Neutral Citation Number: [2008] EWCA Civ 746

Case No: C1/2008/0159

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE JACKSON
[2007] EWHC 3166 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2008

Before :

LORD JUSTICE PILL
LORD JUSTICE RIX
and
LORD JUSTICE LONGMORE

- -

Between :

Persimmon Homes Teesside Limited	**Appellants**
- and -	
The Queen on the Application of Kevin Paul Lewis	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Richard Drabble QC and Mr James Maurici (instructed by **Messrs Ward Hadaway**) for the **Appellants**
Mr Richard Clayton QC and Mr Gordon Nardell (instructed by **Messrs Irwin Mitchell**) for the **Respondent**

Hearing dates : 20 & 21 May 2008

- -

Judgment
As Approved by the Court

Lord Justice Pill :

1. This is an appeal by Persimmon Homes Teesside Limited ("the appellants") against a judgment of Jackson J dated 20 December 2007. The judge quashed the grant by Redcar & Cleveland Borough Council ("the Council") of planning permission to the appellants for:

> "Proposed mixed use redevelopment to provide new tourism, sport, recreation, leisure, linked housing and community facilities including new highways and infrastructure works".

The redevelopment was to be at Coatham Enclosure, Redcar and was subject to over 40 conditions, reasons for each of which were given.

2. The Council's Planning Committee, to whom power had been delegated, resolved to grant permission at a special meeting held on 3 April 2007. The notice of planning permission was issued on 24 May 2007. The Council were represented before the judge and opposed the application to quash. They have not appeared before this court on appeal.

3. The permission was quashed by the judge on the application of Mr Kevin Paul Lewis ("the respondent") who by respondent's notice claims that the grant of planning permission was also unlawful by reason of the Council's failure properly to apply regulation 48 of the Conservation (Natural Habitats &c) Regulations 1994 ("the 1994 Regulations"). I will deal separately with that notice.

<u>The Facts</u>

4. In 1999, the Council adopted a local plan under which Coatham Common, as the Enclosure is more commonly known, and the surrounding area, was allocated for major leisure use with linked housing development. The scheme for the development of Coatham Common was prepared in 2002 at the time when the Council was Labour controlled. (Because of the claimed relevance of party political issues, it is necessary to refer to parties). In 2003, the Council appointed the appellants as development partners. By then, control of the Council had passed to a Coalition comprising Liberal Democrats, Conservatives and East Cleveland Independents. Objection to the scheme came from "Friends of Coatham Common", who wished to keep the area as open space. That is the stance of the respondent. Amongst those who favoured development, there were issues as to the amount of housing development which should be permitted as compared with the extent of the proposed leisure facilities.

5. In February 2006, the Council's cabinet, having considered a detailed report from the Council's Project Manager, resolved to enter into written Heads of Terms with the appellants. It was contemplated that the planning application would be determined in August 2006. Application for planning permission was made and public consultation followed. Labour Councillors, while accepting that there was a need to regenerate the

Coatham area, considered that the proposals included too high a proportion of housing.

6. Local elections were to be held on 3 May 2007. Council Officers issued a document entitled "Local Elections 2007, Guidance Note on Publicity", further reference to which will need to be made. What the document described as the "pre-election period", began on 27 March when formal notice of the elections was given.

7. Having taken advice from Council Officers, the Committee Chairman, a Coalition member, took the view that the planning application could be considered during the pre-election period and the special meeting was arranged for 3 April. On the day before the meeting, Mr Dunning, leader of the Labour group on the Council, wrote to Mr Frankland, the Council's Monitoring Officer, expressing grave concerns over the wisdom and propriety of holding the meeting "to determine such a controversial matter during the election period". What gave rise to the letter was an anonymous note purporting to canvass support for the Coalition, though Mr Dunning says in the letter that concerns had been expressed earlier.

8. The meeting proceeded. The Councillors had before them a detailed report from the Director of Area Management which concluded with the recommendation: "Committee indicate that it is mindful to grant approval for the development at Coatham subject to the conditions outlined below". The minutes of the meeting show that a substantial discussion took place. It was resolved "that the development at Coatham be approved subject to the following conditions unless the application is called in by GONE" (Government Office for the North East). Thirteen members were present. Nine voted in favour, including all Coalition members and two Labour members. Two Labour members abstained and one Labour member and an independent member outside the Coalition voted against.

9. A development agreement between the Council and the appellants was signed on 1 May 2007. At the election on 3 May, a Labour majority was elected. By letter dated 15 May 2007, GONE notified the Council that, having considered representations, the Secretary of State had concluded that her intervention would not be justified "as there is not sufficient conflict with National Planning Policies on the above matters or any other sufficient reason to warrant calling in the application for her own determination". A notice of planning permission was issued on 24 May.

10. The respondent challenged the lawfulness of the grant of permission on the ground that there had been an appearance of bias or predetermination on the part of the Coalition members of the Committee all of whom voted in favour of the proposal. Mr Clayton QC, who appears for the respondent, prefers the expression 'closed minds' and I agree that is a better way of describing the concept, for present purposes.

The Judgment

11. Having considered the authorities, the judge, beginning at paragraph 74, stated four propositions:

> "1. Actual or apparent bias or predetermination on the part of a decision maker renders his decision unlawful.
>
> 2. If a fair minded and informed observer who is neither complacent nor unduly sensitive or suspicious, having considered the facts, would conclude that there was a real possibility of bias or predetermination, then apparent bias or predetermination is established. For the sake of brevity, I shall use the phrase "the notional observer" to denote an observer who is fair minded, informed, not complacent and not unduly sensitive or suspicious.
>
> 3. In the context of decisions reached by a council committee, the notional observer is a person cognisant of the practicalities of local government. He does not take it amiss that councillors have previously expressed views on matters which arise for decision. In the ordinary run of events, he trusts councillors, whatever their pre-existing views, to approach decision making with an open mind. If, however, there are additional and unusual circumstances which suggest that councillors may have closed their minds before embarking upon a decision, then he will conclude that there is a real possibility of bias or predetermination.
>
> 4. Before the court makes a finding of apparent bias or predetermination, it must first identify with precision the facts which would drive the notional observer to such a conclusion."

12. The judge summarised the detailed allegations made to him by Mr Nardell on behalf of the respondent and expressed views on them. The judge concluded:

> "99. Let me now draw the threads together. The following facts are relevant by way of background, but do not by themselves arouse the suspicions of the notional observer.
>
> 100. 1. The planning committee was dealing with a scheme promoted by the council itself on council-owned land, where the council had a pecuniary interest in the grant of permission.
>
> 101. 2. The fact that coalition councillors had previously expressed support for the scheme and Labour councillors had previously expressed opposition.
>
> 102. 3. The fact that Mr Kay was a member of the cabinet which had decided to sign the heads of agreement with Persimmon 14 months before the planning meeting.
>
> 103. In my judgment, however, five further facts, when taken in conjunction with the previous facts, would tip the balance and would cause the notional observer to conclude that there was a real possibility of bias or predetermination. These facts are:

> 104. 1. The merits of the Coatham development project had become a party political issue in the imminent local election. The coalition's support for the project featured in its pre-election literature.
>
> 105. 2. Contrary to the council's own guidance and in the face of Labour opposition, the coalition proceeded with the planning meeting during the purdah period.
>
> 106. 3. One of the coalition councillors who spoke and voted at the planning meeting was a member of the council's cabinet. The cabinet had not only resolved to sign the heads of agreement on 28th February 2006, but also more recently had made forceful public statements in support of the project.
>
> 107. 4. Despite the formidable arguments on both sides, not a single member of the coalition either abstained or voted against the motion.
>
> 108. 5. On the 1st May 2007, just two days before the election and also before the Secretary of State had reached a decision about calling in, the council entered into a binding development agreement with Persimmon. The coalition thereby further tied the hands of its successor."

13. Having accepted, at paragraph 110, that "against that background and also having regard to the Officer's report, the decision to grant planning permission was not one to cause surprise [the background included accord with the adopted local plan, and support from the Regional Development Agency and the North East Assembly] ", the judge stated:

> ". . . On the other hand, the decision reached was far from inevitable. There were serious issues as to how the development should be structured as between housing and leisure facilities. The opposition to the development project in its current form, as expressed by Vera Baird QC MP and by the Labour Group of councillors, shows that different views could properly be held on the question of granting planning permission."

14. The judge acknowledged that members of the Planning Committee had received training in their duties, and that the Council were in breach of statutory duty by reason of the delay in taking the decision, but added, at paragraph 111:

> "In my judgment, having regard to the guidance given in the authorities, a fair minded and informed observer, having regard to the facts identified above, would conclude that there was a real possibility of bias or predetermination on the part of the planning committee."

The judge concluded:

> "The Council's decision to grant planning permission for the Coatham Development Project was unlawful by reason of apparent bias or apparent predetermination."

Discussion

15. The Committee, to whose members planning powers had been delegated by the Council, were an elected body entitled to make and carry out planning policies. The basic facts do not provide a background helpful to the respondent's claim to quash the decision. The proposal to develop Coatham Common for leisure and housing uses was of long-standing. It emerged from, and was consistent with, the statutory local plan. The planning application had been submitted many months before the decision was taken and the Council were under a statutory duty to determine it. They were well out of time, due mainly to the need to conduct statutory consultation considered in the respondent's notice issue. The grant of permission accorded with the advice received from Council Officers, whose competence and objectivity is not challenged.

16. As to the decision to hold the meeting at which the decision would be made during the pre-election period, the appropriate Officers of the Council, one of whom, Mr Frankland, has statutory duties as Monitoring Officer, advised that it was appropriate to hold the meeting. The meeting, which was held in a church hall to enable all those interested to be present, was conducted fairly and representations were made to Committee members. It is not suggested that the Committee members in fact had closed minds.

17. In that analysis, I have not mentioned the party political factor. An important part of the respondent's case is that the decision taken on 3 April was likely to be controversial in party political terms and that the meeting should not have been held in the pre-election period. It is no part of the respondent's case that he was committed to a political party. Indeed, his position was that the Common should not be developed at all, a view contrary to that of each of the political parties. That does not, of course, prevent him from making the points he does. It is submitted that the evidence shows that the local Labour party were plainly opposed to the proposal to be put before the Committee and a politically controversial decision should not have been taken in the pre-election period.

18. Analysis of the evidence does not support the party political dichotomy alleged to have been present. Of the five Labour members on the Committee, two voted in favour of the planning proposal, two abstained, and only one opposed. Following the election, and the change of political control, the Council sought, at the hearing before the judge, to uphold the grant of planning permission. Their witness, Mr Frankland, confirmed that the Labour party supported the proposal for which permission had been granted.

19. The best way in which the respondent's case can be put, and was put, is, in my view, that this substantial project was likely to be an issue at the forthcoming election and that, in supporting the proposal, the real reason of members may have appeared to be political advantage, a reason unconnected with planning merits, rather than planning

merits. I say appears to be because Mr Clayton concedes that there were in fact no closed minds and no predetermination and success for the respondent depends on the perceived view of the fair minded and informed observer that there was a real possibility of closed mind, or predetermination. Of course, the same possibility could have been perceived had the meeting been held, as it would have been but for the non-availability of a member of staff, before the pre-election period, or had it been held after the election on the basis that those supporting the scheme were perceived to have been re-elected on the basis of that support.

20. Little evidence has been produced that members of the Committee were any more politically motivated than would normally be expected from elected policy makers. The relevance of the anonymous note was rejected by the judge. A Liberal Democrat leaflet did pose the question "What's the best thing to happen in Redcar for decades?" and gave the answer "the Coatham Links Development" adding "how can we pass up on that sort of project?" That appeared in what was described as "Redcar's only all-year-round local newsletter" and there is no evidence that it was issued at a time close to the planning vote or the election. A Liberal Democrat election leaflet did include the single sentence: "We're pushing ahead with the £88 million Coatham Links leisure and homes development". That claim appeared amongst a very long list of claims about "what the Lib Dem-led Coalition has done for Redcar & Cleveland in the past 4 years".

21. Mr Clayton said that his main point was the failure to produce good reasons for holding the meeting during the pre-election period. He accepted that other factors were not strong individually and that, had compelling reasons been given for holding the meeting during that period, there could be no complaint. In the absence of a good reason, the notional independent observer would find that there was a real possibility that minds were closed to planning merits, it is submitted. In support of the submission that minds would have appeared closed, the respondent relies on the Council having concluded a development agreement with the appellants prior to election day. That demonstrates political motivation, it is submitted, because it lessened the risk that the decision would be reversed by new members if the existing members lost their seats on the Council at the election.

22. The appellants have declined to disclose the development agreement signed on 1 May, both they and the Council relying on the confidentiality exemption in the Freedom of Information Act 2000. It is claimed that the agreement contains commercially confidential information. I am not prepared to accept the appellants' offer that the court should consider the development agreement without it being disclosed to the respondent. The respondent submits that, failing disclosure, the court should infer that the agreement bound the Council in such a way that reversal of the resolution to grant planning permission was impossible following the change of control and that political motivation in the timing of the meeting is thereby supported.

23. Bearing in mind that the Secretary of State had not decided, at the time the agreement was made, whether to call in the planning proposal for her determination, it is inconceivable that some escape clause was not inserted. I was, however, prepared to infer, in the absence of disclosure, that the agreement would have made it difficult for the Council to withdraw if they themselves reversed the decision to grant planning permission.

24. On behalf of the respondent, unsolicited post-hearing submissions have been received by the court. The appellants responded and the respondent, by letter of 12 June, made further observations. The point had first arisen in submissions, in reply, before the judge and the judge referred to the submission (paragraph 87) as a "further matter which emerged during the hearing". The Council were represented before the judge and the appellants not unfairly rely on Mr Frankland's evidence, for the Council, that the "new Council following the May 2007 local elections is a Labour administration and is supportive of the scheme" and the Council's express submission to the judge to the same effect. I express conclusions on the further submissions at a later stage.

25. However if it was lawful to take the planning decision when it was taken, it is difficult to challenge a decision then to proceed to make the development agreement. The Council and the appellants had been partners for several years. Heads of Terms had been agreed in February 2006. They were approved by the Council's Cabinet at that time and Council Officers were required to 'work up' the development agreement with the appellants. The Heads of Terms featured prominently in the Officer's report to the Committee for the purposes of the 4 April meeting and members were asked to note that they were not "legally binding but formed the agreed basis upon which the detailed Development Agreement would be prepared".

26. Mr Clayton relies on the "Guidance Note on Publicity" issued by the Council's Corporate Communications Team in advance of the election. It was issued under the "Government Code of Recommended Practice on Local Authority Publicity" and was plainly directed to Council staff, as appears from its contents. It included general guidance:

> "Pre-election publicity- general principles
>
> Council staff should never use their position to engage in activity which supports, or could be deemed to support, a political party or prospective candidate. However, this is even more important during the publication of a notice of election and polling day.
>
> Do NOT issue publicity which may be seen to affect public support for a political party. Be particularly careful when the publicity:
>
> - refers to a political party
> - refers to persons identified with a political party"

27. Detailed guidance followed those general statements. Under the heading "Meetings and operational decision-making", it was stated:

> "Any meetings or decision-making relating to the 'day-to-day' business of the Council that do not involve controversial local issues should continue to go ahead – including those meetings and decisions involving partners and outside agencies."

Under the heading "Events & Activities", it was stated:

> "Do not organise photocalls, public meetings or events or activities designed with the aim of generating publicity in relation to a candidate or political party, or, where there is the potential for public debate regarding controversial local issues.
>
> Do not distribute invites or accept invitations to political meetings."

28. Reference has been made to the Government Code, the relevant part of which is in Department of the Environment, Transport and the Regions Circular 06/2001, dated 2 April 2001. Paragraph 41 provides:

> "The period between the notice of an election and the election itself should preclude proactive publicity in all its forms of candidates and other politicians involved directly in the election. Publicity should not deal with controversial issues or report views, proposals or recommendations in such a way that identifies them with individual members or groups of members. However, it is acceptable for the authority to respond in appropriate circumstances to events and legitimate service enquiries provided that their answers are factual and not party political. Members holding key political or civic positions should be able to comment in an emergency or where there is a genuine need for a member level response to an important event outside the authority's control. Proactive events arranged in this period should not involve members likely to be standing for election."

Mr Clayton submits that the meeting did involve "controversial local issues", and "the potential for public debate regarding controversial local issues" and it should not have been arranged for the pre-election period.

29. The evidence before the judge included a statement from Mr Richard Frankland, the Council's Assistant Chief Executive (Legal and Democratic Services) and the Council's Monitoring Officer. Local authorities are under a statutory duty to designate one of their Officers as a Monitoring Officer (section 5 Local Government and Housing Act 1989). Put generally, the duty of the Monitoring Officer is to report to the authority on any proposal, decision or omission by the authority which has given rise to, or is likely or would give rise to a contravention of law or any Code of Practice made or approved by or under any enactment or such maladministration or injustice as is mentioned in Part III of the Local Government Act 1974, section 5(2).

30. Mr Frankland stated the purpose of the Council's local guidance, based on national guidance, was "to ensure that the Council does not assist an election candidate with their campaign." He continued:

> "The statutory guidance does not impose any restriction on the

> Council's ability to determine planning applications during the pre-election period. The pre-election period does not mean that the normal business of the council ceases, although there is a general presumption as a result of the Code of Recommended Practice against undertaking new campaigns during the pre-election period in any area that might be considered controversial in relation to the election. The Coatham proposal was a very long running scheme and it had to be determined at some point. It was ready to go to the planning committee in March. Since Council business is not suspended during the pre-election period, I considered that to postpone a planning decision because of the forthcoming elections would be bowing to pressure from opponents of the scheme and it would have been improperly delayed for political reasons. The scheme had many supporters as well as opponents and there was in my view no political advantage to be gained by any political party if the application was determined prior to the elections. I considered that the presence of a local election was being used by opponents of the scheme to postpone determination of the application in the hope that leading and vociferous opponents of the scheme would be elected as councillors and could influence the outcome of the application."

Mr Frankland described the proceedings at the meeting and concluded:

> "I was satisfied that in making their decision, members addressed themselves to the relevant issues, weighing relevant considerations and ignoring irrelevant considerations."

31. Also before the judge was a statement from Mrs Doreen Mealing, the Council's Development Control Manager. The planning application had been submitted in July 2006. It was highly complex and required lengthy consultations. Once the consultations were concluded on 8 March 2007, "the local planning Authority sought to determine the application promptly as the applicant was pressing for a decision." Mrs Mealing described the circumstances in which arrangements for a special meeting to determine the application had been made:

> "The date of a special committee meeting is decided in discussions between Democratic Services and the Chair of the Planning Committee. The deadline for comments on the final round of consultation was 8 March 2007. We therefore proposed various dates from mid-March, factoring in adequate time to produce a committee report and to give the required publicity to the meeting. These dates were not suitable for logistical reasons. Another date towards the end of March was deferred when it was realised that the Director of Legal Services and Monitoring Officer, Richard Frankland, would be on annual leave at the end of March and it was considered necessary that he attend the meeting. The meeting was therefore convened for the first available date when Mr Frankland would be available which was the 3rd of April. The date was fixed simply as the

> earliest available when all relevant personnel could attend. It happened to be in the pre-election period but that was a consequence of the decision to hold a Special Committee meeting at the earliest time when all relevant officers could be present."

32. Other statements were before the court. Councillor Kay, a member of the Committee, said that he had considered the application "purely on the relevant planning issues with an open mind". Mr CW Davis, a former Councillor, made statements in support of the respondent stating that: "there was no doubt that this was a party political issue" and claiming that there was "no proper debate at the meeting".

33. Mr Frankland rightly pointed out that the scheme was very long-running and was ready to go to the Planning Committee in March. I am less impressed by the relevance of his suggestion that a postponement would have constituted improper delay for political reasons. That is to turn the respondent's argument on its head. The question was whether the meeting could properly go ahead. However, Mr Frankland's central point, that in his view no political advantage was to be gained by any political party if the application was determined prior to the elections is a view entitled to respect, having regard to his statutory duty and his knowledge of the scheme and of Council affairs. His advice could be given weight by the Committee. Mr Frankland was entitled to form the opinion that the purpose of the local guidance was to prevent activities which were controversial in the sense of assisting election candidates or parties with their campaigns, which he did not consider this decision to do.

34. In any event, failure by a Committee to follow advice given by the Council to its own staff would not, of itself, invalidate an otherwise valid planning permission. It would still need to be shown that the minds of Committee members were closed or, on the respondent's test, that the decision led to a perception that minds may have been closed. At another special meeting on 26 April, a major project for a deep sea container terminal at Teesport was determined. Other planning applications were determined at meetings on 5 and 12 April.

35. I respectfully disagree with some of the judge's findings which led him to the conclusions already cited. At paragraph 89, the judge stated:

> "There is, however, a second element to factor B; namely the battle lines in the imminent local election. The public pronouncements of the coalition in the run up to the local elections were strongly supportive of the Coatham development project and strongly critical of those who opposed the project. The Labour Group, on the other hand, was known to oppose the project, at least in its present form.
>
> The notional observer would begin to fear that coalition councillors might feel constrained to vote in favour of planning permission by reason of the coalition's pre-election public statements in support of the project . . .".

The judge then referred only to the document referring to the "best thing to happen in Redcar", already mentioned.

36. There was no evidence of "strongly supportive" Coalition public statements for electoral purposes. Apart from the anonymous note, which the judge did not consider relevant, the only evidence relied on before this court was that in the two documents already mentioned. These were both Liberal Democrat documents, that party being only one of the three components in the Coalition, and one of those documents was not shown to be an election document. No further evidence that the cabinet had made "forceful public statements in support of the project" (paragraph 106) during the electoral period has been relied on. As to the Labour Group, the evidence was that only one of its five members on the Committee opposed the proposal, though there was evidence of opposition by Labour members and by the local MP.

37. I see no basis for the suggestion that Councillor Kay should have excluded himself from the meeting because he was a Member of the Council's "cabinet" which had decided to sign the Heads of Agreement, or for any other reason. The judge himself appears to reject, at paragraph 102, the relevance of Mr Kay's signature on the Heads of Terms. He had no personal interest to declare and he took the advice of Mr Frankland. Leading members of a local authority, who have participated in the development of planning policies and proposals, need not and should not, on that ground and in the interests of the good conduct of business, normally exclude themselves from decision-making meetings.

38. Further, I see no possible basis on which the absence of dissent by Coalition members can amount to "unusual circumstances" which can contribute to a decision to quash. The notion that a planning decision is suspect because all members of a single political group have voted for it is an unwarranted interference with the democratic process.

39. As to the relevance of the Council entering into the development agreement before the election, I remain prepared to infer that the terms of the agreement may have made it difficult for the Council to rescind its resolution to grant planning permission. However, that gives scant assistance to the respondent. First, the evidence fails to demonstrate any inclination by the post-election administration to reverse the approval. Secondly, an early conclusion of the agreement was entirely consistent with what had gone before, the earlier agreement of Heads of Terms, the instruction to Officers in February 2006 to work up the agreement and the obvious desire to see progress. While I agree that the decision to sign on 1 May was capable of throwing light on the state of mind of Committee members a month earlier, in the absence of more substantial evidence than that given, it can count for little, in my view. If the decision to hold the meeting was justified, the decision then to proceed with the agreement does not provide a separate ground of challenge.

40. That leaves the decision, on which Mr Clayton has rightly concentrated his case, to hold the meeting during the pre-election period. The judge found, at paragraph 92, that the decision plainly involved a controversial local issue and that holding the meeting was a "clear breach of the guidance issued by the Council." Before commenting further, I consider the issue and the authorities.

41. For the appellants, Mr Drabble QC, submits, first, that the judge has applied the wrong test to the evidence and, secondly, that even on the test he applied, he reached the wrong conclusion. While it may be possible to infer from the evidence and circumstances that Councillors voting for a proposal had closed minds, the question is whether in fact their minds were closed.

42. Mr Drabble submits that, while the concept of apparent bias is now well established for application to judicial and quasi-judicial decisions (*Porter v Magill* [2002] 2 AC 357), it does not apply to decision makers such as members of a local authority taking planning decisions.

The Authorities

43. In *Franklin v Ministry of Town & Country Planning* [1948] AC 87 the House of Lords considered the extent of the duty imposed on a Minister considering the report of a person who had held a public local inquiry into a proposal under the New Towns Act 1946. Lord Thankerton stated, at page 102:

> "In my opinion, no judicial, or quasi-judicial, duty was imposed on the [Minister], and any reference to judicial duty, or bias, is irrelevant in the present case."

Lord Thankerton distinguished the Minister's position from that of those occupying judicial or quasi-judicial office and stated, at page 104:

> "But, in the present case, the [Minister] having no judicial duty, the only question is what the [Minister] actually did, that is, whether in fact he did genuinely consider the report [resulting from the inquiry] and the objections."

Lord du Parcq and Lord Normand agreed.

44. In *Re Minister for Immigration & Multicultural Affairs; Ex Parte White* [2001] HCA 17 the High Court of Australia, at a time when the apprehended bias rule applied in that jurisdiction, considered the position of a Minister making decisions about cancelling visas under Sections 501 and 502 of the Migration Act 1958. Giving the leading judgment, Gleeson CJ and Gummer J stated, at paragraphs 104 and 105:

> "There was a measure of artificiality about categorising the complaint against the Minister as bias. There is an even greater measure of artificiality about treating the rules of natural justice, and the legislation, as requiring the Minister, in exercising his powers under ss 501 and 502, to avoid doing or saying anything that would create an appearance of a kind which, in the case of a judge, could lead to an apprehension the subject of the apprehended bias rule.
>
> The Minister was obliged to give genuine consideration to the

> issues raised by ss 501 and 502, and to bring to bear on those issues a mind that was open to persuasion. He was not additionally required to avoid conducting himself in such a way as would expose a judge to a charge of apprehended bias."

45. In *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295, decisions of the Secretary of State were challenged on the ground that they were incompatible with the duty under article 6(1) of the European Convention on Human Rights ("the Convention") to provide an independent and impartial Tribunal. The decisions were of a different kind from those of the Committee in the present case in that they were ministerial decisions but the difference between the function of taking planning decisions and the judicial function was recognised. Lord Slynn of Hadley stated, at paragraph 48:

> "The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines. Local authorities, inspectors and the Secretary of State are all required to have regard to policy in taking particular planning decisions and it is easy to overstate the difference between the application of a policy in decisions taken by the Secretary of State and his inspector."

46. Lord Hoffmann stated, at paragraph 123:

> "It is the business of the Secretary of State, aided by his civil servants, to develop national planning policies and co-ordinate local policies. These policies are not airy abstractions. They are intended to be applied to actual cases. It would be absurd for the Secretary of State, in arriving at a decision in a particular case, to ignore his policies and start with a completely open mind."

47. In *R v Amber Valley District Council Ex Parte Jackson* [1985] 1 WLR 298, one of the issues was the relevance of the political pre-disposition of the members of a local authority to grant planning permission for a development. Woolf J stated, at page 307:

> "My conclusion as to what the evidence shows in this case is that it indicates that the majority of the district council can only be said to be "biased" in the sense that they are as the respondents' counsel contends "politically pre-disposed" in favour of the development in respect of which planning permission is sought. It has become the Labour group's policy to support the development. It is therefore likely that any Labour member of the planning committee will be more ready to grant planning permission than he would be if the Labour group had remained adverse to the development. But does this have the effect of

> disqualifying the Labour majority from considering the planning application? It would be a surprising result if it did since in the case of a development of this sort, I would have thought that it was almost inevitable, now that party politics play so large a part in local government, that the majority group on a council would decide on the party line in respect of the proposal. If this was to be regarded as disqualifying the district council from dealing with the planning application, then if that disqualification is to be avoided, the members of the planning committee at any rate will have to adopt standards of conduct which I suspect will be almost impossible to achieve in practice."

Woolf J added, at page 308:

> ". . . while the Labour majority undoubtedly had a policy, there is no evidence before me on which it would be right to hold that they would not (despite the policy) consider the objections to the planning application on their merits. I would make it absolutely clear that they are under a duty to do so."

48. In *R (On the Application of Cummins) v London Borough of Camden & Anr* [2001] EWHC Admin 1116, Ouseley J stated, at paragraph 254:

> "The decision-making structure, the nature of the functions and the democratic political accountability of Councillors permit, indeed must recognise, the legitimate potential for predisposition towards a particular decision."

49. In *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, the New Zealand Court of Appeal, considered a submission that an Order in Council made under the New Zealand Natural Development Act 1979 were invalid by reason of bias by predetermination. Cooke J stated:

> "The references in the amended statement of claim to a real probability or suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this governmental level. Projects of the kind for which the National Development Act is intended, whether Government works or private works, are likely to be many months in evolution. They must attract considerable public interest. It would be naïve to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.
>
> In relation to decisions under s 3(3) I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable. The only relevant question can be whether at the time of advising the making of the Order in

> Council the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied. If they did hold that opinion at that time, the fact that all or some of them may have formed and declared the same opinion previously does not make the order invalid. No doubt, if Ministers had approached the matter with minds already made up, the inference would readily be drawn that they could not genuinely have considered the statutory criteria when advising the making of the Order in Council."

50. The issue in *R v Secretary for State for the Environment & Anr, Ex Parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 was whether the members of an Urban Development Corporation, acting as local planning authority, had disqualifying pecuniary or personal interests amounting to apparent bias because of interests in the relevant property. Sedley J concluded, at page 325:

> "I hold, therefore, that the principle that a person is disqualified from participating in a decision if there is a real danger that he or she will be influenced by a pecuniary or personal interest in the outcome, is of general application in public law and is not limited to judicial or quasi-judicial bodies or proceedings."

51. However, at page 319, Sedley LJ drew a distinction between "the surrender of a decision-making body of its judgment" and "the situation of a participant member of a decision-making body who has something personally to gain or lose by the outcome." Sedley J stated that the two were jurisprudentially different and that there is "a difference of kind and not merely of degree."

52. While it was not essential to the decision, Sedley J went on to analyse, of course at a time before *Porter v Magill*, the position of a decision making body such as a planning authority. He stated a principle "equally important" with that forbidding the participation of a person with a personal interest in the outcome in planning decisions. He stated:

> "The decision of a body, albeit composed of disinterested individuals, will be struck down if its outcome has been predetermined whether by the adoption of an inflexible policy or by the effective surrender of the body's independent judgment."

53. Mr Clayton relies on the decision of Richards J in *Georgiou v Enfield London Borough Council* [2004] LGR 497. A planning proposal had come before a Committee ("CAG") established by the Authority to consider and advise the Planning Committee on the conservation implications of proposals. The CAG having expressed unqualified support for the proposal for permission, four of its members were also members of the Planning Committee which resolved by a majority of 8 to 7 to grant the relevant permissions. Three members of the Planning Committee, including one of those with overlapping memberships, were new to the Planning Committee and had not received the training in planning law and procedure required by the Council's code of practice.

54. Richards J held that the decisions were vitiated by the appearance of bias. Having referred to *Kirkstall Valley*, Richards J stated:

> "30. It seems to me, however, that a different approach is required in the light of *Porter v Magill*. The relevant question in that case was whether what had been said and done by the district auditor in relation to the publication of his provisional conclusions suggested that he had a closed mind and would not act impartially in reaching his final decision: see eg the background set out by Lord Hope at pages 491-492 paras 96-98. Thus it was a case of alleged predetermination rather than one in which the district auditor was alleged to have a disqualifying interest. Yet it was considered within the context of apparent bias, and the decision was based on the application of the test as to apparent bias which I have already set out. There is nothing particularly surprising about this. I have mentioned Sedley J's observation in *Kirkstall Valley*, as quoted in *Cummins*, that predetermination can legitimately be regarded as a form of bias. Cases in which judicial remarks or interventions in the course of the evidence or submissions have been alleged to evidence a closed mind on the part of the court or tribunal have also been considered in terms of bias: see eg *London Borough of Southwark v Jiminez* [2003] EWCA Civ 502, [2003] ICR 1176, [2003] IRLR 477 at para 25 of the judgment, where the test in *Porter v Magill* was accepted as common ground and was then applied.
>
> 31. I therefore take the view that in considering the question of apparent bias in accordance with the test in *Porter v Magill*, it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues. That is a question to be approached with appropriate caution, since it is important not to apply the test in a way that will render local authority decision-making impossible or unduly difficult. I do not consider, however, that the circumstances of local authority decision-making are such as to exclude the broader application of the test altogether . . .
>
> 36**.** Having regard to the objective nature of the question of apparent bias, I do not think that any significant weight is to be attached to the members' own witness statements in which they state that they did approach the planning decision with open minds: cf. per Lord Hope in *Porter v. Magill*."

55. The decision maker under review in *Porter* was an auditor acting under procedures in the Local Government Finance Act 1982. Lord Hope of Craighead summarised the complaints at paragraph 92: "the auditor was being required to act not only as an

investigator but also as prosecutor and judge." In that context Lord Hope, at paragraph 103, adjusted the former test:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility the Tribunal was biased."

56. Mr Clayton also relies on the decision of this court in *Condron v National Assembly for Wales & Anr* [2006] EWCA Civ 1543 [2007] LGR 87 where, under legislation then applicable to Wales, the report of an Inspector who had conducted a public enquiry and recommended that planning permission be granted was placed for decision before a Committee consisting of four members of the Welsh Assembly for final decison. The day before the meeting, the Chairman of that Committee, Mr Carwyn Jones, allegedly told an objector that he was "going to go with the Inspector's report."

57. Richards LJ, with whom Wall LJ and Ward LJ agreed, found in the Assembly's favour on the issue of apparent bias. Richards LJ relied on factors to which I will refer later. Richards LJ accepted the validity of the distinction between pre-disposition and pre-determination. He stated, at paragraph 43:

> "We were referred to various cases in which the distinction has been drawn between a legitimate predisposition towards a particular outcome (for example, as a result of a manifesto commitment by the ruling party or some other policy statement) and an illegitimate predetermination of the outcome (for example, because of a decision already reached or a determination to reach a particular decision). The former is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision; the latter involves a mind that is closed to the consideration and weighing of relevant factors."

58. The appropriateness of the apparent bias test was not challenged in *Condron* and was applied. Ward LJ stated, at paragraph 121:

> "The question is, therefore, whether the reasonable, fair-minded and informed observer would conclude that there was a real risk that Carwyn Jones AM was biased because his mind was closed by his predetermination to endorse the Inspector's Report. That judgment must be made looking at the matter objectively balancing his comments to Mrs Jennie Jones against any contrary evidence."

59. In *R (on the Application of Island Farm Development Ltd & Anr) v Bridgend County Borough Council* [2006] EWHC Admin 2189 [2007] LGR 60, a claim that a local authority's planning decision was vitiated by pre-determination was based on members having a known attitude to the development and one Councillor having participated in a protest group. Having set out the relevant paragraphs from the judgment of Richards J in *Georgiou*, Collins J stated:

> "30. I confess to some doubt as to this approach, and in particular to what he says in paragraph 36. Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. Such may, as here, have been raised as election issues. It would be quite impossible for decisions to be made by the elected members whom the law requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance. The decision of the Court of Appeal in *Baxter's* case, of the New Zealand Court of Appeal in the *Lower Hutt* case and of Woolf J in the *Amber Valley* case do not support this approach. Nor is it consistent with those authorities that no weight should be attached to their own witness statements. *Porter v Magill* was a very different situation and involved what amounted to a quasi-judicial decision by the Auditor. In such a case, it is easy to see why the appearance of bias tests should apply to its full extent.
>
> 31. The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should . . . So it is with Councillors and, unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision."

60. Collins J concluded, at paragraph 32:

> "It may be that, assuming the *Porter v Magill* test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that Councillors can be assumed to be aware of their obligations. In this case, the evidence before me demonstrates that each member was prepared to and did consider the relevant arguments and each was prepared to change his or her mind if the material persuaded him or her to do so. I am not therefore prepared to accept that there was apparent bias or predetermination which vitiated the decision."

Conclusions

61. Mr Clayton has rightly concentrated on the decision to hold the meeting, at which the planning decision was to be taken, during the pre-election period. That alone, it appears to me, and the consequences which could flow from it, is capable of justifying a decision to quash the grant of planning permission. That apart, I can see no possible basis for quashing. I have already commented on the available evidence and have expressed some disagreements in detail with the judge about the effect of that evidence.

62. The difference may, however, arise from a more fundamental difference about the role of elected Councillors in the planning process. There is no doubt that Councillors who have a personal interest, as defined in the authorities, must not participate in Council decisions. No question of personal interest arises in this case. The Committee which granted planning permission consisted of elected members who would be entitled, and indeed expected, to have, and to have expressed, views on planning issues. When taking a decision Councillors must have regard to material considerations and only to material considerations, and to give fair consideration to points raised, whether in an Officer's report to them or in representations made to them at a meeting of the Planning Committee. Sufficient attention to the contents of the proposal, which on occasions will involve consideration of detail, must be given. They are not, however, required to cast aside views on planning policy they will have formed when seeking election or when acting as Councillors. The test is a very different one from that to be applied to those in a judicial or quasi-judicial position.

63. Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence. Given the role of Councillors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision.

64. The members of the Committee had long experience of the Coatham Common project, its merits, demerits and problems. They had received a detailed report from Council Officers and they received advice as to the timing of the meeting. They attended the meeting and heard representations. I am far from persuaded that the imminence of the local elections at the time of decision, on the evidence, demonstrated that those who voted in favour of this planning application had minds closed to the planning merits of the proposal.

65. In my judgment, whether the test applied is that advocated by Mr Clayton, or that advocated by Mr Drabble, a decision to quash the planning permission is not justified. It would be damaging to the democratic process if the decisions of elected Councillors are to be quashed on the basis of the additional and unusual circumstances thought to have been decisive in this case. Notably, it does not follow from the unanimity of the seven Coalition members that any one of them had a closed mind.

66. As to the test to be applied, I respectfully share Collins J's concerns about the test as expressed by Richards J (as he then was) in *Georgiou*, though not necessarily with his concern about Richards J's views about self-justificatory statements. A series of statements from Council members saying that they had open minds would not inevitably conclude the issue. Consideration of the standpoint of the fair-minded and informed observer may be helpful in this context to test the provisional views of the court. Moreover, appearances, in this context, cannot, in the wake of *Porter*, be excluded altogether from the court's assessment. I agree with the statement of Richards J, at paragraph 31 in *Georgiou* that the test in *Porter* should not be altogether excluded in this context. An understanding of the constitutional position of Councillors (and

Ministers) as shown in cases such as *Franklin, Alconbury, Amber Valley*, *CREEDNZ* and *Cummins* must, however, be present. The Councillors' position has similarities with that of Ministers, as the authorities show; Ministers too take decisions on planning issues on which they have political views and policies.

67. In *Condron*, while the court did apply the fair-minded observer test, and no contrary submission was made, the analysis of the circumstances by the members of the court, and particularly Richards LJ in the leading judgment, was essentially the court's own assessment of the situation. I acknowledge that in his concluding paragraph on this issue, Richards LJ did say that the conclusion he had reached was that "a fair minded and informed observer, having considered all the facts as they are now known, would *not* conclude that there was a real possibility (etc)" However, Richards LJ conducted a lengthy analysis of all the circumstances, beginning, at paragraph 41, by posing the question: "What, then, are the relevant facts to be gleaned from the material available to the court in the present case?" Those were held to include, at paragraphs 42 to 57, the "actual words" spoken, the nature of the conversation in which they were spoken ("short and rather tense" and "following a chance encounter"), the "wider picture", said to be particularly important in assessing the significance of the words used, the conclusion the inspector had reached, the absence of surprise that Mr Jones had a predisposition in favour of the grant of planning permission as recommended by the inspector, the contents of the commissioner's decision letter and the qualification for membership of the Committee, which included a course of training in planning matters.

68. Ward LJ and Wall LJ both agreed with the reasoning of Richards LJ. Richards LJ stated, at paragraph 57:

> "In the circumstances I feel entitled, indeed required, to reach a decision on the issue as raised in this appeal by forming a fresh assessment of my own by reference to the various circumstances that I have mentioned."

The assessment was in my judgment essentially the assessment of the court. While reference was made to the fair-minded observer, the court was putting itself in the shoes of that observer and making its own assessment of the real possibility of predetermination. That, I respectfully agree, is the appropriate approach in these circumstances. The court, with its expertise, must take on the responsibility of deciding whether there is a real risk that minds were closed.

69. Central to such a consideration, however, must be a recognition that Councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies. Members of a Planning Committee would be entitled, and indeed expected, to have and to have expressed views on planning issues. The approach of Woolf J in *Amber Valley* to the position of Councillors in my judgment remains appropriate.

70. The judge properly acknowledged the need to be "cognisant of the practicalities of local government". Where he erred, in my judgment, was in finding that there were present "additional unusual circumstances" which required the permission to be quashed. The danger of the "notional observer" test is that the role of elected Councillors may not

fully be taken into account. That could lead to any Councillor, elected on a pro-scheme manifesto, creating a serious risk of a Council's grant of permission being quashed if he participated in the decision to grant. That would not be in the public interest or accord with the law.

71. It is for the court to assess whether Committee members did make the decision with closed minds or that the circumstances give rise to such a real risk of closed minds that the decision ought not in the public interest be upheld. The importance of appearances is, in my judgment, generally more limited in this context than in a judicial context. The appearance created by a member of a judicial tribunal also appearing as an advocate before that tribunal (*Lawal v Northern Spirit Ltd* [2003] ICR 856) may make his judicial decisions unacceptable but the appearance created by a Councillor voting for a planning project he has long supported is, on analysis, to be viewed in a very different way.

72. For the reasons given, I would allow this appeal.

Respondent's Notice Issue

73. Mr Lewis, by respondent's notice, challenges the judge's finding that there was no breach by the Council of regulation 48 of the Conservation (Natural Habitats &c) Regulations 1994 (SI No. 2716 of 1994) ("the 1994 Regulations"). The 1994 Regulations purport to implement in the law of England and Wales provisions of Council Directive 79/409/EC of 2 April 1979, on the Conservation of Wild Birds ("the Birds Directive"), and Directive 92/43/EC of 21 May 1992 on the Convention of Natural Habitats and of Wild Fauna and Flora ("the Habitats Directive"). Regulation 48, as in force at the material time, provided:

> "1. A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which (a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site, in view of that site's conservation objectives.
>
> 2. A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.
>
> 3. The competent authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority may specify.
>
> 4. They shall also, if they consider it appropriate, take the opinion of the general public; and if they do so, they shall take

such steps for that purpose as they consider appropriate.

5. In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.

6. In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

Considerations under regulation 49 do not arise.

74. Article 4 of the Birds Directive provides for Member States to classify areas used by rare or sensitive species of birds as Special Protection Areas ("SPA"s). An area close to the appeal site has been designated as an SPA (the Teesmouth and Cleveland Coast Special Protection Area). The sea to the north of the appeal site and sand dunes to the west of the site form part of the SPA which was a "European site" within the meaning of regulation 48 of 1994 Regulations. The habitats provide feeding and roosting opportunities for important numbers of water birds, both in winter and during passage periods. The SPA also qualifies as a wetland of international importance under Article 4.2 of the Birds Directive.

75. Thus an appropriate assessment of the implications of the development for the site must be conducted (regulation 48(1)). The competent authority is required to consult "the appropriate nature conservation body and have regard to any representations made by that body" (regulation 48(3)). It may grant permission for the project only after having ascertained that it would not affect the integrity of the site (regulation 48(5)).

76. The respondent submits, first, that the Council, as the competent authority, failed to make the assessment required and, secondly, failed in the light of the conclusions of the assessment (if made) to ascertain that the development would not adversely affect the integrity of the SPA.

77. The Council delegated to Mrs Mealing, its Development Control Manager already mentioned, the task of making the assessment. Mrs Mealing consulted Natural England ("NE"), the appropriate conservation body for the purpose of the regulations, and the Royal Society for the Protection of Birds ("RSPB"). Nathaniel Litchfield & Partners ("NLP"), planning consultants, have acted for the appellants in this aspect of the claim. E3 Ecology Limited ("E3") are a specialist ecological consultancy and have been acting for the appellants on the instructions of NLP.

78. There was a long period of consultation, between the Council and those bodies, following the application for planning permission in July 2006. A first assessment made in August 2006 was the subject of criticism by both NE and RSPB.

79. E3 submitted a revised assessment report on 8 November 2006. Both consultation bodies considered most of their concerns had been met but further amendments were thought to be necessary. A third draft by E3 was submitted for comment in January 2007. As a result of comments, a fourth and final version of the report was prepared and submitted by the Council to NE and RSPB on 30 January 2007. Both bodies expressed their satisfaction with the report as an appropriate assessment and withdrew their objection to the planning application, subject to the imposition of conditions.

80. The submission made on behalf of the respondent by Mr Nardell is forceful but succinct. It is for the Council to ascertain that the development "will not adversely affect the integrity of the European site" (regulation 48(5)). The Council can authorise the project "only if they have made certain that it does not adversely affect the integrity of [the] site" (ECJ in *Landelijke Vereniging tot Behond van de Waddenzee v Staatssecretaris van Landbouw Natuurbeheer en Visserij*, C127/02; [2004] ECR-I 7405). Secondly, it is for the Council to make the required assessment and not NE or RSPB, or Mrs Mealing.

81. The Officers' report to Committee, on this aspect of the case, included the following paragraph:

> "3.9 Natural England
>
> Natural England note that the application site is adjacent to South Gare and Coatham Sands SSSI [site of special scientific interest] and Redcar Rocks SSSI. Parts of these SSSI's are also constituent elements of Teesmouth and Cleveland Coast SPA and RAMSAR site [the wetland of international importance]. Initially objected to the scheme but they subsequently advised that following the submission of the revised appropriate assessment, had been able to ascertain that the proposed development would not adversely affect the integrity of the SPA/RAMSAR site and would not be likely to cause damage and disturbance to the SSSI. They therefore advise that they have no objections to the proposed development subject to a number of safeguarding conditions being attached to any approval.
>
> 3.10 Royal Society for the Protection of Birds (RSPB)
>
> RSPB also initially expressed concern regarding the possible impact of the development on protected areas. However, as is the case with Natural England, they withdrew their holding objection on the basis that the revised appropriate assessment contained sufficient information regarding the likely impacts on the SPA/RAMSAR site. They also advise that conditions should be attached to any approval (broadly similar to those suggested by Natural England)."

82. Under the heading "Ecology", at paragraph 4.10, the report states: "an appropriate assessment has therefore been prepared as required under the Habitat Regulations". Considerable detail is provided and, in relation to the Beach Management Plan, it is stated: "A condition would need to be imposed to ensure that the coastguard building and associated works do not impinge into the sand dunes and the condition suggested by Natural England and RSPB would also need to be imposed". Many of the individual conditions proposed by the Officers and imposed by the Committee include as reasons for them: "to protect the dune habitat", "to prevent pollution of the water environment" (twice), "in order to avoid disturbance to water birds associated with the SPA/RAMSAR/SSSI" (3 times) and "in the interests of environmental protection".

83. As a part of a report, though not included in the report to Committee, Mrs Mealing stated:

> "The site's conservation objectives have been taken into account, and the assessment has concluded that subject to conditions, the proposed development would not adversely affect the integrity of the SPA/Ramsar site and would not be likely to cause damage and disturbance to the SSSI."

84. Mr Nardell's submission is that there is no evidence that the Committee members made the required assessment themselves or that they were instructed as to what test to apply, that is, certainty that the project will not adversely affect the integrity of the SPA.

85. NE and RSPB are, of course, organisations of high repute. I have no doubt that in approving the scheme, subject to the conditions they required, they were well aware of the nature and extent of the regulation 48 duty. A summary of their findings was included in the report to Committee and Committee members were entitled to rely on their recommendations. Mrs Mealing, who was aware of the test to be applied, expressed her opinion. The recommended conditions were included in the report submitted to the Committee. It is not suggested that members of the Committee failed to consider the report. One of the stated reasons for granting permission was that "subject to suitable safeguarding conditions, the integrity of the nearby protected sites will not be compromised".

86. In these circumstances, neither the failure to set out the regulation 48 test, nor the failure to set out Mrs Mealing's opinion, in the report to Committee, in my view, require the planning decision to be quashed. The issue had received expert consideration. The Committee had expert advice and could assume from the source of that advice that the appropriate test had been applied.

87. I would dismiss the argument raised by the respondent's notice.

Lord Justice Rix :

88. I agree, and gratefully adopt Lord Justice Pill's exposition of the facts and

jurisprudence. I add some observations of my own as we are differing from the judge's careful judgment.

89. It is common ground that in the present planning context a distinction has to be made between mere predisposition, which is legitimate, and the predetermination which comes with a closed mind, which is illegitimate. However, there is a dispute between the parties as to the appropriate test to be applied for finding the illegitimate closed mind. On behalf of Persimmon, the principal legal submission advanced by Mr Drabble QC is that the applicable rule is not one of apparent bias or predetermination, but actual bias or predetermination, a closed mind in fact. On behalf of Mr Lewis, on the other hand, Mr Clayton QC's principal submission is that the test is, as it is now stated generally in the context of questions of bias, one of the appearance of things: would it appear to the fair-minded and informed observer that there is a serious possibility of the relevant bias, viz predetermination (in other words the *Porter v. Magill* test)?

90. Both counsel have taken us through the relevant authorities, emphasising passages pushing in one direction or the other. Mr Clayton submits that the earlier authorities have to be re-evaluated in the light of *Porter v. Magill*, which was decided in the House of Lords in December 2001. The importance, he submits, of *Porter v. Magill*, is that it emphasises the appearance of things to an outside observer, rather than to the court. Mr Drabble, on the other hand, submits that, in the context of decision-makers who are also democratic policy-makers, not performing a judicial or quasi-judicial function such as that of the auditor in *Porter v. Magill*, the test is one of actual bias, not apparent bias – save in those cases where the decision-maker has a personal or pecuniary interest.

91. The most recent relevant decision is that of this court in *National Assembly for Wales v. Condron*. There this court applied the *Porter v. Magill* test, but it did so as a matter of common ground (see at para 11, "the judge recorded that there was no difference between the parties as to the legal test, which was to be found in *Porter v Magill*…The type of bias alleged was described by the judge as 'possible predetermination'…"; and also at para 38, "Neither before the judge nor before us was there any disagreement as to the correct legal test"). In the circumstances, I believe the issue debated before us is open in this court.

92. The main reason advanced by Mr Drabble for his actual bias test is that otherwise, if an apparent bias test is applied in this context, it would be too simple to advance from the appearance of predisposition to a conclusion that there was a real possibility of predetermination. Such a test based on appearances would therefore inevitably tend to do less than justice to the very real distinction which has long been recognised in this context between the role of judicial (and quasi-judicial) decision-makers and that of democratically accountable decision-makers. On his side, the main reason advanced by Mr Clayton for adopting the test of appearances is the recognition that a finding of actual bias is extremely difficult to achieve (to which he adds the submission that the distinction between judicial and non-judicial decision-makers, at any rate in the context of judicial review as a whole) is a false, old-fashioned and discredited one).

93. There is force in both points of view, and the jurisprudence taken as a whole supports both. In my judgment, however, it would be better if a single test applied to the whole

spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances, and that those circumstances must have an important and possibly decisive bearing on the outcome.

94. Thus, there is no escaping the fact that a decision-maker in the planning context is not acting in a judicial or quasi-judicial role but in a situation of democratic accountability. He or she will be subject to the full range of judicial review, but in terms of the concepts of independence and impartiality, which are at the root of the constitutional doctrine of bias, whether under the European Convention of Human Rights or at common law, there can be no pretence that such democratically accountable decision-makers are intended to be independent and impartial just as if they were judges or quasi-judges. They will have political allegiances, and their politics will involve policies, and these will be known. I refer to the dicta cited at paras 43/52 above. To the extent, therefore, that in *Georgiou v. Enfield London Borough Council* Richards J seems to have suggested (at paras 30/31) that such decision-makers must be subject to a doctrine of apparent bias just as if they were like the auditor in *Porter v. Magill* with an obligation therefore of both impartiality and the appearance of impartiality, I would, with respect, consider that he was stating the position in a way that went beyond previous authority and was not justified by *Porter v. Magill*. I do not intend, however, to suggest that the decision in *Georgiou* was wrong, and it is to be noted that the common ground adoption of the *Porter v. Magill* test in *Condron* did not prevent this court there reversing the judge on the facts and finding no appearance of predetermination.

95. The requirement made of such decision-makers is not, it seems to me, to be impartial, but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case, no complaint is raised by reference to the merits of the planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse allegations of political controversy.

96. So the test would be whether there is an appearance of predetermination, in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination, or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself. I think that Collins J put it well in *R (on the application of Island Farm Development Ltd) v. Bridgend County Borough Council* when he said (at paras 31/ 32):

> "The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should…[U]nless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision…It may be

> that, assuming the *Porter v Magill* test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations."

97. In context I interpret Collins J's reference to "positive evidence to show that there was indeed a closed mind" as referring to such evidence as would suggest to the fair-minded and informed observer the real possibility that the councillor in question had abandoned his obligations, as so understood. Of course, the assessment has to be made by the court, assisted by evidence on both sides, but the test is put in terms of the observer to emphasise the view-point that the court is required to adopt. It need hardly be said that the view-point is not that of the complainant.

98. I think that Lord Justice Pill's conclusion at para 71 above is to similar effect and also puts it well, if I may respectfully say so, when he says that the importance of appearances is generally more limited in this context than in a judicial context. I also agree with Lord Justice Longmore's observations about the jurisprudence.

99. In this connection, I have also derived assistance from the discussion under the heading of "Policy and bias" in *De Smith's Judicial Review*, 6th ed, 2007, at paras 10-065ff. For instance –

> "Closely related to the doctrine of necessity is that which permits decision-makers to exhibit certain kinds of bias in the exercise of their judgment or discretion on matters of public policy. Ordinary members of legislative bodies are entitled, and sometimes expected to show political bias. They ought not to show personal bias, or to participate in deliberations on a matter in respect of which they have a private pecuniary or proprietary interest, but their participation in such circumstances may not in itself affect the validity of a legislative instrument" (at 10-065).
>
> "The normal standards of impartiality applied in an adjudicative setting cannot meaningfully be applied to a body entitled to initiate a proposal and then to decide whether to proceed with it in the face of objections…" (at 10-071).
>
> "Despite the latitude given to policy decisions, it should be remembered that four other principles of public law remain in play. First, the person or tribunal holding an inquiry into the matter may not ignore the other part of procedural fairness, namely, the granting of a fair hearing…Secondly, the "no fettering doctrine" would apply. The policy could therefore not be applied rigidly, and the decision-maker will still be required not to shut his ears to someone with something new to say… Thirdly, the body will not be able to pursue powers outside the statutory purposes conferred upon it…Fourthly, it is no longer the case that the full rigours of procedural safeguards are reserved only for decisions that are "judicial"..." (at 10-073/075).

100. In the present case, Lord Justice Pill has explained how the matters of complaint, understood in both their general and particular contexts, do not amount to such evidence as would meet the required test, however it is exactly expressed. I agree. The timing of the meeting was fully explained. In circumstances where the time for decision had already come and the meeting only fell within the purdah period for exceptional reasons, and where either proceeding or delaying the meeting date in relation to the forthcoming election might be criticised either way, and the Council's Monitoring Officer (Mr Frankland) and Development Control Manager (Mrs Mealing), whose views were in evidence, explain and support the timing of the meeting, I do not consider that the fair-minded and informed observer would infer that there was a real possibility that, because the decision was taken at one time rather than another, therefore it was taken by councillors with closed minds. There was evidence from the Council, which has itself opposed these proceedings, that the new Labour administration, post the election, was supportive of the scheme. It was that new administration that issued the planning permission, which it could in principle have declined to do. The prompt signing of the development contract a few days before the election, once the decision was made, in the circumstances takes the matter no further.

101. In sum, I agree that this appeal should be allowed. I also agree that the argument raised by the respondent's notice should be rejected.

Lord Justice Longmore:

102. The fundamental rule of natural justice that no one should be a judge in his own course has been the subject of considerable elaboration over the years. It is axiomatic that no person making a decision which is subject to judicial review should in fact be biased; in most cases it is axiomatic that there should also be no appearance of bias in the sense that a decision will be liable to be quashed if a fair-minded observer, knowing all the relevant facts, would think that there was a real possibility that the decision-maker would be biased. This latter proposition has, however, been qualified in cases in which allegations of what I may call institutional or structural bias are made. Then it is not open to a litigant to say that a person or body entrusted by Parliament to make a decision cannot be allowed to do so because there is a real possibility of bias, provided that there are sufficient safeguards in place to ensure that the decision is lawful, see *Alconbury v Secretary of State for the Environment* [2003] 2 AC 295.

103. In opening the appeal on behalf of Persimmon Homes, Mr Richard Drabble QC submitted that the consequence of this was that the doctrine of apparent bias did not apply at all to the ordinary run of local authority decision-making and that, since no allegation of actual bias had been made, this appeal must necessarily be allowed.

104. Mr Drabble was careful not to apply his submission to all cases of local authority decision-making since he would accept that in cases where a member of a local planning authority had a personal interest (let alone a financial interest) in the outcome, the doctrine of apparent bias was still relevant. But the fact that the law of apparent bias applies to some cases of the local authority decision-making makes one cautious about saying it will not apply in the majority of cases and shows that it is necessary to differentiate between different types of alleged bias.

105. The particular kind of apparent bias, the real risk of which was alleged (and found by the judge) to exist in the present case, is that of "predetermination" namely that one or more members of the decision-making Committee had made up their minds and come to a determination before the right moment for decision had come. Mr Drabble submitted that, in relation to this species of bias, there was no room for any doctrine of apparent bias. The decision could only be quashed if one or more members had actually predetermined the question not if there was merely an apparent risk of that happening.

106. It is clear from the authorities that the fact that members of a local planning authority are "predisposed" towards a particular outcome is not objectionable see e.g. *R v Amber Valley District Council* [1985] 1 WLR 298. That is because it would not be at all surprising that members of a planning authority in controversial and long-running cases will have a preliminary view as to a desirable outcome. That will be all the more so if there is an element of political controversy about any particular application, since planning authority members elected on a particular ticket would, other things being equal, be naturally predisposed to follow the party line. None of this is remotely objectionable.

107. What is objectionable, however, is "predetermination" in the sense I have already stated namely that a relevant decision-maker made up his or her mind finally at too early a stage. That is not to say that some arguments cannot be regarded by any individual member of the planning authority as closed before (perhaps well before) the day of decision, provided that such arguments have been properly considered. But it is important that the minds of members be open to any new argument at all times up to the moment of decision.

108. If that is the right meaning to give to that species of bias known as predetermination, it is an undesirable and indeed un-judicial attribute. I would not think it right to say, if the fair-minded and well-informed observer considered that there was a real risk that one or more members of the planning authority had refused even to consider a relevant argument or would refuse to consider a new argument, that the decision should stand. Nor do I think that any of the authorities to which Mr Drabble referred us go that far.

109. Conversely, however, the test of apparent bias relating to predetermination is an extremely difficult test to satisfy. This case in my judgment comes nowhere near satisfying this test for the reasons which my Lords have given.

110. As far as the authorities are concerned, Mr Drabble relied chiefly on *R v Secretary of State for the Environment ex parte Kirkstall Valley* [1996] 3 All ER 304. That was a case in which the relevant members of the planning committee had a personal interest (and in one case a financial interest); the argument of Mr Gerard Ryan QC for the developer was that planning authorities are not judicial or quasi-judicial bodies and that accordingly their decisions were not reviewable for bias. In the light of *Ridge v Baldwin* [1964] AC 40 this submission was, unsurprisingly perhaps, rejected. But Sedley J was concerned that the doctrine of bias might go too far for comfort with respect to decisions of planning committee members who might be naturally pre-disposed to come to a decision in a way which a judge or a quasi-judge (such as a local

authority auditor) would not be. He drew the distinction between predisposition and predetermination at page 315e. He then adopted the description of predetermination as being "a surrender of judgment", which had been given by Mahon J in *Anderton v Auckland City Council* [1978] 1 NZLR 657 and said (319f) that a surrender by a decision-making body of its judgment is jurisprudentially a different thing from a disqualifying interest held by a participant in the process. That may be correct but I do not think that by that Sedley J meant that the doctrine of apparent bias had no part to play in cases of "predetermination" or "surrender of judgment". He later described the line of authority, on which Mr Ryan had relied to support his submissions that the rules of bias only applied to judicial or quasi-judicial bodies, as representing the principle that

> "the decision of a body, albeit composed of disinterested individuals, will be struck down if its outcome has been predetermined whether by the adoption of an inflexible policy or by the effective surrender of the independent body's judgment."

It is these words on which Mr Drabble chiefly relied to submit that, in cases of predetermination, there is no room for a doctrine of apparent predetermination. In context, Sedley J had no need to consider appearances; he was only concerned with actuality. But I do not think he meant to indicate by the words he used that only actual predetermination would vitiate a decision. This is an area of the law where appearances matter and Kirkstall is not a decision that in this area they do not.

111. Other authorities relied on by Mr Drabble were cases of what I have called institutional or structural bias. A good example is *CREEDNZ Inc. v Governor General* [1981] 1 NZLR 172 in which the National Development Act 1979 authorised a fast-track planning procedure in cases where Ministers were satisfied that certain criteria contained in section 3(3) of the Act were met. The relevant Ministers said that they had addressed themselves to the criteria and decided that they were satisfied as to their existence before the relevant Order in Council was made. The claimant asserted that, since the Ministers all wanted the Order in Council to be made, there was an apparent risk that the matter had been predetermined by them before the Order in Council was made. Cooke J said (page 179):-

> "What can properly be inferred is that when the question arose in April 1981 the Government was already clearly in favour of the company's project and highly likely to decide in favour of an Order in Council.
>
> But it is fallacious to regard that as a disqualification. The reference in the amended statement of claim to a real probability or suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this government level …
>
> In relation to decisions under section 3(3) I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable."

Planning decisions entrusted to a local authority are very different from Ministerial decisions taken by Government and I do not consider that authorities relating to apparent predetermination in that latter context can automatically apply to the former context, since the risk of bias is institutionally present and permitted to be so by the relevant legislation. *CREEDNZ* is very similar to *Alconbury* and cannot carry Mr Drabble home in the present case.

112. It follows from this that I would reject Mr Drabble's invitation to overrule *Georgiou v Enfield London Borough Council* [2004] LGR 497 and his invitation to say that a concession was wrongly made in *Condron v National_Assembly for Wales* [2006] EWCA Civ 1543.

113. Nevertheless, as I have said there is no apparent risk of predetermination as to facts of the present case. I agree with all that my Lords have said on this topic. I also agree that the appeal should be allowed and the argument raised by the respondent's notice rejected.