PRIVILEGED AND CONFIDENTIAL

IN THE MATTER OF A COMPLAINT BY LPF GROUP LIMITED TO THE JUDICIAL CONDUCT COMMISSIONER ABOUT THE CONDUCT OF THE CHIEF JUSTICE

OPINION

Introduction and summary of my principal conclusions

1. I am asked to advise LPF Group Limited (LPF) on the following questions arising from the recent proceedings in which a funding entity of LPF was granted permission to intervene in the Supreme Court:

    a. the merits of its complaint dated 14 November 2017 to the Judicial Conduct Commissioner regarding the conduct of the Chief Justice of New Zealand, the Right Honourable Dame Sian Elias;

    b. whether the Chief Justice should have recused herself in accordance with the Supreme Court's Recusal Guidelines;

    c. whether the Commissioner's decision dated 19 January 2018 properly addressed the complaint.

2. I am asked to apply English law and practice. I cannot advise on New Zealand law and practice, but I understand from those instructing me that it is not materially different so far as the relevant issues are concerned.

3. My opinion may be summarised as follows:

a. In expressing provisional conclusions on the legality of the litigation funding agreement between PVL and the funding entity, in circumstances where the parties had not had an opportunity to make submissions on that question or to adduce any relevant evidence, the Chief Justice acted unfairly according to the English law principles of natural justice.

b. English law would have required the Chief Justice to declare to the parties that her husband was the chairman of IAG New Zealand Limited (IAG NZ) and a director of its parent company, Insurance Australia Group Limited (IAG), that her husband was a shareholder in IAG, and that she, her husband and two children had an indirect interest in IAG NZ, in order to enable the parties to make an application that she recuse herself. Such application, had it been made, ought to have succeeded as a matter of English law.

c. The Supreme Court that heard the appeal in the proceedings did not meet the standards of impartiality required of courts under English law.

d. On the assumption that substantially the same standards apply in New Zealand, the Chief Justice ought to have recused herself.

e. The Commissioner's preliminary examination of the complaint was fundamentally flawed.

The essential background

The proceedings

4. LPF's complaint arose out of the Chief Justice's judgment in *PricewaterhouseCoopers v Walker & Scutter (as liquidators of Property Ventures Ltd and other companies)* [2017] NZSC 151. PVL brought proceedings against PwC, PVL's auditors, and the directors of PVL. The estimated loss suffered by PVL, as pleaded, was between $256.9 million and $302.7 million up to July 2010 (paragraph 14 of the Supreme Court's judgment). There was also a potentially very substantial claim for interest. The proceedings were funded by SPF No 10 Ltd (SPF), a wholly owned subsidiary of LPF, pursuant to a litigation funding agreement. SPF

subsequently acquired by assignment both the secured debt and security rights over PVL's assets under a general security agreement.

5. PwC applied to the High Court for the proceedings to be stayed on the grounds that the combined effect of the litigation funding agreement, the assignment and the security agreement, taken together, was that SPF had effectively taken an assignment of PVL's bare cause of action against PwC, and that this amounted to an abuse of process in accordance with the principles laid down by the Supreme Court in *Waterhouse v Contractors Bonding Limited* [2013] NZSC 89.

6. PwC did not, however, at any stage challenge the legality of the litigation funding agreement.

7. Brown J and the Court of Appeal dismissed the application on the grounds that PVL's cause of action had not been assigned to SPF.

8. PwC appealed to the Supreme Court. SPF was granted permission to intervene in the appeal, which was heard on 16 March 2017. The dispute between PVL and PwC was settled before judgment was given. By a memorandum dated 4 September 2017, Counsel for the various parties to the appeal, including counsel for SPF, informed the Supreme Court of the settlement as between PwC and PVL. The memorandum stated that a decision of the court on the appeal could affect the proceedings against some or all of the remaining defendants, and that the first defendant and fourth defendant had supported PwC's application in the High Court. The respondents submitted that the decision of the Court of Appeal, affirming the decision of the High Court, was a sufficiently clear exposition and application of the relevant principles and informed the court that they did not seek a judgment. PwC, on the other hand, submitted that it was appropriate that the court should issue a judgment as the appeal had been fully argued and the issues involved were of wider public interest.

The decision of the majority of the Supreme Court

9. The majority of the Supreme Court (Glazebrook, Arnold, O'Regan and Ellen France JJ) agreed with PwC that judgment should be delivered. Their reasons for doing so were that the proceedings remained afoot against other defendants, some of whom had

supported the delivery of judgment; one of the defendants had filed a memorandum in the High Court supporting PwC's application and reserved his right to be heard in relation to the application and any appeal; and delivery of the judgment would cause no prejudice to the respondents (paragraph 4). The majority held that, in the light of certain undertakings given by SPF regarding (i) the exercise of control over the proceedings under the terms of the security agreement and (ii) the distribution of the proceeds of the litigation, the concern that the transactions in question may have amounted to an assignment of a bare cause of action fell away (paragraph 91). It would therefore have allowed the appeal only to the limited extent that it would have required the undertakings to be recorded in a legally enforceable document between SPF and the liquidator and filed in the High Court and served on PwC (paragraphs 94-96).

10. The majority recorded in its judgment that counsel for PwC had not argued that the litigation funding agreement on its own amounted to an abuse of process; that he accepted that litigation funding is permitted under the Supreme Court's decision in *Waterhouse*; and that he did not ask the court to review the appropriateness or otherwise of the litigation funding agreement (paragraph 54). The focus of the majority's judgment was therefore on whether, taking account of the undertakings, the arrangements as a whole amounted to the assignment of a bare cause of action.

The decision of Elias CJ

11. Elias CJ dissented on the question whether judgment should be given and was unable to come to any final conclusion on whether or not the appeal would have been allowed. It is necessary for the purposes of this Opinion to set out her reasoning and conclusions in some detail. There is an initial statement of the Chief Justice's reasons at paragraphs 99 to 113 whose principal elements were as follows.

    a. PwC's concession that the litigation funding agreement was unobjectionable should not be determinative (paragraph 100).

    b. It was well-arguable that the litigation funding agreement was contrary to law (paragraph 100).

c. The litigation funding agreement extended the scope of what was considered to be permissible in *Waterhouse* (paragraph 101).

d. The appeal raised three subsidiary points of real difficulty which also rendered the case unsuitable for determination following settlement (paragraph 103). The first two points concerned the undertakings, which the Chief Justice thought were immaterial because, among other reasons, the rights acquired by SPF under the security agreement were irrelevant to the question whether a bare cause of action had been assigned (paragraphs 103-106). The third point was that, on the view the Chief Justice took of the case, it would have been necessary to consider the liquidator's statutory power to assign a cause of action (paragraph 107).

e. The judgment on the application did not concern a point of statutory interpretation or question of law likely to recur and where there was evident public interest in authoritative resolution (paragraph 109).

f. The effect of the arrangement in the present case extended the scope of litigation funding, despite the fact that the court was not invited to extend or revisit *Waterhouse* (paragraph 111).

g. There were unsatisfactory aspects of the application which made it an unsuitable vehicle for further consideration of *Waterhouse*. These included that PwC did not claim that the litigation funding agreement was contrary to public policy and that the proceedings ought to be stayed on that account, a concession which the Chief Justice thought extended *Waterhouse* and which she would not want to endorse without full argument (paragraph 112).

h. It appears that the dominant reason why the Chief Justice thought that judgment should not be given was that it would be treated as an extension of *Waterhouse* (paragraph 113).

12. Having stated why she would have declined to give judgment, the Chief Justice went on to explain in considerable detail over the course of eight pages at paragraphs 114-135 why she would not accept the concession that the litigation funding agreement

was not contrary to public policy. The Chief Justice began by considering *Waterhouse* and the policy of the law. Noting that maintenance and champerty are torts that still exist in New Zealand, she said that the policy of the law was not only to protect those who obtain litigation funding from unscrupulous funders but also to protect the other party from litigation conducted with the assistance of persons working for their own interests, and not in order to give lawful professional aid (paragraphs 114-121). She observed that in *Waterhouse* the Supreme Court had identified control of the litigation, the funder's profit share and the role of the lawyers as all bearing on the question whether a funding arrangement was an abuse, and said that to be objectionable such control must be beyond that which is reasonable to protect money actually advanced or committed by the litigation funder (paragraph 122).

13. The Chief Justice next explained why she thought that the litigation funding agreement arguably amounted to a bare assignment of a cause of action (paragraphs 123-134). It must be emphasised that she made clear that her conclusions were provisional and acknowledged that the point had not been fully argued (e.g. at paragraphs 134-135). In fact, I am instructed that the question as to the legality of the litigation funding agreement had not been argued at all because, as the Chief Justice acknowledged, it had not been put in issue (paragraph 135). The main points made by the Chief Justice were as follows.

    a. Under the clauses of the litigation funding agreement, the plaintiff seems to have substantially relinquished control of continuance or resolution of the litigation (paragraph 126).

    b. The control of the litigation funder over the appointment of lawyers may suggest that the control of the plaintiff is substantially illusory (paragraph 127).

    c. The powers of the litigation funder to approve, remove and substitute lawyers seem to give it control of legal representation in the claim and, through it, arguably the conduct of the litigation (paragraph 128).

d. The funder's substantial control over the litigation and in particular over settlement and discontinuance arguably allows the claim to be treated as an investment to be maintained to the extent to which it provides a commercial return to the litigation funder; if so, it is difficult to see that the degree of control exercised by SPF over the litigation would not operate as an assignment of a cause of action (paragraph 131).

e. The fees payable under the agreement to the litigation funder seem to entail effective surrender of much control of the litigation (paragraph 132).

14. The Chief Justice concluded by summarising her provisional conclusions and the reasons why should would have declined to give judgment as follows:

> "[134] I consider that there is scope on the basis of the arrangements as to funding, legal representation, and control of settlements and discontinuance to take the view that the funder here has been set up to conduct the litigation in its own interests but in circumstances where it has no existing interest in the litigation and in which the action is not ancillary to its property interests under the GSAs. If so, the litigation funding arrangement amounts to the transfer of a bare cause of action for profit and is champertous. It would constitute trafficking in litigation, which I do not think this Court should acquiesce in without further consideration and full argument.
>
> [135] I would decline to issue judgment in this case. The matter has settled so that the question of stay is moot. As argued, the case entails no question of general importance but only application of the principles discussed in *Waterhouse* to a particular agreement and its context. The case has also been concluded on the basis of an apparent concession I consider to be one the Court should not act on. It is likely that the effect will be taken to be that the law has been developed beyond *Waterhouse* even though such development was not the subject of argument. It may well be that the law should be further developed, perhaps by legislation as in other jurisdictions. But any judicial development should occur only after full argument and in a case where the effect of the agreement is in contention. I would have required the parties to address the Court further on whether the litigation funding agreement itself is

champertous and if so whether it is contrary to the policy of the law and the proceedings should therefore be stayed."

15. The Chief Justice made an observation to the effect that it would be open to the other defendants in the case to seek to challenge the legality of the litigation funding agreement, and that they would not be constrained by the concession made by PwC (see footnote 72).

16. I make the following comments on the Chief Justice's judgment at this stage.

    a. It is very difficult to understand how an acceptance of PwC's concession that the litigation funding agreement was unobjectionable could have been interpreted as meaning that the law had developed beyond *Waterhouse*. The majority had already made clear at paragraph 54 of the judgment that the court had not been asked to review the appropriateness or otherwise of the litigation funding agreement. Certainly as a matter of English law and practice, the acceptance of PwC's concession by the lower courts and by the majority of the Supreme Court would not have involved any judicial acknowledgment that the concession was necessarily well made, or that the litigation funding agreement satisfied the conditions laid down in *Waterhouse* and was lawful. It would appear that, as a result of PwC's concession, those questions were not determined.

    b. If the Chief Justice nevertheless believed that there was scope for misunderstanding then that concern could have been satisfactorily addressed by a further short statement by her to the effect that, in the light of PwC's concession, the lawfulness of the litigation funding agreement itself had not arisen for determination in the proceedings and that it should not be assumed that the concession was necessarily justified by *Waterhouse*. It was unnecessary for that purpose to examine the litigation funding agreement in lengthy detail or to express provisional conclusions about its legality.

    c. I am instructed that the Supreme Court did not indicate at the hearing on 16 March 2017, or in the six-month period that followed before judgment was eventually handed down, that it might reject PwC's concession or require

further argument on the point. PwC's concession was a central feature of its application and, to the extent that any member of the court was not minded to accept it, that ought to have been clearly raised at the hearing so that the parties could make submissions on the issue. It is unclear from the Chief Justice's judgment when she envisaged the further argument to which she referred would have taken place.

d. The Chief Justice's provisional conclusions are expressed in a way that suggest that her firm view on the material she has considered, albeit not necessarily a final view, is that the litigation funding agreement is unlawful.

e. The Chief Justice arrived at the unusual position of expressing extensive provisional conclusions on matters that had not been argued despite being of the view that no judgment should be given at all.

LPF's complaint to the Judicial Conduct Commissioner

17. There were two main limbs to LPF's complaint. The first was that, in expressing her provisional conclusions that the litigation funding agreement may be unlawful without giving the parties an opportunity to make submissions or adduce evidence, the Chief Justice failed to act in accordance with the principles of natural justice. LPF says that the Chief Justice's judgment has dramatically impacted on its business and on litigation funding generally. In particular, the Chief Justice's judgment has cast doubt on the legality of its litigation funding agreements and may encourage other defendants, whether in the present proceedings or in others, to challenge them; it has substantially increased uncertainty around the financial viability of litigation funding; and it has promoted the introduction of new standards, going beyond those stated in *Waterhouse*, that cannot be met. An article about the Supreme Court's decision entitled "Supreme Court Introduces Uncertainty to Litigation Funding" by Fee Langstone, who acted for PwC, lends some support to LPF's concerns. According to Russell Stewart, a senior associate at Fee Langstone, the Chief Justice's criticisms of the litigation funding agreement will probably mean that there are more challenges to litigation funding agreements in the future.

18. The second limb of the complaint was that the Chief Justice failed to disclose the following interests that might be seen as compromising her impartiality in relation to the appeal.

    a. Her husband, Mr Hugh Fletcher, has been the chairman of IAG New Zealand Limited (IAG NZ) since 2003. LPF only became aware of this after the Supreme Court gave judgment. It understood when it made its complaint that IAG NZ was the largest insurer of professional liability in New Zealand and was likely to be an insurer of one of the defendants. LPF has since established that the third defendant, Mr Gordon Hansen, is insured by IAG NZ. There are only three major professional indemnity insurers in New Zealand (QBE, Vero and IAG NZ). Vero is named as a party to the proceedings.

    b. Mr Fletcher has also been a director of Insurance Australia Group Limited (IAG) since 2007. IAG NZ is a wholly-owned subsidiary of IAG. IAG is the largest insurer of professional liability in Australasia. According to IAG's 2017 annual report, Mr Fletcher's total remuneration from IAG in the financial years ended 30 June 2017 and 30 June 2017 were A$384,000 and A$377,000 respectively. As at 1 July 2017, he directly held 36,561 shares in IAG and related parties held a further 46,991 shares. The related parties appear to have been Fletcher Brothers Limited, which held 34,481 shares, and the IAG non-executive directors' share plan trust, which held 12,510 shares beneficially for Mr Fletcher (see Change of Director's Interest Notice dated 9 October 2017). I understand from the information provided to me concerning Fletcher Brothers Limited that that company is owned by the Chief Justice, Mr Fletcher and their two children; that the Chief Justice and Mr Fletcher jointly own 40% of the shareholding; and that the Chief Justice is a director of the company. I am told that the approximate value of shareholdings of Mr Fletcher, the share plan trust and Fletcher Brothers Limited in IAG was A$513,850 at the date of the hearing and $A534,730 at the date of the judgment. On the basis of those figures, I calculate that the value of the Fletcher Brothers Limited's shareholding in IAG on the same dates were A$212,058 and A$220,678.40 respectively.

c. LPF says that the professional indemnity insurance industry in New Zealand stands to benefit from the Chief Justice's provisional conclusions about the legality of the litigation funding agreement and the views she expressed about *Waterhouse*. It says that "[i]t is well known and obvious that the parties with the greatest interests in stymying class actions and litigation funding are the insurance companies that typically insure the types of liability that would be the subject of such actions" (paragraph 38 of the letter of complaint). I note in this regard that the article by Fee Langstone refers to "the far-reaching effects litigation funding has on the insurance industry".

d. Since April 2006 the Rules Committee has been considering the need to further develop rules concerning litigation funding and class actions. The Chief Justice had discussions with Bruce Gray QC, the Queen's Counsel who represented PwC in the proceedings, at a committee meeting on 13 February 2017 at which litigation funding was discussed.

The disclosure made by the Chief Justice in response to the complaint

19. The Commissioner appears to have provided the Chief Justice with a copy of LPF's complaint and an opportunity for her to comment on it. She said in her reply dated 23 November 2017 that she did not wish to make any response to the complaint but was happy to answer any questions the Commissioner had as he proceeded; that the court record would speak for itself; that the Registrar would be happy to supply any material from the file that the Commissioner may wish to review; and that "[t]he only matter not on the record adverted to in the complaint which I should confirm is that my husband, Hugh Fletcher, is Chairman of IAG New Zealand Limited and a member of the Board of Insurance Australia Group Limited".

20. The Chief Justice did not address any of the following factual matters asserted in the complaint, or her knowledge of them when the proceedings were before the Supreme Court:

a. IAG NZ was likely to be the professional indemnity insurers of one of the defendants;

b. The Chief Justice and her family, through their shareholdings in Fletcher Brothers Limited, had an indirect financial interest in IAG NZ and in IAG, and Mr Fletcher also had a direct financial interest in IAG;

c. IAG NZ and the rest of the professional indemnity insurance industry in New Zealand would stand to benefit from her provisional conclusions in the PwC appeal (to the extent they were adopted in subsequent cases).

The questions that arise

21. The following connected questions arise.

a. Did the Chief Justice act contrary to the English law principles of natural justice?

b. Did the panel of the Supreme Court that heard the appeal meet the standards of impartiality required of courts under English law?

c. Should the Chief Justice have recused herself under the Supreme Court's Recusal Guidelines?

d. Did the Commissioner properly address the complaint in his decision dated 19 January 2018?

Did the Chief Justice act contrary to the English law principles of natural justice?

22. The principles of natural justice, as they are often called, embody the duty to act with procedural fairness (*De Smith's Judicial Review* (8th ed) at paragraphs 6-010 and 7-003). The modern case-law has been developed in the context of the judicial control over administrative decision-making. The duty to afford procedural fairness may be engaged whenever a decision of a public body affects a person's rights or interests, of which the interest in pursuing a livelihood and in personal reputation have received particular recognition (*De Smith* paragraph 7-019). The requirements of procedural fairness are flexible and depend on the subject matter and the particular circumstances (*De Smith* paragraph 7-040).

23. I have not found the question under consideration an easy one to resolve because the circumstances are so unusual and I am not aware of any close analogy in the decided cases. Judges must certainly act fairly in accordance with the requirements of natural justice (see e.g. *Labrouche v Frey* [2012] EWCA Civ 881). However, the Chief Justice's judgment did not determine SPF's rights and obligations or make any findings of fact. She was very clear in saying that her conclusions were provisional. In so far as any litigant may wish to adopt the Chief Justice's points in order to challenge the legality of the litigation funding agreement (or a similar agreement) on a future occasion it would remain open to SPF (or any other affected funding entity) to persuade the court that the Chief Justice's provisional conclusions are wrong. Indeed, it may well be that the true position is that the Chief Justice remarks do not have even persuasive value because, as she acknowledged, they were made in circumstances where the parties had not an opportunity to make submissions or adduce evidence. Furthermore, the role of the courts, and especially of the highest court, is to state and develop the law. It is frequently the case that a court's judgment affects the rights and interests of non-parties who have had no involvement whatever in the proceedings.

24. I have all these points well in mind, but in my opinion the Chief Justice did act unfairly, contrary to the principles of natural justice, in expressing her preliminary conclusions regarding the litigation funding agreement in circumstances where the parties, including SPF as an interested party, had not been given the opportunity to make submissions or adduce evidence. I have reached for this conclusion for three reasons.

25. First, I consider that SPF had a sufficient interest in the Chief Justice's provisional conclusions to engage the duty to act fairly towards it. SPF was permitted to intervene in the appeal in recognition of its interest in the proceedings. That interest was not merely collateral or indirect; its litigation funding agreement was the subject of the Chief Justice's extensive comments. The provisional conclusions cast doubt on the legality of the litigation funding agreement and, if well-founded, have obvious implications for SPF's and LPF's commercial interests. They were liable to encourage other defendants in the proceedings to apply for a stay on the grounds that the litigation funding agreement is unlawful (as apparently contemplated by the Chief Justice's comments at footnote 72 of the judgment). The provisional conclusions of

the most senior judge in New Zealand could colour the views of a court that has to decide the question. They may also call into question the legality of any similar litigation funding agreements by which SPF and LPF fund litigation. The potentially harmful consequences for SPF's and LPF's businesses are already apparent from the observations of Fee Langstone to which I have referred at paragraph 17 above. Further, given the Chief Justice's comments about the policy of the law, her provisional conclusions appear to question SPF's and LPF's commercial morality and motives and to suggest that they may have committed tortious conduct. They may fairly be seen as harmful to SPF's and LPF's reputations.

26. Secondly, given SPF's and LPF's interest in the Chief Justice's provisional conclusions as outlined above, in my opinion she acted unfairly in expressing them in circumstances where (i) the legality of the funding agreement was not in issue between the parties, (ii) the court had not informed the parties either at the hearing or during the six-month period between the hearing and judgment that the court might not accept PwC's concession, and (iii) as a consequence, the parties had not an opportunity to make submissions on the legality of the funding agreement or to adduce any relevant evidence. It has long been the practice of the courts in England, and I would expect in New Zealand as well, not to express opinions on points that have not been argued but which may require to be determined between parties to the proceedings on a future occasion. There are a number of sound reasons underlying this practice: the function of the courts is to decide cases, and to state and develop the law in that context, and not to issue advisory opinions on points that are not in issue between the parties and have not been argued; views expressed without the benefit of argument and evidence can be of limited benefit in any event; the expression of judicial opinions on a question that remains to be determined risks unfairly prejudicing any future consideration of that question; and where, as in the present case, those opinions concern the legality and conduct of a particular person or entity, they may have harmful consequences for their reputation and for their commercial interests. It is of some significance that none of the other eight judges who considered PwC's application in the Supreme Court, in the Court of Appeal and in the High Court thought it appropriate to express any view on the point that PwC had conceded. I therefore consider that, to the extent that the legality of the litigation funding

agreement remained a live issue despite PwC's concession, the Supreme Court should have invited submissions from the parties at the hearing on 16 March 2017 or, if that was overlooked for any reason, after the hearing. The question whether the parties might want to adduce further evidence should also have been addressed.

27. Thirdly, as already noted, it was unnecessary for the Chief Justice to express any provisional conclusions at all about the legality of the litigation funding agreement in order to achieve her apparent objective of preventing any misunderstanding arising from PwC's concession that the litigation funding agreement itself was unobjectionable. It was entirely unnecessary, for that purpose, to subject the litigation funding agreement to sustained analysis and criticism, or to express any provisional conclusions at all as to its legality. The Chief Justice could simply have said something to the effect that the court had not examined whether the concession was well-made.

28. The situation was very different from that where a judge expresses provisional views during the course of a hearing. That can assist the parties and promote the proper administration of justice because it allows the parties to focus their submissions on the points of concern to the judge. Any questions on which the judge expresses provisional views are then resolved one way or the other by the judge in her judgment. By contrast, the Chief Justice's provisional conclusions appear to have served no proper purpose and to have raised questions regarding the legality of the litigation funding agreement that were left hanging with no prospect of resolution in the appellate proceedings.

29. It may also be said that the Chief Justice was entitled to discuss a point of general public importance that she considered required to be addressed. This consideration appears to have weighed heavily with the Commissioner, who said at paragraph 40 of his decision that the Chief Justice's judgment was in keeping with her role as the nation's most senior judge. I do not find it convincing in the light of what I have already said at paragraphs 26 to 27 above. Further, as the Chief Justice noted at paragraph 135, the appeal raised no point of general public importance, and indeed she said that she would have preferred not to give judgment at all.

30. As already mentioned, I have been unable to find any reported case that is closely analogous on its facts. That reflects the highly unusual course taken by the Chief Justice. I cannot think of any case either in the law reports or in my own experience where a judge has thought it appropriate to express provisional conclusions on an important mixed question of fact and law (i) that has not been raised by any of the parties, (ii) that substantially affects the interests of a party to the proceedings and/or of an intervenor who has been granted permission to intervene in recognition of its interest in the proceedings, and (iii) on which the parties have not had an opportunity to make submissions or adduce evidence. The overriding question is whether, in all the circumstances, the Chief Justice acted fairly towards SPF in expressing her provisional conclusions as to the legality of the litigation funding agreement. It is my opinion that she did not, for the reasons I have given.

Did the panel of the Supreme Court that heard the appeal meet the standards of impartiality required of courts under English law?

31. It is first necessary to identify the relevant principles.

The right to an impartial tribunal

32. Everyone is entitled to a fair hearing by an impartial tribunal in the determination of their rights and obligations. That is a fundamental right of the common law which is also guaranteed in England by the European Convention for the Protection of Human Rights and Fundamental Freedoms (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 471). I note that the right to an independent and impartial judiciary is similarly protected in New Zealand by the New Zealand Bill of Rights Act 1990 in both criminal and civil jurisdictions (*Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72, paragraph 87).

33. A judge who allows any judicial decision to be influenced by impartiality or prejudice deprives the litigant of this important right and violates one of the most fundamental principles underlying the administration of justice (*Locabail*, paragraph 3). Where in any particular case partiality or prejudice is actually shown, referred to as "actual bias" in the case-law, the litigant has irresistible grounds for objecting to the case being heard

34. by that judge or for applying to set aside any judgment given. But cases of actual bias are seldom encountered not only because the existence of actual bias is very rare but also because, as the law recognises, proof of actual bias is very difficult (*Locabail*, paragraph 3) and any bias is very likely to be subconscious and unintended.

Automatic disqualification where the judge is interested in the outcome of the case

35. There is one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, giving rise to what has been called "automatic disqualification". That is where the judge has been shown to have a direct pecuniary or proprietary interest in the outcome of the case which he is to decide or has decided (*Dimes v Proprietors of Grand Junction Canal* (1852) 3 H.L. Cas. 759). In *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet (no 2)* [2000] AC 119, in which the House of Lords set aside its own decision because of Lord Hoffmann's connections with an intervening party in the appeal, the rule was extended to cover the situation where the judge's decision will lead to the promotion of a cause in which the judge is involved with one of the parties. The rationale for this rule is that if a judge has a personal interest in the outcome of an issue which he is to resolve, then he is improperly acting as a judge in his own cause, and that such a proceeding would undermine public confidence in the integrity of the administration of justice (see *Locabail*, paragraphs 5-6). Once the judge is shown to have an interest in the outcome of the case he is disqualified without any investigation of whether there is a risk of bias (*ex p Pinochet (no 2)* [2000] AC 119 at 113BH).

36. For the purposes of the automatic disqualification principle, the question is whether the outcome of the case could realistically affect the judge's interest (*Locabail*, paragraph 8). A judge will not be automatically disqualified where he holds a relatively small number of shares in a large company that is a party to litigation and the sums involved in the litigation are not such as could realistically affect the value of the judge's shares or the dividend he could expect to receive (*Locabail*, paragraph 8). However, in order to avoid automatic disqualification in that situation the potential effect on the judge's personal interest must be so small as to be incapable of affecting his decision one way or the other; any doubt should be resolved in favour of disqualification (*Locabail*, paragraph 10).

37. In any case where the judge's disqualifying direct interest in the outcome of the case is said to derive from a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself (*Locabail*, paragraph 10).

38. If the judge has a sufficiently significant interest in the outcome of the case, the judge's knowledge or absence of knowledge of that interest is irrelevant (*Locabail*, paragraph 55).

Disqualification where there is apparent bias

39. In addition to the situations covered by actual bias and automatic disqualification on the grounds of interest, a judge is disqualified for determining a case if on examination of all the relevant circumstances there is or was a real possibility of bias (*Locabail*, paragraph 16).

40. This type of bias is known as "apparent bias". The principle may be engaged where the judge has a connection with one of the persons involved in or affected by the case, such as to cast doubt on his impartiality from the standpoint of the fair-minded and informed observer. The court must first ascertain all the relevant facts bearing on the suggestion that the judge may have been, or may be, biased. The question is then whether the fair-mined and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased (or would be biased): *Porter v Magill* [2002] 2 AC 494, paragraph 103.

41. I have not conducted an extensive review of the New Zealand case-law, but it appears from the decision of the Supreme Court of New Zealand in *Saxmere Company Limited v Woolboard Disestablishment Company* [2009] NZSC 72 that essentially the same test applies in New Zealand.

42. The prohibition against apparent bias is intended to serve the overriding public interest that there should be confidence in the integrity of the administration of justice (see *R v Gough* [1993] AC 646, p 659F). As Lord Nolan said in *R v Bow Street Metropolitan Stipendiary Magistrate and others ex p Pinochet* [1999] 1 AC 119, drawing on a long line of case-law to the same effect, "in any case where the

impartiality of a judge is in question, the appearance of the matter is just as important as the reality" (p 139).

43. The following points should be noted concerning the test for apparent bias:

a. The court is here concerned principally with the possibility of subconscious or unconscious bias (*Lawal v Northern Spirit Ltd* [2003] ICR 856, paragraph 2; *R v Gough* [1993] AC 646, pp 659 and 672-683). As Lord Goff said in *R v Gough*, "bias is such an insidious thing that, even though the person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias". And as Lord Mance observed in a recent decision of the Privy Council, "if a judge of the utmost integrity lacks independence, 'then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence'" (*Almazeedi v Penner* [2018] UKPC 3, paragraph 1). The apparent bias principle "admits the possibility of human frailty" (see the judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v The Office Trustee in Bankruptcy* (2000) 205 CLR 337, paragraph 8).

b. As McGrath J noted in the New Zealand Supreme Court in *Saxmere* [2009] NZSC 72 at paragraphs 92 and 95, the test, being objective, ignores considerations such as perceptions of the character, integrity and legal ability of the particular judge. This is an important point in the context of issues under consideration in this Opinion.

c. While the courts will consider any explanation given by the judge regarding his knowledge of the relevant facts, they do not regard it is desirable or helpful to inquire into the effect that those facts actually had on the judge's mind (see *R v Gough* [1993] AC 646, p 672H). The question is assessed objectively from the standpoint of the fair-minded and informed observer; the issue is not whether the court thinks there is a real possibility of bias (see *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, paragraphs 68-69). The reviewing court will not, therefore, pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision. The insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose

impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision (*Locabail*, paragraph 19).

d. I understand from paragraph 4 of the judgment of the Supreme Court of New Zealand in *Saxmere* that the New Zealand and Australian authorities have emphasised the need for "an articulation of the logical connection between the matter and the feared deviation from deciding the case on its merits". This seems to me to be entirely consistent with the English approach since, in the absence of a logical connection, there can be no real possibility of bias.

e. Although the fair-minded and informed observer may be taken to be aware of all relevant facts, he does not possess special expertise that lies beyond the knowledge of the ordinary, reasonably well-informed member of the public (*Locabail*, paragraph 17). I consider that an English court would agree with the statement of McGrath J in *Saxmere* (paragraph 97) to the effect that the observer must be taken to have knowledge and understanding of the judicial process and the nature of judging. Furthermore, he disregards facts of which the judge was unaware, as there is no real possibility that such matters could have influenced the judge's judgment (*Locabail*, paragraph 18).

f. The reviewing court is not bound by a statement from any judge regarding what he knew at any relevant time. As the Court of Appeal said in *Locabail* (paragraph 19), "[m]uch will depend on the nature of the facts of which ignorance is asserted, the source of the statement, the inherent probabilities and all the circumstances of the case in question". Even where the court is inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism (*Locabail*, paragraph 19). If the judge's statement about his knowledge is, objectively viewed, cogent, then that is the basis on which the fair-minded and informed observer will ask whether there is a real possibility of bias; and if the judge's statement is, objectively viewed, an improbable one, that is how the same observer will approach it (*Locabail*, paragraph 64).

g. The characteristics of the fair-minded and informed observer were elucidated by Lord Hope in *Helow v Secretary of State for the Home Department* [2008]

UKHK 62, [2008] 1 WLR 2116 at paragraphs 2-3. He reserves judgment until both sides of any argument are apparent. He is not unduly sensitive or suspicious, but nor is he complacent. He knows that judges, like anyone else, have their weaknesses and he "will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially". He will also take the trouble to inform himself of all matters that are relevant, and to see the matter in its overall social, political and geographical context. Further, as noted in *Locabail* (paragraph 21), he is aware of the oath of office taken by judges to administer justice without fear or favour and of their ability to carry out that oath by reason of their training and experience.

h. The existence of apparent bias cannot be overlooked on the ground that the decision appears to be fair and that any lack of independence due to apparent bias did not matter: *Almazeedi v Penner* [2018] UKPC paragraphs 25-28. On the other hand, a judge's failure to conduct the proceedings fairly and any indications in the court's judgment that it was not impartial may form part of the relevant facts from which apparent bias may be inferred (*Locabail*, paragraphs 72, 84 and 96; *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC), paragraphs 28 and 39).

i. Where a judge is aware of any interest in the outcome of the case the judge should stand down. Otherwise, disclosure should be given of facts and circumstances known to the judge which would or might provide the basis for a reasonable apprehension of bias. A failure to make disclosure in a case that calls for it is a factor to be taken into account in considering the issue of apparent bias. However, non-disclosure of facts or circumstances which should have been disclosed but do not in fact, on examination, give rise to justifiable doubts as to the judge's impartiality cannot, in and of itself, justify an inference of apparent bias (*Davidson v Scottish Ministers (No. 2)* [2005] 1 SC 7, paragraph 19; *Halliburton Company v Chubb Bermuda Insurance Ltd and others* [2018] EWCA Civ 817, paragraph 75).

j. If in any case there is real ground for doubt either as to the facts or as to the application of the principles to the facts, that doubt should be resolved in favour of recusal, or of setting aside the decision if the judge has heard the case (*Locabail*, paragraph 25; *Jones v Das Legal Expenses Insurance* [2003] EWCA Civ, paragraph 24).

The Supreme Court's Recusal Guidelines

44. I have been provided with the Recusal Guidelines dated 1 March 2017 issued by the Supreme Court of New Zealand, which state at paragraph 2:

> "The guiding principle is that a judge is disqualified from sitting if in the circumstances there is a real possibility that in the eyes of a fair-minded and informed observer the judge might not be impartial in reaching a decision in the case. An instance is where a judge has a material interest in the outcome of the appeal."

45. This extract from the guidelines combine what in England are treated as separate categories, namely apparent bias (the first sentence) and automatic disqualification on the grounds of an interest in the outcome of the case (the second sentence). This may reflect a preference for the approach that I understand prevails in Australia, which is to apply the apparent bias test to cases where the judge has an interest in the outcome of the case (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337).[1] Otherwise the guidelines reflect the position under English law. They explain at paragraph 3 that there is a two-step test requiring consideration of (a) the circumstances relevant to the possible need for recusal because of apparent bias, and (b) whether those circumstances lead to a reasonable apprehension the judge may not be impartial. The test is said to require ascertainment of, first, what it is that might possibly lead to a reasonable apprehension that the judge might decide the case other than on its merits and, secondly, whether there is a logical and sufficient connection between those circumstances and that apprehension (paragraph 3). The guidelines set out a procedure for disclosure by the judges of any circumstances that may give rise to a

[1] The understanding of the editors of *De Smith's Judicial Review* (8th edition) is that the automatic disqualification principle remains part of New Zealand law (paragraph 10-106).

concern among litigants or the public that the judge might not be impartial in the case and for the determination of whether the judge should sit on the case.

The application of the automatic disqualification principle to the facts

46. It is now known that IAG NZ is the insurer of the third defendant. The fact that the Chief Justice was not necessarily aware of this is irrelevant for the purposes of the automatic disqualification principle (see paragraph 38 above). I do not consider that the Chief Justice's indirect financial interest in IAG NZ can be regarded as insubstantial or immaterial in the present context, even putting to one side the indirect financial interests of her husband and children. As already mentioned, the value of Fletcher Brothers Limited's shares in IAG appears to have been A$212,058 and A$220,678.40 respectively at the relevant times, of which 40% was jointly owned by the Chief Justice and her husband. Taking account of the underlying policy to maintain confidence in the administration of justice and the importance of a judge being seen to be impartial, in my view an interest of that size cannot be viewed as so small that it could not realistically have affected the Chief Justice's decision.

47. In the light of that conclusion, it is not strictly necessary for present purposes to resolve whether or not the indirect financial interests in IAG NZ of the Chief Justice's husband and children should be treated as the interests of the Chief Justice for the purposes of the automatic disqualification principle. But in my view they should be. In the absence of any evidence to the contrary, I consider that an English court would assume that there is a substantial overlap between the financial interests of the Chief Justice, her husband and her children (the shareholdings in Fletcher Brothers Limited perhaps provide an indication of this).

48. The critical question is whether the Chief Justice had a *direct* interest in the outcome of the appeal (see paragraph 35 above). It is arguable that she did: an order staying the proceedings brought by PVL against PwC would inevitably result in the proceedings against the third defendant being stayed; IAG NZ would then cease being at risk in respect of a very substantial claim; and the effect of IAG NZ's contingent liability to indemnify the third defendant on the value of Mr Fletcher's and Fletcher Brothers Limited's shares in IAG and also potentially on the amount of distributable profits available to pay dividends to IAG's shareholders would fall away. However,

although there appears to have been a close nexus between the outcome of the appeal and the financial interests of the Chief Justice and her family, in my opinion an English court would characterise the Chief Justice's interest in the outcome of the appeal as indirect. There would have been a number of links in the causal chain between any decision in favour of PwC on the appeal and the resulting effects on the financial interests of the Chief Justice and her family. It is therefore necessary to consider the position under the apparent bias principle.

The application of the apparent bias principle to the facts

49. In my opinion, the most important facts that would be material to the fair-minded and informed observer's assessment of whether there was a real possibility that the Chief Justice was biased are as follows.

    a. The Chief Justice was aware when she heard the appeal and gave judgment that IAG NZ may well have been the insurer of one of the defendants. I think that the fair-minded and informed observer would infer this from two principal matters. First, he would assume that the Chief Justice was aware that IAG NZ is one of a small number of leading professional indemnity insurers in New Zealand as a result of (i) her many years of experience as a judge and as a barrister, (ii) her indirect financial interest in IAG NZ (through her shareholding in Fletcher Brothers Limited), and (iii) her connection with her husband, the chairman of IAG NZ. Secondly, the fair-minded and informed observer would note that in her letter dated 23 November 2017 to the Commissioner the Chief Justice did not dispute that she was aware that IAG NZ was likely to be the professional indemnity insurer of one of the defendants.

    b. The Chief Justice would have been aware when she heard the appeal and gave judgment that, if the proceedings brought by PVL against PwC were stayed on the grounds that they were an abuse of process, it would follow that they should be stayed against the other defendants as well. The other defendants therefore appeared to have had as much interest as PwC in the question raised by the appeal. This is confirmed by paragraph 4 of the majority's judgment and paragraph 4 of the memorandum of counsel dated 4 September 2017. The

question as to the legality of the litigation funding agreement was therefore one in which not only PwC but all other defendants and their insurers had an interest.

c. The Chief Justice was aware that her provisional conclusions regarding the legality of the litigation funding agreement could encourage other defendants to challenge it and might assist in any such challenge, as evidenced by her comments in footnote 72 to which I have referred in paragraph 15 above. She must also have been aware that the other defendants' insurers would benefit from any successful challenge to the litigation funding agreement.

d. It follows that the Chief Justice was also aware that IAG NZ, if it was the insurer of one of the defendants, would have a financial interest in the outcome of PwC's application and might benefit from the Chief Justice's provisional conclusions regarding the legality of the litigation funding agreement. The fair-minded and informed observer can perhaps be taken to understand that the Chief Justice's comments are of no precedential effect, but he is likely to think that they could at least colour the view of a subsequent court in the context of any application for a stay that one or more of the other defendants might bring. He would also be mindful that the dispute between PVL and PwC had settled shortly before judgment, and that the Chief Justice's comments could be of value to other defendants in the context of any future settlement discussions between them and PVL.

e. IAG NZ's possible interest in the outcome of PwC's application was potentially very substantial indeed in financial terms, having regard to the pleaded value of the claim ($256.9 million and $302.7 million) even without taking account of any further substantial claim for interest.

f. The Chief Justice's husband, as chairman of IAG NZ, had a strong interest in the fortunes of IAG NZ, quite apart from his financial interest which I shall consider in the next sub-paragraph. As chairman, Mr Fletcher can be taken to be committed to advancing the commercial interests of IAG NZ. IAG NZ's commercial interests would include the dismissal of any claims brought against defendants insured by IAG NZ.

g. The Chief Justice, her husband and two children also have an indirect financial interest in the fortunes of IAG NZ as a result of (i) Mr Fletcher's position as a director of and shareholder in IAG, and (ii) the family's ownership and control of Fletcher Brothers Limited and that company's shareholding in IAG. In the absence of evidence to the contrary, the fair-minded and informed observer would assume that the Chief Justice was aware of the relevant shareholdings and connections with IAG NZ. The fair-minded and informed observer would recognise that the size of the family's direct and indirect interests in IAG and IAG NZ may be relatively small in the context of total amount of issued shares in IAG (as to which I have no information), but would note that they are nevertheless substantial (c. $500,000 in value). In view of the size of the pleaded claim, I consider that the fair-minded and informed observer would not feel able on the information available to say that a decision to uphold PwC's application could have had no material effect on the value of family's direct and indirect interests in IAG or on the amount of dividends they might derive from IAG.

h. There is then the question whether, as LPF have asserted, IAG and IAG NZ, as the leading professional indemnity insurers in Australasia and New Zealand respectively, have a commercial interest in the courts in New Zealand taking a restrictive approach to commercial litigation funding, as apparently contemplated by the provisional conclusions of the Chief Justice. I have not been provided with any evidence to support that view, apart from the article by Fee Langstone, to which I attach no weight for present purposes as it could not have been available to the Chief Justice when the appeal was before the Supreme Court. I do not think the informed observer would be sure that a restrictive approach to commercial litigation funding would inevitably be in the commercial interests of professional indemnity insurers without seeing any evidence to support that proposition. He would acknowledge the possibility that insurers may adjust their premiums and business models accordingly; whether or not that was feasible would depend on commercial considerations beyond his knowledge. However, as a matter of common sense the fair-minded and informed observer would acknowledge that professional

indemnity insurers may well view a restrictive approach to commercial litigation funding as being in their commercial interests.

i. I consider that the fair-minded and informed observer, who is assumed to know and understand the judicial process and the nature of judging, would be concerned about the fairness of the course taken by the Chief Justice essentially for the reasons discussed at paragraphs 22 to 27 above. And even if the Chief Justice's conduct is not to be viewed as unfair, he would note that (i) it was unnecessary for the Chief Justice to express any provisional conclusions about the legality of the litigation funding agreement in order to achieve her apparent objective of preventing the litigants and the wider public from thinking that the Supreme Court thought that PwC's concession was justified by *Waterhouse*; (ii) none of the other judges who had considered PwC's application had thought it appropriate to express any view on the correctness of PwC's concession; and (iii) the course taken by the Chief Justice was highly unusual and unexpected in all the circumstances.

j. The fair-minded and informed observer would remind himself of the judicial oath and of the independence of mind that judges bring to their work.

k. The fair-minded and informed observer would be at pains not to confuse the interests of the Chief Justice's husband with those of the Chief Justice herself. However, in the absence of information to the contrary, it seems to me that the observer would assume that there was a degree of commonality between their financial interests, or at least an interest in each other's financial well-being. The fair-minded and informed observer would also, in my view, believe that in the nature of things a person may be inclined, even if only subconsciously, to support the business or commercial interests of his or her spouse.

50. In my opinion, on these facts the fair-minded and informed observer would conclude that there was a real possibility that the Chief Justice was biased. I have reached this conclusion principally because such an observer would likely consider that the possible financial interest of the Chief Justice and her family in the outcome of PwC's application, and the wider interests of the Chief Justice's husband and of the two insurance companies in which he is closely involved, were all matters that might have

impinged subconsciously on the ability of the Chief Justice to determine PwC's application impartially. It must be remembered that any consideration of the Chief Justice's character, integrity and legal expertise must be put out of mind for present purposes. There is a logical connection between the relevant interests and a reasonable apprehension of a risk that they compromised the Chief Justice's impartiality. I consider that an English court would agree with the observation of McGrath J at paragraph 97 of *Saxmere* that "in those cases which are said to involve a material pecuniary interest, contextual knowledge is unlikely to be of significance".

51. In addition, in my view the approach the Chief Justice took in her judgment, which on any view was unusual and difficult to explain, and her omission to make any disclosure about her connections with IAG and IAG NZ, would compound the concerns of the fair-minded and informed observer regarding the real possibility of bias.

52. I am not persuaded by LPF's complaint at paragraph 9(e) of its letter to the Commissioner that "the Chief Justice failed to disclose her interactions with Queen's Counsel for PwC, Bruce Gray, at and around the Rules Committee meeting on 13 February 2017 prior to the PwC appeal being heard on 16 March 2017 … where attitudes to litigation funding were discussed". It appears from the minutes that the focus of the Rules Committee's discussion was a perceived need to clarify the rules for representative or class actions, albeit the committee appears to have acknowledged that the issue would have to be considered in the context of litigation funding. In *Locabail*, the Court of Appeal said that an objection to a judge's impartiality could not ordinarily be soundly based on "extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers)" (paragraph 25). By contrast, the Court of Appeal's list of examples where apparent bias might well be thought to arise included "if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind" (paragraph 25). There is nothing in the minutes to suggest that the Chief Justice said anything at the meeting of the Rules Committee that could cast doubt on her ability to determine the issues raised by the appeal with an objective judicial mind. It is not clear from the minutes whether

litigation funding was discussed to any significant extent. Even assuming that it was, viewed from the perspective of English law and practice in my opinion the Chief Justice was not obliged to disclose to the parties either the contents of those discussions or the fact that they had taken place.

53. I should say finally on this topic that I have had to address the issue of bias on the basis of the facts as they presently appear to be. The lack of clarity regarding the Chief Justice's knowledge of the relevant matters is unsatisfactory. If her conduct were to be investigated further it would have to be assessed in the light of any further information that might be provided regarding her knowledge of the matters that, in my view on the information before me, firmly support the conclusion that she lacked the necessary impartiality to sit on the appeal.

Should the Chief Justice have recused herself under the Supreme Court's Recusal Guidelines?

54. As already mentioned, there does not appear to be any material difference between the relevant principles of English and New Zealand law, and this Opinion proceeds on that basis. The Recusal Guidelines, from which I have quoted at paragraph 44 above, appear to encapsulate the core principle. In my opinion, on the information before me, it is clear that the Chief Justice should have raised her connections with IAG NZ and IAG NZ's potential interest in the proceedings with her fellow judges in accordance with paragraph 4 of the Recusal Guidelines and recused herself in accordance with paragraph 5.

55. I am reinforced in this conclusion by my consideration of the Recusal Guidelines dated 12 June 2017 for High Court judges issued by the Chief High Court Judge, Hon Justice G J Venning. These appear to require High Court judges not to sit in the circumstances in which the Chief Justice found herself. They do not, I assume, apply directly to the Supreme Court, but their purpose appears to be to encapsulate the generally applicable principles regarding impartiality. Section 4 provides under the heading "Recusal where an economic interest":

> "[4.1] A judge should recuse him or herself if he or she, or a close relative or member of the judge's household, directly or indirectly has an economic

interest in the outcome of the proceedings. Such conflicts may arise out of current commercial or business activities, financial investments (including shareholding in public or private companies) or membership or involvement with educational, charitable or other community organisations which may be interested in the litigation.

[4.2] An economic interest may also arise in another situation. That is where the case is to decide a point of law which may affect a judge in his or her personal capacity beyond that of the public generally. In deciding whether to recuse him or herself, a judge should have regard to the point of law, to the nature and extent of his or her interest, and the effect of the decision on others with whom the judge has a relationship, actual or foreseeable.

[4.3] Shareholdings in litigant companies or companies associated with litigants should be disclosed even where the shareholding is small. They should lead to recusal if the value of the shareholding would be affected by the outcome of the litigation."

56. The present case in my view falls squarely within this guidance. In particular:

a. The Chief Justice and her family had an economic interest in the outcome of the appeal by reason of their financial interest in IAG NZ (paragraph 4.1).

b. The issues of law discussed by the judge in her judgment regarding the scope of the Supreme Court's decision in *Waterhouse*, whether PwC's concession was justified by *Waterhouse*, and whether the court's acceptance of it extended *Waterhouse* were all matters on which the Chief Justice and her children, and even more so her husband, had an interest beyond that of the public generally (paragraph 4.2).

c. The Chief Justice and her family had an indirect financial interest in the insurer of one of the defendants. This does not strictly fall within paragraph 4.3 but appears to be closely analogous to the situation described there.

Did the Commissioner properly address the complaint in his decision dated 19 January 2018?

57. I am not asked to advise on the merits of a claim for judicial review of the Commissioner's decision. I have focussed on whether the Commissioner (i) correctly directed himself as to the relevant legal principles (assuming that English law and New Zealand law are materially the same), (ii) took account of all relevant matters (and only such matters), and (iii) conducted reasonable and proportionate inquiries in his preliminary examination of the complaint. These matters must be considered in the context of the statutory scheme.

Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

58. The relevant features of the statutory scheme for present purposes are as follows.

59. The functions of the Commissioner are:

    a. to receive complaints about judges and to deal with complaints in the manner required by the Act;

    b. to conduct preliminary examinations of complaints;

    c. in appropriate cases, to recommend that a Judicial Conduct Panel be appointed to inquire into any matter or matters concerning the conduct of a judge. See section 8.

60. It is not the function of the Commissioner to challenge or call into question any decision of a judge in relation to legal proceedings (section 8(2)).

61. The Commissioner must deal with a complaint about the conduct of a judge as follows (section 11(3)).

62. He must take the steps set out in section 14, which include dealing with the complaint as soon as practicable after receiving it.

63. By section 15(1), he must conduct a preliminary examination of each complaint and form an opinion on the following points.

a. *Whether there are any grounds for exercising the power under section 15A to take no further action in respect of the complaint*. The Commissioner has a broad discretion, subject I assume to public law controls, to take no further action if satisfied that further consideration would, in all the circumstances, be unjustified. The non-exhaustive list of examples where this power may be exercised include that the complaint has been resolved to the complainant's satisfaction following an explanation from the judge who is the subject of the complaint. It seems very unlikely, having regard to the statutory scheme as a whole, that the Commissioner could lawfully decide to take no further action in respect of an unresolved complaint that appeared to him to have substance.

b. *Whether there are any grounds for dismissing the complaint under section 16*. These include some procedural and jurisdictional bars; that the complaint has no bearing on the judge's judicial functions or judicial duties; that the complaint is frivolous, vexatious or not made in good faith; and that the subject matter of the complaint is trivial.

c. *Whether the subject matter of the complaint, if substantiated, could warrant referral of the complaint to the Head of Bench under section 17*. The Chief Justice is the Head of Bench in relation to the Supreme Court (section 5). The Judicial Commissioner expressed the view that in the case of a complaint about the Chief Justice any referral should be made to the next most senior judge (paragraph 58), but the Act does not appear to provide for that (compare section 23(3)). The Commissioner must refer a complaint to the Head of Bench unless he:

    i. exercises the power under section 15A to take no further action in respect of the complaint;

    ii. dismisses the complaint under section 16; or

    iii. recommends under section 18 that a Judicial Conduct Panel be appointed.

d. *Whether the subject matter of the complaint, if substantiated, could warrant consideration of the removal of the judge from office by way of a recommendation under section 18*. By section 18, the Commissioner may recommend to the Attorney-General that he 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:

   i. an inquiry into the alleged conduct is necessary or justified; and

   ii. if established, the conduct may warrant consideration of removal of the Judge.

64. In conducting the preliminary examination the Commissioner must act in accordance with the principles of natural justice (section 15(3)). But otherwise the statute confers on him a considerable amount of judgment as to how to conduct the preliminary examination. He may seek the judge's response to the complaint (section 15(2)). He may make any inquiries into the complaint that he thinks appropriate (section 15(4)(a)), and obtain any court documents that are relevant to such inquiries (section 15(4)(b)). He may consult the Head of Bench (section 15(4)(c)).

65. Having completed the preliminary examination and formed the opinion required by section 15(1), as outlined in paragraph 63 above, the Commissioner must take one of the following steps (section 15(5)):

   a. exercise the power under section 15A to take no further action in respect of the complaint under; or

   b. dismiss the complaint under section 16; or

   c. refer the Complaint to the Head of Bench under section 17; or

   d. recommend under section 18 that the Attorney-General appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the conduct of a Judge.

66. The Act therefore broadly contemplates four different outcomes of the Commissioner's preliminary examination of a complaint:

a. taking no further action where the Commissioner considers that is justified;

b. dismissing the complaint if the Commissioner considers it is bad on various jurisdictional or procedural grounds, or lacks any substantial merit;

c. as regards any complaint for which taking no further action or dismissal would be impermissible or inappropriate, (i) referring the complaint to the Head of the Bench, unless (ii) the Commissioner considers that an inquiry into the alleged conduct is necessary or justified and, if established, the conduct may warrant consideration of removal of the Judge.

Analysis of the Commissioner's preliminary examination of SPF's complaint

67. In my opinion, the Commissioner's preliminary examination of the complaint was fundamentally flawed for the following reasons.

68. First, he made a number of basic errors concerning his jurisdiction. He said that LPF was asking him to challenge or call into question the legality or correctness of a judgment or decision made by the Chief Justice, which was prohibited by section 8(2), and that he was "of the opinion that there are grounds for dismissing the complaint under section 16(1)(a) [lack of jurisdiction] because of the effect of section 8(2)" (paragraphs 23-29). Having noted that there were grounds for dismissing the complaint for want of jurisdiction, he nevertheless said that there were instances where, even though a complaint was outside his jurisdiction such that he was bound to dismiss it, nevertheless he may find conduct warranting his intervention (paragraphs 14, 15 and 33). He therefore proceeded to address the merits of the complaint before dismissing it on the grounds that it was outside his jurisdiction. This passage of the decision discloses the following errors.

a. The complaint was, on any fair reading, about the conduct of the Chief Justice. This was very clear from the summary at paragraph 9 of the letter of complaint, which identified the principal heads of complaint, and from the explanation that followed. The Commissioner therefore had jurisdiction in respect of the complaint and was bound to deal with it in accordance with the Act: see sections 8(1) and 11. To the extent that any parts of the complaint

could be read as impugning the legality or correctness of the Chief Justice's judgment the Commissioner had no power to deal with them by virtue of section 8(2). But the essence of the complaint concerned the Chief Justice's conduct in denying natural justice to the parties affected by her judgment and in not disclosing to the parties matters that ought to have been disclosed, and not the legality or correctness of her judgment.

b. If, however, the Commissioner had been correct in his opinion that he lacked jurisdiction over the complaint then he had no jurisdiction to intervene. His conclusion that he would still have jurisdiction to intervene is plainly wrong.

c. It may be said that LPF did not suffer any harm as a result of these errors because the Commissioner considered the complaint on its merits. However, they disclose confusion on the part of the Commissioner as to his powers and duties under the Act and may be thought to call into question whether he understood the complaint and the statutory responsibility which he had undertaken.

69. Secondly, it seems to me that the Commissioner did not adequately address two key points raised about natural justice. The first was that there was no opportunity to make submissions or adduce evidence on the legality of the litigation funding agreement. Whilst the Commissioner said that there was plenty of argument and opportunity for argument across a wide range of issues (paragraph 40), that was irrelevant in circumstances where there was no argument or opportunity for argument on the legality of the litigation funding agreement. The second point that, in my view, the Commissioner did not adequately address was the resulting prejudice to SPF's interests. He said that there was already uncertainty regarding litigation funding and that the Chief Justice's judgment had no precedential value (paragraph 43). But it seems to me that the Commissioner failed to take account of the full impact of the judgment on SPF's interests, as discussed in paragraph 25 above.

70. Thirdly, the Commissioner did not consistently direct himself in accordance with, or apply, the correct test when addressing the issue of apparent bias.

a. He introduced his discussion of this limb of the complaint by saying, "[t]he implication is that this assertion [that the Chief Justice's husband is chairman of IAG NZ and a member of the board of IAG] was of sufficient significance to lead to the Chief Justice reaching decisions in the litigation from a biased perspective" (paragraph 45). That statement does not reflect the test for apparent bias, which is concerned with the *possibility* of subconscious bias, assessed objectively from the standpoint of the fair-minded and informed observer, and not with the existence of actual bias. Although the Commissioner said at paragraph 46 that he had had regard to the test of the "fair-minded and fully informed observer" set out in the Recusal Guidelines issued on 12 June 2017 by the Chief High Court Judge, and referred to the correct test and to the relevant attributes of the observer, the introductory statement in paragraph 45 suggests that he may have fundamentally misunderstood the test.

b. The Commissioner failed to identify all the material facts which LPF alleged in its complaint would lead the fair-minded and informed observer to conclude that there was a real possibility of bias. He mentioned only the fact that the Chief Justice's husband was the chairman of IAG NZ and a member of IAG's board (paragraph 44). He may have made this error in reliance on the Chief Justice's letter dated 23 November 2017, which addressed only this point.

c. He said that his "very clear conclusion is that a fair-minded observer who sat through the hearing on 16 March 2017 and who had read the carefully constructed judgment of the Chief Justice could not have formed the view that there was a reasonable apprehension of bias causing the Chief Justice to deviate from dealing properly with the issues" (paragraph 51). He then said, "[t]o the contrary, I am satisfied that the fair-minded observer would have read the judgment as being entirely in keeping with a thoughtful approach to be expected of the Chief Justice <u>in the particular circumstances</u> and having regard to the legal issues involved" (paragraph 52, emphasis in the original). Even if it is assumed, contrary to my conclusions about natural justice, that the conduct of the hearing and the contents of the judgment were entirely fair and

proper, that is irrelevant to the question as to the appearance of bias (see paragraph 43.h above).

d. The Commissioner did not at any stage apply the test for apparent bias to the all of the relevant facts, viewed together, that were said to give rise to the appearance of bias. Nor did he address whether there was a logical connection between the Chief Justice's connections with IAG NZ and the concern that they may have subconsciously affected her approach to the appeal. Thus, he said that the observer would have concluded that "Mr Fletcher's engagement, as described, in the insurance industry would not have influenced the content of the judgment" (paragraph 53). This overlooks the Chief Justice's financial connections with IAG NZ. Further, the question is not whether the fair-minded and informed observe would have thought the connections between the Chief Justice and IAG NZ would have influenced the content of the judgment, but whether that was a real possibility.

71. Fourthly, although the Commissioner rightly referred at paragraphs 46 to 47 to the Recusal Guidelines issued on 12 June 2017 by the Chief Judge of the High Court, he did not address whether the case fell within the relevant parts of the guidelines, in particular section 4, which I have discussed at paragraphs 55-56 above. The Commissioner said at paragraph 47 that "[t]he Guidelines seem to be reflective of the understood position also set out in the earlier published Guidelines for Judicial Conduct issued by the judiciary". That being so, he ought to have considered whether the situation before him was covered by section 4.

72. Fifthly, the Commissioner appears to have misunderstood the relevant disclosure obligations.

a. He correctly noted at paragraph 53 that "[t]he observer may have acknowledged that the Chief Justice could have made the disclosure about her husband", but went on to say the observer "is likely to have concluded that she had (<u>again in the particular circumstances</u>) reasonable grounds not to do so and that Mr Fletcher's engagement as described, in the insurance industry would not have influenced the content of her judgment". Under English law, disclosure should be made in any case where it is properly arguably that the

judge should not hear the case on the grounds of apparent bias. That appears to be the position under the New Zealand Supreme Court's and the High Court's respective recusal guidelines as well. The acknowledgment that the Chief Justice could have made disclosure suggests that the Commissioner may have recognised that apparent bias was at least properly arguable. If so, he should have concluded that disclosure should have been made. Although the Commissioner had the High Court Recusal Guidelines before him, he appears not to have considered section 6.3:

> "Disclosure of any matter which might give rise to objection should be undertaken even if the judge has formed the view that there is no basis for recusal. There may be circumstances not known to the judge which may be raised by the parties consequentially upon such disclosure."

b. The Commissioner next says that the Chief Justice herself would have decided any application to have herself recused (paragraph 54). That is incorrect. The Recusal Guidelines provide at paragraph 7 that any objection to a judge sitting on an appeal is determined by all the judges available other than the judge who is the subject of the objection. The Commissioner goes on to speculate that the Chief Justice may not have acceded to an objection that she should not sit (paragraph 54). That is irrelevant to the question whether disclosure should have been made.

73. Sixthly, the Commissioner did not mention at all the Recusal Guidelines for the Supreme Court issued by the Chief Justice on 1 March 2017 and appears not to have considered whether the Chief Justice complied with the guidance regarding disclosure.

74. Seventhly, the Commissioner appears not to have made reasonable and proportionate inquiries before determining that the complaint should be dismissed. In particular, he appears not to have asked the Chief Justice what she knew about each of the matters on which LPF relied to support its complaint of apparent bias; or whether she had given any consideration to her disclosure obligations in relation to them; or whether she considered the case could fall within paragraph 2 of the Supreme Court Recusal Guidelines or section 4 of the High Court Recusal Guidelines. As a result, the Chief

Justice's knowledge regarding the relevant matters when the appeal was before the Supreme Court is unclear. It seems to me that this was of central importance to the preliminary examination of the complaint and it would have been very easy to ask the Chief Justice for a full explanation.

75. I have not been asked to advise on whether the Commissioner ought to have taken any further action in relation to the complaint. That was a question that the Commissioner was required to determine, after making reasonable and proportionate inquiries, properly directing himself in law and considering all relevant matters (and only such matters). It is my opinion that the Commissioner's preliminary examination of the complaint was fundamentally flawed for the reasons I have given.

Further remarks

76. LPF may wish to review whether, in the light of this Opinion, there are grounds for applying to have the Supreme Court's decision recalled. The focus of such an application could perhaps be the decision to give judgment, which LPF opposed. It may also wish to consider either applying to the Commissioner to review his decision, or making a further complaint (as to which see section 16(1)(i) of the Act).[2] There is also, I understand, the possibility of judicial review. These matters are outside the scope of my instructions.

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29th June 2018

[2] This provides that the Commissioner must dismiss the complaint if he is of the opinion that he has previously considered the subject matter of the complaint, and the complaint fails to raise any issue of significance that he has not previously considered.