

REDACTED VERSION - PUBLICATION PERMITTED IN THIS FORM.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2011-004-018433
[2013] NZHC 157

THE CROWN

v

ROBERT BARRY WHALE
PAUL WILLIAM CROPP
TC

Hearing: 13 February 2013

Appearances: B H Dickey and M Thomas for Crown
P Davison QC and R Woods for Accused, R B Whale
J Billington QC and D Pannett for Accused, P W Cropp
M Lloyd for Accused, TC

Judgment: 13 February 2013

(ORAL) JUDGMENT OF ANDREWS J

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[1] I am required to rule on an application made by Mr Billington QC on behalf of the accused Mr Cropp, and Mr Lloyd on behalf of a further accused, that I declare a mistrial, (or recuse myself) on the grounds of apparent bias. The application is opposed by Mr Davison QC on behalf of the accused Mr Whale, and by Mr Dickey on behalf of the Crown. The application arises out of a matter that I raised with counsel yesterday.

[2] The accused are being tried before me, sitting as a Judge alone, on charges brought by the Serious Fraud Office, following the failure of two associated finance companies: Dominion Finance Group Ltd, and North South Finance Ltd. The accused Mr Whale was a director of both companies. The two other accused were senior executives in both companies. The trial is set down for four weeks, and one and a half hearing days have been completed.

[3] When I was first assigned to try the case I checked to ensure that I would not be conflicted. I was aware that [REDACTED] had for a period been [REDACTED] of the law firm Kensington Swan, in which I was a partner, then consultant, in the Wellington office, before my appointment to the Bench. I advised that if [REDACTED] were an accused, or otherwise involved in the trial, I would not be able to preside. I was assured (I understand after consultation with counsel) that there was no conflict concerning [REDACTED]. At the time, none of the names of the accused meant anything to me.

[4] On receiving the Crown's briefs of evidence shortly before the trial was to begin I learned that [REDACTED] was to give evidence. I raised the point with counsel, and was advised that they were aware of the connection with [REDACTED], and that there was no objection to my trying the case.

[5] Over the lunch adjournment on the second day of the trial, a comment was made to me that Mr Whale had been at one time a partner of Kensington Swan in the Auckland office. I made inquiries with the firm and was advised that he was a partner between 1996 and 2001.

[6] I had (and continue to have) no recollection of Mr Whale as a partner. I certainly do not recall having had any personal dealings with him. I record that at no stage has this matter been raised by any of the accused or their counsel.

[7] At the beginning of the afternoon session I advised counsel, in the presence of the accused, that Mr Whale and I had been partners in the firm at the same time. As it raised an issue as to whether I could continue to hear the case, I invited counsel to take instructions. Mr Billington and Mr Lloyd subsequently made the application I refer to earlier.

[8] Mr Billington (with whose submissions Mr Lloyd agreed) submitted that the conflict issue was different as between [REDACTED] and Mr Whale. While in [REDACTED] case his evidence did not raise credibility issues, there would be significant credibility issues as between the Crown and each accused, and as between the three accused themselves. Mr Billington submitted that it would be difficult to escape the perception of bias arising in the circumstances of a Judge ruling on credibility issues involving someone with whom the Judge had been in a professional partnership.

[9] Mr Davison submitted that membership of a legal partnership would not be seen by a reasonable person as compromising my independence. He further submitted that it is in the interests of justice that the trial proceed. If it does not proceed, he submitted, a new trial will not be able to be allocated for many months and a further trial, Mr Whale faces in connection with Dominion Finance and North South Finance, would not be able to begin before 2014.

[10] Mr Dickey also submitted that the circumstances of my connection with Mr Whale did not meet the test for apparent bias, particularly in light of the fact that the partnership relationship was spent as from 2001, some 12 years ago.

[11] In *Saxmere Co v Wool Board Disestablishment Co*,¹ the Supreme Court said, in relation to the test for apparent bias:

¹ *Saxmere Co v Wool Board Disestablishment Co* [2009] NZSC 72, [2010] 1 NZLR 35 (Supreme Court), at [3], citing *Ebner v Official Assignee in Bankruptcy* (2000) 205 CLR 337, 176 ALR 644 (HCA), at [6].

... the governing principle [is] that, subject to qualifications relating to waiver or necessity, 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.”

[12] The Supreme Court further said:²

[96] ... As the person is a lay observer, rather than a lawyer, no detailed knowledge of the law is to be imputed. And as the test is an objective one, the observer is not to be taken to be aware of any attributes, such as integrity and judicial ability, of the individual judge in question.

[97] ... The reasonable person must have a knowledge and understanding of the judicial process and the nature of judging. ... The hypothetical observer must be sufficiently appraised of those matters to reach a decision on whether the circumstances of the particular case give rise to a reasonable apprehension of bias, that is, an apprehension which is not a matter of superficial impression. Nothing less will provide a reasonable decision. There should, however, be no greater degree of sophistication attributed than is required for that end. ...

[13] I have concluded that I should take a cautious approach. Notwithstanding that the legal partnership with Mr Whale ceased in 2001, any legal partnership requires, as between the partners, trust and good faith. For that reason, I have concluded that I must not continue to try this case. A fair-minded lay observer might well have concerns as to whether a judge could bring an impartial mind to resolving issues of credibility in respect of a former legal partner of the judge.

[14] I have no doubt that, had I recalled the partnership when I was assigned to this trial, I would have declined to try the case for the reasons I have set out above. I am satisfied that my approach should not differ, now that the trial has begun.

[15] Accordingly, this trial will not proceed further before me. I make a formal order that there be a new trial before a different Judge.

[16] I and the Court are anxious to minimise any disruption now that I have raised this matter. A new trial can begin on Monday, next week, 18 February 2013 before Justice Lang. Justice Lang is confident that no conflict issues arise. I would

² At [96] and [97].

appreciate counsels' co-operation in ensuring that the trial can be completed within the allocated time, and I believe it can be.


Andrews J