



# Ryedale District Council

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**REPORT TO:** Standards Committee

**DATE:** 24 January 2008

**REPORTING OFFICER:** Council Solicitor  
Anthony Winship

**SUBJECT:** **R (on the application of Ware) (Claimants) v Neath Port Talbot County Borough Council (Defendant) and National Grid (Interested Party) (2007)**

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## 1.0 PURPOSE OF REPORT

To advise Members about a recent decision of the Court of Appeal in R (on the application of Ware) (Claimants) v Neath Port Talbot County Borough Council (Defendant) and National Grid (Interested Party) (2007) relating to the judicial review of a planning decision.

## 2.0 RECOMMENDATIONS

Members of the Committee are asked to note the report.

## 3.0 BACKGROUND INFORMATION

- 3.1 The Administrative Court decision in R (on the application of Ware) (Claimants) v Neath Port Talbot County Borough Council (Defendant) and National Grid (Interested Party) was delivered on 30 March 2007.
- 3.2 The facts of the case concerned advice, given by a Monitoring Officer, on the issue of the participation of four Councillors in a Planning Committee decision. The Planning Committee were considering applications for a planning and hazardous substances consent in relation to the construction of a high pressure gas pipe and local gas supply system.
- 3.3 Following advice from the Monitoring Officer, four members of the planning committee had abstained from voting.
- 3.4 The Planning Committee made a decision to grant the National Grid planning permission and a hazardous waste consent.

- 3.5 An objector applied for judicial review of the decision to grant the National Grid planning permission and a hazardous waste consent. She contended that the four councillors had recused themselves from considering the planning application on the basis of wrong advice from the monitoring officer.
- 3.6 The Administrative Court (Collins J) had quashed the planning permission and hazardous substance consent granted by the committee to the National Grid for a gas supply system, on the grounds that the Judge considered the officer's advice had been wrong.
- 3.7 The Court of Appeal reversed the decision of the Administrative Court, holding that the officer advice given had not been wrong, the members had been left to exercise their own discretion and that there had been no procedural irregularity. A copy of the Court of Appeal decision is attached as Annex 1.

#### **4.0 REPORT**

- 4.1 This case concerned a situation where alleged erroneous advice was given by a Monitoring Officer to a local authority councillor and that advice was acted upon so that the councillor advised did not participate in a planning decision of a local authority. The Administrative Court concluded that any decision reached through the absence of that councillor was liable to be quashed on the grounds that it had been reached by having regard to an immaterial consideration.
- 4.2 The National Grid applied to the local authority for planning permission to construct a high-pressure gas pipe and local gas supply system. They also sought a hazardous substances consent.
- 4.3 An objector, Ms Ware, lived in the area. She and other local residents objected to the proposal. Four of the councillors on the local authority's planning committee, who formed a non-politically aligned group, were invited to attend a meeting where opponents of the application discussed their objections. The councillors did not express any opinion as to the planning application, and subsequently made a declaration to that effect.
- 4.4 Before the planning committee met, the Monitoring Officer advised that the individual members should make a site visit to the proposed development and that a failure to do so, whilst not precluding a member from the decision-making process, might call into question the decision-making process and result in a challenge to any decision reached. Two of the four councillors failed to attend a site visit.
- 4.5 When the planning committee met, to consider the planning application, the Monitoring Officer asked the four councillors if they would consider making another declaration about their attendance at the earlier meeting at which the application had been discussed. The councillors asked if it would be better for them to leave. The Monitoring Officer told the councillors that it was a matter for them, but he warned them of the possibility of a complaint for the ombudsman if they participated in the decision-making process. The four councillors, having regard to that advice, did not participate further, and the application was approved by 13 votes to 12.

- 4.6 The claimant applied for judicial review of the decision to grant the National Grid planning permission and a hazardous waste consent. She contended that the four councillors had recused themselves from considering the planning application on the basis of wrong advice from the Monitoring Officer, and that the decision to grant planning permission reached without the councillors' participation was flawed and should be quashed.

#### **Administrative Court Decision**

- 4.7 In allowing the application, the Administrative Court held that it was important for local authority decisions on planning applications not to be pre-determined, and that councillors should approach the decision with an open mind and be prepared to be persuaded by the argument. Councillors might be predisposed to a particular view, but they should be prepared to change their minds in response to the argument. A fair-minded and informed observer should not conclude that there was a reasonable prospect of bias.
- 4.8 The court also held that it was, however, equally important that councillors should not be prevented from carrying out the duties imposed on them by the democratic system by the advice from over cautious monitoring officers. They should not participate in a decision only if there was a real risk that a fair-minded and informed observer would perceive bias. In this case there was no doubt that the four councillors had felt under pressure not to take part. The Administrative Court considered that the advice given to them had, however, been wrong. The proper advice would have been that since they had made declarations that they had not expressed any view on the application, there was no reason at all why they should not stay and vote. In addition, in all the circumstances, a site visit was not so essential as to make it wrong for the councillors who had not gone to participate in the decision-making process.
- 4.9 The Administrative Court held that if wrong advice from a council officer had been the cause of a councillor's decision not to vote on a decision of the local authority, it could effect the lawfulness of the decision eventually reached, since it would amount to the consideration of immaterial factors. It would, however, depend on the individual circumstances of any case. In the exceptional circumstances of this case, the advice had been tantamount to a suggestion that the councillors had better not remain and take part in the decision-making process. It was clear that the councillors had wanted to remain, but had been warned, amongst other things, of a possible claim to the ombudsman. They had not had the opportunity of independent advice. If they had remained and taken part in the decision-making process, the decision of the planning application might have been different. Accordingly, the grant of planning permission and hazardous substances consent would be quashed, and the application would have to be reconsidered.

#### **Court of Appeal Decision**

Neath Port Talbot County Borough Council were given leave to appeal to the Court of Appeal and that appeal was heard on the 27<sup>th</sup> November 2007. The judgment was delivered on 18 December 2007.

The Court decided that there were good public interest reasons for it to exercise its discretion to hear and decide the appeal on its merits. This was despite the appeal having been overtaken by events since the Council had subsequently issued fresh consents for the development (having re-determined and confirmed the quashed consents with only minor amendments) and National Grid having then carried out the approved development.

The Court of Appeal reversed the decision of the Administrative Court, holding that the advice given by the Officer had not been wrong, the Members had been left to exercise their own discretion and that there had been no procedural irregularity.

Mummery LJ said that:

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

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

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

Mummery LJ pointed out that at the material meeting the substance of the relevant evidence of all the councillors was that they were left to make their own decisions and to exercise their own judgment about voting on the business in question. And they '... were not directed or pressurised by Council officers to abstain from voting or to leave the meeting prior to the vote. Nor was abstention from voting recommended by the officers'. The members were not told or advised by David Michael (Principal Solicitor and Deputy Monitoring Officer) that they could not participate in the meeting nor that they were disqualified from voting by reason of attendance at a public meeting in February 2006 including objectors to the development in question or by non-attendance at a site visit conducted by the Committee. Mr. Michael had only gone to speak to them in the meeting because they had attracted his attention.

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

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

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

*'The advice which they in fact gave to councillors at several points was not wrong advice . . . In particular, there was nothing wrong in advice that there was a possibility of a claim to the Ombudsman, given, as it was, in response to questions whether they should leave the meeting "to be safe" and "what is the worst that could happen?"'*

Furthermore:

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

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

*'Having received correct advice the councillors decided not to vote on the resolution. This was their decision and it has not been demonstrated that it was affected by immaterial considerations, such as wrong advice either about their attendance at February meeting or about the failure to make a site visit'.*

The judge at first instance had ultimately framed his judgment on flawed factual premises which led him wrongly to set aside the consents. Whilst wrong (including over-cautious and incautious) legal advice clearly could result in an unlawful decision, the advice given in the instant case was correct.

## **5.0 COUNCIL POLICY**

Consideration of this report contributes positively to the Council's Corporate Governance arrangements by ensuring that Members are kept up to date with standards issues and guidance on the code of conduct.

## 6.0 CONCLUSION

The following observations may be made about this case:-

- (i) Members of the Planning Committee are advised to have regard to guidance on attending meetings with supporters or objectors of a planning application;
- (ii) The final decision to declare interests and leave the Council or Committee Chamber needs to be made by Members.

### Background Papers:

None

### OFFICER CONTACT:

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