NON-PUBLICATION ORDERS EXIST IN RELATION TO THIS JUDGMENT. SEE PARAGRAPH [62].

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-1087
[2020] NZHC 3165

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of a decision under the Care of Children Act 2004
BETWEEN	DN First Applicant
AND	LN Second Applicant
	FAMILY COURT AT AUCKLAND First Respondent
	SL Second Respondent
	KQ Third respondent

Hearing: 7 & 8 May 2020

Appearances: D A T Chambers QC for the Applicants
D Harris for First Respondent
V A Crawshaw QC and S M Wilson for Second Respondent
K N Crooks for the Third Respondent
A C M Fisher QC and K Swadling for the New Zealand Law Society, intervener
S P Jerebine, counsel assisting the Court

Judgment: 1 December 2020

JUDGMENT OF DUFFY J

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[1] This judgment determines the second and third causes of action in this proceeding. It should be read together with the interim judgment I delivered on the applicants' first cause of action (the interim judgment) because the reasoning of that judgment encompasses factual and legal matters that are also relevant to the second and third causes of action.[1] This judgment assumes the reader has knowledge of that reasoning.

Second cause of action

[2] The applicants contend that the decision of Judge Burns dated 18 December 2018, was made in error of law because it was made in reliance on the report of the lawyer for child, which was ultra vires. The applicants refer to the lawyer for child: selection, appointment and other matters, practice note. The practice note provides that the report from the lawyer for child should be short, factual and informative, but should be couched in neutral terms and should not introduce any material that ought to come to the court's knowledge only by way of evidence.

[3] The applicants contend that here, the report of the lawyer for the child on which Judge Burns relied recorded ultra vires hearsay evidence and opinions by the lawyer for the child, in particular: (a) the report contained hearsay evidence from teachers at the children's school as well as from a Dr Smith; (b) whilst parts of the report in relation to Dr Smith were excluded by Judge Burns, parts of the report in relation to a school teacher were left in the report on the basis that the school teacher had subsequently sworn an affidavit which had been prepared and filed to establish and demonstrate the inaccuracies in the report; and (c) the report concluded at [69] that a s 133 report was warranted in the view of lawyer for child on the basis of, amongst other things, Dr Smith's views.

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1 See *DN v Family Court at Auckland* [2020] NZHC 210.

[4] The applicants argue that lawyer for child best practice guidelines practice note 2A (the guidelines) provide that the role for the lawyer for the child is prescribed by s 9B of the Family Courts Act 1980 and guided by the United Nations Convention on the Rights of the Child (UNCROC). The applicants further argue that the guidelines require the lawyer for the child to provide an opportunity for the children to be heard in judicial proceedings affecting them and in particular provide: (a) a child must be given reasonable opportunities to be heard either directly or indirectly in any judicial and administrative proceedings affecting them; (b) a child must be given a reasonable opportunity to express his or her views and any views expressed must be taken into account by the court; (c) a child has the right to information about the case in which he or she is involved including information on the progress and outcome of that case; and (d) the lawyer must meet with the child and if it is appropriate to do so ascertain the child's views on matters affecting the child that are relevant to the proceedings.

[5] The applicants also argue that the guidelines impose a further duty on the lawyer for child to ensure that all relevant factors to the child's welfare and best interests are before the court. They maintain the guideline should be read consistently with New Zealand's obligations under international law especially article 12 of UNCROC.

[6] Here, the applicants contend that in her report the lawyer for child expressed the view that a s 133 report should be ordered, without first obtaining the views of the children on whether they supported a further psychologist's interview on what is a very traumatic and complex matter. The applicants contend that failing to obtain the views of the children in the context of this case was an action in direct conflict with the guidelines. Further, that expressing a view to the Judge without having made those inquiries was ultra vires.

[7] The applicants allege that Judge Burns directly relied upon the lawyer for child's report. That by doing so the Judge relied on an ultra vires report, which constitutes an error of law on his part.

[8] The applicants seek a declaration that the actions of the lawyer for the child were ultra vires; an order removing or in the alternative redacting the report of the

lawyer for child from the Family Court file; and an order setting aside the decision of Judge Burns.

Discussion

[9] It needs to be remembered that when Judge Burns decided to order a s 133 report he was doing so in the context of re-hearing the question of whether to order a s 133 report or not. A decision to order a s 133 report had first been made by Judge de Jong on 27 November 2017. This order was made without first obtaining the views of the children. The applicants challenged the lawfulness of this approach by bringing judicial review proceedings in this Court, which were heard by Courtney J.[2] She found that the children's views should have been obtained before a s 133 report was ordered and therefore she set aside Judge de Jong's order and remitted the question of a s133 report back to the Family Court for re-hearing. The re-hearing came before Judge Burns. Rather than apply the law as Courtney J found it to be, which is what should have been done, Judge Burns looked at the matter afresh and decided that it was open to him to order a s 133 report without first obtaining the views of the children. This was in line with submissions he received from lawyer for the child, but contrary to what Courtney J found. Following this outcome, the applicants brought a second judicial review proceeding in this Court, which was heard by me. This time the applicants challenged Judge Burns' decision to order a s133 report without first hearing from the children

[10] In the interim judgment I concluded that in the absence of an appeal against Courtney J's judgment, it was not open to Judge Burns to depart from the legal findings of Courtney J. Accordingly, I set aside his decision to order a s 133 report. [3]I am satisfied that insofar as the lawyer for the child made submissions in her report to the effect that Judge Burns was not bound by Courtney J's findings and was free to decide the question of a s 133 report afresh, those submissions were wrong in law. Accordingly, it was not open to lawyer for the child to contend before Judge Burns that it was open to him to order a s 133 report without first obtaining and paying regard to the wishes of the children. To the extent the lawyer for the child's submissions were

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2 See *AA v Family Court at Auckland* [2018] NZHC 1638.
3 See *D v Family Court at Auckland*, above n 1, at [40].

adopted by Judge Burns they caused him to go wrong in law. Thus, errors of law on the part of the lawyer for the child have either caused or contributed to Judge Burns erring in law. But this is not to say that the legally incorrect submissions or the conduct of lawyer for the child in making those submissions are amenable to judicial review.

[11] In the interim judgment I specifically avoided making legal findings on issues already determined by Courtney J. This is because I considered it was not open to me re-visit those findings. I also consider it is not open to me to consider the broader issues the applicants raise in the second cause of action regarding whether a lawyer for the child is obliged to consider the wishes of a child before advising a Family Court Judge that in the lawyer's view the Judge should direct a s 133 report be obtained. This is because insofar as those issues can be linked to the children in the Family Court proceeding that has given rise to this judicial review, such issues have already been determined by Courtney J. Absent a successful appeal, her legal findings are binding on the parties. Beyond this, and once the issues are removed from their factual context, they become of academic interest only. It is not appropriate in judicial review proceedings for the Court to make findings on general matters of law.

[12] Moreover, whether the legal submissions a lawyer for the child makes in his or her report to a Family Court Judge are amenable to judicial review is problematic. Since the passing of s 9B of the Family Court Act in 2014,[4] I acknowledge that the role of lawyer for the child has a statutory function, which may in principle render it amenable to judicial review. In *Dvorak v Yamamoto* Moore J described the role of lawyer for the child as having a hybrid function, which includes the lawyer for the child acting independently of the child's wishes to promote the child's welfare and best interests:[5]

> [73] For the reasons expressed above I agree that the correct approach to be followed by lawyer for the child is the "hybrid approach". This reflects the wording of the amendment which must be taken to reflect Parliament's intention in passing s 9B. It requires the lawyer not only to advise the Court of the child's views but also mandates the undertaking of an independent

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4 Section 9B was inserted on 31 March 2014 by s 4 of the Family Courts Amendment Act 2013.
5 *Dvorak v Yamamoto* [2017] NZHC 1591.

> evaluative assessment in promotion of the child's welfare and best interests even if this exercise is contrary to the expressed wishes of the child.

[13] Accordingly, I can accept that in principle, when the lawyer for the child performs his or her statutory function under s 9B there may be occasions when this performance has a direct effect that renders any unlawful performance amenable to review.[6] However, the presentation of a report to the Family Court has no direct effect on the child or anyone else in the sense that it is open to the Family Court Judge who receives the report to determine to what extent if any he or she is persuaded by its content. When a report of lawyer for the child misstates or misapplies the law, as happened in the present case, the Family Court Judge will either recognise the errors and put those aspects of the report to the side or the Judge will fail to realise there are errors, which is what happened here.[7] In the latter case the erroneous influence of the report will leave the judgment vulnerable to being set aside on either appeal or judicial review, the latter of which happened here. In such circumstances I consider the correct approach is for this Court to grant relief in the form of setting aside the judgment rather than by a declaration the report of the lawyer for the child's submissions is ultra vires because it contains errors of law, which is essentially the relief the applicants seek. This is another reason why I consider the applicants cannot obtain a declaration that the report of the lawyer for the child is ultra vires. The circumstance is analogous to the conclusions the gaming inspectors in *R v Sloan* reached. Whilst the opinions of the gaming inspectors may have triggered a criminal proceeding, it was the resulting judicial decision which ultimately was of direct effect.[8]

[14] Here, the applicants also argue that the report of the lawyer for the child amounted to an irrelevant consideration which Judge Burns should not have considered. In principle, the report of the lawyer for the child will be a relevant consideration which a Family Court Judge is obliged to consider. However, the obligation to take account of a relevant consideration does not mean it must be followed or applied. All that is required is that it is properly considered.[9] In this case

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6 Counsel assisting the Court accepted as much because she conceded that the acts or omissions of a lawyer for the child can be amenable to judicial review but argued that here the decision to grant relief should not be exercised.

7 See the findings I made on the first cause of action in the interim decision in this proceeding.

8 *R v Sloan* [1990] 1 NZLR 474 (HC) at 478-479.

9 See Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [23.2].

the Judge's failure to realise the report of the lawyer for the children was wrong in law did lead him astray, but only in the sense he should have recognised that aspect of the report and decided to put it to the side. I do not consider that the general character of the report (being a relevant consideration for the Judge) can be transformed into being an irrelevant consideration simply by the poor quality of the report's content. These are further reasons why I consider the applicants cannot obtain relief that directly affects the report of the lawyer for the child.

[15] It follows that the second cause of action has not been made out.

Third cause of action: breach of natural justice

The background to the amendment of the third cause of action

[16] Since delivery of the interim judgment the applicants were given leave to amend the third cause of action in their statement of claim. The pleading needed to be updated to take account of steps taken in the Family Court by Judge de Jong on 19 and 29 December 2019. This was after the first hearing in this Court on 4 December 2019 and before delivery of this Court's judgment on the first cause of action on 19 February 2020.

[17] The third cause of action was initially brought on the basis Judge Burns had displayed apparent bias by failing to determine the application by the applicants for recall (the recall application) of the minute Judge de Jong had issued following the delivery of Courtney J's decision.[10] Recall was sought on the grounds: (a) the minute contained inaccurate and prejudicial material, which portrayed the applicants in a bad light, and therefore deprived them of the right to a fair and impartial determination of the legal question that Courtney J had remitted back to the Family Court for reconsideration (the substantive issue); and (b) this minute remaining on the Court file created the impression of an influenced and partial decision-maker even if that was not the case.[11]

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[10] See discussion in *DN v Family Court at Auckland* above n 1, at [15]-[16]. For the decision of Courtney J, which was delivered on 4 July 2018 see *AA v Family Court at Auckland* [2018] NZHC 1638; for the minute of Judge de Jong, which was issued on 9 October 2018 see: [Redacted material].

[11] See paragraphs 58 to 60 of the second amended statement of claim.

[18] On 18 December 2018, after hearing from the parties, Judge Burns declined to recall the minute of Judge de Jong and delivered judgment on the substantive issue.[12] The reasons given for declining to recall Judge de Jong's minute included the fact Judge de Jong was available to deal with this application and it was, therefore, better that the Judge who issued the minute dealt with the question of recall. Judge Burns expressly stated that he was not influenced by the contents of the minute; indeed he went so far as to say he brought a "completely independent mind" to the substantive issue.[13]

[19] This judicial review proceeding then followed.

[20] On 4 December 2019 the first hearing in this judicial review proceeding came on for hearing before me. At that time the recall application was still to be determined.

[21] On 19 February 2020 I delivered judgment on the first cause of action, with judgment to follow on the second and third causes of action once the parties had an opportunity to be heard on them.[14] Unbeknown to me at that time, by then Judge de Jong had determined the recall application on the papers. He did so by recalling the original minute, releasing an amended minute (the re-released minute) and issuing a "memorandum of Judge".[15] The applicants then sought to re-shape their third cause of action. I granted them leave to file an amended pleading updating the third cause of action to take account of the steps taken by Judge de Jong following his recall of the original minute.[16]

The third cause of action as amended by the third amended statement of claim

[22] The re-released minute and the memorandum of Judge together with the original minute, (collectively referred to as the documents), remain on the Court file. The applicants consider the re-released minute and the "memorandum of Judge" do

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12 See [Redacted material].
13 See above at [5](f).
14 See *DN v Family Court at Auckland,* above n 1, at [36] to [37]. These paragraphs refer to judgment being delivered on the first cause of action and then go on to make provision for the parties to be heard on the second and third causes of action if they so wish.
15 The re-released minute was issued on 19 December 2019 and the memorandum of Judge was issued on 29 December 2019.
16 See the minute of 10 March 2020 in this proceeding.

not go far enough to address their concerns about the presence of inaccurate and prejudicial material on the Family Court file (the Court file), which may adversely influence future Judges against them. Accordingly, they maintain their third cause of action, albeit in amended form.

[23] The applicants contend that Courtney J made findings as to law and fact in favour of their position. They allege the documents contain comments that expressly disagree with and contradict Courtney J's findings (which are binding on the Family Court) and for this reason the documents are prejudicial to the applicants' position in the Family Court. The applicants contend there is a risk that should the documents remain on the file they may be read by future Judges in the Family Court proceeding, thus creating the risk of the reasonable appearance of bias in those Judges and in this way depriving the applicants of their right to a fair hearing. Accordingly, the applicants seek relief in the form of an order directing the Family Court to remove the original minute, the re-released minute and the memorandum of Judge de Jong from the Family Court file.

[24] The particular concerns raised with each of the documents are detailed below.

The original minute

[25] The original minute begins by noting that it is a follow up to the decision of Courtney J and describes her decision as "extraordinary for a number of reasons".[17] Judge de Jong then goes on to state "the father and stepmother effectively want me to disqualify myself from dealing with this file. The effect of [Courtney J's] judgment is to attack my honesty and integrity as a Judge to the extent I should step aside and perhaps even resign as a Judge".[18]

[26] Judge de Jong also made a number of comments that portrayed the applicants or their actions negatively. He stated that the lawyer for the child had been "blocked from seeing the children by the stepmother";[19] that "efforts had been made to delay

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17 Original Minute, 9 October 2018 at [1].
18 At [4].
19 At [17].

the proceeding";[20] and that the affidavits involved in the proceeding are "lengthy and included mutual allegations of serious manipulation and control, and even possibly collusion with an MP".[21] He also recorded that the applicants had filed complaints with the Law Society about the lawyer for the child and the lawyer for the grandmother, and that similar complaints had been alleged to have been filed with the Family Court but had not yet been received.[22]

[27] In regard to Courtney J's decision, Judge de Jong prefaces his comments by stating "it may be helpful to the future of this case if it is known what was actually in my mind and to briefly address each of the points raised by Courtney J …".[23]

[28] Judge de Jong then goes on to state that he "assume[s] the High Court did not have any" of the relevant material;[24] explains why he made the decision that he did and states that it was not pre-determined.[25] He then states that he disagrees with the decision of Courtney J; "I do not agree [the views of the children are] required by s 133(7) because that subsection relates to parties, and the children are not parties".[26]

The re-released minute

[29] This minute largely replicates the earlier minute albeit with a few changes. First, it continues to describe the decision of Courtney J as "extraordinary" and to refer to the decision as attacking Judge de Jong's "honesty and integrity" to the extent that he should step aside and perhaps resign. However, now the Judge recognises that the applicants only sought to disqualify him in regard to the s 133 issue, and not the file more generally.

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20 At [17].
21 At [7].
22 At [3].
23 At [7].
24 At [8]. The material the Judge assumes Courtney J did not have available to her is the Family Court file. In *AA v Family Court of New Zealand,* above n 2, Courtney J does not identify all the material that was available to her. However, she expressly records that she reviewed a transcript of the hearing before Judge de Jong as well as listened to an audio recording of that hearing: see [12] to [25].
25 This statement is contrary to Courtney J's finding that Judge de Jong had predetermined whether to order a s 133 report or not: see *AA v Family Court of New Zealand,* above n 2, at [26] to [30].
26 At [17].

[30] Second, the re-released minute repeats the statements from the original minute that "it may be helpful" if it was known what was in Judge de Jong's mind and why he had made the decision to order a s 133 report. The minute repeats the assertion that this decision was not a predetermined decision.[27] The minute also repeats the statement that Judge de Jong did not agree with the decision of Courtney J. The re-released minute departs from the original insofar as it states that the Judge assumes Courtney J did not have *all* the information before her, whereas in the original minute he had used the phrase *any* of the relevant information.[28]

[31] Third, the minute repeats the comments that place the applicants in a negative light but this time earlier statements that the lawyer for the child was being blocked from seeing the children by their stepmother, and that the applicants had made available to the Family Court a copy of the complaint made to the Law Society are now framed as allegations rather than statements of fact.[29]

[32] In effect, the re-released minute does little to remedy any of the concerns the applicants raised with the original minute.

The memorandum

[33] Prior to issuing the re-released minute Judge de Jong issued the memorandum of Judge. In this memorandum Judge de Jong records, "My [original minute] was issued against a background and history of incredible acrimony and intractable conflict between the father and mother".[30] He further describes a history of "extreme conflict" and states that the file "was one of the most intense, complex and difficult Family Court files to manage".[31]

[34] In the memorandum Judge de Jong then refers to the concerns raised by the applicants that the original minute will "taint any future Judge", states that Judge Burns "was not affected" by the contents of the minute, but nevertheless records an

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27 In the original minute Judge de Jong had stated that he had not outlined all his reasons for reaching the decision that Courtney J later set aside on judicial review: see [5] of the original minute.
28 The re-released minute dated 29 December 2019, at [8].
29 At [3] and [17].
30 The memorandum dated 19 December 2019, at [7].
31 At [7].

acknowledgment that there may be a "slight risk of future Judges being influenced by the contents of the [original minute]".[32]

[35] Judge de Jong also acknowledges that in the re-released minute he had qualified the nature of the disqualification sought by the applicants and then records that, "rightly or wrongly, [he] took the view that [he] was placed in a dangerous position if parties [were] allowed to pick and choose what [he] could or could not decide in their case. For this reason, [he] elected to disqualify [himself]".[33]

[36] In essence, the memorandum explains the limited alterations made to the original minute by the re-released minute.

The alleged effect of the documents

[37] The applicants do not rely on individual statements or sentences within the documents as evidence of apparent bias, rather their approach is a holistic one whereby they refer to each of the matters outlined above and say that in combination the documents are prejudicial to them in the Family Court, and that while the documents remain on the Court file they create the impression of an influenced and partial decision maker.

[38] The applicants argue that Judge de Jong must have intended the documents would influence the minds of other judges as he states in the original minute that "it may be helpful to the future of this case if it is known what was actually in my mind", and in the re-released minute he admitted there was a "slight risk" of future judges being influenced by the minutes. The applicants point to the subsequent decision of Judge Burns, who declined to follow the decision of Courtney J, as evidence that subsequent decisions made in accordance with the comments of Judge de Jong will give rise to a perception of apparent bias. They further contend that the conduct of Judge de Jong is inconsistent with the Guidelines of Judicial Conduct, particularly, that members of the judiciary should take care to avoid unnecessary criticism in the

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32 At [8].

33 At [14]. In the original minute Judge de Jong had stated the applicants sought to remove him from the proceeding. In the re-released minute he stated that the applicants did not want him to determine for a second time whether a s 133 report should be ordered or not. Thus, the disqualification sought was more limited than as outlined in the original minute.

exercise of their judicial function, and that judgments must stand without further clarification or explanation. They acknowledge that Judge de Jong's alleged failure to conduct himself in accordance with these guidelines is not conclusive but contend that such conduct must add to the layperson's perception of fairness and impartiality.

Discussion

[39] The applicants allege apparent bias, not actual bias. The third ground of review is forward looking. It refers to the conduct and decisions of Judge de Jong and Judge Burns as evidencing apparent bias, but only as a foundation for the claim that for as long as the documents remain on the Court file future Family Court Judges who hear the proceeding (future Judges) will do so under a cloak of apparent bias. In short, the applicants argue that for as long as those documents remain available for other Judges to read on the Court file, a fair-minded lay observer might reasonably apprehend that there was a real and not remote possibility that those Judges might not bring an impartial mind to the question each was required to decide: this being the test applied by the Supreme Court in *Saxmere v Wool Disestablishment Board Co Ltd*.[34] Hence the relief they seek in the form of an order requiring the removal of the documents from the Court file.

[40] The test for apparent bias in *Saxmere* is an objective one. It has two stages.[35] First, the party alleging bias must identify the circumstances that are said might lead a judge to decide a case other than on its legal and factual merits. Second, this party must be able to clearly articulate the logical connection between those circumstances and whether they establish a reasonable apprehension of bias. Regarding the second step, it will not be enough that the circumstances create "a vague sense of unease or disquiet", rather the party alleging bias must firmly establish its case.[36] He or she must do so in an analytical way, rather than as a matter of general impression or presumption.[37] Whether the requisite logical connection is established is determined by whether a fair-minded lay observer would so conclude.

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34 The test for apparent bias as set out in *Saxmere Co Ltd v Wool Disestablishment Board Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.
35 At [4] and [20].
36 At [94].
37 At [42].

[41] The fair-minded lay observer is imputed with several characteristics; in this regard the fair-minded lay observer is:[38]

(a) Presumed to be intelligent and to view matters objectively, neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision.

(b) 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 of bias.

(c) Taken to understand three matters relating to the conduct of judges, namely, that a judge is expected to be independent in decision-making and has taken a judicial oath to do right by all manner of people without fear or favour, affection or ill will, that a judge has an obligation to sit on any case allocated to them and that judge are not entitled to pick and choose their cases.

[42] To the above I would add a further factor that is taken from a statement of Tipping J, albeit made in the context of *Saxmere*, where the subject Judge had sat on the Court of Appeal. This is that the fair-minded lay observer has an appreciation of the role of the hierarchy of courts including the various levels of appeal. Thus, I would add the fair-minded lay observer can also be expected to have some understanding of the hierarchy between first instance Judges and senior Judges who sit on either appeal or judicial review from first instance decisions.[39]

[43] Ms Jerbine, counsel assisting as the contradictor, provided this Court with a detailed analysis of whether or not the applicants' claim of apparent bias could succeed. She, in reliance on the law as I have set out above, adopted a systematic

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38 At [5] and [8].

39 See *Saxmere* at [43] where Tipping J referred to the various levels of appellate courts as something that the fair-minded observer would be aware of. It is relevant to this context where the views of Judge de Jong and Judge Burns have been rejected in two judicial reviews conducted by a higher Court.

approach addressing each of the statements in the documents in turn and whether they satisfied the test for apparent bias. She contends they do not. In a case like the present I find an approach, which places the focus on each individual statement, to be artificial. Taken individually each statement may be a poor indication of apparent bias. However, viewed collectively there may be such similarity about the overall tenor of the statements that collectively they operate as strong circumstantial evidence from which apparent bias can be established. Whether that is the case here remains to be seen.

[44] For this reason, I have adopted an approach which I consider applies the tests in *Saxmere* in a way that tailors them to the circumstances of this proceeding. Here, the allegations of apparent bias are formed quite differently from those in *Saxmere*. In *Saxmere* it was the relationship between a Judge and the barrister who was appearing before him that was alleged to give rise to apparent bias. Here, it is the utterances of Judge de Jong articulated in the documents as well as the fact he took the steps he did to issue them. Collectively these are alleged: (a) to reveal an apparent bias on the part of Judge de Jong; (b) to have already wrongly influenced Judge Burns; and (c) to create the reasonable apprehension of a real possibility future Judges might be so influenced as well.

[45] Because no relief is sought for the first two allegations they are only addressed in so far as they are relevant to the assessment of the third allegation.

[46] I am satisfied the documents and the conduct of Judge de Jong would lead a fair-minded lay observer to conclude apparent bias was present. This conduct is not typical of first instance Judges who find their decisions overturned on appeal or set aside by judicial review. To this extent I can understand the concerns of the applicants. However, Judge de Jong has disqualified himself from making any further determinations on the question of whether to order a s 133 report, so any issue regarding apparent bias relevant to him is now of historic interest only. Moreover, any apparent bias on the part of Judge de Jong does not mean future Judges would follow in his footsteps.

[47] As to the conduct of Judge Burns, when the allegations of apparent bias in relation to him were first made, they focussed on his refusal to recall the original minute issued by Judge de Jong. The reasons Judge Burns gave for this are consistent with the usual practice of judges when asked to recall a minute or decision made by another judge. Whilst legally any judge can determine a recall application, the general approach is to leave the decision on recall to the judge who made the original decision, subject to his or her availability to deal with a recall application. So, there is nothing to suggest apparent bias there.

[48] The present allegation of bias against Judge Burns is concentrated on the fact his decision to order a s 133 report did not follow the directions on law made by Courtney J. This conduct is consistent with the statements in the original minute of Judge de Jong, but it is also consistent with the legally incorrect submissions Judge Burns received in the report from the lawyer for the child. So, it is difficult to say what the fair-minded lay observer would conclude here, nor do I consider it necessary to attempt this task. The answer would be of historic interest only as this decision was set aside by me following determination of the first cause of action in the interim judgment. Once again, it does not follow that any apparent bias on the part of Judge Burns would influence future Judges.

[49] I now turn to consider the applicants' real concern, which is whether the documents in their totality, and while they remain on the Court file, might pose a risk of influencing any future Judges who deal with the proceeding in the Family Court. This perceived risk is essentially what the applicants rely on for the first stage of the *Saxmere* test as being the thing that might lead a future Judge not to decide their case on its legal and factual merits

[50] I next consider the second stage of the test in *Saxmere*. This part of the test requires the applicants to establish a logical connection between the perceived risk they identify and whether it can support a reasonable apprehension of bias in the mind of a fair-minded lay observer. *Saxmere* requires the party seeking to establish this connection to do so in an analytical way, rather than as a matter of general impression or presumption.

[51] Here I can understand that the presence of the documents on the Court file may go so far as to create an impression or a vague sense of discomfort that the knowledge future Judges gain from these documents may adversely influence them against the applicants. But, I cannot see a fair-minded lay observer making the necessary logical connection between the presence of those documents on the Court file and the risk of apparent bias on the part of future Judges. The factors the fair-minded lay observer is said to possess tell against him or her making any such connection.

[52] First, I consider the documents would be viewed by the fair-minded lay observer in their overall context, which includes the decisions of this Court in the two judicial review proceedings the applicants have brought against the Family Court.[40] Those decisions clearly indicate the factual and legal findings made by this Court and how future Family Court Judges should approach the question of whether the children's views are to be sought before a decision is made to order further psychologists' reports on the children.[41]

[53] Second, the fair-minded lay observer would be aware of the hierarchy of Courts and the general expectations as to how first instance judges will respond when their decisions are set aside by senior courts on either appeal or judicial review.[42] First instance judges know their decisions are subject to appeal, or in the case of the Family Court judicial review, and that the outcome of an appeal or a judicial review may see the first instance decision set aside. These events are not cause for judicial comment by the first instance Judge who is so affected. The fair-minded lay observer's awareness of these expectations would logically lead to him or her placing a greater emphasis on the directions of this Court in the two judicial review decisions rather than what has been outlined in the documents, in terms of the likelihood of what may influence future Judges. Regarding the decision that is still to be made on the ordering of a s 133 report, the fair-minded lay observer would expect that a future Judge would approach the matter with an open mind and ensure that he or she was well acquainted with the decisions of this Court in the two judicial review proceedings as to the proper process for exercising the discretionary power. A fair-minded lay observer would also

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40 See *DN v Family Court at Auckland,* above n 1, and *AA v Family Court at Auckland*, above n 2.
41 See [37](a) herein.
42 See [38] herein.

expect that any subsequent decisions by future Judges would be solely based on the material the parties and lawyer for the child chose to put before the Judge.

[54] Third, the fair-minded lay observer would understand the expectations relating to the conduct of Judges (independence in decision-making, observance of their judicial oath and their obligations to sit on any case to which they are allocated unless there is reason for recusal).[43] Those expectations would outweigh any influence the documents might have on future Judges who are involved in the Court file.

[55] Fourth, the fair-minded lay observer would be reasonably informed of the workings of the judicial system and therefore would understand that a future Judge who is responsible for dealing with a matter in the applicants' Family Court proceeding will concentrate on reading the relevant material provided by the parties and lawyer for the child (evidence, any expert reports that may have been ordered and submissions) as well as hearing from them in Court rather than reviewing historic material on the Court file.[44] In this regard I note that the views of judges who have been engaged in earlier aspects of a proceeding are not typically relevant to subsequent steps in that proceeding. Judges are obliged to reach their own views on the facts (including the conduct of the parties) and law relevant to the issues to be determined. The parties are entitled to have a Judge assess their respective cases based on the views that Judge has formed and not by the thoughts of other Judges who may have had some earlier involvement in their cases. I would expect the fair-minded lay observer to be aware of these matters.

[56] Finally, I consider that a fair-minded lay observer would conclude there is no useful purpose in a future Judge reading the documents and therefore there would be little if any expectation of this happening.[45] The documents may provide some explanation for why there will be a need for the question of a s 133 report to be determined for a third time. However, I cannot see how they might assist the Judge who comes to make this determination.

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43 See [37](c) herein.
44 See [37](b) herein.
45 See [37](a) herein.

[57] In short, once the understandings to be attributed to a fair-minded lay observer are considered and applied to the circumstantial evidence in this case, I can find nothing to establish a casual linkage between the perceived risk the applicants' fear and the idea this risk might establish a reasonable apprehension of bias in the mind of a fair-minded lay observer. Accordingly, I find the test for apparent bias is not satisfied. It follows that the third cause of action has not been made out.

[58] The above findings mean there is no basis for me to order the documents be removed from the Court file. There is a separate question as to whether this Court in exercising its judicial review function could order the removal of a Court document from a Court file. The Family Court is a court of record, and as such, it is required to keep a permanent record of all essential steps in proceedings. This is not only a common law obligation but is also reflected in s 17 of the Public Records Act 2005. Thus, whether this Court can exercise powers that intrude on the statutory management of Court files is unclear to me. However, the decision I have recorded on the third cause of action means it is not necessary for me to resolve that issue.

Result

[59] The second cause of action is dismissed.

[60] The third cause of action is dismissed. This means that the order I made at [42] of the interim judgment restraining the implementation of the orders and directions I made pursuant to s 17 of the Judicial Review Procedure Act 2016 until the outcome of the third cause of action is now satisfied.

[61] The parties have leave to file memoranda as to costs.

Non-publication orders

[62] I make the following orders:

(a) I reaffirm the orders as to non-publication made by Palmer J on 26 July 2019. Accordingly, the parties will be referred to in Court lists and in minutes, orders or judgments by reference to the initials used in the

intituling of this judgment (which are different from the initials of their names) and in ways which do not identify their names or addresses or contain any other identifying information.

(b) The Court file may not be searched by any person without the parties having the opportunity to address the Court on the likely effect on them of such a search.

(c) No person is permitted, without leave of the Court, to publish any report of these proceedings that includes any identifying information or information in relation to the applicants' income.

(d) Standard orders pursuant to s 139 of the Care of Children Act 2004 and s 169 of the Family Proceedings Act 1980 are also made.

Duffy J