# R (on the application of ) Jeremy Kelton v Wiltshire County Council and others [2015] EWHC 2853 (Admin)

## Bias In Decision Making

The principles of natural justice and fairness apply to the decision making process of public bodies in environmental cases.

In the recent judgment in R (oao Kelton) v Wiltshire County Council and others, Mr Justice Cranston considered the issue of bias in decision making by a local planning authority's planning committee.

## Background

Wiltshire County Council's planning committee resolved to grant planning permission for 35 residential dwellings on the banks of the river Wylye (part of River Avon Special Area of Conservation or SAC). The applicants for permission were HPH Ltd and HAB Housing Ltd. The proposed development included provision for 9 affordable homes. Selwood Housing Association – a not-for-profit association which specialised in affordable properties – had been involved in advising on the development and was a potential provider.

Although the judicial review was brought on four grounds, which included defects in assessing the effects of the development on the SAC and a flawed Environmental Impact Assessment procedure, the Claimant's main argument was that the decision was biased on the basis that one of the members of the planning committee – Councillor Macdonald - had an interest in the outcome, given his relationship with Selwood Housing Association, from which he received a small salary as a director.

## The Role Of The Housing Association

As part of the process of exploring the possibility of a Neighbourhood Development Order (NDO), the Council asked the developer to initiate discussions with those who might provide affordable housing. Selwood was one of several organisations which, at first, were identified as possible providers. After the NDO possibility was abandoned, the developer expressed the desire to "work with Selwood" on the affordable housing element of the development and there were regular meetings between the developer and Selwood.

The officer's report to the committee recorded that Selwood had written one of the two letters of support for the development to the LPA. The officer's report mentioned that Selwood was "the affordable housing provider that has been working with the applicant" and added that "the applicant has already identified Selwood Housing to deliver the affordable housing and they are keen to innovate an affordable housing custom-build model."

## The Committee Meeting And The Councillor

When the present application came to be considered in June 2014, objections were raised to Cllr. Macdonald's participation. Selwood Housing representatives, who were present at the meeting, sent Cllr. Macdonald a note advising him that he could vote on the application, which was at odds with the committee's code of conduct which forbade communication between the public and councillors during committee meetings "as this may give the appearance of bias."

Although the note had not been kept, it was found by Cranston J that it probably advised the councillor that Selwood had "no formal agreement" with the applicants and all that had been done was to "talk to" them.

The minutes of the planning committee meeting record that Cllr. Macdonald declared that he was a member of the Selwood board. But, following the debate, which focused on affordable housing, he cast his vote in favour of approving the application.

The final vote was narrowly in favour by a margin of one, meaning that if the councillor had recused himself, the chair (who was against the development) would have had the casting vote, and the application would have been rejected.

Following the meeting, a formal complaint was made regarding Cllr. Macdonald's participation. It alleged a breach of the Council's Code of Conduct. The deputy monitoring officer decided that there was no breach and that no further action should be taken.

The decision notice confirming the decision of the committee was then published in 2015.

## Automatic Disqualification

The first argument raised by the Claimant related to "automatic disqualification" as a result of the councillor's directorship of Selwood and his pecuniary interest. Selwood, in turn, was involved in the application and had an interest in its fate given that the applicants for planning permission had identified it as, effectively, their affordable housing partner.

The source of the automatic disqualification rule is to be found in common law principles most famously articulated in R v. Bow Street Magistrates, ex parte Pinochet (No. 2) [2000] 1 AC where the rule of automatic disqualification was held to extend beyond pecuniary or proprietary interests to the promotion of a cause. In that case, the judge had taken "an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation": at 132-3, 136, per Lord Browne-Wilkinson.

In planning cases, the rule was first applied in R v. Hendon RDC, ex parte Chorley [1933] 2 KB 696, a case where one of the councillors voting to grant planning permission was also the estate agent for the owner of the land. The bias in that case was "quite clear".

However, Cranston concluded that "Cllr. Macdonald had no direct pecuniary or proprietary interest in the planning application so as to be automatically disqualified from participating in the decision.":

"The decision of the committee in the present case did not lead to Cllr. Macdonald obtaining any benefit. There are too many contingencies between the committee's decision and any benefit to him as a director of Selwood for the rule to have any purchase. As to promotion of a cause, it seems to me that Pinochet was an exceptional case, not only because it involved, as it did, a judge. Here Selwood was not a party to the decision, as the charity was in that case. Cllr. Macdonald cannot be regarded as promoting the cause of affordable housing through his voting on planning permission on this application".

## The Localism Act

The second challenge on this ground was statutory disqualification as a result of a disclosable pecuniary interest. Section 31 of the Localism Act 2011 ("the 2011 Act") provides:

"31. Pecuniary interests in matters considered at meetings or by a single member

(1) Subsections (2) to (4) apply if a member or co-opted member of a relevant authority –

(a) is present at a meeting of the authority or of any committee, sub-committee, joint committee or joint sub-committee of the authority,

(b) has a disclosable pecuniary interest in any matter to be considered, or being considered, at the meeting, and

(c) is aware that the condition in paragraph (b) is met.

. . . .

(4) The member or co-opted member may not – (a) participate, or participate further, in any discussion of the matter at the meeting, or (b) participate in any vote, or further vote, taken on the matter at the meeting".

A 'disclosable pecuniary interest' is defined by section 30(3) as follows:

"(3) For the purposes of this Chapter, a pecuniary interest is a disclosable pecuniary interest" in relation to a person ("M") if it is of a description specified in regulations made by the Secretary of State and either –

(a) it is an interest of M's…"

The question then arose, did Councillor have a pecuniary interest for the purposes of s 31 which would mean that he was automatically disqualified?

The same statutory provisions were considered in R (on the application of Freud) v. Oxford City Council [2013] EWHC 4613 (Admin). Here, the council granted planning permission for a new university building but one of the members of the committee was employed by the university. Ouseley J found that the councillor was employed by a different part of the university and that his interest was at arms length.

> "41...for him to have been obliged not to participate in the debate, it would have to be shown that he had a disclosable pecuniary interest in the subject matter of the discussion. He had no pecuniary interest in this subject matter. He was not in any part of the university which was promoting it. He had no contract to deal with it. He had nothing in that respect which could amount to a disclosable pecuniary interest in that matter."

Again, as with the common law principle, Cranston J concluded that:

"Cllr. Macdonald had no disclosable pecuniary interest in the matter to be considered. Selwood was not the applicant for planning permission and at the point of the decision had no contract with HPH/HAB. It may have built up goodwill with its advice to them over a period, but at the time of the grant of planning permission the affordable housing part of the development was yet to be tendered. In the result, Cllr. Macdonald was not disqualified under section 31 of the 2011 Act".

## Apparent Bias

The legal test for the appearance of bias is set out in Porter v. Magill [2002] 2 AC 357:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": [103], per Lord Hope.

Cranston J concentrated on two cases in particular to "throw light on how the principle of apparent bias applies in practice": R v. Chesterfield Borough Council ex parte Darker Enterprises, [1992] C.O.D. 465 and R. v. Holderness BC ex parte James Robert Developments Ltd (1993) 66 P & CR 46 – which contain opposing conclusions and were relied upon specifically by the Claimant and Defendant respectively.

In Darker Enterprises, a councillor who was a director of the Co-op had voted in the refusal to renew a licence for a sex shop next to a Co-op store. The councillor had understood that he could be seen to have an interest in the outcome of the decision as if the shop closed, the Co-op could expand into its premises.

There, unlike in the present case, the councillor declared his interest and recused himself from the vote. Nonetheless, Brooke J held that there was apparent bias and quashed the decision of the committee.

In Holderness, one of the members of the planning committee which refused planning permission worked for a rival builder in the same area to the applicant. The court considered whether a breach of natural justice had occurred by reason of the appearance of bias.

In finding that there was no such breach, Bulter-Sloss LJ commented:

"All councillors elected to serve on local councils have to be scrupulous in their duties, search their consciences and consider carefully the propriety of attending meetings and taking part in decisions which may give rise to an appearance of bias even though their actions are above reproach. But if a builder is not to sit on a planning committee when planning applications are made for development by a rival builder, in effect he is to be debarred from sitting on the planning committee at all... Equally can a surveyor, or architect sit on the planning committee since one or both may be involved with other builders in projects in the area? Is it too far-fetched to ask builders' merchants and other suppliers to debar themselves, or plumbers or electricians? Within this simple formula as proposed is a wholesale requirement for all those who know something about planning and building or ancillary services within the area to absent themselves from a committee where their general expertise might be useful": at 57-58.

The Defendant and Interested Party argued that the mere fact that Cllr. Macdonald was a director of Selwood and a potential partner of HPH and HAB, would not have caused the fair-minded and informed observer to conclude that there was a real possibility of bias. They argued that all Selwood had done, as part of the Council's Development Partnership, was to give advice to HPH and HAB. There was no legal agreement in place and all that Selwood had simply spoken to HPH. Cllr. Macdonald was, at most, the director of a potential development partner.

However, Cranston J disagreed:

"In my view, Cllr. Macdonald's participation in the decision to grant planning permission gave rise to an appearance of potential bias as defined by Lord Hope in Porter v. Magill. It was plainly in Selwood's interests and Cllr. Macdonald's, as director, for the application to be approved. The reasonable and fair-minded observer, having the background facts, would have been aware that Selwood had committed time, resources and expertise in the way described earlier in the judgment to working with HAB/HPH over the design of the affordable housing part of the scheme"...

Cranston J found that there was "a parallel" with Darker Enterprises: the Co-op did not have an option to acquire the premises of the sex establishment next door and neither did Selwood have a contract to provide the affordable housing.

"Indeed it seems to me that the circumstances in the present case are stronger than in that case, because there the councillor declared his interest and did not vote. Notwithstanding this the court held that there was apparent bias".

Cranston J distinguished R (Lewis) v. Redcar and Cleveland Borough Council [2008] EWCA Civ 746; [2009] 1 W.L.R. 83, where the court rejected apparent bias. This had been a predetermination case in that it was alleged that the planning committee members had made their decision in circumstances which gave rise to a real risk of "closed minds". Whether or not in the present case there was a degree of predetermination was not the most important aspect of the bias issue:

"Certainly one element of the attack on Cllr. Macdonald's participation was that he participated in a decision which furthered the cause of affordable housing, which as a member of Selwood he obviously supported, but that was only part of it. The important distinction is that as a director of Selwood he also had a private interest"

## Comment

Arguments had been raised before Cranston J that there would be unfortunate consequences for the membership of committees were those in Cllr. Macdonald's position to be disqualified from decision making.

However, Cranston was not persuaded. It would not be a concern for the "great majority" of housing applications likely to come before the committee. In the case at hand, the housing association, "was not simply an affordable housing provider"; it was the "only provider" willing to give assistance with the scheme. It had "expressed a clear interest in delivering it", then it had been named by the applicants as their "potential partner", and had finally written in support and actually attended the planning committee meeting, passing a note of advice to the councillor. Cllr. Macdonald's "private interests" were engaged – not just an interest in a "particular cause" – such as affordable housing.

Local planning authorities will now inevitably need to ensure that their councillors are advised of the possible consequences of remaining to vote where a "private interest" is engaged. Declaring such an interest may not be enough to avoid a legal challenge to a decision.

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