IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2007
[2009] NZSC 122

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: 24 November 2009

Court: Blanchard, Tipping, McGrath and Anderson JJ

Counsel: S Grey and M Ritchie for Appellants
L J Taylor, J L Bates and J Orpin for Respondent
D B Collins QC Solicitor-General for Intervener

Judgment: 27 November 2009

JUDGMENT OF THE COURT

A **The judgment of this Court delivered on 3 July 2009 ([2009] NZSC 72) is recalled and the orders made in that judgment are set aside.**

B **The appeal is allowed and the proceeding remitted for rehearing in the Court of Appeal.**

C Costs are reserved. Counsel should make written submissions directed to how costs should be borne for the previous hearing in the Court of Appeal and the two hearings in this Court.

REASONS

[1] The appellants (the Saxmere interests) have applied for recall of an earlier judgment in this proceeding in which this Court dismissed their appeal.[1] This judgment should be read in conjunction with that earlier judgment which will shortly be reported and contains a fuller description of the facts and of the issues arising.

[2] Three categories of case have been recognised by the New Zealand courts in which a judgment may be recalled if not already perfected. They are conveniently set out in the judgment of Wild CJ in *Horowhenua County v Nash (No 2)*:[2]

> [F]irst, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritive decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

It was not suggested that there is any impediment to recall arising from perfection of our judgment.

[3] In brief, the Hon Justice Wilson was one of a panel of three Court of Appeal Judges who allowed an appeal by the respondent, the Wool Board, against a judgment of the High Court in favour of the Saxmere interests. The ground of appeal in this Court, which we rejected in our earlier judgment, was that Wilson J should not have sat in the Court of Appeal, as there was apparent bias, because of his business relationship with Mr Galbraith QC, one of the respondent's counsel in that Court.

---

1 [2009] NZSC 72. The Court which heard this present application is constituted as a Court of four under s 30(1) of the Supreme Court Act 2003.

2 [1968] NZLR 632 (SC) at p 633. See also *Rainbow Corporation Ltd v Ryde Holdings Ltd* (1992) 5 PRNZ 493 (CA) and *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 at para [10].

[4] In dismissing the appeal we stated the applicable test in the New Zealand courts for apparent bias, adopting that laid down in Australia, namely that a Judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".[3] The reasons separately delivered by the members of this Court discussed the application of that test with particular reference to circumstances in which the alleged apparent bias stems from a Judge's relationship with one of the counsel in the case. Applying the test to the facts of this case, as they were then known to us, we concluded that a fair-minded observer would not have had a reasonable apprehension of bias on Wilson J's part.

[5] It is now said that the conclusion we reached ought to be revisited, in part because both counsel and the Court itself overlooked or were unaware of a provision in the Judicature Act 1908 and certain of the *Guidelines for Judicial Conduct* prepared for the assistance of New Zealand Judges but not at that time publicly available.

[6] After the recall application was made and no doubt having in mind certain comments made in our earlier judgment, to which reference will be made hereafter, Wilson J, in a memorandum to the Court, sought leave to provide a statement in reply to the application for recall, in which it was suggested that he had not made a full disclosure before the earlier hearing.

[7] With the leave of the Court the Judge furnished a further statement and thereafter, at the invitation of the Court, supplemented it with further factual information.

[8] The first of the matters on which the appellants now rely was the absence of any earlier mention of s 4(2A) of the Judicature Act 1908, which was inserted into that Act by s 3(2) of the Judicature Amendment Act 2004 on 20 May 2004. It reads:

---

3 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

> (2A) A Judge[4] must not undertake any other paid employment or hold any other office (whether paid or not) unless the Chief High Court Judge is satisfied that the employment or other office is compatible with judicial office.

[9] We find it unnecessary to decide whether that subsection has any application to a Judge of the Court of Appeal or of the Supreme Court who, although technically also a Judge of the High Court, does not in practice sit on the High Court Bench and in respect of whom the Head of Bench is not the Chief High Court Judge but, rather, the President of the Court of Appeal or the Chief Justice. It would be odd, to say the least, to require an appeal judge to obtain a consent of the kind envisaged by the subsection from the Head of a lower Bench.

[10] Nor need we decide whether the "other office" referred to in the subsection encompasses anything other than a public office which might be incompatible with holding the position of a Judge.[5] However that may be, the flaw in Ms Gray's argument directed to s 4(2A) is that it does not at all follow from the fact that a Judge may have overlooked, or failed to heed, the requirements of the subsection, that there are reasonable grounds for suspecting that the Judge has not brought an impartial mind to the resolution of a particular case. It does not follow that a failure to comply with the subsection provides any evidence that the Judge might unconsciously favour Mr Galbraith's client in a case in which Mr Galbraith was appearing for one of the parties.

[11] The same can be said of the second ground advanced in support of the recall application, namely that Wilson J failed to comply with the *Guidelines for Judicial Conduct*. It is surprising that this point was advanced as we had rejected such a view with reference to a similar allegation relating to non-compliance with the *Guide to Judicial Conduct* published by the Council of Chief Justices of Australia. McGrath J said:[6]

> The views of such bodies do, of course, provide important guidance as to appropriate standards of judicial conduct but departure from them by a judge in respect of an association with a person having an involvement in litigation

---

4 The section addresses the composition of the High Court and the reference to a "Judge" in subs (2A) is plainly to a Judge of that Court.

5 Wilson J did not have "paid employment" with Rich Hill Ltd.

6 At para [113].

> does not establish that the nature of the association is such that it has the capacity to influence the judge away from impartial decision making.

And Blanchard J commented that "it does not follow that a particular business relationship with counsel which goes beyond the guideline will necessarily give rise to a reasonable apprehension of bias".[7]

[12] There is nothing in these two points which justifies a recall.

[13] There is, however, cause for concern in relation to some matters not contained in the disclosure made by Wilson J before the earlier hearing. It may be that because reported decisions on apparent bias relating to the relationship between Judges and counsel are quite rare – there appear to have been none in New Zealand – that the Judge had not anticipated the view which we would form of the applicable principles in that connection.

[14] In his reasons Blanchard J said:

> [25] The objective observer might then turn attention to whether the Judge might in some way be beholden to Mr Galbraith because of the business dimension of their relationship and might unconsciously favour the side represented by Mr Galbraith because of some fear of disadvantage to himself (the Judge) if Mr Galbraith's client were to lose the case. Such a situation might theoretically exist if, for example, the Judge had been lent money by counsel or was dependent on counsel in order to meet some liability. However, the materials placed before the Court reveal nothing of this kind. There is nothing to indicate any indebtedness by the Judge to Mr Galbraith, nor any indication of any inability of their joint company, Rich Hill Ltd, to meet its obligations.

And McGrath J observed:

> [115] Aspects of the business relationship are relied on as having the effect, objectively, of potentially influencing the Judge to be more receptive to Mr Galbraith's arguments in Court, so that there is a reasonable apprehension the Judge would subconsciously favour them in order to maintain the closeness of the association. I am satisfied that the feature of mutual trust and confidence and mutual financial interest cannot be perceived to have such an influence over a judge in the circumstances of Wilson J. Objectively these aspects add nothing to what is present in ties of friendship and personal association. In particular, there is nothing which indicates that the financial aspect could make the Judge beholden to

---

[7] At para [29].

> Mr Galbraith. A fair-minded and informed observer would accept that the Judge's professional obligations are more than sufficient to keep aspects of the business association from diverting the Judge and that their presence does not alter the position in respect of the personal friendship and professional association aspects. This is not, of course, a case in which the Judge has any financial interest in the outcome of the litigation.

[15] The further disclosure made by Wilson J refers to two matters which require to be examined to see whether a reasonable observer might consider that the Judge was disqualified from sitting on the case because of the appearance that he was beholden to Mr Galbraith. The impression that the Court had following the earlier hearing was that Rich Hill Ltd was very largely a passive land holding company jointly owned by Wilson J and Mr Galbraith. There was nothing in the material then before the Court to suggest other than that equal contributions had been made by the shareholders to the share capital and any loan capital of the company. It now transpires, from the further disclosure, that substantial advances made by Mr Galbraith and the Judge to the company to finance in part the acquisition and development of its land were not on an equal basis. The Judge says that as a general principle they have attempted to achieve approximate equality of contribution but that imbalances in the level of their shareholders' accounts did develop from time to time because of differing payments made to or on behalf of the company. When they became aware of a significant imbalance, usually from reading the annual financial statements when these became available, they discussed and agreed on how they should return to a position of approximate equality.

[16] It has emerged that as at 31 March 2007, shortly before the hearing in the Court of Appeal, the position was that the Judge had advanced $984,176 to the company and, by informal arrangement with Mr Galbraith, had assumed exclusive responsibility for paying interest and principal on an amount of $168,555 of bank debt owed by the company. The total of those sums was $1,152,731. On the other hand, Mr Galbraith had advanced to the company the sum of $1,226,980. The difference between those figures, i.e. the imbalance in shareholders' accounts, was $74,249 or, if notice is taken of the fact that the Judge had not actually made any payment of the bank debt of $168,555, an aggregate sum of $242,804.

[17] Although counsel for the respondent, Mr Taylor, argued strongly that such sums, although perhaps large in themselves, were not material against a background where the gross assets of the company were about $3 million and the informal arrangements between the Judge and Mr Galbraith were of long standing and could be expected to continue, we are of the clear opinion that the objective lay observer could reasonably consider that, notwithstanding that background, the Judge was at the relevant time beholden to Mr Galbraith because of the imbalance, and that this might unconsciously affect the impartiality of the Judge's mind in deciding a case in which Mr Galbraith was appearing. Indeed, in our view even the sum of $74,249 (or the half of it which represented Mr Galbraith's share) is well above the level at which a direct or indirect indebtedness from Judge to counsel could be regarded as so minimal as to be immaterial, thus giving rise to no concern.

[18] There is now disclosed also a further circumstance which was not appreciated by this Court at the earlier hearing. It is that, at the time of the hearing in the Court of Appeal, Rich Hill Ltd was preparing to participate in the settlement of a sale and purchase in which it had contracted to buy one-third of a property intended to enlarge the horse stud which was being acquired by a group involving Rich Hill for $2,160,000. Arrangements were being put in place for Rich Hill Ltd to borrow its one-third share of that price on the security of its existing land. The Judge and Mr Galbraith must have been reliant upon one another, during the very time when the Saxmere judgment was reserved in the Court of Appeal, for mutual cooperation to enable the funding and completion of the purchase of the additional land. That too is a matter which might raise a question in the mind of the observer about the Judge's ability to address the issues raised by the appeal without being unconsciously affected by this ongoing aspect of his business relationship with counsel. The Judge's shareholding in Rich Hill Ltd was not at that time merely a passive investment.

[19] These circumstances, and in particular the first of them, would, if disclosed before the earlier hearing, have led the Court to the conclusion that the case on apparent bias was made out. There is therefore a very special reason why justice requires recall of our earlier judgment.

[20] Accordingly, we recall our earlier judgment and set aside the orders made in it. The appeal is allowed and the proceeding remitted for hearing in the Court of Appeal by a new panel of Judges.

[21] We reserve costs and invite counsel to make written submissions on them.

Solicitors:
Sue Grey, Lawyer, Nelson for Appellants
Quigg Partners, Wellington for Respondent
Crown Law for Intervener