young on your website, there must be an appearance that he is biased against you. That's really what it amounts to, isn't it?

MR SIEMER:

Well, yes, your Honour, and it's not –

ELIAS CJ:

Yes.

MR SIEMER:

– my opinion, and with all due respect it's not the Bench's –

ELIAS CJ:

No, I understand that.

MR SIEMER:

It is a – from the perspective –

ELIAS CJ:

It's an objective opinion.

MR SIEMER:

It is from an informed and impartial observer.

ELIAS CJ:
Yes, thank you.

MR SIEMER:
And I believe the informed observer would know that I've been very critical of Justice Young.

ELIAS CJ:
Yes.

MR SIEMER:
That he has acted in a, what appears to be a legally arbitrary way in refusing to release the transcript for the purposes of appeal. Again, this is subject to a Judicial Conduct Commissioner complaint which is active, so what we have here is an active complaint in respect to the Judge's conduct, coupled with the exposing of previous conduct while a Serious Fraud Office lawyer, and I don't think that the Court is free in the context of the law to ignore that.

So I believe that's even a more extensive basis for disqualification because it's on multiple fronts. We have a Judge who's been shown to interrupt cross-examination on record, subsequently refused to provide the transcript for the express purpose of an appeal to this Court without any legal reasons at all, and then is well known to know that on Kiwis First information there's background which is not flattering has been exposed. Now can a Judge like that impartially sit? I think overwhelmingly to an informed and impartial observer the answer is no. And I will leave it with that.

ELIAS CJ:
Thank you, Mr Siemer. We'll retire and consider what we shall do, thank you.

COURT ADJOURNS: 10.58 AM
COURT RESUMES: 11.09 AM

ELIAS CJ:
For reasons to be given later we decline the application. We will now take an adjournment and will reconvene at 11.30.

COURT ADJOURNS: 11.10 AM