IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

No. CO/1513/2023

Royal Courts of Justice

Monday, 31 July 2023

Neutral Citation Number: [2023] EWHC 2091 (Admin)

Before:

MR JUSTICE LANE

B E T W E E N :

THE KING
ON THE APPLICATION OF
PHILIP WEBB — Claimant

- and -

LONDON BOROUGH OF BROMLEY — Defendant

- and -

KING'S COLLEGE HOSPITAL NHS FOUNDATION TRUST — Interested Party

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MR M LEWIS KC (instructed by Ashtons Legal) appeared on behalf of the Claimant.

MR P BROWN KC AND MS S MCGIBBON (instructed by the London Borough of Bromley) appeared on behalf of the Defendant.

MR R GROUND KC AND MR B DU FEU (instructed by King's Health Trust) appeared on behalf of the Interested Party.

J U D G M E N T

MR JUSTICE LANE:

1 This is an application for judicial review of the defendant's decision on 15 March 2023 to grant planning permission to the interested party for the erection of an endoscopy unit and substation at Princess Royal University Hospital, Orpington. The decision followed a resolution of the defendant's planning committee on 10 January 2023.

A. THE ISSUE OF BIAS

2 Permission to apply for judicial review was refused on all grounds by Lang J on 28 June 2023, but granted by Upper Tribunal Judge Cooke, sitting as a High Court judge, on 18 July 2023. She did so on a single ground, namely, that applying the well known test in *Porter v Magill* [2001] UKHL 68, a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that one member of the defendant's planning committee, Councillor Anthony McPartlan, was biased in favour of granting planning permission.

3 The interested party's application was recommended for refusal by the defendant's planning officers. This was for five reasons, including the issue of protected species, in that a badger sett had been identified on the proposed site, which lies within the grounds of the existing hospital. The claimant is a nearby resident who considers that his property's amenity would be affected by the unit.

4 After debate, in which Councillor McPartlan spoke in favour of the application, members voted eight to seven to grant planning permission. Councillor McPartlan voted in favour.

5 At the date of the meeting of the planning committee, Councillor McPartlan was a Governor of King's College Hospital NHS Foundation Trust. He declared this interest at the start of the meeting.

6 According to the interested party's summary grounds of defence, its wish to construct the endoscopy unit arose from a recent finding of the Care Quality Commission that existing services cannot meet cancer assessment targets as there are capacity constraints within the existing departmental infrastructure. The endoscopy unit will ensure that services across South East London are significantly improved to benefit patients, reduce waiting lists and improve staff morale.

7 Although KCH is achieving its current target for endoscopy, this is at considerable expense as the services are being undertaken by external providers due to a lack of direct capacity. This also means patients are having to travel further for treatment. There is, it is said, an absolute need to have these services located within an acute setting, that is to say a suitable hospital, as procedures can require immediate surgical intervention.

8 Demand in Bromley for endoscopies is anticipated to grow by 5 per cent each year, with older age being a significant driver of demand. Alternative hospitals were considered, but the Princess Royal University Hospital is the only suitable, available and deliverable location for the endoscopy unit in the relevant catchment area.

B. THE CPRE CASE

9 The parties each make reference to the judgment of Chamberlain J in *CPRE (Somerset), R (on the application of) v South Somerset District Council* [2022] EWHC 2817 (Admin) ("*CPRE*"). The claimant seeks to draw comparisons with the facts of the present case, whilst the defendant and the interested party are keen to highlight points of difference. The

defendant and the interested party's broader submission is, however, that bias cases are highly fact specific.

10 *CPRE* concerned a "bias" challenge to the grant of planning permission for the construction of buildings in which to construct and store carnival floats; street carnivals being a longstanding tradition in Somerset. The case concerned the position of two members of South Somerset's planning committee. Councillor Hamilton was the Vice Chair of that committee. He was also a member of Ilminster Town Council, which had made the application for planning permission. Councillor Baker was the Chair of the planning committee. He was a member of the Chard Carnival Committee, in which capacity he had publicly supported the planning application for the buildings. He was also a close affiliate of the South Somerset Carnival Park Committee, which acted as agent for Ilminster Town Council's planning application. Councillor Baker had a longstanding association with the Eclipse Carnival Club, which appears to have had a financial interest in the outcome.

11 At the meeting of the planning committee, Councillors Hamilton and Baker each declared a personal interest in the planning application but, on the advice of the monitoring officer, they took the view that they did not have a "prejudicial interest" within the meaning of South Somerset District Council's Member Code of Conduct. The relevant terms of that code are set out at para.18 and 19 of the judgment of Chamberlain J as follows:

> "18 The material operative parts of the Code are as follows:
>
> "**Personal Interests**
> 2.8 (1) You have a personal interest in any business of the Council where:
>
> a) it relates to or is likely to affect—
>
> (i) any body of which you are a member or in a position of general control or management and to which you are appointed or nominated by the Council;

(ii) any body—

(a) exercising functions of a public nature;

(b) established for charitable purposes; or

(c) one of whose principal purposes includes the influence of public opinion or policy (including any political party or trade union), of which you are a member or in a position of general control or management;

b) a decision in relation to any business of the Council might reasonably be regarded as affecting your well-being or financial position or the well-being or financial position of a significant person to a greater extent than the majority of other council tax payers, ratepayers or inhabitants of the electoral division, as the case may be, affected by the decision;

(2) Subject to sub-paragraphs (3) to (5) below, where you are aware of a personal interest described in paragraph (1) above in any business of the Council, and you attend a meeting of the Council at which the business is considered, you must disclose to that meeting the existence and nature of that interest at the start of the consideration of that business, or when the interest becomes apparent to you.

Prejudicial Interests
2.9 (1) Where you have a personal interest in any business of your Council you also have a prejudicial interest in that business where the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice your judgement of the public interest and where that business —

(a) affects your financial position or the financial position of a significant person; or

(b) relates to determining any approval, consent, licence, permission or registration in relation to you or any significant person. For the avoidance of doubt and by way of explanation where you are also a member of Somerset County Council and/or a Town or Parish Council within South Somerset you must declare a prejudicial interest in any business of South Somerset District Council where there is a financial benefit or gain or advantage to Somerset County Council and/or a Town or Parish Council which would be at the cost or to the financial disadvantage of South Somerset District Council.

(2) Subject to paragraph (3) and (4), where you have a prejudicial interest in any business of your Council—

(a) You may not participate in any discussion of the matter at a meeting.

(b) You may not participate in any vote taken on the matter at a meeting.

(c) You must disclose the existence and nature of the interest to the meeting and leave the room where the meeting is held while any discussion or voting takes place on the matter. The exception to the requirement to disclose the detail of the interest is if the matter is a sensitive interest under paragraph 2.11. In these circumstances you need only state that you have a prejudicial interest and that the details are withheld because of the sensitive information involved.

(3) Where you have a prejudicial interest in any business of your Council, you may attend a meeting but only for the purpose of making representations, answering questions or giving evidence relating to the business and you leave the meeting room immediately after making representations, answering questions or giving evidence.

(4) Subject to you disclosing the interest at the meeting, you may attend a meeting and vote on a matter where you have a prejudicial interest that relates to the functions of your Council in respect of—

(i) housing, where you are a tenant of your Council provided that those functions do not relate particularly to your tenancy or lease;

(ii) school meals or school transport and travelling expenses, where you are a parent or guardian of a child in full time education, or are a parent governor of a school, unless it relates particularly to the school which the child attends;

(iii) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992, where you are in receipt of, or are entitled to the receipt of, such pay;

(iv) an allowance, payment or indemnity given to members;

(v) any ceremonial honour given to members; and

(vi) setting council tax or a precept under the Local Government Finance Act 1992.

(5) Where, as a Executive member, you may take an individual decision, and you become aware of a prejudicial interest in the matter which is the subject of the proposed decision you must notify the Monitoring Officer of the interest and must not take any steps or further steps in the matter, or seek to influence a decision about the matter."

19 "Significant person" is defined in Schedule 2 to the Code as follows:

"'significant person' in relation to personal and personal and prejudicial interests means a member of your family or any person with whom you have a close association; or any body-

(1) of which you are a member or in a position of general control or management and to which you are appointed or nominated by the Council;

(2) exercising functions of a public nature;

(3) established for charitable purposes; or

(4) one of whose principal purposes includes the influence of public opinion or policy (including any political party or trade union), of which you are a member or in a position of general control or management."

12 Chamberlain J's consideration of the relationship of Codes of Conduct with bias in the *Porter v Magill* test is set out at para.41 to 43 as follows:

"41 Local authorities could draft their codes of conduct to say, simply, that a prejudicial interest will arise whenever a person has an interest which a fair-minded and informed observer would regard as giving rise to a real possibility of bias (or words to that effect). But that would be unhelpful to councillors and to members of the public alike, because it is not always easy to predict how the common law test will be applied by others. So, local authorities generally go further and specify particular kinds of interests and connections which will, and will not, be disqualifying.

42 The process of drafting a code of conduct requires the local authority to take a considered view, in advance, about situations which its members are likely to face and decide whether they should, or need not, disqualify themselves in those situations. The draft will be tailored to the circumstances of the local authority in question and can then be the subject of local consultation and debate. This process not only delivers greater certainty, but also promotes good administration by holding elected representatives to reasonably precise standards, adopted in advance with a democratic imprimatur.

43 Against this background, it would be surprising if compliance with the code of conduct were categorically irrelevant to the question whether the apparent bias test was met. I accept that it cannot be determinative, but it is surely a matter which the fair-minded observer would take into account in deciding whether there was a real possibility of bias. Providing that the definition of "prejudicial interest" is a reasonable one, and other things being equal, a fair-minded observer would consider that a member who had no prejudicial interest was less likely to be biased; and that, other things being equal, a member who had a prejudicial interest was more likely to be biased."

13 Having found that the proper interpretation of the South Somerset Code rendered the advice of the monitoring officer wrong, Chamberlain J continued as follows at para.50 to para.53:

> "50 In my judgment, this affects what the fair-minded observer would think about Cllr Hamilton's participation in the Planning Committee meeting. Although he had not himself promoted the application, or voted to make it, he was nonetheless a member of a relatively small public body whose application he was being asked to consider. The passage quoted above from [24] of Lord Hope's judgment in *Meerabux* shows that mere membership of an organisation party to a proceeding does not automatically disqualify and that active involvement in the institution of the particular proceedings does automatically disqualify. This does not mean that, without such active involvement, there will never be apparent bias. As Lord Hope made clear at [25], that will depend on an application of the Porter v Magill test, which is fact-specific.
>
> 51 In this case, the relevant facts are these. Cllr Hamilton was one of 15 members of the Town Council and was Deputy Mayor. He was present at meetings where support for the application was expressed. Although he did not participate, the Town Council voted to become the applicant and to indicate its support by letter. On a proper construction of the Code, he had a prejudicial interest, which disqualified him from participating in the decision-making process. When taking all these facts into account, a fair-minded member of the public would conclude that there was a real possibility that he would be biased in favour of the Town Council's application.
>
> 52 The Code does not assist in answering the question whether Cllr Baker was tainted by apparent bias. The applicability of the Code in his case depended solely on whether a member of the public with knowledge of the relevant facts would reasonably regard his interest as so significant that it was likely to prejudice his judgement of the public interest. But this is a paraphrase of the *Porter v Magill* test.
>
> 53 In my judgment, however, the *Porter v Magill* test was clearly satisfied. Cllr Baker had a longstanding association with both the CC Committee and the Eclipse carnival club. The application was presented as needed to secure the continued viability in the medium term of both the Federation (of which the CC Committee was a constituent part) and the remaining carnival clubs (of which Eclipse was one). Both the Federation's constituent committees (including the CC Committee) and the clubs (including Eclipse) were said to be supportive of the application. Eclipse appears to have had a financial interest in the outcome, because, as the application made clear, the rent it and the other clubs would pay under the agreement with Dillington was lower than for its existing premises. Cllr Baker was personally pictured in the application documents among a group of individuals appearing to support the SSCP Committee (which was agent for the application). Nice distinctions of the kind relied upon by Mrs Graham Paul ("among the South Somerset carnival

supporters" rather than "a supporter") have no place in an analysis of this kind: the fair-minded observer would place more weight on the impression created by the article and picture than by a minute linguistic analysis of the caption. Such an observer would clearly conclude that there was a real possibility of bias."

14 Before returning to the facts of the present case, it is necessary to note what Chamberlain J had to say about the fact that a decision of a planning committee may be vitiated if members come to it with a "closed mind", in the sense that they have already decided or predetermined which way to vote regardless of anything which may be said at that committee. At para.25 Chamberlain J said:

> "Predetermination is a different, though related concept. A decision may be vitiated by predetermination where there is a "real risk that minds were closed", but in assessing that question in the planning context, the courts must recognise that "councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies" and "would be entitled, and indeed expected, to have and to have expressed views on planning issues*": R (Lewis) v Redcar and Cleveland Borough Council* [2008] 2 P&CR 21, [68]-[69] (Pill LJ)."

I shall have more to say about this in due course.

C. COUNCILLOR MCPARTLAN'S ROLE AS A GOVERNOR OF THE NHS FOUNDATION TRUST

15 It is now necessary to examine in some detail the nature of Councillor McPartlan's role as a governor of the interested party. In order to understand the position of an NHS Foundation Trust Governor, it is first necessary to comprehend the nature of that Trust. The duties of governors of NHS Foundation Trusts derive from the National Health Service Act 2006 (as amended by the Health and Social Care Act 2012). In a "Monitor" guide published in August 2013 it is stated that:

> "The concept of an NHS Foundation Trust rests on local accountability, which governors perform a pivotal role in

> providing. The Council of Governors collectively is the body that binds a trust to its patients, service users, staff and stakeholders."

According to a "Monitor" document entitled "Your Duties – A Brief Guide for NHS Foundation Trust Governors":

> "NHS Foundation Trusts are different from NHS Trusts. They have a unique legal form, known as public benefit corporations. NHS Foundation Trusts provide healthcare services for patients and service users in England. Unlike NHS Trusts, they are free from central government control and can manage their own affairs and make their own decisions, including whether to make and invest surpluses. However, they remain subject to legal requirements and have a duty to exercise their functions "effectively, efficiently and economically".
>
> Each NHS Foundation Trust sets out its governance structure in its Constitution. There are legislative requirements concerning the governance of all NHS Foundation Trusts. For example, all NHS Foundation Trusts have
>
> - members
> - a council of governors
> - a board of directors."

The guide has this to say about governors:

> "**Council of governors**
> The council of governors is made up of elected and appointed governors. Governors are volunteers and are not paid. Elected governors are elected by distinct constituencies:
>
> - public governors are elected by members of the public constituency;
> - staff governors are elected from the staff body; and
> - patient carer or service user governors are elected by members who are patients/service users and/or their carers.
>
> Appointed governors represent stakeholder organisations such as the local council or local charities. If the foundation trust wants governors appointed by an external organisation, this must be specified in the constitution. The structure of the council of governors is shown in the diagram below."

There then follows a diagram, which I shall not attempt to repeat or paraphrase. The guide continues:

> "Governors are not directors. The governors' duty to "hold the non-executive directors, individually and collectively, to account for the performance of the board of directors" **does not** mean that governors are responsible for decisions taken by the board of directors on behalf of the NHS foundation trust. Responsibility for those decisions remains with the board of directors, acting on behalf of the trust."

Governors may also be required to approve "significant transactions" if required by the Trust's constitution and also such important matters as the merger or dissolution of the Trust.

16 Mr Sherlock, Site Director Estates and Facilities with the interested party, has more to say about governors. In his third witness statement he says this:

> "Most of the Trust's governors are elected by members of the Trust. There are over 20,000 people who are members of the Trust made up of patients, staff and members of the public. The type of governors are:
>
> - public governors – there are 14 governors representing each of the Trust's local constituencies;
> - patient governors – there are 6 patient governors who represent the Trust's patients;
> - staff governors – there are 5 staff governors who represent a variety of staff roles across the Trust; and
> - nominated governors – these come from the Trust's stakeholder organisations and are nominated by that organisation.
>
> There are currently 4 stakeholder governors, one each for King's College, London, South London and Maudsley NHS Foundation Trust, the London Borough of Bromley and the London Borough of Lambeth, although there is provision for more. This is provided for in the Trust's constitution. Mr McPartlan was one of four public governors for Bromley. He was not a council nominated governor,

> but a public governor. He acted as an independent, non-remunerated lay person."

17 The third witness statement of Mr Sherlock continues as follows:

> "18) The Trust's Council of Governors meets four times a year and, as a minimum, the Trust's governors are expected to attend each of these meetings. I have discussed these meetings further below.
>
> 19) The Council of Governors also has a number of subcommittees: the Patient Experience and Safety Committee; the Governors Strategy Committee and the Nominations Committee. Mr McPartlan was not on the Nominations Committee, but the membership of both the Patient Experience and Safety Committee and the Governors Strategy Committee is more fluid and all governors are welcome to attend the meetings.
>
> 20) Governors also have informal opportunities to engage with the Trust and to meet with the non-executive directors. A number of the governors sit as observers on the board committees. When Mr McPartlan was a governor, he attended the Bromley Committee as an observer. Mr McPartlan would not have been part of and would have had no role in the decision making process at these meetings and attended in a purely observational capacity."

Mr Sherlock says that the Trust's governors do not, in particular, have any role in decisions relating to the Trust's capital programme. This includes the construction of the proposed new endoscopy unit.

18 Although the governors would not, therefore, have attended any meetings in relation to the proposal, they were, says Mr Sherlock, updated on the proposed construction of the endoscopy unit, along with the existing issues and delays in endoscopy screening. This included a meeting on 11 March 2021, when the governors reviewed the Major Projects Committee's summary and discussed the fact that a new standalone building providing additional endoscopy facilities had been approved.

19 There was another meeting on 10 June 2021, attended by Councillor McPartlan, when a further update on the endoscopy unit was provided. The update included the statement that the current facility did not meet the current high demand. As mentioned by Mr Sherlock, Councillor McPartlan also sat on a number of committees of the Trust governors, namely, the Patient Experience and Safety Governance Committee, the Governors Strategy Committee and the now defunct Bromley Committee.

20 Mr Lewis KC took me through the minutes of the 13 meetings at which Councillor McPartlan attended in his capacity of governor and at which governors were appraised of the endoscopy unit project.

21 Mr Sherlock's third witness statement concludes with these paragraphs under the heading "Mr McPartlan's role at the planning committee".

> "33) Mr McPartlan declared that he was a governor of the Trust at the planning committee meeting on 10 January 2023. No-one present objected to this declaration.
>
> 34) At no stage during the planning committee meeting on 10 January 2023 did Mr McPartlan act in an ambassador role for the Trust or speak on behalf of the Trust. His role is not to do this, but to scrutinise the NEDs as set out above in this statement.
>
> 35) The minutes of the planning committee record that Mr McPartlan "acknowledged the planning issues raised during the debate, but said that these were not insurmountable and could be addressed with the applicant".
>
> 36) I attended the planning committee meeting and my recollection is that Mr McPartlan was very balanced in his approach and raised a few concerns, but certainly did not present a stance that he was all in favour of the application. It appeared to me that he approached the application with an open mind.
>
> 37) I am aware that following the decision to grant planning permission Mr McPartlan posted on his Twitter feed that:
>
> > "The debate whether to grant planning permission for a new endoscopy unit at the PRUH lasted around 90 mins on Tuesday. I genuinely felt torn by the benefits and

> drawbacks, but feel confident the committee made the right decision in the end."
>
> 38) Mr McPartlan was also quoted in the local press as saying: "This is an incredibly difficult decision to make. For me, the benefits of this far outweigh the drawbacks." A copy of this article is included at p.953 to p.955 of Exhibit GS3."

22 The claimant's case, until shortly before the hearing in this court, was based on the proposition that the hypothetical observer would infer from Councillor McPartlan's position as a governor of the interested party that there was a real possibility that the councillor was biased in favour of the interested party's application.

D. BILLIE'S FUND

23 Forty-eight hours before the hearing, however, a further matter arose. This is addressed in the second witness statement of Mr Anthony McGeady. It is said to arise from the minutes of the governors meetings which have been exhibited to Mr Sherlock's third witness statement, which was filed on 20 July 2023. Mr McGeady's witness statement says as follows:

> "2) It appears from the minutes that in addition to Councillor McPartlan serving as a Bromley governor there is also a patient governor called Billie McPartlan. It appears from what follows that Billie McPartlan is Councillor McPartlan's wife.
>
> 3) The Charity Commission's Register of Charities records that both Councillor McPartlan and Billie McPartlan are co-trustees of a charity known as Billie's Fund, whose primary object is "to promote and protect physical and mental health of sufferers of leukaemia and chronically ill people, achieved through the provision of financial assistance, equipment donations and gifts for charities, individuals and projects affected by or dedicated to the advancement of this cause; to advance the education of the general public relating to all areas of blood cancers and general health".
>
> 4) I produce as my Exhibit RAM2 a printout of the charity's page from the Charity Commission's website.
>
> 5) There also appears on the Charity Commission's website a link to the charity's website, from which I also exhibit an extract in Exhibit RAM2.

> 6) In this respect, I note, in particular, the reference on the Charity Commission's website to "achieving" the charity's objectives "through the provision of financial assistance, et cetera, and projects dedicated to the advancement of this cause". Similarly, the charity's website states as follows: "Such was the outpouring of support that she received after her diagnosis with acute lymphoblastic leukaemia, Billie and her husband-to-be Tony created a charity to give something back to King's College Hospital in South East London, as well as the charities that were helping her during her treatment".
>
> 7) I invite the court, on the claimant's behalf, to take this evidence into account in considering whether an objective observer, having knowledge of the relevant facts would have concluded that there was a real possibility that Councillor McPartlan was biased."

24 This has elicited a fourth witness statement from Mr Sherlock, dated 25 July 2023. In this statement Mr Sherlock says as follows:

> "4) The statement of Robert McGeady refers to the treatment received by the partner of Mr Tony McPartlan, Billie McPartlan. However, nowhere in any of the information provided does it confirm that Billie McPartlan received any treatment at the Princess Royal University Hospital.
>
> 5) Mr McGeady's witness statement refers to the treatment that Billie McPartlan received from the Trust following her diagnosis with leukaemia, a type of blood cancer.
>
> 6) However, the planning decision which is the subject of these proceedings relates to the construction of a new endoscopy unit at the PRUH. Endoscopy is not a diagnostic medium for the detection of blood borne cancers.
>
> 7) The Trust is internationally renowned for its haematological work on blood cancers and treats patients from all over the United Kingdom with these conditions.
>
> 8) The Trust serves a population in South East London of around 1.5 million people and a wider population for specialist services of over £5 million. Consequently, the Trust touches on many people's and families' lives, including those living close by. Many of these patients donate money to the Trust or raise money for the Trust. A number of the councillors at the planning meeting spoke of their regard and gratitude for the healthcare that the Trust delivers and confirmed that they or their close relatives had received treatment from the Trust. However, some of these councillors still voted against the proposals.

> 9) The Trust has no record or evidence of receiving any charity donation from Billie McPartlan to the PRUH, nor would we expect any such donation as the Trust's complex cancer haematology services are not based at the PRUH.
>
> 10) The Trust's principal charity is the King's College Hospital Charity. The King's College Hospital Charity is an independent charity as of February 2016 and is independent of and not controlled by the Trust. The King's College Hospital Charity therefore takes its own decision on where and how donations are spent.
>
> 11) I understand from the council's solicitor that Mr McPartlan has confirmed that while some donations were given to the King's College Hospital Charity when Billie's Fund was first set up in 2016, there have not been any donations made to the Trust's charity since March 2020. The charity's records confirm that donations made in July 2016 totalling approximately £2,000 were made to the leukaemia and lymphoma designated fund into the King's College Hospital Charity. These were restricted donations and were therefore legally required to be spent on that project, i.e., in relation to leukaemia and lymphoma treatment.
>
> 12) I also note that this point regarding Billie's Fund was never raised in the original claim. I understand from Bromley Council that Mr McPartlan's membership of the charity is recorded in the council's register of interests and would therefore have been public knowledge since before these proceedings were issued. I attach Mr McPartlan's current register of interest as at 24 February 2023 as Exhibit GS4."

25 At the hearing, the defendant sought to adduce a witness statement of Councillor McPartlan dated 25 July 2023. In that statement, the councillor says as follows:

> "2) Billie McPartlan is my wife and she is a patient governor and both of us are trustees of Billie's Fund. This information is publicly available and has been since before the claimant brought these proceedings. As shown in Exhibit GS4 to the fourth witness statement of Graham Sherlock, I registered my membership in Billie's Fund with the defendant and this can be viewed from my profile page on the defendant's website.
>
> 3) My wife was diagnosed with leukaemia in 2015 at the Princess Royal University Hospital and she was moved to King's College Hospital in Camberwell two days later as it is a specialist haematology centre. Apart from the diagnosis, she has never been treated at the PRUH. A number of friends and family wanted to donate money to relevant charities, so we decided to set up a charity ourselves, "Billie's Fund".

> 4) My role as a trustee is to run it with my wife. It is something that we do in our spare time as the reality is, especially now, very little money flows in or out of it. My wife spent a lot of time in hospital in Camberwell and that meant we saw lots of issues with patient care. Our aim to "give back" was to help fundraise for a few projects that would improve patient care.
>
> 5) Our initial fundraising in 2016 saw £2,000 donated to the King's College Hospital Charity, as set out in para.11 of Graham Sherlock's fourth witness statement.
>
> 6) A further £2,000 was donated to the King's College Hospital Charity to help fund their new critical care unit in Camberwell and £3,500 donated to LIBRA to help fund a new ambulatory care unit in Camberwell.
>
> 7) As my wife continued to go through further treatment, £500 was raised for physio equipment at Orpington Hospital, which is also part of King's College Hospital NHS Foundation Trust, in 2017. Our final larger donation was made in March 2020, £1,000 to Leukaemia UK for their Mind and Body Campaign, of which King's was part. To the best of my knowledge, none of that money went to the PRUH and, instead, was directed to the Camberwell site."

26 Speaking of Billie's Fund, Councillor McPartlan says this at para.11:

> "King's is our local NHS Trust, so it is impossible not to come into contact with it. Unfortunately, my wife's health meant that we have come into contact with it more than most. The generosity of others meant, through Billie's Fund, we could contribute in a small way to improve patient care there. It does not mean I am an advocate partner or spokesperson for the Trust. I want the best for patients who are treated there, but in the same way we all want the best from our local health service."

27 None of the parties at the hearing objected to the admission of these recent witness statements. Given that the substantive hearing had been expedited, this was understandable and I am prepared for them all to be adduced. Mr Brown KC, however, submits that the claimant should not likely be permitted to rely on a ground which has not been pleaded and for which permission has not been granted. He says this is relevant to any challenge in respect of the Billie's Fund issue. I shall return to that submission later.

E. CODES OF CONDUCT

28 We have seen how in *CPRE* Chamberlain J identified the relationship between a local authority's code of conduct and the test to be applied in cases of alleged bias. In Chapter 7 of the Localism Act 2011, Parliament made significant changes in the arrangements applicable to personal interests held by councillors. The previous system of defined disclosable "personal" and "prejudicial" interests was replaced by a system of disclosable "pecuniary" interests. Any interest which is not a disclosable "pecuniary" interest was left to be addressed under a code of conduct which each local authority is to adapt and implement by means of its own rules.

29 In April 2012, the Department of Housing, Communities and Local Government published an illustrative text for a code of conduct which local authorities could use in order to fashion their own codes. The defendant says that its code of conduct (which I shall call the Bromley Code) is based on the department's illustrative text with minor amendments. I do not take the claimant to dissent from this statement.

30 The Bromley Code requires councillors to declare certain "disclosable" non-pecuniary interests, either on the publicly available register of interests or at the outset of the meeting:

> "1.2 Accordingly, when acting in your capacity as a member or co-opted member -
>
> > (i) You must act solely in the public interest and should never improperly confer an advantage or disadvantage on any person or act to gain financial or other material benefits for yourself, your family, a friend or close associate.
> >
> > (ii) You must not place yourself under a financial or other obligation to outside individuals or organisations that might seek to influence you in the performance of your official duties.
>
> 1.6 You must declare any private interests, both pecuniary and non-pecuniary, that relate to your public duties and must take steps to resolve any conflicts arising in a way that protects the public interest, including registering and declaring interests in a manner conforming with the procedures set out in Appendix 1.

1.17 Registering and declaring pecuniary and non-pecuniary interests.

1.17.1 You must, within 28 days of taking office as a member or co-opted member, notify your authority's monitoring officer of any disclosable pecuniary interest as defined by regulations made by the Secretary of State, where the pecuniary interest is yours, your spouse's or civil partner's, or is the pecuniary interest of somebody with whom you are living with as a husband or wife, or as if you were civil partners. A copy of the current Regulations which sets out details of disclosable pecuniary interests is attached to this Code and will be up-dated as necessary if the Regulations change.

1.17.2 In addition, you must, within 28 days of taking office as a member or co-opted member, notify your authority's monitoring officer of any disclosable pecuniary or non-pecuniary interest which your authority has decided should be included in the register.

1.17.2 In addition you must -

(i) Register any gift or hospitality with a value of over £25.00 with the Monitoring Officer within 28 days of receipt. Notification should include details of the gift/hospitality and the identity of the donor;

(ii) In addition to registering your disclosable pecuniary interests, you should also register the following non-pecuniary interests, namely:

(a) membership of outside bodies (as appointed by the Council);

(b) membership of other public organisations;

(c) membership of charities;

(d) membership of campaigning groups, political parties and trade unions.

(iii) You must notify the Monitoring Officer of any change to your disclosable pecuniary or other interests within 28 days of the change occurring so that your Register of Interests may be kept up-to-date.

1.17.3 If an interest has not been entered onto the authority's register, then the member must disclose the interest to any meeting of the authority at which they are present, where they have a disclosable interest in any matter being considered and where the matter is not a 'sensitive interest'.

1.17.4 Following any disclosure of an interest not on the authority's register or the subject of pending notification, you must notify the

> monitoring officer of the interest within 28 days beginning with the date of disclosure.
>
> 1.17.5 Unless dispensation has been granted, you may not participate in any discussion of, or vote on, or discharge any function related to any matter in which you have a pecuniary interest as defined by regulations made by the Secretary of State. You may attend a meeting where you have a disclosable pecuniary interest where that right would be available to any member of the public, provided that you do not address the meeting on the matter in which you have an interest. Additionally, you must observe the restrictions your authority places on your involvement in matters where you have a pecuniary or non-pecuniary interest as defined by your authority."

31 The Bromley Code does not require members to recuse themselves on account of such interests. This recognises the important fact that members will often be actively engaged in local organisations, debates and communities.

32 Reference must also be made to the London Borough of Bromley Local Planning Protocol and Code of Conduct. This is primarily addressed to members who sit on the defendant's planning committees. Paragraph 1.3 of the protocol sets out the so-called *Nolan* principles of public life, namely, selflessness, integrity, objectivity, accountability, openness and honesty. At para.9.3 there is the following:

> "Members must never be involved in decision-making for applications submitted by themselves, a family member or close personal associate and must comply with the Members Code of Conduct at all times when such applications are submitted. If, on consideration of a planning application, a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that a Member was biased the Member must recuse themselves from consideration of that application."

Amongst the bullet points in para.9.4 is this:

> - "make sure that if they are proposing, seconding or supporting a decision contrary to the officer's recommendation or the Development Plan that they clearly identify and understand the planning reasons leading to this conclusion and that they take into account any advice, planning, legal or other officers give them."

F. DISCUSSION

33 In *CPRE*, Chamberlain J held that a failure to comply with a local authority's code of conduct did not automatically invalidate the impugned decision. This was because any code is necessarily cast in broad terms and cannot cater for every situation that might arise. So, as Chamberlain J said at para.43, other things being equal, a fair minded observer would consider a member who had no prejudicial interest was less likely to be biased and one who had a prejudicial interest was more likely to be biased. As he said at para.25 of his judgment, predetermination or having a closed mind is a different, though related concept to that of bias.

34 The relationship between these two concepts is one of some significance in the present case. This is because the defendant and the interested party place particular reliance on the judgments of the Court of Appeal in *Lewis, R (on the application of) v Redcar and Cleveland Borough Council* [2008] 2 P & CR 21 as authority for the proposition that the *Porter v Magill* test applies in a significantly different way in the case of decisions of members of local authority planning committees compared with judicial and other quasi-judicial situations. The claimant, by contrast, says that any such reliance on *Redcar* is misplaced because that case was about predetermination rather than bias.

35 In *Redcar*, the court allowed an appeal against the decision of a judge at first instance who had held that the impugned decision of the planning committee was marred by a "real possibility of bias or predetermination on the part of the planning committee" (see para.14 of the judgment). The Court of Appeal's analysis of the case law included the following:

> 59. In R. (on the application of Island Farm Development Ltd) v Bridgend County BC [2006] EWHC Admin 2189, [2007] L.G.R. 60 , a claim that a local authority's planning decision was vitiated by pre-determination was based on members having a known attitude to the development and one Councillor having participated in a protest group. Having set out the relevant paragraphs from the

judgment of Richards J. in Georgiou , Collins J. stated:

"30. I confess to some doubt as to this approach, and in particular to what he says in paragraph 36. Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. Such may, as here, have been raised as election issues. It would be quite impossible for decisions to be made by the elected members whom the law ***455** requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance. The decision of the Court of Appeal in Baxter's case, of the New Zealand Court of Appeal in the Lower Hutt case and of Woolf J in the Amber Valley case do not support this approach. Nor is it consistent with those authorities that no weight should be attached to their own witness statements. Porter v Magill was a very different situation and involved what amounted to a quasi-judicial decision by the Auditor. In such a case, it is easy to see why the appearance of bias tests should apply to its full extent.

31. The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should … So it is with Councillors and, unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision."

60. Collins J. concluded, at [32]:

"It may be that, assuming the Porter v Magill test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that Councillors can be assumed to be aware of their obligations. In this case, the evidence before me demonstrates that each member was prepared to and did consider the relevant arguments and each was prepared to change his or her mind if the material persuaded him or her to do so. I am not therefore prepared to accept that there was apparent bias or predetermination which vitiated the decision."

Conclusions

61. Mr Clayton has rightly concentrated on the decision to hold the meeting, at which the planning decision was to be taken, during the pre-election period. That alone, it appears to me, and the consequences which could flow from it, is capable of justifying a decision to quash the grant of planning permission. That apart, I can see no possible basis for quashing. I have already commented on the available evidence and have expressed some disagreements in detail with the judge about the effect of that evidence.

62. The difference may, however, arise from a more fundamental difference about the role of elected Councillors in the planning process. There is no doubt

that Councillors who have a personal interest, as defined in the authorities, must not participate in Council decisions. No question of personal interest arises in this case. The Committee which granted planning permission consisted of elected members who would be entitled, and indeed expected, to have, and to have expressed, views on planning issues. When taking a decision Councillors must have regard to material considerations and only to material considerations, and to give fair consideration to points raised, whether in an Officer's report to them or in representations made to them at a meeting of the Planning Committee. Sufficient ***456** attention to the contents of the proposal, which on occasions will involve consideration of detail, must be given. They are not, however, required to cast aside views on planning policy they will have formed when seeking election or when acting as Councillors. The test is a very different one from that to be applied to those in a judicial or quasi-judicial position.

63. Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence. Given the role of Councillors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision.

64. The members of the Committee had long experience of the Coatham Common project, its merits, demerits and problems. They had received a detailed report from Council Officers and they received advice as to the timing of the meeting. They attended the meeting and heard representations. I am far from persuaded that the imminence of the local elections at the time of decision, on the evidence, demonstrated that those who voted in favour of this planning application had minds closed to the planning merits of the proposal.

65. In my judgment, whether the test applied is that advocated by Mr Clayton, or that advocated by Mr Drabble, a decision to quash the planning permission is not justified. It would be damaging to the democratic process if the decisions of elected Councillors are to be quashed on the basis of the additional and unusual circumstances thought to have been decisive in this case. Notably, it does not follow from the unanimity of the seven Coalition members that any one of them had a closed mind.

66. As to the test to be applied, I respectfully share Collins J.'s concerns about the test as expressed by Richards J. (as he then was) in Georgiou , though not necessarily with his concern about Richards J.'s views about self-justificatory statements. A series of statements from Council members saying that they had open minds would not inevitably conclude the issue. Consideration of the standpoint of the fair-minded and informed observer may be helpful in this context to test the provisional views of the court. Moreover, appearances, in this context, cannot, in the wake of Porter , be excluded altogether from the court's

assessment. I agree with the statement of Richards J. at [31] in Georgiou that the test in Porter should not be altogether excluded in this context. An understanding of the constitutional position of Councillors (and Ministers) as shown in cases such as Franklin , Holding & Barnes , Amber Valley , CREEDNZ and Cummins must, however, be present. The Councillors' position has similarities with that of Ministers, as the authorities show; Ministers too take decisions on planning issues on which they have political views and policies.

67. In Condron , while the court did apply the fair-minded observer test, and no contrary submission was made, the analysis of the circumstances by the members of the court, and particularly Richards L.J. in the leading judgment, was essentially the court's own assessment of the situation. I acknowledge that in his concluding paragraph on this issue, Richards L.J. did say that the conclusion he had reached ***457** was that "a fair minded and informed observer, having considered all the facts as they are now known, would *not* conclude that there was a real possibility (etc)" However, Richards L.J. conducted a lengthy analysis of all the circumstances, beginning, at [41], by posing the question: "What, then, are the relevant facts to be gleaned from the material available to the court in the present case?" Those were held to include, at [42]–[57], the "actual words" spoken, the nature of the conversation in which they were spoken ("short and rather tense" and "following a chance encounter"), the "wider picture", said to be particularly important in assessing the significance of the words used, the conclusion the inspector had reached, the absence of surprise that Mr Jones had a predisposition in favour of the grant of planning permission as recommended by the inspector, the contents of the commissioner's decision letter and the qualification for membership of the Committee, which included a course of training in planning matters.

68. Ward L.J. and Wall L.J. both agreed with the reasoning of Richards L.J. Richards L.J. stated at [57]:

"In the circumstances I feel entitled, indeed required, to reach a decision on the issue as raised in this appeal by forming a fresh assessment of my own by reference to the various circumstances that I have mentioned."

The assessment was in my judgment essentially the assessment of the court. While reference was made to the fair-minded observer, the court was putting itself in the shoes of that observer and making its own assessment of the real possibility of predetermination. That, I respectfully agree, is the appropriate approach in these circumstances. The court, with its expertise, must take on the responsibility of deciding whether there is a real risk that minds were closed.

69. Central to such a consideration, however, must be a recognition that Councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies. Members of a Planning Committee would be entitled, and indeed expected, to have and to have expressed views on planning issues. The

approach of Woolf J. in Amber Valley to the position of Councillors in my judgment remains appropriate.

36 As the above extract makes plain, in the *Island Farm* case, Collins J had in mind the concept of bias in saying what he did at para.30 to para.32 of his judgment. I do not consider that the conclusions of Pill LJ beginning at para.61 of *Redcar* are confined to cases of predetermination. On the contrary, those paragraphs constitute an endorsement of Collins J's view that "councillors will inevitably be bound to have views on and may well have expressed them about issues of the public interest locally" and that in such cases "it is easy to see why the appearance of bias test should not apply to the full extent".

37 The same point emerges from the judgment of Rix LJ:

> 89. It is common ground that in the present planning context a distinction has to be made between mere predisposition, which is legitimate, and the predetermination which comes with a closed mind, which is illegitimate. However, there is a dispute between the parties as to the appropriate test to be applied for finding the illegitimate closed mind. On behalf of Persimmon, the principal legal submission advanced by Mr Drabble Q.C. is that the applicable rule is not one of apparent bias or predetermination, but actual bias or predetermination, a closed mind in fact. On behalf of Mr Lewis, on the other hand, Mr Clayton Q.C.'s principal submission is that the test is, as it is now stated generally in the context of questions of bias, one of the appearance of things: would it appear to the fair-minded and informed observer that there is a serious possibility of the relevant bias, viz predetermination (in other words the Porter v Magill test)?
>
> 90. Both counsel have taken us through the relevant authorities, emphasising passages pushing in one direction or the other. Mr Clayton submits that the earlier authorities have to be re-evaluated in the light of Porter v Magill, which was decided in the House of Lords in December 2001. The importance, he submits, of Porter v Magill , is that it emphasises the appearance of things to an outside observer, rather than to the court. Mr Drabble, on the other hand, submits that, in the context of decision-makers who are also democratic policy-makers, not performing a judicial or quasi-judicial function such as that of the auditor in Porter v Magill , the test is one of actual bias, not apparent bias—save in those cases where the decision-maker has a personal or pecuniary interest.
>
> 91. The most recent relevant decision is that of this court in Condron v

National Assembly for Wales . There this court applied the Porter v Magill test, but it did so as a matter of common ground (see at [11], "the judge recorded that there was no difference between the parties as to the legal test, which was to be found in Porter v Magill … The type of bias alleged was described by the judge as 'possible predetermination' …"; and also at [38], "Neither before the judge nor before us was there any disagreement as to the correct legal test"). In the circumstances, I believe the issue debated before us is open in this court.

92. The main reason advanced by Mr Drabble for his actual bias test is that otherwise, if an apparent bias test is applied in this context, it would be too simple to advance from the appearance of predisposition to a conclusion that there was a real possibility of predetermination. Such a test based on appearances would ***462** therefore inevitably tend to do less than justice to the very real distinction which has long been recognised in this context between the role of judicial (and quasi-judicial) decision-makers and that of democratically accountable decision-makers. On his side, the main reason advanced by Mr Clayton for adopting the test of appearances is the recognition that a finding of actual bias is extremely difficult to achieve (to which he adds the submission that the distinction between judicial and non-judicial decision-makers, at any rate in the context of judicial review as a whole) is a false, old-fashioned and discredited one).

93. There is force in both points of view, and the jurisprudence taken as a whole supports both. In my judgment, however, it would be better if a single test applied to the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances, and that those circumstances must have an important and possibly decisive bearing on the outcome.

94. Thus, there is no escaping the fact that a decision-maker in the planning context is not acting in a judicial or quasi-judicial role but in a situation of democratic accountability. He or she will be subject to the full range of judicial review, but in terms of the concepts of independence and impartiality, which are at the root of the constitutional doctrine of bias, whether under the European Convention of Human Rights or at common law, there can be no pretence that such democratically accountable decision-makers are intended to be independent and impartial just as if they were judges or quasi-judges. They will have political allegiances, and their politics will involve policies, and these will be known. I refer to the dicta cited at paras 43/52 above. To the extent, therefore, that in Georgiou v Enfield LBC Richards J. seems to have suggested (at paras 30/31) that such decision-makers must be subject to a doctrine of apparent bias just as if they were like the auditor in Porter v Magill with an obligation therefore of both impartiality and the appearance of impartiality, I would, with respect, consider that he was stating the position in a way that went beyond previous authority and was not justified by Porter v Magill . I do not intend, however, to suggest that the decision in Georgiou was wrong, and it is to be noted that the common ground adoption of the Porter v Magill test in Condron did not prevent this court there reversing the judge on the facts and finding no appearance of predetermination.

95. The requirement made of such decision-makers is not, it seems to me, to be impartial, but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case, no complaint is raised by reference to the merits of the planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse allegations of political controversy.

96. So the test would be whether there is an appearance of predetermination, in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination, or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself. I think that Collins J. put it well in ***463** R. (on the application of Island Farm Development Ltd) v Bridgend County BC when he said (at paras 31/ 32):

"The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should … [U]nless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision … It may be that, assuming the Porter v Magill test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations."

97. In context I interpret Collins J.'s reference to "positive evidence to show that there was indeed a closed mind" as referring to such evidence as would suggest to the fair-minded and informed observer the real possibility that the councillor in question had abandoned his obligations, as so understood. Of course, the assessment has to be made by the court, assisted by evidence on both sides, but the test is put in terms of the observer to emphasise the view-point that the court is required to adopt. It need hardly be said that the view-point is not that of the complainant.

38 In one respect I would, nevertheless, agree with Mr Lewis. The finding that there needs to be "positive evidence" or "clear pointers" of a closed mind is a principle that applies only to cases of alleged predetermination, as opposed to cases of bias in the *Porter v Magill* sense. To hold otherwise would be to dilute that test unduly where it falls to be applied in the

context of decision-making by elected members of local planning authorities. Take the following example. A member of a local planning authority who participates in the debate on a planning application which, unknown to others, is made by her father, should not be taking part at all. In such a scenario, it is unnecessary also to have to show that the member did, indeed, have a closed mind. She might not have done. She might, in fact, have been prepared to listen to the other contributions to the debate and to decide the application according to its merits. She would, nevertheless, fail the test in *Porter v Magill*.

39 The key point for present purposes, however, remains that in the context of decision-making by elected members, the *Porter v Magill* test does not apply in the same manner as it does in judicial or other quasi-judicial contexts. To put this another way, the factors which the informed observer must be taken to have well in mind will include not merely that members of the committee will come to the meeting with views deriving from their membership of political parties, but also that they will bring with them considerations of a wider nature, whether arising from their own interests and concerns or from what they take to be the interests and concerns of local residents. Amongst these may be the provision of healthcare in the authority's area. True it is that members must not let any of these considerations override the obligations they have to make planning decisions according to law. So much is made clear by Bromley's planning protocol. That, however, is where the rule against predetermination comes in and with it the requirement of "positive evidence of a closed mind" as described in *Redcar*.

(a) Role as NHS Foundation Trust governor

40 I shall address first the central contention that Councillor McPartlan fell foul of the test in *Porter v Magill* because of his role as a governor of the interested party. Mr Lewis submits that being a governor of the NHS Foundation Trust is directly analogous to Councillor Hamilton being a member of Ilminster Town Council, which was the applicant for planning

permission in *CPRE*. Mr Brown KC and Mr Ground KC respond that mere membership of an organisation is not enough to establish bias: see *Meerabux v Attorney General of Belize* [2005] UKPC 12.

41 As in *CPRE*, the starting point is the relevant code of conduct, here the Bromley Code and the Bromley Planning Protocol. I agree with the defendant and the interested party that there is no question of Councillor McPartlan having breached the Bromley Code in respect of his role as a governor. He plainly did not. He declared his interest in that regard at the start of the meeting.

42 The claimant suggests that if the defendant's code had been differently framed, along the lines of that in *CPRE*, then Councillor McPartlan would have been disqualified from voting. There is, however, no suggestion that the Bromley Code is unlawfully framed. Nor is there anything about it which suggests it is a code which the fair-minded and informed observer would regard as so problematic as to be left out of account for the purposes of the test in *Porter v Magill,* in a case where there has been no breach of the code. On the contrary, the approach adopted by the defendant in framing the Bromley Code is based on the entirely reasonable policy consideration that it would be wrong if a member who is informed on the subject matter of a particular debate and who wished to participate were thereby to be excluded on the ground of their unremunerated membership of an outside body.

43 I regard the considerations I have just articulated as representing the limit of any judicial analysis of how the hypothetical observer would regard the validity or adequacy of a code. I agree with the defendant that to go further would be to undermine the will of Parliament in enacting the provisions of the Localism Act 2011, described earlier, whereby local authorities are able to frame their own codes in respect of interests other disclosable pecuniary interests. It would also be manifestly unreasonable to expect the hypothetical

observer and, indeed, this court to have knowledge of and make comparisons between the codes of all local authorities.

44 At the hearing, Mr Lewis submitted that Councillor McPartlan had not complied with the Bromley Code in two particular respects. First, contrary to para.1.2(i), he had improperly conferred an advantage on another person and/or had gained a material advantage for a close associate. I find no merit in this submission. Paragraph 1.2(i) is simply not directed at the position of Councillor McPartlan as a governor of the NHS Foundation Trust. The expression "close associate" needs to be read as part of the wider phrase "yourself, your family or a close associate". Seen in this light, "close associate" means a friend or business colleague.

45 Second, Mr Lewis suggested that Councillor McPartlan had not complied with para.1.6 of the Code. Although he had declared his governorship at the beginning of the meeting, he had not "taken steps to resolve any conflicts arising" from that position. Declaring the interest is, however, one of the examples given in para.1.6 of the ways in which such a conflict can be resolved. Insofar as the claimant is suggesting that Councillor McPartlan should have gone further, such as by withdrawing from the debate, that merely seeks to prejudge the substance of the claimant's challenge.

46 Similar problems surround the claimant's contention that Councillor McPartlan did not comply with para.9.3 of Bromley's Planning Protocol. For the reasons I have given, the interested party is in no sense a "close personal associate" of Councillor McPartlan. Again, the suggestion in respect of the protocol that the councillor should have recused himself because a fair-minded and informed observer would conclude there was a real possibility that he was biased goes, again, to the substance of the claim. It does not separately assist in resolving the substantive issue.

47 What all of this means is that Councillor McPartlan's compliance with the Bromley Code and the Planning Protocol is a matter which the hypothetical observer would take into account as a factor weighing against the conclusion of a real possibility of bias. Even without this consideration, however, I do not conclude that the hypothetical observer would consider that Councillor McPartlan's role as governor generated a real possibly of bias. I say this for the following reasons.

48 First, the observer would be aware of the nature of the role as I have endeavoured to describe it earlier. At the hearing, Mr Lewis drew attention to passages in the guidance materials which he submitted are indicative of a broader role for governor than that identified by the defendant and the interested party. In the "Monitor" document entitled "Brief Guide" for Governors we see this:

> "What does a governor do? Governors have an important role in making an NHS Foundation Trust publicly accountable for the services it provides. They bring valuable perspectives and contributions to its activities. Importantly, as a governor you will hold non-executive directors to account for the performance of the board and represent the interests of NHS Foundation Trust members and the public."

In the Monitor reference guide entitled "Your statutory duties" it is said that:

> "We all put patients first, whilst making the best use of valuable public money so that it can stretch even further."

Later in the same guide there is this:

> "In summary, "holding the non-executive directors to account" requires governors to scrutinise how well the board is working, challenge the board in respect of its effectiveness and ask the board to demonstrate that it has sufficient quality assurance in respect of the overall performance of the Trust. This is likely to involve questioning non-executive directors about the performance of the board and of the Trust and making sure to represent the interests of the Trust's members and of the public in doing so. In performing this duty, governors should keep in mind that the board of directors continues to bear ultimate responsibility for the Trust's strategic planning and performance."

49 I do not consider that these passages have the significance for which the claimant contends. Properly read, they do not, in any sense, indicate that governors are expected to represent the interests of NHS foundation trusts to the public or that governors carry any duty towards the trust into their other activities, such as being a member of a local authority and of its planning committee.

50 The reference to representing the interests of NHS foundation trust members is explained by the passage from the Brief Guide. This tells us what members are:

> "Members of the public and staff who work at an NHS foundation trust can be "members" of the trust. In addition, NHS foundation trusts may opt to have a category of members who are either patients/service users and/or their carers. Members vote to elect governors and can also stand for election themselves."

The interested party's constitution provides that the members are the defined public constituencies, a staff constituency and a patient constituency.

51 .I reject the claimant's assertion that the passages he has highlighted indicate that, insofar as governors do not seek to challenge the actions of the non-executive directors, the governors must be taken to endorse every other such action, including, here, the decision to seek permission for the proposed endoscopy unit. This suggestion ignores the limited role of governors in the present context, which is to hold the non-executives to account for the performance of the board. As the Brief Guide states, this duty "does not mean governors are responsible for decisions taken by the board of directors".

52 Mr Lewis also relied on a passage in the "Your statutory duties" guide, which deals with the duty of governors to "assure themselves that the board of directors has followed an appropriate process in deciding to undertake a transaction and that it has taken account of the interests of members and of the public in that process in approving such a transaction".

53 A perusal of the guidance makes clear that the transactions in question here are "significant transactions". Under the heading "What are significant transactions?" we see the following:

> "NHS foundation trusts are permitted to decide themselves what constitutes a "significant transaction" and may choose to set out the definitions in the trust's constitution. Alternatively, with the agreement of the governors, trusts may choose not to give a definition but this would need to be stated in the constitution. Examples of a definition might include any proposed contract over a certain monetary value or over a certain percentage of the trust's turnover. Or trusts could choose to define what constitutes a "significant transaction" in non-monetary terms."

54 I cannot see that the constitution of the interested party makes provision for "significant transactions". On the basis of the passage from the guide which I have just cited, this may be a failing in the constitution. It does not mean, however, that the endoscopy unit falls to be treated as a significant transaction, which would have required the endorsement of the governors.

55 Accordingly, it is, in my view, wholly immaterial how many meetings Councillor McPartlan and, for that matter, Mrs McPartlan may have attended as governors, including the now defunct Bromley Committee. Governors simply had no part at all in making decisions regarding the endoscopy unit. They were informed of decisions which had been reached by others and nothing more. They were not expected to endorse what others had decided.

56 Whilst on the subject of the constitution of the interested party, I must address a submission of Mr Lewis on Part 17. This concerns the declaration of interests of governors. The effect of para.17.3 and 17.5.1 is that a governor needs to declare an interest if they are a governor of another organisation which is or may have an arrangement with, *inter alia*, the interested party. Paragraph 17.14 provides that if the arrangement, etc, is to be considered at a meeting of the governors, then the governor concerned shall not take part. This, says Mr

Lewis, is a telling illustration of how the position of a governor of the interested party should be addressed in other contexts.

57 I do not consider this is so. We are concerned here with what it means to be a governor of the interested party in the context of a meeting of elected members of a planning committee. That is a very different situation from what is addressed in the interested party's own constitution. Furthermore and in any event, it is the substance of the role of such a governor that matters, not the title that may be given to that role.

58 So, how, then, would the hypothetical observer regard the position of Councillor McPartlan as a governor of the NHS Foundation Trust? They would see that such a governor stands at two removes from the executives of the Trust, who are its primary decision-makers in decisions such as whether to seek approval for the endoscopy unit. They would see that governors played no role in these decisions and could not do so as a matter of law. The hypothetical observer would also be aware that the system of governors of NHS foundation trusts is designed to provide an element of local accountability, whereby those using its services, those living in the area, those working for it, and representative bodies, such as local authorities, are given a degree of oversight of certain of the trust's activities. For the reasons I have given, the observer would appreciate that a governor is in no sense to be taken as an advocate for the trust's activities. Whilst an individual is, I accept, unlikely to put themselves forward for appointment as a trust governor if they are not interested in the trust's work, that in no sense makes them a representative of the trust, still less someone who has a vested interest in it.

59 I do not regard the position of Councillor McPartlan in this regard is at all analogous to that of the two councillors in *CPRE*. Councillor Hamilton was one of 15 members of the

Ilminster Town Council and was its Deputy Mayor. He was present at meetings at which support for the planning application was expressed.

60 Mr Lewis emphasises the point that Councillor Hamilton's participation at the planning committee meeting fell foul of the test for bias, even though the councillor had not participated in the Town Council debate and vote. Mr Lewis seeks to equate this with the position of Councillor McPartlan at the 13 meetings. I consider this comparison to be inapt. Councillor Hamilton was a full member of the Town Council, with all the decision-making powers of that office. The legal position of Councillor McPartlan was quite different. He was present to provide local oversight in respect of the non-executive members. He had no decision-making function regarding the endoscopy unit. His role as governor involved no requirement for or expectation of advocacy or other active support of the proposal to site the unit at the PRUH.

61 As for Councillor Baker in *CPRE*, he had an indirect financial interest in the outcome, as para.53 of the judgment of Chamberlain J makes plain. He had also been photographed in application documents among a group apparently supporting the proposed development. Nothing of this kind arises with regard to Councillor McPartlan.

62 The claimant suggests there was a lack of transparency in the presence case. It is therefore noteworthy that those responsible for the meeting on 10 January 2023 were at pains to explain to members and, by extension, the public, what the role of a foundation trust governor is. The minutes record that Councillor Jeffreys was authorised by the Chairman to address members "in light of his special experience in health". Councillor Jeffreys said:

> "The role of a governor of King's College Hospital NHS Foundation Trust was to appoint the Chairman and represent local areas at the Council of Governors and associated committees.

> Governors could also raise questions with the Trust's board on wider financial or governance matters."

There was, here, no suggestion by Councillor Jeffreys of governors being expected to act as advocates for the Trust's activities or as aligning themselves with its projects.

63 For these reasons, I reject the challenge brought by reference to Councillor McPartlan's position as a governor.

(b) Billie's Fund

64 I turn to the issue of Billie's Fund. I indicated earlier that there is an issue of procedure to be addressed. The importance of procedural rigour in judicial and statutory review is well established: see *Talpada, R (on the application of) v Secretary of State for the Home Department* [2018] EWCA Civ 841 and *Keep Bourne End Green v Buckinghamshire County Council* [2020] EWHC 1984 (Admin).

65 In the present case, it is important to bear in mind that the substantive hearing of the judicial review has been brought on on an expedited basis, with both sides having to work at pace. The reason for expedition is because the interested party requires to break ground on the development very soon if it is to deliver the project within the timescale required by those providing the funding. If this does not happen, then, as I understand it, the funding will be lost.

66 Against this background, I do not consider it would be in the interests of justice to prevent the claimant from raising the issue of Billie's Fund. If I were minded to hold otherwise, it would necessary to examine and adjudicate upon the disputed matters of whether the defendant should have volunteered the existence of Billie's Fund as part of its duty of candour, or whether the claimant could and should have inspected the defendant's public

register of interests, where Councillor McPartlan has recorded Billie's Fund. Had any issue of substantive prejudice to the defendant and the interested party arisen, I would have had no option but to address these issues, time consuming though that would have been.

67 Since, however, the defendant and the interested party have disavowed any such prejudice, I believe the appropriate course is to address the issue head-on. This is best achieved by adopting the view that the Billie's Fund's issue is an extension of the pleaded ground of bias, rather than a new ground which requires permission.

68 I agree with the defendant that the Bromley Code did not require Councillor McPartlan to declare his trusteeship of Billie's Fund at the meeting of the planning committee. A declaration had already been made in the register of interests. There was, accordingly, no breach of the Bromley Code. For the reasons I have given earlier, this is a factor pointing against a finding of bias.

69 As for the planning protocol, the only issue is whether the *Porter v Magill* test applies, as to which I refer to or what I have said earlier. The defendant points out that the fact that Councillor McPartlan has been personally affected by cancer does not place him in an unusual position. In the debate, reference was made to the statistic that one in two people will develop cancer during their lifetime. I also note that Councillor Onslow at the meeting "spoke of his personal experience with the excellent clinical care at the PRUH".

70 In the light of this, the defendant submits that it would be deeply contrary to the public interest if personal experiences of this type were to exclude participation in local government decision-making processes relevant to healthcare provision. On the contrary, says the defendant, to the extent that Councillor McPartlan is part of a very significant proportion of the population who have been affected by cancer, either directly or because of

it striking a member of their family, this is a group which should, indeed, be represented in debates and votes on this issue.

71 In my view there is much force in these submissions. Even in the more stringent context of judicial decision-making, they find an echo in the judgment of the Court of Appeal in *Baker v Quantum Clothing Group* [2009] EWCA Civ 566. That case was about whether a Lord Justice should have recused himself in a case about tinnitus, since the judge suffered from that condition. The Court of Appeal held there was no requirement for him to do so. It said at para.33:

> "We turn to the objection based on the fact that Sedley LJ himself suffers from mild tinnitus and we are accepting for present purposes that this was not disclosed. It too is a point of no substance. It amounts to a contention that no judge with any particular disability should hear a case involving that disability. A judge with poor eyesight or only one eye could not hear a case about an eye injury, a judge in a wheelchair could not hear a case about an injury which made the victim wheelchair bound and so on. And, taken to its logical conclusion, the argument would meant that a disabled judge could not hear a case about disability living allowance, or a woman judge hear a case about sexual discrimination against a woman. The examples multiply."

72 The interested party submits that the reaction of many who go through similar experiences is to donate or raise money for charitable causes associated with that experience. The interested party says that this should not disqualify a decision-maker. The high point of the claimant's case on Billie's Fund is, however, that whilst that is true, not everyone who has experienced cancer forms and then runs a charity which is described on its website as having been created "to give something back to King's College Hospital in South East London". At first sight, that might suggest to the hypothetical observer that Councillor McPartlan may have been favourably disposed to the planning application, to the point where this could well override his obligations as a member of the planning committee. Applying the test in *Porter v Magill*, however, requires "an intense focus on the essential facts of the case": see

Bubbles & Wine Limited v Lusha [2018] EWCA Civ 468 at [17]. The hypothetical observer would also be neither "unduly sensitive or suspicious": see *Reza v Medical Council* [1991] 1AC 182 at [194(b)]. He or she is also "a rational and sensible person": see *Archie v Law Association of Trinidad and Tobago* [2018] UKPC 23 at [35].

73 So, possessing these attributes, the hypothetical observer would, I find, look beyond that phrase on the website concerning giving something back. They would look at matters in the round and examine what Billie's Fund has actually done. The observer would see that the primary object of Billie's Fund as stated on the website is "to promote and protect the physical and mental health of suffers of leukaemia and seriously ill young people". This is achieved "through the provision of financial assistance for charities and projects dedicated to the advancement of this cause".

74 The primary focus is, therefore, leukaemia, which is the condition suffered by Mrs McPartlan. The joint primary focus of the charity on seriously ill young people reflects the fact that, as the website indicates, Billie McPartlan was only 28 years old when she contracted the disease.

75 It is in this important light that the significance of Councillor McPartlan's involvement with Billie's Fund needs to be viewed. An endoscopy procedure is plainly not something that would detect leukaemia. The evidence shows that part of the need for such an endoscopy unit in Bromley's area is as a result of the high percentage of older people in the borough. That does not mesh with the aim of Billie's Fund to focus on seriously ill young people.

76 I can see no reason why Mr Sherlock's evidence in his fourth witness statement should not be accepted as correct. In para.9 to para.11 he says that the Trust has no record of receiving any donation from Billie McPartlan to the Princess Royal University Hospital and that a

donation from Billie's Fund of about £2,000 was made in 2016 to the leukaemia and lymphoma designated fund into the King's College Hospital charity. This donation was legally required to be spent on leukaemia and lymphoma treatment.

77 All this, therefore, is the important overall context in which the fair-minded and informed observer would assess Councillor McPartlan's actions, to see whether they met the *Porter v Magill* test. It is the background against which the observer would read the statements on the website about giving something back to King's College Hospital and the statement that "we are always looking to support local hospitals and charitable projects but we now want to give a little help to those who, like Billie, have to manage cancer or long-term health conditions".

78 In conclusion, I find that the hypothetical observer would not consider there to be a real possibility that Councillor McPartlan was biased towards the application to build the endoscopy unit at the PRUH because of his wife's experiences and the existence of the Billie's Fund charity. I do not consider that, viewed together, the position of Councillor McPartlan as a governor and his and his wife's involvement in Billie's Fund would cause the hypothetical observer to find a real likelihood of bias. Their overall view would be that Councillor McPartlan, like very many others, has an interest in local healthcare provision. The fact that his interest took the form it did is not indicative of bias.

(c) Predetermination

79 Finally, I find that there is no evidence of Councillor McPartlan having predetermined the outcome of the planning application. In fact, the evidence shows the contrary. He acknowledged the planning difficulties. He proposed an onerous condition, restricting use of the building to endoscopy; a point which, in itself, flows back into the bias issue by

showing he was not in favour of giving the interested party *carte blanche*. He acknowledged, after the meeting, how difficult the decision had been.

G. DECISION

80 For all these reasons and despite Mr Lewis's most able submissions, I dismiss the application for judicial review.