LCRO 23/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the National Standards Committee
BETWEEN	**ZA** Applicant
AND	**YB** Respondent

DECISION – RECUSAL

The names and identifying details of the parties in this decision have been changed.

Recusal application

[1] At the start of the review hearing in October 2015 Mr [ZA] requested an adjournment, and asked me to recuse myself from this matter and three other applications for review made by Mr [ZA] which were heard the same day.[1] Mr [ZA] said he wanted to advance recusal application through counsel. The evidence upon which Mr [ZA] relied was a finding I had made in another decision on review, LCRO XX/2013 that his complaint had not been made in good faith and was vexatious. Mr [ZA] also requested a transcript of the review hearing.

[2] I declined to recuse myself on the day of the hearing on the basis that I did not consider Mr [ZA] had made out grounds. However, I expressly left the opportunity open to Mr [ZA] to pursue applications in respect of any of the four matters, through counsel if he wished, and to request a copy of the record of hearing if he wanted to.

[3] On Friday [Day Month Year] the High Court issued its decision in [redacted] which determined Mr [ZA]'s application for judicial review of my decision in LCRO XX/2013.

[1] LCRO XXX/2013, XX/2013 and XXX/2014.

The High Court confirmed the substance of the decision on review. The findings that the complaint was vexatious and not made in good faith were not disturbed, but the costs orders made against Mr [ZA] on review were quashed. His Honour did not regard it as productive to order the LCRO to reconsider the award of costs or the application for recusal, either of which was "likely simply to prolong this unfortunate series of events".

[4] As the High Court has not ordered reconsideration of that application for recusal or the decision on costs, this Office is functus officio. LCRO XX/2013 is closed.

[5] The High Court's comments clarify that the passing of a deadline imposed by an LCRO does not preclude late filing by a party. If late-filed correspondence may affect the filing party's rights, receipt of it should be recorded and addressed in the decision. Practically, a filing deadline is unlikely to be effective if the decision in question is not ready to sign when the deadline expires, as was the case with the costs decision in [redacted] Thus my failure to record receipt of Mr [ZA]'s late-filed correspondence did not accurately document an event that followed the passing of the deadline.

[6] That evening Mr [ZA] sent an email to this Office under the subject heading "All [ZA] matters",[2] asking that I be recused from any review involving him on the basis that the "High Court has upheld that Ms Threhser [sic] unlawfully ignored my recusal application" in LCRO XX/2013. Mr [ZA] said he advanced "the same recusal grounds in relation to any extant [ZA] matters currently before" me, and requested a "teleconference to discuss, audi alterem partem and basic natural justice refers".

[7] Further requests followed in a similar vein. A range of allegations including dishonesty, fraud and corruption were made.

[8] This Office issued a Minute on 8 April 2016 (the 8 April Minute) providing Mr [ZA] with clear direction on how he could advance matters of concern to him. The 8 April Minute refers to the High Court decision in [redacted] noting that while the decision on review was generally confirmed:

> The High Court was critical of [my] failure to consider costs submissions and a recusal application that Mr [ZA] filed after the deadline for filing submissions had passed, saying that aspect of the decision under review, "was not a candid portrayal of the situation".

[9] The 8 April Minute provided Mr [ZA] with a detailed pathway and simple timetable to enable him to progress his application on identified LCRO files if he chose to, at which point any broader application he might make could be considered on the basis of evidence and

[2] Email [ZA] to LCRO (4 March 2016).

submissions. The LCRO indicated that if Mr [ZA] proceeded with application for recusal, that could be dealt with expeditiously by consideration of the application on the papers in the course of a review, and either a decision dealing with the substantive review and recusal being reported pursuant to s 213, or by the file simply being reallocated to another LCRO. The LCRO repeated that it remained open to Mr [ZA] to engage counsel, if he wished to, to make submissions on his behalf. The LCRO envisaged "concise and focused argument" that "can effectively be advanced by way of written submission without requirement for a formal hearing".

[10] The timetable provided for Mr [ZA] to file a formal application in relation to any of his current applications for review by 29 April 2016, identifying the LCRO file number, parties' names and date of any review hearing attended by Mr [ZA]. Any such application was to be served on the other party to the review application, and that party would have 10 working days to respond. Any response would be served on Mr [ZA], who was to have five days in which to file a reply. The LCRO noted that "response and reply are not an opportunity to raise fresh issues". With respect to any more general request for recusal the LCRO directed that "any such argument would have to be supported by binding legal authority directed to that particular point". Noting that Mr [ZA] had attended a number of review hearings conducted by me (at that stage there were nine such LCRO files), the LCRO recorded that in the absence of application for recusal on any particular file, reviews will continue to be conducted, with decisions made and reported in accordance with the Act.

[11] Mr [ZA] corresponded further, objecting to the LCRO's directions.

[12] The LCRO issued a further Minute on 21 April 2016 confirming the directions in the Minute of 8 April, and noting that "as with any such application, the applicant should present it without delay" (the 21 April Minute).

[13] Mr [ZA] responded by requesting a week's extension from 29 April in which to file his application(s) for recusal. The LCRO granted an extension to 6 May.

[14] Mr [ZA] sent an email in the evening of 6 May under the subject heading "Seventh application for recusal of Deputy Thresher" attaching a letter of the same date addressed to me personally and headed "ALL cases where Dr [ZA] is an applicant or respondent". Mr [ZA] referred to this file, and two others out of the possible nine. Mr [ZA] identified another LCRO file that had not been allocated to me, and protested the LCRO's direction to provide specific file numbers on the basis that precludes him "from obtaining the full relief" he seeks. Mr [ZA] asked me to disclose the number of every "proceeding" involving him that is currently allocated to me, and set out eight "grounds for permanent recusal in all matters" as follows:

1. You wilfully covered up my recusal application in the XX/13 matter;

2. You did not allow me through my counsel, Dr [XC] to advance a recusal application against you at the 23 October 2015 [YB] hearing;

3. You resisted my obtaining a record of that hearing;

4. You have thereafter continued to wilfully ignore my recusal applications, inter alia, 4 March 2016 5:30 pm, 22 March 2016 9:04 pm, 30 March 2016 1:12 pm, 28 April 2016 1:37 pm, all of which I incorporate into this further application;

5. You outrageously issued a decision in **[redacted]** notwithstanding there being extant recusal applications against you;

6. You have acted disingenuously insofar as you have feigned ignorance as to my a priori recusal applications in requiring me to provide specific file numbers were: (A) it is your office that allocates individual officers to particular files so I do not know in which files you have been allocated but you do have that information; and (B) anyway, it was obvious that I wanted you recused in all matters involving me as it is nonsensical to posit that I would not accept a biased decision maker in some cases but would accept them in others;

7. You have been severely chastised by the High Court in [2016] NZHC 361 so there is de minimis an appearance of bias;

8. You are engaging in a pattern of misconduct towards my goodself.

[15] Mr [ZA] listed a number of domestic and overseas authorities on which he sought to rely;[3] said he wished to file affidavit evidence in support, a synopsis of submissions and have his advocate appear at a hearing to argue the matter. Mr [ZA] observed the LCRO's timetable appeared not to have provided for him to attend to those matters, apologised for "the slight tardiness", and indicated he awaited a response.

[16] As Mr [ZA] had identified this file as of concern to him, a redacted version of his letter of 6 May was provided to Mr [YB] and he was invited to identify any issues he wished to raise arising from it.

[17] On 10 May Mr [YB] said there were no matters he wished to raise.

[18] On 11 May 2016 I issued a direction to enable Mr [ZA] to further his application that I recuse myself from determining this application for review, and the related reviews that I

[3] Section 27 New Zealand Bill of Rights Act 1990, the Statutes of Westminister; the First 1275, the Magna Carta 1297, the Observance of Due Process of Law Statute 1368, the Criminal and Civil Justice Statute 1351, the Criminal and Civil Justice Statute 1354, the Petition of Rights 1627, *Auto Workers Flint Federal Credit Union v Kogler* 188 N.W.2d 184 (1971), *Czuprinysnski v Bay Circuit Judge* 166 Mich. App. 118 (1988), *Feuerman v Overby* 636 So.2d 179 (Fla.App.3 Dist.1994), *Lamendola v Grossman*439 So.2d 960 (Fla.App. 3 Dist 1983).

heard from Mr [ZA] on in October 2015 (the 11 May direction). The 11 May direction also provided for Mr [ZA] to pursue a more general application if he so wished. As Mr [YB] is a party to this review, the direction provided for him to be involved as Mr [ZA]'s application progressed. Mr [ZA] was directed by 1 June 2016 to collate and file a complete recusal application supported by the evidence, written submissions, authorities, and any overseas materials upon which he relies in support. Mr [YB] was directed to file any reply by 29 June 2016, and Mr [ZA] had until 20 July to file a complete submission in reply, or to confirm he intended to file nothing further. Copies of the 8 and 21 April Minutes were also attached, and the parties were advised that the timetable was to be strictly adhered to.

[19] On 23 May Mr [ZA] asked for an extension from 1 to 15 June to accommodate his court commitments. Mr [YB] objected to an extension, saying the 11 May direction was clear, should be adhered to, and that the matter needs to be finally resolved. Given the latitude already extended to Mr [ZA], no further extension was granted.

[20] Mr [ZA] emailed on 24 May that he "cannot comply", referring to pressure of work, and setting out his court commitments in some detail. Mr [ZA] considered the requirement for the parties to adhere to the direction of 11 May was "a breach of natural justice", because he was not provided with Mr [YB]'s opposition, he had not been allowed to argue it, and in any event, there was no prejudice. Mr [ZA] asked for Mr Maidment to consider his request for a further extension of time, because he had given previous directions, and Mr [ZA] questioned why I was now issuing directions.

[21] Although a direction allowing a short extension was being prepared, it was overtaken by events before I could sign it, when Mr [ZA] advised on 26 May that he now was able to comply with the 11 May directions.

[22] In the evening of 1 June 2016 Mr [ZA] sent an email under the subject heading "LCRO XX/13 + XX/14 + XXX/14 [ZA] v [YB] AND ANY AND ALL OTHER cases where [redacted] [sic][4] [ZA] is an applicant or respondent" attaching some documents.

[23] On 2 June the Registry advised Mr [ZA] that the email itself appeared to be incomplete and not all of the attachments had been received. He was invited to resend the email and all of the attachments listed therein.

[24] In the evening of 3 June 2016 Ms [WD] of Mr [ZA]'s chambers forwarded what I take to be Mr [ZA]'s full application for my recusal with all supporting documents, in compliance with the 11 May direction.

---

[4] [redacted]

[25] That information was provided to Mr [YB] so he could comment if he wished to. When no response was received from Mr [YB] by 6 July, Registry staff asked if he wished to respond, and, as the associated reviews relates to his conduct, to advise if he needed more time. Mr [YB] confirmed on 11 July 2016 that he would not be providing any response, saying he was "getting confused with the various [ZA] matters", and that he thought he had previously advised (as he had before Mr [ZA] had filed his recusal application) that he would not be providing any response.

[26] As Mr [YB] did not provide a response to Mr [ZA]'s application, there was nothing for Mr [ZA] to reply to, and his further input was not sought.

[27] Mr [ZA] requested copies of what he describes as "ex parte" communications between this Office and Mr [YB]. On 1 August 2016 Registry staff provided copies of "items of administrative type correspondence" that had not previously been provided to Mr [ZA].

[28] I have carefully considered all of the materials Mr [ZA] has supplied in the course of this review in pursuit of my recusal, including the collation of materials provided by Ms [WD] on 3 June. I am also conscious that Mr [ZA] has concerns about exchanges of administrative correspondence between this Office and Mr [YB] in which Mr [ZA] was not involved.

[29] As to the latter, I understand it is not the Registry's usual practice to copy every administrative item of correspondence to the parties. Section 208(1) of the Act requires this Office to provide "all evidence and information received or ascertained under section 207(1)" to every party. That is "evidence and information" that is the product of the LCRO's investigations and inquiries. It is difficult to see how routine administrative emails about whether or not Mr [YB] wishes to participate in Mr [ZA]'s recusal application fall within s 208(1). However, any request by a party for identified administrative correspondence will be considered, as Mr [ZA]'s has been, and may be granted, as Mr [ZA]'s has been.

[30] I turn now to Mr [ZA]'s application that I recuse myself from determining any review involving Mr [ZA] as a party, including this review which relates to his conduct. Mr [ZA]'s email dated 1 June 2016 says:

> I refer to the minute of 11 May 2016, which has improperly been limited to Files XXX/13, XX/14 and XXX/14 *[ZA] v [YB]* and for what I believe to be the eighth time now affirmed that I moved to permanently recuse Ms D Thresher from acting in any and all files where I am a party (and not just Files XXX/13, XX/14 and XXX/14 *[ZA] v [YB]*).
>
> My submissions for permanent recusal are that she has acted with actual or apparent bias towards me, generically per Saxmere or Muir or specifically per Greymouth or Bassett such that permanent recusal in all matters is warranted.

Even assuming arguendo that there has been no bad faith[1], then in any event, the appearance of justice means she must recuse.

I rely on my grounds in my application and add further that she has ignored my multiple requests for information in what files she is acting, continues to ignore my requests for a hearing and more recently improperly refused me an extension of time and in doing so communicated ex parte with Mr [YB] and/or denied me access to his response and/or denied me the right of final reply and/or did so on the basis of exigency when she has in fact been delayed resolution of the files noted in her Minute for years (looking at the bigger picture) or months (from the hearing that was held) and so that was completely disingenuous.

I ATTACH:

1. *[ZA] v [YB] XX*/2013 16 March 2015 Costs Determination,
2. [redacted] [2016] NZHC [redacted]
3. March 2015 communications (A);
4. March 2015 communications (B);
5. 4 March 2016 communications,
6. 22 March 2016 communications,
7. 30 March 2016 communications,
8. 28 April 2016 communications,
9. A 24 May 2016 Minute
10. *Saxmere Co Limited v Wool Board Disestablishment Co Ltd* (No 1) [2010] 1 NZLR 35 (SC);
11. *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA);
12. *Greymouth Petroleum Ltd v Solicitor-General* HC Wellington CIV 2009-485-1425, 3 February 2010;
13. *Official Assignee v Bassett* HC Auckland CIV 2005–404–4380, 8 June 2007;
14. *Auto Workers Flint Federal Credit Union v. Kogler* 188 N.W.2d 184 (1971);
15. *Czuprynski v. Bay Circuit Judge* 166 Mich.App. 188 (1988);
16. *Feuerman v. Overby* 636 So.2d 179 (Fla.App. 3 Dist. 1994);
17. *Lamendola v. Grossman* 439 So.2d 960 (Fla.App. 3 Dist. 1983);
18. § 27 of the New Zealand Bill of Rights Act 1990;
19. The Statutes of Westminster; Of the First 1275;
20. The Magna Carta 1297;
21. The Criminal and Civil Justice Statute 1351;
22. The Civil and Criminal Justice Statute 1354;
23. The Observance of Due Process of Law Statute 1368; and
24. The Petition of Rights 1627.

I trust it is not necessary to provide LCRO XXX/2015 as it cannot possibly be in dispute that she rendered a substantive decision in that matter on 14 April 2016?

I still await to hear from her as to which files she is acting in, and when a hearing can be held to argue the recusal. Per her statutory obligations I trust it will be most expeditious.

Thank you.

[1] As to which I do note that in her unlawful costs decision against me she misled at ¶ [17] because, whilst factually accurate, she omitted that submissions on costs were in fact filed by me, and so gives the wrongful impression that I did not make submissions on costs, whereas ¶ [28] is an outright lie, because in fact my submissions on costs were never considered. Your Office then disgracefully sought to cover this up as per the March 2015 communications. It all has a rather foul odour.

[31] Mr [ZA]'s correspondence of 1 June was provided to Mr [YB] under cover of a letter dated 8 June 2016, in which he was advised that he had not been provided with some of the attachments. It was explained that attachment 1 was the unpublished costs decision quashed by the High Court on judicial review in [redacted] and that attachments 3 and 4 were emails between Mr [ZA] and this Office relating to that review process. As that review did not involve Mr [YB], and the LCRO must conduct reviews in private pursuant to s 206(1) of the Act, this Office did not provide copies of those materials to Mr [YB]. Mr [YB] was reminded that he had until 29 June 2016 in which to respond, or to indicate that he did not intend to respond, to Mr [ZA]'s concerns. A copy of that letter was also sent to Mr [ZA] by email on 8 June 2016, and he responded asking why the "LCRO's ex parte communications with Mr [YB]" had not been provided to him. It transpired that Mr [ZA] was referring to administrative correspondence, which has since been provided, as mentioned above.

[32] In his submissions in support of his request that I recuse myself Mr [ZA] relies on s 27 of the New Zealand Bill of Rights Act which assures every person of the:

> … right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[33] Mr [ZA] also relies on *Saxmere* or *Muir* "generically" and on *Greymouth* or *Bassett* "specifically", "such that permanent recusal in all matters is warranted".

Saxmere Company Limited v Wool Board Disestablishment Company Limited [2009] NZSC 72 (Saxmere)

[34] Recusal was considered by the Supreme Court in *Saxmere*, which held that, subject to waiver or necessity, the test for recusal is whether:

> … 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 … two steps are required … [and] the fair-minded lay observer is presumed to be intelligent and to view matters objectively (Blanchard J at [3] – [10]).

[35] The Supreme Court observed that the:

> … principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal… be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.

[36] The Court referred to the Australian case of *Ebner* in which the question was referred to as one of real and not remote possibility, not probability, and noted that:

> The High Court of Australia also warned against any attempt to predict or inquire into the actual thought processes of the judge.

[37] The following two stage interrogation of the grounds for recusal was articulated:

> (a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
>
> (b) Secondly, there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

Muir v Commissioner of IRD [2007] NZCA 334 (Muir)

[38] The broad issue in *Muir* was whether Venning J should have recused himself on an application for substantial non-party legal costs against the appellant, Dr Muir. Dr Muir contended that the costs application should have been determined by another judge, because he considered Venning J had a direct financial interest in the litigation out of which the case arose, and the judge fell within the relevant legal test for "apparent bias".

[39] In his judgment, Venning J had recorded detailed criticisms of Dr Muir's evidence, describing it as "less than satisfactory" in some respects, lacking candour, not credible, not forthright and saying he had given "a number of implausible explanations". His Honour was also critical of Dr Muir's approach to his discovery obligations. Costs were reserved, with the Commissioner seeking a substantial amount from the plaintiffs, as well as from Dr Muir, who was not a party to the litigation. His Honour declined to recuse himself.

[40] The Court of Appeal set out the "principles which govern this area of the law" referring to the necessity for impartiality, the duty to sit, presumptive and apparent bias. Section 27 of the New Zealand Bill of Rights Act 1990 was referred to as encompassing "the proposition that judges must be independent and impartial".

[41] Their Honours noted the counterbalance on the requirement of independence and impartiality provided by the "judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law". The duty was described as helping to:

> … protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceeding

[42] The Court repeated the comments of Mason J in *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352:

> [I]t is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

[43] Presumptive and apparent bias were mentioned, with reference again being made to the articulation of the fair minded lay observer test for apparent bias in *Ebner.*

[44] Their Honours reviewed a range of international and domestic authorities, concluding that the preferred approach was to consider "how something might reasonably be regarded by the public, in the form of the reasonably informed observer", which emphasises the "undesirability of idiosyncratic and personal assessments" even though "ultimately, [judges] themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them". The reasonable member of the public is described as "neither complacent nor unduly sensitive or suspicious".

[45] The touchstone was emphasised as being "the ability to bring an impartial mind to bear on the case for resolution". It was noted that did not require "the total absence of preconceptions in the mind of the judge"; that if a judge were "obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad", and that "[i]nterests, points of view, preferences, are the essence of living".

[46] The Court of Appeal stated four broad principles:

(a) a judge should not decide a case on purely personal considerations;

(b) there should not reasonably be room for a perception that the judge will decide the case on anything but the evidence in front of him or her;

(c) a judge must be in a position to consider all potentially relevant arguments;

(d) there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged judge's perception is warped in some way.

[47] Their Honours emphasised the need to get the facts straight before launching into speculation by the memorable phrase: "there is nothing worse than the murder of a beautiful theory by a gang of brutal facts".

[48] Speaking of apparent bias, the Court noted that it:

> … has to be accepted that there are occasions when a judge's prior warnings might lead a reasonable person to question whether he would remain impartial in any subsequent proceedings. That said, this could be relevant to the question of judicial bias only in the rarest of circumstances.
>
> [99] The reasons for this are straightforward. It is common sense that people generally hate to lose, and their perception of a judge's perceived tendency to rule against him or her is inevitably suspect. As Kenneth Davis has said, "almost any intelligent person will initially assert that he wants objectivity, but by that he means biases that coincide with his own biases" (Administrative Law Treatise (2 ed Vol 3 1978) at 378). Every judicial ruling on an arguable point necessarily disfavours someone – judges upset at least half of the people all of the time – and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling. But it is elementary that the judge's fundamental task is to judge. Indeed, the very essence of the judicial process is that the evidence *will* instil a judicial "bias" in favour of one party and against the other – that is how a court commonly expresses itself as having been persuaded.
>
> [100] The general approach that judicial disqualification is not warranted on the basis of adverse rulings or decisions is also justified by appropriate concerns about proper judicial administration. There is huge potential for abuse if recusal applications were permitted to be predicated on a party's subjective perceptions regarding a judge's ruling.
>
> [101] We know of no common law jurisdiction which accepts that a judge's adverse rulings are disqualifying per se. The problem is rather whether an aggrieved litigant should be permitted to seek recusal on the basis of rulings that are either so patently erroneous or so disproportionate as to suggest that something untoward must have motivated them. Even a statistical approach cannot obtain here: most judges will be able without any difficulty to recall trials in which regrettably they have had to endorse every single point which has been advanced against a particular party.

[49] The Court of Appeal repeated the importance of a judge maintaining an open mind, and mentioned in passing cases in United States jurisdictions where, once a disqualification motion has been filed, it must be disposed of by another judge, so that the judge is not "a "judge" in his or her own cause". Although those cases were mentioned, they were not argued before the Court, and Mr [ZA] has provided no authority to support the proposition that that is an approach that has been adopted in New Zealand.

Greymouth Petroleum Limited v The Solicitor General HC Wellington CIV-2009-485-1425

[50] Greymouth applied for Mackenzie J to recuse himself because of his involvement as counsel in earlier litigation involving Greymouth. His Honour considered it appropriate to reconsider any preliminary view formed earlier, if an application for recusal is made. He referred to the applicant's expectation that the recusal application would be dealt with before judgment was delivered, and the unfortunate sequence of events in that matter, namely that the application for recusal had been made, but not dealt with, before judgment was

delivered. Although there was nothing deliberate or conscious on the part of the Judge in that omission, the circumstances were such that his Honour considered a "fair minded lay observer might reasonably apprehend that justice had not been seen to be done, by reason of the fact that the application for recusal was not dealt with before judgment was delivered". His Honour confirmed his judgment was recalled, directed a rehearing and recused himself.

Official Assignee v Bassett HC Auckland CIV-2005-404-4380

[51] Associate Judge Doogue was asked to recuse himself, having issued and recalled judgment, then attended to a series of procedural steps, leaving an issue between the parties to be determined.

[52] In the recalled judgment, his Honour had made comments to the effect that he did not regard Mr Bassett as being a satisfactory witness, and was unable to accept his account of the facts. His Honour gave prominence to the inconsistencies between Mr Bassett's evidence and such records as were available to him, and drew adverse conclusions about Mr Bassett as a witness, which were attributable to the fact that he had accepted that he would concoct fraudulent accounts to conceal the true position.

[53] His Honour also concluded that Mr Bassett had demonstrated a lack of candour in giving evidence on one aspect of the case. Mr Bassett's explanation was described by the Judge as "improbable". His Honour referred to the conclusions he had expressed in "fairly firm language" as the basis on which a reasonable person might perceive he would not be able to approach matters again on the basis that Mr Bassett and his colleague were potentially unreliable witnesses.

[54] His Honour did not think it would be defensible for him to embark upon a further hearing on the matter, given his previous assessment of Mr Bassett in particular, and declined to hear the matter further.

Overseas authorities

[55] Mr [ZA] also relies on a number of other instruments and excerpts of decisions by American courts, all of which predate *Saxmere, Muir, Greymouth* and *Bassett*, in some cases by a significant margin. What the American decisions appear to indicate is that some American lawyers in some circumstances, in some states can apply for a judge to be permanently disqualified from hearing or determining cases involving particular counsel. *Czuprynski*, for example, appears to refer to an exclusive procedure under the MCR, which I take to be the Michigan Courts Rules, by which a chief circuit judge may disqualify a trial

judge on the basis of bias or prejudice against an attorney. I am not aware of any such rule in this jurisdiction.

[56] As American decisions are not binding New Zealand law, and the other instruments are of considerable antiquity, it is more productive to rely on the more contemporary domestic authorities, *Saxmere* in particular.

Consideration

[57] Mr ZA's first submission in support of my permanent recusal from all reviews to which he is a party is that I have acted with actual or apparent bias towards him. *Saxmere*, *Muir*, *Greymouth* and *Bassett* are relied on as options to support permanent recusal in all matters.

[58] It is also relevant to note the comments of the Court of Appeal in *Taylor v The Queen* [2010] NZCA 628 to the effect that even an adverse finding of credibility will only in the rarest of circumstances call for recusal. That case mentions ad hominem attacks on judicial officers and opponents, baseless flimsy claims of judicial misconduct and vilifying those who carry out their statutory duties.

[59] Pursuant to *Saxmere*, step one is to establish the facts, in the sense of the actual circumstances which have a direct bearing on the suggestion that I was or may be seen to be biased. This factual enquiry should be rigorous. Mr [ZA] cannot lightly throw the "bias" ball in the air.

[60] Mr [ZA]'s list of concerns begins from allegation that I "wilfully covered up" his application for my recusal in the *[ZA] v [GR]* review. There was no cover up. My view was that the deadline for filing had passed. The High Court has explained why that was not the correct approach in that case, and this Office abides that decision.

[61] Mr [ZA]'s second concern is that I did not allow him to advance recusal application through counsel at the review hearing in October. Mr [ZA] did not bring counsel to argue the application. I heard Mr [ZA] on his concerns and did not consider he had made out grounds. I explained to Mr [ZA] that it was open to him to make a recusal application after the review hearing. It was for him to decide whether he wished to do that with or without the assistance of independent counsel. The prospect that Mr [ZA] may have received advice from independent counsel over the intervening time has not been discounted.

[62] Mr [ZA]'s third concern is that I resisted his request for a record of the review hearing. I explained to Mr [ZA] at the review hearing that if he requested a copy of the hearing record maintained by this Office, that request would be considered, leaving it open

to any other LCRO to consider that request if I were recused. As LCROs are required to conduct reviews in private it may not always be appropriate to provide audio to parties. If someone else had taken over, it is entirely possible that LCRO would have conducted a second review hearing. The first hearing may have been nugatory. Mr [ZA] requested a transcript of the review hearing some time later. This Office does not produce transcripts of review hearings for parties. As mentioned above, a copy of the audio has been provided to both parties in the course of this review.

[63] Mr [ZA]'s fourth concern is that I have "continued to wilfully ignore" multiple recusal applications made by Mr [ZA]. That is not correct. Mr [ZA] refers to eight recusal applications, the first of which is the application disposed of by the High Court in its decision in [redacted]. It is not correct to describe that application as having been ignored. As mentioned above, I took the view that once the deadline for filing costs submissions had passed no further documents would be accepted for filing. The High Court decision explains why that was not the correct approach in the circumstances of that review.

[64] The second application is the one Mr [ZA] made at the start of the review hearing of this matter in October 2015. Again, it is not correct to say that application was ignored. I considered it on the day, and explained to Mr [ZA] that I did not consider he had made out grounds. I left it open to him to make further application, through counsel if he so chose. During a break in the hearing I checked the *Saxmere* test and when the hearing resumed I repeated my view that grounds had not been made out.

[65] Mr [ZA] next raised concern after the High Court released its decision in [redacted] in [Month Year]. That brings me to the balance of Mr [ZA]'s requests for recusal, which are dealt with below. It is not correct to say that all or part of Mr [ZA]'s series of requests that I recuse myself has been ignored. I have considered everything he has raised in the course of this review, and have also attempted to address the substance of the concerns he has raised without reference to a particular application for review. I have given serious thought to relinquishing conduct of this review and any other involving Mr [ZA] as a party, to the other two LCROs. For the reasons discussed in more detail below, neither course is appropriate.

[66] Mr [ZA]'s next concern is that I "outrageously issued a decision in LCRO 155/15 notwithstanding there being extant recusal applications against" me. Although that is not the correct file reference number, it is possible to discern the decision to which Mr [ZA] refers by the date he mentioned. Mr [ZA] cannot say he was not aware I had conduct of that review, because he attended the review hearing, which occurred before the hearings in this matter. Mr [ZA] had ample opportunity to make a recusal application in respect of that file. He could have done so after receiving the directions issued to him in April and May 2016. The

LCRO's direction indicated that if no recusal application was received identifying a particular LCRO file by parties and number, reviews would continue to be conducted in accordance with the Act. As no recusal application has been made in respect of that file, there is no application to be determined. Reviews cannot be delayed indefinitely in case a party wishes to raise objection to the decision maker.

[67] Mr [ZA]'s next concern is that I acted disingenuously by feigning ignorance of his "a priori recusal applications" by requiring him to provide specific file numbers. As the putative applicant, it is for Mr [ZA] to identify which matters are of concern to him and to advance application accordingly. This Office cannot be expected to guess.

[68] I am not aware of any other jurisdiction in which a party dictates which files are allocated to which decision-maker. The system does not function that way. The mere fact that Mr [ZA] wants me to stop making decisions on matters involving him is not a ground for recusal. There is a process to be gone through first which relies on Mr [ZA], as the applicant, identifying what he says might lead me to decide a review other than on its legal and factual merits, and articulating the logical connection between the review and the deviation he fears. Although my conscience is alert to the potential for recusal in appropriate circumstances, it is not for a decision-maker to predict and formulate applications for their own recusal.

[69] Mr [ZA]'s next concern is that I have been "severely chastised by the High Court" in [redacted] so there is de minimis an appearance of bias.

[70] This is where step two of the *Saxmere* test comes into play: whether any of the High Court's comments might lead a fair-minded lay-observer to reasonably apprehend that I might not bring an impartial mind to the resolution of the instant case. In this case the question is whether Mr [ZA]'s conduct fell below a proper professional standard. It is not a question of whether I believe my own actions in conducting this review to be pure. I am to consider how others would view my conduct.

[71] It will be noted from the High Court decision that appearance by this Office was excused. The practical effect is that the Office was not represented, did not tender evidence or submissions. It adopted its usual position of abiding the decision of the Court. For any number of good reasons, the LCRO does not enter the arena. Our voices are not among those that are heard. Our decisions must speak for themselves. That is a position I would expect a fair-minded lay observer to reasonably apprehend when reading the High Court's decision.

[72] Most of the High Court's comments highlighted by Mr [ZA] arise from differences of perspective. The High Court does not carry out a de novo inquiry on judicial review, and in any event, differences of opinion are an inevitable aspect of law. One would have to be pretty thin skinned to take his Honour's comments as severely chastising rather than simply recognition that a different view is available. The bulk of the comments Mr [ZA] highlights do not fit within Mr [ZA]'s description. However, there is one comment relating to a failure to acknowledge receipt of submissions, which was described as "not a candid portrayal of the situation". I cannot envisage any decision-maker would wish to be associated with a lack of candour in maintaining the record.

[73] The question is whether that remark is so tainting that a fair-minded lay-observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the instant case.

[74] A fair-minded lay observer is a person who is "neither complacent nor unduly sensitive or suspicious"[5] and who is an "ordinary sensible member of the public with appropriate knowledge of all relevant circumstances including the general workings of the legal system".[6] Further, the risk of "tainting", as I have described it, must be "real and not remote" in terms described in *Ebner*. By these standards, I am satisfied that I am not compromised in my impartiality, or in my capacity to discharge my duties conscientiously as a Review Officer.

[75] As suggested in the Guide to Judicial Conduct (referred to in *Muir*), and the section concerning Disqualification Procedure, I have consulted with others, including the equivalent of my "judicial colleagues", and they do not consider that the judgment of Palmer J in [redacted] is compromising of my independence in my Review Officer function in relation to files in which Mr [ZA] is a party, or otherwise.

[76] The issue of practicability, and the effective use of scarce resources, is also relevant. A substantial part of the workload of this Office involves Mr [ZA] as a party. Relinquishing conduct of all reviews involving him as a party would have a number of undesirable consequences, not least of which would be a reduction in the pool of decisions-makers available to determine a disproportionate number of the applications for review before this Office which involve Mr [ZA] as a party. Mr [ZA] has sought recusal of other LCROs.[7] His requests for recusal must therefore be addressed with a significant degree of robustness or he will run short of LCROs.

---

[5] *Saxmere* at [98].
[6] *Saxmere* at [38].
[7] LCRO XXX/2010 and LCRO XX/2011.

[77] Relinquishing conduct of all reviews to which Mr [ZA] is a party would impose an unfair burden on the other two LCROs, and would be inconsistent with the statutory duty on an LCRO to conduct reviews.

Bias

[78] The essence of Mr [ZA]'s application is that actual or apparent bias on my part jeopardises the appearance of justice.

[79] The authorities on recusal suggest a level of context may be relevant to consideration of this issue. So, by way of context, other than by Mr [ZA]'s involvement with this Office, I have never met, and do not know Mr [ZA]. The *[ZA] v [GR]* review was the first decision I made involving Mr [ZA] as a party. Mr [ZA] relies on a mixture of misapprehension and misdirection. It is a misapprehension to say that this Office is obliged to disclose to a party which files have been allocated to which LCRO, that a full application for recusal of an LCRO cannot be determined on the papers and that this Office is required to provide all administrative correspondence to all parties. Considerable latitude has been extended to Mr [ZA] in respect of this review, although I accept that may have contributed to Mr [ZA]'s and Mr [YB]'s concerns about delay.

[80] What is absent from Mr [ZA]'s recusal application is any real evidence to support a logical connection between the concerns he expresses, and my ability to be independent and to bring an impartial mind to determining this or any other review.

[81] I am reasonably confident that brings me to the final concern expressed by Mr [ZA]: that I am engaging in a pattern of misconduct towards him. There is no such pattern.

[82] In the circumstances Mr [ZA]'s application is declined.

DATED this 31st day of August 2016

_____

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr [ZA] as the Applicant
Mr [YB] as the Respondent
Ms [VE] as a Related Party
The XX Standards Committee
The New Zealand Law Society