IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-20209-485-662
[2022] NZHC 1669

UNDER	The Judicial Review Procedure Act 2016
IN THE MATTER OF	An application for Judicial Review of a Land Valuation Tribunal hearing in respect of objections under the Rating Valuations Act 1998 and the Land Valuation Proceedings Act 1948
BETWEEN	RONGOTAI INVESTMENTS LTD and RONGOTAI ESTATES LIMITED Applicants
AND	LAND VALUATION TRIBUNAL First Respondent
AND	2468 LIMITED Second Respondent
AND	BUNNINGS LIMITED Third Respondent
AND	LYALL BAY PROPERTIES LIMITED Fourth Respondent
AND	WELLINGTON INTERNATIONAL AIRPORT LTD Fifth Respondent
AND	WELLINGTON CITY COUNCIL Sixth Respondent
AND	ATTORNEY-GENERAL Seventh Respondent
AND	NZ CASH FLOW CONTROL LIMITED Eighth Respondent

Hearing: 1–10 June and 20 to 23 September 2021

Appearances: G Allan, T Mijatov and M Robertson for Rongotai Parties
No Appearance for 1st Respondent
S V McKechnie and E H Wiessing for 3rd Respondent
K Sullivan and S Gazley for 2nd, 4th, 5th and 8th Respondents
No Appearance for 6th Respondent
No Appearance for 7th Respondent

Judgment: 19 July 2022

JUDGMENT OF CULL J
[Judicial Review]

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Introduction

[1] This is an application for judicial review of the processes and decision-making of the Land Valuation Tribunal (the Tribunal), in its 2012 interim[1] and final 2012 rating valuation decisions.[2]

[2] The applicants, Rongotai Investments Ltd and Rongotai Estates Ltd (collectively "Rongotai"), allege that the Tribunal's conduct and its 2012 decisions disclosed apparent bias and/or pre-determination of the matters in issue. Rongotai seek orders setting aside the Tribunal's interim and final decisions in respect of the 2012 objections; declarations that the 2012 objections' hearing was unfair; and that the Tribunal's conduct and its 2012 decisions disclosed apparent bias and/or pre-determination. A rehearing of the 2012 objections by a differently constituted Tribunal is no longer sought.

[3] This judicial review application was heard sequentially with the consolidated appeal hearing of four appeals and cross-appeals against the Tribunal's decisions in respect of the 2007, 2012, 2015 and 2018 rating year objections. The agreed background facts, with the details of the Rongotai area and the description of the assessment of rates, has been fully described in the 2007 appeal judgment,[3] which was issued contemporaneously in a suite of six judgments, including this judgment.

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1 *Rongotai Investments Ltd v Wellington City Council* [2019] NZLVT 093 [the 2012 interim decision].
2 *Rongotai Investments Ltd v Wellington City Council* [2019] NZLVT 108 [the 2012 decision].
3 *Rongotai Investments Ltd v Wellington City Council* [2022] NZHC 1665 [2007 Rating Valuation Appeal].

[4] This decision should be read in conjunction with the 2012 appeal judgment,[4] as it concerns the conduct of the 2012 rating valuation hearing with the same parties and the same subject properties.

Procedural Background

[5] A history of the Tribunal's decisions sets the context for this judicial review application. The Tribunal issued its decision in relation to the 2007 rating valuation objections on 19 July 2019.[5] Rongotai sought to stay the hearings in relation to the further three valuation rating years. This was declined.[6] On the same day, the Tribunal issued a Minute declining Rongotai's application to recuse Tribunal member Gordon. The next day, on 20 August 2019, Rongotai filed proceedings in the High Court seeking judicial review of the Tribunal's decisions, together with an application to stay the 2012 hearing. On 26 August 2019, Doogue J declined to grant relief.[7] Those judicial review proceedings were discontinued by Rongotai on 28 August 2019.

[6] On 27 September 2019, Rongotai applied for the allocation of a priority fixture to hear among other matters, a separate question of law in relation to the 2007 appeal. I declined that application.[8] Neither my judgment nor that of Doogue J dealt with the issue of bias and pre-determination or the issues raised in these judicial review proceedings.

[7] On 19–29 August 2019, the Tribunal heard the 2012 rating objections. The Tribunal issued an oral interim decision (interim decision) dated 12 September 2019, holding that the Pengelley transaction was relevant to its determination of the 2012 rating valuation objection.[9]

[8] On 6 November 2019, Rongotai filed a judicial review proceeding seeking that the Tribunal's interim 2012 decision be quashed, and orders preventing the Tribunal from issuing a final judgment on the 2012 objection, requiring the 2012

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4 *Rongotai Investments Ltd v Wellington City Council* [2022] NZHC 1666 [2012 Rating Valuation Appeal].
5 *NZ Cash Flow Control Ltd v Wellington City Council* [2019] NZLVT 078 [the 2007 decision].
6 *Rongotai Investments Ltd v Wellington City Council* [2019] NZLVT 083.
7 *Rongotai Investments Ltd v Land Valuation Tribunal* [2019] NZHC 2103 (per Doogue J).
8 *Rongotai Investments Ltd v Wellington City Council* [2019] NZHC 2741 (per Cull J.
9 The 2012 interim decision, above n 1.

objection be reheard by a differently constituted Tribunal, and prohibiting the Tribunal (as then constituted) from hearing or determining the 2015 and 2018 valuation objection hearings. Solicitors for Rongotai served the judicial review pleadings on the Tribunal and filed with the Tribunal a Memorandum of Counsel confirming that the judicial review proceedings had been filed in the High Court; noting the relief sought included orders prohibiting the Tribunal from hearing and determining the 2015 and 2018 rating year objections; and inviting the Tribunal to consider whether it should hear those further rating objections.

[9] The Tribunal issued its final decision in respect of the 2012 rating year objections the following day.[10] In directions made by the presiding Judge, the Tribunal noted that in the absence of any decision from the High Court, the Tribunal was issuing its 2012 decision. That decision has been appealed and cross-appealed. The determination of that appeal is contained in our 2012 appeal judgment.[11]

[10] On 8 November 2019, Rongotai applied for interim orders under s 15 of the Judicial Review Procedure Act 2016, prohibiting the Tribunal as constituted from taking any further steps in relation to the 2012, 2015 or 2018 objection hearings, or otherwise staying those hearings, until the substantial judicial review claims were heard and determined.

[11] The interim application was heard on 19 November 2019. In declining relief, Cooke J noted that a key consideration was the nature and strength of Rongotai's challenge and what was necessary to properly assess that challenge.[12] Because there needed to be a careful consideration of all the evidence from the hearing and given the circumstances of the case, the Judge held that an interim relief hearing was an inadequate opportunity to assess Rongotai's challenge. In dismissing the application for interim orders, however, Cooke J said this:[13]

> I accept that there are some features of the hearing that took place before the Tribunal before 19 and 29 August 2019, and the steps taken thereafter, that can be described as unorthodox, and give rise to a possible question relating to the fairness of the approach that was followed.

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[10] The 2012 decision, above n 2.
[11] The 2012 appeal judgment, above n 4.
[12] *Rongotai Investments Ltd v Land Valuation Tribunal* [2019] NZHC 3040 at [19].
[13] At [20].

[12] In his decision, the Judge then set out five of those unorthodox features, being the Tribunal's far-reaching factual enquiries; the exclusion of witnesses; the warnings about perjury; the substantial questioning by the Chair of the Tribunal; and the timing of the release of the Tribunal's decisions.[14] Those features are reflected in the grounds of these substantive judicial review proceedings.

The claims and the opposition

[13] In summary, Rongotai pleads two claims in judicial review, apparent bias and pre-determination, although both claims similarly challenge the conduct of the Tribunal both during and post-2012 hearing. The claim is that the Tribunal disclosed apparent bias and/or pre-determination in its interactions with Rongotai Counsel, with Rongotai witnesses and any witnesses supporting the Rongotai position, such conduct including substantive questioning bordering on cross-examination by the Tribunal, inappropriate alignment with opposing Counsel, unjustified orders for exclusion of witnesses, and questionable post-hearing conduct in the release of the Tribunal's decision. Rongotai say that they were denied a fair hearing as a result of the Tribunal's apparent bias and/or pre-determination.

[14] The third respondent and the other lessees[15] oppose the application for relief. In essence, they say that the application for judicial review is misconceived because the right to appeal the 2012 decision by way of rehearing will cure any procedural irregularities. They resist the claim that the impugned conduct and decisions of the Tribunal showed apparent bias, predetermination or unfairness. They say the conduct of the hearing was robust, but not unsurprisingly so, given the factual contests raised by the parties. They submit that Rongotai have had their day in Court, with a two-week hearing for the 2012 assessment, involving oral evidence from experts and witnesses of fact.

Structure of this judgment

[15] I will deal with Rongotai's claims as follows:

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14 At [20].

15 "Other lessees" refer to the second, fourth, fifth and eighth respondents.

(a) Background to the 2012 hearing

(b) The Tribunal's function and powers

(c) The legal tests

(d) Hearing and post-hearing conduct

(e) Assessment of apparent bias and predetermination

(f) Relief

Background to the 2012 hearing

[16] The focus of the 2012 interim decision was whether the Pengelly sale should be included as a comparable sale in assessing the market value of the properties in the Rongotai area for the 2012 rating year assessment. The background to the Pengelly sale is addressed fully in our 2012 appeal judgment.[16]

The Pengelly sale

[17] The Tribunal issued an interim oral decision two weeks after the ten day hearing. The Tribunal considered that the oral decision would enable "the parties … to have the benefit of the Tribunal's view having heard all the evidence in relation to the Pengelly transaction."[17]

[18] In its oral decision, the Tribunal described the Pengelly transaction as follows:

> [4] At the heart of much of the factual dispute between the parties in relation to the 2012 valuation is a sale and purchase transaction which occurred by agreement dated 17 October 2012 in relation to two properties within the Rongotai precinct situated near the Wellington Airport. The Rongotai area is more particularly described in our previous decision.[1]
>
> [5] The properties subject to sale were 94 Tirangi Road and 8 Kingsford Smith Street and were sold by Rongotai Properties Limited (for 94 Tirangi Road) and Tullamarine Properties Limited (for 8 Kingsford Smith Street) to Pengelly Properties Limited by agreement for a total price of $2, 375,000. That sum was broken down by terms of the two agreements entered into. We

16 The 2012 appeal judgment, above n 4, at [22]–[29].
17 The 2012 interim decision, above n 1, at [2].

> attach as A and B the key pages from the agreements for sale. The terms are standard and the offer is unconditional.
>
> [5] It is common ground that the process leading to that was one undertaken by Baileys for the vendors by way of a tender process. Mr Grant Young, a senior real estate agent, with some in excess of 20 years' experience, acted for the vendors in respect of the preparation and tendering of the property. He gave evidence to the Tribunal and we acknowledge him to be a senior real estate agent well versed in the matters related to the tendering of business properties.

[19] Mr Aharoni of Prime Property Group Ltd made conditional offers for the properties for $3.6 million.[18] The conditional offer made by Aharoni contained a clause converting an agreement for sale and purchase on its face, into an option to purchase.[19] Mr Aharoni's conditional agreement was cancelled by the vendor, after the expiry of the option and Mr Aharoni's failure to meet a deadline imposed of 1 pm the following day to make an alternative unconditional offer together with a five per cent deposit on "cleared" funds.

[20] The difference between the agreed price in Mr Aharoni's conditional 2012 agreement and the ultimate price the vendors reached with Pengelly Properties Ltd was $1,226,000. This significant price difference was therefore in issue when the Pengelly sale was included as a comparator market sale. It became a prominent issue in the hearing, in which Mr Aharoni and the vendor were each challenged about their evidence in relation to this transaction.

[21] Rongotai contended before the Tribunal that the Pengelly sale was effectively a forced or distressed sale and secondly, that the vendor had not acted prudently in advising the best price. They said it should not be included as a comparator sale because it was not a valid market transaction, or if included, should be given less weight. The lessees submitted the Pengelly sale was highly relevant as it was an arms-length sale in the location, at the relevant time.

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[18] The vendors were given a tenders' sheet, which is annexed to the Tribunal's interim decision marked 'C", showing the offers that were presented.

[19] *BS Developments No 12 Ltd v PB and SF Properties Ltd* (2006) 7 NZCPR 603 (CA) at [35].

The interim decision

[22] The Tribunal found that the Pengelly sale was an arm's length and valid transaction, which would be considered in the 2012 rating valuations as a relevant comparator. In rejecting Rongotai's contention that the Pengelly sale was not reflective of the best market price, the Tribunal made adverse comments about Mr Aharoni and Ms Watson, both of whom contended the Pengelly sale was problematic.

[23] Although Counsel for Rongotai challenges the Tribunal's characterisation of the relevance of the Pengelly sale and Mr Aharoni's cancelled sale and purchase agreement, it is the Tribunal's adverse remarks in its interim decision that is at the heart of this judicial review application. Those remarks, that Mr Aharoni had a collateral purpose, that he used an agent to try and argue for a higher per square metre value for the Rongotai land, and that his role in making such enquiries through his agent was "highly dubious",[20] Rongotai says, were illustrative of the Tribunal's apparent bias or predetermination against Rongotai's position.

The substantive decision

[24] Having determined that the Pengelly sale should be included as a comparable market sale, the Tribunal concluded that the valuation roll figures determined by Quotable Value New Zealand Ltd (QV) for the 2012 rates assessment were not in error, with one exception. The Tribunal concluded that the roll valuation for 5–11 Kingsford Smith Street, one of Rongotai's subject properties under objection, was too high an assessment and adjusted its valuation downward to $375,000. Unlike its 2007 decision, the Tribunal decided that no adjustment to the land value of the properties needed to be made for the encumbrance of "Glasgow" leases.

[25] This judicial review application has as its focus the Tribunal's conduct during the 2012 hearings. Before dealing with the bias and pre-determination allegations, it is relevant to consider the nature of the Tribunal's jurisdiction and procedure before dealing with the specific allegations.

[20] The 2012 interim decision, above n 1, at [44].

The Tribunal's function and powers

[26] Land Valuation Tribunals were established in 1977 by virtue of s 19 of the Land Valuation Proceedings Act 1948 (LVPA),[21] and assumed the jurisdiction of the former Administrative Division of the Supreme Court in land valuation matters. Under s 36 of the Rating Valuations Act 1998, it is the jurisdiction of Land Valuation Tribunals to hear and determine objections to valuations following their review by a territorial authority.

[27] Every Land Valuation Tribunal shall consist of a Chairman, who must be a District Court Judge and two other members, one or both of whom shall be registered valuers.[22] The Chairman of the Tribunal has a "deliberative vote" and in the case of an inequality of votes, has the casting vote.[23] The two members of the Tribunal must take an oath that they will "faithfully and impartially perform the duties of their office."[24] In some instances, the Chairman has jurisdiction to sit alone and make orders on questions of law and procedure as specified under s 19(8) of the LVPA.

[28] Counsel have directed my attention to the function of the Tribunal, which they each submit has relevance to the determination of the conduct of the Tribunal in the 2012 hearing.

[29] Counsel for Rongotai, Mr Allan, submits the judicial role of the Tribunal Chair is significant, given the Judge's role as Chair and that he enjoys tenure. As an illustration, he says, the Judge remarked during the 2012 hearing that "this is a Court of law" and not a more informal "Council hearing." Further, Mr Allan submits that under s 27(1) of New Zealand Bill of Rights Act 1990 (NZBORA) parties have the right to the observance of the principles of natural justice by any Tribunal.

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21 The LVPA replaced the Land Valuation Court Act 1948, which established the Land Valuation Court and gave it the jurisdiction formerly exercised by the Land Sales Court (which fixed values for the purposes of transactions under the Servicemen's Settlement and Land Sales Act 1943), claims for compensation for land taken or injuriously affected under the Public Works Act 1928; and objections to valuations under the Valuation of Land Act 1925. See JP McVeagh *Land Valuation Law* (7th ed, Butterworths, Wellington, 1979) at 50–51.

22 Land Valuation Proceedings Act 1948, s 19(2).

23 Section 19(7).

24 Section 20.

[30] Counsel for the lessees, Mr Sullivan and Ms McKechnie, submit the Tribunal's procedure is essentially an inquisitorial process. Counsel drew the Court's attention to s 19(14) of the LVPA, which provides that every Land Valuation Tribunal is deemed to be a Commission under the Commissions of Inquiries Act 1908, and s 19(15), permitting the Tribunal to adopt such procedure as it thinks fit, subject to the LVPA and to any rules or regulations made under the Act. They point to the rules of process and procedure contained in the Land Valuation Tribunal Rules and the Commission's powers of investigation, which include requiring the production of papers, documents, records or things for inspection and the power to call and examine witnesses.[25] Counsel submit that all parties were given similar treatment by the Tribunal across the four rating objection hearings.

The legal tests

[31] Rongotai has pleaded two grounds of review: apparent bias and predetermination. Both grounds are advanced on the same pleaded allegations and evidence.

[32] Apparent bias and predetermination are distinct concepts. Apparent bias concerns the perception that the decision-maker was not impartial. The Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* described the test in the following way:[26]

> [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.

[33] The Court articulated the two step test for determining a claim of apparent bias:[27]

> (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".

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25 Commissions of Inquiry Act 1908, ss B(4)D.

26 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

27 At [4].

[34] The Court described more fully the features of a fair-minded lay observer:[28]

> The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision.[29] He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias.

[35] Predetermination on the other hand arises where a decisionmaker has approached a decision with a "closed mind", such that they are not amenable to persuasion on the issues engaged,[30] or in other words, are "unwilling, honestly to consider changing [their] mind."[31] In *Save Chamberlain Park Inc v Auckland City Council*, Moore J noted that predetermination was conceptually different from bias, which is concerned with public perceptions as to impartial decision making.[32]

Hearing Conduct

[36] The essence of Rongotai's claims is that based on the Tribunal's conduct during and after the 2012 hearing and the content of its decisions, the Tribunal did not bring an impartial mind to its determination of the 2012 rating objections. The Court of Appeal has cautioned that the factual basis of bias allegations must be carefully made out and the inquiry must be rigorous.[33]

[37] I propose to deal with the bias/pre-determination allegations in each of five separate categories. The following five categories are:

(i) excessive intervention by the Tribunal and inappropriate engagement of the Tribunal with opposing parties' Counsel;

(ii) adverse comments by the Tribunal of witnesses and Counsel;

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28 At [5].

29 *Johnson v Johnson* (2000) 201 CLR 488 at [33]; and *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031 (HL) at [2].

30 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); and *Save Chamberlain Park Inc v Auckland Council* [2018] NZHC 1462 at [180].

31 *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474 at [143].

32 *Save Chamberlain Park Inc v Auckland Council*, above n 30, at [180].

33 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [62].

(iii) the making of unfounded orders;

(iv) the pursuit by the Tribunal of an irrelevant inquiry; and

(v) the post-hearing conduct of the Tribunal.

[38] Rongotai provided numerous examples under categories (i) and (ii), to which the lessees responded and under each of the categories, certain of those examples are examined.

Excessive intervention

[39] Mr Aharoni is the director and ultimate beneficial owner of Rongotai. He was called to give evidence at the 2012 hearing about the Pengelly transaction. Rongotai submits that the Tribunal treated Mr Aharoni in a hostile and over-bearing manner and permitted opposing Counsel to do the same. Rongotai submits the Tribunal was simply set against evidence or propositions supportive of Rongotai's case theory.

[40] Counsel for the lessees reject the suggestion that the Tribunal was hostile to Rongotai's interests. They say this was all part of a robust hearing, which concerned a challenge to the veracity of the evidence given about the Pengelly sale from Mr Aharoni.

[41] Of the examples provided by Rongotai, I deal with four examples where the Tribunal is alleged to have excessively intervened in an over-bearing manner and permitted opposing Counsel to do the same. The four examples are the evidential warning order to Mr Aharoni, the three perjury warnings also received by Mr Aharoni, the Tribunal's intervention with Rongotai's experts and the favourable expert Ms Watson, and engagement with opposing Counsel.

Evidential warning to Mr Aharoni

[42] The evidential warning arose during the cross-examination of Mr Aharoni about the reasons why his conditional offer to purchase the Pengelly properties fell

over. For context, I set out the cross-examination question that prompted the Judge's warning which unfolded as follows:[34]

> Q. Is that what you're saying, that the reason the Pengelly sales, in terms of your conditional offer fell over is because they are unhappy and that's all to do with they own five properties?
>
> A. No that's not what I said, I said they're a non-experienced operator that wanted to liquidate their holding in that area and counter that, also I was told by … by Mr Young, *that they don't like me*, okay and in fact when I left the room I said, "Hi" to Ms Edwards just a couple of days ago, she ignored me, she doesn't want to talk to me. Okay I'm not sure what I've done to her, she's the one who liquidated the company in order to avoid paying me my rent. She is the director of a company, liquidated it to stop – to deceive creditors which I am one of them, or not deceive sorry, avoid paying creditors.

[43] Mr Aharoni was then challenged about whether the agent had actually said that they did not like him. After the following passage of cross-examination, the Judge intervened and gave Mr Aharoni a warning that he may not give evidence. The relevant passage is as follows:[35]

> **COUNSEL:**
>
> Q. Mr Young didn't say anything about, he told you they didn't like you?
>
> A. Mr Young has told me –
>
> Q. Well we'll have to get him back for that then, that's all right okay.
>
> A. – they said they don't like me.
>
> Q. Okay, now just be very, very clear as I proceed here, I don't want long answers from you telling me your evidence.
>
> A. Well you're going to get the truth from me and whatever the truth requires you're going to get it.
>
> Q. No you [will] answer my questions or the Judge will intervene. Now just listen to my questions and answer them.
>
> **THE COURT: JUDGE**
>
> Q. Well wait a second, Mr Aharoni I'm only going to allow you to give evidence if you comply with the rules of evidence and that is you were asked a question, you answer that question concisely and accurately and truthfully. If you need further explanation you ask permission to give it. For the most part it's only if it's relevant to your answer. What I am getting from you at the

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34 Emphasis added.
35 Emphasis added.

moment is what I detect as a level of attitude towards the Court that you're going to tell us things, that is not your purpose before the Court. You are not counsel, you can only give evidence to the Court. If you don't comply I will just exclude you. Now It's entirely up to you but I want to see you answer the questions accurately and precisely. Counsel is entitled to that and it does not advance your case or this case at all if you're not prepared to do so.

A. I apologise Your Honour but I do believe I've answered –

Q. Just to answer the questions please.

A. Which is what I've done.

Q. No you haven't and if you continue to do this I will not allow you to give evidence, do you understand?

A. I do understand I'm sorry.

[44] The Judge's intervention to warn Mr Aharoni that he can give evidence only if he complied with the rules of evidence is perplexing. Mr Aharoni was asked an open question in cross-examination about his reason for saying that his conditional offer fell over. Mr Aharoni gives a full answer. Counsel challenged the answer by indicating that he would call the Bayley's agent and then proceeded to tell Mr Aharoni that he did not want long answers from him "telling me your evidence".

[45] If Counsel puts a proposition for acceptance by a witness, the witness can correct or reject the proposition. If it is inaccurate, then a witness disagrees with it and usually explains why.[36] The cross examination question was "Is that what you're saying …?" Mr Aharoni disputed that that is what he had said and answered the question. There appears to be no basis therefore for the Judge to have warned Mr Aharoni that he would be excluded, if he did not comply with the rules of evidence. It is unclear which rules of evidence to which the Judge was referring, but he warned Mr Aharoni that he must answer a question "concisely and accurately and truthfully."

[46] Mr Aharoni then apologised, saying he believed he had answered the questions. He then received a further warning from the Judge that if he did not continue to answer the question, he would not be allowed to give evidence. Mr Aharoni apologised again.

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[36] Bruce Robertson (ed) *Introduction to Advocacy* (NZLS CLE Ltd, 2014) at 244–246.

The three "perjury" warnings

[47] Rongotai also submits that the Tribunal unfairly and improperly issued three warnings, that by clear inference were perjury warnings. Counsel for the lessees dispute that the Chair offered "the first warning" and say that the Chair simply cautioned the witness that he needed to be careful about saying what other witnesses had said.

(a) First warning

[48] Ms Quinlan, a trustee vendor, had been called by Bunnings to give evidence regarding the circumstances of the Pengelly sale. Her evidence was that she could not deny that an offer had been made. During the course of Ms Quinlan's evidence, Mr Aharoni was excluded from the courtroom.[37]

[49] Mr Aharoni gave evidence that he had made an offer. In cross-examination, Mr Aharoni was challenged about whether he made an initial offer to purchase the Pengelly properties in 2010 as the actual offer was unavailable, either being lost or with the vendors' lawyer. Mr Aharoni was then asked these series of questions:

> **CROSS-EXAMINATION CONTINUES: COUNSEL**
>
> Q. Well that's all right, we won't pursue that further, His Honour knows the position as do the rest of us but the point in referring to 2010 is from your answers, that's a way of legitimising, is it, the integrity of your offer in 2012 for $3.6 million, that's the whole point of going on about these alleged offers.
>
> A. You again –
>
> Q. No wait till I finish. These alleged offers in 2010, that's the point of referring to them.
>
> A. That's not what I said. You are putting words in my mouth again. The point of – my offer is legitimate, it doesn't need any help to legitimise it but the point is that the vendor at 2010 refused an offer for $3.1 million because in fact they said, "We will sell it for three and a half million dollars", or whatever it is and I don't think anyone denies it.
>
> Q. You've told us what they said.
>
> A. So that shows the vendor's view.

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[37] See "Making of unfounded orders" (c) at [86]–[88].

[50] It is at this juncture that the Judge intervenes, warning Mr Aharoni that he needs to be careful about his evidence because it contradicted the evidence of Ms Quinlan. Mr Aharoni, however, had been excluded from the Courtroom when Ms Quinlan gave her evidence, and says so. The passage is as follows:

> **THE COURT: JUDGE**
>
> Q. Now you're saying – I've got to advise you that you need to be careful to say what other witnesses have told the Tribunal because you've been sitting here and you heard Ms Quinlan tell us she doesn't recall any offer from you.
>
> A. I was not here when Ms Quinlan –
>
> Q. Right, he was excluded. So the evidence of Ms Quinlan was that she has no recollection of receiving an offer from you and I think no recollection is the right words isn't it, Mr Scragg?

[51] After clarification that Ms Quinlan did not have any recollection of what happened in 2010, Mr Aharoni was cross-examined again, on the basis that the witnesses had no recollection of his 2010 offer. Again, the Judge intervenes and says to Mr Aharoni:

> Q. Well you're making an assertion that you made an offer that's denied by the other parties.
>
> A. Well this is what my testimony is and as confirmed by Mr Grant Young …

[52] There was no reference by the Judge to the word "perjury" but it clearly was a warning by the Judge that he needed to be careful about his evidence. The appellation of whether it is a warning or a caution matters little in my view. Mr Aharoni was giving his evidence. It was for the Tribunal to decide on the credibility of his evidence in making its determination. Mr Aharoni simply did not agree with the propositions that were being put to him in cross-examination about Ms Quinlan's evidence. More pertinently, he could not comment on what Ms Quinlan had said as he had been excluded from the courtroom during her evidence. On any view of the matter, the warning from the Judge was not justified. Mr Aharoni disagreed with the evidence of the other witnesses and he was giving evidence to that effect, as he was entitled to.

(b) Second warning

[53] During further cross-examination of Mr Aharoni about his view of the vendor's motivation in selling the Pengelly properties, the opposing Counsel put to Mr Aharoni that "Ms Quinlan made it quite clear in her evidence they weren't remotely desperate" to sell and asked Mr Aharoni how that confirmed his view. Mr Aharoni again said that he could not comment on what Ms Quinlan had said, as he was not in the room when she gave her evidence. It was at this point that Counsel rebuked Mr Aharoni for criticising the Judge. This led to the Judge's second warning, which Rongotai submits was a perjury warning. The passage is as follows:

> **CROSS EXAMINATION CONTINUES: COUNSEL**
>
> …
>
> Q. Well we heard here, Ms Quinlan made it quite clear in her evidence they weren't remotely desperate. In fact she says so. She addresses your evidence –
>
> A. Well this is not, this is –
>
> Q. No don't interrupt me. She addresses your evidence directly by way of saying I now address Mr Aharoni's evidence and she says we were not remotely desperate.
>
> A. Well –
>
> Q. So how did that confirm your view?
>
> A. Sorry. If you want me to comment on what Ms Quinlan said you have - you should allow me to be in the room when she was talking, so I can't comment on what she said.
>
> Q. Well don't criticise the Judge please. That's not –
>
> A. Sorry?
>
> Q. You've been told already do not criticise the Tribunal. That's not how we operate here.
>
> A. I'm not. I'm not criticising the Tribunal –
>
> Q. Well that's - the decision was made there.
>
> A. – whatsoever. I'm criticising you.
>
> Q. Get on with answering the question.
>
> A. The question –

> **THE COURT: JUDGE**
>
> The job is not for you to criticise anyone. The job is for you to answer questions. I mean the transcript of this is going to be fascinating reading in the superior Court. You need to focus and I haven't given you a formal warning but some of your answers are almost directly contradictory to your evidence. I'm not going to go into it but you need to be careful in your answers now and I think you need to be more careful in your… I don't think you should get into, well it's not my job to advise the witness what to do but I think you are veering into very dangerous territory. Can I put it that way.
>
> **COUNSEL:**
>
> Can I ask Sir that Your Honour does consider a warning because I might wish to go back to it if this continues in this vein.
>
> **THE COURT: JUDGE**
>
> Q. Okay. Well if it carries on I'm just, I have given the warning yesterday as I recall, a general warning. This is a more serious warning but I'm not going to give what, I don't want to refer to the word. People - all counsel know here what I mean about the warning. I gave it to one other witness. But at this stage I don't think it's gone that far but he's getting dangerously close. So I think you should focus not on [Counsel] or on the Tribunal or on anyone else. Focus on your answers in giving a concise and truthful answer to the questions.
>
> A. Can I ask you Your Honour to tell me where is my evidence now contradictory to my evidence before?
>
> Q. This isn't a query. This matter will be dealt with, you know, on appeal if you appeal or otherwise, if you don't appeal, then we will have to deal with it in the normal way. Carry on [Counsel].
>
> **CROSS EXAMINATION CONTINUES: COUNSEL**
>
> And nobody in the Tribunal is in the witness box or will be Mr Aharoni, this is not a general discussion… you'll have to take that up with your counsel.

The Tribunal then indicated it was prepared to take a break for that purpose and said:

> I have been clear that I'm not giving him, and I don't want to use the word, people know what I'm talking about. I'm only giving him a general warning at this stage, but … he is veering close to a proper warning.

The Tribunal then told opposing Counsel:

> you can ask for one [that is, a "proper warning"] if you consider he goes over the line again. Well, I'm not going to say again, I don't know that he has actually, I haven't examined the transcript carefully.

[54] The Tribunal then said: "all counsel know here what I mean about the warning" and that Mr Aharoni needed to give concise and "*truthful*" answers.

[55] From the above interchange, the Judge accepted that he had given Mr Aharoni a “general warning” the day before. I refer to it as the first warning. The Judge calls the above intervention “a more serious warning”, which he then calls “a general warning at this stage” (the second warning) but says that Mr Aharoni is veering close to a proper warning. I consider it is plain that the Judge is talking about a perjury warning following Counsel’s rebuke that Mr Aharoni was criticising the Tribunal. In fact, Mr Aharoni’s answer was correct. He could not properly comment on Ms Quinlan’s evidence when he had been excluded from the courtroom at the time she was giving it.

(c) Third warning

[56] Again, the issue of inconsistency between Mr Aharoni’s evidence and that of the vendor gave rise to the third warning to Mr Aharoni.

[57] This time, Mr Aharoni was challenged about another aspect of Ms Quinlan’s evidence. This was whether Edwards Hardware Holdings Ltd was an Edwards’ family company. Mr Aharoni had initially thought it was and had said so in his brief of evidence. He was challenged by Counsel that his evidence was therefore untrue. The Judge then questioned Mr Aharoni about whether he accepted that his statement was untrue. Mr Aharoni said that he could not tell the Tribunal whether it was true or not because he received this information from his lawyers. At that stage, the Judge said:

> Q.… this is, we’re getting close to the warning now. You’ve told us everything you say in this brief is true. Is that true or not?
>
> A. I believe that this statement is correct but I received this information from a research from my lawyer. If he ma[d]e a mistake then I take responsibility for this mistake.

[58] Cross-examination is then recommenced by Counsel but the Judge interposes and continued the questioning of Mr Aharoni. Before taking a break, to allow Mr Aharoni to consult with his solicitor, the Court consulted with opposing Counsel by saying:

> **COURT:**
>
> …do you think I’ve got to the P-word warning or not?

> **COUNSEL:**
>
> I do Sir, yes I do.
>
> **THE COURT:**
>
> You know I don't, it's not a land I venture into very frequently at all, in fact, I think this would be the second warning, probably only the third warning I've ever given.
>
> **COUNSEL:**
>
> And two of them in this case Sir.
>
> **THE COURT:**
>
> Two of them in case, I am reluctant to get to that point … I am reluctant to do it, I must say.
>
> ….
>
> There's a cut and thrust to all of this and I think [Opposing Counsel] is making progress in any event and I don't know that I need to go that far but to be fair I think Mr Aharoni needs to reflect on what else in his evidence may not be correct because we're going to be going there very soon.

[59] The Judge then invites Counsel for Rongotai to have a discussion with Mr Aharoni.

[60] I accept Rongotai's submission that Mr Aharoni's evidence in relation to the Edwards Family company in his brief was mischaracterised as "untrue". Mr Aharoni acknowledged that he had obtained the information from his lawyer and that if it was incorrect, he did not think he could change his evidence. Mr Aharoni goes on to give a perfectly adequate explanation as to who had given him the information, but explains that despite the wrong company name being inserted, the company was in fact liquidated and the tenants had stopped paying rent because of the liquidation.

[61] On a review of the transcript passage above, I consider there was no basis for him to receive a perjury warning, particularly as he had been excluded from hearing Ms Quinlan's evidence. His own Counsel advised the Tribunal that he had not discussed other witnesses' evidence with Mr Aharoni since the trial began "given the various exclusion orders that had been in place." It is also unusual, as Cooke J noted

in the interim decision, and in my view, inappropriate, for a Judge to ask opposing Counsel whether he should give a witness for another party, a perjury warning.[38]

Interventions with Rongotai's experts

[62] I turn to consider some examples of the Tribunal's interventions with Rongotai's two expert valuers Mr Horsley and Mr Butchers, when they gave their evidence. These examples also show the Tribunal's unorthodox engagement with opposing Counsel.

[63] In relation to Mr Horsley, a similar issue arose as it did in Mr Aharoni's evidence, regarding his understanding of the ownership of Edwards Hardware Holdings Ltd. The Tribunal warned him "to be very careful with [his] answers", as his "evidence ha[d] shown to date that there are some clear differences between the evidence [he] gave". This was a reference to alleged differences between Mr Horsley's brief of evidence and his oral evidence related to this ownership point.

[64] Rongotai submit that the Tribunal's warning to Mr Horsley could have been reasonably capable as being interpreted as a challenge to his honesty. The lessees, however, assert that Mr Horsley had to accept that there was an incorrect reference in his brief to the Edwards Family owning Edwards Hardware. It had to be removed from his brief and Mr Horsley accepted that he had no evidence to say that the vendors were under pressure to sell Pengelly to realise funds. He accepted also that his brief reflected understandings from Mr Aharoni, when the reference should have been to Mr Aharoni and his lawyers.

[65] Any differences in the written witnesses' briefs of evidence and their oral evidence forms part of the process of examination of witnesses, where any corrections that need to be made arise and are explained during the witnesses' oral evidence. Indeed, opposing Counsel reinforced this, when he said to Mr Horsley: "There's nothing wrong with modifying your evidence as it's examined." It is unusual therefore, for a Judge to caution a witness about correcting his brief of evidence after the identification of mistakes during his oral evidence.

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38 *Rongotai Investments Ltd v Land Valuation Tribunal*, above n 12, at [20(d)].

[66] There are numerous examples to which I was directed, where the Tribunal challenged Mr Horsley's status as an independent expert witness. For example, the Tribunal suggested that Mr Horsley had "spent so much effort on trying to dissuade QV from [the Pengelly sale] being taken into account". Of Mr Horsley's opinion that the Pengelly sale was not a bona fide transaction, the Judge asked, "did someone ask you to say [that]?". Following Mr Horsley's response confirming they did not, the Judge said "Well why did you use that phrase? … I've never heard a valuer use it".

[67] The Judge intervened in the cross-examination of Mr Horsley to pursue a "wider issue" and told Mr Horsley "it is unusual for a witness to challenge Counsel." The Judge said "I think you owe [Counsel] an apology myself" and then Mr Horsley apologised.

[68] The Tribunal repeatedly asked Mr Horsley and Mr Butchers to answer questions regarding the provenance of the information upon which they relied in giving their evidence. For example, to Mr Butchers, the Judge asked whether he had ever "sat in a meeting with those people [being Mr Aharoni's lawyers, Mr Aharoni and Mr Horsley] to discuss this matter" and "did you ever have a meeting, the three of you [Mr Aharoni, Mr Horsley and himself], to discuss the preparation for this case and the evidence you would give?"

[69] I note that during the cross-examination of Mr Horsley, after the Judge made exclusion orders for the Rongotai remaining witnesses, the Judge intervened in opposing Counsel's cross-examination, reframed Counsel's question, checked that Counsel was happy with the reframed question, and proceeded to question Mr Horsley for three and a half pages of the transcript.

[70] The exchange was as follows:

> **THE COURT:**
>
> So I think what [Counsel is] asking you, I hope you will be happy with the reframing of the question, to establish for yourself why it was not a market transaction. Are you happy with that question? [Counsel]?
>
> **COUNSEL:**
>
> Very happy with that question.

[71] The Judge continued to question the witness, interpolating his questions with that of Counsel, again giving the impression that the Judge's questions were being pursued jointly with Counsel.

[72] The lessees submit that there is no reason why a Judge should not pursue answers on matters which had been given by other witnesses or where witnesses had resiled from "Rongotai's Pengelly's 'theory.'" However, it is for Counsel to cross-examine witnesses, not the Judge.

[73] The unfortunate pattern emerging from the frequent interventions by the Judge, particularly in the course of opposing Counsel's cross-examination, is that the Judge has joined with Counsel to cross-examine the Rongotai witnesses. The nature of the questions asked of both Mr Aharoni, Mr Horsley and Mr Butchers by the Judge gives rise to an inference that he considered Mr Horsley and Mr Butchers were not independent experts and that Mr Aharoni was giving untruthful evidence.

Engagement with opposing Counsel

[74] As part of the Chair's intervention in the questioning of witnesses, there are several examples where the Judge expressly refers to leaving matters in the hands of Counsel, after he has completed questioning of witnesses. In the same way, Counsel refers to working on issues together, with the Judge.

[75] Ms Watson was called by QV, as its valuer, who had undertaken her own independent assessment. She was sympathetic to the Rongotai position, in classifying the Pengelly sales as "tainted" or below market value. The Judge intervened during the cross-examination by opposing Counsel on numerous occasions. During the cross-examination, QV's lay representative interceded, asking that the witness be given an opportunity to finish her answers. He questioned whether the cross-examination was relevant, and objected to the way in which opposing Counsel had implied that Ms Watson was making things up to defend her position, embellishing facts and engaging in a "trumpeting of independence".

[76] Opposing Counsel interjected during QV's objection, stating that QV's representative needs to be aware of the basis for making objections and that it was not

a chance for saying he "doesn't like the question." The Judge did not make a ruling or make any comment on this exchange between Counsel and the representative. After concluding his questioning of Ms Watson, the Judge then said to opposing Counsel:

> Well I can only take it so far [Counsel]. I have to leave it to your tender care again.

[77] When the lay representative for QV objected on the grounds that opposing Counsel was harassing the witness, trying to make her uncomfortable, and that it was not fair on the witness, the Tribunal said that it had not been following the questioning. Yet, the Tribunal later stated that Ms Watson's evidence had given rise to a serious matter that "may have further ramifications beyond this decision" and that the Valuer-General might be required to "explain his position".

[78] Further illustrations of the Judge engaging with opposing Counsel unfold as follows.

[79] The day after Mr Aharoni was excluded from the hearing, the Tribunal indicated that a decision as to whether Mr Butchers ought to be excluded from the hearing was for the opposing Counsel to determine:[39]

> …at this stage we haven't got to a point I think that creates any particular problems but *it's up to you [Counsel].*

[80] During the course of cross-examination of Mr Horsley by opposing Counsel, the Judge had intervened repeatedly with his own substantial questioning. After a number of interpolations in the cross-examination by the Judge, opposing Counsel challenged Mr Horsley that information he said he received from Mr Aharoni had instead been provided by Mr Aharoni's lawyer. Counsel then said to the witness:[40]

> So that is an error then, just as we work through this, *the Judge and me together…*

And:

> Even after all we've been through, *His Honour and myself,* pointing these things out you're still grimly holding on…

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[39] Emphasis added.
[40] Emphasis added.

[81] Similarly, the Judge also intervened frequently during the cross-examination of Mr Butchers. The Judge said that he was "happy" to delete aspects of the expert's brief and said to opposing Counsel:

> Another one for the red pen I'm told.

Following the deletion, the Judge then said:

> Carry on [Counsel], there won't be much left soon.

[82] It is correct, as the lessees submit, that inviting a witness to delete parts of their written evidence that have no foundation is common and is adopted in trial practice, where appropriate. They submit such deletion was necessary in relation to Mr Butcher's evidence, who could not establish any evidential or rational connection to the Pengelly theory he adopted. He then also had to acknowledge he could not contradict Ms Quinlan's evidence.

[83] The issue here, however, is the engagement of the Tribunal with opposing Counsel. It is one thing for Counsel to ask a witness to delete portions of their brief of evidence, which are no longer sustainable. It is another, however, for a Judge to make a deprecatory retort about "the red pen" and give opposing Counsel encouragement to continue in like vein, so "there won't be much left [of the brief] soon." Those asides, together with the Judge's remarks that he is leaving the questioning of a witness during Counsel's cross-examination up to Counsel or Counsel's "tender care again," gives the impression of a Judge who has participated in Counsel's cross-examination and is partisan.[41]

Adverse comments

[84] The second complaint about the Tribunal's hearing conduct concerns the adverse comments made by the Tribunal, or made by opposing Counsel without

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[41] A further example was pleaded, where opposing Counsel cross-examined Mr Aharoni about his Local Government Official Information Act (LGOIA) request about QV's use of a valuer's firm, suggesting that Mr Aharoni was looking for ways to impugn or malign QV, its valuer and its relationship with the firm. The Judge pursued Counsel's line of questioning challenging Mr Aharoni about his motivation for the request for "15 years of invoices", his "right" to do so, and its relevance. Neither the LGOIA request or any responses were part of the evidence before the Tribunal.

restriction, about Mr Aharoni and any witnesses who gave evidence in support of his position.

Criticism of witnesses

[85] During the cross-examination of Mr Aharoni, opposing Counsel compared Mr Aharoni with Donald Trump, by suggesting Mr Aharoni adopted the Trumpian approach in answering questions. The following day, Mr Aharoni referred back to the unfortunate analogy. Counsel again asserted that Mr Aharoni was worse than Donald Trump, because Donald Trump seeks to legitimise falsities by saying things "only five times" whereas "I think you are a bit more than that." Mr Aharoni responded, "Oh, well it's more derogatory now. I'm worse than Donald Trump?"

[86] It is the Judge who has the discretion to disallow derogatory comments or unfair or improper questions of witnesses. Section 85 of the Evidence Act 2006 provides the Judge with a wide discretion to "disallow or direct that a witness is not obliged to answer any question that the Judge considers improper, unfair or misleading…"

[87] In the exchange about Mr Trump, the Judge did not curb Counsel's criticism of the witness, despite the witness, Mr Aharoni, describing it as "derogatory". Nor did the Judge exercise his discretion to disallow such questions of the witness for being unfair or improper. The omission to do so leaves an impression that the Tribunal condoned the imputation that Mr Aharoni legitimised false statements, more so than Mr Trump.

[88] The Judge also made critical comments. During Rongotai's Counsel's cross-examination of Mr Pengelly concerning his email exchange with Mr Aharoni's agent, about whether "an email offer" not a "written offer" was capable of enforcement by Mr Pengelly, the Judge interrupted stating: "Good luck enforcing that one Mr Pengelly."

[89] The Tribunal was also critical of Ms Watson during her cross-examination, implying she had colluded with Mr Aharoni. Although Ms Watson gave expert valuation evidence on behalf of QV, her evidence favoured the position taken by

Rongotai at the 2012 hearing, by questioning the reliance on the Pengelly sale as a comparator for valuation purposes.

[90] It is the Tribunal's reaction to this aspect of her evidence that is in contention. First, the Tribunal prevented Ms Watson from refreshing her memory by reference to contemporaneous notes. The Tribunal further directed Ms Watson not to check her notes during an adjournment.

[91] This direction to an expert witness is troubling. If Ms Watson's recollection was under scrutiny, she should have been permitted to check her notes to clarify her evidence. She was an expert called by QV to give her opinion on QVs values with which she did not always agree.

[92] Second, the Tribunal questioned Ms Watson's independence by making inappropriate adverse comments. The Judge said of persons in Ms Watson's position: "obviously they are paid to do the role. They don't do it for free"; "they'll have some obligation to support objections. Otherwise they wouldn't be here"; and "because I'm assuming Ms Watson's been paid to be here by QV".

[93] I consider that the comments made by the Judge in the context of Ms Watson's role in giving evidence at the hearing give rise to an inference by the Tribunal that she was not an independent expert and had a questionable motive for giving evidence in support of the objections. This became manifest in the Tribunal's interim decision where the Tribunal describes Ms Watson's answer to a question as "convenient."[42]

Criticism of the Rongotai parties

[94] It is submitted that the Tribunal imputed ulterior motives to Rongotai and their Counsel. There are two parts to this challenge. The first is the way in which the Tribunal heard and refused Rongotai's recusal application. The second is the Tribunal's criticism of the Rongotai parties' conduct in the previous 2007 hearing and the Tribunal's conduct towards Counsel in the 2012 hearing.

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42 The 2012 interim decision, above n 1, at [34].

(a) The recusal application

[95] Prior to the Tribunal's hearing of the 2012 objections, Rongotai applied for the recusal of Tribunal member Gordon, on the basis that there was a previous close familial relationship with Rongotai's freshly appointed Counsel Mr Scragg, namely, his former father-in-law. There was no conflict in the former 2007 hearing, as different Counsel appeared for Rongotai.

[96] The Tribunal declined to apply the Guidelines for Judicial Conduct, including the guideline that disqualification should occur where a party, lawyer, or witness of disputed facts is a close relative or domestic partner of the judge. The Judge simply stated Members are "not judiciary. They don't have tenure. They don't have all of the other things. They're not judicial officers."

[97] During the course of hearing the recusal application, Rongotai submits the Tribunal treated both the application and Rongotai's Counsel as attempting to manipulate the Tribunal's processes. The Tribunal questioned whether Mr Scragg's involvement in the 2012 hearing was "deliberate,"[43] asked Counsel when was it decided that he would lead the Rongotai case;[44] and suggested there was a "sense of forum shopping" about the application. Rongotai submit that the Tribunal manifested a view that the application was made to manipulate the Tribunal's processes, when that was not a reasonably available interpretation of the application.

[98] I am unable to uphold Rongotai's submission on the recusal decision. Although the Judge's comments could have been more judicious and less critical, Rongotai's Counsel was replaced for the 2012 hearing, when the four hearings were strictly timetabled for hearing before the same three-person Tribunal. The member was part of the three-person panel; he was not the only decision-maker; and the familial relationship was somewhat distant. In my view, the decision was reasonable in the circumstances.

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[43] The Tribunal said the recusal application seemed "*on the face of it to show a deliberateness on the part of Rongotai in that respect.*"

[44] The Tribunal's question was "When was that intention formed that you would do that? Before the 2007 hearing?"; and "when was that discussed? Have you got anything in writing that recorded that?"

(b) Criticism of Rongotai's Counsel's conduct

[99] Rongotai raise four matters in relation to the Tribunal's criticism of Rongotai's conduct during the 2012 hearing.

[100] First, the Tribunal characterised Rongotai's Counsel's conduct during the 2007 hearing as involving "a fair bit of tactics" and stated "this is not the first time we've been through this little dance".

[101] Second, during the 2012 hearing, when Rongotai's Counsel was cross-examining the lessees' expert, the Chair interrupted. He said that Counsel was "almost filibustering" and interrupted Counsel in his questioning, saying that Counsel had "rejected a whole series of things" and cut off Counsel's response to that remark. When Counsel cited an authority he considered relevant, the Chair joked about it relating to a boat sale and repeated his own view of what was relevant. Counsel then sought leave to put one more question to the witness.

[102] Third, during Rongotai's Counsel's cross-examination of the QV witness, Ms Watson, as to the economic impact of Glasgow leases, the Tribunal interrupted and accused Rongotai's Counsel of spending "the last 15 minutes simply repeating parts of an Act" and complained it had "sat through hours of this now".

[103] Fourth, a terse exchange between the Chair and Rongotai's Counsel over the basis for Counsel's questioning, resulted in the Judge abruptly taking an adjournment during Counsel's cross-examination.

[104] Counsel for the lessees contest the characterisation of the Tribunal's exchanges with witnesses and Rongotai Counsel as manifesting apparent bias or predetermination. In a detailed rebuttal of each of the allegations, both Mr Sullivan and Ms McKechnie contend that a number of the Tribunal's interventions were warranted, particularly the allegation about an adjournment the Tribunal took during the cross-examination by Rongotai's Counsel.

[105] They submit that the examination was repetitious, including Counsel for Rongotai reading back to Ms Watson parts of her evidence and a legislative provision.

The Judge intervened to remind Counsel that these matters had been previously covered and that Rongotai's cross-examination was achieving nothing of relevance before the specialist Tribunal. The adjournment, they say, was in response to Counsel's questions and the Tribunal, given the apparent failure to get its position across, took an adjournment and returned telling Counsel what was expected from questions in cross-examination. This, the lessees say, was reasonable.

[106] It is not objectionable that a Judge controls the extent of cross-examination, if it is repetitive[45] or irrelevant. However, the way in which a Judge intervenes should avoid rudeness, be courteous and civil.[46] The manner in which the Judge dismissed the reference to the case raised by Rongotai's Counsel may not have been polite or courteous, but I am unable to assess whether the Tribunal was being unduly harsh or injudicious in requiring Counsel to keep cross-examination relevant and to the point.

[107] Mr Sullivan also submits that all Counsel, from the most experienced QC to junior Counsel were given similar treatment across the four rating objections hearings. This, Counsel say, is demonstrated in the transcript where the Tribunal actively engages with all Counsel, not just Rongotai, and that all Counsel were subjected to the Tribunal's strong questioning. They submit it was a robust style of hearing, with a Judge who had a "very interventionist style", even for a Commission of Inquiry. Mr Sullivan submits that the Judge adopted the socratic method during all submissions and took over sections of questions of Counsel regularly.

[108] Ms McKechnie urges the Court to consider the judicial conduct of the Tribunal in the round, noting that the Tribunal did not spare Bunnings from criticism during the hearing, nor did it favour the opposing Counsel. Three examples were identified. The

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45 Section 85(1) Evidence Act 2006 allows a Judge to disallow any question the Judge considers "needlessly repetitive." It encompasses judicial controls on witness examination … to ensure the just and orderly conduct of trials and the rational ascertainment of facts" as contained in s 6(a): see Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV85.03].

46 Shimon Shetreet and Sophie Turenne *Judges on Trial: The independence and accountability of the English judiciary* (2nd ed, Cambridge University Press, Cambridge, 2013) at [5.25]. The authors canvass cases on judicial rudeness. In England, the nature of the rudeness by the Bench has been considered by the Courts, particularly in criminal trials. In *R v Ptohopoulos* (1968) Crim LR 52, a rude interruption by the Judge to defence Counsel on the basis he is wasting time with irrelevant questions to prosecution witnesses may not justify quashing a conviction. The question is whether the Judge's conduct disparaged Counsel, not his case: see *R v Hircock* [1970] 1 QB 67.

first is where the Tribunal assisted Mr Scragg for Rongotai by intervening in his cross-examination and directly questioning the witness. The Tribunal apologised for intervening but said it was for clarity and Counsel comments "no, that's so helpful Sir." The second is where the Judge admonishes opposing for objecting during Mr Scragg's cross-examination and the third was where opposing Counsel objected to Mr Scragg's cross-examination of Ms Quinlan, which was repetitive. The Judge disallowed the objection.

[109] I have considered these examples and compared them with the Rongotai allegations and claims. In my view, there is a distinct difference between the above three examples and the criticism and questioning of Rongotai's witnesses (and those supporting Rongotai's position) as set out above. Intervention by a Judge to clarify a point, as in the first example, has always been an acceptable judicial intervention, although I note it was during Counsel's cross-examination. The other two examples involve the Tribunal disallowing opposing Counsel's objections. These latter two examples are evidential rulings which must be made by the Judge in the course of Court hearings. What is at issue here, however, is whether the Judge's interventions, comments and conduct were impartial and fair. The examples show the Judge engaging with opposing Counsel's cross-examination to the point where the Judge takes over cross-examination and hands it back to Counsel. It is not just one example; it is several.

[110] As part of my consideration, I have examined the frequency of the Judge's interventions. It is correct, as the lessees' Counsel submits, that the Judge did intervene frequently throughout, and a familiarity developed among the Judge and Counsel over an extended period of common hearings. However, the interventions during Mr Aharoni's cross-examination are concerning.

[111] Mr Aharoni commenced his evidence at 4 pm on 28 August and cross-examination began at 4.30 pm. In the space of one hour and fifteen minutes there were at least 20 interventions by the Judge, excluding questions of clarification.

[112] I am unable to accept the lessees' submission, therefore, that their three examples are equivalent. I also do not accept that the examples raised by Rongotai are "cherry picking."

The exclusion orders

[113] Rongotai allege that the Tribunal made unfounded exclusion orders during the course of the hearing.

[114] The Tribunal made orders excluding Mr Aharoni and his expert, Mr Butchers, from the Courtroom during the evidence of Mr Horsley, the other Rongotai expert. Mr Aharoni was also excluded during Ms Quinlan's evidence.

[115] As Mr Horsley was being cross-examined about the nature of the Pengelly sales, the Judge interrupted Counsel's question to say:

> I think we've got to the point now where I'm sufficiently concerned. I think we have to exclude other witnesses that you're likely to call [Rongotai's Counsel].

[116] The Judge stated that he believed he needed to give the witness a warning too, so he asked that all witnesses who have yet to give evidence, to leave the Court. When Rongotai's Counsel asked whether that applied to Mr Aharoni, the Judge said, *"definitely* Mr Aharoni" and Mr Butchers. It was also to include the Bayley's agent and anyone else who was going to give evidence. At that juncture, these were the only other witnesses to give evidence. These were all witnesses to be called by Rongotai. In insisting that Mr Aharoni needed to leave the Court immediately, the Judge told his Counsel to advise him that he is not to discuss the matter with anyone else.

[117] The lessees submit that the exclusion orders were made by consent. I am unable to accept that submission. Mr Scragg was not asked if he consented to the exclusion order. He sought clarification about the exclusion of Mr Aharoni being his party's representative and accepted the Court's direction to give Mr Aharoni the advice as the Judge directed.

[118] I accept Rongotai's submission that the exclusion warning itself was reasonably capable of being interpreted as a challenge to the honesty of the witness and that the exclusion of Mr Aharoni left Rongotai's Counsel without a client to provide instructions on the evidence.

[119] The witness exclusion orders were made in the second week, on the sixth day, when the Rongotai witnesses were yet to be called. The exclusion orders therefore affected only those witnesses being called for Rongotai, including Mr Aharoni. No party had applied for their exclusion, but after cross-examination finished on the Pengelly sale topic, the Judge asked opposing Counsel whether Mr Aharoni and Mr Butchers could re-enter the courtroom.

> **THE COURT:**
>
> Well, if we've finished with the topic can I advise…that Mr Aharoni and Mr Butchers can no[w] re-enter?
>
> **COUNSEL**
>
> Yes, most certainly Sir.

[120] During the cross-examination of Mr Young, Rongotai's Counsel drew to the Judge's attention that he realised Mr Butchers was in the room and in light of the Judge's order excluding some of the witnesses for the Pengelly sales cross-examination, he sought guidance. The Judge then asked opposing Counsel "do you want him excluded?" Counsel responded "no, I don't really mind sir, he's an expert." The Judge then says:[47]

> … That's why I excluded [him] yesterday because it got to issues of credibility … So at this stage we haven't got to a point I think that creates any particular problems *but it's up to you [Counsel]*.

[121] There are three aspects of these exclusion orders that are troubling. First, they were made on the Judge's own motion. No party sought them. Second, only Mr Aharoni and the Rongotai witnesses, including an expert, were excluded. No other parties' witnesses were excluded. Third, the Judge engaged with opposing Counsel to ask whether (a) he wanted the Rongotai expert excluded and (b) whether the excluded witnesses could re-enter the Courtroom.

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[47] Emphasis added.

The pursuit of an irrelevant inquiry

[122] It is also alleged that the Tribunal engaged in the unnecessary and irrelevant inquiry as to the motive behind Mr Aharoni's offer regarding the Pengelly properties. In its interim decision, the Tribunal dedicated an entire section of the judgment to "Mr Aharoni's purpose in taking the option". The Tribunal was "satisfied that [Mr Aharoni] had no intention of acquiring [the Pengelly properties] from the vendors at his offered conditional contract price"[48] and that he had "seized upon these events to seek to argue without any substance before this Tribunal that there was something wrong with the Pengelly transaction and it should be ignored."[49]

[123] The Tribunal described Mr Aharoni's role as "certainly highly dubious" in using his representative to make enquiry and send an email after the date on which he knew the new contracts were entered into. The Tribunal stated he did so "to try and argue for a higher per square metre value for the Rongotai land".[50] The Tribunal considered Mr Aharoni's purpose in doing so was not in relation to the purchase of the property "but rather for a collateral purpose."[51]

[124] These findings by the Tribunal, as Rongotai submits, were seriously adverse, implying a course of conduct which was either dishonest or deceitful and were findings which were irrelevant. Despite having made those findings in unequivocal terms, the Tribunal then expressly stated that it was unnecessary for them to reach any conclusion about Mr Aharoni's purpose in taking the option. The Tribunal says:[52]

> Nevertheless, we want to be very clear that it is not necessary for us to reach that conclusion to conclude that the Pengelly transaction was entirely a market and relevant transaction.

[125] The Tribunal also makes adverse credibility findings and comments in relation to Ms Watson without the foundation to do so. She had given evidence that the Pengelly sale should be included but that it should be given "very limited weight"[53] and under cross-examination clarified that it was Trevor Pengelly, not Warren

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[48] The 2012 interim decision, above n 1, at [41].
[49] At [42].
[50] At [44].
[51] At [44].
[52] At [45].
[53] The Tribunal's 2012 decision, n 2, at [6].

Pengelly, she spoke to about the offers of sale. The Tribunal simply concludes this was "a convenient answer" without any reasons for this finding.

Post-hearing conduct

[126] Rongotai submits that the Tribunal's intentions in releasing the interim decision on 12 September and the final 2012 decision when proceedings were being taken by Rongotai in the High Court, were indicative of its apparent bias towards Rongotai, given that the Tribunal had expressed adverse views of Rongotai in the interim decision.

[127] Specifically, Rongotai alleges that the Tribunal issued the interim decision knowing or apprehending that the High Court might become seized of an application for leave to transfer the 2015 hearing to the High Court and that an application for judicial review had been filed with the High Court. The Tribunal addressed its reasons for issuing its interim decision two weeks after the hearings were completed (on 29 August). The first reason was that witnesses preparing for the 2015 and 2018 hearings should know that the Tribunal considered the Pengelly sale was relevant. Secondly, the Tribunal considered the parties were able to have the benefit of the Tribunal's view in relation to the leave and appeals before the High Court and the application for review.

[128] In his decision declining interim relief, Cooke J noted that the release of the decisions by the Tribunal seemed a "little unusual." He considered that it was arguable that the interim decision brought to the attention of the High Court the Tribunal's adverse views of the Rongotai parties:[54]

> It is in this [oral interim] decision that the adverse credibility findings were made. *Arguably the purpose of the decision was to make these adverse views known to the parties and this Court*. ...

[129] In relation to the substantive 2012 decision, these judicial review proceedings had been issued and served on the Tribunal, with a claim for an order that the Tribunal not release its substantive decision. The Tribunal then released the substantive decision the afternoon on which the judicial proceedings were served, despite the

[54] *Rongotai Investments Ltd v Land Valuation Tribunal,* above n 12, at [20(e)] (emphasis added).

introductory paragraph of the substantive decision recording that it was unlikely to be issued before the commencement of the 2015 hearing.

[130] On the day the Tribunal was served, together with a memorandum of Counsel drawing the Tribunal's attention to the relief sought, the Judge made the following directions:

> The application requires a decision of the High Court.
>
> No application has been made to this Tribunal, hearing to commence 25 November 2019. Given workload if one is filed that could not be addressed without notice to other parties and would be dealt with on 25 November if necessary. The two previous High Court decisions are relevant.
>
> At this time no injunction has been applied for and given to previous High Court decisions the tribunal will continue until orders issued.
>
> The 2012 decision was approved and issued today at around 12 pm.

[131] It could be argued this was a coincidence, as Cooke J observed.[55] But there is also a reasonable inference, given the divergence between the course of action taken and the timeline predicted in the first paragraph of the Tribunal's decision, that there had been a change of mind by the Tribunal. It appears to me that the 2012 decision was released in haste, well before the previously anticipated date, to enable the High Court to be informed of the Tribunal's ultimate determination of the Rongotai rating objections for 2012.

Did the Tribunal act with apparent bias or predetermination?

[132] Having canvassed the factual allegations of the Tribunal's conduct during and post the hearing, I now turn to whether the test for pre-determination and apparent bias has been made out.

Predetermination

[133] I deal with predetermination briefly. As noted, predetermination involves a "closed mind" on the part of the decision who is not willing to change their mind or is open to persuasion.[56] I am not satisfied here that the Tribunal made its decision with

55 At [20(e)].
56 At [33].

a "closed mind." Nor do I consider it had reached a decision in advance of the hearing and therefore predetermined matters. The Tribunal engaged with the evidence before it and did not "simply [go] through the motions of making a decision.[57] What is at issue is the way in which the Tribunal conducted itself during the hearing of the evidence and whether it gave the appearance it had acted impartially.

[134] I consider then the test for apparent bias.

Apparent bias

[135] As noted earlier, the test for apparent bias has been expressed by the Supreme Court in the following way:[58]

> [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.

[136] The two-step test involves 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 secondly, there needs to be an articulation of the logical connection between the matters raised and the feared deviation from the course of deciding the case on its merits.

[137] Here, the conduct of the Tribunal has been identified in the factual allegations during and post the 2012 rating assessment hearing, as I have canvassed above. The second step is to consider whether that conduct has led to the determination of the issues before the Tribunal on matters other than their merits. In other words, has the Tribunal given the appearance that it has acted impartially in its rating assessment inquiry?

[138] Recent English authority has reinforced that the fairness and impartiality of the Court throughout trials is the "fundamental tenet of the administration of law."[59] There is nothing wrong in a Judge intervening in the course of witness evidence "to ask questions which clarify ambiguities in answers previously given or which identify the

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57 *FSCL v Chief Ombudsman* [2021] NZHC 307 at [73]–[74].
58 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 26, at [3].
59 *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 at [108].

nature of the defence, if this is unclear." But it is wrong for a Judge "to descend into the arena and give the impression of acting as advocate."[60]

[139] There are three relevant observations, which the English Court of Appeal made in respect of the core principle that the Judge must remain neutral. The first is whether a trial has been fair is not to be judged merely by the correctness of the result. The second is that this principle applies with equal rigour to criminal as well as civil litigation, and third, whether or not litigants are legally represented. In *Michel v R*, Lord Brown JSC said:[61]

> There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, the appeal Court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried. … He is denied … the basic right underlying the adversarial system of trial, whether by jury or by jurats: that of having an impartial Judge to see fair play in the conduct of the case against him. …. *The core principle, that under the adversarial system the Judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials*.

[140] There is no "one size fits all" test of bias.[62] For example, in *Khadem v Barbour,* the Federal Court of Australia observed that a statement made by a Judge to a witness during the hearing saying "I do not believe you are giving honest evidence" has been held to show bias.[63] In another case, the statement "your client has more problems in this case than a man with a wooden leg in a bush fire" was held not to show bias.[64] What is required is an assessment of the context as a whole.

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60 At [109]–[110].
61 *Michel v R* [2009] UKPC 41, [2010] 1 WLR 879 at [27]–[31] (emphasis added).
62 Graham Taylor (ed) *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [13.66].
63 *Khadem v Barbour* (1995) 38 ALD 299 (FCA).
64 *Re Australian Industrial Relations Commission, ex parte Heap* [2003] FCAFC 36.

[141] Excessive questioning by a Judge has more than once given rise to a perception of bias.[65] One commentator observes:[66]

> New Zealand judges commonly take an active part in a trial, usually by asking questions of witnesses. Such questioning, even if vigorous and substantial, will not normally give rise to apparent bias. In contrast, when the authority's actions, seen in the context of a series of disciplinary actions, appeared to be ad hominem not ad rem, bias was found.

[142] In *Riverside Casino Ltd v Moxon*, allegations of apparent bias were not upheld in relation to an interim and final decision of the Casino Control Authority which granted a casino premises licence.[67] The Court of Appeal found that confronting witnesses with a contrary view or inviting them to see another point of view does not necessarily reflect a philosophy or ideological commitment.[68] It was emphasised that what may be painted to be a persistent and coherent pattern of interventions by the Casino Authority may be perceived differently when properly considering the length of the hearing.[69]

[143] The Court concluded that:[70]

> From our review of the transcript of the public sittings, with the benefit of the full argument from counsel, we do not find any consistent pattern of intervention pointing to a closed mind. Rather we have gained the impression of an experienced member of the Authority bringing to the public sittings considerable experience in the field and a familiarity with the written material already considered. Throughout, his interventions showed that he closely followed the proceedings and challenged matters he did not immediately accept. He clarified evidence and enquired when he sought elaboration or further information… He participated actively throughout and, when corrected, he readily acknowledged error. His unnecessary robustness at times to us reflected more his personality and background than bias.
>
> …

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65 (a) *R v Loumoli* [1995] 2 NZLR 656 (CA): The Judge embarked on one and a half pages of questioning of a witness in the nature of cross examination, such that the interventions went beyond the lively and active participation in the trial process and tended to impinge on the fair balance of the trial.
(b) *R v Fotu* [1995] 3 NZLR 129 (CA): numerous interventions showing that the Judge did not believe certain evidence, an intimation to the prosecutor to cease re-examination as it was strengthening the defence, and suggestions that a witness was suddenly recalling evidence, together with a biased summing-up, constituted a semi-prosecutorial approach which was impermissible.

66 Taylor, above n 62, at [13.66].

67 *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78 (CA).

68 At [63].

69 At [72].

70 At [70].

> The expression of views in the course of a hearing is not to be confused with bias, and allegations of bias do not open the way for some wider review of the merits of the decision.

[144] The Court of Appeal concluded that the Member's "unnecessary robustness at times… reflected more his personality and background than bias."[71]

[145] In *Vakauta v Kelly* allegations of bias arose from a Judge's conduct in a Judge-alone personal injury trial.[72] The Judge found in favour of the plaintiff. During the trial, the Judge made statements critical of evidence given by the defendant's medical witnesses in previous cases. The Judge called the three witnesses the "unholy trinity", stating that the doctors "think you can do a full week's work without any arms or legs" and suggested a lack of independence from all, accusing them of holding views "almost inevitably slanted in favour of the Government Insurance Office by whom they have been retained, consciously or unconsciously."[73]

[146] In his reserved judgment in favour of the plaintiff, the Judge also described the evidence of one of the doctors was "as negative *as it always seems to be* – and based *as usual* upon his non-acceptance of the genuineness of any plaintiff's complaints of pains."[74]

[147] The majority found that a reasonable lay person would think the trial judge appeared to be biased against those witnesses. They placed emphasis on the emphasised text above as:[75]

> … indicating that his Honour was concerned to vindicate his preconceived and very strong adverse views about the reliability of [the defence witness] and had allowed those views to prejudice his whole approach to the case to the detriment of the defendant.

They further noted:[76]

> An experienced lawyer would appreciate the ability of a trial judge to ensure that preconceived views do not cause the actual decision to be tainted by prejudgment or bias. The likelihood that the lay observer would not lies at the

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71 At [70].
72 *Vakuata v Kelly* [1989] HCA 44, (1989) 167 CLR 568.
73 At 571.
74 Emphasis added.
75 At 573.
76 At 573.

> heart of the requirement of the appearance as well as the reality of impartial justice.

[148] A more recent Australian example is *Gambaro v Mobycom Mobile Pty Ltd*.[77] The appellant was a self-represented litigant, who had issued proceedings against the respondents for contravening the Fair Work Act in terminating his employment. The appellant had applied to the Federal Circuit Court of Australia for leave to file an amended statement of claim, further discovery and other orders. The Judge declined his request. This was appealed. The appellant's grounds of appeal included claims that the Judge denied the appellant procedural fairness and natural justice, including that there was apparent bias by the Judge.

[149] During the hearing, there were several hostile exchanges between the Judge and appellant. This is an example:

> HIS HONOUR: You can't just change the goal posts just before the trial. You're lucky that the trial is being delisted because, quite frankly, if I had looked at this and I had said yes you could do this you would be paying the costs of the other side for bringing an application so soon to the trial which would mean that it would have to be delisted in any event, but anyway I'm still trying to work out your — you know, I'm ---
>
> MR GAMBARO: Can we go back ---
>
> HIS HONOUR: You get — you will get judges very frustrated very easily, Mr Gambaro. Your claims are, in short compass, very narrow matters but you keep wanting to widen them in an incredible way. Now, what is it that you want to say to me?
>
> …
>
> HIS HONOUR: How is there statute changes? Either the law is as it was ---
>
> MR GAMBARO: Workplace ---
>
> HIS HONOUR: Do not ever interrupt me. Do not ever. You've been told many times when I talk your mouth goes closed. You do not ever interrupt me or you will be cited for contempt. I'm not putting up with your rubbish.
>
> MR GAMBARO: Yes, your Honour.
>
> HIS HONOUR: There's only one person in charge here and it's me. Now, make your submission.
>
> MR GAMBARO: I thought you were going to explain something, your Honour.

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77 *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144, (2019) 271 FCR 530.

> HIS HONOUR: You interrupted me. What's so important? What is so important that you would risk the wrath of the court in trying to tell me that there is something more important. Tell me what it is.

[150] The Federal Court of Australia referred to the decision of *R v T, WA*[78] which set out the three grounds upon which excessive judicial intervention in a trial by Judge alone may result in a miscarriage of justice:[79]

> (i) The questioning unfairly undermines the proper presentation of a party's case (the disruption ground);
>
> (ii) The questioning gives an appearance of bias (the bias ground); and
>
> (iii) The questioning is such an egregious departure from the role of a Judge presiding over an adversarial trial that it unduly compromises the Judge's advantage in objectively evaluating the evidence from a detached distance (the conflict ground).

[151] The Court observed:[80]

> The extent and nature of the primary judge's interventions went well beyond the legitimate ends of seeking to clarify, understand and test Mr Gambaro's case. The primary judge's interventions both undermined the proper presentation of Mr Gambaro's case and represented such an egregious departure from the role of a judge presiding over an adversarial hearing that it unduly compromised his Honour's capacity to objectively evaluate the evidence.
>
> It was a feature of the hearing that Mr Gambaro's submissions were interrupted so frequently that he was given no real opportunity to develop his case. The interruptions began almost as soon as Mr Gambaro commenced his submissions and continued throughout the hearing until the primary judge directed his removal from the courtroom.

[152] Ultimately, the Court considered that both the first and third ground were established such that it was unnecessary to consider the "apprehended bias ground:"[81]

> …except to mention that the primary Judge's comments made after Mr Gambaro had been removed from the courtroom and in the reasons for judgment may reflect a recognition that his Honour's conduct gave rise to an apprehension of bias.

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78 *R v T, WA* (2013) 118 SASR 382.
79 *Gambaro,* above n 77, at [19].
80 At [29]–[30].
81 At [28] (emphasis added).

[153] Issues of impartiality and excessive judicial intervention were recently considered by both the English Court of Appeal and Supreme Court in *Serafin v Malkiewicz*, which was an appeal on unfair trial grounds.[82] There, an unrepresented litigant's evidence given during a defamation trial was the subject of the Judge's interventions, which both Courts found were highly unusual and troubling. The Supreme Court held that the Judge had appeared to:[83]

> …descend into the arena, to cast off the mantle of impartiality, to take up the cudgels of cross-examination and to use language which was threatening and bullying; and that its impression was of a Judge who, if not partisan, had developed an *animus* towards the claimant.

[154] The Supreme Court upheld the Court of Appeal's "rare finding" that the Judge's conduct throughout the trial was unfair towards one of the parties and its conclusion that:[84]

> [T]he Judge not only seriously transgressed the core principle that a Judge remains neutral during the evidence, but he also acted in a manner which was, at times, manifestly unfair and hostile to the claimant … the nature, tenor and frequency of the Judge's interventions were such as to render this libel trial unfair.

[155] The Supreme Court observed that this conduct "may come close to a suggestion of apparent bias on the Judges' part towards the claimant" but that the focus for the Court on appeal was whether the trial itself had been unfair.[85] The Court noted that they had not been addressed on the meaning of bias, but said "it is far from clear that the observer would consider that the Judge had given an appearance of bias."[86]

[156] I consider the Supreme Court's observations that the Judge "transgressed the core principle that a judge remains neutral" and that he "cast off the mantle of impartiality" squarely fit within the apparent bias test enunciated by the New Zealand Supreme Court in *Saxmere.* Questions regarding the appearance of impartiality and neutrality are central to this inquiry. Although *Serafin* arose by way of appeal, rather than judicial review, the findings are relevant to the inquiry in this case. In *Serafin,*

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82 *Serafin v Malkiewicz,* above n 59.
83 At [32].
84 At [32], citing *Serafin v Malkiewicz* above n 59: [2019] EWCA Civ 852, [2019] All ER 101 at [119].
85 *Serafin v Malkiecz,* above n 59, at [37].
86 At [39].

the Trial Judge dismissed the defamation claims of the self-represented litigant, who appealed those findings, rather than seeking a judicial review. Plainly, the unfairness of the trial was the key issue.

[157] In the UK authorities cited, the unfairness test has often been focused on the intervention of the Judge during the trial.[87] By comparison, excessive judicial intervention in New Zealand and Australian jurisprudence is more common in the judicial review context in an assessment of bias.[88] Nevertheless, I consider the principles enunciated by Denning LJ in *Jones v National Coal Board* regarding judicial intervention, albeit in the unfairness context, are applicable:[89]

> [the Judge] must keep his vision unclouded …. let the advocates one after the other put the weights into the scales … but the Judge at the end decides which way the balance tilts, be it ever so slightly. *The Judge's part in all this ... is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure to see that the advocates behave themselves seemly and keep to the rules laid down by law to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the Judge and assumes the robe of an advocate; and the change does not become him well ... such are our standards.*

[158] I now turn to apply the bias and fairness principles to these facts.

Analysis

[159] Having identified the aspects of the Tribunal's conduct that are said might lead the Tribunal to decide a case other than on its legal and factual merits, I now assess whether that conduct gives rise to the perception that the Tribunal did not act impartially in its 2012 rating assessment inquiry.

[160] As noted, Counsel reminded the Court that the Land Valuation Tribunal is deemed to be a Commission of Inquiry[90] and inherent in its power to determine its own process, the Tribunal may adopt an adversarial, inquisitorial, or hybrid

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[87] See *Serafin v Malkiewicz,* above n 93, at [40].

[88] See, for example, *R v Loumoli,* above n 65; *R v Fotu,* above n 65; *Riverside Casino Ltd v Moxon,* above n 67; *Vakuata v Kelly,* above n 71; *Gambaro v Mobycom Mobile Pty Ltd,* above n 76.

[89] *Jones v National Coal Board* [1957] 2 QB 55 at 64 (emphasis added).

[90] Land Valuation Proceedings Act, s 19(14).

approach.[91] Mr Sullivan referred to the Court of Appeal's decision in *Re Royal Commission on Thomas case*.[92] In that case, the comments of the presiding judicial officer of the Commission of Inquiry were alleged to show "bias by pre-determination" by the use of strong assertions in his interrogation of police witnesses. The Court found that, while the matter was finely balanced and caused the Court anxiety, a fair-minded observer would not consider the Chairman's use of strong expressions in his interrogation of Police witnesses showed a real likelihood of ultimate bias.[93]

[161] Mr Sullivan referred to two further examples where a District Court Judge's interruptions, including cross-examination of a plaintiff's witnesses, were held not to constitute bias because the interventions did not affect the outcome of the case.[94] Ms McKechnie also referred to a number of authorities in which a Judge questioning witnesses, even if vigorous and substantial, will not normally give rise to apparent bias.[95]

[162] I accept that in the course of an inquiry, particularly in a specialist tribunal such as the Land Valuation Tribunal, the Chair, being a District Court Judge, and the members of the Tribunal are familiar with the issues. In this case, the Tribunal was in the process of undertaking four separate inquiries into the four years of valuation objections. It was open to the Tribunal therefore, to question witnesses as to the validity of the sale price for the Pengelly transaction.

[163] Here, however, the Chair's interventions were substantial, some of which were in the nature of cross-examination. The examples I have canvassed cover a range of the Judge's interventions in opposing Counsel's cross-examination of both Mr Aharoni and the Rongotai witnesses. The two most unconventional examples are during the cross-examination of Mr Aharoni, the Judge asked opposing counsel "do you think I have got to the P-word warning or not?" and the second is his intervention in the cross-

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91 Te Aka Matua o te Ture | Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) at [2.51].
92 *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA).
93 At 284.
94 *Riverside Casino Ltd v Moxon,* above n 67; and *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC).
95 *Henderson v R* [2016] NZCA 431 at [16]; and *EH Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA).

examination of Ms Watson, the registered valuer employed by QV. The Judge took over the cross-examination for a page and a half of questioning, stating he could only take it so far but left it in Counsel's "tender care" again. The interaction between the Judge and opposing Counsel involved the Judge asking Counsel if he should make the third perjury warning, encouraging derogatory questioning by Counsel of witnesses, and taking a joint approach with Counsel to editing an expert witness's brief.

[164] As the commentaries reinforce, while excessive judicial intervention in the examination of witnesses does not always amount to apparent bias, questions which suggest incredulity at what a witness says are viewed in a different category. A distinction is drawn between a Judge's intervention to clarify a genuine ambiguity, particularly if a jury might be confused by the ambiguity, and a Judge expressing or suggesting incredulity:[96]

> … questions which suggest incredulity as to what is being said by a witness is different. Here, the Judge must leave it to one of the parties to undermine the evidence, resisting the temptation to 'step into the arena' to do the job himself, as he is likely to have done in the past as a barrister.

[165] There is a marked difference therefore, between a Judge familiar with the context of the valuation hearings, clarifying points of evidence with a witness, compared to his questioning witnesses in the nature of cross-examination, challenging their credibility and expressing disbelief. The Tribunal's comments such as "good luck with that one Mr Pengelly," and the comments made throughout opposing Counsel's cross-examination of Mr Aharoni, together with statements that he is going to get a perjury warning without specifying why, gives the impression that the Judge thinks Mr Aharoni is not telling the truth and is viewing him in a hostile and adverse manner.

[166] Whatever view one took of the conditional offer made by Mr Aharoni, this was a commercial property transaction. The manoeuvrings by a commercial property dealer may well have been done in an attempt to drive a price up beyond the current market value. That, however, does not justify a Tribunal expressing incredulity as to what Mr Aharoni and Ms Watson said in their evidence and intervening to cross-

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[96] *Shetreet and Turenne*, above n 46 at [5.22].

examine witnesses accordingly. Adopting Lord Denning's description, I consider the Judge here undertook extensive questioning of witnesses and in so doing, "stepped into the arena" and engaged with opposing Counsel in cross-examining the witnesses himself.

[167] I turn then to consider the Judge's perjury warnings. Although the lessees submit that it is an overstatement to say that the Judge gave perjury warnings, I consider that the Judge was clearly referring to perjury warnings, when he gave them to Mr Aharoni. However, the Judge does not specify why he has given a warning and as noted, he did not even wish to refer to the 'P-word.'

[168] I find the warnings are troubling in two respects. First, there was no basis to give a perjury warning. Where a witness runs a risk of committing perjury, if he or she gives dishonest evidence, a Judge may give a perjury warning, to ensure that the witness understands the implication of potential criminal charges. When a witness is advised that there is something incorrect in the witness's brief, that is a proposition that is normally put to the witness in cross-examination and the witness can either accept it or not. The question for the Tribunal was whether it considered the higher conditional offer from Rongotai should affect the validity of the ultimate sale price of the Pengelly transaction. Taken at its highest, the Tribunal potentially had a credibility issue to resolve as to whether the offer should be considered as a valid indicator of value.

[169] Second, once a Judge warns a witness that his answers may give rise to a potential criminal proceeding such as fraud or perjury, the basis for such a warning has to be made clear. Mr Aharoni had been excluded from the evidence of the vendor, Ms Quinlan, but maintained his position that he had made a genuine offer to purchase. Despite the fact that Ms Quinlan agreed that she had received an offer from him, the Tribunal took a different view of Mr Aharoni's evidence and issued the three warnings against Mr Aharoni.

[170] In *Re Erebus Royal Commission*, a line was drawn between a perjury and a credibility finding. Lord Diplock for the Privy Council observed that where the crime concerned is one of perjury, there may well be a grey area between what is permissible

comment upon evidence that is rejected by the decision maker and a finding of criminal conduct by a witness, which does not fall within the Commissioner's terms of reference.[97]

[171] Two important considerations flow from the *Erebus* decision. The first is that if an adverse finding, particularly one bordering on criminal conduct is to be made, there must be an opportunity for the persons involved to comment on such allegations. In this case, the Judge, by referring to the "P-warning" was plainly referring to a 'perjury warning' and potential dishonesty. The Tribunal's view that Mr Aharoni's conduct was dubious or untoward was reflected in comments made in the 2012 interim decision. Mr Aharoni, deserved an opportunity to comment on any adverse findings that were to be made about him.

[172] It was open to the Tribunal, as it did, to reject Mr Aharoni's evidence. In doing so, there was no basis upon which the Tribunal needed to issue perjury warnings.[98] If a witness, as a result of a challenge under cross-examination, has to accept their evidence is wrong in some detail and must therefore be corrected, this does not require a warning against perjury. Any correction to a witness's evidence gives rise to a potential credibility finding, not a warning about perjury.

[173] Making adverse judicial comments is another feature of the Tribunal's conduct in the 2012 hearing. In *Muir v Commissioner of Inland Revenue*,[99] an application was made for the trial judge to recuse himself in determination of a non-party costs application, following a hearing within which he was highly critical of the non-party witness to the proceeding. The Court of Appeal rejected the contention that any prior adverse rulings would be indicative of bias, warranting disqualification.[100] However, relevantly the Court addressed adverse judicial comments as follows:

> [102] Turning now to adverse comments, Judges are duty bound to refrain from making unnecessary comments. The various codes of judicial conduct – including the Australasian ones – call on Judges to be courteous to the litigant, observe proper decorum, and to be particularly cautious and circumspect in

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97 *Re Erebus Royal Commission* [1983] NZLR 662 (PC) at 686.

98 Although the lessees submit that it is an overstatement to say that the Judge gave perjury warnings, I consider that the Judge was clearly referring to perjury warnings, when he gave them to Mr Aharoni.

99 *Muir v Commissioner of Inland Revenue,* above n 33.

100 At [98]–[101].

> their language. And Judges should not issue oral condemnations that are unrelated to the furtherance of the cause to be decided or are simply gratuitous.
>
> [103] Comments as such will ordinarily not suffice to warrant recusal. What is important is that commentary should not however demonstrate that the Judge has formed a fixed opinion as to the ultimate merits of the matter pending before him or her. It has to be shown, in short, that the Judge does not have an open mind.

[174] The Judge here made continued remarks both in the evidence of Mr Aharoni and in the cross-examination of witnesses either called by Rongotai or a witness, such as Ms Watson, who was favourable to Rongotai's position, suggesting there was an orchestration of evidence by Mr Aharoni and they were simply repeating what he had told them. In issuing the perjury warnings, the Judge persisted in telling Mr Aharoni to tell the truth, which indicated he did not accept his evidence. That conclusion is one the Judge should reach after all the evidence is heard and an analysis undertaken in a reasoned decision. I accept Rongotai's submission that adverse comments by a judicial officer to a witness have the effect of impeding a witness's evidence, by implying that their evidence is worthless or is concocted.

[175] The basis for the Tribunal's exclusion orders made in relation to Mr Aharoni was also concerning. The presumption that parties to proceedings should be present throughout a case is derived from s 27 of the New Zealand Bill of Rights Act 1990. The presumption is subject to exclusion orders, which may be made in cases involving "serious allegations of deceit, misrepresentation and concealment".[101] On factual issues not involving fraud or dishonesty or criminal wrong-doing, exclusion of witnesses is not normal. Here, the exclusion order was made part way through the hearing and without advance notice to Counsel.

[176] The Tribunal also made orders excluding Mr Butchers. It is unusual, as Cooke J has noted, that an exclusion order would apply to expert witnesses, unless there were compelling reasons.[102] Having made the witness exclusion orders of his own motion, it is highly unusual for the Judge to then ask opposing Counsel, who had not applied for such an order, if he wanted Mr Butchers "excluded again."

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101 *Maruha Corp v Amaltal Corp* (2004) 17 PRNZ 67 (HC) at [12]–[14]. See also Matthew Downs (ed) Cross on Evidence (loose-leaf ed, Lexis Nexis) at [EVA3.41(e)].

102 *Rongotai Investments Ltd v Land Valuation Tribunal*, above n 12, at [20(b)], citing *Maruha Corp v Amaltal Corp (No 5)* (2004) 17 PRNZ 83 (HC).

[177] However, it is the Tribunal's pursuit of an irrelevant inquiry that is the most concerning feature of the 2012 hearing. The Tribunal did not need to inquire into why Mr Aharoni took the steps he did in making his conditional offer. The Tribunal itself accepted that it was not necessary for it to reach any conclusion as to "why Mr Aharoni acted in the way he did".[103] It was irrelevant to the Tribunal's inquiry and determination. The Tribunal had to adjudicate on objections over the 2012 rating valuations. The relevant issue was a factual one, namely, whether the sale of the Pengelly properties was a market and relevant transaction. If it was a relevant market sale for inclusion in the sales comparison valuation approach, then all that remained for the Tribunal to determine was whether it was a low or distressed sale. In that event, adjustments would then be made to its comparable value.

[178] The Tribunal's questions and comments as to the consistency of Mr Horsley's evidence and the independence of both Messrs Horsley and Butchers are also, to my mind, demonstrative of the Tribunal's adverse views towards the Rongotai position. There was no reason why Mr Horsley would not honestly accept that he may have been wrong in his brief of evidence, when he was challenged. This does not warrant a warning about the truthfulness of his evidence.

[179] I am driven to the conclusion that the fair-minded and informed lay observer might consider that as the Judge did not remain neutral during the evidence, he might not bring an impartial mind to the Tribunal's findings. He made excessive interventions in the oral evidence of Mr Aharoni and his witness Mr Horsley; he made adverse remarks about Mr Aharoni during the hearing, excluded him from the hearing when relevant evidence was being adduced, leaving his Counsel with no client -party in his absence; and he participated in the opposing parties' cross-examination of Mr Aharoni, his witnesses and the independent witness Ms Watson, who was favourable to Rongotai's position.

[180] In relation to the submissions on the post-hearing conduct of the Tribunal, I accept it appears that the Tribunal was intent on making its views of Rongotai's case available to the High Court in delivering the substantive decision much earlier than its

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[103] The 2012 interim decision, above n 1, at [42].

stated expectation that the Tribunal would release it at a later time. I consider this should be viewed as part of the Tribunal's attitude towards the Rongotai position and the parties, rather than being viewed separately.

[181] Applying the test of the fair-minded and reasonably informed lay observer, who is neither unduly sensitive nor suspicious nor complacent about what may influence a Judge's decision, I consider that such an observer might reasonably apprehend that there was a real and not remote possibility that the judicial officer did not bring an impartial mind to the hearing. The words used by the UK Supreme Court in *Serafin v Malkiewicz* are applicable here. The Judge appeared to "descend into the arena, cast off the mantel of impartiality" and took up the "cudgels of cross-examination," engaging with opposing Counsel in doing so. The unfortunate impression was of a Judge that had developed a hostile and adverse attitude towards Mr Aharoni and his witnesses, such that a lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the determination of the 2012 issues at hand.

[182] Even if, as the Tribunal accepted, the conditional offer made by Mr Aharoni was "a construct… to justify a higher per square metre value within Rongotai", it did not provide a basis for the Tribunal to imply that there was something suspicious or dishonest about Mr Aharoni's actions. Unfortunately, that is the flavour of the language used in the interim decision.

[183] In assessing all of the above aspects of the Tribunal's conduct towards the Rongotai parties and witnesses in its conduct of the 2012 rating objection hearing, I find that the Tribunal's conduct gave rise to an appearance of bias in the eyes of the fair-minded and reasonably informed lay observer. Unlike the trial in *Serafin*, where self-represented litigant's credibility and reputation were at issue, this was a rating valuation reassessment before a specialist Tribunal, which did not require such an inquiry into the motives of Mr Aharoni.

[184] The test of apparent bias has, in my view, been met. The Tribunal's conduct resulted in an unfair hearing for the Rongotai parties and culminated in an interim decision, which made damaging and unnecessary adverse findings against Mr Aharoni

and the independent QV witness, Ms Watson with reputational consequences.[104] In relation to the substantive 2012 hearing, the aspects of the Tribunal's error have been determined in the Valuation Court's 2012 appeal decision. Relief in this proceeding, however, in respect of the interim decision is dealt with more fully below.

[185] Accordingly, I make the declarations that the conduct of the Tribunal of the 2012 rating objection hearing and its 2012 interim decision disclosed apparent bias. As a result, the 2012 hearing was unfair.

What is the relief?

[186] Although relief in judicial review is discretionary, "where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the claimant is entitled to relief."[105] The Court may decline relief, even where a decision-maker has acted improperly but there must be "extremely strong reasons" for it to do so.[106] The Courts will however generally consider it appropriate to grant some form of relief where reviewable error is made out[107] and "whatever remedy is most appropriate will be employed."[108]

[187] Rongotai initially sought that the 2012 Tribunal interim and final decisions were quashed and that the 2012 objections be re-heard by a differently constituted Land Valuation Tribunal. I have found apparent bias. The feared logical conclusion was that the Tribunal's 2012 substantive decision was affected by that bias. However, at the outset of this hearing, Mr Allan no longer sought the orders for re-hearing but sought declarations that the 2012 hearing was unfair in that Rongotai's case was not heard and the 2012 decision and the in-hearing and post-hearing conduct of the Tribunal disclosed apparent bias and/or predetermination.

[188] In its written submissions, Rongotai relied on the High Court of Australia's decision in *Oakey Coal Action Alliance v New Acland Coal Pty Ltd*[109] in which the

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104 *Peters v Davison* [1999] 2 NZLR 164 at 189.
105 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR (CA) at [61].
106 *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL).
107 *Ririnui v Land Corp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112].
108 *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at [92].
109 *Oakey Coal Action Alliance v New Acland Coal Pty Ltd* [2021] HCA 2, (2021) 386 ALR 212.

Court held that where an inferior Court's decision is affected by apparent bias, the default position is that the decision is set aside and a new hearing should be ordered, and departure from this approach should be in "highly exceptional" circumstances only.[110]

[189] There are exceptional circumstances here, as all parties appear to acknowledge, justifying a departure from the default approach of directing a re-hearing. There would be no useful purpose in remitting the 2012 objections back to either the originally constituted Tribunal or a differently constituted Tribunal, given that four consecutive hearings for the 2007, 2012, 2015 and 2018 objections were heard by the same Tribunal in a strictly timetabled way, because of the inordinate delay in having the objections heard. Further, such relief is inappropriate, particularly as Rongotai has exercised its appeal right by way of re-hearing. As noted, the 2012 appeal decision is also under consideration by the Valuation Court and will be issued contemporaneously with this judgment.

[190] In *Russell v Taxation Review Authority*,[111] the Court of Appeal addressed an allegation of apparent bias/predetermination by the Taxation Review Authority, where the same Judge had previously made comments in a template judgment that were forcefully adverse to the appellant, holding that the arrangement under review was patently an arrangement for tax avoidance. The Court held that the Judge should have recused himself from deciding afresh whether the appellant's scheme was tax avoidance, given his previous findings and comments.[112] However, the Court found that the appeal to the High Court by way of a re-hearing cured the earlier denial of natural justice and would be unaffected by any suggestion of apparent bias or predetermination.[113]

[191] Counsel for the lessees submit that any unfairness can be addressed by way of Rongotai's rehearing on appeal and that any gratuitous or seriously adverse credibility findings made against Mr Aharoni and Ms Watson can be addressed in the underlying appeal. Both Ms McKechnie and Mr Sullivan submit that given the intensely factual

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110 At [101].
111 *Russell v Taxation Review Authority* [2011] NZCA 158, [2011] NZAR 310.
112 At [34].
113 At [3] and [45].

questions in dispute as part of the four appeal proceedings, including the 2012 appeal, is curative of any procedural irregularities in the Tribunal and there is no continuing prejudice to Rongotai.

[192] I consider then, what relief should follow in respect of each of the Tribunal's interim and substantive 2012 decisions.

The interim decision

[193] The interim decision of the Tribunal reflects the Tribunal's adverse and hostile views of Mr Aharoni in particular and collaterally, Ms Watson. The Tribunal recorded that Mr Aharoni "had no intention of acquiring [the Pengelly properties]" at his offered price and that he had "seized upon these events to argue without any substance" that the Pengelly transaction "should be ignored", finding it "more likely than not" that his offer to purchase was contrived to support an argument in favour of a "different per metre rate".[114]

[194] In light of the Tribunal's orders excluding Mr Aharoni and the perjury warnings, the Tribunal should have given an opportunity to Mr Aharoni to comment on the proposed adverse findings. I accept Rongotai's submission that he was not given a fair opportunity to respond to these conclusions, in light of the reputational damage that could flow. This is particularly so, when the Tribunal itself acknowledges that, "in the end it is not necessary for us to reach a conclusion as to why Mr Aharoni acted in the way he did."[115] Yet, the Tribunal proceeded to make adverse and inappropriate findings against Mr Aharoni.

[195] Similarly, the adverse comments in the interim decision about Ms Watson were gratuitous and she has not had an opportunity to comment on them.

[196] Rongotai has brought a substantive appeal in relation to the valuation assessment for 2012. The outcome of the 2012 appeal deals with the errors in the Tribunal's approach to the valuation issues and as part of that evaluation has determined that the Pengelly transaction was a relevant sale, at the relevant time, and

114 The 2012 interim decision, above n 1, at [41]–[42].
115 At [42].

in the Rongotai area, albeit that it was a low sale. I do not set aside, therefore, the Tribunal's finding in its interim decision that the Pengelly transaction is an arm's length and valid transaction, nor the Tribunal's finding that the Pengelly transaction should be considered as a comparable and relevant, but low, sale.

[197] I consider that as the interim decision manifests the manner in which the Judge did not remain neutral to Mr Aharoni and his position, or to Ms Watson's evidence, the parts of the interim decision, where the Tribunal communicates its views of the witnesses, should be removed. I have determined therefore, that the 2012 interim decision should be set aside in part[116] and an order made to redact the paragraphs of the decision containing the adverse comments about Mr Aharoni and Ms Watson. I consider this is the most appropriate relief to remedy the natural justice and fairness breaches.

The substantive 2012 decision

[198] Although I have concluded that the 2012 hearing was conducted unfairly, the substantive decision is not set aside. The 2012 Tribunal decision forms one of four similar decisions on the substantive issues of rating valuation reassessment. The reasoning of the Tribunal in reaching its 2012 reassessment valuation is analysed in the Valuation Court's 2012 appeal decision. We did not uphold the Tribunal's conclusions and the reasons are set out fully in that appeal decision. As Counsel accepts, it serves no purpose to set aside the 2012 substantial decision. Consistent with the Court of Appeal's approach in *Russell,*[117] the appeal by way of rehearing cures the denial of natural justice or fairness to Rongotai. Further, there is no repetition of the Tribunal's adverse comments in the substantive 2012 decision and no redaction is required.

Relief

[199] The application for review is granted.

[116] Judicial Review Procedure Act 2016, s 16(2).
[117] *Russell v Taxation Review Authority*, above n 111.

[200] A declaration is made that the Land Valuation Tribunal's conduct of the 2012 rating objection hearing and its interim 2012 decision disclosed apparent bias. As a result, the 2012 hearing was unfair.

[201] The Tribunal's interim 2012 decision is set aside in part.

[202] I order that all paragraphs of the interim decision be redacted, save for paragraphs A, B, C, 4, 5, 6, 15, 16, 17, 18, 19, 20, 21 (minus the first sentence), the amended last sentence of [45], [46] and [48], as set out and attached to this judgment as Annexure A.

[203] Leave is granted to Counsel to raise any issues arising from the redactions of the Tribunal's interim 2012 decision.

Costs

[204] If any of the parties seek costs, Counsel are to file memoranda of no more than five pages within 20 days of the date of this decision. Further directions will then follow.

Cull J

Solicitors:
Morrison Kent, Wellington, for Rongotai Investments Ltd and Rongotai Estates Ltd
Quotable Value New Zealand Ltd, Petone for Wellington City Council
Simpson Grierson, Wellington, for Bunnings Ltd
Solicitors for Other Lessees:
Lane Neave, Christchurch, for Wellington International Airport Ltd and 2468 Ltd
PCW Law, Auckland, for NZ Cash Flow Control Ltd
Hughes Robertson, Wellington for R Blaylock & Y Kerekes and Wild Bay Property Ltd

Annexure A

REVISED 2012 ORAL INTERIM DECISION OF THE LAND VALUATION TRIBUNAL

A: The Pengelly transaction is an arms-length and valid transaction.

B: Given it is a sale in the same area of Rongotai, the transaction is a compelling relevant sale when considering rating values in the Rongotai area.

C: The Tribunal will need to consider the 2012 rating valuations in light of this sale.

The Pengelly transaction

[4] At the heart of much of the factual dispute between the parties in relation to the 2012 valuation is a sale and purchase transaction which occurred by agreement dated 17 October 2012 in relation to two properties within the Rongotai precinct situated near the Wellington Airport. The Rongotai area is more particularly described in our previous decision.

[5] The properties subject to sale were 94 Tirangi Road and 8 Kingsford Smith Street and were sold by Rongotai Properties Limited (for 94 Tirangi Road) and Tullamarine Properties Limited (for 8 Kingsford Smith Street) to Pengelly Properties Limited by agreement for a total price of $2,375,000. That sum was broken down by terms of the two agreements entered into. We attach as A and B the key pages from the agreements for sale. The terms are standard and the offer is unconditional.

[6] It is common ground that the process leading to that was one undertaken by Baileys for the vendors by way of a tender process. Mr Grant Young, a senior real estate agent, with some in excess of 20 years' experience, acted for the vendors in respect of the preparation and tendering of the property. He gave evidence to the Tribunal and we acknowledge him to be a senior real estate agent well versed in the matters related to the tendering of business properties.

The Pengelly purchase

[15] We now deal with the purchase of the property by the Pengelly interests. They were the underbidder, in the tender process. We are satisfied from both the evidence of both Ms Quinlan and Mr Young, that the owners instructed Mr Young to go back to the underbidder to see if they would increase their offer.

[16] It is clear that the vendors were interested in selling both properties and they therefore negotiated with the Pengellys' to buy both at the same time. We accept that the individual property offers from Pengelly were in the alternative but that the sum total of the two bids was some $2.6 million. However, it is clear and accepted by all witnesses that these offers were for one or other but not both of the properties.

[17] In fact, they entered a separate bid for both properties A and B together at $2.2 million. Subsequent negotiation led to the agreements, which we annex marked A and

B, for $2,375,000 on normal terms with settlement consequently occurring. That was for the freehold interest in the property, not being subject to any leases.

[18] Nevertheless, Ms Quinlan told the Court and Mr Pengelly confirmed, that there were buildings in poor condition on both sites. Ms Quinlan tells us that at least one of those buildings was yellow stickered as a result of earthquake risk. Mr Pengelly confirmed in this evidence to the Tribunal that he undertook improvement works to at least one of the sites for the purposes of accommodating his business.

[19] As it transpires, the Pengelly transport interests had been located in the Rongotai area for some time and at the time of the agreement were occupying leasehold land from Wellington International Airport Limited nearby. Consequently, we accept that they had a particular interest in acquiring property in the area as did Mr Aharoni.

[20] The evidence from Mr Pengelly was compelling. He manages a large and successful business and we would describe him as a realistic and hard-headed businessman. He purchased the property, he says to us, at a fair price and higher than he thought it was worth. He considered both properties together were worth $2.2 million but the offers A and B were limited time offers for both properties because he wanted to stay in the same area close to his existing building. We accept that evidence unequivocally.

[21] No other evidence produced to us derogated from that evidence at all. We accept that Pengelly's interests were at all times an interested party and a willing purchaser, they were under no compulsion. In answer to questions Mr Pengelly confirmed that they did not exercise any stress or duress upon the vendor and we accept absolutely that this was an arm's length transaction between the two parties.

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Effects of Pengelly transaction on value

[45] [W]e … conclude that the Pengelly transaction was entirely a market and relevant transaction.

[46] It is not necessary at this stage for us to reach a conclusion as to the market value as a result of this conclusion. All parties have accepted that there are a basket of sales that must be had regard to and no party is arguing before us that only the Pengelly transaction should be considered.

[48] This decision is therefore interim only on the question of the Pengelly transaction and we have yet to consider the overall market value per square metre for the land in Rongotai and the appropriate values that would apply.