

January 2008

## Local Government

### Elections Purdah - The Bias Connection

**There are many legal snares for the explorer in the local government jungle. And sometimes too much single-minded enthusiasm can blind the unwary to these perils and drop them painfully into an elephant trap. Such may have been the situation when a controversial planning decision by Redcar and Cleveland Borough Council taken during the elections purdah period was quashed by Jackson J on 20 December 2008 for apparent bias or apparent predetermination (*R (Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes* [2007] EWHC 3166)**

The decision in question was an outline planning permission granted by the Council to Persimmon Homes Teeside Limited for a mixed residential and leisure development on the Cleveland coast in a special protection area in respect of both birds and habitats. In the run-up to the 3 May 2007 elections the Council's corporate communications team produced a 'Guidance Note on Publicity'. This included the following provision: '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'.

Section 2 of the Local Government Act 1986 deals with the prohibition of political publicity and Section 2(1) requires a local authority not to publish any material which, in whole or in part, appears to be designed to affect public support for a political party. By section 2(2), in determining whether material is prohibited, regard shall be had to the content and style of the material, the time and other circumstances of publication and the likely effect on those to whom it is directed. Guidance issued under section 4 highlights the period between the notice of an election and the election itself (frequently called 'the purdah period') as being particularly sensitive for these purposes. In the instant case the notice of election was given on 27 March 2007 so the purdah period ran from then until 3 May 2007.

Neither the Council's ruling coalition (comprising Liberal Democrats, Conservatives and East Cleveland Independents) nor officers took the view that the progress of Persimmon's planning application should be suspended during the purdah period. Whilst the leader of the opposition Labour Group had expressed the view that it would be improper for any such meeting to proceed during this time, the meeting nevertheless went ahead on 3 April 2007 and outline planning permission was granted subject to conditions. The Claimant, a local resident, sought a declaration that the

permission was unlawful (amongst other things) because of appearance of bias or predetermination.

#### Review of Caselaw

Jackson J conducted a thorough review of relevant caselaw in directing himself on the relevant legal principles. He noted that the law requires decision makers to give proper consideration to the arguments and evidence placed before them at the time they are reaching their decision. This necessitates that decision makers should not have made up their minds in advance and should not be biased in favour of one side or the other. However, the Judge did point out that these principles are not easy to apply in the context of local government. This is because the decision makers are often councillors who are publicly committed to policies relevant to the issues under consideration and sometimes those policies are part of the manifestos upon which the councillors were elected. The Court therefore considered the following authorities:

- ***R v Amber Valley DC, ex parte Jackson* [1985] 1 WLR 298.** Here Woolf J (as he then was) refused to restrain a district council from considering a planning application which the majority of the council had previously resolved to support. The councillors would be acting lawfully provided they considered the arguments on their merits and took into account all material considerations.
- ***R v Waltham Forest LBC, ex parte Baxter* [1988] 1 QB 419.** This involved a challenge to a Council decision to impose a substantial rate increase on the ground that several councillors had voted on party lines rather than in accordance with their own opinions. Sir John Donaldson MR held that the councillors were entitled to give weight to the views of colleagues and to party policy, but they were not entitled to vote blindly in support of party policy. The conduct of the councillors in that case fell on the right side of the line.

Continued on reverse

- **Porter v Magill [2001] UKHL 67; [2002] 2AC 357.** Lord Hope noted the close relationship between the concepts of independence and impartiality within Article 6 of the European Convention on Human Rights (right to a fair trial). He indicated that in '...both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these essential qualities.' And he formulated the test for apparent bias as: 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'
- **Bovis Homes Ltd v New Forest District Council [2002] EWHC 483 (Admin).** Ouseley J said that predetermination '... is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed. It is to be distinguished from a legitimate predisposition towards a particular point of view.' In addition: 'The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be the true reasons but a sham.'
- **Georgiou v Enfield London Borough Council [2004] EWHC 779 (Admin).** The principle of law which Jackson J derived from Georgiou is that the fair minded and informed observer test is applicable not only in cases of alleged apparent bias, but also in cases of alleged apparent predetermination. If either is established, the decision in question is unlawful. Georgiou is also authority for the proposition that the fair minded and informed observer test must be applied with appropriate caution. It must not be applied in a way that will render local authority decision making impossible or unduly difficult. Jackson J consequently deduced that the notional, fair minded and informed observer is a person familiar with the structure of local government and that he or she makes due allowance for the need to carry on local authority decision making without undue disruption.
- **Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117.** Per Scott Baker LJ, the test for apparent bias involves a two-stage process: (1) the Court must ascertain all the circumstances relevant to the suggestion of bias; (2) the Court must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility of bias.
- **R (Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189 (Admin).** Expressing doubts about the approach of Richards J in Georgiou, Collins J observed 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.' Jackson J took the view that the key to reconciling the Georgiou and Island Farm decisions lies in the dictum in Georgiou that the test for apparent bias should be applied 'with appropriate caution'. And that test must not be applied '...in a way that will render local authority decision making impossible or unduly difficult'. Jackson J consequently noted that to avoid the difficulties it was necessary '...to assume that the notional, fair minded and informed observer is cognisant of the practicalities of local government' and that he 'does not take it amiss that councillors have previously expressed views on matters which arise for decision'. Also, in '...the ordinary run of events, he will trust councillors, whatever their pre-existing views, to approach decision making with an open mind'.
- **Gillies v Secretary of State for Work and Pensions [2006] UKHL 2.** Lord Hope pointed out that the notional observer was 'neither complacent, nor unduly sensitive or suspicious'. But as Jackson J pointed out: '... If there are additional and unusual circumstances which suggest that councillors may have closed their minds before embarking upon a decision, he will regretfully conclude that there is a real possibility of bias or predetermination'.

#### Key propositions

From the caselaw, Jackson J derived the following 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. Jackson J used 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.

#### Decision in the Instant Case

Jackson J (in the course of a detailed and careful consideration of each submission) noted (contrary to the view of the Council's monitoring officer) that the holding of this particular public meeting during the purdah period was a clear breach of the Council's guidance. The Judge felt it also to be significant that the leader of the Labour opposition 'specifically opposed the holding of such a controversial meeting during the purdah period'. He also considered that the notional observer, whilst trusting of councillors and not unduly suspicious would regard it as a serious possibility that the coalition was trying to force through the development in question in advance of the election. Amongst other considerations, the merits of the project had become a party political issue in the imminent local election and despite 'the formidable arguments on both sides, not a single member of the coalition either abstained or voted against the motion'. Furthermore, on 1 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' thereby further tying the hands of its successor.

In the circumstances Jackson J concluded that in the light of the guidance given in the authorities, a fair minded and informed observer, having regard to the identified facts, would conclude that there was a real possibility of bias or predetermination on the part of the planning committee.

#### Conclusion

Redcar contains an interesting and thoughtful analysis of the law surrounding bias and predetermination which helpfully draws together all the existing strands. It is also resonant in the light of the forthcoming elections on 1 May 2008 which affect the Greater London Authority and various other authorities. The bridge created by Jackson J between the more trusting and more restrictive approaches respectively of Collins J in *Island Farm* and Richards J in *Georgiou* is also very useful based on the 'appropriate caution' counsel from Richards J and the consequent view that the bias test should not be applied in a way that will render local authority decision making impossible or unduly difficult.

Equally useful is the greater depth of insight we now have into the character of the mysterious (but increasingly ubiquitous) 'fair-minded and informed observer'. From the gathered strands, it is now clear that he is neither complacent nor unduly sensitive or suspicious and, in the local authority context, he is cognisant of the practicalities of local government. Ordinarily, he will trust councillors unless there are additional and unusual circumstances that may indicate closed minds before a decision. So whilst the decision of the Court will doubtless disappoint those promoting the quashed decision, in the absence of any appeal, the judgment does constitute a helpful route map through the jungle of bias and predetermination in the context of elections purdah.

**Nicholas Dobson**  
**Senior Consultant, Local and Public Law**  
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LONDON BIRMINGHAM BRISTOL EDINBURGH GLASGOW LEEDS MANCHESTER BEIJING DUBAI HONG KONG SHANGHAI

T 0845 300 32 32 [www.pinsentmasons.com](http://www.pinsentmasons.com)

Should you have any questions please contact Nicholas Dobson ([nicholas.dobson@pinsentmasons.com](mailto:nicholas.dobson@pinsentmasons.com)) or your usual Pinsent Masons adviser who will be able to assist you further.

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