Breathe easy

The Court of Appeal's decision in *Ware* restores stability to the law on bias, says **Nicholas Dobson**

The Court of Appeal brought tidings of great joy to monitoring officers across the land in a judgment delivered on 18 December 2007. The "Bah Humbug" decision of Mr Justice Collins on 30 March 2007 was finally laid to rest on appeal in *R (Ware) v Neath Port Talbot County Borough Council* [2007] EWCA Civ 1359, [2007] All ER (D) 266 (Dec).

COUNCIL DECISION

Collins J had quashed a council decision to grant planning and hazardous substances consents for the development by National Grid of a natural gas pressure reduction station ([2007] EWHC 913 (Admin), [2007] All ER (D) 525 (Mar)).

This was after members decided to leave a material meeting following advice from the deputy monitoring officer that the members would have to state what was said at a previous meeting with objecting residents (among others) if there were a complaint to the local ombudsman.

PRE-DETERMINATION

Collins J had taken the view that the councillors in question were "clearly influenced by concerns that there might be a perception of pre-determination and therefore there was a doubt, and because of that doubt, they decided it was better to leave and not to vote". He had no doubt that the councillors did feel under pressure not to participate and he therefore quashed the decision so that the matter could be:

> "...reconsidered and that all councillors who have an interest in the matter and who have not done anything which can properly disqualify them from taking part, should have the opportunity to consider it, so that there is a proper decision following the process that should be applied."

While correctly reciting the law concerning pre-disposition and pre-determination Collins J also underlined the importance of councillors not being inhibited from carrying out the "duties imposed upon them by the democratic system, by over cautious advice from monitoring officers". For it "is only if there really is a real risk that the informed and fair-minded observer would believe that there was bias that they should not participate".

In his view where the advice given "was clearly wrong, was in raising the spectre of a complaint to the ombudsman. Whether a complaint might be a made or whether judicial review claim might follow cannot be a relevant test. It is only if there is a real risk that any complaint or claim might succeed that there should be withdrawal". Collins J took the view that:

> "The proper advice that should have been given was that since they had clearly decided that they had done nothing wrong (and, indeed they had clearly done nothing wrong,) then there was no reason at all why they should not stay and vote. There should not have been reference to the possibility of a complaint to the ombudsman which could only have put some pressure upon the councillors and raised with them, in their minds, as it did, concerns that such a complaint might follow and they might have to deal with it. Of course any such complaint is a matter which any councillor would consider to be a serious matter."

A TURBULENT TIGHTROPE

On the facts as recited and understood by Collins J in his judgment it did seem surprising that he would find mere reference to an ombudsman complaint to be a killer blow to the whole decision. His general approach left monitoring officers and other local authority lawyers in a quandary and teetering on a turbulent tightrope. Damned if they give over-cautious advice, damned if advice subsequently considered too liberal enables actual or apparent bias. Happily the Court of Appeal came to the rescue in a judgment given by Lord Justice Mummery with which Lords Justices Dyson and Wall agreed.

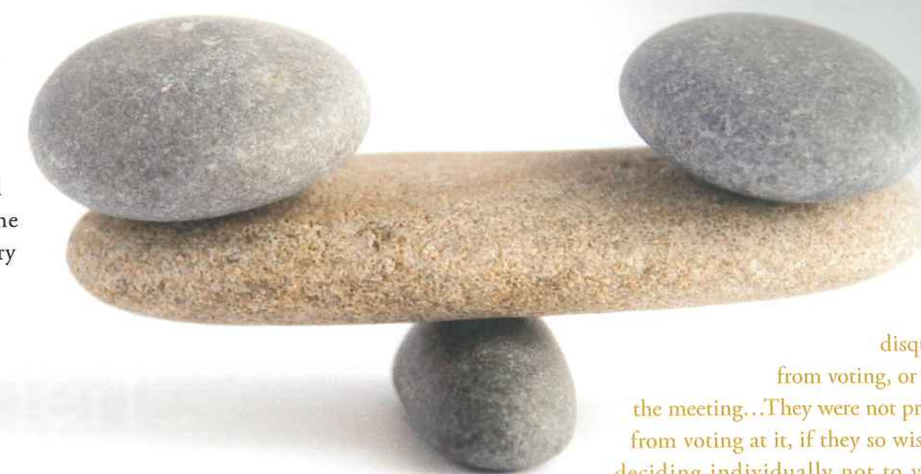
PUBLIC INTEREST

It was fortunate that the court decided that there were good public interest reasons for it to exercise its discretion to hear and decide the appeal on its merits. This was despite the appeal having been overtaken by events since the council had subsequently issued fresh consents for the development—having re-determined and confirmed the quashed consents with only minor amendments—and National Grid had then carried out the approved development. Mummery LJ said that:

> "The persisting public interest aspect of the appeal is the Council's proper concern about the implications of the case for the conduct of future Planning Committee business. It is a point of some general importance, which may recur in this Planning Committee and in the case of other committees and other local authorities. The basis of the ruling of the judge is of concern to local authorities and the role of Monitoring Officers generally when advice is given to councillors. There is also a public interest in knowing the approach of the court to legal challenges to Council decisions, on which individual members of council committees have decided to vote or to abstain from voting, as the case may be."

KEY POINTS

- The test for bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias (see *Porter v Magill*; *Weeks v Magill* [2001] UKHL 67, [2002] 1 All ER 465 (per Lord Hope)).
- A councillor or other public authority decision-maker may lawfully have a predisposition to vote in a certain way before a decision but must retain an open mind and be prepared to be persuaded to a different view in the course of the meeting. Pre-determination, ie approaching the decision with a closed mind, is unlawful.
- The courts will not entertain academic issues in the absence of exceptional circumstances. In *R (Ware) v Neath Port Talbot County Borough Council*, despite events which have overtaken it, there were good public interest reasons for the court to exercise its discretion to hear and decide the appeal on its merits since the basis of the first instance ruling was of concern to authorities and the role of monitoring officers generally.
- Contrary to the decision of Mr Justice Collins: "The advice given was not wrong advice. The judge was not justified in holding that the councillors who abstained from voting were acting under a misapprehension of law or were influenced by immaterial considerations as a result of wrong advice."
- "In particular, there was nothing wrong in advice that there was a possibility of a claim to the Ombudsman, given, as it was, in response to questions whether they should leave the meeting 'to be safe' and 'what is the worst that could happen?'"



INCORRECT CONCLUSION

On the substantive issue, the Court of Appeal concluded that the conclusion of Collins J was incorrect:

> "The advice given was not wrong advice. The judge was not justified in holding that the councillors who abstained from voting were acting under a misapprehension of law or were influenced by immaterial considerations as a result of wrong advice."

Mummery LJ pointed out that at the material meeting the substance of the relevant evidence of all the councillors was that they were left to make their own decisions and to exercise their own judgment about voting on the business in question. And they were not directed or pressurised by council officers to abstain from voting or to leave the meeting before the vote. Nor was abstention from voting recommended by the officers.

The members were not told or advised by David Michael (principal solicitor and deputy monitoring officer) that they could not participate in the meeting nor that they were disqualified from voting by reason of attendance at a public meeting in February 2006 including objectors to the development in question or by non-attendance at a site visit conducted by the committee. Mr Michael had only gone to speak to them in the meeting because they had attracted his attention.

Mummery LJ said that having regard to the unchallenged evidence of Mr Michael, the judge's summary of the advice given to the councillors was inaccurate in several significant respects:

> "The advice about the possibility of a complaint to the ombudsman was only given to two of the councillors (Councillors Williams and Davies), not to all four. The advice to Councillors Williams and Davies was in response to Councillor Davies's question 'what's the worst that could happen?'...In my view, this was a significant circumstance of the context in which Mr Michael's advice was given, though it was not mentioned by the judge. The councillors were not given advice that the possibility of a claim to the Ombudsmen would disqualify them from voting at the meeting."

Nor, said Mummery LJ, were they advised that it was better not to remain or play a part in the decision-making. And neither were the councillors advised that failure to attend a site visit disqualified them from voting. The advice which the judge held was wrong was not the advice that was given according to the evidence of Mr Michael or the other council officers. Furthermore:

> "The councillors were clearly advised that it was for them to make their own decisions about whether to vote. They were not advised or told by the Council officers that they were disqualified from voting, or to leave the meeting...They were not prevented from voting at it, if they so wished. In deciding individually not to vote the councillors were exercising their own judgment in the light of the advice that was given. None of the advice given to them was wrong or amounted to an immaterial consideration giving rise to a procedural irregularity or to unlawfulness in the granting of the consents."

In the circumstances the Court of Appeal found there was no procedural irregularity vitiating the grant of the consents.

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WELCOME STABILITY

The decision of the Court of Appeal restores some welcome stability to the legal ecosystem when potential issues of bias or predetermination arise concerning public law decision-makers. Collins J, while correctly stating the law on bias and pre-determination, appeared to take an over-sensitive and somewhat zealous view of the situation and ultimately framed his judgment on flawed factual premises which led him wrongly to set aside the consents. While wrong—including over-cautious and incautious—legal advice clearly could result in an unlawful decision, the advice given in this case was correct.

Following the appeal judgment, local government lawyers will be able to breathe a little more easily as they return to their desks and arenas of municipal power to start a new trek through the unexplored territories of 2008.

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