Sheku Bayoh Public Inquiry

Conduct and Procedure Hearing - 12 and 13 June 2025

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IN THE SHEKU BAYOH INQUIRY

APPLICATION FOR RECUSAL ON BEHALF OF (1) THE SCOTTISH POLICE FEDERATION; (2) PC CRAIG WALKER; and (3) Ms. NICOLE SHORT (together, "the Applicants") re the Hearing Fixed for 12 and 13 June 2025

LIST OF AUTHORITIES

1. Errington v Minister of Health [1935] 1 KB 239
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Local Government—Declaration by Local Authority of unhealthy Area to be a Clearance Area—Clearance Order—Submission to Minister of Health for confirmation—Objections by Owners—Public Local Inquiry—Subsequent Private Inquiry held by Officials of Ministry in absence of Owners—Reception by Ministry, without notice to Owners, of evidence as to condition of houses—Confirmation of Clearance Order by Minister—Interests of Owners substantially affected—Confirmation Order quashed—Quasi-judicial Functions of Minister—Housing Act, 1930 (20 & 21 *Geo.* 5, *c.* 39), *ss.* 1, 2, 11; *First Schedule, para.* 4.

Where a local authority has made a clearance order under s. 1 of the Housing Act, 1930, and has submitted the order to the Minister of Health for confirmation, and objections are made thereto by the owners, the Minister must comply with the provisions of para. 4 of the First Schedule to the Act of 1930, and cause a public local inquiry to be held, and consider any objections not withdrawn and the report of the person that held the inquiry. In deciding whether or not he shall confirm the clearance order the Minister occupies a quasi-judicial function and must not take into consideration any matters other than those mentioned in para. 4 of the First Schedule. If the Minister holds a private inquiry to which the owners are not invited or takes into consideration ex parte statements with which the owners have had no opportunity of dealing he is not acting in accordance with correct principle of justice, and his confirmation of the clearance order would not be within the powers conferred upon him by the Act, and the owners would be entitled as being persons aggrieved to have the confirmation order quashed.

Dicta of Lord Loreburn L.C. in *Board of Education* v. *Rice* [1911] A. C. 179, 182, and of Viscount Haldane L.C. in *Local Government Board* v. *Arlidge* [1915] A. C. 120, 132, applied and followed.

APPEAL from a decision of Swift J.

On February 23, 1933, the Jarrow Corporation, acting under the Housing Act, 1930, made a clearance order in respect of the buildings in a certain area and submitted the same to the Minister of Health for confirmation. The Order was entitled "North Ward No. 1 Clearance Order, 1933."

On April 13, 1933, notice was published by the local authority in accordance with the provisions of the Act, and served upon the owners of the property comprised within the clearance order, including the appellants.

On April 26, 1933, the appellants gave notice of objection

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to the clearance order on the following grounds (inter alia): "(1.) The dwelling-houses in the area are in good repair and sanitary condition and fit for human habitation." "(4.) The expense to the local authority if the order is confirmed will be more than the town can bear at the present time." "(5.) The local authority cannot provide or secure the provision of accommodation for the persons of the working classes who will be displaced by the clearance of the area within the time specified in the order for the premises to be vacated, nor does such accommodation already exist." "(6.) In any event the demolition of all the buildings in the area is not the most satisfactory method of dealing with conditions in the area."

The Minister of Health in accordance with the provisions of the Housing Act, 1930, caused a public local inquiry to be held on May 31 and June 1, 1933, by Mr. Collin, an Inspector appointed by him. During the course of the inquiry it was suggested that an agreement might be arrived at between the Medical Officer of Health and the owners as to the repairs which would be required in order to make the houses reasonably fit for habitation, and negotiation proceeded with this object.

On September 6, 1933, a further meeting was held at Jarrow at which representatives of the owners were present as well as representatives of the Corporation, and Mr. Collin suggested that the owners should submit particulars of what they were prepared to do.

Some agreement appears to have been arrived at between the officials of the corporation and the owners as to the repairs that would be required to make the houses habitable for a considerable number of years. The Corporation, however, maintained that the proper way of dealing with the situation was for the Minister to confirm their clearance order, and they passed resolutions to that effect and communicated those resolutions to the Ministry of Health in London. The Town Clerk sent various communications to the Minister with additional evidence from the Medical Officer of Health on which the Minister was asked to confirm the Clearance Order which the corporation had made.

On November 8, 1933, Mr. Kerwood wrote, on behalf of the Minister, to the Town Clerk a letter in which he proposed that the Town Clerk and the Medical Officer of Health and the Surveyor should call at the Ministry and discuss with the officials of the Ministry how the proposals of the owners might be carried out. The officials of the Corporation attended at the Ministry on November 17 and had a conference with Mr. Kerwood and Mr. Collin, the inspector who held the inquiry. The officials of the Ministry then expressed the opinion that whilst the houses in their present condition were not suitable for habitation it was not impossible to make most of them fit for another 15 or 20 years by doing very substantial repairs amounting in some cases to reconstruction. It was suggested that the Borough Engineer and the Medical Officer of Health should draw up a schedule of the work necessary to be done in respect of each house, and that the owners be asked to give an undertaking to carry out such work within a reasonable time, and that if the owners would not give such undertaking the Minister would confirm the clearance order.

The Corporation, however, disagreed entirely with the proposals suggested by the Ministry, and on January 3, 1934, they asked that the Minister should receive a deputation from the Town Council to reiterate their submission that the demolition of all the houses in the area was the only effective method of dealing with the area.

Mr. Kerwood on January 10, 1934, replied on behalf of the Minister and said: "I think it will be better to write to you semi-officially in reply to your letter of January 3. In view of the quasi-judicial function which the Minister has to exercise there would be considerable difficulty in the way of receiving a formal deputation representing one side only," and he asked what was the result of the negotiations between the owners and the corporation officials with regard to reconditioning.

On January 11 the Town Clerk replied that "when the officials reported to the Council the result of the interview in London, the Council would not permit them to proceed on

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the lines suggested, the Council still being of opinion that the only satisfactory way of dealing with the property was by its inclusion in a clearance area."

On January 17, 1934, Mr. Kerwood wrote back stating that Mr. Francis, the Principal Assistant Secretary in charge of Housing, had arranged to visit with Mr. Collin and himself various towns in the North of England and proposed to visit Jarrow on January 23, and added "it would I think be of advantage if you could arrange for the members of the Council and the officers who were to form the proposed deputation to this office to meet us there and discuss the matter."

On January 23, 1934, the officials from the Ministry visited Jarrow and inspected the area in question in company with the Corporation officials—no representatives of the owners being present.

On February 24, 1934, the Town Clerk wrote to Mr. Kerwood saying that "The Council . . . . resolved to adhere to the Order and to request its confirmation," and after setting out the four grounds on which the council reiterated their request for the confirmation of the Order, the letter went on to state that "the Council are advised by the Engineer that it is not practicable, even if it were right to do so, to deal with the houses individually by way of closing order, as to reconstruct the houses would require the total vacation of the houses by the inhabitants. In any event this does not arise as the Engineer advises that the foundations and structure of the houses, generally speaking, preclude the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation." The Borough Engineer had not been called as a witness at the public inquiry and those who represented the owners had not had the opportunity of cross-examining him.

On February 24, 1934, the Town Clerk wrote in answer to the request of the Minister that the Council should review their five year slum clearance programme in the light of their financial resources, and said: "The Council have decided to accede to this request before they take any further steps

under the five year programme, and they instructed me to sign the undertaking on their behalf."

On March 10, 1934, Mr. Kerwood wrote to the Town Clerk, saying: "I am directed by the Minister of Health to refer to your further letter of the 24th ultimo relative to the North Ward No. 1 Clearance Order which formed the subject of a local inquiry on May 31 and June 1, 1933, and to state that in all the circumstances he has decided to confirm the order."

The clearance order was confirmed by the Minister of Health on March 27, 1934, and duly published.

On May 17, 1934, the appellants gave notice of their intention to move the High Court, under s. 11 of the Housing Act, 1930, for an order that the Clearance Order as confirmed by the Minister of Health should be quashed on the ground that the order was not within the powers of the Housing Acts, 1925 and 1930, or alternatively that the requirements of the Housing Act, 1930, had not been complied with and the interests of the appellants had been thereby substantially prejudiced, in that, between the date of the holding of the public inquiry and the confirmation of the order the Minister and the Council, by their representatives, met and discussed together the condition of the houses in the area and whether the order should be confirmed, made an inspection of the houses in the area, and held communications in writing discussing the said matters without giving any notice to the appellants of the said meetings, discussions or inspection, or any opportunity to attend thereat, or to see the written communications or to reply thereto. Further, that the Housing Act, 1930, impliedly required that the objections of the appellants should be fairly and properly considered by the Minister and that the Minister should give fair and proper effect to the result of such consideration in deciding whether the order should be confirmed, and that such implied requirements were not complied with.

SWIFT J. held that the Minister of Health when acting under the Housing Act, 1930, was not acting as a judge deciding an issue between two parties, but was acting as an administrative officer having to perform a statutory duty

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imposed upon him by the legislature for the benefit of the community, and that so long as he complied with all the requirements which the legislature had laid down to govern his conduct when there were objections—namely, by holding a public inquiry and by considering the objections and the report of the person who held the inquiry, he might inform his mind in any way that he liked and arrive at his decision in any way which seemed good to him. When the Minister had proceeded to confirm a clearance order it was impossible to say that the order which he made was not within the powers of the Act, or that any requirement of the Act had not been complied with. The application must therefore be dismissed.

The owners of the property comprised within the area appealed.

Blanco White and *J. Charlesworth* for the appellants. In dealing with a clearance order under the Housing Act, 1930, the Minister of Health occupies a quasi-judicial position and is not a mere administrative officer. It follows, therefore, that if he fails to consider and deal with the matter as a quasi-judicial officer should, the Court has power, and ought, to quash his order. The question turns mainly on para. 4 of Sch. I. to the Act which says that "if no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification; but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification . . . ." Those words obviously point to a careful and quasi-judicial consideration of all the circumstances, including any objections made by the house owners affected, which have not been withdrawn; and it is clearly an infraction of this rule if after one side has been heard the other side is given no opportunity of answering. Prohibition and certiorari have been held to lie to the Minister:

see *Rex* v. *Minister of Health, Ex parte Davis* (1), and *Minister of Health* v. *The King* (2), and neither of those writs will lie except to a person exercising judicial or quasi-judicial functions. Those decisions were, it is true, given on the Housing Act, 1925, but there is no essential difference between the position of the Minister under that Act and his position under the Housing Act, 1930, so far as his duty to owners is concerned. The position and duty of the Minister in such cases was clearly enunciated by Lord Loreburn L.C. in *Board of Education* v. *Rice* (3) where he said (4): "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law . . . . but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything . . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view . . . . The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari." Again, in *Local Government Board* v. *Arlidge* (5), Viscount Haldane L.C. said (6): "When the duty of deciding an appeal is imposed, those whose duty

(1) [1929] 1 K. B. 619.
(2) [1931] A. C. 494.
(3) [1911] A. C. 179.
(4) [1911] A. C. 182.
(5) [1915] A. C. 120.
(6) Ibid. 132.

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it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice." See further *Rex* v. *Housing Appeal Tribunal.* (1) What the Minister did in the present case failed to satisfy the obligations imposed upon him as stated in those decisions.

Sir Donald Somervell S.-G. and *W. Bowstead* for the Minister of Health. When the Minister confirms a clearance order made by a local authority he is acting in an administrative capacity, and his confirmation does not cease to be an administrative act merely because objections are made to the confirmation of the order. Under the Housing of the Working Classes Act, 1890, s. 35, a person aggrieved by a closing order might appeal to quarter sessions. Under s. 17 of the Housing, Town Planning, etc., Act, 1909, an appeal was given to the Local Government Board. In the Housing Act, 1925, the right of appeal was taken away, but a right of petition to the Minister of Health was given by s. 40. In the Housing Act of 1930 the language of the Act is altered and the confirmation of a closing order ceases to be a judicial act and becomes purely an administrative act. The Minister has to find out the facts for himself and is not confined to the facts put before him by evidence. The relations between the Minister and a local authority are those between a superior and a subordinate administrative body. The local authority do not act as the slum clearing authority with an appeal against their decisions to the Minister. The Minister and the local authority together form the slum clearing authority and they work in unison. It would be very curious if the Minister and the local authority could not communicate with each other without informing the owners of the property affected. When objections are made to a clearance order which are not withdrawn the Minister is bound by the Act to cause a public

(1) [1920] 3 K. B. 334.

local inquiry to be held, but the Minister is not thereby precluded from obtaining information from any other sources that are open to him. In the present case the objectors called no evidence at the public inquiry with regard to the financial resources of the local authority, and the Minister had therefore to consider the question as to the financial resources of the local authority without any assistance from evidence brought before him by the objectors, and the objectors cannot now complain that the matter was dealt with in communications between the Minister and the local authority. There is no duty upon the Minister to communicate to the owners of the property affected the contentions and information put before him by the local authority subsequent to the public inquiry. The question as to the best method of dealing with the houses is one of policy, and the local authority were continually reiterating their views on this question of policy adhering to their wish that the Minister should confirm their clearance order.

[GREER L.J. referred to the letter of the Town Clerk of February 24, conveying the opinion of the borough engineer that the houses could not be reconditioned on account of their defective foundations, the borough engineer not having been called as a witness at the public local inquiry.]

There is no evidence that that opinion in any way affected the decision of the Minister to confirm the clearance order which proceeded entirely upon a consideration of the financial resources of the local authority. The Minister complied with all the requirements of the Act of 1930 with regard to the holding of a public local inquiry and considering any objections not withdrawn and the report of the person who held the inquiry: he was therefore entitled to confirm the order. The cases that have been cited are very different cases from the present. They deal with the procedure to be adopted by authorities whose functions are administrative and not in the ordinary sense judicial. None of the cases fetter the right of administrative officers to settle their own procedure. Lord Moulton in *Local Government Board* v. *Arlidge* (1) said: "I do

(1) [1915] A. C. 120, 149.

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not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a department of State as the Local Government Board under statutory powers such as we have here to deal with." In that case there was a right of appeal, whereas in the present case there is no right of appeal; the objectors must state their objections at the local inquiry but there is no lis between parties. Atkin L.J. in *Rex* v. *Electricity Commissioners* said (1) that "certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed." Therefore certiorari implies a judicial procedure. "Quasi-judicial procedure" is a very vague phrase.

Blanco White in reply. The duties of a person holding a quasi-judicial position are defined in *Board of Education* v. *Rice* (2) and in *Local Government Board* v. *Arlidge*. (3) A Government department in that position must act fairly. An award of an arbitrator was set aside in *Gregson* v. *Armstrong* (4) on the ground that it was improper for an arbitrator to take information from one side in the absence of the other.

[He was stopped.]

GREER L.J. This is an appeal from a decision of Swift J. given under s. 11 of the Housing Act, 1930, refusing to quash an Order of the Minister of Health confirming a clearance order which was made by the Corporation of Jarrow.

The order is concerned with certain buildings in what is called No. 1 Area, which are referred to on the plan, document No. 13, with which we have been provided. The appellants are concerned with properties which have on that plan been enclosed with a red line.

The powers of the Minister are contained in the Act and the First Schedule to the Act (5) and under those powers he could, if no objection be taken on behalf of the persons interested in

(1) [1924] 1 K. B. 171, 204.
(2) [1911] A. C. 179.
(3) [1915] A. C. 120.
(4) (1894) 70 L. T. 106.
(5) See note p. 283 post.

the property, make an Order confirming the order made by the local authority; and in so far as the Minister deals with the matter of the confirmation of a closing order in the absence of objection by the owners it is clear to me, and I think to my brethren, that he would be acting in a ministerial or administrative capacity, and would be entitled to make such inquiries as he thought necessary to enable him to make up his mind whether it was in the public interest that the Order should be made. But the position, in my judgment, is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. It seems to me that in deciding whether a closing order should be made in spite of the objections which have been raised by the owners the Minister should be regarded as exercising quasi-judicial functions. The effect of the closing order if confirmed would be to diminish greatly the value of the property owned by the objecting parties, and the decision of the Minister is a decision relating to the rights of the objecting parties and, in my view, it is a decision in respect of which he is exercising quasi-judicial functions. I will deal with the decisions and the law on the question after shortly stating the facts.

On February 23, 1933, the clearance order was made by the Council. On April 13 notice was published in accordance with the provisions of the Act, and on April 26, 1933, objections were made by the owners of the property concerned in this appeal. The notice of objection was as follows: "We hereby give notice that our clients object to the above mentioned clearance order made by the Mayor Aldermen and Burgesses of Jarrow on the 23rd day of February, 1933, on the following grounds: (1.) The dwelling-houses in the area are in good repair and sanitary condition and fit for human habitation." Then follow Nos. 2 and 3, with which we are not concerned. "(4.) The expense to the local authority if the order is confirmed will be more than the town can bear at the present time. (5.) The local authority cannot provide or secure the provision of accommodation for the persons of the working classes who will be displaced by the clearance of the area within the time specified in the order for the premises to be vacated, nor does

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such accommodation already exist. (6.) In any event the demolition of all the buildings in the area is not the most satisfactory method of dealing with conditions in the area."

So far as they presented their objections at the public hearing by the Inspector appointed by the Minister, the appellants relied mainly upon No. 1 and No. 6; but No. 4 and No. 5 were never withdrawn, and they were therefore matters that had to be considered by the Minister before he made his final decision.

During the course of the inquiry, a suggestion was made that the situation was one which might be adequately met by an agreement between the Medical Officer of Health of the Council and the owners of these workmen's cottages as to what repairs would be required in order to make the buildings reasonably fit for habitation. But the Inspector quite properly said that even if such an agreement were made he could not bind the Minister to it. That was quite a correct attitude for him to take up. Thereafter the inquiry was concluded, and negotiations took place between the Medical Officer and the owners of these buildings in order to arrive at some decision as to what repairs the owners would undertake to do in order to meet the objections of the Medical Officer, and ultimately I think it is clear upon the evidence a consensus of view was established between the Medical Officer and the owners as to what repairs would be required to make the buildings properly habitable for a substantial number of years. But again I accept the view which has been put forward on behalf of the Minister that he was not bound to give effect to the arrangement that had been made.

On September 6, 1933, in order to enable the Minister to give his decision on the question as to what effect, if any, should be given to the objections which had been urged at the public inquiry, there was a meeting at Jarrow and, quite properly, the people who were summoned to that meeting included representatives of the owners as well as representatives of the Corporation. So far, it is not possible to take any objection to the action of the Minister or those who represented him at the Ministry in London. But it was still the view of

those concerned that the matter might be met by an agreement between the Council, on the one hand, and the owners on the other, though that was not a view that commended itself to the Council. It seems, however, to have been considered by those who represented the Minister that the matter might still be disposed of in that way. The negotiations continued, but notwithstanding that, the Council maintained their view that the only right way of dealing with the situation was to have their clearance order confirmed, and they passed resolutions to that effect and communicated those resolutions to the Minister in London. So far as my view of this case goes I am satisfied that there was nothing wrong in the Minister receiving those communications from the Council. It was a matter on which the Council were entitled to stress the view that was already implied in the clearance order that they had made in the first instance, but I think it would have been a wise precaution on the part of the Minister when he received those further communications from the Council pressing for the confirmation of the order to communicate those letters or verbal persuasions to the other side, the objectors, and ask whether they had anything further to say on the matter. Still, I doubt very much whether, if the position had remained there, any real objection could be taken to the conduct of the Minister in confirming the order. But it did not rest there, because there were numerous communications between, first of all, the acting Town Clerk, and subsequently the appointed Town Clerk of the Council, and the Minister, and those communications afforded to the Minister additional evidence on which he was asked by the Council to confirm the order they had made. Various letters from the Medical Officer to the Council were sent by the Council to the Minister expressing the further opinions of the Medical Officer. One of them, dated October 13, 1933, is in these terms: "With regard to the area generally, I feel that in view of the low standard of workmanship (vide evidence of Mr. Lumsden at the inquiry) and low quality of the materials used in the construction of these houses it is unlikely that any repairs will render the houses fit for a reasonable length of time." That was one of the matters

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which had been discussed at the inquiry, and this is an instance of the Council sending to the Minister a further opinion of one of their witnesses who had been present at the inquiry, without the objectors having any opportunity of dealing with that further opinion. So much with regard to Dr. Dormer's opinion. There is more than one letter which was sent to the Minister in the same way and to a similar effect. The objections to what was done do not, however, rest there because, at a later date, Mr. Kerwood, on behalf of the Minister, wrote on November 8, 1933, to the Town Clerk, saying: "I think that it would be of advantage if you and the Medical Officer of Health and the Surveyor could call and discuss with us here how the proposals of the owners might be carried out and subsidy under the Act of 1930 be made available in respect of the rehousing accommodation required. Would you let me know when it would be convenient for you to come." There is nothing very objectionable about that, but it is noticeable that at this time the Ministry were still considering whether the situation could not be met by repairs rather than by the demolition of the area.

The correspondence went on, and on January 3, 1934, the Town Clerk wrote asking that the Minister should receive a deputation from the town council to reiterate their submission that the demolition of all the houses in the area was the only effective method of dealing with the area. Mr. Kerwood, on behalf of the Minister, replied on January 10, 1934, in a very proper letter. He said: "I think it will be better to write to you semi-officially in reply to your letter of the 3rd January. In view of the quasi-judicial function which the Minister has to exercise there would be considerable difficulty in the way of receiving a formal deputation representing one side only. Before considering the matter further, however, I should be grateful if you would let me know what has been the result of the negotiations with the owners which it was agreed with the deputy Town Clerk, the Medical Officer of Health and the Borough Engineer at the interview at this office should be carried on." That again is a very proper letter written by Mr. Kerwood in which he recognized, though that does not

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bind this Court, that the duty of the Minister was of a quasi-judicial character, and it would therefore be wrong for the Minister to receive a deputation from the Council in the absence of the objectors. But apparently the view that he expressed did not continue to be the view of the Ministry. It may have continued, so far as I know, to be Mr. Kerwood's view, but it was not the view upon which the Ministry acted. Accordingly on January 17, 1934, he wrote this letter: "It so happens that Mr. Francis who, as you are no doubt aware, is the Principal Assistant Secretary in charge of Housing, has arranged to visit with Mr. Collin"—Mr. Collin being the Inspector who held the inquiry—"and myself various towns in the North of England next week"—probably Mr. Collin had also held inquiries as regards the other towns which were included in the term "various towns in the North of England"—"We could spend at Jarrow the afternoon and early evening of Tuesday, 23rd January, and it would I think be of advantage if you could arrange for the members of the Council and the officers who were to form the proposed deputation to this office to meet us then and discuss the matter." Mr. Kerwood is there suggesting, contrary to what he had suggested in the earlier letter, that it would be quite right for the members of the Council and the officers to meet the Principal Assistant Secretary in charge of Housing at Jarrow, though it might still be improper for them to meet in London. It seems to me that if it was improper for them to meet in London, it was equally improper for them to meet in Jarrow in the absence of the representatives of the owners of the property in Jarrow, whom they could easily have obtained.

That interview so arranged did in fact take place and what happened is a little vague. No doubt questions of finance were discussed, though it is a little odd, as was pointed out by Mr. Blanco White, that if the financial question was the main question to be discussed, the Borough Treasurer was not one of the officials who were asked to be present upon this occasion; but undoubtedly the Principal Assistant Secretary with Mr. Collin, the gentleman who had held the inquiry, and three officials of the Corporation visited the site and had the

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opportunity of having pointed out to them by the officials of the Corporation in what respect the buildings were such as would make it unsatisfactory to leave them even in the condition they would be in if the repairs and alterations which had been suggested were agreed to and carried out.

Now it seems to me that if, as I think, the Ministry were acting in a quasi-judicial capacity they were doing what a semi-judicial body cannot do, namely, hearing evidence from one side in the absence of the other side, and viewing the property and forming their own views about the property without giving the owners of the property the opportunity of arguing that the views which the Ministry were inclined to take were such as could be readily dealt with by means of repairs and alterations to the buildings. Whether the surveyor was one of the officials, or whether the borough engineer was one of the officials, we do not know; but we do know this, that by a letter of February 24, 1934, which was sent by the Town Clerk to the Ministry of Health, the views of the borough engineer were put before the Minister before the Minister gave his decision. The borough engineer had not been called at the public inquiry. Those who represented the owners had not had the opportunity of cross-examining him, testing the value of his opinion, and representing to the Minister through the Inspector that no weight should be attached to his view. The view of the borough engineer is expressed in the letter from the Town Clerk to the Ministry on February 24, 1934: "In any event this does not arise as the Engineer advises that the foundations and structure of the houses, generally speaking, precludes the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation." That is a view which is hardly consistent with the view which had been expressed on behalf of the Borough Council by the barrister who appeared for them at the inquiry. It is an additional reason being urged by the Council on the advice of the borough engineer in order to put pressure upon the Ministry to confirm the order which had been made by them.

Now I think it quite clear on the authorities that if this were a case not affected by the special legislation contained

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in s. 11 of the Act of 1930, certiorari would have been granted to quash the confirming Order. I take that to be the law as laid down by Viscount Haldane L.C. and Lord Parmoor in *Local Government Board* v. *Arlidge*. (1) Viscount Haldane there said (2): "It is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from Courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported. My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work

(1) [1915] A. C. 120. (2) Ibid. 132.

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efficiently." Both Lord Haldane (1) and Lord Parmoor (2) cited with approval the views which had been expressed by Lord Loreburn L.C. in *Board of Education* v. *Rice* (3), where he said: "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. . . . . The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari." There are also passages in the judgments of Bankes L.J. and Atkin L.J. in *Rex* v. *Electricity Commissioners* (4) giving the history of the extension of the powers of the Court in interfering by certiorari, not merely with inferior courts, but also with individuals who are given quasi-judicial functions. I think these observations are specially applicable to this case, where the quasi-judicial function was of a

(1) [1915] A. C. 133.
(2) Ibid. 141.
(3) [1911] A. C. 179, 182.
(4) [1924] 1 K. B. 171, 195, 204.

character to deprive the appellants of important rights that they held as citizens. It is said that that cannot be done by reason of the Act of 1930, which contains special provisions as to what the judge may consider. Sect. 11 of the Act says this, sub-s. 1: "The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation." Sub-s. 2: "So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form," and so on. Then sub-s. 3: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court—(i.) may by interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings; and (ii.) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant." It is said by Mr. Blanco White on behalf of the appellants that the Court ought to be satisfied that the Order is not within the powers of this Act or, alternatively, that the interests of the applicants had been substantially prejudiced by a requirement of the Act not having been complied with.

In order to see what the requirements of the Act are one must look to the First Schedule to the Act. Para. 4 of the Schedule says: "If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification." That

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part of the paragraph does not apply, because the objections were not withdrawn. The paragraph goes on: "but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification." It seems to me that that involves the proposition that the matters there mentioned are the only matters which he is entitled to consider, and that if, instead of directing his mind solely to those matters, he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given ex parte afterwards without the owners having any opportunity whatever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the Act. It is admitted that though the draftsmanship of s. 11, sub-s. 3, is not perfect, the Order there referred to is the confirming Order and not the original order. In my judgment it is true to say that an order made by a quasi-judicial officer based on materials which are not the materials referred to in para. 4 of the First Schedule is an order which is not within the powers of the Act, having regard to the proposition which has been established in common law that a quasi-judicial officer in exercising his powers must do it in accordance with the rules of natural justice, that is to say, he must hear both sides and must not hear one side in the absence of the other.

For these reasons I have come to the conclusion, though the point is not free from difficulty, that we ought to reverse the order that has been made by the learned judge and quash the confirming Order made by the Minister of Health.

MAUGHAM L.J. I am of the same opinion. The important question that arises upon this appeal is one of law as to the position of the Minister of Health in confirming an order establishing a clearance area under the Housing Act of 1930. The Act by s. 1 (1) gives the local authority power to declare an unhealthy area to be a clearance area, but the order is not

(1) See note p. 283 post.

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binding upon any one until it has been confirmed by the Minister of Health.

The local authority have to be satisfied, as the Solicitor-General pointed out in his argument, on four topics. The first one is a pure question of fact, whether the dwelling-houses in the area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of other circumstances mentioned in the section dangerous or injurious to the health of the inhabitants of the area. The second thing is, that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, and there I may mention that the usual alternative is that of reconditioning the houses in the area. It is to be noted in connection with those two qualifications that the authority in defining the area on a map have to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health, so that if there were in the area some buildings which at small expense could be rendered perfectly proper they would, I think, prima facie have to be excluded from the area. The third qualification is that suitable accommodation is available for the persons displaced by the clearance, and the fourth is, that the resources of the authority are sufficient for the purpose of carrying the resolution into effect.

It is apparent that those are four very widely different qualifications. The first is a pure question of fact. The second, with regard to the most satisfactory method of dealing with the conditions in the area, is, as I think, a question of fact, in this sense that it does not involve any question of law; it is a matter for the discretion of the person who has to satisfy himself upon the matter, and depends upon weighing the relative advantages and disadvantages of dealing with the area in the way of demolition, or dealing with it by the alternative method of re-conditioning the houses in the area. I may add, however, that the second qualification, being very largely one of discretion, it is naturally one with regard to which different persons would form very different views, because if the first qualification that the houses are unfit for human habitation has been proved, it may well be

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that the person deciding upon the most satisfactory method of dealing with the conditions in the area may be entitled to take the view that no reconstruction will make the area one in which there are truly satisfactory houses or buildings. Those are the main provisions of s. 1. Sect. 2 provides for the resolution or the order being submitted to the Minister for confirmation by him, and that brings in under sub-s. 2 the provisions of the First Schedule to the Act. I need not read the whole of them, but the fourth of the provisions in the First Schedule is very important, and I shall have to refer to it again.

The main question of law is as to the position which the Minister occupies when, under para. 4 of the First Schedule, he causes a public local inquiry to be held, and proceeds to consider any objection made to the clearance order and either to confirm the order with or without modification, or to reject it. Are his acts in that respect merely acts of administration in reference to which the only remedy of the subject, if his powers are improperly exercised, is an application to Parliament; or is he exercising a quasi-judicial function, a function I may observe of a somewhat vague character? As I do not like using words the meaning of which I do not know, I will say at once that I use the phrase "quasi-judicial" in the sense in which it has been used in some of the decisions, and in particular having regard to the qualification upon its meaning which I think is to be found in the decision of the House of Lords in *Board of Education* v. *Rice*. (1) The Minister is not, in my opinion, in the position of a judge, and he has not to hold a judicial proceeding. What he has to do is to ascertain the law, so far as the law is material, and the facts; and, in my view, he is in the same position as the Board of Education was in the case of *Board of Education* v. *Rice*. (1) Lord Loreburn L.C. (2) remarks as follows, and I may say that his statement has constantly been approved by other judges: "I need not add that in doing either"—that is in ascertaining the law and ascertaining the facts—"they must act in good faith and fairly listen to both sides, for that is a duty lying

(1) [1911] A. C. 179. (2) Ibid. 182.

upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." I repeat that is the sense in which I use the phrase "quasi-judicial." I may add that in the *Arlidge* case (1) that statement was in effect approved by various lords.

In determining whether the position of the Minister is that which I have described as being quasi-judicial, I think it is necessary to appreciate that under a clearance area scheme to which objections are made by the owners of the property in the area, there is a true contest as between the owners of the property and the local authority; in other words, there are two sides as between whom the Minister has to come to a determination after consideration. It also has to be borne in mind that the rights of the householders are being very seriously affected by an Order that their houses shall be demolished without compensation. That, of course, must not be pressed too far, but it is a consideration which cannot be neglected.

Under para. 4 of the First Schedule—I deal only with the cases where there are objections, because the others are cases where, in effect, nobody complains—if there are objections the Minister is required—the word "shall" is used—before confirming the order, to cause a public local inquiry to be held. Then the paragraph goes on, "and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification." It has been suggested that the main object, not the only object of the public inquiry, is to afford publicity in the local press which may in some way affect the decision of the Minister. That is not, in my view, by any means the only reason for requiring a public local inquiry to be held. The obvious implication is, that at such

(1) [1915] A. C. 120.

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an inquiry the two sides may be heard. Persons will be called before the gentleman who holds the inquiry who will make statements which may perhaps, without much inaccuracy, be described as their evidence, and it is obvious, I think, that the side which objects to any statements made by any such witnesses must be entitled to ask questions, which may be described as cross-examination. The Solicitor-General does not seek to object to the view that that public inquiry is of the nature of a quasi-judicial inquiry in which, although the rules of procedure of a Court of Justice may not be followed, the ordinary principles of fair play have to be observed. As I think, the question whether the Minister, after such an inquiry has been held and after a report has been made, can then proceed—I am not dealing with the facts for the moment—to hear ex parte statements from one side or the other in the absence of those whose obvious desire it would be to controvert them is precisely similar to the question whether, after holding a public local inquiry or after having caused a public local inquiry to be held of a quasi-judicial character, the Minister can then hold a private inquiry of his own to which one party only is admitted. That seems to me to be a very extraordinary result, and one which I should be very slow to approve, especially in such a case as the one I am dealing with—namely, a case in which the rights of property owners are being affected without compensation; nor do I think the form of para. 4 of the First Schedule tends to suggest anything of the sort. It has already been pointed out that the form is: After causing the inquiry to be held, considering any objection not withdrawn and the report, the Minister may then confirm the order either with or without modification. In my opinion, had it been intended by the legislature to authorise the Minister after having caused a public inquiry to be held and after having received the report, then to hold a private inquiry of his own—with regard to something which was the subject of an objection which was being considered before the Inspector, I should have expected the legislature to say so in plain terms. My conclusion is, that on the fair construction of this clause he has no right to do anything of the kind. That is not to say

that there may not be matters which were not in dispute at all at the inquiry, and which were not the subject of anything dealt with at the inquiry, with regard to which he might, if he thought fit, inform himself. I am dealing with a case where something which is the subject of an objection definitely put and urged before the gentleman who holds a public inquiry is before the Minister after the report has been made, and with regard to which he subsequently obtains ex parte information from one side or the other. My conclusion is that although the act of affirming a clearance area order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in the *Board of Education* v. *Rice*. (1)

Now I want to deal to some extent with the facts, endeavouring to avoid re-stating all that has been said by my Brother Greer. It is not immaterial to note that, as the result of the public inquiry, those who were representing the local authority came to the conclusion, which, of course, did not bind those for whom they were acting, that reconditioning of the houses in this area was a practical course, and that would, of course, involve the condemnation of the scheme. We have not seen the report which was made because, acting on a legal authority, the Ministry has thought fit, and very likely for a good reason, not to put it in evidence. But it is I think apparent that on November 17, 1933, when the officials of the local authority attended at the Ministry in London and were received by Mr. Kerwood, who had Mr. Collin, who held the inquiry, in attendance, Mr. Kerwood's statement was very far from a statement to the effect that the Ministry were satisfied that the most satisfactory method of dealing with the conditions in the area was the demolition of these buildings. So far from that being so, Mr. Kerwood said that the Ministry had very carefully considered the Council's proposals, and then this follows, according to the report of the acting Town Clerk, which was made almost immediately after the meeting of November 17: "They are of opinion"—that is, the officials

(1) [1911] A. C. 179.

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of the Ministry—"that whilst the houses in their present condition are not suitable for habitation, it is not impossible to make the most of them fit for another 15 or 20 years. To do this, very substantial repairs, and in some cases reconstruction, will be necessary." There are further paragraphs which deal with the difficulty about reconditioning, and the report then continues: "It is suggested that the Borough Engineer and Medical Officer of Health collaborate to decide on the work necessary to be done and draw up a schedule in respect of each house. These schedules are to be submitted by them to the respective owners and the owners are to be asked to give undertakings to carry out all the work specified within a reasonable time and to agree to closing orders being made in respect of parts of the houses." According to the report, the next statement was this: "If the owners will not give undertakings to do reasonable reconditioning, the Minister will confirm the order so far as those properties are concerned," not, be it observed, with regard to the whole of the area, but only with regard to those parts of the area as to which the owners will not give an undertaking. I accept that, coming from the source it did, and having been drawn up at the time, as a fair account of what took place between the officials of the Corporation and the officials of the Ministry.

According to the evidence before us, the Housing Committee of the Town Council, and the Town Council itself, wholly disagreed with the view which had been taken on their behalf at the inquiry, and with the proposals suggested by the Ministry; and they recommended on September 19, 1933, "that the Council's decision that this area should be a clearance area, be again stressed upon the Ministry." At a later date there was a proposal that some of the officials should call upon the Ministry, that being done at the request of the Ministry of Health. On December 19, 1933, there is a minute that the committee had received the report from the officials who visited the Ministry of Health, and having received that report they "recommend that the Minister be asked to receive a deputation consisting of your Chairman and Councillor Symonds to reiterate again your submission that the demolition of all

the houses in this area is the only effective method of dealing with the area." That was after the Ministry of Health had once more dealt with the question of reconditioning, without in any way suggesting that reconditioning was not the best way of dealing with the area; and indeed the implication was that at that time they thought it was. I agree that it may well be that the officials of the Ministry at this time were in favour of the course of reconditioning, because they were impressed with the financial position of Jarrow and had at the backs of their minds the question whether the resources of the authority were really sufficient for the purposes of carrying out the clearance order. Therefore I do not want to lay too much stress upon the view, which I think anybody would immediately take on reading the documents to which I have referred—namely, that at this time the Ministry were in favour of reconditioning the houses in the clearance area rather than demolition. It may be that they were in favour of reconditioning only because they thought the resources of the authority were insufficient, but what followed then is the matter which so much exercises my mind in dealing with the facts of this case. On January 3 the Town Clerk wrote to the Ministry of Health—and I am here going to read very short paragraphs—stating that the Council, notwithstanding the recommendations of the Ministry, "are still of the opinion that the only satisfactory way of dealing with the property is by its inclusion in a clearance area, and they submit that the order should be confirmed." Then they asked, in support of those submissions, that the Minister should receive a deputation, consisting of the chairman of the Housing Committee and two councillors together with the appropriate officials. The reply on January 10, 1934, of Mr. Kerwood, on behalf of the Ministry, begins by saying: "I think it will be better to write to you semi-officially in reply to your letter of the 3rd January. In view of the quasi-judicial function which the Minister has to exercise, there would be considerable difficulty in the way of receiving a formal deputation representing one side only." I think he was perfectly right in that view, and it encourages me to think that in deciding that some of the functions of

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the Minister are, at any rate, quasi-judicial, I am not giving a shock to the officials in the Ministry of Health.

On January 11, 1934, there was a reply from the Town Clerk which was described as a semi-official reply. It contains this paragraph: "When the officials reported to the Council the result of the interview in London,"—which was to the effect that the Ministry were pressing for an agreement between the owners and the borough officials with regard to reconditioning—"the Council would not permit them to proceed on the lines suggested, the Council still being of opinion that the only satisfactory way of dealing with the property was by its inclusion in a clearance area. This took place at the meeting in December, and at that meeting also, the Council resolved to ask the Ministry to receive the deputation mentioned in my previous letter." Upon that Mr. Kerwood wrote back on January 17, 1934, and he noted that "the Council decided that their officers should not proceed on the lines agreed at the recent interview at this office." I think there is some importance to be attached to the word "agreed." The letter continues: "It so happens that Mr. Francis who, as you are no doubt aware, is the Principal Assistant Secretary in charge of Housing, has arranged to visit with Mr. Collin and myself various towns in the North of England next week. We could spend at Jarrow the afternoon and early evening of Tuesday, 23rd January, and it would I think be of advantage if you could arrange for the members of the Council and the officers who were to form the proposed deputation to this office to meet us then and discuss the matter." That is in a letter headed: "North Ward No. 1 Clearance Order, 1933." I think that was an error of judgment. I think the right course, having regard to the view I take, and which Mr. Kerwood himself had taken, who had pointed out that the functions of the Minister in this respect were quasi-judicial, was to suggest that in addition to those people, one or two representatives of the other side should also be present. However, that was not done, and on January 23, 1934, this ex parte perambulation of the district took place, followed as it was by a meeting at the Town Hall, at which further

suggestions were made with regard to the main point—namely, the question whether reconditioning was a course which might not be better than demolition.

On February 24, 1934, the matter being still not yet decided by the Minister under his powers, the Town Clerk wrote to Mr. Kerwood a letter in which he says: "The Council . . . . resolved to adhere to the order and to request its confirmation; at the same time, to meet the wishes of the Minister, they resolved to give their undertaking to review the five year slum clearance programme in the light of their financial resources." Then: "The grounds on which the Council reiterate their request for the confirmation of the order are as follows," and there follow the four qualifications which I mentioned as qualifications in s. 1 of the Housing Act, 1930. Then there follow this paragraph: "In connection with reasons (1.) and (2.)"—(2.) being the question whether demolition or reconstruction was the best plan—"the Council are advised by the engineer that it is not practicable, even if it were right to do so, to deal with the houses individually by way of closing order, as to reconstruct the houses would require the total vacation of the houses by the inhabitants." I should imagine, in the absence of evidence, that that is a thing upon which opinions might differ. The letter continues: "In any event this does not arise as the engineer advises that the foundations and structure of the houses, generally speaking, precludes the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation." That is an entirely fresh point, a matter that had never been raised on the public inquiry. The engineer is said—I agree it is hearsay—to have formed that opinion, and instead of the Ministry writing back and deprecating matters of that sort being stated to them without the presence of the other side and without any opportunity for the other side to cross-examine to such a statement, or to call evidence on the other side, one gets the final letter from Mr. Kerwood, on March 10, 1934, saying: "I am directed by the Minister of Health to refer to your further letter of the 24th ultimo relative to the North Ward No. 1 Clearance Order which formed the

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subject of a local inquiry on the 31st May and 1st June, 1933, and to state that in all the circumstances he has decided to confirm the order." On that it seems to me difficult for us to come to the conclusion that the Minister, who refers to all the circumstances, and indeed, to some extent having invited these expressions of opinion by officials of the Corporation, was totally uninfluenced by anything which took place ex parte. I ought to add that in referring to the Minister I am more directly referring to Mr. Kerwood, because it is plain that so far as any evidence before us is concerned, the Minister himself never heard of this case or, at any rate, he had nothing to do with the decision, which was left naturally enough to his officials. In my judgment, as I have already said, the officials committed an error of judgment in allowing the results of the public inquiry to be supplemented by a quasi private inquiry, plus ex parte statements made to the Minister, without any repudiation of that being the right course. My view is founded on the fact that the statements I have referred to were statements in reference to the main question which was dealt with at the public inquiry—namely, that of demolition or reconditioning.

Having formed that conclusion, I think it would follow, subject to an argument which was based on s. 11 of the Housing Act, 1930, that prima facie the Order of the Minister ought not to be allowed to stand. Sect. 11 provides a substitute for proceedings by prohibition or certiorari which were in vogue with reference to acts of the Minister of Health under the preceding Act of 1925. It says: "(1.) The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation. (2.) So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed." Then sub-s. 3 provides: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that

any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court . . . . (ii.) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant." It has been argued before us that even assuming—of course, it is not admitted—that the functions of the Minister are quasi-judicial if he complies with the exact words of para. 4 of the First Schedule and causes a public local inquiry to be held, and considers any objection not withdrawn, and the report of the person who held the inquiry, he has done all that is necessary, and that no objection can be taken under s. 11 on the ground that the requirements of the Act have not been complied with. For the reasons which I have to some extent already indicated, I do not take that view. I think it is not a compliance with para. 4 of the First Schedule to come to a conclusion in favour of confirming the order, basing the conclusion not merely on the public local inquiry and the report of the person who held the inquiry but also on an ex parte private inquiry, such as I think the officials of the Minister have held here. I think that is not a compliance with what is requisite under para. 4 of the First Schedule.

The only question that remains is whether the Court should come to the conclusion that the interests of the applicants have been substantially prejudiced by what has been done, because the quashing of the Order is, of course, a matter of discretion of the Court. I do not think it has been proved that the statements which were made to the Ministry in fact affected the decision of the Minister, or of his officials, and I certainly have no reason to doubt that the officials were acting in what they thought to be the public interest. On the other hand, it seems to me a matter of the highest possible

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importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair has been done in the matter, and that ex parte statements have not been heard before the decision has been given without any chance for the persons concerned to refute those statements. That seems to me a matter of the greatest possible public importance, and if I am right in the view that I have expressed as to the functions of the Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case, as I understand them to be, the Court has no option but to quash the Order, as my brother has suggested.

ROCHE L.J. I agree that this appeal should be allowed, and for the reasons assigned by the Lords Justices who have given judgment. There is little that I desire to add, and that little I add out of respect to Swift J., from whose judgment we are differing.

Speaking for myself, I feel that I am differing from the learned judge not upon any question of principle, or upon any question of the construction of the statute. I am differing as to a matter of fact, and that not a matter of fact depending upon oral evidence, or the credibility of witnesses, but depending upon the proper inference to be drawn from documents which are beyond dispute.

As to the principles applicable I have nothing to add to the citations made by the Lords Justices from the decisions of the highest tribunal which has laid down those principles. It is sufficient to say that whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a Court or by a Board, or any body of persons, it is necessary and essential in the words of Lord Loreburn in

Board of Education v. *Rice* (1), which have already been cited, that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard.

The learned Solicitor-General, in answer to a question, which, I think, I put to him, said he did not dispute that the functions of the Minister and those who represented him, in respect of the public inquiry, were quasi-judicial. The argument of the learned Solicitor-General upon the facts was, in substance, to the effect that that which was done by the Minister after the inquiry, and which is complained of, had reference to matters of high policy and to finance, which were not the subject of the inquiry, rather than to matters which were the subject of the inquiry. If I thought that that was the state of facts, I should agree with the conclusion to which it is sought to lead us, but it is, in my judgment, plain on the facts of the case that the situation was otherwise. It is unnecessary to refer again to the letters which have been read, but it is sufficient to say that the Ministry were invited on the subject-matter of this order and this clearance scheme to hear a deputation, and that, quite rightly, those in charge of the matter for the Ministry took the view that having regard to the quasi-judicial position occupied by the Minister, it was not right that a deputation should be heard representing, as it was proposed it should represent, one side only. Unfortunately that view did not continue to prevail, and other advisers of the Ministry permitted themselves to do things which, in my judgment, vitiated the proceedings. They permitted themselves, first, to view the premises, not for themselves or by themselves, but with the representatives of one side only, and without the knowledge of the owners of the property, and without any opportunity to those owners to point out what they thought should be seen there. Secondly, it is clear that they met the same deputation that it was proposed to bring to London with one unimportant

(1) [1911] A. C. 179, 182.

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alteration of personnel, and to hear the views and arguments of that deputation upon the same matters which had been heard and dealt with at the inquiry. That appears from the minutes of the Council itself. Thirdly, they permitted themselves to receive, without notice to the other side, entirely new evidence which had not been dealt with at the inquiry bearing upon what was the topic of the inquiry, namely, the condition of the houses, and whether it was proper that they should be demolished.

For these reasons I am satisfied, to put the matter shortly, that the inquiry which was required to be in public, and which, according to the admission of the Solicitor-General it is conceded should be such as to give effect to the elementary principle of hearing both sides, was continued and resumed in private, and when so resumed and continued was held with audience to one side alone. That, in my judgment, is manifestly a breach of the requirements of para. 4 of the First Schedule to the Housing Act, 1930. It follows that the remedy prescribed by s. 11 of the Act is open to the appellants, and upon the topic of whether the interests of the appellants were substantially affected by what was done, it seems to me for the reasons assigned by Maugham L.J. that they were so affected, and little if any argument has been presented to the Court to show that they were not so affected.

For these reasons, I agree that this appeal should be allowed, and that the Order should be quashed.

Appeal allowed.
Order of Minister quashed.

Solicitors for appellants: *Francis Miller & Steele, for Livingston & Pattie, Jarrow.*

Solicitor for respondent: *Solicitor to the Ministry of Health.*

R. F. S.

NOTE.

Housing Act, 1930.

"PART I.

"Provisions with respect to the clearance or improvement of unhealthy areas.

"*Clearance Areas.*

Sect. 1, sub-s. 1: "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—

(i) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and

(ii) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area,

the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained:

Provided that, before passing any such resolution, the authority shall satisfy themselves—

(*a*) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds; and

(*b*) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect.

Sub-s. 2: "A local authority shall forthwith transmit to the Minister a copy of any resolution passed by them under this section, together with a statement of the number of persons of the working classes who on a day specified in the statement were occupying the buildings comprised in the clearance area.

Sub-s. 3: "So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways,

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or partly in one of those ways and partly in the other of them, that is to say—

(i) by ordering the demolition of the buildings in the area; or

(ii) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon.

Sect. 2, sub-s. 1: "Where as respects any area declared by them to be a clearance area a local authority determine to order any buildings in the area to be demolished, they shall make and submit to the Minister, for confirmation by him, an order (in this Act referred to as a 'clearance order') ordering the demolition of each of those buildings.

Sub-s. 2: "The provisions of the First Schedule to this Act shall have effect with respect to the making, submission and confirmation of clearance orders."

Sect. 11, sub-s. 1: "The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation.

Sub-s. 2: "So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed, and naming a place where a copy of the order as confirmed and of the map referred to therein may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the Minister of his objection to the order, appeared at the public local inquiry in support of his objection.

Sub-s. 3: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court—

(i) may by interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings; and

(ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant.

Sub-s. 4: "Subject to the provisions of the last preceding sub-section, an order shall not, either before or after its confirmation, be questioned by prohibition or certiorari or in any legal proceedings whatsoever, and shall become operative at the expiration of six weeks from the date on which notice of its confirmation is published in accordance with the provisions of sub-section 2 of this section.

Sub-s. 5: "Except by leave of the Court of Appeal, no appeal shall lie to the House of Lords from a decision of the Court of Appeal in proceedings under this section."

"FIRST SCHEDULE.

"*Clearance Orders.*

1. "A clearance order shall be in the prescribed form and shall describe by reference to a map the area to which it applies, and shall fix by reference to the date on which it becomes operative the period, not being less than twenty-eight days from that date, within which the authority require the buildings in the area to be vacated for the purposes of demolition, and for that purpose may fix different periods as respects different buildings.

2. "Before submitting the order to the Minister the local authority shall—

(*a*) publish in one or more newspapers circulating within their district a notice in the prescribed form stating the fact of such an order having been made and describing the area comprised therein and naming a place where a copy of the order and of the map referred to therein may be seen at all reasonable hours; and

(*b*) serve on every owner, lessee and occupier (except tenants for a month or a less period than a month) of any building included in the area to which the order relates and so far as it is reasonably practicable to ascertain such persons, on every mortgagee thereof, a notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation, and specifying the time within and the manner in which objections thereto can be made.

3. "So soon as may be after the required notices have been given, the local authority shall submit the order to the Minister for confirmation.

4. "If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification; but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification:

"Provided that the order as confirmed by the Minister shall not apply to any building to which the order would not have applied if it had been confirmed without modification.

5. "The Minister may confirm an order notwithstanding that the effect of the modifications made by him in excluding any buildings from the clearance area is to sever that area into two or more separate and distinct areas, and in any such case the provisions of this Act relating to the effect of an order when confirmed and to the proceedings to be taken subsequent to the confirmation thereof shall apply as if those areas formed one clearance area."

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GOVERNMENT OF THE FEDERATION OF MALAYA . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF THE FEDERATION OF MALAYA.

Malaya—Police—Constitution—Power of dismissal—Whether in Commissioner of Police or in Police Service Commission—Conflict between Constitution and existing law—Constitution provisions paramount—Dismissal of inspector by Commissioner of Police void—Police Ordinance (Malaya), 1952, ss. 9 (1), 45 (1)—Constitution of the Federation of Malaya, August 31, 1957, arts. 135 (1) (2), 140 (1), 144 (1), 162 (1) (4) (6).

Natural Justice — Opportunity to meet charge — Dismissal of public servant—Police disciplinary proceedings—Findings of board of inquiry furnished to adjudicating officer but not to accused police officer—Constitution of the Federation of Malaya, art. 135 (2).

Article 135 (1) of the Constitution of the Federation of Malaya, which came into operation on Merdeka Day (August 31, 1957), provided: "No member of any of the services"—which included the police service—"shall be dismissed . . . by an authority subordinate "to that which, at the time of the dismissal . . . has power to appoint "a member of that service of equal rank."

By art. 140 (1): "There shall be a Police Service Commission, "whose jurisdiction shall, subject to article 144, extend to all "persons who are members of the police service."

Article 144 (1) provided: "Subject to the provisions of any "existing law and to the provisions of this Constitution, it shall be "the duty of a Commission . . . to appoint . . . and exercise disci-"plinary control over members of the service . . . to which its "jurisdiction extends."

In July, 1958, the Commissioner of Police in Malaya purported to dismiss the appellant, an inspector of police, on the ground that at an inquiry before an adjudicating officer he had been found guilty on a charge of failing to disclose evidence at a criminal trial. While under the law as it existed before Merdeka Day the commissioner had, pursuant to the Police Ordinance, 1952, power to dismiss an inspector, the appellant contended that after the coming into force of the Constitution that power was only in the Police Service Commission, to which the commissioner was a subordinate authority, and he sought a declaration that his purported dismissal by the commissioner was void and of no effect:—

Held, that the provision in article 144 (1) of the Constitution that the functions of the Police Service Commission were "sub-"ject to the provisions of any existing law" meant only such

* *Present*: LORD DENNING, LORD HODSON and LORD DEVLIN.

provisions as were consistent with the commission carrying out the duty entrusted to it. Where, however, as here, there was a conflict between the existing law and the Constitution the former would have to be modified so as to accord with the latter, and the court itself, where the Head of the Federation of Malaya had not done so under article 162 (4) of the Constitution within the prescribed time limit, could and would under article 162 (6) make the necessary modification in the powers of the Commissioner of Police. There could not, at one and the same time, be two authorities with concurrent power to appoint members of the police service. The Constitution must prevail and the existing law must be applied with such modification as might be necessary to bring it into accord with it. Accordingly, since Merdeka Day the commission and not the commissioner had power to appoint and dismiss members of the police service and the dismissal of the appellant by the commissioner was therefore void.

Held, secondly, that the failure to supply the appellant with a copy of the report of the board of inquiry, which contained matter highly prejudicial to him and which had been sent to and read by the adjudicating officer before he sat to inquire into the charge, amounted to a failure to afford the appellant "a reasonable opportunity of being heard" in answer to the charge within the meaning of article 135 (2) of the Constitution and to a denial of natural justice (post, p. 338).

Order of the Court of Appeal of the Supreme Court of the Federation of Malaya reversed.

APPEAL (No. 9 of 1961) from an order of the Court of Appeal of the Federation of Malaya (December 9, 1960) setting aside a judgment of the High Court at Penang (March 24, 1960).

The following introductory statement is taken from the judgment of the Judicial Committee: The appellant, B. Surinder Singh Kanda, was an inspector of police in the Royal Federation of Malaya Police. On July 7, 1958, he was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. Inspector Kanda brought an action in the High Court challenging that dismissal. Rigby J. declared that his dismissal was void and of no effect. The Government appealed. The Court of Appeal by a majority (Thomson C.J. and Hill J.A., with Neal J. dissenting) allowed the appeal and held that inspector Kanda was validly dismissed. He now appealed to their Lordships' Board.

The appeal raised two questions: (1) The first question was whether the Commissioner of Police had any power to dismiss him. Inspector Kanda said that under the Constitution the power rested only with the Police Service Commission: (2) The second

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question was whether the proceedings which resulted in his dismissal were conducted in accordance with natural justice. Inspector Kanda said they were not.

The Federation of Malaya came into being on Merdeka Day, that was, August 31, 1957. Thenceforward the Constitution was the supreme law of the Federation (article 4). The Supreme Head of the Federation was the Yang di-Pertuan Agong (article 32). Great changes were made in the structure of government. In particular the public services were placed under commissions. Thus a Police Service Commission was set up with jurisdiction over all members of the police service (article 140). But the persons serving in the police force continued in general to have the same powers and functions as before (article 176). And for the most part the existing laws were continued unchanged (article 162).

In September, 1957, after Merdeka Day, two men were charged in the Supreme Court at Penang with uttering forged lottery tickets. The prosecution failed. The reason was because the prosecution called a number of witnesses, including police officers, whose evidence was palpably false. The two accused men were acquitted. The Commissioner of Police ordered an inquiry to be held. The board of inquiry was presided over by Mr. D. W. Yates, a very senior police officer. It reported that false evidence had been fabricated for use at the trial.

After considering the report the Commissioner of Police decided that proceedings should be taken against inspector Kanda. Not criminal proceedings before the courts of law, but disciplinary proceedings under what the Police Regulations called "Orderly Room "Procedure." The commissioner appointed Mr. Strathairn to be the adjudicating officer to inquire into the charges. Mr. Strathairn was junior to Mr. Yates who had conducted the inquiry. Mr. Yates drafted a specimen charge, but Mr. Strathairn preferred his own. He drafted another. The charge, as eventually laid against inspector Kanda, was that he had failed to disclose evidence which to his knowledge could be given for the two accused men: or alternatively, that he had been guilty of conduct to the prejudice of good order and discipline in that he had submitted investigation papers to his superior officer knowing the same to be false. Another charge was afterwards added that he wilfully disobeyed a lawful command to subpoena a witness.

In April and May, 1958, the charges were heard by Mr. Strathairn, the adjudicating officer. He found inspector Kanda guilty on the original charge of failing to disclose evidence and

recommended that he be dismissed from the Force. He also found him guilty on the added charge of disobeying a lawful command and recommended an award of a severe reprimand. The Commissioner of Police approved the recommendations: and on his direction, on July 7, 1958, inspector Kanda was formally notified that he was dismissed from the Force. On July 14, 1958, inspector Kanda appealed to the Ministry of Defence and also to the Police Service Commission. (He did that because he was not sure which was the right authority to hear his appeal.) Over a year later, on July 19, 1959, the secretary to the Police Service Commission informed him that his appeal was dismissed. It was not contended that, by that internal appeal within the administration, he in any way waived his right to apply to the courts.

On October 1, 1959, inspector Kanda brought this action against the Government of the Federation of Malaya claiming a declaration that his dismissal was void, inoperative and of no effect. He put it on two grounds: (1) His dismissal was effected by an authority which had no power to dismiss him, contrary to article 135 (1) of the Constitution; (2) he was not given a reasonable opportunity of being heard, contrary to article 135 (2) of the Constitution.

1962. Feb. 8, 12, 13, 14. *Rodney Bax* for the appellant. The main and short point is that the purported dismissal of the appellant by the Commissioner of Police on July 7, 1958, was, as the trial judge found, invalid because the commissioner on that date no longer had power to dismiss him. Article 4 of the Federal Constitution provides that the Constitution "is the supreme law "of the Federation." Article 135 (1), which is absolutely vital and has no qualification whatever, enacts that "No member of "any of the services"—which includes the police—"shall be "dismissed . . . by an authority subordinate to that which, at "the time of the dismissal . . . has power to appoint a member "of that service of equal rank." Article 140 (1) established a Police Service Commission, and article 144 (1) provided that "Subject to the provisions of any existing law and to the provi- "sions of this Constitution, it shall be the duty of a commission "to appoint . . . and exercise disciplinary control over members "of the service . . ." The submission is that, relating that to article 135 (1), the Police Service Commission had the power and duty to appoint, and therefore no subordinate authority—and the commissioner is an authority subordinate to the commission—

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shall dismiss. The power previously vested in the commissioner by virtue of the provisions of the Police Ordinance, 1952, to dismiss a superior police officer was impliedly revoked by articles 135 (1), 140 and 144 of the Constitution and was thereby transferred to the commission as from Merdeka Day. The power of dismissal has thus clearly been transmitted to the commission and the court must apply the existing law. All that the appellant has to show is that the commission at the relevant date had power to appoint a member of the police force of his grade, and that is enough, because admittedly he was dismissed by a subordinate authority.

Article 162 (6) of the Constitution provides that "Any court "or tribunal applying the provision of any existing law which has "not been modified on or after Merdeka Day under this article "or otherwise may apply it with such modifications as may be "necessary to bring it into accord with the provisions of this "Constitution," and the alternative submission is that the provisions of the Police Ordinance, 1952, must, after Merdeka Day, be modified, that is to say repealed, by the court applying the same, pursuant to article 162 (6), so as to give effect to article 144. The effect of article 162 (6) is to bring any provisions of any existing law into accord with the Constitution. The provisions of the Constitution in that context mean the express provisions to set up bodies and functions themselves. If that is right, then it is plain that the Police Service Commission had the power and, indeed, the duty to appoint. The pre-existing law gives the power to one authority and the Constitution to another, and if the effect of the provisions is to leave the pre-existing law in force, then the Constitution power is merely theoretical.

The second point is that the purported dismissal of the appellant was in any event invalid because he was not given a reasonable opportunity of being heard, in accordance with the provisions of article 135 (2) of the Constitution, in that the terms of the findings of the board of inquiry were before the adjudicating officer but unknown to the appellant, who never had any knowledge of the contents of the report until about the fourth day of the trial of the action. The trial judge rightly found on the evidence that the proceedings before the adjudicating officer were, by reason of the appellant's lack of knowledge, held in a manner contrary to natural justice. If there was in the report of the board of inquiry, as in fact there was, matter to the appellant's disadvantage, strongly prejudicial to him, the existence of which he did not know and with which he had no chance to deal, then it cannot

be said that he was given a reasonable opportunity of being heard. Thomson C.J. in his judgment in the Court of Appeal said that "the charges themselves must have conveyed to him [the appellant] the view regarding himself which the board of inquiry had formed. The only thing he was not aware of was the precise words in which these views were expressed . . . the actual words, however, are of little importance." It is submitted that the actual words used in the report here are of the utmost importance. The trial judge said that "the very fact he [the adjudicating officer] was furnished with, and read, the findings of the board must, in my view, to put it at its lowest, have created a very real likelihood that he would have a pre-determined bias or—to use the words of Lord O'Brien L.C.J. in the case of *Rex* v. *Justices of Queen's County* [1]—'an operative 'prejudice, whether conscious or unconscious,' against the plaintiff in respect of the disciplinary charges upon which he was to adjudicate." Those words of Lord O'Brien L.C.J. were adopted by Lord Parker C.J. in *Reg.* v. *Duffy, Ex parte Nash.* [2] At the very least the appellant should have been told what was in the report. It is also submitted that the proceedings were not in conformity with the Police Regulations, and as Hill J.A. said in his judgment in the Court of Appeal: "Such proceedings could invariably result in unconscious bias in the mind of any or all adjudicating officers as a result of knowledge of the proceedings before and the findings of boards of inquiry." There are two cases on bias which may be of assistance: *Cooper* v. *Wilson* [3]; *Reg.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller* [4]; the present is a stronger case. The judgment of the trial judge was right and should be restored.

Lord Bledisloe Q.C. and *Philip Clough* for the respondent. There are two questions: first, a point of construction, whether the power to appoint and dismiss a superior police officer, which was conferred under the Police Ordinance, 1952, on the Commissioner of Police, remained vested in him after Merdeka Day when the Federal Constitution came into force, or whether the relevant provisions of the Constitution are to be construed as having divested the commissioner of that power and as having conferred

[1] [1908] 2 I.R. 285, 294.
[2] [1960] 2 Q.B. 188, 200; [1960] 3 W.L.R. 320; [1960] 2 All E.R. 891, D.C.
[3] [1937] 2 K.B. 309, 322, 342; 53 T.L.R. 623; [1937] 2 All E.R. 726, C.A.
[4] [1956] 1 Q.B. 36, 41; [1955] 3 W.L.R. 563; [1955] 3 All E.R. 300, D.C.

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it on the Police Service Commission. Secondly, whether or not in the course of the disciplinary proceedings the appellant was given a reasonable opportunity of being heard in compliance with article 135 (2) of the Constitution. It is clear that under the pre-existing law the commissioner had power to appoint and dismiss. It has been conceded, rightly or wrongly, that the commissioner is subordinate in rank to the commission. If he had power to appoint, there must be power to dismiss.

The initial jurisdiction of the commission is conferred by article 140 (1) of the Constitution "subject to article 144," which itself is a general provision and is "subject to the provisions of "any existing law and to the provisions of this Constitution." "Existing law" is defined in article 160 (2) as meaning "any "law in operation in the Federation . . . immediately before "Merdeka Day." That definition must be applied, "unless "the context otherwise requires," throughout the Constitution. Reading article 144 (1) with that definition in it, it reads: "Sub-"ject to the provisions of any law in operation in the Federation "immediately before Merdeka Day . . . it shall be the duty of" the commission, etc. Under article 162 (1) the existing law shall be continued in force, but it may be modified by the Head of the Federation as provided in article 162 (4). In the present case it is common ground that the pre-existing law has not been modified under sub-article (4), and the court should not apply the rather curious power under article 162 (6) to import a modification unless it is absolutely necessary—not merely expedient—to do so, and the submission is that it is not necessary or even desirable. Further, article 176 (1) supports the argument that all existing law in force was to continue and that the same persons should have the same functions. The commissioner's powers have been preserved under article 144 and have not been taken away by legislative modification, and, unless the court thinks it absolutely necessary to modify under article 162 (6), the power remains. If it results that there are two persons with the power, that cannot take away the plain meaning of the words—that power is vested in the commissioner.

The process of appointing the Police Service Commission must necessarily take some time. There was no commission in existence on July 7, 1958 (the date of dismissal). If the appellant's contention that the power of the commissioner came to an abrupt end on Merdeka Day is correct, then there would be an interval of time between that date and when the Police Service Commission was appointed. If that is right, chaos would reign in that

interval, and that illustrates the difficulties which would arise. The matter is a pure question of construction, but reference may be made to *Rex* v. *Churchwardens of St. James, Westminster* [5]— it is rather a long way from the present case. See also *Akisatan Apena of Iporo* v. *Akinwande Thomas*.[6] In *Smith* v. *London Transport Executive* [7] Lord Simonds said: "The words 'subject "'to the provisions of this Act' . . . are naturally words of "restriction. They assume an authority immediately given and "give a warning that elsewhere a limitation upon that authority "will be found." *Suresh Chandra* v. *Himangshu* [8] has no real bearing on this case—the dismissal there was by an officer subordinate in rank. It may be that, as a practical result of the construction contended for, the Police Service Commission looks after the executive officers and the commissioner looks after the junior officers.

In summary on the point of construction: (1) The jurisdiction of the Police Service Commission was from its very inception expressly made subject to existing law: articles 140, 144. (2) The jurisdiction of the commission was also made subject to the provisions of the Constitution: article 144 (1). (3) "Existing "law" is widely defined in article 160 (2) and can be modified. "Existing law" clearly includes the Police Ordinance, 1952, and its meaning cannot be restricted to mere legal procedure or machinery. (4) "Subject to the provisions of the Constitution" refers to provisions such as article 144 (3), (4) and (5) and article 135 (2), and in particular to article 162 (1)–(4), which provided machinery for the modification or amendment of existing law. (5) Article 176 (1) preserves the powers and functions of the pre-Merdeka Day officials, including the commissioner of police. (6) The respondent's construction simply results in the Police Service Commission inheriting the powers of the High Commissioner to deal with gazetted police officers, leaving the power to deal with junior ranks in the Commissioner of Police, and that is a very sensible division of functions. (7) If the Ruler and the Government had wished to alter this state of affairs they would have made an order under article 162 (4). (8) The power of the court or tribunal under article 162 (6) is a power to apply existing law in a particular way, and is only exercisable in a particular way where it is necessary—the word "necessary" is stressed;

[5] (1836) 5 A. & E. 391.
[6] [1950] A.C. 227, 233, P.C.
[7] [1951] A.C. 555, 569; [1951] 1 T.L.R. 683; [1951] 1 All E.R. 667, H.L.
[8] (1951) 55 Cal.W.N. 605, 608.

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there is no such necessity here. (9) There is nothing indefinite about the period during which the existing law must continue in force. If it is not already modified under article 162 (4) it can still be amended under article 162 (1). (10) Article 176 (1) renders it impossible to adopt Neal J.'s view in the court below of the meaning of existing law that it merely relates to procedure or machinery.

With regard to the second point—whether the appellant was in the course of the disciplinary proceedings given a reasonable opportunity of being heard in compliance with article 135 (2)—the principle stated by Blackburn J. in *Reg.* v. *Rand*[9] is applicable in all cases where there is bias or prejudice or poisoned mind —where there is "a real likelihood" of bias. *Frome United Breweries Co. Ltd.* v. *Bath Justices*[10] applies Blackburn J.'s test of real likelihood of bias. The cases are all reviewed in *Reg.* v. *Camborne Justices, Ex parte Pearce*,[11] which is the last word on this subject and makes the principle very clear. Here it comes down to whether there was any real likelihood that the adjudicating officer's mind was in any way poisoned by the fact that he knew the contents of the report of the board of inquiry. In applying the general principle it was assumed in certain of the cases that there was a real likelihood of bias—where, e.g., there was a financial interest. Here the adjudicating officer *had* to read the report; it contained unquestioned statements of witnesses. It may be that there was an outside possibility of bias, but it was not a case of likelihood. If there was bias, and it is submitted that there was not, it could not be put right by supplying the document to the appellant. In *Cooper's* case,[12] which is very near the present case, conflicting views were taken. [Reference was also made to *Byrne* v. *Kinematograph Renters Society Ltd.*,[13] *University of Ceylon* v. *Fernando*,[14] *Russell* v. *Duke of Norfolk*,[15] *Goold* v. *Evans*,[16] *In re an Arbitration between Gregson and Armstrong*,[17] *Ridge* v. *Baldwin*[18] and *Reg.* v. *Duffy, Ex parte Nash*.[19]] The principle to be culled from those cases is that it must be determined whether there is a real likelihood of bias or

[9] (1866) L.R. 1 Q.B. 230, 232.
[10] [1926] A.C. 586, 590; 42 T.L.R. 571, H.L.
[11] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.
[12] [1937] 2 K.B. 309, 357, C.A.
[13] [1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 579.
[14] [1960] 1 W.L.R. 223, 227; [1960] 1 All E.R. 631, P.C.
[15] (1949) 65 T.L.R. 225; [1949] 1 All E.R. 109, C.A.
[16] [1951] 2 T.L.R. 1189.
[17] (1894) 70 L.T. 106.
[18] [1961] 2 W.L.R. 1054; [1961] 2 All E.R. 523.
[19] [1960] 2 Q.B. 188.

prejudice; each case depends on its own circumstances and no general rule can be laid down to cover every case. The underlying principle is that nothing should be done in the name of justice which would strike a reasonable man as unjust. It is more important that justice should be done than that it should be seen to be done. In the present case the adjudicating officer was in fact carrying out the duties of both judge and prosecuting counsel. He was really conducting an investigation, and must necessarily be supplied with all the material which would be available to prosecuting counsel; that is inevitable and one should not shut one's eyes to the reality of the situation. It is unfortunate, but that is the procedure laid down in the regulations. One has to make up one's mind whether there is a reasonable likelihood of bias; the trial judge found in favour of the appellant on this point; the three judges in the Court of Appeal were against him.

Bax in reply. There is no evidence on whether there was a gap before the commission came into existence—it should not be assumed that there was. "Subject to the provisions of any "existing law" is not intending to sweep away existing law, but to apply the provisions of the Constitution to existing law mutatis mutandis, that is, to retain the existing law so far as it can be applied in conformity with the provisions of the Constitution. The Constitution intends to create a new machinery of government. In other words, the police force and other services remain unchanged, but the persons to administer those bodies are henceforth to be the commissions and not whatever other authority it may have been. The Police Regulations which applied before Merdeka Day were thereafter to be applied by the Police Service Commission.

With regard to article 162 (6), if the Ruler of the Federation has not seen fit to make any modification other than that made by the Constitution itself, then the court is entitled to look at the existing law and apply it as provided by the Constitution, and to say here that the commission is the authority to appoint or dismiss. Under the existing law the powers of the commissioner are to be preserved, and preserved also subject to the provisions of the Constitution, but that means not necessarily preserved in their entirety, and his functions of appointing and dismissing members of the police force are transferred to the commission. That is, he held on the same terms as before, but subject to the provisions of the Constitution.

There was here a breach of natural justice. Examination as to previous bad conduct would have been forbidden, and that very

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thing came into the possession of the adjudicating officer by other means—he saw the report. [*Rex* v. *Justices of Bodmin, Ex parte McEwen*[20] was referred to.]

April 2. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships will consider the two grounds of appeal separately.

First. The power of the commissioner to dismiss.

The governing article of the Constitution on this point is article 135 (1), which came into operation at once on Merdeka Day (August 31, 1957): "135 (1): No member of any of the "services mentioned [the police service is one of these] shall "be dismissed or reduced in rank by an authority subordinate "to that which, at the time of the dismissal or reduction, has "power to appoint a member of that service of equal rank."

Inspector Kanda was dismissed on July 7, 1958, nearly a year after Merdeka Day. In order to see who had power to dismiss him, it is necessary under article 135 (1) to ask who had power at that time to *appoint* an officer of his rank: for no one could dismiss who could not appoint.

Under the law as it existed prior to Merdeka Day the Commissioner of Police could appoint superior police officers, including inspectors of police, see section 9 (1) of the Police Ordinance, 1952; and if an inspector had been found guilty of an offence against discipline, the Commissioner of Police could dismiss him, see section 45 (1) of that Ordinance. Did this law continue to exist after Merdeka Day? In particular, did it continue to exist on July 7, 1958?

Inspector Kanda says that that law did not continue to exist. It was replaced, he says, by the articles of the Constitution which set up the Police Service Commission and entrusted to them the power to appoint members of the police service. The power of appointment was, he says, in the commission. The Commissioner of Police was an authority subordinate to the commission. He could not therefore dismiss him, because he could not appoint him.

Inspector Kanda relies for this contention on articles 140 (1) and 144 (1) of the Constitution which read as follows:

"140 (1). There shall be a Police Service Commission, whose "jurisdiction shall, subject to article 144, extend to all persons "who are members of the police service.

"144 (1). Subject to the provisions of any existing law and to

[20] [1947] K.B. 321, 325; [1947] 1 All E.R. 109, D.C.

" the provisions of this Constitution, it shall be the duty of a " Commission . . . to appoint, confirm . . . promote, transfer " and exercise disciplinary control over members of the service . . . " to which its jurisdiction extends."

In answer to this contention, the Government of Malaya point to the words " subject to " in both articles 140 (1) and 144 (1). Those words give priority, they say, to the existing law and preserve it intact, including the power of the commissioner to appoint superior police officers.

The Government admit that after Merdeka Day a Police Service Commission was established and that since Merdeka Day all superior police officers, including police inspectors, have been appointed by the Police Service Commission. They admit, too, that on July 7, 1958, the Commissioner of Police was an authority subordinate to the Police Service Commission. But, despite these admissions, they say that the existing law as to appointment and dismissal was preserved by the opening words of article 144 (1) which says that the duty of the commission is " subject to the " provisions of any existing law." This gives priority, they say, to the existing law. The Constitution is subject to the existing law, and not vice versa. The words " subject to the provisions " of this Constitution " can be amply satisfied, they say, by reference to article 144 (3) (4) (which refers to special posts) and 135 (2) (which gives a right to be heard).

This argument found favour with Thomson C.J. and Hill J.A.: but their Lordships find themselves unable to accept it. Their Lordships realise that it is a difficult point but they prefer the view taken by Rigby J. and Neal J. It appears to their Lordships that, as soon as the Yang di-Pertuan Agong appointed the Police Service Commission, that commission gained jurisdiction over all members of the police service and had the power to appoint and dismiss them. It is true that under article 144 (1) the functions of the Police Service Commission were " subject " to the provisions of any existing law ": but this meant only such provisions as were consistent with the Police Service Commission carrying out the duty entrusted to it. If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution. There are elaborate provisions for modification contained in article 162 which run as follows:

" 162 (1) Subject to the following provisions of this article . . .

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" the existing laws shall . . . continue in force on and after Merdeka Day, with such modifications as may be made therein under this article . . . (4) The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law . . . as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution . . . (6) Any court or tribunal applying the provision of any existing law (which has not been modified on or after Merdeka Day under this article or otherwise) may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution. (7) In this article 'modification' includes amendment, adaptation, and repeal."

It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under article 162 (4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the court to do so under article 162 (6). It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. And that is just what has happened. The Police Service Commission has in fact made the appointments. And their Lordships are of opinion that they were lawfully made.

Their Lordships do not overlook the argument of the Government that there was no conflict. The jurisdiction of the Police Service Commission, they said, would be satisfied by entrusting

them with the power to appoint gazetted police officers, leaving the Commissioner of Police to appoint all others. Their Lordships cannot accede to this argument. Under article 140 the jurisdiction of the Police Service Commission extends to *all* persons who are members of the police service: and their functions under article 144 apply to all of them also. The commission has the duty, and therefore the power, to appoint *all* members of the police service, and not merely the gazetted police officers. The Police Service Commission can, of course, delegate any of its functions under article 144 (6), but still it is its own duty and its own power that it delegates. It remains throughout therefore the authority which has power to appoint, even when it does it by a delegate.

The result is that on July 7, 1958, the Police Service Commission was the authority to appoint an officer of the rank of inspector Kanda: and therefore under article 135 (1) it was the authority to dismiss him. The Commissioner of Police had no authority to dismiss inspector Kanda as he did. The dismissal was therefore void.

Second. The reasonable opportunity of being heard.

The governing article of the Constitution on this point is article 135 (2), which came into operation on Merdeka Day (August 31, 1957): "135 (2) No member of such a service as "aforesaid [the police service is one of these] shall be dismissed "or reduced in rank without being given a reasonable opportunity "of being heard."

Several complaints were made by inspector Kanda of a failure to comply with this article, but none of them survived for argument before their Lordships except one complaint which related to the report of the board of inquiry. This complaint was not contained in the statement of claim, but this was because inspector Kanda did not know the contents of the report until the fourth day of the trial. Their Lordships think that an amendment should have been made even at that stage to permit it, but as the case proceeded before Rigby J. and the Court of Appeal as if an amendment had been made, their Lordships think it would be wrong to shut it out now.

The report of the board of inquiry contained a severe condemnation of inspector Kanda. It was sent to the adjudicating officer before he sat to inquire into the charge. He read it and had full knowledge of its contents. But inspector Kanda never had it. He never had an opportunity of dealing with it. Indeed, he never got it until the fourth day of the hearing of this action, when

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this took place between the judge and the legal adviser to the Government:

"*The court to legal adviser*: Am of the opinion that in the "interests of justice the findings of the board of inquiry ought to "be made available to the court and to the plaintiff and privilege "waived thereon. . . .

"*Legal adviser*: Must be some misunderstanding—they have "always been available—and no privilege claimed thereon.

"*Court*: It is my clear impression that both in court and "throughout earlier proceedings in chambers, privilege has been "consistently claimed in respect of the board of inquiry file and "the findings thereon."

The report was then made available to inspector Kanda and his advisers. It dealt in detail with the evidence of each witness heard by the board, and expressed views as to the credibility of each witness, and the weight to be attached to his statement. It referred to inquiries made by the board itself apart from the evidence given by witnesses. In the result it presented, as Rigby J. said, a most damning indictment against inspector Kanda as an unscrupulous scoundrel, who had suborned witnesses, both police and civilian, to commit perjury. It said: "The board are "unanimously of opinion that inspector Kanda is the 'villain of "'the piece'. . . . The board were forced to the conclusion "that inspector Kanda is a very ambitious and a thoroughly "unscrupulous officer who is prepared to go to any lengths, "including the fabrication of false evidence, to add to his reputa-"tion as a successful investigator. The board could not help "considering how many of his previous successful cases had been "achieved by similar methods."

The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that report without inspector Kanda being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and, indeed, before the courts in Malaya proceeded on the footing that this depended on this further question: Was there a "real "likelihood of bias," that is, "an operative prejudice, whether "conscious or unconscious," on the part of the adjudicating officer, Mr. Strathairn, against inspector Kanda? The well-known line of cases was cited from *Reg.* v. *Rand* [1] to *Reg.* v. *Camborne Justices, Ex parte Pearce.* [2] Adopting this test, much effort was

[1] (1866) L.R. 1 Q.B. 230.

[2] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.

devoted to showing that Mr. Strathairn was not biased against inspector Kanda. Thus he had not adopted the specimen charge drafted for him by his superior officer, Mr. Yates, but had framed lesser charges of his own. And he deliberately refrained from calling the two accused men as witnesses because he realised that their evidence might be very prejudicial to the accused. He only called them at a later stage because Mr. Yates directed him to do so. The trial judge, Rigby J., was not persuaded by these arguments. He held that there was a very real likelihood of bias. But all the members of the Court of Appeal thought otherwise. They held that there was no real likelihood of bias. So inspector Kanda failed on that way of looking at the case.

In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education* v. *Rice*[3] down to the decision of their Lordships' Board in *Ceylon University* v. *Fernando*.[4] It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to

[3] [1911] A.C. 179, 182; 27 T.L.R. 378, H.L.

[4] [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C.

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the judge without his knowing. Instances which were cited to their Lordships were *In re an Arbitration between Gregson and Armstrong*,[5] *Rex* v. *Bodmin Justices, Ex parte McEwen*[6] and *Goold* v. *Evans & Co.*,[7] to which might be added *Rex* v. *Architects' Registration Tribunal*,[8] and many others.

Applying these principles, their Lordships are of opinion that inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, "the furnishing of a copy of the findings of the board of inquiry "to the adjudicating officer appointed to hear the disciplinary "charges, coupled with the fact that no such copy was furnished "to the plaintiff, amounted to such a denial of natural justice "as to entitle this court to set aside those proceedings on this "ground. It amounted, in my view, to a failure to afford the "plaintiff a reasonable opportunity of being heard in answer to "the charge preferred against him which resulted in his dis-"missal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Since their Lordships have already reached the conclusion that the dismissal was void on the ground that the Commissioner of Police had no authority to effect it, it is unnecessary for their Lordships to consider whether the setting aside of the proceedings would result also in avoiding the dismissal or merely in rendering it wrongful. Their Lordships notice that, before Rigby J., it was suggested that the only remedy was by certiorari. But their Lordships agree with him that the remedy by declaration is available also. There was some question at one time as to the scope of the declaration, but it was agreed before their Lordships that it should be limited to the date of the dismissal.

Their Lordships will therefore report to the Head of the Federation as their opinion that the appeal should be allowed,

[5] (1894) 70 L.T. 106, D.C.
[6] [1947] K.B. 321; [1947] 1 All E.R. 109, D.C.
[7] [1951] 2 T.L.R. 1189, C.A.
[8] (1945) 61 T.L.R. 445; [1945] 2 All E.R. 131, D.C.

the order of the Court of Appeal should be set aside, and that it should be declared that the dismissal of the plaintiff from the Federation of Malaya Police Force purported to be effected by one W. L. R. Carbonnell, the Commissioner of Police of the Federation of Malaya, on July 7, 1958, was void, inoperative and of no effect. The respondents should pay the costs of the appellant before their Lordships' Board and in the Court of Appeal and in the High Court.

P. C.
1962
KANDA v. GOVT. OF MALAYA.

Solicitors: *Summer & Co.; Wray, Smith & Co.*

C. C.

JACK ERIC THORNTON . . . . . PETITIONER;

AND

THE POLICE . . . . . RESPONDENTS.

P. C.*
1962
March 26.

ON APPEAL FROM THE SUPREME COURT OF FIJI, APPELLATE JURISDICTION.

Nationality—Colonial immigration ordinance—Validity—Regulation of entry into and residence in colony—Not repugnant to Imperial Act extending to colony and conferring citizenship of "United Kingdom "and Colonies" — Colonial Laws Validity Act, 1865 (28 & 29 *Vict. c.* 63), *s.* 2—*British Nationality Act,* 1948 (11 & 12 *Geo.* 6, *c.* 56), *s.* 12—*Immigration Ordinance (Fiji), No.* 33 *of* 1947, *s.* 8.

Colony—Ordinance—Validity—Immigration ordinance—Colonial Laws Validity Act, 1865, *s.* 2—*British Nationality Act,* 1948, *s.* 12—*Immigration Ordinance (Fiji), No.* 33 *of* 1947, *s.* 8.

The Colonial Laws Validity Act, 1865, provides by section 2: "Any colonial law which is . . . in any respect repugnant to the "provisions of any Act of Parliament extending to the Colony to "which such law may relate . . . shall be read subject to such Act ". . . and shall, to the extent of such repugnancy, but not other- "wise, be and remain absolutely void and inoperative."

By section 12 (1) of the British Nationality Act, 1948: "A "person who was a British subject immediately before the date of "the commencement of this Act shall on that date become a citizen "of the United Kingdom and Colonies. . . ."

By section 8 of the Immigration Ordinance, 1947, of Fiji: "(2) "The Principal Immigration Officer may issue a permit to any

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and the RT. HON. L. M. D. DE SILVA.

Hibernian Property Co. Ltd. v. Secretary of State for the Environment and Another

QUEEN'S BENCH DIVISION

BROWNE J.

November 1, 2 and 28, 1973

Housing—Clearance area—Compulsory purchase order—Inquiry—Natural justice—Audi alteram partem—Inspector hearing views of residents in absence of objectors—Whether breach of rules of natural justice—Whether sufficient to establish mere risk of prejudice to objectors—Whether order of Secretary of State confirming compulsory purchase order after breach of rules of natural justice within powers of Act—Whether failure to comply with requirements of Act—Whether "substantial prejudice"—Housing Act 1957 (5 & 6 *Eliz.* 2, *c.* 56), *s.* 42 (1), *Sched.* 3, *para.* 3 (3), *Sched.* 4, *para.* 2 (*ii*).[1]

The second respondents, a local authority, made a compulsory purchase order under sections 42 and 43 of the Housing Act 1957 in respect of 115 houses alleged, and later admitted, to be unfit for human habitation and certain added lands. The applicants were interested as freeholders or ground rent owners in all the land the subject of the order. They, with others, objected to the order, and a public local inquiry was held. The main question at the inquiry was whether the houses included in the order should be dealt with by demolition or by improvement. At the inquiry two petitions and a letter from the residents in the order area were put before the inspector. None of the signatories of the petitions or of the letter and no occupier supporting demolition gave evidence at the inquiry. After the conclusion of the inquiry, the inspector invited representatives of the objectors to accompany her on her inspection of the order land and certain other areas which had been referred to in evidence. No representative of the applicants accepted the inspector's invitation to accompany her on her inspection of the order land. During the inspector's inspection, occupiers of thirty-nine of the houses in the order which were inspected inside were asked whether they wished to go or to stay if the houses were improved, and they expressed views. In her report, the inspector concluded that the most satisfactory method of dealing with conditions in the order area was the demolition of all the buildings. She recommended that the compulsory purchase order be confirmed, and her recommendation was accepted by the Secretary of State.

The applicants applied for an order under paragraph 2 of Schedule 4 to the Housing Act of 1957 quashing the compulsory purchase order on the grounds that the confirmation of the order was not within the powers of the Act in that in receiving further information in their absence after the close of the public inquiry the inspector and the Secretary of State had failed to observe the rules of natural justice, in particular, that of *audi alteram partem*, and that the interests of the applicants had been substantially prejudiced by a failure to comply with paragraph 3 (3) of Schedule 3 to the Act of 1957. In an affidavit, the inspector said that she had not considered that in listening to the observations of the occupiers of the thirty-nine houses she was taking new evidence but had considered that she was merely obtaining clarification of evidence given at the inquiry. She took the view that the answers to her questions to the occupiers were not unfavourable to the applicants and

[1] See *post*, pp. 200, 206.

that it was right and proper to include those answers in her report. It was accepted by the Secretary of State that the wishes of occupiers were considered to be a relevant factor in the case.

Held, allowing the application and quashing the compulsory purchase order, (1) that while it was not clear that the applicants had been prejudiced by the information obtained by the inspector in answer to her questions to the occupiers the question in relation to an alleged failure to observe the rules of natural justice was not whether the information had in fact prejudiced them by contributing to the decision of the Secretary of State to confirm the compulsory purchase order but whether there was a risk that it might have done so; that there was, on the facts, such a risk; that, therefore, there had been a failure to observe the rules of natural justice; and that the order of the Secretary of State confirming the compulsory purchase order was accordingly not within the powers of the Act.

Board of Education v. *Rice* [1911] A.C. 179; 9 L.G.R. 652, H.L.(E.); *Errington* v. *Minister of Health* [1935] 1 K.B. 249; 32 L.G.R. 481, C.A.; *Steele* v. *Minister of Housing and Local Government and Another* (1956) 6 P. & C.R. 386, C.A.; *R.* v. *Deputy Industrial Injuries Commissioner, ex p. Jones* [1962] 2 Q.B. 677; [1962] 2 W.L.R. 1215; [1962] 2 All E.R. 430, D.C.; *Kanda* v. *Government of Malaya* [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.; and *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.) applied.

(2) That the receipt of further information in the absence of the applicants after the close of the inquiry in breach of the rules of natural justice had constituted a failure to comply with the requirements of paragraph 3 (3) of Schedule 3 to the Act of 1957; and that the interests of the applicants had necessarily been " substantially prejudiced " thereby.

Errington v. *Minister of Health* [1935] 1 K.B. 249 and *Wilson* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1083; 26 P. & C.R. 232; 71 L.G.R. 442 applied.

Per Browne J. In relation to other requirements of the Act an applicant must in general prove that his interests have in fact been substantially prejudiced by a failure to comply with them. The loss of a chance of being better off in relation to a proposed order would usually be enough to constitute substantial prejudice.

MOTION.

By notice of motion dated March 15, 1973, the applicants, Hibernian Property Co. Ltd., sought, *inter alia*, an order quashing the City of Liverpool (Harrowby Street Area No. 2) Compulsory Purchase Order 1972 on the grounds (1) that the order was not within the powers of the Housing Act 1957 and the applicants were aggrieved thereby, and/or (b) the requirements of the Housing Act 1957 had not been complied with and the interests of the applicants had been substantially prejudiced thereby and they were aggrieved thereby. Particulars:

(a) The [Secretary of State] failed either properly or at all to cause a public local inquiry to be held or afford to the applicants by whom an objection to the said order had been made and not withdrawn an opportunity of appearing before and being heard by a person appointed by him for the purpose, contrary to the requirement that he should so do before confirming the said order as contained in paragraph 3 (3) of Part I of Schedule 3 to the Housing Act 1957. (b) The [Secretary of State] in confirming the said order failed to observe the rules of natural justice. (c)

The inspector appointed by the [Secretary of State] to hold a public local inquiry (i) heard evidence after the close of the said inquiry, (ii) heard evidence without informing the applicants that she proposed so to do, (iii) heard evidence in the absence of counsel or other legal representative of the applicants, (iv) heard evidence which the applicants were given no opportunity to challenge or rebut. (d) the said inspector in reporting to the [Secretary of State] and the [Secretary of State] in confirming the said order took into account the evidence given and heard as aforesaid. (e) The [Secretary of State] by reason of the matters aforesaid purported to reopen the inquiry or to cause a second inquiry to be heard without informing the applicants.

The facts are stated by Browne J.

Sir Derek Walker-Smith, *Q.C.* and *Michael Barnes* for the applicants.

Edwin J. Prince for the first respondent, the Secretary of State.

The second respondents, the Liverpool Corporation, were not represented.

Cur. adv. vult.

November 28. **Browne J.** This is an application under paragraph 2 of Schedule 4 to the Housing Act 1957 for an order quashing a compulsory purchase order made by the Liverpool City Council and confirmed by the Secretary of State under that Act. On August 3, 1972, the Liverpool Corporation made the City of Liverpool (Harrowby Street Area No. 2) Compulsory Purchase Order 1972. That order was made under sections 42 and 43 of the Housing Act 1957 and covered 115 houses alleged, and later admitted, to be unfit for human habitation (coloured pink on the plan attached to the order) and forty-nine other houses proposed to be taken as added lands (coloured grey on the plan). The applicants had an interest as freeholders or ground rent owners in all the land covered by the order (see the schedule attached to the order).

On August 9, 1972, the Liverpool Corporation gave notice of the making of the order and that it was about to be submitted to the Secretary of State for confirmation. On August 25 the applicants objected. These documents are exhibited to an affidavit by Mr. Wade [on behalf of the Secretary of State], but I do not think that I need refer to them in any further detail.

On October 3 and 4, 1972, a public local inquiry was held, the inspector being Miss D. R. Lane, A.R.I.C.S. Her report also is exhibited to Mr. Wade's affidavit, and I shall have to refer to it in more detail later. It was dated October 27 1972.

On October 5, the day after the inquiry was closed, Miss Lane inspected the order area and also some neighbouring areas which were being dealt with as improvement areas. On February 14, 1973, the Secretary of State issued his decision letter by which he confirmed the

order. On March 16 the applicants gave their notice of motion in this matter.

All the properties included in this compulsory purchase order had been included, with other adjoining property, in a compulsory purchase order made by the Liverpool City Council in 1970 but had been excluded from that order by the Secretary of State in September 1971 to give the council the opportunity of considering again the alternative possibility of taking action in respect of the properties now covered by the 1972 order as an improvement area under the Housing Act 1969. The council again decided, however, to deal with the area by compulsory purchase and demolition and therefore made the 1972 order.

Section 42 of the Housing Act 1957, under which the order was made, provides as follows.

> (1) Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(*a*) that the houses in that area are unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and (*b*) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area; . . .

then they have power to pass a resolution declaring a clearance area. I need not, I think, read section 43, which deals with the alternative methods of dealing with a clearance area, either by demolition or by compulsory purchase, nor, I think, need I read the provisions relating to added lands.

At the inquiry the present applicants, who were the main objectors, accepted that the houses coloured pink on the order map were unfit for human habitation, and the inspector so found (see paras. 60 and 220 of the report). They therefore accepted that section 42 (1) (*a*) was satisfied, and the issue was whether section 42 (1) (*b*) was satisfied. The vital question was whether these houses and the houses included in the order as added lands should be demolished or improved (see para. 61 of the report).

One of the factors which the Secretary of State considers relevant in deciding between demolition and improvement is the wishes of the occupiers. I was referred to circular no. 65 of 1969, which was issued by the Secretary of State's predecessor in connection with the Housing Act 1969 informing local authorities of the considerations which they should take into account in deciding whether to treat areas as improvement areas. Paragraph 11 of this circular says this:

> Along with the planning future and the physical potential of an area the authority should consider as a third governing factor the attitude of the inhabitants and owners. This they may

> wish to discover either from house to house visiting or by public meetings. This is something which they will need to know when deciding whether to declare an area to be a general improvement area and is the sort of information which may often help them to decide on one area as against another on the ground that the people in it are more likely to welcome and co-operate in a scheme of improvement.

This circular, as I have said, consists of advice and instruction to local authorities about how they should approach this matter, but it is plain that it is also indicating a matter which the Secretary of State himself considers relevant in deciding how to deal with an application for confirmation of a compulsory purchase order. Indeed, Mr. Prince, who appeared for the Secretary of State, accepted that the wishes of the occupiers were a relevant factor in this case.

At the inquiry two petitions and a letter from the residents in the order area were put before the inspector (see paras. 27, 29, and 35 of the report). The council relied on those petitions (see paras. 106 and 181), though the present applicants and other objectors criticised them as being unreliable (see paras. 98, 152, 156 and 176). None of the signatories of the petitions or of the letter and no occupier supporting demolition gave evidence at the inquiry (see para. 6 of Miss Lane's affidavit).

The facts as to the inspection on October 5 appear from paragraphs 210 to 219 of the report and in the affidavits of Miss Lane and of Mr. Speakman-Brown, the surveyor acting for the present applicants. Miss Lane inspected the order area and, as I have said, also four other areas nearby which were being dealt with as improvement areas. Paragraphs 210 to 216 of the report relate to the other areas and paragraphs 217 to 219 to the order area.

Miss Lane says this in her affidavit about the inspection. Paragraph 2;

> At the conclusion of the inquiry I invited representatives of the objectors (including Hibernian Property Co. Ltd.) and of the Liverpool City Council to accompany me on my inspection of the order land and also of certain other areas which were referred to in the course of the evidence as the Kensington Fields General Improvement Area, the " Flower " Streets General Improvement Area, the Shelter Neighbourhood Action Project (S.N.A.P.), Granby Street General Improvement Area, and the " Holy Land " neighbourhood. Mr. K. J. Speakman-Brown, F.R.I.C.S. was the principal representative of Hibernian Property Co. Ltd. who accompanied me during my inspection of those other areas (save as mentioned in para. 3 below) although other representatives of that company attended from time to time in addition to Mr. Speakman-Brown. The company did not accept my invitation to send a representative to accompany me on my inspection of the order land.

Paragraph 4: " My inspection took place on October 5, 1972, after I had closed the inquiry. . . ."

Mr. Speakman-Brown in his affidavit says, in paragraph 2, that he attended the public local inquiry and gave evidence on behalf of the applicants. In paragraph 3 he says that he has considerable experience of public local inquiries and of the procedure of inspections. In paragraph 4 he says:

> I agree that I accompanied Miss Lane on her inspection of areas other than the order land, and I agree that neither I nor any other representatives of the applicant[s] accompanied her on her inspection of the order land.

Then he says that he accompanied her on a visit to a particular property, about which she says that she has no recollection as to whether he was there or not.

The paragraphs of the report dealing with the inspection of the order land itself are, as I have said, paragraphs 217 to 219. Paragraph 217:

> As doubts had been expressed during the inquiry as to the validity of the residents' petitions, the occupiers of thirty-nine of the houses in the order which were inspected inside were asked whether they wished to go, or to stay if the houses were improved. Twenty-three wished to go; of these seven had been inside a house which had been improved, five were elderly and living alone and wanted to move to an old person's dwelling; one of them (a woman of seventy-three) alleged that she had been attacked in the street by two coloured men; another said she was frightened of the neighbourhood; two families (one with five children) found their houses were too small for them; one occupier said there was too much difference between the " show house " which had been improved and the other improved houses.

Paragraph 218:

> Eleven occupiers (including a lessee-occupier who had not objected to the order) said they wanted to stay, one of them on condition that the conversion was done properly; he said that some he had seen had been a shambles. Two of these occupiers said they had seen inside an improved house, one in Moses Street. One person who wished to stay and have the house improved was an old age pensioner living alone.

Paragraph 219:

> Five occupiers did not know whether they wanted to stay or to go. One was a lessee-occupier who had not objected to the order; he had been unemployed for a considerable time, had four young children and had no money with which to finance improvement. He suggested that if the streets were blocked off at the Park Way/Princes Avenue end it would stop " kerb-crawling " and give the children somewhere to play.

Going back to Miss Lane's affidavit, she says this about what she did. Paragraph 4:

> My inspection took place on October 5, 1972, after I had closed the inquiry. It is apparent from my report that certain observations were made to me in the course of my inspection but I

did not consider that in listening to such observations I was taking new evidence but merely obtaining clarification of evidence given at the inquiry.

Paragraph 5: " The information in paragraphs 212, 213 and 214 of my report "—pausing there, those are the paragraphs dealing with the other areas, not the order area—

> was given to me by a representative of Hibernian Property Co. Ltd. or in response to question[s] by him of the occupier. After the complaint by the daughter of the tenant of 76, Eversley Street Mr. Speakman-Brown observed that the incident had not been rehearsed.

I do not understand the relevance of that observation. Mr. Speakman-Brown says in his affidavit that he did make it.

Paragraph 6 of the affidavit:

> The information given to me by the occupiers of thirty-nine of the houses in the order (paras. 217, 218, and 219 of my report) was received in the absence of any representative of the Hibernian Property Co. Ltd. because no representative accepted the invitation to accompany me on my inspection of the order lands. I deliberately asked the questions of those occupiers because no such person had actually been called as a witness by the council or by Hibernian Property Co. Ltd., although two petitions and a letter urging clearance rather than improvement had been mentioned in evidence (paras. 27, 29 and 35 of my report); and in the council's reply its representatative had referred to the alleged wishes of local residents in favour of clearance (para. 106 of my report). In addition, comment had been made on behalf of Hibernian Property Co. Ltd. (para. 98 of my report) and another objector (paras. 152 and 156 of my report), and in all the circumstances I considered it proper to ask the questions referred to in paragraph 217 of my report. In doing so I had in mind paragraph 11 of the circular of the Ministry of Housing and Local Government No. 65/69 which had been referred to by counsel representing Hibernian Property Co. Ltd. during the inquiry.

That of course, is the paragraph which I have already read.

Paragraph 7 of the affidavit:

> I took the view that the answers to my questions to the thirty-nine occupiers were not unfavourable to Hibernian Property Co. Ltd. and that it was right and proper to include those answers in my report.

Mr. Speakman-Brown says this in his affidavit. Paragraph 5:

> The reason for my not accompanying Miss Lane on her inspections of the order land is as follows. I understood that the purpose of an inspection was for the inspector to view the properties in question. I further understood that the sole function of any person accompanying the inspector on such inspection was to assist the inspector in finding and seeing anything she wished to see and to point out any physical feature

> mentioned in evidence at the inquiry. In respect of the order land there was no issue between my clients and the second-named respondents

—that is, the corporation—

> as to which houses were or were not technically unfit according to the statutory criteria; consequently there was no assistance I could give on this point. The only issue which directly concerned the physical condition of the order properties was the question of stability and possible subsidence. During the course of the inquiry I visited the area with Mr. J. T. Rimmer, the senior public health inspector of the Liverpool Corporation, to investigate this issue, and we agreed a statement on the issue which was presented in evidence to the inquiry as an agreed statement. Thus there was no matter on which I thought I could assist Miss Lane on her inspection of the order lands and I therefore did not accompany her on that part of her inspection.

Paragraph 6:

> I did accompany Miss Lane on her inspection of the other areas because they had been referred to in my evidence and I felt there might be ways in which I could assist such as by pointing out areas or properties referred to in the evidence.

Paragraph 7:

> I had no idea or intimation that on her visit to the order lands Miss Lane intended to take evidence from thirty-nine occupiers and to classify and evaluate that evidence. I have never before heard of an inspector taking further evidence in this way after the close of the inquiry. Had I known that Miss Lane intended to take and record further evidence in the manner described in paragraphs 217 to 219 of her report, I would have protested and would have informed the applicants' legal advisers at once.

Going back to the inspector's report, her conclusions are stated in paragraphs 220 to 238. She found in paragraph 221 that it was physically possible for the houses to be made fit and improved. She then dealt, I think very fairly, with the argument as between clearance and improvement, referring to the economic and social arguments and the question whether improvement was in fact likely to take place if the order was not confirmed. I think that I need only read paragraphs 224 and 235, because they were relied on by Sir Derek Walker-Smith. Paragraph 224:

> It is apparent from the experience with the "Holy Land" improvements carried out by Grant Improvements (Liverpool) Ltd. that improvement, as well as clearance, can itself cause considerable distress. It is also apparent from the "Flower Streets" improvements that this can be minimised by good management and mutual respect between occupiers and improvers. There is unfortunately little evidence of such respect between the freeholders and occupiers of the houses in the order.

It is that last sentence to which Sir Derek particularly referred. Paragraph 235:

> If the order is not confirmed there is, therefore, no certainty that ninety-five houses (fifty-eight of which are unfit) will be improved. In my view, the improvement of the houses in the order is likely to be slow and only achieved at the expense of considerable stress to the lessees and occupiers. There appear to be no social advantages of improvement over clearance and the economic advantages are doubtful.

The inspector's conclusion, in paragraph 238, is:

> In my view, therefore, the most satisfactory method of dealing with conditions in the area is the demolition of all the buildings in the area; the council are justified in acquiring all the land in the area in order to secure satisfactory clearance and redevelopment and the acquisition of all the added lands is reasonably necessary to give a cleared area of convenient shape and dimensions or for the satisfactory development or use of the cleared area.

Accordingly, she recommended in paragraph 239 that the compulsory purchase order be confirmed without modification. That recommendation was accepted by the Secretary of State. I need not, I think, read the whole of the decision of February 14, 1973. I should, however, refer, I think, to three paragraphs. Paragraph 3:

> The objections to the order were on the grounds that the houses should be improved and not demolished. Some objectors claimed that their houses were not unfit.

Paragraph 5:

> It is noted, from the evidence submitted at the inquiry, that the council instituted a fresh survey of the excluded properties and in March 1972 examined the courses open to the council for dealing with the area other than by clearance.

That reference to the excluded properties is of course to the properties that had been excluded from the 1970 order.

> The survey revealed that the houses had deteriorated further since the survey in 1969 and that a number were suffering from severe settlement. Whilst the results of the survey did not prove that area improvement was impossible the council decided that having regard also to other relevant factors the best way of dealing with the conditions was the demolition of all the properties. They were supported in this view by a petition from residents in the area.

Paragraph 12:

> The Secretary of State is satisfied that following his decision on the earlier order the council have considered the possibility of improvement area action. He appreciates the steps some of the objectors have already taken in an attempt to secure the improvement of their properties but he accepts the inspector's conclusion that taking the area as a whole improvement of the houses could be a prolonged process causing inconvenience or

even stress to many residents; that there are no apparent social advantages of improvement over clearance; and that the economic advantages are doubtful. He also accepts the inspector's recommendation and has decided to confirm the order without modification.

This application comes before me under paragraph 2 of Schedule 4 to the Housing Act 1957. This paragraph provides:

> If any person aggrieved by such an order as aforesaid . . . desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation of the order . . . make an application for the purpose to the High Court, and where any such application is duly made the court . . . . (ii) if satisfied upon the hearing of the application that the order . . . is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order . . . either generally or in so far as it affects any property of the applicant.

The powers laid down in this paragraph are my only powers on this application, and I am in no way concerned with the merits of the controversy between demolition and improvement.

The applicants, in their notice of motion, allege a number of points. Their first ground is that " (a) the first-named respondent " —that is, the Secretary of State—

> failed either properly or at all to cause a public local inquiry to be held or afford to the applicants by whom an objection to the said order has been made and not withdrawn an opportunity of appearing before and being heard by a person appointed by him for the purpose, contrary to the requirement that he should so do before confirming the said order as contained in paragraph 3 (3) of Part I of Schedule 3 to the Housing Act 1957.

That paragraph provides as follows:

> If any objection duly made is not withdrawn, the Minister shall, before confirming the order, either cause a public local inquiry to be held or afford to any person by whom an objection has been duly made as aforesaid and not withdrawn an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose, and, after considering any objection not withdrawn and the report of the person who held the inquiry or of the person appointed as aforesaid, may, subject to the provisions of this Part of this Schedule, confirm the order with or without modification.

Ground (b) of the applicants' notice of motion is that the first-named respondent in confirming the order failed to observe the rules of natural justice.

> (c) The inspector appointed by the first-named respondent to hold a public local inquiry (i) heard evidence after the close of

> the said inquiry, (ii) heard evidence without informing the applicants that she proposed so to do, (iii) heard evidence in the absence of counsel or other legal representative of the applicants, (iv) heard evidence which the applicants were given no opportunity to challenge or rebut. (d) The said inspector in reporting to the first-named respondent and the first-named respondent in confirming the said order took into account the evidence given and heard as aforesaid. (e) The first-named respondent by reason of the matters aforesaid purported to reopen the inquiry or to cause a second inquiry to be heard without informing the applicants."

All those grounds, of course, refer to the information obtained by the inspector during her inspection of the order land and set out in paragraphs 217 to 219 of her report.

Sir Derek Walker-Smith, for the applicants, puts his application on both the grounds which are open to him under paragraph 2 (ii) of Schedule 4 to the Act of 1957. He says that the confirmation of the compulsory purchase order was not within the powers of the Act because the inspector and the Secretary of State failed to observe the rules of natural justice, and, further or in the alternative, that the interests of the applicants have been substantially prejudiced by failure to comply with the requirements of paragraph 3 (3) of Schedule 3 as to the public local inquiry.

As to the natural justice point, it is common ground that at all times relevant to this application the inspector and the Secretary of State were acting in a quasi-judicial capacity and that they were therefore bound to observe the rules of natural justice, including in particular the rule embodied in the maxim *audi alteram partem*. Mr. Prince, for the respondents, did not dispute that in general terms a party to an issue of the kind involved in this case must be heard and given an opportunity of dealing with the case against him. It seems to me, therefore, that I need only refer to a few of the authorities on this point cited by Sir Derek Walker-Smith.

I shall begin with the well known and often approved general statement of Lord Loreburn L.C. in *Board of Education* v. *Rice*.[2] I quote this partly because Mr. Prince relied strongly on the last few words which I am going to quote. Lord Loreburn L.C. said this[3]:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to

[2] [1911] A.C. 179; 9 L.G.R. 652, H.L.(E.).
[3] *Ibid.*, 182.

> ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

It was those last few words which Mr. Prince particularly stressed.

The next case to which I am going to refer is *Errington* v. *Minister of Health.*[4] That was a case relating to a clearance order under the Housing Act 1930, and I need not go into the facts in any detail because they are well known. In substance, what had happened was that after the close of the local inquiry the inspector and two officials of the Ministry had gone down to the area concerned and met the representatives of the local authority, the acquiring authority, had a discussion with them and gone to see the site with them, the objectors not being present either at that meeting or at the inspection. For present purposes the relevant provisions of the Housing Act 1930 are identical with the provisions of the Housing Act 1957 which are contained in paragraph 3 (3) of Schedule 3 and paragraph 2 (ii) of Schedule 4.

The Court of Appeal in that case consisted of Greer L.J., Maugham L.J. and Roche J. I shall come back to the judgment of Greer L.J. later. Maugham L.J., however, said this[5]:

> The Solicitor-General does not seek to object to the view that that public inquiry is of the nature of a quasi-judicial inquiry in which, although the rules of procedure of a court of justice may not be followed, the ordinary principles of fair play have to be observed. As I think, the question whether the Minister, after such an inquiry has been held and after a report has been made, can then proceed—I am not dealing with the facts for the moment—to hear *ex parte* statements from one side or the other in the absence of those whose obvious desire it would be to controvert them is precisely similar to the question whether, after holding a public local inquiry or after having caused a public local inquiry to be held of a quasi-judicial character, the Minister can then hold a private inquiry of his own to which one party only is admitted. That seems to me to be a very extraordinary result, and one which I should be very slow to approve . . . . I am dealing with a case where something which is the subject of an objection definitely put and urged before the gentleman who holds a public inquiry is before the Minister after the report has been made, and with regard to which he subsequently obtains *ex parte* information from one side or the other.

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[4] [1935] 1 K.B. 249; 32 L.G.R. 481, C.A.
[5] *Ibid.*, 272–273.

> My conclusion is that although the act of affirming a clearance area order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in *Board of Education* v. *Rice*.[6]

Then he said[7]:

> In my judgment, as I have already said, the officials committed an error of judgment in allowing the results of the public inquiry to be supplemented by a quasi private inquiry, plus *ex parte* statements made to the Minister, without any repudiation of that being the right course. My view is founded on the fact that the statements I have referred to were statements in reference to the main question which was dealt with at the public inquiry—namely, that of demolition or reconditioning. Having formed that conclusion, I think it would follow, subject to an argument which was based on section 11 of the Housing Act, 1930, that prima facie the order of the Minister ought not to be allowed to stand. Section 11 provides a substitute for proceedings by prohibition or certiorari . . . ,

section 11 of the Act of 1930 being the section corresponding to paragraph 2 of Schedule 4 to the present Act. I shall have to come back to that case again later. I am not going to say any more at the moment except that Roche J.[8] agreed as to the principles applicable to the case.

The next case is *Steele* v. *Minister of Housing and Local Government and Another*.[9] That case related to a compulsory purchase order under the Housing Act 1936 and to proceedings under the provisions of that Act corresponding to the provisions under which this application is made. In fact, the application failed in that case, but there are two statements, one by Denning L.J. and one by Parker L.J., which seem to me to be very helpful.

Denning L.J. said this:[10]

> We well know the arguments in these matters. In a judicial matter such as this, it is infinitely better, whenever it can be done, that the man who hears the evidence and the arguments and sees the place should be the very person to decide; and conversely, the person to decide ought to be the person who hears the evidence and the arguments and sees the place. That is the best way of doing these things; but that is not the way which Parliament has prescribed. Parliament has prescribed that the inspector shall hold the inquiry and the Minister shall decide; and there shall be a report passing from the inspector to the Minister. One man hears. Another decides. In this

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[6] [1911] A.C. 179.
[7] [1935] 1 K.B. 249, 278.
[8] *Ibid.*, 280–281.
[9] (1956) 6 P. & C.R. 386, C.A.
[10] *Ibid.*, 392.

> situation, the courts have gone as far as they can to see that everything is conducted judicially. The inspector on his part must act judicially. He must only hear evidence and inspect the property when both sides are present. He must not take into consideration extrinsic information which comes to his knowledge in the absence of one party or the other. The Minister on his part must also act judicially. He must only consider the report and the material properly before him. He must not act on extrinsic information which the houseowner has had no opportunity of contradicting. Thus far have the courts gone; but they cannot go as far as Mr. Lawson asks us to go today.

Parker L.J. said this[11]:

> The question how far a tribunal sitting in what is called usually a quasi-judicial capacity must act judicially as understood in a court of law has, of course, been fully considered in *Board of Education* v. *Rice*[12] and *Local Government Board* v. *Arlidge*,[13] and I do not stop to refer to what are now the classic passages on this subject in the speeches of Lord Loreburn L.C. in the former case and Lord Haldane in the latter. I would only add a reference to what Lord Selborne L.C. said in an earlier case—*Spackman* v. *Plumstead District Board of Works*.[14] In the course of his opinion Lord Selborne L.C. said[15]: "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view." I would add to that that such a person ought not to hear evidence from one party in the absence of the other, or to receive and pay attention to material, however it comes before him, unless the parties have had an opportunity of commenting upon it.

The last case to which I am going to refer on this point is another judgment of Lord Parker C.J. in *R.* v. *Deputy Industrial Injuries Commissioner, ex p. Jones*.[16] The passage which I am going to quote reads[17]: "Without considering that decision"—that is, the decision of the deputy commissioner—

> any further for a moment, it seems to me perfectly plain that here was a quasi-judicial tribunal, namely, the deputy commissioner, deciding a case *inter partes* and required to arrive at his decision after an oral hearing. Accordingly, on well known principles, such a tribunal is not entitled, apart from

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[11] *Ibid.*, 398–399.
[12] [1911] A.C. 179.
[13] [1915] A.C. 120; 12 L.G.R. 1109, H.L.(E).
[14] (1885) 10 App.Cas. 229, H.L.(E.).
[15] *Ibid.*, 240.
[16] [1962] 2 Q.B. 677; [1962] 2 W.L.R. 1215; [1962] 2 All E.R. 430, D.C.
[17] [1962] 2 Q.B. 677, 685–686.

> express provision, to continue privately to obtain evidence between the end of the oral hearing and its decision without notifying the parties thereafter of the advice or information received, so as to give the parties an opportunity of having a further hearing if need be, or, at any rate, commenting on the information and making their final submissions thereon. That was certainly not done in this case because, without any further communication with the parties, the deputy commissioner gave his written and reasoned decision.

What had happened there was that the deputy commissioner had consulted a medical specialist after the end of the hearing and then acted on the opinion which the specialist had given him.

In the present case the very frank and helpful affidavit of the inspector makes it clear that after the closing of the inquiry she did obtain further information about the wishes of occupiers as between demolition and improvement; that she obtained it by a deliberate course of questioning because she felt that the evidence on this point at the inquiry had been left uncertain or incomplete; and that she obtained it in the absence of any representative of the applicants, although she had invited Mr. Speakman-Brown to attend the inspection.

Mr. Prince said, however, (a) that there was no infringement of the rules of natural justice unless the information obtained in the absence of the applicants was not only relevant but also " prejudicial to their view," relying on the words which I have quoted from the speech of Lord Loreburn L.C. in *Board of Education* v. *Rice*[18]; that in this case the information obtained by the Inspector was not prejudicial to the applicants' case because, as Mr. Prince put it, it did not " do them any harm in the context of this inquiry "; it did not make it more likely that they would fail in their objection or less likely that they would succeed; (b) that the facts that the inspector invited Mr. Speakman-Brown to attend the inspection and that he chose not to do so distinguishes this case from all the authorities cited.

As to (a), I have no doubt (and Mr. Prince accepts) that the information obtained by the inspector was relevant to the main issue in this case—whether the admittedly unfit houses should be dealt with by demolition or by improvement. As I have already said, the Secretary of State clearly regards the wishes of the occupiers as a relevant factor on this question (see again para. 11 of circular 65/69), and there had been evidence at the inquiry about the occupiers' wishes in the form of the petitions and the letter on which the council relied but which the objectors criticised as unsatisfactory (see the paragraphs of the inspector's report to which I have already referred: 27, 29, 35; 106 and 181; and 98, 152, 156 and 176).

I am not satisfied that the applicants have in fact been prejudiced by the information obtained by the inspector in answer to her

[18] [1911] A.C. 179, 182.

questions to the occupiers and set out in paragraphs 217 to 219 of the report. I do not accept Sir Derek Walker-Smith's suggestion that the Secretary of State or his advisers would be influenced by the crude arithmetic that twenty-three out of the thirty-nine occupiers wanted to go rather than stay in improved houses. It appears from paragraph 217 of the report that only seven out of the twenty-three had been inside an improved house and that nine of them wanted to move for reasons which had nothing whatever to do with the choice between demolition and improvement. If, however, the people who gave this information to the inspector had been called to give evidence at the inquiry the applicants would obviously have wanted to cross-examine them, and no one can now say what the results of such cross-examination would have been. No doubt counsel for the objectors, now the applicants, would also have wished in his final speech to the inspector to comment on that evidence.

In my judgment the question is not whether the information obtained by the inspector did in fact prejudice the applicants by contributing to the decision of the Secretary of State to confirm the compulsory purchase order but whether there is a risk that it may have done so.

In *Kanda* v. *Government of Malaya*[19] the Judicial Committee of the Privy Council, in giving their advice, said this (the board in that case consisted of Lord Denning, Lord Hodson and Lord Devlin, and the advice of the Board was delivered by Lord Denning)[20]:

> In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua*: and *Audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard. If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education* v. *Rice*[21] down to the decision of their Lordships' Board in *Ceylon University* v. *Fernando*.[22] It follows, of course, that the judge

[19] [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.
[20] [1962] A.C. 322, 337-338.
[21] [1911] A.C. 179, 182.
[22] [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C.

> or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.

It is obviously impossible for the Court to investigate what weight the various relevant factors had in inducing the Secretary of State to decide to confirm this order. The wishes and views of the occupiers were, however, a relevant factor and there is no means of knowing what effect the information obtained by the inspector from occupiers after the close of the inquiry may have had on the views expressed by her in the last sentence of paragraph 224 and in paragraph 235 of her report which I have read and by the Secretary of State in paragraph 12 of his decision letter, or on the decision of the Secretary of State. The applicants had, however, no chance of cross-examining or commenting on that information, and in my view there is clearly a risk that it may have influenced the decision.

As to (b), it is true that in none of the cases cited was there an unaccepted invitation to the other party to be present on the occasion when the information complained of was obtained. On an inspection like that in this case, when the inspector is visiting a lot of inhabited houses, there is an obvious danger that things will be said to the inspector by the occupiers, and I cannot help feeling that it would have been wise if some representative of the applicants had been present. This was not, however, a case of something being blurted out by an occupier. The information came as a result of deliberate questioning by the inspector to fill up a gap in the evidence at the inquiry (see para. 6 of her affidavit). I accept Mr. Speakman-Brown's explanation of his failure to accept the invitation (see paras. 5 and 7 of his affidavit); there is no contradiction of his statement that he had no idea that the inspector intended to take further evidence, and in my view the giving of the invitation did not justify the inspector's action.

In my judgment, therefore, there was a failure to observe the rules of natural justice.

If I am right in holding that there was a failure to observe the rules of natural justice, is the effect that the confirmation was " not within the powers of this Act " within the meaning of paragraph 2 (ii) of Schedule 4? In *Errington* v. *Minister of Health*[23] Greer L.J. held that the order was not within the powers of the Act because there had been a failure to comply with what is now paragraph 3 (3) of Schedule 3 to the Act of 1957. That is the position relating to the

[23] [1935] 1 K.B. 249.

public inquiry. Greer L.J. quoted the corresponding provision of the Act of 1930 and said[24]:

> It seems to me that that involves the proposition that the matters there mentioned are the only matters which he is entitled to consider, and that if, instead of directing his mind solely to those matters, he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given *ex parte* afterwards without the owners having any opportunity whatever to deal with that evidence, then it seems to me that the confirming order was not within the powers of the Act. It is admitted that though the draftsmanship of section 11 (3) is not perfect, the order there referred to is the confirming order and not the original order. In my judgment it is true to say that an order made by a quasi-judicial officer based on materials which are not the materials referred to in paragraph 4 of Schedule 1 is an order which is not within the powers of the Act, having regard to the proposition which has been established in common law that a quasi-judicial officer in exercising his powers must do it in accordance with the rules of natural justice, that is to say, he must hear both sides and must not hear one side in the absence of the other.

Although, however, in my view Greer L.J. was clearly saying that what had happened was not within the powers of the Act, I think that Maugham L.J. and Roche L.J. put their decision on the other branch of what is now paragraph 2 (ii) of Schedule 4, that is, substantial prejudice by failure to comply with requirements.[25] I shall have to come back to their judgments later.

On principle, however, it seems to me that a decision reached after proceedings in which there has been a failure to observe the rules of natural justice is void, or a nullity, and must therefore be beyond the powers of the Act. In *Burwood* v. *Secretary of State for the Environment*[26] Mr. Gordon Slynn, appearing for the Secretary of State, conceded that if the inspector and the Secretary of State failed to observe the principles of natural justice the decision (in that case on a planning appeal) was a nullity and beyond the powers of the Secretary of State: see the transcript of my judgment at p. 11G-H. I acted on that concession and quashed the decision. The concession is, of course, not binding on the present respondents, but in my judgment it was rightly made by Mr. Slynn.

I think that this view is supported by what was said by three members of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission.*[27] This case was not in fact cited to me, but it is a case well known to me because I gave the judgment at first instance. Lord Reid said this[28]:

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[24] *Ibid.*, 268.
[25] See *ibid.*, 278–280, 282.
[26] Unreported (1972).
[27] [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.).
[28] [1969] 2 A.C. 147, 171.

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice.

Lord Pearce said[29]:

> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

Then he deals further with the question of nullity on page 196 which I do not think I need read at this stage.

Lord Wilberforce said this[30]:

> In every case, whatever the character of a tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter. Equally, though this is not something that arises in the present case, there are certain fundamental assumptions, which without explicit restatement in every case, necessarily underlie the remission of power to decide such as (I do not attempt more than a general reference, since the strength and shade of these matters will depend upon the nature of the tribunal and the kind of question it has to decide) the requirement that a decision must be made in accordance with principles of natural justice and good faith. The

[29] *Ibid.*, 195.
[30] *Ibid.*, 207.

> principle that failure to fulfill these assumptions may be equivalent to a departure from the remitted area must be taken to follow from the decision of this House in *Ridge* v. *Baldwin.*[31]

That was a case in which the majority of the House held that the decision of the Foreign Compensation Commission was a nullity because there had been a failure to observe the rules of natural justice. Lord Wilberforce does say[32] that he does not like the use of the word " nullity," but this, as it seems to me, is a matter of words and not of substance.

Lord Pearson did not deal with the matter in any detail, but he said[33] that he agreed with the opinions of the three Lords from whose speeches I have already read extracts as to the general nature of the court's supervisory functions.

In my judgment, therefore, the order of the Secretary of State confirming this compulsory purchase order was not within the powers of the Act.

In my judgment, the decision of the majority of the Court of appeal in *Errington* v. *Minister of Health*[34] binds me to hold also that the interests of the applicants have been substantially prejudiced by a failure to comply with the requirements of paragraph 3 (3) of Schedule 3 to the Act of 1957. In *Errington's* case, all three members of the court held that by receiving further information in the absence of the objectors after the close of the public inquiry the Minister had failed to comply with the requirements of paragraph 4 of Schedule 1 to the Housing Act 1930, which, for present purposes, is identical to paragraph 3 (3) of Schedule 3 to the Act of 1957 (see *per* Greer L.J.,[35] Maugham L.J.[36] and Roche L.J.[37]).

As to " substantial prejudice," Maugham L.J. said this[38]:

> The only question that remains is whether the court should come to the conclusion that the interests of the applicants have been substantially prejudiced by what has been done, because the quashing of the order is, of course, a matter of discretion of the Court. I do not think it has been proved that the statements which were made to the Ministry in fact affected the decision of the Minister, or of his officials, and I certainly have no reason to doubt that the officials were acting in what they thought to be the public interest. On the other hand, it seems to me a matter of the highest possible importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing

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[31] [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66; 61 L.G.R. 369, H.L.(E.).
[32] *Ibid.*, 208.
[33] *Ibid.*, 215.
[34] [1935] 1 K.B. 249.
[35] *Ibid.*, 268.
[36] *Ibid.*, 279.
[37] *Ibid.*, 282.
[38] *Ibid.*, 279–280.

> unfair has been done in the matter, and that *ex parte* statements have not been heard before the decision has been given without any chance for the persons concerned to refute those statements. That seems to me a matter of the greatest possible public importance, and if I am right in the view that I have expressed as to the functions of the Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case, as I understand them to be, the Court has no option but to quash the order, . . .

Roche L.J. said[39] that manifestly there had been a breach of the requirements of paragraph 4 of Schedule 1 to the Act of 1930. and he went on:

> It follows that the remedy prescribed by section 11 of the Act is open to the appellants, and upon the topic of whether the interests of the appellants were substantially affected by what was done, it seems to me for the reasons assigned by Maugham L.J. that they were so affected, and little if any argument has been presented to the Court to show that they were not so affected.

I confess that I am not clear as to the basis of the decision of Maugham and Roche L.JJ. It *is* clear that they held that it was not necessary for an applicant to prove that failure to comply with the requirement there in question had in fact affected the decision. I think that they must have held that a failure to comply with that particular requirement, which was also a failure to observe the rules of natural justice, must necessarily cause substantial prejudice to the interests of the applicant.

If that is so, it must also apply to the present case, where the provision with which there has been a non-compliance is identical to the provision which was being considered in that case. It seems to me that I must hold that it does apply even though I am not satisfied that in fact the information obtained by the inspector in the present case did affect the decision.

If that was the basis of the decision of the majority in *Errington's case*,[40] I wish to make it clear that in my view that decision does not apply generally to failures to comply with other requirements of the Act [of 1957]. In general, it seems to me that an applicant must prove that his interests have in fact been substantially prejudiced by the failure to comply with the particular requirement in question: see *Gordondale Investments Ltd.* v. *Secretary of State for the Environment and Another*,[41] especially *per* Lord Denning M.R.[42] This of course does not mean that the applicant must prove that the decision *would* have been different if the requirement had been complied with, which would usually be quite impossible.

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[39] *Ibid.*, 282.
[40] [1935] 1 K.B. 249.
[41] (1971) 23 P. & C.R. 334; 70 L.G.R. 158, C.A.
[42] 23 P. & C.R. 334, 340.

In my view, the loss of a *chance* of being better off in relation to the proposed order would usually be enough to constitute substantial prejudice. For example, in *Wilson* v. *Secretary of State for the Environment*[43] I held that the interests of the applicants had been substantially prejudiced by a failure to give proper notice of a proposal to give a certificate relating to an exchange of common land because they had been deprived of the opportunity of making representations or objections and of the chance that the Secretary of State would order a public inquiry (which was discretionary and not obligatory under the legislation applicable to that case).[44]

The result is that I feel compelled to quash this order under both heads of paragraph 2 (ii) of Schedule 4. I am sorry to have to do this because I suppose that the result must be that there will be further delay in dealing, either by demolition or by improvement, with over 100 houses which the applicants themselves admit are unfit for human habitation. I suppose that most judges have felt the temptation to try to find out the truth for themselves by their own investigations when the evidence at the hearing has been left in an unsatisfactory and uncertain state. When the inspector gave way to this temptation I have no doubt at all that she was acting from the highest motives. As I have said, I am not satisfied that in fact the result would have been different if these questions had not been asked.

In view, however, of the authorities to which I have referred and of the vital importance of ensuring the strictest observance of the rules which the courts have laid down as being those of natural justice, I am, in my judgment, bound to quash this order, which I accordingly do.

Application granted. Order quashed Applicants' costs against Secretary of State

Solicitors—Bower, Cotton & Bower; Treasury Solicitor.

[*Reported by Michael Gardner, Barrister.*]

[43] [1973] 1 W.L.R. 1083; 26 P. & C.R. 232; 71 L.G.R. 442.
[44] See [1973] 1 W.L.R. 1083, 1096–1097; 26 P. & C.R. 232, 247–248.

Kane v. University of British Columbia, [1980] 1 S.C.R. 1105

Supreme Court Reports

Supreme Court of Canada

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and McIntyre JJ.

1979: October 25, 26 / 1980: March 3.

[1980] 1 S.C.R. 1105 | [1980] 1 R.C.S. 1105 | [1980] S.C.J. No. 32 | [1980] A.C.S. no 32

Julius Kane, Appellant; and Board of Governors of the University of British Columbia, Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Colleges and universities — University president ordering suspension of faculty member — Appeal to Board of Governors — Appellant's withdrawal following conclusion of hearing by Board — Further facts given to Board by president in absence of appellant — Breach of natural justice — Failure to observe rule expressed in maxim audi alteram partem.

Two deans of faculties at the University of British Columbia recommended that the appointment of the appellant (K), a professor at the University, be terminated for cause, the chief complaint being that he had made improper use of the university computer facilities for personal purposes. Following a meeting called by the President of the University, at which K and his counsel were present, the deans recommended that, instead of terminating K's appointment, he should be suspended without salary for three months, and be required to make financial restitution to the University. The deans were influenced by the argument that the irregular procedures followed by K were the result of a misunderstanding rather than a deliberate attempt to deceive, and that administrative officers of the University may have been lax in discharging their duties to such a degree as to mislead K as to the proper procedures to be followed.

The President of the University acted according to the deans' recommendation. He suspended K for three months, without salary, pursuant to s. 58(1) of the Universities Act, 1974 (B.C.), c. 100, and directed him to provide a full accounting and restitution of all sums due the University.

K appealed to the Board of Governors of the University, pursuant to s. 58(3). K did not question the fact that he had used the university computer for his own purposes, but felt that he should not be suspended for doing so. The President attended the meeting as a member of the Board. Section 61 of the Universities Act provides that the President is a member of the Board "and shall attend its regular meetings."

K and his counsel were heard by the Board. K answered questions directed to him by members of the Board. During the hearing, the President of the University responded to questions directed to him by Board members, but did not ask questions of K or his counsel.

At the conclusion of the hearing, the chairman requested K and his counsel to leave so that the Board might deliberate. Following an adjournment for dinner, the Board deliberated, the University President being present throughout. The President did not participate in the discussions. Nor did he vote upon the resolution. He did, however, answer questions directed to him by Board members. The Board approved the three-month suspension of

K, without salary, and the order for a full accounting and restitution of all sums due to the University for the use of the computer for private and commercial affairs.

K petitioned the Supreme Court of British Columbia for an order that the Board resolution be quashed, pursuant to the Judicial Review Procedure Act, 1976 (B.C.), c. 25. The petition was dismissed. A majority of the British Columbia Court of Appeal dismissed an appeal from the trial judgment. K appealed from the judgment of the Court of Appeal to this Court.

Held (Ritchie J. dissenting): The appeal should be allowed.

Per Martland, Pigeon, Dickson, Beetz, Estey and McIntyre JJ.: The submission which was based upon the fact that the President testified or gave evidence during the postprandial session in the absence of K and that this amounted to a breach of the principles of natural justice and a failure to observe the rule expressed in the maxim audi alteram partem was accepted. Applying the following principles, the appeal must be allowed.

1. It is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a University, sitting in appeal, pursuant to legislative mandate.

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake. A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views.

5. Unless expressly or by necessary implication empowered to act ex parte, an appellate authority must not hold private interviews with witnesses or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny.

6. The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so.

The Board was under an obligation to postpone further consideration of the matter until such time as K might be present and hear the additional facts adduced; at the very least the Board should have made K aware of those facts and afforded him a real and effective opportunity to correct or meet any adverse statement made. In the event, the Board followed neither course. The Board heard the further facts, deliberated, and ruled against K. In doing so, it made a fundamental error. The danger against which the Courts must be on guard is the possibility that further information could have been put before the Board for its consideration which affected the disposition of the appeal.

Per Ritchie J., dissenting: K knew from the outset exactly what it was that he was charged with, and he had an opportunity to present his case and to examine the witnesses against him. It could not be suggested that the President decided to wait until K was absent before providing the members of the Board with facts prejudicial to K, what the allegations really were and the reasons why the penalty was reduced from termination to suspension. If this had been the case there would indeed have been a grave breach of good faith on the part of the President and other Board members and a denial to the appellant of the fundamental right to be heard in his own defence in breach of the elementary principles of natural justice.

The statement contained in a letter from a member of the Board to the counsel for the University to the effect that the President provided the Board with necessary facts without in any way discussing the merits of the appeal, was too slender a thread upon which to support an accusation of such gravity against men of presumed integrity acting under a statutory authority.

Cases Cited

[Local Government Board v. Arlidge, [1915] A.C. 120; Ridge v. Baldwin, [1962] 1 All E.R. 834; Russell v. Duke of Norfolk, [1949] 1 All E.R. 109; Abbott v. Sullivan, [1952] 1 K.B. 189; Board of Education v. Rice, [1911] A.C. 179; Kanda v. Government of the Federation of Malaya, [1962] A.C. 322; Errington v. Ministry of Health, [1935] 1 K.B. 249; Re Brook and Delcomyn (1864), 16 C.B.R. (N.S.) 403; Re an Arbitration between Gregson and Armstrong (1894), 70 L.T. 1106; R. v. Deputy Industrial Injuries Commissioner, Ex p. Jones, [1962] 2 Q.B. 677; Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise, [1977] 1 S.C.R. 456; Jeffs v. New Zealand Dairy Production and Marketing Bd., [1967] 1 A.C. 551; R. v. Architects' Registration Tribunal, Ex p. Jaggar (1945), 61 T.L.R. 445, referred to.]

APPEAL from a judgment of the Court of Appeal for British Columbia [(1979), 11 B.C.L.R. 318], dismissing an appeal from the dismissal of a petition under the Judicial Review Procedure Act, 1976 (B.C.), c. 25. Appeal allowed, Ritchie J. dissenting.
David Roberts, for the appellant. G.S. Cumming, Q.C., and M.A. Cummings, for the respondent.

Solicitors for the appellant: Macrae, Montgomery, Spring & Cunningham, Vancouver. Solicitors for the respondent: Cumming, Richards, Underhill, Fraser, Skillings, Vancouver.

The judgment of Martland, Pigeon, Dickson, Beetz, Estey and McIntyre JJ. was delivered by

DICKSON J.

DICKSON J.:— Julius Kane holds tenured appointment as a professor at the University of British Columbia. On February 21, 1977, the Dean of the Faculty of Graduate Studies and the Dean of the Faculty of Science recommended that Dr. Kane's appointment be terminated for cause. It was alleged he had made improper use of University Computer facilities for personal purposes. It was further alleged that he had improperly used his National Research Council grant to support private work and to purchase hardware items not related to the purposes of the grant.

Following a meeting called by the President of the University, Dr. Douglas T. Kenny, at which Dr. Kane and his counsel were present, the Deans recommended that, instead of terminating Dr. Kane's appointment, he should be suspended without salary for three months, and be required to make financial restitution to the University. The Deans were influenced by the argument that the irregular procedures followed by Dr. Kane were the result of a misunderstanding rather than a deliberate attempt to deceive, and that administrative officers of the University may have been lax in discharging their duties to such a degree as to mislead Dr. Kane as to the proper procedures to be followed.

The President of the University acted according to the Deans' recommendation. He suspended Dr. Kane for three months, without salary, pursuant to s. 58(1) of the Universities Act, 1974 (B.C.), c. 100, and directed him to provide a full accounting and restitution of all sums due the University. Section 58 of the Act reads:

> 58. (1) The president has power to suspend any member of the teaching and administrative staffs and any officer or employee of the university.
>
> (2) Upon the exercise of the power, he shall forthwith report his action to the board with a statement of his reasons.
>
> (3) A person who is suspended under this section has a right of appeal to the board.

Dr. Kane appealed to the Board of Governors of the University, pursuant to s. 58(3). The appeal came before a regular meeting of the Board of Governors. Dr. Kane did not question the fact that be had used the university computer for his own purposes, but felt that he should not be suspended for doing so. The President attended the meeting as a member of the Board. Section 61 of the Universities Act provides that the President is a member of the Board "and shall attend its regular meetings."

Dr. Kane and his counsel were heard by the Board. Dr. Kane answered questions directed to him by members of the Board. During the hearing, the President of the University responded to questions directed to him by Board members, but did not ask questions of Dr. Kane or his counsel.

At the conclusion of the hearing, the Chairman requested Dr. Kane and his counsel to leave so that the Board might deliberate. Following an adjournment for dinner, the Board deliberated, the University President being present throughout. According to the findings of the Chambers judge, "Dr. Kenny did not participate in the discussions. Nor did he vote upon the resolution. He did, however, answer questions directed to him by Board members." The Board approved the three-month suspension of Dr. Kane, without salary, and the order for a full accounting and restitution of all sums due to the University for the use of the computer for private and commercial affairs.

Dr. Kane petitioned the Supreme Court of British Columbia for an order that the Board resolution be quashed, pursuant to the Judicial Review Procedure Act, 1976 (B.C.), c. 25.

The main thrust of the case advanced on behalf of Dr. Kane was that no man could be a judge in his own cause, and although no actual bias on the part of the President was alleged, his presence during the deliberations of the Board violated the principles of natural justice. The judge rejected this submission, being of opinion that the judgment of this Court in Law Society of Upper Canada v. French [[1975] 2 S.C.R. 767], determined the application. The judge considered that the President was in no sense an accuser or prosecutor, and the Legislature, in directing the President to attend regular Board meetings, had implicitly accepted the duplication which followed through the President making the decision to suspend and then sitting on the Board of Governors on appeal from that decision. Reference was also made by the judge to King v. University of Saskatchewan [[1969] S.C.R. 678], and to Ringrose v. College of Physicians and Surgeons of Alberta [[1977] 1 S.C.R. 814].

A majority (McFarlane and Aikins, JJ.A., Lambert J.A. dissenting) of the British Columbia Court of Appeal agreed with the Chambers judge and dismissed an appeal brought to that Court by Dr. Kane. The Court rejected the argument based upon the dual position of the University President as originator of the suspension and member of the tribunal sitting in appeal. Rejected also was a second submission, apparently not advanced expressly in the Court of first instance, impugning the presence and conduct of the University President during the deliberations of the Board, after Dr. Kane and his counsel had withdrawn. This argument rested upon the fact that the President testified or gave evidence during the postprandial session in the absence of Dr. Kane. It is contended that this amounted to a breach of the principles of natural justice and a failure to observe the rule expressed in the maxim audi alteram partem. It is to that argument that I now turn because, in my view, it is one to which the University can give no compelling answer. If this ground of appeal succeeds, as I think it must, it is unnecessary to address the argument resting upon the dual role of the President, the maxim nemo judex in causa sua, and the ramifications of the King, French and Ringrose decisions.

The evidence as to what occurred following the dinner adjournment is scant. Paragraph 7 of Dr. Kane's petition reads:

> 7. During the consideration by the Board of Governors of the said appeal leading to the said Resolution, the President, Douglas T. Kenny, was present and took part in the consideration and the discussion of the merits of the said appeal.

Dr. Kane's affidavit in support of his petition reads in part:

> 6. I am informed by the said Roberts [David Roberts, counsel for Doctor Kane] and verily believe that he was informed by a member of the Board of Governors, Mr. George Morfitt, that following the hearing of my appeal pursuant to Section 58 of the Universities Act and when the Board of Governors was considering my appeal following the hearing, the President of the University of British Columbia, Douglas T. Kenny, from whose decision the said appeal was brought, was present and took part in the discussion leading to the said Resolution.

An affidavit was filed in which Mr. Morfitt, a member of the Board of Governors, swore that during the meeting after dinner President Kenny did not participate in the discussions with regard to the petitioner. In clarification of Mr. Morfitt's affidavit, Mr. George S. Cumming, counsel for the University, wrote to counsel for Dr. Kane as follows:

> I refer you to our telephone conversation of December 14th in which you sought some clarification of the affidavit sworn by Mr. George Morfitt.
>
> Mr. Morfitt has advised me as follows:
>
> > "I note that Item 7 on page 2 of the Petition Facts states that President Kenny 'was present and took part in the consideration and discussion of the minutes [should read "merits"] of the said appeal'. While the President did provide the Board with the necessary facts relating to the Kane suspension it can be asserted that the President was at all times most careful not to take part in the consideration and the discussion of the merits of the appeal. A similar comment could be made in respect of the statement made in Item 6 of the Affidavit."
> >
> > I think it would be appropriate if this were filed with the Court on the hearing of the Petition. We can thereby avoid the necessity of any cross-examination upon affidavits.

The critical words are "... the President did provide the Board with the necessary facts relating to the Kane suspension ... " There was no cross-examination upon affidavits. The clarification which the letter sought to achieve is less than entire but this much is clear: the Board was furnished with "the necessary facts" relating to the suspension, in the absence of Dr. Kane and his counsel. In those circumstances, I do not see how the resolution of the Board can stand.

The following propositions, in my view, govern the outcome of this appeal:

1. It is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a University, sitting in appeal, pursuant to legislative mandate. The Board need not assume the trappings of a court. There is no lis inter partes, no prosecutor and no accused. The Board is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case. Members of the Board are drawn from all constituencies of the community. They normally serve without remuneration in the discharge of what is frequently an arduous and thankless form of public service. Few, if any, of the members of the Board will be legally trained. It would be wrong, therefore, to ask of them, in the discharge of their quasi-judicial duties, the high standard of technical performance which one may properly expect of a court. They are not fettered by the strict evidential and other rules applicable to proceedings before courts of law. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice: per Lord Parmoor in Local Government Board v. Arlidge [[1915] A.C. 120], at p. 140. Let me make it clear that in this appeal nothing has been said which in any way impugns the integrity or bona fides of any member of the Board of Governors of the University of British Columbia.

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [Ridge v. Baldwin [[1962] 1 All E.R. 834 (C.A.)], at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in Russell v. Duke of Norfolk [[1949] 1 All E.R. 109], at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake. Abbott v. Sullivan [[1952] 1 K.B. 189], at p. 198; Russell v. Duke of Norfolk. supra, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views". Board of Education v. Rice [[1911] A.C. 179 (H.L.)], at p. 182; Local Government Board v. Arlidge. supra, at pp. 133 and 141.

5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an appellante authority must not hold private interviews with witnesses (de Smith, Judicial Review of Administrative Action (3rd. ed.) 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in Kanda v. Government of the Federation of Malaya [[1962] A.C. 322], at p. 337, "... know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a

fair opportunity to correct or contradict them. ... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other." In Errington v. Ministry of Health [[1935] 1 K.B. 249], Greer L.J. held that a quasi-judicial officer must exercise powers in accordance with the rules of natural justice, and must not hear one side in the absence of the other:

> If ... he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given ex parte without the owners having any opportunity whatsoever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the Act. (p. 268)

The principle was summarized in the headnote in these words:

> If the Minister holds a private inquiry to which the owners are not invited or takes into consideration ex parte statements with which the owners have had no opportunity of dealing he is not acting in accordance with correct principle of justice....

In the early case of Re Brook and Delcomyn [(1864), 16 C.B.R. (N.S.) 403], Erle C.J. came to the conclusion that the law had been violated when an arbitrator brought before the umpire evidence which had never been communicated to the other arbitrator and which, consequently, one of the parties never had an opportunity of meeting by contradictory evidence. Erle C.J. referred to this as "not a point of form" but a matter of substance, and "one of the last and deepest importance". A similar case is Re an Arbitration between Gregson and Armstrong [(1894), 70 L.T. 106], in which an award was set aside at the instance of a landlord when, all of the evidence on both sides having been heard, the arbitrators on a subsequent day, before making their award, held a meeting on the farm at which the outgoing tenant was present, but not the landlord. In a much later case, R. v. Deputy Industrial Injuries Commissioner, Ex p. Jones [[1962] 2 Q.B. 677], the tribunal received evidence which was both fresh and highly prejudicial to the applicant's position. The case at bar cannot be put so strongly, but the principle to be applied is the same. Lord Parker C.J., in granting the order for certiorari, stated that a tribunal is not entitled to continue privately to obtain evidence between the end of a hearing and the reaching of decision "without notifying the parties thereafter of the advice or information received, so as to give the parties an opportunity of having a further hearing if need be, or, at any rate, commenting on the information and making their submissions thereon" (p. 686).

A recent decision of this Court which has relevance for this appeal is Pfizer Company Limited v. Deputy Minister of National Revenue for Customs and Excise [[1977] 1 S.C.R. 456], in which Pigeon J., speaking for the Court, said at p. 463:

> While the Board is authorized by statute to obtain information otherwise than under sanction of an oath or affirmation ... this does not authorize it to depart from the rules of natural justice. It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it.

Pfizer is not a case in which a tribunal heard one party in the absence of the other. It establishes, however, the principle that each party to a hearing is entitled to be informed of, and to make representations, with respect to evidence which affected the disposition of the case. See also R. v. Birmingham City Justices, Ex p. Chris Foreign Foods (Wholesalers) Ltd. [[1970] 1 W.L.R. 1428]; R. v. Barnsley Metropolitan Borough Council, Ex p. Hook [[1976] 3 All E.R. 452]; R. v. Justices of Bodmin, Ex p. McEwen [[1947] 1 K.B. 321].

6. The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. Kanda v. Government of the Federation of Malaya, supra, at p. 337. In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment. See Jeffs v. New Zealand Dairy Production and Marketing Board [[1967] 1 A.C. 551 (P.C.)], at p. 567. We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

Applying the foregoing principles, I think this appeal must succeed. The Board was aware of the possibly anomalous position of the President during the after dinner deliberations. The Chairman, vigilant in ensuring that Dr. Kane receive a fair hearing, advised the meeting that the President should not participate in discussion, nor vote. There can be no criticism of this direction. The vigilance, unfortunately, was not carried to its full length for, despite the care with which the appeal was conducted, the Board, as appears to be the case, found that it needed

additional, "necessary" facts before reaching a decision, and the President furnished those facts. It is quite immaterial whether the facts were furnished by the President or, for example, another professor at the University. It cannot improve matters that the informant was the University President.

The Board was under an obligation to postpone further consideration of the matter until such time as Dr. Kane might be present and hear the additional facts adduced; at the very least the Board should have made Dr. Kane aware of those facts and afforded him a real and effective opportunity to correct or meet any adverse statement made. In the event, the Board followed neither course. The Board heard the further facts, deliberated, and ruled against Dr. Kane. In so doing, it made a fundamental error. The danger against which the Courts must be on guard is the possibility that further information could have been put before the Board for its consideration which affected the disposition of the appeal. See R. v. Architects' Registration Tribunal, Ex p. Jaggar [(1945), 61 T.L.R. 445], at p. 447.

I would allow the appeal, set aside the judgment of the Court of Appeal, and quash the resolution passed on July 5, 1977, by the Board of Governors of the University of British Columbia relative to the appellant, with costs to the appellant in all Courts.

The following are the reasons delivered by

RITCHIE J. (dissenting)

RITCHIE J. (dissenting):-- This is an appeal from a judgment of the Court of Appeal of British Columbia dismissing an appeal from a judgment rendered at trial by Mr. Justice Macdonald whereby he dismissed the petition of the present appellant brought pursuant to the Judicial Review Procedure Act. 1976 (B.C.), c. 25, seeking to quash a resolution passed by the respondent Board of Governors on July 5, 1977, approving the suspension of the appellant from his employment as a professor at the University of British Columbia for the three months May to July 1977, inclusive.

I have had the advantage of reading the reasons for judgment prepared for delivery by Mr. Justice Dickson in this case, but as I am unable to agree with the conclusion at which he arrives on the very slender record before us, I find it necessary to express my views separately.

The judgment rendered at trial by Mr. Justice Macdonald is now conveniently reported in 82 D.L.R. (3d) at p. 494 and the reasons for judgment of the Court of Appeal of British Columbia are also now reported in 11 B.C.L.R. 318; both of these reports contain a full review of the circumstances giving rise to this appeal.

The petitioner, Julius Kane, is a professor at the University of British Columbia with tenure of appointment but it was recommended by the Deans of the Faculty of Graduate Studies and of the Faculty of Science that his employment with the University be terminated for cause, the chief complaint being that he had made improper use of the university computer facilities for personal purposes.

Professor Kane at no time disputed the allegation that he had made use of the University computer in the manner complained of, but he complained of the penalty sought to be imposed by way of termination of his services, and following a meeting which was called by the President of the University, Dr. Douglas T. Kenny, at which Kane and his counsel were present, the Deans changed their recommendation to that of suspension without salary for three months and a requirement of financial restitution to the University by Kane. President Kenny complied with this latter recommendation and issued an order in conformity with it pursuant to s. 58(1) of the Universities Act. 1974 (B.C.), c. 100 (hereinafter called the Act). Section 58 of that Act reads:

> 58. (1) The president has power to suspend any member of the teaching and administrative staffs and any officer or employee of the university.
>
> (2) Upon the exercise of the power, he shall forthwith report his action to the board with a statement of his reasons.
>
> (3) A person who is suspended under this section has a right of appeal to the board.

Professor Kane exercised the right of appeal to which he was entitled under s. 58(3) and in due course the appeal came on for hearing before a regular meeting of ten members of the Board of Governors which included the Chairman (The Honourable T. A. Dohm, Q.C.) and the President whose presence was required by s. 61 of the Act. This meeting of the Board was also attended by the Dean of Science, the Dean of Geology and the Dean of

Graduate Studies together with three other faculty members. Professor Kane together with his counsel and the counsel for the Board were also present. There is no report in the record of the proceedings at this meeting of the Board of Governors but I am prepared to adopt the account contained in the judgment of the learned trial judge at 82 D.L.R. (3d) at p. 497:

> The appeal came before the board of governors at a regular meeting on July 5th. It was one of many items on the agenda. Among the members of the board present was Dr. Kenny. When the appeal came on for hearing other persons joined the meeting, including the petitioner and his counsel, Mr. Roberts. The board heard from both Mr. Roberts and Dr. Kane. Dr. Kane was questioned by board members on points he had brought forward. During the hearing president Kenny did not ask questions of the petitioner or Mr. Roberts. He did answer questions directed to him by other members of the board and may have responded to statements made by Dr. Kane or Mr. Roberts. At the conclusion of the hearing the chairman requested Mr. Roberts and his client to leave so that the board could deliberate. The other non-members who attended for the hearing of the appeal also left. The board's deliberations upon the appeal commenced after adjournment for dinner. Dr. Kenny did not participate in the discussions. Nor did he vote upon the resolution. He did, however, answer questions directed to him by board members.

Accepting as I do this version of the proceedings, it appears to me to be plain that at the initial meeting of the Board the appellant was given full opportunity to answer all allegations against him and to present his version of the case. This opportunity was offered to him in the presence of a group of persons who as governors must be taken to have had the welfare of the University at heart, and whose chairman, the Honourable Mr. Dohm, was a former judge of the Supreme Court of British Columbia. Evidence was given by both the appellant and President Kenny and Dean Larkin, who as Dean of Graduate Studies had been one of those responsible for recommending that the appellant's employment with the University should be terminated, and I would think it to be a fair inference that all relevant facts having to do with the plight of the appellant would have been canvassed by either one or more of these witnesses at that time. It is to be remembered that the Board was acting pursuant to statutory authority and there is no suggestion anywhere in the record that the proceedings which took place at the initial hearing were not fairly and properly conducted giving due weight to the position of the appellant and the results flowing from his suspension from office.

However, the main complaint of the appellant relates to the fact that after the hearing had terminated the Chairman, President and other members of the Board adjourned for dinner and, in the absence of the appellant and his counsel, reconvened to continue their meeting which had been concerned with a number of issues in addition to the appellant's appeal and which culminated in so far as the appellant was concerned with the passage of the resolution ordering his suspension. By para. 7 of his petition the appellant complained that:

> During the consideration by the Board of Governors of the said appeal leading to the said Resolution, the President, Douglas T. Kenny, was present and took part in the consideration and the discussion of the merits of the said appeal.

The affidavit filed by the appellant in support of his petition contained the following paragraph:

> I am informed by the said Roberts and verily believe that he was informed by a member of the Board of Governors, Mr. George Morfitt, that following the hearing of my appeal pursuant to Section 58 of the Universities Act and when the Board of Governors was considering my appeal following the hearing, the President of the University of British Columbia, Douglas T. Kenny, from whose decision the said appeal was brought, was present and took part in the discussion leading to the said Resolution.

This affidavit was dated August 8, 1977, but it is C noteworthy that an affidavit was filed by Mr. Morfitt on September 6th of the same year in which he stated as follows after having described the Board meeting:

> 11. Mr. Roberts and the petitioner left the hearing. The hearing was adjourned
>
> 12. Following dinner the meeting of the Board was called to order.
>
> 13. President Kenny did not participate in the discussions with regard to the petitioner.

This latter affidavit constitutes the only sworn evidence coming from any member of the Board who was present at the after dinner meeting and if it stood alone there can be no doubt that it would support the contention that

nothing adverse was said about the appellant at that meeting. There was, however, a letter written by the solicitor for the University to Dr. Kane's counsel in which he quotes from Mr. Morfitt in part as follows:

> While the President did provide the Board with the necessary facts relating to the Kane suspension it can be asserted that the President was at all times most careful not to take part in the consideration and the discussion of the merits of the appeal.

The words which I have italicized are treated by the appellant as being potentially prejudicial to him in that they might be taken to mean that the President stated some necessary facts relating to the Kane suspension which could be construed adversely to him and he had no opportunity to answer. This submission is supported by reference to the case of Kanda v. Government of the Federation of Malaya [[1962] A.C. 322], in which the report of an inquiry containing a most damaging indictment against Inspector Kanda as an unscrupulous scoundrel was made available to the adjudicating officer before he sat to inquire into the charge while it was withheld from Kanda. It was in these circumstances that Lord Denning said at p. 337:

> It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.

The facts of the Kanda case are obviously vastly different from those with which we are here concerned. In the present case Kane knew from the outset exactly what it was that he was charged with and as I have explained, he had an opportunity to present his case and to examine the witnesses against him, and it cannot in my view be suggested that the President decided to wait until Kane was absent before providing the members of the Board with facts prejudicial to Kane, what the allegations really were and the reasons why the penalty was reduced from termination to suspension. If this had been the case there would indeed have been a grave breach of good faith on the part of the President and other Board members and a denial to the appellant of the fundamental right to be heard in his own defence in breach of the elementary principles of natural justice.

In my view the statement contained in Mr. Morfitt's letter to the effect that the President provided the Board with necessary facts without in any way discussing the merits of the appeal, is too slender a thread upon which to support an accusation of such gravity against men of presumed integrity acting under a statutory authority. I say this having in mind particularly the reasons for judgment of Mr. Justice Pennell in Re Schabas and Caput of the University of Toronto [(1974), 52 D.L.R. (3d) 495], which is referred to by Macdonald, J.A., in the present case at 11 B.C.L.R. 326 and where he said:

> Subject to evidence of actual bias, I am of the opinion that the Court should be reluctant to say that a presumption of bias can arise in so far as it relates to the personnel of a quasi-judicial body where the composition of the tribunal is specifically authorized by the Legislature: ... It is to be assumed that a body of men entrusted by the Legislature with large powers affecting the rights of others will act with good faith.

The Latin maxim "omnia praesumuntur rite acta esse ..." has been interpreted as meaning that where acts are of an official nature or require the concurrence of official persons a presumption arises in favour of their due execution. The maxim is an old one but not I think dead in the administration of our law, and in my view it expresses a principle applicable to the present circumstances. In Halsbury's Laws of England, 3rd ed., vol. 10, at p. 457 it is said:

> The presumption omnia rite esse acta (for example, that a man who has acted in a public capacity was duly appointed and has properly discharged his official duties) is common to criminal and civil proceedings.

For all these reasons, as well as for those contained in the reasons for judgment of Mr. Justice McFarlane and in the cases decided in this Court to which he has made reference, I would dismiss this appeal with costs.

Appeal allowed with costs, RITCHIE J. dissenting.

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by section 7 (1A) (*a*) which is that the written statement should contain "policy and general proposals in respect of the development and other use of land" and this was not argued before Glidewell J. Nevertheless, the change in the degree of precision by which the location of growth was identified did mean that Bradleys were placed in the difficult position of having to argue out the respective merits of fairly precise areas of land in the context of an Examination in public.

The Code of Practice for Examinations does recognise that there is a potential problem as under the heading "Objections Straddling the level of structure and local plans" it states: "4.5 Some objections may straddle the structure and local plan levels. An objection apparently related only to detail may in fact be relevant, at least by implication, to the structure plan. For example, the reference to a proposal in a structure plan may indicate its location only approximately. Existing development and the topography of the area may virtually dictate the precise position of the proposed development when it is worked out and comes to be considered at the local planning stage. People or groups who were concerned about the effect of the proposal on their property, might take the view that an objection belonged more appropriately to the local planning stage, only to find that, by stage and because the structure plan had been approved, it was then too late to argue effectively that the proposal, because of its detailed impact on properties in the area, should not be carried out at all. Thus an objection apparently concerned only with detail might in fact have an important structure plan component. 4.6 This potential difficulty has been inherent in the new system of development plans from the start. It arises from the two levels of plan required for distinct purposes. It is not created by the decision to replace the traditional inquiry into objections by the examination dealt with in the Code of Practice. It is no part of the new arrangements to discourage anyone from making an objection to a structure plan if they would consider themselves prejudiced at the local plan stage by not doing so. Safeguards to prevent such prejudice are incorporated in the new arrangements."

These safeguards are mainly concerned with ensuring that individuals are aware of the implications of Structure Plans and are therefore aware of the need to object at the Examination in Public. The safeguards do not deal with the difficulties which can arise when the Examination in Public takes on board issues which straddle the line between Structure Plans and Local Plans.

Turning to the strictly legal issues, this is the first direct legal challenge to a Structure Plan and from the outcome, it might at first seem likely to be also the last. Certainly many commentators have in the past doubted whether the courts have much of a role to play in the process of preparing and approving structure plans because of the extremely broad wording of the statutory provisions. Yet, Glidewell J.'s confirmation of that potent source of litigation "the duty to give reasons," does indicate that Structure Plans are not totally impervious to judicial review. What Glidewell J. seems to be laying down is that although the curious wording of section 9 (8) gives the Secretary of State a certain discretion as to the form and length of his statement of reasons, it does not free him from the standard obligation to ensure that those reasons are still adequate and intelligible. It would seem to follow that if the statement failed to deal with important arguments raised at the Examination or dealt with them in too cursory a way, this could render the plan or at least parts of it invalid. What is hard to explain is the unusual wording of section 9 (8), as in the case of the standard statutory duty to give reasons, the reason-giver is still left free to decide the form and the extent of the detail of his reasons as long as they remain adequate and intelligible. On the question of the observance of the rules of Natural Justice, Glidewell J.'s approach is predictable, as if ever the nature of a public hearing could be classified as "Administrative" rather than "quasi-judicial," it is an Examination in Public.

Appeal against refusal to grant planning permission—inquiry held—Inspector seen discussing case with Council's representative after close of meeting. Appeal to High Court on grounds that the interest of the applicant had been prejudiced—Natural justice—Secretary of State submitted to judgment and paid applicant's costs.

Furmston v. Secretary of State for the Environment and Kent County Council[3] (Queen's Bench Division No: SJ 289/80)

The applicant applied to the second respondent, the county council, for planning permission to build a residential development on a disused site. This application was refused on the grounds that it was contrary to the local structure plan, that it would be "an undesirable extension of the village into the countryside" and that there were no exceptional circumstances which would justify overriding these objections.

The applicant appealed to the Secretary of State for the Environment in accordance

[3] This report has been prepared by the solicitors who acted for the applicants (Gulland and Gulland, of Maidstone); the Treasury Solicitor; the Solicitor to Kent County Council.

with section 36 of the Town and Country Planning Act 1971. An inspector was appointed by the Department of the Environment to hold an inquiry. The inquiry consisted of written representations, the inspector's viewing of the site and a site meeting. The applicant's representative later learnt that an officer of the local Shepway District Council, responsible for recommending a refusal at local level, had been invited to ensure "fair play" but he did not arrive. Instead, the applicant later learnt that the inspector had spoken to him before the site meeting.

On May 15, 1980 at the site meeting both sides put forward their cases. The meeting was then closed, the inspector thanking both representatives and shaking their hands. As the applicant's representative was in the process of leaving, he noticed that the county council's representative was still talking to the inspector over an open file. He hesitated, thinking he should check what was being said, but as the meeting had been formally closed he did not feel he should. Fifteen minutes later as the applicant's representative was driving past the site, the inspector and the county council representative were seen still discussing matters, pointing at an open file.

In the event, the appeal was dismissed. The applicant thereafter appealed to the High Court by way of Originating Notice of Motion on the grounds that the inspector acted contrary to the rules of natural justice as he had discussed the matter with the district council representative before the meeting, and with the county council representative after the meeting, with no representative of the applicant present and that therefore the interests of the applicant had been substantially prejudiced.

In correspondence the first respondent, the Secretary of State, said that the discussion with the county council representative concerned the lack of co-operation in forwarding documentation on the part of the district council. The applicant replied that even if this was so, justice must not only be done it must be seen to be done. The case having reached the Warned List, the first respondent informed the applicant that it was their intention to submit to judgment. Their reasons for this were, "The Secretary of State's decision reflects his view that it may have been an error of judgment for any private conversation to have taken place in such circumstances however innocent."

In the meantime the applicant had put in an identical planning application to the district council and that was granted. To dispose of the High Court case the parties agreed that it be discontinued upon the first respondent paying the applicant's costs.

1951. *Planning permission granted to reopen disused limestone quarry subject to conditions—permission due to expire on April 1, 1979 unless quarrying operations had begun—operations commenced on March 1979—various enforcement notices and stop notices served—on appeals to the Secretary of State one enforcement notice quashed but other appeals left pending further representations on merits—local planning authority appealed to the High Court against the decision to quash the enforcement notice—developers sought declaration and mandamus to force Secretary of State to quash one of the other enforcement notices and the stop notices—Forbes J. held that the local planning authority's appeal failed, quashed the enforcement notice and granted a declaration that the stop notice was invalid and should be withdrawn—on appeal to the Court of Appeal question of whether the judge had identified the correct planning unit and the meaning of Class VIII of the General Development Order—Held that the judge had correctly identified the correct planning unit and that the building of a road can be a process incidental to an industrial undertaking*

Welsh Aggregates Ltd v. Secretary of State for the Environment and Clywd County Council[4] (Court of Appeal, Lord Lane C.J., Waller and Donaldson L.JJ., July 28, 1982)

Land at Pantasaph Clwyd, owned by the Sisters of Charity, had been used in the last century as a limestone quarry. In 1951 an application for planning permission to reopen the quarry was made. This permission was granted subject to certain conditions. The permission was not used for some time.

[4] *Konrad Schiemann*, Q.C. and *Jeremy Sullivan*, *Q.C.* (Sharpe Pritchard & Co.) appeared for Clwyd County Council; *Bernard Marder, Q.C.* and *Brian Ash* (Clement Jones & Co. Holywell); *Simon Brown.* (Treasury Solicitor).

Bradford v. McLeod

HIGH COURT OF JUSTICIARY

THE LORD JUSTICE-CLERK (ROSS), LORDS HUNTER AND DUNPARK

5 NOVEMBER 1985

Justiciary — Procedure — Summary procedure — Trial — Declinature of jurisdiction — Remarks by sheriff at social function capable of being construed as displaying bias — Refusal by sheriff to decline jurisdiction at subsequent trials — Whether justice "seen to be done" — Whether miscarriage of justice.

During the miners' strike in 1984 a conversation took place at a social function in Ayr at which the strike was discussed. A sheriff and a solicitor were both present during the conversation. At one point the sheriff made certain remarks to the effect that he "would not grant legal aid to miners". The solicitor understood this observation to be seriously made. Subsequently a miner represented by that solicitor appeared for trial before the same sheriff on a summary complaint alleging breach of the peace at a picket line. The solicitor moved the sheriff to disqualify himself from hearing that case in the light of the views he had expressed at the social function. The sheriff refused, saying that he did not propose to disregard his judicial oath. The trial proceeded. The same solicitor renewed his motion on a number of subsequent occasions at the start of other trials in which miners came before the sheriff charged with picket line offences. In each case the sheriff refused the motion and heard each trial. Fourteen miners who had been convicted by the sheriff in these circumstances sought to have their respective convictions and sentences suspended on the grounds that in each case there had been a miscarriage of justice. It was argued that the sheriff, in refusing to disqualify himself, had applied the wrong test: the question was not whether the sheriff was biased or had disregarded his judicial oath, but whether the circumstances were such as to create in the mind of a reasonable man a suspicion of the sheriff's impartiality.

Held, there had been a miscarriage of justice. The sheriff had erred in law in thinking that the sole issue was whether he was prepared to act fairly and in accordance with his judicial oath. He failed to realise that it was not enough that justice should be done, but that justice must also be seen to be done; and convictions and sentences *suspended.*

Bills of suspension

Alexander Bradford, John Fergus McCartney, Brian Cochrane, Robert Donald, Adam Steven Jardine, Anthony Black, Robert Scott, Thomas Gordon Cossar, George Speirs, James Black McMahon, Alexander O'Hara, Kenneth Thomas McDonald, John Syme and John Murdoch Fowlds each brought separate bills of suspension against John Leslie McLeod, procurator fiscal, Kilmarnock. Each complainer sought suspension of a pretended conviction and sentence imposed by Sheriff David B. Smith at Kilmarnock whereby each complainer was found guilty of a charge of breach of the peace brought against him on summary complaint at the instance of the respondent. Although each bill differed slightly in detail, the point raised in each was the same and the Crown lodged answers to each bill in similar terms.

Statement and answers

The bill by Alexander Bradford contained the following statement of facts and plea-in-law, with which there are interposed the answers and pleas-in-law by the respondent. All the other bills and answers followed a similar pattern:

1. By summary complaint at the instance of the respondent the complainer was charged that he did on 8 May 1984 at the entrance to British Steel Terminal, Hunterston, Cunninghame District, Strathclyde, conduct himself in a disorderly manner, form part of a disorderly crowd, shout and swear and commit a breach of the peace.

Ans. 1. Admitted.

2. The complainer instructed a solicitor to appear on his behalf at the sheriff court at Kilmarnock when a plea of not guilty was tendered. In due course a diet of trial was fixed for 22 October 1984.

Ans. 2. Believed to be true that the appellant instructed a solicitor to appear on his behalf. Explained and averred that the complainer appeared personally in court on 15 May 1984 represented by Mr J. R. B. Penny, solicitor, Ayr. An intermediate diet was fixed for 20 August 1984 and a trial diet for 21 September 1984. At said diet of trial on 21 September 1984, the presiding sheriff, Sheriff T. F. Russell, adjourned the trial on a joint motion to 22 October 1984, due to pressure of business. Quoad ultra admitted.

3. On 22 June 1984 at Ayr Ice Rink [Sheriff] David B. Smith, Esq., attended a social function organised by Ayr Curling Club. At or about 11.30 p.m. arrangements were made for a photograph to be taken of members of the club committee of the said curling club. The said sheriff was a member of the said committee as was J. R. B. Penny, Esq., solicitor, Ayr. The said J. R. B. Penny was a solicitor who was regularly instructed to act on behalf of members of the National Union of Mineworkers and this was known to the said sheriff.

Ans. 3. Not known and not admitted.

4. Prior to the said photograph being taken a discussion took place regarding various scenes of violence which had been shown on television in the days immediately preceding 22 June 1984 at various collieries in England. In particular, scenes showing a police officer striking a man who was understood to be a member of the National Union of Mineworkers repeatedly about the head and body with a

baton. In addition, scenes were shown portraying a person understood to be a member of the National Union of Mineworkers assaulting a police officer by kicking him with both feet.

Ans. 4. Not known and not admitted.

5. In response to the said discussion the said sheriff repeatedly stated that he knew what he would do with miners. He further stated to the said J. R. B. Penny that if any legal aid applications for cases involving miners came before him he would refuse them.

Ans. 5. Not known and not admitted.

6. On or about 11 September 1984 the said J. R. B. Penny appeared before the said sheriff at Kilmarnock Sheriff Court as agent for a member of the National Union of Mineworkers who had been charged with a breach of the peace arising from similar circumstances as in the case of the present complainer. The said J. R. B. Penny moved the sheriff to disqualify himself from considering the said case in the light of the views which he had expressed on 22 June 1984. In particular, it was submitted that the sheriff could not in the light of views expressed fairly try that accused of the crime of which he was charged and that justice could not therefore be seen to be done. The sheriff refused said motion. Thereafter the said motion and the sheriff's refusal received widespread publicity in the area of Kilmarnock and surrounding districts.

Ans. 6. Not known and not admitted what publicity was received by the said sheriff's refusal on 11 September 1984 of a motion to disqualify himself from hearing another case. Quoad ultra denied except insofar as coinciding herewith. Explained and averred that on 11 September 1984 five summary prosecutions were set down for trial before Sheriff Smith. In each case the said Mr Penny made a motion to Sheriff Smith that he should decline jurisdiction. In the first case in which said motion was made the said Mr Penny, in moving the motion, referred to the said dance held at Ayr Ice Rink by Ayr Curling Club on 22 June 1984. In addressing the sheriff the said Mr Penny alleged that the sheriff had expressed views which clearly indicated that he had made up his mind with regard to the miners who were to be appearing before him and what he intended to do with them and that he intended to refuse legal aid applications for miners on strike. During said submission the sheriff commented that he was surprised that what had passed between two committee members of the Ayr Curling Club at a social gathering late in the evening should be founded upon in said submission. The said Mr Penny alleged that what the sheriff had said had been within the hearing of other members of the committee. After hearing said submission the sheriff adjourned the court for 20 minutes. When the court resumed the sheriff commented that it was extremely unfortunate that the said Mr Penny had chosen to base his submissions on what had been a private conversation and that it had been implied he was prepared to disregard his judicial oath as a sheriff. The sheriff indicated he did not propose to disregard said oath and intimated that he was not prepared to decline jurisdiction. He accordingly refused the motion. In the four other cases set down for trial on said date, a similar motion was made in formal terms. In each case the sheriff refused the motion under reference to what he had said during the first case.

7. At the trial diet on 22 October 1984 the said agent acting for the complainer moved the sheriff to disqualify himself from considering the said case in the light of the views which he had expressed on 22 June 1984. In particular it was submitted that the sheriff could not in the light of views expressed fairly try the complainer of the crime of which he was charged and that justice could not therefore be seen to be done. It was further submitted that as a result of the widespread publicity given to the said motion on 11 September 1984, the sheriff should disqualify himself so that justice could be seen to be done. The said sheriff refused said motion.

Ans. 7. Not known and not admitted. Explained and averred that at the trial diet the agent who appeared was Mr A. Currie, solicitor, Kilmarnock. The complainer was convicted as libelled by said sheriff after trial.

8. The sheriff by the statements made by him on 22 June 1984 to the said J. R. B. Penny and to others then present disclosed that he had made up his mind regarding the guilt of members of the National Union of Mineworkers including the complainer; the complainer was and is a member of the National Union of Mineworkers; the sheriff by virtue of his statement that he knew what he would do with members of the National Union of Mineworkers disclosed that he had already made up his mind regarding cases involving members of the National Union of Mineworkers including that of the complainer; at the trial on 22 October 1984 questions of credibility between prosecution witnesses on the one hand and the complainer on the other were crucial; justice could not in these circumstances be seen to be done and in the whole circumstances the complainer was unfairly convicted.

Ans. 8. Denied.

Plea-in-law for the complainer.—That the actings of the sheriff hereinbefore condescended upon amounted to a miscarriage of justice and a conviction with the sentence following thereon should be suspended simpliciter.

Pleas-in-law for the respondent.—1. The bill being incompetent should be dismissed. 2. Esto the sheriff acted as condescended upon by the complainer (which is not known and not admitted) said actings did not amount to a miscarriage of justice and the bill should be refused.

Cases referred to

Law v. *Chartered Institute of Patent Agents* [1919] 2 Ch. 276.

Stewart v. *Agnew*, High Court, 18 June 1953, unreported.

All the bills first came before the High Court on

11 June 1985, when the court remitted to the sheriff principal to inquire and report on certain matters. Following that report all the bills were argued before the High Court on 23 October 1985.

Arguments

For the complainers.—There had been a miscarriage of justice and all the convictions should be suspended. The general rule of natural justice was that "justice should not only be done, but should be seen to be done". The effect of the remarks by the sheriff would make a reasonable man think that the sheriff had prejudged the question of whether or not the complainers should receive legal aid. It was nothing to the point that the sheriff had indicated that he did not propose to disregard his judicial oath. If the circumstances here were such as to create in the mind of a reasonable person a suspicion as to the sheriff's impartiality, that was sufficient to disqualify the sheriff even though in fact there was no bias. That test was met and so the convictions could not stand.

For the respondent.—The Crown's position was strictly neutral. The court was in a better position to make an assessment on what constituted the proper course for the sheriff. It was however significant that in three other cases miners had been acquitted after trial before this sheriff, even after two of them had been refused legal aid.

Eo die the court made avizandum. At advising on 5 November 1985 the court *passed* each bill and *suspended* each conviction and sentence.

The following opinions were delivered:

THE LORD JUSTICE-CLERK (ROSS).—In these 14 bills of suspension, each of the complainers contends that his conviction by the sheriff and the following sentence should be suspended simpliciter. The ground for seeking suspension in each case is that the actings of the sheriff amounted to a miscarriage of justice.

Each of the complainers was charged at the instance of the respondent that he did on 7 May 1984 at the entrance to British Steel Terminal, Hunterston, Cunninghame District, Strathclyde, conduct himself in a disorderly manner, form part of a disorderly crowd, shout and swear, throw material at passing lorries and commit a breach of the peace.

The background to the charges was that there was a miners' strike, and that each of the complainers was a striking miner who was said to have been involved in picketing at the British Steel Terminal at Hunterston.

In all 14 bills, the point raised is the same. However, the cases were not all heard by the sheriff on the same day, and there are some differences of detail between the cases and the allegations made therein. It was agreed, however, that the same result should follow in each case.

Put shortly, it is averred in each bill that at the trial diet, the agent for the complainer moved the sheriff to disqualify himself from considering the case in the light of certain views which he had expressed when present at a function in Ayr on 22 June 1984.

When the bills first came before this court on 11 June 1985, this court remitted to the sheriff principal to inquire and report on certain matters relating to the bills. The sheriff principal has now reported, and on 23 October 1985, counsel for the complainers moved us in each instance to pass the bill and to suspend the conviction and sentence pronounced on each complainer.

In each bill, it is averred that the sheriff had attended a social function organised by Ayr Curling Club at Ayr Ice Rink on 22 June 1984. The sheriff was a member of the committee of the club as was Mr J. R. B. Penny, solicitor, who acted for some of the complainers. A committee photograph was to be taken and prior to that being done some discussion took place in the course of which the sheriff made certain remarks. It is not necessary to go into the matter in detail, since the sheriff principal has done that in his report. More than one statement regarding miners is attributed to the sheriff in the bills, and the sheriff principal has made it clear in his report that there were discrepancies between the witnesses whom he interviewed. However the sheriff principal's conclusion on the matter is that at some point during the evening, either before or after the photographs, two gentlemen who were present expressed views hostile to certain miners arising from what they considered was happening on the picket lines. The sheriff and Mr Penny were present during this conversation although neither initiated it. At some point in the conversation the sheriff observed that he would not grant legal aid to miners. The sheriff principal states that it is not clear whether he meant miners in general or miners who had been engaged in particular activities; nor is it clear whether he specifically addressed his observation to Mr Penny or whether Mr Penny just happened to hear it. The sheriff principal adds "Beyond what may be inferred from anything he said about legal aid I cannot be satisfied that Sheriff Smith gave vent to any expression of prejudice towards miners or any group of them".

At this stage I would only refer to two other observations of the sheriff principal. He interviewed the sheriff and states that the sheriff simply cannot remember any detail of the various social conversations he had at the function. It is thus clear, that the sheriff did not deny that he made the observation quoted above regarding legal aid. The other point is this. According to the sheriff principal, both Mr Penny and one of the other two gentlemen who heard the remark, understood the observation about legal aid to be seriously made.

The first trials of any of the complainers took place on 11 September 1984. At no time prior thereto had any hint been given by Mr Penny or anyone else that Sheriff Smith was unacceptable to Mr Penny's clients as a trial judge. The first case to call was one involving a client of Mr Penny who is not one of the complainers. Before the trial began

Mr Penny made a submission to the effect that Sheriff Smith should disqualify himself from hearing the miners' cases in the light of the views which he had expressed on 22 June 1984. He stated that the views which the sheriff had expressed with regard to miners clearly indicated that he had made up his mind with regard to the miners and the accused who were appearing before him.

When this motion was made to him, the sheriff expressed himself as being flabbergasted that what had passed between two members of the committee of the curling club at a social gathering late in the evening should form the basis of such a submission in court. No doubt the sheriff considered on 22 June 1984 that he was conversing with friends on a private occasion. It may be that he was confident that others present would treat his remarks on the same basis, but, if so, his confidence in Mr Penny appears to have been misplaced. However that may be, on 11 September 1984, Mr Penny referred to the conversation in open court, and the sheriff had then to rule upon the motion which had been made.

The sheriff adjourned the court for approximately 20 minutes. Apparently he regarded the allegation which had been made as reflecting on his judicial competence and integrity. He consulted the sheriff clerk. We are informed by the sheriff principal that the sheriff clerk was in no doubt that the sheriff gave the motion anxious and judicial consideration. In the event, when he returned to court, he stated that he did not propose to disregard the judicial oath which he had taken, and he refused to decline jurisdiction. Three trials took place that day, and on subsequent dates in September and October 1984 the trials took place of the remaining complainers. Before each trial the sheriff was moved to disqualify himself from hearing the case on grounds similar to those advanced before the first trial, and in each case he refused to decline jurisdiction. In the result each of the complainers was convicted and sentenced.

For the complainers, senior counsel put at the forefront of his submissions the following proposition in the form of a question — whether there were circumstances affecting the sheriff which would create in the mind of a reasonable person a suspicion of his impartiality? If that question fell to be answered in the affirmative, senior counsel submitted that that would disqualify the sheriff even though no bias in fact existed.

I am entirely satisfied that what are commonly referred to as the rules of natural justice apply to criminal trials in this country. In the unreported case of *Stewart* v. *Agnew*, the Lord Justice-General said: "But it is vital in every criminal prosecution not only that justice should be done but that justice should be visibly done." In the same case, Lord Russell stated: "By tradition and practice it is fundamental to the proper conduct and proceedings in our criminal courts that justice should not only be done but should also be seen to be done."

This principle which applies to criminal trials also applies to persons performing judicial duties in a domestic forum. The rule was well expressed by Eve J. in *Law* v. *Chartered Institute of Patent Agents* at p. 289 where he said: "Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiassed and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists." That dictum, in my opinion, also represents the law in Scotland upon this matter.

Applying that dictum to the present case, I am clearly of opinion that the contentions of the complainers must prevail. When the solicitor for the complainers moved the sheriff to disqualify himself from considering the case, I am of opinion that the sheriff misdirected himself as to the test to be applied. The sheriff regarded the motion as reflecting on his judicial competence, and emphasised that he would observe his judicial oath. For myself, I am quite satisfied that the sheriff, in trying the various complainers, did not disregard his judicial oath. Investigations have been carried out by the sheriff principal, and there is nothing in his report to suggest that at the trials the sheriff acted unfairly. What the sheriff failed to note, however, when the motion was made that he should decline jurisdiction, was that the interest of justice required not merely that he should not display bias but that the circumstances should not be such as to create in the mind of a reasonable man a suspicion of the sheriff's impartiality.

It could hardly be suggested that a sheriff who had refused an applicant legal aid, was thereby precluded from taking the trial of that applicant. But that was not the situation here. The effect of s. 1 (7) (*a*) (ii) of the Legal Aid (Scotland) Act 1967 is that a person shall not be given legal aid in connection with summary criminal proceedings unless the court considers that in all the circumstances of the case it is in the interests of justice that legal aid should be available to the accused and grants a legal aid certificate. In his report, the sheriff principal explains that at Kilmarnock the sheriffs have a policy, under reference to the foregoing subsection, that legal aid should only be granted in summary criminal proceedings if the accused can satisfy the sheriff that he has a serious defence in advance. In that situation, the effect of the sheriff's observation on 22 June 1984 to the effect that he personally would not grant legal aid to miners is that irrespective of the circumstances his view was that no miners should receive legal aid as they had no answer to the charges. He was indicating ab ante that without considering the merits of an application for legal aid at the instance of any miner, he would refuse it.

In my opinion, a reasonable person on hearing

that the sheriff had made that observation would be likely to conclude that the sheriff was biased so far as cases involving miners were concerned. Indeed the generality of the observation is such as to create in the mind of a reasonable man a definite suspicion that the sheriff may have such a bias. As explained by Eve J. in the passage quoted above, that is sufficient to disqualify a judge from performing his duty even though as matter of fact the judge is not biased. I appreciate that at the time when the sheriff made the observation about legal aid, he had no reason to suppose that he personally would be involved in the determination of legal aid applications by any miners as he was not the nominated legal aid sheriff at Kilmarnock for the year in question. In my opinion, that does not matter since the important question is the effect that hearing the observation would have on a reasonable person. I should add for the sake of completeness that, in the absence on leave of the nominated legal aid sheriff and the other permanent sheriff at Kilmarnock, Sheriff Smith did in fact deal with and refuse legal aid applications lodged by the seven complainers represented by Mr Penny. The seven complainers subsequently made second applications for legal aid which were refused by the nominated legal aid sheriff. The remaining seven complainers (not represented by Mr Penny) had their legal aid applications dealt with and refused by the nominated legal aid sheriff who also refused second applications at their instance. It is thus clear that as regards the seven complainers represented by Mr Penny, Sheriff Smith duly acted as he had said he would when he made the observation on 22 June 1984.

In my opinion, in refusing the motion to decline jurisdiction, the sheriff acted in error. He mistakenly thought that the sole issue was whether he was prepared to act fairly and in accordance with his judicial oath; he failed to realise that it was not enough that justice should be done, but that justice must also be seen to be done. Regrettably, because of the observations which it is established that the sheriff made on 22 June 1984, justice could not be seen to be done when he conducted the trials of the complainers.

I can readily appreciate, as the sheriff principal observes, that the sheriff was naturally concerned about the impact which this matter could have on the conduct of court business. There were many trials to be taken involving miners, and if the motion made to him was well founded, then he would be disabled from carrying out part of the business of the court. None the less, once Mr Penny had made public what the sheriff had said on 22 June 1984, the inevitable consequence was that the sheriff was disabled from dealing with any case involving a miner.

As I have already indicated, having read the sheriff principal's report, I have no reason to think that the complainers did not in fact receive fair trials. Indeed we were informed by the advocate-depute that in three other instances Sheriff Smith had acquitted miners who had been charged with similar offences. That would certainly go some way towards negativing the suggestion that the sheriff was in fact biased against miners. However, as already explained, that was not the sole issue raised by the motion.

It follows that the convictions cannot stand. It is a tribute to the law in Scotland that there are so few recorded cases where it has been alleged that justice has not been seen to be done. This case may serve as a reminder that the law in Scotland is jealous of its reputation for doing justice and for ensuring that justice is seen to be done; it may also serve to remind judges that if justice is not merely to be done but is to be visibly done, they like Caesar's wife must be above suspicion.

In all the circumstances I move your Lordships to pass these bills, and to suspend the convictions and sentences passed.

LORD HUNTER.—I am in complete agreement with the opinion of your Lordship in the chair. The proposition that it is fundamental to the proper conduct of proceedings in the criminal courts of Scotland that justice should not only be done but should be seen to be done is a salutary one. The principle derived from that proposition, which is particularly applicable to the circumstances of the present cases, was well stated in the concluding words of the passage from the judgment of Eve J. in *Law* v. *Chartered Institute of Patent Agents* at p. 289, quoted by your Lordship. That statement of principle merits repetition: "if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists".

The circumstances of the present cases have been fully developed in the opinion of your Lordship, and it would be pointless to repeat them. It is sufficient to say that, if they are examined in the light of the principle to which reference has been made, only one conclusion is, in my opinion, possible. That conclusion is that the learned sheriff, in the confident and no doubt justifiable belief that he could lay aside bias, misdirected himself by concentrating on that aspect of the matter and by failing to take account of the wider considerations encapsulated in the exacting language of the principle. It is unfortunate in many ways that the matter was first raised at a relatively late stage of the proceedings, since if the sheriff had been given longer to reflect and to consult before committing himself a different course might possibly have been followed. The moral is that every judge should remind himself daily of the proposition, set forth at the outset of this opinion, since "To step aside is human".

For the foregoing reasons I agree that the bills should be passed and the convictions and sentences in each case suspended.

LORD DUNPARK.—I agree with the comprehensive opinion of your Lordship in the chair. The fact that the sheriff acquitted three other miners

charged with a similar offence satisfies me that he had not prejudged the issue in these cases. Nevertheless, as your Lordship has demonstrated, the question for us is not whether the complainers received fair trials but is whether what the sheriff said socially was sufficient to create in the minds of reasonable men the suspicion that he *might* not be impartial. In my opinion the sheriff cannot be blamed for applying the wrong test after hearing a submission at a trial diet without advance warning and without, apparently, any citation of authority. I cannot understand why the solicitor in question gave no intimation to anyone of his intention to make this submission until after the calling of the trial diets. The sensible course for him to take was to notify the sheriff clerk in good time before the trial diets that he intended to submit that the sheriff had disqualified himself from presiding at these trials. Had he done that, there would have been time for arrangements to be made for another sheriff to take these trials and thus to avoid the undesirable publicity which these cases have attracted. I trust that this advice will be followed if ever a similar situation arises in future.

Counsel for Complainers, Hope, Q.C., Bell; Solicitors for First and Second Complainers, Lindsays, W.S. (for Kerr & Wylie, Kilmarnock); Solicitors for Third, Fifth, Sixth, Twelfth and Thirteenth Complainers, Robin Thompson and Partners; Solicitors for Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh and Fourteenth Complainers, Robin Thompson and Partners (for McMillan and Howie, Ayr). — Counsel for Respondent, Bruce, Q.C., A.-D.; Solicitor, I. Dean, Crown Agent.

C. S.

Denheen v. British Railways Board

OUTER HOUSE

LORD STEWART

26 JUNE 1984

Reparation — Negligence — Damages — Necessary services rendered to injured person — Claim for payment in respect of services rendered to pursuer by her husband — Whether defenders liable — Administration of Justice Act 1982 (c. 53), ss. 7, 8 and 9.

Section 8 (1) of the Administration of Justice Act 1982 provides that the pursuer in an action of damages may claim from the wrongdoer reasonable remuneration to a relative who has rendered "necessary services" to the pursuer.

A pursuer averred that she had been injured when she fell while descending from a train. She concluded, inter alia, for damages in respect of reasonable remuneration for certain necessary services rendered by her husband. These services included managing the household, washing, ironing, cooking and shopping.

Held, that the managing of the household, etc., could be described as necessary services rendered to the pursuer by her husband; and proof before answer *allowed*.

Observed, that "necessary services" in s. 8 are services rendered to the injured person because of his or her injuries and would not include the doing of what the injured person might have done for the family, that being covered by s. 9.

Action of damages

Grace Denheen raised an action of damages against the British Railways Board.

The case came before the Lord Ordinary (Stewart) in procedure roll.

Statutory provisions

The Administration of Justice Act 1982 provides:

"7. Where a person (in this Part of this Act referred to as "the injured person") — (*a*) has sustained personal injuries, or (*b*) has died in consequence of personal injuries sustained, as a result of an act or omission of another person giving rise to liability in any person (in this Part of this Act referred to as "the responsible person") to pay damages, the responsible person shall also be liable to pay damages in accordance with the provisions of sections 8 and 9 of this Act.

"8.—(1) Where necessary services have been rendered to the injured person by a relative in consequence of the injuries in question, then, unless the relative has expressly agreed in the knowledge that an action for damages has been raised or is in contemplation that no payment should be made in respect of those services, the responsible person shall be liable to pay to the injured person by way of damages such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith.

"(2) The relative shall have no direct right of action in delict against the responsible person in respect of the services or expenses referred to in this section, but the injured person shall be under an obligation to account to the relative for any damages recovered from the responsible person under this section.

"9.—(1) The responsible person shall be liable to pay to the injured person a reasonable sum by way of damages in respect of the inability of the injured person to render the personal services referred to in subsection (3) below.

"(2) Where the injured person has died, any relative of his entitled to damages in respect of loss of support under section 1 (3) of the Damages

Comment. In the decision of Nolan J. in the case of *The Trustees of the Castell-y-Mynach Estate* v. *Secretary of State for Wales and Taff Ely Borough Council* the Court looked at the related question of the circumstances in which a use of a building as a dwelling-house could be abandoned. The case confirmed that an important factor will be the state of repair of the building in question and whether it is inhabitable. In a similar way, it would seem that once a dwelling-house has become a complete ruin, it ceases to be a dwelling-house. In this decision, the error of the Secretary of State seems to have arisen from him in not addressing himself properly to the question as to whether the building was still capable of being considered a dwelling-house.

However, this altogether rather muddled decision, does not completely clarify the position as to what is the correct approach. The Secretary of State took the line that the question to be asked was whether the building was inhabitable or at least capable of habitation after essential repairs and refurbishments. McNeill J. did not directly repudiate this test but seemed to prefer that enunciated by the Secretary of State in an earlier ministerial decision of *Oak Tree Cottage*. This was the less strict test of whether there remained on the land "a structure sufficiently intact as to reasonably support the description of a dwelling-house and not merely the ruins of a dwelling." This test would suggest that even, if a building needed considerable repairs to make it inhabitable, it could still be a dwelling-house.

McNeill J. also placed considerable importance on the fact that in this case the use as a dwelling had not been abandoned. There obviously can be cases where even though a dwelling-house use has been abandoned, the building may still be regarded as constituting a dwelling-house. In such a case, operations could be carried out to the building, but it could not be used as a dwelling-house. Alternatively, it might just be conceivably possible to argue that although a building was such a ruin that it could not be considered a dwelling-house, the use as a dwelling-house had never been abandoned. However, in most cases the two concepts will be fused and the facts that point to abandonment, will also point to the conclusion that the building is not a dwelling-house.

Inquiry held into refusal of planning permission—allegation of bias—chairman of development control committee in conversation with the Inspector after the end of the inquiry—Held, that a breach of natural justice had occurred—a reasonable person on the facts could have concluded that justice might not be being done, despite the fact that the Inspector was totally absolved of any actual bias.

Simmons v. Secretary of State for the Environment and Another (Queen's Bench Division, Forbes J., October 23, 1984)[2]

Mr. Simmons, a solicitor, made two planning permission applications to build a dwelling-house on land at the rear of his house. Both applications were refused by Harrow L.B.C. Mr. Simmons was of the opinion that the views held by the Chairman of the council's Development Control Committee were responsible each time for the failure of his applications.

An inquiry was held at which the inspector decided that the chairman did not need to give evidence. The chairman however remained in the chamber where the inquiry was being held. After the close of the inquiry the applicant and his counsel observed the inspector in conversation with the chairman and the council solicitor, a conversation which, it was alleged, lasted for approximately five to ten minutes.

Mr. Simmons appealed to the High Court alleging a breach of natural justice.

FORBES J. said that the first, and perhaps the most important, complaint about this inquiry, was the first ground relied on by the appellant, namely, that natural justice had not been done or, at any rate, had not been seen to be done because the inspector had been observed to be having this conversation with Mr. Denney and Mr. Ward.

He (Forbes J.) had been referred to a number of cases. Perhaps the most convenient was *Regina* v. *London Rent Assessment Panel Committee, Ex parte Metropolitan Properties Co. (F.G.C.) Ltd.* (1969) 1 Q.B. 577; in which Lord Denning, at page 598, quoted the very frequently quoted saying of Lord Hewart C.J. in the case of *R.* v. *Sussex Justices, Ex parte McCarthy*: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Lord Denning then went on:

"There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as

[2] *P. Morgan* (Palmer Cowen, London W1); *A. Cooper* (Treasury Solicitor).

the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.' "

Lord Justice Edmund Davies also said, at page 606:

"With profound respect to those who have propounded the "real likelihood" test I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by *Reg.* v. *Barnsley Licensing Justices* itself, as Devlin L.J. made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body."

It might be that there was some slight difference between bias and other manifestations of breaches of natural justice, but he (Forbes J.) did not think it had been suggested in the instant case that there was sufficient difference to make it necessary to go any further.

He took the view that the law really was that if a person could reasonably conclude, or draw an inference from the observed facts, that justice might not be being done, then that was a breach of natural justice which the court would correct. Having read the affidavit in this case, he (Forbes J.) was not prepared to accept some of the suggestions made by Mr. Simmons. What he said, or what he implied in that affidavit, was that the conversation between Mr. Gasson and the other two had gone on for something like ten minutes. The reason he said that was because there was some five minutes during which Mr. Gasson, Mr. Denney and Mr. Ward had left the council chamber and Mr. Simmons was still in it. Nevertheless, despite the fact that those five minutes were unaccounted for, Mr. Simmons drew the inference that for the whole of that five minutes Mr. Gasson and the other two were in conversation. There could be no point in that at all.

He went on to say in terms, that when Mr. Gasson and the other two saw Mr. Simmons, his wife and counsel approach them, "they looked apprehensive, stopped talking for a moment and only resumed their conversation after we had gone." He (Forbes J.) took the view, reading that affidavit as a whole, that it really did depart perhaps from the sort of affidavit which one would expect from an entirely objective observer. He did not think that Mr. Simmons was an objective observer, but was not sure that it was necessarily a criticism of him at all. He was specially interested because he was the appellant in the case. When one looked at what people might reasonably think, or a person might reasonably think in this case, the question was whether justice was being seen to be done. While one required a certain objectivity from the observer one did have to put oneself not infrequently in the shoes of the actual litigant, because otherwise matters which were important background circumstances, when one was considering whether justice had manifestly been seen to be done, would pass unobserved.

It was because in many of these cases it was the disappointed litigant who got emotional when justice had not been done, that one might have to put oneself into the shoes of the disappointed litigant. In considering whether a person could reasonably draw an inference did one have to expect the litigant, however disappointed, to approach the matter entirely objectively? He (Forbes J.) thought not, though one might have expected reasonable objectivity. So while this affidavit departed from what he regarded as the proper objectivity, that was not necessarily fatal when one was considering whether a person in Mr. Simmons's shoes could reasonably have formed the impression from what he had seen that justice was not being done. Looking at the position from Mr. Simmons's point of view, and approaching it with an objectivity which he did not think Mr. Simmons was in fact displaying, the situation seemed to be this. There was Mr. Denney, whom the applicant regarded as the person

in the Harrow Borough Council most responsible for what he regarded as an unnecessary rejection of his planning application. There was that same Mr. Denney about to be called as a witness and not called. There was that same Mr. Denney remaining in the council chamber throughout the inquiry, despite the fact that he was not to be called as a witness. Of course, he could have wanted to hear what was going on, but one was trying to put oneself into the shoes of the observer—in this case the applicant. Following the conclusion of the inquiry there were Mr. Denney and Mr. Ward to be seen speaking to the inspector.

It seemed to him (Forbes J.) that one could reasonably draw the inference from those facts, or at any rate it was not an unreasonable inference, that Mr. Denney might, in some way, have been seeking to influence the inspector in his decision—having not been able to give evidence but seizing an opportunity to talk to the inspector after the inquiry was over.

He (Forbes J.) had read the affidavit of Mr. Gasson. When reading it, it seemed clear that what happened was that Mr. Denney had some interest in the question of whether there was any value in having informal proceedings in planning inquiries. When Mr. Gasson came out of the council chamber he tackled him on this. It was plain from the inspector's affidavit that the inspector did not want to talk to Mr. Denney about it and, without being plainly rude, sought to disengage himself from the conversation as soon as he might. There was absolutely no doubt that the inspector himself was guilty of no impropriety. If it had simply depended on the inspector being free from impropriety he (Forbes J.) would have had no hesitation in saying that this appeal failed.

But one had to look at the circumstances to see whether an inference could be drawn that there was an impropriety. He had the uneasy feeling here that it was an inference which could reasonably have been drawn. One approached it in this way. It seemed that it was clearly extremely unwise for the chairman of that committee to tackle the inspector immediately after an inquiry of this kind. If one came to the conclusion that it was extremely unwise then one asked oneself why. The answer inevitably was because it might give the wrong impression. Of course, that was just what this branch of the law was about. If the circumstances gave the impression that something was being done which should not be done, in relation to the matter which was under adjudication, then that was exactly what this branch of the law was concerned with—that justice was not being manifestly seen to be done. In those circumstances he (Forbes J.) came to the conclusion, very regretfully, that this was something which could have led somebody who knew the background to the conclusion, to the not unreasonable conclusion, that something was being done to interfere with the natural course of justice. Having come to that conclusion, it seemed to him that he had no alternative but to say that the appeal should be allowed on that ground.

He wanted to make it absolutely abundantly clear, that nobody could possibly have said that Mr. Gasson behaved improperly. He was put in an extremely embarrassing situation, which might very well have been difficult for him to get out of without being too brusque or rude. What could he have done? Perhaps the first thing he could have done was to have been more rude. He could in fact have declined to have any conversation at all with Mr. Denney. He might have been wise to do so, but if he found it difficult to be as abrupt as that, he might have indicated to the parties (because they were all going on a view during which Mr. Simmons and Mr. Ward would have been present) what had happened. He might have indicated that nothing untoward had occurred. In those circumstances it might have been very difficult for Mr. Simmons to have taken the point which he had. He would allow the appeal.

Comment. This decision is an extreme illustration of the application of the principle that justice should not only be done, but be seen to be done. Such a principle is understandable in the situations where the decision-maker is seen to be biased because he himself has some personal interest in the outcome of the case before him; as in *R.* v. *London Rent Assessment Panel Committee, ex parte Metropolitan Properties Co.* [1969] 1 Q.B. 577. In the situation where the decision-maker is not seen to be biased in that sense, but fails to allow one of the parties an opportunity to comment on evidence or arguments on which the decision may be based, the

courts have been reluctant to impose such absolute standards. There is no universal standard and the courts tend to impose different tests in different situations. For example the context as well as the conduct may affect the test. In this regard, the fact that the apparent unfairness takes place in the running of a public inquiry, would seem to increase the strictness of the test. In *Performance Cars Ltd.* v. *Secretary of State for the Environment* (1977) 34 P. & C.R. 92, the unfairness lay in the failure to allow the appellant adequate time to inspect during an inquiry letters of objection from local residents. There was no question of the inspector having any personal interest and yet the Court of Appeal insisted that as long as there was a risk or even a feeling on the part of a party that justice had not been done, then the decision should be quashed. On the other hand where the alleged unfairness takes place *after* the inquiry proper, the courts have been less severe; see *Bushell* v. *Secretary of State for the Environment* (1981) A.C. 75 and *R.* v. *Minister of Transport* (1984) 48 P. & C.R. 239. In those cases the test of natural justice seems to have been replaced by a more general test of fairness akin to *Wednesbury* unreasonableness. Forbes J. referred to the fact that there might be some slight difference between bias and other manifestations of breaches of natural justice but did not consider that this affected this particular case. The term bias is normally used to cover the case where the judge or decision-maker has a personal interest in the outcome, but it can be used more loosely to cover the case where for whatever reason the decision-maker is favouring one party at the expense of another. As in *Halifax Building Society* v. *Secretary of State for the Environment* (1984) J.P.L. 816, where a decision of an inspector was quashed because he had given the impression of being hostile to one of the parties. This instant case is even further away from the standard concept of bias and at the most amounts to the suspicion that one party is getting favoured treatment. It is very similar to the case of *Furmston* v. *Secretary of State for the Environment* (1983) J.P.L. 49, where an inspector was seen in discussion with representatives of the local authority both before and after a site meeting. In a Current Topic on the issue; see (1984) J.P.L. 712, it was suggested in similar cases it might be necessary to prove substantial prejudice. However this decision makes clear that it is sufficient if a reasonable person knowing the background to the case, would have concluded that something was being done to interfere with the natural course of justice. It is interesting to compare that approach with that of Glidewell J. in *R.* v. *Sevenoaks District Council, ex parte Terry* (1984) J.P.L. 420. This concerned the more normal meaning of bias as it related to situations where the local planning authority was alleged to have been committed to a particular course of action, because of its interest in a site. Glidewell J. said that cases like *Lannon* were not apposite to what was an administrative decision and that the proper test was whether it was clear that the council could not exercise its discretion properly. If the answer was that it could exercise its discretion properly, that was the end of the matter and it did not matter whether the reasonable man on being told the facts might have thought differently.

So in conclusion, the crucial factor would seem to be the quasi-judicial role of the inspector. This requires that not only must he, like Caesar's wife, be above suspicion himself, but his conduct of the inquiry must be above suspicion. It may be that having a few inspectors' decisions quashed on these grounds is not too high a price to pay, so that parties may have complete confidence in the inquiry system, but it is felt that the rigour of this decision may have in future to be tempered a little.

Use of a dwelling-house as offices under a temporary permission not extended—Appeal to Secretary of State by way of written representations—No duty to give reasons under Inquiries (Procedure) Rules—Held, general duty to give reasons—Decision of inspector quashed—remitted for redetermination.

Sir George Grenfell-Baines v. The Secretary of State for the Environment and Sheffield City Council (Queen's Bench Division, Woolf J., January 20, 1984)[3]

The applicant had been using a dwelling-house as offices under a temporary planning permission, which had been extended once, but which was not re-newed on a subsequent application. The applicants appealed and the matter was heard by an inspector by way of written representations. The inspector upheld the second respondents' refusal. The applicant appealed to the High Court.

WOOLF J. (after stating the facts and the background to the application) said that the applicant submitted that the inspector's decision letter had not given adequate reasons and was therefore defective, and secondly or alternatively, that the reasoning which did appear in the letter because it did not deal with certain issues indicated that the inspector had failed to take into account matters which he was required to do so by law.

[3] *Richard Phillips* (Warren Murton); *Simon Brown* (Treasury Solicitor). Report compiled by Wener Ullah, Barrister.

BRITISH MUSLIMS ASSOCIATION AND OTHERS v. SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER

QUEEN'S BENCH DIVISION (Stuart-Smith J.): July 20, 1987

Town and country planning—Compulsory purchase order—Inquiry by inspector—Inspector talked to council officers during site visit in absence of applicants—Whether appearance of bias—Whether order should be quashed

The second respondent, Leicester City Council, made a compulsory purchase order for property known as Prebend Hotel in Leicester, which was owned by Mr. Bajwa, one of the applicants for judicial review of the order. At an inquiry into the compulsory purchase order, an inspector held a conversation with officers of the council in the absence of the applicants. The owner and two tenants of the property, the British Muslims Association and Ravel Construction Company Ltd., applied for judicial review to quash the order on the grounds that the order was vitiated by the appearance of bias.

Held, allowing the application, the proper test for bias in the current circumstances was would or might a reasonable person, observing what happened, draw the conclusion that a procedural unfairness indicative of bias had occurred so as to vitiate the essential elements of fairness necessary for proper conduct by the inspector of his quasi judicial functions. On the facts of the present case, while there was no actual impropriety, an inference of impropriety could reasonably be drawn. The conversation between the inspector and the council officers was more than just a casual one such as might occur in the normal course of a site inspection and continued for an appreciable period of time while the applicants were an appreciable distance away.

Cases cited:

(1) *Furmston* v. *Secretary of State and Kent County Council* [1982] J.P.L. 49, D.C.

(2) *Metropolitan Properties Co. (F.G.C.)* v. *Lannon* [1969] 1 Q.B. 577; [1968] 3 W.L.R. 694; [1968] 3 All E.R. 304; 19 P. & C.R. 858, C.A.

(3) *R.* v. *Barnsley Licensing Justices, ex p. Barnsley and District Licensed Victuallers' Association* [1960] Q.B. 167; [1960] 3 W.L.R. 305; [1960] 2 All E.R. 703, C.A.

(4) *R.* v. *Sussex Justices, ex p. McCarthy* [1924] K.B. 256.

(5) *Simmons* v. *Secretary of State for the Environment* [1985] J.P.L. 253.

Application for judicial review.

The applicants, Mr. Bajwa, the British Muslims Association and Ravel Construction Company Ltd., who were the owner and tenants respectively of property known as Prebend Hotel in Leicester, sought judicial review of an order of the first respondent, the Secretary of State for the Environment, confirming a compulsory purchase order made by the second respondent, Leicester City Council. The facts are set out in the judgment of Stuart-Smith J.

Mrs. N. Sheikh, A. W. Bajwa and Dr. G. M. Khan appeared for the applicants.

R. Jay for the first respondent.

R. Davies for the second respondent.

STUART-SMITH J. In form this is an application for judical review to quash a compulsory purchase order made on January 28, 1985 and confirmed after an inquiry by an inspector in February 1986. In substance it is in fact an appeal brought pursuant to the provisions of sections 23 and 24 of the Acquisition of Land Act 1981. I say it "in form" is an application for judical review. The respondents take no point that the form of the proceedings are wrong and, as I say, in substance it is an appeal under those provisions.

Section 23 of the Act provides as follows:

> (1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provisions contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in section 1(1) of this Act, he may make an application to the High Court.
>
> (2) If any person aggrieved by (a) a compulsory purchase order, or (b) a certificate under Part III of, or Schedule 3 to, this Act [which is not relevant here] desires to question the validity thereof on the ground that any relevant requirement has not been complied with in relation to the order or certificate he may make an application to the High Court.

In section 23(3) it is provided that "relevant requirement" means "any requirement of this Act." Section 24 defines the powers of the court under such an application:

> (1) On an application under section 23 above the court may by interim order suspend the operation of the compulsory purchase order or any provision contained therein, or of the certificate, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings.

In fact the city council gave an undertaking not to enforce the compulsory purchase order until the final determination of these proceedings and so the application for an interim order was not proceeded with.

Under subsection 2:

> If on the application the court is satisfied that: (a) the authorisation granted by the compulsory purchase order is not empowered to be granted under this Act or any such enactment as is mentioned in section 1(1) of this Act, or (b) the interests of the applicant have been substantially prejudiced by any relevant requirement (as defined in section 23(3) above) not having been complied with, the court may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant.

The premises in question were known as the Prebend Hotel and are situated at 1 College Street and 6 Prebend Street in the city of Leicester. The premises are near the city centre in Leicester. They consist of 30 habitable rooms together with stairs, halls, entrances and so on, bathrooms and lavatories. They were bought by the applicant, Mr.

Bajwa, in early 1983 for a sum of between £30,000 and £35,000. Since then he has spent a good deal of money on attempting to renovate the premises and put them into a condition where they can be used as a hotel. In all the inspector found that some £80,000 to £90,000, inclusive of the purchase price of the property, had been spent. There is no doubt that if the hotel could be renovated it would serve a useful purpose in providing, albeit temporary, accommodation for people in Leicester, and that was the purpose for which it was previously used.

Unhappily it seems that in the course of renovation being carried out by Mr. Bajwa, the premises were severely vandalised and it may be because of that the cost of renovating them was substantially exceeded. The fact is that from the time that he bought the premises until to date, Mr. Bajwa has been unable to complete the renovation through lack of money. Although he told me that the renovation was nearly complete, it seems that it certainly is not yet complete. The order, as confirmed by the Secretary of State, reflected the hope that the applicant might be able to complete the renovations, because the council gave an undertaking not to enforce it if they were completed by a certain time, but unfortunately that was not done.

The applicant, Mr. Bajwa, and his wife live in the premises, and there are also two tenants of the premises, the Ravel Construction Company Ltd. (who were represented before me by their director Mr. Khan), and the British Muslims Association which is an unincorporated association.

The council's case which was made before the inspector is that they have a severe housing shortage in Leicester, especially in the city centre, and they wish to acquire the premises to turn them into seven flats for elderly people. No doubt that is a very important and worthwhile alternative way of using these premises. The proceedings are obviously a matter of very great concern to Mr. Bajwa and Dr. Khan, who addressed me, each as litigants in person, and also, I apprehend, to the third applicants, the Muslims Association. Mrs. Sheikh, who was here for them, did not choose to speak separately on their behalf. They are of great concern, obviously, to Mr. Bajwa. He has spent a great deal of money on the acquisition and renovation of the premises, much of which he has had to borrow. It means, if the compulsory purchase order is confirmed, that his cherished hope of turning the place into a hotel will be frustrated and, of course, he will lose his home. So far as the Ravel Construction Company are concerned, they have a tenancy of two rooms, no doubt at a very favourable rent, and will be in difficulty in finding anything comparable round about.

A number of matters are raised in the notice of motion of the three applicants. In substance they are all the same, and I deal with the ones raised by Mr. Bajwa. The first three grounds are all procedural grounds, and it is therefore necessary for the applicants to establish a substantial prejudice if they are to succeed on these grounds. The first one is that the published notice for the submission of an order to the Secretary of State of the Environment dated January 24, 1985 was inaccurate. This relates to a notice which was published in one of the local newspapers and it is common ground that it was inaccurate, having understated by about half, the size of the land. The requirement in relation to this matter is to be found in section 11, subsections 1 and 2(*b*) of the Act.

Section 11 provides as follows:

> (1) The acquiring authority shall in two successive weeks publish a notice in the prescribed form in one or more local newspapers circulating in the locality in which the land comprised in the order is situated. (2) The notice shall: . . . (*b*) describe the land and state the purpose for which the land is required.

This matter was dealt with by the inspector at the hearing and he refers to it in paragraph 30 of his report. He says this:

> The map referred to in the sealed order clearly shows half the width of the adjoining parts of Prebend, College and Lincoln Streets as being within the order land. The area so defined measures some 1,670 sq.m. or thereabouts and the description of the extent of the land as 805 sq.m. is wrong. No objection to that error has been made and there has been no indication that any person has been misled. Accordingly, my ensuing considerations of the order are based on the substitution of the figure of 1,672 sq.m. for 805 sq.m.

It seems to me that this matter was quite clearly raised and dealt with at the inquiry. There is no suggestion that anybody was prejudiced by it and in my judgment it does not amount to a substantial ground of appeal or for judicial review.

The next two grounds can be taken together. They are as follows:

> No notices for the submission of the Compulsory Purchase Order to the Secretary of State were served upon the legal tenants of the premises. (3) No notices were served upon the legal tenants after the confirmation of the order published on February 21, 1986.

The requirement for the service of those orders and notices is to be found in section 12 of the Act, which provides as follows:

> (1) The acquiring authority shall serve on every owner, lessee and occupier . . . of any land comprised in the order a notice in the prescribed form (*a*) stating the effect of the order, (*b*) stating that it is about to be submitted for confirmation, and (*c*) specifying the time (not being less than twenty-one days from service of the notice) within which, and the manner in which, objections to the order can be made.

That was not done in this case. It may be because the local authority did not appreciate that the Ravel Construction Company and the British Muslims Association were in fact tenants. I am satisfied that the Ravel Construction Company at least were tenants and I am prepared to accept that the British Muslims Association were also tenants. In fact both those organisations appeared by representatives at the hearing of the inquiry because they were told by Mr. Bajwa shortly beforehand. They complain that it was only at the last minute that they were notified of the matter and therefore they did not have an opportunity to instruct solicitors to appear. Dr. Khan at least made strenuous and clear representations to the inquiry, as indeed he did to me. Mr. Bajwa was represented by a solicitor and it seems to me, particularly in the light of what has happened subsequently in relation to this case, that it would be very unlikely that either of the tenants would in fact have instructed solicitors separately, or indeed, if they had done so, that it would have

made any material difference to the outcome of the inquiry. I say that for this reason. Both those tenants, although they have filed notice of motion, and although I made it perfectly plain to them when an application was made before me some months ago that they had to obtain legal representation if they wished their cases to be heard before me, and that they should do that without any delay at all, neither made any attempt to do so. It was in those circumstances that they appeared in person through their representatives that I have referred to. I am satisfied, therefore, that there was no prejudice to the tenants for the failure by the council to comply with those requirements. It is really only they, and not Mr. Bajwa, who can seek to take advantage of the failure in those respects.

The fourth ground of the notice of motion by Mr. Bajwa is that he lives on the premises and has been living there. That, of course, in itself is no grounds for appeal or for judicial review and I am not quite sure what the significance of it is save only to contradict a passage in the inspector's report where he says that the premises have been substantially vacant. It is quite clear that he was well aware that Mr. Bajwa and his wife were living on the premises.

That brings me to the fifth ground, which is the substantial ground, in my view, on which these applications are made, and it is this, that the inspector was talking to and was seen to be talking to the council's officers during the site visit that was made to the premises in the absence of the applicants or their representatives. The evidence in relation to this matter is to be found, first of all, in the affidavit of the inspector, Mr. Bromley, who deals with this matter at paragraph 2 of his affidavit. He says:

> I assume this allegation refers to an incident during the site visit I made to the order land. I was accompanied on my site visit by Mr. Bajwa, Dr. G. M. Khan (on behalf of the Ravel Construction Company Ltd.) and, I believe, Mr. M. Khan (Vice-President of the British Muslims Association). All three had been present at the inquiry. I was also accompanied at the site visit by Mr. Hooper and Mr. Gilbert, Senior Renewal Officer and Senior Housing Inspector respectively of the Leicester City Council. All of those who accompanied me were present for the whole (or practically the whole) of my visit. At one point I recall standing on the north-east pavement of College Street which is opposite the order premises. I noted that number 9 College Street was in the process of being improved, but that numbers 23 and 25 remained unimproved. At this point I asked Mr. Hooper for clarification of the position concerning those two properties. If Mr. Bajwa was not with me at this point he was standing less than 30 feet away on the other side of the street. To the best of my recollection this was the only occasion during the site visit when I had any conversation with a council officer which was not within Mr. Bajwa's hearing. The conversation was a very brief one and did not concern the order land or any of the applicants at all.

Mr. Hooper, who has filed an affidavit, says that he has no recollection of the matter at all. Mr. Gilbert has not filed an affidavit but I am told by counsel today that if he had done so it would be to the same effect as

Mr. Hooper. Mr. Bajwa, whose affidavit is somewhat brief about this, amplified the matter in his submissions to me and in a statement which he put in in reply. He said that the conversation took place about 100 feet to 150 feet away and that it lasted some 20 minutes. I think that is an exaggeration as to the length of time and it was probably not as far as 100 feet to 150 feet away, but I am quite satisfied that it did take place, and that it took place out of the earshot of Mr. Bajwa and those who were with him.

There is some authority which I look to for guidance in dealing with this matter. It is common ground that it is not only the reality of the situation with which the court is concerned, but also the appearance of justice in matters of this sort. In *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon and Others*, the court was dealing with a question of bias, and the appearance of bias, but somewhat similar considerations apply in this case. Lord Denning M.R. said this[1]:

> A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject matter. Second, "bias" in favour of one side or against the other.

A little later on he says:

> So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear: but I start with the oft-repeated saying of Lord Hewart C.J. in *R.* v. *Sussex Justices, ex p. McCarthy*: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."
>
> In *R.* v. *Barnsley Licensing Justices, ex p. Barnsley and District Licensed Victuallers' Association*, Devlin J. appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as he could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.

He then cites a number of authorities.

He continues:

> There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he

[1] [1969] 1 Q.B. 577 at p.598; (1968) 19 P. & C.R. 856 at p.871.

did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

Edmund Davies J., as he then was, said this[2]:

It cannot be made too clear that the appellants expressly disclaim *actual* bias in the chairman. But if Mr. Slynn be right, what becomes of the principle which remains transcendent despite its enshrinement in the excessively quoted words of Lord Hewart in *R.* v. *Sussex Justices* that "justice should not only be done, but should manifestly and undoubtedly be seen to be done"?

He then refers to a passage in an article by Professor Smith and to the judgment of Devlin J. For the sake of brevity I will not set those out in this judgment, but he said this[3]:

With profound respect to those who have propounded the "real likelihood" test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by *R.* v. *Barnsley Licensing Justices* itself, as Devlin L.J. made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is *reasonable* suspicion of bias on the part of one or more members of the adjudicating body.

That was a case, as I have said, of bias, which is somewhat different to the considerations which apply here, but they are akin to it. There are two reported cases to which counsel have drawn my attention. The first is *Furmston* v. *Secretary of State for the Environment and Kent County Council.* In that case after a site meeting at which representations of both sides had been completed and it appeared that the meeting was over, as the applicant's representative was in the process of leaving he noticed that the county council's representative was still talking to the inspector over an open file and that that conversation went on for some little while. He brought an originating notice of motion on the grounds that the inspector had been in conversation with the representative of the other side when they were not present, and the counsel for the Secretary of State did not seek to uphold the decision. The matter was dealt with in that way. That was not a decision of the court but it indicates the importance attached to the appearance of justice. It may be that the period was somewhat longer in that case over which the conversation took place.

The next case is a case called *Simmons* v. *Secretary of State for the Environment*, a decision of Forbes J. In that case the chairman of the county council was seen to be talking to the inspector for a while, after the formal proceedings had finished, in the absence of the applicants. Forbes J. said he took the view that the law really was that if a person

[2] *Ibid.* at p.604; p.877.
[3] *Ibid.* at p.606; p.878.

could reasonably conclude or draw an inference from the observed facts that justice might not be being done, then that was a breach of natural justice which the court could correct.[4] He held in that case that one had to look at the circumstances to see whether an inference could be drawn that there was an impropriety. He had the uneasy feeling that it was an inference which could reasonably have been drawn on the facts of that particular case.

The test which Mr. Davies invites me to adopt, and which I do adopt for the purpose of this consideration, is would or might a reasonable person, observing what happened, draw the conclusion that a procedural unfairness indicative of bias had occurred so as to vitiate the essential elements of fairness necessary for proper conduct by the inspector of his quasi judicial functions. I am bound to say I have not found this a particularly easy decision. I am satisfied that there was in fact no impropriety here but it seems to me that the inference can be drawn, and can reasonably be drawn that there might have been. I say that for a number of reasons.

First of all, I think it is material to bear in mind that the applicants or their representatives in this case are all either immigrants in the sense that they have come to this country, or if they were born here they are of ultimately foreign extraction. Mr. Bajwa himself has an adequate command of English but it is not by any means perfect, and he found it very much easier to submit a written submission to me than to make those submissions himself in person. I think in the circumstances where such people are involved it may be easier to draw the inference that they are themselves concerned where a conversation of this sort takes place in their absence. Secondly, I think it is entirely right that it is not just any casual conversation which happened by chance when somebody of the other side was not there; that in my view could not possibly amount to a procedural impropriety or even give the appearance of it. One knows perfectly well that people move around on a site visit, and it may well be that for a period of a few moments somebody may be out of earshot because they are going to the lavatory or the room is not big enough for them all to be there, or something of that sort, but it does not seem to me that that was the situation here. At least the distance of the road separated the two groups. It must have been for an appreciable period of time, although I do not accept that it was necessarily as long as 20 minutes, which Mr. Bajwa thinks that it was.

Thirdly, it is not insignificant, it seems to me, that Mr. Hill, who had represented Mr. Bajwa at the hearing, was not present at the time. Fourthly, it is not obvious why any conversation which did take place should relate to other houses and not the property in question, although as I have indicated I accept what Mr. Bromley says, that that was what they were talking about.

Fifthly, it seems to me material that in fact both the two representatives of the Council were present, whereas none of the applicant's party—if I may so describe them—were present. It seems to me that the fact that this conversation took place and that there was an appreciable distance between them, and an appreciable period of time elapsed, cannot have

[4] [1985] J.P.L. 253.

happened by accident or inadvertently such as might happen in circumstances that I indicated a little while ago.

Finally, as I have indicated, although I think Mr. Bajwa's estimate of time has been coloured by his undoubted concern about this matter, and also to some extent by his belief, genuinely but wrongly held, that there has been some political motivation behind this order, although that may have coloured his view to some extent, I do not think that the conversation can have been as brief as all that.

For those reasons it seems to me that this is a case where unfortunately the inference might reasonably be drawn by a reasonable person in the position of the applicant, that justice did not seem to be done. That being so it is not necessary for me to deal fully with the final two grounds which are made, and I do so very briefly.

The sixth ground is that the City Council exercised their powers unfairly and Mr. Bajwa sets out the grounds of what really amount to a conspiracy by his political opponents. Suffice it to say that in my judgment there is no sufficient evidence to come to the conclusion that there is any reality of such a conspiracy and in my view there is not even sufficient to establish an appearance of such a conspiracy.

Finally, it is said that the inspector did not visit the location properly and that his report was misinformed. I think the answer to that is to be found in the inspector's own report where he says his inspection was a lengthy and detailed one; he made seven pages of notes, which is far more than he would normally make. It seems to me that the care with which he sets out his findings supports that view.

Not without hesitation, therefore, I have come to the conclusion that the appearance of justice is so important that in this case I ought to make the order and allow the appeal.

Appeal allowed. Order of Secretary of State quashed.

Solicitors—the Treasury Solicitor; the City Attorney, Leicester City Council.

officer. In her submission she should have been cautioned first. The effect of his failure to caution her at the outset was that the police officer was telling the appellant that unless she made the statement she would be detained. Counsel made it clear that she was not suggesting that this was an example of pressure deliberately brought to bear by the police officer. She also accepted that there was nothing improper in his telling the appellant that he intended to detain her in the light of the information which he had obtained. Her submission was directed to the use which the police officer made of the fact that he was proposing to detain the appellant. Her argument was that this amounted to unfair pressure, and the consequence was that the statement which the appellant then made was inadmissible as evidence against her.

The question in all these cases is whether what has been done amounts to unfairness. In *Tonge v HM Advocate* at 1982 JC, p 147; 1982 SLT, p 516, Lord Cameron said that it is well established that police officers are entitled to question a suspect as to his possible complicity in a crime which they are investigating, and that his replies will be admissible in evidence if they have not been extracted or compelled by unfair or improper means. As examples of what he meant by unfair or improper means he included threats, intimidations, offers of inducements or cross examination designed or intended to extract incriminating replies. In *Black v Annan* at 1995 SCCR, p 274F; 1996 SLT, p 285C, Lord Sutherland said that there was no dispute in that case about what the test was. It was the simple one as to whether or not what had taken place was fair. Counsel's submission was that what was done in this case, taking all the matters in their context, amounted to an inducement to make the statement which meant that it was obtained from her by means which were unfair.

In our opinion, however, the proper way to view what took place in this case was that the police officer was doing his best to meet the objection which the appellant had raised to being taken to the police station leaving the young children alone in the house. He suggested two ways in which her genuine concern might be met. One was that a social worker might be asked to attend to look after the children in her absence. The other was that she could make a statement to him there and then in her own house. We do not regard his attempt to solve the appellant's difficulty as amounting to unfairness or the bringing of improper means to bear upon her. In the context, his advice that if she were to make a statement to him there and then detention would be unnecessary, was not as an inducement to make the statement but as an answer to her difficulty. The fact that she was not obliged to make a statement was put beyond doubt, in our opinion, by the caution which the police officer then administered to her. It was not suggested at the trial, nor was it suggested by counsel, that anything was done after the administering of that caution which could be said to have been improper or unfair. In our opinion it cannot be said, in these circumstances, that the statement which the appellant then elected to make after caution, and having been offered the services of a solicitor but declined that offer, was unfairly obtained from her.

For these reasons we consider that the sheriff was right to repel the objection, and we shall refuse the appeal insofar as it is directed to the convictions under charges 1 and 2 in this complaint. We shall answer the first question in the case in the affirmative.

Counsel for Appellant, M E Scott; Solicitors, Dickson Smith, WS (for Beaumont & Co, Pitlochry) — Counsel for Respondent, Bonomy, QC, A D; Solicitor, J D Lowe, CB, Crown Agent.

P W F

Doherty v McGlennan

HIGH COURT OF JUSTICIARY
THE LORD JUSTICE CLERK (ROSS),
LORDS McCLUSKEY AND ALLANBRIDGE
5 JUNE 1996

Justiciary — Procedure — Summary procedure — Trial — Conduct of sheriff — Accused convicted after trial of assaulting local Member of Parliament and diet adjourned for sentence — Sheriff inviting complainer into chambers to be formally introduced to him — Whether justice seen to be done — Whether miscarriage of justice.

An accused person was charged on a summary complaint with assault and breach of the peace. The complainer on the assault charge was a local Member of Parliament. After the sheriff had found the accused guilty of the charges and had adjourned the diet to a later date for sentence, he, having adjourned his court, invited the complainer into his chambers as he had not met him before and wished to take the opportunity of being formally introduced to him as one of the three Members of Parliament for his sheriff court district. The accused sought suspension of his conviction.

Held, that a reasonable bystander could well form the suspicion that the sheriff was not being impartial in having a private meeting with the complainer before sentence had been imposed and before it was known whether there was to be an appeal (p 446A-B); and bill *passed* and conviction and sentence *suspended*.

Bradford v McLeod, 1986 SLT 244, *applied*.

Bill of suspension

Gary Doherty brought a bill of suspension against J G M McGlennan, procurator fiscal, Kilmarnock, praying the High Court of Justiciary to suspend a pretended conviction dated 30 August 1995 whereby Sheriff D B Smith found the accused guilty of breach of the peace and assault. The facts of the case appear from the opinion of the court.

Cases referred to

Bradford v McLeod, 1986 SLT 244; 1985 SCCR 379.

Law v Chartered Institute of Patent Agents [1919] 2 Ch 276.

Stewart v Agnew, High Court of Justiciary, 18 June 1953, unreported.

The bill and answers for the Crown were heard before the High Court on 5 June 1996.

Eo die the court *passed* the bill and *suspended* the conviction and sentence.

The following opinion of the court was delivered by the Lord Justice Clerk (Ross):

OPINION OF THE COURT.—This is a bill of suspension at the instance of Gary James William Doherty. The respondent is the procurator fiscal, Kilmarnock. What has given rise to this bill is that the complainer appeared in the sheriff court at Kilmarnock on 30 August 1995, when he was convicted after trial of charges of breach of the peace and assault, which were libelled on a summary complaint at the instance of the respondent.

During the trial evidence was given by a witness who was in fact the complainer in the charge of assault. In the statement of facts in the bill, various allegations are made regarding the conduct of the sheriff during the trial, but senior counsel who has appeared for the complainer has explained that in the light of what is stated in the answers for the respondent and the sheriff's report, these points are not being insisted upon. However, in the statement of facts it is also stated that after the sheriff had found the complainer guilty of the two charges the sheriff adjourned the diet until a later date for sentence and that immediately thereafter, having adjourned his court, he invited the Crown witness who, as we say, was the complainer, into his chambers. Counsel has emphasised that he cannot know what took place thereafter, but he has submitted that for the sheriff at that stage to invite this witness who had been the complainer into his chambers, was liable to give rise to a suspicion regarding his impartiality, and because this step was taken he has moved the court to pass the bill.

The respondent lodged answers and in ans 4 it is stated so far as this matter is concerned: "Not known and not admitted that the sheriff invited said witness into his chambers". We have, however, also been provided with a report from the sheriff and the sheriff deals with this allegation in the following passage from his report. The witness in question was a local Member of Parliament and what the sheriff says in regard to this allegation is as follows: "I did not, before the trial, know the witness Brian Donohoe. I did speak to the witness in chambers after the trial was over. I have never met him and as he is one of the three Members of Parliament for my sheriff court district I took the opportunity of being formally introduced to him, once all questions of credibility and reliability of witnesses were disposed of. It may be that my choice of time and place was somewhat inappropriate, but I had not met Brian Donohoe before that date, nor have I met him since, and I took the opportunity when it presented itself."

Counsel drew attention to what had been said in *Bradford v McLeod*. In the course of delivering an opinion in that case, the Lord Justice Clerk at 1985 SCCR, p 381; 1986 SLT, p 247E recorded the submissions made to the court in that case as follows: "For the complainers, [counsel] put at the forefront of his submissions the following proposition in the form of a question: whether there were circumstances affecting the sheriff which would create in the mind of a reasonable person a suspicion of his impartiality. If that question fell to be answered in the affirmative, [counsel] submitted that that would disqualify the sheriff even though no bias in fact existed."

In that opinion the Lord Justice Clerk went on to say: "I am entirely satisfied that what are commonly referred to as the rules of natural justice apply to criminal trials in this country. In the unreported case of *Stewart v Agnew* (18th June 1953), the Lord Justice-General said: 'But it is vital in every criminal prosecution not only that justice should be done but that justice should be visibly done.' In the same case, Lord Russell stated: 'By tradition and practice it is fundamental to the proper conduct and proceedings in our criminal courts that justice should not only be done but should also be seen to be done.'"

In the opinion there is also reference made to the English case of *Law v Chartered Institute of Patent Agents* and a dictum from that case was said to represent the law of Scotland. In delivering his opinion in *Bradford v McLeod*, Lord Dunpark said: "Nevertheless, as your Lordship has demonstrated, the question for us is not whether the complainers received fair trials but is whether what the sheriff said socially was sufficient to create in the minds of reasonable men the suspicion that he *might* not be impartial."

Counsel accepted that these were the proper tests, and he submitted that in the present case there would in the mind of a reasonable man be at least a suspicion that the sheriff was not being impartial if, at this stage, before sentence was imposed, he invited the witness, who was the complainer, into his chambers for a private conversation. He reminded us that the sheriff himself had recognised that what he had done was open to question in that he appreciated that his choice of time and place for this meeting was, as he put it, "somewhat inappropriate".

We are satisfied that counsel's submissions in this regard are well founded. As was stressed in the case of *Bradford v McLeod*, it is essential that judges should be very careful not to do anything which may give rise to such a suspicion and although justice may well have been done in this case, we are persuaded that a reasonable bystander might well form the suspicion that the sheriff was not being impartial in acting as he did. The sheriff admittedly had convicted the complainer by the time he had this meeting with the witness, but for all the sheriff knew the complainer might have appealed against conviction in which event the sheriff would have had to prepare a stated case. It is stated in the statement of facts that the issue of credibility and reliability of witnesses was a crucial one in this case and if that is so, then in a stated case the sheriff would have had to express a view upon the credibility of, among other witnesses, the complainer who was the individual with whom he had this private meeting. In fairness to the sheriff we can appreciate that he may have thought it helpful that he should make the acquaintance of one of the local Members of Parliament. Had he done that on some other occasion, no complaint could have been made, but what has given rise to this bill is the fact that he chose to have this meeting with the Member of Parliament immediately after the Member of Parliament had given evidence as a complainer and before the case had been completed in the sense that sentence had been imposed, and before it was known whether there was to be an appeal.

We are accordingly satisfied that, on the basis of the test laid down in *Bradford v McLeod*, this was a case where, though justice may have been done, it was not seen to be done. For that reason we shall pass the bill and suspend the conviction and sentence.

Counsel for Complainer, Bell, QC, Jones; Solicitors, Macbeth, Currie & Co — Counsel for Respondent, Totten, A D; Solicitor, J D Lowe, CB, Crown Agent.

P W F

Macdonald v Munro

HIGH COURT OF JUSTICIARY
THE LORD JUSTICE CLERK (ROSS), LORDS McCLUSKEY AND ALLANBRIDGE
5 JUNE 1996

Justiciary — Procedure — Summary procedure — Oppression — Conduct of prosecutor — Report on accused's psychiatric condition prepared at Crown's request to inform court — Report concluding that accused sane and fit to plead — Report based on interviews with accused and his mother, the complainer, containing details of accused's position and at odds with mother's account — Report sent to Crown to be available to court — Whether oppressive — Whether report should only state conclusion — Whether part of report disclosing accused's position should be sent, sealed, to Crown — Criminal Procedure (Scotland) Act 1975 (c 21), s 376 (5).

Section 376 (5) of the Criminal Procedure (Scotland) Act 1975 provided inter alia that where it appears to the Crown that an accused person may be suffering from mental disorder, it shall be the Crown's duty to bring before the court "such evidence as may be available" of the mental condition of that person.

An accused person was charged on summary complaint with inter alia breach of the peace, involving threatening violence towards his mother, and assault on his mother. When the case first called in court the diet was adjourned on the prosecutor's motion to allow the Crown to instruct a psychiatric examination of the accused. The report, which concluded that the accused was sane and fit to plead and that there was no evidence of a recognisable form of mental disorder, was based on interviews with the accused and his mother whose account of the events was noted by the psychiatrist to be at odds with the accused's account. The accused objected to the proceedings on the ground of oppression because the report disclosed to the Crown the accused's position as regards the charges including his responses to his mother's position. The sheriff repelled the objection but granted leave to appeal.

Held, that it was undesirable that a psychiatrist carrying out the function envisaged by s 376 (5) should be restricted in the nature of the inquiry which was to be conducted, or inhibited in expressing the basis on which the opinion to be put before the court had been formed, and in circumstances such as the present a psychiatrist would require to include information on the accused's background and to interview the accused and possibly members of his family in order to allow him to arrive at a proper conclusion on whether the accused was sane and fit to plead (pp 448L-449B and 448E); and appeal *refused.*

Sloan v Crowe, 1996 SLT 1094, *applied*; *Reid v Nixon*, 1948 SLT 295, *distinguished.*

Observed, that it would not be sufficient for the psychiatric report to state no more than that the accused was sane and fit to plead, nor would it be satisfactory for part of the report containing the objectionable information to be sent to the Crown in a sealed envelope, because the whole report was part of the evidence which s 376 (5) envisaged the Crown would make available to the court (p 448E-F).

Observed, further, that if the Crown attempted to use information in the report, an objection by the accused would in all probability be sustained by the sheriff (p 448D).

Georgiou v Enfield London Borough Council (Cygnet Healthcare Ltd and others, interested parties)

[2004] EWHC 779 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
RICHARDS J
26, 29 MARCH, 7 APRIL 2004

Councillor – Dual membership of committees – Councillors on conservation advisory committee and planning committee – Appearance of bias.

One of the interested parties sought listed building consent and planning permission from the defendant planning authority in respect of a grade II listed building that was in need of urgent repair. The claimant was a local businessman who opposed the development. The proposals came before a committee (CAG), established under the authority's constitution to consider and advise the planning committee on the conservation implications of proposals affecting, inter alia, listed buildings. The CAG expressed unqualified support for the proposals in their original form, and, later, in a revised form. Four members of CAG were also members of the planning committee. Two of those were present when CAG resolved to support the original proposals, and three were present when CAG considered the revised proposals. When the planning committee considered the matter, it resolved, by a majority of 8:7 to grant the relevant permissions. The three members who had previously considered the proposals before CAG, one of whom was the chairman of the planning committee, voted in favour of the proposals. The remaining councillor with dual membership of both committees voted against the proposals. Nothing had been said to those with dual membership that they had to put the support expressed by CAG to one side and to examine all the relevant planning issues before reaching planning decisions. One of those with dual membership had also received no training in planning matters. The claimant applied to challenge that decision by way of judicial review. He argued, inter alia, that the circumstances were such as to create an appearance of bias, sufficient to vitiate the planning committee's decisions.

Held – In considering the question of apparent bias, it was 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 question had to be approached wi appropriate caution, since it was important not to apply the test in way that would render local authority decision-making impossible unduly difficult. However, the circumstances of local authori decision-making were not such as to preclude the broader applicati of the test altogether. In all the circumstances, the decisions in questi were vitiated by the appearance of bias in that broader sense. Althou CAG's remit was to consider only the conservation implications of t proposals, its resolutions were expressed in simple terms and witho any qualification. Nothing was said of the need to put CA considerations aside, and one of the dual members had received training in planning matters. However, nothing turned on the fact th one of the dual members was the chairman of the planning committe since the problem related to the possibility that the dual membe approached the matter with closed minds, rather than the possibili that they influenced other members, or that the special status attach to CAG meant that its support for the applications affected oth members. Finally, no significant weight was to be attached to t dual members' witness statements that they approached the mat with open minds since the question of apparent bias was objective ([31]–[33], [35], [36], below).

Porter v Magill [2002] 1 All ER 465 applied. *Bovis Homes Ltd v N Forest DC* [2002] EWHC 483 (Admin) and *R (on the application Cummins) v Camden London BC* [2001] EWHC Admin 1116 considered

Notes

For preconceived bias for or against any particular outcome by decision-maker, see *Butterworths Local Government Law*, A [1828].

Cases referred to in judgment

Bovis Homes Ltd v New Forest DC [2002] EWHC 483 (Admin).

Medicaments and Related Classes of Goods (No 2), Re [2001] ICR 564, [20 1 WLR 700, CA.

Porter v Magill [2001] UKHL 67, [2002] LGR 51, [2002] 1 All ER 4 [2002] 2 AC 357.

R v Secretary of State for the Environment, ex p Kirkstall Va Campaign Ltd [1996] 3 All ER 304.

R v Selby DC, ex p Oxton Farms (18 April 1997, unreported), CA.

R (on the application of Cummins) v Camden London BC [2001] EW Admin 1116.

Southwark London BC v Jiminez [2003] EWCA Civ 502, [2003] IRLR [2003] ICR 1176.

APPLICATION

The claimant, Costas Georgiou, applied for judicial review of decision of the defendant local planning authority, Enfield Lon Borough Council, upon an application by Cygnet Healthcare Ltd,

first interested party, to grant listed building consent and planning permission for the change of use of a grade II listed building. The facts are set out in the judgment.

David Wolfe (instructed by *Bindmans*) for the claimant.
Toby Davey (instructed by the *Head of Legal Services,* Enfield) for the authority.
Anthony Dinkin QC and *Mary Cook* (instructed by *Beachcroft Wansbroughs*) for the interested parties.

Cur adv vult

7 April 2004. The following judgment was delivered.

RICHARDS J.

[1] This is a challenge to decisions of the defendant council on 17 June 2003: (i) to grant listed building consent for a change of use of a property known as Truro House into offices and a consulting room and for erection of a mental health nursing home for up to 60 persons within its curtilage, and (ii) subject to conclusion of a s 106 agreement [s 106 of the Town and Country Planning Act 1990], to grant planning permission for the erection of the nursing home. The decisions were taken by the council's planning committee. The challenge also encompasses the subsequent formal grant of listed building consent and planning permission.

[2] Truro House is a grade II listed building. It has suffered from neglect and is currently on English Heritage's register of buildings at risk and is subject to an urgent repairs notice requiring works to be undertaken. Those works were included in the planning application.

[3] The applications for listed building consent and planning permission were made by Cygnet Healthcare Ltd (Cygnet), a specialist provider of mental healthcare which had an option to purchase the site.

[4] The claimant is chairman of a local business association which objected to the applications. He is also an active member of other local representative groups. No issue is taken over his standing to bring the present claim.

[5] The detailed facts are best considered in the context of the specific issues. In order to put matters in context, however, it is helpful to set out the broad chronology.

(i) The applications for listed building consent and planning permission were made in January 2003.

(ii) On 5 February the proposals were considered by the council's conservation advisory group (the CAG), which is established under the council's constitution to consider and advise on a range of conservation issues. It consists of members of the council and representatives of the local community.

(iii) On 16 April there was a public meeting of a special planning panel set up in accordance with the council's constitution to provide an opportunity for: (a) Cygnet to explain its proposals; (b) local residents and organisations to put forward their views at an early stage; and

(c) officers and members to listen to the ideas and issues raised and concerns expressed prior to consideration at a subsequent planning committee.

(iv) An officers' report was prepared for a meeting of the planning committee on 29 April at which decisions were due to be taken on the applications. The report recommended that listed building consent and planning permission be refused.

(v) At Cygnet's request, consideration of the applications was deferred to enable it to consider the concerns expressed and to submit revisions.

(vi) Local government elections took place on 1 May, as a result of which there were some changes in the membership of the CAG and of the planning committee.

(vii) Revised drawings and further supporting documents were submitted by Cygnet on 14–15 May. Further representations were also made during May on other matters, including the question of need for the proposed development

(viii) The revised proposals were considered by the CAG on 27 May.

(ix) A revised officers' report was prepared for a meeting of the planning committee on 17 June. The revised report recommended the grant of listed building consent and planning permission.

(x) At the meeting on 17 June the planning committee, having heard representations from various individuals and deputations, resolved by a majority of 8:7 to grant planning permission subject to the completion of a s 106 agreement and subject to the conditions set out in the officers' report. It also resolved to grant listed building consent subject to the conditions set out in the report. The formal grant of listed building consent was made on the same day.

(xi) The actual grant of planning permission took place on 8 October, following completion of the s 106 agreement.

[6] There are four remaining grounds of challenge to the decisions taken on 17 June. They are in summary as follows: (1) there was a failure to take into account matters raised by one of the council's officers concerning highways/access matters; (2) participation in the decisions by members of the planning committee who were also members of the CAG gave rise to an appearance of bias; (3) members of the planning committee were not adequately informed on the issues of need for the proposed development and of its impact on existing services; and (4) members were not adequately informed about the consultation responses generally.

[7] It is convenient to consider ground (2) first. The other three grounds have a theme in common, in that they concern in one way or another the sufficiency of the information given to the planning committee for the purposes of reaching the decisions; and they are relied on cumulatively as well as individually.

GROUND (2): APPEARANCE OF BIAS

[8] This ground raises the question whether the planning committee's decisions were vitiated by an appearance of bias arising out of the fact

that four members of the committee were also members of the CAG and three of them (who all voted in favour of the grant of consents) participated in the meetings of the CAG at which support was expressed for the applications.

[9] I have mentioned that the CAG is established under the council's constitution. Specifically, Ch 7, on regulatory and consultative committees and panels, provides that '[t]he Council will appoint the committees set out below to discharge the following non-executive functions described'. The 'committees' listed are the planning committee, planning panels and the CAG. The membership of the CAG consists of six members of the council plus 19 other members comprising representatives of residents' associations and of various societies and groups within the borough. Various officers are also involved, as non-voting members. The terms of reference of the CAG include: (a) to consider and advise the planning committee on proposals for development which are referred to the CAG which could affect the character or appearance of conservation areas, ancient monuments, listed buildings or their settings; and (b) to advise the planning committee on the preservation or enhancement of the character or appearance of heritage features, areas and their environs.

[10] When the applications came before the CAG on 5 February 2003, those present included two members of the CAG (Cllrs Dey and Zinkin) who were also members of the planning committee that took the impugned decisions on 17 June. At the CAG meeting the members received a presentation from Cygnet's consultants. The note of the meeting records that, following discussion, 'the Chairman concluded that the Group were encouraged at the good opportunity to restore Truro House with an associated development which was sensitive to the history of the site.'

[11] When the revised applications came before the CAG on 27 May, those present included three members of the CAG (Cllrs Dey, McCannah and Zinkin) who were also members of the planning committee that took the impugned decisions. A fourth person (Cllr Giladi) also had dual membership of the CAG and the planning committee, but was not present at the CAG meeting. At the CAG meeting the members again received a presentation from Cygnet's consultants. The note of the meeting records that 'the Group noted the revisions and continued to support the application'.

[12] The views of CAG received separate mention in the officers' report for the planning committee on 17 June. The report stated, for example, that '[t]he revised application was reported to CAG on 27 May 2003, and the Group have noted the revisions made to the scheme and continue to support the application'.

[13] Another pointer to the significance of the CAG is that the seating plan for the meeting of the planning committee on 17 June involved the allocation of particular places in the room for certain groups of people, including non-councillor representatives of the CAG as well as officers from the planning department.

[14] At the 17 June meeting, the three members of the planning committee who had attended the CAG on 27 May voted in support of the applications. One of them, Cllr Dey, was in fact the chair of the planning committee. (Mr Wolfe submitted that Cllr Dey also chaired the CAG on 27 May, but in my view the evidence does not support that conclusion.) The fourth person with dual membership of the CAG and the planning committee, but the member who had not attended the CAG on 27 May, voted against the applications.

[15] Mr Wolfe submits that the circumstances were such as to create an appearance of bias sufficient to vitiate the planning committee's decisions. He relies on the principles laid down in *Porter v Magill* [2001] UKHL 67, [2002] LGR 51, summarised by Lord Hope of Craighead (at [103]) in the following sentence:

> '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.'

[16] Reliance is also placed on the decision of Ouseley J in *Bovis Homes Ltd v New Forest DC* [2002] EWHC 483 (Admin). The relevant issue in that case was whether the defendant council's decision to adopt the local plan was vitiated by apparent bias on the part of the chairman of the relevant committee. The contentious feature of the local plan was the inclusion of certain land in the New Forest Heritage Area. The chairman of the committee was also a member of a non-statutory body, the New Forest Committee, which had been closely involved in defining the boundaries of the heritage area and had supported the position adopted by the committee. Ouseley J, applying in substance the test approved in *Porter v Magill*, though using the language of 'real danger of bias' rather than 'real possibility of bias', held that the chairman's membership of the New Forest Committee did vitiate the council's decision:

> '[88] I do, however, consider that by the time of the September 1999 meeting, a fair-minded observer, knowing the background, would have considered that there was a real danger of bias from her external interest as a member of the New Forest Committee [NFC]. First, it is clear that the decisions of a planning authority are open to review on the basis of apparent bias of participating councillors (see, for example, *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 30[illegible] per Sedley J).
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> [89] Second, the source of the danger has to be a personal external interest. In my judgment an interest as a member of another body is a personal interest ...
>
> [90] Third, it is not necessarily sufficient to remove the danger that the external interest should arise from a councillor's appointment in her capacity as a councillor. It depends on the circumstances, including the degree of involvement in the external body, the position of the councillor on the relevant council committee and the nature of the issues ...

[95] Fifth, in the circumstances of this case, Cllr Drake had participated in a meeting of the NFC in August 1999, at which it declared its support for the council's position. She says the vote was unanimous, which suggests she voted. The committee had also previously supported the council's position on the heritage area when she had been a member of the NFC earlier in the 1990s and again since her reappointment in May 1999.

[96] This was not a body of incidental importance to the issue. It had been regarded by the council as the body which ought to be defining the heritage area boundary, and indeed in the early 1990s the government had so regarded it. It was an influential body ...

[97] Councillor Drake was also not a councillor of incidental importance. She was the planning and transportation committee chairman, a position which can be regarded as one of real influence in committee deliberations, even though she did not actually vote in July because the decision was so clear-cut. Events at the meeting in July would have done nothing to assuage the fears that might have arisen in August and September.

[98] This committee in September 1999 had to consider Bovis' response to the reasons given by the council for the rejection of the inspector's view. It had to do so against the background not just of the previous council decision, but on the basis that the NFC supported the council. The council was pursuing a proposal which had already been influenced by the NFC, rejecting for the third time the recommendation of the second inspector. These circumstances give all the appearance of a council being influenced by the NFC, not just through its representations, but also through the chairman of the planning and transportation committee, who had helped to formulate and had voted on those very NFC views. In my judgment she should not have been present at the September 1999 meeting. Her presence leads to the inference that there was an appearance of bias.'

[17] In support of the submission that a fair-minded and informed observer in possession of all the facts of the present case would conclude that there was a real possibility of bias, Mr Wolfe points to the overlapping membership of the CAG and the planning committee; the importance attached to the CAG; the fact that the CAG had expressed positive support for the applications even though they had heard only part of the evidence and had not considered all the relevant planning issues; the fact that there was no indication that any of those present at the CAG meeting on 27 May dissented from the CAG's support for the applications; the fact that the three members of the planning committee who had attended the CAG meeting on 27 May voted in favour of the applications, whilst the other person with dual membership, but who had not attended the CAG meeting, voted against; the fact that one of those with dual membership who voted in favour was the chair of the planning committee; and the very narrowness of the 8:7 vote in the planning committee.

[18] It is also submitted that matters were made worse by the fact th three members of the planning committee, including one of those wit overlapping membership of the planning committee and the CAG (Cl McCannah), were new to the planning committee and had not ye received the training in planning law and procedure which they wer required by the council's code of practice to receive within three month of their appointment. The three new members all voted in favour of th applications.

[19] A further submission is that in expressing support for th applications, the members of the CAG were in breach of the council code of practice, which provides that—

> '[w]hen being lobbied, Members of the Planning Committe should not express an opinion which may be taken as indicatin that they have already made up their mind on the issue before the have exposed themselves to all the evidence and arguments.'

I say at once that I do not think that this provision of the code i directed towards consideration of issues in the CAG or othe committees of the council, even if the meeting does receiv presentations from a developer or other interested party. But that doe not affect the wider question whether members' participation both i the CAG and in the planning committee gave rise to an appearance o bias on the facts of this case.

[20] Finally, Mr Wolfe relies on what he submits to have been a implicit recognition by the council itself that what had happened in th case was flawed. In a report dated 10 June 2003 officers had drawn th council's attention to potential problems arising out of du membership of the CAG and the planning committee:

> '3.4.1 Currently, some councillors are members of the CAG an the Planning Committee. This has arisen mainly because o members' interests in both areas and the clear links between th two. Indeed, such dual membership can have a positive effect o the working relationship between the two bodies. However, th dual membership can also give rise to possible conflicts of interes For example, where a member has commented publicly, an possibly voted, on a planning application at CAG (without th benefit of a Planning Committee report covering all relevan issues), this could be viewed as prejudicing his/her position as member of the Planning Committee subsequently considering th same matter. The conservation issues may be but one of a numb of issues that need to be considered.
>
> 3.4.2 The ability of the members to vote at CAG, and therefo affect the recommendation to the Planning Committee, could giv rise to a possible conflict of interest. It is suggested therefore th the following could be included in the Planning Code of Practic which is part of the Council's Constitution (Part 5 – para 5.2)
>
> "Councillors may be members of both the Conservatio Advisory Group (CAG) and the Planning Committee. Th

> considerations at CAG are confined strictly to conservation matters. When a matter is to be considered by both bodies, these members may participate in the discussion at CAG but not vote on the issues. This is because when the item reaches the Planning Committee, members must be seen to consider impartially all the material considerations. Such members will be required to make a statement reflecting the above position at both CAG and Planning Committee. These statements will be minuted." '

[21] The council resolved to amend the code of practice in line with the recommendation. But that resolution was adopted only on 18 June, the day after the impugned decisions were taken. Accordingly the arrangements provided for in the amended code were not in place at the time of the decisions.

[22] For the council, Mr Davey accepts that the governing principles are those in *Porter v Magill* and the *Bovis* case, but submits that the situation is factually distinguishable from that which led to a finding of an appearance of bias in the *Bovis* case. The CAG is formed of a variety of interest groups concerned with conservation issues. It is not concerned with the full range of issues arising on a planning application, and the views it forms on conservation issues give rise to no predetermination of the planning issues. The evidence of the councillors themselves shows that they appreciated the wider range of issues that needed to be considered in the context of the decisions of the planning committee and that they had not made up their minds on those issues by reason of their participation in the CAG. Further, no vote was taken in the CAG. In any event, merely to express support for a proposal in terms of conservation issues cannot be taken to demonstrate a closed mind in relation to wider planning issues.

[23] For Cygnet, Mr Dinkin draws particular attention to the reasoning of Ouseley J in *R (on the application of Cummins) v Camden London BC* [2001] EWHC Admin 1116 and submits that a distinction has to be drawn between bias, predisposition and predetermination. *Cummins'* case predated *Porter v Magill* and the *Bovis* case. It involved the grant of planning permission by the full council in respect of land owned by the council and appropriated for the most part to its Leisure and Community Services Committee. The issues raised included bias and a closed mind, which were considered (at [234] ff) of the very long judgment. Ouseley J cited passages from *Ex p Kirkstall Valley* [1996] 3 All ER 304 in which Sedley J drew a distinction, first, between bias (ie whether there was a real danger that a person would be influenced by a pecuniary or personal interest in the outcome) and predetermination (which, as Sedley J put it (at 319), 'while it can legitimately be described as a form of bias, is jurisprudentially a different thing from a disqualifying interest held by a participant in the process'); and, secondly, between predetermination and predisposition (eg arising out of the policies of a political party or the known views of an individual). He summarised the position ([2001] EWHC Admin 1116 at [256]) as follows:

'I accept Sedley J's analysis of the two distinct principles. The first question is whether there was a real danger that a councillor's decision would be influenced by a personal interest, or putting it in what may be a slightly different formulation of the test for bias, following *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564: would the fair-minded observer, knowing the background, consider that there was a real danger of bias from, in this context, a personal interest held by a councillor? There is an important distinction between bias from a personal interest and a predisposition, short of predetermination, arising say from prior consideration of the issues or some aspect of a proposal. 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. The source of the potential bias has to be a personal interest for it to be potentially objectionable in law.'

[24] He went on to hold that there had to be an extraneous personal interest to give rise to bias. That could arise through membership of an external body, but not through membership of one of the council's own committees, including the leisure and community services committee, even though it was closely involved in the promotion of the scheme. Thus, in relation to membership of that committee he stated:

'[264] I do not consider that this gives rise to any personal interest. It is not an extraneous interest. The committee is exercising functions on behalf of the council. Its members' support for the applications is transparent but not binding on the full council which, subject to argument on predetermination, reached its own decision.

[265] I do not consider that the bias test can be applied, at least in this decision-making area, unless the danger of the influence on councillors derives from an extraneous personal interest. Were the law otherwise, it is difficult to see how a council could lawfully reach a decision on a planning application, whether made by the council or an outsider, if the application advantaged the council financially or in the performance of its functions. The real danger of influence would be ever present.'

[25] Ouseley J went on to consider as a separate question whether the decision was vitiated by predetermination, in relation to which, upon detailed consideration of the evidence, he rejected the claimant's case that the members of the council had approached the decision with a closed mind.

[26] Applying the principles in *Cummins'* case to the facts of the present case, Mr Dinkin submits that membership of the CAG, which is a committee of the council, must be distinguished from membership of an extraneous body. The fact that a member of the planning committee is also a member of CAG cannot in itself give rise to an extraneous interest capable of engaging the rules on bias. To apply the rules on bias to the position of the CAG would interfere with the proper operation

council committees. Consistently with those submissions, Mr Dinkin contends that the amendments to the council's code of practice to deal with perceived problems concerning dual membership of the CAG and the planning committee were in fact unnecessary. He submits further that, given the limited role of the CAG in considering only conservation issues, the expression of views in the CAG could at most evidence a predisposition in favour of the proposals; it did not amount to any predetermination of the applications. There is nothing to show that anyone approached the planning issues with a closed mind at the meeting of the planning committee on 17 June.

[27] My conclusions in relation to this ground are as follows.

[28] First, the case is put squarely on the basis of an appearance of bias. The governing principles are therefore those stated in *Porter v Magill* and, in particular, whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the planning committee or some of its members were biased.

[29] I accept Mr Dinkin's submission that bias, in the sense of a pecuniary or personal interest in the outcome of a decision, is conceptually distinct from predetermination or a closed mind, and I see the force of the analysis in *Ex p Kirkstall Valley* which was picked up and applied in *Cummins'* case. If the *Cummins* approach were applied narrowly here, then it seems to me that the rules on bias could not be said to be engaged, since under the council's constitution the CAG is a committee of the council (albeit one with co-opted external members) rather than an external body, and a councillor's membership of that committee could not be said to amount to an external or extraneous personal interest. The situation is in that respect factually closer to *Cummins'* case than to the *Bovis* case, where the problem arose out of participation in what was truly an external body by the chairman of the relevant committee of the council.

[30] It seems to me, however, that a different approach is required in the light of *Porter v Magill* [2002] LGR 51. 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 [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 *Ex p Kirkstall Valley*, as quoted in *Cummins'* case, 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 *Southwark*

London BC v Jiminez [2003] EWCA Civ 502 at [25], [2003] IRLR 477 at [25], 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.

[32] On that basis I do have concerns about what happened in this case and the objective impression that it conveyed. Although the CAG's remit was to consider only the conservation implications of the applications, its conclusion was expressed in simple terms of support for the applications, without any qualification. Both the note of the CAG meeting on 27 May and the report to the planning committee on 17 June state that CAG 'continued to support' the applications. Moreover, although there is nothing to show that a vote was taken within the CAG, there is equally nothing to show that any of the members present dissented from that conclusion: the support appeared to come from all those present, including the three members who were also members of the planning committee. When it came to the meeting of the planning committee, nothing was said about the limited function of the CAG or about the need for those with dual membership to put on one side the support expressed in the CAG and to examine all the relevant planning issues before reaching the planning decisions.

[33] In those circumstances I take the view, though not without a degree of hesitation, that a fair-minded and informed observer would conclude that there was a real possibility of bias, in the sense of the decisions being approached with closed minds and without impartial consideration of all the planning issues, as a result of the support expressed by the CAG being carried over into support for the applications in the context of the planning committee's decisions.

[34] The fact that one of those with dual membership had received no training in planning matters reinforces that concern. So does the fact that all three of those with dual membership who had attended the CAG meeting on 27 May voted in favour of the applications.

[35] On the other hand, in my view nothing turns on the fact that one of them was the chairman of the planning committee. The problem, as I see it, relates to the possibility that the three members to whom I have referred approached the matter with closed minds, rather than

possibility that they influenced other members or that the special status attached to the CAG meant that its support for the applications affected other members.

[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* [2002] LGR 51 at [104].

[37] It follows from the above that in my view the concerns expressed by the council's officers about the problems arising out of dual membership of the CAG and the planning committee were justified, and the amendment to the planning code of practice which took effect on 18 June had a sensible basis to it. Whether the amendment goes far enough is another question. The facts of this case throw up a possible deficiency, in that the amendment provides that those with dual membership must not *vote* on issues considered at the CAG; but a member of the CAG may be associated with a position adopted by the CAG even in the absence of a formal vote, as appears to be the position here. The mischief at which the amendment is aimed is therefore capable of arising, and in my view arose in this case, without the need for a formal vote. It may be that the amendment should go further and provide those with dual membership should expressly dissociate themselves from any conclusion reached by the CAG, even if reached without a formal vote. In any event a very important point, and one substantially reflected in the last part of the amendment (the requirement to make a statement both at the CAG and at the planning committee), is that all concerned should understand and acknowledge openly the need to ensure that participation in the CAG does not lead to any predetermination of the planning application, which must be approached in the planning committee with an open mind and by impartial consideration of all the planning issues.

[38] Whether or not the amendment to the planning code of practice goes far enough, it cannot help to save the decisions in this case, which were taken before the amendment was adopted.

[39] For the reasons I have given, the decisions were in my judgment vitiated by the appearance of bias.

GROUND (1): THE HIGHWAYS/ACCESS ISSUE

[40] The nature of the claimant's case on this ground is that concerns expressed by an official in the council's transport planning team, Mr Roger Juer, were not communicated to the members of the planning committee and that this resulted in a failure on the part of the committee properly to discharge its obligations under s 54A of the 1990 Act and/or a failure to take into account material considerations.

[41] To put Mr Juer's involvement in its proper perspective, I should explain that he was a senior engineer in the transport planning team. His line manager was Mr David Taylor, who was Team Leader (Transportation Planning) and was himself a qualified highways

engineer. Above Mr Taylor was Mr Stephen Tapper, who was Assista Director (Planning and Transportation) and who approved in th capacity the officers' report to the planning committee.

[42] Traffic and transportation issues, including parking and turnin arrangements and access to and from the road onto the site, we plainly of potential importance. At the meeting of the special plannin panel on 16 April they were identified by Mr Tapper, the Assista Director (Planning and Transportation), as one of five key plannin issues in relation to the proposed development.

[43] Mr Juer had expressed concerns about highways an transportation aspects of the original planning application. These we discussed at a meeting on 16 April 2003 with Mr Peter Prutton, Singleton Clamp & Partners Ltd, a consultant retained by Cygnet. On 21 April Cygnet submitted revised drawings and additiona information on parking requirements. In a memorandum dated 24 Ap Mr Juer expressed continuing concerns, expressing the view that th application should be refused on grounds that the proposal did no make provision for (i) car and pedal cycle parking or (ii) access an servicing in accordance with the standards adopted by the council. On 25 April Mr Prutton sent a fax to Mr Juer about various matter On 14 May, Cygnet submitted further revised drawings, followed on 15 May by addenda on various matters, including an addendum b Mr Prutton on highway and traffic matters. The 15 May covering lett stated that 'I am advised by Peter [Prutton] that all of the outstandi issues raised by Roger Juer have been addressed'.

[44] Although Cygnet believed that the outstanding issues had be addressed, Mr Juer evidently took a different view. In a memorandu dated 30 May and an e-mail dated 2 June, which were internal to th council and not seen by Cygnet, he raised continuing concerns abo the application even in its amended form.

[45] The memorandum of 30 May stated:

> 'Specifically, in addition to the issues raised in previous correspondence, the concerns apparent from inspection of the pla and SC's [Singleton Clamp's] letter *now* received are as follows:
>
> 1 The plans described in the letter to Development Contr from Brady and Mallalieu Architects and dated 14 may 2003 a different from those received. I shall comment only on what I g and not on what I should have got if that is different.
>
> 2 I note that surgical waste is still shown. No surgery shou be conducted on the site and no body parts should be remov from it. Minor bits like nail clippings should not need a separ storage and collection.
>
> 3 Locating refuse stores at the bottom of a ramp is poor desi as it means pushing or lifting waste uphill—with added risk spillage or tipping.
>
> 4 The gradients shown are steeper than the maximu permitted under UDP [Unitary Development Plan] standar and I am aware of no reason why an exception should be ma in this case.

5 I have previously requested a plan showing how the proposed access junction would relate to the existing layout of Oakthorpe Road and existing features thereon, including existing junctions nearby. This has not been received. The plan received suggests a bellmouth requiring pedestrians to cross some 10 metres of carriageway. This is excessive and should be designed down.

6 The plans show no North point and it is difficult nay impossible to relate the proposed development and highway layout.

7 I reject out of hand the suggestion made by SC that "it is highly unlikely that two vehicles would ever meet on or in the vicinity of the ramp". Given the likelihood that one shift would end when another begins, I would argue strongly that it is highly unlikely that they would not ever meet.

8 I have previously requested—and been promised—a plan showing the autotrack analysis mentioned in SC's letter. I have not received one and therefore cannot assume that turning movements would be acceptable.

9 The passing place for two vehicles is shown at the bottom of the ramp, remote from the junction with the public highway. This is unacceptable because it would involve either a lobster quadrille at the junction, which is what the passing place is to obviate, or reversal down the ramp, which should be designed out.

10 The plans and elevations are not consistent and it appears that parts of the vehicle ramp would be only 3 metres wide. This is too narrow for a refuse collection vehicle to access the bins, particularly in reverse gear!

The above may not be exhaustive.

I conclude that, as currently presented, this application should be *refused consent* for the reasons that:

1 The proposal does not make provision for access and servicing in accordance with the standards adopted by the Council and could therefore give rise to kerbside loading unloading and servicing in the adjacent streets to the detriment of safety and the free flow of traffic including pedestrian traffic on the public highway. In this respect the proposal is contrary to policies GD6 and GD8 of the UDP.

2 The proposed layout would result in a vehicle crossing the footway at an acute angle and would therefore constitute a hazard to pedestrians on the public footway. In this respect the proposal is contrary to Policies (II)GD8 (II)T13 and (II)T17 of the UDP.'

[46] The e-mail of 2 June stated:

'In conclusion I myself do not see justification to relax Council standards of development and therefore would not revise my recommendation. However, if it decided, following receipt of

> advice from the DoSS [Department of Social Services] and oth
> appropriate quarters that the application should be supported, the
> clearly we must look again at the details. I should point out tha
> achievement of an acceptable vehicle ramp, disability access an
> accommodation, ambulance/minibus parking, and highway layo
> in Oakthorpe Road, are likely to result in revised plans an
> elevations, since flattening gradients could well lift the wh[o]
> building out of the ground, adding to its mass.'

[47] The claimant's case is that Mr Juer's views, in particular on th lack of conformity with UDP policies, were something that the planni committee needed to be aware of and to take into account. By s 54A the 1990 Act the application had to be determined in accordance wi the development plan unless material considerations indicate otherwise. It was therefore necessary for the committee to interpret th development plan properly, decide whether the proposed developme accorded with the development plan, identify and take into account a other material considerations, and decide whether the developme plan should be accorded the priority given to it by statute. Yet neith the fact nor the substance of Mr Juer's views was drawn to the attenti of members for the purposes of their decision on 17 June. Indeed th impression given in the officers' report to the committee was that the were no highways or related difficulties in relation to the applicatio

[48] The responses of Cygnet and the council are surprisingl different from each other.

[49] For Cygnet, Mr Dinkin submits that there was no substance i any of the points raised by Mr Juer, which have to be viewed again the background of the discussions and revisions that had already take place. Some of the points had nothing to them at all or were simp petty, some were factually in error, and it was plainly open t Mr Tapper to conclude that none of them raised any substantial issue as to compliance with the UDP and that none of them needed to b mentioned in the report to the planning committee. (Although doub was expressed about whether Mr Juer's comments were based o consideration of the up to date revised plans, this was not pursued an was in my view not sustainable.)

[50] The council is not so dismissive of Mr Juer's comments. In h witness statement, Mr Taylor states:

> 'By way of explanation it should be highlighted that Mr Ju provides the groundwork for comments on the highway a transportation aspects of development proposals. In preparing b recommendation for councillors, I reviewed Mr Juer's comme and took his views into account. However, I took the view that th matters raised by Mr Juer were not sufficient in their own right t justify refusing planning permission, but could be covered b planning conditions or that they were outweighed by oth considerations. This explains why Mr Juer's comments did not fi their way into the final report.'

[51] Mr Tapper gives evidence to the same effect, also stressing that the comments formed part of an internal discussion held within the team and that comments from external bodies would have been treated differently and reported more or less verbatim.

[52] So it is not suggested by the council that Mr Juer's comments lacked substance. Both officers state instead that the view taken internally by officers was that the issues raised could be covered by planning conditions or that they were outweighed by other considerations.

[53] The council in fact moved in stages to the position set out in the witness statements. In response to a supplementary letter before claim, the council stated simply that 'the report reflected that there were no traffic problems of significance remaining sufficient to justify refusal of the scheme'. In its grounds of resistance to the claim, it contended that the issues raised by Mr Juer had been addressed by the imposition of the planning conditions set out in the report. It was only in the evidence of Mr Taylor and Mr Tapper that it was said that the view taken was that the matters could be covered by planning conditions *or* were outweighed by other considerations. Although this shift of ground may be thought surprising, I think it right in a matter of this kind to concentrate on the account given in the actual evidence filed by the council.

[54] One further point I should make about the state of the evidence is that there is no witness statement from Mr Juer himself. Mr Dinkin sought to make something of the fact that Mr Juer was present at the meeting on 17 June but did not repeat his concerns on that occasion. In my view, however, that cannot justify the inference that he had changed his views in any respect; nor is there any suggestion to that effect in the council's evidence.

[55] I move on to consider the issues arising on this ground of challenge.

[56] The adequacy of the report to the committee needs to be assessed in the light of the principles set out in *R v Selby DC, ex p Oxton Farms* (unreported), a judgment of the Court of Appeal dated 18 April 1997. The contention advanced in the case was that an officers' report to the planning committee was deficient. Pill LJ stated:

> 'It is important that those who make determinations under the planning acts are familiar with ss 70(2) and 54A of the [Town and Country Planning Act 1990] and apply the test imposed by Parliament. It follows that a planning officer reporting to and advising council members who are to make a relevant decision must keep the test in mind in the information and advice he provides and in the manner in which he provides it. Clear mindedness and clarity of expression are obviously important. However that is not to say that a report is to be construed as if it were a statute or that defects of presentation can often render a decision made following its submission to the council liable to be quashed, The overall fairness of the report, in the context of the

statutory test, must be considered. It has also to be borne in mind that there is usually further opportunity for advice and debate at the relevant council meeting and that the members themselves can be expected to acquire a working knowledge of the statutory tests. In my view the report itself in the present case was not only comprehensive in its treatment of the facts but sufficiently advised the committee upon the statutory and policy framework within which the decision was to be taken. The committee were adequately advised and their decision should stand. I would dismiss these appeals.'

[57] Judge LJ concurred and added:

'The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury. From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken.'

[58] In the present case the report to committee listed relevant UDP policies, including those referred to by Mr Juer, but did not set them out or summarise their terms. It identified 'highways implications' (which evidently included questions of access) as one of the key issues raised by the application. On that issue it stated:

'The proposal involves 32 parking spaces provided within an underground car park. This total would be for a shift containing 29 staff on site at any one time serving the 48-bed space facility. The applicant also envisages 3 visitors present on top of this figure.

The relevant UDP requirement would be for 1 space per two members of staff plus one space for every 10 occupants. This level of provision would thus be within that required by UDP standards. Consequently, together with cycle parking provision and its proximity to Green Lanes, it is considered the provision is sufficient for the proposed development.

Vehicular access to the premises would be from Oakthorpe Road. Access via Green Lanes is not an option on highway grounds (free flow and safety of traffic) as well as the possible impact on

setting of the listed building. The access point would be positioned close to the entrance with St Anne's School. To mitigate against any potential safety concerns, the introduction of traffic calming measures have been discussed and could in principle address such concerns.

Local residents have expressed objections to the proposal on grounds relating to the impact on Oakthorpe Road particularly given the cumulative impact arising from the use of the Community Centre and Mosque (now under construction). On street parking in the vicinity of the site is during the day at saturation. Any further pressure therefore is likely to lead to additional parking along Oakthorpe Road. However, it is accepted that sufficient parking exists and although there could be pressure at times when shifts are changing, this is outside peak times when spare capacity is likely to exist. It is not considered therefore that the proposal would result in unacceptable level of traffic generation to the detriment of Oakthorpe Road.

Any further observations relating to this issue will be reported at the meeting if necessary.'

[59] The general impression conveyed by that passage was that highways matters were not a problem. Mr Juer's concerns were not mentioned. Nor were they mentioned at the meeting on 17 June itself. The essential question is whether their omission resulted in the committee being significantly misled or otherwise led to a failure properly to carry out the exercise required by s 54A of the 1990 Act.

[60] If Mr Dinkin is right in his submission that Mr Juer's points contained nothing of substance, then plainly it was unnecessary to draw them to the attention of the committee and their omission was of no consequence. I accept that some points fall readily into that category. Others, however, give rise to greater difficulty:

[61] Perhaps the single most important of the points in Mr Juer's memorandum of 30 May is no 4, where he states that the gradients shown are steeper than the maximum permitted under UDP standards. Its potential importance lies in the fact that it is picked up in the e-mail of 2 June, where he says that flattening gradients could well lift the whole building out of the ground, adding to its mass. If this was right, I have no doubt that it ought to have been drawn to the attention of the committee. But Mr Prutton has provided detailed evidence to show that it was not right and that the gradients on the approved plans do comply with the standards referred to in the relevant policy of the UDP, namely policy GD8. I am conscious of the danger of getting drawn into planning judgments that are not for the court. I take account of the fact that Mr Juer states at point no10 that the plans and elevations are not consistent. I am also concerned about the fact that the council's own evidence does not seek to cast doubt on the correctness of Mr Juer's concerns. On the other hand, the claimant has not advanced any positive case as to non-compliance with the UDP or with standards referred to in it and has put forward nothing to cast doubt on the

substance of Mr Prutton's evidence that the gradients do comply with the standards. In the circumstances I am not satisfied that Mr Juer's concerns about the gradients needed to be drawn to the attention of the committee.

[62] On the other hand, some of Mr Juer's other points cannot be dismissed by reference to objective material in the same way as can his point on gradients. His concerns about the access junction (no 5), the ramp and the adequacy of passing places (nos 7 and 9) and the collection of refuse (points nos 3 and 10)—all of them being points that contributed to his advice that the application should be refused on the two grounds stated by him—raise issues of planning judgment. The judgmental nature of the issues is emphasised by the terms of the UDP policies to which he refers. For example, policy GD6 is 'to have regard ... to the traffic likely to be generated ... and its implications for the locality'. Policy GD8 is—

> 'to require that the site access and servicing of all development normally complies with the council's standards and in particular ... (c) that refuse storage facilities are carefully sited and screened in all cases ... (d) that ... there are adequate arrangements for circulation, servicing and off-street parking ...'

Policy T13 is: '... to assess proposals for the creation or improvement of an access onto the public highway ... in accordance with the following criteria ...' It is not for me to make the requisite judgments, eg by way of accepting Mr Dinkin's submission that it is plain from the plans that the access to the highway would not pose any problems. It may be inferred from the council's evidence that the council's senior officers did not consider Mr Juer's points to be without substance.

[63] In those circumstances I am not persuaded by Mr Dinkin's submission that Mr Juer's comments should be regarded as being without substance or no more than technical points on which senior officers could properly form a different assessment. Nor in my view can they be dismissed on the basis that even if they had been brought to the attention of the planning committee, they could have had no effect on the outcome, in that members could not reasonably have accepted Mr Juer's advice or concluded that the proposals would be in breach of UDP policies.

[64] That makes it necessary to consider how, on the council's own evidence, the comments were actually dealt with.

[65] As to the council's evidence that it was that thought that the matters raised by Mr Juer could be covered by planning conditions, there is of course no problem in principle about the use of appropriate conditions to deal with matters that might otherwise justify the refusal of planning permission. Where, however, it was being said that the proposals were contrary to policies in the UDP (as was the case with some of Mr Juer's concerns, even if one discounts the point about gradients), it seems to me that the attention of members ought to have been drawn to the concerns expressed and to the way in which it was said that they could be met by conditions. The relevant judgment

was for them to make, even though they would no doubt rely heavily in practice on the advice given to them by senior officers. As it was, the report not only failed to draw their attention to the concerns or to the view (in so far as this was the case) that they could be met by conditions, but gave very little information about the conditions themselves. It referred to them only in summary form, eg '6. C13 Details of Loading/ Unloading/ Turning Facilities' and '7. C14 Details of Access and Junction', these apparently being the headings of the council's standard conditions. It did not include any reasons for the imposition of such conditions. The full text of the conditions and the statement of reasons only came later, with the actual grant of planning permission.

[66] In his submissions Mr Davey sought to identify which particular conditions addressed each of the concerns raised by Mr Juer. I have to say, however, that I found this exercise unsatisfactory since it is in the first instance for the decision-making committee, not for the court, to satisfy itself that the conditions are apt to meet the concerns expressed. The material placed before members of the committee did not enable them to carry out that exercise.

[67] The council's difficulties increase if one considers the other basis upon which, on the council's evidence, it was considered unnecessary to draw Mr Juer's concerns to the attention of the committee, namely that they were outweighed by other considerations. Although Mr Davey submitted that this meant other *highways* considerations, that is not what the witness statements say and is not what council said when asked to clarify the evidence. In my view it is an impermissible gloss on the evidence. Yet if the reference is to other, non-highways considerations, then plainly it was for the members of the committee, not just for the officers, to carry out the balancing exercise. They were not, however, in a position to do so, since the report did not tell them of Mr Juer's concerns and, as I have said, it gave the general impression that highways matters were not a problem at all.

[68] In my view nothing that was said at the meeting on 17 June altered the position.

[69] I am driven to the conclusion that there was here a failure to place adequate information before the members. I think it likely that the concerns were capable of being met by conditions or of being outweighed by other considerations, but it was for the committee to form the relevant judgment, and for that purpose the members needed more information than they were in fact given. This conclusion involves no departure from the reasoning in *Ex p Oxton Farms*, but is an application of that reasoning to the particular facts of this case.

GROUND (3): HEALTHCARE NEED AND SERVICE IMPACT

[70] Issues of healthcare need and the impact of the proposed development on existing health and social services provision were treated at all times as material considerations and were the subject of substantial comments from consultees. Amongst the responses were objections from the council's Social Services Department and from the

local NHS Primary Care Trust. Cygnet sought to counter the concerns expressed. As is now clear, however, the objections remained. The main issue raised by this ground is whether the members of the planning committee were given adequate information about the up-to-date position and/or whether they were left with the erroneous impression that the concerns had been resolved.

[71] The nature of the concerns expressed is sufficiently indicated by reference to two documents. In a letter dated 19 March 2003 the Assistant Director (Adults) of Social Services, Ms Penny Butler, disputed the existence of a need for the services to be provided by the proposed development and said that it had the potential severely to de-stabilise local statutory services. In a letter dated 8 April 2003 the Chief Executive of Enfield NHS Primary Care Trust stated that the proposed development did not accord with Enfield's three-year local development plan based upon the needs of Enfield residents, and expressed concern that patients might be imported from outside Enfield, causing increased pressure on other local services, and that it would prejudice the successful recruitment and retention of staff in existing and planned services.

[72] Those concerns were summarised in the officers' report prepared for the meeting of the planning committee that was due to be held on 29 April but was then deferred. Although Mr Wolfe criticised the summary (which was repeated in the later report) as failing to convey the full nature and strength of the concerns, it was in my view in that respect adequate. Furthermore the report went on to state, when discussing the acceptability of the proposed land use:

> 'Of further relevance to this issue though is the question of the need for such a facility. Again this concern reflects the concern of local residents and expressed at the recent Planning Panel.
>
> Both Social Services and the local NHS Trust object to the development. They consider there is no proven need for the development at present and that such a facility will place additional strain on already over stretched support services. Although national advice advocates the pre-eminence of choice and competition which the planning system should not seek to hinder, the question of need can be material to the consideration of such proposal and this application especially where the development would have some adverse environmental impact. The Applicant has sought to provide further support to this issue citing support from Barnet, Enfield & Haringey Mental Health Trust and local representatives of MIND [National Association for Mental Health]. In addition, the Applicant reiterates the contention that the facility would provide a type of facility and treatment not presently available within the Trust area and that would enable all Enfield patients to be treated within the Borough and not externally as currently occurs. However, in the light of the local NHS Trusts and Social Services objection, this issue continues to be of concern. Any further comments will be reported at the meeting.'

[73] The absence of a proven need for the proposed use was one of the matters that was then weighed in the balance in the report's conclusion, leading to the recommendation at that time that planning permission be refused.

[74] In the course of May, Cygnet submitted a substantial amount of additional material on the question of need, including a report dated 23 May and referred to before me as the Laing Report.

[75] The officers' report for the meeting on 17 June contained the same summary as before of the comments of social services and the primary care trust, though noting at that point that additional information had been received and that any further comments would be reported at the meeting. The report's subsequent discussion of the issue of need started in terms almost identical to those in the previous report, though excluding the words 'However, in the light of the local NHS Trusts and Social Services objection, this issue continues to be of concern'. The report went on to set out a summary of the additional information received from Cygnet. What was set out was in fact a verbatim transcription of a lengthy executive summary provided by Cygnet. The report continued:

> 'In the light of the above additional information, and the advice contained in PPG1, it is considered that a refusal on the question of need may be difficult to sustain. However if any further comments are received from either Social Services or the local NHS Trust, these will be reported at the meeting.'

[76] No further comments from social services or the primary care trust were reported at the meeting, though it is right to note that the concerns previously expressed by those bodies were referred to in the course of representations made by objectors at the meeting.

[77] Mr Wolfe submits that the officers' report for the 17 June meeting ought to have drawn members' attention to the recommendation for refusal contained in the previous report, and that the failure to do this resulted in the committee unlawfully failing to take account of that recommendation as a material consideration. I reject that submission. It is based on a factually mistaken premise, in that the evidence before the court (which, despite a certain oddity about it, I must take at face value since it has not been possible to take the matter any further) is that each member of the committee did in fact receive copies of the earlier report; they must therefore be taken to have been aware of the earlier recommendation for refusal. In any event I do not accept that the earlier recommendation needed to be drawn to their attention. It was based on the information then available and had not been considered by the committee at that time. What mattered on 17 June was the up-to-date information and the fresh recommendation based on that information.

[78] Mr Wolfe's further and stronger submission is that the members of the committee did not have adequate up to date information and

were left with an erroneous impression that the concerns previous expressed by social services and the primary care trust had be resolved.

[79] The Laing Report itself suggested the existence of mixed vie concerning the need for the proposed development. Reference w made, inter alia, to the view expressed by officers at Strategic Hea Authority level as to the absence of a significant need, and to concer expressed by a local NHS manager about competition for staff and t financial implications of a new local service. Those matters were n mentioned in the summary of Cygnet's representations contained the officers' report to the planning committee, nor were members of t committee supplied with a copy of the Laing Report itself.

[80] It does not appear that the council's officers, having received t Laing Report, put it to social services or the primary care trust f comment. Nevertheless it appears to have come to the attention social services at least. The evidence before the court includes a let dated 29 May 2003 from Barnet, Enfield and Haringey NHS Men Health Trust to Penny Butler at social services, giving the Mental Hea Trust's comments on the Laing Report. Ms Butler's own comme endorsed in manuscript on the letter, was 'my view remains the sam There was also a manuscript instruction that the document should copied to the planning department. It was received by the planni department but there is no record of its having been drawn to t attention of members of the planning committee.

[81] Recent inquiries by or on behalf of the claimant confirm that t concerns of social services and the primary care trust in fact remai as set out in the letters of March and April 2003 to which I ha previously referred. In manuscript comments annotated on a l of questions sent to her by the claimant, Ms Butler states that 'the vi of Social Services did not change and has not changed subsequently letter dated 5 March 2004 from Enfield NHS Primary Care Trust to t claimant's solicitors states that had there been further consultation w them on health care needs the primary care trust's views would ha been as set out in their original letter.

[82] The fact that social services and the primary care trust contin to object to the proposed development, an objection underlined by t views of the Strategic Health Authority referred to in the Laing Rep is a matter of some importance, especially given that the absence proven need had been one of the factors contributing to recommendation for refusal in the original officers' report. In judgment this was something of which members of the plann committee ought to have been aware.

[83] Mr Davey and Mr Dinkin seek to meet that point by saying the objections of social services and the primary care trust were alr summarised in the officers' report and were therefore before committee, and that it would have added nothing to draw attentio the fact that their objections were maintained. I disagree. On a reading of the report as a whole and in the absence of information further input from social services or the primary care trust, mem

could well have been left with the impression that the objections of those bodies had been substantially met by the additional information received from Cygnet. Members were told in the report that in the light of that additional information, together with an unparticularised reference to the advice contained in PPG1, it was considered that a refusal on the question of need might be difficult to sustain. They were also told that if further comments were received from social services or the primary care trust, such comments would be reported at the meeting. The fact that no such further comments were communicated to members would have tended to indicate that the social services and the primary care trust did not dissent from the view expressed by officers in the report.

[84] It may be little more than a forensic point, but Mr Wolfe draws attention to the witness statement of Cygnet's own Regional Director, Mr Hoar, in which he notes that that social services, the primary care trust and the Mental Health Trust did not appear to speak at the committee meeting on 17 June and had not written to the council to pursue their objections. He states his belief that 'they did not do so because their concerns had been addressed in the additional documentation which they had been sent'. If Cygnet's own witness formed that impression, then it is not easy for Cygnet to contend that members of the committee would have proceeded on the contrary basis that the objections of social services and the primary care trust were maintained.

[85] Accordingly, and again in application of the principles in *Ex p Oxton Farms* (above), I take the view that on the issue of need the report to members was materially deficient and misleading. It resulted in the committee proceeding on a mistaken factual basis and failing to have proper regard to a material consideration in reaching its decision.

GROUND (4): INADEQUATE SUMMARY OF CONSULTATION RESPONSES

[86] This ground looks at the adequacy of the report's summary of consultation responses as a whole. In part it is cumulative, referring back to matters covered under grounds (1) and (3). It also advances two further points.

[87] The first additional point concerns the views expressed by members of the public who attended the meeting of the special planning panel on 16 April. A nine-page note of the meeting was prepared, summarising the views expressed. It was sent to members with the original officers' report, for the meeting of the planning committee that was due to take place on 29 May but was then deferred. The report for the committee on 17 June referred to the earlier meeting of the planning panel and to certain of the concerns expressed at the panel, but the note of the meeting was not appended or sent separately to members. Mr Wolfe's submission is that this was a material omission.

[88] Planning panels are set up as and when required and have a formal place within the council's constitution. I have referred already to their purpose. Chapter 7 of the constitution provides that '[t]he Panel proceedings to be noted and fed back to Committee', and the same

point is made in the actual terms of reference. It seems to me that the note of the meeting of the planning panel ought to have been sent to members of the planning committee for their consideration of the applications on 17 June. It is true that the panel meeting took place before significant revisions had been made to the planning applications. But what had been said at the panel meeting remained relevant. Otherwise it would not have been referred to in the report for the committee on 17 June; and indeed, if matters had changed so substantially as to render the previous panel meeting irrelevant, one would have expected a further panel meeting to have been held.

[89] Some members of the planning committee had themselves been present at the panel meeting and the rest of the then existing membership of the planning committee would have received the note of the panel meeting together with the original officers' report for committee on 29 April. Since that time, however, the membership of the committee had changed and there were three new members. Although there is evidence that those attending the meeting of the committee on 17 June were sent a copy of the original report, there is no evidence that they were also sent the note of the panel meeting. So the new members, at least, had neither personal involvement in the planning panel nor a note of the panel meeting. They were therefore lacking information that, under the council's constitution, they were intended to have.

[90] It is true that most of the points covered in the note of the panel meeting were covered in one way or another in the officers' report of 17 June or at the 17 June meeting itself. But that is not so with all of them. For example, Mr Wolfe points to a concern raised by one resident that further building would exacerbate an existing problem of overflow of raw sewage into gardens. This featured in the report, if at all, only by way of reference to a concern expressed about 'flooding risk in the area'. In any event the notes of the panel meeting would in my view have given members a better feel for, or understanding of, the issues raised.

[91] Accordingly I accept that the failure to send the notes of the panel meeting to the new members of the planning committee was a material failure.

[92] Mr Wolfe submits that the summary of consultation responses was also deficient in a further respect, in that the report to committee did not summarise properly the public responses to consultation as set out in extensive and detailed correspondence opposing the proposal. The report referred simply to responses from the public 'raising some or all of the following points' and then set out a list of bullet points such as 'There is a flooding risk in the area' and 'Traffic flow, parking and access implications'. It did not give an intelligible account of the specific concerns expressed or of the reasons for them.

[93] Viewed by itself, I would not attach much weight to that criticism of the report. It has to be said, however, that the report was in this respect very thin; and when taken in conjunction with the omission from the notes of the planning panel meeting, this does add marginally to

concern about the adequacy of the information given to members about the views of the public. Again I do not think that a complete answer is to be found in the fact that oral representations were received at the meeting of the planning committee itself on 17 June.

[94] Taking everything into account, I have come to the conclusion that the members of the planning committee were not given sufficient information to ensure the proper discharge of their functions in relation to this planning application. It was plainly a difficult and highly controversial decision, reached by the narrowest of majorities. Members needed to be fully aware of the nature and extent of concerns expressed on all material issues, so that they could perform the requisite judgments both as to compliance with the UDP and as to the nature of, and weight to be given to, other material considerations. I accept that what was said in the report and at the meeting itself must have alerted them to the extent of the opposition and to most of the important issues. I also accept that, as was made clear in *Ex p Oxton Farms*, a sensible and practical approach must be adopted towards officers' reports and too much should not be expected of them. On the particular facts of this case, however, I take the view that the report did not do enough. The deficiencies identified in relation to the highways/access issue (ground 1), the issue of need (ground 3) and the overall public response to consultation (ground 4) are substantial when viewed individually. When aggregated they give rise to a strong case that the committee was not made sufficiently aware of relevant information and that its decision was flawed in consequence.

DISCRETION

[95] Some efforts were made to persuade me to exercise my discretion to withhold relief even if I found in favour of the claimant on the substance of the challenge. In the light of my conclusions I see no scope for the exercise of such discretion. It is plainly not appropriate to do so in relation to the bias issue; and given the narrowness of the vote in the planning committee, it is impossible to conclude that the decision would inevitably have been the same if members had been given the further information that they ought to have been given. I am conscious of the importance attached to the development for conservation reasons and of the interests of Cygnet, but such matters cannot justify my denying the claimant the relief to which he is otherwise entitled. The right course is for the decisions to be retaken in circumstances that do not give rise to an appearance of bias and on the basis of sufficient information.

CONCLUSION

[96] For the reasons given, the decisions to grant listed building consent and planning permission, together with the subsequent formal grant of listed building consent and planning permission, must be quashed. I will hear from counsel as to the precise terms of the order.

Application allowed.

Martyn Gurr *Barrister.*

CO/364/2010

Neutral Citation Number: [2012] EWHC 643 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

FRIDAY, 17TH FEBRUARY 2012

B e f o r e:

VINCENT FRASER QC

Between:
THE QUEEN ON THE APPLICATION OF TAIT
Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
Defendant

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(Official Shorthand Writers to the Court)

MR H HENDRON (instructed by DHC LAW) appeared on behalf of the **Claimant**
MR G LEWIS (instructed by TREASURY SOLICTORS) appeared on behalf of the **Defendant**

J U D G M E N T
(approved by the court)

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1. THE DEPUTY JUDGE: This is an appeal pursuant to section 289 of the Town and Country Planning Act 1990 against the first defendant's decision on an enforcement notice appeal. Permission to appeal was granted by His Honour Judge Stewart QC sitting as a Deputy High Court Judge on 28 October 2010.

2. The enforcement notice in this case was issued on 18 July 2009. It was concerned with developments to the appellant's property at 62 Mangrove Road in Hertford. The breach of planning control alleged in the notice was:

> "without planning permission the construction of unauthorised developments of the dwelling to include a roofed veranda, roof alterations, dormer windows and dormer features and the erection of unauthorised fencing."

3. The appellant appealed against that notice on the grounds a, c, f and g of section 174 of the Town and Country Planning Act 1990. The appeal was determined by the Inspector appointed by the first defendant by the Written Representations Procedure. The Inspector undertook a site visit on 11 August 2009. It was decided at some point before that date that the site visit should be an accompanied site visit.

4. The appellant's evidence is that she received a letter from the Planning Inspectorate notifying her of the site visit but that the date coincided with a holiday she had already arranged. The appellant said she accordingly telephoned the Planning Inspectorate to notify them of this. The appellant states that she spoke to a named official, Mr Hutt, who told her that she would have to email the request for a different date. The appellant explained that she no longer had access to email and the official agreed that he would speak to another named official, Miss Vicker, to change the appointment. The appellant asked if she would be notified of the re-arranged date, and she was told that she would.

5. The appellant said that as a result of the telephone conversation she clearly understood that the site visit would not go ahead on 11 August 2009 and that she would be offered an alternative date, or the Planning Inspectorate would otherwise revert back to her.

6. The site visit was not in fact re-arranged and the first defendant's Inspector duly attended on 11 August 2009, when the appellant was away from the property. The Inspector continued with the site visit in the absence of the appellant and issued a decision letter on 18 August 2009, which is the subject of this appeal. The Inspector addresses his site visit in the appellant's absence in paragraph 4 of his decision letter. I shall deal with that paragraph later, but his comments in that paragraph are best understood when consideration is given to the remainder of the decision letter, and so I shall deal with it at that point.

7. The appellant's evidence with respect to the site visit is set out in her witness statement dated 12 September 2009 at page 14 of the bundle. She says:

> "Upon returning from holiday, I received a telephone call from a builder

who had been working on an out building in my absence. Mr Bracken has no knowledge or right to act on my behalf and he would not have accepted this responsibility. Mr Bracken told the Inspector that I was on holiday and at no time indicated to the Inspector that he was acting on my instruction or as my representative. Mr Bracken indicated that the Inspector was extremely angry that he had travelled 150 miles and I was not present. As I had no representation and he was also unable to view the property internally he should have cancelled and left, but he proceeded with the visit, which is unlawful, and not in line with the Inspectorate's procedure. Not only this, but the bad feeling, I believe, has led to a bias or wrong outcome. How can a decision be reached without the proper procedures being carried out. I feel I have been treated unfairly, and this can only be overcome by a new site visit being arranged and the facts being looked at by a new inspector."

8. The first defendant does not accept this version of events and has provided witness statements of both Mr Hutt and the Inspector. Mr Hutt explains that he assists with the administration of planning appeals at the Planning Inspectorate. He summarises the allegations made about him by the appellant and then goes on to state:

> "3. I have no recollection of having this conversation with the Appellant before the site visit. The only telephone conversation that I recall having with her took place *after* the site visit on the afternoon of 11 August, when I was sitting in for the case officer, Kate Vicker. The Appellant expressed her frustration during that call that the site visit had gone ahead earlier that day as she claimed to have told the Inspector... personally a week earlier that she would not be able to attend. I considered this to be most unlikely, but thought it better to check the position with [the Inspector]. I did so by emailing [the Inspector] that afternoon at 16.10h. I received a reply from [the Inspector] an hour later, at 17.11h, confirming that he had not spoken to the Appellant as she had claimed. I append these emails at exhibit LH1.
>
> 4. In the light of the Appellant's claims, I have looked again at our internal file notes for this case, in which all telephone calls and emails received by us in relation to the appeal are recorded. There is no record in these notes of the Appellant having spoken to me or any other officer of the inspectorate before the site visit took place on 11 August 2009. In an entry for 12 August 2009, the notes simply record the claim made by the Appellant after the site visit that "apparently they [the Appellant] notified us very late before the visit of this". I exhibit the internal file note at LH2.
>
> 5. I should add that if a party to an appeal seeks to notify the Inspectorate by telephone that it cannot attend a site visit, the established practice is to ask the party to confirm their notification in writing, whether by letter, fax or email. No such written notification was received from the Appellant in this case."

9. The Inspector's witness statement explains what happened when he attended the site visit and his subsequent dealings with Mr Hutt:

> "5. I arrived at the site on 11 August at around 11:15 am. I was met by an officer of the Council, Mr Glyn Day, but the Appellant was absent. I was expecting her to be present. I was aware that a previous site visit scheduled for 14 July 2009 had to be cancelled because only a day before then, on 13 July 2009, the Appellant had notified the Inspectorate by email that she would be unable to attend as it was her children's sports day. By letter dated 16 July 2009, the Inspectorate notified the Appellant that the site visit was rescheduled for 11 August 2009 (Exhibit BC1, attached).
>
> 6. Upon arrival at the Site, I asked Mr Day to knock on the front door of the house. There was no answer and so he approached a man who was working at the rear of the property, apparently undertaking some clearing work in the garden. The man introduced himself as Mr Daniel Bracken. He explained that the Appellant was on holiday and was not expected back until the weekend.
>
> 7. I did not consider it necessary to adjourn the site visit once more in the light of the Appellant's absence as I was satisfied that I could gather all the information that I needed to determine the appeal by observing the property from the outside. The breaches of planning control alleged in the enforcement notice all related to external works, namely the construction of a roofed veranda, roof alterations, dormer windows, dormer features and unauthorised fencing. In those circumstances, I considered it proper to continue with the site visit in the Appellant's absence, particularly given that Mr Bracken agreed to observe the visit throughout so that I would not at any time be conducting it alone with Mr Day. Indeed, my written note of the visit, which I append to this witness statement as exhibit BC2 states:
>
> "Asked Mr Glyn [that should be Mr Bracken] if he would see 'fair play'. Did not go onto her land. Mr Glyn [that should be Mr Day] showed me the approved plans for 2446 to confirm the requirements and scope of the notice. He agreed it was only the short length of fence.'
>
> 8. The only questions that I asked of Mr Day related to factual matters. I asked him to point out, for the avoidance of doubt, some of the developments that were the subject of the enforcement notice, and which developments already benefited from planning permission. I also sought the assistance of both Mr Day and Mr Bracken to agree on a point some 2.4m back from the edge of the highway so that I could assess the visibility of the unauthorised developments from that point. At no time were the merits of the case discussed by anyone. I considered this to be in accordance with the published guidance on site inspections, which

states:

'if the inspector decides to view the site from your property no discussion of the case is permitted as the Inspector will be there purely to assess the effect of the proposed development on the surroundings. However, he/she may ask factual questions to confirm his/her understanding of the physical features of the site on your property.'

9. I do not consider that the site visit was conducted differently from how it would have been conducted had the Appellant been present, with the one exception that, had the Appellant been there, I would probably gained access to the property to view the property next door from the inside one of the Appellant's unauthorised dormer windows. However, I did not consider this to be necessary to come to a planning judgment on the acceptability of the unauthorised developments.

10. I strongly dispute the allegation in the Appellant's grounds of appeal that I was 'upset and angered' by the Appellant's absence during the site visit (paragraph 9). As I had another site visit in Hertfordshire that day for another matter, I needed to be in the area in any event and did not consider myself to have had a wasted journey, if that is what is being implied.

11. Upon returning home later that day after my two site visits in Hertfordshire, I received an email from Mr Lionel Hutt, an administrative officer of the Inspectorate, informing me that the Appellant had called him that afternoon after my site visit. The Appellant claimed to have spoken to me personally a week before then to explain that she was on holiday on 11 August and would not be able to attend the rescheduled site visit. She claims I referred her to the case officer, Ms Kate Vicker, but that she was unable to speak to her. There is no truth in these claims. It would not have been possible for the Appellant to speak to me personally before the site visit as I am not based at the Inspectorate's offices in Bristol and would not have had any calls put through to me directly from one of the parties in a matter. I promptly replied to Mr Hutt that afternoon, recording these facts and explaining my decision to conduct the site visit not withstanding the Appellant's absence. I exhibit this exchange of emails at BC3.

12. As I was satisfied that the site visit had been conducted fairly and properly, I was satisfied that I could proceed to write my decision on the appeal, which was promulgated on 18 August 2009. At DL/4, I recorded my reasons for deciding to proceed with the site visit notwithstanding the Appellant's absence:

'Procedural matters.

4. Mr Day, who represented the Council, established from Mr Bracken, who was working at the property for Miss Tait, that she was on holiday. I was satisfied that I would be able to carry out the site inspection unaccompanied by either party. However, I required the Council to identify two matters referred to in evidence, namely, the part of the fence to which the notice referred and, with the aid of the approved plan which neither party had provided, the works required to be in accordance with an extant planning permission. **Mr Bracken willingly agreed to be present at all times while Mr Day identified these matters**. They also agreed a point some 2.4 metres back from the edge of the highway along the centre line of Mangrove Drive from which I was able to look to both the left and right along Mangrove Road. Although Mr Bracken did not formally represent the Appellant, at no point during the site inspection was I alone with Mr Day and I did not enter any part of the appeal property.'

13. I note the Appellant's complaint at paragraph 3 of her grounds that she was unfairly deprived of the opportunity to make 'actual representations on the day of the site visit', but as the guidance that I have cited at paragraph 8 above makes clear, representations on the merits of the case are not permitted during a site visit. The visit is simply an opportunity for the Inspector to ensure that he is fully apprised of the facts of a case. I stress that I did not receive any representations on the merits of the case from Mr Day and Mr Bracken does not assert otherwise in his witness statement [CD/26-27].

14. In conclusion, I remain satisfied that it was not unfair of me to conduct the site visit in the Appellant's absence given its limited fact-finding purpose, the presence of an independent observer throughout, and the fact that an earlier site visit had been cancelled at late notice at the Appellant's request."

10. A copy of the letter informing the appellant of the site visit is produced as the first exhibit to the Inspector's witness statement. The second and third paragraphs of the letter read:

"the Inspector will visit the appeal site at 11.15 on 11 August 2009. It is important that you make immediate arrangements for the Inspector to be met at the site to enable the inspection to be made. If you cannot attend you should arrange for someone else to attend in your place. **If this is not possible, you must let me know immediately**.

The Inspector will expect to be accompanied by representatives of both parties. If one of the parties fails to arrive, the Inspector will determine the most suitable course of action, which could mean that he will conduct the visit unaccompanied. In other circumstances the visit might have to

be aborted."

The letter is dated 2 July 2009 and was presumably received by the appellant shortly afterwards.

11. The internal file note from the Inspectorate, which is produced as exhibit LH2 and found at pages 41 and 42 of the bundle, records that on 13 July 2009 an email had been received from the appellant informing the Planning Inspectorate that she would not be able to attend the site visit on 14 July 2009. It appears from the file note that a different inspector was dealing with the matter at that time. It is clear that the letter of 16 July was written as a result of the cancellation of the earlier site visit, which also appears to have resulted in the appeal being transferred to a different inspector. It is also apparent that shortly before receiving the letter of 16 July 2009 the appellant had been able to communicate with the Planning Inspectorate by email. Although she states in her witness statement that she had explained in a telephone conversation with Mr Hutt that she no longer had access to email, no details of how this came about are provided.

12. The other exhibited document which I should refer to is the email exchange between Mr Hutt and the Inspector. That is found at pages 54 and 55. It starts with Mr Hutt's email timed at 16.10 on 11 August 2009, which read as follows:

> "I'm sitting in for the case officer, Kate Vicker, this week.
>
> I had a bit of an odd call from Morag Tait this afternoon, the appellant in this case.
>
> The ASV was meant to take place this morning at 11.15. She claims she spoke to you personally a week ago to say that she was on holiday for 11 August and would not be able to make the SV date. That would be highly unusual if she is not mistaken, I cannot imagine how she could possibly have obtained your telephone number. She said you referred her to Kate Vicker as case officer and she claims she was unable to speak to Kate. Kate is on holiday but there has been someone here covering her desk. She wants me to return to her and tell her what's going on. In some cases an ASV is necessary but in others an Inspector can conclude that he can proceed as a USV and dismiss the other main party. I would be grateful if you could update me so I can return to her.
>
> Thank you very much.
>
> Lionel Hutt.
>
> 3/26."

13. The Inspector replied at 17.11 on the same day, stating:

> "Lionel,
>
> I have just returned from my 2 site visits in Hertfordshire - 9.5 hour, 320 mile round trip; not a complaint as I got travel time, just an observation!

As you say, the ASV did take place at the arranged time and, yes, she was not there. Correct, she did not speak to me last week. I imagine she phoned TQH and asked to speak to, [me] and was maybe given Lyndon or Robert.

At 11.15 I asked Glyn Day from the LPA to knock. After getting no reply he approached a person (Mr Bracken) who was working at the rear of the property clearing rubbish for Mrs Tait; he explained she was on holiday and not expected back till the weekend. It was obvious to me that I could get all the information that I needed to determine the appeal from outside the site and that I did not need to go onto her property. I did however need to clarify some factual information with Mr Day, namely, asking him to point out what they were enforcing against, pointing out what had permission (he showed me the approved plans), and establishing a point 2.4m back from the edge of the highway so that I could see for myself the visibility to the right down the road. The first two points did seem clear to the appellant from her evidence but they were not to me from the notice which may need to be corrected. All this was explained to Mr Bracken who readily agreed to be present at all times (and agreed with Mr Day as to the point 2.4m on the centre line) to ensure, as I put it to him, fair play and that there was no discussion about the merits between me and the LPA. I would not be correct to say that Mr Bracken represented the appellant but it would be fair to say that he was in independent observer at all times. In my view there was no difference in the way the site visit was, as opposed to how it would have been, conducted with the one exception that I was not able to view the next door property from inside one of Mrs Tait's unauthorised dormer windows. However, this was never going to be a main issue in this case and I saw no reason to postpone the site visit for this reason. This is an enforcement case and you will know that a previous ASV was cancelled at very short notice for a sports day.

I am not sure what you now have to do regarding Mrs Tait but I will be writing this decision on Thursday unless I hear from someone to the contrary. I note that the letter advising her of the site visit is dated 16 July so I am not sure why it took till August to tell us she was going on holiday.

Regards."

14. There is finally a witness statement from Mr Bracken, who is the gentleman who had been working at the appellant's property. The material parts of his witness statement start at paragraph 2 and run to paragraph 7:

"2. I was present on 11 August 2009 and was undertaking some turfing work when two men approached me.

3. They said that they were planning inspectors and asked for Miss Tait.

I explained that she was not here and they looked quite angry.

4. They stated that they had travelled 150 miles to see her and were not at all happy with my response that Miss Tait was not there.

5. They stated that they needed an independent witness and asked for my name and address. They started to talk about aspects of the property but as I had no authority from Miss Tait, I did not get involved.

6. I believe that they remained at the property for approximately half an hour. During this time, they were looking around the property, on the roadside and at the other side over the fence but did not enter as they did not have access.

7. There was nobody else present with me at the time."

15. The Inspector's decision is set out in his decision letter of 18 August 2009. By that decision letter, the Inspector amended the enforcement notice by inserting wording to define what length of fencing was to be included in the allegation of breach of planning control in the enforcement notice. The Inspector dealt with this amendment at paragraph 6 of his decision letter, which read as follows:

> "In its appeal statement the Council confirms that it is only that length of fence between the driveway opening on Mangrove Drive and the point where that fence meets with the fence facing Mangrove Road that it is seeking to enforce against. During my site inspection I confirmed that this is clear on the ground and it is apparent from her evidence that the appellant understands what she has done wrong. I am therefore content that there would be no injustice to either party if I corrected the allegation in these terms to more clearly define the scope of the planning application deemed to have been made under S177(5) of the Act. I shall therefore correct the notice as indicated in accordance with the powers available under S176(1) of the Act."

16. The Inspector then considered the ground c appeal, which involved consideration of whether the matters alleged amounted to a breach of planning control. The appeal on this ground applied only to the allegation with respect to the fence. The Inspector considered this issue in paragraphs 7 to 10 of his decision letter, and for the reasons set out concluded that the erection of the fence as defined in accordance with the corrected enforcement notice did involve a breach of planning control.

17. He then went on to consider under appeal ground a whether planning permission should be granted for the development. The Inspector records his understanding in paragraph 11 of his decision letter that the appeal on this ground was also limited to the fence, and that in fact is common ground before me.

18. The Inspector considered this ground of appeal in paragraphs 11 to 21 of the decision letter and for the reasons set out in those paragraphs he concluded that planning permission should be granted for the fence, subject to a condition which restricted the

height of the fence on a particular specified section of the fence. The restriction in height arose out of highway safety concerns. It appears from paragraph 14 of the decision letter that the fence had already been modified in height over this particular section, so in effect the Inspector was granting planning permission for the fence as it actually was on site at the time of his site visit.

19. It can be observed that the net effect of the Inspector's actions with respect to the fence is first that the notice was limited to a specified section of fence and second that planning permission was granted for the fence as actually in place at the time of the site visit.

20. The Inspector finally considered the appeal under ground f, which involved consideration as to whether the enforcement notice required more than was necessary to remedy the breach of planning control and ground g, which concerns the period for compliance with the enforcement notice. The Inspector dismissed the ground f appeal but allowed the ground g appeal, so as to increase the time for compliance from 3 months to 6 months.

21. Returning to the question of the site visit, paragraphs 4 and 5 of the decision letter read as follows:

> "4. Mr Day, who represented the Council, established from Mr Bracken, who was working at the property for Miss Tait, that she was on holiday. I was satisfied that I would be able to carry out the site inspection unaccompanied by either party. However, I required the Council to identify two matters referred to in evidence, namely, the part of the fence to which the notice referred and, with the aid of the approved plan which neither party had provided, the works required to be in accordance with an extant planning permission. Mr Bracken willingly agreed to be present at all times while Mr Day identified these matters. They also agreed a point some 2.4 metres back from the edge of the highway along the centre line of Mangrove Drive from which I was able to look to both the left and right along Mangrove Road. Although Mr Bracken did not formally represent the Appellant, at no point during the site inspection was I alone with Mr Day and I did not enter any part of the appeal property.
>
> 5. At the time of my site inspection the corner fence panels that are shown on the photographs dated 4 June 2008 appended to the Council's appeal statement had been removed and replaced by a structure of a different design."

22. The procedure for determining enforcement notice appeals by written representations is set out in the Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002 SI 2002 no. 2683. The regulations are silent as to the conducting of site visits, as are the equivalent regulations dealing with the determination of planning appeals by written representations.

23. My attention was drawn to the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 SI 2000 no. 1624. However, these regulations have no application to the current case. Furthermore, whilst they do make some reference to site inspections, they do not deal with the issues that are central to this case.

24. The Planning Inspectorate's website contains guidance as to the conduct of site inspections on written representation appeals. The current guidance all post-dates the conducting of this site visit, but there was nothing before me to indicate that it marked a significant departure from past practice. If one goes on to the website there is a link to a page explaining site visits. I was provided with a copy of that page, the material parts of which read as follows:

> "If the Inspector can see enough of the site from the road or public view, he/she will visit the site alone. If that is not possible, the appellant and the Local Planning Authority's representative will go with the Inspector. There is normally no need for other people to attend the site inspection. However, if you own a property nearby and you want the Inspector to see the appeal site from your property **you should tell us**. We will then tell you the date and time of the inspection. At the site inspection, the Inspector will decide if it is necessary to view the site from your property. If so, the appellant and an LPA representative must come, too. If the Inspector decides to view the site from your property, no discussion of the case is permitted, as the Inspector will be there purely to assess the effect of the proposed development on the surroundings. However, he/she may ask factual questions to confirm his/her understanding of physical features of the site or your property."

25. There is very similar guidance to be found in two other Planning Inspectorate documents. The first is entitled "A Guide to Taking Part in Enforcement Appeals Proceeding by Written Representations - England",which was published in June 2011, on page 3 of which there is a section addressing the site inspection, and the second document is the "Planning Inspectorate Good Practice Advice Note 13", which was published in February 2011, which covers the matters in paragraphs 6 to 10.

26. The appellant challenges the decision letter on four grounds under the headings of "procedural impropriety", "legitimate expectation", "bias" and "irrelevant considerations". It is fair to observe that there is a considerable degree of overlap between the points raised under these various heads. In essence, the appellant's complaints appear to raise the following issues: (i), that it was wrong for the site visit to proceed on 11 August when the appellant had been led to believe the date would be changed; (ii), that the appellant was denied an opportunity to make representations to the Inspector at the site visit; (iii), that an internal inspection of the property was required and it was wrong for the Inspector to determine the appeal without carrying out such an inspection; (iv), that the Inspector gave the appearance of bias at the site visit in that he was angry at the appellant not being present and (v), that the Inspector was wrong to undertake a site visit accompanied by a representative of the Local Planning Authority in the absence of the appellant or an agent on her behalf. I propose to deal with each of those in turn.

Wrong for the site visit to proceed.

27. The first complaint can be addressed shortly. There has been no cross-examination of the first defendant's witnesses. In Cran v Camden LBC [1995] RTR 346, McCullough J observed where witnesses have not been heard and subject to cross-examination the court must fall back on the principle where a relevant dispute cannot be resolved on the written material alone, the facts must be assumed to be those which favour the respondent. In this case, the documents cast serious doubt on the appellant's evidence with respect to the alleged telephone conversation with Mr Hutt. First, there is no record of this conversation within the Planning Inspectorate's files, when one would be expected given their systems and practices. Second, there is a record of a complaint made by the appellant on 11 August 2009. This complaint is further evidenced by the email exchange of that date between Mr Hutt and the Inspector. Given that Mr Hutt's email was sent on the same day as the phone call to which it refers, I consider that it is likely to be an accurate record of what was said. That email records the appellant as saying that the earlier conversation was with the Inspector rather than Mr Hutt, which is strong evidence that the appellant was not at that time alleging that she had had this conversation with Mr Hutt.

28. I do take into account that the respondent's evidence establishes that the appellant was complaining on 11 August 2009 that she had had a conversation with somebody about an adjournment and I also note the Inspector's surmise in his email as to what might have occurred, which is a possibility. However, on the basis of the evidence before me there is no proper ground for finding that the appellant had been given to understand that the site visit would not take place 11 August. Even if the documents were not sufficient to dispose of this point in favour of the first defendant, one would be left with an unresolved dispute which would consequently have to be resolved in favour of the first defendant. In the circumstances, any complaint based simply upon any claimed expectation on the part of the appellant that the site visit was to be re-arranged must fail.

29. The letter of 16 July 2009 notifying the appellant of the site visit warned her that if a party failed to attend the inspector would determine the most suitable course of action, which could entail an unaccompanied site visit or the visit being aborted. The appellant was plainly warned that if she failed to attend the site visit it might proceed in her absence. The complaint, therefore, that it was wrong for a site visit to proceed at all on 11 August 2009 fails.

Denial of opportunity to make representations.

30. The second complaint, that the appellant was denied an opportunity to make representations to the Inspector at the site visit, is wholly misconceived. A site visit is not an opportunity for fresh arguments, as was made clear in Taylor and Sons (Farms) v the Secretary of State for the Environment, Transport and the Regions [2001] EWCA CIV 1254. This point is also made clear by the Planning Inspectorate in the various guidance documents to which I have referred.

Failure to undertake an internal inspection.

31. Whether an internal inspection of this property was required was essentially a matter of judgement for the Inspector. His decision not to undertake an internal inspection could

only be challenged on the normal public law grounds if he failed to exercise that discretion properly. It would not be sufficient merely to demonstrate that somebody else might have made a different judgement. It must be noted in this case the ground a and c appeals related solely to the fence and plainly there could be no need to undertake an internal inspection to determine matters with respect to the fence. The works in question were all external works and visible without needing to enter the dwelling. The appeals with respect to the works to the roof were limited to grounds f and g, namely that the enforcement notice required more than was necessary to remedy the breach of planning control and that the period for compliance was inadequate. These were all matters which could be considered with the benefit of an external inspection.

32. It is not apparent to me how any internal inspection could conceivably have assisted the Inspector in determining those grounds of appeal in this case, given the particular breaches of planning control under question. More importantly, there is no evidence before me to found any suggestion that the Inspector failed to exercise his judgement properly in determining this matter without an internal inspection of the property.

33. As there is no ground to conclude that the Inspector exercised his discretion incorrectly, this ground of complaint must fail.

Angry Inspector

34. The next complaint raised is that the Inspector gave the appearance of bias at the site visit because he was angry about the appellant's non-attendance. In the circumstances of this case it would have been entirely human for the Inspector to have expressed a degree of exasperation at the appellant's failure to attend the site visit or to provide a representative. I do not consider that an expression of displeasure within reasonable grounds would have demonstrated bias. However, the Inspector's evidence is that he was neither upset nor angry and was not really concerned as he had another site visit in the area. This evidence is contradicted by Mr Bracken. It is possible that this may be a matter of different perception of the two witnesses. Whatever the reason for the differences between the witnesses, there is again no proper basis on which I could or would conclude that the Inspector exhibited any degree of annoyance, and I say that taking into account what was said by the Inspector in his email, which was drawn to my attention.

35. I am satisfied on the evidence that the Inspector behaved perfectly properly when notified of the appellant's non-attendance, nor did he display any bias as a result of her non-attendance, nor was he biased against the appellant because of it. The appeal would therefore fail on this ground also.

Undertaking an accompanied site visit.

36. I have already found that the Inspector could properly proceed with the site inspection in the absence of the appellant on 11 August 2009. The question this ground raises is whether in undertaking that site inspection the Inspector could be accompanied by a representative of the local planning authority or enter into any discussions about the case with that representative. The Planning Inspectorate's clear practice is that when an accompanied site visit is undertaken there must be representatives present from both parties. This practice is outlined in the various guidance documents to which I have

referred, which all stress the need for a representative from the appellant and the local planning authority when an accompanied site visit is undertaken. This approach is also reflected in the letter of 16 July 2009 notifying the appellant of the site visit. The material paragraph, which I have already quoted, states:

> "the Inspector will expect to be accompanied by representatives of both parties. If one of the parties fails to arrive the Inspector will determine the most suitable course of action, which could mean that he will conduct the visit unaccompanied. In other circumstances the visit may have to be aborted."

37. Whilst the paragraph states that the Inspector will determine the most suitable course of action, on a fair reading it cannot be suggested that it is contemplated that this will include undertaking a visit accompanied by only one side. In reality the paragraph is contemplating the option of an unaccompanied site visit or, if the Inspector considers that an unaccompanied site visit is unsuitable, abandonment of the site visit. I am satisfied that the appellant or anybody else reading that letter would have been entitled to expect that the Inspector would not undertake an accompanied site visit if the appellant was not represented at the visit.

38. The Planning Inspectorate's normal practice and procedure reflects the approach which has been taken by the courts. In Hibernian Property Company Limited v Secretary of State for the Environment [1974] 27 P & CR 197, which involved a compulsory purchase order inquiry, the Inspector received further information from occupiers of affected properties on his site visit. The applicants had expressly declined an invitation made by the Inspector for them to attend this part of his site visit. The Inspector's evidence to the court was that he did not consider that in listening to these observations he was taking new evidence, but merely obtaining clarification of evidence given at the inquiry. The point was taken that there was no infringement of the rules of natural justice unless the information obtained in the absence of the applicant was not only relevant but also prejudicial to their view. Brown J as he then was concluded that he was not satisfied that the applicant's had in fact been prejudiced by the information obtained but that the question was not whether the information did in fact prejudice the applicants but whether there was a risk that it may have done so. On that basis and with some regret, because he did not think there had been prejudice, Brown J quashed the decision.

39. I observe that the information obtained by the Inspector in Hibernian Property does appear to go beyond mere clarification of factual matters on the site, however I do not read the judgment as hinging upon a distinction between matters relating to merits of the case and pure factual clarification.

40. The approach in Hibernian Property was endorsed by the Court of Appeal in Performance Cars Limited v Secretary of State for the Environment [1977] 34 P & CR 92, which involved consideration of whether the applicant had been provided with sufficient time to consider new evidence produced at the inquiry. The Court of Appeal allowed the appeal and quashed the decision even though it expressed strong doubts that the refusal of an adjournment had made any difference to the outcome, on the basis

that there was a breach of the rules of natural justice if there was a risk that the applicant had been prejudiced.

41. In British Muslims Association v the Secretary of State for the Environment [1988] 55 P & CR 205, another case concerning a compulsive purchase order, the Inspector was observed at the site visit in conversation with the council officers in the absence of other parties. The Inspector's evidence was that he recalled that at the site visit there was an occasion when he asked a council officer for factual clarification with respect to a property he was looking at from the outside. The Inspector considered that the other parties were no more than 30 feet from him at that time and he said the conversation was very brief. This version of affairs was contested by the applicants. The test adopted by the Court in this case was would or might a reasonable person, observing what happened, draw the conclusion that a procedural unfairness indicative of bias has occurred so as to vitiate the essential elements of fairness necessary for proper conduct by the Inspector of his quasi judicial functions. The judge stated that he was satisfied that there was in fact no impropriety in this case but found that the inference could be drawn for a number of reasons, which he set out at pages 212 and 213. Accordingly the order was quashed.

42. It is fair to observe that a number of the reasons identified in that case are not present in the present case, but it is also important to observe that one of the reasons given was that this was not any casual conversation which happened by chance when somebody of the other side was not there.

43. Two further cases are cited in British Muslims Association where decisions had been quashed because an inspector had been seen talking to one party. The first was Furmston v Secretary of State for the Environment [1982] JPL page 49. In that case the Inspector was observed talking with council representatives over an open file after the site visit. The second was Simmons v Secretary of State for the Environment [1985] JPL 253. In that case the Inspector was observed talking to the chairman of the local authority after the formal proceedings had finished.

44. The respondent relies upon George v Secretary of State for the Environment [1979] 38 P & CR 609 quite properly to make the point that there is no such thing as a technical breach of natural justice. The first defendant appears to suggest that this is authority for the proposition that there must be actual prejudice, although in fairness to counsel's very eloquent submissions that is not the way he put it in his submissions to me. I do not read that case as authority for that proposition, indeed Cumming-Bruce LJ expressly made the point that what is required is either actual injustice or a real risk that somebody has suffered injustice and that, I interject, was the approach taken by the first defendant before me today. Indeed both Hibernian Property and Performance Cars are referred to in the judgment in this case and there is no suggestion that the court is doing anything other than following the approach taken in those authorities.

45. It is moreover important to note the facts in George. That was another case involving a compulsory purchase order. The property in question was jointly owned by a husband and wife. The compulsory purchase order was served on her husband but not the wife. The order should in addition have been served on his wife, but the evidence was that

she was aware that the order had been served on the husband. The husband objected to the compulsory purchase order and the objection was considered at an inquiry. The court was satisfied that the husband took every objection open to both of them and that these were considered at the inquiry. The court found that the wife relied upon her husband to look after her interest, and he did. In those circumstances, as Lord Denning, MR, stated, the wife was not prejudiced substantially or at all. It can be noted in particular that this was a case where the wife was represented and had her interests, it was found, actively looked after.

46. The first defendant has also drawn my attention to the judgment in DJ Baker v Secretary of State for Communities and Local Government [2009] EWHC 1345 (Admin). This was a case involving a site inspection on an enforcement notice appeal which was being determined by the written representation procedure. The appellant had not originally wanted an accompanied site visit, but one was requested by the Local Planning Authority. There appears to have been some form of mix up about the arrangement for this site visit, which resulted in the appellant's representative not being present at the site visit. The representative was contacted by telephone and agreed to an unaccompanied site visit taking place. The Inspector then undertook an unaccompanied site visit. The representative subsequently wrote to the Planning Inspectorate apologising for not attending the site visit and asking for his apology to be forwarded to the Inspector. He did not at this stage object to the Inspector having undertaken an unaccompanied site visit. It appears that points were only taken about the site visit when it became clear that the appeal had been unsuccessful.

47. The appellant challenged the decision on the basis that he had been denied an opportunity to draw particular matters to the Inspector's attention and that the Inspector may have been pre-disposed against him because of his agent's failure to attend the site visit. Not surprisingly, this challenge was unsuccessful.

48. The respondent draws my attention in particular to passages of the judgment at paragraphs 21 to 29, which made the point that even if there were some procedural error there was no prejudice in that case and therefore the appeal failed. It is, however, important to put those comments in context. They are made in the context of the Inspector carrying out an unaccompanied site visit where the complaint is that an accompanied site visit was required, as can be seen from paragraph 21. In paragraph 22 the learned judge identified the key issue to be determined by the Inspector on appeal and in the light of that goes on to conclude that an accompanied site visit was not required, so no prejudice could arise from the Inspector having proceeded with an unaccompanied site visit.

49. In considering this judgment it is pertinent to note paragraph 14, which read as follows:

> "There is no doubt that the site visit that then took place following the Inspector having been informed of Mr Brett's agreement was a USV. The planning officer waited in his car while the Inspector carried out the site visit. Despite the local planning authority's wish that it should be an ASV, the planning officer very properly realised that in Mr Brett's absence that would not be appropriate and so he remained in his car."

50. I observe that the judge comments that it would not have been appropriate for the Local Planning Officer to accompany the Inspector. That case provides no support for what occurred in this case. Furthermore, the action taken in that case accorded with the approach set out in the respondent's letter of 16 July 2009 and the various guidance documents published by the Planning Inspectorate.

51. For the sake of completeness, I mention Cotterill v the Secretary of State for Environment [1991] JPL 1155, which is the only case of which I am aware where a decision has been upheld after a complaint that the Inspector conducted discussions after a site visit in the absence of one party. In that case all parties had gone to a public house after the site visit, where they engaged in some social conversation. At some point the appellant's party decided to leave but it was clear that the Inspector and the Local Authority representatives were going to remain, and no objection was taken to this. The evidence was that the subsequent discussion did not involve anything relevant to the matter which the inspector was determining. The learned judge did not find the case wholly easy, but concluded that the Inspector's conduct fell on the acceptable side of the line, given that the other party had full knowledge of what was occurring and bearing in mind all of the circumstances of the case.

52. With those authorities in mind, I turn to consider the circumstances in this case. In this case the Inspector accepts that he had a conversation with the Local Planning Authority about matters pertinent to the appeal in the absence of the appellant. It is plain that part, at least, of his site visit was undertaken accompanied by the local planning authority. That must be considered to be an accompanied site visit rather than an unaccompanied site visit. That much is accepted by the respondent. Given the letter of 16 July 2009 and the Planning Inspectorate's guidance, the appellant would not have expected that to have occurred and would have had a legitimate expectation that the Inspector would not undertake an accompanied site visit.

53. In the skeleton argument the respondent at times appeared to take the point that the conversation was limited to clarification of factual matters, which is something that is acceptable on a site visit, rather than consideration of fresh submissions. This was not a point that was progressed in argument.

54. For the sake of completeness, I do record that I do not consider that that is an answer to the problem of the Inspector undertaking an accompanied site visit without the appellant. If the matters involved fresh submissions which were not appropriate for consideration at a site visit at all that might involve a further ground of challenge, but the limitation of any discussion to factual matters does not remove the objection to the Inspector undertaking an accompanied site visit in the absence of a representative of the appellant.

55. The Inspector appears to have been aware of the problems with undertaking an accompanied site visit, because he enlisted the help of Mr Bracken. In paragraph 4 of the decision letter the Inspector acknowledges that Mr Bracken did not formally represent the appellant. But he makes the point that at no time during the site inspection was he alone with Mr Day. In paragraph 7 of his witness statement the Inspector says that Mr Bracken agreed to observe the site visit throughout so that he

would not at any time be conducting it alone with Mr Day. His note refers to Mr Bracken being enlisted to see fair play.

56. Mr Lewis, who very eloquently represented the respondent, interestingly made the point that the presence of Mr Bracken was there to protect the Inspector, which is a clear acknowledgement, it seems to me, that Mr Bracken was not there to protect the interests of the appellant. He also went on to say that the presence of Mr Bracken was simply a belt and braces approach, which seems to be an indication that it would have been perfectly proper for the Inspector to have undertaken this accompanied site visit without anybody being there by way of third party, which does not, again, appear to have been the approach that the Inspector took. Nor is it the approach supported by the Planning Inspectorate's guidance and the authorities to which I have already referred.

57. Mr Lewis also went on to say that there is no evidence of improper conduct by the Inspector, indeed Mr Bracken gives no evidence of that. I do not consider this answers the real complaint. The Inspector's actions in recruiting Mr Bracken are a recognition that it was inappropriate to conduct a site visit accompanied by the Local Planning Authority representative in the absence of a representative on behalf of the appellant. Whilst one can sympathise with the position in which the Inspector found himself, and whilst I have no doubt that the Inspector tried to conduct matters in a fair manner, I do not consider that Mr Bracken's presence removes the objection to the Inspector undertaking an unaccompanied site visit.

58. Mr Bracken was not representing the appellant. Once it is accepted that Mr Bracken was not representing the appellant the position remains that the site visit was undertaken accompanied by the Local Planning Authority in the absence of the appellant or her representative.

59. It is furthermore unrealistic to rely upon a lay person who presumably has no knowledge of the issues in the appeal to act as some form of arbiter or guarantor of fair play. There is no evidence that Mr Bracken would be in any position to know whether what was being said was appropriate or not, or that it would make any particular impact upon him. Indeed, Mr Bracken's evidence suggest that sensibly he did not really get involved. In those circumstances the suggestion that he provides no evidence of actual impropriety again carries, I consider, no weight.

60. Whilst the Inspector had been placed in an unfortunate position by the appellant's non-attendance, there were clearly alternatives open to him which could and should reasonably have been taken. He could have undertaken an unaccompanied site visit and then written to the parties seeking the factual clarification he required. Alternatively he could have aborted the visit, as the 16 July 2009 letter contemplated.

61. It must also be remembered that the appellant complained promptly about the conduct of the site visit. It, appears that her complaint was made within hours of the visit. This is not a case where the appellant could be said to be agreeing to or even acquiescing in the procedure adopted.

62. I note that the email from Mr Hutt referred to his returning to the appellant in response to her objection, but it is not clear from the evidence what then happened. All we are left with is the note of 12 August 2009 at page 42 of the bundle, which does not make it clear to me that there was any further contact with the appellant, nor is there any evidence from Mr Hutt that there was further contact with the appellant.

63. I am mindful that the queries the Inspector said he made were limited to matters which resulted in effectively his amending the enforcement notice so as to limit the extent of the fence covered by the notice and that he then granted planning permission for the fence as in place on the site at the time of his visit. It could be argued that in those circumstances no prejudice was caused to the appellant in consequence of the site visit. Indeed, the question of whether there was evidence of prejudice was at the heart of the representations made by the Secretary of State to me this afternoon.

64. Mr Hendron on behalf of the appellant argues that there was prejudice and outlines a number of matters. The first is he says that had the appellant been present at the site visit she would have produced further plans. I am not convinced that this actually takes the matter one way or the other. Secondly he says that the Inspector says that had the appellant been present at the site visit he would probably have gone inside. Again, it seems to me that that does not address the issue of prejudice arising from the Inspector undertaking an accompanied site visit, and I have already found that there was no need for the Inspector to go inside.

65. However, the appellant refers to other matters which could be said to raise issues of prejudice. The first is that the Inspector had sought agreement as to the measurement of 2.4 metres from the edge of the highway and indeed he seems to have thought it was important to have Mr Day and Mr Bracken agree that with him. The appellant says she would have liked to take part in that.

66. Whilst I have no doubt that Mr Day, Mr Bracken and the Inspector were all perfectly capable of noting whether a measure from one point to the other was in truth 2.4 metres, that is not the real issue. The real issue of course is whether the measurement was being taken from the right place to the right place. Clearly that is something, if the Inspector thought it was important to his decision, which he seems to have done, the appellant might have wished to say something about.

67. Secondly, the Inspector appears to have sought clarification as to what works were involved in the planning permission. The appellant says that she would have liked to have been able to make some submissions on that if the Inspector was raising that issue, because of course there would be a degree of judgment involved in that. Again, that seems to me as something that could not be ruled out as being completely fanciful.

68. There is finally, of course, the fact that the Inspector clarified what element of the fence was covered by the enforcement notice. That again is something on which the appellant might have wished to express a view.

69. So I am satisfied that in fact, even on the assumption that the conversation was limited to that which the Inspector says in his witness statement, there are grounds for

concluding that the appellant might have wished to say something about those matters and could have been prejudiced by her inability to do so.

70. However, I am not convinced that there is a need in actual fact to identify any particular prejudice in matters such as this. The authorities that I have referred to have made it quite plain on a number of occasions that the judge was not convinced that there was any prejudice at all, but still found it necessary in the circumstances of the case to quash the decision, because of course it is most important in matters such as this that justice is seen to be done. The approach that is clearly generally taken is that if an inspector has a conversation about the case with one party in the absence of the other that raises a real risk that justice will not be seen to be done.

71. It may be the case that the appellant has not in fact suffered any prejudice as a result of the conduct of the site visit, although as I have indicated I think there is actually some ground for saying that she has, but as the authorities to which I have referred demonstrate, that is not the appropriate test. In this case the Inspector undertook an accompanied site visit and discussed the case with the Local Planning Authority's representative in the absence of any representative from the appellant. That fails to accord with the Planning Inspectorate's own guidance, the advice provided in the letter of 16 July 2009 and the various authorities to which I have referred.

72. In the circumstances of this case I do conclude that there is at the very least a real risk that the appellant was prejudiced and that an objective observer would conclude that this was not a fair procedure and there was consequently a real danger of bias. In those circumstances, there is a clear error of law in the conduct of this matter and on that ground the appeal is allowed.

73. MR HENDRON: I am grateful, my Lord. Given that you have now allowed the appeal, it seems that the way forward is to remit the matter back.

74. **THE DEPUTY JUDGE:** Yes. There is no quashing, I am remitting it back to the Secretary of State.

75. MR JONES: Indeed.

76. **MR HENDRON:** My Lord, may I make an application for the appellant's costs on this matter?

77. **THE DEPUTY JUDGE:** Of course.

78. **MR JONES:** My Lord, I have not seen a schedule of costs supplied by the appellant in this matter. If there is one I am happy to look at it. I do resist the application for costs if we deal with the principle first.

79. **THE DEPUTY JUDGE:** Perhaps the principle first. Perhaps I should hear from you first, Mr Lewis, because I think the normal presumption is that you would pay the costs.

80. **MR JONES:** Indeed. I resist the application for costs and the principle of costs in this case on two grounds. The first of which is that there was in this matter a substantial

failure, I say, by the appellant and her representatives to comply with proper procedure. Now, this court when making a decision as to whether to award costs in a party's favour has a wide discretion as to whether that would be an appropriate order taking into account how the litigation has been conducted. In this case --

81. **THE DEPUTY JUDGE:** I think the conduct of the litigation can go to the reasonableness and quantum of cost rather than the principle of whether you get them at all.

82. **MR JONES:** My Lord, I say that in this case it would go further, and also because of the second reason, which is that the appropriate order should be no order as to costs because of the significant inconvenience, this is not a minor inconvenience, but a significant inconvenience which was caused to the treasury solicitor in particular, and dare I say also the court, although I would not speak on behalf of the court. But it was the position, my Lord, that there was no skeleton argument in this matter served by the appellants until yesterday. I hear what my learned friend said at the beginning of the hearing about there being difficulties with email. I am afraid that I have seen no basis whatsoever, in evidence --

83. **THE DEPUTY JUDGE:** If I stop you there, Mr Lewis, it may well be the case that if that caused you any prejudice you would have a basis to ask for an adjournment at the appellant's expense, but no such application was made to me.

84. **MR JONES:** No application was made, my Lord. The only reason I am drawing attention to this matter now is that I do say the court, when making a judgment on costs, can take into account how the litigation was conducted, and if a court thinks it appropriate in a particular case to indicate its displeasure or dissatisfaction as to how litigation is conducted, one way to do that is in respect of costs. I say that on the first ground there should be no order for costs because the conduct here was substantially inadequate. I have drawn attention to the skeleton argument having been served late. There was witness evidence that was filed and served on 9 February -- very recently before the hearing -- and it has caused considerable inconvenience to those instructing me and to my client.

85. The second ground for opposing any order for costs, my Lord, is that in my submission the court has been greatly assisted in the resolution of this matter by work that has been done by my Lord in researching the relevant case law and in referring to what my Lord considered to be the relevant principles. The reality is that the skeleton argument as, it was supplied late in this case, my Lord, not materially, in my submission, going further than the so-called grounds for judicial review that formed part of the original claim, did not in any way engage meaningfully with the relevant case law in this area and did not put the case at anything like the level of sophistication at which my Lord has analysed it.

86. THE DEPUTY JUDGE: I have been conscious of my concern about that, which is why I did ask more than once whether everybody was happy to proceed.

87. **MR JONES:** Indeed.

88. **THE DEPUTY JUDGE:** And I think I did outline the effect of the analysis that is in my judgment. I may have been thought to have interrupted more often than is usual, but I thought I was helping people by doing that.

89. **MR JONES:** Not all. May I make clear that the respondent takes no point at all as to the propriety as to my Lord referring to those authorities. What I do say is that in circumstances where my Lord has had to do a lot of leg work, if I put it colloquially, to get this claim up to a standard where my Lord was in a position to make the findings that he did. I say that that confirms a substantial inadequacy yet again in the preparation of this case by the appellant and her representatives and I do say that that is a second reason for saying that no order for costs, or that no order for costs would be the appropriate order in this case.

90. THE DEPUTY JUDGE: Thank you very much, Mr Lewis. Again, you have put the case very well, if I might put it like that, but I am afraid I am against you.

91. **MR HENDRON:** My Lord, I am grateful.

92. **THE DEPUTY JUDGE:** I take it you don't want any reasons?

93. **MR JONES:** No, I am content to accept that.

94. MR HENDRON: My Lord, the appellant is publicly funded so I ask for the costs to be assessed, subject to detailed assessment.

95. **THE DEPUTY JUDGE:** That is no issue. I don't think that is a problem. Is the application for costs against the Treasury Solicitor, because --

96. **MR HENDRON:** There is, against the Treasury Solicitor.

97. **THE DEPUTY JUDGE:** I think what the Treasury Solicitor is entitled to know what you are asking for, unless you are asking for a detailed assessment, which would not be a normal course to take on a half day case, really. I think there is some substance in the complaints about the conduct of this case that are raised by the Treasury Solicitor, so sadly it may well be the case that we are not in a position to properly deal with the summary assessment of costs. Where do we go then? I think the Treasury Solicitor is entitled to say they should not be put to the expense of a detailed assessment when you have not put your house in order.

98. **MR HENDRON:** My Lord, I take on board those points. Having sought instructions from a representative of the firm that instructs me, there is not a schedule of costs.

99. THE DEPUTY JUDGE: We are not in a position to deal with costs. If I make an order as to costs it can only be for detailed assessment, it seems to me, can it not? It is perhaps complicated a little by the fact that the claimant is publicly funded, as there is going to have to be some form of assessment in relation to that. I don't know if the position has changed, but certainly in the old days publicly funded litigants were under a duty to make an application for costs against the other side if they were successful. Where are you suggesting we go from here, then?

100. MR HENDRON: My Lord, in my submission the right order should be that the respondent do pay the appellant's costs subject to detailed assessment.

101. MR JONES: My Lord, I am not realistically in a position to resist that, because I am very loathe to suggest to the court that there should be written representations on quantum in relation to a schedule which will increase the costs.

102. THE DEPUTY JUDGE: I am not going to do that. I think that that is the only course that can be taken. I am not sure I need make any further order in relation to that, other than the appellant shall recover their costs from the respondent subject to detailed assessment. But if it helps, I think it is fair for me to express the view that if there are further costs incurred because of the need for detailed assessment it seems that that is unreasonable in the circumstances of this case and that is a matter on which the respondent would have proper grounds for complaint. I am sure that can be taken on board when any assessment is undertaken.

103. MR JONES: My Lord, I am very grateful. No doubt that is recorded.

104. THE DEPUTY JUDGE: I am very grateful to both of you gentlemen for your assistance in this matter.

REPORTS

GREATER GLASGOW HEALTH BOARD v CHAIRMAN OF THE SCOTTISH HOSPITALS INQUIRY

COURT OF SESSION (OUTER HOUSE)

Lady Wise: 4 February 2025

[2025] CSOH 12; 2025 S.L.T. 205

Administrative law—Judicial review—Scottish hospitals inquiry—Health board challenging refusal by Chairman of inquiry to admit its expert report into evidence—Whether refusal to admit report unfair—Inquiries Act 2005 (c.12), s.17.

The Scottish hospitals inquiry was established under the Inquiries Act 2005 to consider the planning, design, construction, commissioning and maintenance of *inter alia* two hospitals in Glasgow. The inquiry sought to determine whether issues relating to ventilation and water adversely impacted on patient safety and care, and whether one of the hospitals was "unsafe", which was defined by the inquiry as "present[ing] an additional risk of avoidable infection to patients". The tenor of the expert evidence heard during the inquiry was that the hospital's ventilation and water systems posed an increased risk of avoidable infections to patients and were unsafe. The health board which owned and operated the hospital, and was a designated core participant in the inquiry, denied the allegations made against it and commissioned a further expert report on the risk of infection from the water and ventilation systems at the hospitals, which advanced different conclusions on those matters to the other expert evidence. The health board applied to the chair to have the report considered in evidence and for its authors to give oral evidence. The chair considered that admitting the report would abandon the inquisitorial procedure controlled by him and turn it into an adversarial litigation, which was inconsistent with his duties under s.17 of the 2005 Act. He could resolve the issue at the level of principle. The chair further considered that the reasons for refusing the report were underlined by the practical difficulties which would arise were it to be admitted, namely not being able to conduct a hearing which met the requirements of procedural fairness. The health board petitioned for judicial review, seeking declarator that the chair's decision was unlawful and reduction thereof. The chair maintained that he was entitled to refuse the report on the basis of principle, and even if that was wrongly decided, the decision on the practical difficulties involved in admitting the report remained.

Held, (1) that fairness included the obligation, by those exercising an investigative jurisdiction, to listen to any relevant argument and evidence that might conflict with a possible or proposed finding (para.33); (2) that while the requirement to hear both sides, expressed by the *maxim audi alteram partem*, had to be followed by those exercising an investigative jurisdiction, fairness would not always require the admission of evidence tendered by an inquiry participant (para.34); (3) that the existence of contradictory expert evidence should have been regarded as a significant development when considering the need for balance, and the issue of principle was wrongly decided and consequently unfair, in breach of s.17(3) of the 2005 Act (paras 34–35); (4) that where a different conclusion on matters about which key findings would require to be made was advanced for consideration, the first question ought to be whether the evidence was likely to assist determination of those issues; it was not a question of the process transmuting into an adversarial one, but of assisting the chair in making robust and defensible findings (para.36); (5) that the decision was not to admit the report on the basis of principle, and the underscoring of an erroneous decision by reference to practical considerations could not rectify it (para.37); (6) that it was not currently open to the respondent to reach a different view and there was no other mechanism to correct the error; reduction would be unnecessary and inappropriate given recent developments, and declarator would be granted to the effect that the respondent's decision was wrong in principle and unfair to the extent that it concluded that receiving the expert report tendered by a core participant and hearing evidence from the report's authors would result in the abandonment of the inquiry's inquisitorial procedure (paras 39–40); and petition *sustained in part*.

Petition for judicial review

Greater Glasgow Health Board petitioned for judicial review seeking declarator that the Chairman of the Scottish Hospitals Inquiry's refusal to admit the petitioner's expert report in the Scottish hospitals inquiry was unlawful and reduction thereof.

The petition came before the Lord Ordinary (Lady Wise).

Cases referred to

BBC v Chair of the Scottish Child Abuse Inquiry [2022] CSIH 5; 2022 S.C. 184; 2022 S.L.T. 385

Columbia Steam Navigation Co v G&J Burns (sub nom Owners of the Nerano v Owners of the Dromedary) (1895) 22 R. 237; (1895) 2 S.L.T. 449

Connelly (Peter) v HMA Advocate 1990 J.C. 349; 1991 S.L.T. 397; 1990 S.C.C.R. 504

Conway v Secretary of State for Scotland 1996 S.L.T. 689

F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; (1973) 117 S.J. 713

Griffiths v TUI UK Ltd [2023] UKSC 48; [2023] 3 W.L.R. 1204; [2024] P.I.Q.R. P6

Honisz v Lothian Health Board [2006] CSOH 24; 2008 S.C. 235

Mahon v Air New Zealand [1984] A.C. 808; [1984] 3 W.L.R. 884; (1984) 81 L.S.G. 3336

R v Deputy Industrial Injuries Commissioner Ex p Moore [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; (1964) 108 S.J. 1030

R v Lord Saville of Newdigate Ex p B (No.2) [2000] 1 W.L.R. 1855; [1999] C.O.D. 436; (1999) 149 N.L.J. 1201

R v Secretary of State for the Home Department Ex p Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; (1995) 7 Admin. L.R. 1

R (on the application of Associated Newspapers Ltd) v Leveson [2012] EWHC 57 (Admin); [2012] A.C.D. 23

R (on the application of Cabinet Office) v Chair of the UK Covid-19 Inquiry [2023] EWHC 1702 (Admin); [2024] K.B. 319; [2024] 2 W.L.R. 485

R (on the application of EA) v Chairman of the Manchester Arena Inquiry [2020] EWHC 2053 (Admin); [2020] H.R.L.R. 23; [2020] Inquest L.R. 130

United States Shipping Board v Owners of The St Albans [1931] A.C. 632; (1931) 39 Ll. L. Rep. 23

Wightman v Secretary of State for Exiting the European Union [2018] CSIH 62; 2019 S.C. 111; 2018 S.L.T. 959

Legislation referred to

Inquiries Act 2005 (c.12)

On 4 February 2025, the Lord Ordinary *sustained* the petition *in part*.

LADY WISE.—

Introduction

[1] This petition for judicial review raises a point about the application of the principle of fairness to an inquisitorial process. It concerns a decision of the Chair of the Scottish Hospitals Inquiry dated 1 August 2024 refusing an application by Greater Glasgow Health Board to have an expert report received into evidence and to hear from its authors.

[2] The Scottish Hospitals Inquiry was established under the Inquiries Act 2005 to consider the planning, design, construction, commissioning and maintenance of *inter alia* the Queen Elizabeth University Hospital and the Royal Hospital for Children, Glasgow. The relevant focus of the Inquiry is to determine whether issues relating to ventilation and water adversely impacted on patient safety and care and whether the QEUH is or was "unsafe". The term unsafe has been defined by the Inquiry as "present[ing] an additional risk of avoidable infection to patients".

[3] The Inquiry has held hearings in tranches. The first of these, "Glasgow I", reviewed the evidence and material involving patients and families. "Glasgow II" considered evidence from treating clinicians. This petition challenges a decision made during "Glasgow III". The Glasgow III phase has heard evidence from clinicians, members of the petitioner's management and estate teams and independent experts. Its focus is, *inter alia*, whether the ventilation and water systems in the QEUH are or were unsafe. The evidence stage of Glasgow III concluded on 13 November 2024 and a submissions hearing for that tranche is due to take place between 11 and 13 March 2025. It is anticipated that a fourth phase, Glasgow IV, will be held from the end of April to the end of May 2025 when all remaining evidence necessary for the Inquiry to address its remit and terms of reference will be heard.

[4] To date, the Inquiry has appointed six expert witnesses, all of whom gave evidence during Glasgow III. The tenor of all six experts was to the effect that the ventilation and water systems at QEUH posed an increased risk of avoidable infections to patients and accordingly were "unsafe". Greater Glasgow Health Board, which owns and operates the QEUH is a designated core participant in the Inquiry. The Board and some of its estates and management teams have been criticised by witnesses during the evidence in all three tranches of evidence to date. It denies allegations made against it during the Inquiry, including that there has been an institutional effort to conceal any environmental link with infections and that organisational reputation has been prioritised over patient safety. Many members of the Health Board's staff have given detailed witness statements on matters of fact and been subjected to examination in evidence.

[5] The present challenge relates to an independent expert report from three individuals, Professor Hawkey, a Dr Agrawal and a Dr Drumwright. It was instructed by the petitioner and finalised on 25 July 2024. The report addresses the core issue of the risk of infection from the water and ventilation systems at the two hospitals. It is accepted in these proceedings that each of the authors of the report is a recognised expert in their respective fields which are, in summary, bacteriology, haematology and clinical informatics.

[6] Greater Glasgow Health Board applied to the Chair of the Inquiry to have the report by these experts considered as part of the evidence at Glasgow III and for its authors to be called to give oral evidence. A number of core participants opposed the Board's motion, which led to a hearing after which the Chair made the decision of 1 August 2024 to refuse it.

The decision under challenge

[7] The Chair's decision and reasons for refusal of the petitioner's application runs to 22 pages. The introduction sets out some of the background and the terms of the Health Board's application that the independent expert report be included in the hearing bundles for Glasgow III and that the three named experts be called to give evidence. Reference is made to the terms of the letters of instruction sent to the experts and the fact that the instruction to the first two experts had been requested so that those advising the Health Board could provide advice in respect of the associated police investigation, the Inquiry, and a defence to civil claims. The contents of the report are summarised between paragraphs 18 and 25 and the submissions made by counsel between paragraphs 26 and 52. The decision and reasons are set out between paragraphs 53 and 62 in the following terms:

> "53. For inter-related reasons of principle and practicality, I have decided to refuse Mr Gray's motion and therefore the Inquiry will not consider the GGC Report as part of the evidence to be led at Glasgow III and will not call the authors of the GGC Report as witnesses.
>
> 54. I have already described the GGC Report and the circumstances in which it has come into existence. It should not be inferred from that description or anything I have to add that I have come to any view whatsoever as to the soundness or otherwise of its contents and apparent conclusions; I am not in a position to do so and I have not done so. Nor should it be inferred that I am in any way questioning the integrity, professionalism or good faith of its authors or those who instructed them. Mr Gray specifically stated that there was no question as to the impartiality of the experts instructed by NHS GGC and no question of them having been invited to adopt any position. For present purposes I accept that. The fact remains that the authors of the GGC Report were instructed by NHS GGC's legal advisers (CLO) in order for CLO to provide legal advice to NHS GGC in respect of the Inquiry, and also in respect of a police investigation and the defence to civil claims. The GGC Report was therefore a piece of work commissioned on behalf of NHS GGC for NHS GGC's purposes, entirely legitimate as these purposes may be, but with all the natural consequences of that. NHS GGC and its advisers had control over choice of author, scope of the work, the extent of information provided, and the use made of the eventual product. In short, the GGC Report is an NHS GGC document. In his submission Mr Gray characterised the terms of GGC Report as being to 'restore some degree of balance' in the face of the criticisms made by the Inquiry's Expert Reports. That is to confirm its purpose

is thus to advance an argument or arguments in favour of the position taken by NHS GGC in its Positioning Paper, and more generally. The GGC Report is an advocacy document prepared for a single core participant.

55. The GGC Report is also a very substantial document. I accept what was said by Counsel to the Inquiry and the representatives of core participants about what would be required properly to understand and evaluate it. National Services Scotland (NSS) have assessed that task as requiring five weeks for a team that is already assembled. Nothing in what was said about this by the legal representatives of the other core participants was challenged on behalf of NHS GGC.

56. At risk of repetition, I imply no criticism of what NHS GGC and its advisers have done, subject only to the qualification that the GGC Report must be seen for what it is and treated accordingly. I proceed on the basis that the GGC Report would be admissible as an expert report in adversarial court proceedings with a view to it being referred to and the authors led as witnesses by legal representatives acting for NHS GGC. However, the Inquiry is not a court. Its proceedings are not adversarial. It is not proposed that its authors be led by NHS GGC's legal representatives; that responsibility is to be left with Counsel to the Inquiry.

57. In adversarial proceedings, whether civil or criminal, it is for the parties to determine what evidence goes before the factfinder (the judge or the jury), subject only to that evidence being relevant to the matters of fact in issue. Moreover, it is for the parties to protect and advance their respective positions. While the judge has a duty to attempt to ensure that the procedure adopted is efficient and fair, that duty is informed by an expectation that parties have a responsibility to look after their own interests but only a very limited responsibility to look after other parties' interests. Thus, adversarial proceedings are of the nature of a contest in which all the parties are entitled to put such relevant evidence before the court as they wish. The court is bound to hear that competing evidence and make its decision solely on the basis of that evidence.

58. As Ms Connelly succinctly explained in her written and oral submissions, the procedure of inquiries under the 2005 Act, and in particular this Inquiry, is not intended to be adversarial; it is inquisitorial. Ms Connelly cited what had been said by Lord Saville in making his opening statement to the Bloody Sunday Inquiry as illustrating the difference between an inquisitorial approach to be taken in an inquiry and an adversarial approach such as taken in litigation: 'An Inquiry like the present Inquiry is quite different. Here the Tribunal takes the initiative in trying to ascertain the truth. Unlike an adversarial contest, it is for the Tribunal to seek all the relevant material. Its task is not to decide the matter in favour of one party or side or another. Indeed, from the point of view of the Tribunal, there are no parties or sides. There will, of course, be those who have material evidence to give or who have a legitimate interest in challenging such evidence, but the Tribunal will not treat them as sides or parties in an adversarial contest, but rather as a means of seeking out the truth. (Volume X, A2.1 Opening Statement of the Tribunal (3rd April 1998) p.45).'

59. It was Ms Connelly's submission that to admit the GGC Report as part of the evidence to be considered by the Inquiry would be to make a fundamental change in the procedure adopted from an inquisitorial method to an adversarial method, with the consequence that fairness would require that what had been allowed to NHS GGC should be allowed to other core participants and all that would follow from that. I understood Ms Watts and Mr Love to associate themselves with Ms Connelly's submission. I heard nothing to contrary effect.

60. I accept Ms Connelly's reference to what was said by Lord Saville as entirely apposite and I accept her submission that to allow the GGC Report to become part of the evidence to the Inquiry would be to abandon the inquisitorial procedure controlled by the chair, which the Inquiry has adopted until now, and turn it into something like an adversarial litigation. I would see that as entirely inconsistent with my duties in terms of section 17 of the 2005 Act.

61. While what I require to decide can be resolved at the level of principle, the inevitable consequences of admitting the GGC Report narrated by Counsel to the Inquiry and the

legal representatives of core participants and not disputed by counsel for NHS GGC and which I accept would arise, underline why it should not be admitted. Put short, it would mean not being able to conduct a Glasgow III hearing beginning on 19 August 2024 which met the requirements of procedural fairness. That is something which should be avoided.

62. Counsel to the Inquiry and legal representatives of core participants made criticisms of the conduct of NHS GGC in this matter which Mr Gray was eager to refute. It is not necessary for my decision to express any view on what was said and I do not do so. I simply welcome Mr Gray's reaffirmation of NHS GGC's wish to adopt a wholly collaborative approach in its engagement with the Inquiry."

Submissions for the petitioner

[8] The decision of 1 August 2024 was irrational *et separatim* unfair. A declarator to that effect should be granted and the decision reduced. Any discretion afforded to the Chair of an Inquiry is subject to the duty of fairness – *R (Associated Newspapers Limited) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin) at para [46]. It was not in dispute that the fairness of any decision in a Public Inquiry was ultimately for the court's determination – *R v Lord Saville of Newdigate* [2000] 1 WLR 1855 at para [38] and *Levesonsupra* at paragraph 47. It had been noted in *Leveson* that a duty of fairness does not exist in a vacuum and is in that respect like a duty of care. The starting point for any consideration of a Chair's duty of fairness is the task which he was appointed to perform under his terms of reference – *Leveson* at para [35].

[9] The report that had been the subject of the application fell squarely within the terms of reference, which included an examination of the issues in relation to the adequacy of ventilation, water contamination and other matters adversely impacting on patient safety and care arising in the construction and delivery of the QEUH. The terms of reference also included an examination of what actions have been taken to remedy defects and the extent to which those have been adequate and effective. The position of Greater Glasgow Health Board was significant. It treats a large number of patients on a daily basis. Its haemato-oncology wards treat the most clinically vulnerable patients in Scotland. The Royal Hospital for Children in Glasgow is a national centre for paediatric haemato-oncology treatment in which world leading experts care for a particularly vulnerable patient cohort. It is critical that public trust in the relevant hospitals and clinicians is maintained and the duty of the Health Board to its staff includes ensuring that their version of events was fully heard together with any relevant supporting (expert) evidence. Public confidence would be significantly undermined in the event that the Inquiry made any adverse comment about the safety of the QEUH. It was not just desirable but necessary for the Inquiry to have access to a range of views before making any such comment or criticism.

[10] As all of the experts appointed by the Inquiry had been critical of the Health Board, fairness demanded that where contradictory evidence was available it should be heard. While the Health Board had provided a detailed critique of all of the Inquiry's expert reports that was of limited utility without the alternative analysis presented by the three experts who had prepared the report. In essence, the report concludes, supported by significant data analysis and comparisons with other Glasgow hospitals, that the QEUH did not create any additional risk to patients. If the decision of 1 August was allowed to stand, the Inquiry would not hear highly pertinent evidence in relation to the safety of the hospital, which may result either in the petitioner receiving significant unjustified criticism or in the Inquiry Chair being unable to make any proper recommendation.

[11] It was accepted that in terms of section 17(1) of the Inquiries Act 2005 the procedure of the Inquiry is such as the Chair may direct. However, that discretion was fettered by an important provision in section 17(3) providing that the Chair is obliged to act with fairness. The requirements of natural justice continue to apply to an inquisitorial process. That is supported by the duty embodied in section 17(3). Those requirements were summarised in this context by the judicial committee of the privy council in *Mahon v Air NZ* [1984] A.C. 808. They include that an Inquiry Chair must listen fairly to any relevant evidence and rational argument that a person represented at the Inquiry and whose interest may be adversely affected by its findings may wish to place before him. Such a person must not be left in the dark as to the risk of an adverse finding being made, as that would deprive that person of an

opportunity to "adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding…" – *Mahon v Air NZ* at 820. The court was there relying on the decision of the Court of Appeal in *Reg v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456.

[12] The requirement to observe the rules of natural justice applies to both adversarial and inquisitorial procedure – *F Hoffmann-La Roche and Co A.G. v Secretary of State for Trade and Industry* [1975] A.C. 295 at 368. Further, fairness is not an invariable or fixed matter and will be intensely fact dependant – *R v Secretary of State for the Home Department Ex parte Doody* [1994] 1 A.C. 531. It was also emphasised in *Associated Newspapers v Leveson* (at paragraph 53) that it is of the greatest importance that the Inquiry should be, and should be seen by the public to be, as thorough and balanced as is practically possible.

[13] While the Health Board had been afforded an opportunity, albeit limited, to submit questions to counsel to the Inquiry by way of Rule 9 of the Inquiry's process, those questions were necessarily in the abstract and of limited utility. The inability to put any alternative independent analysis to the witnesses such as that in the report, resulted in unfairness. The questions arising for the Inquiry's determination and which are considered in the report, are questions of a technical or scientific nature. Accordingly it was essential for the Inquiry to hear expert or skilled evidence before deciding thereon – *Walker and Walker on Evidence* (5th Ed), at 16.3.19, citing *inter alia Connelly v HMA Advocate* 1990 JC 349, *The "Nerano" v The "Dromedary"* [1895] 22 R 237 and *United States Shipping Board v The Ship St Albans* [1931] AC 632. In consequence of the Chair's decision of 1 August 2024, the Inquiry is faced with matters which require skilled evidence in order to be determined, yet the only skilled evidence permitted is "all one way", the Inquiry having deliberately excluded from consideration skilled evidence pointing in another direction. That was plainly unfair. The ability of the Chair himself, absent a contradictor, to discount the skilled evidence that has been led would be limited. He could do so only where that evidence simply did not stand up to rational analysis – *Honisz v Lothian Health Board* 2008 SC 235 at paragraph 39, or where it was mere *ipse dixit* or based on an incomplete understanding of the facts – *Griffiths v Tui (UK) Limited* [2023] 3 WLR 1204 at paragraphs 62 – 66.

[14] Many of the authorities relied on by the respondent related to applications to limit the evidence available to an Inquiry either through anonymity or confidentiality. The present case was different in that the petitioner did not seek to exclude evidence but to present an additional independent analysis that would assist the respondent in addressing the terms of reference. The report utilised comparator data from other hospitals, both in-patient and out-patient, and reached the conclusion that there was no increased risk of infection. Such a conclusion went to the heart of the issues of whether the hospital was safe and whether there was any need for public concern in relation to risk. At the very least it would be rational to consider that evidence and use it to test the conclusions of the Inquiry's appointed experts. It was unfair and irrational to exclude it.

[15] Insofar as the other parties suggest that the decision of 1 August was limited to the Glasgow III tranche of hearings such that the petition was academic, that position was plainly flawed. When these proceedings were raised, the petitioner relied on the terms of Inquiry Direction 5, which provided that the respondent intended to issue an *interim* report following the Glasgow III hearings, including conclusions and recommendations in respect of the safety of the hospital. On 25 October 2024 the respondent issued Direction 8, stating that the Inquiry no longer intended to issue an *interim* report. Accordingly, as no recommendation in respect of safety will be made until after the fourth tranche of hearings the matter was not academic. A plain reading of the decision, in particular at paragraph 61, indicated that it was based on principle and so amounted to a refusal to admit the report into evidence at all. The Inquiry Chair could not retract a decision based on principle.

[16] The circumstances in which the court will refuse to entertain an academic question were explored in *Wightman v Secretary of State for exiting the European Union* 2019 S.C. 111. There the Lord President (Carloway) explained, at paragraph 21, that the default position was that "anyone who wishes to do so can apply to the court to determine what the law is in a given situation" and "the court must issue that determination publicly". Thus the exception to the general position

that the court does not answer academic questions is one of practicality. Where there is no petitionary conclusion the litigation must be capable of achieving some practical result. In the present case as the decision was one based on principle, namely that the proceedings were inquisitorial and admitting the report would render those proceedings adversarial, there was a live practical question. The decision should be declared unlawful and reduced.

Submissions for the respondent

[17] The focus should be on the specific question asked of the respondent and the specific answer provided. The application made had been to include the expert report in the hearing bundles for Glasgow III and call its authors to give evidence in that tranche of proceedings. The application had been made less than one month from the start of a 12 week evidential hearing. The report in question ran to over 200 pages and the application was tantamount to a demand that it be included and the witnesses called. It was accordingly unsurprising that as a matter of both principle and practicality the Chair refused the application.

[18] It was noteworthy that the petitioner's focus had been exclusively on the question of principle and an effective concession that the petition would not have been raised had the matter been decided purely as an exercise of the broad discretion available to the respondent. The decision on practicality still stood and there was nothing to indicate that the respondent had been in error in that regard. The subsequent issue of Directions 8 and 9 was relevant. Direction 8 provides a complete answer to the petitioner's challenge of fundamental unfairness on the basis that findings could be made without any opportunity to challenge the substance. Direction 9 provides that all core participants will be afforded the opportunity to highlight any issues, alleged gaps in evidence and advance arguments to challenge any evidence led. It was wrong to contend that findings would be made without the opportunity for comment or contradiction. Direction 9 also alerts parties that they will be able to make an application in the context of Glasgow IV to include any evidence they contend is relevant. It was clear from correspondence that at one stage the petitioner's side had suggested that the report could just be admitted for Glasgow IV but then without explanation that was not pursued and these proceedings were raised. What the petitioner was seeking to do was render this court the primary decision maker in relation to a proposal made and withdrawn.

[19] It was accepted that the discretion of the Chair in the application that had been before him was not unfettered – section 17(3) of the 2005 Act and the decisions in *Ex Parte Moore* and *Mahon v Air NZ*. It was clear that a party must be given an opportunity to contradict evidence led. However, those opportunities still exist in the Inquiry such that fair procedure will be ensured. The respondent had not barred himself in all time coming from admitting the report under consideration. In any event no submission had been made to him at the time that it was fundamentally unfair to determine the matter as one of principle.

[20] While there was no dispute about the application of legal principle, there was a need to focus on what the Chair had been asked to address and the specific issue under review – *Cabinet Office v UK Covid Inquiry* [2024] KB 319. That case involved Notices under section 21 of the 2005 Act seeking to recover the WhatsApp messages of Boris Johnson, as Prime Minister during the pandemic. The court emphasised that an Inquiry does not determine issues between parties to a civil or criminal litigation but conducts a thorough investigation and has to follow leads rather than being bound by the rules of evidence (para [52]). It was not for parties to dictate to the Chair what is and is not relevant. While the expert report that had been tendered on behalf of the petitioner was relevant to the task of the Inquiry and the experts were on the face of it qualified to undertake the task they had been set, their instructions had come from one core participant. Those instructions were apparently for the combined purposes of a criminal investigation, civil proceedings and the Inquiry itself. The point had been made by the respondent in his decision that the report was effectively an advocacy document. In any event the data set underlying the authors' conclusions was still missing. There was no attempt to impugn the independence of these experts but they had been answering questions posed by their clients and not by the Inquiry.

[21] The petitioner had conceded that the Inquiry Chair had a broad discretion in relation to applications of the kind under dispute here. It could not be said that the only fair outcome was to allow

the report to be lodged as there were other ways of including any relevant material. The stage of the Inquiry at which the application had been made was highly relevant. The application had been restricted to the Glasgow III stage and the Inquiry would be moving to Glasgow IV when any further application could be considered. It would only be at the end of the Inquiry that a core participant such as the petitioner could contend that the respondent had failed to "hear the full story" in relation to relevant evidence.

[22] Fairness was an all-encompassing concept and the Inquiry Chair had required to consider the interests of a number of participants. There was nothing new or novel about the Inquiry instructing its own experts. That was standard practice and supported in the leading text *"The Practical Guide to Public Inquiries"* (Hart, 2020, at p 231). It was relatively rare for core participants to be permitted to instruct their own expert witnesses to give evidence, although they may be afforded the opportunity to comment on an intended expert appointment by the Inquiry. Accordingly, it was for the Inquiry Chair to decide what documents and evidence were to be heard and it was contrary to accepted procedure that core participants could force any lines of inquiry upon him. Fairness did not require the type and level of participation rights for which the petitioner contended. Far from being silenced, the petitioner had taken the opportunity to make trenchant criticisms of the Inquiry experts. It will have the further opportunity of making submissions on the evidence given by those experts. It was consistent with *Ex parte Moore* and *Mohan v Air NZ* that what a party must be given is an opportunity to comment or contradict evidence on issues with which it disagrees. The difference between the parties in this case is that the respondent contends that the petitioner has and will continue to have such opportunities such that in the round a fair procedure will have been adopted.

[23] The decision of the respondent should not be interpreted in the manner suggested on behalf of the petitioner. At paragraph 53 the reference to "inter-related reasons of principle and practicality" could be taken as meaning that both reasons would have to be wrong before there could be interference with the decision. While paragraph 61 does state that the argument can be resolved at the level of principle (that to allow the report to be part of the evidence would be to abandon the inquisitorial procedure) the respondent had gone on to deal with the practical reasons to refuse it. Paragraph 61 should be interpreted as the respondent stating "esto I am wrong on the issue of principle, it would nonetheless be impracticable to allow the report to be lodged and so I exercise my discretion not to allow it". Absent a standalone legitimate expectation argument that would be enough to dispose of the petition.

[24] The circumstances in which the court might answer questions that may seem academic was summarised in *BBC v Scottish Child Abuse Inquiry Chair* 2022 SC 184 at paras [35] – [38]. In the present case the issue came to be one of remedy. In order to succeed, the petitioner would have to persuade the court that it could not now have a fair hearing. That could not be so as Direction 9 made clear that the application could be made of new. It would be sterile to reduce the decision when it was already known that the same motion could be made. The respondent had lodged the relevant correspondence and Directions 8 and 9, clarifying that there would be scope for seeking that additional evidence be led and that no findings in fact would be made until hearings were completed. It had clearly been the petitioner's original intention to make a fresh application but that had now been abandoned. As the Chair was open to a fresh application there was no practical purpose to be served by the petition. It was an attempt to interfere with a decision that had been made and implemented but where there was scope for a fresh decision. If any new application was made, the respondent would decide what should happen next in terms of whether the Inquiry should commission further expert reports, hear from the experts instructed by the petitioner or refuse the application. It was not for the court to micro manage the inordinately difficult task faced by the Inquiry Chair. The key point was that there were other ways of resolving the situation.

Submissions for the interested parties

[25] The interested parties, the "whistle-blowers" who had all worked for the petitioner were also core participants in the Inquiry. Each gave evidence during Glasgow III. They too had opposed the petitioner's application to have an expert report included and its authors called to give evidence. Insofar as the petitioner's approach seemed to be that the relationship between the petitioner and the

respondent was a purely bilateral one that was wrong. There were others with interests and the petitioner was just one of a number of core participants. The interested parties contend that the decision made was a reasonable one and within the exercise of the Chair's discretion. It would have been irrational to receive the report in question unless the hearings were discharged. That had been the context in which the application was made. It might have been different had the petitioner made an application to admit the report and call the witnesses but not under reference to the Glasgow III phase.

[26] The present proceedings had been conducted by the petitioner in a leisurely manner. Even if the argument on their behalf was well founded the remedy should be refused. They had not sought urgent consideration and the evidential stage of Glasgow III had taken place prior to the substantive hearing. The case was squarely in the territory of there being no practical consequences arising from success as outlined in *Conway v Secretary of State for Scotland* 1996 SLT 689 at 690. What the petitioner was seeking was effectively a reduction of an outstanding and undetermined application to admit a report and call witnesses to a tranche of hearings which have come and gone. To the extent that the petitioner also sought a declarator, the terms of that remained unclear. Accordingly the petition should simply be refused in the absence of any practical consequences arising from success. If the petitioner was correct on the issue of principle that there had been an error of law in relation to whether allowing the report would result in abandonment of the inquisitorial process, the respondent would have the benefit of the Opinion of the Court in dealing with any subsequent application.

[27] It could not possibly be fair to expect the other core participants, such as the interested parties, to have dealt with the expert report under discussion at hearings that were about to commence. The report cited many dozens of papers several of which had been written by the interested parties. The conclusions expressed therein would clearly affect the interested parties as core participants and they would have to be afforded the opportunity to take a view on those.

[28] Under reference to the decision in *Ex parte Moore* the situation here was analogous. If the decision of principle was an error of law there was an alternative reason for refusal of the application that was not tainted by the same error. The situation in *Mahon v Air NZ* was different. Their problems had arisen from the piecemeal disclosure of evidence. In the present case the petitioners have been participants and know the argument against them. Their position has been that the argument against them is fundamentally flawed and there is no longer any argument that they have not been given advance notice of evidence. The absence of the underlying data on which all of the conclusions in the report are based should be taken into account. While it is said that this data can be immediately produced if the report is allowed one would need to consider that data in assessing whether it was relevant and material. It is not yet known whether the refusal to allow the report and associated evidence has resulted in unfairness. The Inquiry experts have not yet had an opportunity to examine the report and the underlying data. In any event, the petitioner's experts would not require to rely on their report to challenge or undermine the suggestion that the hospital was unsafe. Irrational analysis of the evidence led would not require separate expert evidence. Of course the expert evidence led was complicated but it was for the Chair to decide what else was required not the experts. The question of fairness extended not just to all participants but also to the public interest in the time taken with the Inquiry and its cost.

[29] Notwithstanding the use of the word "underline" in paragraph 61, the practicality reason was an independent one and was sufficient to allow the decision to stand. If that was wrong and the court was persuaded that there was a material error on the point of principle, the fact that there were separate good reasons based on practicality was sufficient to justify refusal of the introduction of the report at the time and so refusal of this petition.

Decision

[30] It is important to acknowledge the wide discretion bestowed on the Chair of any Inquiry operating under the Inquiries Act 2005. The procedure is designed to be flexible and inquisitorial in nature. The Chair has considerable scope to determine the nature and extent of the evidence received and witnesses led. He takes the initiative in the search for truth. The parameters of the Inquiry's work are framed by its terms of reference. The present dispute is concerned with a decision

about evidence relating to a central question for the Inquiry, namely the safety or otherwise of the Queen Elizabeth University Hospital. When the decision challenged was made on 1 August 2024, the expectation was that conclusions on that issue would be made in the Glasgow III phase of the Inquiry.

[31] Standing the wide discretion available to the Chair on procedural and evidential matters, the parties agree that, had the decision of 1 August been made exclusively in the proper exercise of discretion, it would be effectively unassailable. However, the dispute relates to the consequences of the issue of principle described in the decision. That issue was encapsulated in the submission by counsel for two of the families who are core participants. It was that to allow the report tendered by the Health Board to become part of the evidence to the Inquiry "… would be to abandon the inquisitorial procedure controlled by the chair….and turn it into something like an adversarial litigation". The Chair accepted that submission and recorded that he was able to resolve the issue before him at the level of principle. He added that the practical difficulties that would inevitably arise, which would prevent the Glasgow III hearings commencing on 19 August 2024, underlined the reason for not admitting the evidence.

[32] While there is reference in the decision to the report being an "advocacy document", this related only to the nature of the original instruction. It was no part of the arguments for the respondent and the interested parties that the authors of the report had failed in their duties as experts and were advocating for a participant. I have proceeded on the basis that those authors and proposed witnesses are skilled professionals who are qualified to give independent opinion evidence that would assist the Inquiry.

[33] There is no support in the authorities for the proposition that receiving evidence tendered by a core participant to an Inquiry would alter the form of procedure from inquisitorial to adversarial. The parties agree that the fundamental principles of natural justice apply to Inquiry proceedings. Fairness is a substantive requirement applicable to both adversarial and inquisitorial hearings. It includes the obligation, by those exercising an investigative jurisdiction, to listen to any relevant argument **and evidence** that may conflict with a possible or proposed finding, "…that a person represented at the inquiry, whose interests (including in that terms career or reputation) may be adversely affected, may wish to place before him" – *Mahon v Air New Zealand Ltd and Others* [1984] A.C. 808, at 820. The requirement to hear both sides, traditionally expressed by the maxim *audi alteram partem,* requires to be followed by those exercising an investigative jurisdiction, such that principal parties must be able to contradict any information obtained – *Reg v Deputy Industrial Injuries' Commissioner, ex parte Moore* [1965] 1 Q.B. 456. In its application to modern statutory Inquires, fairness demands that they be "and be seen by the public to be, as thorough and balanced as possible" – *R (Associated Newspapers Limited) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin), para [56]. That will include considering all material evidence on the core issues. Once it is known that there is expert evidence on technical and scientific matters available, the conclusions of which are contradictory to that led to date by Inquiry experts, it is difficult to regard its complete exclusion from consideration could be fair.

[34] Application of the principle of fairness will not always require allowing an Inquiry participant to have evidence tendered by them heard. Much depends on the context. It is not inconsistent with the principle of fairness that norms of procedure will be adopted that may generally discourage core participants from submitting their own expert evidence. A challenge of this type cannot be brought on the basis of disagreement with the Chair's conclusion on such matters - *R (on the application of EA) v Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin) per Sharp J, at paragraph 87. In the present case however, the application presented was by a core participant for whom the risks, including loss of public confidence, are incalculable in a situation where the expert evidence adduced to date had all been to the same effect. The existence of contradictory expert evidence should have been regarded as a significant development when considering the need for balance, albeit that it would have caused unpalatable disruption to planned hearings for it to be heard within Glasgow III, a point to which I will return. It is sufficient to record that, given the complexity and magnitude of the safety issue, there is considerable force in the Health Board's position that cross-examination of the Inquiry experts would be an inadequate method of challenge without a

basis in contradictory expert evidence heard by the respondent.

[35] I have reached the view that the issue of principle was wrongly decided and consequently unfair, in breach of section 17(3) of the 2005 Act. The conclusion that receiving the report would result in abandonment of the inquisitorial procedure was effectively determinative of the Health Board's application, or at least material. While the general concept of the safety of a hospital is easy to understand, the evidence relating to it in the circumstances of the Inquiry's terms of reference is highly complex and has been the subject already of extensive expert testimony. In getting to the heart of the issue of safety, the Inquiry has attempted to inform itself by eliciting evidence from no fewer than six expert witnesses, all of whom have reached the same conclusion. The Health Board, as a core participant who would indisputably be impacted severely by adverse findings on the matter, invited the Chair to receive additional expert evidence that reached conclusions contrary to those reached by the Inquiry experts. The act of doing so would not have the inevitable result of turning the process into an adversarial one. It is not for this court to direct the Inquiry as to management of its process. However, receiving the report and calling the authors to give evidence could all be achieved under the inquisitorial procedure adopted to date. Counsel for the Inquiry would take responsibility for leading the evidence, with core participants submitting questions in the usual way. There was no suggestion either to the respondent or to me that the witnesses would be led by one party (the Health Board) and be cross-examined by all others in a manner that would simulate a court process. A decision to receive evidence tendered by one participant can be perfectly consistent with a form of procedure that imposes an obligation on the Chair to do whatever is necessary to make fully informed findings on the central issues within the terms of reference.

[36] While it may be relatively unusual for a core participant to tender a document or witness to the Inquiry and suggest that the witness give evidence, it is competent. The approach to its inclusion will depend on the context. At the time of the Health Board's application, as indicated, the Inquiry had only one expert conclusion on the risk to safety issue, albeit from six different witnesses. Where a different conclusion on matters about which key findings will require to be made is advanced for consideration, the first question ought to be whether the evidence is likely to assist determination of those issues. It is not a question of the process transmuting into an adversarial one, but of assisting the Inquiry Chair in making robust and defensible findings.

[37] I reject the submission that the conclusion on the practical obstacles to including the expert report tendered as part of the Glasgow III phase can amount to a stand-alone decision. Paragraph 61 of the decision states clearly that the contentious matter of the expert report can be resolved "at the level of principle". The decision was not to admit the report on that basis, something the respondent considered was underlined by the practical considerations. Thus, the practical considerations served to highlight or emphasise a decision reached by reference to principle. The underscoring of an erroneous decision by reference to practical considerations cannot rectify it. The suggestion that I should read into paragraph 61 that the practical considerations were included as a separate or alternative reason in the event that the respondent was wrong on the issue of principle, is contradicted both by the statement that the issue could be resolved at the level of principle and that the reasons were "interrelated".

[38] Counsel for the respondent and the interested parties placed considerable emphasis on both the fact that the application had been made only in the context of Glasgow III and the developments that have taken place since August 2024. It is clear from Directions 8 and 9, issued subsequent to the decision of 1 August, that no conclusions are now to be reached at this stage and that the respondent is open to receive any further application to receive the expert report and hear from further witnesses. I acknowledge that the respondent has adopted an entirely responsible approach in an attempt to resolve the consequences of the decision to exclude this evidence. Circumstances have changed since the Health Board made the application and there is now time to consider the merits of receiving the contradictory expert evidence.

[39] The difficulty is that, as the decision to refuse to receive it in August was, at least primarily, made as an issue of principle, it would not currently be open to the respondent to reach a different view. None of the correspondence shown to me impacts

on that as there is no agreement that the decision of principle was wrong. Even if there was, there is no other mechanism to correct the error. The effect of the decision is to exclude the report and related evidence from consideration completely. That is sufficient to dispose of the arguments that the petition is academic and/or premature. The petitioner has required to ask this court to invoke its supervisory jurisdiction to resolve the current impasse, so the petition has been capable of achieving a practical result (*BBC v Scottish Child Abuse Inquiry Chair* 2022 SC 184, Lord Carloway, at paragraph 36).

[40] The question then becomes one of appropriate remedy. The Health Board seeks declarator and reduction, which failing declarator. I have concluded that reduction would be unnecessary and inappropriate given recent developments. Matters have moved on since the decision under challenge. The evidence stage of Glasgow III has concluded and the contradictory expert evidence was not led. Procedurally the respondent has made clear that he would accommodate a further application for this evidence to be included. In the absence of a declarator from this court in relation to the issue of principle, it seems likely that those who opposed the previous application as a matter of principle would do so again. They would be bound to succeed as the respondent has already expressed a view on that principle. Accordingly, I will sustain the petitioner's plea in law insofar as it seeks declarator and repel the pleas in law of the respondent and the interested parties. I will pronounce a declarator that the respondent's decision of 1 August 2024 was wrong in principle and unfair to the extent that it concluded that receiving the expert report tendered by a core participant and hearing evidence from the report's authors would result in the abandonment of the Inquiry's inquisitorial procedure. *Quoad ultra* I will repel the petitioner's plea in law. I will make no other orders. Any argument about whether the data accompanying the report should be produced before any future application is determined falls within the scope of Inquiry management and will be for the respondent to address. I will reserve all questions of expenses.

Counsel for Petitioner, *Dean of Faculty, KC, Toner*; Instructed by NHS Central Legal Office
Counsel for Respondent, *MacGregor, KC, Breen*; Solicitors, Balfour + Manson LLP
Counsel for Interested Parties, *Reid, KC*; Solicitors, MDDUS.

Supreme Court

Lachaux *v* Independent Print Ltd (Media Lawyers Association intervening)

Lachaux *v* Evening Standard Ltd (Media Lawyers Association intervening)

[2019] UKSC 27

2018 Nov 13, 14;
2019 June 12

Lord Kerr of Tonagmore, Lord Wilson, Lord Hodge, Lord Briggs JJSC, Lord Sumption

Defamation — Libel — Serious harm — Claimant bringing libel proceedings in respect of news articles — Statutory requirement that statement complained of "has caused or is likely to cause serious harm" to claimant's reputation — Whether tendency to cause serious harm sufficient — Defamation Act 2013 (c 26), s 1(1)

The claimant brought three claims in libel against the defendant news publishers in respect of a number of articles which reported allegations made against the claimant by his ex-wife. He complained that the articles bore the meaning that he was a wife-beater who had falsely accused his ex-wife of kidnapping their son, causing her to risk being jailed, and later unjustifiably snatched their son back from her. On a preliminary issue the judge found that the publication of all but one of the articles satisfied the requirement in section 1(1) of the Defamation Act 2013[1] that a statement's publication had caused or was likely to cause "serious harm" to the claimant's reputation. The Court of Appeal dismissed the defendants' appeal, holding that the "serious harm" requirement in section 1(1) of the 2013 Act could be satisfied by a tendency to cause serious harm.

On appeal by the defendants to the first and second claims—

Held, dismissing the appeals, that the effect of section 1(1) of the Defamation Act 2013 was that a statement which would previously have been regarded as defamatory because of its inherent tendency to cause some harm to reputation was not to be so regarded unless it had caused or was likely to cause harm which was serious; that the words "has caused . . . serious harm" in section 1(1) referred to the consequences of the publication, not the publication itself, and pointed to some historic harm which was shown to have actually occurred, a determination of which would depend on a combination of the inherent tendency of the words and their actual impact on those to whom they had been communicated, including those who had never heard of the claimant at the time; that, likewise, the words "likely to cause serious harm" referred to probable future harm, rather than an inherent tendency to cause harm; that, therefore, as a result of section 1(1) the defamatory character of a statement no longer depended only on the meaning of the words and their inherent tendency to damage the claimant's reputation; that, further, section 1 did nothing to abolish or limit the application of either the repetition rule, which treated as defamatory the reporting, even without endorsement, of another person's defamatory statement, or the *Dingle* rule, which prevented a defendant from relying in mitigation of damages on the fact that similar defamatory statements had been published about the same claimant by other persons; that while the Court of Appeal's construction had given little or no effect to the language of section 1(1), the judge had correctly held that the "serious harm" test required more than a tendency to cause such harm and made no error of principle when finding that nevertheless the test had been satisfied on the facts of the case; and that, accordingly, the judge's finding that

[1] Defamation Act 2013, s 1: see post, para 10.

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A the articles published by the defendants in the first and second claims satisfied section 1(1) would be affirmed (post, paras 12–17, 20–26).

Dingle v Associated Newspapers Ltd [1964] AC 371, HL(E), *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, CA and *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 considered.

Decision of the Court of Appeal [2017] EWCA Civ 1334; [2018] QB 594; [2018] 2 WLR 387 affirmed on different grounds.

B The following cases are referred to in the judgment of Lord Sumption:

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591; [1975] 2 WLR 513; [1975] 1 All ER 810, HL(E)
Broome v Cassell & Co Ltd [1972] AC 1027; [1972] 2 WLR 645; [1972] 1 All ER 801, HL(E)
Dingle v Associated Newspapers Ltd [1964] AC 371; [1962] 3 WLR 229; [1962]
C 2 All ER 737, HL(E)
Jameel (Yousef) v Dow Jones & Co Inc [2005] EWCA Civ 75; [2005] QB 946; [2005] 2 WLR 1614, CA
Jones v Jones [1916] 2 AC 481, HL(E)
Lewis v Daily Telegraph Ltd [1964] AC 234; [1963] 2 WLR 1063; [1963] 2 All ER 151, HL(E)
Ratcliffe v Evans [1892] 2 QB 524, CA
D *Sim v Stretch* [1936] 2 All ER 1237, HL(E)
Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (QB); [2011] 1 WLR 1985

The following additional cases were cited in argument:

Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd [2011] UKPC 7; [2012] 1 WLR 1804; [2011] 4 All ER 1027; [2012] 1 All ER (Comm) 319, PC
E *Ames v Spamhaus Project Ltd* [2015] EWHC 127 (QB); [2015] 1 WLR 3409
Cooke v MGN Ltd [2014] EWHC 2831 (QB); [2015] 1 WLR 895; [2015] 2 All ER 622
Cream Holdings Ltd v Bannerjee [2004] UKHL 44; [2005] 1 AC 253; [2004] 3 WLR 918; [2004] 4 All ER 617, HL(E)
Derbyshire County Council v Times Newspapers Ltd [1993] AC 534; [1993] 2 WLR 449; [1993] 1 All ER 1011, HL(E)
F *Hough v London Express Newspaper Ltd* [1940] 2 KB 507; [1940] 3 All ER 31, CA
McLaughlin v Lambeth London Borough Council [2010] EWHC 2726 (QB); [2011] EMLR 8
Pirtek (UK) Ltd v Jackson [2017] EWHC 2834 (QB)
Theedom v Nourish Training (trading as CSP Recruitment) [2015] EWHC 3769 (QB); [2016] EMLR 10

G The following additional cases, although not cited, were referred to in the parties' printed cases:

Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd [2010] EWCA Civ 609; [2011] QB 497; [2011] 2 WLR 91; [2010] 4 All ER 1029, CA
Armonienė v Lithuania CE:ECHR:2008:1125JUD003691902; 48 EHRR 53
Axel Springer AG v Germany CE:ECHR:2012:0207JUD003995408; 55 EHRR 6, GC
H *Baker v Pierce* (1703) 6 Mod 23
Beresovsky v Michaels [2000] 1 WLR 1004; [2000] 2 All ER 986, HL(E)
Berkoff v Burchill [1996] 4 All ER 1008, CA
Bewry v Reed Elsevier UK Ltd (trading as LexisNexis) [2014] EWCA Civ 1411; [2015] 1 WLR 2565, CA
Bonnick v Morris [2002] UKPC 31; [2003] 1 AC 300; [2002] 3 WLR 820, PC

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Bray v Ford [1896] AC 44, HL(E)
C v Mirror Group Newspapers [1997] 1 WLR 131; [1996] 4 All ER 511, CA
Cammish v Hughes [2012] EWCA Civ 1655; [2013] EMLR 13, CA
Capital and Counties Bank Ltd v George Henty & Sons (1882) 7 App Cas 741, HL(E)
Charleston v News Group Newspapers Ltd [1995] 2 AC 65; [1995] 2 WLR 450; [1995] 2 All ER 313, HL(E)
Chase v News Group Newspapers Ltd [2002] EWCA Civ 1772; [2003] EMLR 11, CA
De Crespigny v Wellesley (1829) 5 Bing 392
Economou v de Freitas [2018] EWCA Civ 2591; [2019] EMLR 7, CA
English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd [1940] 1 KB 440; [1940] 1 All ER 1, CA
Flood v Times Newspapers Ltd [2012] UKSC 11; [2012] 2 AC 273; [2012] 2 WLR 760; [2012] 4 All ER 913, SC(E)
Grappelli v Derek Block (Holdings) Ltd [1981] 1 WLR 822; [1981] 2 All ER 272, CA
Grobbelaar v News Group Newspapers Ltd [2002] UKHL 40; [2002] 1 WLR 3024; [2002] 4 All ER 732, HL(E)
Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799, SC(E)
Haire v Wilson (1829) 9 B & C 643
Hebditch v MacIlwaine [1894] 2 QB 54, CA
Hill v Church of Scientology of Toronto [1995] 2 SCR 1130
Jameel (Mohammed) v Wall Street Journal Europe Sprl [2006] UKHL 44; [2007] 1 AC 359; [2006] 3 WLR 642; [2007] Bus LR 291; [2006] 4 All ER 1279, HL(E)
James-Bowen v Comr of Police of the Metropolis [2018] UKSC 40; [2018] 1 WLR 4021; [2018] ICR 1353; [2018] 4 All ER 1007, SC(E)
Jeynes v News Magazines Ltd [2008] EWCA Civ 130, CA
John v MGN Ltd [1997] QB 586; [1996] 3 WLR 593; [1996] 2 All ER 35, CA
Jones v Skelton [1963] 1 WLR 1362; [1963] 3 All ER 952, PC
Khuja v Times Newspapers Ltd [2017] UKSC 49; [2019] AC 161; [2017] 3 WLR 351, SC(E)
Lumby v Allday (1831) 1 Cr & J 301
Mapp v News Group Newspapers Ltd [1998] QB 520; [1998] 2 WLR 260, CA
Mark v Associated Newspapers Ltd [2002] EWCA Civ 772; [2002] EMLR 38, CA
Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd [2001] NZCA 321; [2002] 2 NZLR 289
Monroe v Hopkins [2017] EWHC 433 (QB); [2017] 4 WLR 68
Multigroup Bulgaria Holding AD v Oxford Analytica Ltd [2001] EMLR 28
New York Times Co v Sullivan (1964) 376 US 254
O (A Child) v Rhodes (English PEN intervening) [2015] UKSC 32; [2016] AC 219; [2015] 2 WLR 1373; [2015] 4 All ER 1, SC(E)
Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd [2012] HKCFA 59; [2013] EMLR 7; 15 HKCFAR 299
PJS v News Group Newspapers Ltd [2016] UKSC 26; [2016] AC 1081; [2016] 2 WLR 1253; [2016] 4 All ER 554, SC(E)
Pamplin v Express Newspapers Ltd (Note) [1988] 1 WLR 116; [1988] 1 All ER 282, CA
Parmiter v Coupland (1840) 6 M & W 105
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)
Plato Films Ltd v Speidel [1961] AC 1090; [1961] 2 WLR 470; [1961] 1 All ER 876, HL(E)
Pullman v Walter Hill & Co Ltd [1891] 1 QB 524, CA
Reynolds v Times Newspapers Ltd [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
Scott v Sampson (1882) 8 QBD 491, DC

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A *Shah v Standard Chartered Bank* [1999] QB 241; [1998] 3 WLR 592; [1998] 4 All ER 155, CA
Shevill v Presse Alliance SA [1996] AC 959; [1996] 3 WLR 420; [1996] 3 All ER 929, HL(E)
Slim v Daily Telegraph Ltd [1968] 2 QB 157; [1968] 2 WLR 599; [1968] 1 All ER 497, CA
Somers v House (1693) Holt KB 39
B *Sube v News Group Newspapers Ltd* [2018] EWHC 1234 (QB)
Sunday Times v United Kingdom (No 2) CE:ECHR:1991:1126JUD001316687; 14 EHRR 229
Tamiz v United Kingdom CE:ECHR:2017:0919DEC000387714; [2018] EMLR 6
Thorley v Lord Kerry (1812) 4 Taunt 355
Tolley v JS Fry & Sons Ltd [1930] 1 KB 467, CA
Vaughan v Menlove (1837) 3 Bing NC 468
C *Villers v Monsley* (1769) 2 Wils KB 403
Von Hannover v Germany CE:ECHR:2004:0624JUD005932000; 40 EHRR 1
Webb v Bloch (1928) 41 CLR 331
Yeo v Times Newspapers Ltd [2014] EWHC 2853 (QB); [2015] 1 WLR 971

APPEALS from the Court of Appeal

By claim forms issued on 2 December 2014 the claimant, Bruno Lachaux, commenced defamation proceedings against the defendants, Independent D Print Ltd and the Evening Standard Ltd, claiming damages in respect of articles appearing in various newspapers, namely the *Independent*, the *i*, and the *Evening Standard*. The claimant subsequently also brought proceedings against a further defendant, AOL (UK) Ltd, in respect of further articles. The articles reported allegations of domestic abuse and mistreatment made by the claimant's former wife, Afsana Lachaux. On 1 April 2015 Nicola E Davies J directed, inter alia, that the question whether the claimant had satisfied the serious harm requirement in section 1(1) of the Defamation Act 2013 be tried as a preliminary issue in the claims. In June 2015 Nicol J directed that the claims be consolidated. By a decision dated 30 July 2015 Warby J [2015] EWHC 2242 (QB); [2016] QB 402 found, inter alia, that all but one of the published statements satisfied the requirement in section 1(1) of the 2013 Act that they had caused or were likely to cause serious harm to F the reputation of the claimant.

By appellant's notices dated 21 October 2015 and with permission of the Court of Appeal (Floyd LJ) granted on 11 January 2016 the defendants in the first two claims each appealed on the grounds that the judge had erroneously construed and applied the serious harm test in section 1(1), had wrongly inferred serious harm (a) in the absence of evidence of such harm, G and (b) from the extent of the circulation, the nature of the agreed meaning and the number of people who knew the claimant and might have read the articles, and had erred in principle in his approach to the evidence.

By a respondent's notice dated 1 February 2016 the claimant sought to uphold the judge's order on, inter alia, the ground that if the judge had construed section 1(1) correctly he could have taken a shorter route to reach the conclusion of serious harm than he did, in that he could have confined his H factual inquiry and findings either to the issues of common law in the claims and the gravity of the defamatory imputations concerning the claimant in the publications complained of and/or to the issues of the extent of the publication of those imputations and the identity/credibility of the publisher, rather than concentrating on factual matters which did not have to be

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decided in order to determine the issue of serious harm such as vindication, the extent of the claimant's connections to and reputation in the jurisdiction prior to publication of the articles and the extent to which identifiable readers in fact understood that the articles referred to the claimant.

On 12 September 2017 the Court of Appeal (McFarlane, Davis and Sharp LJJ) [2017] EWCA Civ 1334; [2018] QB 594 dismissed the appeal, concluding, inter, alia, that section 1(1) of the 2013 Act did not affect the common law presumption as to damage in libel cases, but that the judge's holding of serious harm would be upheld.

Pursuant to permission granted by the Supreme Court (Lord Kerr of Tonaghmore, Lord Reed and Lady Black JJSC) on 21 March 2018 the defendants appealed. The following issues for determination by the Supreme Court were set out in the statement of facts and issues agreed by the parties: (1) the proper construction of section 1; (2) the circumstances in which the court should draw the inference of serious harm to reputation in the absence of any evidence of it and the extent to which it could be inferred from the seriousness of the imputations conveyed by the statement by operation of the common law rules for determining meaning; (3) whether the repetition rule applied to a section 1 determination; (4) whether the rule in *Dingle v Associated Newspapers Ltd* [1964] AC 371 applied to a section 1 determination; (5) whether readers who might get to know a claimant after a section 1 determination were relevant to the words "has caused" or "is likely to cause".

The Media Lawyers Association intervened in the appeal by way of written submissions only.

The facts are stated in the judgment of Lord Sumption, post, paras 2–3.

David Price QC, solicitor, and *Jonathan Price* (instructed by *David Price QC, Solicitor Advocate*) for the defendants.

By section 1(1) of the Defamation Act 2013, Parliament rebalanced the law in favour of freedom of expression. The provision is crystal clear; "has caused" refers to the past; "is likely to" refers to the future. [Reference was made to *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253.] The provision sets up another hurdle, the common law hurdles remaining in place. Previously a statement was actionable even if there had been no damage. [Reference was made to *Hough v London Express Newspaper Ltd* [1940] 2 KB 507.] A higher barrier was introduced by which a level of harm, substantial harm, was introduced: see *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985. The Parliamentary intention was to exclude claims; in particular, the circumstances prevailing at the date of determination would all be relevant; "is likely to" would deal with future harm; corporations would have to show actual loss, not a mere tendency; and cost would be frontloaded in the form of a weeding-out process. [Reference was made to *Cooke v MGN Ltd* [2015] 1 WLR 895.]

The Court of Appeal's reasoning was inconsistent with the Parliamentary aim. The limitation problems said to arise from section 8 are theoretical, not practical, and in any event to allow section 8 to control section 1 would amount to the tail wagging the dog. The real issue is how it should be proved that serious harm has been or is likely to be caused. One test would be obviousness but, if serious harm were not obvious, a claimant would have to

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A establish it by other means and the court would then weigh all factors advanced.

In the present case the judge fell into error by indulging in guesswork. In particular he should not have applied the so-called repetition rule to prevent the defendant from reliance on previous reporting of the relevant allegations, and he should not have taken into account people who did not already know the claimant because they would be unlikely to make a B connection between the claimant and the earlier statement. [Reference was made to *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409.]

The principle in *Dingle v Associated Newspapers Ltd* [1964] AC 371 relates to assessmment of damages and is not relevant to section 1. The judge's conclusion was in error as there was no evidence of harm and it was not a case of obvious harm.

C *Adrienne Page QC* and *Godwin Busuttil* (instructed by *Taylor Hampton*) for the claimant.

Section 1(1) of the Defamation Act 2013 effects an adjustment of the characteristics that words or other statements must be shown to possess if they are to qualify as defamatory, but does no more than that. The adjustment "raises the bar" for the bringing of defamation claims, and thereby rebalances D defamation law, by requiring a claimant to establish, as a condition of having a cause of action, that publication of the statement of which he complains has, as a matter of the gravity of the statement's defamatory tendency, caused, or is likely to cause, serious harm to his reputation. That result did not abolish or amend the common law principle of actionability per se or the presumption of damage to reputation upon publication. Proof of extraneous adverse E consequences is not required to establish a cause of action, which continues to accrue on publication, and limitation continues to run from publication subject only to the new "single publication rule" in section 8 of the Act, which itself proceeds on the basis that the cause of action continues to accrue on publication. The words "is likely to cause" mean "more likely than not", and cater for the quia timet, pre-publication, situation.

In particular, a claimant is not required to prove harm to reputation F because it is inevitable, and therefore presumed in law, that such harm will follow as a result of a defamatory publication. The test of whether harm to reputation has been sustained is how the court would assess the effect upon an ordinary reasonable reader of reading the statement. The court would determine whether "serious harm" to reputation had been suffered for the purposes of section 1(1) by the same method. There is no justification for G inferring a Parliamentary intention to make a revolutionary change to the law by dispensing with actionability per se. While the 2013 Act abolishes some of the previously established defences, replacing them with statutory equivalents, no general abolition of the common law was intended. Furthermore, to be able to prove harm to reputation is rarely possible. [Reference was made to *Theedom v Nourish Training (trading as CSP Recruitment)* [2016] EMLR 10.] In most cases, particularly ones involving H mass publication, it is impossible to know what damage has been suffered. The judge was correct to conclude that an absence of tangible evidence did not prevent the drawing of inferences. A claimant should not have to prove adverse consequences as a condition of establishing a cause of action. The Parliamentary intention was, as the Explanatory Notes to the Bill showed,

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no more than to build on the common law position established in *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, raising the bar from a requirement of "substantial" to one of "serious" harm to reputation.

There are already control mechanisms built into the common law, developed and deployed in *Thornton* and in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, to weed out trivial claims at an early stage. They are available on an application by a defendant. The effect of the present defendants' argument is that the burden should be on the claimant to prove as a condition of the cause of action in defamation that the claim is not a *Jameel* abuse. There is no justification for that as a matter of statutory interpretation.

The words "is likely to cause serious harm" refer to quia timet situations because a claimant will not be able to show in a pre-publication situation that he has suffered serious harm to his reputation.

The repetition rule is preserved, as there is no general intention to repeal the common law. Section 14 of the 2013 Act abolishes actionability per se in relation to two of four categories of slander actionable per se, but the abolition would relate to all four if the defendants' construction of section 1 were correct. Sections 8 and 14 of the 2013 Act, section 2 of the Defamation Act 1952 and section 1 of the Defamation Act 1996 show that whether a statement is defamatory and therefore actionable must still be capable of ascertainment at the time of publication.

On the claimant's construction of section 1 the *Dingle* principle does not arise.

The reasoning of the Court of Appeal was substantially correct.

The decision on the facts of Warby J was right, although there was no need for him to have investigated and reached concluded views on a wide range of factual issues before deciding that the claimant had suffered serious harm to reputation.

Busuttil following.

Section 1(2) of the 2013 Act relates to bodies that trade for profit, so has no direct application in the instant case. However, section 1 falls to be construed as a whole. Section 1(2), in referring to "financial loss", does not require claimants to prove special damage or its likelihood; it is a broader concept. As with section 1(1), it raises the common law bar, whereby a corporate claimant was in effect required to show that a libel had caused it "substantial financial loss", to one of "serious financial loss". [Reference was made to *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd* [2012] 1 WLR 1804 and *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.]

The court took time for consideration.

12 June 2019. **LORD SUMPTION** (with whom **LORD KERR OF TONAGHMORE**, **LORD WILSON**, **LORD HODGE** and **LORD BRIGGS JJSC** agreed) handed down the following judgment.

Introduction

1 The tort of defamation is an ancient construct of the common law. It has accumulated, over the centuries, a number of formal rules with no analogue in other branches of the law of tort. Most of them originated well before freedom of expression acquired the prominent place in our

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A jurisprudence that it enjoys today. Its coherence has not been improved by attempts at statutory reform. Statutes to amend the law of defamation were enacted in 1888, 1952, 1996 and 2013, each of which sought to modify existing common law rules piecemeal, without always attending to the impact of the changes on the rest of the law. The Defamation Act 2013 is the latest chapter in this history. Broadly speaking, it seeks to modify some of
B the common law rules which were seen unduly to favour the protection of reputation at the expense of freedom of expression. In particular, there had been criticism of a state of the law in which persons resident outside the United Kingdom with only a very limited reputation in the United Kingdom were able to sue here for defamation and obtain substantial damages. One of the principal provisions of the new Act was section 1, which provided that
C a statement was not to be regarded as defamatory unless it had caused or was likely to cause "serious harm" to the claimant's reputation.

2 The claimant, Bruno Lachaux, is a French aerospace engineer who at the relevant time lived with his British wife Afsana in the United Arab Emirates. The marriage broke down, and in April 2011 he began divorce proceedings in the UAE courts and sought custody of their son Louis. In March 2012, Afsana went into hiding with Louis in the UAE, claiming that
D she would not get a fair trial in its courts. In August 2012, the UAE court awarded custody of Louis to his father. In February 2013, Mr Lachaux initiated a criminal prosecution against Afsana for abduction. In October of that year, having found out where Louis was, he took possession of him under the custody order. In January and February 2014, a number of British newspapers published articles making allegations about Mr Lachaux's
E conduct towards Afsana during the marriage and in the course of the divorce and custody proceedings. These appeals arise out of two libel actions begun by him in the High Court on 2 December 2014 against the publishers of the *Independent* and the *Evening Standard*, and a third begun on 23 January 2015 against the publisher of the *i*. Other libel actions were begun against the publisher of similar articles in another online newspaper, but we are not
F directly concerned with them on these appeals.

3 In February 2015, Sir David Eady, sitting as a deputy judge of the Queen's Bench Division, conducted a meaning hearing. In a reserved judgment, he held that the article in the *Independent* bore eight defamatory meanings, and the article in the *Evening Standard* 12. In summary, the articles were held to have meant (inter alia) that Mr Lachaux had been
G violent and abusive towards his wife during their marriage, had hidden Louis' passport to stop her removing him from the UAE, had made use of UAE law and the UAE courts to deprive her of custody and contact with her son, had callously and without justification taken Louis out of her possession, and then falsely accused her of abducting him. For the purpose of the trial of the issue before of serious harm, which took place before Warby J in July 2015, the newspapers did not contest the primary facts set
H out in Mr Lachaux's particulars of claim. Their case was that the statements in the articles were not defamatory because they did not meet the threshold of seriousness in section 1(1) of the 2013 Act. To appreciate the force of this point, it is necessary to summarise some well-established features of the common law relating to damage to reputation.

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The common law background

4 The law distinguishes between defamation actionable per se and defamation actionable only on proof of special damage. But although sharing a common label, these are very different torts with distinct historical origins. Libel, which is always actionable per se, originated in the disciplinary jurisdiction of the ecclesiastical courts and the criminal jurisdiction of the Court of Star Chamber. The gist of the tort is injury to the claimant's reputation and the associated injury to his or her feelings. Defamation actionable per se comprised, in addition to all libels, four categories of slander which were assimilated to libel on account of their particular propensity to injure the reputation of the claimant. These categories were (i) words imputing criminal offences, (ii) words imputing certain contagious or infectious diseases, and (iii) words tending to injure a person in his or her office, calling, trade or profession. The Slander of Women Act 1891 (54 & 55 Vict c 51) added (iv) words imputing unchastity to a woman. In these cases, the law presumes injury to the claimant's reputation and awards general damages in respect of it. These are not merely compensatory, but serve to vindicate the claimant's reputation. In a frequently quoted passage of his speech in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071, Lord Hailsham of St Marylebone LC acknowledged that this

> "may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge."

Special damage, ie pecuniary loss caused by the publication, may be recovered in addition, but must be proved.

5 By comparison, slander which is not actionable per se originated as a common law action on the case, and is governed by principles much closer to those of the law of tort generally. The law does not presume injury to reputation by mere oral statements and treats injury to feelings as insufficient to found a cause of action. Special damage, representing pecuniary loss rather than injury to reputation, must be proved: see *McGregor on Damages*, 20th ed (2017), paras 46.002, 46.003; *Gatley on Libel and Slander*, 12th ed (2013), para 5.2. The interest which the law protects in cases where a defamatory statement is actionable per se differs from that which it protects in other cases. The gist of the tort where the statement is not actionable per se is not injury to reputation but, as Bowen LJ observed in *Ratcliffe v Evans* [1892] 2 QB 524, 532, wrongfully inflicted pecuniary loss: cf *Jones v Jones* [1916] 2 AC 481, 490 (Viscount Haldane). Indeed, it is an open question, which has given rise to conflicting dicta, whether general damage is recoverable at all in such cases.

6 For present purposes a working definition of what makes a statement defamatory, derived from the speech of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240, is that "the words tend to lower the plaintiff in the estimation of right-thinking members of society generally". Like other formulations in the authorities, this turns on the supposed impact of the statement on those to whom it is communicated. But that impact falls to be ascertained in accordance with a number of more or less artificial rules.

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A First, the meaning is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. Secondly, in an action for defamation actionable per se, damage to the claimant's reputation is presumed rather than proved. It depends on the inherently injurious character (or "tendency", in the time-honoured phrase) of a statement bearing that meaning. Thirdly, the presumption is one of law, and irrebuttable.

B

7 In two important cases decided in the decade before the Defamation Act 2013, the courts added a further requirement, namely that the damage to reputation in a case actionable per se must pass a minimum threshold of seriousness.

8 The first was *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946.

C The Saudi claimant had sued the publishers of the *Wall Street Journal* for a statement published online in Brussels to the effect that he had been funding terrorism. The statement was shown to have reached just five people in England and Wales. The Court of Appeal rejected a submission that the conclusive presumption of general damage was incompatible with article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Phillips of Worth Matravers MR, delivering the leading

D judgment, observed (para 37) that "English law has been well served by a principle under which liability turns on the objective question of whether the publication is one which *tends* to injure the claimant's reputation". But he held that the presumption could not be applied consistently with the Convention in those cases, said to be rare, where damage was shown to be so trivial that the interference with freedom of expression could not be said to be

E necessary for the protection of the claimant's reputation. The appropriate course in such a case was to strike out the claim, not on the ground that it failed to disclose a cause of action, but as an abuse of process. The Court of Appeal held that it was an abuse of process for the action before them to proceed "where so little is now seen to be at stake", and duly struck it out. The effect of this decision was to introduce a procedural threshold of

F seriousness to be applied to the damage to the claimant's reputation. Two things are clear from the language of Lord Phillips MR's judgment. One is that the threshold was low. The damage must be more than minimal. That is all. Secondly, the Court of Appeal must have thought that the operation of the threshold might depend, as it did in the case before them, on the evidence of actual damage and not just on the inherently injurious character of the statement in question.

G 9 The second case was *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, a decision of Tugendhat J. It arose out of an application by the defendant newspaper to strike out part of the particulars of claim in a libel action on the ground that the statement complained of was incapable of being defamatory. Allowing the application, Tugendhat J held that in addition to the procedural threshold recognised in *Jameel*, there was a

H substantive threshold of seriousness to be surmounted before a statement could be regarded as meeting the legal definition of "defamatory". The judge's definition (para 96) was that a statement "may be defamatory of him because it *[substantially]* affects in an adverse manner the attitude of other people towards him, *or has a tendency so to do*" (the emphasis is the judge's). He derived this formula from dicta of Lord Atkin in *Sim v Stretch*

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[1936] 2 All ER 1237. At para 94, he dealt with the relationship between the definition thus arrived at and the presumption of general damage, in terms which suggested that (unlike the *Jameel* test) the application of the threshold depended on the inherent propensity of the words to injure the claimant's reputation:

> "If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant. The Court of Appeal in *Jameel (Yousef)'s* case [2005] QB 946 declined to find that the presumption of damage was itself in conflict with article 10 (see para 37), but recognised that if in fact there was no or minimal actual damage an action for defamation could constitute an interference with freedom of expression which was not necessary for the protection of the claimant's reputation: see para 40."

Section 1 of the Defamation Act 2013

10 Section 1 is in the following terms:

> "*Serious harm*
>
> "(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> "(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss."

11 On the present appeals, the rival constructions of this provision may be summarised as follows. The case on behalf of Mr Lachaux is that the Act leaves unaffected the common law presumption of general damage and the associated rule that the cause of action is made out if the statement complained of is inherently injurious or, as Lord Phillips MR put it in *Jameel* [2005] QB 946 and Tugendhat J in *Thornton* [2011] 1 WLR 1985, it has a "tendency" to injure the claimant's reputation. The effect of the provision on this view of the matter is simply that the inherent tendency of the words must be to cause not just some damage to reputation but serious harm to it. The defendant publishers dispute this. Their case is that the provision introduces an additional condition to be satisfied before the statement can be regarded as defamatory, on top of the requirement that the words must be inherently injurious. It must also be shown to produce serious harm in fact. They submit that unless it was self-evident that such a statement must produce serious harm to reputation, this would have to be established by extraneous evidence. Warby J, after a careful analysis of the Act and the antecedent common law, substantially accepted the defendant publishers' case on the law. But he found, on the facts, that the relevant newspaper articles did cause serious harm to Mr Lachaux. The Court of Appeal (McFarlane, Davis and Sharp LJJ) [2018] QB 594, preferred Mr Lachaux's

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A construction of section 1, but they upheld the judge's finding of serious harm.

12 Although the Act must be construed as a whole, the issue must turn primarily on the language of section 1. This shows, very clearly to my mind, that it not only raises the threshold of seriousness above that envisaged in *Jameel* and *Thornton*, but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.

13 In the first place, the relevant background to section 1 is the common law position, as I have summarised it. Parliament is taken to have known what the law was prior to the enactment. It must therefore be taken to have known about the decisions in *Jameel* and *Thornton* and the basic principles on which general damages were awarded for defamation actionable per se. There is a presumption that a statute does not alter the common law unless it so provides, either expressly or by necessary implication. But this is not an authority to give an enactment a strained interpretation. It means only that the common law should not be taken to have been altered casually, or as a side-effect of provisions directed to something else. The Defamation Act 2013 unquestionably does amend the common law to some degree. Its Preamble proclaims the fact ("An Act to amend the law of defamation"). It is not disputed that there is a common law presumption of damage to reputation, but no presumption that it is "serious". So the least that section 1 achieved was to introduce a new threshold of serious harm which did not previously exist. The question on these appeals is what are the legal implications of that change, and what necessarily follows from it. Even where some change to the common law was intended, it should not go any further than that. As Lord Reid observed in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 614, Parliament "can be presumed not to have altered the common law further than was necessary".

14 Secondly, section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it "has caused or is likely to cause" harm which is "serious". The reference to a situation where the statement "has caused" serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same must be true of the reference to harm which is "likely" to be caused. In this context, the phrase naturally refers to probable future harm. Ms Page QC, who argued Mr Lachaux's case with conspicuous skill and learning, challenged this. She submitted that "likely to cause" was a synonym for the inherent tendency which gives rise to the presumption of damage at common law. It meant, she said, harm which was *liable* to be caused given the tendency of the words. That argument was accepted in the Court of Appeal. She also submitted, by way of alternative, that if the phrase referred to the factual probabilities, it must have been directed to applications for pre-publication injunctions quia timet. Both of these suggestions seem to me to be rather artificial in a

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context which indicates that both past and future harm are being treated on the same footing, as functional equivalents. If past harm may be established as a fact, the legislator must have assumed that "likely" harm could be also. As to pre-publication injunctions, the section is designed to import a condition to be satisfied if the statement is to be regarded as defamatory at all. It is not concerned with the remedies available for defamation, whether interlocutory or final. It is right to add that pre-publication injunctions are extremely rare, because of the well-established constraints on judicial remedies which restrict freedom of expression in advance of publication.

15 Thirdly, it is necessary to read section 1(1) with section 1(2). Section 1(2) is concerned with the way in which section 1(1) is to be applied to statements said to be defamatory of a body trading for profit. It refers to the same concept of "serious harm" as section 1(1), but provides that in the case of such a body it must have caused or be likely to cause "serious financial loss". The financial loss envisaged here is not the same as special damage, in the sense in which that term is used in the law of defamation. Section 1 is concerned with harm to reputation, whereas (as I have pointed out) special damage represents pecuniary loss to interests other than reputation. What is clear, however, is that section 1(2) must refer not to the harm done to the claimant's reputation, but to the loss which that harm has caused or is likely to cause. The financial loss is the measure of the harm and must exceed the threshold of seriousness. As applied to harm which the defamatory statement "has caused", this necessarily calls for an investigation of the actual impact of the statement. A given statement said to be defamatory may cause greater or lesser financial loss to the claimant, depending on his or her particular circumstances and the reaction of those to whom it is published. Whether that financial loss has occurred and whether it is "serious" are questions which cannot be answered by reference only to the inherent tendency of the words. The draftsman must have intended that the question what harm it was "likely to cause" should be decided on the same basis.

16 Finally, if serious harm can be demonstrated only by reference to the inherent tendency of the words, it is difficult to see that any substantial change to the law of defamation has been achieved by what was evidently intended as a significant amendment. The main reason why harm which was less than "serious" had given rise to liability before the Act was that damage to reputation was presumed from the words alone and might therefore be very different from any damage which could be established in fact. If, as Ms Page submits, the presumption still works in that way, then this anomaly has been carried through into the Act. Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them part of the test of the defamatory character of the statement.

17 I agree, as the judge did, that this analysis is inconsistent with the previous common law governing statements actionable per se. But it is inconsistent with it only to this extent: that the defamatory character of the statement no longer depends only on the meaning of the words and their

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A inherent tendency to damage the claimant's reputation. To that extent Parliament intended to change the common law. But I do not accept that the result is a revolution in the law of defamation, any more than the lower thresholds of seriousness introduced by the decisions in *Jameel* and *Thornton* effected such a revolution. Ms Page argued that to construe section 1 in the way that I have done would transform the way in which the B Limitation Act 1980 applies to actions for defamation; and that it would effectively abolish the distinction between defamation actionable per se and defamation actionable only on proof of special damage. In both respects, this was said to be inconsistent with other provisions of the Act, notably sections 8 and 14.

18 Section 8 is concerned with limitation. Section 4A of the Limitation Act 1980 provides for a limitation period in defamation actions of one year C from the accrual of the cause of action. The cause of action is treated at common law as accruing on publication where it is actionable per se, and on the occurrence of special damage in other cases. Successive publications therefore give rise at common law to distinct causes of action. Section 8 of the Defamation Act 2013 provides that where a statement has been made to the public or a section of the public (for example in a newspaper) and later republished in the same or substantially the same terms, "any cause of action D against the [same] person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication". The object of this provision is to deprive claimants of the right to sue on a further publication by the same person of substantially the same defamatory statement, more than a year after the first publication. They must sue on the first publication or run the risk of being time-barred. The E argument is that section 8 assumes that the common law rule that the cause of action accrues on publication subsists, subject only to the modification that the accrual of the cause of action for a qualifying second publication is backdated to the date of the first. Therefore, it is said, section 1 must be construed on the footing that the cause of action is complete on publication and not on some later date at which "serious harm" may occur. One of the F problems of legislating piecemeal for different aspects of the law of defamation, as the Act of 2013 does, is that the interrelation between different rules may be overlooked. I rather doubt whether Parliament got to grips with the implications of section 1 for limitation. I would not therefore modify my construction of section 1, which I regard as clear, even if I agreed with Ms Page that its effect was to postpone the accrual of the cause of action for defamation actionable per se. But I do not agree with her about that. It is G necessary to distinguish between the damage done to an interest protected by the law, and facts which are merely evidence of the extent of that damage. Where a statement is actionable per se, the interest protected by the law is the claimant's reputation. As an element in the cause of action for defamation, publication does not mean commercial publication, but communication to a reader or hearer other than the claimant. The impact of the publication on the claimant's reputation will in practice occur at that H moment in almost all cases, and the cause of action is then complete. If for some reason it does not occur at that moment, the subsequent events will be evidence of the likelihood of its occurring. In either case, subsequent events may serve to demonstrate the seriousness of the statement's impact including, in the case of a body trading for profit, its financial implications.

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It does not follow that those events must have occurred before the claimant's cause of action can be said to have accrued. Their relevance is purely evidential. The position is different where a statement is not actionable per se, because the interest protected by the law in that case is purely pecuniary. The pecuniary loss must therefore have occurred.

19 Section 14 is concerned only with the law of slander. It abolishes two of the four categories of slander actionable per se, by repealing the Slander of Women Act 1891 which made the imputation of unchastity to a woman actionable per se, and by providing that an imputation that a person has a contagious or infectious disease is not to be actionable without proof of special damage. The argument is that since section 14 abolishes two of the categories of slander actionable per se, section 1 should not be read as abolishing all of them. The fallacy of this argument is that it assumes that section 1 does abolish all of them. I do not think that it does. To say that a slander is actionable per se simply means that it is actionable without proof of special damage. That is still the case for the two surviving special categories of slander. As I have pointed out above, special damage in this context means damage representing pecuniary loss, not including damage to reputation. Section 1 is not concerned with special damage in that sense but with "harm to the reputation of the claimant", i e with harm of the kind represented by general damage. It simply supplements the common law by introducing a new condition that harm of that kind must be "serious" and in the case of trading bodies that it must result in serious financial loss.

20 The Court of Appeal's analysis not only gives little or no effect to the language of section 1. It is to my mind internally contradictory. Davis LJ, who delivered the only reasoned judgment, accepted the submission on behalf of Mr Lachaux that the seriousness of the harm caused to the claimant's reputation by the publication depended on the inherent tendency of the words. But he appears to have thought (paras 70–73) that where this was "serious", the result was to set up an inference of fact, which it was open to the defendant to rebut by evidence. As Ms Page accepted, this will not do. The common law rule was that damage to reputation was presumed, not proved, and that the presumption was irrebuttable. If the common law rule survives, then there is no scope for evidence of the actual impact of the publication. That is the main reason why in my opinion it cannot survive. Davis LJ has, with respect, accepted the legal analysis advanced on behalf of Mr Lachaux, while attaching to it the consequences of the legal analysis advanced on behalf of the newspapers. In my opinion, Warby J's analysis of the law was coherent and correct, for substantially the reasons which he gave.

Application to this case

21 On the footing that (as I would hold) Mr Lachaux must demonstrate as a fact that the harm caused by the publications complained of was serious, Warby J held that it was. He heard evidence from Mr Lachaux himself and three other witnesses of fact, and received written evidence from his solicitor. He also received agreed figures, some of them estimates, of the print runs and estimated readership of the publications complained of and the user numbers for online publications. He based his finding of serious harm on (i) the scale of the publications; (ii) the fact that the statements complained of had come to the attention of at least one identifiable person in the United Kingdom who

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A knew Mr Lachaux and (iii) that they were likely to have come to the attention of others who either knew him or would come to know him in future; and (iv) the gravity of the statements themselves, according to the meaning attributed to them by Sir David Eady. Mr Lachaux would have been entitled to produce evidence from those who had read the statements about its impact on them. But I do not accept, any more than the judge did, that his case must necessarily fail for want of such evidence. The judge's finding was based on a B combination of the meaning of the words, the situation of Mr Lachaux, the circumstances of publication and the inherent probabilities. There is no reason why inferences of fact as to the seriousness of the harm done to Mr Lachaux's reputation should not be drawn from considerations of this kind. Warby J's task was to evaluate the material before him, and arrive at a conclusion on an issue on which precision will rarely be possible. C A concurrent assessment of the facts was made by the Court of Appeal. Findings of this kind would only rarely be disturbed by this court, in the absence of some error of principle potentially critical to the outcome.

22 It was submitted on behalf of the defendant newspapers that there were errors of principle in the judge's treatment of the facts. It was said that the injury to Mr Lachaux's reputation was at least in part the result of artificial legal rules, notably the "repetition rule" which treats as defamatory D the reporting, even without endorsement, of another person's statement; and the *Dingle* rule (see *Dingle v Associated Newspapers Ltd* [1964] AC 371) that a defendant cannot rely in mitigation of damages on the fact that similar defamatory statements have been published about the same claimant by other persons. The argument was that while these rules of law are well established, they do not affect the factual inquiry required by section 1, E namely whether the harm caused by a particular publication was serious. It was also said that the judge should not have taken account of the damage that Mr Lachaux's reputation might suffer in the eyes of people who might get to know him in future. Warby J must have rejected all of these submissions, and the Court of Appeal agreed with him. So do I.

23 The repetition rule is a rule governing the meaning of a statement and the availability of the defence of truth. A statement that someone else F has made a defamatory statement about the claimant, although literally true, is treated as equivalent to a direct statement to the same effect. The policy is that "repeating someone else's libellous statement is just as bad as making the statement directly": *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 (Lord Reid). The rule is nothing to do with the threshold of seriousness, and nothing in the 2013 Act can be taken as implicitly abolishing it or limiting its G application.

24 The effect of the *Dingle* rule is to treat evidence of damage to the claimant's reputation done by earlier publications of the same matter as legally irrelevant to the question what damage was done by the particular publication complained of. It has been criticised, but it is well established. It has the pragmatic advantage of making it unnecessary to determine which of multiple publications of substantially the same statement occurred first, H something which in the case of a newspaper would often be impossible to ascertain and might differ from one reader to the next. The practical impact of the *Dingle* rule in the modern law is limited by section 12 of the Defamation Act 1952, which allows a defendant to rely in mitigation of damage on certain recoveries or prospective recoveries from other parties for

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words to the same effect; and by the operation of the Civil Liability (Contribution) Act 1978. Section 1 of the Act is concerned with the threshold of harm and not with the measure or mitigation of general damage. But both raise a similar question of causation. It would be irrational to apply the *Dingle* rule in one context but not the other, and no one is inviting us to abrogate it. The judge was therefore entitled to apply it.

25 Turning, finally, to the complaint about the impact of the publications on those who did not know Mr Lachaux but might get to know him in future, there is no principled reason why an assessment of the harm to the claimant's reputation should not take account of the impact of the publications on those who had never heard of him at the time. The claimant's reputation is harmed at the time of publication notwithstanding that the reader or hearer knows nothing about him other than what the publication tells him. It cannot make any difference that it is only later, when he comes to know the claimant personally, that the latter's diminished reputation is of any personal interest to him.

Disposal

26 For these reasons, while I would state the law differently from the Court of Appeal, I would dismiss these appeals on the facts.

Appeals dismissed.

DIANA PROCTER, Barrister
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A MILLAR v DICKSON

No 2
24 July 2001

Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Clyde and Lord Scott of Foscote

B DAVID CAMERON MILLAR, Appellant — *Bovey, QC, Shead*
D J DICKSON (Procurator Fiscal, Elgin), Respondent — *Solicitor General (Davidson, QC), McCreadie*
KERRY PAYNE, Appellant — *Bovey, QC, Shead*
PAUL STEWART, Appellant — *O'Neill QC, Di Rollo*
JOSEPH TRACEY, Appellant — *Bovey, QC, Collins, Shead*
BARRY HEYWOOD (Procurator Fiscal, Dundee), Respondent — *Solicitor General (Davidson, QC), McCreadie*

C

Justiciary — Human Rights — Devolution Issue — Summary procedure — Waiver — Trial before independent and impartial tribunal — Conviction and/or sentence occurring before High Court's decision that temporary sheriffs were not independent and impartial tribunal — Appellants' solicitors not objecting to temporary sheriffs — Whether appellants waived rights under European Convention — Scotland Act 1998 (cap 46) sec 57(2) — European Convention on Human Rights, arts 6(1) and (2)

D

Section 57(2) of the Scotland Act 1998 provides *inter alia* that a member of the Scottish Executive (which includes the Lord Advocate) has no power to do any act insofar as that act is incompatible with certain rights ('Convention rights') set out in the European Convention on Human Rights. Subsection (3)(a) of the Act provides that subsec (2) does not apply to an act of the Lord Advocate in prosecuting any offence which, because of sec 6(2) of the Human Rights Act 1998 is not unlawful under sec 6(1) of that Act. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Subsection (2) provides *inter alia* that 'Subsection (1) does not apply to an act if —...((b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect to in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions'. Article 6(2) of the European Convention on Human Rights provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Each of the appellants was the subject of (unrelated) criminal proceedings before a temporary sheriff between 20 May 1999 and 11 November 1999. With effect from 20 May, the Scotland Act prohibited the Lord Advocate from doing any act incompatible with Convention rights. On 11 November, the decision in *Starrs v Ruxton* was issued, holding that temporary sheriffs were not an independent and impartial tribunal within the meaning of art 6 of the Convention. The appellants raised bills of advocation or suspension of the convictions and sentences imposed by temporary sheriffs. They argued before the High Court of Justiciary that the Lord Advocate and the respondents had acted incompatibly with the appellants' Convention rights in prosecuting them before temporary sheriffs, who were not an independent and impartial tribunal; that the proceedings were *ultra vires* and null; and that the convictions and sentences should be quashed. These complaints were unsuccessful, but leave to appeal was granted, and the appellants appealed to the Judicial Committee of the Privy Council.

The appellants argued before the Committee (1) that the Lord Advocate had no power to do any act incompatible with the appellants' Convention rights; that they were entitled to be tried before an independent and impartial tribunal; that temporary sheriffs were not at the material time an independent and impartial tribunal; and therefore that the Lord Advocate had no power to continue to prosecute them before temporary sheriffs after 20 May 1999; and (2) that they had not waived their entitlement under art 6 to trial before

an independent and impartial tribunal. The respondents argued (1) that, as the proceedings were complete before the challenge was raised, overall fairness should be viewed in light of the circumstances as a whole, and that there had been no overall unfairness to the appellants, and thus no breach of their Convention rights; (2) that, as the appellants had not taken objection at the appropriate time, they had waived their rights to object to proceedings on the grounds of want of independence and impartiality of the tribunal; and (3) that the act of the Lord Advocate fell to be exempted under subsec 57(3) as he was giving effect to sec 11 of the Sheriff Courts (Scotland) Act 1971 which could not be read or given effect in a way compatible with the Convention rights.

Held (1) that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is a right which, unless validly waived by the accused, cannot be compromised or eroded (pp 39G, 50D); (2) (*diss* Lord Clyde (pp 58H–59H)) that the right to trial before an independent and impartial tribunal could be waived but only if all of the relevant circumstances were known to the applicant and the waiver was voluntary and unequivocal (pp 43F, 50G, 57G); (3) that the appellants' knowledge that sec 57(3) of the Scotland Act 1988 gave a remedy against acts of the prosecutor which breached Convention rights was not sufficient to impute knowledge of all of the facts necessary to make an informed choice as to what to do where the law was unsettled; and that the appellants did not have such knowledge (pp 36F–H, 46E–G, 52B–F, 52H, 57H); (4) that the right to an independent and impartial tribunal was so fundamental that the question of a breach could not be tested after the trial, by asking whether the proceedings overall were fair (pp 53D–54I); (5) that the act of the Lord Advocate in bringing prosecutions before temporary sheriffs was not giving effect to or enforcing sec 11 of the Sheriff Courts (Scotland) Act, which related to the different act of appointing temporary sheriffs; and hence the exemption under sec 57(3) did not apply (pp 43D–E, 55A–D, 60H); (6) that the act of prosecuting a case continued up to and included the moment when sentence was passed, and the act of the Lord Advocate in bringing a prosecution continued beyond the calling of the case and conviction; and accordingly that the appeals in which the temporary sheriff had only passed sentence could not be distinguished from those where the case had proceeded to trial (pp 42H, 50B, 56F); (7) that by continuing to prosecute the accused before a tribunal which was not independent and impartial, in the absence of waiver, the Lord Advocate infringed the right of the accused to a have the charges against them determined by such a tribunal (p 42G); and appeals *allowed*.

Observed by Lord Bingham of Cornhill (1) that, in the context of waiver, knowledge of the law could not be imputed to a party regardless of his own or his agent's actual knowledge, ignorance or misapprehension of the law (pp 44B–45C); (2) that a declaratory theory of law (which assumes that a decision of the court states not only the law at the date of the decision, but what it has always been) is not apposite in the field of waiver; and consequently that there can be no waiver where a party relies upon what is reasonably understood to be the law at the relevant time, even if a court subsequently rules that the law is different from that understanding, because that party lacks the knowledge necessary to make an informed choice(pp 44E, 45D); (3) that failure to take a point on the qualification of the trial court as a plea in bar would be taken as a waiver unless a contrary intention, or a reasonable explanation for the failure, was shown; and that the more obvious and notorious it was that a point was there to be taken by a party, the more readily it might be inferred that failure to take it represented a true decision to waive it; but that even an express declaration of waiver might not constitute abandonment of a right if knowledge of a material matter were absent (pp 44E, 45D); (4) that there are few if any Convention rights of more practical importance to the accused than the right to a fair trial, which is a safeguard that should not, least of all in the criminal field, be weakened or diluted, whatever the administrative consequences (p 42E).

Observed by Lord Hope of Craighead that an appeal was an imperfect safeguard where the right to trial before a fair and impartial tribunal was concerned, as many decisions at first instance were incapable of being reviewed effectively on appeal (p 50D).

Observed by Lord Clyde that the existence of a right of appeal was not a matter which could cure a failure in impartiality of a tribunal (p 59A).

DAVID CAMERON MILLAR was convicted on indictment of drug offences in the Sheriff Court at Elgin on 27 August 1999 and was sentenced to imprisonment the same day. He brought a bill of advocation in the High Court of Justiciary praying the court to quash his conviction and sentence. Kerry Payne pleaded guilty to a charge of assault and other offences in the Sheriff Court at Dundee on 16 September 1999 and was sentenced to a term of imprisonment on 12 October 1999. Paul Stewart was summarily convicted of driving offences in the Sheriff Court at Dundee on 16 February 1999, and appeared in the Sheriff Court again on 28 June 1999 when he was sentenced to non-custodial penalties. Joseph Tracey was summarily convicted of offensive weapon and assault offences in the Sheriff Court at Dundee on 23 September 1999 and was sentenced to a term of imprisonment on 8 November 1999. They each brought bills of suspension in the High Court of Justiciary praying the court to suspend the convictions and sentences imposed by temporary sheriffs. At advising, on 3 August 2000, the bills were refused (reported at 2000 JC 648).

On 15 August 2000, the appellants were granted leave to appeal to the Judicial Committee of the Privy Council. They did so by virtue of sec 98 of the Scotland Act 1998 and para 13(a) of schedule 6 to that Act. The Committee heard the appeals on 2 and 3 July 2001.

Cases referred to:
Bradford v McLeod 1986 SLT 244
Brown v Stott 2001 SC(PC) 43
Bulut v Austria (1996); 24 EHRR 84
Caledonian Railway Co v Ramsay (1897) 24 R(J) 48
Clancy v Caird 2000 SC 441
De Cubber v Belgium Series A No 86 (1984); 7 EHRR 236
Deweer v Belgium Series A No 35 (1980); 2 EHRR 439
Dimes v Proprietors of Grand Junction Canal (1852) 3 HL Cas 759
Doherty v McGlennan 1997 SLT 444
Evans v Bartlam [1937] AC 473
Findlay v United Kingdom (1997); 24 EHRR 221
H v Belgium Series A No 127 (1997); 10 EHRR 339
Hakansson and Sturesson v Sweden Series A No 171 (1990); 13 EHRR 1
Howdle v Beattie 1995 JC 65
Jones v Randall (1774) 1 Cowp 37
Law v Chartered Institute of Patent Agents [1919] 2 Ch 276
Locabail (UK) v Bayfield Properties Ltd [2000] QB 451
McGonnell v United Kingdom (2000); 30 EHRR 289
Martindale v Faulkner (1846) 2 CB 706
Millar v Dickson 2000 JC 648
Oberschlick v Austria Series A No 204 (1991); 19 EHRR 389
Pfeifer and Plankl v Austria Series A No 227 (1992); 14 EHRR 692
R v Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Ltd [2001] 2 WLR 1389
R v Bow Street Metropolitan Magistrate, Ex parte Pinochet Ugarte (No 2) [2000] 1 AC 119
R v Gough [1993] AC 646
Rimmer v HM Advocate, High Court, 23 May 2001 (unreported)
Skeen v Fullarton 1980 SLT (Notes) 46
Starrs v Ruxton, Ruxton v Starrs 2000 JC 208
Werner v Austria (1997); 26 EHRR 310
Zumtobel v Austria Series A No 268–A (1993); 17 EHRR 116

Textbooks referred to:
Mitchell, *Constitutional Law*, (2nd edn; 1968)
Renton and Brown, *Criminal Procedure* (6th edn), para 20.02
Stair Memorial Encyclopaedia, vol 5, para 663–667
Willock, *Temporary Sheriffs* 1993 SLT (News) p 352

At advising on 24 July 2001 —

LORD BINGHAM OF CORNHILL. —[1] Each of these four appellants ('the accused') was the subject of criminal proceedings before a temporary sheriff between 20 May 1999 and 11 November 1999. Mr Millar was convicted on indictment of drug offences in the Sheriff Court at Elgin on 27 August 1999 and was sentenced on the same day to a term of imprisonment. Ms Payne pleaded guilty to assault and other offences in the Sheriff Court at Dundee on 16 September 1999 and was sentenced to a term of imprisonment on 12 October 1999. Mr Stewart was summarily convicted of driving offences in the Sheriff Court at Dundee on 16 February 1999, but appeared in the Sheriff Court again after 20 May 1999, on 28 June 1999, and was then sentenced to non-custodial penalties. Mr Tracey was summarily convicted of offensive weapon and assault offences in the Sheriff Court at Dundee on 23 September 1999 and was sentenced to a term of imprisonment on 8 November 1999. All the accused were represented by solicitors.

[2] It was on 20 May 1999 that sec 44(1)(c) of the Scotland Act 1998 came into force. The Lord Advocate thereupon became a member of the Scottish Executive. As such, by virtue of sec 57(2) of the Act, he had no power to do any act incompatible with any of the Convention rights defined in sec 1 of the Human Rights Act 1998 (unless the act in question fell within sec 57(3)).

[3] It was on 11 November 1999 that the High Court (the Lord Justice-Clerk (Cullen), Lord Prosser and Lord Reed) gave its decision in *Starrs v Ruxton, Ruxton v Starrs*, holding that temporary sheriffs were not an 'independent and impartial tribunal' within the meaning of art 6(1) of the European Convention on Human Rights.

[4] Before the High Court and again before the Board the accused made the same very simple complaint: that the Lord Advocate (and thus the respondent procurators fiscal who conducted the prosecutions) acted incompatibly with the Convention right of the accused under art 6(1) by prosecuting them before temporary sheriffs who were not an independent and impartial tribunal; that such proceedings were accordingly *ultra vires* and null; and that the convictions and sentences of Millar, Payne and Tracey and the sentence of Stewart should accordingly be quashed. These complaints were resisted by the Solicitor General on behalf of the respondents, and were rejected by the High Court on 3 August 2000: *Millar v Dickson*.

[5] The issues raised by each of the accused before the High Court were devolution issues within para 1(d) of sched 6 to the Scotland Act 1998, namely 'a question whether a purported or proposed exercise of a function by a member of the Scottish Executive [the Lord Advocate] is, or would be, incompatible with any of the Convention rights'. On 15 August 2000 the High Court gave leave to the accused to appeal against its determination of those issues, and the accused come before the Board by virtue of sec 98 of and para 13(a) of sched 6 to that Act. The appeals are of obvious practical importance since these cases have been selected for decision out of a significant number of other cases brought before temporary sheriffs between 20 May and 11 November 1999. The sentences imposed upon the accused have been suspended pending final resolution of these issues.

The High Court's decision in Starrs

[6] Before the High Court and again before the Board the Solicitor General accepted the correctness of the decision in *Starrs* and accordingly accepted, on

A the basis of that decision, that the temporary sheriffs were not at the material time 'an independent and impartial tribunal': see 2000 JC at p 651B, para 4. It follows that the correctness of that decision is not open to review before the Board. It is nonetheless necessary to summarise its effect since the present appeals are based upon it.

[7] The accused Starrs and Chalmers appeared before a temporary sheriff on a B summary complaint on 5 May 1999, when their trial began but was not concluded. The trial diet was adjourned to 8 July 1999, and on that date was further adjourned and leave was given to the accused to raise a devolution issue whether the procurator fiscal acted compatibly with art 6 of the Convention in prosecuting them before a temporary sheriff. When the devolution issue came before the temporary sheriff he decided it against them. The accused C challenged the temporary sheriff's decision in the High Court. The issue in that court was described by the Lord Justice-Clerk in this way (at p 213C): 'I come then to the main issue which was debated at some length, namely whether a temporary sheriff such as Temporary Sheriff Crowe, was an "independent and impartial tribunal" in the sense of art 6(1) of the Convention. I should, of course, make it clear that this point does not involve any reflection whatsoever D on his conduct. The point is of general importance, not only for its potential effect in individual cases but also for any future consideration of the terms of the relevant legislation and any appointments made thereunder.'

[8] In the course of their judgments the Lord Justice-Clerk and Lord Reed reviewed the legislation governing the appointment of temporary sheriffs and also some additional information (not previously public knowledge: p 215A) E concerning the recent practice of the Lord Advocate in making appointments of temporary sheriffs: see pp 213D–219A, 235B–241A. The Lord Justice-Clerk drew attention in particular to the fact that temporary sheriffs were appointed for one year only and were subject to recall during that period at the instance of the Lord Advocate, perhaps without the possibility of challenge: see pp 214C, 216E, 218E, 226G. The Lord Justice-Clerk quoted the material terms of art 6(1) of the Convention: 'In the determination of his civil rights and obligations or of F any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' He made extensive reference to Strasbourg and other authority on the meaning of 'an independent and impartial tribunal': see pp 219–226. He expressed a number of conclusions: (1) 'Rather than a control over numbers, the use of the one year term suggests a reservation of control over the tenure of G office by the individual, enabling it to be brought to an end within a comparatively short period. This reinforces the impression that the tenure of office by the individual temporary sheriff is at the discretion of the Lord Advocate. It does not, at least *prima facie*, square with the appearance of independence' (p 228); (2) 'There is no question whatever as to the integrity and fair mindedness with which the Lord Advocate has acted. However, what I H have to consider is whether the basis on which the temporary sheriff holds office is truly independent, that is independent of the executive, whether it presents an appearance of such independence, and whether and to what extent the lack of the former gives rise to the appearance of lack of impartiality. I do not have difficulty with the fact that temporary sheriffs are appointed by the executive, following upon their selection by the Lord Advocate. Counsel did I not contend to the contrary. However, appointment by the executive is consistent

with independence only if it is supported by adequate guarantees that the appointed judge enjoys security of tenure. It is clear that temporary sheriffs are appointed in the expectation that they will hold office indefinitely, but the control which is exercised by means of the one year limit and the discretion exercised by the Lord Advocate detract from independence' (p 229); (3) 'This line of reasoning seems to me to be persuasive and to support the view that even when full allowance is made for the matters relied upon by the Solicitor General, the power of recall under sec 11(4) is incompatible with the independence and appearance of independence of the temporary sheriff. For the reasons which I have already indicated, I regard the one year limit to the appointment as being a further critical factor arriving at the same result... I also accept that in this case there is a link between perceptions of independence and perceptions of impartiality, of the kind which has been categorised in Canada as institutional impartiality. I consider that there is a real risk that a well-informed observer would think that a temporary sheriff might be influenced by his hopes and fears as to his prospective advancement. I have reached the view that a temporary sheriff, such as Temporary Sheriff Crowe, was not an "independent and impartial tribunal" within the meaning of art 6.1 of the Convention' (p 230); (4) 'In the whole circumstances, therefore, I am of opinion that in proceeding with the trial the Lord Advocate, as represented by the procurator fiscal, acted incompatibly with the right of the accused under art 6(1) to trial by "an independent and impartial tribunal"' (p 231).

[9] Lord Prosser was in complete agreement. His conclusions were expressed as follows: (1) 'the answer to the question of whether a person has had a hearing "by an independent and impartial tribunal established by law" when the tribunal is a temporary sheriff holding office at the pleasure of the Lord Advocate, with no security of tenure, can in my opinion be answered in the negative without any deep or detailed consideration of the words "independent and impartial". Nothing in the statutory provisions regarding temporary sheriffs, and nothing in the account which we were given of how they are selected and appointed, or how they are used, or how they cease to be used or to hold office, appears to me to point to any other answer. Equally, nothing in the authorities to which we were referred appears to me to point to any other answer. The opinions of your Lordships appear to me to demonstrate with great clarity why no other answer is appropriate' (p 231); (2) 'As regards the actual words "independent" and "impartial", the latter appears to me to be of the essence of the judicial process. I would regard the concept of a partial judge as a contradiction in terms. But I am inclined to see independence — the need for a judge not to be dependent on others — as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether in the executive, or indeed in the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him. The requirement of independence seems to me to have an importance which runs even wider than that of impartiality. The two concepts appear to me to be inextricably interlinked, and I do not myself find it useful to try to separate the one from the other' (p 232); (3) 'Like your Lordships, I am not suggesting in any way that there has ever been any impropriety, either

A on the part of temporary sheriffs or on the part of any holder of any ministerial office, or of their officials. But I would add that if a judge is not independent, then however great his integrity, it may be very difficult for him to know whether his want of independence affects the way in which he carries out his judicial duties. And however determined a Minister or public servant may be to carry out his functions in relation to the judiciary only on the basis of wholly
B appropriate considerations, it will be important for him to remember that his own confidence in his own integrity is not, and cannot be regarded as, a guarantee' (p 234).

[10] Lord Reed delivered a comprehensive judgment. It is necessary to cite the following extracts only: (1) 'Given that temporary sheriffs are very often persons who are hoping for graduation to a permanent appointment, and at the
C least for the renewal of their temporary appointment, the system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the executive when his appointment comes up for renewal: in short, a relationship of dependency. This is, in my opinion, a factor pointing strongly away from 'independence' within the meaning of art 6' (p 243); (2) 'There can be no doubt as to the
D importance of security of tenure to judicial independence: it can reasonably be said to be one of the cornerstones of judicial independence. The critical importance of judicial security of tenure has been recognised in Scots law since at least the declaration in art 13 of the Claim of Right 1689 (cap 28, APS IX 38) that "the changing nature the [sic] of the judges' gifts *ad vitam aut culpam* into commissions *durante beneplacito*" is "contrary to law".' (p 245); (3) 'There is, however, no objective guarantee of security of tenure, such as can be found in
E sec 12 of the 1971 Act; and I regard the absence of such a guarantee as fatal to the compatibility of the present system with art 6. The Solicitor General emphasised that it is inconceivable that the Lord Advocate would interfere with the performance of judicial functions. I would readily accept that; but that is not the point. Judicial independence can be threatened not only by interference by the executive, but also by a judge's being influenced, consciously or
F unconsciously, by his hopes and fears as to his possible treatment by the executive. It is for that reason that a judge must not be dependent on the executive, however well the executive may behave: "independence" connotes the absence of "dependence"' (p 248); (4) 'Even if I were mistaken in my conclusion that the necessary objective guarantees of independence were lacking, it seems to me that the need for the temporary sheriff's appointment to be
G renewed annually at the discretion of the executive, and his lack of security of tenure, are in any event factors which could give rise to a reasonable perception of dependence upon the executive. The necessary appearance of independence is therefore in my opinion absent' (p 252); (5) 'Given my conclusion that trial before a temporary sheriff violates the right of the complainers under art 6 to a trial before an independent and impartial tribunal, and the Solicitor General's
H concession that such a trial involves the doing of acts which must be taken to be acts of the Lord Advocate for the purposes of sec 57(2) of the Scotland Act, it follows that sec 57(2), if it is applicable, renders those acts incompetent' (p 255); (6) 'Before concluding this part of my opinion, I wish to make it plain that I am not suggesting that any temporary sheriff has ever allowed his judicial conduct to be influenced by any consideration of how he might best advance his prospects
I of obtaining the renewal of his appointment, or his promotion to a permanent

appointment. Nor am I suggesting that any official or minister has ever sought to interfere with the judicial conduct of a temporary sheriff or would ever be likely to do so. There is, however, no objective guarantee that something of that kind could never happen; and that is why these appeals must succeed' (p 257).

The High Court's decision in the instant cases

[11] In his leading judgment in these cases Lord Prosser defined the main issues then before the High Court at p 651, para 4: 'In relation to these cases, the Solicitor-General on behalf of the respondents conceded that there was a relevant "act" for the purposes of paragraph 1(d) of sched 6 to the Scotland Act 1998. It was accepted, upon the basis of the decision in *Starrs*, that the temporary sheriffs were not an "independent and impartial tribunal" within the meaning of article 6(1). The Crown's position was, however, that each of these complainers had tacitly waived the right to an independent and impartial tribunal. And regardless of the question of waiver, the Crown's position was that, notwithstanding the decision in *Starrs*, the acts of each of the temporary sheriffs, in convicting and/or sentencing the complainers prior to the date of that decision were those of a *de facto* judge, and should be treated as valid. Moreover, it was not suggested on behalf of any of these complainers that waiver of the entitlement to an independent and impartial tribunal under article 6(1) would be incompetent or otherwise impossible as a matter of law: the question was not whether that entitlement could be waived, but whether it had been in these cases. It is convenient to deal with the question of waiver first, before considering the contention that these decisions are valid as decisions of *de facto* judges. Upon both issues, it appeared to me that there was no substantial difference between the submissions advanced on behalf of the different complainers, and I have not found it necessary to deal with these submissions separately from one another.' Most of Lord Prosser's judgment, with which Lord Cowie agreed, and most of the shorter judgment of Lord Johnston, were devoted to the waiver issue, which was resolved against the accused and in favour of the Crown. The issue concerning *de facto* judges was decided against the Crown: in his written case the Solicitor General sought to challenge that adverse ruling, but in oral argument before the Board he did not seek to pursue that submission and no further reference need be made to it.

[12] It is clear that in the High Court the accused, relying on sec 57(2) of the Scotland Act, challenged the *vires* of the Lord Advocate to pursue prosecutions against them before temporary sheriffs after 20 May 1999, but this issue does not appear to have featured prominently in the argument and was disposed of in a single paragraph of Lord Prosser's judgment (at p 664, para 39): 'I should mention briefly one further argument which was advanced on behalf of the complainers in these four bills, which was founded upon this same proposition, that in terms of section 57(2) of the 1998 Act, the Lord Advocate was acting *ultra vires* in continuing the prosecution. Viewing the matter as one of *vires*, it was submitted that a waiver could not overcome his lack of *vires*. But in my opinion this argument is misconceived. Section 57(2) means that the Lord Advocate has no power to do any act so far as that act is incompatible with "any of the Convention rights". In terms of section 126(1), that expression has the same meaning as in the Human Rights Act 1998. In terms of sec 1(1) of that Act "the Convention rights" means the rights and fundamental freedoms set

A out in, *inter alia*, article 6. But where such a right can competently be waived, and in particular circumstances has been waived, it has in my opinion ceased to be a right of any kind, in those circumstances. I do not think that it was actually suggested by counsel for the complainers that once such a Convention right had been waived, so that it was no longer a right of the complainer in the circumstances, the Lord Advocate was nonetheless still obliged, in terms of
B section 57(2), not to do an act which would have been incompatible with that right if it had still existed, and was incompatible only with the description of the right which had been waived. At all events, I would reject any such contention. I would accept that speaking generally, waiver cannot render *intra vires* an act which is inherently *ultra vires*. But the whole question of the Lord Advocate's powers is related to the complainers' rights under the Convention,
C and I am unable to see him as debarred from acting incompatibly with rights which in the circumstances they do not have.'

[13] In argument before the Board the balance of the argument very substantially altered. Counsel for the accused forcefully submitted, in reliance on *Starrs*, that the Lord Advocate had no power to continue to prosecute them before temporary sheriffs after 20 May 1999, although counsel continued to
D argue that the accused had not waived their entitlement under art 6 to trial before an independent and impartial tribunal. The Solicitor General for his part placed very muted reliance on the waiver submission which had prevailed below, but joined issue with the *vires* argument of the accused, which became the primary focus of the debate before the Board. It is accordingly convenient first to address the *vires* issue arising under sec 57(2) of the Scotland Act 1998.

E *Section 57(2)*

[14] It was common ground between the parties that the relevant acts of the respondent procurators fiscal were to be treated as acts of the Lord Advocate, that the conduct of the procurators fiscal in continuing to prosecute the accused before temporary sheriffs after 20 May 1999 were 'acts' within the meaning of
F sec 57(2), and that temporary sheriffs were not at the material time an independent and impartial tribunal within the meaning of art 6(1), at p 651, quoted above. The argument for the accused on this point was in essence both short and simple: by virtue of sec 57(2) the Lord Advocate as a member of the Scottish Executive had no power to do any act incompatible with any of the Convention rights of the accused; art 6(1) of the Convention entitled the accused
G to trial of the criminal charges against them by an independent and impartial tribunal; temporary sheriffs were not at the material time an independent and impartial tribunal because *Starrs* so decided; the Lord Advocate acted incompatibly with the Convention rights of the accused under art 6(1) by prosecuting them before temporary sheriffs as, again, *Starrs* decided; acts done in relation to the prosecution of the accused after 20 May 1999 were accordingly
H *ultra vires*, null, void and without legal effect; and the convictions and sentences of Millar, Payne and Tracey and the sentence of Stewart should therefore be quashed.

[15] The Solicitor General sought to rebut this argument by distinguishing *Starrs*, essentially on the ground that the challenge in that case had been raised at a relatively early stage of the proceedings, before the trial had been concluded.
I Thus the court had no public or other interest to balance against the defect in

the qualification of the temporary sheriff before whom the trial was proceeding. The judgments in that case, he rightly submitted, did not attempt to weigh the interests of the public against the interests of the accused, doubtless because no argument was directed to that issue. But it was plain that rights under art 6, save for the right to a fair trial, were not absolute; it was proper to consider the right allegedly infringed in the context of all the facts and circumstances of the case as a whole and to weigh the alleged infringement against the general interest of the public. The ultimate issue was one of overall fairness, viewing the proceedings as a whole, which could be done in these cases but could not be done in *Starrs* because of the early stage in the proceedings at which the devolution issue had there been raised and determined. In making the submissions the Solicitor General relied on recent observations of the Board in *Brown v Stott* at pp 60A–D, 61G–I, 62I–64D, 67H, 73D–E, 74B–F, 79E, 81I–82D, 84B–E and 87A–C, and on the Strasbourg authority there referred to. Applying these principles to the present cases it could be seen that the trials of the accused after 20 May 1999, albeit before temporary sheriffs, had been fair in all respects. Millar had been convicted by a jury and no criticism was made of the summing-up by the temporary sheriff. Payne had pleaded guilty; it made no practical difference that her plea was tendered to a temporary sheriff and there was nothing to suggest her sentence was excessive. Stewart no longer complained of his conviction before 20 May 1999, and the non-custodial penalties imposed after that date were moderate. Tracey had been convicted by a temporary sheriff on a summary complaint after 20 May 1999, but had demonstrated no grounds to impugn conviction or sentence. Whatever the theoretical defects to which the appointments of the respective temporary sheriffs were subject, none of them was said to have shown any lack of independence or impartiality and none of the accused could show that he or she had in the event suffered any injustice.

[16] With these last submissions of the Solicitor General I have much sympathy. There is indeed nothing to suggest that the outcome of any of these cases would have been different had the relevant stages of the prosecution been conducted before permanent instead of temporary sheriffs. There is no reason to doubt that the conduct of all the temporary sheriffs involved was impeccable, and no reason to suppose that any of the accused suffered any substantial injustice. But I cannot accept that the outcome in *Starrs* would have been different had the challenge been raised after the trial in that case was concluded and it is in my view clear from authority that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded.

[17] In *Locabail (UK) Ltd v Bayfield Properties Ltd* the Court of Appeal of England and Wales (the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor) said at pp 471–472, paras 2–3: '2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case. 3. Any judge (for convenience,

A we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant
B has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called "actual bias" are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge
C about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.'

[18] These observations, although directed to impartiality, would apply equally to independence. I do not understand them to be in any way inconsistent with Scots law on this subject, which attaches no less weight than the English common
D law to the integrity of a tribunal carrying out judicial functions, not least in the criminal field.

[19] The observations are also, as I think, fully supported by the jurisprudence of the European Court of Human Rights. In *De Cubber v Belgium* the complaint was made, in reliance on an express prohibition in the national judicial code and art 6(1) of the Convention, that a judge had acted as a trial judge after conducting the preliminary investigation into the offences alleged against the
E complainant. Having found that there was no evidence of actual bias on the part of the judge, the Court summarised its general approach (in para 26, at p 244): 'However, it is not possible for the Court to confine itself to a purely subjective test: account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim
F quoted in, for example, the *Delcourt* judgment of 17 January 1970, "justice must not only be done: it must also be seen to be done". As the Belgian Court of Cassation has observed, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.' The
G Court continued (in para 30, at p 246): 'In conclusion, the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt. Although the Court itself has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, it recognises, having regard to the various factors discussed above, that his presence on the bench provided grounds for some legitimate misgivings on the applicant's
H part. Without underestimating the force of the Government's arguments and without adopting a subjective approach, the Court recalls that a restrictive interpretation of Article 6(1) — notably in regard to observance of the fundamental principle of the impartiality of the courts — would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the
I meaning of the Convention.' In para 32, at p 248, the Court went on to hold that

a lack of independence and impartiality in the trial court could not be excused because such qualities were met by another court to which an appeal lay. A

[20] It was held in *Håkansson and Sturesson v Sweden* (p 16, para 66) that 'a waiver must be made in an unequivocal manner and must not run counter to any important public interest'.

[21] *Oberschlick v Austria* involved a journalist against whom a criminal prosecution for defamation was brought. The case against him was dismissed by a lower court but reinstated by a court of appeal which remitted the case to the lower court for trial. The journalist was convicted by the lower court, which held itself bound by the opinion of the court of appeal on the earlier occasion. The journalist's appeal against that decision came before a court of appeal over which the same judge as on the earlier occasion presided. This was contrary to the national code of criminal procedure. The journalist complained that the court of appeal on the second occasion was not an independent and impartial tribunal. The main argument in the case turned on waiver, which, it was said, had to be established in an unequivocal manner: para 51, p 420. Such waiver was not established. It therefore followed that there had been a violation of art 6(1) because the tribunal was not impartial. B C

[22] The complaint in *Pfeifer and Plankl v Austria* again was that, in breach of the national code of criminal procedure, the judges who had acted as investigating judges sat also as trial judges. The Court reiterated its position (paras 37, 39 on pp 712–713): '37. According to the Court's case law, the waiver of a right guaranteed by the Convention — in so far as it is permissible — must be established in an unequivocal manner. Moreover, the Court agrees with the Commission that in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance.... 39. Thus even supposing that the rights in question can be waived by a defendant, the circumstances surrounding the applicant's decision deprived it of any validity from the point of view of the Convention.' A violation of art 6(1) was accordingly found. D E

[23] In *Bulut v Austria* a trial judge had yet again, in breach of the national code of criminal procedure, acted as an investigating judge at an earlier stage of the proceedings. But on this occasion the lawyer representing the accused had been expressly asked, in writing before the trial and orally at the trial, whether he objected to the participation of the judge in the trial. On neither occasion did he object. In holding that there was no violation of art 6(1) the Court referred to the very limited participation of the judge at the investigatory stage and held (in para 34 at p 101): 'In this limited context, the applicant's fear that the Innsbruck Regional Court lacked impartiality cannot be regarded as objectively justified. In any event, it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so.' F G

[24] In contrast with the other cases so far cited, *Findlay v United Kingdom* concerned the independence as well as the impartiality of the tribunal. A serving soldier pleaded guilty to a number of offences at a court martial. The Commission considered the court martial, because of the way in which it was composed and administered, to lack both independence and impartiality (paras 106, 108, pp 239–240). The court shared this view (paras 73, 76 at pp 244–245): '73. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had *inter alia* to the manner of H I

A appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate
B doubt in this respect. The concepts of independence and objective impartiality are closely linked and the Court will consider them together as they relate to the present case. 76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court-martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of
C command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified.' A violation of art 6 was found. It was further held that the defects in the trial tribunal could not be cured by any subsequent review proceedings; para 79, p 246. No significance was attached to the fact that Findlay had pleaded guilty. The lack of independence and objective impartiality was fatal.

D [25] There was no accusation of actual bias or prejudice against the Bailiff of Guernsey whose role was reviewed in *McGonnel v United Kingdom*: see para 50. But his dual role was 'capable of casting doubt on his impartiality' and the applicant had 'legitimate grounds for fearing' that he might have been influenced by his earlier involvement in the planning process (para 57). It followed that there was a breach of art 6(1).

[26] In *Brown v Stott* at p 63G Lord Steyn said: 'And it is a basic premise of the Convention system that only an entirely neutral, impartial, and independent
E judiciary can carry out the primary task of securing and enforcing Convention rights.' There are few, if any, Convention rights of more practical importance to the citizen than the right to a fair trial. The conduct of trials at all stages by an independent and impartial tribunal is in my view recognised by the convention and the authorities, subject to waiver where that is permissible, as a necessary although not a sufficient safeguard of the citizen's right to a fair trial. It is a
F safeguard which should not, least of all in the criminal field, be weakened or diluted, whatever the administrative consequences.

[27] I accept the argument for the accused on this point. The Lord Advocate had no power to act in a way which infringed any Convention right of the accused. By continuing to prosecute the accused before a tribunal which was not independent and impartial he infringed the right of the accused to have the
G criminal charges against them determined by a tribunal which was independent and impartial. Unless the accused validly waived their entitlement to trial before an independent and impartial tribunal, he acted in a way which sec 57(2) denied him power to do. I think this is the view taken by the High Court.

[28] No distinction is to be drawn between the case of Ms Payne, who pleaded guilty, and the other accused who pleaded not guilty and were convicted. It
H cannot be said that on the occasion when she entered her plea there was then no determination of a criminal charge against her within the meaning of art 6. The role of a court before which an accused pleads guilty is not entirely passive: it has a duty to ensure that the accused understands the charge (a duty of greater significance when the accused is unrepresented) and that the plea is not equivocal. It is noteworthy that in *Findlay's* case the European Court drew no
I distinction between his plea of guilty and his sentence.

Section 57(3)

[29] Before the Board, although not before the High Court, the Solicitor General sought to rely on sec 57(3) of the Scotland Act, which provides: 'Subsection (2) does not apply to an act of the Lord Advocate — (a) in prosecuting any offence, or (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, which because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.' Section 6 of the Human Rights Act, so far as relevant, provides: '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if — (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.' Relying on sec 6(2)(b), the Solicitor General submitted that sec 11 of the Sheriff Courts (Scotland) Act 1971 could not be read or given effect in a way compatible with the Convention rights and that the prosecutors were acting to give effect to or enforce those provisions

[30] I cannot accept this argument. The appointment of temporary sheriffs under sec 11 of the 1971 Act was one thing. The prosecution of offenders was quite another. In appointing temporary sheriffs under sec 11 the Lord Advocate was giving effect to that section. In prosecuting the accused before temporary sheriffs so appointed the Lord Advocate (through the respective procurators fiscal) was performing a distinct and different function, which did not give effect to or enforce sec 11. Section 57(3) gives the Solicitor General no help in these cases.

Waiver

[31] In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression. That the waiver must be voluntary is shown by *Deweer v Belgium*, where the applicant's failure to insist on his right to a fair trial was held not to amount to a valid waiver because it was tainted by constraint (para 54, p 465). In *Pfeifer and Plankl v Austria* there was held to be no waiver where a layman had not been in a position to appreciate completely the implication of a question he had been asked (para 38, p 713). In any event, it cannot meaningfully be said that a party has voluntarily elected not to claim a right or raise an objection if he is unaware that it is open to him to make the claim or raise the objection. It is apparent from passages already cited from cases decided by the European Court of Human Rights that a waiver, to be effective, must be unequivocal, which I take to mean clear and unqualified. I infer that the High Court was of this opinion: (at pp 654–655, paras 12 and 13).

[32] Did the accused, then, make a voluntary, informed and unequivocal election not to claim their right to be tried by an independent and impartial tribunal or to raise no objection to the temporary sheriffs before whom they appeared as a tribunal which was not independent and impartial? There is no suggestion that

A any reference was made at any stage in these cases before sentence to the standing or qualification of the respective temporary sheriffs. Thus any election, if made, must have been tacit. It was on the grounds of tacit waiver that the High Court resolved this issue against the accused. The High Court recorded that the parties were not really at issue as to the tests to be applied but as to application of those tests to the circumstances of the present cases: (para 16, p 655).

B [33] The High Court made its finding of tacit waiver in reliance on a series of very carefully formulated propositions: (1) If an accused or his agent wishes to take any point on the qualification of the trial court it should be taken timeously as a plea in bar of trial. If such a point is not taken, the omission to do so will be taken to show an intention to abandon or waive the point unless circumstances show that it was not intended to abandon or waive it or that the omission

C resulted from ignorance or misapprehension which provided a reasonable explanation of the failure to take it (para 17, p 656); (2) If knowledge of some material matter is absent, even an express intention to waive a right may readily be recognised as insufficient to constitute a binding abandonment of the right (para 18, p 656); (3) In general, regardless of the knowledge or ignorance or misapprehension of an accused or his agent as to the law, knowledge of the law will be imputed to him (para 20, p 656); (4) An authoritative decision of the

D courts operates retrospectively, stating not only what the law is at the date of the decision but what it has always been (para 21, p 657); (5) In judging whether a right has been waived, it may be seen as reasonable for a party to have proceeded upon the law as it appeared to be at the relevant time (para 22, p 657); (6) If the law is reasonably regarded as settled, that may afford a reasonable ground for not taking a point, even if the law is later changed, but it may be

E otherwise if the law is unsettled (para 23, pp 657–658); (7) In the present case there was no settled view of what the law was at the crucial time, and the accused and their agents were not subject to misapprehension attributable to some established view of what the law was (paras 24, 25, p 658); (8)The accused and their agents must be deemed to have known that the enactment of sec 57(2) of the Scotland Act 1998 had radically altered the rights of accused persons and

F that art 6(1) of the European Convention gave accused persons a right to an independent and impartial tribunal. Once the Scotland Act came into force the accused and their agents could not reasonably say how or why they took a view of the law which only the decision in *Starrs* revealed to be a misapprehension. Without deeming that they knew the law as declared in *Starrs*, they must be deemed to have known that the statute had changed the law and

G that new rights were in issue (para 25, pp 658–659); (9) The same deemed knowledge must be attributed to the temporary sheriffs and the prosecutors, but they were under no obligation to inform the accused of these known changes (para 26, p 659); (10) It was of no real importance whether the accused's agents specifically knew that proceedings before temporary sheriffs were open to challenge, this being widely known in the legal profession (paras 10, 11 and 27,

H pp 653, 659); (11) The agents' deemed knowledge of the new legislation precluded any contention that the law could be assumed to be unchanged. It was for the agents to decide whether the new law created a new right or the possibility of asserting a new right. There was nothing which made it reasonable not to take the point (para 28, pp 659–660); (12) The agents were not to be criticised for not taking the point, since waiver could well have been seen as the best course to

I follow in the interests of the accused (para 29, p 660).

[34] Proposition (1) may, as I respectfully think, be accepted as generally true and as providing the correct starting point. I would also accept proposition (2). But I cannot accept proposition (3). In *Martindale v Falkner* at p 719 Maule J said, as I think correctly, 'There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so'. In *Jones v Randall*, where Mr Dunning had argued that 'all Judges know the laws', Lord Mansfield differed (at p 40): 'As to the certainty of the law mentioned by Mr Dunning, it would be very hard upon the profession, if the law was so certain, that every body knew it: the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort.' More recently, in *Evans v Bartlam* at p 479 Lord Atkin laid down what I take to be the true principle: 'For my part I am not prepared to accept the view that there is in law any presumption that any one, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.' Thus ignorance of the law will not excuse unlawful conduct; but it cannot suffice to found a plea of waiver.

[35] As to propositions (4) and (5), I cannot accept a declaratory theory of law, which depends upon a fiction, as apposite in the very practical field of waiver. That there is no waiver where a party relies on what is reasonably understood to be the law at the relevant time is not because such conduct is reasonable (although it plainly is) but because the party lacks the knowledge necessary to make an informed choice. As to proposition (6), I consider the true rule to be this: the more obvious and notorious it is that a point is available to be taken, the more readily may it be inferred that failure to take it represented a deliberate intention not to take it. The contrary is also true.

[36] I can readily accept that the agents for the accused in Elgin and Dundee knew of the enactment of the Scotland Act 1998, knew that the legal landscape had altered, knew that members of the Scottish Executive (including the Lord Advocate) were bound by the European Convention, knew at least in general terms of the fair trial guarantee in art 6(1) and knew that the powers of the Lord Advocate as a member of the Scottish Executive were subject to the Convention (proposition (8)). Plainly, the standing of temporary sheriffs had been a subject of continuing discussion, both before the Scotland Act (see, for example, Willock, 'Temporary Sheriffs', 1993 SLT (News), pp 352–354) and, with greater intensity, afterwards. I would readily accept the informed observations of the Court of Session in *Clancy v Caird* at pp 453 and 470 as to the state of professional belief (proposition (10)) and that the law was known to be in a state of flux. But it is in my opinion impossible to accept that the qualification of temporary sheriffs was generally known to be open to serious question and that the agents were subject to no misapprehension attributable to some established view of what the law was (proposition (7)). I doubt very much if the outcome of *Starrs* was widely foreseen. I cannot accept proposition (9) and, since waiver depends on the making of an informed choice, I cannot accept the opening part of proposition (10).

[37] Section 11(4) of the Sheriff Courts (Scotland) Act 1971, which provided in effect that temporary sheriffs held office at pleasure (see *Starrs*, p 235F per Lord Reed), had stood unamended for nearly 30 years. No attempt had been made, in anticipation of the coming into force of the Scotland Act, to amend it or to

A provide for the appointment of temporary sheriffs for fixed terms longer than a year, no doubt because the qualification of temporary sheriffs was not recognised to be vulnerable. Had that vulnerability been recognised, the Lord Advocate would, one assumes, have taken before 20 May 1999 the steps he took after 11 November 1999, and would not have resisted the challenge to the standing of temporary sheriffs which was made in *Starrs*. Had the respective procurators
B fiscal apprehended that their conduct as prosecutors of the accused on behalf of the Lord Advocate was or might be *ultra vires* they would doubtless have raised the issue at the hearings and sought the consent of the accused or made other arrangements. Had the respective temporary sheriffs apprehended that they were not or might not have been an independent and impartial tribunal, they would doubtless have acted in the same way. Both the procurators fiscal and
C the temporary sheriffs would have been under the clearest obligation, if they entertained any doubt about the temporary sheriffs' compliance with art 6, to share their doubts with the defence: see *Locabail* at p 478, para 21, which I do not understand to be inconsistent with the law applicable in Scotland. I do not doubt that, if they had entertained any doubt, they would have acted in this way, and their failure to do so points towards an absence of doubt. The
D inescapable fact is that, until *Starrs*, no challenge was successfully made to the qualification of temporary sheriffs, despite their employment in greatly increased numbers over the years. It has not been suggested that their reputation was other than high. And to this day no accusation of actual bias has been made against them.

[38] It was of course for the agents of the accused to decide what points to make on behalf of their clients (proposition (11)) and they could have seen
E advantages in proceeding before temporary sheriffs (proposition (12)). But the point is whether the agents on behalf of the accused made a voluntary, informed and unequivocal election not to claim trial before an independent and impartial tribunal and not to object to the respective temporary sheriffs as a tribunal not meeting the requirements of art 6(1). They could only have done this if they appreciated, or must be taken to have appreciated, the effect of the eventual
F decision in *Starrs* or the real possibility of a decision to that or similar effect. In my regretful conclusion there is no evidence, and nothing in the judicial decisions before the Board, which would entitle us to find that the accused or their agents appreciated this nor is the Board entitled to infer that they must have done. A finding or inference to the opposite effect is in my view very much more compelling. I conclude, without enthusiasm, that the finding of tacit waiver
G cannot be supported.

[39] For these reasons, and those given by my noble and learned friends Lord Hope of Craighead and Lord Clyde, I am of opinion that these appeals should be allowed. All four cases will be remitted to the High Court for that court to consider what orders should now be made. The accused must have their costs against the respective procurators fiscal before the Board.

H

LORD NICHOLLS OF BIRKENHEAD — [40] I agree that for the reasons given by my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Clyde, these appeals should be allowed.

LORD HOPE OF CRAIGHEAD — [41] Central to the rule of law in a modern
I democratic society is the principle that the judiciary must be, and must be seen

to be, independent of the executive. Writing on the independence of the judiciary in the title on Constitutional Law in the *Stair Memorial Encyclopaedia*, vol 5, paras 663–667, Lord Fraser of Tullybelton identified security of tenure and immunity from suit as the two most important ways of ensuring that judges perform their duties impartially and without fear of the consequences. Of these, security of tenure is the more vulnerable to erosion at the hands of the executive.

[42] The appointment of temporary sheriffs to assist in the disposal of business in the sheriff courts was provided for by sec 11 of the Sheriff Courts (Scotland) Act 1971. At first the use which was made of this additional judicial resource was modest and unremarkable. But as growth in the volume of business in the sheriff courts was matched by a tightening of controls over growth in public expenditure the executive became increasingly attracted to it. Preference was given to increasing the number of temporary sheriffs as a means of meeting the demand for more judges on the shrieval bench. Some doubted the wisdom of this policy. Professor I D Willock in his article 'Temporary Sheriffs', 1993 SLT (News) p 352, observed that temporary sheriffs appeared to lack the independence which was attached to the permanent sheriffs. But there was no evidence that this was having any influence on the way in which the temporary sheriffs were in practice discharging their responsibilities. Furthermore, the Lord Advocate made it his business during this period to consult regularly with the Lord President and the Sheriffs Principal before making or terminating appointments to this branch of the judiciary.

[43] It was not until the coming into force of sec 57(2) of the Scotland Act 1998 on 20 May 1999 that an opportunity arose for a challenge to be made to this system in the courts. It was not long in coming. On 30 July 1999 Temporary Sheriff Crowe resumed consideration of a case which had come before him for trial on summary complaint in Linlithgow sheriff court on 5 May 1999 and had been continued to a date after 20 May 1999 for the completion of the evidence. Minutes had been lodged under rule 40.5 of the Act of Adjournal (Criminal Procedure Rules) 1996 raising a devolution issue as to whether, by continuing with their prosecution before a temporary sheriff, the Lord Advocate had acted in a way which was incompatible with the accused's Convention right to a fair trial by an independent and impartial tribunal. Temporary Sheriff Crowe rejected this challenge to his presiding at the trial. But on 11 November 1999 it was upheld on appeal by the High Court of Justiciary in *Starrs v Ruxton*, the effect of which has been summarised so helpfully by my noble and learned friend Lord Bingham of Cornhill. The Lord Advocate decided not to seek leave to appeal against that decision to the Judicial Committee. Instead the use of temporary sheriffs for whatever purpose in both civil and criminal cases, which had continued without interruption since 20 May 1999, was instantly terminated.

[44] Legislation has been passed by the Scottish Parliament which provides for the creation of a new category of part-time sheriffs: sec 11A–11D of the Sheriff Courts (Scotland) Act 1971, inserted by the Bail, Judicial Appointments, etc (Scotland) Act 2000, ASP 9, sec 7. The appointment and removal from office of part-time sheriffs is the subject of new provisions which have been designed to be compatible with the Convention rights. But the Scottish legal system now faces the not inconsiderable problem of dealing with objections which have been taken under the devolution legislation since *Starrs v Ruxton* to the disposal by temporary sheriffs of criminal cases under both solemn and summary procedure between 20 May 1999, when sec 57(2) of the 1998 Act came into

force, and 11 November 1999, when their use was terminated by the Scottish Executive.

[45] The four cases which are now before your Lordships in this appeal were selected by the Law Officers to test the various factual situations that have arisen. David Millar was convicted after trial and sentenced by Temporary Sheriff Sinclair in solemn proceedings in Elgin on 27 August 1999. Kerry Payne, having pled guilty before Temporary Sheriff McSherry in summary proceedings in Dundee on 16 September 1999, was sentenced by Temporary Sheriff Eccles on 12 October 1999. Paul Stewart, who had been convicted after trial in summary proceedings in Dundee on 16 February 1999, was sentenced by Temporary Sheriff Pender on 28 June 1999. Joseph Tracey was convicted after trial in summary proceedings in Dundee on 23 September 1999 and sentenced by Temporary Sheriff Kelly on 8 November 1999. In the event no relevant point of distinction has emerged between them. They all stand or fall together on the same point, which is whether the continuation of the prosecutions before a temporary sheriff was an act by the prosecutor which was incompatible with the appellants' Convention rights.

The issues

[46] In the High Court of Justiciary the Solicitor General conceded that there was a relevant act in each case for the purposes of para 1 (d) of sched 6 to the Scotland Act 1998. He also accepted, in the light of *Starrs v Ruxton*, that the temporary sheriff before whom each case was conducted was not an 'independent and impartial tribunal' within the meaning of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. His argument was that, as they did not take the objection at the appropriate time, the appellants had each waived their Convention right to object to the presiding judge on this ground. He also argued that, regardless of the question of waiver, the acts of the temporary sheriff were those of a *de facto* judge and should be treated as valid notwithstanding the decision in *Starrs*. The High Court of Justiciary (Lords Prosser, Johnston and Cowie) held that the appellants had waived their right to object to the hearing of their cases by a temporary sheriff and that the Lord Advocate was not obliged by sec 57(2) to comply with a Convention right which no longer existed: *Millar v Dickson*. The appellants sought and were granted leave to appeal against this decision to the Judicial Committee. The High Court rejected the alternative argument that the proceedings were valid as having taken place before a *de facto* judge. The Crown did not seek leave to appeal against this decision. In my opinion the application of the doctrine which gives validity to the acts of *de facto* judges does not raise a devolution issue within the meaning of para 1 of sched 6 to the 1998 Act.

[47] The appellants have identified the issue in this appeal as being whether in the proceedings before the temporary sheriffs their agents effectively waived on their behalf their right to object to the presiding judge. As put, the question of waiver might be thought in itself not to raise a devolution issue as defined in para 1 of sched 6 to the Scotland Act 1998. But the point which the appellants wish to raise can be put in a way which does bring the question within the jurisdiction of the Judicial Committee under that schedule. As senior counsel for the appellant Paul Stewart said, the point on waiver bears directly on the issue whether the Lord Advocate was acting compatibly with the appellants'

Convention rights. Falling within that broad issue there are a series of closely related issues which may be raised by way of a preliminary objection. For example, a person cannot bring proceedings under the Act on the ground that an act is incompatible with the Convention rights unless he would be a victim for the purposes of art 34 of the Convention if proceedings in respect of the right were brought in the European Court of Human Rights: sec 100(1). So too the question may be raised whether the person has waived his right to object to the act which is alleged to be incompatible. In my opinion preliminary objections of that kind fall within the scope of the questions which have been identified in para 1 of sched 6 as devolution issues.

[48] As the argument developed however the Solicitor General sought to raise a new and more fundamental question in answer to the appellants' devolution issue. This was whether, as the facts have turned out, there was truly an incompatibility with the appellants' Convention rights. He accepted the decision in *Starrs v Ruxton* and did not seek to attack its analysis. But he maintained that an infringement of the right to an independent and impartial tribunal in art 6(1) did not necessarily mean that the act of continuing with the prosecution in these cases was unlawful as being incompatible with that right. The question that had now to be asked was whether in the light of all the facts and circumstances they had had a fair trial. It had not been alleged that the temporary sheriffs were affected by an actual lack of independence or impartiality, and it had not been demonstrated that any of the appellants would benefit from being retried or sentenced again by a permanent sheriff. There had been an irregularity, but no more than that. So the acts of the Lord Advocate in continuing to prosecute these cases before the temporary sheriffs were not made unlawful by sec 57(2) of the Act.

[49] The statutory regime which sets the context for an examination of these questions is simple and uncompromising. Section 57(2) of the Act provides that a member of the Scottish Executive has no power to do any act which is incompatible with any of the Convention rights. An act which he has no power to do is an unlawful act: see the corresponding provision in sec 6(1) of the Human Rights Act 1998. Two questions must therefore be addressed. The first is, what is the act which the Lord Advocate is said to have had no power to do? The issue of waiver belongs to that question. The second is, if he had no power to do that act, what are the consequences? To this question there belongs the Solicitor General's argument that the act was not unlawful as the appellants are unable to say that they did not have a fair trial.

The 'act'

[50] The act of the Lord Advocate which is in issue in these cases can best be described as conducting a prosecution in proceedings before a temporary sheriff. It is for the prosecutor to determine whether or not a case is to be called: Renton and Brown *Criminal Procedure*, 6th edition looseleaf, para 20.02; *Howdle v Beattie*. He is the master of the instance, and no proceedings can take place in his absence. He is entitled to withdraw the indictment or complaint at any time: *Skeen v Fullarton*. If a conviction results it is for him to lay any information before the court which the sheriff needs to have in order to pass sentence. From start to finish the procedure which takes place in the court is on his initiative. Had it not been for his participation in the proceedings the temporary sheriff would not have been able to determine the issues which were before the court.

A [51] In each of the cases which are before us therefore the determination of the criminal charges by the temporary sheriff was the result of an act by the prosecutor. Senior counsel for the appellant Paul Stewart said that, by having the case called in a court which was presided over by a temporary sheriff, the prosecutor was acting incompatibly with the appellants' Convention right. But the prosecutor's act in conducting the prosecution did not end with the calling
B of the case. By maintaining the prosecution up to and including the moment when sentence was passed he was also performing an 'act' within the meaning of sec 57(2) of the Act. It is for this reason that I do not see any grounds for distinguishing those cases where all the temporary sheriff was required to do after the case was called was to pass sentence from those where the case had to proceed to trial.

C

Waiver

[52] The right which a person has under art 6(1) of the Convention to a hearing by an independent and impartial tribunal is fundamental to his right to a fair trial. Just as the right to a fair trial is incapable of being modified or restricted in the public interest, so too the right to an independent and impartial tribunal is an
D absolute right. The independence and impartiality of the tribunal is an essential element if the trial is to satisfy the overriding requirement of fairness. The remedy of appeal to a higher court is an imperfect safeguard. Many aspects of a decision taken at first instance, such as decisions on the credibility of witnesses or the exercise of judgment in matters which are at the discretion of the presiding judge, are incapable of being reviewed effectively on appeal. As Lord Steyn said in
E *Brown v Stott* at p 636, it is a basic premise of the Convention system that only an entirely neutral, impartial and independent judiciary can carry out the primary task of securing and enforcing Convention rights.

[53] Senior counsel for the appellant Paul Stewart said that there was no example in the case law of the Strasbourg Court of a case in which a tribunal was held to be defective on this ground but that the right to object to it had
F been waived. But the Court's jurisprudence shows that this element of the right to a fair trial, like the right to a public hearing, is not so fundamental that it is incapable of being waived if all the circumstances which give rise to the objection are known to the applicant and the waiver is unequivocal. In practice waiver of the right is not uncommon, as in the case where the parties agree to the resolution of their dispute by private arbitration or the payment of a fixed penalty is
G tendered in composition of a criminal charge. The legal system would be unduly hampered if the right to a public hearing by an independent and impartial tribunal were to be incapable in any case of being waived.

[54] In *Håkansson and Sturesson v Sweden*, p 16, para 66 the Court said that, while the public character of court hearings constitutes a fundamental principle enshrined in art 6(1), neither the letter nor the spirit of this provision prevents a
H person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public so long as this is made in an unequivocal manner and is not counter to any important public interest. The rule that, according to the Court's case law, waiver of a right guaranteed by the Convention, in so far as it is permissible, must be established in an unequivocal manner was emphasised in *Oberschlick v Austria* and *Pfeifer and Plankl v Austria*,
I in the context of a discussion in each case as to whether there had been a

waiver of the right to an independent and impartial tribunal. The rigorous nature of the requirement that the waiver be unequivocal is illustrated by the grounds on which the argument on waiver was rejected.

[55] In *Oberschlick* the Court observed at p 420, para 51 that neither the applicant not his counsel were aware until well after the hearing of all the circumstances which provided grounds for objecting to the tribunal on the ground of a lack of impartiality. In *Pfeifer* waiver was rejected because of the circumstances surrounding the decision not to object to the composition of the tribunal. The court observed at p 713, para 38 that the judge had approached Mr Pfeifer in the absence of his lawyer and put a question to him whose implication, as it was essentially a question of law, he was not in a position to understand completely. Similarly, in *Werner v Austria* where it was contended that the applicant had waived his right to a public hearing because he did not ask for one, the Court said at p 349, para 48 that the applicant could not be blamed for not having made an application for a public hearing of his case which had no prospects of success as the relevant provisions of Austrian legislation made no provision for such a hearing in his case.

[56] In *Bulut v Austria* the Court held at p 101, para 34 that the applicant's fear that the tribunal lacked impartiality could not be regarded as objectively justified in view of the limited role that the judge whose impartiality was questioned had played in the questioning of witnesses during the preliminary investigation of the case. It also made this observation: 'In any event, it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so.' But that was a case where the facts were made known to the applicant's lawyer before the trial began and they were mentioned again by the presiding judge before the court began to hear evidence. In *McGonnell v United Kingdom* the court rejected the argument that the applicant, who was legally represented and did not raise an objection to the fact that the Bailiff was presiding over the Royal Court when it was open to him to do so, had tacitly waived his right to an independent and impartial tribunal. One of the reasons given for this decision in para 44 was that the Court of Appeal had held that there was not structural conflict between the Bailiff's duties in the Royal Court and in the States of Deliberation. It appears that this too was a case where, in the light of authority which was binding on the Royal Court, the objection would have had no prospects of success.

[57] In none of the cases which are before us was there was an express waiver of the right to an independent and impartial tribunal. The High Court held that waiver was to be implied from the fact that the appellants' agents remained silent. As Lord Prosser put it, their failure to take a plea in bar of trial was to be construed as a waiver of all rights which require to be asserted by such a plea unless it appeared that there was some ignorance or misapprehension which could be regarded as a reasonable explanation for not taking the point: p 656D–E. Acknowledging that knowledge was at the heart of the matter, he said that the court was not concerned in this case with ignorance of facts but with an alleged ignorance or misapprehension as to the law: p 656G–H. He said that the appellants' agents must be deemed to have known that the effect of sec 57(2) of the Scotland Act 1998 was to introduce new provisions giving accused persons a right to an independent and impartial tribunal which could not be assumed to be of no significance and that there were new, unsettled issues to be resolved: pp 658H–659A.

A [58] But it is one thing to know that the effect of sec 57(2) was to introduce new provisions giving accused persons a remedy in domestic law against acts of the prosecutor which were incompatible with their art 6 Convention rights. It is quite another to be in possession of all the information that was needed to appreciate fully that the acts in question were incompatible. The Strasbourg jurisprudence shows that, unless the person is in full possession of all the facts, an alleged B waiver of the right to an independent and impartial tribunal must be rejected as not being unequivocal. It was not suggested that in any of the four cases which are before us the appellants' agents were not aware that the sheriff before whom the case had called was a temporary sheriff or of the statutory provisions under which they had been appointed. But no evidence has been produced by the prosecutor, on whom the onus lies, to show that they were aware of the system C which had been developed by the executive for making and not renewing these appointments. A full description of this system was given to the court in *Starrs v Ruxton*, pp 215–218. But, as the Lord Justice-Clerk (Cullen) said at p 215A, the content of that description was not a matter of general public knowledge.

[59] There are other reasons for not regarding any waiver that might be implied from the absence of a plea in bar of trial based on the Convention right as D unequivocal. The circumstances in which the point was not taken are also relevant to this issue. There is no suggestion that, if it had been taken, the prosecutor would have refrained from calling the case or that he would have conceded the point after calling and sought an adjournment so that the case could be called before a permanent sheriff. This is not one of those cases, of which *Oberschlick* and *Pfeifer* provide examples, where there was an undoubted right to object and a clear remedy in the event of doing so. Lord Prosser made it E clear at p 659A that he was not suggesting that the appellants' agents must be deemed to have known just how the unsettled issues in the new legal landscape would be resolved. I agree that there is no basis for making that assumption. But in my opinion the fact that there is no basis for it strengthens the argument that it would not be reasonable to infer waiver in any of these cases. The appellants were not, through their agents, in a position to make an informed F choice as to what to do, as they were in a situation where the law was unsettled and the consequences of that choice were not predictable.

[60] The Solicitor General, in a notable change of position from that which he had adopted in the High Court, said that the issue of waiver was not central to these appeals. He maintained that the decisive factor was the issue whether or not the appellants had a fair trial, bearing in mind the lack of evidence as to any real G difference in the result which was to have been expected if the cases had been heard by a permanent sheriff. He did not seek to develop a sustained argument in support of the reasons for holding waiver established which were given by the High Court. In my opinion the High Court were in error on this point, as the appellants' agents were not in a position to make a fully informed choice. I would hold that sufficient grounds for holding that there was an unequivocal waiver of H the Convention right have not been made out and that, subject to the argument to which I now turn, the appellants must succeed in these appeals.

The consequences

[61] The Solicitor General said that the facts and circumstances did not disclose I any infringement of the appellants right to an independent and impartial

tribunal amounting to an incompatibility with art 6(1) of the Convention. In the absence of such an incompatibility there was no 'act' of the Lord Advocate which he had no power to do in terms of sec 57(2) of the Act. Even if there was such an incompatibility, there was nevertheless no unlawful act. He maintained that sec 57(2) was disapplied by sec 57(3) in this case, as he was giving effect to the primary legislation under which the temporary sheriffs had been appointed and were authorised to sit in the sheriff court.

[62] The essential point on which he based his main argument was that the question as to whether the Lord Advocate's act was unlawful had to be tested at the date when the challenge was made. This had to be done in the light of all the facts and circumstances which were known to exist at that time. All there was in this case was a perception that the temporary sheriffs lacked independence. But the reality was that they did not lack independence in fact. Their judgment was unaffected, and there were no grounds for saying that the verdicts of guilty were unsafe or the sentences imposed were excessive. The appellants were unable to show that they would derive any real benefit from being retried or sentenced again. He invited us to hold that the decisive factor in these cases was not that the right to an independent and impartial judge had been waived because no plea in bar of trial had been taken at the outset, but that the use of temporary sheriffs in these cases made no difference in fact to the result.

[63] In my opinion this argument overlooks the fundamental importance of the Convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality: *McGonnell v United Kingdom* at p 306, para 48 quoting *Findlay v United Kingdom* pp 245, para 73. As Lord Clarke said in *Rimmer v HM Advocate*, the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings.

[64] There is ample authority in our domestic law to support these propositions. In *Bradford v McLeod*, the convictions and sentences were suspended on the ground of a suspicion that the sheriff was biased even although, as the Lord Justice-Clerk (Ross) said at p 248F, there was no reason to think that the complainers did not in fact receive fair trials. Lord Dunpark said at p 249A that the question was not whether the complainers received fair trials but whether what the sheriff said was enough to create a suspicion that he might not be impartial. The same result followed in *Doherty v McGlennan*, where there was a suspicion about the sheriff's impartiality. These decisions were based on the rule which Eve J described in *Law v Chartered Institute of Patent Agents*, at p 289 that, if circumstances exist which give rise to a suspicion about the judge's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists. It is also worth noting that the same rule was applied in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)*

where, as Lord Browne-Wilkinson made clear at pp 129E–F and 135H, the result was in no way dependent on the judge personally holding any view or having any objective regarding the question whether Senator Pinochet should be extradited. The fairness of the proceedings was not in question, but that was not the issue which the House had to decide.

[65] The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice: see *Dimes v Proprietors of Grand Junction Canal*; *R v Gough* at p 661 per Lord Goff of Chieveley. It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand. The Solicitor General's submission that the matter, if raised after the event, should be considered in the light of all the facts bearing on the question whether there was a fair trial is contradicted by this line of authority.

[66] There is no reason to believe that the position is any different in the jurisprudence of the Strasbourg Court. The Solicitor General said that he had not found any case where that court, having held that a tribunal was not an independent and impartial tribunal within the meaning of art 6(1) of the Convention and that there had been no waiver of that Convention right, nevertheless held that there had in the event been no breach of art 6(1). In *McGonnell v United Kingdom* the court said at p 308 in para 57 that the applicant had legitimate grounds for fearing that the Bailiff had been influenced by his prior participation in the adoption of the development plan which was in issue in the case, and that the doubt which this raised, however slight its justification, was sufficient in itself to vitiate the impartiality of the Royal Court. It is plain from this decision that there is no room for the argument that the question whether there was a breach of this Convention right can be tested after the event by asking whether the proceedings overall were fair.

[67] The decision in *Starrs v Ruxton* leads therefore to this result. Temporary sheriffs, viewed objectively, lacked the quality of independence and impartiality to which all accused persons are entitled under art 6(1) of the Convention. This lack of independence and impartiality, however slight, was sufficient to disqualify temporary sheriffs from taking any part in the determination of criminal charges at the instance of prosecutors acting under the authority of the Lord Advocate. It also made it unlawful for prosecutors to conduct proceedings in the sheriff court under the authority of the Lord Advocate with a view to the determination of criminal charges by temporary sheriffs in that court. The Lord Advocate had no power to conduct those proceedings before them in that court, as this was incompatible with the accused's Convention right: sec 57(2) of the 1998 Act. The proceedings were thus vitiated from the moment when they were brought before the temporary sheriffs for their determination. The Convention right and the statutory fetter which the 1998 Act has imposed on the powers of the Lord Advocate thus march hand in hand. Under the devolved system the disqualification of a tribunal whose objective independence or impartiality is vitiated gives rise, at once and at the same time, to a lack of competence on the part of the Lord Advocate.

[68] As for the argument that sec 57(2) was disapplied in regard to proceedings before temporary sheriffs by sec 57(3), I think that this question is sufficiently closely linked to the question whether the Lord Advocate's exercise of his functions as prosecutor was incompatible with the appellants' Convention rights to come within the scope of the devolution issue. But I do not think that there is anything in the argument.

[69] In *Starrs v Ruxton* the High Court rejected a submission which was made under reference to sec 6(2)(a) of the Human Rights Act 1998 that the Lord Advocate could not have acted differently: see the Lord Justice-Clerk at p 231B–C; Lord Reed at p 256A. The Solicitor sought this case to rely instead on sec 6(2)(b), but in my opinion this submission too is unsound. The Lord Advocate was not giving effect to sec 11 of the Sheriff Courts (Scotland) Act 1971 within the meaning of sec 6(2)(b) of the Human Rights Act 1998 when these proceedings were being conducted before the temporary sheriffs by the procurator fiscal acting on his authority. Section 11 of the 1971 Act dealt with the appointment of temporary sheriffs. It did not define the circumstances in which they were to be used. Their appointment was not in itself incompatible with any of the Convention rights. Everything depended upon the use that was made of them as to whether there was an incompatibility. But no rules for their use were laid down by the statute, so it cannot be said that there was anything in sec 11 to which effect was being given by the prosecutor.

Conclusion

[70] For these reasons, and those given by my noble and learned friend Lord Bingham of Cornhill with which I agree, I would allow these appeals. I would leave it to the High Court to make such orders as fall to be made in consequence of this judgment in order to dispose of the various bills of advocation and suspension which the appellants presented to that court: see r 40.11 of the Act of Adjournal (Criminal Procedure Rules) 1996.

LORD CLYDE — [71] On 20 May 1999 the holder of the office of Lord Advocate in Scotland became a member of the new Scottish Executive by virtue of the arrangements for devolution introduced by the Scotland Act 1998. On 11 November 1999 judgment was given by the High Court of Justiciary in *Starrs v Ruxton*. In that case it was held that the continuation of a trial which was in course before a temporary sheriff constituted a violation of the right of the accused under art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to a trial before an 'independent and impartial tribunal'. Section 11 of the Sheriff Courts (Scotland) Act 1971 empowers the Secretary of State to appoint a temporary sheriff to act in a sheriffdom in certain circumstances. While the appointments were made by the Secretary of State, the Lord Advocate had in recent years come to play an important part in the finding of candidates for the office, in considering applications, in consulting and obtaining opinions on the suitability of candidates, and eventually forwarding a finalised list to the Scottish Courts Administration for the appointments to be made. Appointments were in practice made for a period of one year only and the Lord Advocate also played a significant part in the re-appointments of current temporary sheriffs. By sec 11(4) of the 1971 Act the office of temporary sheriff was open to recall. That factor together with the one

year limit were the two critical considerations which led the court in *Starrs* to hold that the temporary sheriff in that case did not possess and did not appear to possess the independence required by art 6(1). The lack of a security of tenure of the office was seen to be fatal to his independence.

[72] The appellants in three of the four appeals before us have been convicted and sentenced by temporary sheriffs during the period between 20 May 1999 and 11 November 1999. In the fourth case (Stewart) the proceedings began and the conviction occurred before 20 May 1999 but the proceedings continued after that date and the sentence was imposed on 28 June 1999. In one case (Millar) the proceedings were on indictment, while the other three cases were summary proceedings. In Payne the accused pled guilty and was subsequently sentenced. In Tracey the accused was found guilty after trial and subsequently sentenced. The four cases represent different situations but all give rise to the same problem. Following on the ruling in *Starrs* the appellants sought to have the effect of that decision applied to their own cases. They raised their appeals by way of Bills of Suspension, or in the case of Millar a Bill of Advocation. The High Court of Justiciary refused the Bills, principally on grounds of waiver.

[73] It was common ground between the parties before us that the appeals raised a 'devolution issue' within the meaning of para 1(d) of pt I of sched 6 to the Scotland Act 1998. It is accepted that although it was the procurator fiscal who was purportedly exercising the function it was still to be treated as an exercise by the Lord Advocate. There was some discussion about the precise identity of the function in issue. 'Functions' is defined in sec 126(1) as including powers and duties. In sec 57(2) it is provided that a member of the Scottish Executive has no power to do any act so far as it is incompatible with any of the Convention rights. But it was not suggested that there was any distinction to be made for the purpose of these provisions between the purported exercise of a function by the Lord Advocate and an act by him.

[74] For present purposes it is useful to identify what was the purported function or the act. The suggestion was made that it might be the calling of the case before the temporary sheriff, but even although the prosecutor may take an initiative in that matter, that approach seems to me to be too narrow. In my view in the circumstances of the present appeals this is not a matter to be analysed into a detailed study of every step which he took. The function which he was purporting to exercise in each case was that of conducting a prosecution. That was the act which he was doing on every occasion when the case came before the temporary sheriff. The question then is whether in conducting and continuing to conduct these cases before a temporary sheriff, his acts were incompatible with the appellants' Convention rights.

[75] It was not submitted that the decision in *Starrs* was wrong. We were not invited to overrule it. The Solicitor General sought to distinguish it on the basis that the challenge was raised in *Starrs* while the proceedings were still current, while in the present cases the point has been raised by way of appeal some time after the dates of the conclusion of the cases. This difference enabled him to argue that in the present cases the whole circumstances could be viewed in the round in a way which was not possible and was not attempted in *Starrs*, and in a way which would accord with the global approach generally taken by the European Court of Human Rights. But while it is possible in that way to view the present cases in light of the whole course which they have taken, one is still faced with the decision in *Starrs* that a temporary sheriff is not an independent

tribunal. What the Solicitor General sought to do was to argue that on the global view available in the present cases it can be held that the appellants have in the totality of the circumstances, and notwithstanding the lack of independence of the tribunal, nevertheless had a fair trial.

[76] This was a somewhat different argument from the one which was advanced before the High Court and accepted by them. No longer was the Solicitor General basing his case on waiver. He accepted that the focus of the argument had changed. The appellants had put at the forefront of their case a submission that the acts of the procurator fiscal were in light of sec 57(2) *ultra vires* and accordingly that they were null and void. It was in response to this argument that the Solicitor General submitted that on a global view of the whole facts and circumstances in each of the four cases it could still be held that they had each enjoyed a fair trial and that there was nothing in the acting of the procurator fiscal which ran counter to art 6(1). Thus as the case developed before us it became evident that the battle was now joined on a quite different field than that on which the parties had been engaged before.

[77] Before leaving the former scene of combat I should say that I find it difficult to accept the argument on waiver on which the High Court proceeded. There is a question, to which I shall return later, whether in the context of criminal proceedings the right to an independent and impartial tribunal can always be waived, but, even assuming that it can be, I have not been persuaded that a case of waiver has been established in the present cases. No doubt the accused, or at least their legal advisers, will have known of the opportunity afforded by the Scotland Act to challenge acts by the Lord Advocate which were incompatible with a Convention right. No doubt they will have been aware that under the Convention their clients were entitled to trial before an independent and impartial tribunal. They may well have known that the sheriff before whom the case was being conducted was a temporary sheriff. But it has not been shown that they knew of the lack of security of tenure of the temporary sheriffs in general nor of the involvement of the Lord Advocate in their appointment. The way in which they were appointed and used, at least since May 1997, was, as the Lord Justice-Clerk (Cullen) observed in *Starrs* (p 215), not a matter of general public knowledge. Without knowing the factual background to the appointment of temporary sheriffs and the close participation of the Lord Advocate in that process it would not be possible to make any waiver of the objection to the case proceeding before such a tribunal. Waiver must essentially depend upon a knowledge of the relevant facts on which the right to object is based. In the present cases there is no evidence to support the proposition that the accused, or their representatives, knew or even suspected that there might be grounds for objection. Without evidence to demonstrate such knowledge I do not consider that a case of waiver can be established. The Solicitor General made some submissions on the matter of waiver but his principal concern was to treat the possibility of waiver as an ingredient in the global view which he sought to promote and the submissions which he made in regard to waiver were to an extent at least directed to the significance of that possibility in the context of an overall view.

[78] The new approach to the case requires some consideration of art 6(1) and I now turn to that article. It is critical for the respondent's argument that the requirement for an independent and impartial tribunal should be seen as simply an aspect of the governing requirement for fairness, so that it would be possible

A to sustain the validity of a criminal conviction on grounds of fairness even although the tribunal lacked independence and impartiality. The approach which he advocates makes fairness the ultimate test, so that if on a review of the whole circumstances the trial can be found to be fair the lack of an independent and impartial tribunal can be held not to be fatal.

[79] I would accept that on a broad view of art 6 the ultimate essential is that B a fair trial should be secured. In *Delcourt v Belgium* at p 460, para 49 it was recognised that the 'right to a court' is a constituent element of the right to a fair trial. But how the goal of a fair trial is achieved is a matter of the particular circumstances of each case so that general propositions cannot always be usefully or safely prescribed. The hearing to which everyone is entitled in terms of art 6(1) is a hearing which is fair, which is public, which is held within a reasonable C time, and which is held by an independent and impartial tribunal established by law. The concept of fairness may, as was recognised in *Brown v Stott* at p 82 be in itself an absolute, but what is comprised in the concept is a matter of the circumstances of the particular case. In *Brown* the implied right not to incriminate oneself was seen as subsumed under the governing requirement for fairness. But that case was not concerned with the issue of an independent and impartial tribunal. The requirement that the hearing be in public is expressly qualified in D the article itself, so it is not a universal necessity and it can be waived (eg *Zumtobel v Austria* p 133, para 34; *Håkansson and Sturesson v Sweden* p 16; *H v Belgium*). The hearing must be within a reasonable time. But while that may in itself be categorised as an absolute requirement, the application of the concept, like the concept of fairness, is matter of consideration in light of the facts and circumstances of the particular case. No doubt the particular rights set out in E art 6(2) and (3) are all aspects of the general requirement of fairness.

[80] There remains the requirement that the tribunal be independent and impartial and established by law. Freedom from bias may be analysed into distinct considerations of structural independence and objective impartiality, but the two concepts are closely linked and it may be sufficient to speak simply of independence. Judicial independence is of fundamental constitutional F importance. It is an indispensable condition for the preservation of the rule of law. It is a principle which has been stoutly protected by the Scottish judges for centuries (Mitchell, *Constitutional Law*). We are fortunate in this country that for a very considerable length of time this principle has never been lost, although through the annals of history there may have been times when its light burned less brightly. But the complaisance which such a situation can inspire should G never allow it to be forgotten that the principle is not so robust that it can always withstand the pressures which some forms of government may impose upon it. In my view the requirement that a tribunal be independent and impartial is of such fundamental importance that it should not lightly be subordinated to other considerations of fairness.

[81] As matter of generality a lack of independence in the tribunal may not H necessarily be fatal to the validity of a hearing. The recent decision of the House of Lords in *R v Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Ltd* provides one example where in the particular context of town and country planning an overall fairness in the process may be achieved despite a lack of independence in one of the stages. In such cases the global view of the whole proceedings may make it possible to conclude that overall I there was a fair trial. But it is important to notice that the impartiality of the

tribunal in criminal cases is not a matter which can be cured by the existence of a right of appeal to a court which itself satisfies the requirements of art 6(1) (*De Cubber v Belgium*). In *Findlay v United Kingdom* the Court held that the lack of independence of the tribunal in court-martial proceedings was not remedied by the presence of safeguards, which included an oath taken by the court-martial board, and stated at p 246 (para 79): 'Nor could the defects... be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of article 6(1).

It is clear that as matter of generality it is possible to waive a Convention right. It has been repeatedly affirmed that to be effective a waiver must be established in an unequivocal manner and there must be 'minimum guarantees commensurate to its importance' (*Pfeifer and Plankl v Austria*, p 712, para 37). But the critical question here is whether a waiver is possible where the matter is one of a lack of independence and the case is a criminal one. I have not been persuaded from the material put before us that an objection to the lack of independence and impartiality 'such as the one presented by the appellants here' has been recognised by the European Court of Human Rights as one which can be waived. In *Deweer v Belgium*, pp 460–461 (para 49) the Court recognised that waivers could be made in civil matters in the form of arbitration clauses and in criminal cases in the form of fines paid by way of composition. The Court stated that 'The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention'. But that is a very different kind of situation from that which is before us in the present cases. In *Pfeifer and Plankl v Austria* the court held that the decision in question was invalid 'even supposing that the rights in question can be waived by a defendant' p 713 (para 39). In *Bulut v Austria* two opportunities were given to the accused's lawyer to challenge one of the judges on the ground of his previous involvement in the case. On the first occasion the lawyer did not reply to the note asking whether he wished to make a challenge. On the second occasion, at the outset of the trial, the record of the court was to the effect that the parties had waived the right to raise the point. The European Court of Human Rights held that the fear of impartiality lacked objective justification, adding at p 101 (para 34) that in any event: ' it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so.' The court did not decide whether a waiver could be made. Judge Morenilla, at pp 117–118, para 3, in his partly dissenting opinion thought the right to an impartial tribunal was an absolute right which could not be waived and he pointed out that the court had had an opportunity to decide the issue but had not considered it appropriate to do so. I note that in Scotland it has even been doubted whether a declinature by a judge who was a shareholder in one of the parties to a criminal proceeding could be waived by consent of the parties (*Caledonian Railway Co v Ramsay*).

[82] In light of this consideration of the fundamental importance of the right to an independent tribunal in criminal cases I turn to consider the Solicitor General's proposition that if a global view is taken of the whole proceedings in each of these four cases it should be held that in each case there has been a fair trial. The Solicitor General listed several factors which he argued supported the fairness of the proceedings. All the appellants had been found or had pled

A guilty. There was nothing to show that the verdicts were unsafe or that a full-time sheriff would have done anything different from what was done, so that there was no real purpose to be served by requiring the appellants to undergo a second trial. The appellants had not made any challenge to the proceedings until after the proceedings were concluded. No criticism was made that the particular sheriffs in fact lacked independence or impartiality. Nor was it said B that the system by which they had been appointed in fact lacked independence.

[83] But even if one was to adopt the global approach put forward by the Solicitor General and test the matter by the criterion of fairness, it seems to me that there are other considerations to be taken into account. What is required here is a consideration of all the circumstances and the forming of a view in the light of all of them. The decision in *Starrs* was pronounced as one of general C application to temporary sheriffs. The Lord Justice-Clerk stated (p 213): 'The point is of general importance, not only for its potential effect in individual cases but also for any future consideration of the terms of the relevant legislation and any appointments made thereunder.' So one has the situation of the appellants having been tried, convicted and sentenced by a tribunal which was not independent. In the absence of any defence of waiver it seems to me far D from fair to them that they should not have the benefit of a decision which plainly would have been applicable to their cases. The appearance that justice is being done is as important as the actual doing of justice. The independence of the judiciary is not an empty principle which can be forgotten simply because one thinks that a correct conclusion has been reached. Rightly or wrongly there is always room for an uneasy fear that there might have been some improper influence affecting the mind of the judge where he lacks independence. The E principle is far too important to allow it to be passed over in the way which the respondent suggested.

[84] The Solicitor General's final argument was that even if the actings in question were incompatible with art 6(1) nevertheless they should not be held to be outside his powers in terms of sec 57(2) because they fell within the scope of sec 57(3). That section provides that subsec (2) is not to apply to an act of the F Lord Advocate in prosecuting any offence which because of sec 6(2) of the Human Rights Act 1998 is not unlawful under sec 6(1). Section 6(2) excepts the unlawfulness of an act incompatible with the Convention in two circumstances. The first is where because of some provision of primary legislation he could not have acted differently. That does not apply here and it was on the second that the Solicitor General sought to found his argument. It provides: '(b) in the case G of one or more provisions of ... primary legislation which cannot be read or given effect in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions.' The argument then is that sec 11 of the Sheriff Courts (Scotland) Act 1971 is incompatible with the Convention and the procurator fiscal in conducting the prosecution was 'giving effect' to that provision. In my view it is too strained a construction of H sec 57(3) to say that proceeding with a case before a temporary sheriff is giving effect to the power to appoint temporary sheriffs.

[85] It should not need to be said that these cases cast no reflection at all on the character or conduct of the temporary sheriffs engaged on them, nor indeed on any other of the temporary sheriffs. Their personal integrity and independence of mind are not in doubt and it is not suggested that there was any conscious or I unconscious bias or any subjective partiality felt or displayed in their work. But

it is as important that the appearance of justice be safeguarded as well as the actual doing of justice and it is on that account that I am driven to the conclusion that the convictions in these four cases cannot be held to be fair. Now that it has been held that temporary sheriffs lack independence, a decision which has not been questioned in these appeals, and in the absence of an effective plea of waiver, I see no alternative to a finding that the acts of the prosecutors in each of these four cases were unlawful for the same reasons as those which applied in *Starrs*. The principle of independence and impartiality of the tribunal 'particularly in criminal cases' is too precious to be put at any risk. I should be sorry if in a case like the present we were to allow any derogation from that principle, even if the consequences of holding to it involve the invalidation of convictions which from every other angle were safe and unimpeachable.

[86] I would accordingly allow these appeals.

LORD SCOTT OF FOSCOTE — [87] I agree that for the reasons given by my noble and learned friends, Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Clyde, these appeals should be allowed.

THE JUDICIAL COMMITTEE allowed the appeals

Patrick Wheatley — Purdie & Co — Crown Agent

Privy Council

Stubbs *v* The Queen

Davis *v* The Queen

Evans *v* The Queen

[on appeal from the Court of Appeal of the Commonwealth of The Bahamas]

[2018] UKPC 30

2018 July 2;
Oct 18

Baroness Hale of Richmond PSC, Lord Wilson, Lord Sumption, Lord Hughes, Lord Lloyd-Jones JJSC

Bahamas, The — Natural justice — Bias — Appearance of bias — Entitlement to hearing before impartial and independent tribunal — Judge at defendants' earlier aborted trial sitting as member of Court of Appeal in appeal following defendants' retrial before different judge and jury — Whether giving appearance of bias — Whether fair-minded and informed observer would conclude real possibility that tribunal biased — Whether defendants denied fair trial — Whether judge should have recused himself from sitting on defendants' appeal

In 2002 the defendants were convicted of murder and attempted murder but their appeals against conviction were allowed and a retrial was ordered. In 2007 a second trial took place before a different judge and jury in the course of which the judge made certain rulings relating to the admissibility of evidence and dock identification and ruled against a submission of no case to answer. However on the first day of the judge's summing up the trial was aborted. In 2013 a third trial took place before yet another judge and jury and the defendants were convicted and sentenced to life imprisonment. The defendants appealed. When the Court of Appeal convened in 2015 to hear the appeals, one of the three judges who constituted the court was the judge before whom the second trial had taken place. The defendants objected and invited the judge to recuse himself on grounds of apparent bias. The Court of Appeal rejected the defendants' objection, finding that the participation of the same judge in the second trial and in the appeal would not give rise to a reasonable apprehension of bias since, inter alia, the aborted trial had taken place some seven years earlier and the judge would not be sitting alone but in a panel with two other judges. The Court of Appeal heard and dismissed the appeal.

On the defendants' appeal—

Held, advising that the appeals be allowed, that the basic common law principle was that a judge should not sit to hear a case in circumstances where the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased; that the appearance of bias as a result of pre-determination or pre-judgment was a recognised ground for recusal and the appearance of bias included a clear indication of a prematurely closed mind or anything other than an objective view; that, although the fact that a judge had previously made a decision adverse to the interests of a litigant was not, of itself, sufficient to establish the appearance of bias on a later hearing in the same proceedings, different considerations applied when the occasions for further rulings arose in a separate appeal; that on an appeal the judges should consider the issues afresh without any pre-determination or pre-judgment and, since each judge played a full part in the deliberation and resolution of those issues, the mutual influence of each member of the court over the others necessarily meant that if one was affected by apparent bias the whole decision would have to be set aside; that, since (i) as a member of the Court of

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Appeal the judge had been required to address essentially the same issues on which he had given final rulings in the second trial after full oral argument, (ii) the proximity of those issues and the arguments advanced by the parties would weigh heavily in the mind of the fair-minded and informed observer, and (iii) the passage of time would do little to diminish the legitimate concern of such an observer in relation to the judge's participation in the appeal because the appeal hearing would inevitably bring back to the judge a full recollection of his part and his rulings in the earlier trial, such an observer would conclude that there was a real possibility that the judge had pre-judged the issues which fell for consideration in the Court of Appeal and that the defendants therefore did not have the appearance of a fresh tribunal of three judges to consider their appeals; and that, accordingly, the decision of the Court of Appeal should be quashed and the case remitted to it for rehearing (post, paras 13, 15, 23–30, 32–35).

Dictum of Longmore LJ in *Otkritie International Investment Management Ltd v Urumov* [2015] CP Rep 6, para 1, CA applied.

Per curiam. A judge should not recuse himself unless there is a sound reason for doing so, lest unmeritorious applications for recusal become the norm and result in damage to the administration of justice. In particular, it is necessary to stand firm against illegitimate attempts to influence which judge shall sit in a particular case (post, para 34).

Decision of the Court of Appeal of the Commonwealth of The Bahamas reversed.

The following cases are referred to in the judgment of the Board:

Amjad v Steadman-Byrne (Practice Note) [2007] EWCA Civ 625; [2007] 1 WLR 2484, CA

Hauschildt v Denmark CE:ECHR:1989:0524JUD001048683; 12 EHRR 266

Hong Kong Special Administrative Region v Hossain [2016] HKCFA 86; 19 HKCFAR 679

K (Return Order: Failure to Comply: Committal: Appeal), In re [2014] EWCA Civ 905; [2015] 1 FLR 927, CA

Livesey v New South Wales Bar Association (1983) 151 CLR 288

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA

Medicaments and Related Classes of Goods, In re (No 2) [2001] 1 WLR 700; [2001] ICR 564, CA

Millar v Dickson [2001] UKPC D4; [2002] 1 WLR 1615; [2002] 3 All ER 1041; 2002 SC (PC) 30, PC

Mitchell v Georges (sole commissioner of the Ottley Hall Commission of Inquiry) (No 2) (2012) 82 WIR 308; [2014] UKPC 43; 87 WIR 318, PC

Otkritie International Investment Management Ltd v Urumov [2014] EWCA Civ 1315; [2015] CP Rep 6, CA

Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465, HL(E)

Q (Children) (Fact-finding Hearing: Apparent Judicial Bias), In re [2014] EWCA Civ 918; [2014] 3 FCR 517, CA

Sengupta v General Medical Council [2002] EWCA Civ 1104; The Times, 19 August 2002, CA

Zuma's Choice Pet Products Ltd v Azumi Ltd [2017] EWCA Civ 2133, CA

No additional cases were cited in argument.

APPEALS from the Court of Appeal of the Commonwealth of The Bahamas

An earlier trial before Isaacs J in 2007 having been aborted, on 25 July 2013 before Jones J and a jury each of the defendants, Stephen Stubbs, Andrew Davis and Clinton Evans, was convicted on one count of murder and one count of attempted murder, and sentenced to life imprisonment for

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the murder and ten years' imprisonment for the attempted murder, to run concurrently. The third defendant was additionally convicted on two further counts charging firearms offences for which he was sentenced to three years' imprisonment, to run concurrently with the other sentences.

The defendants appealed against conviction and sentence. On 8 July 2016 the Court of Appeal of the Commonwealth of The Bahamas (Conteh, Isaacs and Crane-Scott JJA) dismissed the appeals, although Crane-Scott JA dissented in respect of the appeal against conviction of the third defendant.

Pursuant to leave granted on 19 July 2017 the defendants appealed to the Judicial Committee of the Privy Council against conviction and sentence. The issue on the appeal was whether the involvement of Isaacs J at the earlier aborted trial of the defendants in 2007 should have required him to recuse himself from hearing the defendants' appeals in 2015 as a member of the Court of Appeal, on the grounds of apparent bias.

The facts are stated in the judgment of the Board.

Edward Fitzgerald QC (instructed by *Simons Muirhead & Burton llp*) for the first defendant.

Isaacs JA should not have sat on the defendants' appeal. He should have disqualified himself as requested by the defendants, because he had presided over an earlier trial and made adverse rulings on some of the very issues raised in the defendants' appeal. In those circumstances the fact that the earlier trial was aborted was irrelevant since Isaacs JA had given conclusive rulings of his own involving issues both of law and of fact. A judge must bring an open mind to the determination of issues of law and of fact. Although Isaacs JA would sit with two other justices of appeal that did not cure the taint of bias since he himself would inevitably play his own important role in the appeal. The passage of time was not really a mitigating factor in a notorious and memorable case such as the defendants'.

Isaacs JA referred to the wrong test when he said that the defendants must show a "reasonable apprehension of bias" or that the allegation of bias must be "based on reasonable grounds". As a result he focussed on proof of actual bias rather than the appearance of bias to a fair-minded observer. A sub-category of "bias" is that there is a risk of pre-judgment. The test is whether a reasonable and well-informed observer, having considered the facts, would conclude that there was a real possibility that the judge had pre-judged the case: see *Porter v Magill* [2002] 2 AC 357, para 103. This was a highly publicised trial and Isaacs JA was to determine the same issues he had heard before.

A judge's conduct at an earlier stage of proceedings can create an appearance of pre-determination. The question is whether the issues to be determined at the substantive hearing are identical or very similar to those which have already been determined at an earlier stage. The principle is that, where a judge or tribunal has already reached a conclusive adverse finding on the very issues which fall to be determined on an appeal, that will cause a fair-minded observer to apprehend a real possibility of bias by way of pre-determination. The specific danger of creating an appearance of bias by way of pre-determination of the issues to be resolved at a forthcoming substantive hearing is a recognised ground for recusal. [Reference was made to *Amjad v Steadman-Byrne (Practice Note)* [2007] 1 WLR 2484; *In re K (Return Order: Failure to Comply: Committal Appeal)* [2015] 1 FLR 927;

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A *In re Q (Children) (Fact-finding Hearing: Apparent Judicial Bias)* [2014] 3 FCR 517; *Otkritie International Investment Management Ltd v Urumov* [2015] CP Rep 6; *Hauschildt v Denmark* (1989) 12 EHRR 266 and *Mitchell v Georges (No 2)* (2015) 87 WIR 318.]

It is both a rule of law and policy that a judge should not sit in an appellate capacity to determine the correctness of his own rulings at a trial at first instance. That is reflected in section 56(2) of the Senior Courts Act 1981 of the United Kingdom Parliament. One reason for that statutory rule is the inherent risk that a judge who has reached an earlier decision on a matter may be, or may be perceived to be, entrenched or defensive, whether consciously or subconsciously, about his earlier ruling because he has already formed and pronounced a considered view on the issues at stake.

That same risk is present in the case of an appeal court judge like Isaacs JA, who has made rulings in the same matter on the same issues at an earlier trial, and come to the same conclusions as the trial judge whose decisions he must now review on appeal. That is particularly so when those rulings are a matter of judicial discretion, as was the case with the trial judge's decision at the third trial not to exclude the prior oral testimony of a witness.

Isaacs JA had made earlier rulings in the second trial on questions of mixed fact and law. None of those earlier rulings had been corrected by a higher tribunal. There was no new evidence and there were no new arguments. It is a cardinal principle that an appellant should have his matter determined free of preconception or pre-judgment. The specific question of pre-judgment was not addressed by Isaacs JA; instead he focussed on a presumption against recusal and placed the burden on the defendant to show that an apprehension of bias was reasonable by reference to actual bias.

The general principle is that if there is any doubt about an apprehension of bias, that doubt must be resolved in favour of the applicant: see *Otkritie International Investment Management Ltd v Urumov* [2015] CP Rep 6.

The Court of Appeal's decision must necessarily be regarded as tainted by apparent bias by reason of Isaacs JA's participation and its judgment cannot be permitted to stand.

As to the trial, the deposition and transcript of evidence of a witness were wrongly admitted, an impermissible dock identification was made and inadequate directions were given to the jury in relation to that identification and on the failure to hold an identification parade. The first defendant's conviction was therefore unsafe and a serious miscarriage of justice has occurred.

Richard Thomas (instucted by *Simons Muirhead & Burton llp*) for the second defendant.

The submissions of the first defendant on bias and the recusal of Isaacs JA at the hearing of the appeal are adopted.

Identification was the sole and decisive issue in the case against the second defendant. The identification evidence against the second defendant came predominantly from witnesses who could not be challenged at trial either because they were not present or because their identities are unknown since it was hearsay evidence of what others in the crowd said. The evidence used should not have been admitted against the second defendant since it had no probative value and was hugely prejudicial, particularly when no directions were given to the jury as to how to treat that anonymous hearsay evidence.

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Ben Cooper and *Amanda Clift-Matthews* (instructed by *Simons Muirhead & Burton llp*) for the third defendant. A

The submissions of the first defendant on bias and the recusal of Isaacs JA at the hearing of the appeal are adopted. That ground carries particular resonance for the third defendant given the powerful dissenting judgment in his favour. His appeal would have been allowed if only one more judge of the Court of Appeal had agreed with the careful dissenting judgment.

The conviction of the third defendant is unsafe and a real miscarriage of justice has occurred due to the a series of serious factual mistakes and misdirections of law in the course of the trial judge's directions to the jury, particularly on the identification evidence. B

Peter Knox QC and *Tom Poole* (instructed by *Charles Russell Speechlys llp*) for the Crown.

Apparent bias refers to the situation where circumstances exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased. The court must ascertain all the circumstances which have a bearing on the suggestion that the judge was biased and then ask whether it would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the tribunal was biased: *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700. C D

The fair-minded observer is not unduly sensitive or suspicious. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour, and their ability to carry out that oath of office by reason of their training and experience: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

There are two types of putative bias. The first is where on the facts the judge is subject to extraneous influences such as financial interest in the outcome of the case or personal connection with one of the parties. In those situations as a general rule there is no need to show actual bias and the judge must stand down. E

The second category is where, absent extraneous influence, there is an apprehension that the judge will approach the case with a closed mind. In that situation there is no brightline rule, like the presence or absence of financial interest, which will tell the judge whether he must stand down. Such an apprehension of a closed mind will only arise where it is said that the judge has pre-judged the issue and in consequence it is reasonably feared that he cannot or will not revisit the issue with an open mind. This appeal falls into the second category and the question is whether, having considered the facts, the fair-minded and informed observer would conclude that there was a real possibility of bias. The issue was whether Isaacs JA would not approach his task as a judge hearing the appeal with an open mind. F G

Recusal is only necessary where a judge considers that he genuinely cannot give one or other party an impartial hearing or a fair-minded and informed observer would conclude that there was a real possibility that he would not do so. Neither criterion is satisfied in the present case because (i) during the second aborted trial Isaacs JA did not express a final, concluded view on the same issues as arose in the first defendant's appeal; (ii) nothing in Isaacs JA's conduct of the second trial would suggest to the fair-minded observer that he had come to a concluded view, had shown a closed mind or had a particular view of the evidence amounting to H

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A pre-judgment; and (iii) the proximity of the second trial to the appeal would not arouse the suspicion of a fair-minded observer.

The Court of Appeal directed itself correctly as to the law, applied the correct legal test and reached a decision which it was entitled to reach. It identified several factors weighing against a possibility of bias, in particular that seven years had passed since the aborted trial over which Isaacs J had
B presided, and that was sufficient to assuage any apprehension of bias. Seven years was a long time even if, as the first defendant submitted, this was a notorious and memorable case.

In England and Wales section 56(2) of the Senior Courts Act 1981 prohibits a judge from sitting in an appellate capacity to determine the correctness of his own rulings at trial at first instance. There is no Bahaman statute equivalent to section 56(2), nor is there any authority to support the
C argument that under section 56(2) a judge who has presided over an earlier aborted trial should disqualify himself from sitting on an appeal arising out any later trial of the same offence. That is because every application for recusal must be decided on the facts and circumstances of the individual case.

In all the circumstances, Isaacs JA's refusal to recuse himself from sitting
D on the appeal does not cast doubt on the safety of the convictions. If, contrary to that submission, the Board consider that Isaacs JA should have recused himself, the appeal should be remitted to the Court of Appeal for reconsideration before a differently constituted court which does not include Isaacs JA.

In the case of all three defendants the dock identification evidence was not
E wrongly admitted. The identification was not really a dock identification and was not improper. The witness was saying that the defendants were men he already knew. In the case of the second defendant, the judge did not wrongly admit the eye witness evidence that others at the scene of the crime had pointed out the second defendant as one of the shooters. In the case of all three defendants the judge gave proper and adequate directions to the
F jury on the issue of identification.

Fitzgerald QC replied.

Thomas replied.

Cooper replied.

The Board took time for consideration.

G

18 October 2018. **LORD LLOYD-JONES JSC** handed down the following judgment of the Board.

1 These appeals raise the question whether a judge who has presided at an aborted trial by jury ought to have recused himself from sitting on an appeal against conviction by the defendants following their conviction on
H the same charges at a further trial by jury in which he played no part.

2 On 25 July 2013, following a trial before Jones J and a jury, the three appellants, Stephen Stubbs, Andrew Davis and Clinton Evans, were each convicted on one count of the murder of Jimmy Ambrose, a police officer, and on another count of the attempted murder of Marcian Scott. Evans was also

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convicted on two further counts alleging firearms offences. They were each sentenced to life imprisonment for murder and ten years' imprisonment for attempted murder. Evans was also sentenced to three years' imprisonment on each firearms count. All sentences were to run concurrently.

3 This was the third trial of this matter. The first trial took place before Allen J and a jury in 2002. The appellants were convicted but their appeals against conviction were allowed and a retrial ordered. The second trial took place before Isaacs J and a jury in 2007. It was aborted on the first day of the judge's summing up.

4 The charges arose out of a shooting incident which is alleged to have occurred on 29 March 1999 outside the Club Rock nightclub in Bay Street, Nassau. In interview all three appellants admitted their presence in the vicinity of the incident. A central issue was identification. The evidence implicating Stubbs came mainly from Marcian Scott, John Campbell, both eye-witnesses, and from Officers Ryan and Duncombe. The evidence implicating Davis came mainly from Scott and Campbell. The evidence implicating Evans came mainly from Campbell and Officers Burrows and Robinson. Scott made a deposition at the preliminary inquiry and gave oral evidence at the first trial. However, he died on 29 June 2006, between the first and second trials.

5 At the second trial Isaacs J made the following rulings:

(1) He permitted Campbell to make dock identifications of all three appellants.

(2) He ruled that section 168 of the Criminal Procedural Code was constitutional and admitted in evidence Scott's deposition at the preliminary inquiry.

(3) He declined to exercise his discretion under section 178(1) of the Evidence Act to exclude Scott's deposition on grounds of unfairness.

(4) He excluded the transcript of Scott's evidence in the first trial.

(5) He ruled that Stubbs's interview was admissible and declined to edit it to exclude reference to Evans.

(6) He rejected submissions of no case to answer made by all three appellants.

6 At the third trial Jones J made the following rulings:

(1) He permitted Campbell to make dock identifications of Stubbs and Evans notwithstanding objection by their counsel that there had been no pre-trial identification of them.

(2) He ruled that the presumption of constitutionality was not displaced in respect of section 168 of the Criminal Procedure Code.

(3) Following a voir dire in respect of the admissibility of Scott's deposition and the transcript of his evidence at the first trial, he ruled that both were admissible and declined to exercise his discretion under section 178(1) of the Evidence Act to exclude them.

(4) He rejected submissions of no case to answer made on behalf of all three appellants.

7 Following their conviction at the third trial, the appellants appealed against conviction and sentence. For present purposes it is sufficient to record that the grounds of appeal included the following.

(1) The judge erred in failing to exclude evidence of the dock identification of Stubbs and Evans.

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A (2) The judge erred in admitting the deposition and transcript of Scott as this was contrary to article 20(2)(e) of the Constitution.

(3) The judge erred in failing to exclude Scott's evidence on the ground that its prejudicial effect outweighed its probative value.

(4) The judge erred in admitting Stubbs's interview and in failing to edit that interview to exclude reference to Evans.

B (5) The judge erred in rejecting the submissions of no case to answer.

8 When the Court of Appeal convened on 4 May 2015 to hear the appeal, the appellants objected to Isaacs JA's sitting on the appeal because of his rulings in the second trial and invited him to recuse himself on grounds of apparent bias.

9 Following a further hearing on 28 May 2015 the Court of Appeal (Conteh, Adderley and Isaacs JJA) ruled on the application in a reserved C decision dated 4 June 2015. Conteh JA considered the objection unsustainable and lacking in any merit. He emphasised the importance of an independent and impartial court system to the administration of justice and the rule of law. He was, however, satisfied that the reasonable, fair-minded and informed man or woman on Bay Street, viewing the context and circumstances of the present appeal and Isaacs JA's participation in it, would not apprehend any D possible bias in him to warrant his recusal. He gave five reasons for this conclusion. First, Isaacs J had participated in an abortive trial, some seven years earlier. Secondly, he might have made some rulings on the law but there was no record of what those rulings were as the trial had been aborted. The slate had been wiped clean. More importantly, those rulings were not in issue on the present appeal. Furthermore, Isaacs JA would not be sitting alone but in a panel with two other judges. Thirdly, the length of time since the aborted E trial should be sufficient to assuage any apprehension of bias. Fourthly, it could not realistically be said that his involvement in the earlier trial precluded him from approaching the appeal with an open mind. Fifthly, a court should be astute to guard against "judge-shopping" which can be a blight on the proper and due administration of justice.

10 In a separate judgment, Isaacs JA considered that the general rule is F that a judge should not recuse himself unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair-minded and informed observer would conclude that there was a real possibility that he would not do so. However, he referred to the length of time which had passed since the second trial and he observed that the court should not acquiesce too readily in applications for recusal because of the unnecessary G delays this would cause in the administration of justice. In his view, his participation in the appeal would not give rise to a reasonable apprehension of bias.

11 The Court of Appeal (Conteh, Isaacs and Crane-Scott JJA) heard the appeal over five days in September 2015 and on 8 July 2016 dismissed the appeals. Crane-Scott JA dissented in respect of Evans's appeal against conviction.

H 12 On 19 July 2017 the appellants were given leave to appeal against conviction and sentence to the Judicial Committee of the Privy Council on specific grounds. At the hearing on 2 July 2018 the Board heard the parties on the issue of apparent bias which was common to all three appeals against conviction.

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Apparent bias

13 Article 20 of The Bahamas Constitution provides:

> "If any person is charged with a criminal offence . . . the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The appellants found their case on apparent bias. They rely on a basic principle of the common law that a judge should not sit to hear a case in circumstances where "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased", a principle which is also in harmony with the jurisprudence of the European Court of Human Rights affirming the right to an independent and impartial tribunal under article 6 of the European Convention of Human Rights: *Porter v Magill* [2002] 2 AC 357, para 103, per Lord Hope of Craighead. It is obvious that that principle would be violated if a judge were to sit in an appellate capacity to determine the correctness of his own earlier decisions or on an appeal against a conviction in a trial by jury in which he had presided. In England and Wales this principle is given statutory form in the context of criminal appeals. Section 56(2) of the Senior Courts Act 1981 provides that:

> "No judge shall sit as a member of the criminal division of the Court of Appeal on the hearing of, or shall determine any application in proceedings incidental or preliminary to, an appeal against . . . a conviction before himself or a court of which he was a member; or . . . a sentence passed by himself or such a court."

Although there is no express statutory equivalent in The Bahamas, it is likely that effect would be given to this rule by section 9 of The Bahamas Court of Appeal Act under which, in the absence of specific local provision, the practice of the English court will be followed.

14 In the present appeals, however, the issue does not arise in this stark form. The question for consideration is, rather, whether the involvement of the judge in an earlier stage of the proceedings should require him to recuse himself. Here, this issue appears in a novel form. Counsel were unable to refer us to any reported authority in any jurisdiction in which it had been argued that a judge who had presided at an earlier trial by jury which had been aborted should not sit on an appeal against a subsequent conviction of a defendant on the same charges in a later trial in which the judge played no part.

15 The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. "The appearance of bias includes a clear indication of a prematurely closed mind": *Amjad v Steadman-Byrne (Practice Note)* [2007] 1 WLR 2484, para 16, per Sedley LJ. The matter was expressed by Longmore LJ in *Otkritie International Investment Management Ltd v Urumov* [2015] CP Rep 6, para 1, in the following terms:

> "The concept of bias . . . extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case."

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16 A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case. (See generally, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para 25, per Lord Bingham of Cornhill CJ; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 299.) However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced.

17 It is not acceptable for a judge to form, or to give the impression of having formed, a concluded view on an issue prior to hearing full argument by all parties on the point. *In re Q (Children) (Fact-finding Hearing: Apparent Judicial Bias)* [2014] 3 FCR 517 provides a strong example. In care proceedings the judge expressed himself at a case management hearing in terms which made clear that he accepted the account given by the father and rejected the allegations made by the mother, in circumstances where the mother had not yet given evidence. The Court of Appeal allowed an appeal against an order made by the judge in a subsequent fact-finding evaluation. McFarlane LJ observed, at paras 53, 54 and 57, that there is a thin line between case management and premature adjudication. Here however, the judge had strayed beyond the case management role by engaging in an analysis, which, by definition, could only have been one-sided, of the veracity of the evidence and the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process. Further examples are provided by *Amjad v Steadman-Byrne (Practice Note)* [2007] 1 WLR 2484 and *In re K (Return Order: Failure to Comply: Committal: Appeal)* [2015] 1 FLR 927.

18 Similarly, in *Mitchell v Georges (sole commissioner of the Ottley Hall Commission of Inquiry) (No 2)* (2012) 82 WIR 308, para 7 the interim report of a commissioner charged with inquiring into the failure of a development project was "replete . . . with strong and colourful language" and "used the decisive language of a concluded finding". In the opinion of the Judicial Committee of the Privy Council (2014) 87 WIR 318, para 41,

> "the fair-minded observer would conclude that there was a real possibility that the respondent had made up his mind that the appellant

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> was at the heart of the wrongdoing which led to the project and its collapse" A

and would not be willing to change his mind, so that his final report would not be impartial.

19 The degree of proximity between the subject matter of the earlier decision and the later decision can clearly have an important bearing on the appearance of bias. In *Hauschildt v Denmark* (1989) 12 EHRR 266, the B applicant was charged with fraud and tax evasion. As a result of successive decisions, a number of which were taken by Judge Larsen, he was remanded in custody pending his trial. The trial at first instance took place before Judge Larsen and two lay judges and the applicant was convicted. Pending an appeal, he was again remanded in custody, all such decisions with a few exceptions being taken by the same judges who heard the appeal. The C European Court of Human Rights in plenary session observed, at para 50, that the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, could not be held as in itself justifying fears as to his impartiality. However, special circumstances might in a given case warrant a different conclusion. Here the court, at paras 51–53, attached D particular importance to the fact that in nine of the decisions continuing the applicant's detention on remand Judge Larsen had relied specifically on section 762(2) of the Administration of Justice Act. Similarly, the judges who later sat on the appeal had relied specifically on this provision in a number of their decisions remanding him in custody. The Strasbourg court noted that this section requires that the judge be satisfied that there is a particularly confirmed suspicion that the accused has committed the crimes with which he E is charged. The wording had been explained officially as meaning that the judge has to be convinced that there is a very high degree of clarity as to the question of guilt. The Strasbourg court noted that, as a result, the difference between the issue the judge had to settle when applying this section and the issue he had to settle when giving judgment became tenuous. It therefore concluded that the impartiality of the tribunals was capable of appearing to F be open to doubt and that the applicant's fears in this respect could be considered objectively justified. On this basis it held that there had been a violation of article 6.1 of the European Convention on Human Rights.

20 In *Livesey v New South Wales Bar Association* 151 CLR 288 two members of the court hearing professional misconduct proceedings against a barrister had earlier sat in similar proceedings involving the fitness of G another person to be admitted to the Bar. The same factual issue featured large in both sets of proceedings. The High Court of Australia held, at p 300, that the judges should have recused themselves from sitting in the second case because of the appearance of pre-judgment:

> "It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, H special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the

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credit of a witness whose evidence is of significance on such a question of fact. The consideration that the relevant question of fact may be conceded or that the relevant person may not be called as a witness if the particular judge sits would not, of course, avoid the appearance of bias. To the contrary, it would underline the need for the judge to refrain from sitting."

21 On behalf of the respondent Mr Peter Knox QC placed considerable reliance on the decision of the Court of Appeal of England and Wales in *Sengupta v General Medical Council* [2002] EWCA Civ 1104; The Times, 19 August 2002, in which the *Hauschildt* and *Livesey* cases were not followed. Under the then current procedure, applications for permission to appeal to the Court of Appeal were made initially in writing and considered by a single Lord Justice and, if refused, could be renewed at an oral hearing before two Lord Justices. In *Sengupta's* case, Laws LJ had refused an application on paper which was subsequently granted on renewal by two other Lord Justices. At the hearing of the substantive appeal, the appellant submitted that Laws LJ should recuse himself on grounds of pre-judgment. The Court of Appeal unanimously dismissed the appeal. Laws LJ observed, at para 35, that on the paper application he had not had to resolve the case's factual merits, nor had he expressed himself incontinently. All that he had done was to conclude on the material before him that the result arrived at in the court below appeared correct. He had done so, moreover, in the knowledge that, at the option of the applicant, his view could be reconsidered at an oral hearing. Furthermore, with regard to the hearing of the substantive appeal, he noted, at para 38, that the fact that judges change their minds under the influence of oral argument is at the centre of our legal system and knowledge of this should be attributed to the fair-minded and informed observer. In these circumstances he did not consider that there was a reasonable basis for supposing that he may not bring an open mind to bear on the substantive appeal. Keene LJ concluded, at paras 45–47, that the nature of the decision being made by the single Lord Justice on a paper application was sufficiently different from that required on the hearing of the substantive appeal for any allegation of an appearance of bias to be seen as unfounded. When making a decision on the papers whether or not to grant permission to appeal, the single Lord Justice was well aware that, although his decision may prove to be final, there existed the opportunity for the applicant to renew his application orally in open court. It was, therefore, potentially a provisional decision. This, he considered, was borne out by the fact that none of the parties had suggested that the same judge should not hear the oral argument on any renewed application for permission to appeal. This was a recognition that he was to be seen objectively as still having a sufficiently open mind at that stage to be able to act impartially. In addition, the fact that a decision on an initial application was decided on the papers without the benefit of oral argument was a further distinction between that decision and one made on the substantive appeal.

22 *Sengupta's* case was applied in a criminal context by the Court of Final Appeal of the Hong Kong Special Administrative Region in *Hong Kong Special Administrative Region v Hossain* (2016) 19 HKCFAR 679. There Macrae JA had sat as a single Justice of Appeal on an application for leave to appeal against conviction and sentence which he refused. He later sat as one member of a court of three judges which considered the renewed application

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for leave to appeal. The Court of Final Appeal rejected the submission that there was apparent bias on grounds of pre-determination or structural lack of impartiality. Mr Justice Fok PJ, with whom the other members of the court agreed, observed, at para 39, that while it was true that the issue before the single judge was the same issue as that on the renewed application before the full court, namely whether to grant leave to appeal, the issue on the renewed application was a reconsideration of the initial and necessarily provisional refusal of leave by the single judge and could involve additional grounds and, if admissible, new evidence. The single judge was not bound by any views previously expressed and could change his mind as to the outcome. The decision by the Court of Appeal on the rehearing was a fresh and final determination of the leave application. The submission that the participation of the same single judge in the Court of Appeal would give the appearance of a closed mind was rejected, at para 41, on the basis that it ignored the important fact that the consideration by the fair-minded and impartial observer is necessarily informed by objective appreciation of the qualities of a judge and the essential characteristics of the judicial function and process.

Discussion

23 Mr Knox is correct in his submission that the fact that a judge has previously made a decision adverse to the interests of a litigant is not, of itself, sufficient to establish the appearance of bias. As Floyd LJ observed in *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 at [29]–[30], the fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant. However, different considerations apply when the occasions for further rulings do not arise in the same proceedings, but in a separate appeal.

24 In the present case, during the second trial of the appellants Isaacs J had made rulings on issues of mixed questions of fact and law or involving the exercise of judicial discretion. In particular, first he had ruled against a submission of no case to answer. In doing so he had necessarily concluded that there was sufficient evidence on which a reasonable jury properly directed could convict the appellants. Secondly, he had ruled that Scott's deposition should be admitted in evidence. In doing so he held that the statutory provision under which the application was made was not unconstitutional, that Scott's evidence was sufficiently reliable for it to be in the interests of justice to admit it and that, in the exercise of his discretion, it was fair to admit it. Thirdly, in a further exercise of judicial discretion, he permitted dock identifications of all three appellants. These were concluded rulings on intermediate issues of major significance in the proceedings.

25 The Board is conscious that the application for Isaacs JA to recuse himself seems to have arisen unexpectedly, perhaps because those organising the listing had had no reason to be aware of his prior connection with the case. Moreover, the judgment of Conteh JA suggests that it may well not have been clear at the time of the Court of Appeal's ruling upon recusal that the issues on which Isaacs J had had to rule at the second trial were to some extent revisited in the grounds of appeal. But it is now apparent that as a member of the appellate court he was required to address essentially the

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A same issues on which he had ruled at the second trial. So far as concerns the issue whether there was a case which could properly be left to the jury, it is of course the case that the appeal involved an examination of the evidence given at the third trial which would not have been identical to that given at the second trial. Nevertheless, the prosecution evidence is accepted to have been in substance the same at the second and third trials, the issues for
B decision on appeal remained essentially the same as those decided by Isaacs J at the second trial and the submissions advanced by the parties were very similar.

26 In the same way, the decisions at the second and third trials on the admissibility of Mr Scott's evidence were not identical. Isaacs J ruled at the second trial that the deposition of Mr Scott was admissible but not the transcript of his evidence at the first trial in May 2001, whereas in the third
C trial Jones J held both admissible. Furthermore, the Court of Appeal recorded in its judgment of 8 July 2016 that the objections against the admissibility of the deposition and the transcript of Mr Scott's evidence at the first trial "have now in the instant appeals morphed into a constitutional challenge". However, the point made on behalf of Stubbs and Davis at the second trial and on the appeal was essentially the same: that by virtue of
D article 20(2)(e) of the Constitution, a defendant has an entrenched right to cross-examine those persons who come to give evidence against them as the prosecution's witnesses. That submission was rejected by Isaacs J at the second trial and by the Court of Appeal. Moreover, the Court of Appeal in dismissing this ground also found that Jones J was correct to have admitted in evidence both the deposition and the transcript of evidence. As a result, the issues for decision were substantially the same.
E

27 Similarly, the issue of whether a dock identification should have been permitted or should have been refused (given what had occurred at the preliminary inquiry and the first trial), arose both in the second trial and before the Court of Appeal, albeit in the latter case only in the grounds of appeal of Stubbs and Evans.

28 In addition, the admissibility of Stubbs's interview and the issue
F whether it should be edited to exclude reference to Evans arose both in the second trial and before the Court of Appeal.

29 The proximity of these issues and the arguments advanced by the parties would weigh heavily in the mind of the fair-minded and independent observer.

30 Mr Knox submits that the strength of the prosecution case against
G these appellants was such that it is hardly surprising that both Isaacs J and Jones J rejected the submissions of no case to answer and that none of Isaacs J's other rulings involved any conclusive imputation or finding against the appellants. The first part of this submission misses the point that we are here concerned not with the merits of the substantive case for the prosecution but with apparent bias. The appellants were entitled to a hearing before an independent and impartial tribunal and the possibility, even probability, that
H such a tribunal might have come to the same conclusions, if that were the case, is irrelevant: *Millar v Dickson* [2002] 1 WLR 1615, para 16, per Lord Bingham of Cornhill. The second part is also flawed. The rulings made by Isaacs J in the second trial were on intermediate issues but they were not provisional in character nor were they subject to any procedure for review.

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On the contrary they were final rulings made after full oral argument and were subject only to the possibility of an appeal in the event of a conviction. Moreover, they governed the subsequent course of the trial. Accordingly, *Sengupta's* case The Times, 19 August 2002 and *Hong Kong Special Administrative Region v Hossain* 19 HKCFAR 679 are unable to assist the Crown in the circumstances of this case.

31 In the course of his submissions Mr Knox placed great emphasis on the fact that if a retrial had taken place following the discharge of the jury in the second trial, there could have been no objection to Isaacs J sitting as the trial judge at that retrial. This is correct. Indeed, it is often the case that, following an aborted trial, a retrial takes place before the same judge and a different jury. However, this does not assist the respondent. While this process may involve the same judge revisiting the rulings he made at the first trial, this is essentially a repetition of one stage of the judicial process in circumstances where the earlier rulings were rendered of no effect by the aborted trial. There is no prejudice to a defendant in these circumstances. If a previous ruling against the defendant is repeated at the retrial the defendant is in no worse a position and, if there are good grounds, he will be able to appeal the ruling to an independent and impartial appellate tribunal. On the other hand, where, as here, one is concerned with an appeal, very different considerations apply. An appellant is entitled to be heard by an independent and impartial appeal tribunal without any appearance of bias by way of pre-determination or pre-judgment. For the same reason, the common case of a judge who has to make successive rulings in the same proceedings (see para 16 above) is not analogous to the present case. In the former the high desirability of judicial continuity is an important factor, whereas in the present case this consideration is entirely absent.

32 The respondent also relied upon the observation of Lord Bingham CJ in the *Locabail* case [2000] QB 451, para 25 that the greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. A similar point was made by Conteh JA in the Court of Appeal in the present case. He noted that seven years had passed since the aborted trial and stated that "This length of time should be sufficient to assuage any apprehension of bias in the informed and critical but reasonable observer". In the same way Isaacs JA considered the passage of time to be relevant to the objections to his sitting on the appeal. The Board considers, however, that in the context of this case, the passage of time could have done little to diminish the concern which would legitimately be created in the mind of a fair-minded and informed observer in relation to the participation of Isaacs JA in the appeal. This was a notorious and memorable case. Nothing occurred in the interim period to alter the situation. Moreover, even if at the time of the recusal hearing memory was faint or obscure, the appeal hearing would inevitably bring back to the judge a full recollection of his part in the second trial and the rulings he made on that occasion.

33 Finally, contrary to the view of the Court of Appeal, the fact that Isaacs JA was not sitting alone to hear the appeal cannot assist the respondent. The whole point of the appeal was that three judges should consider the issues afresh and without any pre-determination or pre-judgment. If there were valid grounds requiring Isaacs JA to recuse himself, they apply with equal

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force whether he sat alone or in company. Each member of the Court of Appeal will have played a full part in the deliberation and resolution of the issues raised on the appeal. The mutual influence of each member of the court over the others necessarily means that if any of them was affected by apparent bias the whole decision would have to be set aside: *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, para 99, per Lord Phillips of Worth Matravers MR.

34 In the present case the Court of Appeal was clearly concerned that submissions based on apparent bias should not be accepted too readily. It may well be that the members of the court were influenced by their experience of wholly unmeritorious applications for recusal in other cases. In this regard, we note that one ground of appeal advanced by Evans before the Court of Appeal in the present case was that the trial judge should have recused himself "after sharing emails with the Crown with reference to the trial to the exclusion of the appellant and/or his counsel". It appears from the judgment of the Court of Appeal that this refers to no more than one unsolicited email sent by prosecuting counsel to the judge containing a list of authorities he proposed to cite the next day which had not been copied to the other parties, and for which the prosecutor was duly reprimanded when it was brought to the judge's attention. The Board wholeheartedly agrees with the Court of Appeal that a judge should not recuse himself unless there is a sound reason for recusal, lest unmeritorious applications for recusal become the norm and result in damage to the administration of justice. In particular, it is necessary to stand firm against illegitimate attempts to influence which judge shall sit in a particular case. The Board is also conscious that the limited size of the Court of Appeal in some jurisdictions, such as The Bahamas, can make it difficult to avoid accidental listings before judges who have had some prior involvement with parties or with earlier stages in the proceedings. However, for the reasons stated above, the Board is of the clear view that the complaint made by the appellants is well founded. In its view, the decisions of Isaacs J made during the second trial would lead a fair-minded and informed observer to conclude that there was a real possibility that he had pre-judged issues which fell for consideration on the appeal to the Court of Appeal and that the appellants did not have the appearance of a fresh tribunal of three judges to consider their appeals. In reaching this conclusion, the Board has not been influenced by the decision of the High Court of Australia in *Livesey's* case 151 CLR 288 and expresses no view on whether that decision should be followed.

Disposal

35 Having heard argument from all parties on the apparent bias ground, the Board came to the unanimous view that the appeal should be allowed and the decision of the Court of Appeal set aside on that ground. The Board invited further submissions from all parties as to the future conduct of the appeal. Counsel for all three appellants told us, on instructions, that it was the wish of the appellants that the Board should proceed to decide the appeals on the substantive grounds. In doing so, however, they very properly accepted the difficulties the Board might face in following that course. It would, in principle, be open to the Board to exercise the powers of the Court of Appeal of the Commonwealth of The

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Bahamas. The Board is mindful of the extraordinary delays which have occurred in these proceedings, which continue some 19 years after the offences are alleged to have been committed, and of the understandable anxiety of the appellants that they should be brought to a conclusion as soon as possible. However, the Board considers it inappropriate to address the further grounds of appeal in circumstances where the decision of the Court of Appeal dismissing the appeals is of no force or effect. Furthermore, the appellants' counsel were without instructions to waive those grounds of appeal which had been refused leave below. Accordingly, the Board proposes humbly to advise Her Majesty that the appeals should be allowed on this ground, the decision of the Court of Appeal quashed and that the case be remitted to the Court of Appeal for the appeals to be reheard. In order to assist the making of arrangements for that rehearing, at the conclusion of the oral hearing the Board indicated the advice it proposes to tender. Nothing in the Board's conclusions on the present issue involves any assessment, even of a preliminary nature, of whether any of the other grounds of appeal relied upon has substance.

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A House of Lords

Porter *v* Magill

Weeks *v* Magill

[2001] UKHL 67

B

1999	March 22, 23, 24, 25, 26; April 30	Kennedy, Schiemann and Robert Walker LJJ
2001	Nov 5, 6, 7, 8, 12; Dec 13	Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote

C *Local government — Audit — Loss due to "wilful misconduct" — Majority party's policy to sell council properties in marginal wards — Legal advice that policy unlawful — Revised policy adopted by housing committee and endorsed by council — Allegations of breach of statutory obligations and gerrymandering — Auditor certifying substantial loss due to wilful misconduct of responsible persons — Whether policy unlawful — Whether evidence establishing wilful misconduct — Auditor's refusal to discharge himself following objections to* D *conduct of investigation — Whether investigation conducted fairly — Whether real possibility of bias — Local Government Finance Act 1982 (c 32), s 20 — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6(1)*

In the local government elections in May 1986 the Conservative Party retained control of a city council with a much reduced majority. In the belief that home owners were more likely than council tenants to vote Conservative, P and W, the E leader and deputy leader of the council, formulated a policy to sell, pursuant to powers under section 32 of the Housing Act 1985, 250 council properties a year in eight marginal wards. Following legal advice that such targeted sales would be unlawful, the policy was revised to extend designated sales to 500 across the city while maintaining the target of 250 sales in the marginal wards. A report was prepared on three housing options with the revised policy, option 3, enjoying majority party support. The housing committee, of which neither P nor W was a F member, adopted option 3 in July 1987. The council approved the committee's decision later in July. Measures to implement the policy were introduced and the progress of the policy was monitored. Opposition councillors objected that the policy prevented the council from meeting its statutory obligations as a housing authority, and in July 1989 gave notice of objection to the auditor under section 17 of the Local Government Finance Act 1982. The objectors requested that the council's auditor certify a sum due to the council as a result of wilful misconduct under G section 20[1] of the 1982 Act on the ground that all expenditure arising from the policy was unlawful. Having completed his investigation into the statutory objections in January 1994, the auditor announced his provisional findings in a press statement which attracted considerable publicity. He also made such findings available to those he had interviewed, including P and W, and invited submissions. After an audit hearing and further evidence on quantum of damages, in May 1996 the auditor gave a final decision. In reaching his conclusion the auditor found, with regard to P and W, H that the council had adopted a policy with the predominant purpose of achieving electoral advantage for the majority party, that P and W were party to its adoption and implementation in the knowledge that it was unlawful and that the policy so promoted and implemented by them had caused financial loss to the council. In

[1] Local Government Finance Act 1982, s 20: see post, paras 69, 70.

respect of the accounts for 1987–88 to 1994–95 the auditor certified that those responsible for the policy, including P and W, had jointly and severally by their wilful misconduct caused the council to lose approximately £31m. The Divisional Court allowed appeals by the chairman of the housing committee, the director of housing and the managing director of the council but, accepting the auditor's findings in relation to P and W, dismissed their appeals, although the amount of the loss was reduced to £26,462,621. On their further appeal the Court of Appeal, by a majority, held that since they had acted on what they believed to be legal advice they were not guilty of wilful misconduct, that the Divisional Court had acted inconsistently in dismissing their appeals while allowing those of the other appellants and that, since other members of the housing committee had not voted for option 3 for improper reasons, any improper motive or purpose attributable to P and W did not render the committee's decision unlawful and was not causative of the council's loss. The Court of Appeal accordingly allowed their appeals and quashed the auditor's certificates.

On appeal by the auditor and on the questions whether the conduct of his investigation had been fair and P's and W's rights under article 6(1), as scheduled to the Human Rights Act 1998[2], had been infringed—

Held, (1) that a public power given to a local authority might only be exercised for the public purpose for which it had been conferred and those who exercised such a power otherwise misconducted themselves; that where they so acted knowingly or recklessly they were guilty of wilful misconduct and were liable under section 20 of the 1982 Act to make good to the local authority any consequent loss; that, although councillors did not act improperly or unlawfully if, exercising a power on behalf of a council for its proper purpose, they hoped to obtain the electorate's support and strengthen their electoral position and although they might lawfully support party policy so long as they did not abdicate responsibility to exercise personal judgment, powers conferred on a local authority might not lawfully be exercised to promote the electoral advantage of a political party; and that, accordingly, while the council might lawfully dispose of its property in exercise of its powers under section 32 of the 1985 Act it could not do so lawfully to promote the electoral advantage of any party represented on the council (post, paras 19, 21–22, 59–60, 144, 164).

(2) Allowing the appeal, that there were no grounds to doubt the correctness of the findings on which, as primary fact-finders, the auditor and the Divisional Court had based their decisions; that those findings precluded P's and W's claim to reliance on legal advice, in particular, since such advice had not been sought as to the lawfulness of a revised policy in the form of option 3 and since they plainly knew that such a policy was unlawful; that given the strength of the findings against them they suffered no injustice from the Divisional Court's dismissal of their appeals while those of the other appellants had been allowed; that, given P's and W's acceptance that once option 3 had been adopted by the majority party it would be approved by the housing committee, that committee's decision to adopt the policy gave effect to its unlawful purpose, whatever the voting reasons of individual members; further that, if account were taken of those reasons, the resolution was invalid for want of a majority, since the votes of chairman and vice-chairman were tainted by knowledge of the policy's unlawful purpose and other members were not in a position to exercise an independent and informed judgment; and that, accordingly, the chain of causation was unbroken between P's and W's wilful misconduct and the loss caused to the council (post, paras 25–26, 28–29, 31–32, 40, 45–48, 50–60, 131, 144, 148, 155, 163–164).

(3) That, assuming P and W might rely on Convention rights irrespective of the acts in question predating implementation of the 1998 Act, proceedings under section 20 of the 1982 Act were not punitive in character but compensatory and

[2] Human Rights Act 1998, Sch 1, Pt I, art 6(1): "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A regulatory, the measure of compensation being the amount of loss suffered, and there was no provision for a fine or penalty by way of imprisonment; and that, therefore, the proceedings before the auditor were civil, and not in the nature of a criminal charge; that on its proper construction article 6(1) created separate, though closely related rights, which required separate consideration; that, although the auditor's role within the context of the 1982 Act required him to act as investigator, prosecutor and judge, the requirement of the tribunal's independence and impartiality was met B by the right of appeal from his decision provided by section 20(3) by way of a full rehearing by the appellate court; that, since the Divisional Court's conduct of the appeals satisfied the requirement of independence and impartiality, that element of P's and W's rights under article 6(1) were fully protected; that the appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased; that since the auditor had emphasised in his C public statement that his findings were provisional, since a progress statement would have been appropriate in view of the public interest in the matter and having regard to his subsequent conduct, no real possibility of bias was shown; that the right to a determination of a person's civil rights within a reasonable time was, on a proper interpretation of article 6(1), an independent right which was not to be regarded simply as part of an overriding right to a fair trial and did not require the complainant to show himself prejudiced by the delay; that, having regard to the complexity of the case and the volume of evidence before the Divisional Court, to the immense scope of D the auditor's investigations and to his constant activity in the pursuit of information, the proceedings did not exceed the reasonable time requirement in article 6(1); and that, accordingly, P's and W's Convention rights were not infringed and they suffered no unfairness at common law (post, paras 57, 59–60, 82, 85–87, 92–94, 102–103, 105, 106, 108, 109–114, 118, 131, 161).

König v Federal Republic of Germany (1978) 2 EHRR 170, *Findlay v United Kingdom* (1997) 24 EHRR 221 and *Darmalingum v The State* [2000] 1 WLR 2303, E PC applied.

R v Gough [1993] AC 646, HL(E) and *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, CA considered.

(4) That the underlying principle in providing for certification under section 20 of the 1982 Act was to compensate the body which had suffered the loss by such amount as would put it in the position it would have been in but for the relevant wilful misconduct; that since the council's loss was the difference between the full market F value of the properties sold and the discounted prices received no element of double counting in the auditor's calculation had been demonstrated; and that, accordingly, the sum certified by him, as reduced by the Divisional Court, would be restored (post, paras 54–56, 59, 126, 129–130, 131, 160, 163–164).

Decision of the Court of Appeal [2000] 2 WLR 1420 reversed.

The following cases are referred to in the opinions of their Lordships:

G *AP, MP and TP v Switzerland* (1997) 26 EHRR 541
Attorney General v Belfast Corpn (1855) 4 Ir Ch R 119
Attorney General v Wilson (1840) Cr & Ph 1
Ausiello v Italy (1996) 24 EHRR 568
Bell v Director of Public Prosecutions [1985] AC 937; [1985] 3 WLR 73; [1985] 2 All ER 585, PC
Bradford v McLeod 1986 SLT 244
H *Brown v Stott* [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Bryan v United Kingdom (1995) 21 EHRR 342
Crédit Suisse v Allerdale Borough Council [1997] QB 306; [1996] 3 WLR 894; [1996] 4 All ER 129, CA
Crummock (Scotland) Ltd v HM Advocate 2000 SLT 677
DC, HS and AD v United Kingdom [2000] BCC 710

Darmalingum v The State [2000] 1 WLR 2303, PC
De Cubber v Belgium (1984) 7 EHRR 236
Demicoli v Malta (1991) 14 EHRR 47
Deweer v Belgium (1980) 2 EHRR 439
Director of Public Prosecutions v Tokai [1996] AC 856; [1996] 3 WLR 149, PC
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Zumtobel v Austria (1993) 17 EHRR 116

APPEAL from the Divisional Court of the Queen's Bench Division

By a notice of appeal amended in November 1998 the appellant, Dame B Shirley Porter, appealed from the decision of the Divisional Court on 19 December 1997 dismissing her appeal against the certificate of the respondent auditor, John Magill, made under section 20 of the Local Government Finance Act 1982 on 9 May 1996 and giving a certificate that the appellant by wilful misconduct caused a loss to Westminster City Council in the sum of £27,023,376 amended to £26,462,621 on 12 January 1998. C

The grounds of appeal were, inter alia, first in relation to unfairness, that the Divisional Court erred in law and fact or exercised its discretion on an erroneous basis in failing to find that the bias or appearance of a real danger of bias or manifest unfairness of the auditor rendered the procedure grossly defective and so prejudiced the appellant that it would have been appropriate to quash the auditor's decision, alternatively if the Divisional D Court was justified in embarking on a rehearing it erred in law or exercised its discretion on an erroneous basis in failing to provide a full rehearing, that the Divisional Court erred in law in applying the test of whether there was a real danger of bias, the correct test being whether there was an appearance of a real danger of bias, that the Divisional Court erred in its application of article 6 of the Convention for the Protection of Human Rights and E Fundamental Freedoms (1953) (Cmd 8969), in particular in finding that the proceedings were not criminal within article 6, in concluding that there had been no breach of the reasonable time guarantee in article 6 and in rejecting the contention that it was incompatible with article 6 for the auditor to exercise the functions of investigator, expert witness, judge and prosecutor.

In relation to liability, the grounds of appeal were, inter alia, that the Divisional Court erred in law in finding that the decision of the housing F committee of 8 July 1987 was unlawful, that in view of the burden and high standard of proof the Divisional Court erred in finding the appellant guilty of wilful misconduct, that the Divisional Court misunderstood the meaning, effect and purpose of the legal advice given to the appellant and misunderstood the role of political considerations in local government decisions and the appellant's understanding of it, that the Divisional Court G erred in law and fact in finding that the housing committee's resolution of 8 July 1987 was caused by the appellants, and in finding that the policy of building stable communities targeted marginal wards.

In relation to the loss and deficiency, the Divisional Court erred in law and in fact in finding that any loss was caused to the council.

By a notice of appeal the appellant, David Weeks, appealed in substantially the same terms. H

By respondent's notices dated 2 April 1998 in relation to Mr Weeks and 29 July 1998 in relation to Dame Shirley Porter, the auditor contended that the order of the Divisional Court should be affirmed or the certificates varied to £28,142,103 on the grounds, inter alia, (1) that the court erred in holding that it was for the appellants to show merely that the auditor had appeared

to go wrong in any respect and that, if they did, it was then for the auditor to prove misconduct causing loss. The court should have held (i) that it was for the appellants to establish that the auditor had in fact erred in some respect, whether in fact or in law, on grounds specified in the grounds of appeal, (ii) that if the appellants discharged that burden then it was for the auditor to show none the less that his decision to issue the certificate in respect of a particular amount should be upheld or that the certificate should be varied and (iii) that, in doing so, the auditor was entitled to rely on any findings in respect of which the appellants had not shown that the auditor had erred in some respect as specified in the appellants' grounds of appeal; (2) that the court erred in holding that prima facie the auditor went wrong in giving no consideration to the impact on the state of mind of the appellants of Mr England's report of 5 May 1987 of the advice given by Jeremy Sullivan QC; (3) that the court erred in treating the auditor as having prima facie gone wrong in relation to the impact on the appellants of Mr England's report of 5 May 1987 of Mr Sullivan's advice as the court's own specific findings on that impact in relation to the electoral advantage of the Conservative Party were consistent with and supported those of the auditor; (4) that the court erred in treating the impact of that advice on the appellants as sufficient to place on the auditor the onus of proving wilful misconduct causing loss in respect of all matters whether or not the auditor's findings in relation thereto were the subject of any, or any successful, grounds of appeal; (5) that the court erred in law in holding that a person reaching or promoting a decision would only be guilty of wilful misconduct if he knew, or was recklessly indifferent to whether, the decision was unlawful, whereas it was sufficient for him to be guilty of wilful misconduct if he deliberately did, or omitted to do, something knowing such conduct to be wrong or with reckless indifference to whether or not it was wrong; (6) that the court should have found that the decision of the housing committee was unlawful for the reasons given by the auditor; and (7) that the court erred in disallowing an apportioned part of central management and other costs on the ground that they would have been incurred in any event and that only increased marginal costs involved an authority in a loss.

The facts are stated in the judgments of Kennedy and Robert Walker LJJ.

Lord Lester of Herne Hill QC, Jeremy McMullen QC, Stuart Cakebread and *Clare Roberts* for Dame Shirley Porter.

Stuart Cakebread and *Clare Roberts* for David Weeks.

John Howell QC and *Karen McHugh* for the auditor.

Cur adv vult

30 April. The following judgments were handed down.

KENNEDY LJ This judgment is in three sections. The first section is an introduction which comes conveniently at the beginning of this judgment, but which is in fact an introduction provided by the court. A more detailed summary of events covering the years 1986 to 1989 can be found at the start of the judgment of Robert Walker LJ. The second section of this judgment looks at the decision of the Divisional Court (1997) 96 LGR 157 in relation to the issue of liability, and the third section deals with my approach to that issue. My conclusions in relation to that issue make it unnecessary for me to

A deal with the other two issues, namely fairness and quantum, but fairness is dealt with in the judgment of Schiemann LJ, with which I agree, and I also agree with that part of the judgment of Robert Walker LJ which deals with quantum.

I. Introduction

B This is an appeal by Dame Shirley Porter and Mr David Weeks from an order of the Divisional Court (Rose LJ, Latham and Keene JJ) made on 19 December 1997. The Divisional Court had heard appeals under section 20(3) of the Local Government Finance Act 1982 by five individuals (three former members and two former officers of the Westminster City Council) against whom the appointed auditor, Mr John Magill, had issued certificates of loss under section 20(1) of the 1982 Act.

C The Divisional Court allowed the appeals of three of the appellants (Mr Peter Hartley, Mr Graham England and Mr Bill Phillips). It reduced the amount of the loss certified against Dame Shirley and Mr Weeks but dismissed their appeals on liability. They appeal to this court on issues of procedural unfairness, liability and quantum. The auditor by a respondent's notice seeks to reverse the reduction in quantum.

D Elected members and senior officers of local authorities are in the position of trustees for their ratepayers and since the 19th century there have been statutory procedures of audit and surcharge as a sanction against losses to ratepayers caused by unlawful expenditure or wilful misconduct on the part of members or senior officers of local authorities. The provisions in force at the material time (since re-enacted in the Audit Commission Act 1998) were in Part III of the 1982 Act.

E Section 11 of the 1982 Act provided for the establishment of the Audit Commission for Local Authorities in England and Wales. Sections 12 to 16 provided for the Audit Commission to appoint auditors and for the appointed auditors to audit local authorities' accounts in accordance with a code of audit practice prescribed by the Audit Commission, with statutory powers of obtaining documents and information. Section 15(3) was in the

F following terms:

> "The auditor shall consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the body concerned or brought to the attention of the public, and shall consider whether the public interest requires any such matter to be made the subject of an immediate

G report rather than of a report to be made at the conclusion of the audit."

Section 17 provided for accounts to be open for public inspection, and by section 17(3) any local government elector might (on notice under section 17(4)) make an objection as to any matter in respect of which the auditor could take action under section 19 or section 20, or could make a report under section 15(3).

H Section 19(1) (2) and (3) were in the following terms:

> "(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act that any item of account is contrary to law he may apply to the court for a declaration that the item is contrary to law except where it is sanctioned by the Secretary of State.

"(2) On an application under this section the court may make or refuse to make the declaration asked for, and where the court makes that declaration, then, subject to subsection (3) below, it may also—(a) order that any person responsible for incurring or authorising any expenditure declared unlawful shall repay it in whole or in part to the body in question and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to repay it as aforesaid; (b) if any such expenditure exceeds £2,000 and the person responsible for incurring or authorising it is, or was at the time of his conduct in question, a member of a local authority, order him to be disqualified for being a member of a local authority for a specified period; and (c) order rectification of the accounts.

"(3) The court shall not make an order under subsection (2)(a) or (b) above if the court is satisfied that the person responsible for incurring or authorising any such expenditure acted reasonably or in the belief that the expenditure was authorised by law, and in any other case shall have regard to all the circumstances, including that person's means and ability to repay that expenditure or any part of it."

The following subsections contained ancillary provisions, including rights of appeal for objectors under section 17(3). Section 20(1) (2) (3) and (4) were in the following terms:

"(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount.

"(2) Any person who—(a) has made an objection under section 17(3)(a) above and is aggrieved by a decision of an auditor not to certify under this section that a sum or amount is due from another person; or (b) is aggrieved by a decision of an auditor to certify under this section that a sum or amount is due from him, may not later than six weeks after he has been notified of the decision require the auditor to state in writing the reasons for his decision.

"(3) Any such person who is aggrieved by such a decision may appeal against the decision to the court and—(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above.

"(4) If a certificate under this section relates to a loss or deficiency caused by the wilful misconduct of a person who is, or was at the time of

A such misconduct, a member of a local authority and the amount certified to be due from him exceeds £2,000, that person shall be disqualified for being a member of a local authority for the period of five years beginning on the ordinary date on which the period allowed for bringing an appeal against a decision to give the certificate expires or, if such an appeal is brought, the date on which the appeal is finally disposed of or abandoned or fails for non-prosecution."

B

The following subsections contained ancillary provisions. It will be apparent that section 20 is concerned with the most serious breaches of duty (failure to account or wilful misconduct causing loss) and that neither the auditor nor the court has any discretion as to the amount to be certified.

The principal events relevant to this appeal were concerned with housing policies in the City of Westminster between 1986 and 1989. Those events C were examined in great detail in a history of events which formed part of the auditor's report and decisions. There is little or no challenge to the accuracy of that history, so far as primary facts are concerned, although the conclusions drawn are matters of acute controversy.

By way of introduction it is useful to isolate a few landmark dates and events. On 8 May 1986 there were local elections at which the Conservative D group on the Westminster City Council was returned to power, but with a greatly reduced majority. Dame Shirley Porter was leader of the council and Mr Weeks was deputy leader. Mr Hartley became chairman of the housing committee in June 1987 (succeeding Mrs Patricia Kirwan). Mr England was director of housing. Mr Phillips was head of the policy unit until February 1987 and then became managing director (the second most senior officer E serving the council).

In the latter part of 1986 and the early part of 1987 a policy of "building stable communities" ("BSC") was discussed and adopted among the majority party. An important element of that policy was a proposed increase in designated sales, that is sales of council dwellings, when vacant, otherwise than under existing "right to buy" ("RTB") arrangements. On 5 May 1987 Mr Jeremy Sullivan QC gave advice in consultation as to the lawfulness of F the proposed extension of designated sales. Legal advice had already been obtained from the city solicitor and further advice was obtained from counsel later.

On 8 July 1987 the housing committee voted by seven votes to five to adopt a policy (called "option 3" in a written joint report prepared by officers) which is of central importance to this case. The lawfulness of that G decision and the legal advice obtained in relation to it have been the subject of close examination and discussion before the auditor, in the Divisional Court and in this court. The policy greatly expanded the council's programme of designated sales, with an associated programme of capital grants for the purchase of dwellings.

The policy came under fierce and sustained attack from the Labour opposition party on the council. On 18 and 19 July 1989 the attack H culminated with a notice of objection given to the auditor (under section 17 of the 1982 Act) by Councillor Neale Coleman, an opposition member of the housing committee, and 12 other electors, and with the transmission on the BBC Panorama programme of an edition entitled "Lady Porter—the pursuit of power". The auditor undertook a long investigation (the character and

fairness of which have been issues before this court). He conducted a large number of interviews, including interviews with Dame Shirley Porter and Mr Weeks. On 13 January 1994 the auditor issued notices to 10 individuals, together with a note of his provisional findings and views and a large number of supporting documents. The 10 individuals included Dame Shirley Porter, Mr Weeks, Mr Hartley, Mr England and Mr Phillips. The auditor held a press conference on 13 January 1994 which attracted a great deal of publicity at the time, and which has attracted a great deal of criticism subsequently. Indeed the auditor was asked to disqualify himself but in a written decision dated 18 October 1994 he declined to do so (the Audit Commission having already decided not to exercise its power to remove him as auditor).

The auditor was asked to hold an audit hearing (in relation to the council's accounts for 1987–88 to 1994–95) and he did so over 32 days between 19 October 1994 and 7 February 1995. Dame Shirley was legally represented (as were many other interested parties) but she did not give evidence. Expert evidence was given on her behalf on the issue of quantum. Mr Weeks appeared in person and made submissions but did not give evidence. On 9 May 1996 the auditor gave his final written decision in the form of a report under section 15(3) of the 1982 Act (designated as volume 1); decisions and reasons on the section 19 objection, excluding questions of personal liability (volume 2); decisions and reasons on the section 19 and section 20 objections in relation to individual members of the council (volume 3A) and individual officers (volume 3B); and appendices containing the auditor's history of events (volume 4, appendix 1), associated documents (volume 4, appendices 2 to 12), and the auditor's findings on quantum (volume 5, appendix 13 with its 23 annexes).

The auditor issued certificates in the sum of £31·677m each against Dame Shirley Porter, Mr Weeks, Mr Hartley, Mr England, Mr Phillips and Mr Paul Hayler (a housing officer). Their appeals to the Divisional Court (except that of Mr Hayler, which was stayed for health reasons) were heard between 2 October and 4 November 1997, with further oral evidence from numerous witnesses, including Dame Shirley and Mr Weeks. The Divisional Court allowed the appeals of Mr Hartley, Mr England and Mr Phillips but dismissed those of Dame Shirley and Mr Weeks, apart from a reduction in the certificated amount to £26·463m (rounded to the nearest £1,000).

II. Divisional Court re Liability

(A) The case for and against

The Divisional Court summarised the way in which that court saw the central issue in the case in relation to all five appellants before it—namely Dame Shirley Porter, Mr Weeks, Mr Hartley, Mr England and Mr Phillips, 96 LGR 157, 166:

> "The essence of the case against all the appellants is that each, in differing ways, played a role in 1986–1987 in devising and/or implementing a policy targeting designated sales of council properties in marginal wards with a view to increasing the Conservative vote there in the 1990 elections. It is the case for each appellant that whatever role, if any, he or she played in the targeting, which admittedly existed as a political aspiration, no such targeting became council policy, as distinct

A from political aspiration and, or alternatively, there was no wilful misconduct: members relied on legal and other advice from officials; officials did no more than proffer advice."

The Divisional Court set out the case against Dame Shirley whose role and that of Mr Weeks the court regarded as "inextricably intertwined", at p 181:

B "The essence of the case against [Dame Shirley] . . . was that as leader of the majority party she was instrumental in pursuing the political policy of targeting designated sales in the marginal wards, despite the absence of support from council officials or independent consultants and, in the absence of any legitimate local government reasons, for the improper purpose of electoral advantage by seeking to introduce more electors who C might vote Conservative. The essence of her case is that political considerations inevitably play a part in local government, but there is a divide well understood by councillors between party proposals and council policy and there was nothing improper in the council or housing committee implementing a policy founded on party political considerations provided these were not dominant and there were other legitimate reasons for the policy; further, she was entitled to rely on the D advice of leading counsel, based on information provided to him by officials which she believed would include all relevant matters, as a complete answer to an allegation of wilful misconduct."

(B) The auditors' error

The Divisional Court noted, at p 174G, that the auditors' decision lacked E "a sufficient analysis of the possible impact on the state of mind of the appellants, which is crucial in relation to wilful misconduct, of the legal advice received, or reported to have been received, on 5 May 1987". That was a shortcoming which, the Divisional Court found to be "in itself sufficient reason for concluding that prima facie the auditor went wrong".

F *(C) Matters common to all appellants*

The Divisional Court identified three matters which were common to all five appellants before that court.

(1) All were observed to *distance themselves* from responsibility for the designated sales policy targeted in marginal wards which was prima facie improper (see p 175), but the court recognised, at p 177, that such a G distancing did not necessarily indicate any lack of frankness. The crucial events occurred a decade ago, and certainly since the auditor held his press conference in 1994 they had attracted much criticism. In addition, they were of course the very reason why the appellants found themselves surcharged and having to appeal to the Divisional Court. The Divisional Court said, at p 177:

H "In such circumstances it would be unsurprising if any of the appellants, however innocent of wrongdoing, had claimed any close relationship with the genesis and propagation of a policy which it is now common ground was both unlawful unless rescued by proper non-political reasons and might give rise to wilful misconduct unless sanitised by legal advice."

I have reservations about the way in which the Divisional Court expressed itself in relation to the common ground, but the recognition of the huge pressures on all appellants was clearly apposite.

(2) Secondly the Divisional Court noted the legal advice which was available to one or more of the appellants during the period from March to July 1987. It came from Mr Lewis (the deputy city solicitor), Mr Ives (the city solicitor) and counsel instructed by Westminster City Council (Mr Jeremy Sullivan QC and Mr Alan Wilkie). The first relevant piece of advice was that of Mr Lewis on 20 March 1987, when he advised Mrs Kirwan (then chairman of the housing committee) of the possible adverse effect on the homeless of a change in disposal policy, and of the need legally to justify a major change in policy: p 177. In fact the purpose of Mr Lewis's note was to explain the circumstances in which a policy change might be quashed by the court on judicial review, and it emphasised the need for the officer's report leading to a controversial decision to be "comprehensive, giving the pros and cons of possible actions." The effect on the homeless was given as an example of a relevant consideration. As Mr Lewis put it in his note, "there must be sufficient justification for the policy decision in the report, even if some of the factors point to a different decision".

On 24 March 1987 Mr England and Mr Ives responded separately to a series of questions posed by Mr Greenman (Dame Shirley's assistant). In answer to question 4(A) Mr Ives said:

> "The way to avoid successful challenge [by judicial review] is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision-takers have acted irrationally or relied on an irrelevant consideration."

In answer to question 7 he said:

> "It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property."

On 5 May 1987, at short notice, Mr Sullivan was consulted about the policy which at that time was to designate properties in such a way as to yield at least 250 sales in marginal wards in the belief that such changes of tenure would increase the Conservative vote. There is, as the Divisional Court noted, no contemporaneous record or minute of Mr Sullivan's advice, but after the consultation, Mr England prepared a note for Dame Shirley to use in connection with a discussion paper prepared by Mr Hayler (divisional director of housing, private sector) at the chairmen's group meeting to be held that evening. Mr England's note makes some important references to Mr Sullivan's advice as to designated estates, capital grants, and what should go into a joint report to go to the housing committee. For the moment I leave aside capital grants, but as to other matters Mr England's note reads:

A "Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council . . . The target set by housing committee is 'at least 250.' Counsel advises that this cannot be targeted solely in key wards, therefore, the group will need to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to B affordable housing contained in the PA Cambridge study should be included in the report. This report has now been released to the opposition . . ."

It also contains this passage:

"If the group wish to go for a larger global target in order to achieve C 250 in the marginal wards, this will require a decision by the committee. Counsel confirms that the report should be considered at the same meeting."

As the Divisional Court observed, at p 178F, Mr England's note "does not suggest that Mr Sullivan had advised that sales could be targeted in marginal wards for electoral advantage". No doubt, but the clear thrust of his advice, D as recorded, was that if the housing committee was provided with a balanced report, and then decided to adopt a designated sales policy which was city-wide, that decision could not be impugned provided that it was a decision which a reasonable committee could take in the light of the report—even if, when operated even-handedly across the city, it yielded 250 or more designated properties in marginal wards, a yield which for electoral reasons the majority party wanted to achieve.

E On 12 June 1987 Mr Sullivan approved the fourth draft of the joint report which was to go before the housing committee, and on 26 June 1987 Mr England sent Mr Hartley, the new chairman of the housing committee, an analysis of the estates by ward, and "a suggested list of estates which would give approximately the target sales and where sales can be justified in terms of the four indicators included in the committee report". There were F 269 properties in key or marginal wards, and 220 in other areas, a total of 489. Mr Lewis, in his note to Mr Hartley of the same date, said:

"The report on designated sales to the next housing committee invites the committee to select estates for designation. In drawing up its list it is vital that the committee chooses estates on the basis of housing and planning issues. We must be able to defend any challenge to the list by G showing that there is a rationale behind it and that it was neither arbitrary nor drawn up with regard to improper factors. To help the chairman, four criteria are set out in the report. Other factors can be taken on board, including members' own knowledge of the area. You are not limited by the criteria set out. But the list must be capable of surviving challenge in the courts and to do so it must be defensible in housing and H planning terms."

On 3 July 1987 instructions were sent to Mr Sullivan and Mr Wilkie to advise on the homeless persons legislation in the context of the final version of the joint report, and the forthcoming meeting of the housing committee on 8 July. Advice was given at a lunchtime consultation on 6 July.

After the housing committee had met, but just before the meeting of the full council on 29 July, Dame Shirley circulated to all members of the majority party a note prepared by Mr Lewis on 23 July which recorded his recollection of the advice given by Mr Sullivan on 5 May. She commented, "As you can see from the attached note our legal advice is that our policy is 'completely judge proof'."

(3) The third matter effecting all appellants considered by the Divisional Court was the housing committee decision of 8 July. The Divisional Court held, at p 181, that it was "substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful". The policy was proposed by Mr Hartley, and it gave effect to what the Divisional Court described as "this purpose" (i e the wish identified above) "whatever may have been the reasons for the votes of individual members". If the votes of individual members are not critical it must follow that it is necessary to look for the influential wish elsewhere. As the Divisional Court pointed out, a corrupt principal can act through an innocent agent, and the Divisional Court explained its conclusion, at p 181, by saying that option 3, the option for which the housing committee voted, was placed before the committee "in part at least, in order to achieve the improper purpose" of altering the composition of the electorate in marginal wards. In the circumstances that is a conclusion which is directly relevant to the state of mind of each of the appellants with whom we are concerned, and to whom I now turn.

(D) Dame Shirley and Mr Weeks

The Divisional Court said of these two appellants, at p 181, that "Although the evidence given by and about them differed in some respects, their roles in these events were . . . closely and inextricably intertwined." Dame Shirley as the majority party leader was clearly a driving force, and Mr Weeks was her details man, ensuring that the majority party objectives "particularly in targeting designated sales in marginal wards" were fulfilled. As the Divisional Court pointed out, at p 182, there was ample documentary evidence to show that from July 1986 onwards targeting marginal wards "ensuring that the right people live in the right areas" was central to Dame Shirley's political objectives. In January 1987, in the paper produced by Mr Segal at Dame Shirley's request, he spoke of the short-term objective being to target the marginal wards and "redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes". The Divisional Court concluded that the paper was generally endorsed. Between that date and 5 May 1987 document after document shows that Dame Shirley and Mr Weeks were pushing that policy forward, hoping initially that the PA Cambridge Economic Consultants ("PACEC") report would provide a non-partisan explanation for the policy which could then be put to the housing committee. However, that hope was not fulfilled, and it was against that background that Mr Sullivan was consulted on 5 May and gave the advice to which I have already referred.

As to the effect of that advice on Dame Shirley and Mr Weeks the Divisional Court said, at p 179E, that it was "impossible for [her] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible". The Divisional Court also found that on

A the evening of 5 May the chairmen's group meeting, attended by Dame Shirley and Councillor Weeks, agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The drive towards implementation then continued. As I have already mentioned, Mr Sullivan was asked to approve the joint report for the housing committee which was to meet on 8 July and, using the criteria set out in that report, a selection of 489 properties was made city-wide, 269 of them being in marginal wards.

The Divisional Court, at p 184B, rejected as "plainly untrue" the claim of Dame Shirley and Mr Weeks that following counsel's advice on 5 May designation of sales in marginal wards for electoral purposes was abandoned. Throughout June and July steps identified by the Divisional Court were being taking to monitor the effect of the city-wide policy now proposed in relation to marginal wards, and, even after the full council meeting on 29 July, this went on. Later in 1988, as the Divisional Court found, there was "a cover-up" which, the court held, was inconsistent with the belief that what had been done in 1987 was proper.

The Divisional Court found that from March 1987, when she saw the answers given by Mr Ives, Dame Shirley knew that the advantages of selling council properties had to be considered "not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority". She did not understand counsel's advice on 5 May to be any different, and so, the Divisional Court concluded, at p 185A, she cannot have thought that the suggestion of increasing the numbers city-wide came from Mr Sullivan because it "would have left untouched the continuing ulterior motive in relation to marginal wards which Mr Ives had advised against".

By way of summary, the Divisional Court concluded, at p 185, that because Dame Shirley and Mr Weeks knew the targeting policy was unlawful they were content to adopt the suggestion in Mr England's note that it be "dressed up in city-wide clothes". Their purpose throughout was to achieve unlawful electoral advantage. Because they knew that the purpose, which they sought to conceal, was unlawful they were guilty of wilful misconduct.

(E) Mr Hartley

Although the Divisional Court allowed the appeals of Mr Hartley and the two officers, Mr England and Mr Phillips, it is necessary to look at the court's reasons for doing so because it is said on behalf of both appellants before us that at least to a large extent the same reasons applied in their cases and should have led to the same conclusion.

Mr Hartley knew of the designated sales policy long before he took over the chairmanship of the housing committee in June 1987. He knew of Dame Shirley and Mr Weeks's objective to sell properties in marginal wards to boost Conservative votes, but, he claimed, his intention was to sell as many houses as possible. He regarded the policy which he guided through the housing committee on 8 July 1987 as a lawful policy to sell at least 500 homes per annum city-wide, which was not in any way skewed to obtain electoral advantage for the Conservatives. It met his political objective of selling as many council properties as possible, and Dame Shirley's aspirations in the marginal wards. Neither Mr England nor Mr Lewis (as legal adviser to the housing committee) suggested it was unlawful.

Subsequent monitoring he regarded as a legitimate tool to gauge the effect of the policy in wards in which his party had a particular interest.

The Divisional Court was satisfied that Mr Hartley knew that the policy which he had to carry forward would produce 250 sales per annum in marginal wards, which was intended to improve the Conservative vote. But the list of properties presented to Mr Hartley was one which apparently met the legal requirement identified by Mr Lewis. Mr England had not apparently approved or disapproved of the figure of 500 so, the Divisional Court concluded, at p 198:

> ". . . [Councillor Hartley] had no reason to believe that he would be acting contrary to either professional housing or legal advice were he to present, as he did, option 3 as the majority party's preferred option at the housing committee meeting. He was entitled, in our view, to take further comfort from the fact that the joint report had, so far as he was concerned, been approved by counsel."

Both Mr McMullen, for Dame Shirley, and Mr Cakebread, for Mr Weeks, contend that their respective clients were in the same position. The Divisional Court was critical of Mr Hartley, saying, at p 198:

> "He knew that the genesis and development of the policy to extend designated sales lay in the lead members' desire to add to the number of Conservative voters in marginal wards. We have no doubt that he knew that this was an improper purpose. He knew that in supporting the policy he would enable that improper purpose to be achieved. In doing so he was guilty of misconduct in that he was promoting a policy which was infected by that improper purpose."

The court then went on to say, at p 199, that the crucial question in his case was whether he knew or was reckless as to whether the policy was unlawful, given that his own purpose was lawful. The Divisional Court's conclusion was that because he had a proper motive (i e to sell as many houses as possible) he did not appreciate the unlawfulness of his conduct, and genuinely believed that his own proper purpose rendered his actions lawful, so his misconduct was not wilful.

(F) Mr England

The Divisional Court found that from January 1987 onwards, and probably before, the designated sales policy was clearly targeted at marginal wards, and yet Mr England as director of housing assisted the council members to pursue their policy. The PACEC report provided no justification for such a policy, and yet Mr England did not give to council members unequivocal and clear advice that the choice of marginal wards for electoral advantage was improper. He was anxious about the council's ability to discharge its statutory obligations to the homeless, but, the Divisional Court accepted, at p 191H, after seeing Mr Sullivan's advice on 5 May 1987 Mr England "believed that designating city-wide would not be unlawful *merely* because it met [Dame Shirley's] objective of 250 in marginal wards". Before us Mr McMullen and Mr Cakebread asked why their clients could not be credited with the same belief.

After Mr Hartley was appointed chairman of the housing committee, Mr England was told that the chairman's group had decided to go for 500

A sales per annum. The case against Mr England was that thereafter he went along with that proposal, and drew up a list of designated properties distorted in such a way as to provide 250 sales in marginal wards. There was also an allegation as to the way in which the PACEC report was reflected in the joint report to the housing committee which he helped to prepare, but for present purposes that is not so significant. What is significant is that the Divisional Court, at p 193, accepted Mr England's evidence that in his view B the figure of 500 was "just the right side of the line", and the Divisional Court also accepted that in the joint report he "fairly, properly and in clear language set out the consequences of each of the options". The report as a whole was described by the Divisional Court as "a fair and adequately comprehensive representation of the relevant issues" which, in a version "not materially different from that seen by the committee" had been C approved by leading and junior counsel.

Mr England helped to prepare the list which was ultimately chosen by the committee. In essence it was the list which he passed to Mr Hartley on 26 June, and despite its apparent bias the Divisional Court was not satisfied that the lists were manipulated by council officers. There was no evidence before the Divisional Court casting doubt on the propriety of the criteria used to compile the list.

D Having accepted that, after seeing Mr Sullivan on 5 May 1987, Mr England believed that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards, the Divisional Court found it impossible to conclude that anything Mr England did up to and including the date of the housing committee meeting on 8 July amounted to wilful misconduct. He was, the court found, entitled to take E comfort from the fact that Mr Sullivan had, according to Mr Lewis, approved the joint report.

Thereafter there was monitoring, assisting the majority party to ascertain whether the council's policy was yielding the results which the majority party, and the present appellants in particular, hoped that it would yield in the marginal wards. The Divisional Court found, at p 195B, that F Mr England knew that it was inappropriate for him to be involved in that partisan activity, but it also found "no substantial evidence that the monitoring was coupled with a deliberate attempt to increase the level of designated sales actually achieved in the marginal wards", and that, like the findings in relation to the compilation of the list, seems to me to be a significant finding so far as the present appellants are concerned. As the Divisional Court concluded, at p 195D, in relation to Mr England, "if he may G have believed that the majority party's aspirations could be lawfully achieved, the fact that he was involved in monitoring to see whether they had in fact been achieved adds nothing to the case against him".

In the light of those findings in relation to Mr England the argument presented to us by Mr McMullen and Mr Cakebread on behalf of their respective clients is clear and obvious. It can be encapsulated thus: if Mr England, with his extensive knowledge of local government and his full H knowledge of all the relevant facts, was entitled to conclude on 5 May 1987, after seeing Mr Sullivan, that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards, why were two amateur politicians to whom he reported not entitled to reach the same conclusion? And if that was their conclusion, where is the evidence

of wilful misconduct which justified the court in distinguishing between Dame Shirley and Mr Weeks on the one hand and Mr England on the other? A

(G) Mr Phillips

The argument to which I have just referred is clearest when it is advanced by reference to the decision of the Divisional Court in relation to Mr England, but it is also advanced by reference to the decision in relation to Mr Hartley and the decision in relation to Mr Phillips, who joined Westminster City Council in July 1986 as head of the policy unit, and who in February 1997 was appointed managing director. He too was an experienced civil servant. He knew of the targeting of the eight key wards both before and after 8 July 1987, but he did not claim to have been influenced by the legal advice obtained on 5 May. The Divisional Court, at p 201E, regarded it as an important piece of evidence in his favour that after meeting Mr England and Mr Hayler he prepared the "critical path" which required that the draft report to the housing committee be sent to counsel. The Divisional Court regarded that as strongly indicating that at that date Mr Phillips believed that there was a lawful policy which could be taken forward to committee with the approval of counsel. Here again, we are asked to consider wherein lies the difference? If Mr Phillips was able to reach that state of mind on the basis of the information he received from Mr England, why should it be said that the state of mind of Dame Shirley and Mr Weeks, who had the same informant, could not have been identical? Indeed in the case of Mr Phillips, although he did not rely upon Mr Sullivan's advice, the Divisional Court regarded the advice given on 5 May as having affected his mind "and his appreciation of whether what was thereafter proposed was unlawful": p 202. The Divisional Court's conclusion was that his state of mind might have been affected by the fact that Mr England and Mr Lewis, the deputy solicitor, were both prepared to carry forward the policy determined by the chairman's group on 5 May. Somewhat surprisingly, the Divisional Court went on to say of Mr Phillips, at p 202:

B C D E F

> "he knew that what was proposed would give effect to an improper purpose, and he was therefore guilty of misconduct. But he was not advised that it was unlawful and accordingly we are not prepared to conclude that he must have known that what was proposed was unlawful as well as improper."

The critical path which he set out was regarded as a sufficient answer to an allegation of recklessness, and his position after 8 July was regarded as broadly similar to that of Mr England. G

(H) Causation

The Divisional Court accepted that most members of the housing committee were not guilty of misconduct and did not themselves vote for option 3 for improper reasons, but the court found that option 3 was placed before the committee because Dame Shirley and Mr Weeks hoped to increase the Conservative vote in marginal wards by selling each year 250 council properties in those wards. Furthermore, as adoption of option 3 was Conservative policy promulgated by Mr Hartley as chairman of the committee, Dame Shirley and Mr Weeks knew that it would become council H

A policy because in reality the housing committee always did adopt the majority party's policy. So the Divisional Court concluded that the housing committee's decision on 8 July was caused by Dame Shirley and Mr Weeks and thus there was no break in the chain of causation. At the end of July the full council refused to overturn the housing committee's decision, and on that occasion Councillor Weeks voted with the majority, motivated, so the
B Divisional Court held, at p 204A, by "a continuing desire to target marginal wards".

Before us Mr McMullen and Mr Cakebread have submitted that once it was clear that Mr Hartley and the members of the housing committee had before them a full and properly balanced report which pointed out the advantages and disadvantages of each option (including option 1, which was the maintenance of the status quo), and once it was held that "most"
C members of the housing committee were not guilty of misconduct and did not vote for option 3 for improper reasons, it followed that even if Dame Shirley and Mr Weeks were guilty of misconduct their misconduct was not causative of the committee's decision and any resultant loss. Indeed it can only be linked to the decision by reason of the fact that the two appellants were responsible for the matter going before the committee with majority
D party support for option 3, and that, it is contended, is an insufficient link, given the duty of individual councillors on the housing committee to decide matters for themselves on proper grounds, a duty which, according to the Divisional Court, they fulfilled.

III. Liability

1 Auditor's approach to liability contrasted with that of Divisional Court

E Unlike the Divisional Court, the auditor treated the legal advice given by counsel as almost an irrelevance. His conclusion in substance was that the key members of the majority party and the key local government officers at all material times knew that they could not sell council property in marginal wards to secure, or to attempt to secure, an electoral advantage. Any canvassing of that idea amounted to wilful misconduct, and, although legal
F advice was obtained on 5 May 1987 and on various occasions thereafter, the reality was that the members and officers continued as before, pursuing an objective which they knew to be illegal, but masking their activities by purporting to act city-wide and restricting the flow of information wherever possible. The monitoring of sales in marginal wards and the lack of frankness when challenged were regarded by the auditor as indications of
G wilful misconduct, so he concluded that all who were involved should be held liable—not only the present appellants, but also Mr Hartley, Mr England and Mr Phillips. In my judgment, that was a tenable position to adopt, but it was not the position adopted by the Divisional Court.

The Divisional Court found that the legal advice, especially that given by counsel, was critical for some of the appellants before that court, and the court made other findings of fact which seem to me to be of considerable
H importance. I list some of them.

1. After receiving the advice of counsel on 5 May 1987, Mr England "*believed* that designating city-wide *would not be unlawful* merely because it met [Dame Shirley's] objective of 250 in marginal wards": p 191H (emphasis supplied). He was an experienced director of housing, and it was

through him that on that evening Dame Shirley and the chairmen's group learnt what counsel had advised. A

2. The decision was then made to designate *500* properties city-wide. That number of properties was regarded by Mr England as "*just the right side of the line*", having regard to the council's other obligations: p 193B

3. A joint report was then prepared by council officers, including Mr England, which "fairly, properly and in clear language set out the consequences of each of the options" which members of the housing committee were to be invited to consider: p 193B One of the options was option 3, which the court clearly regarded as a genuine option, thus rejecting Mr Howell's submission that it was an option which no rational authority could accept. B

4. The Divisional Court found that, considered as a whole, the joint report was "a fair and adequately comprehensive representation of the relevant issues", which was approved by leading and junior counsel in a version "not materially different from that seen by the committee": p 193D C

5. Dame Shirley and Mr Weeks were aware that counsel had approved the report, and Mr Phillips had, in his "critical path", specified that *counsel approval* be sought—something which the Divisional Court regarded as clearly indicative of his belief that there was a lawful policy which could be taken forward to committee with the approval of counsel: p 201. So two important council officers, who knew of the majority party's aspirations in relation to the marginal wards, nevertheless at the material time believed that the policy being pursued was lawful, and neither counsel nor any officer appears thereafter to have suggested otherwise. D

6. As the Divisional Court noted when dealing with Mr Hartley, neither Mr England nor Mr Lewis (as legal adviser to the housing committee) suggested that the policy was unlawful, and Mr Hartley had "no reason to believe that he would be acting contrary to either professional housing or legal advice were he to present, as he did, option 3 as the majority party's preferred option at the housing committee meeting": p 198A. He too was regarded by the Divisional Court as entitled to take comfort from the fact that the joint report had been approved by counsel. E F

7. The joint report set out criteria for the selection of properties. The criteria were appropriate, and although the application of those criteria resulted in a surprisingly large number of properties being designated in the eight marginal wards, the Divisional Court, having heard evidence from Mr England, held that the auditor was unable to establish to the requisite standard of proof that the criteria or the lists were manipulated by officers for the purpose of securing party political advantage for the majority party. G

8. After 8 July 1987 there was monitoring of sales in marginal wards, but, as the Divisional Court recognised in relation to Mr England, monitoring was equivocal: "if he may have believed that the majority party's aspirations could be lawfully achieved, the fact that he was involved in monitoring to see whether they had in fact been achieved adds nothing to the case against him": p 195D. H

9. There was, as the Divisional Court found, "no substantial evidence that the monitoring was coupled with a deliberate attempt to increase the level of designated sales actually achieved in the marginal wards": p 195B.

A *2 Approach of Court of Appeal*

Mr Howell, for the auditor, whilst for his own purposes reminding us of the weight which this court always gives to findings of fact reached by a court which has seen and heard the relevant witnesses, has nevertheless invited us to reconsider virtually all of the factual conclusions listed above. For obvious reasons he would like to restore the auditor's conclusions, but B there is no appeal against the conclusions of the Divisional Court in relation to Mr Hartley, Mr England and Mr Phillips, and it would be strange indeed if we were to reopen the evaluation of the case against each of them without them even having an opportunity to be heard. In my judgment this case must now proceed upon the basis that the Divisional Court was entitled to make each of the findings which are set out above.

As part of his attempt to put back the clock, Mr Howell also invited us to C reverse the Divisional Court's decision that the auditor failed to make any sufficient analysis of and the possible impact on the state of mind of the appellants of the legal advice received and reported on 5 May 1987 which, as the Divisional Court said, "is crucial in relation to wilful misconduct": p 174G. However, that is no longer a matter of any real significance, because the fact is that the Divisional Court decided to conduct a full hearing. The D hearing involved fresh evidence, as well as looking again at evidence which already existed, and it is against the decisions of the Divisional Court as to the liability of the appellants that this appeal lies. As I understand the position, the auditor does not go so far as to contend that the Divisional Court was not entitled to reach its own conclusions as to liability, so I need say no more about his analysis of the impact of legal advice on the appellants' separate states of mind.

E

3 What is "wilful misconduct?"

Wilful misconduct was defined by Webster J in *Graham v Teesdale* (1981) 81 LGR 117, 123 as "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not". In this case that definition has enjoyed universal support, but there is an issue F as to the extent to which the conduct in question must impact upon the activities of a local authority before it becomes misconduct for the purposes of section 20 of the 1982 Act. Mr Howell submits that a state of mind alone will suffice, so he says:

> "It is misconduct for a member of a local authority to seek to promote a proposal for an authority to do something for a reason which the G authority may not take into account, such as the electoral advantage of his own political party. Such misconduct is wilful if that member knows that the reason is one which the authority may not take into account or is recklessly indifferent to whether or not it may do so."

Mr McMullen adopts a narrower formulation, saying:

> H "For a member to be guilty of wilful misconduct because she has caused or taken part in a decision of the council, it is necessary for that decision to be unlawful, because, for example, it is an abuse of the council's relevant public powers, and has caused a loss or deficiency. The fact that the decision is ultra vires and unlawful is a necessary but not sufficient condition for the section 20 offence to be committed."

I agree with Mr Howell that the wording of section 20 is wide, and has to be related to the facts of an individual case. It may, as he points out, be used where there has been a theft of council property, but the section only bites where a loss has been incurred or a deficiency has been caused (the past tense is, in my judgment, important). So, for example, discussions at a meeting of party members which do not result in any action impacting upon the local authority cannot be misconduct for the purposes of section 20. That is important because politicians must be free to discuss and explore ideas freely prior to implementation. So, in the present case, the impact upon the local authority occurred when the housing committee made its decision on 8 July 1987 to increase designated sales to 500 per annum and to institute a scheme of capital grants. If there was misconduct by the appellants or by either of them, it must be found in effective action which they took to obtain and/or implement that decision. In the context of this case, that seems to resolve itself into two issues: (1) did the appellants know when they caused or permitted option 3 to go before the housing committee with majority party support that they were acting illegally? (2) If so, was their conduct causative of the housing committee's decision?

Unlike Mr McMullen I do not begin by analysing the legality of the housing committee's decision, but unlike Mr Howell I do not regard the legality of that decision as a matter of no significance.

4 Real politics

Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. That seems to me to be unreal. In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it. In most cases they cannot seriously be expected to disregard it, but they know that if the action which they take is to withstand scrutiny (to be "judge-proof") there must be sound local government reasons, not just excuses, on which they can rely. As Neill LJ said in *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, 333:

> "The statutory powers conferred on local authorities to be exercised for public purposes can only be validly used if they are used in the way which Parliament, when conferring the powers, is presumed to have intended. This is a general principle of public law. . ."

Although the sale of local authority housing is a matter in relation to which many people have strong views it is common ground that local authorities are entitled to sell housing, so the adoption of option 3 did not, on the face of it, contravene the law. Furthermore, in a case which has achieved so much notoriety, it is important to recognise that no one has ever contended that either appellant became involved in the sale of council properties for private gain.

5 Burden and standard of proof

Allegations of wilful misconduct contrary to section 20(1)(b) of the 1982 Act are very serious and, as this case shows, if they are established the

A outcome for the individual may well be catastrophic. As Lord Nicholls of Birkenhead said in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586:

> "the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

B Mr Howell contends that the Divisional Court adopted the wrong approach in relation to the issues raised by all five appellants in that court. He submits that the Divisional Court cast the burden of proof upon the auditor and then made the standard too high. In my judgment there is no substance in that submission. The Divisional Court was right to require the auditor to prove his case, and, although the Divisional Court used different C formulations at different times when expressing its conclusions, I see no reason to conclude that it was ever unaware of the standard which had to be attained.

6 Effect of legal advice

I remind myself that the Divisional Court had the advantage of seeing the D two appellants, as well as others, when they gave evidence, and clearly that court was not particularly impressed by these two appellants, but what I cannot follow is how the court was able to find these appellants guilty of wilful misconduct having regard to its conclusions in relation to those important factual issues which I set out at the beginning of this section of this judgment, conclusions which led the court to conclude that three out of five appeals must be allowed. I recognise that long before 5 May 1987 Dame E Shirley, but not Mr Weeks, had received legal advice from Mr Ives, but on 5 May 1987 the possibility of targeting sales in marginal wards for political gain was put to leading counsel of considerable standing. Mr England, who received and reported upon counsel's advice, was led to believe that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards. The judgment of the Divisional F Court simply does not explain why the advice of leading counsel did not affect Dame Shirley and Mr Weeks as it affected Mr England, and for that matter Mr Hartley and Mr Phillips, and I cannot make good the omission because there seems to have been no reason to make any distinction. The Divisional Court said that the purpose of the appellants throughout was "to achieve unlawful electoral advantage". The use of the word "unlawful" begs the question. Their submission is that having taken legal advice they, like the G others, believed that electoral advantage could lawfully be pursued by the route envisaged in Mr England's report of his consultation with Mr Sullivan, and thereafter the route chosen was, they believed, entirely legitimate. The number of properties designated was not excessive. A joint report was prepared and approved by counsel. Proper criteria were used to select properties in marginal and other wards. No improper pressure was brought H to bear on the members of the housing committee or thereafter on the officers responsible for sales, and, although sales in marginal wards were monitored, that was, as the Divisional Court recognised, no clear indication of guilt.

Mr Howell is right to say that the inconsistencies on which the appellants rely are not internal. They are only observed when I look to see how the

Divisional Court dealt with others, but that is no answer when they relate as they do so closely to the case of each appellant. I recognise, of course, that in the Divisional Court the appellants contended that the great increase in the number of designated properties was not promoted in order to achieve 250 sales per annum in marginal wards, and that the Divisional Court held otherwise, but in all essential matters the records speak for themselves. On 5 May 1987 counsel and the officers who attended on him knew all there was to know about Dame Shirley's ambition as to sales in marginal wards. The Divisional Court was critical of both appellants for saying that, in the light of Mr Sullivan's advice, the policy was abandoned. The court said, 96 LGR 157, 185, that they "lied", but on any view option 3 was not the proposal which Mr Sullivan was asked to consider. It was only formulated as a result of his advice.

As Mr McMullen pointed out, those who wish to offend against the law do not usually consult lawyers of good reputation, give them access to all relevant information, and then act in accordance with their understanding of the lawyer's advice, arranging for further advice to be obtained as events progress. In most cases where a breach of section 20 has been found proved, the evidence shows an unwillingness to obtain or a defiance of legal advice. That is not this case.

Mr Howell, being fully alive to the difficulty of his position, sought to contend that, if the Divisional Court erred, it was when it allowed appeals, not when it dismissed them. In my judgment in this case, such severance is simply not a possibility, and the findings of fact made by the Divisional Court, primarily in relation to others, should have resulted in the appeals of these appellants also being allowed. In the light of those findings, it is simply not possible to find, as against these two appellants, even on a balance of probabilities, in relation to a serious matter such as this, that wilful misconduct has been proved. That is a conclusion I reach without resort to the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), which we were invited to consider, together with a whole host of authorities to which it is unnecessary to refer.

7 Legality of the housing committee decision

If there was no wilful misconduct by either appellant prior to the decision of the housing committee on 8 July 1987, then there would seem to be no ground for saying that the housing committee's decision was unlawful.

8 Causation

In any event, the link between the wilful misconduct alleged and the housing committee decision can only be found in the decision of the appellants to put before the housing committee a joint report which contained option 3, and to advise the members of the committee that option 3 had majority party support. As Mr McMullen points out, the reasons for laying a proposal before a committee may not be the same as the reasons for adopting it, if it is adopted, and here that point is clearly illustrated by the decision of the Divisional Court. Mr Hartley, as chairman of the housing committee, was a firm believer in selling as many properties as possible, and no doubt voted for option 3 for that reason. As to the rest, the Divisional Court found, at p 203F, that "most members of the committee were not

A guilty of misconduct and did not themselves vote for option 3 for improper reasons". They knew, of course, of Dame Shirley's desire to sell properties in marginal wards, and could reasonably infer that it was that desire which generated party support for option 3, so it would seem to follow from the Divisional Court's finding, that in the end party support for that option was not critical. The support of Mr Hartley may have been.

B

9 Grants

If, as I would hold, the findings of wilful misconduct cannot be sustained in relation to the primary decision to designate properties city-wide, the same must follow in relation to capital grants. They were an ancillary part of the designation package, incorporated into the joint report as approved C by counsel. As it turns out there was, it seems, no power to make such grants, but it is not contended that either appellant knew that.

10 Preparation of papers

Similarly, as it seems to me, the cost of preparing papers and other costs related to the widespread designation cannot be laid at the door of the D appellants if they did not transgress. I would therefore discharge the certificates in their entirety and allow the appeal of both appellants.

SCHIEMANN LJ Having nothing to add as to the facts which are compendiously set out in Kennedy and Robert Walker LJJ's judgments I can go straight to the first issue in this appeal, namely whether or no the evidence before the Divisional Court showed that a loss had been incurred by the E wilful misconduct of the two appellants.

I agree with Kennedy LJ's conclusion and reasoning to the effect that the auditor has not shown that any loss has been incurred or deficiency caused by wilful misconduct on the part of either appellant and that therefore this appeal must be allowed and the certificate quashed. Since that is the view of the majority of this court it is not necessary for me express a view on the F submissions as to unfairness or as to quantum. As to the latter I prefer to express no opinion. The submissions as to unfairness, however, raise some issues of general importance, upon which I take this opportunity to comment later in this judgment. Before doing so I would like to express in my own words the reasoning process which has led me to the conclusion that the appeals ought to be allowed.

G As Robert Walker LJ points out in his judgment, post, p 432A–B, there was throughout the hearing a certain lack of focus as to precisely what misconduct is alleged against the appellants and the relationship between that alleged misconduct and the decision of the housing committee on 8 July 1987. I agree with him that the Divisional Court approached the issue as being "whether the appellants had promoted, pursued or implemented a policy which was unlawful because of its improper purpose": post, p 433A–B. H However, unlike him, I do not consider that the Divisional Court was right so to do. That very formulation has led to the lack of focus to which he draws attention. The phrase "*its* improper purpose" leads one to forget to be clear as to *whose* purpose is under examination. I differ from him in the formulation of the issue. He formulates it in this way, post, p 428A–B:

"The crucial issue is whether the appellants devoted a great deal of their considerable energy and enthusiasm, and a great deal of the council's financial resources, to the genuine pursuit of a lawful (though highly controversial) policy . . . or whether they merely pretended to do so and their real purpose remained the improper purpose of targeting marginal wards in order to win the 1990 elections, but with an extension of the policy to other wards tacked on as camouflage."

As it seems to me the following questions lie at the root of this case. Was the decision of the committee on 8 July unlawful? Did either appellant wish the committee to take an unlawful decision?

What caused any loss to the council was the decision of the housing committee on 8 July. Unless it can be shown that this decision was unlawful the appeals should, in my judgment, succeed. Even if it can be shown that the decision taken by the committee was unlawful, nevertheless the appeals should in my judgment succeed unless it can be shown that the relevant appellant wished the committee to take an unlawful decision.

Whether or not the decision of the housing committee was unlawful depends, in the circumstances of this case, on the motivation of the committee at the time of the vote. If its motive was purely to secure electoral advantage for the Conservative Party then the decision was unlawful. If purely Housing Act considerations were its motivation then its decision would be lawful. I shall term these two motives electoral and housing respectively. There is a complication. Frequently individual persons act from mixed motives. Further, group decisions may have multiple motivations—in part because there are many votes cast and in part because each voter may himself have several motivations. For the purposes of the present case I can ignore this complication and proceed on the assumption that the committee decision was either motivated by electoral considerations or by Housing Act considerations.

The following in my judgment are not sufficiently analysed in the judgment of the Divisional Court: (1) the motivation of the committee and those who composed it; (2) two possible desires in the breast of Dame Shirley: (i) a desire, having a party political aim, that designated sales should take place in marginal wards, and (ii) a desire that those who voted in favour of designated sales in marginal wards should do so being themselves motivated by party political considerations.

The Divisional Court found on ample material that: (1) Dame Shirley was motivated by a desire, having an electoral aim, that 250 designated sales should take place in marginal wards; (2) Dame Shirley expected the Conservative majority on the committee to share her desire; (3) Dame Shirley knew and every other councillor knew that for the committee to take the decision motivated at that time purely by electoral considerations would be unlawful; (4) had it not been for Dame Shirley the proposal for designated sales in the marginal wards would not have been placed before the committee.

The appellants knew that if a decision to designate city-wide was taken the chances were that it would be challenged in the law courts by their political opponents. They were expressly warned by their officers of this risk. It is clear that they were concerned, at the least, to obtain something "judge-proof"—that is to say something whose illegality could not be

A demonstrated in court. In those circumstances a court can legitimately demonstrate such worldly wisdom as it has and expose any reality which is hidden behind a form of words. However, a court embarking on such an exercise must do so with immense care, identifying precisely what are the questions which need to be asked and what is the evidence in relation to each question. It is a particularly difficult task when the court is faced with a B group decision. The Divisional Court might perhaps have concluded on the evidence before it that the resolution passed by the housing committee was voted for by the Conservative councillors solely because *they* wished for electoral advantage. However, the Divisional Court refrained from so concluding. Instead the reasoning was that because the passing of the resolution would achieve Dame Shirley's political purpose she was guilty of wilful misconduct in urging the committee to pass it. That I regard, with C respect, as too simplistic a solution to the difficulties of this case.

It is important initially to keep separately in mind the position and motivation of each of three sets of persons—the committee, individual councillors who vote, and the councillor, such as each of the appellants, who does not vote but who seeks to persuade others to vote. The judgment under appeal does not do so.

D It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality. The leading case on this branch of the law is *R v Waltham Forest* E *London Borough Council, Ex p Baxter* [1988] QB 419. That was a decision of this court (Sir John Donaldson MR, Stocker and Russell LJJ) upholding a decision of the Divisional Court consisting of Glidewell LJ and myself. The essence of the case, as was pointed out by Watkins LJ in *R v Derbyshire County Council, Ex p Times Supplements Ltd* (1991) 155 LGRev 123, 126, is contained in the following quotation from the judgment of Russell LJ F [1988] QB 419, 428:

> "Party loyalty, party unanimity, party policy, were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other considerations which are required for a balanced judgment. If, by blindly toeing the party line, the G councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote [is] potentially flawed."

The Court of Appeal's decision in the *Waltham Forest* case was expressly referred to in the judgment of Slade LJ in *Jones v Swansea City Council* [1990] 1 WLR 54, 83 where he said:

H "Even if the evidence had established that all the Labour members who voted for the resolution both knew of the resolution and on 28 June would have regarded it as subjecting themselves to an informal party whip, they would still have been entitled and bound to have regard to their personal responsibility and to vote in accordance with their beliefs

and consciences. The decision of this court in *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419 shows that this would have been their duty as councillors, even if there had been a party whip. It also illustrates that the mere fact that all the members of one party vote the same way does not establish that they were not exercising an independent judgment."

This passage in the judgment of Slade LJ was approved by Lord Lowry and at least three of the other members of the appellate committee of the House of Lords when the decision in that case was reversed [1990] 1 WLR 1453, 1469E.

Although a *councillor* can be motivated by a desire that his party should win the next election, a desire that one party should win the next elections is not one which is permitted to motivate the *council's* actions: it is an impermissible motivation for the committee. If the committee's resolution had set out the motivation of the committee and that motivation had been expressed to be to change the composition of the electorate in order to advantage the Conservative Party this would have been an impermissible motivation for the council.

One of the problems highlighted by the present case is that it is difficult to separate the motivation of individual councillors from the motivation of the committee. But this is a commonplace of decision-making by a body having a legally separate existence but constituted of individuals. Examining the motivation of individuals is fraught with problems. One problem is that the motivation of councillors may change during the course of debate—to suppose otherwise would render all debate futile. Further, a resolution for which a councillor's vote is sought may have a number of concurrent different attractions for him. Another problem is that different councillors may vote for the same resolution but for different reasons.

The law of the European Community, following French traditions, requires that regulations, directions and decisions of the Council and the Commission shall state the reasons on which they are based: EC Treaty, article 190. Absent deceit, this has the great advantage that the court knows the motivation and can test its legality. That however is not our tradition. The decision under attack does not set out the reasoning of the councillors who passed it. It is common ground that the decision is not illegal on its face. I accept that it is open to a court, after hearing evidence, to come to the conclusion that the council's motivation was an impermissible one.

The Divisional Court held in relation to the decision of 8 July, 96 LGR 157, 181:

"In our view this decision was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful. The policy proposed at the meeting by [Mr Hartley] and adopted by the committee was one which gave effect to this purpose, *whatever may have been the reasons for the votes of individual members.* It is perfectly possible, in law and common sense, for a corrupt principal to cause a result through an innocent agent or (in the context discussed by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385C) a dishonest third party to be liable for a breach of trust perpetrated by a trustee acting innocently. In the present case,

A *whatever the reasons of individual members for voting as they did*, the option for which they voted was placed before the committee, in part at least, in order to achieve the improper purpose to which we have referred." (My emphasis.)

The meaning of the first sentence is obscure. It has not been proved that the committee was itself motivated by legally impermissible motives. The B repeated reference in the passage which I have just cited to "whatever the reasons of individual members" indicates that the Divisional Court did not regard the motives of the voting members as crucial to its decision. It would have been open to the Divisional Court to conclude that the committee was motivated at the time of the vote by an impermissible motive but the Divisional Court refrains from making such a finding. In those C circumstances, I do not think that we ought to make a finding that the committee's motivation was impermissible. Thus the decision must be regarded as a lawful decision by the committee unless it is prevented from being lawful by the motivation of the councillors who voted for it or by the motivation of those who procured the presence of the motion on the committee agenda.

D *The motivation of individual voting councillors*

Questions

In theory there are two separate question which arise: (1) what is permissible motivation for voting councillors; (2) did the voting councillors in the present case overstep the limits of what is permissible?

The Divisional Court did not decide that the voting councillors E themselves overstepped the limits of what was permissible. In those circumstances the logically first question does not need to be answered.

As I indicated above it is legitimate for councillors to desire that their party should win the next election. For a council to decide to lower council house rents with a view to pleasing council house tenants or to decide to lower rates with a view to pleasing ratepayers is not illegal provided that F these decisions involve no other element of illegality, such as not providing for a balanced budget. These voter-pleasing decisions are lawful in my judgment even if one of the motivating factors in the minds of the councillors who vote for them is the desire to be re-elected and a consciousness that their wards contain a significant number of electors of the category which the relevant decision is designed to benefit.

Undoubtedly, however, there are some means of securing the re-election G of one's party that are unlawful. The declaration of what is lawful and which are unlawful in this context is, in part at any rate, made expressly by Parliament. Thus imposing a rate at a higher figure than is permitted under statute is illegal. Deliberately setting a rate so low that the council's total income and reserves will not enable the council to fulfil its statutory obligations is again unlawful. Giving money bribes to electors is unlawful. H In part the courts have felt free to supplement these parliamentary constraints by imposing behavioural rules on a council acting as a council—broadly equating the council's position with that of a trustee.

Designating properties city-wide does not become unlawful merely because it achieved Dame Shirley's objective of 250 in marginal wards. It is similar in some ways to a decision to lower council house rents not being

illegal merely because it may well have been motivated by a desire not to lose council house tenants' votes at the next election. A

Parliament has, by sections 94 to 98 of the Local Government Act 1972, placed certain limits on what councillors may vote for when they have a personal interest. They do not impinge on the present case save that the very fact that Parliament saw fit to regulate some matters and not others may be a pointer and save that it could be said that this legislation was in part not necessary if the theory that a councillor is a trustee be correct. B

The law recognises that the fact that an individual may have voted for a decision without having given careful thought to all relevant factors, or for personal grounds which are strictly irrelevant to the merits of that decision, does not make the decision illegal. A vast number of decisions come before local authorities at each meeting and it is simply not practicable for each councillor to have examined the merits of each decision. In practice the C immediate motivation of the councillors voting for it will often be that the proposal has the support of members of their party some of whom will have carefully considered the merits of the proposal in the light of general values which a particular councillor member of that party will broadly share. Thus councillor A will frequently vote for the sewage scheme proposed by his party or by councillor B because councillor A wishes to persuade his party and councillor B to vote for councillor A's education proposal. D

As it seems to me there is nothing illegal in a councillor saying to a council officer, "This is the aim we are trying to achieve. Is that an aim which is permitted to us by law and are the means we are minded to employ open to us?" Nor is there anything illegal in council officers spending money in an attempt to find the answer to them. I agree with the Divisional Court when it says, 96 LGR 157, 174: E

> "We can see nothing improper today in council officers attending political meetings of a group of council members if invited to do so. Their presence does not convey assent to party political views but gives the opportunity to hear the germination and development of ideas which, particularly if they are the ideas of the majority party, may develop into council policy. That knowledge will both alert them to issues which they F may ultimately have to address professionally and, in some cases, afford an opportunity . . . 'to give a steer' as to the practicality and propriety of ideas before they become policy."

I do not think it would be right to draw a distinction between asking questions designed to avoid one possible illegality and questions designed to avoid another type of illegality. G

The motivation of those who procured the presence of the relevant motion on the committee agenda but who did not vote

The Divisional Court suggest that, if a proposal comes before a committee by reason of what would be illegal motivation if that were the committee's motivation at the time of resolution, then, whatever the motivations of the H voting councillors at the time of their vote, the passing of the motion is an illegal act. I disagree. Where a councillor proposes something for an unlawful reason and this illegality is pointed out to the committee and the committee then expressly rejects the unlawful ground and instead substitutes a lawful ground justifying the same action then the committee's resolution is

A lawful notwithstanding the unlawfulness attendant upon the policy's conception.

The judgment under appeal concentrates on two matters: (1) a historical examination as to how it came about that the motion was before the committee at all; (2) the fact that the policy was presented to the committee as being Conservative Party policy.

B So far as the first is concerned, it seems to me of no great significance that Dame Shirley was motivated throughout by a desire that her party's interest should triumph at the next election. There is nothing in local government law which prevents a councillor putting a proposal before a council in a matter in which he has a personal interest. There are inhibitions on voting but that is a separate matter. If Dame Shirley had applied for a discretionary grant for herself under some legislation she would not have been acting C improperly if she had put that matter before the council. Nor I think would she have been acting improperly if she had tried to lobby other councillors before the vote to vote in favour of giving her the grant. That is her right in a democracy. If that be correct, then I can not see anything wrong in her lobbying other councillors to cast their votes in favour of a proposal which favours, not her pocket, but her party.

D While I accept that a corrupt principal can cause a result through an innocent agent and a dishonest third party can be liable for breach of trust committed by a trustee acting innocently, I differ from the Divisional Court in that I do not regard these principles as dispositive in the present case. I do not see how Dame Shirley can be regarded as the council's principal or the council as her agent. Once one accepts that the committee has passed a lawful resolution the question of the liability of a dishonest third party does E not arise. Not that I accept that she was dishonest or indeed improperly motivated.

As the division of opinion in this court shows, there is no doubt that the borderline between what is permissible and what is not permissible in the context of what Dame Shirley was trying to achieve is not easily perceived by lawyers and even less easily perceived by laymen. It is clear to me that Dame F Shirley was seeking to avoid doing anything illegal and that this was the reason why she laid bare her hopes to her legal advisers and asked for legal advice.

If she, motivated by a desire to benefit her party, had sought to persuade the committee to vote with the same motivation as she herself had, then I accept she would have acted improperly, though given the complexities of analysis required I am not entirely persuaded that she would have acted G improperly wilfully. However, that is not the present case.

Rider

The judgment of the Divisional Court and the questioning by members of the court of Dame Shirley and their conclusion that she lied fail, as it seems to me, sufficiently to distinguish between: (1) the end result she desired in the H marginal wards, and (2) what her desires were in relation to the motivation of the committee voting for the resolution which would produce that end result.

As it seems to me, the position is that she, motivated by a desire to benefit her party, sought to persuade the council to vote with the same result but

motivated by a different desire. That does not seem to me illegal or improper, still less wilfully so.

Of course I concede that a different view from mine as to the legality of the committee's decision may be taken. However, as it seems to me, if a judge takes the view that something is lawful, albeit that other judges differ, it is hard to describe the attitude of a layman who takes the same view as the first judge as wilful misconduct even if her conduct took place at a time when she did not know of the first judge's view.

I turn now to my comments on the submissions on unfairness.

Unfairness

Lord Lester, in submissions which were broadly adopted by Mr Cakebread, submitted that this court should quash the certificate on the basis that the procedures adopted by the auditor and the Divisional Court were in their total effect so unfair that such a quashing was appropriate. For the purpose of exposition he isolated for the attention of the court four matters—apparent bias on the part of the auditor, unreasonable delay on the part of the auditor and the Divisional Court in confirming the auditor's decision in part, a failure on the part of the Divisional Court to hold a fair balance between the auditor and Dame Shirley Porter, and a breach by the Divisional Court of the presumption of innocence.

Lord Lester drew our attention to a number of features which he submitted cumulatively did result, or may have resulted, in the conclusions reached by the auditor and the court being unsafe. Mixed with these submissions were submissions of a different nature which one can call rights-based submissions. These had as their conceptual origin the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, Lord Lester submitted that there had been an infringement of a right to a trial within a reasonable time. He submitted that "the English courts should fashion an appropriate and effective remedy for a breach of Dame Shirley's right to a trial within a reasonable time and that the only effective remedy in the circumstances of this case was and is to quash the certificate". He submitted that this should be the result even if there was no danger that the infringement of the alleged right had produced wrong conclusions on the part of the tribunals below.

He inevitably accepted that at the relevant times the Convention had not been incorporated into our law. He accepted that no private rights could be derived from the provisions of unincorporated treaties. He submitted, however, that there were uncertainties and gaps in the statute and common law which this court should resolve and fill by seeking inspiration from the Convention and the jurisprudence decided under it.

Apparent bias

Lord Lester put at the forefront of his submissions complaints as to the way the auditor had conducted himself at and after the press conference in January 1994.

The Divisional Court, 96 LGR 157, deals with this aspect in the following passages in its judgment:

> "Having completed his investigation into the statutory objections, the auditor on 13 January 1994 wrote to all the appellants and others with a

A note of his provisional findings and views, together with 13 appendices, a bundle of material documents including notes and transcripts of interviews, a copy of the statement which he had that day made to the press and a notice that he had to consider whether to certify a sum slightly in excess of £21m or some other sum as due, on the ground that the loss of such a sum had been incurred by the wilful misconduct of the appellants and others. The notice also indicated that written representations could B be made by 29 July 1994 . . . The letter emphasised that the history of events set out in appendix 1 to the note and the auditor's findings and views were provisional and were being made available so that the appellants, the objectors and the council might make oral and/or written representations. On the same day, 13 January 1994, the auditor made a statement to the press which received substantial publicity on television C and in the newspapers. This court has seen video recordings of the relevant item on the 1 p m and 9 p m BBC news. In the light of this event and other matters to which we shall later come, [Dame Shirley Porter] . . . invited the Audit Commission to discharge the auditor, which they declined to do. That decision was not sought to be challenged by judicial review. All the appellants then invited the auditor to discharge himself and made representations to him. This he refused to do, in his written D decision dated 18 October 1994": pp 165–166.

"We are prepared to accept that, in the light of the great public interest in this matter and the lengthy period taken by the initial investigation culminating in the provisional findings, it was appropriate for the public to be given some explanation for the time spent and some indication of the auditor's provisional views. But, in our judgment, the press E conference which took place was ill-conceived and unfortunately executed. It would have been sufficient for a press statement to have been issued, preferably by the auditor's solicitor, saying that the complexity of the investigation accounted for its length and that, at that stage, the auditor was provisionally minded to make findings of wilful misconduct causing loss against the individuals named but that, before he reached any final decision, the individuals would have the opportunity to F give evidence and make submissions to him. Instead, a televised announcement was arranged at which the auditor himself appeared and, although he said that his views were provisional, he expressed them in florid language and supported them by reference to the thoroughness of the investigation which he claimed to have carried out. There was a further feature of the event which should have had no place in the middle G of a quasi-judicial inquiry. A stack of ring binders on the desk at which the auditor sat bearing the name of his firm for the benefit of the cameras was, ostensibly, under the protection of a security guard: unless it was being implied that the persons under investigation might wish to steal the documents, it is not clear what was the purpose of this posturing": p 173.

"We express the hope that, in any future statutory investigation of this kind, no auditor will stage any similar event, which may undermine the H perception, whatever may be the reality, of the auditor's open-mindedness. In the light of the material before us, including, in particular, the auditor's reasons for declining to recuse himself, we accept that, despite such inferences to the contrary as might have been drawn from the press conference, the auditor did have an open mind and was

justified in continuing with the subsequent hearings. We note that he did not confirm his preliminary findings in respect of those who gave evidence at those hearings. The error of judgment which we find he made, in holding the press conference as he did, did not, in our view, demonstrate bias on his part. He was at pains to stress the provisional nature of his findings and it is pertinent that in his final decision he made no finding of wilful misconduct against three people in relation to whom he had, provisionally, been minded so to find. In any event, as with the investigation, any possible unfairness to the appellants has been cured by the hearing before us": p 174.

I note that the Divisional Court referred to the auditor's reasons for declining to recuse himself. These reasons fall into two categories. The first category consists of contentions in the nature of submissions as to what was a sensible procedure for him to follow in the light of the audit procedure laid down by statute. The second category consists of protestations of lack of bias in fact. It was perfectly sensible of the auditor to include those protestations: had he not done so, some might have said that he had not even bothered to deny actual bias. However I would not regard such protestations as being of any great assistance to a court dealing with allegations of apparent bias. I doubt whether the Divisional Court in its reference to the auditor's reasons for declining to recuse himself had these protestations in mind. For my part I have given no weight to them.

So far as conduct at the press conference is concerned we too have seen the videos and agree with the criticisms of the Divisional Court. The citation from the judgment above accurately sets out the gist of some of Lord Lester's present submissions. To them, however, he adds complaints that the auditor did not do all he could to stem the publicity or correct inaccuracies in reporting.

Lord Lester accepts that he has not shown that the auditor was actually biased against the appellants but he submits that the auditor's conduct had as its predictable result that those against whom a prima facie case was found were "effectively found guilty by the media and the public at large." I agree that this seems probable. He submits that the release of all this material to the appellants' political opponents was almost bound to result in incomplete snippets adverse to his client appearing in the news media. I agree. He submits that the auditor could have done more than he did to discourage the media from such reporting. Perhaps, although there is no reason to suppose that this would have had any effect.

Lord Lester submits that there was "prejudicial publicity". In one sense of that word he is clearly right: the publicity would incline at least the superficial listener or reader to suppose that it was the auditor's view that Dame Shirley's conduct had been improper and that she had caused a huge loss. His difficulty, as he recognised, is that he has to establish a risk that the auditor and the Divisional Court, not the public, might be prejudiced. He sought to overcome this hurdle by submitting that, after such a public statement and after spending over £3m on the investigation the auditor would be under some psychological, perhaps unconscious, pressure to make his final conclusion tally in its essentials with his preliminary conclusion.

In this context it is important to separate out two types of damage which can be caused by this sort of publicity—first, damage to the integrity of the

judicial process in so far as it affects the appellants and, second, damage to the appellants' general reputation by giving publicity to provisional findings. While the latter is clearly regrettable it is not something with which this court is concerned in the present context.

Mr Howell before us disputed the accuracy of the description of what happened as a press conference and provided a number of reasons which, he submitted, justified the auditor in proceeding as he did. I see force in some of what Mr Howell submitted under this head but there is no need to lengthen this judgment by setting out findings in detail. This is because the resolution of the disputes as to the propriety of each of the auditor's actions or inactions under this head is not crucial to my conclusion.

The parties are at one in relation to the test which the court has to apply in cases where there is an allegation of apparent bias. That is the test pronounced by Lord Goff of Chieveley in *R v Gough* [1993] AC 646, 670. Although that test has not escaped criticism (see the comment by Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 136A–B), each of the other members of the appellate committee approved it. All counsel agree that we are bound by it:

> ". . . I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him . . ."

The mere fact that the case of one party is regarded with disfavour is manifestly not enough to raise a danger of bias. It is necessary to concentrate on the assertion that there is a danger that this regarding with disfavour was the result of some unfairness. Lord Lester submits that the Divisional Court confused actual bias with danger of bias. The basis of that submission was the reference by the Divisional Court to the auditor's own exposition of his views when he refused to recuse himself. I do not accept that there was such a confusion in the Divisional Court which expressly referred to *R v Gough* [1993] AC 646. In any event, we are not thus confused.

I think there was room for a casual observer in January 1994 after the press conference to form the view that the auditor might be biased. However, that is not the relevant test. We must look at the matter now and consider whether there is a danger that the auditor in coming to his provisional and final conclusions unfairly regarded with disfavour the case of either of these appellants. Having looked at the material it seems to me that the auditor's conclusions at either stage in relation to that material are

not so odd that they lead one to suspect that the explanation for the oddness might be bias. To express that differently, the conclusions are ones which, while they can be the subject of rational attack, are ones to which there is an understandable path. Again, the fact that the auditor expressed a provisional view is one wholly understandable given the procedure sanctioned by Parliament. Having looked at the audit procedure laid down by Parliament and the code of practice, while one can take the view that the auditor was too enthusiastic and may have got lost by reason of having seen the mass of material which his researches dug up, there is nothing to lead one to suppose that he was unfairly biased against either of the appellants. Again, while one can take the view that he might have done more to discourage leaking of material after the press conference or to correct unfair press reports there is no reason to suppose that his failure to do so was attributable to bias.

I note that no one has been able to suggest any possible motive for bias on the part of the auditor against either of these appellants. Like the Divisional Court, and giving no weight to the auditor's inevitably self-serving protestations when he refused to recuse himself, I consider that there is here no real danger that the auditor might have unfairly regarded with disfavour the case of either of these appellants.

One can examine the issues in relation to bias in the light of the jurisprudence under the Convention and Lord Lester did so at length in his interesting submissions. However, as we think he accepts, the Convention case law does not suggest that the test in *R v Gough* is either wrong or inadequate. In those circumstances it is unnecessary to lengthen this judgment by consideration of that case law.

Delay causing an unsafe verdict

I turn now to examine the submission in relation to delay. For the purposes of exposition it is useful to consider separately two possible effects of delay—an unsafe verdict and other damage for the appellant.

I first consider the submission that the effect of the undoubted delay in disposing of this matter rendered the conclusions of the Divisional Court unsafe. The submission was primarily based on the fact that the appellants and others found themselves giving evidence some 10 years after the relevant events. A secondary basis was that, by reason of the delay, the appellants found themselves prejudiced when it came to adducing evidence in relation to the amount of the loss allegedly suffered by the city.

Lord Lester submitted that the delay was such that disadvantage to Dame Shirley in the presentation of her case is to be inferred. He pointed out that she had stated in her affidavits and at the trial before the Divisional Court that her memory of some of the meetings was imperfect.

The Divisional Court said in its judgment that the crucial question was whether the delay had given rise to such prejudice that no fair trial could be held. It considered that no such prejudice had on the balance of probabilities been shown and pointed out, 96 LGR 157, 169:

> "All the appellants were aware of the allegations from the time they were made in 1989 . . . [Dame Shirley] was advised by counsel from September 1989. [Mr Weeks] instructed solicitors in August 1991. In the public hearing which followed the provisional findings there was, as it

A seems to us, ample and fair opportunity given for the appellants to make their case to the auditor. Although each chose not to give evidence, each made representations, [Dame Shirley] . . . by counsel. Numerous contemporaneous documents chart the course of events. Accordingly, we are not persuaded that the auditor's final conclusions can be impeached on the grounds of unfairness. In any event, we are satisfied that the B hearing which has taken place before this court has cured any possible unfairness to the appellants which could have arisen from the conduct of the auditor. Each has had the opportunity, after mature consideration of the objectors' complaints, the relevant documents and the auditor's findings, to put his or her case fully in evidence and submission by experienced counsel."

C Mr Howell asked the court to note that: (1) the objection related to a major controversial policy for the appellants' party in the evolution and implementation of which both were closely involved; (2) the appellants were aware of the objection at the outset and they had every opportunity to prepare their case and refresh their memory by reference to documents produced at the time, the appellants were aware that the auditor would investigate the matter and that it was inevitable that they would be D interviewed and that indeed they were interviewed on a number of occasions by the auditor when they were shown relevant documents; (3) the Divisional Court reminded itself that it was necessary to bear in mind the lapse of time since the crucial events. That court was able to consider the extent to which the lapse of time materially interfered with the ability to hold a fair hearing, given the amount of contemporary documentation available, and having E seen the appellants and others give oral evidence. The court was able to conclude that a fair hearing could be held notwithstanding the lapse of time.

I have no doubt that the appellants' memory of events 10 years before, even given the contemporary documentation, would not be as full or accurate as their memory in 1989. However, in the context of what are the crucial issues in the present case, I consider that the Divisional Court was F justified in its conclusion that the lapse of time did not impede the fairness of the trial.

Submissions were made to the effect that the passage of time had adversely affected the appellants' ability to adduce evidence in relation to quantum. I desire to do no more than to say that I was not impressed by this part of the appellants' case.

G *Delay not causing an unsafe verdict*

I now turn to the first of the rights-based submissions. They are founded on article 6 of the Convention and on citations from a number of authorities from various common law jurisdictions, many of which are helpfully and extensively considered in a decision of the New Zealand Court of Appeal: *Martin v Tauranga District Court* [1995] 2 LRC 788.

H Article 6 provides:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

The concept of reasonableness in this context is not limited by the effect of the delay on the reliability of any verdict produced after trial. Pursuant to the Convention there can be a remedy for the distress or other loss caused by delay even if there is an acquittal. We were addressed at length about the causes of the undoubted delay. For the purposes of this part of this judgment I am prepared to assume in the appellants' favour, without so finding, that the appellants did not have a hearing within a reasonable time.

Mr Howell did not accept that there was in English law any right to a trial within a reasonable time; still less did he accept that there was a right not to be tried after the lapse of a reasonable time. It is not in my judgment necessary for us to express any concluded view on either proposition in the abstract and I refrain from doing so. This is because I reject the submission that, on the assumption that such rights exist in certain circumstances, the natural consequence of the lapse of a reasonable time is that there must be a quashing of any order made after the lapse of this period—in the context of the present case a setting aside of the order of the Divisional Court and a quashing of the certificate. Lord Lester repeatedly referred to the "prejudice" resulting to Dame Shirley from the delay. However, his use of the word had a chameleonic quality—sometimes it referred to the distress and damage caused to the appellants by having these grave charges hanging over them and sometimes it referred to the possibility that their chances of success in relation to the surcharge and disqualification had been adversely affected by the delay.

The passage of time may have one or both of two results. First, it may cast doubt on the reliability of the conclusions reached by the tribunal. Second, it may cause or aggravate financial, physical or psychological harm to one or more of the parties to litigation. In so far as the court considers that the reliability of the conclusions reached by the tribunal has been impaired by the tribunal's failure to give appropriate weight to the effects of the passage of time, the court may treat this as a ground for quashing the judgment arrived at by the tribunal. This I have already considered.

However, in so far as the passage of time has resulted in *other* harm to the litigants, the requirement in article 13 of the Convention that everyone be given an effective remedy for a violation of his rights does not have as a logical or inevitable consequence that the decision of the tribunal be quashed. An award of damages may well be a more appropriate remedy for damage caused to a litigant by an unduly delayed trial. This is clearly so where the litigant has been acquitted or found not liable. While in the case of an unsuccessful litigant no doubt the quashing of the decision will be welcome it does not as such provide any relief which is commensurate with the loss which has been suffered. In the context of the present case, the quashing of the certificate in no way provides a remedy for any financial or other damage suffered by the appellants. No award of damages having been asked for in the present case, we are not required to address the question whether under our law as it currently stands the courts would be able to make such an award.

Questions as to the effect of delay may come before the court both before and after the decision of the tribunal. When they arise *before* the decision of the tribunal then it will often be appropriate to take into account both the danger of an unreliable verdict and the danger of other damage caused to the litigant by the delay. Both of these can be averted by a stay of proceedings

A and may be averted by an order for speedy trial. However, when questions as to the effect of delay arise *after* the decision it seems to me that quashing is likely to be the appropriate remedy for delay resulting in unreliable conclusions by the tribunal whereas an award of damages is likely to be the appropriate remedy for delay resulting in damage to the litigants.

We did not have our attention drawn to any case where the verdict obtained at trial was quashed because of the lapse of time although the B verdict was held to be safe notwithstanding the lapse of time. I do not consider it appropriate to quash the certificate merely because there was an undue delay in proceedings.

Equality of arms and the presumption of innocence

I turn now to the remaining aspects of Lord Lester's submissions as to C fairness which can usefully be considered under the same heading.

Using terminology more familiar on the continent than here, he referred to the principle of equality of arms, a principle which he summarised as meaning that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him under a substantial disadvantage vis-à-vis his opponent.

D The disadvantages of which he complained related to delay, the auditor's alleged apparent bias in relation to the press conference and its aftermath, the fact that the auditor did not decide to proceed under section 19 of the Act and the fact that, in the Divisional Court, Dame Shirley Porter was required to give evidence and be cross-examined before the auditor had to put his case.

I have already set out my views as to delay and bias. I do not consider that the appellants' complaints in relation to either of these matters gain any E extra strength from the invocation of the principle of equality of arms.

Lord Lester submits that by choosing to invoke section 20 rather than section 19 of the Act the auditor put Dame Shirley at a severe disadvantage. He makes a number of points: (1) by virtue of section 19(3) the court is precluded from making an adverse order if it is "satisfied that the person [affected] acted reasonably or in the belief that the expenditure was F authorised by law"; there is no such phrase in section 20; (2) section 20 imposes a burden on the person surcharged to appeal whereas if the auditor proceeds under section 19 it is he who has to apply to the court for a certificate: he has to swear an affidavit supporting his application, he goes first and the nature of his case appears before the person criticised has to reveal his hand; (3) in proceedings under section 19(3) the court can take into account ability to pay.

G There are a number of answers to these submissions. As to the first, if a person acts reasonably and in the belief that the expenditure is authorised by law then he will not be guilty of wilful misconduct. So the point proceeds from a misconception: in this regard there is no significant distinction between the sections.

The second is more complicated. Lord Lester's original submission was that the auditor should have proceeded under section 19 rather than H section 20. However, it was rightly pointed out that, once it appears to him that a loss has been caused by wilful misconduct, the auditor has no discretion whether to proceed under section 20. Lord Lester thereupon reformulated the point so as to submit that it was a misuse of the auditor's discretion not to proceed concurrently under section 19. Assuming, without

so finding, that, had the auditor chosen to proceed thus it would have removed the procedural disadvantage of which Dame Shirley complains, I consider that it was well within the auditor's discretion to choose to proceed under only one of these sections. This course had the advantage of avoiding a yet further layer of complexity in what was already a complex case.

As to the third point, whilst it is true that section 20 does not permit account to be taken of ability to pay, that is the regime prescribed by Parliament. Given the duty to proceed under section 20, the fact that ability to pay is irrelevant under that section whereas it is relevant under section 19 is of no significance.

I turn therefore to consider Lord Lester's criticisms of the procedure adopted by the Divisional Court. He submits that: (1) the Divisional Court required, as a condition for allowing the appellants to pursue their appeals, that they each file affidavits and submit themselves to cross-examination upon them; (2) the auditor's report was admitted in evidence without the exclusion, which was imposed on the appellants' evidence, of inadmissible material; (3) the auditor was afforded a specially privileged status in that his report was accepted as cogent evidence without any requirement for him to submit himself to cross-examination; had cross-examination been permitted it might have been fruitful in two areas—as showing actual bias on the auditor's part and in relation to the calculation of loss; (4) by contrast, his advocate was permitted to cross-examine the appellants and their experts; (5) whereas the auditor was under no time constraints in producing his report, Dame Shirley's experts were under time constraints imposed by the court the result of one of which was that some valuation evidence was not admitted; moreover, the experts called by him were not themselves subject to time constraints comparable to those imposed upon those called by Dame Shirley; (6) in section 20 proceedings persons in the position of the appellants were effectively required to show cause why the auditor's report should not stand.

Lord Lester submits that the cumulative effect of these matters is that the appellants were in effect required to prove themselves not guilty of wilful misconduct and were also in effect required to prove that the loss which the auditor asserted had been incurred as a result of that misconduct had not been incurred. Moreover, he submits, the appellants were required to prove themselves not guilty at a time when the auditor had not declared his position in relation to the crucial issue, namely, the impact on the minds of the appellants of the legal advice received.

So far as the first of these submissions is concerned I do not accept it. While there is indeed a requirement under RSC Ord 98, r 3(3) that

> "the appellant must file . . . an affidavit stating—(a) the reasons stated by the auditor for his decision; (b) the date on which he received the auditor's statement; [and] (c) the facts on which he intends to rely at the hearing of the appeal . . ."

it is perfectly possible to appeal against a certificate without asserting any facts. The reason why the appellants chose to file evidence of facts is because they no doubt recognised that the facts disclosed in the auditor's report called for an answer which could not be given by mere submission. This situation is no more a violation of any presumption of innocence than that which faces any person against whom a case has been made on the facts. In

A any event it results from the provisions of the Rules of the Supreme Court which as such have not been challenged in this appeal.

The auditor's approach was that any burden of proof was on the objectors and that he should only make a finding of wilful default if he was sure that he should do so. The Divisional Court, on 1 May 1997, directed that "the ultimate burden of proof on appeal will be on the respondent". I am satisfied that looking at the procedures overall in substance the B appellants were not required to prove their innocence of wilful misconduct but that the auditor and the Divisional Court were persuaded that the appellants had been guilty of wilful misconduct.

As to the suggestion that the auditor's report may have contained some evidentially inadmissible material and it was unfair not to exclude it in the Divisional Court, we have not heard detailed submissions. The fact is that C the Rules provide for the whole of the report to be in evidence. That is no doubt because it reveals what the auditor took into account and is admissible on that basis because it is relevant to the inquiry which the appellate court is undertaking. In any event no suggestion of significant prejudice to the appellants is made under this head.

So far as lack of the opportunity for cross-examination of the auditor is D concerned the complaint falls into two parts. The first concerns the inability to conduct a fishing cross-examination designed to elicit an admission that actual bias, of which the appellants had no evidence, in truth existed. I reject this complaint. Any tribunal's judgment is liable to be reversed on the grounds of actual bias by the tribunal but it is not a part of our procedures that the tribunal be required to submit itself to cross-examination just in order to see whether or no an admission of actual bias can be procured. E Lord Lester's submissions have more force in the context of his submission that the Divisional Court may have given weight to the auditor's assertions of lack of bias. Since I however, as I have indicated, give no weight to these assertions I do not need to address this point. The second cross-examination point relates to the calculation of loss. Submissions were made to the effect that the appellants were unfairly prevented from cross-examining in relation F to quantum. I desire to do no more than to say I was not impressed by this part of the appellants' case.

Even looking at all these matters cumulatively I am not persuaded that there has been unfairness justifying the allowing of the appeal.

ROBERT WALKER LJ

G

I

Summary of events (1): up to April 1987

The local government area known as the City of Westminster covers a large part of central London and contains some sharply contrasting residential areas. These range from Mayfair, Belgravia and Regent's Park to some far less fashionable areas in the vicinity of Queen's Park and the H Harrow Road. For electoral purposes the city is divided into 23 wards which elect either two or three members, making up a total of 60 seats on the city council. The composition of the new council elected on 8 May 1986 was 32 Conservative members, 27 Labour members and one independent member.

A policy of designated sales of vacant council dwellings had been introduced by Westminster City Council in 1972 but until 1986 it was on a very small scale, producing only about 10 sales a year. An expansion to produce 65 to 70 sales a year was considered by the majority group in 1984. In mid-May 1986, soon after the local elections, Mrs Kirwan (then chairman of the housing committee) discussed expansion again with Mr England and other officers. Mr England wrote a briefing note for Mrs Kirwan in which he stated: "Were we able to go forward with a policy of wholesale disposal of stock as Wandsworth have done it will be virtually impossible for us to meet our statutory let alone our socially desirable rehousing commitments." (The elected members and officers principally concerned are identified in the overview at the beginning of the judgment of Kennedy LJ.)

On 3 June 1986 there was a discussion at the chairmen's group attended by (among others) Dame Shirley Porter, Mrs Kirwan, Mr Hartley and Mr Weeks. The chairmen's group was an influential group of Conservative members, including the leader and deputy leader, the chief whip (then Mr Barry Legg) and the chairmen of the principal committees of the council. It was described by some witnesses as Dame Shirley's cabinet. They met on a regular basis (sometimes with officers in attendance) under Dame Shirley's chairmanship. On 3 June they decided that major policy initiatives should come down from the chairmen's group and the policy and resources committee. The subjects discussed included "marginal wards". Marginal wards (or, as they were sometimes called, "target wards", "key wards" or even "key battlezone wards") are of central importance to the events of this period. As Dame Shirley explained in a paper entitled "Keeping Westminster Conservative" which she wrote in March 1988, 15 of the 23 wards within the City of Westminster were either safe Conservative (9 wards with 22 seats) or safe Labour (6 wards with 18 seats). Those wards would change hands only in a landslide. The other, marginal wards were as follows (the figure for majority indicating the gap between the least successful elected candidate and the most successful non-elected candidate at the 1986 election):

	Members	Majority
Bayswater	3 Labour	156
Cavendish	3 Conservative	70
Hamilton Terrace	2 Conservative	128
Little Venice	3 Labour	36
Millbank	3 Labour	241
St James's	2 Conservative	130
Victoria	2 Conservative	248
West End	1 Conservative, 1 Independent	142

Shortly after the meeting of the chairmen's group Mrs Kirwan produced a note for Dame Shirley. The note stated that "the dangers of mass voting one way or another (i e nurses about to be evicted from health service accommodation . . . and homeless/down and outs who are not our natural supporters) cannot be overemphasised". The note recognised an increase in designated sales as a possibility but commented that "all these options will lessen our already stretched ability to meet our statutory requirements". The council's statutory obligations included those imposed by Part III of the

A Housing Act 1985 (Housing the Homeless) which re-enacted the Housing (Homeless Persons) Act 1977.

On 24 June 1986 Dame Shirley and Mr Weeks attended a special meeting of the chief officers' board. The board was told that the focus of attention would be winning the next election, and there was a reference to "social engineering". On the same day the chairmen's group decided to withdraw a B paper on the homeless persons review from the housing committee. On 30 June Dame Shirley attended a working lunch with Jones Lang Wootton. Mr England, who was present, made a note referring to "economic justification for G[erry]mander on housing". That seems to have been the first, but it was not to be the last, reference in the case to Elbridge Gerry, who was Governor of Massachusetts at the beginning of the 19th century and gave his name to a form of manipulation for electoral advantage. The C Divisional Court found that from July 1986, if not before, concentration on key wards was the policy of the majority party. On 1 September 1986 the policy unit produced a paper entitled "Homelessness/Gentrification". It stated that homelessness was reaching crisis proportions, and that the law should be changed. It continued:

> "Within the present legislation we might (a) test the law to its limits . . . D (b) target additional homeless accommodation on specific and appropriate wards; (c) use property outside Westminster for both temporary and permanent accommodation. This could assist in relieving homelessness in Westminster; and in gentrification, to the extent that it frees suitable properties in the city. What is gentrification? In short, it is ensuring that the right people live in the right areas. The areas are relatively easy to define: target wards identified on the basis of electoral E trends and results. Defining 'people' is much more difficult and is not strictly council business."

On the same day Mr England submitted a draft paper on "Gentrification" to Mr Weeks. Its conclusion was as follows:

> "A number of initiatives are already in operation to improve home F ownership in the city in both public and private sectors. The current economic and planning study will hopefully identify further areas where these schemes can be pushed forward. The major constraint unfortunately, at the present time, is the impact of the Housing (Homeless Persons) Act and the council's other statutory and high priority rehousing requirements, eg: medical cases and the need in many instances for rehousing to be available to prime the pump in getting further home G ownership schemes off the ground. The rate of disposal of council stock must therefore be seen in this overall context."

The reference to the "current economic and planning study" was to a study already commissioned from PA Cambridge Economic Consultants ("PACEC"). On 2 September 1986 Dame Shirley sent a note to members of the chairmen's group entitled "Strategy to 1990". It stated, "Clearly our top H priority is to win the 1990 elections." It listed "homelessness/gentrification" as one of the key issues relevant to electoral success. This and other papers were presented to a seminar of Conservative members on 6 September.

On 15 September there was a meeting with PACEC attended by Dame Shirley Porter, Mr Weeks and others. The consultants were shown (but did

not retain) some policy papers. Notes made by Mr Mark Kleiman of PACEC included the following:

> "Getting the right people housed. Strategy—to push Labour voters out of marginal wards. Housing Dept can't say—privatise/gentrify council blocks in marginal wards—400 in b & b. But *we* could say—preserve economic base—need to boot out these blocks."

Ten days later Mr England wrote in a note to Mr Phillips:

> "Initial discussions being held with [PACEC]. Report targeted for four months' time. The current feeling is that the consultants have grasped the key issues very quickly and are likely to produce a productive report."

The development of the policy of designated sales in key wards can be seen in the minutes of successive meetings of the chairmen's group on 23 September, 1 October and 16 November 1986 and 13 January and 27 January 1987. It is not necessary to summarise these minutes because it is not in dispute that the policy was being actively developed at this time, or that its purpose was to achieve electoral advantage for the Conservative group on the city council. By way of illustration, the meeting on 27 January considered a paper by Mr Alex Segal, a Conservative member of the housing committee, which stated the problem as he saw it:

> "If it is accepted that owner-occupiers are more inclined to vote Conservative then we approach the city council elections in 1990 with an enormous handicap . . . The short-term objective must be to target the marginal wards and, as a matter of utmost urgency, redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes."

On 23 January 1987 Dame Shirley, Mr Weeks and others met the PACEC representatives to discuss their preliminary findings. On 14 and 15 February there was a conference at the University Arms Hotel, Cambridge, organised by PACEC and attended by (among others) Dame Shirley, Mr Weeks and Mr Phillips (who was at about that time appointed as managing director). After the conference Dame Shirley sent a note to all Conservative members stating:

> "We agreed at the seminar that we've got to target our efforts in key areas. The [PACEC] study shows that we've got to put a tremendous effort into providing affordable housing, community improvement and effective expansion room for our growing office sector. All this is going to require a tremendous amount of thought. David [Weeks], Barry [Legg] and I will continue to act as a strategy group, but we'll need to draw on other colleagues to help ensure that our corporate plan brings success."

By then the eight key wards had been identified. Two other wards (Churchill and Maida Vale) were also mentioned in some papers prepared at this time, but were not, as matters developed, regarded as key wards.

On 14 March 1987 the chairmen's group met and considered how the BSC policy (of which designated sales formed part) should be presented and implemented. A paper entitled "Handling" favoured a "broad-brush" approach and stated, under "Members' corporate role", "Chairmen will also have a key role in getting officers—especially chief officers—to 'think BSC' Chairmen can impart to officers a political awareness which will be essential

A to the success of the strategy." Under "Officers' corporate role" it stated, "The managing director will lead and direct the officer input to BSC." On 17 March Mr England submitted an analysis "based on the designation of all council-owned properties in the key wards". The conclusion of this paper merits quotation in full since it contains the first, or almost the first, reference to obtaining legal advice:

B "As previously reported to the housing sub-group, it is not possible in professional terms to justify the designation of all properties in the eight wards. The key ward analysis will have to flow from the PA Cambridge study. Neither is it possible to justify in an officer report, a greater degree of designation within those wards than is indicated in the first column of appendix 1. Any further designation in columns 2 and 3 would require a C report by the chairman and would need justification by members as to the impact on the council's existing allocation policies. Members would be advised to consult the city solicitor as to the 'reasonableness' of proceeding on this course of action and whether, in view of the reports which they have received on the council's annual housing priorities and homelessness statistics, the city council could find itself subject to judicial review in proceeding along this course."

D The total in the first column (officer proposal) was 172. The total in the second column (members' sub-group, referring to a proposal made on 27 February 1987) was 249. The total in the third column (total designation) was 490, with the largest sub-totals in Millbank (225), Bayswater (124) and Little Venice (61).

On 20 March 1987 Mr Robert Lewis, the deputy city solicitor, wrote a E note to Mrs Kirwan under the heading "Disposal Policy". He gave some general advice and concluded, "I'm sorry that the above is all rather general. I hope it at least reinforces the notes of caution that have already been expressed. If there is to be a major change of policy it is important to involve lawyers early on to minimise the risk of successful challenges."

On the following day a seminar for Conservative members was held at the F London Business School. It was attended by Dame Shirley Porter, Mr Weeks, Mrs Kirwan and Mr Hartley, among others. Mrs Kirwan spoke against the designated sales policy. However there was general support at the seminar for BSC A later note (prepared for Dame Shirley and presented by her) referred back to BSC having been agreed at the seminar and set out the key elements of the policy:

G "*Targeting key areas*

"Certain marginal wards require special attention. In these wards, targets for increasing our support are:

Bayswater	350
Cavendish	250
Hamilton Terrace	250
H Little Venice	250
Millbank	450
St James's	250
Victoria	150
West End	250

"*Protecting the electoral base*

"In addition to our goals in the targeted wards, we need to protect the electoral base in the wards that we have.

"*Affordable housing*

"A key element in BSC must be to attract home owners in Westminster. This means finding innovative ways of ensuring that the right sort of housing is available to the right sort of buyer or tenant. And it must be available by October 1989."

October 1989 was the time at which the official lists would be prepared of those qualified to vote in the local elections in 1990.

On 24 March 1987 (possibly prompted, although there is no finding about this, by Mrs Kirwan having referred at the seminar to the advice of Mr Lewis) Dame Shirley Porter got an assistant, Mr Stuart Greenman, to fax a series of handwritten questions to Mr England and to Mr Ives, the city solicitor. The first three (of 15) questions to the director of housing were (with the original emphasis):

"1. How does he propose to achieve the target voter figures in the *eight relevant wards by 1990?* 2. Does he agree there are good decant possibilities in all eight wards? 3. Will he please give figures on numbers of units in each ward which will become available for sale?"

Mr England's replies to the first two were:

"1. The [PACEC] report was meant to set the targets for the eight relevant wards. There is very little support that officers can give to the eight target wards as opposed to the policies in other wards without the [PACEC] report. 2. No There are decant possibilities in the Millbank ward and possibly in the Bayswater ward but these will need to be considered in conjunction with the housing committee's other strategies and obligations."

In answer to the third question he repeated the figures in his paper of 17 March: "option 1 (officer suggestion 172); option 2 (members' sub-group suggestion 249); option 3 (party group suggestion total designation 490)" Mr England's replies reflect the expectation (also apparent in other papers prepared at this time) that the final PACEC report might provide a satisfactory objective basis for targeting designated sales in the key wards. The final draft of the report had by then been received but it is not clear when it was seen by officers other than Mr Phillips. The expectation was at least partially disappointed.

The seven questions put to the city solicitor and his replies (faxed on the same day) need to be set out in full. The questions were:

"1. Will the council's new policy on 100% designation for sale in the eight target wards conflict with its statutory obligations? 2. Given proposed annual figure of sales within the target wards, will this conflict with council's ability to house category A medical cases etc? 3. If there is any possibility of conflict, then what level of annual sales (and void creation) *would* enable council to continue to house category A medical cases etc. 4. Is there any possibility that this policy will lay the council open to (a) judicial review of its policy or (b) surcharging for illegality etc.

A 5. What happens if Westminster is unable to fulfil all obligations, e g if it is overwhelmed by numbers of homeless families etc? 6. Is committee approval needed for any further designation? 7. Is there anything in the answers to the previous 15 questions put to director of housing which may put us ultra vires or in breach of our duty as a local authority under the law?"

B Mr Ives's replies were:

"1. This is a question of fact not of law. If the policy is to be introduced then as a matter of law the reasons for its introduction have got to be carefully argued. The needs of the homeless and the impact of a decision to sell accommodation which might otherwise be available for them is a highly relevant consideration which will have to be balanced against the C advantages of selling. It is fundamental that the arguments in favour of selling be soundly based and properly argued. Anything which smacks of political machinations will be viewed with great suspicion by the courts. 2. The same considerations apply as in the answer to 1 above. The needs of the medical cases like other housing requirements will have to be put in the balance against each other. The courts will interfere if all issues are not put fairly to the committee or if the committee have considered all the D relevant issues but arrive at a decision which no reasonable man could have arrived at. 3. A specific number cannot be given at this stage. Later it may be possible to give a broad indication of the parameters within which the council should work once the arguments in favour of sale have been developed and weighed against the disadvantages. The courts recognise that two reasonable people can legitimately hold differing views E and will only interfere if a decision is perverse or unreasonable. 4. (A) Yes. The way to avoid successful challenge is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision-takers have acted irrationally or relied on an irrelevant consideration. (B) For F the district auditor to take action financial loss must have resulted either because expenditure has been incurred contrary to law (an abuse of power) or because loss has flowed from wilful misconduct of decision-takers. The possibility of surcharge exists but it will be necessary for those challenging to demonstrate that the loss flowed from the act of wilful misconduct. This re-emphasises the need for a good argument to be constructed in favour of sale. 5. The duty to provide accommodation G is not limited by the ability of the council to find accommodation. The council must find accommodation. A consequence of increased sales would of course be an increase in the numbers housed in temporary accommodation. 6. Yes. 7. It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the stand point of what is right in view of the council's role as a housing authority. A general H policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property. It might be sensible to go forward in stages rather than offer a broad target. Lawyers should be involved in consideration of any reports at the earliest possible stage. Since a general policy will inevitably draw fire the advice of counsel

should be sought at an early stage so that if judicial review is commenced the prospects of successful challenge can be minimalised."

The auditor (who conducted interviews with Mr Ives, though Mr Ives did not give evidence either at the audit hearing or to the Divisional Court) said that parts of these replies might demonstrate an unfortunate choice of language. But he did not find that Mr Ives was encouraging or colluding in any sort of cover-up of an unlawful policy.

On the same day, 24 March 1987, the chairmen's group rejected a draft report prepared for the housing committee because it contained too many options. The group wanted to get on with designated sales. Two days later Mr England wrote a note to Mr Phillips about the problem which the group's decision posed for him, and suggested (as he had already discussed with Mrs Kirwan and Mr Weeks) a planted question about the level of designated sales. The planted question was asked by Mr Segal at the housing committee meeting on 1 April and the committee resolved that the director of housing should "report back to the committee on means by which designated sales can be increased without delay to an annual level of at least 250". By then two lists had been prepared, one by Mr England and one by the members' sub-group, as shown in the appendix to Mr England's paper of 17 March. On 3 April Mr Garry Peltzer Dunn, an officer in the housing department, produced a third list adding another 98 properties in Millbank, Bayswater and Little Venice, so as to bring the proposed total to 270. He produced a fourth list with a further 117 properties, almost all outside the key wards, on 9 April. The final PACEC report was eventually received on 10 April. On 14 April a fifth, consolidated list was prepared. It showed numbers of potential sales where vacancies were created otherwise than by transfers. 199 were in the eight key wards and 120 in the other wards.

Towards the end of April a discussion paper headed "Designated Sales" was prepared by Mr Hayler (the divisional director of housing) for Dame Shirley and the chairmen's group. It assumed a designated sales target of 250 dwellings a year. It contained a list which consisted of the fifth list, rearranged, together with 83 units on the Churchill Gardens estate in Churchill ward. The paper recorded the city solicitor's strong advice

> "that because the matter is inevitably going to prove contentious and because it raises a whole range of legal issues, it is imperative that counsel's advice be sought and obtained on the final shape of the committee report. The legal issues are not only the legality of the specific proposals . . ."

The paper also noted that an increase in designated sales from 10–20 a year to 250 a year would have significant staffing and financial implications.

II

Summary of events (2): May to September 1987

That was where matters stood on 5 May 1987. There were three important meetings on that day and its events have been examined in great detail by the auditor, in the Divisional Court and in this court. At 9.45 a m Dame Shirley Porter called Mr Hayler and Mr Lewis to a meeting at which Mr Segal, Mr Phillips and Mr Albert Newman (a consultant) were also present. Dame Shirley told Mr Hayler that his discussion paper was not

A what was needed: "The policy was clear—the note needed to spell out how, not give options." Mr Lewis was told that leading counsel's advice must be obtained in the course of the day. A revised note was required for a meeting of the chairmen's group at 6 p m that day.

Mr Lewis was able to arrange a consultation with Mr Sullivan. It was held at 3 p m and attended by Mr Lewis, Mr England and Mr Hayler. It lasted for about one hour. Mr Sullivan received no written instructions B or documents before the consultation. Mr Lewis made notes of the consultation (which were typed on the following day, omitting a reference to the decision being made "completely judge-proof") and Mr England prepared a note for the chairmen's group meeting on the evening of 5 May. Mr England thought that he read the note to Mr Lewis.

The auditor interviewed and heard oral evidence from Mr Lewis; he C interviewed, but did not hear oral evidence at the audit hearing from, Mr England and Mr Hayler. The auditor found (volume 4, paragraph 237) that Mr Sullivan was told by Mr Lewis that he (Mr Lewis) believed that leading Conservative members on the council wished to secure electoral advantage by a policy of designated sales in marginal wards, and that Mr Sullivan confirmed Mr Lewis's view that it would be unlawful to D concentrate sales in marginal wards or to select properties for sale by reference to electoral considerations. However the auditor found (volume 3B, paragraph 2810) that Mr Lewis did not take a full note of the consultation, and took a conscious decision not to record Mr Sullivan's advice as to what would be unlawful.

Mr England's note for the chairmen's group did not purport to be a full note of counsel's advice. Its structure was to suggest action to be followed in E respect of the options set out in the discussion paper (which Dame Shirley had already dismissed as not what was wanted). It stated in relation to paragraph 2(i) (setting the designated sales target):

> "Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council. The group will therefore need to decide whether the 250 target applies across F the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300–350 properties will need to be sold across the city. This will clearly exacerbate the problems of dealing with housing demand."

In relation to paragraph 5(iv) (which referred to the PACEC report as not justifying increased sales) it stated:

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> "The target set by housing committee is 'at least 250'. Counsel advises that this cannot be targeted solely in key wards, therefore the group will need to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the [PACEC] study should be included in the report. This [PACEC] report has now been released to the H opposition."

No minutes, formal or informal, are extant for the meeting of the chairmen's group held that evening. Dame Shirley Porter and Mr Weeks were among those present. A sixth version of the list of properties to be designated was included in the papers before the group. The group decided,

as the auditor recorded in his history of events (volume 4, paragraph 253), to adopt Mr England's suggestion for a higher target throughout the city in order to achieve 250 sales a year in the eight marginal wards.

The true significance of that decision, and of the way in which it was carried into effect, lies at the heart of this case. Mr Weeks's evidence to the Divisional Court, which the Divisional Court rejected as plainly untrue, was that the chairmen's group's policy of designated sales in marginal wards was abandoned "with relief". The Divisional Court's view, 96 LGR 157, 185, was that what happened was that Dame Shirley and Mr Weeks, as leading members of the group,

> "were content, without further inquiry of Sullivan, [England], Lewis or anyone else, to adopt the suggestion in [England's] note that [the targeting policy] be dressed up in the city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage."

On 13 May Mr Phillips produced a document headed "Designated Sales: Critical Path" laying down a detailed timetable for production of an officers' report to go before the housing committee on 8 July. It provided for the draft report to be submitted to counsel three times during May and June. Mr Ives questioned whether such frequent advice on drafts was necessary but Mr Phillips maintained his view (however, the programme for advice was not in the event followed). On 14 May there was a meeting of officers to discuss homelessness. The minutes record the view that 600–700 permanent dwellings were needed to house homeless persons. They also referred to "political objectives regarding the maintenance of stable residential communities within Westminster".

On 13 May Dame Shirley Porter was re-elected as leader of the Conservative group on the council, defeating Mrs Kirwan who stood against her. Shortly afterwards Mr Hartley replaced Mrs Kirwan as chairman of the housing committee.

On 20 May Mr Hayler sent a draft of the officers' report to Mr Ives. His covering note stated that one of the principal matters still to be included was a clear setting out of the three main options:

> "option one—maintain the current balance of provision between sale and renting; option two—designate 250 casual vacancies for sale in relevant areas; option three—designate 400 approximately vacant units on estate for sale/rent via trusts."

On 29 May Mr Phillips, Mr Ives and Mr Hayler met Mr Richard Loftus (a property developer described in the file note as an adviser to Dame Shirley) to discuss proposals for the Westminster Housing Trust. The file note prepared by Mr Ives records Mr Loftus as having accepted "that the role of the housing trust was not strictly necessary and that its intervention was purely to sanitise what might otherwise appear to be politically motivated decisions". On the same day a revised draft of the officers' report was sent by Mr Hayler to Mr Phillips, Mr Ives and others. The options appeared in paragraph 82 as (1) maintain the present balance of policies and provision; (2) designate 250 voids per annum for sale; (3) designate 400 voids per annum for sale/higher rent. Against (2) and (3) are the manuscript comments "No—we would need to designate far more to achieve 250 sales"

A and "ditto". The draft was accompanied by a seventh draft list identical to the sixth.

A third draft of the report was prepared in early June, following by a fourth draft on or about 8 June. The copy of the fourth draft which is in evidence shows the changes later made to it. In paragraph 7.6 the number of units of council accommodation required for the homeless has been altered in ink from 635 to 570 (with the marginal query "does counsel agree or can this be toned down?"). Option 2 is "increase designated sales by 250 per annum" (correcting the previous inapposite reference to voids but keeping the same number). Option 3 was "increase designated sales further and expand higher rented accommodation" altered in ink to "increase designated sales by 500 per annum".

Throughout this period there were numerous further meetings and memoranda passing between officers as to the ever-increasing problem of homelessness and its impact on designated sales. The officers involved included Mr Phillips, Mr Ken Hackney (a divisional director of housing) and Mr Nick Reiter (the head of the policy unit).

On 12 June (which was a Friday) Mr Lewis instructed Mr Sullivan by letter to review the latest draft of the officers' report. This draft was the fourth draft in its original state (that is, without the manuscript alterations mentioned above). There is no record of the content of Mr Sullivan's advice (for which he charged a fee of £75 indicating chargeable time of about half an hour) but it seems likely that he approved the report with minor changes, and gave his advice by telephone.

On 11 June Dame Shirley's new appointments of chairmen and vice-chairmen of committees took effect. On 13 and 14 June she held a weekend strategy meeting outside London. Those in attendance included Mr Weeks, Mr Hartley, Mr Phillips and Mr Reiter. The papers circulated and discussed included papers entitled "Setting the scene" written by Dame Shirley; and (all written by Mr Reiter) "Building stable communities", "Targeting areas", "Protecting the electoral base" and "Affordable housing". The first paper began:

> "We face a tremendous challenge. The electoral register for the 1990 elections will be compiled in just over *two* years' time. Some very ambitious policies must be implemented by then: providing a great deal of affordable housing in key areas; protecting the electoral base in other areas (for example, by controlling the impact of homelessness); and implementing the Conservative philosophy throughout Westminster . . ."

A large part of the second paper has already been quoted with reference to an earlier seminar. On the copy of this paper in evidence there is written in ink in what is accepted to be Dame Shirley's handwriting: "These papers are written assuming that ALL know ALL."

On 17 June Mr Hartley and two Conservative members of the housing committee had a meeting with Mr England and other housing officers. Mr England's file note records that the members' main policy objective was to achieve a substantial increase in RTB sales and to achieve a minimum of 500 sales under the designated sales policy. At about the same time the fourth draft of the officers' report was further revised, including the alterations already mentioned. At the chief officers' board on 25 June the

chief officers "were reminded of the paramount importance of the [BSC] strategy in the development of all council policy."

On 26 June Mr England sent a note to Mr Hartley enclosing:

> "1. Final copy of the committee report; 2. an analysis of the estate by ward; 3. a suggested list of estates which would give approximately the target sales and where sale can be justified in terms of the four indicators included in the committee report. The city solicitor is concerned at the possibility of legal challenge if members individually designate estates which do not have a key indicator in the appendix. I have ignored the scattered properties although we can discuss these when we meet on Monday morning."

Several points on this note call for explanation. The auditor recorded (volume 4, paragraph 331) that the second enclosure could not be identified, but may have been a document prepared by Mr Peltzer Dunn during the previous February. The third enclosure was a list of possible sales by ward, with a total of 4,285 properties (expected to produce 269 sales a year) in six of the key wards (Victoria and West End had very few council properties) and a total of 3,826 properties (expected to produce 220 sales a year) in ten other wards (Bryanston, Hyde Park, Knightsbridge, Lancaster Gate and St George's also had few council properties). The auditor identified this as the eighth list.

The report itself is summarised below but it is convenient to note at once that the "four indicators" referred to in Mr England's note are identified in paragraph 10.5 of the report (where they are referred to as options) and at the end of appendix 5 (where they are referred to as categories and are stated as (1) popular for home ownership, (2) above average level of turnover, (3) area identified by [PACEC] study and (4) unmodernised property).

The four indicators were also referred to in a note which Mr Lewis sent on the same day, 26 June, to Mr Hartley, stressing the importance of the list being drawn up by the housing committee on the basis of housing and planning issues. The documentary evidence suggests that officers were at this time anxious that responsibility for the selection of the final list should be that of the members on the committee (although ultimately it was essentially an officers' list which was approved, as the Divisional Court noted).

On 29 June the chairmen's group considered a draft paper on homelessness by Dr Michael Dutt (a joint vice-chairman of the housing committee who took his life after the release of the auditor's provisional views). The first two recommendations in the paper were:

> "1. We should not accept that increasing designated sales should in any way be prevented by our statutory obligations for the homeless. The figures do not show that our statutory obligations are put in peril merely through an increase in designated sales."—Mr England annotated his copy: "? seems likely they do"—"2. We should take a definite decision to look outside Westminster for accommodation for the homeless, and be imaginative: prefabricated homes, mobile homes, houseboats, disused holiday camps are all possibilities."—Mr England annotated: "in public at committee?"

A The list of properties was further revised (twice) by officers between 30 June and the housing committee meeting on 8 July. On 3 July (a Friday) written instructions were sent to Mr Sullivan by the city solicitor. The instructions were concerned with the council's policy towards the homeless. The instructions referred to the BSC policy as a key theme in the council's policies. A copy of the officers' report (in its final form) was included but B counsel's attention was not drawn to the respects in which it differed from the draft sent to him on 12 June. Nor was he asked in terms to approve the report.

On the morning of Monday, 6 July Mr Sullivan was appearing in the Court of Appeal on behalf of Westminster City Council, instructed by Mr Lewis. It was a judicial review application which had no direct connection with this case. Mr Sullivan also had a consultation with other C clients fixed for 2.30 p m Mr Sullivan stated in written statement to the auditor:

> "It seems most probable that we managed to have a fairly hurried consultation at some time over the lunch period between the end of the Court of Appeal hearing and the beginning of the 2.30 consultation. In the circumstances it would have been the best we could do. The fact that D any consultation had to be 'squeezed in' might explain why I did not endorse my backsheet, or send in a fee note. It might also explain why there appears to be no written record of the advice given. The fact that [Mr Lewis] persuaded me to have a consultation over the lunch period is, I feel, eloquent testimony of his determination to obtain counsel's advice. Since I had no recollection of the consultation I am unable to say whether I did or did not approve the final version of the report. [Mr Lewis] is clear E in his own mind that I did, and I would not question the genuineness of his belief. The instructions did not seek my approval and given the pressure of work described above, I suspect that I would have looked at the report in advance of the consultation only in so far as I thought it necessary to enable me to answer the specific questions in my instructions."

F Mr Lewis told Mr England that Mr Sullivan had approved the report. But even if paragraph 7.6 had been drawn to his attention it is hard to see how counsel, whose task was to advise on matters of legal principle, could have said whether it was right for the director of housing to change his professional opinion as to the homelessness requirement from 635 units to 570 units.

G On the same day, 6 July, there was a meeting with Mr Victor Hausner of PACEC. It was attended by Dame Shirley, Mr Weeks, Mr Hartley, Mr Phillips and others. One purpose of the meeting was to consider what further role PACEC had to play in the BSC policy. The minutes record that Dame Shirley "reaffirmed the agreed BSC programme of action as agreed by chairmen as an all-embracing strategic council policy with determined H priorities for BSC initiatives". The minutes record that in discussion: "[Dame Shirley] and Peter Hartley felt that the city council had an agreed plan of action which could be clearly understood and implemented by officers, and that there was little need for an external catalyst . . ." This meeting took place, it may be noted, two days *before* the officers' report was, after its long and difficult gestation, to be placed before the housing

committee, which had delegated power to make a decision on behalf of the Westminster City Council. Dame Shirley Porter said in her affidavit sworn on 20 December 1996 (paragraph 239): "It was confidently expected by the majority party that its proposals would be approved by the housing committee bearing in mind the majority our party held on the council."

In preparation for the meeting of the housing committee on 8 July officers prepared briefing notes for Mr Hartley and Dr Dutt. Officers (Mr England and Mr Hayler) also attended a caucus meeting, at 6 p m on 8 July, of the Conservative members of the committee. The Divisional Court saw nothing improper in that provided that officers did not imperil their independence by political partiality. At this meeting the latest (tenth) version of the list of properties was disclosed to those backbench Conservative members of the committee who attended.

It is not clear whether all the Conservative members attended the caucus meeting but there were seven Conservative members at the housing committee meeting which began at 7 p m: Mr Hartley (chairman), Dr Dutt and Mrs Judith Warner (vice-chairmen), and Councillors Jenny Bianco, Karen Buxton, Richard Evans and Angela Hooper. Councillor Hooper was filling a casual vacancy for that meeting only. The opposition members at the meeting were Councillors Coleman, Gavin Millar, J B Provost, Jackie Rosenberg and Peter Wright.

The officers' report placed before the housing committee was headed "Review of Home Ownership". It was supported by various background papers including the PACEC report. Paragraph 2 ("Recommendations") contained some relatively uncontroversial matters. Paragraph 3 was headed "If the committee wish to increase the number of designated sales the following additional recommendations would be appropriate" and paragraph 3.1 was in these terms:

> "That the following blocks be designated for sale [with a blank] (The committee is invited to select from appendix 5 those blocks comprising a total of 5,500 dwellings (which may be expected to produce approximately 250 voids per annum) or 11,000 dwellings (which may be expected to produce approximately 500 voids per annum)."

Paragraph 3.3 and appendix 4 referred to the selection of purchasers. Paragraph 3.4 proposed a measure of flexibility between RTB and designated sales. Paragraph 3.5 proposed a scheme of capital grants. Paragraph 3.6 recommended (if option 3 was adopted) the acquisition of new premises for a complete home ownership advice service.

Paragraphs 4 ("Background"), 5 ("The need to promote home ownership"), 6 ("The need for some control of home ownership"), 7 ("The need for social housing") and 8 ("The conflict between the demand for social housing and the need to promote home ownership in Westminster") set out the arguments on both sides in a way which the Divisional Court considered, 96 LGR 157, 193, to be "a fair and adequately comprehensive representation of the relevant issues." Paragraph 7.6 estimated the homelessness requirement at 570 units in accordance with the amendment already mentioned.

Paragraph 9 then introduced and set out the three options. Option 3 was stated as "Increase designated sales by 500 per annum (appendix 2, column 3)." That appendix set out the expected effects on different

A categories of those seeking housing by the council. The narrative in paragraph 9.5 spelt out the effects:

> "Ability to meet homeless needs substantially reduced and significant increase in use of temporary accommodation; decanting requirements to be maintained; ability to house category A medical applicants drastically reduced. Tenant transfers reduced. Most other priority housing
B categories closed; allow existing secure tenants who have the right to buy to purchase designated flats . . . introduce capital grants to existing secure tenants to buy privately owned accommodation inside or outside Westminster; home ownership increased by 500; introduce model clauses in leasehold disposals to ensure occupation by people as their main or principal home; investigate restrictions on resales of low-cost home ownership dwellings."

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Paragraph 10 dealt with implementation, including (in paragraph 10.5, appendix 6) the four options or categories already noted. Paragraph 11 dealt with financial implications.

The proceedings at the meeting and the decisions which it reached were closely examined by the auditor and appear at various places in his findings (notably the conclusions in volume 2, paragraphs 871–890 and volume 4,
D paragraphs 367–390). On the review of home ownership (which was the seventh item on the agenda) the housing committee agreed to receive a deputation from the Bayswater co-ordinating group and to hear its representative. There was a vigorous debate in the committee. The committee then passed a resolution (by seven votes to five) of which paragraph (v) designated a list of 9,360 properties for sale, and paragraph
E (ix) was for the introduction of a scheme of capital grants.

The auditor found that Mr Hartley and Dr Dutt had taken into account electoral advantage to the Conservative Party and had sought to promote it by their votes. He found that Councillors Warner, Bianco, Buxton, Evans and Hooper may have been aware of the electoral objective but he was not satisfied that they sought to promote it by their votes. He found that
F Councillors Warner, Bianco and Hooper sought to exercise an independent judgment in relation to option 3, but that they relied on the officers' report and on Mr Hartley. He found that Councillors Evans and Buxton did not seek to, and did not, exercise any independent judgment in relation to option 3, but relied on the report and on Mr Hartley. The auditor found that none of these five members could exercise any independent judgment in relation to the list of properties. He concluded (volume 2, paragraph 884):

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> "that both the decision to increase the number of designated sales and the selection of the properties designated for sale were influenced by the electoral advantage of the majority party . . . [That] is an irrelevant consideration which ought not to have been taken into account. I have concluded that both decisions were ultra vires and unlawful for this reason."

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Under the council's standing orders the housing committee's decision had to be referred to the next meeting of the council, which was to be on 29 July. The legality of the decision had already been questioned by Councillor Coleman and others, both in debate and in communications with officers. On 20 July Mr Lewis wrote to Mr Alan Wilkie (who had often acted for the

council as junior counsel to Mr Sullivan) explaining that the detailed financial arrangements consequent on the housing committee's decision were to be considered by an appointed members' panel ("AMP"). Mr Lewis wrote:

> "We have learnt that the minority party is considering judicial review, mainly on the basis that no reasonable authority could decide the way we did in the light of the financial consequences (which are significant). In view of this, I am anxious for the AMP report to be scrutinised by yourself to make sure it, too, is 'judge-proof'."

On 23 July Mrs Kirwan wrote to Mr Rodney Brooke, the council's chief executive, expressing concern. She referred to the advice given to her by Mr Lewis on 20 March and asked to see counsel's opinions or notes of advice in consultation. Mr Lewis prepared a revised note of the consultation on 5 May and Mr Ives sent this to Mr Coleman. On 28 July there was an informal meeting of chairmen attended by Dame Shirley. The minutes recorded under "Monitoring" that figures were being prepared by Mr Reiter "to show which initiatives are most likely to achieve the electoral targets".

29 July 1987, the date of the full council meeting, was an eventful day. Mr England sent Mr Reiter a list of likely designated and RTB sales arranged by ward, with six of the eight key wards (that is, except Victoria and West End) listed first. Mr Brooke sent Mrs Kirwan a copy of the revised note of the consultation on 5 May, and stated that counsel had approved the officers' report and the AMP report. He told Mrs Kirwan that they were matters of report only so far as the council meeting was concerned. Dame Shirley sent a letter to all Conservative members of the council referring to the controversy and stating:

> "At the last party meeting, I said that I would reassure you on this point. We took advice from a QC before preparing the report to housing committee. As you can see from the attached note, our legal advice is that our policy is 'completely judge-proof'. We all know how important the designated sales policy is to the success of our overall objectives. We are completely sure that it carries no risk of legal challenge."

On the same day Mr Millar wrote to Mr Ives expressing concern about the legality of the officers' report. Mr Ives telephoned Mr Wilkie and obtained advice from him. At the meeting Mr Ives addressed the council and stated that the report had been seen and approved by leading counsel before it went to the housing committee. Mr Ives also reported on his very recent advice from Mr Wilkie. The report was debated and adopted. On 3 August 1987 there was a working lunch of leading Conservative members and some officers. The agenda began: "The attached target schedules show the target for new electors in each of the eight key wards. They then show target figures for the various initiatives designed to achieve the increase in the electorate." A later paragraph stated: "The overwhelming message from these figures is that the council will have to rely very heavily on the housing trust/private sector and planning gain routes in order to achieve the electoral objectives in the key wards." "New electors" was, as the Divisional Court observed, a euphemism for "Conservative voters". There was a table for each of the eight marginal wards (including Victoria and West End) and for the eight wards overall in the following format:

	BSC Targets Totals for all eight wards Target to 1989
New electors	2,200
RTB sales	260
Designated sales	260
Housing trust/private sector	1,195
Planning gain	650
HOUSING TOTAL	2,365
Enforce against hotels with homeless	11
Deal with other unlicensed hotels	19
Potential planning permissions (units)	994

Quality of life amount [illegible, but apparently about £1·1m].

At about the end of August 1987 Mr Reiter circulated to officers a draft paper entitled "BSC Campaign: Plan for Action". In relation to RTB and designated sales it stated the policy as being to maximise the number of sales "particularly in the key wards." Comment on the proposed housing trust was also directed towards the eight key wards. Annexed were detailed profiles of all eight key wards, with targets for "new residents" (another euphemism, as the Divisional Court noted, for Conservative voters).

On 2 September 1987 the AMP (consisting of members of the housing committee and the policy and resources committee) met but the meeting was disrupted. It was reconvened on 4 September, when it approved the recommendations before it.

On 5 and 6 September Dame Shirley held a strategy weekend attended by (among others) Mr Weeks, Mr Hartley, and Mr Phillips. The papers sent with the agenda included a paper prepared by Mr Reiter, "the BSC Campaign Plan for Action". It was very similar to the draft already mentioned. On 29 September the chairmen's group (attended by Dame Shirley, Mr Weeks and Mr Hartley) received "BSC Monitoring Report No 1" written by or at the direction of Mr Phillips. Under "RTB" it stated:

> "The target across the eight areas is 256 sales in 1987/8. So far, we have achieved 79 (30% of the total). The immediate task is to pull out of the log jam those applications which arise in the key areas; give those applications priority; and sift the rest of the log jam. In the past, there has been no accurate measurement by ward of how many applications are stuck at each stage of the procedures. I have seconded a member of the VFM team to the housing department to research this information; and to devise a suitable data base for recording it in future."

Under "Designated sales" it stated:

> "We have already identified 118 designated voids in the key areas, against a target of 137 for 1987/8. Most of these are in Bayswater (34 sales needed, 34 voids identified) and Millbank (70 sales needed, 68 voids identified). No sales had yet been completed: the first are expected towards the end of November. The figures to the end of August are . . ."

and it set them out in detail (with none in Victoria or West End).

III

Summary of events (3): after September 1987

It would be an unnecessary protraction of what is already a long summary to recount in detail the events which occurred from the end of September 1987 until the formal objection made to the auditor (on 18 July 1989), the Panorama programme (19 July 1989) and the applications for leave to move for judicial review made to Hutchinson J (12 February 1990) and the Court of Appeal (14 June 1990); these applications were refused on the ground that an alternative procedure for a remedy was available, and had indeed already been invoked. But five main themes can be traced in the auditor's history of events and the documentary evidence: monitoring; steering groups; concentration of the BSC policy on key wards; opposition challenges; and the increasing financial and political problems associated with the council's statutory duties to homeless persons.

At a meeting on 11 October 1987 Mr Weeks, Mr Legg and Mr Phillips agreed to set up a BSC support group as had been proposed by Mr Reiter. It was to include various officers whose functions would include "monitoring of progress on BSC initiatives (eg RTB, designated sales)" for "clients" consisting of the chairmen's group, Mr Phillips and individual chairmen. The policy and resources committee was invited to give budgetary priority to BSC and support for BSC The second monitoring report was made to an informal meeting of chairmen (including Mr Weeks and Mr Hartley) on 3 November 1987. The third monitoring report was made at a chairmen's strategy day (also attended by Mr Weeks and Mr Hartley) on 5 December 1987. At a meeting on 12 January 1988 (attended by Mr Weeks, Mr Phillips and Mr Hausner among others) it was agreed that the monitoring system to drive BSC should be steered at member level by Mr Weeks and Mr Hartley and at officer level by Mr Phillips, Mr England and Mr Syd Sporle (a divisional director of planning and transportation).

Accordingly, in January 1988 the officers' and members' steering groups were established and from then on they met on a regular basis. The officers' steering group sometimes met as often as once a week during 1988, but its meetings became less frequent and in May 1989 it discontinued regular meetings because the BSC campaign was regarded as "self-running".

Monitoring continued until well into 1989. The documentary evidence shows that it was deliberately concentrated on the key wards, almost to the entire exclusion of the other wards, although at a council meeting on 27 April 1988 Dr Dutt, in reply to a question about monitoring key wards, stated that officers monitored all designated sales. Yet on the next day, 28 April 1988, the BSC members' steering group (attended by Mr Weeks, Dr Dutt, Mr Phillips and Mr England) received the monitoring report for April which referred to the need:

> "to provide more precise and quantitative information on the targets for BSC actions and progress to date upon their achievements, particularly in those wards which have been identified as being key to the BSC initiative."

The report contained various statistics including a summary table for the eight key wards giving target voter figures. The group also received a paper on the rationale for key wards which said of designated sales, "there was a

A tremendous demand. The problem was to generate vacancies in key wards. There was a limit of £12m. So assisted purchases should perhaps be targeted."

At a chairmen's strategy weekend on 7 and 8 May 1988 held by Dame Shirley the meeting received a paper summarising progress on BSC, with tables referring to figures for "target voters" and a presentation by B Mr England on home ownership. Mr England made a note in the following terms: "Should we be selling to cats. 1, 2—are they 'the right stuff'. Grass roots work? . . . Why key wards—Victor [Hausner] to do paper on bringing eight key wards in." At a BSC members steering group meeting on 31 May statistics on five key wards (Little Venice, Victoria, Cavendish, St James's and West End) were presented by Mr England. "Target voter" figures were C again produced and considered. It was agreed that Cavendish, St James's and West End were to be the priority areas. Bar charts were regularly produced illustrating progress in the various key wards.

All this was taking place against a background of sustained questioning from opposition members on the council. Councillor Paul Dimoldenburg, the leader of the opposition, repeatedly pressed Mr Phillips for information on the selection of wards and the political neutrality of officers. D Mr England's candid manuscript notes on his papers appear to show a mixture of bravado and apprehension: for instance at a meeting with Dr Dutt on 25 July 1988 he wrote: "Lab[our] bashing—fit facts to strategy plan" but also "Public audit . . . explanation of eight wards . . . can we justify why eight chosen and look at pattern of designated? Why did we pick them?—members will ask us . . ." On 12 August 1988 Mr England wrote an internal E memorandum as to Councillor Dimoldenburg's complaints. On 24 August Mr Ives suggested that Mr England should respond to three questions: "1. Why were these eight wards chosen? 2. By whom were these eight wards chosen? 3. Why and by whom are these eight wards regarded as 'key'?" Mr England appears never to have done so; when pressed he said on 27 October 1988 that he could not add to his memorandum of 12 August.

F A defensive attitude to opposition questioning appears not to have been confined to officers. After a chairmen's strategy weekend on 17 and 18 September 1988 all the papers were shredded in order to avoid any leak. At about the same time it was decided that in future BSC reports should be given orally.

During 1988 there was mounting concern (apparent, for instance, in the G minutes of informal meetings of chairmen on 18 October and 20 December 1988) as to the cost to Westminster of housing homeless persons. The need to achieve a saving of £1m was perceived. One aspect of the problem was that many homeless families needed the largest units of accommodation, and much accommodation of that type had been designated and had become vacant but remained unsold. This problem was referred to in a memorandum on four-bedroom units written on 26 November 1987. H Action was eventually taken more than a year later, on 6 February 1989, when five large family flats which had been vacant for a long time were "de-designated" to achieve a saving of £150,000 a year.

On 9 May 1989 an informal chairmen's meeting received a report on homelessness which stated:

"We have no strategy for dealing with the long-term permanent rehousing obligation. The issue now is that we are taking many more cases a year than we are able to house. Unless the government repeals the legislation, or we can supply more accommodation, this will have a major financial impact on the city's community charge position in 1990–91 and beyond, despite the policies to contain temporary accommodation costs."

Savings of almost £2m were required in order to avoid a supplementary estimate. The possibility was mentioned of returning to counsel to seek confirmation of the legality of existing policies. Mr Phillips wrote on his copy of the report: "Don't go to counsel—he'll want everything in the report."

The possibility of "de-designation" "in non-marginal wards only" was considered again at an informal meeting of chairmen on 18 July 1989 but the proposal was rejected. That was the same day as a formal notice of objection to the auditor was made by Councillor Coleman and 12 other Westminster electors. The Panorama programme followed the next day. The policy of designated sales effectively came to an end at a meeting of the housing committee on 30 October 1989, although "pipeline" sales continued into 1990.

The Panorama programme gave rise to intense activity. At a meeting of the full council on 26 July Dame Shirley stated that no one had taken the decision that quality of life schemes should be targeted as far as possible into the key wards. She denied that there were any clear conclusions reached in the briefing note presented to her by Mr England in March 1987. She stated that no one was responsible for the decision that homeless families should be moved out of Westminster starting with the key wards, and said that no such decision had been taken. When she was asked about the BSC Campaign Plan for Action she stated that Panorama had refused to let the council have copies of the papers referred to. When she was asked which officers had prepared papers for the meeting on 14 March 1987 she said that officers would have provided data for members. When she was asked about officers collecting information on the eight key wards, she replied that, "at various times different wards have been key issues for study". Mr Weeks also spoke and gave an explanation of how policies had evolved.

On 28 July Mr Hayler gave an instruction that in future monitoring wards should be listed in alphabetical order (previously the eight key wards had always come first). On the same day Mr Phillips sent a memorandum to Mr Reiter referring to the folder "Chairmen's Weekend June 1987" obtained from Dame Shirley's papers. He wrote:

"Some of these documents, which came as news to me as to you, are plainly highly political . . . It is absolutely vital that we establish, from our own sources and by asking the members directly concerned: (a) which papers were produced by officers, (b) which were produced by members, and (c) whether any of those in (b) involved the use of council resources. You agreed to let Mr Ives and myself have a complete set of the papers on the folder."

These papers were provided to Mr Phillips but not to Mr Ives. They were not disclosed to Mr Sullivan when he next gave advice.

A On 22 August 1989 there was a meeting between Mr Phillips, Mr Ives, Mr Colin Wilson (who had succeeded Mr Lewis as deputy city solicitor) and Mr England. Mr England's notes under the heading "legality" state: "unlawful motive—selection of estates by members—discussed with MD and city solicitor who consider current policy to be legally dead". Reference was also made to Dame Shirley having requested a glossary of "difficult" terms.

B The glossary was produced by Mr Reiter on 1 September 1989 on what was his last working day at Westminster. His glossary included the following:

> "*Key wards.* The term is loosely used. Relates to wards where the level of stress, in terms of the [PACEC] study, is particularly high, and therefore
C where the implementation of [BSC] policies would be particularly important.
>
> "*How were the key wards identified?* When the [PACEC] study was first commissioned members pointed at five wards where they felt, based on their observations, the problems of loss of middle income permanent residency was particularly acute. The [PACEC] study concluded that the problem was based rather in a swathe cutting across the centre of the city.
D The eight wards in question appear to have been identified as a result of discussion between members and Victor Hausner, based on the stress factors which the study had identified. It should be noted that, when the term key wards is used, it may not necessarily refer to the eight wards, but to wards which are key in terms of a particular policy or objective . . .
>
> "*Numerical targets of electors.* These appear to be guesstimates of
E what might be achieved in the given ward in terms of getting additional electoral registrations, if BSC was fully and effectively implemented. Electoral registration was perceived as the easiest and most straight forward way of measuring the impact of BSC policies."

Mr Sullivan was again instructed and gave oral and written advice which need not be set out. Nor is it necessary to go further into the unsuccessful
F applications for leave to move for judicial review.

IV

Unfairness

I agree with all that Schiemann LJ has said on the issue of unfairness. I add some remarks of my own.

G I agree with Schiemann LJ that there are serious criticisms to be made of the procedural course which this case has taken, from the original objection on 18 July 1989 to the hearing before the Divisional Court more than eight years later; but that they do not lead to the conclusion that the auditor's certificate should be quashed, and the appeal allowed, on the ground of unfairness. Some of the matters of criticism are inherent in the statutory scheme of audit, objection and surcharge laid down by the 1982 Act (and
H now re-enacted in the Audit Commission Act 1998). Those inherent difficulties are accentuated when the statutory scheme has to be applied to allegations as grave and as complex as those which the auditor had to investigate in this case. The enormous scale and protracted nature of the auditor's investigations must be deplored, but it was the auditor's duty to be

careful and thorough, and he did (as his report records) encounter delays and difficulties in obtaining copies of relevant agenda, minutes, memoranda and other documents. A

Other procedural problems arose from the decisions of Dame Shirley Porter and Mr Weeks not to give evidence at the audit hearing held by the auditor between October 1994 and February 1995. They were fully entitled not to give evidence to the auditor if they chose not to, but when they later decided to put in very lengthy affidavits before the Divisional Court (136 pages from Dame Shirley and 160 pages from Mr Weeks) it led to a position which was (to say the least) unusual and unsatisfactory. The Divisional Court (following the general guidance given by this court in *Jones v Attorney General* [1974] Ch 148) decided at a preliminary hearing on 1 May 1997 to admit affidavit evidence from and on behalf of the appellants in that court with cross-examination of deponents on their affidavits, subject to a proviso about possible abuse of process (which seems not to have arisen at the full hearing). The result was that the Divisional Court became the main tribunal of fact in relation to the appellants, but with the auditor's lengthy report, findings and history of events standing as the foundation on which the Divisional Court built. B C

The hearing of two rounds of oral evidence by two successive tribunals of fact has led to various submissions as to the burden and standard of proof before the Divisional Court. Each side criticised the Divisional Court for having imposed too high a burden on it. At the preliminary hearing the Divisional Court described its approach as following the House of Lords in *Lloyd v McMahon* [1987] AC 625 (and in particular what Lord Templeman said, at p 716). The Divisional Court regarded the ultimate burden of proof on the appeal as being on the auditor, and the standard of proof as being the high civil standard described by Lord Nicholls of Birkenhead in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586–587. In my judgment the Divisional Court did not, in adopting that approach, err in favour of the auditor in relation to the liability of Dame Shirley Porter and Mr Weeks. It would be inappropriate, on this appeal by Dame Shirley and Mr Weeks, to express any definite view as to whether the Divisional Court erred in favour of the other persons (appellants before the Divisional Court) whom it acquitted of wilful misconduct. D E F

V

Liability (1): reality and pretence

The essential task facing the auditor and the Divisional Court, as the twin tribunals of fact, was to distinguish between reality and pretence. There has been no real dispute about the principles of law to be applied, and I can at this stage restrict myself to two citations. In *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386, 398 (the Pergau Dam case) Rose LJ said: G

> "The principle is correctly summarised by Professor Wade in *Administrative Law*, 7th ed (1994), p 413: 'statutory powers, however permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper.' A political purpose can taint a decision with impropriety: see per Glidewell J in *R v Inner London Education Authority, Ex p Westminster City Council* [1986] H

A 1 WLR 28 and *R v Governor of Brixton Prison, Ex p Soblen* [1963] 2 QB 243, 302, where Lord Denning MR said, in relation to the decision to deport: 'If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.' "

In *R v Derbyshire County Council, Ex p Times Supplements Ltd*, 155 B LGRev 123 (where the county council had decided to stop advertising teaching posts in "The Times Educational Supplement" because of a vendetta) Watkins LJ described the local authority's decision-making process in these terms, at p 127:

"It cannot possibly be gainsaid, I think, that the Labour group on the county council decided to sever all links with Mr Murdoch's publications, C gave instructions through [the leader of the council] to that end, secured an immediate order from [the chief executive] imposing the ban and then set about trying to discover whether there was available the reality or semblance of a lawful excuse for that conduct. Obviously, the Labour group took its decision being unaware of any lawful reason for it. The officials of the county council had then to look about, with the help of D learned counsel, in order to see whether, somewhere or other, a lawful consideration could be put before the forthcoming meeting of the education committee. In those circumstances the officials of the county council were presented, in my view, with an unenviable task which they performed by the production of a report which purported to show that the effective publication for the advertisement of teaching posts by the TES had suddenly become not so effective after all. Another outstanding E fact is, in my judgment, that the subject of advertising in the TES would not have been on the agenda of the education committee were it not that the decision of the Labour group forced its inclusion. All of that, it was submitted, is really of no account. It is, it is maintained, only the conduct of the education committee and later of the county council itself with which we are concerned. It has to be shown that if bad faith there was, it F was manifested at the respective meetings of those two bodies. That, in the last analysis, is, of course, true. But in examining what happened at those meetings, it is of the utmost importance, in my view, to keep well to the forefront of one's mind how the subject of advertising in the TES came to be placed on the agenda and how the report came to be prepared. It would be totally unrealistic to neglect to think of such a consideration when endeavouring to discover what was in the minds of the Labour G councillors when they successfully voted for the move from the TES to The Guardian."

In this case attention is focused (although not exclusively, a point I shall come back to) on the decision taken by Westminster City Council's housing committee on 8 July 1987. Even though the target of 500 sales a year under option 3 was (in Mr England's own words) on the edge of perversity H (because of the ever-worsening problem of homelessness in Westminster, and the city council's statutory duties under Part III of the Housing Act 1985) it might have been lawful and proper for the housing committee to have adopted a policy of 500 sales a year, spread through the 23 wards on a sound basis (which does not necessarily mean either an equal or a

proportionate basis, since the wards differed so much in size and character). It is common ground that it would have been unlawful and improper to have adopted a policy of 250 sales a year concentrated in the eight marginal wards (or in six of those eight wards) in the hope of electoral advantage. The crucial issue is whether the appellants devoted a great deal of their considerable energy and enthusiasm, and a great deal of the council's financial resources, to the genuine pursuit of a lawful (though highly controversial) policy of the sort described at the beginning of this paragraph, or whether they merely pretended to do so and their real purpose remained the improper purpose of targeting marginal wards in order to win the 1990 elections, but with an extension of the policy to other wards tacked on as camouflage. If it was no more than camouflage, it could not serve to turn an illegal purpose into a legal one: on the contrary, because of the more severe effect of the policy on homeless persons, it would exacerbate the seriousness of the illegality (this point is vividly made, in a totally different context, in G K Chesterton's short story "The Broken Sword").

The Divisional Court, which saw and heard evidence from the appellants, was in no doubt that there had been widespread and persistent pretence, and that Dame Shirley and Mr Weeks had lied to the court. It rejected, 96 LGR 157, 184, the evidence of Mr Weeks (that the policy of concentrating designated sales in marginal wards in the hope of electoral advantage was abandoned after counsel's advice on 5 May 1987) as "plainly untrue". I can see no reason why this court, which has not heard the witnesses, could or should depart from the Divisional Court's findings. There is ample documentary evidence to confirm, and virtually none to put against, those findings. Some of the most striking items of documentary evidence are mentioned in the first three sections of this judgment, and it is not necessary to repeat them. The overall impression throughout, from mid-1986 to mid-1989, is that the most influential members of the Conservative group on the city council, led by Dame Shirley and Mr Weeks, had electoral advantage as the overriding objective in formulating their housing policy, securing its adoption by the council, and implementing it with high priority given to the marginal wards. The city solicitor was correct when he wrote on the agenda for the working lunch on 3 August 1987, "This paper shows officers working for a Tory victory." The same comment could have been made about dozens of other similar papers produced at the expense of council tax payers in the city of Westminster. What occurred cannot realistically be described simply as officers providing factual information to elected members, nor simply as elected members allowing the occasional thought of possible electoral advantage to cross their minds.

The phraseology of the Divisional Court's judgment shows that it found that the conduct and utterances of the most influential members of the majority party (and especially Dame Shirley and Mr Weeks) were steeped in pretence. Pretence is symptomatic of a guilty conscience. "New residents" and "new electors" were euphemisms for potential Conservative voters. There was a "cover up" in relation to monitoring. Mr Weeks was content that officers should in their reports "mask" action which chairmen wished to take. The point is spelt out most clearly in the Divisional Court's conclusion as to the appellants, at p 185:

A "Because [Dame Shirley Porter and Mr Weeks] knew the targeting policy was unlawful they were content, without further inquiry of Sullivan, [England], Lewis or anyone else, to adopt the suggestion in [England's] note that it be dressed up in city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage. Knowledge of the unlawfulness and such
B deliberate dressing-up both inevitably point to, and we find, wilful misconduct on behalf of each of them."

That being the conclusion of the Divisional Court which saw and heard the appellants, it would in my view be a very strong thing for this court to reach a different conclusion, unless some error of law on the part of the Divisional Court is clearly demonstrated. There are, I think, three topics
C which have by their combined or cumulative effect led Kennedy and Schiemann LJJ to the conclusion that the appeal should be allowed. The first concerns the legal advice sought and obtained on behalf of the city council, in view of which (it is said) any misconduct on the part of the appellants cannot be characterised as wilful. The second is an amalgam of overlapping points including what Dame Shirley Porter referred to as "the great divide"
D (between party political inclinations and local authority decision-making), the relationship between the misconduct alleged and the particular decision taken by the housing committee on 8 July 1997, and associated issues of causation. The third is the apparent inconsistency in the conclusions of the Divisional Court that the appeals of Dame Shirley and Mr Weeks should be dismissed (except as to quantum) but that those of Mr Hartley, Mr England and Mr Phillips should be allowed.

E

VI

Liability (2): legal advice

Counsel for the appellants submitted that the Divisional Court had criticised the auditor for dealing inadequately with the effect on the
F appellants' states of mind of the legal advice which they received, but then fell into the same error so far as Dame Shirley and Mr Weeks were concerned. It is therefore necessary to examine closely the section of the Divisional Court's judgment, at p 177 (headed "Legal advice"), which deals with this aspect. It begins with a summary of the legal advice given by the city solicitor and his deputy before 5 May, and then goes on to Mr Sullivan's advice on that day, concentrating on what it refers to as Mr England's note
C of conference. In fact the only document properly called a note of conference was prepared by Mr Lewis; Mr England's "Note to Leader" was a series of comments on an earlier discussion paper with two brief references to counsel's advice. Both are set out verbatim in the judgment, which continues, at p 178:

H "In our judgment, the actual terms of Mr Sullivan's advice, save in relation to [Mr England], are immaterial for present purposes: it is material what if anything, by reason of [Mr England's] note or otherwise, each of the other appellants believed Mr Sullivan had advised. The note does not suggest that Mr Sullivan had advised that sales could be targeted in marginal wards for electoral advantage."

In fact Mr Sullivan had, as the auditor found, given unambiguous advice on this point (volume 4, paragraph 237):

> "Mr Sullivan confirmed the view of Mr Lewis that it would be unlawful to concentrate sales in marginal wards or to select properties for sale by reference to party political or electoral considerations. The advice from Mr Sullivan on what Mr Lewis has described to me as the 'hidden agenda' included advice that the electoral marginality of wards was not a proper factor for council members and officers to take into account in selecting properties for inclusion in an extended programme of designated sales."

The judgment of the Divisional Court then briefly summarised later legal advice and reached conclusions, at p 179, as to Dame Shirley and Mr Weeks which are so important that they need to be set out in full:

> "The position of [Dame Shirley Porter] in relation to legal advice was initially, as reflected in the opening skeleton argument on her behalf, that she never sought or received advice which could have led her to believe that it was open to the council to exercise its powers to secure an electoral advantage for the majority party. In her affidavit she said her duty as a councillor was 'to decide matters in council only upon considerations relevant to local government factors identified by officers'. In cross-examination she said she could see nothing wrong in targeting quality of life programmes in marginal wards but she gave no clear answer when asked whether a local authority's resources could be used to promote the advantage of a political party. In answer to the court she said she felt there must have been some proper local government considerations for targeting marginal wards but did not know whether these were in mind at the time. She also said that Mr Ives's advice that there must not be any ulterior motive came as no surprise in the light of her experience and she did not understand leading counsel's advice on 5 May to have differed from that of Mr Ives. In the light of this evidence, although we accept that [Dame Shirley] was always anxious to obtain and follow legal advice, it is, in our judgment, impossible for [her] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible. [Mr Weeks's] evidence in cross-examination was that, as a result of counsel's advice on 5 May it was clear 'that you could not just designate for 250 in the marginal wards' and that he greeted that advice 'with some relief' because a major aspect of contentiousness could be removed. He said that, following counsel's advice, he and other members 'immediately abandoned' talk of designating blocks in marginal wards and the lists produced 'after 5 May were constructed on other grounds'. Whether that evidence is credible we shall consider later. But it provides no basis whatever for suggesting that, if [Mr Weeks] continued to be party to a scheme for targeting designated sales in marginal wards for electoral advantage, he did so in reliance on legal advice."

Counsel for Dame Shirley suggested that the Divisional Court had misunderstood or misstated her evidence given in cross-examination and in answer to questions from all three members of the Divisional Court, but the transcript does not appear to me to support that suggestion. She could not say what proper local government reasons there might have been for

A concentrating sales in the marginal wards. To the last question from Latham J she said: "I feel that there must have been some, but whether or not it was in mind, I do not know." She said in cross-examination that the policy did change, and she answered a question from Keene J by referring to a "whole change in emphasis", meaning (as I understand it) that by the time of the housing committee meeting on 8 July 1987 the policy of concentrating
B sales in marginal wards had been abandoned or at least substantially diluted. But in fact (as Mr Reiter's draft "BSC Campaign: Plan for Action" made plain within a matter of weeks) the policy of targeting marginal wards was continuing with renewed vigour.

The way in which Dame Shirley's case has been presented has varied from time to time. Only in this court, I think, has much emphasis been placed on
C her reliance on legal advice. In her oral evidence she said that she was well aware that local authority resources must not be used for party political ends, and that the legal advice which she received came as no surprise to her. She also said that it never occurred to her to ask to see Mr Sullivan's advice in writing. She did not contend, either in her oral evidence or through her counsel (apart from drawing attention to Mr Ives's unfortunate references to
D devising or constructing arguments), that she was relying on any legal advice to the effect that an unlawful policy could be made lawful by camouflage. On the basis of Mr England's "Note to Leader" it seems likely that Mr Sullivan's unambiguous advice was distorted in the course of transmission to Dame Shirley, although in the absence of any minutes of the meeting of the chairmen's group on the evening of 5 May 1987 (at which Mr England was present) it is impossible to gauge the degree of distortion.
E But as the Divisional Court found, she cannot at any stage have believed (either in reliance on legal advice or otherwise) that targeting marginal wards for electoral advantage was a lawful use of council resources.

In relation to Mr Weeks the position is similar, but if anything even clearer. Mr Weeks was present at the evening meeting on 5 May 1987 at which Mr England reported to the chairmen's group. He said in the course
F of his examination-in-chief:

> "There was talk of designating blocks in marginal wards, which persisted until 5 May. Mr Sullivan advised through Mr England and Mr Lewis that that was not a wise thing to do and it might be controversial, so members immediately abandoned that. I abandoned it
G with some relief."

Dame Shirley said the same (without any reference to relief) in paragraph 72 of her affidavit and in cross-examination. The Divisional Court found, on ample grounds, that that evidence was false. Legal advice as to the propriety of a genuinely city-wide policy cannot be relied on as approval of the deceptive continuation of a policy (of targeting marginal wards for
H electoral advantage) which Mr Sullivan had in fact unambiguously disapproved.

I am not therefore persuaded that the Divisional Court dealt inadequately with the issue of legal advice. I find the Divisional Court's conclusions on this topic clear and convincing.

VII

Liability (3): "the great divide" and associated topics

The expression "wilful misconduct" in section 20 of the 1982 Act is capable of covering a variety of acts and omissions, including both formal and informal acts and a continuing course of conduct. That is to state the obvious but on this occasion it may be useful to do so, since there has throughout the hearing of this important and difficult appeal been a certain lack of focus, in my view at least, as to precisely what misconduct was alleged against the appellants, and the relationship between that alleged misconduct and the decision taken by the housing committee on 8 July 1987.

Sometimes misconduct may consist of a single decision made on behalf of a local authority by an individual acting under delegated powers, the decision being formally correct but invalid because made for improper and legally irrelevant reasons. One example is *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207, in which the borough housing officer, under pressure from the chairman of the housing committee, gave priority to rehousing another councillor for improper reasons. It may consist in the negligent performance or non-performance of routine duties, where no question of formal decision-making arises, as in *Pooley v District Auditor No 8 Audit District* (1964) 63 LGR 60, the case of the head caretaker who failed to take care of the supplies of solid fuel for his group of schools.

Where formal decision-making is involved and the decision-maker is not an individual but a committee, difficult inquiries may be necessary as to whether the decision of the committee as a whole (embodied in the voting majority) was tainted by some improper purpose not apparent on the face of the resolution, or the papers before the meeting. That is illustrated by a case alleging misfeasance in public office against a local authority itself, *Jones v Swansea City Council* [1990] 1 WLR 1453, reversing the decision of this court [1990] 1 WLR 54. Normally the purposes for which a local authority committee reaches a decision to exercise its powers will be inferred from the tabled papers (which will normally have been prepared by officers under a duty to act impartially). But if ulterior purposes are alleged, a closer inquiry becomes necessary. What Maugham LJ said in *In re Magrath* [1934] 2 KB 415, 434 ("in my view evidence is not admissible to show that some of the persons present and voting took a particular view of the resolution which they concurred in passing") was directed to the meaning of a resolution, not to any issue of ulterior purpose.

In this case the original objections, made under section 17 of the 1982 Act on the day before the Panorama programme, identified the decisions of the housing committee on designated sales and capital grants, and detailed objections under two heads: (i) the unlawfulness of the original decisions; and (ii) unlawfulness in implementation (see volume 4, appendix 6 of the auditor's report). In line with that the auditor made a very detailed investigation, not only of events leading up to the decisions on 8 July 1987, but also of the events of the next two years and beyond. Investigation of the consequences of the decision was of course necessary in order to quantify the loss caused by any wilful misconduct which the auditor found to be established. But it was also necessary in order to answer a question which is central to the issue of liability, that is whether or not the policy of concentrating sales in marginal wards for electoral advantage was, as

A Dame Shirley Porter and Mr Weeks claimed, abandoned immediately after receipt of Mr Sullivan's advice.

The issue of misconduct cannot therefore, as I see it, be equated simply with the question of whether the appellants were (so to speak) vicariously responsible for the decision taken by the votes of Mr Hartley and his six Conservative colleagues. Both the auditor and the Divisional Court
B approached the issue more broadly, as whether the appellants had promoted, pursued or implemented a policy which was unlawful because of its improper purpose. In my view they were right to approach the issue in that way. But the decision of the housing committee is plainly of crucial importance because it was (if assumed to be valid) the means by which the policy of the majority group became the official policy of the city council, with increasingly serious financial implications over the next two years as
C indicated in the third section of this judgment.

The decision of the housing committee was in fact the occasion on which, in Dame Shirley Porter's phrase, the policy passed "the great divide" between political aspiration and the exercise by a local authority of its statutory powers. Dame Shirley said in her affidavit (paragraph 14) that the auditor had failed to appreciate the difference between political discussion and the
D considerations which a councillor has to take into account in decision-making at meetings of the council or its committees. However she also said (paragraph 29):

> "The dividing line between purely political matters and legitimate council matters is a narrow one and can become blurred. If it is considered that on any occasion an officer has inadvertently crossed the
E line then I would wish to make it plain that this would have been at the express or implicit instance of myself or other members and not at the instigation of the officer."

When that passage was put to Dame Shirley in the course of her cross-examination (in which she used the expression "the great divide" in her first substantive answer) she said:

F > "I believe that throughout my affidavit I have made it abundantly clear that there is a great divide and I know where the divide is. The divide is the moment that it gets into the council machinery. When we cease just to be thinking politically, and when we are working on a policy."

(The context shows that by "working on" the witness must have meant "carrying out at the expense of local government funds".)

G Dame Shirley also made some spirited and realistic comments about the place of party politics in local government. Near the end of her cross-examination in the Divisional Court she said: "If you are saying to me that there should not be any politics in local government, then I have to come back and say then there is no point in having political parties and that, to me, is the whole essence of it." There Dame Shirley was acknowledging the fact
H that (for better or worse) local government, as well as national government, is now suffused with party politics. That inescapable fact has been clearly acknowledged in the Report of the Committee of Inquiry into the Conduct of Local Authority Business (the Widdicombe Report) (1986) (Cmnd 9797), para 4.17), which pointed out that the statutory scheme of local government barely acknowledges party politics, and "As a result insufficient distinction

has been made between the fact of the existence of politics, which is a reality which any system of government must recognise and accommodate, and particular manifestations of politics that should not be sanctioned." (One of the rare statutory references to politics is in section 175(3) of the Local Government Act 1972, where the reference to political objects must be to party politics.)

However the courts have gone some way to recognise the reality of rival party political loyalties and organisations within the members of a local authority council who are meant, in theory, to make decisions as to the exercise of their powers in a collegiate and corporate manner. Realistic and helpful guidance was given in the three separate judgments given in this court in *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419. See Sir John Donaldson MR, at pp 423–425, Stocker LJ, at p 427, and Russell LJ, at p 428, who said:

> "Party loyalty, party unanimity, party policy, were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other considerations which are required for a balanced judgment. If, by blindly toeing the party line, the councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote potentially flawed."

It is important to note that in the *Waltham Forest* case the only issue (at any rate in this court) was as to whether a council decision setting a rate was invalidated because four of those who voted with the majority had expressed different views at a party caucus meeting held just before. The issue of invalidity turned on a supposed abdication of individual judgment, not on ulterior purpose (except so far as blindly maintaining party solidarity might be described as being in itself an ulterior purpose).

Sometimes it may be difficult or even impossible to discern the precise point at which party political and electoral considerations come to play too large a part in a local authority's decision-making. That appears from several cases to which this court was referred, including *R v Inner London Education Authority, Ex p Westminster City Council* [1986] 1 WLR 28; *R v Lewisham London Borough Council, Ex p Shell UK Ltd* [1988] 1 All ER 938 and the *Waltham Forest* case [1988] QB 419. But, whatever difficulties may arise in borderline cases, it is common ground in this case that it would not have been lawful for the ruling Conservative group to adopt a new housing policy, and to incur heavy direct and indirect costs in pursuing it, with the purpose of improving its prospects of success at the local elections in 1990. The appellants' case was that the ruling group did not, after 5 May 1987, have such a policy. The Divisional Court rejected that case as based on false evidence.

I must try to pull these threads together by reference to the main submissions made on behalf of Dame Shirley by Mr McMullen (and adopted on behalf of Mr Weeks by Mr Cakebread). The Divisional Court found, 96 LGR 157, 181, that the decision of the housing committee on 8 July 1987 "was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful". Mr McMullen made a

A two-pronged attack on this conclusion. In the first place, he argued, the decision was not unlawful, since (as the Divisional Court found) most members of the housing committee were not guilty of misconduct and did not themselves vote for option 3 for improper reasons. Mr McMullen also argued that the decision of the housing committee broke the chain of causation between any earlier misconduct on the part of the appellants (in B devising and promoting the BSC policy, targeted at marginal wards, during the second half of 1986 and the first half of 1987) and the financial losses suffered in the next two years (and beyond) in consequence of the housing committee's decision.

Mr McMullen developed these twin submissions by reference to four matters: the joint report prepared by officers for the housing committee; the list of properties for designation in marginal and non-marginal wards; the C motivation of Mr Hartley, the chairman of the housing committee, in voting for option 3 and the other resolutions; and the motivation of the other Conservative members of the committee (Councillors Dutt, Warner, Bianco, Buxton, Evans and Hooper).

Mr McMullen submitted that the Divisional Court had been right to conclude that the report was "in general fair and adequately comprehensive", and that the auditor's respondent's notice challenging D that conclusion should be rejected. To my mind the Divisional Court's conclusion about the report cannot be faulted, if the report in its final form is considered simply as a text, without reference to its painful evolution as Mr England and other officers struggled with their professional consciences (it must be remembered what Mr England had written in his memorandum of 17 March 1987, and in his replies to Mr Greenman's faxed questions of E 24 March). However it would be going too far to say, as was submitted, that the joint report did not hide anything. It did fail to disclose one absolutely crucial fact, that is what Mr England called the "hidden agenda" of the most influential members of the Conservative group to concentrate their efforts and resources on the eight marginal wards. In the circumstances the approval given by leading counsel (at a hastily arranged lunchtime consultation, still without any proper written instructions) seems to me to F add little if anything to the status or significance of the joint report.

I take much the same view of the list of properties approved by the housing committee. The Divisional Court discussed the evolution of the list and concluded, at p 194, that the auditor

> "is unable to establish to the requisite standard of proof that the G criteria or the lists were manipulated by officers for the purposes of securing party political advantage for the majority party. There is no evidence before us which casts doubt on the propriety of the criteria. Having listened with care to [Mr England's] explanations for the reduced proportion of designations in the non-key wards, we are unable to say that those explanations are specious."

H That conclusion also is challenged in the auditor's respondent's notice. For my part I see more force in that challenge, but I am not prepared to differ from the findings of the Divisional Court which saw and heard Mr England being cross-examined on this point. Mr England's basic case on this point was set out in paragraph 227(1) of his affidavit: "My case on this has always been that once you seek to achieve 500 designated sales per annum across

the city (as opposed to 250) you have little choice as to which properties to select." That basic case, as elaborated and tested in cross-examination, seems to have been accepted (or at any rate not rejected) by the Divisional Court. The sheer scale of designation required for 500 sales a year made it almost inevitable that the 9,360 properties designated city-wide should include all those already provisionally identified in the six marginal wards which had a significant number of council properties. But assuming in the appellants' favour that the final list was (or may have been) objectively justifiable as a basis for a genuine city-wide policy of sales at the rate of 500 properties a year, I consider that the list does not by itself demonstrate that that ever was a genuine policy; and the facts as to the painful evolution of the list, through nine intermediate drafts, reflect Mr England's continuing doubts and anxieties about the matter.

In relation to what happened at the housing committee meeting, Mr Howell for the auditor has not challenged the Divisional Court's finding that most members of the committee were not guilty of misconduct and did not vote for option 3 for improper reasons. He did, however, contend that there was sufficient evidence that Mr Hartley and Dr Dutt were aware of the appellants' ulterior purposes, even though Mr Hartley was acquitted of wilful misconduct and no findings of individual misconduct were made against Dr Dutt after he had taken his own life. Since the resolutions were passed by seven votes to five that would arguably be sufficient to lead to the conclusion that the resolutions were improperly passed.

However, the decision of this court in *R v Derbyshire County Council, Ex p Times Supplements Ltd*, 155 LGRev 123 shows that it is permissible, and indeed necessary, to take a broader view of the realities of the decision-making process. The resolutions and the officers' report came to be before the housing committee as the result of a carefully planned strategy (involving a "planted" question) devised or approved by the appellants and other influential members of the Conservative group. Dame Shirley Porter realistically accepted that, once the resolutions were on the agenda, their approval (with option 3) was something which the majority party "confidently expected". Those committee members who were in the majority party, but outside the influential centre, followed the party line innocently (so far as any hidden agenda was concerned) but in some cases without exercising any independent judgment. (Councillor Hooper knew nothing about the details of housing problems and was asked to fill a casual vacancy about two hours before the committee meeting; Councillors Evans and Buxton were regular committee members but exercised no real judgment about the option 3.)

Since councillors are (at least in a non-technical sense) in the position of trustees of the public funds which they control (see *Attorney General ex rel Rea v Belfast Corpn* (1855) 4 Ir Ch R 119, 143, 156) I would if necessary apply by analogy the principle which the Divisional Court derived from the decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385, that a dishonest third party may be liable (as a constructive trustee) for a breach of trust perpetrated by a trustee acting innocently. But as all councillors were under the same statutory obligations of a fiduciary character, whether or not they were members of the housing committee, and as the appellants no longer rely on the material parts of paragraph 17 of Dame Shirley's notice of appeal, I do not find it necessary to go further into

A that point. In my judgment the appellants' attack on this part of the Divisional Court's judgment fails on both fronts.

VIII

Liability (4): inconsistency

The appellants' counsel made some powerful submissions, developed in
B great detail, to the effect that the Divisional Court had acted inconsistently in allowing the appeals of Mr England, Mr Phillips and Mr Hartley, but dismissing the appeals (on liability) of Dame Shirley Porter and Mr Weeks. The appellants are, counsel submitted, entitled to equal treatment before the law. It is not open to this court to reverse the conclusions which the Divisional Court reached in relation to Mr Hartley (against whom the
C auditor sought leave to appeal, but failed to get it) or in relation to Mr England and Mr Phillips (against whom the auditor did not seek leave to appeal).

I have to say that I have found this the most difficult aspect of the whole of this difficult case. Mr Hartley, as chairman of the housing committee from 11 June 1987, was a member of the chairmen's group which acted as Dame Shirley's political cabinet, and Mr England and Mr Phillips were closely
D involved at all stages in the policy of targeting wards, including attendance at meetings of the chairmen's group and subsequently at the officers' steering group. Mr England's candid manuscript notes on his papers are eloquent testimony of his doubts and apprehensions at various stages. Mr England was the individual who, having attended the consultation with Mr Sullivan on 5 May 1987, was responsible for conveying counsel's advice to Dame
E Shirley Porter and the other members of the chairmen's group that evening. Mr England was primarily responsible for the evolution of both the officers' report and the list of properties, however much he sought to distance himself from the list and to foster what Mr Howell has called "the myth of the members' list". Counsel submitted that his acquittal, and that of Mr Hartley and Mr Phillips, make the adverse findings against Dame Shirley and
F Mr Weeks unsafe and that their appeals should be allowed on that ground.

This part of the case has caused me some anxiety. I accept Mr McMullen's submission that the auditor, not being in a position to seek to reverse the conclusions which the Divisional Court reached about Mr Hartley and the two officers, cannot be heard to say (as part of his case against Dame Shirley and Mr Weeks) that the Divisional Court was wrong about the others. I cannot completely avoid the feeling that there may have
G been some element of mercy in the Divisional Court's conclusions about Mr Hartley and the two officers, especially Mr England, who seems to have been most vulnerable to pressure from elected members. The Divisional Court found, 96 LGR 157, 186: "There is no evidence that any officer was exposed to overt intimidation or threats during the relevant period; but Lewis told the auditor about 'an atmosphere of fear'." The judgment then
H quotes some observations made by Mr Weeks and continues, at p 186:

> "As [Mr Weeks] was deputy leader this gives a flavour of the attitude of the majority party to [the Westminster City Council] officers, for whom it could not have been pleasant working at this time. We take into account that such pressures may well have had an insidious effect on the officers,

making them consciously or unconsciously reluctant to speak out robustly."

The structure of the first sentence may have gone awry, but its meaning is plain. It is to be observed that in a passage of her affidavit already quoted Dame Shirley Porter did, to her credit, seek to protect the council's officers, saying that they acted at the instance of herself or that of other elected members.

Section 20 of the 1982 Act does not leave any room for mercy, if wilful misconduct causing loss has been established, however grave the financial consequences. But, whether or not there was some element of mercy in the Divisional Court's conclusions, it could uphold the surcharge on Mr Hartley and the two officers only if satisfied that each was, on the totality of the evidence, guilty of wilful misconduct, and that his misconduct was causative of loss. The Divisional Court saw and heard oral evidence from each of the five appellants before it and had to reach conclusions in respect of each of them individually, not collectively.

In the case of Mr England its findings in relation to the officers' report and the list of properties (which the auditor has unsuccessfully challenged in this court), and its finding that Mr England made an honest attempt to pass on Mr Sullivan's advice, led it to the conclusion that Mr England was not guilty of wilful misconduct down to 8 July 1987, whatever his doubts and equivocations. As to the subsequent course of monitoring by the steering group, the Divisional Court found, at p 195:

"that he knew that it was inappropriate at the time, and that that is the explanation for his assistance to [Mr Phillips] in providing Councillor Dimoldenburg of the minority party with wholly misleading answers to what appear to us to be understandable and wholly proper questions. This does not, however, mean that he was guilty of wilful misconduct in relation to the policy of designated sales."

In relation to Mr Phillips the Divisional Court found that he must have realised that the policy of concentrating sales in marginal wards, as it was developing down to 5 May 1987, was improper. However it found, at p 202D, that from that date his state of mind must have been affected by the support being given by Mr England and Mr Lewis to "the policy determined by the chairmen's group on 5 May". The Divisional Court found misconduct established against Mr Phillips, but not wilful misconduct, either in relation to events down to 8 July 1987 or in relation to subsequent monitoring.

As to Mr Hartley, the Divisional Court considered him to have been his own worst enemy in the evidence which he gave to the court. It took account of his relatively late involvement in the development of the policy and his reliance on the advice of Mr England and Mr Lewis "who both knew as much, if not more, about the genesis and development of the policy as he did". It also took account of Mr Hartley's own strongly held view that the city council should be selling as much as possible of its housing stock, whatever ward it was in. It concluded, at p 199, that Mr Hartley's action

"was still unlawful and amounted to misconduct despite his own proper motive, because of the improper motive of others of which he was aware. But we are prepared to accept that he did not appreciate the

A unlawfulness of his conduct and genuinely believed that his own proper purpose rendered his actions lawful. Accordingly, his misconduct was not, in our judgment, wilful."

I do feel some unease about these conclusions. They seem to me to have an air of "absolution by association", which can be no more acceptable an approach than that of guilt by association. Nevertheless I cannot say that B they are not conclusions which were open to the Divisional Court. I note also that the Divisional Court did not, in this part of its judgment, make any express findings as to whether (non-wilful) misconduct by any of these three individuals was causative of loss. The judgment went on to consider causation in relation to Dame Shirley Porter and Mr Weeks and found, in my view correctly, that the loss to the city council was caused by those C appellants as the promoters of the policy. Had the Divisional Court found it necessary to consider causation in relation to Mr Hartley and the two officers it might (especially in relation to the officers) have found a further ground for allowing their appeals in the lack of any sufficient causal link.

For all these reasons I would dismiss the appellants' appeals on the issue of liability.

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IX

Quantum

In case this matter goes further I should deal with the issue of quantum. I do so on the footing that the sales policy was unlawful although the majority of this court have reached a different conclusion. The differences between sections 19 and 20 of the 1982 Act have already been noted. E Whereas section 19 is concerned with unlawful expenditure, section 20 is (so far as now material) concerned with "a loss . . . incurred or deficiency caused by the wilful misconduct of any person". The auditor made calculations under both section 19 and section 20 but only the latter are now material. It is clear that the scope of section 20 is not restricted to a loss or deficiency arising from expenditure: see *Asher v Lacey* [1973] 1 WLR 1412, F the first round of the Clay Cross litigation. Neither side has based any submission on any perceived distinction between "loss" and "deficiency" and in what follows the simple expression "loss" will be used to cover both.

Both before the Divisional Court and (on a somewhat reduced scale) in this court the parties' submissions on quantum have been directed to various different items in a sort of balance sheet of items of loss, partly offset by items of gain, prepared by the auditor (volume 5, appendix 13 of his G decision; the overall summary, apart from interest, is at paragraph 129, showing a total loss of about £26·510m before interest). But before embarking on a detailed item-by-item scrutiny it is appropriate to note the way in which the issues as to quantum have developed, and to comment on some general submissions made to this court. In his note of preliminary findings issued on 13 January 1994 the auditor mentioned the sum of H £21·255m as the sum which he had to consider certifying. At the audit hearings (held between 19 October 1994 and 7 February 1995) the auditor heard evidence (on behalf of Dame Shirley Porter) as to quantum from three accountants, Mr Wheeler of Chantrey Vellacott, Mr Aldous of Robson Rhodes, and Mr Swinson of BDO Stoy Hayward. There was no evidence as to the valuation of the 618 dwellings sold under the designated sales policy.

The auditor also received supplementary statements from Mr Aldous and Mr Swinson in April 1995. On 17 August 1995 the auditor sent out a "revised provisional calculation" of loss supported by various appendices, and invited representations on them. No representations were received on behalf of Dame Shirley Porter or Mr Weeks.

The Divisional Court had before it four experts' reports bearing on the issue of quantum: from Mr Swinson and Mr Adams-Cairns of Savills on behalf of Dame Shirley Porter, and from Mr Dallas of Coopers & Lybrand and Mr Scott-Barrett of Cluttons for the auditor. It also, of course, had before it the auditor's findings in volume 5 of his final report. The Divisional Court rejected a further supplementary report by Mr Adams-Cairns which was produced just before he gave oral evidence.

The appellants' case on these points was argued in this court by Mr McMullen. He submitted that the auditor's function is the equivalent of assessing damages, and that the damages should be compensatory, and measured by the loss to the person who is to be compensated. I readily accept the conclusion to which that submission leads, but it seems to me a rather roundabout way of getting there. Section 20 focuses on loss from the start and the diversion into damages is unnecessary, even though occasional references to damages can be gleaned from the authorities on surcharges, for instance *R v Roberts* [1908] 1 KB 407, 419.

For similar reasons little or no assistance is to be derived from submissions addressed to this court about restitution and restitutionary damages. The expression "restitution" and its derivatives have different shades of meaning. In some contexts (and in particular in the traditional Latin phrase restitutio in integrum) it may be indistinguishable from compensation; restitutionary damages, as a term of art, must however be sharply distinguished from compensatory damages (see generally *Attorney General v Blake* [1998] Ch 439, 456–459, and the wealth of academic work there referred to); and sometimes a restitutionary remedy (such as an account of profits) is an alternative to damages of any sort, and the plaintiff must elect between them: see generally *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713, noting but refraining from comment on *Ministry of Defence v Ashman* (1993) 25 HLR 513. There is no suggestion whatsoever that either of the appellants has been unjustly enriched at the expense of the City of Westminster's ratepayers. The issue is what loss the ratepayers have suffered as a result of any wilful misconduct established against the appellants.

Any such loss must be measured in money. But it must be borne in mind (so far as damages provide any useful analogy here) that a successful plaintiff is not bound to lay out his damages in making good any physical loss to his property, and in practice he may be unable or unwilling to do so. As Lord Lloyd of Berwick said in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 366, after citing the words of Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689:

> "Note that Lord Haldane does not say that the plaintiff is always to be placed in the same situation physically as if the contract had been performed, but in as good a situation financially, so far as money can do it."

A The Divisional Court may, with respect, have lost sight of that point when it said, 96 LGR 157, 205–206:

> "To put the council back into the position in which it originally was as owner of the dwellings requires one to envisage the council going out into the market place to acquire comparable dwellings as replacements."

B There is no suggestion in this case that the council was under a duty to acquire replacement dwellings, or that it did acquire them. The loss of part of its stock of social housing exacerbated the council's problems in performing its statutory duty to house the homeless, and that gave rise to a separate item of loss, which is one of the issues on this appeal. But the council could perform its statutory duty in a variety of ways, which were not limited to housing stock in the council's ownership. To provide for the cost C of notional replacement of part of the housing stock by the acquisition of new dwellings, as well as its actual replacement by use of bed and breakfast accommodation or private sector lettings, would not in my view be the right approach. It will be necessary to come back to this point.

The Divisional Court approached the issue of the burden and standard of proof on the appeal as a whole

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> "by considering, in relation to each appellant, whether the auditor appears to have gone wrong in any respect and whether, having regard to the high standard of proof appropriate to the seriousness of the allegation . . . on the material before us, wilful misconduct causing loss has been shown": see p 162.

E The correctness of that approach is challenged by the auditor in his respondent's notice. Conversely paragraph 20 of Lady Porter's notice of appeal contends that the Divisional Court "failed to consider adequately or at all in the light of the burden and standard of proof applicable whether any loss was caused to the council".

The burden and standard of proof appropriate to the central issue of wilful misconduct is not relevant on the issue of quantum. If wilful F misconduct is established proof of loss, and its quantification, must proceed in accordance with ordinary principles. Neither the auditor nor the court may speculate where there is no evidence. But in an area where judgments have to be formed on the basis of a mass of financial and statistical information (with some gaps) the auditor must do his best to reach a fair conclusion, erring if necessary in favour of those who are to be surcharged: G see the observations of Lord Denning MR in *Asher v Secretary of State for the Environment* [1974] Ch 208, 222. If the auditor proceeds in that way the court will be slow to interfere with the exercise of his judgment, especially in circumstances where the persons surcharged have had the opportunity of challenging his data and his reasoning, but have not taken that opportunity. The Divisional Court was in my view quite right not to accede to the last-minute attempt to introduce new expert evidence H challenging the valuations by Ellis & Co on which the auditor relied. It was not necessary for the auditor to require rigorous proof of every material fact, whether or not it had been put in issue, and had he done so the audit process would have been even more protracted and expensive than it was.

What the council lost as a result of the adoption of the unlawful designated sales policy was, in general terms, (i) 618 dwellings which formed part of its stock of social housing (at a time when it was already hard-pressed to perform its obligations under Part III of the Housing Act 1985 to house the homeless) together with (ii) funds used to pay capital grants which formed an integral part of the policy and (iii) the resources of its officers and others who were devoting their time and energy, at the council's expense, to promoting and carrying out the unlawful policy. However these losses were, as already noted, broken down into a number of items on both sides of a sort of balance sheet which the auditor set out in his final report; and Mr Swinson, the principal witness called on behalf of Dame Shirley Porter at the hearing before the Divisional Court, naturally adopted the same approach in his criticisms of the auditor's figures. (Indeed, the same approach can be seen in paragraph 11.4 of the original officers' report, dealing with financial implications.)

The figures put forward in the auditor's final report can be summarised as follows (with agreed corrections which mean that the totals in the Divisional Court judgment cannot be precisely reconciled):

	£m.
1. Capital grants (most of which were paid in 1987–88 and 1988–89)	2·462
2. Cost of keeping unsold property vacant (mostly incurred in 1988–89 and 1989–90)	1·567
3. Losses resulting from sales	
(a) discounts	15·476
(b) rent lost after sales (1989–95)	7·922
(c) subsidy lost after sales (1989–95)	8·013
(d) extra homelessness costs (1988–94)	4·237
4. Staff and professional costs (1988–90)	2·089
	41·766
offset by	
5. Interest on proceeds of sales (1989–95)	(15·197)
6. Service charges on property sold (1989–95)	(1·837)
7. Savings on landlord's outgoings (1989–95)	(1·044)
	23·688
8. Interest	5·157
	28·845

It should be noted that most of the 618 dwellings were not sold outright but were let on long leases granted in consideration of substantial premiums, and references to sales include those disposals by way of long lease at a premium. Item 6 above refers to service charges payable to the

A council as landlord under these long leases. The auditor took 8 July 1987 as the starting date for the purpose of assessing loss, disregarding the argument that some dwellings might have been kept empty in anticipation of the decision of the housing committee taken on that day. He took 31 October 1989 as the date on which the policy of designated sales was effectively discontinued. However what the auditor called "pipeline" sales continued until 4 May 1990, when the last of those sales was completed (see generally volume 5, appendix 13, paragraphs 56–63 of the auditor's final report).

Of the items set out above those numbered 1, 2, 3(b) and (c)—which were all relatively straightforward matters of computation—were not in the end challenged before the Divisional Court (although item 1 was challenged for the first time in this court). There was also relatively little between the experts on item 5 (interest on proceeds of sales) since the dispute was limited to how far the proceeds should be assumed to have been used to reduce the council's borrowings, as opposed to being used to swell the council's cash reserves. As the judgment of the Divisional Court records, both experts finally agreed that the proper approach was to assume a mixture of deposit and borrowing rates, and the Divisional Court accepted the evidence of Mr Dallas, which had not been challenged in cross-examination, as to the appropriate mixture.

In my judgment the belated challenge on capital grants (item 1) must fail. They were an integral part of the unlawful policy. Items 3(a) (discounts on vacant possession values), 3(d) (extra homelessness costs), 4 (staff and professional costs), 6 (service charge income), 7 (reduction in landlord's outgoings) and 8 (interest) were the main areas of controversy in the Divisional Court. The Divisional Court resolved all those issues in favour of the auditor except for the staff and professional costs, on which it reduced the auditor's figure of £2·089m to £1·146m by excluding the element of overhead and central costs (Mr Swinson, on behalf of Dame Shirley Porter, had been contending for a reduction to £0·579m). The reduction made by the Divisional Court is challenged in the final paragraph of the auditor's respondent's notice. The Divisional Court's decision not to make any reduction in respect of discounts or interest is challenged in paragraphs 22 and 24 of Dame Shirley Porter's notice of appeal, which are adopted on behalf of Mr Weeks. The skeleton argument on behalf of Dame Shirley Porter (which is adopted on behalf of Mr Weeks) does not contain any submissions challenging liability for interest on the loss, but does raise points (not raised expressly in the notice of appeal) as to the extra homelessness costs, the service charge income and the savings on landlord's outgoings. In this court, therefore, the main issues as to quantum have been the discounts and staff and professional costs, with further subsidiary issues as to homelessness, service charge income and landlord's outgoings. Two of these points (staff and professional costs and landlord's outgoings) have something in common in that they depend partly on the choice between marginal and proportionate cost (the issue of construction actually before the House of Lords in *Pepper v Hart* [1993] AC 593) as the correct measure of loss.

It may be helpful to set out again the amounts at which the auditor quantified the disputed items of loss (or offset), with Mr Swinson's competing figure and the Divisional Court's conclusion:

(£m)	Auditor	Swinson	Div Ct
Discounts	15·476	nil	15·476
Extra costs of homelessness	4·237	2·268	4·237
Staff, etc costs	2·089	0·579	1·146
Service charge income	(1·836)		(1·836)
		=(5·818)	
Savings of outgoings	(1·044)		(1·044)

The largest difference between the parties, both in monetary terms and as a matter of principle, is over the inclusion in the loss of the difference between the open market value, with vacant possession, of the dwellings disposed of and the discounted prices at which they were actually disposed of. (The discount was 30% to purchasers who were not already tenants of the council, or were tenants but did not have the right to buy; it was a variable amount, but always more than 30%, for existing tenants with the right to buy.) The primary dispute was as to whether that was the right approach in principle: there was a secondary dispute over whether the undiscounted valuation figures produced by Ellis & Co should be accepted as evidence of open market, vacant possession values.

The Divisional Court noted the argument (deployed in the evidence of Mr Swinson) that vacant possession values were not the right starting point because, had the unlawful policy not been adopted, the dwellings would have continued to be held by the council as social housing let at rents below the level of full market rents. What the council had lost, therefore, was the capital value of a rental stream from the letting of social housing.

The judgment of the Divisional Court then cited the well known observations of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 and stated, 96 LGR 157, 205–206 (in a passage part of which has already been set out):

> "In the present case that restoration is not achieved by compensation based on the value of the dwellings 'to the council' assuming occupation of them at social rents. To put the council back into the position in which it originally was as owner of the dwellings requires one to envisage the council going out into the market place to acquire comparable dwellings as replacements. Whether it then chooses to let them at below market rents (and if so, how far below market level) or at full market rents in appropriate cases or to sell them under ministerial general consents at full market value or a discount is a matter for the council exercising its discretion in a proper way. As things stand, it has lost that opportunity. It is no answer to say that the designated dwellings sold as a result of the housing committee's decision of 8 July 1987 had sitting tenants at the date of that decision. It is agreed that all the dwellings disposed of as a result of that decision were sold with vacant possession—indeed, it was because they became vacant that they could be sold. All of them, therefore, were ones where during the relevant accounting periods the council came into full vacant possession. That is the proper basis for assessing the council's loss in respect of this item."

Mr Howell for the auditor did not seek to support the view that this was a "loss of a chance" case: see *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, 1623–1624. He did, however, contend that the value of the lost dwellings to the council lay in enabling the council to discharge its

A statutory functions as a social landlord. The council could not, he said, have discharged its functions by acquiring replacement dwellings already occupied by sitting tenants.

Since the council never even considered the acquisition of replacement dwellings there is a degree of unreality in debating whether vacant or let dwellings would have formed the subject matter of such an acquisition. The B fundamental objection to this approach is that it loses sight of what the council lost as a result of adopting the unlawful policy of designated sales—that is, part of its stock of social housing. Had the designated dwellings, as they became vacant, not been boarded up and kept vacant until they were sold, they would have been available for reletting either to homeless persons or to others with priority needs. The focus on the fact that the dwellings were vacant at the time of sale seems to me to be, as Lord Hoffmann put it in C *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 211:

> "the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the D [defendant] is liable must precede any consideration of the measure of damages."

In this case the relevant element of loss is the loss of part of the council's stock of social housing. It was not a loss in a commercial venture of selling dwellings with vacant possession. In my judgment the Divisional Court erred in its approach. It should have accepted the submission that there was E no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. There was ample evidence that the discounted prices did exceed that value, and it is not necessary to go into the subsidiary issue as to Ellis & Co's valuations. Any other approach would, it seems to me, be inconsistent with the auditor's separate investigation and conclusion as to the additional costs of housing homeless F persons which the council had to incur as a result of its own stock of social housing having been depleted by the designated sales policy.

It is convenient to take together the loss arising from additional staff and professional costs and the allowance for the reduction in landlord's liabilities for management and maintenance costs, since they raise the same point of principle, but with the auditor contending for a proportionate (rather than a marginal) approach to staff and professional costs, and the G appellants contending for a proportionate (rather than a marginal) approach to the landlord's liabilities. If a consistent approach is taken neither side can succeed on both points. The Divisional Court was consistent in adopting a restrictive approach on both points and taking into account only such liabilities as could be identified as directly resulting from the additional costs of the designated sales policy or from the reduced landlord's liabilities, as the case might be. Of the inclusion of an element of the "overhead and central H costs" of the policy the Divisional Court said, 96 LGR 157, 210A, that "Certainly this would be normal accounting practice, but the ascertainment of 'loss or deficiency' is not to be equated to a book-keeping exercise." Of Mr Swinson's evidence on the landlord's outgoings the court said, at p 211A, that "he was unable to identify any savings which the auditor has omitted

and his own [proportionate] method is plainly inappropriate". In my view the Divisional Court was right in its consistently cautious approach to these two points. I would not depart from the figures of a loss of £1·146m, and offsets of £1·836m and £1·044m, taken by the Divisional Court.

The last item which affects quantum is the additional cost of performing the council's statutory duty of housing the homeless. The auditor estimated this cost at £4·237m and the Divisional Court accepted that figure (Mr Swinson had contended for £2·268m). The auditor reached his figure by a complex four-stage process which can (with some sacrifice of precision) be described as follows. (1) The auditor calculated, for units of accommodation of different types (ranging from bedsitters to four-bedroom dwellings), the numbers of unit/weeks lost in each accounting period. (2) The auditor then reduced those figures by giving a credit for the number of additional vacancies created by (i) the introduction of the grant system or (ii) existing council tenants purchasing flats under the designated sales policy. (3) The auditor then calculated the percentage of the units no longer available to house the homeless which would in practice have been used for that purpose at the relevant time (these percentages were within a broad range of about 65% to 95% for different types of accommodation). (4) There was then a final filter of matching the provisional figures for lost unit/weeks against unmet demand at the relevant time: if the figure for unmet demand for a particular type of unit was lower only the lower figure was taken. The resulting figures for lost unit/weeks were then costed against average marginal costs for private sector leasing or (if that was not available) bed and breakfast accommodation, which was a more expensive resource.

Mr Swinson in his evidence to the Divisional Court made three main criticisms of the auditor's approach, two of which were relied on in the appellants' submissions in this court. The first point is concerned with the number of vacant units at any given time. Mr Howell is, it seems to me, correct in saying that the appellants' written submissions do not do justice to the complexity of the calculations which the auditor made (in paragraphs 104–117 of appendix 13). The auditor was well aware that demand varied for units of different sizes, and that if a vacant unit such as a bedsitter would not be used to house a homeless family (for instance, because at the relevant time all the homeless needed larger units) it would not be kept vacant but would be used to house another priority applicant. Mr Swinson relied on another witness's comment that "you do not carry forward empty properties". Certainly it was not the council's practice, before the introduction of the designated sales policy, to leave any part of its stock of social housing empty for longer than was necessary. But once that policy was introduced, its inevitable consequence was that units were kept for sale and, once sold, were a permanent depletion of the housing stock. The Divisional Court recognised force in Mr Swinson's argument on this point, but saw it as counterbalanced by the auditor's "overgenerous approach" to the costing of alternative accommodation (to the extent, as the Divisional Court found, of £1·541m). For my part I am not persuaded that there is any real force in the point about vacant units, but if there is it is amply counterbalanced by the costing point.

The other point relied on by the appellants in this court is concerned with the procedures adopted by the council in dealing with applicants who claimed to be homeless. An applicant who had not yet actually been housed

A would be classified as either "under offer", "OK" or "not OK". Those who were "OK" had provided all the information which the council needed and the council had completed any necessary inquiries. In the case of those who were "not OK" further information or inquiries were needed and some but not all of the applicants would not move on into the "OK" and "under offer" categories.

B The Divisional Court said on this point, at p 209:

> "Had [the 'not OKs'] all eventually been refused, this would reduce the homelessness costs by about £600,000. It is unlikely that all would have been refused, although some no doubt would have been. No firm data exists on this. We take the view that some allowance should have been made for this element."

C Again, however, the court was satisfied that any error had been compensated for by the auditor's approach to the costing. Mr McMullen criticised that as speculation, citing the observations of Forbes J in *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 WLR 149, 152. But he did not criticise the figure of £1·541m at which the Divisional Court quantified the "overgenerous approach" to costing, and in my view the D Divisional Court reached a sensible conclusion well within the scope of permitted principles.

I would therefore reduce the principal sum certified by the auditor to £7·092m, to which must be added interest at the rate taken by the auditor.

Appeal allowed
Leave to appeal

E 19 May. The Court of Appeal ordered the auditor to pay the appellants' costs in the High Court and the Court of Appeal on the standard basis other than those in relation to the appeal to the Court of Appeal on the question of fairness but refused the appellants' application for expenses against Westminster City Council pursuant to section 18(10) of the Audit Commission Act 1998. Leave to appeal from the order for costs was refused.

F *Solicitors: Nicholson Graham & Jones; Rowe & Maw.*

SLD

The auditor appealed.

G *John Howell QC* and *Karen McHugh* for the auditor. Councillors must exercise their statutory powers for the public purposes for which those powers are conferred: see *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419 and *R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council* [2001] 1 All ER 462. Statutory powers are held on trust and cannot validly be used for the purpose of promoting the electoral advantage of any particular party or H the re-election of an individual councillor. The power to dispose of land under section 32 of the Housing Act 1985 cannot be used for such an unlawful purpose: see *Crédit Suisse v Allerdale Borough Council* [1997] QB 306; *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858; *Padfield v Minister of Agriculture,*

Fisheries and Food [1968] AC 997; *R v Board of Education* [1910] 2 KB 165 and *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207.

"Wilful misconduct" within section 20 of the Finance Act 1982 is the wrongful and deliberate act or omission with knowledge of its wrongfulness or with reckless indifference as to whether or not it is wrong: see *Graham v Teesdale* (1981) LGR 117 and *Lloyd v McMahon* [1987] AC 625. Councillors are, in any event, required to discharge their duties to the best of their ability and judgment and may be liable to make good resources whose unlawful alienation they have procured: see *Asher v Lacey* [1973] 1 WLR 1412; *Asher v Secretary if State for the Environment* [1974] Ch 208; *Smith v Skinner* (1986) 26 RVR 45; *Parr v Attorney General* (1842) 8 Cl & Fin 409; *Attorney General v De Winton* [1906] 2 Ch 106; *Barrs v Bethell* [1982] Ch 294; *Charitable Corpn v Sutton* (1742) 2 Atk 400; *Attorney General v Wilson* (1840) Cr & Ph 1 and *Attorney General v Belfast Corpn* (1855) 4 Ir Ch R 119.

The Divisional Court's findings were well founded and the Court of Appeal was not entitled to interfere with or displace them: see *SS Hontestroom (Owners) v SS Sagaporack (Owners)* [1927] AC 37; *Watt or Thomas v Thomas* [1947] AC 484; *R v Birmingham City District Council, Ex p O* [1982] 1 WLR 679; [1983] 1 AC 578; *In re District Auditor for London, Ex p Riley* (unreported) 20 November 1944; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Pooley v District Auditor No 8 Audit Office* (1964) 63 LGR 60 and *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22.

The Divisional Court was correct to hold that the council suffered a loss when it disposed of the dwellings at less than their open market value: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191. The Divisional Court was also correct in holding that the additional homelessness costs incurred as a result of the unlawful disposal of any property involved no element of double-counting. Those costs would have been incurred whether the properties were disposed of at market value or at less than their market value, and no interest was assessed on the delayed recovery of the value lost on the disposal of the dwellings.

Jeremy McMullen QC, Stuart Cakebread and *Clare Roberts* for Dame Shirley Porter. Although a local authority must exercise its statutory powers consistently with the purposes for which they were conferred (see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Crédit Suisse v Allerdale Borough Council* [1997] QB 306), councillors are in general elected on a party political manifesto. Reality demands that Party political or electoral considerations may be relevant to the development of policy or the deliberations of councillors in committee and will not necessarily render their decision unlawful. The motivation of the individual members cannot be ascribed to the council. If, therefore, the voting members were ignorant of the unlawful purposes of non-voting members or knew of them but did not take them into account; those purposes would have no bearing on the lawfulness of the voting members' decision: compare *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. The decision would only be unlawful if the voting members relied upon the political motivation of the non-voting members of the exclusion of local government reasons. Since the housing committee's decision was lawful the motivation of P was irrelevant: see *R v*

A *Sheffield City Council, Ex p Chadwick* (1985) 84 LGR 563; *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419; *Jones v Swansea City Council* [1990] 1 WLR 54; [1990] 1 WLR 1453; *R v Bradford City Metropolitan Council, Ex p Wilson (Note)* [1990] 2 QB 375; *R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council* [2001] 1 All ER 462; *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207; *R v Derbyshire County Council, Ex p The Times Supplements Ltd* (1991) 151 LG Rev 123; *Smith v Skinner* 26 RVR 45; *R v Bradford Metropolitan City Council, Ex p Wilson (Note)* [1990] 2 QB 375; *In re Magrath* [1934] 2 KB 415; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386 and *In re District Auditor for London, Ex p Riley* (unreported) 20 November 1944.

C The test of wilful misconduct within the meaning of section 20 of the Local Government and Finance Act 1982 is defined in *Graham v Teesdale* 81 LGR 117. For a member to be liable for a decision of the council it is a necessary, but not sufficient, condition that the decision is unlawful: see *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220. Section 20 must be strictly construed; the law must be adequately accessible, clear and predictable and so defined that members and officers can regulate their conduct and reasonably know the circumstances in which they would risk certification. "Misconduct" means "improper conduct" and connotes malfeasance or culpable neglect: see *Horabin v British Overseas Airways Corpn* [1952] 2 All ER 1016. It must consist of conduct which takes place in relation to the member's office. Moving a political programme to achieve electoral advantage is not enough.

E The standard of proof for wilful misconduct is high and will only be satisfied if the member knew that his conduct was unlawful. The test of whether a councillor has acted with reckless indifference is no less stringent than that applicable to misfeasance in public office: see *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220. Reliance on legal advice is a defence: see *Asher v Lacey* [1973] 1 WLR 1412; *Asher v Secretary of State for the Environment* [1974] Ch 208; *Lloyd v McMahon* [1987] AC 625 and *Ex p Riley* (unreported) 20 November 1944. In assessing whether P had the necessary belief that her conduct was unlawful regard must be had to her knowledge and expertise. An unpaid lay councillor is not in the same position as a paid professionally qualified senior council officer: see *In re Waterman's Will Trusts; Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054 and *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515. Liability should only be imposed on councillors where they are sufficiently aware of what they are doing.

The Court of Appeal was entitled to review the Divisional Court's findings: see *Watt or Thomas v Thomas* [1947] AC 484, equality of treatment is a fundamental principle. Like cases should be treated alike unless there is sound justification for not doing so. See also, *Arthur J S Hall & Co v Simons* [2002] 1 AC 615; *R v Westminster City Council, Ex p Union of Managerial and Professional Officers* [2000] LGR 611; *R v Hertfordshire County Council, Ex p Cheung* The Times, 4 April 1986; Court of Appeal (Civil Division) Transcript No 287 of 1986; *Police v Rose* [1976] MR 79; *Matadeen v Pointu* [1999] 1 AC 98 and *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252.

The object of the section 20 certificate is to restore a local authority to the position it would have been in if the unlawful act had not occurred. The Court of Appeal was correct to conclude that there was no loss if the discounted prices actually received by the Council exceeded the value of the dwellings as tenanted social housing. Since the Council did not intend to acquire replacement properties at full market price it was not reasonable that it be entitled to receive the difference between that price and the discounted price: see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; *Attorney General v Blake* [2001] 1 AC 268; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25; *The Argentino* (1888) 13 PD 191; *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406; *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659; *Ministry of Defence v Ashman* (1993) 25 HLR 513 and *R v Roberts* [1908] 1 KB 407.

The decisions of the auditor and of the Divisional Court should in any event be set aside on the ground that they were unfair and in breach of P's rights at common law and under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: see *R v Lambert* [2001] 3 WLR 206; *R v Kansal (No 2)* [2002] 2 AC 69; *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326; *R v Benjafield* [2001] 3 WLR 75; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214 and *King v Walden* [2001] STC 822. Although the Convention was not then part of the domestic law P may rely on it: see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

In exercising his wide discretions under the 1982 Act, the Auditor had to act consistently with the Convention: see *R v Secretary of State for the Home Department v Brind* [1991] 1 AC 696 and *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770. By virtue of article 6 he is obliged to determine issues impartially within a reasonable time and in accordance with principles of natural justice and fairness. It is relevant to consider the structural unfairness of the statutory scheme under which he operates: see *Preiss v General Dental Council* [2001] 1 WLR 1926. The multiplicity of roles he is required to perform—investigator, prosecutor and decision-maker—violates his article 6 obligation to act with independence and impartiality: see *Piersack v Belgium* (1982) 5 EHRR 169; *Findlay v United Kingdom* (1997) 24 EHRR 221; *De Cubber v Belgium* (1984) 7 EHRR 236; *Hauschildt v Denmark* (1989) 12 EHRR 266 and *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455.

Article 6 requires not only that its safeguards are met where the initial determination of civil rights or obligations is made by a court (see *De Cubber v Belgium* (1984) 7 EHRR 236) but also that, where that determination is made by an administrative or quasi-judicial body, an appeal lies to a judicial body which itself complies with article 6: see *Albert and Le Compte v Belgium* (1983) 5 EHRR 533. Where serious criminal charges are brought the accused is entitled to appear before a first instance tribunal which fully meets the requirements of article 6: see *Findlay v United Kingdom* 24 EHRR 221. Any appeal tribunal whether criminal or civil, must comply with Article 6: *Delcourt v Belgium* (1970) 1 EHRR 355. However, the auditor is not a tribunal within the meaning of article 6: see *Belilos v Switzerland* (1988) 10 EHRR 466. His office is not established by statute as a court and he is not obliged to administer justice in public. Nor is he an "inferior court" under English law whose functions can be protected

by contempt proceedings: see *Attorney General v British Broadcasting Corpn* [1981] AC 303. He is not a judicial forum applying the rules of due process which would be applied in a court or judicial tribunal.

"Wilful misconduct" under section 20 of the 1982 Act has a criminal or quasi-criminal character. Classification of offences under domestic law is not determinative for the purposes of the Convention: see *Deweer v Belgium* (1980) 2 EHRR 439. Thus the substance rather than the form of the "offence" has to be examined in the light of the severity and nature of the penalty and the stigma involved in any finding of "guilt": see *AP, MP and TP v Switzerland* (1997) 26 EHRR 541; *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340; *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084; *Lutz v Germany* (1987) 10 EHRR 182; *Bendenoun v France* (1994) 18 EHRR 54; *Georgiou (trading as Marios Chippery) v United Kingdom* [2001] STC 80; *King v Walden* [2001] STC 822; *Lloyd v McMahon* [1987] AC 625; *R (Greenfield) v Secretary of State for the Home Department* [2001] 1 WLR 1731; *Lauko v Slovakia* (1998) 33 EHRR 994; *Demicoli v Malta* (1991) 14 EHRR 47; *Engel v Netherlands (No 1)* (1976) 1 EHRR 647; *Weber v Switzerland* (1990) 12 EHRR 508; *Pierre-Bloch v France* (1997) 26 EHRR 202; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165; *Customs and Excise Comrs v City of London Magistrates' Court* [2000] 1 WLR 2020 and *Garyfallou AEBE v Greece* (1997) 28 EHRR 344. *G v France* (1988) 57 DR 100 is distinguishable on its facts.

Since, on the basis that for the purposes of the Convention, wilful misconduct is to be treated as criminal, the procedural safeguards of article 6, in particular the presumption of innocence (as well as under the common law: see *Woolmington v Director of Public Prosecutions* [1935] AC 462), must be observed whatever procedure is adopted. Although rules of evidence are for the domestic law to determine, a reverse onus rule must be within reasonable limits and the overall effect of the proceedings must safeguard P's rights. Here they failed to do so (see *Barberà, Messegué and Jabardo v Spain* (1988) 11 EHRR 360; *Allenet de Ribemont v France* (1995) 20 EHRR 557; *Salabiaku v France* (1988) 13 EHRR 379 and *Krause v Switzerland* (1978) 13 DR 73) and required P to prove her innocence: see *R v Roberts* [1908] 1 KB 407; *Jones v Attorney General* [1974] Ch 148; *Lloyd v McMahon* [1987] AC 625 and *X v Austria* (1972) 42 CD 145; contrast *Tyrer v District Auditor for Monmouthshire* (1973) 230 EG 973. Publicity given to the interim findings of the auditor both violated the presumption of innocence and gave an appearance of bias: see *Hoekstra v HM Advocate* [2001] 1 AC 216; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451. The auditor was not an independent and impartial tribunal in breach of article 6 (see *Bryan v United Kingdom* (1995) 21 EHRR 342), and this failure led to the appearance of bias such that his findings should be set aside: see *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Montgomery v HM Advocate* [2001] 2 WLR 779; *Hoekstra v HM Advocate* [2001] 1 AC 216; *Darmalingum v The State* [2000] 1 WLR 2303 and *R v Camborne Justices, Ex p Pearce* [1955] 1 QB 41.

The test for apparent bias is whether, on an objective evaluation, the circumstances would lead a fair-minded and informed observer reasonably to apprehend that there was a real possibility that the tribunal would unfairly consider the case of one party with favour or disfavour: see *R v Gough* [1993] AC 646; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* [2000] 201 CLR 488; *Valente v The Queen* [1985] 2 SCR 673; *Bradford v McLeod* 1986 SLT 244; *Doherty v McGlennan* 1997 SLT 444; *BOC New Zealand Ltd v Trans Tasman Properties Ltd* [1997] NZAR 49; *Moch v Nedtravel (Pty) Ltd* (1993) 3 SA 1; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147; *Delcourt v Belgium* 1 EHRR 355; *Findlay v United Kingdom* 24 EHRR 221; *Bryan v United Kingdom* 21 EHRR 342; *Pullar v United Kingdom* (1996) 22 EHRR 391; *Hauschildt v Denmark* 12 EHRR 266; *Piersack v Belgium* 5 EHRR 169; *De Cubber v Belgium* 7 EHRR 236; *Sander v United Kingdom* (2001) 31 EHRR 1003; *Gregory v United Kingdom* (1997) 25 EHRR 577; *Roylance v General Medical Council (No 2)* [2000] 1 AC 311; *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *Preiss v General Dental Council* [2001] 1 WLR 1926; *Kremzow v Austria* (1993) 17 EHRR 322; *Grant v United Kingdom* (1988) 55 DR 218 and *R v Williams* The Times, 8 October 2001.

Although unfairness can be cured on appeal the Divisional Court failed to do so; in any event the defect was systemic, as well as so gross and flagrant as to be incapable of cure: the only proper course was to quash the decision: see *Lloyd v McMahon* [1987] AC 625; *Calvin v Carr* [1980] AC 574; *Smith v Skinner* 26 RVR 45; *Jones v Attorney General* [1974] 1 Ch 148, the *Preiss* case [2001] 1 WLR 1926 and *Darmalingum v The State* [2000] 1 WLR 2303.

The auditor's inordinate delay also breached the reasonable time requirement in article 6(1). At common law, a complainant may need to show prejudice resulting from the delay: see *Bell v Director of Public Prosecutions* [1985] AC 937; *Minister of Home Affairs v Fisher* [1980] AC 319; *Barker v Wingo* (1972) 407 US 514; *R v Secretary of State for the Home Department, Ex p Phansopkar* [1976] 1 QB 606; *Martin v Tauranga District Court* [1995] 2 LRC 788; *R v Morin* [1992] 1 SCR 771; *Fisher v Minister of Public Safety and Immigration* [1998] AC 673; *Mungroo v The Queen* [1991] 1 WLR 1351; *Director of Public Prosecutions v Tokai* [1996] AC 856; *McCalla v Disciplinary Committee of the General Legal Council* (unreported) 30 July 1998; *Darmalingum v The State* [2000]1 WLR 2303; *Flowers v The Queen* [2000] 1 WLR 2396 and *Attorney General's Reference (No 2 of 2001)* [2001] 1 WLR 1869; contrast *Attorney General's Reference (No 1 of 1990)* [1992] QB 630; *Jago v District Court of New South Wales* (1989) 168 CLR 23 and *Tan v Cameron* [1992] 2 AC 205. The Convention test is different: prejudice does not have to be shown; but specific factors are to be taken into account, including the complexity of the case, the complainant's conduct and the manner in which the judicial and administrative authorities have dealt with the case: see *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1 and *König v Federal Republic of Germany* (1978) 2 EHRR 170. Time runs from the institution of civil proceedings or from the time of a charge in criminal proceedings and includes appellate proceedings: see *Ausiello v Italy* (1996) 24 EHRR 568; *H v United Kingdom* (1987) 10 EHRR 95 and *Attorney General's Reference*

A *(No 2 of 2001)* [2001]1 WLR 1869. *Robins v United Kingdom* (1997) 26 EHRR 527 is not relevant where criminal matters are in issue. Whether the length of time is "reasonable" will depend on the test in the *König* case: see *Ciricosta and Viola v Italy* (unreported) 4 December 1995, Publications of the European Court of Human Rights, Series A no 337-A. The remedy for undue delay is to quash the decision in question: see the *Darmalingum* case. There may be alternative remedies, however: see *Attorney General's Reference (No 2 of 2001)* [2001] 1 WLR 1869; *Locabail (UK) Ltd v Waldorf Investment Corpn (No 4)* The Times, 13 June 2000 and *Sparks v Harland* [1997] 1 WLR 143.

Stuart Cakebread and *Clare Roberts*, for Mr Weeks, adopted the submissions of Dame Shirley Porter.

Howell QC in reply. The Divisional Court was correct to conclude that the alleged delay did not prejudice P and W so as to make a fair trial impossible: see *Attorney General's Reference (No 1 of 1990)* [1992] QB 630; *Tan v Cameron* [1992] 2 AC 205; *Jago v District Court of New South Wales* 168 CLR 23; *Director of Public Prosecutions v Tokai* [1996] AC 856 and *Rochefoucauld v Boustead* [1897] 1 Ch 196. In any event, the Court of Appeal could only interfere with the Divisional Court's finding if it was satisfied that it was plainly wrong: see *SS Hontestroom (Owners) v SS Sagaporak (Owners)* [1927] AC 37.

The Human Rights Act 1998 does not apply to the present case: see *R v Lambert* [2001] 3 WLR 206. In any event, article 6 does not prescribe the consequences of proceedings where the reasonable time requirement is not met. The expedition required by article 6 must be consonant with the proper administration of justice: see *Bell v Director of Public Prosecutions* [1985] AC 937; *R v Morin* [1992] 1 SCR 771; *Ciricosta and Viola v Italy* 4 December 1995, Publications of the European Court of Human rights, Series A no 337-A and *Pretto v Italy* (1983) 6 EHRR 182.

The test of bias or apparent bias is whether the circumstances would lead a fair-minded and informed person to conclude that there was a real possibility that the tribunal would unfairly consider the case of a party. On that test, or the real danger test (see *R v Gough* [1993] AC 646) there was no apparent bias such as to vitiate the auditor's decision: see *Sander v United Kingdom* 31 EHRR 1003; *Pullar v United Kingdom* 22 EHRR 391; *Hauschildt v Denmark* 12 EHRR 266; *Montgomery v Lord Advocate* [2001] 2 WLR 779; *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *Gregory v United Kingdom* 25 EHRR 577; *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Johnson v Johnson* 201 CLR 488; *In re Minister for Immigration and Multicultural Affairs, Ex p Epeabaka* [2001] 179 ALR 296; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 and *Roylance v General Medical Council (No 2)* [2000] 1 AC 311.

The provisional view of a decision-maker does not disqualify him on the ground of actual or apparent bias (see *Kremzow v Austria* 17 EHRR 322 and *Grant v United Kingdom* 55 DR 218) although a premature but concluded view will (see *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70).

Section 20(1) of the 1982 Act neither creates a criminal offence nor imposes a penalty for such an offence. The section merely enables a local

authority to recover compensation in the civil courts for the loss or deficiency suffered. Prospective disqualification is not a punitive sanction but a disciplinary or professional measure imposed for the regulation of persons in positions of trust: see *Lauko v Slovakia* 33 EHRR 994; *Pierre-Bloch v France* 26 EHRR 202; *Bendenoun v France* 18 EHRR 54; *Weber v Switzerland* 12 EHRR 508; *Demicoli v Malta* 14 EHRR 47; *Garryfallou AEBE v Greece* 28 EHRR 344 and *R v Secretary of State for Trade and Industry, Ex p McCormick* [1998] BCC 379.

Any lack of fairness in the proceedings conducted by the auditor may be cured by a rehearing on the merits: see *Lloyd v McMahon* [1987] AC 625; *Kingsley v United Kingdom* The Times, 9 January 2001 and *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

Their Lordships took time for consideration.

13 December. **LORD BINGHAM OF CORNHILL**

1 My Lords, the issue in this appeal is whether the auditor should have certified any sum to be due to the Westminster City Council from Dame Shirley Porter and Mr David Weeks and, if so, in what amount.

2 The appellant, Mr John Magill, is the auditor. He was appointed by the Audit Commission under section 13 of the Local Government Finance Act 1982 to audit the accounts of Westminster City Council for the years 1987–88 to 1994–95. He conducted a very lengthy and detailed audit and certified under section 20 of the Act that three councillors and three officers had, by wilful misconduct, jointly and severally caused a loss of approximately £31m to the council which they were liable to make good. All three of the councillors and two of the officers pursued appeals against the auditor's decision to the Queen's Bench Divisional Court (Rose LJ, Latham and Keene JJ). The councillors were Dame Shirley Porter, who was leader of the council at all material times, Mr David Weeks, who was deputy leader, and Mr Hartley, who from June 1987 was chairman of the council's housing committee. The two officers were Mr England, who was the council's director of housing, and Mr Phillips, who was managing director of the council. The Divisional Court upheld the auditor's finding that Dame Shirley Porter and Mr Weeks were liable, although it reduced the sum certified; it allowed the appeals of Mr Hartley and the two officers and quashed the auditor's certificate in relation to them: (1997) 96 LGR 157. On further appeal by Dame Shirley Porter and Mr Weeks, the Court of Appeal by a majority (Kennedy and Schiemann LJJ, Robert Walker LJ dissenting) upheld both appeals on liability: ante, p 370G [2000] 2 WLR 1420. Robert Walker LJ, although in favour of dismissing both appeals against liability, would have reduced the sum of the auditor's certificate: p 1504. On this quantum issue Kennedy LJ agreed with him (at p 371A) and Schiemann LJ (at p 389) expressed no opinion. The auditor now appeals to this House seeking to reinstate the certificate issued against Dame Shirley Porter and Mr Weeks in the sum certified by the Divisional Court. Mr Hartley and the two officers are no longer directly involved in the proceedings. It is necessary to decide whether the Court of Appeal was right to quash the certificate

A issued against Dame Shirley Porter and Mr Weeks and, if not, in what sum that certificate should have been issued.

3 My Lords, the facts giving rise to this appeal and much of the evidence have been summarised at some length by the Divisional Court 96 LGR 157, 164–166, 175–203, and by the Court of Appeal, ante, pp 373B–374F, 405G–425E and are the subject of a lengthy statement of facts agreed between the parties for purposes of this appeal. The facts and B the evidence are crucial to the appeal, but it is unnecessary to repeat the detailed summaries already made. It is enough, for present purposes, to highlight some of the key events in the narrative, which I take from the agreed statement of facts.

4 The council comprised 60 councillors elected to represent 23 wards. As a result of the local government elections in May 1986, the overall C Conservative party majority was reduced from 26 to 4. The close results of those elections prompted leading members of the council to consider how council policies could be developed in order to advance the electoral prospects of the Conservative party in the next local government election to be held in 1990. Dame Shirley Porter was determined that the Conservative party would have a greater majority at the 1990 elections than that which it had narrowly achieved in 1986. With this end in view, she reorganised the D party's administrative and decision-making structure and herself chaired a group of committee chairmen. This body comprised herself as leader, Mr Weeks, the deputy leader, the majority party's chief whip and the chairmen of the council's committees. It was not a committee or sub-committee appointed by the council. It met on a regular basis, sometimes with officers in attendance. It developed and promoted policy. One of these E concerned the designation of council-owned properties for sale.

5 The council first introduced a policy of designated sales in 1972. Under this policy, blocks of council dwellings were designated and, when a dwelling in a designated block became vacant, it was not re-let but offered for sale to an approved applicant with the intention that all dwellings in designated blocks would become owner-occupied. Under the scheme as it was in July 1987, 10 to 20 sales per annum were generated from the 300 F dwellings then designated. With a view to achieving greater success in the 1990 elections, the chairmen's group formulated a policy entitled "Building Stable Communities" (known for short as "BSC"). This included targets for increasing the numbers of Conservative voters in each of eight key wards, the target voter figures for those wards adding up to a total of 2,200. The eight most marginal wards in the election of May 1986 from the Conservative G party's point of view were Bayswater, Cavendish, Hamilton Terrace, Little Venice, Millbank, St James's, Victoria and West End. Those eight wards were chosen in mid-February 1987 by some members of the majority party on the council (including Dame Shirley Porter and Councillor Weeks), and were known as the "key wards". Both the eight key wards and the target voter figures (which envisaged an overall increase of 2,200 Conservative supporters in the eight key wards) were identified to officers in February H 1987. The target voter figures remained the same thereafter and the achievement of those figures (including the contribution of designated sales to them) was monitored by leading members and officers. The references in contemporary documents to "new residents", "more electors" and "new electors" in many instances were euphemisms for "more potential

Conservative voters", particularly in marginal wards. A major element of BSC was to increase designated sales of council properties in the eight key wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative. In some of the key wards there was very little council housing and few or no designated properties. But, even in respect of those wards, designated sales appeared on monitoring charts recording the progress towards the targets in the eight key wards. From July 1986, if not before, concentrating on marginal wards was majority party policy. The intention of the majority party was to develop council policies which would target marginal wards, including such housing policies as could affect the make-up of the electorate in those wards.

6 Very soon after the 1986 local government elections, the first suggestions for disposing of council housing, including increased designation, were made. On 19 May 1986, Mr England informed the then chairman of the housing committee that it would be virtually impossible for the council to meet its statutory obligations if a policy of wholesale disposal of council housing were to be adopted. On 3 June 1986 the chairmen's group decided that major policy initiatives should come down from it (and from the policy and resources committee) and it discussed marginal wards. On 5 June 1986 the chairman of the housing committee responded to Dame Shirley Porter's request for a note on "balancing the social mix" by identifying a number of factors contributing to the drop in the Conservative party's "natural support" and suggesting various options for increasing home ownership, including increased designated sales which would, however, lessen the council's "already stretched ability to meet our statutory requirements". On 24 June 1986 Dame Shirley Porter and Mr Weeks attended the chief officers' board when the officers were told that the focus of attention would be on winning the next election, and there was discussion of the majority party's objective of "social engineering including housing". On 30 June 1986 a working lunch, attended by Dame Shirley Porter and others, was held to discuss a prospective planning study: Mr England made a note of the discussion which included references such as "economic justification for gmander on hsg", "who is a Tory voter?", "gentrification" and "will company lets vote Tory?". On 29 July 1986 Dame Shirley Porter had a discussion with Mr Phillips concerning properties in key wards, voting records and decanting and she asked Mr England for information in respect of key wards. By the beginning of September 1986 the council's policy unit had prepared a paper on "homelessness/gentrification". It stated that "homelessness is reaching crisis proportions" and described "gentrification" as:

> "ensuring that the right people live in the right areas. The areas are relatively easy to define: target wards identified on the basis of electoral trends and results. Defining 'people' is much more difficult and not strictly council business . . . the housing/planning study should be used to define which initiatives are likely to produce the desired results, and in which areas."

On 1 September 1986 Mr England produced a paper for Mr Weeks on "Gentrification" in which he identified the major constraints on initiatives to increase home ownership as the duties to the homeless and other high priority rehousing requirements.

7 Dame Shirley Porter wrote a paper setting out her "Strategy to 1990" in which she gave top priority to winning the 1990 elections. Two of the key issues identified in the "Strategy to 1990" in relation to electoral success were "homelessness/gentrification" and how best to use the study about to be commissioned from consultants. The paper prepared by the policy unit on "homelessness/gentrification" formed part of Dame Shirley Porter's paper. Her "Strategy to 1990" was agreed by the chairmen's group on 2 September 1986 and on 3 September was circulated by the head of the policy unit to all chief officers. Officers recommended that the consultants' study should be used to establish the key wards and the need for increased home ownership in them. At a meeting on 15 September 1986 with representatives of the consultants, attended by Dame Shirley Porter and Mr Weeks, there was a discussion of a strategy "to push Labour voters out of marginal wards. Housing Dept can't say privatise/gentrify council blocks in marginal wards—400 in B & B but we could say—preserve economic base—need to boot out these blocks". Reference was also made to an aim to "preserve local communities—but boot out certain categories" and to community groups which "don't vote Tory". Dame Shirley Porter told the consultants "we want the right answers". In January 1987 a paper on home ownership was written at Dame Shirley Porter's request by the then vice-chairman of the housing committee, Mr Segal. That paper, written in advance of the consultants' report, identified the short-term objective as being "to target the marginal wards and, as a matter of the utmost urgency, redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes". The paper assumed that owner-occupiers were more inclined to vote Conservative and drew attention to the low proportion of owner-occupiers in Westminster relative to the national average. It called for the council to reappraise its designation policy and to "identify far more blocks particularly in key marginal wards". The paper was submitted to, and generally endorsed, by the chairmen's group at its meeting on 27 January 1987. Further work on designated sales in marginal wards followed. At least from the time of this paper in January 1987, targeting designated sales in marginal wards was firm political policy. The chairmen's group decided on 24 March 1987 to adopt a target of 250 designated sales per annum in the marginal wards. At that meeting, attended by Dame Shirley Porter and Mr Weeks, she stated: "need a peg in the [consultants'] report". The chairmen's group also considered a draft report. Dame Shirley Porter indicated that she did not want the report to go into detail because it exposed the other sales policies for discussion, notwithstanding that the report had been prepared, according to Mr England, to give members a "smokescreen" to identify the designated area for growth. Mr England explained to the managing director in a memorandum dated 26 March 1987 that the intention was to plant a question at the housing committee on 1 April 1987 in order to obtain authority for officers to provide a report on how to increase designated sales to at least 250 per annum, and that he intended to report back "once we have [the consultants'] steer on 250 in certain wards".

8 By this stage legal concerns were beginning to surface. On 20 March 1987 the deputy city solicitor advised the then chairman of the housing committee on the need to have sufficient justification for a major change in policy on designated sales, reinforcing (as he put it) the notes of caution that

had already been expressed. On 24 March 1987 one of Dame Shirley Porter's aides (Mr Greenman) addressed certain questions to the director of housing and the city solicitor. In response to the first question addressed to him, namely, whether the council's new policy on 100% designation for sale in the eight target wards would conflict with the council's statutory obligations, the city solicitor replied on 24 March 1987 to Dame Shirley Porter that:

> "If the policy is to be introduced then as a matter of law the reasons for its introduction have got to be carefully argued. The needs of the homeless and the impact of a decision to sell accommodation which might otherwise be available for them is a highly relevant consideration which will have to be balanced against the advantages of selling. It is fundamental that the arguments in favour of selling be soundly based and properly argued. Anything which smacks of political machinations will be viewed with great suspicion by the courts."

A further question was addressed: "Is there any possibility that this policy will lay the council open to (a) judicial review of its policy or (b) surcharging for illegality etc". To this question the city solicitor replied:

> "(a) Yes. The way to avoid successful challenge is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision takers have acted irrationally or relied on an irrelevant consideration.
>
> (b) . . . The possibility of surcharge exists but it will be necessary for those challenging to demonstrate that the loss flowed from the act of wilful misconduct. This re-emphasises the need for a good argument to be constructed in favour of sale."

In response to a further question the city solicitor said:

> "It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property. It might be sensible to go forward in stages rather than offer a broad target. Lawyers should be involved in consideration of any reports at the earliest possible stage. Since a general policy will inevitably draw fire the advice of counsel should be sought at an early stage so that if judicial review is commenced the prospects of successful challenge can be minimised."

9 The consultants' report was received by the council on about 10 April 1987. The Divisional Court found that Dame Shirley Porter plainly hoped and was deeply interested in the possibility that the report would provide a peg on which to hang the policy of increasing designated sales in marginal wards. Both she and Mr Weeks knew that, without the consultants' support, the officers could not provide professional justification for designation only in the eight wards. In fact, the consultants' report gave no such support. The report did not identify the eight key wards. Of the five "stress" wards it

A considered, only two were among the eight key wards. On its face the report gave no support for any increase in designated sales. It recommended that the council should exercise its powers with a view to "making available a supply of low and medium priced rented housing".

10 Before receipt of this report, on 17 March 1987, a memorandum from the director of housing to the chairmen's group advised that, with the B scale of designation then proposed, namely of all council properties in the eight key wards (490 sales per annum), the council might find it impossible to meet its statutory obligations to a number of homeless households; that it was not possible in professional terms to justify a designation of all properties in the eight key wards given the impact on the homeless and other priority cases; that the "key ward analysis" would have to be provided by the forthcoming consultants' study; and that members should seek legal advice C on the reasonableness of the proposed course of action. In a further memorandum on the following day, the director of housing advised Dame Shirley Porter in addition that it was necessary to consider providing additional properties for the homeless and "non-statutory groups" in non-key wards but that the time required for such provision might conflict "with the objective of achieving the number of sales within the three year period". D A later discussion paper on designated sales, prepared in the housing department and presented to Dame Shirley Porter and the chairmen's group on 5 May 1987, stated that the housing committee would need to set the number of designated sales per annum to be achieved and select the relevant properties for designation. It recorded that the city solicitor and secretary had advised that it was imperative that counsel's advice should be obtained on the final shape of the committee report and that there were four further E matters for decision by the committee. The fourth of these was:

> "Given the inevitable impact on rented supply . . . should the council's target be 250 per annum or will this have an impact on the council's re-housing abilities which could not be justified? The [consultants'] report suggests a need to supplement the rented supply. There is nothing in the [consultants'] report which at the moment would justify a designated F sales programme on the scale presently proposed."

Having read this discussion paper, Dame Shirley Porter summoned its author and the deputy city solicitor to her office at 9.45 a m on 5 May 1987. She told the author that the paper was not what was required; that the policy was clear; and that the note needed to spell out how it was to be achieved, not give options. She told the deputy city solicitor to obtain leading C counsel's advice. She also required that a revised note be prepared for the chairmen's group meeting that evening.

11 That afternoon, Mr Jeremy Sullivan saw the deputy city solicitor, Mr England and the author of the discussion paper in consultation. He was informed that the majority group wished to target sales in marginal wards for electoral advantage. He advised that the council could not lawfully sell H 250 properties per annum in the marginal wards alone. He advised that properties had to be designated for proper reasons, across the whole of the city and not in particular wards and that, in identifying properties to be designated, the same criteria had to be applied across the whole city and, ultimately, choice made without reference to anything other than those proper criteria. He also advised on a number of other matters, including the

legality of a scheme of capital grants which was not ultimately adopted. Following this consultation, Mr England wrote a note to Dame Shirley Porter suggesting action in relation to the matters identified in the discussion paper. The note was relayed to the chairmen's group at its meeting on the evening of 5 May 1987. That meeting was attended (among others) by Dame Shirley Porter, Mr Weeks and Mr Hartley. In interview on 5 November 1992, in his affidavit and in cross-examination Mr England accepted that Mr Sullivan had not advised that marginality of a ward was a proper factor when designating for sale. In the course of his note Mr England stated:

> "The housing committee has already decided that the designated sales target should be 'at least 250' . . . Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council. The Group will, therefore, need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300–350 properties will need to be sold across the city. This will clearly exacerbate the problems of dealing with housing demand . . .
>
> "The target set by the housing committee is 'at least 250'. Counsel advises that this cannot be targeted solely in key wards, therefore, the Group will have to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the [consultants'] study should be included in the report. This report has now been released to the opposition.
>
> "The housing committee has set a target of at least 250. If the Group wishes to go for a larger global target in order to achieve 250 in the marginal wards, this will require a decision by the committee. Counsel confirms that the report should be considered at the same meeting."

On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course described in Mr England's note of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards.

12 On 13 May 1987, Dame Shirley Porter was re-elected leader and Mr Weeks deputy leader of the majority party. Dame Shirley Porter appointed Mr Weeks as lead chairman for BSC with responsibility for ensuring that its performance met time-scales. She appointed Mr Hartley to be chairman of the housing committee.

13 The chairmen's group met on 13–14 June 1987. In a note by Dame Shirley Porter presented to the meeting it was stated that:

> "We face a tremendous challenge. The electoral register for the 1990 elections will be compiled in just over *two* years' time. Some very ambitious policies must be implemented by then: providing a great deal of affordable housing in key areas; protecting the electoral base in other areas . . . There is very little time to achieve these radical policy objectives . . ."

A In a note by Dame Shirley Porter on BSC the key elements of the policy were summarised. One of these was the targeting of key areas, under which heading the voter targets for the eight marginal wards, in the total of 2,200 voters already mentioned, were listed. The note said that:

> "A key element in BSC must be to attract homeowners into Westminster. This means finding innovative ways of ensuring that the
B right sort of housing is available to the right sort of buyer or tenant. And it must be available by October 1989."

October 1989 was the qualifying date for inclusion in the electoral register for the 1990 local government elections. At this meeting the chairmen's group endorsed the target of 500 sales per annum across the council area in order to produce the number of sales desired in the marginal wards.
C Mr Hartley, the new chairman of the housing committee, knew that the policy for designated sales which he had to carry forward was to produce 250 sales in the marginal wards, in order to improve the Conservative vote in those wards. The target of 500 was passed on to officers, and members agreed that they would select at the housing committee the estates they wished to see designated for sale. A meeting was held on 6 July 1987, two days before the housing committee was to meet, attended by Dame Shirley
D Porter, Mr Weeks, Mr Hartley and others to discuss how to monitor the impact of BSC policies on each key ward in the context of electoral considerations and to monitor targets for such policies including designated sales. It was recorded that "the leader reaffirmed the agreed BSC programme of action as agreed by chairmen as an all embracing strategic council policy with priorities for BSC initiatives" and that both she and Mr Hartley "felt
E that the city council had an agreed plan of action which could be clearly understood and implemented by officers".

14 At the meeting of the housing committee on 8 July 1987, Mr Hartley presented a joint report in which option 3, designation of sufficient properties to produce 500 sales per annum, was the majority party's preferred option. That option was placed before the committee because
F Dame Shirley Porter and Mr Weeks hoped to increase the Conservative vote in marginal wards by selling each year 250 council properties in those wards. They knew, or had every reason to believe, that as adoption of option 3 was Conservative policy, promulgated by Mr Hartley as chairman of the committee, it would become council policy. There was no instance of the housing committee, at this time, not adopting the majority party's policy. Mr Hartley knew that he was promoting this policy in order to produce 250
G sales per annum in the eight marginal wards in order to increase the number of Conservative party voters in them. He also knew that, in supporting this policy, it would be adopted by the housing committee. The committee resolved to designate a number of specific properties for sale which were expected to produce 500 sales per annum. The committee further resolved to introduce a scheme of capital grants. 20,697 properties had been identified in the joint report to the committee as eligible for designation. Of
H these, 5,912 dwellings (29%) were in the eight key wards, 13,633 dwellings (66%) were in the other fifteen wards and there were in addition 1,152 scattered miscellaneous properties. The list of properties to be designated was not recommended by officers; it was presented by the chairman of the housing committee. 9,360 dwellings were designated, including all the

scattered miscellaneous properties. 74% of all eligible dwellings in the eight key wards were designated; only 28% of all eligible properties in the other wards were designated. A

15 There were seven Conservative party members who voted at the meeting of the housing committee: Councillors Hartley, Dutt, Warner, Bianco, Buxton, Evans and Hooper. Councillors Hartley, Dutt, Evans, Hooper and Bianco were appointed to be members of the housing committee by Dame Shirley Porter acting as the chairman of the Policy and Resources Committee. For five of these members (Councillors Hartley, Dutt, Evans, Buxton and Hooper) it was the first meeting of the housing committee they had attended as voting members. There were five members of the committee who were members of the Labour Party. Designated sales was the seventh of eighteen items on the agenda. The committee adopted the list proposed by Councillor Hartley by seven votes to five. The Conservative members voted in favour; the opposition members voted against. B C

16 At a meeting on 29 July 1987 the council received a report from the housing committee. The city solicitor informed the council that a report on designated sales had been prepared following a consultation with leading counsel and that it had been seen and approved by leading counsel before it went to the housing committee. The council voted to receive the report.

17 The achievement of the electoral targets set out in the BSC campaign "plan for action", including those for designated sales, was monitored by the chairmen's group and by members' and officers' steering groups. On 14 September 1987, the chairmen's group decided that the managing director of the council should produce a BSC monitoring report to every other of its meetings, and confidential BSC monitoring reports were produced to such meetings on a number of dates thereafter. The reports considered what progress was being made in each of the eight key wards towards the sales target for that ward in 1987–88. Two reports which were presented to the policy and resources committee of the council, in October 1987 and May 1988, referred to BSC but did not refer to the key wards, the targets established for them or the system established to secure the achievement of those targets. Documents which were intended for public consumption did "not speak to key wards". In 1988, opposition members of the council raised questions about why the key/marginal wards were being monitored. There were deliberate attempts by officers to conceal the system of monitoring which had been established by giving deliberately misleading answers to proper questions from members of the minority party on the council. Under this pressure from the opposition, the BSC members' steering group (which Mr Weeks chaired) sought, but was unable to find, a rationale (other than their electoral marginality) for the selection of the eight key wards. On 12 April 1988 the chairmen's group, with Dame Shirley Porter and Mr Weeks in attendance, were informed that the BSC members' steering group would consider a BSC monitoring report (in the form requested by the chairmen) and a "rationale for key wards" at its meeting on 28 April 1988. Item 3 on the agenda for that meeting was "Rationale for Key Wards". This took the form of a paper by an officer, which did not provide any rationale for the selection of the eight key wards. The minutes recorded that "the paper looked at ways of going public on targeted wards. It was agreed that no such paper should be a formal document; each ward should be taken individually". Mr England's note of the meeting, under "area approach" D E F G H

recorded "Minority Party interest . . . not easy to confirm just the 8 . . . Keep on Dodging???". Subsequent attempts were made to find a rationale (other than their electoral marginality) for the eight key wards. On 25 July 1988 Mr England met with Dr Dutt and discussed (among other things) "explanation for eight wards", "public audit . . . can we justify why eight were chosen" and "why did we pick them? Members will ask us", and Mr England's action list as a result of the meeting included "key wards—find defence of eight wards". In a memorandum dated 24 August 1988, the city solicitor asked why the eight wards were chosen, by whom they were chosen and why they were regarded as key, but those questions were never answered.

18 On 19 July 1989 the BBC transmitted a "Panorama" programme on the designated sales policy in Westminster. Charts presented to the BSC members' steering group after 28 July 1989 recorded rights to buy and designated sales in all 23 wards in the city, not just the eight key wards. The auditor was appointed following objections made by a number of local government electors in letters dated 18 July, 20 July and 8 November 1989.

The underlying legal principles

19 The legal principles which underlie the auditor's findings against Dame Shirley Porter and Mr Weeks are not in the main controversial, but since they are the bedrock of his decision they should be briefly summarised.

(1) *Powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise.* A very clear statement of this principle is to be found in *Wade & Forsyth, Administrative Law,* 8th ed (2000), pp 356–357. The corresponding passage in an earlier edition of that work was expressly approved by Lord Bridge of Harwich in *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858, 872:

> "Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."

The principle is routinely applied, as by Neill LJ in *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, 333 who described it as "a general principle of public law".

(2) *Such powers are exercised by or on the delegation of councillors. It is misconduct in a councillor to exercise or be party to the exercise of such powers otherwise than for the public purpose for which the powers were conferred.* Where public powers are conferred on a council, it is the body of elected councillors who must exercise those powers save to the extent that such exercise is lawfully delegated to groups of councillors or to officers. All will act in the name or on behalf of the council. It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle. It was clearly expressed by the Lord Chancellor of Ireland in *Attorney General v Belfast Corpn* (1855) 4 Ir Ch R 119, 160–161:

"Municipal corporations would cease to be tangible bodies for any purpose of redress on account of a breach of trust, if the individuals who constitute its executive, and by whom the injury has been committed, cannot be made responsible. They are a collection of persons doing acts that, when done, are the acts of the corporation, but which are induced by the individuals who recommend and support them; and this court holds that persons who withdraw themselves from the duties of their office may be rendered equally answerable for the acts of those whom they allow, by their absence, to have exclusive dominion over the corporate property . . . As the trustees of the corporate estate, nominated by the legislature, and appointed by their fellow-citizens, it is their duty to attend to the interests of the corporation, conduct themselves honestly and uprightly, and to see that every one acts for the interests of the trust over which he and they are placed."

(3) *If the councillors misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct.* The auditor's power to surcharge councillors under section 20(1)(b) of the 1982 Act is dependent on a finding of wilful misconduct. That expression was defined by Webster J in *Graham v Teesdale* (1981) 81 LGR 117, 123 to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not". That definition was approved by the Court of Appeal in *Lloyd v McMahon* [1987] AC 625, 646–647, 655 and 674 and by the House of Lords, at pp 697 and 702. It was adopted by the Divisional Court in the present case 96 LGR 157, 167–168. It was also accepted by the Court of Appeal: ante, pp 385E–386A. There was no challenge to this definition before the House and I would accept it as representing the intention of Parliament when using this expression.

(4) *If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council.* This is the rule now laid down in section 20(1) of the 1982 Act. But it is not a new rule. A similar provision was expressed in section 247(7) of the Public Health Act 1875 (38 & 39 Vict, c 55), section 228(1)(d) of the Local Government Act 1933 and in section 161(4) of the Local Government Act 1972 (although in the two earlier sections the reference was to "negligence or misconduct" and not to "wilful misconduct"). Even before these statutory provisions the law had been declared in clear terms. One such statement may be found in *Attorney General v Wilson* (1840) Cr & Ph 1, 23–27 where Lord Cottenham LC said:

"The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property, shall the corporation be estopped in this court from complaining because the act done was ostensibly an act of the corporation? . . . As members of the governing body, it was their duty as the corporation, whose trustees and agents they, in that respect, were, to preserve and protect the property confided to them; instead of which, having previously, as they supposed, placed the property, by the deeds of the 30 May 1835, in a convenient position for that purpose, they take measures for alienating that property,

A with the avowed design of depriving the corporation of it; and, with this view, they procure trusts to be declared, and transfers of part of the property to be made to the several other defendants in this cause, for purposes in no manner connected with the purposes to which the funds were devoted, and for which it was their duty to protect and preserve them. This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of B spoliation against all the inhabitants of Leeds liable to the borough rate; every individual of whom had an interest in the fund, for his exoneration, pro tanto, from the borough rate. If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but that such agent or trustee would, in this court, be made responsible for so much of the alienated property as could not be C recovered in specie? But if Lord Hardwicke was right in the *Charitable Corpn* case, and I am right in this case, in considering the authors of the wrong as agents or trustees of the corporation, then the two cases are identical. I cannot doubt, therefore, that the plaintiffs are entitled to redress against the three trustees and those members of the governing body who were instrumental in carrying into effect the acts complained of; and it is proved that the five defendants fall under that description." D

(5) *Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party.* Support for this principle may be found in *R v Board of Education* [1910] 2 KB 165, 181 where Farwell LJ said:

"If this means that the Board were hampered by political E considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby."

This passage was accepted by Lord Upjohn in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1058, 1061. In *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207, 214, where F council accommodation had been allocated to an applicant in order that she should be the better able to fight an election, Nolan J regarded that decision as based on irrelevant considerations.

20 Counsel for Dame Shirley Porter and Mr Weeks urged upon the House what were said to be the realities of party politics. Councillors elected as members of a political party and forming part of that party group on the council could not be expected to be oblivious to considerations of party G political advantage. So long as they had reasons for taking action other than purely partisan political reasons their conduct could not be impugned. Reliance was placed on observations of Kennedy LJ in the Court of Appeal, ante, p 386D–E:

"Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the H possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. That seems to me to be unreal. In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it. In most cases they cannot seriously be expected to disregard it, but they know that if the

action which they take is to withstand scrutiny (to be 'judge-proof') there must be sound local government reasons, not just excuses, on which they can rely."

Schiemann LJ, ante, pp 390C–D, 391C–D, spoke to similar effect:

"Whether or not the decision of the housing committee was unlawful depends, in the circumstances of this case, on the motivation of the committee at the time of the vote. If its motive was purely to secure electoral advantage for the Conservative Party then the decision was unlawful. If purely Housing Act considerations were its motivation then its decision would be lawful . . . There is a complication. Frequently individual persons act from mixed motives. Further, group decisions may have multiple motivations—in part because there are many votes cast and in part because each voter may himself have several motivations . . . It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality."

21 Whatever the difficulties of application which may arise in a borderline case, I do not consider the overriding principle to be in doubt. Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council.

22 The House was referred to a number of cases in which the part which political allegiance may properly play in local government has been explored: *R v Sheffield City Council, Ex p Chadwick* (1985) 84 LGR 563; *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419; *Jones v Swansea City Council* [1990] 1 WLR 54; *R v Bradford City Metropolitan Council, Ex p Wilson* [1990] 2 QB 375; *R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council* [2001] 1 All ER 462. These cases show that while councillors may lawfully support a policy adopted by their party they must not abdicate their

A responsibility and duty of exercising personal judgment. There is nothing in these cases to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage.

The findings made against Dame Shirley Porter and Mr Weeks

B 23 Reference has already been made to the detailed and protracted investigation conducted by the auditor. Details are given in the judgment of the Divisional Court 96 LGR 157, 161–162. He made very lengthy findings. The Divisional Court in its turn received a mass of written material, heard evidence from Dame Shirley Porter and Mr Weeks and conducted a hearing extending over 23 sitting days. The decision of the auditor and the C Divisional Court adverse to Dame Shirley Porter and Mr Weeks rested on four main findings.

24 The first of these findings was that the Westminster City Council adopted a policy the object of which was to achieve a specified annual level of sales of properties owned by the council in the eight marginal wards with the intention that the properties thus vacated should be sold to new residents who, as owner-occupiers, might reasonably be expected to vote Con- D servative and so increase the electoral strength of the Conservative Party in those wards in the 1990 council elections. The auditor put his conclusions on this point in a number of different ways. It is enough to quote paragraph 53(2)(d)(v) of his summary of his findings and views:

> "both the decision to increase the number of designated sales and the selection of the properties designated for sale were influenced by an E irrelevant consideration, namely the electoral advantage of the majority party. I have found that the electoral advantage of the majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant consideration which influenced both the decision to increase designated sales by 500 per annum and the selection of properties designated for sale. My view is that the council F was engaged in gerrymandering, which I have found is a disgraceful and improper purpose, and not a purpose for which a local authority may act."

The Divisional Court, at pp 164–165, accepted this conclusion:

> "In the 1986 local government elections the Conservative Party on the G council were returned with a very small majority. With a view to greater success in the 1990 elections, the party formulated a policy of 'building stable communities'. A major element in this policy was to increase designated sales of council properties in eight key marginal wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative . . . On 8 July 1987 the housing committee, having received a much amended joint report from council H officials, resolved to extend the programme of designated sales so as to produce 500 sales per annum city-wide and introduced a scheme for capital grants of £15,000 to encourage tenants to move. On 29 July 1987 the council refused to overturn the committee's decision. Thereafter, the progress of the policy in marginal wards was monitored."

In the Court of Appeal Robert Walker LJ could see no reason why that court, which had not heard the witnesses, could or should depart from the Divisional Court's findings, which there was ample documentary evidence to confirm and virtually no evidence to contradict. These conclusions are clearly accepted in the agreed findings briefly summarised in paragraphs 4–18 above.

25 Nothing that the House has heard gives any ground for doubting the correctness of the conclusion of the auditor and the Divisional Court on this point. It follows from the legal principles already summarised that the council's policy was unlawful because directed to the pursuit of electoral advantage and not the achievement of proper housing objectives.

26 The decision of the auditor and the Divisional Court adverse to Dame Shirley Porter and Mr Weeks was based, secondly, on the conclusion that they were both party to the adoption and implementation of this unlawful policy.

27 With regard to Dame Shirley Porter the auditor found, at p 417, para 1147 of his decision:

> "I find as a fact that Councillor Lady Porter was one of the members responsible for determining the direction and content of the policy of the majority group on the council. She formulated the '*Strategy to 1990*' which aimed to give top priority in the development of council policies to electoral success. I find that, after the local government elections in May 1986, her top priority was to secure that the Conservative Party was successful in the local government elections for the council in 1990 and she ensured that the policies of the council on matters such as home ownership and homelessness were directed to that end. I find as a fact that she was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For her, the designated sales policy was a means to that end."

The auditor made similar findings concerning Mr Weeks, p 578, paras 1579–1580:

> "I have found that Councillor Weeks was one of the members responsible for determining the direction and content of the policy of the majority group on the council. He was aware of, and supported, the Leader's 'Strategy to 1990' which aimed to give top priority in the development of council policies to electoral success. He was aware of, and supported, the initial housing strategy, evolved after the May 1986 local government elections, which involved concentration of activity in marginal wards to help the Conservative party to win the 1990 local government elections, including increased designated sales. I have found as a fact that he was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For him, the designated sales policy was a means to that end.

A "I have found that thereafter, Councillor Weeks promoted and supported the Leader's 'Strategy to 1990' and a policy of targeting designated sales and other Council policies in marginal wards in order to secure electoral advantage for the Conservative Party."

The Divisional Court reached similar conclusions, at pp 175, 176 and 183:

B "[Dame Shirley Porter] was by title leader of the majority party and by personality a leader not a follower. Targeting marginal wards was, probably from the end of July 1986 at the latest, central to her political objectives, as a succession of contemporaneous documents makes plain . . . [Mr Weeks] said that the idea of targeting designated sales in marginal wards had 'not got to a detailed stage by March 1987': it was still 'pretty loose' and remained so, even after 5 May. Although he was C the lead BSC chairman monitoring the performance of other chairmen, he said he had no direct responsibility for designated sales policy which was a matter 'wholly within the . . . view of the housing committee'. We reject this. As we have said, one of [Dame Shirley Porter's] central objectives from July 1986 was targeting marginal wards and we accept [Mr England's] evidence that, at least from the time of the Segal paper D in January 1987, targeting designated sales in marginal wards was firm political policy. As deputy leader and, as he admitted, one who worked closely with the leader and was 'the details man', [Mr Weeks] was well aware of [Dame Shirley Porter's] objectives and determination and we find that one of his roles was to ensure by supervision that the housing committee fulfilled the objectives of the leader and the E majority party, particularly in targeting designated sales in marginal wards. Whereas in his affidavit he said that key wards were not selected because of their marginality, in his oral evidence he said that marginality was the reason for their selection . . . We find that designated sales in marginal wards was, as [Mr Hartley] put it, very much [Dame Shirley Porter's] 'baby' and it was embraced by the chairmen's group including [Mr Weeks]. We have no hesitation in F finding that the eight wards were identified in early 1987 by members of the majority party *because* they were marginal, albeit that there were also particular problems to be addressed in some of them, such as those in the central activity zone."

In the Court of Appeal Robert Walker LJ summarised the facts at G considerable length, but expressed his conclusion briefly, ante, p 428E–F:

"The overall impression throughout, from mid-1986 to mid-1989, is that the most influential members of the Conservative group on the city council, led by Dame Shirley and Mr Weeks, had electoral advantage as the overriding objective in formulating their housing policy, securing its adoption by the council, and implementing it with high priority given to H the marginal wards."

28 These findings again are clearly accepted in the agreed findings already summarised. There is no reason to doubt their correctness.

29 The third finding crucial to the decision against Dame Shirley Porter and Mr Weeks is that they both knew the designated sales policy targeted on

marginal wards to be unlawful. The auditor found, at p 500 of his decision, paras 1363–1364:

> "I find as a fact that Councillor Lady Porter knew that Council facilities could not lawfully be used for party political purposes and that the council was not entitled to exercise its powers or expend its resources to promote the electoral advantage of her party. As she told Councillor Peter Bradley, in answer to a question from him at a meeting of the council on 10 June 1987: 'As the member well knows, council facilities must not be used for party political purposes.'
>
> "I find as a fact that although Councillor Lady Porter may have believed that leading counsel had advised that the council could lawfully extend its programme of designated sales on the basis of the joint report without acting inconsistently with its statutory duties to the homeless, Councillor Lady Porter knew that it was unlawful and wrong for the council to exercise its powers to secure an electoral advantage for any political party or to gerrymander or, in pursuit of such advantage for her party, she was at least recklessly indifferent as to whether it was right or wrong."

Save for the reference to Dame Shirley Porter's answer to Councillor Peter Bradley, the auditor made identical findings in relation to Mr Weeks, p 584, paras 1597–1598.

30 The Divisional Court made a number of findings on this point, at pp 184–185:

> "[Dame Shirley Porter] failed to explain to us why and by whom the eight wards were identified. In our judgment, this failure is explicable not by the effect of the subsequent passage of time on recollection but by the realisation on her part that the more knowledge of detail which she admitted the more closely she would become identified with a policy of targeting designated sales to enhance Conservative prospects in marginal wards which she knew in 1987 and knows now was unlawful . . . From March 1987 when [Dame Shirley Porter] saw [the city solicitor's] answer to the Greenman questions she knew, as she asserts in her affidavit, that the advantages of sale had to 'be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority'. She told us that she was not surprised by that advice and that she did not understand counsel's advice on 5 May to be any different. If this is true, [Dame Shirley Porter] cannot have thought that the suggestion of increasing the numbers city-wide came from Sullivan, because this would have left untouched the continuing ulterior motive in relation to marginal wards which [the city solicitor] had advised against. Clearly there was nothing in Sullivan's advice, as reported by [Mr England], which legitimated designated sales targeted in marginal wards. Indeed, on 10 June [Dame Shirley Porter] answered a question at a council meeting in these terms: 'Council facilities must not be used for party political purposes'. As all members and officers of the council well knew, council properties could not be sold for these purposes. [The city solicitor's] view expressed to the auditor, was that 'everyone in the Conservative Party in Westminster would have known that they could not take party political advantage into account in deciding this policy' . . .

A Because [Dame Shirley Porter] and [Mr Weeks] knew the targeting policy was unlawful they were content, without further inquiry of Sullivan, [Mr England], [the deputy city solicitor] or anyone else, to adopt the suggestion in [Mr England's] note that it be dressed up in city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage. Knowledge of the unlawfulness and such deliberate dressing-up both inevitably point to, B and we find, wilful misconduct on behalf of each of them."

In the Court of Appeal Robert Walker LJ concluded, ante, p 431E, that Dame Shirley Porter cannot at any stage have believed that targeting marginal wards for electoral advantage was a lawful use of council resources, and that the position was similar but even clearer in relation to C Mr Weeks.

31 Both Dame Shirley Porter and Mr Weeks, in their respective printed cases, accept that they knew that the council could not use its powers for electoral advantage. They plainly did know that. It follows, subject to the points discussed below, that in adopting and implementing the designated sales policy both acted in a way they knew to be unlawful.

32 Fourthly, it was found that the designated sales policy promoted and D implemented by Dame Shirley Porter and Mr Weeks caused financial loss to the council. The auditor's conclusion (p 499, para 1361) was as follows:

"The fact that Councillor Lady Porter was not present at the meeting of the housing committee on 8 July 1987 or at the meetings of the Appointed Members' Panels on 4 September 1987, and did not, at those meetings, vote for the extended designated sales policy, which she had sought to E procure, does not mean that she was not responsible for the consequences of those decisions. Without Councillor Lady Porter's promotion and support there would have been no proposal put to the housing committee for an increased programme of designated sales, targeted in the key/marginal wards and on the scale proposed. I find as a fact that she was one of those responsible for the decisions taken and the consequences F which ensued. The resulting financial consequences were caused, in my view, by her misconduct."

An identical finding was made in relation to Mr Weeks: p 583, para 1595. The Divisional Court found 96 LGR 157, 204, that such loss as resulted to the council from the decisions taken by the housing committee and the council in July 1987 was caused by the wilful misconduct of Dame Shirley C Porter and Mr Weeks. In the Court of Appeal Robert Walker LJ, ante, p 439B accepted that conclusion. But Dame Shirley Porter and Mr Weeks have raised an issue on causation which it is necessary to consider in more detail below.

33 In argument before the House, counsel for Dame Shirley Porter and Mr Weeks raised a large number of points in resistance to the auditor's appeal. The three most substantial of these arguments are considered in the H sections which follow.

Reliance on legal advice

34 On behalf of Dame Shirley Porter and Mr Weeks it was argued before the House that whatever the lawfulness or unlawfulness of the

designated sales policy they acted, in promoting it after 5 May 1987, in accordance with what they believed to be legal advice given to the council and were accordingly not guilty of wilful misconduct. A

35 The auditor's findings on this matter in relation to Dame Shirley Porter were set out in paras 1362 and 1366 of his decision, at pp 499–500:

> "I find as a fact that Councillor Lady Porter did not act reasonably or in the belief that any expenditure resulting from the decisions of the housing committee and the appointed Members' Panels, was authorised by law. Councillor Lady Porter did not receive any legal advice which could have led her to believe that it was open to the council to engage in gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. She does not claim that the council was engaged in gerrymandering or in exercising its powers to secure an electoral advantage for the Conservative Party. She does not claim that she received legal advice that it was lawful for the council to engage in gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. On the contrary, she received legal advice from the City Solicitor that the council was not entitled to exercise its powers for an ulterior purpose. Neither this advice nor the advice from Mr Sullivan QC gave any support for targeting designation in the key/marginal wards to promote the electoral advantage of the Conservative Party. As Councillor Lady Porter was aware, that could not lawfully be done.
>
> "I am further strengthened in my conclusion by the evasive, false and misleading evidence given to me by Councillor Lady Porter in interview as to the reason for the selection of the eight key wards, the nature of the targets adopted and the monitoring which took place against those targets and by the misleading answers she gave in response to questions at Council meetings. Councillor Lady Porter did not admit that the designated sales policy was introduced for the purpose of securing electoral advantage for the Conservative Party in the 1990 local government elections in the City of Westminster. If Councillor Lady Porter had believed that the policy of adopting an extended programme of designated sales in order to secure electoral advantage for the Conservative Party was legally acceptable and supported by legal advice, she had ample opportunity to tell me that this was what the council was doing and that she had received legal advice that it was lawful for the council so to do."

B C D E F

In relation to Mr Weeks, very similar findings were made in paras 1596 and 1600, at pp 583–585. G

36 The Divisional Court found as follows, at p 179:

> "The position of [Dame Shirley Porter] in relation to legal advice was initially, as reflected in the opening skeleton argument on her behalf, that she never sought or received advice which could have led her to believe that it was open to the council to exercise its powers to secure an electoral advantage for the majority party. In her affidavit she said her duty as a councillor was 'to decide matters in council only upon considerations relevant to local government factors identified by officers' . . . She also said that [the city solicitor's] advice that there must not be any ulterior motive came as no surprise in the light of her experience and she did not

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A understand leading counsel's advice on 5 May to have differed from that of [the city solicitor]. In the light of this evidence, although we accept that [Dame Shirley Porter] was always anxious to obtain and follow legal advice, it is, in our judgment, impossible for [Dame Shirley Porter] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible."

B The Divisional Court then, in relation to Mr Weeks, found, at p 179:

"[Mr Weeks's] evidence in cross-examination was that, as a result of counsel's advice on 5 May it was clear 'that you could not just designate for 250 in the marginal wards' and that he greeted that advice 'with some relief' because a major aspect of contentiousness could be removed. He said that, following counsel's advice, he and other members 'immediately C abandoned' talk of designating blocks in marginal wards and the lists produced 'after 5 May were constructed on other grounds'. Whether that evidence is credible we shall consider later. But it provides no basis whatever for suggesting that, if [Mr Weeks] continued to be party to a scheme for targeting designated sales in marginal wards for electoral advantage, he did so in reliance on legal advice."

D 37 In the Court of Appeal Robert Walker LJ, in a passage to part of which reference has already been made, said, ante, p 431B–E:

"The way in which Dame Shirley's case has been presented has varied from time to time. Only in this court, I think, has much emphasis been placed on her reliance on legal advice. In her oral evidence she said that she was well aware that local authority resources must not be used for E party political ends, and that the legal advice which she received came as no surprise to her. She also said that it never occurred to her to ask to see Mr Sullivan's advice in writing. She did not contend, either in her oral evidence or through her counsel (apart from drawing attention to [the city solicitor's] unfortunate references to devising or constructing arguments), that she was relying on any legal advice to the effect that an unlawful policy could be made lawful by camouflage. On the basis of Mr England's F 'Note to Leader' it seems likely that Mr Sullivan's unambiguous advice was distorted in the course of transmission to Dame Shirley, although in the absence of any minutes of the meeting of the chairmen's group on the evening of 5 May 1987 (at which Mr England was present) it is impossible to gauge the degree of distortion. But as the Divisional Court found, she cannot at any stage have believed (either in reliance on legal G advice or otherwise) that targeting marginal wards for electoral advantage was a lawful use of council resources."

As already noted, Robert Walker LJ considered the position of Mr Weeks to be similar but if anything even clearer.

38 Counsel for Dame Shirley Porter and Mr Weeks naturally placed much reliance on the contrary views expressed by the majority in the Court H of Appeal. In the course of his judgment, ante, pp 387–388, Kennedy LJ said:

"I remind myself that the Divisional Court had the advantage of seeing the two appellants, as well as others, when they gave evidence, and clearly that court was not particularly impressed by these two appellants, but

what I cannot follow is how the court was able to find these appellants guilty of wilful misconduct having regard to its conclusions in relation to those important factual issues which I set out at the beginning of this section of the judgment, conclusions which led the court to conclude that three out of five appeals must be allowed. I recognise that long before 5 May 1987 Dame Shirley, but not Mr Weeks, had received legal advice from [the city solicitor], but on 5 May 1987 the possibility of targeting sales in marginal wards for political gain was put to leading counsel of considerable standing. Mr England, who received and reported upon counsel's advice, was led to believe that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards. The judgment of the Divisional Court simply does not explain why the advice of leading counsel did not affect Dame Shirley and Mr Weeks as it affected Mr England, and for that matter Mr Hartley and Mr Phillips, and I cannot make good the omission because there seems to have been no reason to make any distinction. The Divisional Court said that the purpose of the appellant throughout was 'to achieve unlawful electoral advantage'. The use of the word 'unlawful' begs the question. Their submission is that having taken legal advice they, like the others, believed that electoral advantage could lawfully be pursued by the route envisaged in Mr England's report of his consultation with Mr Sullivan, and thereafter the route chosen was, they believed, entirely legitimate . . . I recognise, of course, that in the Divisional Court the appellants contended that the great increase in the number of designated properties was not promoted in order to achieve 250 sales per annum in marginal wards, and that the Divisional Court held otherwise, but in all essential matters the records speak for themselves. On 5 May 1987 counsel and the officers who attended on him knew all there was to know about Dame Shirley's ambition as to sales in marginal wards. The Divisional Court was critical of both appellants for saying that, in the light of Mr Sullivan's advice, the policy was abandoned. The court said, 96 LGR 157, 185, that they 'lied', but on any view option 3 was not the proposal which Mr Sullivan was asked to consider. It was only formulated as a result of his advice. As Mr McMullen pointed out, those who wish to offend against the law do not usually consult lawyers of good reputation, give them access to all relevant information, and then act in accordance with their understanding of the lawyer's advice, arranging for further advice to be obtained as events progress. In most cases where a breach of section 20 has been found proved, the evidence shows an unwillingness to obtain or a defiance of legal advice. That is not this case."

Schiemann LJ, ante, p 394E–F, said:

"As the division of opinion in this court shows, there is no doubt that the borderline between what is permissible and what is not permissible in the context of what Dame Shirley was trying to achieve is not easily perceived by lawyers and even less easily perceived by laymen. It is clear to me that Dame Shirley was seeking to avoid doing anything illegal and that this was the reason why she laid bare her hopes to her legal advisers and asked for legal advice."

A 39 The issue of inconsistency of findings is one which I consider separately below. The issue here is whether the majority of the Court of Appeal had any sustainable grounds for rejecting the very clear conclusions reached by the primary fact-finders, the auditor and the Divisional Court. Before the auditor Dame Shirley Porter and Mr Weeks did not contend that they had pursued the designated sales policy on legal advice. At that stage they were seeking to distance themselves from the policy. In the Divisional B Court they contended that the policy had been abandoned after 5 May 1987, a contention found by that court to be dishonest and untrue. Only in the Court of Appeal was the case made that reliance had been placed on legal advice, as Robert Walker LJ pointed out in the passage quoted in paragraph 37 above. It is not clear to me how the Court of Appeal majority felt able to reject the very clear findings of the auditor and the Divisional Court, which C in my opinion are entitled to stand. But I draw attention to two particular, in my view fatal, weaknesses in the majority reasoning. First, it is simply not true that Mr Sullivan was given access to all relevant information or that Dame Shirley laid bare her hopes to her legal advisers. Mr Sullivan received no written instructions and gave no written advice. There were two questions which the council should have put to him. The first was whether it was lawful to promote a policy of designating council properties for sale in D marginal wards for the purpose of securing an electoral advantage for the majority party at the forthcoming council elections. That question was put to Mr Sullivan and he answered it in the negative, as he was bound to do. The second, follow-up, question should have been whether, if that policy would be unlawful, the policy would become lawful if, with the same objective, and in order to conceal the targeting of sales in marginal wards, E the designated sales policy were extended across the City of Westminster. That question was never put. No one, including Dame Shirley Porter and Mr Weeks, could have had any doubt at all what the answer would have been if it had. Mr Sullivan was never told of the course on which the council proposed to embark or had embarked. The second weakness is found in the history of pretence, obfuscation and prevarication which surrounded the policy from May 1987 onwards. If the policy was genuinely believed to be F lawful, albeit controversial, there was no need for such intensive camouflage.

40 I can for my part see no reason to question the very clear findings made by the auditor and the Divisional Court on this question.

Inconsistency

G 41 The auditor's findings of wilful misconduct against Mr Hartley, Mr England and Mr Phillips were not upheld by the Divisional Court, and it is argued on behalf of Dame Shirley Porter and Mr Weeks that they cannot fairly or rationally be found liable if those others are to be exonerated. The inconsistency, as he saw it, of the Divisional Court findings was the main ground upon which Kennedy LJ allowed the appeal by Dame Shirley Porter and Mr Weeks.

H 42 In the case of Mr Hartley the Divisional Court found his conduct to be unlawful and so to amount to misconduct because of the improper motives of others of which he was aware. But the Divisional Court was prepared to accept that he did not appreciate the unlawfulness of his conduct and genuinely believed that his own overriding belief in wider home

ownership rendered his conduct lawful: p 199. It accordingly found that his misconduct was not wilful.

43 In the case of Mr England the Divisional Court found that he was not guilty of wilful misconduct down to 8 July 1987, whatever his doubts and equivocations, and although critical of his conduct thereafter the Divisional Court did not find him guilty of wilful misconduct: p 195.

44 The Divisional Court found that Mr Phillips was guilty of misconduct. But it was not prepared to conclude that he must have known that what was proposed was unlawful as well as improper: p 202. The Divisional Court considered whether he was reckless. In the results it was not satisfied to the standard required that he had been reckless: p 203.

45 Robert Walker LJ found this the most difficult aspect of the whole case and it caused him some anxiety (p 437F) and unease (p 439A–B) and he thought there had perhaps been some element of mercy in the Divisional Court's conclusions: pp 437, 438. But he could not say they were not conclusions which were open to the Divisional Court (p 439A–B). I share Robert Walker LJ's anxiety and unease. It is understandable that the Divisional Court was reluctant to be excessively critical of officers, who were subject to considerable pressure from elected members, as the Divisional Court pointed out: p 186. Mr Hartley's conduct does not earn that measure of indulgence. But the Divisional Court had the advantage of hearing these three witnesses. It was rightly alert to the high standard required before a finding of this gravity could be sustained. It may very well be that Messrs Hartley, England and Phillips were fortunate to be exonerated, to the limited extent that they were exonerated. But the findings made against Dame Shirley Porter and Mr Weeks were, in truth, very strong. They were the leader and deputy leader of the council, and were respectively the prime architect and midwife of this policy. I am satisfied that no injustice is done to either of them by upholding the findings of the auditor and the Divisional Court.

Causation

46 At the forefront of their submissions on behalf of Dame Shirley Porter and Mr Weeks counsel advanced an argument to the effect that whatever the impropriety or unlawfulness of their clients' purpose and motive this did not render the decision of the housing committee on 8 July 1987 unlawful. That was a decision lawfully made by the members of the committee (not including Dame Shirley Porter and Mr Weeks) for lawful housing reasons, untainted by the unlawful designated sales policy, and accordingly anything which happened thereafter was not attributable to any unlawful motivation on the part of Dame Shirley Porter and Mr Weeks. As Schiemann LJ made plain, ante, pp 393D–395E of his judgment, this was an argument which particularly impressed him (although he made plain, ante, p 395D–E, that he did not accept that Dame Shirley Porter had been either dishonest or improperly motivated). In my opinion this argument must be rejected. It is an agreed fact (recited in paragraph 14 above) that once the city-wide designated sales policy had been adopted by the majority party it was to all intents and purposes bound to be approved by the committee. The auditor concluded (p 325 of his decision, para 885):

A "In the event that taking into account party electoral advantage does not invalidate a decision unless it becomes the dominant factor, I give my view as to whether party electoral advantage was such a dominant factor. I have concluded that the overwhelming inference to be drawn from the evidence is that party electoral advantage was the dominant consideration which influenced the housing committee in reaching a B decision to adopt option 3 (increase designated sales by 500 per annum) and in selecting the properties designated for sale. I find as a fact that the electoral advantage of the majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant consideration which influenced both the decision to adopt option 3 and the selection of the properties designated for sale."

C The conclusion of the Divisional Court on the committee's decision of 8 July 1987 (at p 181) is one that I would, for my part, accept:

"In our view this decision was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore D unlawful. The policy proposed at the meeting by [Mr Hartley] and adopted by the committee was one which gave effect to this purpose, whatever may have been the reasons for the votes of individual members. It is perfectly possible, in law and common sense, for a corrupt principal to cause a result through an innocent agent or (in the context discussed by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385) a dishonest third party to be liable for a breach of E trust perpetrated by a trustee acting innocently. In the present case, whatever the reasons of individual members for voting as they did, the option for which they voted was placed before the committee, in part at least, in order to achieve the improper purpose to which we have referred."

47 If however it is appropriate to inquire into the motivation of the F majority party members who voted for option 3 in the committee on 8 July 1987, the conclusion does not assist Dame Shirley Porter and Mr Weeks. Whatever his own reasons for supporting that option, Mr Hartley was very well aware of the purpose which underlay the policy. He was, as already noted, found guilty of misconduct by the Divisional Court. In the auditor's decision he said that the late Dr Dutt, who was vice-chairman of the G committee,

"was also aware of the objective to increase the majority party's voting strength in marginal wards by the adoption of an extended programme of designated sales in those wards. In my view, he took into account the electoral advantage of the Conservative Party and sought to promote it in his voting and otherwise."

H (The auditor in his provisional findings expressed conclusions adverse to Dr Dutt, who disputed those findings and took his own life. The auditor, in his decision, made no finding of personal liability against Dr Dutt.) If those two tainted votes are discounted, the majority party had no majority of votes on the committee. The auditor found that Councillor Warner tried to

exercise an independent judgment but was influenced by the joint report laid before the committee (which contained no hint of the true purpose of the policy) and by the views of Mr Hartley (p 323, para 879). The same finding was made in relation to Councillors Bianco and Hooper, save that they were unable to and did not exercise any independent judgment in relation to adoption of the list of properties for designation circulated at the meeting, which had been devised by officers working with the chairman to achieve target numbers of sales in certain marginal wards in order to secure an electorate advantage for the majority party in those wards (pp 323–324, para 880). In the case of Councillors Evans and Buxton the auditor found that they neither sought to exercise nor exercised any independent judgment in relation to voting for the adoption for option 3: they simply relied on the joint report and the views of Mr Hartley. The inescapable truth is that while the chairman and vice-chairman of the committee knew of the purpose which underlay option 3, the back bench members were in no position to exercise an informed independent judgment because they were never given a clear picture of why the policy had been adopted and what it was intended to achieve. The committee was used by the party leadership to secure approval of a policy of which the purpose was never fully explained. In my opinion there was no informed exercise of independent judgment by members of the committee such as could break the chain of causation between the conduct of Dame Shirley Porter and Mr Weeks and the consequences which followed.

The liability of Dame Shirley Porter and Mr Weeks

48 The Divisional Court's findings adverse to Dame Shirley Porter and Mr Weeks, reached on a mass of evidence, were fully justified, if not inevitable. The Court of Appeal majority erred in departing from them. The passage of time and the familiarity of the accusations made against Dame Shirley Porter and Mr Weeks cannot and should not obscure the unpalatable truth that this was a deliberate, blatant and dishonest misuse of public power. It was a misuse of power by both of them not for the purpose of financial gain but for that of electoral advantage. In that sense it was corrupt. The auditor may have been strictly wrong to describe their conduct as gerrymandering, but it was certainly unlawful and he was right to stigmatise it as disgraceful.

Preparation of papers

49 The auditor held Dame Shirley Porter and Mr Weeks responsible for a sum amounting (with interest) to £10,126 attributable to the cost of preparing papers relating to the promotion of the electoral advantage of the majority party. The basis of his finding was that this was an unlawful misuse of the time of council officers. There is no dispute concerning the quantum of this sum. The Court of Appeal held by a majority that since Dame Shirley Porter and Mr Weeks did not transgress, the cost of preparing these papers could not be laid at their door: ante, p 389C–D. For reasons already given, I would hold that they did transgress and would hold them liable to make good this sum.

A *Quantum*

50 The power of local authorities to dispose of land held by them under section 32(1) of the Housing Act 1985 was subject to the consent of the secretary of state. By section 34(2) of that Act the secretary of state's consent could be given generally, and was so given by a ministerial letter issued in 1981 and continuing to have effect under the 1985 Act by virtue of B section 2(2) of the Housing (Consequential Provisions) Act 1985. By paragraph B(2) of this letter it was stated:

> "A local authority may dispose of any house, if that house is vacant, to any individual who intends to use it as his only or principal home, provided that the disposal is effected for a price, consideration or rent which is equal to the current market value of the house with vacant C possession."

It was also open to a local authority to dispose of properties at a discount of between 30% and 70%, which is what the council in fact did.

51 As explained by the Divisional Court, at p 204 of its judgment, the auditor certified in accordance with section 20(1) of the Local Government Finance Act 1982 that some £31·67m was due jointly and severally from D Dame Shirley Porter and Mr Weeks (in addition, at that stage, to Mr Hartley, Mr England, Mr Phillips and another officer). This was a net sum, arrived at by calculating the gross loss or deficiency and then deducting from that figure the financial benefits enjoyed by the council as a result of the sale of designated dwellings, such as the reduced cost of management and maintenance of the council—owned housing stock. The net sum also E allowed for interest on the net losses. Most of the items in the auditor's computation are not (subject to liability) in dispute. But there is one major issue: the treatment of the discounts allowed by the council on selling designated properties pursuant to what must, for present purposes, be treated as an unlawful policy. The auditor based his calculation on the open market value, with vacant possession, of the properties sold. He did not F reduce his calculated figure of loss to reflect the discounted prices at which the council sold, and at which the council would have sold even if the policy had been a lawful one, if pursuant to a lawful policy the council would have sold at all. On this basis he reached a loss figure under this head of £15·476m.

52 Robert Walker LJ (with, as already noted, the assent of Kennedy LJ on this point) took a different view. He said, ante, p 445D–F:

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> "In this case the relevant element of loss is the loss of part of the council's stock of social housing. It was not a loss in a commercial venture of selling dwellings with vacant possession. In my judgment the Divisional Court erred in its approach. It should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted H social housing. There was ample evidence that the discounted prices did exceed that value, and it is not necessary to go into the subsidiary issue as to Ellis & Co's valuations. Any other approach would, it seems to me, be inconsistent with the auditor's separate investigation and conclusion as to the additional costs of housing homeless persons which the council had to

incur as a result of its own stock of social housing having been depleted by the designated sales policy."

On this basis he would have disallowed the full sum for which the auditor held Dame Shirley Porter and Mr Weeks liable under this head.

53 Although the sum involved is very considerable, the point which divides the parties is (as it seems to me) a very narrow one. Should the prices at which the council actually sold be compared with the prices at which it would have sold if selling in lawful pursuance of its powers under section 32? If so, it has suffered no loss under this head. Or should the prices at which the council actually sold be compared with the open market value of the properties with vacant possession at the time of sale? If so, it has suffered the loss certified by the auditor.

54 Section 20(1) of the 1982 Act provides for the certification by the auditor of the amount of a loss or deficiency incurred or caused by the wilful misconduct of any person. It is that amount which is due and recoverable for the benefit of the body which has suffered the loss or deficiency. The underlying principle is one of compensation, to put the body which has suffered the loss or deficiency in the same position as it would have been in had the wilful misconduct which caused the loss or deficiency never occurred.

55 In this case the council was the freehold owner of a number of properties. The wilful misconduct of Dame Shirley Porter and Mr Weeks caused the sale of some of those properties pursuant to an unlawful policy of designated sales. Thus the council parted with those properties. The council did not lose the full market value of the properties because it received discounted prices for them. But it lost the difference between the full market value of the properties and the discounted prices received. Had the council wished to replace the properties sold under the unlawful policy it would have had to pay the full market value of comparable properties. I do not think it is open to those responsible for an unlawful sales policy to contend that if the properties had been sold under a lawful policy they would have been sold at equally discounted prices since, if the policy of the council had been lawful the council might never have sold the properties at all, and it is in any event a matter for the owner of an asset to decide whether he will exploit its value to the maximum extent or not. A wrongdoer is not entitled to reap the benefit of a benign policy which might, but only might, have been pursued by the owner had it not been unlawfully deprived of the asset.

56 I do not for my part detect any element of double counting in the auditor's calculation, which is in my opinion correct.

Impartiality, fairness and delay

57 Before the Divisional Court and in the Court of Appeal Dame Shirley Porter and Mr Weeks challenged the impartiality of the auditor, the fairness of his investigation and the time taken to carry out the audit. This challenge was very fully considered by the Divisional Court, but failed both in that court and in the Court of Appeal. The challenge has been further pursued before the House. It must in my opinion be rejected for the detailed reasons given by my noble and learned friend Lord Hope of Craighead.

58 For all these reasons I would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court. The parties (and

A Westminster City Council, if so advised) are invited to make written submissions on costs. I would in conclusion pay tribute to the clear and comprehensive judgment of the Divisional Court.

LORD STEYN

59 My Lords, I am in complete agreement with the opinion of Lord Bingham of Cornhill. I am also in complete agreement with the reasons B given by my noble and learned friend Lord Hope of Craighead in regard to the issues of impartiality, fairness and delay. I would therefore also allow the auditor's appeal and restore the certificate in the sum upheld by the Divisional Court.

LORD HOPE OF CRAIGHEAD

C 60 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I agree with all that he has said on the issue of liability and, subject to some observations of my own, with what he has said on the issue of quantum. I wish to concentrate in this speech with the remaining issues in the case, which are those of impartiality, fairness and delay.

D *Introduction*

61 In the Court of Appeal four matters were identified under the broad heading of unfairness: ante, p 396C–D per Schiemann LJ. These were (a) apparent bias on the part of the auditor, (b) unreasonable delay on the part both of the auditor and on the part of the Divisional Court in confirming the decision by the auditor, (c) failure on the part of the Divisional Court to E hold a fair balance between the auditor and Dame Shirley Porter and (d) breach by the Divisional Court of the presumption of innocence. The Court of Appeal was not persuaded that there had been any unfairness which would justify allowing the appeal.

62 Before your Lordships the respondents have contended that the Court of Appeal should have upheld their appeals on the ground that the F proceedings were unfair, applying common law principles as understood before the coming into force of the relevant provisions of the Human Rights Act 1998. They also contend that the auditor violated their Convention rights and that, as victims, they are entitled to rely directly on those rights under the 1998 Act. In addition they contend that the Divisional Court violated their Convention rights, that these are legal proceedings brought by the auditor and they are entitled to rely on that violation in these G proceedings under the Act. The main thrust of their contentions on the issue of unfairness was directed to their arguments that the auditor lacked the Convention requirements of independence and impartiality, that he gave the appearance of bias contrary to the requirements of the common law and that there was unreasonable delay.

63 Before dealing with the substance of the points raised by these H arguments I must first outline the statutory background and set out the facts. I shall then deal with a preliminary question which must be addressed. This is whether it is open to the respondents to rely directly on the provisions of the Human Rights Act 1998 in this appeal. I shall explain why, notwithstanding the decision of this House in *R v Kansal (No 2)* [2002] 2 AC 69, I consider it appropriate to deal with the merits of

the points which have been raised on the assumption that they can do so. As to the merits, I shall deal first with the questions relating to independence and impartiality and to the appearance of bias on the part of the auditor. I shall then deal with the issue of delay. Finally I shall deal with the points which have been raised about the conduct of the hearing by the Divisional Court.

The statutory background

64 Provision has been made for many years in local government legislation to protect ratepayers against losses caused by unlawful expenditure or wilful misconduct on the part of members or senior officers of local authorities. Procedures were laid down for the audit of local authority accounts and, in the event of unlawful expenditure or wilful misconduct by of a member or senior officer, for the surcharge of that member or officer on a certificate given by the auditor. The provisions which were in force during the period to which this case relates were those in Part III of the Local Government Finance Act 1982. These provisions were repealed by and re-enacted in the Audit Commission Act 1998, but I shall concentrate on those which are to be found in the 1982 Act.

65 Prior to the coming into force of the 1982 Act local authorities and other bodies subject to audit were able to choose whether their accounts should be audited by a district auditor appointed by the Secretary of State or by a private auditor. The Layfield Committee of Inquiry into Local Government Finance (1976) (Cmnd 6453) considered that it was wrong in principle that any public body should be able to choose its own auditor. It recommended that the audit service should be made completely independent of both central government and local authorities, with a head of local audit reporting to a specially constituted higher institution: ch 6, paras 18, 30–31. Section 11 of the 1982 Act provided for the establishment of a body to be known as the Audit Commission for Local Authorities in England and Wales. Section 12 provided that local authority accounts were in future to be subject to audit by an auditor or auditors appointed by the Commission. Section 13 provided that an auditor appointed by the Commission to audit the accounts might be an officer of the Commission, an individual with prescribed qualifications who was not such an officer or a firm of such individuals. Section 14 provided that the Commission was to prepare and keep under review a code of audit practice prescribing the way in which auditors were to carry out their functions under the Act. It was to be laid before Parliament and approved by a resolution of each House. Section 15 sets out the general duties of auditors when auditing accounts in accordance with Part III of the Act. Among these, in terms of subsection (3), is the auditor's duty to consider whether in the public interest he should make a report on any matter coming to his notice in the course of the audit.

66 That, in brief, was the system under which Mr John Magill was appointed by the Commission under sections 12 and 13 of the 1982 Act. His task was to audit the Council's accounts for the years 1987–88 to 1994–95. The Code of Audit Practice for Local Authorities and the National Health Service in England and Wales 1990 stated in paragraph 10 that, in order that his opinions, conclusions, judgments and recommendations would be and would be seen to be impartial, he was to maintain an independent and objective attitude of mind and ensure that his independence was not

A impaired in any way. Paragraph 15 of the Code stated that the audit was to be carried out in a professional and timely fashion. His duties and powers in respect of hearing objections by local government electors and in regard to loss due to wilful misconduct were those set out in sections 17, 19 and 20 of the Act.

67 Section 17(1) of the 1982 Act deals with the right of members of the B public to inspect the accounts to be audited and all books and other documents relating to them, and subsection (2) of the section provides that at the request of any local government elector the auditor shall give the elector, or any representative of his, an opportunity to question him about the accounts. Sections 17(3) and 17(4) provide:

"(3) Subject to subsection (4) below, any local government elector . . . C or any representative of his, may attend before the auditor and make objections—(a) as to any matter in respect of which the auditor could take action under section 19 or 20 below; or (b) as to any other matter in respect of which the auditor could make a report under section 15(3) above.

"(4) No objection may be made under subsection (3) above by or on behalf of a local government elector unless the auditor has previously D received written notice of the proposed objection and of the grounds on which it is to be made."

68 Section 19(1) of the Act provides that, where it appears to the auditor that any item of account is contrary to law, he may apply to the court for a declaration that the item of account was unlawful except where it is sanctioned by the Secretary of State. Where the court is persuaded that it E should make the declaration, it has power under section 19(2) to order any person responsible for incurring or authorising the unlawful expenditure to repay it in whole or in part to the body in question, if the expenditure exceeded £2,000 to order the person responsible who was a member of a local authority to be disqualified from being a member of a local authority and to order rectification of the accounts.

F 69 Section 20(1) of the 1982 Act provides:

"Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any G person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more H persons, they shall be jointly and severally liable for that sum or amount."

70 Section 20(2)(b) of the 1982 Act provides that a person who is aggrieved by a decision of an auditor to certify under that section that a sum or amount is due from him may require the auditor to state in writing the reasons for his decision. Section 20(3) provides:

"Any such person who is aggrieved by such a decision may appeal against the decision to the court and—(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above."

Section 20(4) provides for the disqualification of a member of a local authority if a certificate relates to a loss or deficiency caused by his wilful misconduct and the amount due from him exceeds £2,000.

The facts in outline

71 This narrative begins where that set out in paragraphs 4 to 18 of Lord Bingham's speech breaks off. Like him, I have taken much of it from the agreed statement of facts.

72 By letters dated 18 and 20 July 1989 Councillor Neale Coleman, an opposition member of the housing committee, and a number of other local government electors made objections to the auditor under section 17(3) of the 1982 Act and invited him to take action under sections 19 and 20 of the Act and to make a report in the public interest under section 15(3). 28 individuals were named or referred to in the objections as persons against whom the objectors invited the auditor to take action. They included the respondents Dame Shirley Porter and Mr Weeks. By letter dated 8 November 1989 Councillor Coleman made further submissions in support of the original objection and added a further objection. Following receipt of the objections the auditor embarked on an investigation, the main stages of which were as follows.

73 In October 1989 the auditor requested a formal response from the council to the initial objections. The council provided its formal response on 27 November 1989. On 5 December 1989 he asked the Council if it wished to supplement that formal response to deal with the matters raised in the letter of 8 November. On 1 May 1990 the council provided its supplementary response to the auditor. During the period from June to December 1990 he carried out a review of the documentation at City Hall and obtained preliminary legal advice on matters arising from the objection. The documentation was extensive but it was incomplete, and he asked the council to provide further documents. In December 1990 he commenced his programme of interviews. From January to April 1991 he visited council offices to inspect further documents made available by the council, requested further documents and continued his programme of interviews. He completed his initial round of interviews in November 1992. He reviewed the evidence which he had received by that date, obtained further legal advice and in January 1993 began a second round of interviews which lasted from January to July 1993. He found it necessary to conduct further interviews in September and October 1993.

74 On 29 September 1993, at the request of counsel and solicitors acting for Dame Shirley Porter the auditor issued a preliminary provisional

A indication of net expenditure and loss. He invited representations by 15 October 1993. Written submissions on this preliminary indication were made on 15 October 1993 on behalf of Dame Shirley Porter and on 27 October 1993 by Mr Weeks. On 13 January 1994 the auditor gave notice of his provisional findings to ten individuals and provided copies of them to the objectors and to the council. He invited those concerned to indicate B whether they wished him to hold an oral hearing. He made a public statement on the same date which representatives of the media were invited to attend. This statement attracted widespread publicity. Recordings of the auditor reading parts of the statement appeared on television news, and the statement was referred to and discussed in Parliament and the media. Three parties and the council, but not Dame Shirley Porter or Mr Weeks, then requested the auditor to hold an oral hearing and the auditor agreed to do so. C All parties were informed on 25 March 1994 that there would be an oral hearing starting on 17 October 1994.

75 The public statement by the auditor raised questions about his impartiality. Solicitors for Mr Phillips and Dame Shirley Porter applied to the Audit Commission on 29 March and 19 April 1994 to replace Mr Magill with a new auditor. The Audit Commission refused to do so. At a D preliminary meeting on June 1994 applications were made on behalf of Dame Shirley Porter and Mr Phillips that the auditor should disqualify himself from further consideration of the objections. On 7 October 1994 the auditor held a meeting to consider oral submissions on this matter. Written representations in support of the application were made on behalf of, among others, Mr Weeks. Further oral submissions were made on behalf of Dame Shirley Porter on 17 October 1994. The auditor decided that he E should not disqualify himself. He gave his reasons in writing on 18 October 1994.

76 The auditor held an audit hearing which sat for a total of 32 days between 19 October 1994 and 7 February 1995. He received further representations and evidence after the hearing. On 17 August 1995 he circulated a revised provisional calculation of net expenditure and loss. He F invited representations on this calculation by 5 October 1995. He received representations on it from the objectors. The parties were informed by him that notification of the arrangements for the issuing of his decision would be given on 21 March 1996. On 19 March 1996 the solicitors for Dame Shirley Porter wrote to the Audit Commission to request an investigation into the auditor's conduct. On 16 April 1996 the Audit Commission rejected her complaint. On 9 May 1996 the auditor issued his decision on the objections, C in which he issued certificates in the sum of £31·677m against Dame Shirley Porter and Mr Weeks and four others. They appealed to the Divisional Court. The appeal by one of the other four was stayed on the ground of ill health. The appeals by Dame Shirley Porter and Mr Weeks and the other three were heard between 1 October and 4 November 1997. On 19 December 1997 the Divisional Court dismissed their appeals but allowed H the appeals by the three others. Their appeals to the Court of Appeal were heard between 22 and 26 March 1999. On 30 April 1999, the Court of Appeal allowed the appeals by Dame Shirley Porter and Mr Weeks.

77 There are two key points in this history in regard to the respondent's argument about the fairness of the conduct of the proceedings by the auditor and the conduct of the Divisional Court when it dismissed their appeal. The

first relates to the auditor's public statement on 13 January 1994. It is said that his conduct on this occasion gave rise to the appearance of bias on his part which could only be cured in the Divisional Court by quashing his certificate. The second relates to delay. The auditor issued his report and the certificate of surcharge on 9 May 1996. The respondents say that this was 15 months after the conclusion of the audit hearing on 7 February 1995, almost seven years after the objection was made on 18 July 1989, nearly nine years after the decision of the housing committee of 8 July 1987 against which the objection was taken and exactly ten years after start of the events following the local government elections on 8 May 1986. They contend that there had been such excessive delay that for the Divisional Court to quash the decision was the only appropriate remedy.

The Human Rights Act 1998

78 The respondents' argument on unfairness was presented on the assumption that they were entitled under section 22(4) of the Human Rights Act 1998 to rely in these proceedings on an alleged infringement of their Convention rights by acts of the auditor and of the Divisional Court, all of which took place before the relevant sections of that Act were brought into force on 2 October 2000. It assumed that these are proceedings by or at the instance of Mr Magill as auditor, and that an auditor appointed by the Audit Commission under section 12 and 13 of the Local Government Finance Act 1982 was a public authority within the meaning of section 6(1) of the 1998 Act. It also assumed that section 22(4), which states that section 7(1)(b) applies to proceedings by or at the instigation of a public authority whenever the act in question took place, applies to an appeal in these proceedings.

79 Mr Howell did not challenge the proposition, which I would accept, that an auditor appointed by the Audit Commission to audit the accounts of a local authority is a public authority. But he submitted that the proceedings which were conducted by the auditor and by the Divisional Court in the appeal to that court under section 20(3) of the 1982 Act were proceedings by or at the instigation of the objectors and not the auditor. He also submitted, following observations which I made in *R v Lambert* [2001] 3 WLR 206, that the acts of the Divisional Court which were complained of were outside the scope of section 7(1)(b) of the 1998 Act as they were acts of a court. I would reject both of these arguments.

80 As to the first point, the function of the auditor under Part III of the 1982 Act is to audit the accounts which require to be audited. It is his duty to satisfy himself by examination of the accounts and otherwise that the requirements of the statute have been complied with, that proper practices have been observed and proper arrangements have been made to obtain value for money in the use of resources: section 15(1). He must also consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the body concerned or brought to the attention of the public: section 15(3). He has power under sections 19 and 20 to declare an item of account unlawful and to recover a loss incurred or deficiency caused by wilful misconduct irrespective of whether there has been any objection to the accounts. It is in that context that the right of any local government elector under section 17(3) to attend before the auditor and make objections as to any matter in respect of which he could take action under section 19 or 20,

A or as to any matter in respect of which he could make a report under section 15(3), must be seen. The essence of these proceedings, from start to finish, is that they are proceedings by the auditor.

81 As to the second point, it has now been held in *R v Kansal (No 2)* [2002] 2 AC 69 that section 7(1)(b) of the 1998 Act applies to acts of courts and tribunals in the same way as it applies to acts of other public authorities. There has been no suggestion that the acts of the Divisional Court which are B complained of are acts to which section 6(2) of that Act applies. It has not been argued that, as the result of primary legislation, the court could not have acted differently or it was acting so as to give effect to primary legislation which could not be read or given effect in a way which was compatible with the respondents' Convention rights. It follows that the acts of the Divisional Court which are under challenge are in the same position in C this respect as the acts of the auditor.

82 There remains however the question whether the benefit of retrospectivity under section 22(4) of the 1998 Act is available at the stage of an appeal. The hearing of this appeal took place before judgment was delivered in *R v Kansal (No 2)*. In that case it was held that section 22(4) does not apply to an appeal against a conviction which took place before 2 October 2000. One of the points which I made in my dissenting judgment D was that I did not see how it would be possible to confine the decision in that case to criminal cases only: see para 48 of my judgment. But this point has yet to be decided in a civil appeal, and it is perhaps still open to argument. As your Lordships did not hear any argument on it, I would prefer to approach the respondents' submissions as to fairness on the assumption that they are entitled to rely on their Convention rights in this appeal irrespective E of the fact that all the acts in question took place before 2 October 2000.

Whether the proceedings are civil or criminal

83 On the assumption that they were entitled in this appeal to rely on their Convention rights, the respondents submitted that in substance the proceedings under section 20 of the 1982 Act were in the nature of a F criminal charge. This argument was considered and rejected by the auditor. It was also rejected by the Divisional Court, which held that English law treats the matter as one of civil not criminal liability (1997) 96 LGR 157, 171D. Schiemann LJ did not mention the question of classification when he was dealing in the Court of Appeal with the issues of fairness [2000] 2 WLR 1420, 1453–1463. But this question was addressed by Mr McMullen in the course of his argument in this House, and it is the G subject of detailed submissions in his written case. The Strasbourg cases were reviewed by Lord Bingham of Cornhill in *McIntosh v Lord Advocate* [2001] 3 WLR 107, 114–119, where the issue was whether a person against whom an application had been made for a confiscation order was, by virtue of that application, charged with a criminal offence: see also *Phillips v United Kingdom* (2001) 11 BHRC 280.

H 84 For the purposes of the Convention the category into which the proceedings are placed by domestic law, while relevant, is not the only consideration. The court is required to look at the substance of the matter rather than its form, to look behind the appearances and to investigate the realities of the procedure: *Deweer v Belgium* (1980) 2 EHRR 439, 458, para 44. The nature of the offence and the nature and degree of severity of the

sanction must be taken into account also. As to the sanction, the question is whether, by reason of its nature and degree of severity, it amounts to a penalty in the sense of punishment: *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, 678–679, paras 82, 83; *Lutz v Germany* (1987) 10 EHRR 182, 197, para 54; *Demicoli v Malta* (1991) 14 EHRR 47, 62–63, para 34. For example, *Engel v The Netherlands* concerned proceedings in a military court for disciplinary offences for which one of the sanctions liable to be imposed as punishment was deprivation of liberty. In *Demicoli v Malta* too the applicant was at risk of imprisonment if the fine was not paid. In *AP, MP and TP v Switzerland* (1997) 26 EHRR 541, 559 para 42, the court said that it attached great weight to the domestic court's finding that the fine in question was penal in character and depended on the "guilt" of the offending taxpayer. In *DC, HS and AD v United Kingdom* [2000] BCC 710 the European Court held that proceedings for the disqualification of directors on the ground of unfitness under section 6 of the Company Directors Disqualification Act 1986 were inherently regulatory in character, and that for this reason they could not be said to involve the determination of a criminal charge within the meaning of article 6(1) of the Convention.

85 I consider that the nature of the proceedings under section 20 of the 1982 Act is compensatory and regulatory, not punitive. Section 20(1) provides that the amount certifiable by the auditor, where it appears to him that a loss has been incurred or deficiency caused by wilful misconduct, is the amount of the loss or deficiency and that both he and the body in question may recover that amount for the benefit of that body. The object of the procedure is to compensate the body concerned, and the measure of the compensation is the amount of the loss suffered. In the present case the amount certified was very large, but the nature of the proceedings does not alter depending on the amount certified. No fine is involved, nor does the section provide for a penalty by way of imprisonment. Section 20(4) provides for the respondents' disqualification from being members of a local authority. But this outcome is similar to that where a trustee is removed after being found to have been in serious breach of trust, or a person is disqualified from acting as a director of a company. In my opinion measures of the kind provided for by section 20, which apply to persons having a special status or responsibility and are compensatory and regulatory rather than penal in character, lie outside the criminal sphere for the purposes of article 6 of the Convention.

86 For these reasons I would hold that section 20 of the 1982 Act does not involve the making of a criminal charge within the meaning of article 6. But that does not mean that the respondents lack protection. They are entitled to all the protections afforded to them by article 6(1), the first sentence of which provides that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The independence and impartiality of the auditor

87 The protections which article 6(1) lays down are that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. As I shall explain later when dealing

A with delay, I consider that this sentence creates a number of rights which, although closely related, can and should be considered separately. The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached cannot be B answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see *Millar v Dickson* 2001 SLT 988, 994D–E per Lord Bingham of Cornhill and my own observations in that case, at p 1003C–F. Under this heading the question is whether the auditor lacked C the independence and impartiality which is required by article 6(1).

88 There is a close relationship between the concept of independence and that of impartiality. In *Findlay v United Kingdom* (1997) 24 EHRR 221, 244–245, para 73 the European Court said:

> "The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner D of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> "As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any E legitimate doubt in this respect.
>
> "The concepts of independence and objective impartiality are closely linked . . ."

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 F difficult, but also that it must not appear in the objective sense to lack these essential qualities.

89 I shall leave over to the next heading the question whether the auditor's public statement on 13 January 1994 showed that he lacked the appearance of impartiality for the purposes of the article 6(1) Convention right. At this stage the matter for consideration is the respondents' complaint that the circumstances and nature of his appointment and the G investigation which he then conducted were such that the requirements of independence and impartiality in his case were not satisfied. At the heart of the argument is the multiplicity of roles which were being performed by the auditor. The respondents say that the procedure which he adopted on receipt of the objections violated their Convention right because he acted as investigator, prosecutor and judge in the investigation which he carried out. H He conducted the investigation, took the decision whether there was a case to answer, tried the case, assessed the loss and then appeared in the Divisional Court to defend his decision and his conduct.

90 The Divisional Court said 96 LGR 157, 168E–F that the 1982 Act imposes on the auditor the roles of investigator, prosecutor and judge which might be thought an almost impossible burden, and it referred to the

recommendation in para 223 of the Third Report of the Nolan Committee on Standards in Public Life: Standards of Conduct in Local Government in England, Scotland and Wales (1997) (Cm 3702–1), which has now been implemented for England and Wales by Part III of the Local Government Act 2000, that surcharging by an auditor be abolished and replaced by other remedies. At p 169G, the court said, after reviewing his conduct of the hearing, that it was not persuaded that the auditor's final conclusions could be impeached on the grounds of unfairness. But, at p 172E–F, it said that it appeared to it that the roles which the auditor played would not meet the requirements of independence and apparent impartiality demanded by the Convention.

91 In my opinion the conduct of the auditor requires to be looked at as a whole and in the context of the procedure which is laid down in the statute. Part III of the 1982 Act starts, as one would expect, by placing the responsibility for auditing the accounts on the auditor. It seeks to ensure his independence from the body whose accounts he is auditing by requiring in sections 12 and 13 that his appointment is to be by the Audit Commission and not by the body itself. His responsibilities include making reports under section 15 on any matter coming to his notice in the course of the audit and dealing with objections made by any local government elector under section 17. Where objections are made, it is his duty to consider under section 17(3) whether they relate to any matter in respect of which he could take action under section 19 (items contrary to law) or section 20 (wilful misconduct) or to any matter in respect of which he could make a report under section 15. The Act does not enable him to pass this responsibility to someone else. It is his duty, as the person in charge of the audit within the context of which the objections are made, to deal with them himself and, if they are well founded, to take such action as he is required to take on them by the statute. The auditing process, which is in his hands, is not complete until this has been done.

92 That being the structure of the procedure laid down by the statute, there is inevitably some force in the criticism that, where accusations of wilful misconduct are involved, the auditor is being required to act not only as an investigator but also as prosecutor and as judge. But this problem has been recognised and dealt with in section 20(3). It provides not only that any person aggrieved by his decision may appeal against the decision to the court but also that the court "may confirm, vary or quash the decision and give any certificate which the auditor could have given". The solution to the problem which section 20(3) provides is that of a complete rehearing by the Divisional Court. The court can exercise afresh all the powers of decision which were given to the auditor. In *Lloyd v McMahon* [1987] AC 625, 697F–G Lord Keith of Kinkel said that, while there might be extreme cases where it would be appropriate to quash the auditor's decision, the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course.

93 In *Kingsley v United Kingdom* The Times, 9 January 2001 (Application No 35605/97), 7 November 2000, the European Court said in paragraph 51 that, even if an adjudicatory body determining disputes over "civil rights and obligations" does not comply with article 6(1), there is no breach of the article if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does

provide the guarantees of article 6(1); see also *Bryan v United Kingdom* (1995) 21 EHRR 342, 360–361, paras 44 and 46. The court went on to say this in *Kingsley v United Kingdom*, at para 58:

> "The court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of 'full jurisdiction' involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body."

The powers which the Divisional Court has been given by section 20(3) fully satisfy these requirements. Not only does it have power to quash the decision taken by the auditor. It has power to rehear the case, and to take a fresh decision itself in the exercise of the powers given to the auditor. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1407C–D Lord Slynn of Hadley observed that the principle of judicial control did not go so far as to provide for a complete rehearing on the merits of the decision. In the case of the procedure governed by section 20(3) however a rehearing on the merits can be conducted, and that is what was done in this case.

94 In these circumstances it is not necessary to examine the various grounds on which the procedure adopted by the auditor was criticised. The issue at this stage is whether the Divisional Court satisfied the requirements of article 6(1) in regard to the scope of the jurisdiction which it was entitled to exercise. I would answer this question in the affirmative. There has been no suggestion that the proceedings in that court, which were conducted with conspicuous care and attention to detail, lacked the appearance of independence and impartiality. In my opinion those elements of the respondents' article 6(1) Convention rights were fully protected by the proceedings in the Divisional Court, having regard to the powers which that court was entitled to exercise.

Apparent bias

95 I turn now to the question whether the auditor's certificate should have been quashed on the ground of apparent bias. The respondents submit that the way in which the auditor conducted himself when he made his statement on 13 January 1994 indicated an appearance of bias on his part which affected all stages of his investigation both before and after that date. Both the article 6(1) Convention right to an independent and impartial tribunal and the respondents' rights to an unbiased judge at common law as it was understood before the coming into effect of the relevant provisions of the Human Rights Act 1998 are invoked under this heading.

96 As I have said, the statement which the auditor made on 13 January 1994 received considerable publicity on television and in the newspapers. The Divisional Court saw video recordings of the relevant item on the 1 p m and 9 p m BBC TV news. The following description of the event is given in its judgment 96 LGR 157, 173:

"a televised announcement was arranged at which the auditor himself appeared and, although he said that his views were provisional, he expressed them in florid language and supported them by reference to the thoroughness of the investigation which he claimed to have carried out. There was a further feature of the event which should have had no place in the middle of a quasi-judicial inquiry. A stack of ring binders on the desk at which the auditor sat bearing the name of his firm for the benefit of the cameras was, ostensibly, under the protection of a security guard: unless it was being implied that the persons under investigation might wish to steal the documents, it is not clear what was the purpose of this posturing."

97 In the reasons which he gave on 18 October 1994 for deciding not to disqualify himself the auditor said that he was mindful of the serious nature of the allegations made against the respondents, that he had been careful to give them a full opportunity to respond to these allegations and his provisional findings, that he retained an open mind and that he was not biased against any individual or the council. He went on to say:

"114. I am not biased. I have acted fairly and will continue to do so. I will exercise impartial, independent and objective judgment. I will reach a decision on the evidence and submissions before me. I will not reach any decision adverse to the council and/or to any respondent unless I am satisfied on the basis of the evidence that I am under a duty to do so. All parties will get a fair hearing from me.

115. In my consideration of the disqualification application, I have sought to apply the test formulated in *R v Gough* [1993] AC 646, namely 'whether, in all the circumstances of the case, there appeared to be a real danger of bias . . .'. In my view, a person having ascertained the relevant circumstances would not consider that I will regard unfairly any person's case with disfavour. It has been suggested that I will find it difficult to depart from my provisional findings and views because of the publicity given to these. I feel no such inhibition. Nor, in my view, is there any ground on which I should reasonably be thought to be so inhibited. I have always made it plain that before reaching any conclusion I will consider any representations made to me. In my view, that is a process which necessarily conveys to any reasonable person the point that my conclusions may not coincide with my provisional findings and views. My view is that no real danger of bias exists and nor is there any other basis on which I should disqualify myself."

98 The Divisional Court set out its conclusions on this issue in this way 96 LGR 157, 174:

"In the light of the material before us, including, in particular, the auditor's reasons for declining to recuse himself, we accept that, despite such inferences to the contrary as might have been drawn from the press conference, the auditor did have an open mind and was justified in continuing with the subsequent hearings. We note that he did not confirm his preliminary findings in respect of those who gave evidence at those hearings. The error of judgment which we find he made, in holding the press conference as he did, did not, in our view, demonstrate bias on his part. He was at pains to stress the provisional nature of his findings and it is pertinent that in his final decision he made no finding of wilful

misconduct against three people in relation to whom he had, provisionally, been minded so to find. In any event, as with the investigation, any possible unfairness to the appellants has been cured by the hearing before us."

99 The test for apparent bias which the auditor sought to apply to himself, and was applied in its turn by the Divisional Court, was that which was described in *R v Gough* [1993] AC 646 by Lord Goff of Chieveley where he said, at p 670:

"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him . . ."

100 The "reasonable likelihood" and "real danger" tests which Lord Goff described in *R v Gough* have been criticised by the High Court of Australia on the ground that they tend to emphasise the court's view of the facts and to place inadequate emphasis on the public perception of the irregular incident: *Webb v The Queen* (1994) 181 CLR 41, 50, per Mason CJ and McHugh J. There is an uneasy tension between these tests and that which was adopted in Scotland by the High Court of Justiciary in *Bradford v McLeod* 1986 SLT 244. Following Eve J's reference in *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 (which was not referred to in *R v Gough*), the High Court of Justiciary adopted a test which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances: see also *Millar v Dickson* 2001 SLT 988, 1002–1003. This approach, which has been described as "the reasonable apprehension of bias" test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified: *Piersack v Belgium* (1982) 5 EHRR 169, 179–180, paras 30–31; *De Cubber v Belgium* (1984) 7 EHRR 236, 246, para 30; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402–403, para 30. In *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, para 48 the court also observed that, in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive: "What is decisive is whether this fear can be held objectively justified."

101 The English courts have been reluctant, for obvious reasons, to depart from the test which Lord Goff of Chieveley so carefully formulated in

R v Gough. In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 136A–C Lord Browne-Wilkinson said that it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said, at p 142F–G, that, although the tests in Scotland and England were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. The Court of Appeal, having examined the question whether the "real danger" test might lead to a different result from that which the informed observer would reach on the same facts, concluded in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477 that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

102 In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711A–B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B–C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726–727:

> "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

103 I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. 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.

A 104 Turning to the facts, there are two points that need to be made at the outset. The first relates to the auditor's own assertion that he was not biased. The Divisional Court said, at p 174A–B, that it had had particular regard to his reasons for declining to recuse himself in reaching its conclusion that he had an open mind and was justified in continuing with the subsequent hearings. I would agree that the reasons that he gave were relevant, but an examination of them shows that they consisted largely of B assertions that he was unbiased. Looking at the matter from the standpoint of the fair-minded and informed observer, protestations of that kind are unlikely to be helpful. I think that Schiemann LJ adopted the right approach in the Court of Appeal when he said that he would give no weight to the auditor's reasons: ante, p 400C. The second point relates to the emphasis which the respondents place on how the auditor's conduct appeared from C the standpoint of the complainer. There is, as I have said, some support in the jurisprudence of the Strasbourg court for the proposition that the standpoint of the complainer is important. But in *Hauschildt v Denmark* 12 EHRR 266, 279, para 48 the court emphasised that what is decisive is whether any fears expressed by the complainer are objectively justified. The complainer's fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated. But they D lose their importance once the stage is reached of looking at the matter objectively.

105 I think that it is plain, as the Divisional Court observed, at p 174B, that the auditor made an error of judgment when he decided to make his statement in public at a press conference. The main impression which this would have conveyed to the fair-minded observer was that the purpose of E this exercise was to attract publicity to himself, and perhaps also to his firm. It was an exercise in self-promotion in which he should not have indulged. But it is quite another matter to conclude from this that there was a real possibility that he was biased. Schiemann LJ said, at p 1457D–E, that there was room for a casual observer to form the view after the press conference that the auditor might be biased. Nevertheless he concluded, at p 1457H, having examined the facts more closely, that there was no real danger that F this was so. I would take the same view. The question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias. The auditor's conduct must be seen in the context of the investigation which he was carrying out, which had generated a great deal of public interest. A statement as to his progress would not have been inappropriate. His error G was to make it at a press conference. This created the risk of unfair reporting, but there was nothing in the words he used to indicate that there was a real possibility that he was biased. He was at pains to point out to the press that his findings were provisional. There is no reason to doubt his word on this point, as his subsequent conduct demonstrates. I would hold, looking at the matter objectively, that a real possibility that he was biased has not been demonstrated.

H

Unreasonable delay

106 The respondents' argument under this heading is directed to their article 6(1) Convention right to the determination of their civil rights and obligations within a reasonable time. They contend that the auditor was

guilty of inordinate delay in breach of the article 6(1) requirement and that they were at an unfair disadvantage due to delay when they were giving evidence before the Divisional Court. They also submit, under reference to constitutional provisions considered by the Privy Council, that they had a right to a determination within a reasonable time at common law which did not require them to demonstrate actual prejudice: *Bell v Director of Public Prosecutions* [1985] AC 937; *Director of Public Prosecutions v Tokai* [1996] AC 856. The Divisional Court held, at p 169D–E, that the test at common law was whether delay had given rise to such prejudice that no fair trial could be held: *Tan v Cameron* [1992] 2 AC 205, 222–224, per Lord Mustill. In its judgment no such prejudice was shown, and in the Court of Appeal Schiemann LJ was of the same opinion: ante, p 401E–F. The respondents say that the approach taken by these courts was wrong in law, as there was no requirement to show actual prejudice. The nature of the common law right which they asserted in your Lordships' House appeared to me to be virtually indistinguishable in this respect from the right under article 6(1), so I do not need to dwell on this part of their argument. I shall deal with the issue of delay on the assumption that the test which they must satisfy is that which requires to be satisfied to demonstrate that there was a breach of the Convention right and that prejudice, while relevant if it exists, does not require to be demonstrated.

107 In their overall complaint about delay they have included the time which elapsed from the local government elections on 8 May 1986 and the decision of the housing committee on 8 July 1987. The period that has elapsed since the event in question may be a relevant factor when considering the question whether the delay was unreasonable. But they accept that the obligation under the Convention relates only to the conduct of the proceedings. Time usually begins to run in civil cases for the purposes of article 6(1) from the date when the proceedings in question are initiated: *Ausiello v Italy* (1996) 24 EHRR 568, 571, para 18. I would hold that time began to run in this case from the date when the objections which gave rise to the investigation were received by the auditor, and that it includes the stage of the appeal to the Divisional Court. The period under review can therefore be divided into four distinct periods: (a) that from the receipt of the original objection on 18 July 1989 to the issuing by the auditor of his provisional views on 13 January 1994; (b) that from 13 January 1994 to the end of the audit hearing on 7 February 1995; (c) that from 7 February 1995 to the issuing by the auditor of his decision and the certificates of surcharge on 9 May 1996; and (d) that from 9 May 1996 to the decision of the Divisional Court, which was given on 19 December 1997. No complaint is made about any delay after that date.

108 I would also hold that the right in article 6(1) to a determination within a reasonable time is an independent right, and that it is to be distinguished from the article 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the article which creates a number of rights which, although closely related, can and should be considered separately. This means that it is no answer to a complaint that one of these rights was breached that the other rights were not. To take a simple example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law.

A 109 I would respectfully follow Lord Steyn's observation in *Darmalingum v The State* [2000] 1 WLR 2303 about the effect of section 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay. In
B *Flowers v The Queen* [2000] 1 WLR 2396 a differently constituted Board, following *Bell v Director of Public Prosecutions* [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in section 20(1) of the Constitution of Jamaica. In the context of article 6(1) of the Convention however the way this right was construed in *Darmalingum v The State* seems to me to be preferable. In *Crummock (Scotland) Ltd v HM Advocate* 2000
C SLT 677, 679A–B, Lord Weir, delivering the opinion of the High Court of Justiciary, said that under article 6(1) it was not necessary for an accused to show that prejudice has been, or is likely to be, caused, as a result of delay. The article 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the article as implied rights which
D are capable of modification on grounds of proportionality: see *Brown v Stott* [2001] 2 WLR 817, 851B–E; *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, para 90. The only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable.

110 In *König v Federal Republic of Germany* (1978) 2 EHHR 170, 197,
E para 99 the European Court gave the following guidance as to the test to be applied in civil proceedings on the question of delay:

> "The reasonableness of the duration of proceedings covered by article 6(1) of the Convention must be assessed in each case according to its circumstances. When inquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the
F complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by article 6(1)."

G

111 Applying this test to the facts, it will be convenient to examine separately the conduct of the auditor and that of the Divisional Court. I start with the Divisional Court. It seems to me that there is no basis whatever for the suggestion that there was an unreasonable delay at this stage. The auditor issued his certificate in May 1996. It was not until December 1996
H that the respondents filed their evidence on the main issues. The accounting evidence was not filed until April 1997. A procedural hearing was heard shortly afterwards in May 1997. The case proceeded to a hearing in the Divisional Court in October 1997, which lasted for 23 days. Judgment was given on 19 December 1997. I would conclude without any difficulty, having regard to the complexity of the issues and the volume of evidence that

had to be prepared and presented, that the proceedings in that court were concluded within a reasonable time.

112 As for the conduct of the investigation by the auditor, there is a much more extended timetable. A period of about $3\frac{1}{2}$ years elapsed between the receipt of the first objection in July 1989 and the issuing of the provisional findings in January 1994. A further period of about two years and five months then elapsed before he issued his decision and the certificates of surcharge. But this brief narrative has to be seen in the light of the nature of the exercise on which he was engaged. The Divisional Court, at p 161C–D, described his investigation as vast. It referred, at p 169D, to its mammoth nature, bearing in mind that the objections related to 28 individuals. I do not need to go over the details which are set out in the agreed statement of facts. I have already provided my own summary in an earlier part of this judgment, and some further details are given by the Divisional Court at pp 161–162 and 168.

113 In my opinion the most striking feature which emerges from all the facts relating to the conduct of the investigation by the auditor is that, far from causing delay by inaction, he was constantly in action. He was seeking out information wherever it could be found, often with considerable difficulty. He was interviewing and re-interviewing many witnesses, recovering and perusing thousands of documents, calculating amounts of loss and expenditure and then gathering all this information together into a decision which eventually extended to almost 2000 pages including the appendices. It has been suggested that his investigation was over-elaborate. There are comments to that effect in the Divisional Court's judgment, at p 161D. But the auditor had to form his own judgment on this matter. He had to take account of the importance of the exercise to all parties, including those who were at risk of being surcharged, and he was entitled to have regard to its obvious political sensitivity. I would attach particular significance to these factors and to the fact that it has not been suggested that the auditor caused delay at any stage by inactivity.

114 Applying the test described in *König v Federal Republic of Germany* 2 EHRR 170, 197, para 99 which directs attention to the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the authorities, and leaving aside the question whether the respondents have shown that they were prejudiced, I would hold that the proceedings did not exceed the reasonable time requirement which article 6(1) lays down.

115 In view of the conclusion which I have reached I do not need to deal with the respondents' submissions about the remedy to which they were entitled if there had been undue delay. Schiemann LJ, said, at p 1460F, that it would not have been appropriate in that event to quash the auditor's certificate. He had in mind the remedy which was available in the Divisional Court to ensure that, despite the delay, there was a fair trial and the possibility instead of a remedy in damages. The appellant supported this approach. But these are difficult issues, and I would prefer to reserve my opinion on them.

The Divisional Court

116 The respondents submit that the Divisional Court made errors of law by applying the wrong tests to their arguments on apparent bias and

A delay. Their argument is that it dealt with the case as if their complaint was one of actual bias and with their complaint of delay on the basis that it was necessary to establish prejudice. It is true that the Divisional Court took particular account of the auditor's assertions that he was not biased and that, basing itself on the common law authorities, it had regard to the question whether the delay resulted in prejudice. But I do not think that, read as a whole, the judgment is vulnerable to such serious criticism that B their decision to uphold the certificates against Dame Shirley Porter and Mr Weeks should, as the respondents assert, have been set aside by the Court of Appeal on that ground alone. Mistakes of law of this kind, if they are made, do not in themselves amount to breaches of the article 6 Convention rights of the kind which must inevitably attract that remedy. They can be corrected on appeal. I have taken full account of the respondents' arguments C in my review of their case on unfairness and of their criticisms of this part of the Divisional Court's reasoning.

117 They also submit that the Divisional Court ought to have quashed the certificates on the ground that the injury done to her public reputation by reason of the auditor's conduct in making his statement at a press conference was so severe that to quash the certificate was the only possible remedy. D I would reject this argument also. The question which the Divisional Court had to address was whether the defects in the investigation conducted by the auditor were so prejudicial to the respondents that it should in its discretion quash the certificates or whether it should proceed to a rehearing on the merits and decide the issue on the evidence presented to the court: see *Lloyd v McMahon* [1987] AC 625, 716F–G per Lord Templeman. Various factors had to be taken into account in this case, including the inevitable E consequence of the passage of time on the recollection of witnesses to which the Divisional Court refers, at p 162D–E. But the fact that the press conference gave rise to adverse publicity, albeit that this was severe, would not of itself have justified quashing the certificates. There were other interests to be taken into account, namely those of the objectors and of the council and its electors. The respondents were given the opportunity, to F which they were entitled, to raise the issue in the context of their arguments on unfairness. In my opinion their rights were sufficiently protected by the way in which this issue was examined in that court and by the remedies that were available to them by way of appeal.

Conclusion on unfairness

G 118 For these reasons I would hold that the proceedings as a whole did not infringe the respondents' Convention rights and that there was no unfairness at common law on the ground either of apparent bias or of delay.

Quantum

119 The auditor included in the amount which he certified under section 20(1)(b) of the Local Government Finance Act 1982 as one of the H items of loss in consequence of the respondents' wilful misconduct a sum amounting to £15·476m for discounts on the sale of dwellings sold at a discount. He took as the measure of this loss the difference between the open market value of the dwellings with vacant possession, as estimated at the time of the sales by the council's valuers, Ellis & Co, for the purpose of

arriving at a discounted price, and the discounted prices at which they were actually disposed of. Most of the dwellings included in this item were not sold outright but were let on long leases granted in consideration of substantial premiums. For convenience however all the transactions were referred to as sales. The discount was 30% to purchasers who were not already tenants of the council. For existing tenants with the right to buy it was a variable amount, but it was always more than 30%.

120 As the Divisional Court said 96 LGR 157, 205B, the question whether this amount was properly certified was by far the most significant issue in terms of quantum. Two main challenges to the auditor's approach to it were advanced in that court. The first, which raised an issue of principle, was whether the auditor was right to use the open market value of the unoccupied dwellings as his starting point. The second was directed to the figures which he used for assessing their market value which, it was said, were unreliable. The Divisional Court upheld the auditors' approach on both points. It concluded, at p 207E, that the loss arising from the sales at a discount was correctly calculated at £15·476m.

121 The issue whether this amount was correctly calculated was raised again in the Court of Appeal. Robert Walker LJ said, ante, p 445D–F, that in his judgment the Divisional Court erred in its approach, as it should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. His conclusion on this issue was rendered academic by the decision of the majority to allow the appeals and discharge the certificates. Kennedy LJ said, ante, p 371A, that he agreed with that part of the judgment of Robert Walker LJ which dealt with quantum, but Schiemann LJ said, ante, p 389F, that he preferred to express no opinion on the point. As your Lordships have decided to allow the appeal, the issue as to quantum is once again a live issue. The auditor submits that the amount which was found to have been correctly calculated by the Divisional Court should be included in the certificates.

122 It may be convenient for me to set out again the provisions of section 20(1) of the 1982 Act:

> "Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of that meeting) may recover that sum or amount for the benefit of that body . . ."

123 The task of the auditor in this case was to certify the amount of the loss or deficiency caused by the wilful misconduct. The loss or deficiency which he identified as due to wilful misconduct fell into two distinct parts. The first part consisted of expenditure incurred in the preparation of papers for the purpose of discussing the promotion of the electoral advantage of the majority party. This part raised no issue of principle. It was simply a matter of arriving at an appropriate figure to restore to the council's

account the amount of the expenditure. The auditor made a broad estimate under this heading of £5,000 which, when interest was added, amounted to £10,126. No appeal was taken against the calculation of this amount. By far the greater part of the loss which he identified fell into the second part. This was the result of the resolution of the housing committee on 8 July 1987 to extend the programme of designated sales of dwellings from the council's social housing stock. After agreed corrections in the Divisional Court, the total amount of this loss was £26·462m. The figure of £15·476m for losses resulting from sales of dwellings at a discount is included in this figure.

124 The auditor's approach, as explained by him in paragraph 43 of his report, was a simple one. He said that the sale of property such as housing accommodation at less than its market value involves a loss or deficiency to the authority which is equal to the difference between the market value of the asset and the proceeds of sale. In his view, the amount of this difference was the amount that should be certified as due from any person by whose wilful misconduct that loss or deficiency has been incurred. It is this approach that the respondents have challenged as being wrong in principle.

125 I agree that the sale of a dwelling which is unoccupied at less than its open market value with vacant possession can be regarded as producing a loss or deficiency for the purposes of section 20(1)(b) of the 1982 Act. This assumes that those who were responsible for the sale were under a duty to obtain a full price for it, measured by its value with vacant possession in the open market. But I do not think that this can be regarded as a universal rule. The proper starting point is to identify the act of wilful misconduct. The next step is to determine what items of loss, if any, were caused by it. In the case of the designated dwellings, the act of wilful misconduct for which the respondents must be held accountable was the promotion of the policy which the housing committee adopted on 8 July 1987. The effect of its resolution was to remove the designated dwellings from the council's social housing stock as they became vacant. What the council lost as a result of the adoption of the policy were 618 dwellings from its social housing stock. Its capacity to perform its obligation to house the homeless under Part III of the Housing Act 1985 was correspondingly reduced.

126 Nevertheless, when these dwellings became vacant they could have been sold with vacant possession on the open market. Robert Walker LJ said, ante, p 445D–F, that there was no loss to the council so long as the discounted prices actually received by it exceeded the value of the dwellings as tenanted social housing. They exceeded this value in all cases, so he was of the view that the auditor ought to have found that their sale did not result in any loss or deficiency. But I agree with Lord Bingham that the principle which underlies the statutory procedure is one of compensation. What the auditor is directed by section 20(1) to certify is the amount of the loss or deficiency, and it is for the benefit of the body that the amount certified is recoverable. The aim of the procedure is to put the body in the same position that it would have been in but for the wilful misconduct. Applying this approach, the loss to the council due to the sales for which it ought to be compensated was the difference between the full market price of the dwellings and the discounted prices which were received for them.

127 That however does not conclude the argument. This is because the auditor included in his calculation of this amount a sum amounting to £4·237m for extra homelessness costs. These costs were directly attributable to the removal of the designated dwellings from the social housing stock. Robert Walker LJ said, at p 1502D, that to include this figure in the amount of the loss or deficiency as well as a figure for loss on the sale of the dwellings at a discount would result in double counting. In his view it would be inconsistent with the auditor's decision to include an amount for homelessness costs due to the depletion of the council's social housing stock to assume that those dwellings would have been sold with vacant possession at their full value on the open market.

128 I think that there is considerable force in the point which Robert Walker LJ made on this issue in his careful judgment. It seems to me that these two items were arrived at by the auditor on two different and arguably inconsistent assumptions. On the one hand the figure of £15·476m representing the loss arising from sales at a discount assumes that the council would, but for the unlawful policy, have obtained full value for dwellings as they no longer required to be treated as part of the social housing stock when they were sold. On the other hand the figure of £4·237m for extra homelessness costs is based upon costs for which it is assumed the council should be compensated on the ground that the dwellings ought to have been retained for social housing purposes. The principle of compensation requires that the council should be fully compensated, but it does not permit the council to be overcompensated. An auditor who seeks to apply this principle must guard against the risk of double counting. The effect of doing so would be to penalise the person from whom the amount was due, which is not the object of the procedure. It would also enable the body to recover more than was needed to make good the loss or deficiency.

129 In my opinion however the point about double counting is not free from difficulty. The principles are clear enough, but they depend for their application on the facts. It seems to me that the point ought to have been raised when the facts about the extra costs of homelessness were being inquired into by the auditor or by the Divisional Court. That was not done, with the result that your Lordships do not have the findings of fact which would be needed to disturb the calculations made by the auditor on this issue. With some hesitation therefore I have come to the conclusion, in agreement with your Lordships, that it would not be right to hold that the auditor fell into the obvious trap of double counting and that the sum upheld by the Divisional Court should not be departed from.

Conclusion

130 I too would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court.

LORD HOBHOUSE OF WOODBOROUGH

131 My Lords, I agree that the appeal should be allowed and the judgment of the Divisional Court restored as proposed by my noble and learned friends, Lord Bingham of Cornhill and Lord Hope of Craighead and for the reasons which they have given. The question of quantum referred to in the penultimate section of Lord Bingham's speech gave me some anxiety but was effectively concluded by the limited way in which the arguments of

A the respondents were put. The respondents (no doubt for some good reason) did not deploy or support by evidence the arguments which might have displaced the valid primary measure of the council's capital account loss. I agree that what Robert Walker LJ said in his judgment, at p 1502, did not, on examination, suffice to displace the primary measure nor did it show that there had been any double counting.

B **LORD SCOTT OF FOSCOTE**

132 My Lords, this is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a C clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government. Like Viola's "worm i' the bud" it D feeds upon democratic institutions from within (Twelfth Night).

133 When detected and exposed it must be expected, or at least it must be hoped, that political corruption will receive its just deserts at the polls. Detection and exposure is, however, often difficult and, where it happens, is usually attributable to determined efforts by political opponents or by investigative journalists or by both in tandem. But, where local government E is concerned, there is an additional very important bulwark guarding against misconduct. The Local Government Finance Act 1982 (now repealed but in force until 11 September 1998) required the annual accounts of a local authority to be audited by an independent auditor appointed by the Audit Commission (sections 12 and 13). The auditor had to satisfy himself that the local authority's accounts were in order (section 15(1) and (2)) and, also, F had to "consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the [local authority] concerned or brought to the attention of the public . . .": section 15(3).

134 If, in the course of the audit, it came to the attention of the auditor that municipal powers had been used not in the general public interest but, selectively, for party political advantage, it was plainly right that the G political corruption in question should be exposed in a report under section 15(3).

135 Section 16 of the Act gave the auditor extensive powers to obtain documents and information for the purposes of the statutory functions. These included the power to require any officer or member of the local authority "to give him such information or explanation as he thinks necessary . . .": section 16(2). Any report made by the auditor under H section 15(3) became a public document open to inspection by any member of the public (section 18A).

136 The statutory provisions to which I have referred provided an institutional means whereby political corruption consisting of the use of municipal powers for party political advantage might be detected and

cauterized by public exposure. These provisions were repealed by the Audit Commission Act 1998 but replaced by provisions in Part II of that Act which are to much the same effect (see, in particular, section 8 of the 1998 Act).

137 In addition, however, where the misconduct in question had caused loss to the local authority, section 20 of the 1982 Act enabled the auditor to require those responsible to make good the loss. Section 20(1) provided:

> "(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act . . . (a) . . . or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that . . . the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the [local authority] in question . . . may recover that . . . amount for the benefit of that [local authority] . . ."

138 Subsection (3) permitted an appeal against the auditor's certificate to be made to the court. Subsection (4) applied where a certificate requiring payment of more than £2,000 had been made, or upheld, and disqualified the individual concerned from being a member of any local authority for a period of five years. And subsection (5) required payment of the certified sum to be made within fourteen days of the certificate becoming final.

139 The purpose of a section 20 certificate was compensatory, not penal. Its purpose was not to punish the wrongdoer but to require the quantified loss caused to the local authority by the "wilful misconduct" to be made good. There was no element of discretion. If the officer or member had been guilty of "wilful misconduct" as a result of which loss had been incurred it was the duty of the auditor to issue a section 20 certificate specifying the amount of the loss. Of course, it will not be every case of political corruption, or other misconduct, in local government that will lead to financial loss to the local authority concerned. But many will do so and, in those cases, the powers and duties of auditors under section 20 of the 1982 Act (and under section 19 as well, although nothing turns on that section in this case) constituted, in my opinion, powerful and valuable protection to the public.

140 Section 20 of the 1982 Act was replaced by section 18 of the 1998 Act which was to the same effect. But section 18 of the 1998 Act has been repealed by the Local Government Act 2000 and not replaced. The 2000 Act also substantially recast the investigation and report provisions that had been contained first in the 1982 Act and then in the 1998 Act. The institutional protection provided by statute against political corruption and other misconduct by members of local authorities is now confined to the investigation, report and publicity for which the 2000 Act and an amended version of section 17 of the 1998 Act (formerly section 19 of the 1982 Act) make provision. There is now no statutory provision directed to restitution or compensation for loss caused by any wrongdoing that the investigation and report may have exposed. Certificates such as those issued against and challenged by Dame Shirley Porter and Mr David Weeks in the present case cannot now be issued. Local authorities that want to recover from delinquent councillors the loss caused by the delinquency must now do so by means of legal remedies available under the general law. However, section 20 of the 1982 Act was in force at the time the events material to this

A case took place and the propriety of the auditor's certificates against Dame Shirley and Mr Weeks must be tested on that footing.

141 My Lords, I have had the advantage of reading in draft the opinion on this appeal of my noble and learned friend, Lord Bingham of Cornhill. As Lord Bingham has observed, the facts that have given rise to the appeal are set out at some length in the judgments of the Divisional Court and the Court
B of Appeal. Lord Bingham has highlighted some of the key events. I gratefully adopt and need not repeat those highlights.

142 The factual findings made by the auditor, Mr John Magill, and by the Divisional Court against Dame Shirley Porter and Mr David Weeks were findings that justify being described as findings of political corruption. Dame Shirley and Mr Weeks, having appealed unsuccessfully to the Divisional Court, appealed successfully to the Court of Appeal. Mr Magill
C has appealed to this House. For the purposes of this appeal the parties have prepared a statement of agreed facts and issues. The contents of the statement were agreed by Mr Howell on behalf of Mr Magill, by Mr McMullen on behalf of Dame Shirley and by Mr Cakebread of counsel on behalf of Mr Weeks. The contents of the statement, in my opinion, endorse the essential findings of the auditor and of the Divisional Court
D regarding the conduct of Dame Shirley and Mr Weeks and justify the description of that conduct as political corruption. Thus:

(1) As a consequence of local government elections in May 1986 reducing the Conservative majority from 26 to 4, Dame Shirley, the leader of the Conservatives on the Westminster Council, was determined that a greater majority should be achieved at the 1990 elections (paragraphs 9 and 10 of
E the statement).

(2) Eight marginal wards, the "key wards", were identified. The intention of Dame Shirley and Mr Weeks was to reduce the number of Labour voters and increase the number of Conservative voters in these key wards. The target was an overall increase of 2,200 Conservative supporters in these wards (paragraphs 13 to 15).

(3) This increase was to be brought about by selling council-owned
F residential properties in the eight key wards when they became vacant. It was believed that owner-occupiers were more likely to vote Conservative than were council tenants (paragraphs 16 and 28).

(4) The Director of Housing advised in May 1986 and again in March 1987 that if all council properties in the eight key wards were designated for selling, the council would not be able to meet its statutory housing
G obligations (paragraphs 18 and 29).

(5) Nonetheless, at a meeting on 24 March 1987, attended by Dame Shirley and Mr Weeks, it was decided to sell annually 250 properties in the eight key wards (paragraph 35).

(6) On 5 May 1987 Mr Sullivan met council officials in consultation. He was informed that the majority (Conservative) group wished to target sales in marginal wards for electoral advantage. He advised that this would not
H be lawful, that the designation of properties for sale had to be done for proper reasons and that, in identifying the properties to be sold, the same criteria had to be applied across the whole city (paragraph 40).

(7) The critical paragraph in the agreed statement of facts is paragraph 42. It reads:

"On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course . . . of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards."

143 That was the policy eventually carried into effect via the housing committee decision on 8 July 1987 (paragraph 58 of the statement). It led to the sale of 618 council properties (some were let on long leases for substantial premiums). It is clear that the policy was adopted by the chairmen's group, led by Dame Shirley and Mr Weeks, and was thereafter promoted by Dame Shirley and Mr Weeks, as well as by others, not in order to achieve sales city-wide but in order to achieve 250 sales per annum in the eight key wards. And those sales were for the purpose of replacing probable Labour voters by probable Conservative voters. The city-wide policy was no more than a cloak to give apparent legality to the sales in the eight key wards which leading counsel had rightly warned would be unlawful unless part of a city-wide policy adopted for a proper reason. The sales of the 618 properties involved the exercise of local government powers to sell council properties (see section 32, Housing Act 1985) not for the purpose for which those powers were granted but in order to increase the number of Conservative voters in marginal wards. It has not been in dispute before your Lordships that this purpose for selling is an unlawful purpose.

144 In the Court of Appeal Kennedy LJ commented on the political reality that many government decisions, whether at local government level or in central government, are taken with an eye to the electoral effect they may have. He said, ante, p 386D:

"Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct . . . In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it."

Kennedy LJ was, of course, correct. But there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage. The agreed statement of facts places the policy adopted by the chairmen's group on 5 May 1987 fairly and squarely in the former category.

145 My Lords, there are three issues which arise on this appeal on which I wish to comment. The first is whether Dame Shirley and Mr Weeks were, for section 20 purposes, guilty of wilful misconduct. The second is whether, if they were, that misconduct was causative of loss to the council. The third is how such loss should be quantified. But, my Lords, the backcloth to each of these issues is that Dame Shirley and Mr Weeks stand convicted of political corruption. They stand so convicted on the basis of facts which are not now in dispute.

Wilful misconduct

146 It has been submitted on behalf of Dame Shirley and Mr Weeks that whether or not their conduct in promoting the policy of designated sales in the eight key wards was misconduct, it lacked the quality of being "wilful". This, it is said, is because, relying on advice which they believed had been given by Mr Sullivan, they did not realise that the policy was unlawful. In *Lloyd v McMahon* [1987] AC 625 Woolf LJ said that misconduct "would only be wilful if the councillors were doing something which they knew to be wrong or about which they were recklessly indifferent as to whether it was wrong or not" (p 674). It has been common ground before your Lordships that this is the correct test.

147 It is said that, in reliance on Mr England's note of what Mr Sullivan had said in consultation on 5 May 1987, Dame Shirley and Mr Weeks thought that it would be lawful for them to achieve their purpose of designating properties for sale in the eight key wards in order to achieve annual sales of 250 properties in those wards provided that there were similar designations of properties for sale city-wide. Mr England's note reads, so far as material, as follows:

> "Counsel advises that designated estates should be identified in marginal and non-marginal wards in order to protect the council. The group will, therefore, need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300–350 properties will need to be sold across the city."

148 But Dame Shirley and Mr Weeks knew that a policy adopted for the purpose of electoral advantage in the key wards would be unlawful. And nothing in Mr England's note of what Mr Sullivan had said, or indeed in what Mr Sullivan had actually said, indicated that the adoption of the city-wide policy in order to achieve the unlawful electoral purpose in the eight key wards would be any less unlawful than the adoption for that purpose of a policy in respect of the eight key wards alone. As Lord Bingham has noted in paragraph 39 of his opinion, Mr Sullivan was never asked the critical question, namely, whether the designated sales policy would become lawful if, with the same objective, the designated sales policy were extended city-wide. I agree with Lord Bingham that no reason for doubting the clear findings, adverse to Dame Shirley and Mr Weeks, of the auditor and the Divisional Court has been shown.

Causation

149 Dame Shirley and Mr Weeks rely on the housing committee's decision of 8 July 1987 as breaking the chain of causation. The designated sales policy was implemented because the housing committee had resolved to adopt it. If the housing committee had not so resolved, the policy would not have been implemented. Neither Dame Shirley nor Mr Weeks was a member of the housing committee. Neither of them was present at the 8 July meeting. Mr McMullen submitted that a city-wide designated sales policy was a policy capable of being a lawful one. So it was. He submitted that the housing committee resolution that adopted the policy was capable of being a lawful resolution. I agree. He submitted that if a majority of members of the

committee voted in favour of the resolution for reasons that were lawful, then the resolution would have been lawful, notwithstanding that misconduct on the part of the leader of the council and her deputy had attended the formulation and promotion of the policy adopted by the resolution. Again, I agree.

150 It was argued on behalf of Mr Magill that even if the resolution were a lawful one, nonetheless the misconduct of Dame Shirley and Mr Weeks was not spent and could still be regarded, for section 20 purposes, as having "caused the loss". But for their misconduct, the designated sales policy would not have been formulated and placed before the housing committee for approval. I agree that, applying a "but for" test, it could be said that their misconduct had caused the loss. But I do not think that that is enough. If the housing committee resolution was a lawful one, then it was lawful for it to be implemented by the council. Its implementation was within the statutory powers of the council. This is not a case in which the council lacked power to carry out the property sales contemplated by the policy.

151 So, if the improper electoral advantage in the eight key wards, the purpose of the designated sales policy, had been made plain at the housing committee meeting and had been repudiated by a majority of those present who had then voted in favour of the policy for unimpeachable reasons, it would have been plain that the misconduct had become spent even if, without the misconduct, the policy would never have found its way to the committee. I find it difficult to follow why the case would be different if, without an explicit disclosure and repudiation of the policy, a lawful resolution adopting the policy were passed. I accept that a corrupt principal can attain his unlawful object via the medium of an innocent agent (see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385), but I do not think a local authority committee can be treated as merely an agent for the leader of the council, no matter how influential he or she may be. I am, therefore, disposed to agree with Mr McMullen, and to disagree with the Divisional Court (see 96 LGR, 157, 181), that if the housing committee resolution could be shown to have been a lawful resolution, the causative effect of Dame Shirley's and Mr Weeks' misconduct would, for section 20 purposes, be spent.

152 There were twelve members of the housing committee. Seven of them voted in favour of the designated sales policy. Five voted against. Of the seven, two of them, Mr Hartley and Dr Dutt, were found guilty of misconduct by the auditor. Each, in the auditor's opinion, "took into account the electoral advantage of the Conservative party and sought to promote it in his voting". The auditor issued a section 20 certificate against Mr Hartley but Mr Hartley succeeded on appeal to the Divisional Court. In the view of the Divisional Court he was guilty of misconduct but not of wilful misconduct: see p 199. It follows, however, from the finding of misconduct that Mr Hartley's vote at the housing committee meeting was invalid.

153 As to Dr Dutt, he took his own life before the auditor made his final findings. The auditor, in his report, said:

> "My provisional findings and views were adverse to Dr Dutt . . . In letters to me Dr Dutt disputed my provisional findings and views. Shortly

A thereafter, he took his own life. I make no findings of personal liability of Dr Dutt": para 1903.

154 Mr McMullen has submitted that Dr Dutt must be treated as exonerated from misconduct. I do not agree. Dr Dutt was exonerated from wilful misconduct, but the provisional findings of misconduct were unchanged. In my opinion Dr Dutt's vote falls into the same state as that of B Mr Hartley. It was invalid. As for the other five members of the committee who voted in favour of the resolution, they so voted because the resolution was Conservative party policy. They did not know that the purpose of the resolution was to obtain electoral advantage in the eight key wards. They did not know that that was the reason why the policy had been adopted. They may very well have supposed that the resolution reflected their party's C general dislike of social housing and bias in favour of owner occupation. I do not think, in these circumstances, that their votes can be disregarded on the ground that they were invalid. But their votes were insufficient in number to carry the resolution. Five valid votes in favour of the resolution and five against would have produced a tie which, in theory, could have been resolved by the chairman's casting vote. But the chairman was Mr Hartley D and any casting vote of his would, for the reasons already discussed, have been an invalid vote.

155 In my opinion, therefore, the resolution purportedly passed at the housing committee meeting was not a valid resolution, the wilful misconduct of Dame Shirley and Mr Weeks in promoting the policy purportedly adopted by the resolution was not spent and the chain of causation was not broken. In my opinion, their misconduct caused, for E section 20 purposes, the 618 sales by the council that produced the loss.

Quantification of the loss

156 The issue is whether Robert Walker LJ's disagreement with the basis on which the Divisional Court had quantified the loss was correct.

157 The 618 designated properties were sold with vacant possession. F They were sold by the council at a discount against their vacant possession market value. The council had power to sell at a discount. If the sales had been lawful, no complaint about the discount could have been made. The question is whether, the sales being unlawful, the amount of the discount represents an item of loss caused by the wilful misconduct. The rival arguments, as I understand them, are these.

G (1) The properties were, before being designated for sale and becoming vacant, occupied by council tenants. Their value so tenanted was a good deal less than their value with vacant possession. If, on becoming vacant, they had been re-let to those on the council's waiting list for social housing, their value so re-let would, similarly, have been a good deal less than their value with vacant possession. The amount of the discount at which the properties were sold may be taken, on a rough and ready footing, as H representing the difference in value between the properties let as social housing and the properties with vacant possession. So, if the council recover the amount of the discount the council will be in a better financial position than it would have been if the unlawful designated sales policy had never been adopted. This argument, expressed by Robert Walker LJ more lucidly

than I have done, was concurred in by Kennedy LJ. It has been espoused by Mr McMullen and Mr Cakebread.

(2) The alternative argument proceeds like this. The council has a statutory housing obligation and a long list of people who need to be housed. The unlawful sales reduced the council's stock of social housing. In order to replenish its stock and restore the position to what it was before the sales took place, the council would have to purchase properties in the open market. It would have to pay vacant possession prices. Accordingly, the loss it suffered by reason of the misconduct included the discounts at which the properties were sold. This was the approach of the Divisional Court. It was supported by Mr Howell.

158 The answer to the question as to which approach is the right one does not, in my opinion, depend at all upon the manner in which the properties appeared in the council's accounts. The quantification of loss for section 20 purposes should, in my view, apply the same principles as are applicable to quantification of damages in tort. As a result of the wrongful acts of Dame Shirley and Mr Weeks the council suffered loss. What was that loss? It lost the properties that were sold, but it received the purchase price that was paid for them. Immediately before sale, the properties were vacant. They were sold with vacant possession but the council did not receive a vacant possession price. In my opinion, the discount represented a true loss suffered by the council. Interest on the discounted purchase price since its receipt and interest on the amount of the discount from the date of the sale ought, on the assumption that interest rates more or less reflect rates of inflation in property values, to enable the council to replace the sold housing stock. Thus, to treat the discounts as items of loss seems to me to produce a just result, in line with the intentions underlying section 20.

159 The problem, as it seems to me, with Robert Walker LJ's approach, is that it attributes no value to the benefit to the council of owning properties which are available to be used for social housing. The sale of the properties deprived the council of that benefit. The council can restore that benefit only by purchasing similar properties in the open market. The value of that benefit can be taken, again on a rough and ready basis, as being equivalent to the discounts.

160 To allow the council to recover the discounts as items of loss does not, in my opinion, involve any element of double counting. A separate item of loss allowed by the Divisional Court was £4·237m, representing extra costs of housing homeless people which the council had to incur as a result of its own stock of social housing having been depleted by the sales of the 618 properties. Robert Walker LJ thought that to allow the discounts to be recovered as well as the £4·237m would be inconsistent and involve double counting. I do not think so. The £4·237m covered the extra costs of homelessness over the period starting from the date on which the properties, on becoming vacant, were available for reletting and ending on the date of the auditor's certificate. Thereafter the loss of the 618 properties from the housing stock is covered by the capital sum received (or receivable) by the council (ie the discounted proceeds of sale plus the amount of the discounts) that enables it to replace the sold properties. There is no double counting.

A *Bias and unfairness*

161 There was a fourth issue raised by Dame Shirley and Mr Weeks. They submitted that the manner in which the auditor had gone about his task of fact finding was attended by at least the appearance of bias against them and that that feature of the case, coupled with the time it has taken for the case to come to finality, represented such a degree of unfairness as to
B infringe their right to a fair trial (see article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). These submissions fail, in my opinion, for the reasons given by my noble and learned friend Lord Hope of Craighead. I want to add just one comment on the issue of unfairness.

162 One of the most striking features of the case is the enormous amount that under the auditor's certificates Dame Shirley and Mr Weeks
C were adjudged liable to pay. The amount, £31m-odd, seems enormous not because it does not accurately reflect the loss caused to the council by Dame Shirley's and Mr Weeks's misconduct but because it is so out of line with what most people would regard as a proportionate punishment for their misconduct. There is, I think, an almost instinctive feeling that the requirement that they pay the certified amount is unfair.

D 163 This instinctive feeling, however, overlooks the very important fact that the purpose of a section 20 certificate is to compensate the local authority for loss. The purpose is not one of punishment. Nor does the amount to be certified lie in the discretion of the certifying auditor. If wilful misconduct has been proved it is his duty to certify the full amount of the loss thereby caused. The size of the amount so certified can no more represent an article 6 unfairness than can the size of an award of damages for
E tort or breach of contract. Since, for the reasons given by Lord Hope, there was no procedural unfairness in the proceedings which have culminated in the appeal to this House, there is no further ECHR point that can be taken.

Conclusion

164 For the reasons given in this opinion in addition to those given by
F Lord Bingham, with which I am in full agreement, I would allow the appeal and restore the order of the Divisional Court.

Appeals allowed.
Order of Court of Appeal of 30 April 1999 set aside.
Order of Divisional Court of
G *19 December 1997, as amended, restored.*

Solicitors: Rowe & Maw; Nicholson Graham & Jones.

DECP

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SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS

[2024] FAI CITATION NUMBER

ABE-B204-20

DETERMINATION

BY

SHERIFF PRINCIPAL DEREK C Y PYLE

UNDER THE INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC (SCOTLAND) ACT 2016

into the death of

WARREN GEORGE FENTY

ABERDEEN, 10 May 2024

Introduction

[1] The investigation of Mr Fenty's death has taken far too long. It is now 10 years since the event. I discuss the reasons for that below, including the actings of the Crown and the failure of the presiding sheriff to make the determination, which resulted in my having to take the unprecedented step of taking over the inquiry.

[2] Due to the availability of modern technology introduced by the Scottish Courts and Tribunals Service during the course of the Covid pandemic, the fortunate position was reached whereby it was possible for me not only to listen to all of the evidence given during the inquiry but also to see the witnesses by way of the video recordings. Without that technology, I do not consider that there would have been any alternative to the rehearing of all of the evidence – with all the delay and possible prejudice to each or

all of the participants which that would have incurred. To that extent, the world has moved on from the traditional view courts have expressed where due to either death, incapacity or other reason a judicial office holder has been unable to produce a reasoned decision.

[3] In any fatal accident inquiry there are many interests involved, including public or private bodies and their employees and the general public interest. But in this case my view is that the primary interest is that of Mr Fenty's family, not least his mother. Everyone is affected by delay, but the family more than anyone. At a recent meeting I had with Mrs Fenty[1], it was obvious to me that the decade of delay had added a considerable burden to the grief caused by the loss of her son. It was also obvious to me that she had struggled – and continues to struggle – to understand the circumstances which had led her son to overdose on methadone, to be admitted to hospital and to end up dying in police custody. Whether having heard all of the evidence and having read this determination Mrs Fenty is able fully to understand what happened I cannot say. But I hope that what follows at least gives her some insight.

[4] My approach is to set out what are for the most part uncontroversial findings in fact.[2] I will then discuss the evidence under various headings and finally deal with various statutory matters required of a determination.

[1] The holding of the meeting was the subject of criticism by some of the parties. I deal with that at the end of the determination.

[2] I have not included in the findings in fact all of the agreed matters in the Joint Minute. Not all of them are crucial and given that the determination is published I regarded some as confidential to Mr Fenty's family and need not be disclosed.

[5] The purpose of fatal accident inquiries is not to attach blame to any organisation or individual, but it can – and should – identify any failures which contributed to the death. At the outset, I can say that while Grampian Health Board and Police Scotland rightly accepted that changes in systems and processes were required as a result of Mr Fenty's death (and which they have introduced) I have concluded that no one individual can be held responsible. Indeed, all those involved, whether medical practitioners or police officers, were doing their best in what proved to be quite exceptional circumstances. Nevertheless, I do identify certain institutional failures by Police Scotland which, while not on the evidence being the cause of death or indeed materially contributing to it, resulted in missed opportunities to have Mr Fenty returned to hospital where it is likely, although by no means certain, that he would have survived. I also refer to failures by the forensic medical examiner at Kittybrewster custody centre (failures which he himself very fairly and readily admitted) which also resulted in the same missed opportunity.

[6] It is often the case that after hearing the evidence the sheriff will set out in considerable detail what changes to practices and procedures have occurred since the date of death – sometimes with recommendations for additional changes. I make no such recommendations in this case. Indeed, none of the parties invited me to do so. It is plain that the world has moved on considerably in the last 10 years and the current culture for the care of police custodies is fundamentally different. Given the length of time which has passed, I do not discuss these changes in great detail and describe the current position only in broad terms.

[7] I am grateful to all the parties' representatives for their very full written submissions at the end of the hearing of the evidence. They have made my task much easier.

Findings in fact

[8] In the early hours of 28 June 2014, Mr Fenty was found lying unconscious at a dwelling house in Aberdeen having taken an apparent overdose. He was taken by ambulance to Aberdeen Royal Infirmary.

[9] In the hospital high dependency unit, Mr Fenty received treatment for a methadone overdose by the infusion of the drug, Naloxone. The infusion was interrupted by the intravenous access being lost by the displacement of the cannula in Mr Fenty's arm and his refusal to allow it to be reinstalled. Nevertheless, the view of the clinicians was that while preferable it was not essential that the infusion continue. The infusion ceased at 12.44 hours. The manufacturer's recommended period for clinical observation after the cessation of the infusion is 6 hours, but that is subject to change depending upon the clinical appearance of the patient.

[10] Mr Fenty intimated his intention to discharge himself from the hospital. While the clinicians would have preferred that he remain within the hospital for the full 6 hours, after a psychiatric assessment was carried out the Accident and Emergency consultant, Dr Lee, released him from hospital at 15.20.

[11] During the whole period in hospital, Mr Fenty was observed by police constables who had been instructed immediately to detain him upon his discharge, all in terms of

the now repealed section 14 of the Criminal Procedure (Scotland) Act 1995 on suspicion of offences under the Misuse of Drugs Act 1971. He was immediately so detained and was transported to Kittybrewster custody centre.

[12] Prior to Mr Fenty's departure from hospital, Dr Lee asked one of the police officers whether or not he required him to complete a form. The police officer said that he did not. In accordance with the relevant Police Scotland standard operating procedure at the time, the police officer was correct.

[13] In Dr Lee's clinical judgement, the risk of opiate toxicity returning was low. Mr Fenty's level of consciousness remained at GCS 15, despite the rate of Naloxone infusion having been decreased twice and the infusion having ceased almost 3 hours previously. That judgement was a reasonable one. In any event, if Mr Fenty's discharge had been delayed until the hours had passed, namely 18.44, he would not have been in a clinical condition for him not to be so discharged.

[14] Mr Fenty and the police officers arrived at Kittybrewster at 15.46. Both officers were aware that Mr Fenty had been in hospital overnight, had taken a methadone overdose and that he had been treated in the hospital high dependency unit. One of the officers, Police Sergeant Moir, was aware that Mr Fenty had been treated with Naloxone.

[15] When a person is taken into police custody, he requires to go through a formal booking-in process, including a vulnerability assessment. The relevant Police Scotland standard operating procedure required that the arresting/ escorting officers inform the custody staff of any known issues which might affect the person's care and welfare whilst in police custody and all relevant information they had gained about the person

during their enquiry and interaction with him. The escorting officers handed over the responsibility for the booking-in to two other officers. This was not an unusual step. The custody officer was told that Mr Fenty had seemingly overdosed on methadone the previous night and had been treated in hospital. He was not told that Mr Fenty had been treated in the hospital high dependency unit and with Naloxone.

[16] Mr Fenty was assessed as a high-risk custody due to recent self-harm marks on his wrists. He was taken to his cell, underwent a strip search and was provided with anti-suicidal clothing. He was placed on a 30-minute observation regime.

[17] In accordance with the accepted proper procedure, Mr Fenty ought to have been marked up to see the on-duty forensic medical examiner who would be expected to see him within 2 hours, ie by about 18.00.

[18] At the request of a police officer, the forensic medical examiner, Dr Weston, examined Mr Fenty at 20.55 to assess whether he was fit enough to be interviewed in relation to the suspected offences, because the police officer had witnessed Mr Fenty being sick. The police officer did not advise Dr Weston of the circumstances which had led to Mr Fenty's detention.

[19] Dr Weston during his examination was advised by Mr Fenty that he had taken someone else's methadone (200 mls), had been in hospital and that he was not a regular drug user. He also observed that Mr Fenty's pupils were pinpoint. Dr Weston checked with the custody desk whether a discharge letter had been issued by the hospital, but was advised that there was none. He deemed Mr Fenty to be fit for interview.

[20] Mr Fenty was interviewed, finishing at 21.43. During the interview, Mr Fenty was again sick. This was not recorded in the custody cell file; nor was it passed on to Dr Weston.

[21] During the course of the night, Mr Fenty was subject to cell visits. Neither of the officers who carried out the visits was aware that he had had a methadone overdose, been in hospital, been sick earlier and had been seen by Dr Weston.

[22] The relevant Police Scotland standard operating procedure required that at each visit the custody should be roused and spoken to and be required to give a distinct verbal response ("DVR"). PC Dawson carried out seven visits to Mr Fenty's cell between 22.43 and 04.52. Only his first two visits were DVR compliant. PCSO Murison carried out seven such visits between 00.40 and 06.40. Only the first visit was DVR compliant.

[23] The last visit to Mr Fenty's cell was by PCSO Campbell at 07.07 on 29 June 2014. She found Mr Fenty to be unresponsive. She immediately called for assistance. An ambulance was called. Paramedics arrived at 07.19 at which point police officers were trying to resuscitate Mr Fenty. He remained asystolic despite CPR which lasted for 20 minutes. He was pronounced dead at 07.25.

[24] The cause of Mr Fenty's death was methadone intoxication.

The evidence

[25] Evidence was heard from 19 witnesses (including four expert witnesses) over the course of 12 days. Much of the witnesses' evidence in chief was by way of their written

statements or reports, supplemented by additional oral examination in chief, and cross-examination. In addition, parties entered into two Joint Minutes of Agreement.

[26] The evidence fell into two chapters: the first related to the events which occurred while Mr Fenty was in Aberdeen Royal Infirmary having been taken there by ambulance; the second related to the period in which Mr Fenty was detained in Kittybrewster Police Station having been taken into custody at the hospital immediately following his medical discharge.

Aberdeen Royal Infirmary

[27] In the early hours of 28 June 2014, Mr Fenty was found lying unconscious at a dwelling house in Aberdeen having taken an apparent overdose. He was taken to Aberdeen Royal Infirmary where he underwent treatment, including treatment in the high dependency unit for a methadone overdose.

[28] Evidence was led of Dr John Lee who was the emergency consultant. He described that Mr Fenty was admitted to hospital in the early hours because of a methadone overdose and a suspected overdose of Quetiapine and Mirtazapine. The decision was made to give him a Naloxone infusion of 200mcg/ml, commencing at 05.20. Dr Lee took control of Mr Fenty's treatment from 08.00 and examined him an hour later. Mr Fenty told him that he had taken a few cups of methadone and no other medication. He was fully alert and his observations were normal/stable. The plan was gradually to reduce and then end the Naloxone infusion by midday. Shortly after midday, Dr Lee was told that Mr Fenty wanted to discharge himself from the hospital. He said that this

should not be allowed until a psychiatric assessment had been done. At 15.20 – after the assessment had been completed – Dr Lee reviewed Mr Fenty. He was fully alert and his conditions were stable, the Naloxone treatment having ended over 3 hours before. Dr Lee was satisfied that Mr Fenty could be discharged. During the course of the morning, Dr Lee was aware that Mr Fenty was "under police escort", a police officer being at or near his bed. At the point of the decision to discharge, a police officer was present. Dr Lee, being aware that Mr Fenty was to be taken into custody, asked the officer "if there was anything you need me to fill in". In asking that, he was meaning any additional information, he being under the mistaken impression, as he now recognised, that the police officers were recording the key events as they occurred during the course of the day. He was told that there was nothing to be filled in. He said that based on his previous experience there have been occasions when he has been asked to complete a form which would be for the benefit of the police surgeon. If he had been, he would have summarised the treatment received and the fact of the psychiatric assessment. He was aware of the general guidance that Naloxone treatment should be over a six-hour period, but that this was just a guide and in any event did not cover a situation where the patient wants to leave. A number of hours had elapsed since the end of the infusion. Mr Fenty was fully conscious and alert, his ventilation was normal and there were no concerning features. Moreover, he was being taken to a place of safety – a police office – and Dr Lee thought that he would be assessed there by the forensic medical examiner.

[29] In his evidence at the inquiry, I considered that Dr Lee was an impressive witness. He had carefully reflected on the treatment he had given to Mr Fenty and readily accepted that he should have recorded in the medical records that he would have liked to have kept Mr Fenty in hospital for longer but that he could not be kept against his wishes. He explained that this was in the context of the considerable time pressures he was under on the day, having responsibility for 100 patients. He also accepted that knowing now that the police officer was not taking any notes about the treatment it would have been beneficial to have provided information directly to the police surgeon. These candid comments, while not material to the issue of his overall professional competence, are to his credit.

[30] Evidence was also given by Staff Nurse Cheryl Cummings and Senior Staff Nurse Nicola Anderson. SN Cummings commenced her duties at 07.00 on 28 June 2014. During the handover of patients, she was told about Mr Fenty and that he was "under police escort". During the day she was aware of uniformed police officers being on the ward, but was not privy to any detailed discussion with them or between them and Mr Fenty. She confirmed that on his discharge the police officers did not seek any medical information from her; nor did she offer any. SNS Anderson was on duty during the latter part of Mr Fenty's attendance at hospital. She reported that at 10.30 Mr Fenty had gone to the toilet and removed the cannula which was being used for the administration of the Naloxone. He refused to have it reinstated but she was aware that Dr Lee was content that the dose he had already received had worked. She was aware of the presence of police officers and the eventual decision that Mr Fenty could be

discharged, but was not privy to any discussions between medical staff and police officers at that point.

[31] Police Constable Martin was the first police officer to be present while Mr Fenty was in hospital. He was a very junior officer, having been in post for only a matter of months. He was instructed that if Mr Fenty intimated an intention to discharge himself he should detain him under section 14 of the 1995 Act. At 14.00 he was relieved by Police Constable Melville (also a very junior officer) and duly passed on to him the instruction for the detention. Both officers were aware that Mr Fenty was in hospital because of a methadone overdose. PC Melville was in Mr Fenty's presence, apart from a period when he was being psychiatrically assessed, until he and Police Sergeant Moir detained Mr Fenty at 15.28, after which they took him to Kittybrewster Police Station.

[32] The solicitor for six of the police officers involved in the inquiry, including PS Moir, was critical of Dr Lee's decision to release Mr Fenty after only 3 hours, rather than the recommended 6 hours for Naloxone infusion and monitoring. The difficulty with that submission is that it ignores the fact that Mr Fenty had stated an intention to discharge himself, despite Dr Lee telling him that it was his preference that Mr Fenty stay in hospital – and in the context of his refusing the reinstatement of the cannula. In any event, this submission was not supported by any expert witness who gave evidence at the inquiry. Indeed, the contrary was true.

[33] Dr Michael Johnston is a very experienced consultant in emergency medicine. He was an impressive witness. He has considerable experience in his current role at Ninewells Hospital in Dundee and Perth Royal Infirmary of dealing with the same

situation as faced the staff at Aberdeen Royal Infirmary on Mr Fenty's admission. Dr Johnston considered that the clinical treatment conducted by the medical practitioners, including Dr Lee, to be appropriate in the circumstances. He noted that Mr Fenty had been discharged from hospital before the recommended period of 6 hours from the cessation of his treatment with Naloxone but that even if he had remained there for the full recommended period he still would have been discharged at that point. The basis for this conclusion was the evidence about Mr Fenty's physical presentation from the police officers and the forensic medical examiner, Dr Weston, during Mr Fenty's detention during the rest of the day and into the early hours of the following morning at Kittybrewster. In any event, Dr Johnston opined that many consultants in emergency medicine would have released Mr Fenty at the same time as Dr Lee. During his parole evidence, Dr Johnston said that what subsequently happened to Mr Fenty - the delayed return of opiate toxicity while at Kittybrewster - was highly unusual and unexpected.

[34] Indeed, as will become clear, Dr Johnston's expression of that point is highly significant for other aspects of the evidence in this inquiry and the conclusions to be reached.

[35] I note that in her final submissions counsel for Mrs Fenty did not seek to criticise the care her son received in hospital. I think that counsel was right to do so. On the evidence, the criticism levelled at Dr Lee by the solicitor for the six police officers was misplaced.

[36] A further important issue which arises is the system which was in place to communicate to relevant parties the clinical treatment provided in hospital. As Inspector Mark Fleming explained in his evidence, there was a procedure in place for the situation where a person was in custody but was then taken to hospital, including the preparation of an illness/injury form. But there was nothing in place for the situation which arose here, namely where the person to be detained and subsequently arrested visited the hospital before being transferred to the police custody unit. Dr Lee explained that at the time a discharge letter would be prepared by a junior doctor and subsequently approved by a consultant. The purpose of that letter was to inform the patient's general practitioner, doubtless to ensure, first, that the GP has a history of the treatment in case it is relevant for future health issues of the patient and, secondly, in case any follow up treatment is recommended by the hospital physicians. No such follow up was recommended. The letter was not envisaged as a means of communication to police officers about what care should be provided for a prisoner taken into custody following the hospital discharge. Dr Johnston did not criticise the system that was in place at the time in Grampian Royal Infirmary; nor indeed the steps which Dr Lee took.

[37] There was however a review by Grampian Health Board of its procedures. That was to be expected, not least because experience shows that defects in processes can become first known as a result of a tragic death, even where such defects are neither the cause of nor materially contributed to that death. Following discussion with Police Scotland, the latter has introduced a new standard operating procedure to deal with

situations like Mr Fenty's – Police Scotland Care and Welfare of Persons in Police Custody Standard Operating Procedure (SOP) Version 17, published on 4 May 2022. This provides as follows:

> "18 Persons Hospitalised from Locus
>
> There may be circumstances where a person is either taken directly to hospital from the locus prior to being arrested, or has been admitted to hospital prior to Police involvement.
>
> Where circumstances are such that an arrest is not affected [sic] until after person [sic] is discharged from hospital and thereafter taken directly to a Custody Centre, Officers must detail care instructions including brief details of treatment provided and the relevant Doctor/Nurse who examined them, within their Police issue notebook/ mobile device.
>
> This information must be accurately passed to the Custody Supervisor, who will assess if the person requires any further medical attention on arrival at the Custody Centre. The Custody Supervisor must ensure this information is recorded on NCS."

The Police Federation is concerned that the above imposes a duty on a police officer to obtain information which might properly not be provided by the medical staff. This issue has still to be resolved but for the purposes of this inquiry nothing turns on that.

[38] Evidence was given by Dr Donna Paterson, a consultant in emergency medicine in Aberdeen since 2016. She reviewed the procedures which were in place prior to her appointment. In 2015, in the year after Mr Fenty's death, a procedure was introduced whereby there would be direct telephone contact between the emergency department clinician and the on duty forensic medical examiner at discharge of every patient from the emergency department into police custody. She reported that the procedure was not well known by clinicians and that this has now been resolved by the introduction in

2020 of a standard operating procedure setting out the lines of communication to be followed in that situation, including the completing of any paper work provided by police officers. A discharge letter for the general practitioner is now produced electronically but it would not contain any more information than would have been provided to the forensic medical examiner or the police.

[39] I discuss Dr Weston's evidence below, but in the context of the cause of Mr Fenty's death or anything which materially contributed to the above processes – or rather the lack of them – it is essentially irrelevant. While I acknowledge that Dr Lee stated that the reasons he decided to allow the discharge of Mr Fenty from hospital included that he was going to, what Dr Lee described as, a safe place, namely police custody, and that he would have preferred that Mr Fenty remained in hospital for a few more hours, the fundamental reason was that Dr Lee considered that Mr Fenty's medical presentation was such that it was safe to discharge him. That view is fully supported by the evidence of Dr Johnston. Thus, the lack of the formal processes is peripheral to this inquiry.

[40] Much of the evidence was concerned with what information the police officers should have obtained from the hospital clinicians and what they knew or did not know about what had happened to Mr Fenty before his arrival at Kittybrewster. Officers were also criticised for not referring him to the forensic medical examiner immediately after his booking in. The problem with that is that there was no evidence before the inquiry that an examination by the forensic medical examiner within that timescale would have resulted in anything different than he being told by Dr Lee what had happened and that

he was satisfied that Mr Fenty was fit to be discharged. Indeed, such evidence as there is – namely from Dr Johnston – suggests that the advice from Dr Lee would have remained the same. Police Sergeant (now Inspector) Moir was also an impressive witness. He made the point that given that Mr Fenty had been discharged from hospital with no conditions attached and indeed with no follow up required, the police officers were entitled – indeed obliged given that they are not medically qualified – to treat Mr Fenty as fit and well like any other custody (subject to any additional problems such as suicide risk). As I discuss below, that position, which I accept, undermines the evidence of Inspector Fleming and, albeit to a much lesser extent, the evidence of Dr O'Keefe on the role of the forensic medical examiner and the police custody procedures. These observations are not the complete picture, as I explain, but they are relevant in relation to the procedures operating at the time over the passing of information from the hospital to the police.

Kittybrewster Police Station

[41] The primary evidence of the state of the facilities at Kittybrewster, the procedures followed by the various police officers and custody staff and the lessons learned was given by Inspector Mark Fleming who was instructed to carry out a comprehensive review of the procedures adopted at Kittybrewster following Mr Fenty's death. He prepared a report in which he is critical of the overall process for identification of the requirements of the care plan for Mr Fenty. But that criticism is based upon his understanding at the time that a person who had been administered

Naloxone should not be admitted into custody until 6 hours had passed. That understanding was based upon an email of September 2013 from an Inspector Chalmers. But he also acknowledged that further guidance had been introduced in 2017 in which it was noted that advice from NHS Scotland was that the period for observation after the administration of Naloxone could vary between two and 12 hours and that accordingly the "specific 6 hour rule had been removed". Nevertheless, he concluded that "the essential element was the requirement of arresting or escorting officers to obtain the time when Naloxone had last been administered, details of the discharging doctor and to notify the custody sergeant".

[42] Inspector Fleming accepted that he was not medically qualified to express an opinion on the effects of the volume of methadone consumed by Mr Fenty or how much Naloxone would be required to counteract it, but he regard himself as qualified, it seems, to have an opinion on the length of time for observation. The difficulty with that evidence is that it flies in the face of the medical evidence, particularly that of Dr Johnston. In order to evaluate the assessment of risk carried out by the police officers at Kittybrewster it is necessary to consider what clinical information would have been provided by Dr Lee if that had been given and then passed on to the custody officers. In my opinion, based on the evidence of Dr Lee and Dr Johnston all that would have been provided was that Naloxone of a specified amount had been given, observations had followed it and that Mr Fenty was clinically suitable for discharge from hospital. It would not have required him to be further observed for the effects of methadone. That is self-evident. If it were otherwise, Mr Fenty would not have been discharged. I

therefore do not take from Inspector Fleming's evidence that the police officers required to take any other steps in their assessment of risk and that their conclusion that Mr Fenty be regularly monitored while in custody was based not upon the fact of his having ingested methadone and had received Naloxone treatment but was upon the fact that he had a history of suspected self-harm and was therefore a suicide risk.

[43] But there is a further problem with Inspector Fleming's opinion: affidavits were produced late in the day and in light of his insistence that what he described as the "six hour rule" was in place for many years and was universally known – or ought to be – by custody officers. Those affidavits were by two senior doctors who would have been responsible at the relevant times suggested by Inspector Fleming. They both said that no such rule had ever been agreed with clinicians. I do not doubt that Inspector Fleming thought that was the position, but his misunderstanding of that necessarily means that he should not have imputed such knowledge onto the other officers. I accept that there was some support for his view in Dr Weston's evidence, but standing the terms of the affidavits – and indeed that Inspector Fleming admitted that the "rule" had not been committed to writing – I am bound to conclude that no such rule in fact existed. Indeed, that conclusion is further bolstered by the evidence of Dr Lee and Dr Johnston that the recommendation from the manufacturer is no more than that and cannot be used as a substitute for clinical judgement.

[44] I have other reservations about Inspector Fleming's evidence, which I discuss later, but what can be said at this stage is that, in my opinion, his misunderstanding of the role of custody officers in dealing with a custody who had been released by a

hospital emergency consultant as fit and well with no follow up after an overdose of methadone and administration of Naloxone inevitably means that his expert evidence must be treated with considerable caution.

[45] It also follows that the subsequent admitted failures in the observation process should be looked through the prism of possible suicide, rather than potential death due to opiate toxicity. That in turn means that for the purposes of this inquiry (but subject to my further observations below), namely to identify the cause of death or any failures which may have materially contributed to the death, these failures are essentially irrelevant.

[46] It also follows, on the evidence, that I cannot accept Inspector's Fleming's other conclusion that the custody sergeant should have contacted the forensic medical examiner for advice or at least directed custody staff to arrange for Mr Fenty to be assessed by the forensic medical examiner – or indeed have him returned to hospital. I acknowledge the evidence of Inspector Hannan that in accordance with the standard procedures at the time Mr Fenty ought to have been seen by the forensic medical examiner shortly after his arrival at Kittybrewster, and the evidence of Dr Weston that he would expect to have been asked to see any person who had previously been in hospital. But even if that had been done, there was no evidence to suggest that such an examination would have reached a conclusion different from the one reached by Dr Lee. In other words, at the time when such an examination might have taken place there was nothing to suggest a deterioration in Mr Fenty's condition. I say again that everything that happened during the evening and overnight to the time of Mr Fenty's death must

be considered in the light of Dr Johnston's uncontested expert opinion that the delayed opiate toxicity, which caused Mr Fenty's death, was highly unusual and unexpected.

Missed opportunities

[47] The conclusions I have reached are not the end of the matter however. Any system of safe working will include rules and procedures which can on occasion have unexpected benefits. Indeed, it is a necessary component of a sound health and safety regime. It is often evidenced by the term "the culture", but it can equally be processes which provide protection against known problems but also against unknown or unexpected ones. In my opinion, there were a number of institutional failures by Police Scotland, which while not material as a contributory cause of Mr Fenty's death were nevertheless precautions which if they had been taken would have presented *opportunities* for Mr Fenty to be returned to hospital, which on the evidence of Dr Johnston would have probably resulted in clinicians realising at some uncertain point in the hours before his death that Mr Fenty's life was at risk and would have been able to prevent it.

[48] The first of those failures was the lack of a standard operating procedure in the form which has now been introduced to deal with the situation, not of a person being in custody, going to hospital and returning, but of a person being taken to hospital first and then being taken into custody. That circumstance, which I accept on the evidence was highly unusual, should have been in the contemplation of the police when preparing the standard operating procedure. The section 14 detention power is no

longer part of the criminal law, but it was first introduced following the recommendations of the Thomson Committee by way of the Criminal Justice (Scotland) Act 1980. By 2014, it had been in force for over 30 years. I agree with counsel for Mrs Fenty that to all intents and purposes, throughout his hospital attendance, Mr Fenty was in police custody, a position accepted by Inspector Fleming in the sense that it was not logical to make a distinction for practical reasons. The standard operating procedure should accordingly have covered that situation.

[49] I should add however, in fairness to Police Scotland, that it had the task of unifying the operating procedures of the eight police forces in existence prior to its formation. It is clear from this inquiry that this required a formidable body of work and it was inevitable that it could not be done overnight. I also recognise, as explained below, that the procedures now in place are far superior to those which applied at that time, although at the same time I appreciate that this will be of little comfort to Mrs Fenty and her family.

[50] It should also be pointed out that the standard operating procedure at the time allowed for an early examination by the on-duty forensic medical examiner – a practice which we know from Dr O'Keefe's report was also required by Strathclyde Police. That in theory might result in a conversation - clinician to clinician - between the examiner and the hospital doctor.

[51] Dr O'Keefe was for 28 years the Principal Forensic Medical Examiner for Strathclyde Police and is currently an Honorary Senior Lecturer at Glasgow University. He has a wealth of experience in the management of drug dependent persons in police

custody and was plainly well versed in the treatment of opiate induced toxicity by way of Naloxone. In his evidence he focussed on two issues: the checks carried out by custody staff on Mr Fenty during the period of his custody, which I discuss below, and the examination by Dr Weston to establish Mr Fenty's fitness for a police interview.

[52] Dr Weston's examination began at 20.55. It lasted for only five minutes. He had been told that Mr Fenty had vomited shortly before. He was unable to identify a cause for that. He noted that Mr Fenty was lucid and orientated. Mr Fenty had told him that he taken someone else's methadone and had been to hospital that day. Dr Weston observed that Mr Fenty's pupils were pinpoint. Dr O'Keefe regarded this examination as inadequate, an opinion which Dr Weston now accepted. Dr O'Keefe considered that not only was Mr Fenty unfit for interview but also that he, Dr O'Keefe, would have had considerable concerns and reservations about Mr Fenty's continued detention in police custody and instead consideration should have been given to his being returned to hospital. Dr Weston did make inquiries about whether there was any written information from the hospital available for him to examine. He now accepted that he too easily assumed that as Mr Fenty had been in hospital earlier in the day and had been discharged the hospital had no concerns about his condition. With the benefit of hindsight, he accepted that he should have immediately referred Mr Fenty back to the hospital and was confident that they would have accepted him as a patient.

[53] Dr Weston did not attempt to put any gloss over his feelings of responsibility for what had happened. He was plainly an extremely experienced forensic medical examiner. Nevertheless, in fairness to him, two points should be made. First, the

purpose of the examination was only for the interview, not to test Mr Fenty's general condition after the ingestion of methadone. That leads to the second point: Dr Weston did go looking for information from the hospital. If Police Scotland had had appropriate procedures in place a written record would have been available for him to consider. There was no evidence of exactly what would have been in it, but it is reasonable to suppose that it would have been such that, at the very least, Dr Weston would have been able to come to a more informed view about what further steps, if any, to take. Accordingly, the nub of the issue remains the inadequacy of the process for obtaining information from clinicians at the hospital.

[54] Dr Johnston did not consider the vomiting or the pinpoint pupils as necessarily significant. Vomiting might be for a multitude of reasons unconnected to opiate toxicity. Pinpoint pupils might well be merely a side effect of the treatment which had been given in hospital. The half-life of methadone could be anything between 15 and 60 hours depending upon the individual patient. For signs of potentially life threatening opiate toxicity he would expect to observe a decreased level of consciousness, difficulty in being roused, inability to speak and breathing rate deteriorating significantly – below 10 or 12 breaths per minute. If the signs which Dr Weston observed had been noticed before Mr Fenty's discharge from hospital, the pinpoint pupils would not have delayed it and while the vomiting would have it was only because of a general position that patients are not discharged if they are unable to eat or drink. Nevertheless, Dr Johnston readily accepted, as Dr Lee had, that he would have re-admitted Mr Fenty to hospital if that had been requested by Dr Weston. He also noted that given when that decision

would have been made – shortly after Dr Weston's examination – in all likelihood Mr Fenty would have survived.

[55] For custody cell checks the relevant standard operating procedure at the time provided as follows:

> "At each visit, all custodies are to be roused and spoken to enough to give a distinct verbal response" (para 13.3.2)

Moreover, in an email from September 2013, a chief inspector had emphasised to the relevant managers that "a distinct verbal response was not "mmm", "hmmm" or a thumbs up".

[56] In his evidence before the inquiry, Dr O'Keefe said that the minimum procedure should be that, if sleeping, the custody should be wakened, whether by touching his foot, knee or even his ear, his eyes should be open and he should provide answers to questions on where he thought he was and his name, address and date of birth. Inspector Hannan, the custody sergeant at the point Mr Fenty was booked in, described it as "some sort of cognitive response", not a grunt, nod or thumbs up.

[57] I should emphasise that it is for Police Scotland to decide their procedures for ensuring the care and welfare of custodies. It is best placed to determine what is and what is not an appropriate means for carrying out cell checks. Accordingly, any comments I make should not be interpreted as putting a gloss on the police definition of distinct verbal response or suggesting that current procedures should be changed. But one of my responsibilities is to analyse the procedures which were in place at the time of Mr Fenty's death and how they were implemented. That is not in order to apportion

blame – not a matter for this inquiry – but it is appropriate for me to identify failures which might have prevented the death.

[58] PC Dawson and PCSO Murison accepted in their evidence that they had failed to carry out DVR compliant checks of Mr Fenty. PC Dawson carried out seven checks between 22.43 and 04.52. Only the first two visits were DVR compliant. PCSO Murison carried out seven checks between 00.40 and 06.40. It was only on the first of those checks did she obtain a compliant DVR.

[59] PC Dawson, in his evidence, explained the background circumstances which he and PCSO Murison faced that night. He was a relief officer, just helping out as backfill for the permanent custody staff. He had been performing that role for 3 years but primarily when the previous custody facility at Queen Street was full and, say, four or five custodies were transferred elsewhere and he would supervise them. 90% of the time he would be doing the booking-in role, not the cell checks. On the night of Mr Fenty's detention, the situation in Kittybrewster was chaotic. He and PCSO Murison were running around like headless chickens. The facility had first been opened only a few days before. The fire alarm was faulty and going off. The CCTV cameras were malfunctioning. The fingerprint machine was not working, with the result that one officer who would normally perform cell checks spent his whole shift dealing with that problem. There were 42 custodies, a number which he had never experienced before. He was feeling "very distressed". He knew of the standard operating procedure although he had never read it. He was aware of the email emphasising the need for DVR compliant checks. He accepted that he and PCSO Murison probably failed to

notice a deterioration in Mr Fenty's condition and if they had done so they should have called for medical assistance. He had not had any hand-over discussion when he started his shift because immediately upon his arrival, 15 minutes before the start of it, he had to assist Dr Weston with another custody, which took him to 22.20, twenty minutes after the start of his shift. He could not check the Cell files for each custody. Some are up to 16 pages. To read all those for 42 custodies was unrealistic. He did not know that Mr Fenty was on 30-minute checks because of a suicide risk, although he had thought that was probably the reason. He certainly knew nothing about the methadone overdose. Checks of female custodies were not supposed to be done by male officers – and vice versa. But because of the high number of custodies and the short staffing, he and PCSO Murison had to breach that rule. During the night, there was a dirty protest by another custody. That alone took him away from his other duties for an hour.

[60] PCSO Murison also said that she had been running around like a headless chicken. At the start of her shift she had a brief handover from another PCSO, but no mention was made of Mr Fenty. It was impractical to read the Cell files. She had only been doing the job for a short time. She could not remember any training on the terms of the standard operating procedure. She accepted now that she should never accept a grunt as DVR compliant but she did not know that at the time. This was only her second shift at Kittybrewster, and for the previous one she had been at the booking-in desk. When she did the checks she just assumed that Mr Fenty was in a deep sleep – a natural thing for what she regarded as a run of the mill custody albeit subject to a risk of suicide and therefore had to be watched for that.

[61] PCSO Valerie Campbell gave evidence about her discovery of Mr Fenty's condition immediately before emergency medical assistance was called at 07.00. She gave some evidence on the practicalities of performing DVR compliant checks. She accepted that she had been trained to get the custody actually to say something and she would never leave a cell without getting something by way of communication, but "you can't get what you can't get". The rule has to be put in perspective. Not all custodies are in the mood to speak to police officers – often the contrary. "We [custody staff] all want a chat, but sometimes all you get is a grunt, a moan, an "OK", maybe a wave." The key thing is to get a response which is acceptable, bearing in mind that you get to know the custody on a personal level. If in doubt, she would shake or prod the custody but only if some other officer is present.

[62] Inspector Fleming was unimpressed by this body of evidence. Yes, Kittybrewster had some teething problems, but they were not such as to override the fundamental duty to ensure that custodies in the care of the police are looked after properly. Their care and welfare is the priority. There were two fingerprint machines. The custody sergeant should not have instructed an officer to be diverted to that problem. The current staff numbers at Kittybrewster have nearly doubled (on Mondays to Fridays there are a police sergeant and four staff; Saturdays police sergeant and five staff; Sundays police sergeant and six staff) and there is now a nurse on site at all times. The ratio of custodies to officers is now 10:1. But the reason for the increase was a change in the modelling of the staff duties. In the previous facility at Queen Street, there were days when there were up to 36 custodies. The problem on the night was a failure

to prioritise custody welfare. It was indeed a breach of the standard operating procedure to have officers entering a cell of a custody of the opposite sex, but it was "OK to depart from that". Every DVR check should be performed to the same standard, no matter the condition of the custody, the test being whether the custody is "fit and well". The training programme of new staff in 2014 would have included training on DVR. A PCSO would not be in an operational environment without that training. The contemporaneous CCTV footage did not imply that there was chaos. The checks which were performed by PC Dawson and PCSO Murison were, more or less, done timeously. Accordingly, time pressures were not there to warrant them being non-compliant.

[63] I have already explained the problem with Inspector's Fleming's belief about the six-hour rule for Naloxone. In my opinion, that mistaken belief coloured much of his overall approach to his investigation, report and his conclusions within it. But there are further problems:

a. When first instructed (by a chief inspector), he was told that it was unnecessary for him to interview anyone. He should simply rely upon their statements. He said that if he had thought it necessary to do such interviews, he would have done so, but it is difficult to understand how he could decide that. It seems to me that a truly independent investigator would have done so, not least so that any differing views could be put to the various witnesses.

b. I do not doubt that he performed his task with an objective frame of mind, but it cannot be ignored that he was at the time a sergeant within the

custody facility, albeit not on duty, and indeed as an inspector now he has a supervisory role over it and other custody facilities in the area.

c. While I accept that PC Dawson should have, as he himself accepted, carried out his checks in a manner which was DVR compliant and that strictly speaking he had time to do so, his description of the environment on the night and the pressures he and others were under would not have been so quickly dismissed by an independent investigator. By doing so, Inspector Fleming, in my opinion, did not address the important question of whether there were underlying institutional weaknesses at Kittybrewster.

d. I do not understand why Inspector Fleming appeared to accept without criticism that the standard operating procedure was not followed on the night for same sex visits to cells when he, rightly, set such great store on the standard operating procedure for other events.

e. PCSO Murison and PCSO Campbell both said that they would not seek to prod or otherwise physically touch a custody to rouse them without another officer being present. That makes sense. Yet, Inspector Fleming did not address the necessary question that if there were only two officers carrying out the checks how such physical checks could possibly have been done, particularly, as we now know, PC Dawson was away for an hour dealing with the dirty protest. That alone indicates that the facility was short-staffed on the night.

f. The same conclusion should have been reached on the deployment of the officer to the fingerprinting process. To blame the custody sergeant misses the

point: if it is accepted, as I am bound to do, that fingerprinting is an important part of the process a malfunctioning machine should not be dismissed merely as a teething problem in a new facility. The correct answer should have been that contingencies ought to have been in place to deal with such potential issues, primarily by the provision of sufficient staff to deal with the unexpected.

g. In justification of the overall system, Inspector Fleming relied upon a general rule that the manner in which cell checks are carried out should be to the same standard no matter the condition of the custody. That may well be true, but taken to its logical conclusion it means that all the criticisms he otherwise makes of what occurred during the relevant period, including what passed at the hospital and at the booking-in desk, are irrelevant. That cannot be true of course. The point is surely that a custody officer has to deal with each custody as an individual. ("You get to know them personally", as PCSO Campbell testified.) A certain minimum standard is required, but each case should be treated on its merits. Inspector Fleming might well agree with that. But the overall point is that in answering questions in cross-examination by the solicitor for PCSO Murison about the effectiveness of the then standard operating procedure he produced a response which, at least to me, suggested an overreaching desire to defend at all costs the procedure for cell visits.

h. I would have expected that an independent report would have covered not just the general provision of training of custody staff but the reasons for the individual officers apparently not knowing about the standard operating

procedure. That might be their fault, but there might also be institutional shortcomings in their training, which ought to have been investigated to ensure that any lessons would be learned.

[64] In my opinion, the failure to perform DVR compliant cell checks can be put down to more than the admitted failures of the officers. Kittybrewster had been open for only a few days. There were problems which ought to have been anticipated, not of themselves but to cover the possibility of them arising. That should have been by the provision of additional staff. Moreover, in deciding on the staff provision, no-one seems to have considered the quality of the staff, rather than just their quantity. Two officers were left to deal with 42 custodies. One of them was only a relief officer; the other had been in post for only a month or so. It was always likely that such officers, particularly PCSO Murison, would struggle to cope. Accordingly, this is, in my opinion, an institutional failure by Police Scotland.

[65] It is impossible to know with any certainty that compliant DVR checks would have resulted in either custody officer seeking the advice of the forensic medical examiner. Various witnesses, including Dr O'Keefe, thought that it would. But neither officer, even if aware of the methadone overdose and the Naloxone treatment, would have been aware of what clinical signs to watch out for, such that they should have sought medical assistance. As they and others said, other than the suicide risk factor neither officer – nor indeed other officers who gave evidence – regarded Mr Fenty as any different from all the other custodies. He had been discharged from hospital as fit and well. As Dr Johnston said, Mr Fenty's delayed opiate toxicity was unexpected.

Vomiting or pinpoint pupils were not necessarily signs of it. Instead, other factors should have presented themselves. It is impossible on the evidence to know if and when those factors were present in Mr Fenty. Nevertheless, in my opinion, it can be concluded that if Kittybrewster had been run properly and DVR compliant checks had been performed, it is *possible* that medical assistance would have been sought for Mr Fenty, that he would have been returned to hospital and that he would have survived.

[66] For completeness, I should mention that the inquiry also heard expert evidence from Dr Katherine Morrison. Counsel for Grampian Health Board was very critical of her evidence. There was some force in that, but as none of the parties relied extensively upon her evidence in their submissions and I did not think it added more to the evidence of the other experts, I say no more about it.

[67] I emphasise again that the failures by Police Scotland must be looked at through the prism of it having only recently been formed and it having a huge task in bringing all of the various legacy practices into a national form which would not only be comprehensive but which would also require a major training campaign to ensure that it was learned and properly understood by all staff. On top of that, it had a brand new custody facility. These are all mitigating factors which I recognise. Moreover, the officers on the day were dealing with a medical event which the clinicians themselves had not expected and therefore had not considered as a risk which needed to be mentioned to either Mr Fenty, the police or Mr Fenty's general practitioner.

[68] Inspector Fleming's evidence on the present arrangements for custody units in general and Kittybrewster in particular was much more impressive. While I see no point in discussing these in detail given that 10 years has elapsed, I do observe that the culture has completely changed, that staff numbers have nearly doubled, that the operational model has been revamped, that DVR compliance is now universal (a point illustrated by the evidence of PCSO Murison in which she clearly now understood what she was supposed to do), that Kittybrewster has a permanent nurse presence on site, and there is a robust audit system in place to ensure that the rules are always followed.

[69] I should finally add under this chapter that on one view Inspector Fleming was put in an invidious position. It would have been better for him and for the investigation as a whole that someone independent had been appointed to give expert evidence from the police point of view. Preferably, that would have been from a different police force, but if not certainly from someone who was not part of the Aberdeen custody division. That is not to say that Inspector Fleming would not have had an important role, but it would have assisted the inquiry to know that the opinions expressed were from someone without any previous engagement within the custody facility under scrutiny.

Delay

[70] The Crown produced a timeline setting out what steps were taken. I do not rehearse those steps in detail and make only the following observations:

1. From the date of death until May the following year, the Crown had to await the investigation by PIRC, which was completed in October 2014, and the

production of the post mortem report. During that time, the Crown had active discussions with PIRC on what further work was required. I have no criticism of that period.

2. It was, however, not until June 2018 – over 3 years later – that the next step took place, which was a letter to Mr Fenty's mother advising that a joint inquiry into other custody deaths required completion before further steps be taken with this one. At the procedural hearing I invited the procurator fiscal depute to take the opportunity to explain the gap. He declined to do so. I can therefore only conclude that the gap cannot be excused.

3. The hospital and GP records and the CCTV recordings were not requested until July 2018. It is unknown when they were received, but it was not until February 2019 that experts were contacted to provide reports. While there were changes in staff during that time, why it took 7 months for this process is unexplained. Dr Johnston was first instructed at the end of May 2019. Over the coming months work was done on further information sought by him, doubtless causing a delay in production of his report, which was in late 2019. I have no criticism of that period.

4. Contact was then made with the sheriff clerk to make the arrangements for the inquiry, the first day of which took place on 14 September 2021. I have no criticism of that delay, given that it occurred during the Covid pandemic.

5. The inquiry took place for two weeks in September and there was then a gap until February 2022. I have no criticism of that. Under my instruction,

sheriff clerks are aware that fatal accident inquiries should be given appropriate priority within the system, but there can be delays, sometimes because of the unavailability of the particular sheriff due to other programming commitments but more usually because of the unavailability of all the various parties' representatives who have other commitments, including in counsel's case the High Court and one or more of the other inquiries, including major national ones, which are proceeding at the same time. It is difficult to co-ordinate so many diaries.

6. The Crown advised that major changes have been made in the investigation of sudden deaths, including a very substantial increase in the available staffing resource. That should be recognised and, indeed, there is now a very helpful system in place for the Crown to give quarterly progress reports to each of the sheriffs principal on the investigation of deaths within each sheriffdom. That secures an element of accountability and scrutiny, which my colleagues and I regard as a significant change. But the history of this inquiry is still a further illustration of unnecessary delay and how and why it should be avoided. Looking at it as a whole, over a period of 5 years and 2 months only some 22 months were usefully spent.

[71] This delay was compounded by the delay in the issue of the determination. As I have said before, I cannot explain the failure of the sheriff to do so other than to say it was for personal medical reasons. I do however myself accept that the problem should have been identified by me 6 months or so before it was. I have always had a system in

place for the monitoring of written work by the sheriffs in the sheriffdom, but that did not include fatal accident inquiries, the reason being that until now it has never been a problem. But I accept that I should have. It would have meant that by 3 months after the final date of the hearing I would have been asking questions. In the event, I was unaware of the problem until March last year, some 7 months later. I cannot go into what happened after that, except to say that I was ever conscious that other than the eventual issue of the determination by the sheriff the only, most unattractive, alternative was a rehearing of the inquiry, a step I was only very reluctantly willing to take – albeit that was indeed what happened. I promised parties that I would issue the determination four weeks after the last procedural hearing. It was only during the course of considering the evidence that I discovered that I had not been provided with all of the productions. Eventually the Crown sent me a pen drive only to find that it did not open. I required the assistance of the technology experts within the Scottish Courts and Tribunals Service to resolve it, by which time three weeks of preparation time had been lost. I was then on previously arranged leave abroad for three weeks. I have however on my return been in a position to produce the determination within just over three weeks overall.

Meeting with Mrs Fenty

[72] Some parties' representatives were critical of my decision to meet Mrs Fenty without the other parties being present, such that a motion to recuse myself from the inquiry was made. I refused it. I of course readily accept that a judicial office holder

should not meet parties in private without the attendance of all. That is a basic rule of natural justice. I also of course readily accept that justice must be seen to be done. In other words, the perception of a reasonable bystander must be taken into account. However, the situation here was unprecedented. All parties were affected by the unconscionable delay, but as I have already said I considered that Mrs Fenty had been hit the hardest. For that reason, I considered that not only in the interests of justice but also out of common humanity she was entitled to an explanation for it directly from me. The sheriff clerk was present throughout and I was careful to advise Mrs Fenty, which I had to repeat on several occasions during the meeting (understandably so given Mrs Fenty's rightful concerns), that I could not discuss the merits. A full minute of the meeting was provided to all parties. I consider that for these reasons the meeting was appropriate and that justice was served – and was seen to be served.

Formal findings

[73] I make the following formal findings:

(a) W**hen and where the death occurred:**

Mr Fenty died on 29 June 2014 at 07.25 hours at Kittybrewster Police Station, Aberdeen.

(b) W**hen and where any accident resulting in the death occurred; and (d) the cause or causes of any accident resulting in the death:**

The death was not as a result of an accident.

(c) T**he cause or causes of the death:**

The cause of death was methadone intoxication.

(e) A**ny precautions which (i) would reasonably have been taken, and (ii) had they been taken might realistically have resulted in the death or any accident resulting in the death, being avoided:**

(1) The Police Scotland standard operating procedure for care of custodies should have had a procedure for the obtaining by police officers from hospital clinicians information on the nature of the medical condition, the treatment and any further precautions which should be taken post discharge where a person has been admitted into hospital prior to arrest into police custody;

(2) The forensic medical examiner should have carried out a more thorough medical examination of Mr Fenty, which created a missed opportunity which if taken might have resulted in his re-admission into hospital and which would be likely to have avoided his death;

(3) The custody officers should have conducted cell checks of Mr Fenty in accordance with the then standard operating procedure, which created a missed opportunity which might have resulted in them seeking the advice of the forensic medical examiner, which might in turn have resulted in Mr Fenty's re-admission into hospital, which might have avoided his death.

(f) **Any defects in any system of working which contributed to the death or any accident resulting in the death:**

(1) The Police Scotland standard operating procedure for care of custodies should have had a procedure in terms set out at para (e)(1) *supra*;

(2) Police Scotland should have had a system in place to ensure that the Kittybrewster custody centre opened with sufficient staff to cover all eventualities, including unexpected problems with new equipment, thereby allowing custody staff to perform their duties properly, including the passing on of information at shift changes and the recording of relevant information on the cell file computerised system.

(g) **Any other facts which are relevant to the circumstances of the death:**

None.