**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 85/2012**
**[2013] NZSC 3**

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| BETWEEN | MALCOLM EDWARD RABSON<br>Applicant |
| AND | ANDREW CROAD AND CHRISTINE MARGARET DUNPHY<br>Respondents |

Court: Elias CJ, McGrath and William Young JJ

Counsel: T Ellis for Applicant
H L Thompson for Respondents

Judgment: 19 February 2013

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed with costs to the respondents of $1,500 plus reasonable disbursements to be fixed by the Registrar.**

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**REASONS**

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal dated 31 October 2012 dismissing his appeal against an order made against him in the High Court for reimbursement of $58,084.31 to a company in liquidation.[1] The applicant had been a director of the company. Two principal grounds of appeal are raised; one a challenge to the composition of the bench which heard the appeal and the other a challenge to its substantive determination.

[2] There are two arguments for the first challenge. One is that the Court of Appeal which heard Mr Rabson's appeal was "improperly constituted" because, of the three Judges, Wild J had earlier been the subject of a recusal application by the

1 *Rabson v Croad* [2012] NZCA 496.

applicant and a second Judge who also sat on the appeal, Harrison J, had declined the applicant's earlier recusal application. This procedure is said to be flawed, first because Harrison J, as a single Judge, lacked jurisdiction to determine the matter and, secondly, because the Judge declined to deal with what he regarded as unsubstantiated and scurrilous allegations. The claimed procedural impropriety is said to be compounded when, on renewal of the recusal request before the full bench at the commencement of the hearing of the appeal, both Harrison J and Wild J participated in the Court's decision to decline that request.

[3] The other argument for the first challenge is that the order for reimbursement was made by the High Court without inquiry into Mr Rabson's conduct, as required by s 301 of the Companies Act 1993, pursuant to which it was made. The Court entered judgment against the applicant for the sum which, following formal proof, it determined had been obtained by or through the applicant which belonged to the company, but was not accounted for.[2] In addition, the substantive determination in the lower Courts is challenged for errors in calculation of the amount ordered to be reimbursed.

**Apparent bias**

[4] In two notices of application, the applicant seeks leave to appeal against "decisions" of the Court of Appeal dated 9 October and 17 October, as well as against the judgment of 31 October. The references to the 9 and 17 October decisions are to the minute of Harrison J declining the applicant's recusal request in respect of Wild J, and to the minute of the full bench declining a further recusal request. The initial application for leave to appeal against the determinations of the recusal requests, dated 13 November 2012, was questioned by McGrath J for this Court by a minute of 19 November. It queried whether the recusal determinations and the procedure adopted by the Court of Appeal in making them had been overtaken by the judgment of the Court of Appeal of 31 October on the substantive appeal. In response, the applicant filed, on 28 November 2012, a supplementary application for leave to appeal against the judgment of 31 October. It relies on what

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2 *Rabson v Croad* [2012] NZHC 347.

the applicant claims were irregularities in the procedure followed by the Court of Appeal in not granting the recusal requests.

[5] The submissions filed in support of the application of 28 November 2012 for leave to appeal do not address whether the earlier complaints about the process have been overtaken by the substantive judgment, despite what was raised in the minute of McGrath J. We consider they have been and that the only basis on which this Court could properly entertain an appeal concerning the process followed and ultimate composition of the bench is if the applicant claims the substantive decision is tainted by apparent bias. The procedural history of an unsuccessful recusal request may substantiate an underlying claim of actual or apparent bias, but is not itself the focus of inquiry. Although the applicant has not distinctly made a claim of such bias against Wild J, we are prepared to deal with the application as if it does and on the basis that the applicant's concern is the necessary substantive claim that the appearance of bias taints the decision the subject of the appeal. The problem for the applicant, however, is that the grounds put forward do not conform to the standard required for such claims.

[6] The principles on which a judgment may be subject of an appeal on the ground of apparent bias are settled.[3] In seeking leave to bring an appeal to this Court on this ground an applicant has to identify circumstances which prima facie might have led either or both Judges to decide the appeal other than on its factual or legal merits. As well, the applicant must clearly state the connection between those circumstances and the concern that the Judge would not decide the case entirely on its merits. No such factual material has been put before the Court to establish these matters. We have nothing more than descriptions, from counsel and in further submissions the applicant filed personally, as to what they are. Counsel for the respondents, in his submissions, describes these descriptions as "hearsay conjecture", but the key point is that there is no evidence and no circumstances before this Court which might found a claim of apparent bias arising from a Judge's association. That is because the applicant, through his counsel, wishes to confine the challenge to one of process. Claims of bias, actual or apparent, must be squarely confronted when properly raised. It is not, however, responsible for an appellate

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3 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35 (SC).

court to entertain such claims on the basis of speculation or other wholly unsubstantiated assertion.

[7] As well, Harrison J's rejection of the application on the material available to him itself provides no basis for an assertion of apparent bias against him.

**The reimbursement order**

[8] On the second proposed ground, the Court of Appeal held that inquiry through the formal proof proffered by the liquidators in the High Court when Mr Rabson failed to appear, despite notice, fulfilled the requirement of s 301. The argument that this was not "inquiry" within the meaning of s 301 is untenable. So too is an argument that Mr Rabson was not shown to have benefited personally from the monies he was obliged to account for. No other point of general importance arises. Mr Rabson seeks to argue that the calculation put forward by the liquidators, and relied on by the Judge, was wrong on the facts (a conclusion said to be supported by judicial findings in another case). This complaint was considered and rejected by the Court of Appeal on the facts. No question of general or public importance such as would warrant appeal to this Court arises.

**Conclusion**

[9] The application for leave to appeal is accordingly dismissed with costs to the respondents (in respect of submissions made before receiving the Court's direction that pending further order they not be filed) of $1,500 plus reasonable disbursements to be fixed by the Registrar.

Solicitors:
Nat Dunning, Wellington for Applicant
Mahon Butterworth Thompson, Auckland for Respondent