DECISION OF

THE JUDICIAL CONDUCT COMMISSIONER

AS TO THREE COMPLAINTS

CONCERNING JUSTICE WILSON

7 May 2010

DECISION OF THE JUDICIAL CONDUCT COMMISSIONER

SECTION 1: INTRODUCTION:

The genesis of the complaints, briefly stated:

1. I hold office as the Judicial Conduct Commissioner under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 ("the Act"). In that capacity, I have received three separate complaints about the conduct of the Hon. Justice W M Wilson, now a Judge of the Supreme Court.

2. In 2007, Justice Wilson was then a Judge of the Court of Appeal. He was appointed by the President of the Court as one of the three Judges due to hear an appeal in a case that has become known as the *Saxmere* case[1]. Each of the three complainants takes issue with the way in which Justice Wilson went about disclosing a personal and business relationship that he had with Mr Alan Galbraith QC. Mr Galbraith was one of the counsel for one of the parties to the appeal. Apart from questioning the means of disclosure, each of the complainants says, more fundamentally, that the Judge should have recused himself, and thus should not have participated in the hearing at all.

3. The issue subsequently came before the Supreme Court on two occasions. The question to be determined, ultimately, was whether the Court of Appeal's decision should be set aside because of "a reasonable apprehension of bias" resulting from Justice Wilson's relationship with Mr Galbraith.

4. On 27 November 2009, the Supreme Court finally concluded[2] that, on the facts as then known to it, a case of apparent bias had been made out. It recalled an earlier judgment[3] it had made, and set aside the orders made. The substantive proceedings were then remitted for re-hearing in the Court of Appeal by a new panel of Judges.

5. The first of the three complaints that have been made about Justice Wilson was received by my predecessor, Mr Ian Haynes, on 16 May 2008. When it became clear that the Saxmere interests were challenging the decision of the Court of Appeal, and that the requirement for, and basis of, disclosure by Justice Wilson would become central issues before the Supreme Court, Mr Haynes took a decision, pursuant to the Act, to defer further action on the complaint until matters were resolved.

6. After the Supreme Court's final decision was released on 27 November 2009, the first complainant's legal adviser asked me[4] to resume consideration of the complaint. An amended version of the complaint was submitted.

7. I received two other complaints, one on 10 December 2009 and the other on 24 December 2009.

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[1] *Wool Board Disestablishment Co. Ltd* v *Saxmere Co. Ltd and others* CA 288/05 [2007] NZCA 349.

[2] *Saxmere Co Ltd & Others* v *Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 76.

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

[4] I was appointed Commissioner on 3 August 2009, following the retirement of Mr Haynes.

The decisions of the Courts

8. The decisions of the Courts which are relevant to my preliminary examination are these:

   (a) the Court of Appeal decision (15 August 2007);[5]

   (b) the decision of the Supreme Court (3 July 2009) (which I will refer to as "Supreme Court No. 1");[6]

   (c) the decision of the Supreme Court (27 November 2009) (which I will refer to as "Supreme Court No. 2").[7]

   There were two other earlier decisions of the Supreme Court, as well as a number of Minutes which it issued.

Release of findings and reasons

9. This is an important matter involving, as it does, a Judge who is now a member of New Zealand's highest Court. It has received widespread publicity and has generated a good deal of public comment.

10. In most cases, the Commissioner does not release a decision, or the reasons for it, publicly. The decision remains confidential to the parties directly affected.

11. Indeed, section19 (1) of the Act requires the Commissioner and all employees to "keep confidential all matters that come to their knowledge in the performance of their functions". Further, they "must not communicate any of those matters to any person except for the purpose of carrying out their functions under or giving effect to this Act."

12. However, I have decided that, in this instance, I ought to make public my decision and the reasoning behind it. I believe that section 4 of the Act leads me in that direction. I place particular emphasis, first, on the general opening words of the section that the purpose is to "enhance public confidence in, and to protect the impartiality of, the judicial system". And, secondly, upon one of the means by which that is to be achieved, that is "by providing a fair process that recognises and protects the requirements of judicial independence and natural justice".

13. The publicity which this case has generated has been so extensive – and often inaccurate – that the purpose just described would not be served if I were to make no, or limited, information publicly available. If anything, that would be counter-productive.

14. So I have decided that it will assist in "giving effect to this Act" if I do make the terms of my decision and the background and reasons for it publicly available. To do one without the other would not, I think, be satisfactory. Nonetheless, I shall seek to maintain confidentiality where that may appropriately be done.

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[5] See note 1.

[6] See note 3.

[7] See note 2.

Jurisdiction

15. Each of the three complaints concerns the conduct of a Judge, and otherwise satisfies the procedural requirements for validity under the Act. So all must be dealt with in accordance with the terms of the Act.

16. Section 8(2) of the Act has effect to limit the Commissioner's jurisdiction to considering matters of judicial conduct. The Commissioner does not have jurisdiction to consider a complaint about the legality or correctness of a judicial decision. The appropriate remedy for reviewing a judicial decision, on any point or points, is by way of an appeal or an application for judicial review. Section 16(1)(f) of the Act requires the Commissioner to dismiss a complaint if it is "about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review."

17. The purpose of section 8(2) and section 16(1)(f) is to ensure that complainants cannot use the procedures set out in the Act as a means of re-litigating a judicial decision. However, the fact that the particular conduct that is complained of may also be a ground for appeal in the substantive legal proceedings does not, in itself, exclude that conduct from the scope of the Commissioner's jurisdiction. That view is supported by the terms of section 11(1).

18. In the present instance, none of the complainants is challenging the legality or correctness of the Supreme Court's most recent decision. Indeed, two of the complainants expressly disavow any intention of challenging the Court's decision. Instead, the complaint of all three is largely confined to a consideration of the conduct of Justice Wilson:

    (a) specifically: the nature and extent of the disclosure that Justice Wilson made prior to the hearing of the *Saxmere* case in the Court of Appeal;

    (b) the fact that he did not recuse himself from sitting on that hearing; and

    (c) his conduct in relation to the later Supreme Court proceedings.

    The conduct is largely a matter of record, although the context in which the acts or omissions complained of occurred does require examination.

    There are some other grounds of complaint, as well. I will refer to them later, but they – and the principal basis for the complaint - all arise directly from the actual or inferred conduct of the Judge.

19. My opinion is that I do have jurisdiction to deal with all aspects of the three complaints.

Process: a preliminary examination

20. Section 15(1) of the Act requires the Commissioner to "conduct a preliminary examination of each complaint and form an opinion" as to two specified issues.

21. Section 15(4) of the Act provides that for the purpose of conducting a preliminary examination, the Commissioner may make any inquiries into the complaint that he or she thinks appropriate. The extent of the inquiries that may be necessary for the purposes of a preliminary examination will vary from case to case, but the objective is

to reach a position where the opinions described in sections15(1) and 18(1) of the Act can fairly and properly be formed.

22. Pursuant to section 15(4) of the Act, I have:

    (a) conducted interviews with eight people whose views and explanations I considered relevant;

    (b) obtained written information or confirmation from a number of others;

    (c) read a large quantity of written material (complaints, judicial decisions, submissions, financial accounts, legal documents, and other miscellaneous papers provided to or obtained by me);

    (d) obtained supplementary explanations and documents arising from a consideration of the materials provided.

    I have now completed my preliminary examination.

23. I have been greatly assisted in my examination by the Hon. Murray Gleeson, a former Chief Justice of Australia.

The steps to be taken

24. Section 15(5) sets out the three options available to me. I may:

    (a) dismiss the complaint;

    (b) refer the complaint to the Head of Bench; or

    (c) recommend that the Attorney-General appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the conduct of a Judge.

    Section 17(1) sets out a particular sequence or priority to be observed, as between these three options.

Is there a basis for dismissing the complaints?

25. Section 16(1) of the Act requires the Commissioner (the word used is "must") to dismiss a complaint if he or she is of the opinion that any one of nine particular grounds in that section apply.

26. I will not set out all nine grounds. Instead, I will mention only those few which might possibly apply in respect of the three complaints:

    (a) paragraph (b): "the complaint has no bearing on judicial functions or judicial duties."

        This ground does not apply. The complaints are about things done, or not done, by the Judge in the course of his duties as a Judge. So the complaints do have a bearing on judicial functions or duties.

    (b) paragraph (d): "the complaint is frivolous, vexatious, or not in good faith"

        There is some basis for saying that one of the complaints (dated 10 December 2009) is vexatious. But that is arguable and I do not propose to make a finding

to that effect. The substance of the complaint – although not well articulated – is about the conduct of the Judge. I will deal with it later.

(c) paragraph (f): "the complaint is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review."

I have dealt with this provision in paragraphs 16 to 18 above. In essence, the complaints are not about a judicial decision or function. The two more substantial complaints expressly deny that that is so. Instead, they focus directly on the conduct of the Judge at the time. So I conclude that this paragraph (f) does not provide a basis for dismissal of the complaints.

27. Thus, I see no valid basis for dismissing the complaints under section 16 of the Act.

The next question

28. Following the sequence that is set out in section 17(1) of the Act the next task is to decide whether I should (as set out in section 15(5)(c)) recommend the appointment of a Judicial Conduct Panel in terms of section 18(1):

> The Commissioner may recommend to the Attorney-General that he or she appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the alleged conduct of a Judge if the Commissioner is of the opinion that –
>
> (a) an inquiry into the alleged conduct is necessary or justified; and
>
> (b) if established, the conduct may warrant consideration of removal of the Judge."

29. The inquiry referred to in paragraph (a) is an inquiry of a Judicial Conduct Panel. Whether this is necessary or justified may depend upon what emerges from the Commissioner's preliminary examination. Paragraph (b) adds a further requirement, which is that a recommendation may be made only in a case where, *if established*, the conduct *may* warrant consideration of removal of the Judge.

30. For reasons associated with the constitutional importance of judicial independence, a Judge may be removed only by the Governor-General acting upon an address of Parliament on grounds of misbehaviour or incapacity.[8] There is, in this case, no question of incapacity. Misbehaviour could include conduct that, although not dishonest, fell so far short of accepted standards of judicial behaviour as to warrant the ultimate sanction of removal.

The three complaints

31. I will refer to each complaint by a number. Complaint 1 is that originally lodged on 16 May 2008; complaint 2 is that lodged on 24 December 2009; complaint 3 is that lodged on 10 December 2009 (this sequence is convenient rather than chronological). Generally speaking I will not name individuals, thus preserving confidentiality. But in circumstances where a person's name has already been publicly disclosed and that person's actions are significant, I will use that person's name.

[8] Constitution Act 1986, section 23.

SECTION 2: COMPLAINT 1

Description

32. The complainant is Mr P E Radford, the sole shareholder and director of Saxmere Co Ltd, one of the parties to the proceedings. The initial version of the complaint was lodged with the Commissioner on 16 May 2008 by the complainant's lawyer at the time. The then Commissioner deferred consideration of this complaint, as he was empowered to do, as proceedings were pending in the Supreme Court. Once those proceedings were finally resolved on 27 November 2009, the complainant's current solicitor requested that consideration of the complaint be resumed. A restated version of the complaint was submitted.

Complaint 1: Item 1: Basis of complaint

33. The complaint makes a number of allegations. The first and principal one arose from a discovery by Mr Radford in February 2008 of the "very significant business relationship that Judge Wilson had with Mr Galbraith, senior counsel for the First Respondent". His research showed that Rich Hill Stud is "one of New Zealand's most well established and significant racing studs", and that the Judge and Mr Galbraith are joint owners of Rich Hill Limited. The complainant does "not accept that justice can be done or can be seen to be done when one party, through its agent and senior counsel, is in such a close relationship with one of the Judges." He concludes that Judge Wilson should have recused himself, and that his attempted disclosure was inadequate.

Complaint 1: Item 1: The background

34. As a part of my preliminary inquiries, I have interviewed, among others, Justice Wilson and his legal advisers, and (separately) Mr Galbraith. I sought explanations about the nature of the association between the Judge and Mr Galbraith and the way in which it had developed. In summary, the following points emerged (they will be relevant to the formation of the opinion which I am required to reach in respect of both this complaint and the two other complaints):

    (a) Justice Wilson was appointed directly to the Court of Appeal with effect from 1 February 2007.

    (b) Prior to that Justice Wilson and Mr Galbraith had both practised for many years as Queen's Counsel. They were good friends.

    (c) In 1998 they formed a company called Rich Hill Limited, and each held half the shares. The company purchased a property of about 38 hectares in the Waikato. It is known as Rich Hill. It was a dairy farm at the time but, by means of company borrowings and shareholders' contributions, funds were provided for its conversion to a horse stud.

    (d) Justice Wilson had a longstanding interest in horses, and had been involved in several partnerships owning racehorses. Mr Galbraith had the same interest, though his interest was more active and on a larger scale than the Judge's. The Rich Hill property was originally used primarily for the agistment of horses which did not belong to the company, though the company did purchase two horses from a partnership which was being dissolved and in which Mr Galbraith and the Judge both had an interest. The company subsequently bred one or two horses a year and either kept them on its books or sold them.

(e) Mr Galbraith already had an interest in an adjoining property of about 43 hectares and in the operation of a thoroughbred horse stud on that property. That business was conducted by a company called Rich Hill Thoroughbreds Limited. Mr Galbraith was already a shareholder in that company. Justice Wilson had no interest in that company, the land or the business, apart from this: it was agreed by Mr Galbraith and Justice Wilson that some horses owned by that company would be kept on the property owned by Rich Hill Limited, under a conventional agistment arrangement.

(f) There was never any written agreement between Mr Galbraith and Justice Wilson in the nature of a shareholders' agreement or a partnership agreement. They were equal shareholders in, and the only directors of, Rich Hill Limited, and any decisions that needed to be made were reached in discussion between them. There was a shared view that there should be equality of financial contribution, but also an understanding that – because of their relatively unstructured method of operation – there would be some inequalities from time to time. However, these inequalities were to be reduced progressively when they became apparent, so that a broad equality of contribution could be resumed.

(g) Rich Hill Limited was a Loss Attributing Qualifying Company (LAQC), so that losses incurred by the company could, broadly, be off-set against taxable income earned by the two shareholders.

(h) The two shareholders had a different approach in some respects. Justice Wilson was certainly interested in the horses and he greatly enjoyed his time spent at the property. But he did not take a particularly active role in management of the horses or in the management and development of the property. Mr Galbraith, by contrast, was pleased to undertake those roles. Each had different interests and it was a comfortable accommodation between them.

(i) There was also a difference in approach between the two shareholders about the method of providing funds for the company's activities. Justice Wilson preferred to raise money by borrowing. Mr Galbraith preferred to inject cash from his own personal resources.

(j) An example of that difference of approach arose late in 2004. Mr Galbraith had been making cash injections to help pay for development costs. With Mr Galbraith's approval, Justice Wilson reduced the resulting imbalance by taking over personal responsibility for meeting the principal and interest payments under a term loan of $200,000 which Rich Hill Limited had raised by way of mortgage to the Bank of New Zealand.

(k) For accounting purposes, the amount of the loan was treated as a capital contribution by the Judge. As the principal was repaid, the repayments were credited to his shareholder's account. As the Judge was paying the interest, the company did not claim the interest payable on the loan.

(l) In 2006, Justice Wilson consolidated and re-arranged his finances. As a part of that process, he repaid existing loans to the Bank of New Zealand, and took out a new loan in the sum of $900,000. At the time, the amount standing to his credit in his shareholder's current account with Rich Hill Limited was in excess of that figure. The company agreed to give the bank a guarantee in respect of the Judge's obligations under the loan. Mr Galbraith had no objection and he

and the Judge signed on behalf of the company. As they saw it, the Judge was, in effect, borrowing on the security of his own money. Mr Galbraith did not personally guarantee Justice Wilson's indebtedness.

(m) Three measures were, however, implemented. These helped to protect Mr Galbraith's position. First, liability under the guarantee was capped by the bank at $1 million (plus 12 months interest). Second, the bank acknowledged that the guarantee was in respect of the outstanding balance of this particular loan only. Third, Justice Wilson confirmed to Mr Galbraith that, if the guarantee were ever to be called upon by the bank, then the payment made by the company would be deducted from the Judge's shareholder's account.

(n) Towards the end of 2006, Rich Hill Ltd reached agreement to participate in the purchase of a one-third share in an adjoining block of land. The total price was $2,160,000. The other purchasers were Rich Hill Thoroughbreds Limited and two other individuals. (As previously mentioned, Justice Wilson had no direct connections with that company, though Mr Galbraith did.) It was intended that, subsequently, the property would be subdivided into two blocks, with Rich Hill Limited retaining the portion closest to its existing property. The Judge and Mr Galbraith agreed that the full amount of the company's one-third share of the purchase price was to be funded wholly by way of a separate, interest-only loan secured by the company's existing mortgage to its banker, under which the Judge and Mr Galbraith were both guarantors. Settlement was effected as at 1 June 2007.

(o) Quite apart from their joint interest in Rich Hill Ltd, Justice Wilson and Mr Galbraith have been involved in the breeding, selling and racing of horses as members of three partnerships, each involving other participants. Each partnership owned a broodmare and bred from that mare. The financial contributions from the partners were equal. Justice Wilson was never in arrears on any payments due. There was no issue as to any imbalance. These partnerships were entirely separate from Rich Hill Ltd, apart from the fact that that company received a share of agistment payments when any of the horses were on its land. These partnerships have subsequently been wound up.

(p) There had been a long-standing practice between the two shareholders in Rich Hill Ltd that they would each pay the sum of $5,000 a month to the company. This was to provide it with working capital. The amounts were credited to the shareholders' accounts. Justice Wilson ceased making such payments from December 2006 onwards. This coincided with the announcement of his appointment as a Judge of the Court of Appeal. His Honour says that there was no necessary connection between the two. But he had had discussions with Mr Galbraith and he (His Honour) then had in mind two other sources of his own from which equivalent payments could and would be made.

(q) Justice Wilson thought that Mr Galbraith would also be suspending his monthly instalments and would be making comparable payments on some other basis. But when the Judge saw the accounts for the company some time after the end of the financial year, 31 March 2007, he found that Mr Galbraith's monthly payments had continued. For his part, Mr Galbraith confirms that discussions had taken place. He was not concerned with the cessation of the Judge's monthly payments. He took the view that the company was actually or close to being cashflow positive, and that no issue arose from it. He took no action to

suspend monthly payments himself, though he says that there was no reason why he should not do so. He says that he gave no thought then to the possible consequences of any disparity in contribution. He acknowledges that the financial arrangements between them may be seen as imprecise, but that is how the arrangement had been, and continued to be: it was flexible and collaborative.

(r) Justice Wilson's appointment as a Judge of the Court of Appeal was announced on 19 December 2006. The appointment became effective on 1 February 2007.

(s) In the intervening period, Justice Wilson and Mr Galbraith discussed what the Judge's change in status might mean when Mr Galbraith appeared as counsel before him. They both concluded that there should not be any difficulty. But the Judge says that he was conscious of the possibility of some issue arising, at some stage.

(t) The *Saxmere* appeal before the Court of Appeal[9] was heard on 2, 3 and 4 April 2007. I have enquired about the date upon which the panel of Judges was selected. The panels for each month are provisionally allocated in the month before a hearing is due. In this case, the fixture list for April 2007 was last modified on 19 March 2007. So the composition of the Court was determined during that month, and on or before that date.

(u) Thus, Justice Wilson knew that he would be sitting on the bench for the *Saxmere* appeal some time in March 2007, roughly a month after his appointment to the Court of Appeal had become effective.

Complaint 1: Item 1: *Saxmere* in the Court of Appeal

35. What I have described in the preceding paragraph 34 is a description of the factual background prior to the hearing of the *Saxmere* appeal in the Court of Appeal. The narrative does not, however, describe one particular incident and all that has flowed from it.

36. After Justice Wilson knew that he would be one of the panel of Judges hearing the appeal, he read, in preparation, the Court's file in respect of the appeal. He decided that he would speak to Mr F M R Cooke QC, one of the counsel for the respondent. The Judge now acknowledges that this was not the right way to have gone about raising an issue. Disclosures for the purpose of allowing others to consider the possibility of objecting to a Judge's sitting should be made to both or all parties and either in open Court or through the Court's normal means of communication with the parties, for example, via the Registrar.

37. A telephone call from Justice Wilson to Mr Cooke took place some time between the 13th and the 20th March. There is a lack of clarity about what exactly was said, and there are differences in recollection between the two people concerned. (This is one reason for the use of normal procedure, as just described).

38. Mr Cooke says that Justice Wilson explained that he was calling because he was due to sit on the appeal, and that he wanted to raise with Mr Cooke his relationship with Mr Galbraith. The Judge said that he explained that he was a close personal friend of Mr Galbraith, and that they shared in the ownership of a horse-stud. Mr Cooke cannot

[9] See note 1 above.

be sure of the precise terms used in relation to that second point. He thinks it was "horse racing" or perhaps "bloodstock" interests.

39. Mr Cooke said that he, personally, saw no difficulty with Justice Wilson sitting on the case. But the Judge emphasised that he wanted to make sure that Mr Cooke's client had no objection. Mr Cooke then suggested, and Justice Wilson agreed, that any communication of the client's view should be effected through the Registrar. Mr Cooke asked the Judge just what it was that he wanted him to tell his client. Mr Cooke says that the Judge then used words to this effect: "that we are good friends and have shared horse-racing interests. That's it."

40. Mr Cooke then spoke with his instructing solicitor and conveyed the terms of the discussion. He added that personal relationships between counsel and Judges were common. He was not sure what the shared interest in horses was, but he thought they owned one or more race horses together. Mr Cooke says that he told the solicitor that, in his view, there was no actual bias here, and there should be no concern of any perception of one.

41. The instructing solicitor spoke with Mr Radford. Some enquires were made – the results of which suggested there was no basis for concern about the Judge and his relationship with Mr Galbraith. Mr Cooke received an email saying that Mr Radford had no objection to Justice Wilson sitting on the case.

42. From Justice Wilson's perspective, there are some significant points to add here.

43. First, the Judge was firmly of the view that there was no conflict arising from his relationship – personal and business – with Mr Galbraith: he saw no connection between the issues before the Court and the business of Rich Hill Ltd. For that reason, he thought that it was not appropriate for him to make any formal disclosure through the Registrar. In his view, Judges should not sit on cases where the law regards them as having a conflict of interest; but it is also important that Judges should not be precluded from sitting because of an alleged conflict which does not, in reality, exist. So balancing those considerations, the Judge thought the best approach was for him to advise Mr Cooke informally of his involvement with Mr Galbraith. His purpose in doing so was to give Mr Cooke's client the opportunity of considering what he had said and of making further enquires, if it felt the need to do so.

44. Second, Justice Wilson is sure that he told Mr Cooke that he "shared in the ownership of a horse stud" with Mr Galbraith, and he believes that Mr Cooke would have inferred from that that the association was a business one, going beyond a shared ownership of some racehorses. There is thus a difference of view as to whether the Judge had conveyed that the relationship with Mr Galbraith involved no more than a shared hobby involving racehorses (Mr Cooke's recollection) or whether he had conveyed that it involved a shared business interest in a horse stud (the Judge's recollection). The Judge has given several reasons for his point of view, quoting from documents emanating from *Saxmere* and its advisers. However, I do not propose to enlarge upon these. They do not entirely resolve the difference in perceptions.

45. The appeal by *Disco*[10] was heard on 2, 3 and 4 April 2007. In essence, the appeal was about the validity of four decisions as to funding allocations made by the Wool Board between 1998 and 2002. The Wool Board was then a producer board, constituted by statute. It was disestablished in 2003 and *Disco* became its successor. *Saxmere* and other parties had challenged in the High Court the validity of the Wool

[10] The Wool Board Disestablishment Company

Board's decisions. The High Court found in favour of the *Saxmere* interests in respect of two of those decisions. *Disco* then appealed and there was a cross appeal by the *Saxmere* interests.

46. The judgment of the Court of Appeal was given on 15 August 2007[11]. The appeal by *Disco* was allowed, and the cross-appeal by the *Saxmere* interests was dismissed. All orders made by the High Court were set aside. The decision of the Court of Appeal was unanimous.

Complaint 1: Item 1: *Saxmere's* applications to the Supreme Court

47. *Saxmere* made an application for leave to appeal to the Supreme Court. Judgement was given on 12 November 2007[12]. The application for leave was dismissed. Justice Wilson was not one of the panel of three Judges who made the decision. Nor was the nature of his relationship with Mr Galbraith mentioned by the applicants, the *Saxmere* interests, or anyone else.

48. On 1 September 2008 the *Saxmere* interests filed an application in the Supreme Court seeking special leave to bring an appeal against the decision of the Court of Appeal. This was followed by an application for an extension of time within which to lodge the application just referred to. Extensive affidavits in support of each application were filed by Mr Radford. Both affidavits focus upon his discovery, some months after the Court of Appeal had delivered its decision, of further information about the relationship between Justice Wilson and Mr Galbraith.

49. On 7 November 2008, the Supreme Court issued its judgment,[13] granting leave to appeal.

Complaint 1: Item 1: The Supreme Court's decision of 3 July 2009 ("Supreme Court No. 1")

50. On 21 November 2008, a further affidavit (the third) by Mr Radford was filed in support of the *Saxmere* appeal. At the heart of his contentions is his view that "having engaged in the Court process I expected our case to be considered by judges who were indisputably independent." But his discovery that "Justice Wilson and Mr Galbraith share substantial business interests as well as sharing a friendship and horse racing passion" led him to the view that "I do not consider that justice has been done or been seen to be done in our case."

51. For his part, Justice Wilson sought and obtained the Court's approval to provide a statement in response to the affidavits that had been filed. The statement was dated 19 December 2008.

52. He said that he found it difficult to discern just what was being alleged against him. In particular, he says that it did not occur to him then that there might be a question of his being beholden to Mr Galbraith. Indeed, he believes he became aware of this being an issue only when, later on, he read the transcript of the first hearing, and saw that counsel for *Saxmere* had disavowed any such suggestion.

53. In the final paragraph of his statement, Justice Wilson says: "I would welcome the opportunity to confirm on oath the contents of this statement, and to be questioned on

[11] See note 1 above.
[12] See note 3 above.
[13] See note 2 above.

them." He says that he made this offer in an attempt to ensure that all relevant information was available to the Court and to counsel for *Saxmere*.

54. When Justice Wilson was preparing that first statement a discussion took place with Mr Galbraith about the draft. According to Mr Galbraith, he said that he thought that the Judge should indicate that the shareholders' contributions were unequal. Mr Galbraith's view was that, if there was to be a statement, then it should include everything. Mr Galbraith also said that his own adviser, Mr James Farmer QC, shared that view. For his part, Justice Wilson had a different recollection. He does not think that Mr Galbraith expressed this view to him, and that he would certainly remember it if he had. His own view was that it was not relevant to mention the disparity. And he was reluctant simply to submit the accounts, as they needed to be explained. Hence he made his offer to be questioned on oath.

55. On 3 March 2009 the Court heard arguments from counsel for the parties. It delivered its decision on 3 July 2009 dismissing the appeal. Each of the five Judges gave a separate decision.

56. Using the test that was considered to be relevant in these circumstances and applying it to this case, the Court found that a fair-minded lay observer would not reasonably have apprehended that the personal and business relationship in question might affect the Judge's impartiality.

57. In the opinions delivered by some of the members of the Court it was noted that the result might be different if the circumstances (which were not considered to be present here) were such that the Judge might be considered to be "beholden" to counsel. (Justice Blanchard at paragraph [25] and Justice McGrath at paragraph [11]).

Complaint 1: Item 1: The application for recall

58. On 28 July 2009, an application for the recall of the Supreme Court's No. 1 decision (dated 3 July 2009) was filed on behalf of the *Saxmere* interests. The grounds included a claim that the Justice Wilson was beholden to Mr Galbraith because of their financial interdependence and resulting obligations.

59. For his part, Justice Wilson sought leave from the Supreme Court to make a written response to the application. The Court granted him leave to make a statement. In this second statement (dated 28 August 2009) Justice Wilson referred to each allegation. In particular:

    (a) Justice Wilson described the informal arrangements which existed between Mr Galbraith and him. He stated that when the accounts for Rich Hill Ltd for the year to 31 March 2007 became available – some time after the hearing in the Court of Appeal – they confirmed his view that his and Mr Galbraith's contributions to the company were approximately equal. He demonstrated that by saying that, as at the balance date, his contributions were approximately 6% less than Mr Galbraith's and that the difference represented less than 2.5% of the then value of the company's assets.

        (Justice Wilson has since said that he did not disclose the actual figures in the accounts because they were the confidential information of Mr Galbraith who did not wish them to be made public. The Judge also thought that the absence of beholdenment could readily be demonstrated by reference to a percentage difference, without disclosing the actual figures).

(b) Justice Wilson stated that, if the Court wished to see them, he would provide copies of all accounts – the company's and those for the three racehorse partnerships - along with evidence of the current market value of assets. However, because those documents contained confidential financial information of other parties, he asked for an order that their contents be kept confidential to the Court and counsel.

(c) Justice Wilson also noted that, because he did not wish to subject himself to similar allegations being made against him in the future, he had reached agreement with Mr Galbraith to sell to him all his (the Judge's) interest in Rich Hill Ltd. That sale was effected on 28 August 2009. The three horse partnerships were wound up as at 1 August 2009.

60. Prior to the completion of that second statement by Justice Wilson, he and Mr Galbraith discussed the position. Mr Galbraith thought that the Supreme Court's decision, especially what was said in paragraph [25], was serious and he repeated his view that the Court had to be told what the position was in respect of the imbalance in shareholder contributions. Mr Galbraith's adviser, Mr Farmer, agreed that the position was indeed serious and that if the Judge was not willing to act, then Mr Galbraith should convey his concern to the Chief Justice.

61. Nonetheless, Mr Galbraith read Justice Wilson's second statement and agreed with the Judge that he could properly support it. He did so, in a separate letter, in these terms: "I have read the statement and in respect of the matters of which I have personal knowledge, I confirm its correctness."

62. On 30 September 2009, the Supreme Court issued a Minute. It drew attention to the passage in Justice Wilson's statement to the effect that his contributions to Rich Hill Ltd were approximately 6% less than those of Mr Galbraith. It sought disclosure of the dollar amount of that differential.

63. On 22 October 2009, Justice Wilson provided a statement in answer to that Minute. In particular:

(a) Justice Wilson pointed out that than an imbalance in contributions would not of itself result in indebtedness, directly or indirectly, as between shareholders. (He has explained that he took the view that, both from a legal and an accounting perspective, an imbalance in contributions does not, of itself, create indebtedness between shareholders. Mr Galbraith may be legally entitled to recover any difference from the company, but not from the Judge.)

(b) Justice Wilson gave figures to demonstrate that his own contribution was $1,152,731 and that Mr Galbraith's contribution was $1,226,980. The difference is $74,249 or approximately 6%. He gave figures to show that the value of the land and buildings of Rich Hill Ltd was $2,955,000 (and $74,249 is 2.5% of that figure). The company's broodmares had a book value of $190,668, taking the asset value on the books to over $3 million. (The figure that he gives for his own contribution proceeds on the basis that he had, by agreement with Mr Galbraith, assumed exclusive responsibility for meeting all payments of principal and interest in respect of the company's debt to the bank, which then stood at $168,555. That figure, together with the amount standing to his credit in the shareholders' account, produces the total of $1,152,731. The Judge stated that this treatment was valid for legal and accounting purposes).

(c) Justice Wilson added that he had not included any figures in his previous statement because they are confidential information of another party, Mr Galbraith, who did not wish them to be made public.

64. Mr Galbraith said, in a separate letter attached to the Judge's statement: "I have read the signed statement of Justice Wilson dated 22 October 2009. I confirm the accuracy of what Justice Wilson says in that statement."

65. The hearing of the application for recall took place on 24 November 2009. The Court's judgment was delivered on 27 November 2009.

Complaint 1: Item 1: The Supreme Court's decision of 27 November 2009 ("Supreme Court No. 2")

66. The central focus of the Court's decision was on the discrepancy in the shareholders' contributions. It concluded that "the objective lay observer could reasonably consider that … the Judge was at the relevant time beholden to Mr Galbraith, and that this might affect the impartiality of the Judge's mind." The Court decided that the case of apparent bias was made out. It recalled its earlier decision, set aside the orders made in it and allowed the appeal.

Complaint 1: Item 1: Consideration of Conduct

67. I now consider the conduct of Justice Wilson against the background that I have described. There are two periods of time involved:

(a) what took place up to the time of the hearing of the *Disco* appeal[14] in the Court of Appeal; and

(b) what took place after that.

Prior to the Court of Appeal hearing

68. The Supreme Court's prime focus in its most recent decision[15] is with the view which an objective lay observer would take of the Judge's position. My concern, as Commissioner, is with the Judge's behaviour: how has he conducted himself? In examining that question, it is important to consider both the facts relevant to his position and the basis of his approach to the issues that they raised.

69. The Supreme Court has decided that Justice Wilson was significantly beholden to Mr Galbraith because of the degree of financial imbalance between them at the relevant time. The Judge accepts that finding, as he must. But as at the date of the hearing in the Court of Appeal, he saw things differently:

(a) the understanding between the Judge and Mr Galbraith was for there to be a rough level of equality between their respective contributions, with any imbalance being rectified over time;

(b) an imbalance in shareholder contributions, in the Judge's view, did not of itself create indebtedness between shareholders. Mr Galbraith would have been legally entitled to recover any difference in contributions from the company, but not from him, the Judge;

[14] See note 1 above.

[15] See paragraph 66 above.

(c) in any case, the level of imbalance between them at the time (as subsequently revealed by the accounts) was of no particular concern to the Judge (or, for that matter and in respect of that period, to Mr Galbraith);

(d) despite the reduction in the Judge's earnings consequent upon his judicial appointment and his decision to cease making monthly cash contributions to his shareholder's account, there were two other sources of payment available to him which he would use and which he said would have effect to restore the balance (those sources were known to Mr Galbraith and have been disclosed to me and Mr Gleeson);

(e) the Judge takes the view that too much reliance should not be placed on the accounts retrospectively. Further, they should not be considered in isolation. (He gave, as examples, items of expenditure he had incurred in relation to the house and gardens on the property which he and his family occupied, but which he did not claim from the company, as that would have been inconsistent with the spirit of his relationship with Mr Galbraith; further he gave as an illustration a foal owned by the company which had a 2008 book value of $28,174 but which was sold within a year for $360,000). It was because he considered that the accounts did not provide a comprehensive depiction of the business relationship that he had with Mr Galbraith that the Judge offered subsequently to present himself for questioning on oath by the Supreme Court and by counsel, rather than simply providing the accounts on their own.

70. The interview of Mr Galbraith which I subsequently conducted along with Mr Gleeson reflected and confirmed the views of Justice Wilson, as set out in the preceding paragraph, in respect of the period leading up to the hearing in the Court of Appeal.

71. There is another consideration which I should mention. This aspect of this complaint assumes that it was the very size of the venture between the Judge and counsel which, in itself, gave rise to a perception of apparent bias. That view finds a reflection in a passage in the Supreme Court No. 2 decision.[16] The Court refers[17] to the purchase by Rich Hill Ltd of a one-third interest in an adjoining property.[18] The purchase was agreed in late 2006 and the price payable by the company was to be funded in full by borrowing from the company's bank upon the security of the existing mortgage – supported by the existing guarantee from both shareholders. The Court notes[19] that:

> "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."

The Court regards that as an additional reason for raising an issue of perception about the Judge's impartiality.

72. The Judge and Mr Galbraith's own perspective was that the additional borrowing of the full amount of the company's share of the price could readily be accomplished within the security margin under the existing Rich Hill mortgage. Payments in respect of the borrowing would be funded by agistment payments, from small-scale cattle farming and from the selling of horses. From their point of view, there was equality in

[16] See note 2 above.

[17] At paragraph [18].

[18] See paragraph 34(n) above.

[19] At paragraph [18].

the funding of the purchase, and the means of making payment in respect of the loan were clear. The fact that they believed that the company was not in any way under stress and was readily able to meet its obligations was important to their approach.

After the Court of Appeal hearing

73. After the hearing in the Court of Appeal, the complainant and its current solicitor continued their investigation of Justice Wilson, his relationship with Mr Galbraith and his circumstances generally. Some of the information they discovered is included in the narrative I have already set out above (for example, the acquisition of a share in the adjoining property). Other points will be referred to in separate items of complaint that I will mention later.

74. For his part, Justice Wilson stated that, once the hearing in the Court of Appeal was over, he had no reason to reconsider his limited disclosure to Mr Cooke. However, that changed in September 2008, when the *Saxmere* interests filed an application for special leave to appeal to the Supreme Court and an application seeking an extension of time in which to lodge that application.[20] Justice Wilson says that at the time of the hearing in the Court of Appeal and subsequently – until he saw those applications and affidavits – the notion that he may have been beholden to Mr Galbraith did not cross his mind. Further, when he did have to consider the allegation, his view was that there was no element of being beholden at the time of the Court of Appeal hearing.

75. The Judge reiterated that if, in his mind, he had been beholden to Mr Galbraith at the time of the Court of Appeal hearing, then he would not have sat on the appeal. And if later on, when he came to file his statements in the Supreme Court, he had come to the view that there had been beholdenment, he would have acknowledged it.

76. Justice Wilson discussed the allegation as to his relationship with Mr Galbraith with his legal advisers. They posed three questions: were there any personal guarantees by one party in respect the other?; were there any personal loans between them?; and was the company under any financial stress, so that one party may have to bail it out? The Judge answered all three questions in the negative. The same questions were put separately to Mr Galbraith. He also answered them in the negative. It was against that background that the Judge completed and submitted his first statement (dated 19 December 2008) to the Supreme Court.[21]

77. To back-track a little, after the hearing in the Court of Appeal, there were some developments in relation to Rich Hill Ltd which should be mentioned.

78. First, settlement of the purchase of the one-third interest in the adjoining block of land was settled on 1 June 2007.[22] That was prior to the delivery of the Court of Appeal's judgment on 15 August 2007. Neither Justice Wilson nor Mr Galbraith attaches any particular significance to this. The purchase was fully funded by an interest-only loan; it did not therefore create any imbalance in the shareholders' account; the company's resources were sufficient to meet the financial obligations in respect of the loan.

[20] See paragraph 48 above.

[21] See paragraphs 51 to 53 above.

[22] See paragraph 34(n) above.

79. Second, during the latter part of 2008 Mr Galbraith began to undertake improvements to the company's additional block, as part of the process of converting at least part of it from a dairy farm to a property to be used as a horse stud. This involved new wooden fences, tree planting and other improvements. It was part of a common intention that this should be done at some stage, but Mr Galbraith proceeded with it largely at his own initiative. Mr Galbraith says that he had always been somewhat more active in the management of the horse business and in the land required for it than Justice Wilson. The Judge was certainly interested in these aspects of the venture, but somewhat less actively so.

80. At all events, the two participants were broadly aware that there was a growing disparity in their respective contributions towards the company's operations. It was agreed between them that that would be ameliorated by the company paying interest at commercial rates to Mr Galbraith on the amount of the imbalance. That was to be back-dated to 1 April 2007. Justice Wilson also suggested that he should take over sole responsibility for paying all amounts falling due under the company's bank loan of approximately $650,000 – that is, the loan referred to in paragraph 34(n). But this did not eventuate: it was overtaken by other events.

81. Justice Wilson maintained – and still maintains – his view that there had been no element of beholdenment at the time that he made his brief disclosure to Mr Cooke prior to the Court of Appeal hearing. The Judge's counsel asked him, between the subsequent hearing in the Supreme Court on 3 March 2009 and the delivery of the judgment on 3 July 2009, whether he remained comfortable with the adequacy of his disclosure to the Court. The Judge responded that he was because he remained sure that there was no beholdenment in 2007 and neither the Court nor the appellants had taken up his offer to make himself available for questioning.

82. Nonetheless, towards the end of 2008 and into 2009, the Judge was becoming concerned about the growing imbalance in the shareholders' accounts. He still believed that there was no beholdenment, because of the actual or pending arrangements referred to in paragraph 80 and because external finance would have been available to him if needed to bridge any discrepancy.

83. The proceedings in the Supreme Court had attracted the attention of journalists and commentators. There was significant publicity given to the Judge's position. What was written was sometimes adverse. In addition, the Judge was concerned about future awkwardness, if Mr Galbraith were to appear before the Supreme Court (as he would continue to do) and if they continued to share their business interests together. For his part, Mr Galbraith entertained the same concerns.

84. Justice Wilson and his counsel conferred about the position. Together – and in consultation with Mr Galbraith – they concluded that the most suitable course was for Justice Wilson to sell out his interest to Mr Galbraith. The sale was settled on 28 August 2009. The Judge transferred all his shares in Rich Hill Ltd to Mr Galbraith, and resigned as a director. The three horse partnerships, in which Justice Wilson was a participant, were also wound up as at 1 August 2009.

85. The Judge believed that this was a necessary outcome. He did not wish to sell, and he believed that the allegations made against him were unfounded. But he said: "I was not prepared to subject myself to the possibility of similar allegations being made against me in the future."[23]

[23] Justice Wilson's statement to the Supreme Court dated 28 August 2009, paragraph 17.

86. I set out my conclusions regarding Justice Wilson's conduct in Section 5 below. I now deal with seven other items of complaint put forward by Mr Radford.

Complaint 1: Item 2: Actual bias?

87. The initial complaint, submitted by Mr Radford's original lawyer, drew attention to the fact that Mr Galbraith appeared for *Disco* only before the Court of Appeal, and not earlier before the High Court, nor later before the Supreme Court. Then this was said:

> "This gives rise to the appearance that Mr Galbraith was retained after the composition of the bench of the Court of Appeal was determined. This is a matter of considerable concern to the complainant."

88. The counsel for Justice Wilson contend that this is an allegation of actual bias on the part of the Judge. They also say that it casts a serious slur on the integrity of Mr Galbraith.

89. In fact, Mr Galbraith was instructed to act for *Disco* in 2006. As noted above, the composition of the Court of Appeal to hear *Disco's* appeal was determined in March of 2007. Justice Wilson did not ask to be included on the panel of Judges.

90. Mr Radford and his current lawyer acknowledge that there is no validity in this item of the complaint. They did not pursue it.

Complaint 1: Item 3: The Judicature Act 1908

91. Section 4(2A) of the Judicature Act 1908 provides that:

> "A Judge may not undertake any other paid employment or hold any other office … unless the Chief High Court Judge is satisfied that the employment or other office is compatible with judicial office."

The prime purpose of this provision, enacted in 2004, was to facilitate the appointment of part-time Judges.

92. *Saxmere's* lawyer has ascertained that, in fact, no applications for approval have ever been made, by anyone, to the Chief High Court Judge. That led to the contention by the complainant that an evident failure on Justice Wilson's part to obtain approval raised issues as to his judicial independence or impartiality.

93. Justice Wilson says that, at the time of his appointment, it did not occur to him that he should seek approval in respect of his existing directorship in Rich Hill Ltd, a private company.

94. The Judicature Act provides no penalty for a breach of this provision. There are also questions about its applicability in circumstances such as these.[24]

95. Assuming, though, that this provision did apply to Justice Wilson and his directorship in Rich Hill Ltd, the question arises whether an inadvertent breach of the requirement might warrant consideration of his removal as a Judge. I can see no realistic basis for suggesting that that could be so.

Complaint 1: Item 4: Judicial Conduct Guidelines

[24] See paragraphs [9] and [10] of the decision referred in note 2 above.

96. On two separate occasions, counsel for *Saxmere* drew the attention of the Supreme Court to guidelines governing judicial conduct. First, reference was made to the *Guide to Judicial Conduct* published by the Council of Chief Justices of Australia. Subsequently, reference was made to the *Guidelines for Judicial Conduct*. The latter is a New Zealand version. It was formulated in 2003, but only publicised (as a result of enquires made by counsel for *Saxmere*) on the Courts of New Zealand website in November 2009. (Other guidelines from other jurisdictions have since been mentioned to me, as well.) It was contended by *Saxmere* that Justice Wilson had not complied with the requirements of these documents, and that that amounted to culpable conduct.

97. It does seem that knowledge of the Australian Guide and (especially) the New Zealand Guidelines was not widespread in New Zealand in 2007. Justice Wilson said that he was not aware of the existence of either document at the time of his appointment, nor were they drawn to his attention.

98. Paragraph 3 of the New Zealand Guideline says:

> "… the guidance provided in these statements and comments is not intended to be a code of conduct. It does not identify judicial misconduct. It is advice. The advice is designed to assist judges to make their own choices informed by a checklist of general principle and illustrations drawn from experience."

99. It would be erroneous to regard any divergence from the points set out later in the Guidelines as amounting to a breach. There can be no such thing as a breach of advice. Advice is either followed or not. In any event, the law in New Zealand as to when a personal or business relationship between Judge and counsel should result in the disqualification of a Judge from sitting has now been stated in the Supreme Court decisions No's. 1 and 2.

Complaint 1: Item 5: The website

100. Mr Radford drew attention, in the first of his affidavits, to a page from the website *www.richhillstud.co.nz*. He believed that it can be inferred from what is shown that the Judge was using his position to promote a commercial enterprise. The page shows a photograph in which the Judge and Mr Galbraith appear along with two others associated with Rich Hill Thoroughbreds Ltd. The emblem for the enterprise is depicted as being "Rich Hill Thoroughbreds". Mr Galbraith is a director and shareholder of the company bearing that name, Justice Wilson was not. Aspects of the text on the website, as it then stood, are misleading.

101. Justice Wilson did not know of the existence of this item. He had not been consulted about it. He discovered it only when he saw it mentioned in Mr Radford's affidavit. As soon as he did see it, he asked for it to be removed from the website, and it was. For his part, Mr Galbraith confirmed that he was also unaware of the content of that page until it was drawn to his attention at this point.

Complaint 1: Item 6: The Muir case

102. The complainant refers to the fact that Justice Wilson was one of the three Court of Appeal Judges who heard the case of *Muir v CIR*.[25] It involved an allegation of apparent judicial bias. The claim is that the Judge must have been aware, in light of that case, that the extent and method of his disclosure in the *Saxmere* case failed to meet the standards laid down in the *Muir* case.

103. A comparison of the dates of hearing and the dates of judgment in the two appeals shows that there was a period when the outcome of both cases was under consideration by the Court at the same time. Justice Wilson says that he recalls reflecting on this. The *Muir* case reinforced his view that he did not have a conflict in the *Saxmere* case.

104. In the *Muir* case, the Court found that the Judge was not conflicted, even though he had an interest in the same type of business (forestry) and an association with the authors of a report produced to the Court. By contrast, the *Saxmere* case did not involve any connection with Justice Wilson's business interests in horses, and his association was with counsel rather than a witness. Thus, from Justice Wilson's perspective, he had made a distinction based on significantly different facts. There is no apparent inconsistency.

Complaint 1: Item 7: Other cases

105. The complainant has referred to two other cases on which Justice Wilson has sat and in which Mr Galbraith has appeared as counsel. It is claimed that there is an inconsistency in the Judge's approach to disclosure of interests.

106. I have prepared a schedule of the appeals on which Justice Wilson has sat and in which Mr Galbraith has appeared as counsel. The schedule is attached at the end of this decision. It includes the two cases referred to by the complainant Mr Radford, as well as cases referred to in Complaint 2 and includes a brief description of the extent and nature of the disclosure made in each case. I see no issue arising in respect of any of these cases.

Complaint 1: Item 8: The position of a third party

107. The complainant has claimed that Justice Wilson failed to disclose his state of knowledge of his close friend Mr Keith Sutton's directorship of Wool Equities Ltd, a company that was said to be a prime beneficiary of the Court of Appeal's decision. In an affidavit sworn on 25 September 2008 by Mr Radford he describes discussions that he had had with Mr Sutton.

108. In Justice Wilson's first statement (dated 19 December 2008) to the Supreme Court, the Judge says:

> "19. I do not know why Mr Radford referred to certain discussions with Mr Keith Sutton. Mr Sutton and his wife are personal friends of my wife and me. I did not however have any knowledge of those discussions with Mr Radford until I read the affidavits for the first time in the week commencing 24 November."

109. The Judge had said that at the time the *Saxmere* appeal was before the Court of Appeal in 2007 he was aware that Mr Sutton held a number of directorships but did not know he was a director of Wool Equities Ltd. Paragraph 19 of his statement

[25] [2007] 3 NZLR 495.

(which he offered to the Court to confirm on oath) supports the conclusion that he did not, at the time of the Court of Appeal hearing, know of any connection between Mr Sutton and Wool Equities Ltd.

SECTION 3: COMPLAINT 2

Complaint 2: The background

110. A letter was received at the Commissioner's office on 24 December 2009. This dealt with matters relevant to my preliminary examination of Mr Radford's complaint, but in some aspects, went beyond the scope of that complaint. As the letter satisfied the criteria for a complaint under the Act, I informed the writer that I proposed to treat it as a separate complaint and he agreed. I had not intended to name Sir Edmund Thomas as the writer, now treated as a complainant, but his identity and the substance of his complaint have now been published in the media, on and from 10 April this year.

111. Sir Edmund is a retired Judge of the Court of Appeal who has sometimes sat on the Supreme Court. Sir Edmund played no part in any of the *Saxmere* proceedings before the Courts, nor was he present at any of the hearings. The information that he says he has about the conduct and position of the main participants was largely obtained indirectly – that is, by a second or third hand account – or derived by way of inference.

112. Sir Edmund's principal source of information was Mr James Farmer QC. They had a number of discussions and email exchanges. Mr Farmer's role was that of adviser to Mr Galbraith. Mr Farmer obtained his information from Mr Galbraith and also from Mr Colin Carruthers QC, an adviser to Justice Wilson. On at least one occasion Mr Farmer also spoke to Justice Wilson. Mr Farmer had turned to Sir Edmund, a friend of longstanding and an experienced former Judge, as someone with whom he thought he could discuss, frankly and in confidence, a sensitive situation.

Complaint 2: The information

113. Sir Edmund's complaint makes four specific allegations (which I will return to). He bases these allegations on what he describes as "the information" which he puts forward as a factual narrative, derived from his understanding of events.

114. In the compilation of his complaint, Sir Edmund has drawn his appreciation of what happened from indirect – that is, second or third-hand – sources. I thought it important to ask the primary sources for their own, direct views and to comment upon what Sir Edmund had to say.

115. During the course of my preliminary investigation, I interviewed, with Mr Gleeson's assistance, a number of people. In the present context, questions were put, in particular, to Justice Wilson, Mr Carruthers and Mr Galbraith about the information contained in Sir Edmund's complaint. Significant differences emerged. I will not deal with the issues extensively, but will give a few examples:

    (a) "Mr Carruthers had tried and tried to persuade Justice Wilson to disclose the indebtedness." Mr Carruthers and Justice Wilson each said that is not correct.

    (b) "Justice Wilson telephoned Mr Galbraith following the hearing and said he had been 'vindicated'." Justice Wilson said that he made no such claim; he didn't see it as a vindication at all. Mr Galbraith says that he does not think that he had indicated anything of that kind as being the Judge's view of the result.

    (c) "As the position had worsened since 2007, Mr Galbraith had increased his demands for payment from Justice Wilson." Mr Galbraith said that is wrong: he had not been making demands for payment. He said that he and the Judge

did have discussions about how their respective contributions were to be managed, but he had never sought repayment. Justice Wilson said that Mr Galbraith had never made a demand for repayment, as none was due to him.

(d) "A guarantee had been completed … which Mr Galbraith had signed, guaranteeing Justice Wilson's facility at the bank for approximately $1 million. The guarantee also had not been disclosed". This may make it appear that Mr Galbraith has directly guaranteed the Judge's obligation to the bank. The position, on the documents, is different: see paragraphs 34(l) and (m) above. The Judge did refer to the existence of the guarantee in his second statement to the Supreme Court, at paragraph [11].

(e) There is a reference to a tripartite discussion between Mr Galbraith, Mr Carruthers and Mr Farmer, and to three basic points which were agreed. All three of them deny there was ever a meeting or a joint discussion between them, though a number of separate conversations did take place. There is also disagreement as to the three points said to have been agreed. For example, Mr Galbraith and Mr Carruthers each say that they did not advocate a rehearing for *Saxmere*; neither Mr Galbraith nor Mr Carruthers held or expressed the view that Justice Wilson had no option but to resign.

116. Mr Farmer has said to me that he does not accept the validity of much of what Sir Edmund presents as factual material. He says that Sir Edmund has drawn inferences and applied value judgments to what he had been told which were not warranted.

Complaint 2: Item 1: The allegations

117. Sir Edmund's complaint contains four specific allegations about Justice Wilson. The first is:

> "(1) Giving the Chief Justice a "categorical assurance" that he was not "beholden" to Mr. Alan Galbraith QC when, although he may not have known the exact amount, he was and knew he was substantially indebted to Mr. Galbraith."

118. Justice Wilson did have conversations with the Chief Justice about his position. In a discussion which took place shortly before the Supreme Court delivered its judgment on 3 July 2009, he described his position and gave her what he said was an unqualified assurance that he was not beholden to Mr Galbraith at the time of the Court of Appeal hearing. (The word "unqualified" may be equated with "categorical".)

119. On 17 August, Justice Wilson wrote to the Chief Justice in some detail about his position. Notably, he said that at the time of the Court of Appeal hearing in April 2007:

> "I understood that my level of financial support for the company was approximately the same as that for Mr Galbraith… I did not owe Mr Galbraith or [Rich Hill Ltd] any money. The company owed us each substantial sums... There was simply no issue between us about the shareholder current accounts during this period."

And also:

> "When I read the various affidavits in support of the Saxmere application to the Supreme Court, they did not raise in my mind any element of concern about my position as an investor in [the company], or about how the company was funded. I therefore did not address that aspect in my statement."

120. On the same day, Mr Galbraith wrote separately to the Chief Justice. He had read the letter from Justice Wilson and said, among other things:

> "That, given the agreement between Justice Wilson and myself as to the division of responsibility for the bank funding, there was no material disparity or any issue of concern between myself and Justice Wilson in respect of financial contributions to Rich Hill Ltd at the time of the Saxmere hearing."

And:

> "The disparity which subsequently arose from the capital improvement to the additional land bought by Rich Hill Ltd was dealt with by agreement that Rich Hill Ltd would pay interest to me. I am certain that neither of us became fully conscious of that disparity until well into 2008, shortly before the financial accounts became available in October 2008."

121. Dealing with the first allegation set out in paragraph 117 above, Justice Wilson did, in fact, give a "categorical assurance" to the Chief Justice that he was not "beholden" to Mr Galbraith. But is it the case that "he was and knew that he was substantially indebted to Mr Galbraith"? The quotations set out above suggest that that question may be answered in the negative. For one thing, neither Justice Wilson nor Mr Galbraith accepts that the Judge "was substantially indebted to Mr Galbraith". There may have been some differences in their respective balances, but neither thought it material or that it could give rise to "any issue of concern" between them. Further, they did not accept the claim that one was beholden or indebted – directly or indirectly – to the other.

122. However, the use of the word "was" in the first allegation requires that the issue be addressed from an objective viewpoint as well as a subjective one. That aspect will be dealt with in the conclusions set out in Section 5 below.

Complaint 2: Items 2 to 4

123. The other three allegations made by Sir Edmund are as follows:

> "(2) Failing to fully disclose a patently relevant matter to the Court (and to the litigant) when required to disclose his interest to the Court for the purpose of determining whether the informed and fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the issue
>
> (3) Following the delivery of the Court's judgment dated 3 July 2009, failing to inform the Court (and the litigant) having regard to paragraph 25 of the judgment that he was in fact substantially indebted to Mr Galbraith.
>
> (4) Failing to make the disclosure referred to in the foregoing subparagraph knowing that Saxmere Company Ltd ("Saxmere") was either entitled to apply to recall the Court's judgment of 3 July and obtain a rehearing or, at the very least, that it was entitled to the opportunity to apply to recall the judgment and argue that it was entitled to a rehearing."

124. I regard paragraph (2) as being the most serious of these allegations. What occurred following the delivery of the Supreme Court No. 1 judgment involved a period of uncertainty and confusion, but it ultimately resulted in the further appeal – the application for recall – and the Supreme Court No. 2 decision that followed.

125. Each of these allegations uses the word “failing”. That word may also be addressed from a subjective and an objective point of view. An appreciation of Justice Wilson’s subjective point of view can be assessed from the narrative set out earlier in this decision. But an objective view of his conduct requires additional consideration. I will not, at this point, set out any further analysis of how the information that I have gathered in the course of my preliminary examination is to be assessed in relation to both aspects of these three allegations. The issues which arise will be reflected in the conclusions which are set out in Section 5.

SECTION 4: COMPLAINT 3

126. This complaint was lodged with the Commissioner's Office on 10 December 2009. The complainant has no connection with the *Saxmere* litigation.

127. The complaint is brief and not well articulated. It makes broad general allegations. No factual material is provided in support of those allegations.

128. I did give consideration to dismissing the complaint under section 16(1)(d) of the Act on the ground that: "the complaint is…vexatious…". As I said earlier[26] that may be arguable. However, the substance of the complaint does concern the conduct of a Judge and it is the conduct I have considered in the context of the two complaints described in Sections 2 and 3 above.

129. Thus I will not dismiss the complaint. Instead I will treat it as being subsumed within the conclusions set out in Section 5.

[26] See paragraph 26(b) above.

SECTION 5: CONCLUSIONS IN RESPECT OF ALL COMPLAINTS

130. I now state the overall conclusions that I have reached in respect of all complaints.

131. First, a preliminary point: The fact that Justice Wilson and Mr Galbraith are personal friends might, perhaps, lead some people to consider that that, of itself, is a disqualifying factor which should have resulted in the Judge's recusal. The reason for that not being so is clearly set out in the Supreme Court No. 1 decision.[27]

132. Second, I consider that the particular items of complaint set out in Complaint 1: Items 3 to 8 above[28] (and Item 2 was not pressed) do not, individually or collectively, warrant the exercise of the power to recommend the appointment of a Judicial Conduct Panel under section 18 of the Act.

133. Turning to a consideration of Justice Wilson's conduct in relation to the hearing of the Saxmere case in the Court of Appeal, I make this point: if the only subject of the complaints made about Justice Wilson's conduct was his acts and omissions prior to and during the Court of Appeal hearing, then it would have been open to me to conclude that the matter should be dealt with by a reference to the Head of Bench (under section 17 of the Act) rather than by a recommendation that a Judicial Conduct Panel should be appointed (under section 18).

134. I cannot, however, say the same when there are added aspects of the complaints made, insofar as they concern the conduct of Justice Wilson in the period leading to the delivery of the Supreme Court No 1 decision.[29] In that respect I note these points:

(a) as a Judge making disclosure to a Court (his own Court) Justice Wilson's obligations were strict and were to disclose promptly whatever might be relevant;

(b) there are questions, in that regard, about the adequacy of the Judge's disclosure; about the relative importance of his duty to the Court and his wish to preserve the confidentiality of others; and about whether a continuing change in circumstances after a defined point in time should be disclosed;

(c) Justice Wilson's own views on his obligations as to disclosure to the Court, formed in good faith, are important. But there are unresolved questions of fact about the advice and encouragement that the Judge received from different quarters as to the disclosure that he should make. Specifically, there is some difference in the recollections of Mr Galbraith and the Judge. There are also differences about what Mr Farmer said to Sir Edmund and on what basis he said it;

(d) the terms of the judgments in the Supreme Court No1 decision (notably paragraph [25] of the judgment of Justice Blanchard[30]) and the terms of the Court's Media Release[31] show that the Court was under a significant misapprehension about the nature, scale and finances of the jointly owned

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[27] See note 2 above: McGrath J at paragraphs [101] and [102].

[28] Paragraphs 91 to 109 above.

[29] See note 3 above.

[30] Paragraph [25] includes this passage:

> "[Rich Hill Ltd] is in fact, save for a breeding operation confined to one or two horses a year, a passive land holding vehicle and does not appear to have any significant indebtedness. The three broodmare partnerships would appear to any observer to be small in scale and quite unremarkable."

[31] The Media Release stated "[The Judge's] involvement with Mr Galbraith was restricted to a jointly owned landholding company which owned part of the land of the stud and itself bred one or two horses a year."

company, Rich Hill Ltd. To what extent this misapprehension was the fault of the Judge, and to what extent his offer to answer questions on oath excuses him from blame, are contestable matters of judgment.

It is hard to see how a preliminary examination can take these issues further. On further inquiry, and in the exercise of its judgment about Justice Wilson's conduct and the context in which it occurred, a Judicial Conduct Panel may well form a view which is favourable to the Judge, but a different view is possible.

135. Applying the provisions of section 18(1) of the Act to the conclusions that I have set out in paragraphs 133 and 134 above, it is my opinion that:

(a) An inquiry into the alleged conduct is justified; and

(b) If established, the conduct may warrant consideration of the removal of the Judge.

I will now recommend to the Attorney-General that a Judicial Conduct Panel be appointed to inquire into the conduct that is relevant to Complaints 1, 2 and 3.

7 May 2010

Sir David Gascoigne, KNZM
Judicial Conduct Commissioner

Schedule of Cases on which Justice Wilson sat and in which Mr Galbratih appeared as counsel:

Appeal Cases:

	Case Name	Date of Hearing	Date of Judgment	Disclosure*
1.	*Ngai Tahu Property Ltd v Central Plains Water Trust* [2009] NZSC 24	13 and 14 October 2008	26 March 2009	Before this appeal was heard the *Saxmere* interests had commenced their proceedings seeking to revisit the judgment of the Court of Appeal. Justice Wilson thought it prudent to disclose the relationship to the parties, even though he did not think it created a conflict. He did so by means of an email to the Registrar which was then sent to the parties. All parties confirmed they had no objection to the Judge sitting.
2.	*New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54	12 February 2009	28 May 2009	Justice Wilson did not make disclosure in this case as he was confident that all counsel were aware of his business relationship with Mr Galbraith and did not see it as creating a conflict.
3.	*APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93	9 and 10 June 2009	26 August 2009	On 3 March 2009 Justice Wilson issued a Minute advising his relationship with Mr Galbraith and other counsel and his previous work as Counsel for the Crown regarding the allocation of scampi. All parties confirmed they had no objection to the Judge sitting.

*On 1 September 2009, the Chief Justice issued a memorandum to counsel in each of these cases, drawing their attention to the issues raised in the *Saxmere* appeal and asking them to consider any issues this raised for their clients. Each of the counsel advised that it did not raise any issues of concern.

Leave to Appeal Cases:

	Case Name	Date of Hearing	Date of Judgment	Disclosure
4.	*New Zealand Exchange Ltd v Bank of New Zealand* [2008] NZSC 54	7 July 2008	23 July 2008	Justice Wilson did not make a disclosure in this case as he was confident that all counsel were aware of his business relationship with Mr Galbraith and did not see it as creating a conflict.
6.	*Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 48	n/a (decided on papers)	25 May 2009	Justice Wilson did not make a disclosure in this case as he was confident that all counsel were aware of his business relationship with Mr Galbraith and did not see it as creating a conflict.