

## **Local Government Act (Northern Ireland) 2014**

**In the matter of Mr Mervyn Rea (former Councillor on Antrim and Newtownabbey Council).**

**Decision of the Northern Ireland Local Government Commissioner for Standards following the public Adjudication Hearings held at Progressive House, Wellington Place, Belfast, on 29 May, 14 June and 28 June 2019**

*Adjudication Hearing: Mrs Marie Anderson, Northern Ireland Local Government Commissioner for Standards (the Commissioner).*

*The Deputy Commissioner was represented at the Adjudication Hearing on the above dates by Counsel (Ms Fiona Fee BL), which was convened for the purposes of the Commissioner making a determination as to whether or not Mr Rea had breached the Northern Ireland Local Government Code of Conduct (the Code). The Respondent, Councillor Mervyn Rea<sup>1</sup>, was in attendance at the Adjudication Hearings on the above dates and was represented by Mr David Scoffield QC, instructed by Worthingtons Solicitors.*

### **Complaint**

By virtue of section 55(1)(a) of the Local Government Act (NI) 2014 (2014 Act), the Commissioner may investigate a written allegation made by any person that a councillor (or former councillor) has failed, or may have failed, to comply with the Northern Ireland Local Government Code of Conduct for Councillors (the Code).

On 11 January 2017, a member of the public complained to the Commissioner in respect of Mr Rea's conduct at a pre-determination hearing of the Council's Planning Committee on 27 October 2016, where an application for planning permission for a Pig Farm by Mr Derek Hall on the Reahill Road in Newtownabbey was being discussed. Although Mr Rea was not a member of the Planning Committee, he spoke in support of the application.

The complaint stated:

---

<sup>1</sup> The Respondent Mr Rea was a councillor at the time of the circumstances giving rise to the complaint and he is referred to throughout this decision as 'Mr Rea'. He was not re-elected to Antrim and Newtownabbey Borough Council following the local government elections held on 2 May 2019.

*“Was there a conflict of interest when the Chair of the Audit Committee Mervyn Rea spoke in the time allocated to Councillors at the pre-determination hearing ref: LA03/2015/0051/F (Pig Farm, Reahill Road) on 27<sup>th</sup> October 2016?*

*He is also an Agent for Hermitage AI Services and if they supply the applicant, would he financially gain from increased sales of expansion? If so did he misuse his council position to get speaking time as a councillor and not use the applicant’s time, he was also given extra time to be question by his fellow councillors?”*

## **The Investigation**

The Deputy Commissioner commenced an investigation pursuant to section 55(1)(a) of the 2014 Act.

The investigation report dated 22 March 2019 addressed whether Mr Rea had failed to comply with the following paragraphs of the Code:

### *Paragraph 4.6*

*‘You must comply with any request of the Commissioner in connection with an investigation conducted in accordance with the Commissioner’s statutory powers.’*

### *Paragraph 4.16*

*‘You must not:*

*(a) use, or attempt to use, your position improperly to confer on, or secure an advantage for yourself or any other person;*

*These provisions apply both to your actions in your official capacity, including as a member of a body to which you are appointed by the council, and to any dealings you may have with the council on a personal level (for example, as a council ratepayer, tenant or recipient of a council service or as an applicant for a licence or consent granted by the council).’*

### *Paragraph 6.1*

*‘Section 28 of the 1972 Act requires you to declare any pecuniary interest, direct or indirect, that you may have in any matter coming before any meeting of your council. Such interests will be recorded in the register kept by your council for this purpose.’*

### *Paragraph 6.2*

*'You must not speak or vote on a matter in which you have a pecuniary interest.*

*If such a matter is to be discussed by your council, you must withdraw from the meeting whilst that matter is being discussed.'*

The Investigation Report also made reference to the applicability of the Code's Principles of Selflessness, Integrity, Objectivity and Honesty.

### **Investigation Findings**

In accordance with section 55(5) of the 2014 Act, the Deputy Commissioner found that there was evidence that Mr Rea had failed to comply with paragraphs 4.6, 4.16(a) 6.1 and 6.2 of the Code.

In particular he found, on the balance of probabilities, that Mr Rea had a pecuniary interest in the planning application which was before the council at the pre-determination hearing on 27 October 2016, and that he did not declare an interest in the matter which came before the council and which he spoke in support of. This amounted to a breach of paragraphs 6.1 and 6.2 of the Code.

He also found that Mr Rea had not provided a full explanation of his relationship with Hermitage AI or documentation from Hermitage AI to evidence this relationship which breached 4.6 of the Code.

The Deputy Commissioner also made a finding that in speaking in support of the planning application, it could be reasonably perceived that he was seeking an advantage for Hermitage, which could have benefitted himself, and he was in breach of 4.16(a) of the Code.

He therefore requested that the Commissioner should make an adjudication on the matters which were the subject of the investigation.

### **Referral for Adjudication**

On 26 March 2019, the Commissioner determined to hold an Adjudication Hearing in relation to Mr Rea's conduct in order to determine whether or not he had failed to comply with the Code.

In response to the Commissioner's decision to adjudicate on this matter, Mr Rea submitted a completed Councillor Response Form on 17 April 2019 in which he indicated that he did not accept any of the findings of the Deputy Commissioner's investigation report.

On 7 May 2019, Mr Rea's legal representative contacted the Commissioner to advise that his client was not returned as a councillor in the local government elections on 2 May 2019, and enquired whether she intended to proceed with an adjudication in this case.

The Commissioner, having regard to the public interest in this case (including the relevant rules of the Code engaged) and the views of both the Deputy Commissioner and Mr Rea (both of whom expressed a willingness for the adjudication to proceed), determined to continue with the Adjudication.

### **The Adjudication Hearing 29 May 2019 (Stage 1 - Findings of Fact)**

An agreed statement of facts was provided to the Commissioner by the parties at the hearing on 29 May 2019, and after consideration she determined the facts as follows:

#### **Relevant Undisputed Facts**

1. At the relevant time (27 October 2016) Mr Mervyn Rea was a member of Antrim and Newtownabbey Borough Council.
2. Mr Mervyn Rea signed an undertaking on 5 June 2014 that he had read and would observe the Local Government Code of Conduct for Councillors.
3. Mr Mervyn Rea attended training on the Code of Conduct on 19 February 2015. He attended a Code of Conduct for Members review on 4 September 2017.
4. Prior to the recent local government elections on 2 May 2019, Mr Mervyn Rea served as a member of Antrim and Newtownabbey Borough Council (and formerly Antrim Borough Council) for a combined total of 34 years.
5. Mr Rea was Mayor of the council for 2 consecutive terms; 2001-2003.
6. Mr Rea lost his seat on the council in the elections on 2 May 2019.
7. Mr Mervyn Rea was a member of the council's Audit Committee and the Operations Committee. He was appointed to sit as the Council's representative on the NI Amenity Council; GROW South Antrim and the Local Government Partnership on Traveller issues.
8. Mr Rea has worked within the pig industry for approximately 40 years.
9. Hermitage are a company that are based in the Republic of Ireland, in Kilkenny. There are two branches of this company: Hermitage Pigs, which sells gilts

(juvenile sows that have never birthed before); and Hermitage AI, which provides pig semen.

10. Mr Rea recorded in the Antrim and Newtownabbey Borough Council member's registration of interests for 2016/2017, '*Hermitage AI Pedigree Pigs & AI NI Agent*' in respect of interests categorised as, '*Any person who employs or has appointed you, any firm in which you are a partner or any company for which you are a remunerated or non-remunerated director.*'
11. Mr Rea has a contractual relationship with Hermitage Pigs and Hermitage AI.
12. Mr Rea is a self-employed contractor.
13. Mr Rea is the sole advertised Hermitage Pigs and Hermitage AI, sales/advisory agent for Northern Ireland.
14. Mr Rea has worked as an agent for Hermitage Pigs and Hermitage AI for approximately 25 years.
15. Mr Rea is paid a monthly lump sum from Hermitage AI for covering approximately 1,000 miles per week. This is £2,035 or £2,543 depending on the number of weeks in the month.
16. Mr Rea is paid commission by Hermitage Pigs for gilt sales, deliveries and servicing.
17. Mr Rea's invoices for payment cover both Hermitage Pigs and Hermitage AI with no distinction being made as to which branch payment is due from.
18. The applicant Mr Derek Hall (Hall's Pig Farm), who was seeking planning permission for a new Pig Farm, is a customer of Hermitage AI but not Hermitage Pigs.
19. Mr Rea's relationship with the Planning applicant and his family 'the Halls' is purely a business relationship.
20. Mr Rea does not usually deliver product to the existing Hall Pig Farm, but employs a driver who completes those deliveries. Mr Rea personally delivers Hermitage AI product to Derek Hall around once or twice a year.
21. In agreeing to speak in support of the application Mr Rea was aware that the Halls may gain from the planning application.

22. It is forecast that Hermitage AI may benefit by a 20% increase in purchases from Hall's pig farm in the event that the application was approved, that Hall's pig farm is expanded and that the Halls continue to purchase semen from Hermitage AI.
23. In light of the way in which Mr Rea is paid by Hermitage AI, even if Hermitage AI did benefit by means of an increase in purchases from Hall's pig farm, this would not affect Mr Rea's remuneration for mileage covering approximately 1,000 miles per week.
24. Mr Rea did not declare an interest during the pre-determination hearing on 27 October 2016, nor had he sought prior dispensation to speak.
25. On 27 October 2016 Mr Rea spoke at the pre-determination hearing, as a non-Planning Committee member, in support of the applicant Mr Hall.
26. The pre-determination hearing for application LA03/2015/0051/F was held on 27 October 2016
27. Mr Rea has disclosed and registered his interest with Hermitage AI and Hermitage Pigs by virtue of the entry on his registration of interests form for 2016/17.
28. Mr Rea was contacted in advance of the pre hearing by Mr Hall and asked if he would speak in support of the application.
29. At interview, Mr Rea accepted that if the application was approved it could result in increased sales for Hermitage AI.
30. In relation to Mr Rea's compliance with requests during the Deputy Commissioner's investigation, the timeline of correspondence between LGES Directorate and Mr Rea is below:
  - 12 January 2018 – LGES Directorate letter to Mr Rea.
  - 25 January 2018 – Mr Rea's letter to LGES Directorate.
  - 19 April 2018 – Interview with Mr Rea. It is agreed that the interview transcript represents an accurate record of the interview.
  - 13 November 2018 – LGES Directorate letter to Mr Rea.

- 26 November 2018 – LGES Directorate email to Mr Rea.
  - 28 November 2018 – Mr Rea’s response to LGES directorate.
  - 8 January 2019 - LGES Directorate letter and draft report to Mr Rea.
  - 8 February 2019 – Mr Rea’s letter and attachments to the LGES Directorate.
  - 22 March 2019 – LGES Directorate’s final report and letter to Mr Rea.
31. The purpose of pre-determination hearings and their procedure is as set out in paragraphs 22-24 Antrim and Newtownabbey Borough Council’s Standing Orders, approved on 29 June 2015: *‘In addition, the planning Committee may also hold pre-determination hearings, at its discretion, when considered necessary, to take on board local community views, as well as those in support of the development. The intention is to give applicants and those who have submitted relevant representations the opportunity to be heard by the planning Committee before it takes its decision. This will make the application process for major development more inclusive and transparent.’*
32. There is no evidence that the respondent was asked to make a declaration of interest or was invited to make a declaration of interest at the outset of the pre-determination hearing on 27 October 2016.
33. The Respondent has stated in evidence that *‘the interests of Hermitage AI honestly never entered my mind either before or during the time that I spoke during the pre-determination hearing.’*

**Stage 2 of the Adjudication Hearing – Determination by the Commissioner of any breach of the Code**

**The Respondent’s submissions**

In summary Mr Scofield QC, on behalf of Mr Rea, submitted as follows:

Paragraphs 6.1 and 6.2 of the Code

Section 28 of the 1972 Act, which relates to the duties of Councillors at any meeting of the council in which they have a pecuniary interest in a matter being considered, was not engaged given that the meeting in question was a pre-determination hearing and the Council was not exercising decision-making functions.

Section 28(1) of the 1972 Act only applies where a councillor him or herself "has" a pecuniary interest. It must be a pecuniary interest of the councillor and not of some other third party. The fact that Mr Rea's financial position would not stand to be altered meant that he could not have a pecuniary interest in the planning application.

Although section 146 of the 1972 Act states that a pecuniary interest may arise if a councillor has himself, or by, or with, or through another, an interest in the outcome of a matter considered at any meeting of the council, it still must be the pecuniary interest which the councillor himself personally enjoys.

Where a pecuniary interest is indirect, it must still involve the councillor in question having something of monetary value to gain or lose by the outcome. An indirect pecuniary interest on the part of the councillor does not arise on the basis that a third party may have a pecuniary interest in the outcome of a decision, unless there is some suggestion that this will be passed through or shared with the councillor in question.

The decision of the Planning Committee would not lead to Mr Rea obtaining any benefit. There were a range of contingencies between the Planning Committee's decision and any benefit to Hermitage arising; for example, the application would have to be granted, the Hall family would have to proceed with the expansion, increase the numbers of pigs kept, continue to use pig semen and continued to purchase from Hermitage. Even then, that would have no financial effect on Mr Rea.

For these reasons, it was submitted that there was no pecuniary interest, direct or indirect, on the part of Mr Rea in the matter which came before the pre-determination meeting.

In the alternative, if it was considered that Mr Rea had a pecuniary interest, he would fall within one of the statutory exceptions set out in section 146 of the 1972 Act. If this provision was engaged, he should not be treated as having a pecuniary interest given that it was *"of such a general nature or is so insignificant or trivial, or is so indirectly or remotely related to the matter considered that the judgment of the person is not to be influenced thereby."*

Even if there was some suggested breach of the provisions of the Code, the Commissioner must give effect to section 62(2) of the 2014 Act, which states:

*"Any participation by a councillor in any business which is prohibited by the code of conduct is not a failure to comply with the code of conduct if the councillor has acted in compliance with sections 28 to 31 of the Local Government Act (NI) 1972."*

If Mr Rea has complied with sections 28-31 of the 1972 Act his conduct at the pre-determination hearing cannot be considered to be a failure to comply with the Code.

#### Paragraph 4.6 of the Code

Mr Rea denied breaching 4.6 of the Code.



The Deputy Commissioner accepted that Mr Rea provided invoices to Hermitage, payment notes and personal financial information.

Although the Deputy Commissioner was critical of Mr Rea for not disclosing the mileage rate, he did provide him with the necessary information to enable this figure to be calculated.

Mr Rea's contractual relationship with Hermitage was a longstanding, relatively informal arrangement and not set out in writing. The documentation of the type the Deputy Commissioner might have expected did not exist.

Although at interview, the investigator advised Mr Rea that he would be contacted after the interview to provide documentary evidence of his payments from Hermitage, this request for further information was not followed up until seven months after the interview. In any event, the evidence that was requested was eventually provided by Mr Rea's solicitor.

#### Paragraph 4.16(a)

This was an assertion that Mr Rea knowingly abused his position for personal gain for himself or another.

He did not make an attempt to hide the fact that he was speaking in support of the application and the pig industry generally; nor that he had a business relationship with Hermitage, since he had recorded this as an interest in his Register of Interests.

The Code makes it clear that Councillors have a legitimate role in representing the views and aspirations of developers.

#### Paragraph 6.3 and 6.4

It would not be appropriate to address whether Councillor had a *non-pecuniary* interest in the planning application at the pre-determination hearing, given that this was not a matter that was subject to the Deputy Commissioner's investigation. The allegations the Deputy Commissioner were investigating were of financial gain, and no breaches of the non-pecuniary interest Code provisions were identified in his report.

### **The Deputy Commissioner's submissions**

In summary Ms Fiona Fee BL on behalf of the Deputy Commissioner submitted as follows:

#### Paragraphs 6.1 and 6.2 of the Code

The prohibition on participation set out in paragraphs 6.1 and 6.2 of the Code applied to any form of participation in any matter coming before any meeting of the Council.

The Hall's planning application was being 'considered' at the pre-determination hearing within the meaning of section 28 of the 1972 Act.

Section 146 of the 1972 Act defines a pecuniary interest as when a councillor "*has himself or by or with or through another, an interest in the outcome...*" This provision therefore makes clear that someone 'has' a pecuniary interest for the purposes of section 28 of the 1972 Act even when the interest in the outcome is by, or with, or through, another party. This covers a considerably broader range of scenarios.

As Mr Rea had a contractual relationship with Hermitage and it was s forecast that Hermitage might benefit by a 20% increase in purchases from Hall's pig farm in the event the application was approved, Mr Rea's interest should be categorised as an indirect pecuniary interest in the planning application considered at the pre-determination.

It was unreasonable and unsustainable for Mr Rea to assert he was unaware that if the application was approved it might result in increased sales for Hermitage. He had advance notice of the application, chose to participate in the hearing and met with the applicant and his agent immediately before the hearing took place.

A registrable financial interest was still required to be disclosed even where there was no personal benefit to the councillor.

Section 62(2) of the 2014 has the effect that any of the exceptions, defences or exemptions set out in sections 28-31 of the 1972 Act should operate to insulate a councillor against a finding that he or she has breached the Code. Where one of those exceptions does not apply, the Code is to be applied in the usual way.

#### Paragraph 4.6 of the Code

Mr Rea did not provide full and accurate responses to the investigators at interview and thereafter in writing clearly setting out his relationship with Hermitage. He refused to provide the amount of mileage paid and the rate payable.

Only after some time, and after the intervention of his solicitor, did Mr Rea submit handwritten informal invoices relating to his mileage claims and payments for his work for Hermitage.

There are remaining issues relating to his relationship with Hermitage that were not clarified in his further statement of evidence.

#### Paragraph 4.16(a) of the Code

The purpose of allocating time to councillors at the pre determination hearing is so that they can represent the views and aspirations of the community within the democratic decision making process.

The views presented by Mr Rea were inextricably linked to his business interests and those of Hermitage. Mr Rea did not use the time afforded to the applicant to make his representations but rather used the time available for Councillors generally who had registered to speak.

#### Paragraphs 6.3 and 6.4

The Deputy Commissioner did not accept Mr Rea's submission that the question of non-pecuniary interest might not be capable of consideration on the basis that it was not the subject of the investigation.

The investigation arose out of a complaint about a potential conflict of interest and was scoped as whether Mr Rea had failed to 'comply with the rules of the Code of Conduct relating to the registration, disclosure and declaration of interests, in particular paragraphs 6.1 and 6.2 of the Code.

It is not stated that the investigation was to focus solely on pecuniary interests to the exclusion of all other potential issues.

#### **The Commissioner's Stage 2 Determination**

The statutory provisions establishing the Code are set out in the 2014 Act, in particular:

*'Section 53 (1) The Department may issue a code of conduct as regards the conduct which is expected of Councillors (to be known as the Northern Ireland Local Government Code of Conduct for Councillors).*

*(2) The Code must specify principles which are to govern the conduct of Councillors.*

*(3) The principles may be –*

*(a) principles which are to apply to a person at all times;*

*(b) principles which are to apply to a person otherwise than at all times.*

*(4) The Code of Conduct may indicate –*

*(a) provisions which are to apply to a person at all times;*

*(b) provisions which are to apply to a person otherwise than at all times.*

*Section 54. The Commissioner may -*

*(a) issue guidance on matters relating to the conduct of councillors'.*

A definition of pecuniary interest is provided in the Commissioner's Guidance on the Code (page 39, paragraphs 4.13.5 and 4.13.6):

*The term, 'pecuniary interest' is defined in the 1972 Act. Pecuniary interests are your business interests (for example, your employment, trade, profession, contracts, or any company with which you are associated) and wider financial interests you may have (for example, investments, and assets such as land and property).*

*Pecuniary interests may be both direct and indirect; you are required, under section 28 of the 1972 Act, to disclose both. A direct pecuniary interest is one in which you personally may benefit from a decision on the matter before your council. An indirect pecuniary interest is one where your employer, your partner in a legal partnership, a company in which you have shares, or a body of which you are a trustee or director or member, such as a club or charity, may benefit as a consequence of the decision.'*

In addition section 62(2) of the Act states that 'Any participation by a Councillor in any business which is prohibited by the Code of Conduct is not a failure to comply with the Code of Conduct if the Councillor has acted in accordance with sections 28 to 31 of the Local Government (NI) Act 1972'.

The provisions of section 62(2) require me as Commissioner to identify what 'business' is prohibited by the Code as it relates to the facts of the present case. Based upon the facts which I have determined (at Stage 1) I must first consider whether Mr Rea has complied with sections 28-31 of the 1972 Act.

Section 28(1) of the 1972 Act provides as follows:

*'...it shall be the duty of every councillor who has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter and is present at any meeting of the council at which that contract, proposed contract or other matter is, or is to be, considered to disclose openly to the meeting and as soon as practicable after the commencement thereof the nature of his interest and—*

*(a) not to preside over or take any part in the consideration or discussion of, or to vote on any question with respect to, that contract, proposed contract, or other matter'*

### **Paragraphs 6.1 and 6.2 of the Code**

(i) *What was the nature of the pre-determination meeting?*

Mr Scofield QC argues that section 28(1) does not apply because the nature of the pre-determination meeting was an information meeting and not a decision-making forum. He argues that for section 28(1) to apply to Mr Rea's conduct at the meeting it must be a meeting at which the matter is or is to be considered and in this context 'consideration' is designed to refer to the exercise of decision-making functions. I do not agree with this proposition.

The prohibition set at paragraph 28(1)(a) refers to consideration or discussion:

*'...not to preside over or take part in the consideration or discussion of (my emphasis) or to vote on any question with respect to that contract, proposed contract or other matter.*

I refer to the Council's Standing Orders and to paragraph 22 in relation to pre-determination meetings which outlines the purpose of such meetings:

*'...the Planning Committee may also hold pre-determination hearings... to take on board local community views, as well as those in support of the development. The intention is to give applicants and those who have submitted relevant representations the opportunity to be heard by the Planning Committee before it takes a decision. This will make the application process for major development more inclusive and transparent.'*

It is clear that the matter under consideration at the pre-determination meeting was the planning application by Hall's Pig Farm for a significant extension of the existing pig unit. This application attracted much public interest and a significant number of 'objections'. The purpose of the meeting was clearly set out by the Chair at page 1 line 16 of the transcript of that meeting as follows:

*'this pre-determine[sic] hearing relates to the full planning application'*

I am satisfied that the matter under consideration was the planning application. Although the pre-determination hearing was not a meeting of the Council Planning Committee (which has a determining role) nevertheless the hearing was a meeting of the Council. The meeting was for the purposes of 'considering' that application by way of taking the views of the local community and those supporting the development. I am satisfied that the hearing was part of the planning application process.

(ii) Did Mr Rea have a relevant pecuniary interest in that matter?

The relevant provision is section 146(1) of the 1972 Act which states that:

*'Subject as hereafter provided a person shall be treated for the purpose of this Act as having a pecuniary interest in a contract or proposed contract or any other matter if:*

- (a) he has himself or by or with or through another an interest in the outcome thereof, or in any commission, advantage or benefit arising or accruing therefrom;*
- (b) he or any nominee of his is a member of a company or other body with which that contract is made or is proposed to be made or which has a direct pecuniary interest in that other matter; or*
- (c) he is a partner or is in the employment of a person with whom that contract is made or is proposed to be made or who has a direct pecuniary interest in that other matter*

I am satisfied that sub paragraphs (b) and (c) do not apply to the facts of this case. Based on the agreed facts, I am satisfied that Mr Rea is not an employee of Halls. The facts as agreed are that he is a self-employed contractor of Hermitage AI (and the

NI agent for Hermitage Pigs). He is not a member of Hall's Pig Farm. The matter under consideration at the pre-determination hearing was not Hermitage AI's relationship with Hall's Pig Farm, rather it was Hall's planning application. The applicable provision therefore is section 146(1)(a).

The further question to be determined is whether or not Mr Rea had a pecuniary interest (direct or indirect) in the outcome of the discussion at the meeting on 27 October 2016. This raises the question as to the 'outcome of the matter'. I am satisfied the outcome was the grant or refusal of planning permission to Hall's Pig Farm for the extension of its units on Reahill Road, Newtownabbey.

Ms Fee on behalf of the Deputy Commissioner described an 'interest' as including a potential benefit or loss. Mr Scofield QC on behalf of the respondent asserted the 'interest' which a Councillor has himself 'by' or 'with' or 'through another' must be a pecuniary advantage which he himself enjoys.

I consider that Mr Scofield QC has conflated the idea of pecuniary interest with pecuniary advantage. His interpretation is, in my view, too narrow a construction of section 146(1)(a) therefore I prefer the approach of Ms Fee that interest can be a potential benefit or loss.

### **Case Law on Pecuniary Interest**

I am grateful to both Counsel for the authorities identified as relevant to the matters under consideration. It has not been possible to identify any relevant case law which directly relates to the application of section 28 of the 1972 Act.

Mr Scofield QC referred me to the case of *R v Secretary of State for the Environment and Another, Ex parte Kirkstall Valley Campaign*.<sup>2</sup> In that case, Sedley J outlined the difference between direct and indirect pecuniary interest. Mr Scofield QC relies in particular on the passage below:

*'The law makes a distinction between pecuniary and other personal interests. On authority, a 'direct' pecuniary or proprietary interest, however small, is conclusively presumed to create a real danger of bias: (see R v Gough [1993] A.C. 646 and the cases there cited). It may be that a direct pecuniary interest is meant to be contrasted with an indirect one (for example, an interest not in the member's own assets but in those of a close relative); or it may simply be the antonym of one which is too remote. The latter meaning was apparently the one used in the Lannon case [1968] 2 All ER 304 at 309, where Lord Denning MR adopted the Divisional Court's decision that the rent assessment committee chairman had had no direct pecuniary interest.' (emphasis added)*

In that case, Sedley J found that Mr Hartley, who with his wife owned land which would multiply in value if planning consent were granted, had a pecuniary interest as 'in no way was this interest remote'. However, in contrast Mr Jackson, who was the

---

<sup>2</sup> [1996] 3 ALL ER 304

President of the rugby club, had an interest that was too insubstantial and remote. Sedley J states at page 1064 of his judgment that:

*'Membership of the rugby club was no more than an association which fell short of identification with a party interested in the material planning application'.*

The rugby club's interest in the planning application in that case was found to be too 'exiguous' to matter. I am satisfied that 'exiguous' means insignificant.

Ms Fee on behalf of the Deputy Commissioner referred to the Standards Commissioner for Scotland's (SCS) decision in the case of *Frank Toner*<sup>3</sup>. In that case, Councillor Toner had declared non-financial interests but failed to declare his employment. The SCS censured the Councillor and found that he had breached the Code. This case supports the Deputy Commissioner's assertion that a registrable financial interest must be disclosed even where there is no personal gain to the Councillor who had failed inter alia to declare his interest at a meeting of the St John's Stakeholder Group. The financial interest arose from his employment by Mr Findlay MSP who had himself taken an active interest in retention of paediatric services at St John's Hospital. The SCS referred to the objective test in the Scottish Code of Conduct at paragraph 5.3. The objective test requires Mr Rea Councillor to have considered not just whether he himself could be influenced by his employer's interest in the matter under discussion (no decisions were made at the meetings in question) but also whether his actions might be perceived by a member of the public as being so influenced.

There is no objective test in the Northern Ireland Code of Conduct for Councillors. However, Ms Fee BL referred to the integrity principle at paragraph 3.3 of the Code which states that:

*'You should not place yourself under any financial or other obligation to outside individuals or organisations, which might reasonably be thought by others to influence you in the performance of your duties as a councillor.'*

I note also the Commissioner's guidance at paragraphs 4.13.5 and 4.13.6 states as follows in relation to the objective test:

*'Pecuniary interests are your business interests (for example your employment, trade, profession, contracts or any company with which you are associated) and wider financial interests you may have.'*

*'...A direct pecuniary interest is one in which you personally may benefit from a decision on the matter before your council.'*

*An indirect pecuniary interest is one where your employer, your partner in a legal partnership, a company in which you have shares, or a body of which you are a trustee*

---

3

<https://www.standardscommissionscotland.org.uk/uploads/files/1480589991161129WrittendecisionFINAL.pdf>

*or director or member, such as a club or charity, may benefit as a consequence of the decision.'*

The Commissioner's guidance on what constitutes an indirect pecuniary interest is not exhaustive. The issue here is whether there is an indirect relationship between persons connected to the Councillor and the matter under consideration. I am satisfied that there is an indirect relationship given the undisputed business relationship between Halls and Hermitage AI and Mr Rea is a self-employed contractor of the latter company.

I would also draw attention to the NI Audit Office (NIAO)<sup>4</sup> guidance on conflicts of interest at paragraph 2.1 which defines a conflict of interest as *'conflict between the public duty and the private interest of a public official in which the official's private-capacity interest could improperly influence the performance of his/her official duties and responsibilities.'*

Paragraph 3.5 of the NIAO guidance further provides that *'A conflict of interest can arise where a public official has private business interests and can use their public position to benefit their private business interests.'*

I am mindful that Mr Rea registered his interest in Hermitage Pigs and Hermitage AI in his register of interests, which is registered as:

*'Hermitage Pedigree Pigs & AI NI Agent' under the category of 'Any person who employs or has appointed you, any firm in which you are a partner or any company for which you are a remunerated or non-remunerated director.'*

In the course of the hearing I had referred the parties to the decision in *R v Kirklees Metropolitan Borough Council ex parte Beaumont and others*.<sup>5</sup> In that case, two local councillors who sat as governors of one school (Westborough School) had voted on a motion regarding the closure of a neighbouring school (Birkdale High School). The Court held the councillors ought not to have voted on the matter as they had a clear, if indirect, financial interest in the issue (Westborough would have been significantly enlarged and benefitted from additional resources as a result of the closure of Birkdale). The councillors ought to have declared the interest and declined to vote. Membership of a school's board of governors was not listed in the relevant Code of Practice, but that Code did not contain a complete list of interests which might be declarable. The Court found bias in this decision. The decision was quashed and the school remained open for another 11 years.

The Kirklees case was a case on bias but is of relevance because the councillor's obligations under their Council's Standing Orders 25 referred to the provisions of section 94 of the Local Government Act 1972:

---

<sup>4</sup> [https://www.niauditoffice.gov.uk/sites/niao/files/media-files/conflicts\\_of\\_interest\\_good\\_practice\\_guide.pdf](https://www.niauditoffice.gov.uk/sites/niao/files/media-files/conflicts_of_interest_good_practice_guide.pdf)

<sup>5</sup> [2001] LGR 187



*'Order 25 of the Kirklees Metropolitan Borough Council's Standing Orders provides as follows:*

*Interest of members in contracts and other matters.*

*1. If any member of the council has any pecuniary interest direct or indirect within the meaning of section 94 of the Local Government Act 1972 (other than an indirect interest described in subsections (5) and (6) of section 97 thereof) in any contract, proposed contract or other matter that member shall withdraw from the meeting while the matter is under discussion by the council.*

*2. Any member who has a personal interest as is or is in the future defined by the National Code of Local Government Conduct in any matter shall forthwith disclose that interest but may remain, speak and vote unless the interest is clear and substantial, in which case the member shall withdraw from the room."*

It is noteworthy that section 94 is worded in similar terms to section 28 of the 1972 Northern Ireland Act. The Court found that the councillors who were governors of a neighbouring school had an 'indirect' pecuniary interest in the decision under consideration by the Council.

*'In my judgment, by the time of the taking of the vote on 14 July 1999, the proposal to close Birkdale High School was inextricably connected with the consequential proposal to increase the resources of Westborough High School. In my judgment, it is obvious that each of the two councillors must have been well aware of the consequences to which I refer... the vote to close Birkdale High School undoubtedly concerned Westborough. As members of the board of governors at Westborough, Mr Ripley and Mr Razaq had a private and personal interest in the resolution.'*

Mr Scofield QC has relied on a number of judicial review cases on 'bias' to promote his argument that Mr Rea did not have a pecuniary interest. In the case of R (*on the application of Kelton) v Wiltshire Council*<sup>6</sup> a Councillor was held not to have a pecuniary interest in a planning application in circumstances where he held a directorship in Selwood Housing Association, which was identified as an affordable housing partner. The judge based his decision on the fact that Councillor Macdonald did not obtain any benefit and *"there are too many contingencies between the Committee's decision and any benefit to him as a director of Selwood for the rule to have any purchase"*.

That case can be distinguished from the present one, given that Mr Rea, as agreed on the facts, had a contractual relationship with Hermitage AI who, it was also agreed, may benefit from the grant of planning permission to the Hall's (in the event that the application was approved).

---

<sup>6</sup> [2015] EWHC 2853 (Admin)

The judge in *Kelton* sought to distinguish Councillor Macdonald's interest from that of the councillor in the case of *R v Hendon Rural District Council Ex parte Chorley*<sup>7</sup> where the councillor was acting as an agent for the owner of the land in negotiations for its sale to a developer. In the present case, as agreed in the facts, Mr Rea is the sole NI agent for Hermitage AI and Hermitage Pigs.

Mr Scoffield QC also referred me to the case of *R (on the application of Freud) v Oxford City Council*.<sup>8</sup> In that case, which was a judicial review renewal application, Mr Justice Ouseley considered a challenge from Mr Freud, who had an interest in the building, called Freud, which occupies a site adjacent to the development site in respect of which Oxford City Council had granted planning permission. One of the grounds of his challenge was the alleged conflict of interest of Councillor Cook who was an employee of the University of Oxford. The development related to a new building for the Blavatnik School of Government. The Judge held Councillor Cook had no pecuniary interest in the subject matter as *'he was not in any part of the university promoting the application'*. *He had no contract to deal with it*. I am satisfied however that on the facts the *Freud* decision on pecuniary interest is not relevant to the present case where Mr Rea had at the relevant time a contractual relationship with Hermitage AI.

Mr Scoffield QC argued that regardless of whether a pecuniary interest is direct or indirect, for an interest to be pecuniary it must be a financial or monetary interest on the part of the councillor. He has also argued that Mr Rea would not obtain any benefit from the matter under discussion and that his relationship was an arms-length relationship with Hermitage AI. There are, he states, a range of contingencies between the Planning Committee's decision and any benefit to Hermitage arising. Further, he argues, this will have no financial effect on Mr Rea.

Miss Fee BL cautioned me on placing too narrow a construction of the term 'pecuniary interest'. The Deputy Commissioner relied on Sedley J in the *R v Secretary of State for the Environment and Another, Ex parte Kirkstall Valley Campaign*<sup>9</sup> at p. 303

*'The parties have not sought to discuss the question of the meaning of the term 'direct or indirect interest' but it seems to me such that an interest must be a real personal interest in the sense that the person concerned has something to gain or something to lose, directly or indirectly, depending on the outcome.'*

In this case, Mr Rea had registered his interest in Hermitage Ai and Hermitage Pigs as a personal interest, as required by paragraph 5.2 of the Code.'

Sedley J also found that *'I hold therefore that the principle that a person is disqualified from participation in a decision if there is a real danger that he or she will be influenced*

---

<sup>7</sup> [1933] 3 KB 696

<sup>8</sup> [2013] EWHC 4613 (Admin)

<sup>9</sup> Ibid (n2)

*by a pecuniary or personal interest in the outcome is of general application in public law and is not limited to judicial or quasi-judicial bodies or proceedings’.*

Taking into account the case law and based on the agreed facts, I am satisfied that Mr Rea had an indirect pecuniary interest in the matter under consideration at the pre-determination hearing on 27 October 2016. That is because, applying section 146(a) of the 1972 Act he had ‘through another’ [Hermitage AI] an interest in the outcome which was one that was not too remote..

The question of remoteness depends on the purpose which the interest is to serve. Mr Rea is a self-employed contractor of Hermitage AI which could benefit by a 20% increase in sales if the planning permission was granted. Halls were in a business relationship with Hermitage AI. I am satisfied that these ‘connections’ were not remote and that the nature of the interest was a pecuniary interest.

Mr Scofield QC also referred to the statutory exception under section 146(1)(ii) as to when a Councillor is treated as having a pecuniary interest *‘but shall not be so treated if the pecuniary interest is of such a general nature or so insignificant or trivial or is so directly or indirectly related to that...or other matter that the judgment of the person is not likely to be affected or influenced thereby’.*

The question of ‘likely to influence’ goes to the heart of the case law on bias and is reflected in the Commissioner’s Guidance on the Code of Conduct for Councillors. I refer to paragraph 4.13.13 of the Commissioner’s guidance *‘The requirements relating to disclosure and declaration of interests are complex. When deciding whether you are required to disclose or declare an interest you must consider whether there may be a perception that your interest may influence how you will vote or decide on the matter. The key consideration is therefore not whether your decision would be influenced by your interest but whether a member of the public if he or she knew all the relevant facts would perceive that the interest is such that it would be likely to influence your decision’.*

Based on the business relationship between Mr Rea, Heritage and Halls I am satisfied that a reasonable member of the public would perceive that the interest would be likely to influence Mr Rea’s judgment.

I find that Mr Rea had an indirect pecuniary interest in the planning application considered at the pre-determination hearing. The interest was ‘indirect’ because the connection to the matter under consideration was through another (Hermitage) within the meaning of section 146 of the 1972 Act.

Although not relevant to my decision, I have also considered the argument that if Mr Rea complied with sections 28-31 of the 1972 Act, there could not have been any further complaint under the Code. However, I am of the view that although paragraph 6.1 of the Code references section 28 of the 1972 Act, the Code is nonetheless free standing and is not expressly limited by section 28.

#### **Paragraph 4.16(a) of the Code**

*'You must not:*

- a) *use, or attempt to use, your position improperly to confer on, or secure, an advantage for yourself or any other person'*

This is a rule which applies to the conduct of a Councillor at all times, and not just when acting as a Councillor. Mr Rea spoke at the pre-determination hearing as a councillor using councillor speaking time to speak in favour of Hall's planning application. Mr Scoffield QC argued that this was not a breach of paragraph 4.16(a) because Mr Rea did not act 'improperly' as he did not knowingly abuse his position for personal gain for himself or another.

There is no definition of 'improperly' in the Code. Miss Fee's submission suggests a broader definition of 'improperly' than Mr Scoffield's and she argued this includes a Councillor acting in breach of the Code.

Stroud's Judicial Dictionary of Words and Phrases (Ninth Edition) Volume 2 at page 118 refers to improper as covering any significant breach of a substantial duty imposed by a relevant code of professional conduct and conduct regarded as improper according to a consensus of professional opinion (see *Ridehalgh v Horsefield* per Master of the Rolls Thomas Bingham at page 232)<sup>10</sup>:

*"Improper" means what it has been understood to mean in this context for at least half a century... It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.*

Mr Rea failed to declare an indirect pecuniary interest at the pre-determination hearing, spoke in support of the application and remained at the meeting which is conduct I have found to be in breach of paragraphs 6.1 and 6.2 of the Code. I consider this to be an 'improper' use of his position as Councillor.

#### **Paragraph 4.6 of the Code**

*'You must comply with any request of the Commissioner in connection with an investigation conducted in accordance with the Commissioner's statutory powers.'*

I have considered carefully all available evidence including Mr Rea's responses to the Investigating Officer at interview, his responses to the Deputy Commissioner and his solicitor's responses to the draft investigation report. Whilst I acknowledge the importance of timely and full responses to the Deputy Commissioner's investigation, I have concluded that Mr Rea met with the investigating officer, provided answers to his

---

<sup>10</sup> (1994) Ch 205

questions, and provided responses albeit in a less than timely manner through his solicitor. This can be contrasted with the previous case of *Councillor George Duddy*<sup>11</sup>, where the Commissioner found a breach of paragraph 4.6 of the Code where that councillor had refused to answer questions.

### **Summary of the Commissioner's Stage 2 Determination**

- (i) Mr Rea's register of interests states 'Hermitage Pedigree Pigs and AI NI agent 'which he registered under the category of 'any person who employs or has appointed you, any firm in which you are a partner or any company for which you are a remunerated or non-remunerated director ' and he also recorded that this was a personal and private interest.
- (ii) The Code applied to Mr Rea's conduct at the Council's pre-determination hearing on 27 October 2016 as it was a meeting of the Council.
- (iii) Mr Rea's interest in the discussion at the pre determination hearing on 27 October 2016 was a pecuniary interest within the meaning sections 28 and 146 (1)(a) of the Local Government Act (NI) 1972 ( the 1972 Act).
- (iv) Mr Rea's interest in the planning application which was the subject of consideration at the pre determination hearing was a pecuniary interest within the meaning of section 146(1) (a) as he had an interest in that matter 'through another 'That other person being Hermitage AI with whom he had at the relevant time a contractual relationship (as its sales/advisory agent for approximately 25 years). It was agreed between the parties that Hermitage AI might benefit by a 20% increase in purchases from Hall's pig farm in the event that the planning application by Derek Hall (Hall's Pig Farm), who was a customer of Hermitage AI, was approved.
- (v) Mr Rea's interest did not fall within one of the statutory exceptions set out in section 146 (1) and in particular it did not fall within the statutory exception in section 146 (1)(ii) as it was not of a general nature, or so insignificant or trivial or so indirectly or remotely related to the matter that his judgment was not likely to be affected or influenced thereby.
- (vi) Mr Rea's interest as a self-employed contractor with Hermitage AI was an 'indirect' pecuniary interest within the meaning set out in 4.13.6 of the Commissioner's guidance. That guidance describes an indirect pecuniary interest as follows:

*'one where your employer, your partner in a legal partnership, a company in which you have shares, or a body of which you are a trustee or director or member, such a s a club or charity , may benefit as a consequence of the decision'.*
- (vii) The guidance on the Code is not exhaustive and my consideration of the breach of paragraph 6.1 and 6.2 of the Code is based upon a consideration of all of the

---

<sup>11</sup> Case Reference: C00084

circumstances of the case, relevant case law and, in particular, the admitted business relationships between the Councillor and Hermitage AI, and between the Councillor and the Halls. I also considered the manner in which the councillor had registered his interest under paragraph 5.1 of the Code. Based on the facts agreed between the parties, Hermitage AI might benefit from the increased sales if the application for planning permission were granted to Hall's pig farm.

- (viii) Mr Rea as required by paragraphs 6.1 and 6.2 of the Code and provided for by section 28(1) of the 1972 Act was required to declare his pecuniary interest and to withdraw from the meeting
- (ix) Mr Rea has therefore breached the **paragraphs 6.1 and 6.2** of the Code:
- (x) Mr Rea in his failing to declare an interest and withdraw from the Council meeting on the 17 October 2016 also failed to meet his obligations under **paragraph 4.16(a)** of the Code. Mr Rea spoke as a councillor at that meeting and used the time allocated for councillors to speak. The word 'improperly' does not require malice or an intent to abuse his/her position but can include conduct which breaches the Code. Having concluded that Mr Rea failed to declare an indirect pecuniary interest and to withdraw from the meeting, in speaking in favour of Hall's planning application he was using his position improperly to confer an advantage for Halls and also Hermitage AI. The advantage to Hall's was the grant of planning permission and the advantage to Hermitage AI being the potential increase in sales, if planning permission was granted.
  
- (xi) The Commissioner has determined that Cllr Rea has not breached **paragraph 4.6** of the Code. Mr Rea met with the investigating officer, provided answers to his questions, and provided responses albeit in a less than timely manner through his solicitor.

### **Stage 3 Submissions on Sanction**

Having found that Mr Rea had breached paragraphs 6.1, 6.2 and 4.16(a) of the Code, this is the decision on sanction.

Ms Fee BL, on behalf of the Deputy Commissioner referred to the Sanctions Guidelines, and to mitigating factors and aggravating factors relevant to this case

### **Mitigating Factors**

The Deputy Commissioner acknowledged that, an honestly held (although mistaken) view that the action concerned did not constitute a failure to follow the provisions of the Code may be applicable to this case.

The Respondent's previous record of good service and compliance with the Code.

In light of the Commissioner's Stage 2 findings, it was accepted that Mr Rea had co-operated with the investigation process.

The Respondent attended the adjudication hearings and has been legally represented throughout the adjudication process which enabled matters to be dealt with more expeditiously.

Although not referred to in the non-exhaustive list of mitigating factors set out in the Sanctions Guidelines, the Deputy Commissioner also observed the following further points in favour of Mr Rea:

There was no suggestion of any further breaches of the Code on Mr Rea's part since the events giving rise to the Deputy Commissioner's investigation. There is no suggestion that it is anything other than a one-off occurrence.

Although Mr Rea had failed to comply with the requirement to declare a pecuniary interest, the interest itself was registered in his Register of Interests, which is a separate requirement under the Code.

The Deputy Commissioner also acknowledged this case has been complex and members of the public have had the benefit of hearing the various legal submissions which have been made by both parties unpicking the legislation underlining the rules around pecuniary interest. It may be that there is something to be afforded by way of mitigation to former Mr Rea in this regard.

The Deputy Commissioner also noted that this decision will inevitably have some beneficial effect for the public interest in clarifying and increasing understanding for sitting councillors on the rules relating to pecuniary interest.

### **Aggravating factors**

Mr Rea was an experienced councillor and therefore it may be considered that he should have been aware of the provisions of the Code which he had signed and he should have sought additional advice or guidance if he had any uncertainty around how those provisions applied to him.

However, it also submitted that none of the aggravating factors as set out in the Sanctions Guidelines applied to this case.

### **No Action**

To take no action in respect of the breaches of the Code identified by the Commissioner would send a dangerous message to councillors about responsibilities under the rules around declarations of a pecuniary interest and in the context of the facts of this case would not be appropriate

## **Censure**

There is considerable public interest in this case and although the conduct complained of was serious, as opposed to the minor failures which are usually envisaged under the outcome of censure, the particular context of this case and the unusual factual circumstances are such that the Deputy Commissioner considers that the sanction of censure may be engaged.

## **Suspension**

Given that Mr Rea lost his seat as a councillor, the Sanctions Guidelines set out that this sanction is not available to the Commissioner.

Even if Mr Rea was still in office the Deputy Commissioner was not contending for this sanction. Although they are a non-exhaustive list, none of the factors which would justify a suspension under the Sanctions Guidelines apply in this case. There was no evidence to suggest that he had brought his position as a councillor or his council into disrepute, and there was no evidence of any future likelihood of failing to comply with the Code.

## **Disqualification**

Given the particular context of this case and the factual circumstances the Deputy Commissioner is not persuaded that disqualification would be appropriate given that Mr Rea's conduct was not deliberate.

The only factor which may lead to disqualification under the Sanctions Guidelines may be misusing council resources given that he was using a time allocated to councillors to speak and he spoke in the Council chamber. However it was not suggested that in itself in this case is sufficient to bring disqualification.

## **The Respondent's submissions on sanction**

Mr Scofield QC submitted that there were a number of mitigating factors engaged and that none of the aggravating factors as set out in the Sanctions Guidelines were applicable to this case.



## **Mitigating factors**

The facts of this case place it at the less serious end of the scale.

Mr Rea did not receive any benefit at all from the grant of planning permission. Even in the event of Hall's Pig Farm expanding and increasing its orders he receives no direct financial benefit at all.

The only thing he 'gained' was three minutes of speaking time at the pre-determination hearing. That that shouldn't be viewed as being a council resource that is not the ordinary and natural meaning of that word.

Mr Rea believes strongly that he acted in accordance with the understood council procedures at the time. Letters had been passed to the Commissioner from both the Council's Chief Executive and the Chair of the Planning Committee which stated that it was not the council's practice to ask for declarations of interests at pre-determination hearings.

This was an honestly held view (although subsequently determined by the Commissioner to be a mistaken one) that the action concerned did not constitute a failure to follow the provisions of the Code.

The interest in respect of his contractual relationship with Hermitage was registered in his Register of Interests. It was not a case of him seeking to keep those matters private or secret. This was not a case of lobbying behind the scenes.

Mr Rea believed that his knowledge of the pig industry would be a valuable contribution to the pre-determination hearing and he provided evidence which was helpful in relation to the pig industry generally. This may engage the mitigating factor that there was some beneficial effect for the public interest in his participation in the meeting.

Two other councillors who spoke at the meeting, both of whom spoke against the proposal had a personal interest in the case. One of those declared that formally having been spoken to in advance of the meeting and the other didn't. Neither of them has been complained about or proceeded against for any breach of the code. This has given rise to a feeling of unfairness on the part of Mr Rea.

Mr Rea was a serving councillor for 34 years and received an MBE in 2011 for Community Service. He has never had any previous disciplinary concerns.

The Respondent lost his seat at the last local government elections, he believes this was, at least in part, a result of the publicity around this case. This could be seen as a de facto sanction which has already arisen from this case.

There has been, as determined by the Commissioner, co-operation with the investigation and the adjudication hearing process.

With this in mind, in all of those circumstances, it was submitted that this was a case where the Commissioner could properly choose to take no further action in this case rather than censure.

### **The Commissioner's Decision on Sanction**

Having considered the particular facts and circumstances of this case, the Commissioner was satisfied that this is a case where the appropriate sanction is censure.

In determining sanction she was mindful of the fact that suspension was not available to her given that Mr Rea is not an elected councillor. She also held that she did not consider the breaches found, in the context of the case, engaged disqualification.

She was however not satisfied that it was a case for no action because she was not satisfied that this was an inadvertent failure to comply with the code.

The Commissioner accepted the mitigating factors highlighted by both the Deputy Commissioner and Mr Rea and was of the view that there were no particular aggravating factors engaged.

A sanction of censure was both appropriate and proportionate and also reflective of the public interest in the matters underlying this complaint.

### **Summary of the Commissioner's Decision on Sanction**

#### **The Commissioner's Conclusions on Mitigating/Aggravating Factors**

##### **Mitigating Factors:**

1. The Respondent had co-operated with the investigation and the Adjudication hearing.
2. The Respondent had a previous record of exemplary public service as a Councillor
3. The Respondent had also served as a former Chair of the Council's Audit Committee.
4. There was no previous history of non-compliance with the Code.
5. There has been no further incidence of non-compliance.
6. The rules on pecuniary interest are complex and there are no decisions to date on the meaning of pecuniary interest in this jurisdiction.

## **Aggravating Factors:**

The Commissioner determined there were no aggravating factors.

## **Case Law on Sanction**

In the case of *Patrick Heesom v Public Services Ombudsman for Wales and the Welsh Ministers*<sup>12</sup>, in considering the approach to sanction by the Adjudicating Panel for Wales, Mr Justice Higginbottom referred to the need to ensure that a sanction is in line with other similar cases.

The Commissioner has also considered jurisprudence from other jurisdictions in relation to Councillor's failures to declare an interest.

In the case of *Councillor Maskell*<sup>13</sup> the Adjudication Panel for Wales imposed a sanction of 18 months suspension upon the Councillor for failure to declare an interest.

In the case of *Councillor Haulwen Lewis*<sup>14</sup> the Adjudication Panel for Wales imposed a sanction of three months suspension upon the Councillor for failure to declare a personal and prejudicial interest in relation to a planning application.

In the case of *Councillor Matthew Pollard*,<sup>15</sup> the First Tier refused an appeal by the Councillor of the decision the North West Leicestershire District Council Standards Committee. The Tribunal upheld the finding that he was in breach of the Code of Conduct and in particular had misused his position, failed to leave the room when his prejudicial interest was engaged and brought his office into disrepute. Given the nature of the breaches, the Tribunal held that it was entirely justified that Councillor Pollard's original sanction of suspension be increased from three months (imposed by the Standards Committee) to six months.

In the case of Alan Nimmo<sup>16</sup> the Standards Commission for Scotland (SCS) found that the Councillor's actions in asking council officers to deal with his enquiry about a planning application in which he had a personal interest and his seeking information not normally available to the public, breach the Scottish Code of Conduct. The SCS censured Councillor Nimmo.

---

<sup>12</sup> [2014] EWHC 1504 Admin

<sup>13</sup> Case No APW/002/2009-010/CT ('First reference') APW/012/2009-010/CT ('Second reference')

<sup>14</sup> Case No APW/002/2014-015/CT

<sup>15</sup> Case Reference LGS/2012/0578

<sup>16</sup> Case Reference LA/Fa/1799,2016

In the case of Councillor Frank Toner, referred to above, the SCS imposed the sanction of censure for failure to declare a pecuniary interest.

The Commissioner considered the facts and circumstances of this case, the Sanctions Guidelines and the submissions of both the Deputy Commissioner and Mr Rea through their Counsel. The Commissioner has considered to Appendix A of the Sanction Guidelines, which set out a non-exhaustive list of mitigating and aggravating factors in determining the appropriate sanction. The Commissioner considered what, if any, action should be taken and examined each potential sanction in ascending order of severity.

### **No Action**

The Commissioner has determined that to take no action in this case is not an appropriate response to the significant failures by Mr Rea to comply with the Code; namely breaches of paragraphs 4.16(a), 6.1 and 6.2 of the Code. This conduct is a serious matter and the Commissioner is satisfied that it was not merely an 'inadvertent' failure to comply with the Code.

### **Censure**

Censure will normally take the form of criticism of the conduct which was found to constitute or have given rise to a failure to comply with the Code. The Commissioner may consider censure to be appropriate where she finds there has been a failure to comply with the Code, or that it would not be sufficient to conclude the case by taking no further action but the circumstances are such that a suspension or partial suspension is not warranted.

On the facts of this case the Commissioner has determined that Mr Rea's conduct could not be considered as a minor failure to comply with the Code. The sanctions of partial and full suspension are not available to the Commissioner because Mr Rea has ceased to be a councillor.

The Commissioner has considered the applicability of the objectives identified in paragraph 3 of the Sanction Guidelines and considered that the objective of upholding and improving the standard of conduct expected of Councillors and in fostering the public confidence in Local Government and in the ethical standards regime that was introduced by the 2014 Act is relevant to the consideration of sanction in this case. Any sanction imposed must be justified in the wider public interest and should be designed to discourage or prevent councillors from any future failures to comply with the Code or to discourage similar conduct by others.

### **Disqualification**

Disqualification is the most severe of the options open to the Commissioner. The factors which may lead to this option are listed at paragraphs 19 (a) to (h) of the Sanctions Guidelines. The factors listed are a non-exhaustive list. In this case, the Commissioner considered whether factor f 'Misusing Council resources' applied to the facts of the case. Mr Rea had used councillors speaking time for three minutes at the Council's predetermination hearing when he ought not to have participated in the discussion. The Commissioner has determined that Mr Rea used his position as a Councillor improperly to confer an advantage for Halls in respect of its planning application. However as Mr Scofield QC points out this was not an event which occurred in the Council Chamber and the use of councillor speaking time was for three minutes only. The meeting was held at Mossley Mill which is the Council's offices and therefore this a Council resource. Miss Fee BL submits that this misuse of council resources was a mere 'technical breach'. In light of these submissions and the facts of this case, I consider that there was a misuse of council resources by Mr Rea in that Council Offices and speaking time at a meeting of the Council were used by him in breach of the Code. However this conduct was not sufficient to warrant disqualification.

The Commissioner also considered whether factor 'h' 'Unfit for Public Office' of the potential disqualification factors was relevant to this case. Factor 'h' is outlined as follows

*'h If the conduct giving rise to a failure to comply with the Code is such as to render Mr Rea entirely unfit for public office, then disqualification is likely to be the appropriate sanction'.*

The Commissioner note that Mr Rea was formerly the Chair of the Council's Audit Committee, which is a significant governance role in the Council. The Commissioner noted that the Chief Executive. Ms Jacqui Dixon provided information that Councillor who wished to speak on a planning application who are not members of the Council's Planning Committee were not previously asked to declare any interests. The Chief Executive has informed the Deputy Commissioner that she intends to inform all Councillors whether on the Planning Committee or not if they have any interest to declare should they intend to speak on a planning application. Further information of the Council's procedures at pre determination hearings in this regard was also provided by Councillor Frazer Agnew MBE by letter dated 27 May 2018. Councillor Agnew also expressed his opinion of Mr Rea as a long serving councillor and 'a man of utmost integrity, sincerity and good character'.

In light of these submissions and the facts of this case, the Commissioner determined that the conduct of Mr Rea in failing to comply with the Code was not such as to render him unfit for public office.

The Commissioner determined that, although the failures by Mr Rea were serious, having regard to his exemplary public service, the conduct was not so serious as to warrant disqualification.

Taking all of this into account, the Commissioner considers censure to be an appropriate and proportionate in this case.

## **Leave to Appeal**

Mr Rea may seek the permission of the High Court to appeal against a decision made by the Commissioner, which must be made within 21 days of the date on which Alderman Rea receives written notice of the Commissioner's decision.

## **Learning Points**

This is an important case which highlights a number of learning points for other councillors and for the Deputy Commissioner.

1. The requirements relating to the declaration of pecuniary interests are a fundamental requirement of the Code and it is a councillor's personal responsibility to comply with the Code, regardless of the relevant Council practices and procedures.
2. The Code provides for separate and distinct obligations in respect of both registration and declaration of personal interests. Part 5 of the Code relates to the requirements on councillors to register their personal interests. However having registered those interests, under Part 6 of the Code, councillors have an ongoing obligation to comply with the requirements to in relation to the disclosure and declaration of pecuniary (both direct and non-direct) and non - pecuniary interests<sup>17</sup>.
3. The Commissioner wishes to highlight to councillors generally that a failure to declare a pecuniary interest (direct or indirect) may result in a sanction of disqualification. This is a serious conduct matter which is underpinned by 28 of the Local Government Act 1972. A breach of section 28 may in some cases be a criminal offence.

---

<sup>17</sup> In this case the issue of non-pecuniary interest was relevant as the complainant questioned whether Mr Rea had a conflict of interest when he spoke at the per-determination hearing.

4. Section 28 of the 1972 Act created a statutory obligation on councillors to declare a pecuniary interest, which is reflected in paragraph 6.1 of the Code. It was the clear intent of the Northern Ireland Assembly to retain this provision while providing for councillor's obligations in relation to declarations of pecuniary interest in the Code. The retention of section 28 does not render the Code redundant. However, section 62(2) of the 2014 Act is confusing for councillors as it appears to provide a form of dispensation for councillors outside that provided for at Section 6 of the Code. The position is confusing and unclear. The Commissioner intends therefore to write to the Department requesting it to review the retention of section 62(2) of the 2014 Act as part of its ongoing review of the Code.
5. The English Court of Appeal case in *R v Liverpool City Council*<sup>18</sup> and Justice Keegan's decision in *Rural Integrity judicial review*<sup>19</sup> highlight that a failure to declare an interest is a serious matter not only for councillors in regulating their conduct but a failure of this nature is a failure in governance<sup>20</sup>. Such a failure may result in a finding of maladministration by the relevant Ombudsman and also a judicial review challenge to that decision.
6. The importance of engaging and co-operating with both the investigation and adjudication process. In this case the respondent, assisted by his legal representatives, was given credit for his co-operation throughout the process and the regard he showed for the standards regime. This invariably leads to consequential savings to the public purse.
7. The Code is based on 12 principles of conduct (the Principles). These are intended to promote the highest standards of conduct for councillors. Section 53 (1) of the 2014 Act provides that the Code must specify principles which are to govern the conduct of councillors. At paragraph 3.1 of the Code it states that '*As a councillor, you must observe these Principles*'. The Principles are not merely aspirational in nature. Paragraph 3.2 of the Code states that '*The Rules of conduct set out in the Code (the Rules) are the specific application of the Principles. Your compliance with the Rules, which is required under the Code, will help you meet the high standards of conduct promoted by the Principles*'.

The Commissioner wishes to remind councillors that their conduct is regulated by both the Rules and the Principles and councillors must have regard to both when considering their responsibilities under the Code.

---

<sup>18</sup> *R v Local Commissioner for Administration in North and North East England ex parte Liverpool City Council* [2001] 1 All ER 462

<sup>19</sup> [2017] NIQB 133

<sup>20</sup> The Code is by virtue of section 2 (1)(b) an integral part of the Council's constitution

8. Mr Rea is aggrieved by the fact that a number of councillors in attendance at the pre-determination hearing on 27 October 2016 had, in his view also breached the Code in that they remained at the hearing having declared an interest. I can make no finding in this regard. However, in light of this concern, I request that the Deputy Commissioner review his investigations procedures and set out clearly the criteria for the application of section 55(1)(b) of the 2014 Act. The latter provides for an investigation into other cases where he may consider that a councillor (or former councillor) has or may have failed to comply with the Code.

**MARIE ANDERSON**

**NI Local Government Commissioner for Standards**

**8 July 2019**