



[3] The appellant contends that the Chief Justice is disqualified from sitting because of an association which the appellant says links the Chief Justice to Mr Stiassny.

[4] The association, which is said to give rise to apparent bias, concerns the husband of the Chief Justice, Mr Fletcher, who is a director of Vector Limited, a public company. Mr Stiassny is also a director of Vector and chairman of the board. The Chief Justice has advised the parties that she was once introduced to Mr Stiassny but has not had other contact with him. The issue we must decide is whether, in these circumstances, a fair minded, impartial and properly informed observer could reasonably have thought that the Chief Justice might unconsciously be biased in favour of the respondent to the appeal who is the Solicitor-General.

[5] The above facts are not in dispute. But Mr Lithgow QC for the appellant goes on to invite us to make factual assumptions concerning Mr Stiassny and Vector. He asserts that Mr Stiassny led a controversial capital restructuring of the company which also involved restructuring the board and the departure of a number of board members who were critical of Mr Stiassny. In this context, counsel says, Mr Fletcher “chose to join or remain on the board”. Counsel argues that their common membership of the board in those circumstances poses apparent bias concerns. He says that it is possible that Mr Fletcher is beholden to Mr Stiassny, who might be in a position to cause Mr Fletcher to lose his position on the board along with annual director’s fees.

[6] No factual material is before the Court providing a basis for these broader assertions. The recent decision of the Court which addressed an issue of apparent bias indicated that where an association between a judge and a person having an interest in litigation leads a litigant to seek recusal, that party must be specific about the connection perceived between the circumstances giving rise to concern, and why they establish that a fair minded observer would have a reasonable apprehension about the judge’s impartiality. The facts relied on in relation to the association had to be spelt out, as well as why concern reasonably arises that the judge might not

decide the case on the true merits. The person who asserts that there is a situation giving rise to apparent bias bears the onus of establishing that this is the case.<sup>2</sup>

[7] Mr Lithgow invited us to depart from these statements in *Saxmere* concerning the need for the litigant objecting to establish the facts that show that there is a case of apparent bias. He suggested that in the particular circumstances of the present case the relevant factual information should be put before the Court through disclosure by the Judge. The appellant's concerns, however, are premised on assertions concerning possible future actions by the chairman of Vector and his alleged ability to control the constitution of the company's board. Facts relevant to those assertions are not matters that the Chief Justice can reasonably be expected to have direct knowledge of (or indeed any knowledge at all, given expectations of board confidentiality) and thus disclose to the Court. While it may be difficult at times for a party objecting to a judge sitting to verify facts said to be relevant, that is a difficulty which is always associated with bearing the onus of proof. If the facts necessary to found an allegation of apparent bias which lie outside the direct knowledge of a judge cannot properly be put before the Court to support an interlocutory application for recusal or disqualification, there is no basis for the application to be made.

[8] This brings us back to the association itself, involving the common board membership. It must be borne in mind that Vector itself has no interest at all in the outcome of the appeal. It is unrelated to the business of Vector. Mr Stiassny has an interest, but the nature of his association with Mr Fletcher, as directors of the same company, would not in the eyes of the fair minded observer of itself give rise to a reasonable concern over bias of the Judge who happens to be married to Mr Fletcher. To establish such a concern there would need to be substantial factual information before the Court concerning Mr Stiassny's chairmanship of the company, as well as evidence of the extent of his influence over shareholders and control of composition of the board. As indicated, no information of this kind has been put in evidence.

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<sup>2</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35 at [20], [42], [93] and [94].

[9] In those circumstances we have concluded that the appellant's concerns are highly speculative. He provided nothing by way of proof that the nature of the association identified might be such as would reasonably and objectively cause a fair minded bystander concern that it may influence the Chief Justice's decision-making in the case. It is unnecessary in these circumstances for us to consider any significance of the financial consequences were Mr Fletcher to lose his position on the board of the particular public company because it is not shown there is any likelihood of that occurrence.

[10] For these reasons we dismissed the application. There will be no order for costs.

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