

Bias Arising From Participation in Mediation – Sanders & City of South Perth [2019] WASC 226

By Craig Slarke

A recent Supreme Court decision has touched on the question of alleged bias on the part of Council members, arising from participation in a State Administrative Tribunal (**SAT**) mediation. In *Sanders v City of South Perth* [2019] WASC 226, two neighbours to a proposed development on Salter Point Parade were concerned about the effect the new development would have on their views of the Canning River, and challenged the Council's decision on a number of grounds. One of those grounds was that the City's decision was affected by actual or apprehended bias, in that the Councillors had not brought a neutral and independent mind to the determination of the development application, having negotiated with the applicant through the mediation process.

Background

The Council initially refused the proposed development because of the impact it would have on the neighbours' views. The applicant sought a review of the Council's decision in the SAT, and the matter was referred to mediation. The Tribunal made standard orders inviting the Mayor of the City to attend along with other nominated elected members. The Mayor and another councillor did attend, along with City staff and consultants engaged for the SAT review. As is often the case, the mediation lead to the preparation of amended plans, which were considered by the Council at a briefing session, and ultimately approved at the subsequent Ordinary Council Meeting.

The challenge

The bias alleged by the neighbours was bias in the form of pre-judgment. The relevant test for pre-judgment bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the question to be decided.

The neighbours relied principally on comments made by a number of councillors at the Council meeting at which the approval was granted upon reconsideration. One councillor referred to the '*opportunity to maintain the integrity of that mediated outcome by an approval*'. The Mayor said "*I find it a challenge coming up with this determination and it's not something I've taken lightly however in good faith I entered the mediation and in good faith I am making the decision*". Another councillor said "*The applicants considered an appeal to SAT as we know they and the City agreed to mediate this matter in an attempt to agree a resolution rather than go straight to a full hearing of this matter. Both parties attended the mediation and conducted themselves in good faith. The mediation process resulted in the application that we see before us today. I think it's fair to assume that the parties to the mediation consider that the present application, to the original application that is, complied with the Town Planning Scheme...*"

The neighbours argued that these remarks suggested the City was committed to an already formed conclusion, and the elected members' minds were incapable of alteration whatever arguments or evidence may be presented.

The Court did not agree with the neighbour's contentions and noted:

- It must be recognised that all of the remarks were made after all of the evidence and the arguments had been presented. The members of the Council were not expressing predetermined or preliminary views, but rather, views that had been reached after considering all of the relevant information;
- The statements did not, on a fair reading, suggest that any of the members of the Council considered that they were bound to give effect to a mediated outcome. Indeed the remarks as a whole suggest the councillors were acutely aware that whatever outcome had been 'agreed' at the mediation was a matter for their independent consideration against the legislative criteria; and
- The fact that the final plans arose out of the mediation should not be regarded as precluding the ability of the Council to reach the necessary state of satisfaction as to the applicable legislative criteria.

An undetermined question

The City made an additional submission at the hearing, arguing that the common law principles of bias are excluded by the framework of the *Local Government Act 1995* (**LG Act**). The City's argument was, in summary:

1. The *LG Act* makes express provision in relation to the disclosure of "interests", including financial interests and proximity interests;
2. A councillor is required to disclose those interests in relation to matters to be discussed at a meeting. By section 5.67 a councillor who has disclosed an interest (as defined in the *LG Act*) must not participate in discussions or decisions in relation to the matter (subject to certain exceptions);
3. A councillor who is present at a Council meeting, unless prohibited by section 5.67 of the *LG Act*, is required to vote. A person who fails to comply with this requirement to vote commits an offence;
4. The *Local Government (Rules of Conduct) Regulations* require Council members to disclose any other interests that could, or could reasonably, be expected to adversely affect their impartiality. Such interests are commonly known as "impartiality interests". There is no statutory consequence that flows from a Council member's disclosure of an impartiality interest (such as the prohibition on participation that arises in relation to interests under the *LG Act*). Indeed, a councillor who discloses an impartiality interest and who is present at a Council meeting is required to vote on the matter notwithstanding the declaration with respect to an impartiality interest;
5. A councillor who has disclosed an impartiality interest has, in effect, declared that a reasonable observer might apprehend that the councillor might not bring an unbiased mind to the issue, but the councillor is nevertheless required by the *LG Act* to vote. In those circumstances, the common principles of bias cannot operate.

As the Chief Justice determined there was no actual or apprehended bias, it was not necessary for him to decide this further issue raised by the City. However the Chief Justice did make a number of relevant observations, including that:

1. The rule against bias in so far as it concerns pre-judgment, is an element of the principles of procedural fairness. It is well established that the principles of procedural fairness may be excluded from the powers conferred by legislation only by "plain words of necessary intentment";

2. There is a strong basis for concluding that Part 5, Division 6 of the *LG Act* has supplanted the common law principles in relation to procedural fairness in so far as they relate to bias in the form of interests (ie, the interests defined in the *LG Act* , in the form of financial or proximity interests);
3. Whether the relevant provisions exclude the rule against *pre-judgment* is a significantly broader question.

The Chief Justice expressed considerable doubts that the *LG Act* has sufficient plain words of necessary intendment to bring about the result that the common law rules in relation to pre-judgment bias – however it was not appropriate to express a concluded view in the absence of a concrete factual scenario calling for its determination.

Lessons learned?

Councillors need to be conscious that questions relating to bias by pre-judgment can arise when they interact with applicants (or objectors) prior to determining a development application. Engaging in a SAT mediation can be an important step in resolving planning issues, but Councillors need to keep an open mind, and be careful to express their preliminary views in a measured way, to minimise the possibility of pre-judgment bias being raised. It appears unlikely that the *LG Act* affords any protection against the common law principles of pre-judgment bias.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Craig Slarke by email to cslarke@mcleods.com.au

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