

# Bias and predetermination in planning law: *The lessons of Westferry and beyond*



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## The basics

- Bias and predetermination = closely related
- Both are aspects of fairness
- Bias
  - Showing, or being perceived to show, inclination or prejudice for or against one party or interest in a way that is unfair
- Predetermination
  - Approaching a decision with a closed mind

## Bias: Two types

- Actual bias
  - Very difficult to prove so cases are rare
  - Effectively redundant because unnecessary to allege given apparent bias sufficient
  - Immediately disqualifies a decision-making from continuing
  - Conclusive vitiating factor if proven in relation to a decision
- Apparent bias
  - “Would a fair-minded and informed observer, having considered the facts, conclude that there was a **real possibility** of bias”?
  - The *Magill* test (*Magill v Porter* [2002] 2 AC 357)

## Examples

- Planning committee chairman voting in favour of granting planning permission after having discussions with developer about how to facilitate scheme: ***R (Ghadani) v Harlow DC*** [2004] EWHC 1883
- Voting in favour of a scheme after expressing support for the proposal on another committee: ***Georgiou v Enfield LBC*** [2004] LGR 497 (but now see ***Lewis***: discussed later)
- Possible to express legitimate predisposition towards an outcome without this amounting to apparent bias: ***National Assembly for Wales v Condrón*** [2006] EWCA Civ 1573 (Assembly Chair had said before decision: “*I’m going to go with the Inspector*”)

## Examples (2)

- Freemason not necessarily precluded from voting on planning decision if another freemason has interest in outcome: ***R (Port Regis School Ltd) v North Dorset DC*** [2006] EWHC 742 (Admin)
  - Case shows importance of applying *Magill* test by reference to “informed” observer: i.e. “having considered the facts”
  - Court: many people might assume that freemasons are bound to assist each other, but evidence is that freemasonry is underpinned by impartiality and fairness

## Examples (3)

- ***R (Lewis) v Redcar & Cleveland BC*** [2009] 1 WLR 83
  - Remains leading case on pre-determination in planning
  - Voting councillors had previously made strong statements in favour of development
  - High Court found apparent bias/predetermination, mainly because the meeting to vote to grant permission was held during election period, contrary to local authority guidance
  - High Court found that the development had become a party political issue during the election campaign
  - Held: “informed” observer would consider: real possibility of bias

## Examples (4)

- ***R (Lewis) v Redcar & Cleveland BC*** (cont.)
  - Court of Appeal: more pragmatic approach
  - Local authority decision-making different from judicial/quasi-judicial decision-making
  - Only limited role for apparent bias/predetermination arguments
  - Elected members would be *“entitled, and indeed expected, to have and to have expressed views on planning views”* [62] (Pill LJ)
  - 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”* [94] (Rix LJ)
  - *“Something more is required”* that *“goes to the appearance of a predetermined, closed mind”*

## The Westferry Saga

- Site of former printworks, Isle of Dogs
- Proposal: Residential-led mixed use scheme (1,500 units)
- 3-week public inquiry
- Inspector recommended refusal of planning permission
  - Multiple breaches of the development plan, including heritage impacts
- Secretary of State disagreed, allowed appeal
- Decision issued 1 day before Council due to approve new CIL Charging Schedule to take effect in 3 days



## The Westferry Saga (2)

- New CIL charging schedule would have very substantially increased developer's CIL payment (circa £40m) if planning permission not granted before it took effect
- Pre-action letter: Council asked SoS to explain timing of decision
- SoS responded: admitted that decision expedited to be issued before Council adopted new Charging Schedule
- Council issued claim under s. 288
- Council submitted: "fair-minded and informed observer" would conclude "real possibility" of bias in favour of developer

## The Westferry Saga (3)

- SoS conceded to judgment soon after claim issued
- Planning Court approved consent order agreed between parties quashing SoS's decision and remitting appeal to different Minister
- Council had applied for specific disclosure of various internal communications (including text messages between Minister and developer)
- Concession meant SoS avoided further disclosure in proceedings
- But (redacted) material disclosed in any event ultimately in Parliament following political pressure

## The Westferry Saga (4)

- Successful tactics:
  - Claim pleaded on single ground of apparent bias: no room to concede on other, less “problematic” grounds
  - Council sent SoS pre-action “request for disclosure and compliance with duty of candour” in knowledge that SoS does not engage in standard pre-action correspondence for s. 288 challenges
  - Letter did not set out grounds – focused only on disclosure request
  - SoS resisted any disclosure, contrary to duty of candour at pre-action stage
  - Council then able to rely on SoS’s resistance to disclosure as part of narrative of its case on apparent bias

## The Westferry Saga (5)

- Disclosure request:
  - *A copy of all correspondence (including emails), memoranda, file notes, text messaging or other records of communication, submissions and/or advice that includes any reference to, or is otherwise relevant to, the decision of the Secretary of State to allow appeal APP/E5900/W/19/3225474 relating to the land at the former Westferry Printworks site, 235 Westferry Road, London, E14 3QS (including, to be clear, any reference to the Secretary of State's decision-making process, the timing of the Secretary of State's decision, or the related Inspector's report), sent, received, prepared or recorded by:*
  - *any employee or representative of the Planning Casework Unit and/or, beyond that, the Ministry of Housing, Communities & Local Government; and/or*
  - *the Secretary of State for Housing, Communities and Local Government and/or any of his team or representatives*

## Apparent bias: How to respond as defendant?

- No “significant weight” to be given to a witness statement by the decision-maker claiming that the decision was made with an open mind: ***Georgiou*** case
- Evidence:
  - What are “the facts” that the “informed” observer would take into account?
  - Need to explain decision-making structures in an organisation?
  - Evidence of the decision-maker completing training in relation to apparent bias/predetermination?

# Thank you for listening

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