IN THE HOUSE OF LORDS No. [2001] UKHL 67

Thursday 13th December, 2001

B e f o r e:

LORD BINGHAM OF CORNHILL
LORD STEYN
LORD HOPE OF CRAIGHEAD
LORD HOBHOUSE OF WOOD-BOROUGH
LORD SCOTT OF FOSCOTE

OPINIONS OF THE LORDS OF APPEAL IN THE CAUSE

- - - - - - -

MAGILL

(APPELLANT)

- v -

PORTER

(RESPONDENT)

MAGILL

(APPELLANT)

v.

WEEKS

(RESPONDENT)

- - - - - - - - -

J U D G M E N T

LORD BINGHAM OF CORNHILL

My Lords,

1. The issue in this appeal is whether the auditor should have certified any sum to be due to the Westminster City Council from Dame Shirley Porter and Mr David Weeks and, if so, in what amount.

2. The appellant, Mr John Magill, is the auditor. He was appointed by the Audit Commission under section 13 of the Local Government Finance Act 1982 to audit the accounts of Westminster City Council for the years 1987-8 to 1994-5. He conducted a very lengthy and detailed audit and certified under section 20 of the Act that three councillors and three officers had, by wilful misconduct, jointly and severally caused a loss of approximately £31m to the council which they were liable to make good. All three of the councillors and two of the officers pursued appeals against the auditor's decision to the Queen's Bench Divisional Court (Rose LJ, Latham and Keene JJ). The councillors were Dame Shirley Porter, who was leader of the council at all material times, Mr David Weeks, who was deputy leader, and Mr Hartley, who from June 1987 was chairman of the council's Housing Committee. The two officers were Mr England, who was the council's director of housing, and Mr Phillips, who was managing director of the council. The Divisional Court upheld the auditor's finding that Dame Shirley Porter and Mr Weeks were liable, although it reduced the sum certified; it allowed the appeals of Mr Hartley and the two officers and quashed the auditor's certificate in relation to them: (1997) 96 LGR 157. On further appeal by Dame Shirley Porter and Mr Weeks, the Court of Appeal by a majority (Kennedy and Schiemann LJJ, Robert Walker LJ dissenting) upheld both appeals on liability: [2000] 2 WLR 1420. Robert Walker LJ, although in favour of dismissing both appeals against liability, would have reduced the sum of the auditor's certificate: p 1504. On this quantum issue Kennedy LJ agreed with him (at p 1429) and Schiemann LJ (at p 1447) expressed no opinion. The auditor now appeals to this House seeking to reinstate the certificate issued against Dame Shirley Porter and Mr Weeks in the sum certified by the Divisional Court. Mr Hartley and the two officers are no longer directly involved in the proceedings. It is necessary to decide whether the Court of Appeal was right to quash the certificate issued against Dame Shirley Porter and Mr Weeks and, if not, in what sum that certificate should have been issued.

3. My Lords, the facts giving rise to this appeal and much of the evidence have been summarised at some length by the Divisional Court (at pp 164-166, 175-203) and by the Court of Appeal (pp 1431-1432, 1463-1482) and are the subject of a lengthy statement of facts agreed between the parties for purposes of this appeal. The facts and the evidence are crucial to the appeal, but it is unnecessary to repeat the detailed summaries already made. It is enough, for present purposes, to highlight some of the key events in the narrative, which I take from the agreed statement of facts.

4. The council comprised 60 councillors elected to represent 23 wards. As a result of the local government elections in May 1986, the overall Conservative party majority was reduced from 26 to 4. The close results of those elections prompted leading members of the council to consider how council policies could be developed in order to advance the electoral prospects of the Conservative party in the next local government election to be held in 1990. Dame Shirley Porter was determined that the Conservative party would have a greater majority at the 1990 elections than that which it had narrowly achieved in 1986. With this end in view, she reorganised the party's administrative and decision-making structure and herself chaired a group of committee chairmen. This body comprised herself as leader, Mr Weeks, the deputy leader, the majority party's chief whip and the chairmen of the council's committees. It was not a committee or sub-committee appointed by the council. It met on a regular basis, sometimes with officers in

attendance. It developed and promoted policy. One of these concerned the designation of council-owned properties for sale.

5. The council first introduced a policy of designated sales in 1972. Under this policy, blocks of council dwellings were designated and, when a dwelling in a designated block became vacant, it was not re-let but offered for sale to an approved applicant with the intention that all dwellings in designated blocks would become owner-occupied. Under the scheme as it was in July 1987, 10 to 20 sales per annum were generated from the 300 dwellings then designated. With a view to achieving greater success in the 1990 elections, the chairmen's group formulated a policy entitled "Building Stable Communities" (known for short as "BSC"). This included targets for increasing the numbers of Conservative voters in each of eight key wards, the target voter figures for those wards adding up to a total of 2,200. The eight most marginal wards in the election of May 1986 from the Conservative party's point of view were Bayswater, Cavendish, Hamilton Terrace, Little Venice, Millbank, St James's, Victoria and West End. Those eight wards were chosen in mid-February 1987 by some members of the majority party on the council (including Dame Shirley Porter and Councillor Weeks), and were known as the "key wards". Both the eight key wards and the target voter figures (which envisaged an overall increase of 2,200 Conservative supporters in the eight key wards) were identified to officers in February 1987. The target voter figures remained the same thereafter and the achievement of those figures (including the contribution of designated sales to them) was monitored by leading members and officers. The references in contemporary documents to "new residents", "more electors" and "new electors" in many instances were euphemisms for "more potential Conservative voters", particularly in marginal wards. A major element of BSC was to increase designated sales of council properties in the eight key wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative. In some of the key wards there was very little council housing and few or no designated properties. But, even in respect of those wards, designated sales appeared on monitoring charts recording the progress towards the targets in the eight key wards. From July 1986, if not before, concentrating on marginal wards was majority party policy. The intention of the majority party was to develop council policies which would target marginal wards, including such housing policies as could affect the make-up of the electorate in those wards.

6. Very soon after the 1986 local government elections, the first suggestions for disposing of council housing, including increased designation, were made. On 19 May 1986, Mr England informed the then chairman of the Housing Committee that it would be virtually impossible for the council to meet its statutory obligations if a policy of wholesale disposal of council housing were to be adopted. On 3 June 1986 the chairmen's group decided that major policy initiatives should come down from it (and from the Policy and Resources Committee) and it discussed marginal wards. On 5 June 1986 the chairman of the Housing Committee responded to Dame Shirley Porter's request for a note on "balancing the social mix" by identifying a number of factors contributing to the drop in the Conservative party's "natural support" and suggesting various options for increasing home ownership, including increased designated sales which would, however, lessen the council's "already stretched ability to meet our statutory requirements". On 24 June 1986 Dame Shirley Porter and Mr Weeks attended the chief officers' board when the officers were told that the focus of attention would be on winning the next election, and there was discussion of the majority party's objective of "social engineering including housing". On 30 June 1986 a working lunch, attended by Dame Shirley Porter and others, was held to discuss a prospective planning study: Mr England made a note of the discussion which included references such as "economic justification for Gmander on Hsg", "who is a Tory Voter?", "Gentrification" and "will company lets vote Tory". On 29 July 1986 Dame Shirley Porter had a discussion with Mr Phillips concerning properties in key wards, voting records and decanting and she asked Mr England for information in respect of key wards.

By the beginning of September 1986 the council's policy unit had prepared a paper on "homelessness/gentrification". It stated that "homelessness is reaching crisis proportions" and described "gentrification" as:

> "ensuring that the right people live in the right areas. The areas are relatively easy to define: target wards identified on the basis of electoral trends and results. Defining 'people' is much more difficult and not strictly Council business . . . the housing/planning study should be used to define which initiatives are likely to produce the desired results, and in which areas."

On 1 September 1986 Mr England produced a paper for Mr Weeks on "Gentrification" in which he identified the major constraints on initiatives to increase home ownership as the duties to the homeless and other high priority rehousing requirements.

7. Dame Shirley Porter wrote a paper setting out her "Strategy to 1990" in which she gave top priority to winning the 1990 elections. Two of the key issues identified in the "Strategy to 1990" in relation to electoral success were "homelessness/gentrification" and how best to use the study about to be commissioned from consultants. The paper prepared by the policy unit on "homelessness/gentrification" formed part of Dame Shirley Porter's paper. Her "Strategy to 1990" was agreed by the chairmen's group on 2 September 1986 and on 3 September was circulated by the head of the policy unit to all chief officers. Officers recommended that the consultants' study should be used to establish the key wards and the need for increased home ownership in them. At a meeting on 15 September 1986 with representatives of the consultants, attended by Dame Shirley Porter and Mr Weeks, there was a discussion of a strategy "to push labour voters out of marginal wards. Housing Dept can't say privatise/gentrify council blocks in marginal wards - 400 in B & B but we could say - preserve economic base - need to boot out these blocks". Reference was also made to an aim to "preserve local communities - but boot out certain categories" and to community groups which "don't vote Tory". Dame Shirley Porter told the consultants "we want the right answers". In January 1987 a paper on home ownership was written at Dame Shirley Porter's request by the then vice-chairman of the Housing Committee, Mr Segal. That paper, written in advance of the consultants' report, identified the short-term objective as being "to target the marginal wards and, as a matter of the utmost urgency, redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes". The paper assumed that owner-occupiers were more inclined to vote Conservative and drew attention to the low proportion of owner-occupiers in Westminster relative to the national average. It called for the council to reappraise its designation policy and to "identify far more blocks particularly in key marginal wards". The paper was submitted to, and generally endorsed, by the chairmen's group at its meeting on 27 January 1987. Further work on designated sales in marginal wards followed. At least from the time of this paper in January 1987, targeting designated sales in marginal wards was firm political policy. The chairmen's group decided on 24 March 1987 to adopt a target of 250 designated sales per annum in the marginal wards. At that meeting, attended by Dame Shirley Porter and Mr Weeks, she stated: "need a peg in the [consultants'] report". The chairmen's group also considered a draft report. Dame Shirley Porter indicated that she did not want the report to go into detail because it exposed the other sales policies for discussion, notwithstanding that the report had been prepared, according to Mr England, to give members a "smokescreen" to identify the designated area for growth. Mr England explained to the managing director in a memorandum dated 26 March 1987 that the intention was to plant a question at the Housing Committee on 1 April 1987 in order to obtain authority for officers to provide a report on how to increase designated sales to at least 250 per annum, and that he intended to report back "once we have [the consultants'] steer on 250 in certain wards".

8. By this stage legal concerns were beginning to surface. On 20 March 1987 the deputy city

solicitor advised the then chairman of the Housing Committee on the need to have sufficient justification for a major change in policy on designated sales, reinforcing (as he put it) the notes of caution that had already been expressed. On 24 March 1987 one of Dame Shirley Porter's aides (Mr Greenman) addressed certain questions to the director of housing and the city solicitor. In response to the first question addressed to him, namely, whether the council's new policy on 100% designation for sale in the eight target wards would conflict with the council's statutory obligations, the city solicitor replied on 24 March 1987 to Dame Shirley Porter that:

> "If the policy is to be introduced then as a matter of law the reasons for its introduction have got to be carefully argued. The needs of the homeless and the impact of a decision to sell accommodation which might otherwise be available for them is a highly relevant consideration which will have to be balanced against the advantages of selling. It is fundamental that the arguments in favour of selling be soundly based and properly argued. Anything which smacks of political machinations will be viewed with great suspicion by the courts."

A further question was addressed: "Is there any possibility that this policy will lay the council open to (a) judicial review of its policy or (b) surcharging for illegality etc". To this question the city solicitor replied:

> > "(a) Yes. The way to avoid successful challenge is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision takers have acted irrationally or relied on an irrelevant consideration.
> >
> > (b) . . . The possibility of surcharge exists but it will be necessary for those challenging to demonstrate that the loss flowed from the act of wilful misconduct. This re-emphasises the need for a good argument to be constructed in favour of sale."

In response to a further question the city solicitor said:

> "It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property. It might be sensible to go forward in stages rather than offer a broad target. Lawyers should be involved in consideration of any reports at the earliest possible stage. Since a general policy will inevitably draw fire the advice of counsel should be sought at an early stage so that if judicial review is commenced the prospects of successful challenge can be minimised".

9. The consultants' report was received by the council on about 10 April 1987. The Divisional Court found that Dame Shirley Porter plainly hoped and was deeply interested in the possibility that the report would provide a peg on which to hang the policy of increasing designated sales in marginal wards. Both she and Mr Weeks knew that, without the consultants' support, the officers could not provide professional justification for designation only in the eight wards. In fact, the consultants' report gave no such support. The report did not identify the eight key wards. Of the five "stress" wards it considered, only two were among the eight key wards. On its face the report gave no support for any increase in designated sales. It recommended that the council should exercise its powers with a view to "making available a supply of low and medium priced rented housing".

10. Before receipt of this report, on 17 March 1987, a memorandum from the director of housing to the chairmen's group advised that, with the scale of designation then proposed, namely of all council properties in the eight key wards (490 sales per annum), the council might find it impossible to meet its statutory obligations to a number of homeless households; that it was not possible in professional terms to justify a designation of all properties in the eight key wards given the impact on the homeless and other priority cases; that the "key ward analysis" would have to be provided by the forthcoming consultants' study; and that members should seek legal advice on the reasonableness of the proposed course of action. In a further memorandum on the following day, the director of housing advised Dame Shirley Porter in addition that it was necessary to consider providing additional properties for the homeless and "non-statutory groups" in non-key wards but that the time required for such provision might conflict "with the objective of achieving the number of sales within the three year period". A later discussion paper on designated sales, prepared in the housing department and presented to Dame Shirley Porter and the chairmen's group on 5 May 1987, stated that the Housing Committee would need to set the number of designated sales per annum to be achieved and select the relevant properties for designation. It recorded that the city solicitor and secretary had advised that it was imperative that counsel's advice should be obtained on the final shape of the committee report and that there were four further matters for decision by the committee. The fourth of these was:

> "Given the inevitable impact on rented supply . . . should the Council's target be 250 per annum or will this have an impact on the Council's re-housing abilities which could not be justified? The [consultants'] report suggests a need to supplement the rented supply. There is nothing in the [consultants'] report which at the moment would justify a designated sales programme on the scale presently proposed."

Having read this discussion paper, Dame Shirley Porter summoned its author and the deputy city solicitor to her office at 9.45am on 5 May 1987. She told the author that the paper was not what was required; that the policy was clear; and that the note needed to spell out how it was to be achieved, not give options. She told the deputy city solicitor to obtain leading counsel's advice. She also required that a revised note be prepared for the chairmen's group meeting that evening.

11. That afternoon, Mr Jeremy Sullivan QC saw the deputy city solicitor, Mr England and the author of the discussion paper in consultation. He was informed that the majority group wished to target sales in marginal wards for electoral advantage. He advised that the council could not lawfully sell 250 properties per annum in the marginal wards alone. He advised that properties had to be designated for proper reasons, across the whole of the city and not in particular wards and that, in identifying properties to be designated, the same criteria had to be applied across the whole city and, ultimately, choice made without reference to anything other than those proper criteria. He also advised on a number of other matters, including the legality of a scheme of capital grants which was not ultimately adopted. Following this consultation, Mr England wrote a note to Dame Shirley Porter suggesting action in relation to the matters identified in the discussion paper. The note was relayed to the chairmen's group at its meeting on the evening of 5 May 1987. That meeting was attended (among others) by Dame Shirley Porter, Mr Weeks and Mr Hartley. In interview on 5 November 1992, in his affidavit and in cross-examination Mr England accepted that Mr Sullivan had not advised that marginality of a ward was a proper factor when designating for sale. In the course of his note Mr England stated:

> "The Housing Committee has already decided that the designated sales target should be 'at least 250'. . . . Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the Council. The Group will, therefore, need to decide whether the 250 target applies across the City or whether in fact 250 sales in marginal wards are required in which case following Counsel's advice, somewhere in the region of

> 300-350 properties will need to be sold across the City. This will clearly exacerbate the problems of dealing with housing demand . . .
>
> The target set by the Housing Committee is 'at least 250'. Counsel advises that this cannot be targeted solely in key wards, therefore, the Group will have to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the [consultants'] study should be included in the report. This report has now been released to the opposition.
>
> The Housing Committee has set a target of at least 250. If the Group wishes to go for a larger global target in order to achieve 250 in the marginal wards, this will require a decision by the Committee. Counsel confirms that the report should be considered at the same meeting."

On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course described in Mr England's note of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards.

12. On 13 May 1987, Dame Shirley Porter was re-elected leader and Mr Weeks deputy leader of the majority party. Dame Shirley Porter appointed Mr Weeks as lead chairman for BSC with responsibility for ensuring that its performance met time-scales. She appointed Mr Hartley to be chairman of the Housing Committee.

13. The chairmen's group met on 13-14 June 1987. In a note by Dame Shirley Porter presented to the meeting it was stated that:

> "We face a tremendous challenge. The electoral register for the 1990 elections will be compiled in just over 2 years' time. Some very ambitious policies must be implemented by then: providing a great deal of affordable housing in key areas; protecting the electoral base in other areas . . . There is very little time to achieve these radical policy objectives . . ."

In a note by Dame Shirley Porter on BSC the key elements of the policy were summarised. One of these was the targeting of key areas, under which heading the voter targets for the eight marginal wards, in the total of 2,200 voters already mentioned, were listed. The note said that:

> "A key element in BSC must be to attract homeowners into Westminster. This means finding innovative ways of ensuring that the right sort of housing is available to the right sort of buyer or tenant. And it must be available by October 1989".

October 1989 was the qualifying date for inclusion in the electoral register for the 1990 local government elections. At this meeting the chairmen's group endorsed the target of 500 sales per annum across the council area in order to produce the number of sales desired in the marginal wards. Mr Hartley, the new chairman of the Housing Committee, knew that the policy for designated sales which he had to carry forward was to produce 250 sales in the marginal wards, in order to improve the Conservative vote in those wards. The target of 500 was passed on to officers, and members agreed that they would select at the Housing Committee the estates they wished to see designated for sale. A meeting was held on 6 July 1987, two days before the Housing Committee was to meet, attended by Dame Shirley Porter, Mr Weeks, Mr Hartley and others to discuss how to monitor the impact of BSC policies on each key ward in the context of electoral considerations and to monitor targets for such policies including designated sales. It was recorded that "the Leader reaffirmed the agreed BSC programme of action as agreed by chairmen as an all embracing strategic Council policy with priorities for BSC initiatives" and that both she and Mr Hartley "felt that the City Council had an agreed plan of action which could be clearly understood and implemented by officers".

14. At the meeting of the Housing Committee on 8 July 1987, Mr Hartley presented a joint report in which option 3, designation of sufficient properties to produce 500 sales per annum, was the majority party's preferred option. That option was placed before the committee because Dame Shirley Porter and Mr Weeks hoped to increase the Conservative vote in marginal wards by selling each year 250 council properties in those wards. They knew, or had every reason to believe, that as adoption of option 3 was Conservative policy, promulgated by Mr Hartley as chairman of the committee, it would become council policy. There was no instance of the Housing Committee, at this time, not adopting the majority party's policy. Mr Hartley knew that he was promoting this policy in order to produce 250 sales per annum in the eight marginal wards in order to increase the number of Conservative party voters in them. He also knew that, in supporting this policy, it would be adopted by the Housing Committee. The committee resolved to designate a number of specific properties for sale which were expected to produce 500 sales per annum. The committee further resolved to introduce a scheme of capital grants. 20,697 properties had been identified in the joint report to the committee as eligible for designation. Of these, 5,912 dwellings (29%) were in the eight key wards, 13,633 dwellings (66%) were in the other fifteen wards and there were in addition 1,152 scattered miscellaneous properties. The list of properties to be designated was not recommended by officers; it was presented by the chairman of the Housing Committee. 9,360 dwellings were designated, including all the scattered miscellaneous properties. 74% of all eligible dwellings in the eight key wards were designated; only 28% of all eligible properties in the other wards were designated.

15. There were seven Conservative party members who voted at the meeting of the Housing Committee: Councillors Hartley, Dutt, Warner, Bianco, Buxton, Evans and Hooper. Councillors Hartley, Dutt, Evans, Hooper and Bianco were appointed to be members of the Housing Committee by Dame Shirley Porter acting as the chairman of the Policy and Resources Committee. For five of these members (Councillors Hartley, Dutt, Evans, Buxton and Hooper) it was the first meeting of the Housing Committee they had attended as voting members. There were five members of the committee who were members of the Labour Party. Designated sales was the seventh of eighteen items on the agenda. The committee adopted the list proposed by Councillor Hartley by seven votes to five. The Conservative members voted in favour; the opposition members voted against.

16. At a meeting on 29 July 1987 the council received a report from the Housing Committee. The city solicitor informed the council that a report on designated sales had been prepared following a consultation with leading counsel and that it had been seen and approved by leading counsel before it went to the Housing Committee. The council voted to receive the report.

17. The achievement of the electoral targets set out in the BSC campaign "plan for action", including those for designated sales, was monitored by the chairmen's group and by members' and officers' steering groups. On 14 September 1987, the chairmen's group decided that the managing director of the council should produce a BSC monitoring report to every other of its meetings, and confidential BSC monitoring reports were produced to such meetings on a number of dates thereafter. The reports considered what progress was being made in each of the eight key wards towards the sales target for that ward in 1987-1988. Two reports which were presented to the Policy and Resources Committee of the council, in October 1987 and May 1988, referred to BSC but did not refer to the key wards, the targets established for them or the system established to secure the achievement of those targets. Documents which were intended for public consumption did "not speak to key wards". In 1988, opposition members of the council raised questions about why the key/marginal wards were being monitored. There were deliberate attempts by officers to conceal the system of monitoring which had been established by giving

deliberately misleading answers to proper questions from members of the minority party on the council. Under this pressure from the opposition, the BSC members' steering group (which Mr Weeks chaired) sought, but was unable to find, a rationale (other than their electoral marginality) for the selection of the eight key wards. On 12 April 1988 the chairmen's group, with Dame Shirley Porter and Mr Weeks in attendance, were informed that the BSC members' steering group would consider a BSC monitoring report (in the form requested by the chairmen) and a "rationale for key wards" at its meeting on 28 April 1988. Item 3 on the agenda for that meeting was "Rationale for Key Wards". This took the form of a paper by an officer, which did not provide any rationale for the selection of the eight key wards. The minutes recorded that "the paper looked at ways of going public on targeted wards. It was agreed that no such paper should be a formal document; each ward should be taken individually". Mr England's note of the meeting, under "area approach" recorded "Minority Party interest . . . not easy to confirm just the 8. . . Keep on Dodging???". Subsequent attempts were made to find a rationale (other than their electoral marginality) for the eight key wards. On 25 July 1988 Mr England met with Dr Dutt and discussed (among other things) "explanation for eight wards", "public audit . . . can we justify why eight were chosen" and "why did we pick them? Members will ask us", and Mr England's action list as a result of the meeting included "key wards - find defence of 8 wards". In a memorandum dated 24 August 1988, the city solicitor was asked why the eight wards were chosen, by whom they were chosen and why they were regarded as key, but those questions were never answered.

18. On 19 July 1989 the BBC transmitted a "Panorama" programme on the designated sales policy in Westminster. Charts presented to the BSC members' steering group after 28 July 1989 recorded rights to buy and designated sales in all 23 wards in the city, not just the eight key wards. The auditor was appointed following objections made by a number of local government electors in letters dated 18 July, 20 July and 8 November 1989.

The underlying legal principles

19. The legal principles which underlie the auditor's findings against Dame Shirley Porter and Mr Weeks are not in the main controversial, but since they are the bedrock of his decision they should be briefly summarised.

(1) *Powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise.* A very clear statement of this principle is to be found in Wade and Forsyth, *Administrative Law* (8th ed, 2000) at pp 356-357. The corresponding passage in an earlier edition of that work was expressly approved by Lord Bridge of Harwich in *R v Tower Hamlets London Borough Council Ex p Chetnik Developments Ltd* [1988] AC 858 at 872:

> "Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended . . ."

The principle is routinely applied, as by Neill LJ in *Credit Suisse v Allerdale Borough Council* [1997] QB 306 at 333 who described it as "a general principle of public law".

(2) *Such powers are exercised by or on the delegation of councillors. It is misconduct in a councillor to exercise or be party to the exercise of such powers otherwise than for the public purpose for which the powers were conferred.* Where public powers are conferred on a council, it is the body of elected councillors who must exercise those powers save to the extent that such exercise is lawfully delegated to groups of councillors or to officers. All will act in the name or on behalf of the council. It follows from the proposition that public powers are conferred as if

upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle. It was clearly expressed by the Lord Chancellor of Ireland in *Attorney General ex rel Rea v Belfast Corporation* (1855) 4 IR Ch 119 at 160-161:

> "Municipal Corporations would cease to be tangible bodies for any purpose of redress on account of a breach of trust, if the individuals who constituted the executive, and by whom the injury has been committed, cannot be made responsible. They are a collection of persons doing acts that, when done, are the acts of the Corporation, but which are induced by the individuals who recommend and support them; and this Court holds that persons who withdraw themselves from the duties of their office may be rendered equally answerable for the acts of those whom they allow, by their absence, to have exclusive dominion over the corporate property . . . As the trustees of the corporate estate, nominated by the Legislature, and appointed by their fellow-citizens, it is their duty to attend to the interests of the Corporation, conduct themselves honestly and uprightly, and to see that every one acts for the interests of the trust over which he and they are placed."

(3) *If the councillors misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct.* The auditor's power to surcharge councillors under section 20(1)(b) of the 1982 Act is dependent on a finding of wilful misconduct. That expression was defined by Webster J in *Graham v Teesdale* (1981) 81 LGR 117 at 123 to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not". That definition was approved by the Court of Appeal in *Lloyd v McMahon* [1987] AC 625 at 646-7, 655 and 674 and by the House of Lords at pp 697 and 702. It was adopted by the Divisional Court in the present case: (1997) 96 LGR 157 at 167-8. It was also accepted by the Court of Appeal: [2000] 2 WLR 1420 at p 1443. There was no challenge to this definition before the House and I would accept it as representing the intention of Parliament when using this expression.

(4) *If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council.* This is the rule now laid down in section 20(1) of the 1982 Act. But it is not a new rule. A similar provision was expressed in section 247(7) of the Public Health Act 1875, section 228(1)(d) of the Local Government Act 1933 and in section 161(4) of the Local Government Act 1972 (although in the two earlier sections the reference was to "negligence or misconduct" and not to "wilful misconduct"). Even before these statutory provisions the law had been declared in clear terms. One such statement may be found in *Attorney General v Wilson* (1840) Cr & Ph 1 at pp 24-27 where the Lord Chancellor (Lord Cottenham) said:

> "The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property, shall the corporations be estopped in this Court from complaining because the act done was ostensibly an act of the corporation? . . . As members of the governing body, it was their duty as the corporation, whose trustees and agents they, in that respect, were, to preserve and protect the property confided to them; instead of which, having previously, as they supposed, placed the property, by the deeds of the 30th May 1835, in a convenient position for that purpose, they take measures for alienating that property, with the avowed design of depriving the corporation of it; and, with this view, they procure trusts to be declared, and transfers of part of the property to be made to the several other Defendants in this cause, for purposes in no manner connected with the purposes to which the funds were devoted, and for which it was their duty

to protect and preserve them. This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of spoliation against all the inhabitants of Leeds liable to the borough rate; every individual of whom had an interest in the fund, for his exoneration, pro tanto, from the borough rate. If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but that such agent or trustee would, in this Court, be made responsible for so much of the alienated property as could not be recovered in specie? But if Lord Hardwicke was right in *The Charitable Corporation case*, and I am right in this case, in considering the authors of the wrong as agents or trustees of the corporation, then the two cases are identical. I cannot doubt, therefore, that the Plaintiffs are entitled to redress against the three trustees and those members of the governing body who were instrumental in carrying into effect the acts complained of: and it is proved that the five Defendants fall under that description."

(5) *Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party.* Support for this principle may be found in *R v Board of Education* [1910] 2 KB 165 at 181 where Farwell LJ said:

"If this means that the Board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby."

This passage was accepted by Lord Upjohn in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1058, 1061. In *R v Port Talbot Borough Council and Others Ex p Jones* [1988] 2 All ER 207 at 214, where council accommodation had been allocated to an applicant in order that she should be the better able to fight an election, Nolan J regarded that decision as based on irrelevant considerations.

20. Counsel for Dame Shirley Porter and Mr Weeks urged upon the House what were said to be the realities of party politics. Councillors elected as members of a political party and forming part of that party group on the council could not be expected to be oblivious to considerations of party political advantage. So long as they had reasons for taking action other than purely partisan political reasons their conduct could not be impugned. Reliance was placed on observations of Kennedy LJ in the Court of Appeal (at 1444):

"Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. That seems to me to be unreal. In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it. In most cases they cannot seriously be expected to disregard it, but they know that if the action which they take is to withstand scrutiny (to be 'judge-proof') there must be sound local government reasons, not just excuses, on which they can rely."

Schiemann LJ (at pp 1448, 1449) spoke to similar effect:

"Whether or not the decision of the housing committee was unlawful depends, in the circumstances of this case, on the motivation of the committee at the time of the vote. If its motive was purely to secure electoral advantage for the Conservative Party then the decision was unlawful. If purely Housing Act considerations were its motivation then its decision would be lawful. . . . There is a complication. Frequently individual persons act from mixed motives. Further, group decisions may have multiple motivations - in part because there are many votes cast and in part because each voter may himself have several motivations . . . It is legitimate for councillors to desire that their party should win the next election. Our political

system works on the basis that they desire that because they think that the policies to which their party is wedded is in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality . . ."

21. Whatever the difficulties of application which may arise in a borderline case, I do not consider the overriding principle to be in doubt. Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council.

22. The House was referred to a number of cases in which the part which political allegiance may properly play in local government has been explored: *R v Sheffield City Council, Ex p Chadwick* (1985) 84 LGR 563; *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419; *Jones v Swansea City Council* [1990] 1 WLR 54; *R v Bradford City Metropolitan Council, Ex p Wilson* [1990] 2 QB 375; *R v Local Commissioner for Administration in North and North East of England, Ex p Liverpool City Council* [2001] 1 All ER 462. These cases show that while councillors may lawfully support a policy adopted by their party they must not abdicate their responsibility and duty of exercising personal judgment. There is nothing in these cases to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage.

The findings made against Dame Shirley Porter and Mr Weeks

23. Reference has already been made to the detailed and protracted investigation conducted by the auditor. Details are given in the judgment of the Divisional Court at pp 161-162. He made very lengthy findings. The Divisional Court in its turn received a mass of written material, heard evidence from Dame Shirley Porter and Mr Weeks and conducted a hearing extending over 23 sitting days. The decision of the auditor and the Divisional Court adverse to Dame Shirley Porter and Mr Weeks rested on four main findings.

24. The first of these findings was that the Westminster City Council adopted a policy the object of which was to achieve a specified annual level of sales of properties owned by the council in the eight marginal wards with the intention that the properties thus vacated should be sold to new residents who, as owner-occupiers, might reasonably be expected to vote conservative and so increase the electoral strength of the Conservative Party in those wards in the 1990 council elections. The auditor put his conclusions on this point in a number of different ways. It is enough to quote paragraph 53(2)(d)(v) of his summary of his findings and views:

"both the decision to increase the number of designated sales and the selection of the properties designated for sale were influenced by an irrelevant consideration, namely the electoral advantage of the majority party. I have found that the electoral advantage of the

majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant consideration which influenced both the decision to increase designated sales by 500 per annum and the selection of properties designated for sale. My view is that the Council was engaged in gerrymandering, which I have found is a disgraceful and improper purpose, and not a purpose for which a local authority may act."

The Divisional Court (at pp 164-165) accepted this conclusion:

"In the 1986 local government elections the Conservative Party on the council were returned with a very small majority. With a view to greater success in the 1990 elections, the party formulated a policy of 'building stable communities'. A major element in this policy was to increase designated sales of council properties in eight key marginal wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative . . . On 8 July 1987 the housing committee, having received a much amended joint report from council officials, resolved to extend the programme of designated sales so as to produce 500 sales per annum city-wide and introduced a scheme for capital grants of £15,000 to encourage tenants to move. On 29 July 1987 the council refused to overturn the committee's decision. Thereafter, the progress of the policy in marginal wards was monitored."

In the Court of Appeal Robert Walker LJ could see no reason why that court, which had not heard the witnesses, could or should depart from the Divisional Court's findings, which there was ample documentary evidence to confirm and virtually no evidence to contradict. These conclusions are clearly accepted in the agreed findings briefly summarised in paragraphs 4-18 above.

25. Nothing that the House has heard gives any ground for doubting the correctness of the conclusion of the auditor and the Divisional Court on this point. It follows from the legal principles already summarised that the council's policy was unlawful because directed to the pursuit of electoral advantage and not the achievement of proper housing objectives.

26. The decision of the auditor and the Divisional Court adverse to Dame Shirley Porter and Mr Weeks was based, secondly, on the conclusion that they were both party to the adoption and implementation of this unlawful policy.

27. With regard to Dame Shirley Porter the auditor found (at p 417, para 1147 of his decision):

"I find as a fact that Councillor Lady Porter was one of the Members responsible for determining the direction and content of the policy of the majority group on the Council. She formulated the '*Strategy to 1990*' which aimed to give top priority in the development of Council policies to electoral success. I find that, after the local government elections in May 1986, her top priority was to secure that the Conservative Party was successful in the local government elections for the Council in 1990 and she ensured that the policies of the Council on matters such as home ownership and homelessness were directed to that end. I find as a fact that she was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For her, the designated sales policy was a means to that end."

The auditor made similar findings concerning Mr Weeks (p 578, paras 1579-1580):

"I have found that Councillor Weeks was one of the Members responsible for determining the direction and content of the policy of the majority group on the Council. He was aware

of, and supported, the Leader's '*Strategy to 1990*' which aimed to give top priority in the development of Council policies to electoral success. He was aware of, and supported, the initial housing strategy, evolved after the May 1986 local government elections, which involved concentration of activity in marginal wards to help the Conservative party to win the 1990 local government elections, including increased designated sales. I have found as a fact that he was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For him, the designated sales policy was a means to that end.

I have found that thereafter, Councillor Weeks promoted and supported the Leader's '*Strategy to 1990*' and a policy of targeting designated sales and other Council policies in marginal wards in order to secure electoral advantage for the Conservative Party."

The Divisional Court reached similar conclusions (at pages 175, 176 and 183):

"[Dame Shirley Porter] was by title leader of the majority party and by personality a leader not a follower. Targeting marginal wards was, probably from the end of July 1986 at the latest, central to her political objectives, as a succession of contemporaneous documents makes plain . . . [Mr Weeks] said that the idea of targeting designated sales in marginal wards had 'not got to a detailed stage by March 1987': it was still 'pretty loose' and remained so, even after 5 May. Although he was the lead BSC chairman monitoring the performance of other chairmen, he said he had no direct responsibility for designated sales policy which was a matter 'wholly within the ……..view of the housing committee'. We reject this. As we have said, one of [Dame Shirley Porter's] central objectives from July 1986 was targeting marginal wards and we accept [Mr England's] evidence that, at least from the time of the Segal paper in January 1987, targeting designated sales in marginal wards was firm political policy. As deputy leader and, as he admitted, one who worked closely with the leader and was 'the details man,' [Mr Weeks] was well aware of [Dame Shirley Porter's] objectives and determination and we find that one of his roles to ensure by supervision that the housing committee fulfilled the objectives of the leader and the majority party, particularly in targeting designated sales in marginal wards. Whereas in his affidavit he said that key wards were not selected because of their marginality, in his oral evidence he said that marginality was the reason for their selection . . . We find that designated sales in marginal wards was, as [Mr Hartley] put it, very much [Dame Shirley Porter's] 'baby' and it was embraced by the chairmen's group including [Mr Weeks]. We have no hesitation in finding that the eight wards were identified in early 1987 by members of the majority party *because* they were marginal, albeit that there were also particular problems to be addressed in some of them, such as those in the central activity zone."

In the Court of Appeal Robert Walker LJ summarised the facts at considerable length, but expressed his conclusion briefly (at p 1485):

"The overall impression throughout, from mid-1986 to mid-1989, is that the most influential members of the Conservative group on the city council led by Dame Shirley and Mr Weeks, had electoral advantage as the overriding objective in formulating their housing policy, securing its adoption by the council, and implementing it with high priority given to the marginal wards."

28. These findings again are clearly accepted in the agreed findings already summarised. There is no reason to doubt their correctness.

29. The third finding crucial to the decision against Dame Shirley Porter and Mr Weeks is that they both knew the designated sales policy targeted on marginal wards to be unlawful. The auditor found (at p 500 of his decision, paras 1363-1364):

> "I find as a fact that Councillor Lady Porter knew that Council facilities could not lawfully be used for party political purposes and that the Council was not entitled to exercise its powers or expend its resources to promote the electoral advantage of her party. As she told Councillor Peter Bradley, in answer to a question from him at a meeting of the Council on 10 June 1987: 'As the member well knows, Council facilities must not be used for party political purposes'.
>
> I find as a fact that although Councillor Lady Porter may have believed that Leading Counsel had advised that the Council could lawfully extend its programme of designated sales on the basis of the Joint Report without acting inconsistently with its statutory duties to the homeless, Councillor Lady Porter knew that it was unlawful and wrong for the Council to exercise its powers to secure an electoral advantage for any political party or to gerrymander or, in pursuit of such advantage for her party, she was at least recklessly indifferent as to whether it was right or wrong."

Save for the reference to Dame Shirley Porter's answer to Councillor Peter Bradley, the auditor made identical findings in relation to Mr Weeks (p 584, paras 1597-1598).

30. The Divisional Court made a number of findings on this point at pp 184-185:

> "[Dame Shirley Porter] failed to explain to us why and by whom the eight wards were identified. In our judgment, this failure is explicable not by the effect of the subsequent passage of time on recollection but by the realisation on her part that the more knowledge of detail which she admitted the more closely she would become identified with a policy of targeting designated sales to enhance Conservative prospects in marginal wards which she knew in 1987 and knows now was unlawful . . . From March 1987 when [Dame Shirley Porter] saw [the city solicitor's] answer to the Greenman questions she knew, as she asserts in her affidavit, that the advantages of sale had to 'be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority'. She told us that she was not surprised by that advice and that she did not understand counsel's advice on 5 May to be any different. If this is true, [Dame Shirley Porter] cannot have thought that the suggestion of increasing the numbers city-wide came from Sullivan, because this would have left untouched the continuing ulterior motive in relation to marginal wards which [the city solicitor] had advised against. Clearly there was nothing in Sullivan's advice, as reported by [Mr England], which legitimated designated sales targeted in marginal wards. Indeed, on 10 June [Dame Shirley Porter] answered a question at a council meeting in these terms: 'Council facilities must not be used for party political purposes'. As all members and officers of the council well knew, council properties could not be sold for these purposes. [The city solicitor's] view expressed to the auditor, was that 'everyone in the Conservative Party in Westminster would have known that they could not take party political advantage into account in deciding this policy' . . . Because [Dame Shirley Porter] and [Mr Weeks] knew the targeting policy was unlawful they were content, without further inquiry of Sullivan, [Mr England], [the deputy city solicitor] or anyone else, to adopt the suggestion in [Mr England's] note that it be dressed up in city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage. Knowledge of the unlawfulness and such deliberate dressing-up both inevitably point to, and we find, wilful misconduct on behalf of each of them."

In the Court of Appeal Robert Walker LJ concluded (at p 1488) that Dame Shirley Porter cannot

at any stage have believed that targeting marginal wards for electoral advantage was a lawful use of council resources, and that the position was similar but even clearer in relation to Mr Weeks.

31. Both Dame Shirley Porter and Mr Weeks, in their respective printed cases, accept that they knew that the council could not use its powers for electoral advantage. They plainly did know that. It follows, subject to the points discussed below, that in adopting and implementing the designated sales policy both acted in a way they knew to be unlawful.

32. Fourthly, it was found that the designated sales policy promoted and implemented by Dame Shirley Porter and Mr Weeks caused financial loss to the council. The auditor's conclusion (p 499, para 1361) was as follows:

> "The fact that Councillor Lady Porter was not present at the meeting of the Housing Committee on 8 July 1987 or at the meetings of the Appointed Members' Panels on 4 September 1987, and did not, at those meetings, vote for the extended designated sales policy, which she had sought to procure, does not mean that she was not responsible for the consequences of those decisions. Without Councillor Lady Porter's promotion and support there would have been no proposal put to the Housing Committee for an increased programme of designated sales, targeted in the key/marginal wards and on the scale proposed. I find as a fact that she was one of those responsible for the decisions taken and the consequences which ensued. The resulting financial consequences were caused, in my view, by her misconduct".

An identical finding was made in relation to Mr Weeks: p 583, para 1595. The Divisional Court found (at p 204) that such loss as resulted to the council from the decisions taken by the Housing Committee and the council in July 1987 was caused by the wilful misconduct of Dame Shirley Porter and Mr Weeks. In the Court of Appeal Robert Walker LJ at page 1496 accepted that conclusion. But Dame Shirley Porter and Mr Weeks have raised an issue on causation which it is necessary to consider in more detail below.

33. In argument before the House, counsel for Dame Shirley Porter and Mr Weeks raised a large number of points in resistance to the auditor's appeal. The three most substantial of these arguments are considered in the sections which follow.

Reliance on legal advice.

34. On behalf of Dame Shirley Porter and Mr Weeks it was argued before the House that whatever the lawfulness or unlawfulness of the designated sales policy they acted, in promoting it after 5 May 1987, in accordance with what they believed to be legal advice given to the council and were accordingly not guilty of wilful misconduct.

35. The auditor's findings on this matter in relation to Dame Shirley Porter were set out in paras 1362 and 1366 of his decision at pp 499-500:

> "I find as a fact that Councillor Lady Porter did not act reasonably or in the belief that any expenditure resulting from the decisions of the Housing Committee and the appointed Members' Panels, was authorised by law. Councillor Lady Porter did not receive any legal advice which could have led her to believe that it was open to the Council to engage in gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. She does not claim that the Council was engaged in gerrymandering or in exercising its powers to secure an electoral advantage for the Conservative Party. She does not claim that she received legal advice that it was lawful for the Council to engage in

gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. On the contrary, she received legal advice for the City Solicitor that the Council was not entitled to exercise its powers for an ulterior purpose. Neither this advice nor the advice from Mr Sullivan QC gave any support for targeting designation in the key/marginal wards to promote the electoral advantage of the Conservative Party. As Councillor Lady Porter was aware, that could not lawfully be done.

I am further strengthened in my conclusion by the evasive, false and misleading evidence given to me by Councillor Lady Porter in interview as to the reason for the selection of the 8 key wards, the nature of the targets adopted and the monitoring which took place against those targets and by the misleading answers she gave in response to questions at Council meetings. Councillor Lady Porter did not admit that the designated sales policy was introduced for the purpose of securing electoral advantage for the Conservative Party in the 1990 local government elections in the City of Westminster. If Councillor Lady Porter had believed that the policy of adopting an extended programme of designated sales in order to secure electoral advantage for the Conservative Party was legally acceptable and supported by legal advice, she had ample opportunity to tell me that this was what the Council was doing and that she had received legal advice that it was lawful for the Council so to do."

In relation to Mr Weeks, very similar findings were made in paras 1596 and 1600 at pp 583-585.

36. The Divisional Court found as follows (at p 179):

"The position of [Dame Shirley Porter] in relation to legal advice was initially, as reflected in the opening skeleton argument on her behalf, that she never sought or received advice which could have led her to believe that it was open to the council to exercise its powers to secure an electoral advantage for the majority party. In her affidavit she said her duty as a councillor was 'to decide matters in council only upon considerations relevant to local government factors identified by officers.' . . . She also said that [the city solicitor's] advice that there must not be any ulterior motive came as no surprise in the light of her experience and she did not understand leading counsel's advice on 5 May to have differed from that of [the city solicitor]. In the light of this evidence, although we accept that [Dame Shirley Porter] was always anxious to obtain and follow legal advice, it is, in our judgment, impossible for [Dame Shirley Porter] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible".

The Divisional Court then, in relation to Mr Weeks, found (at p 179):

"[Mr Weeks'] evidence in cross-examination was that, as a result of counsel's advice on 5 May it was clear 'that you could not just designate for 250 in the marginal wards' and that he greeted that advice 'with some relief' because a major aspect of contentiousness could be removed. He said that, following counsel's advice, he and other members 'immediately abandoned' talk of designating blocks in marginal wards and the lists produced 'after 5 May were constructed on other grounds'. Whether that evidence is credible we shall consider later. But it provides no basis whatever for suggesting that, if [Mr Weeks] continued to be party to a scheme for targeting designated sales in marginal wards for electoral advantage, he did so in reliance on legal advice."

37. In the Court of Appeal Robert Walker LJ, in a passage to part of which reference has already been made, said at p 1488:

"The way in which Dame Shirley's case has been presented has varied from time to time. Only in this court, I think, has much emphasis been placed on her reliance on legal advice. In

her oral evidence she said that she was well aware that local authority resources must not be used for party political ends, and that the legal advice which she received came as no surprise to her. She also said that it never occurred to her to ask to see Mr Sullivan's advice in writing. She did not contend, either in her oral evidence or through her counsel (apart from drawing attention to [the city solicitor's] unfortunate references to devising or constructing arguments), that she was relying on any legal advice to the effect that an unlawful policy could be made lawful by camouflage. On the basis of Mr England's 'Note to Leader' it seems likely that Mr Sullivan's unambiguous advice was distorted in the course of transmission to Dame Shirley, although in the absence of any minutes of the meeting of the chairmen's group on the evening of 5 May 1987 (at which Mr England was present) it is impossible to gauge the degree of distortion. But as the Divisional Court found, she cannot at any stage have believed (either in reliance on legal advice or otherwise) that targeting marginal wards for electoral advantage was a lawful use of council resources."

As already noted, Robert Walker LJ considered the position of Mr Weeks to be similar but if anything even clearer.

38. Counsel for Dame Shirley Porter and Mr Weeks naturally placed much reliance on the contrary views expressed by the majority in the Court of Appeal. In the course of his judgment (at pp 1445-1446) Kennedy LJ said:

"I remind myself that the Divisional Court had the advantage of seeing the two appellants, as well as others, when they gave evidence, and clearly that court was not particularly impressed by these two appellants, but what I cannot follow is how the court was able to find these appellants guilty of wilful misconduct having regard to its conclusions in relation to those important factual issues which I set out at the beginning of this section of the judgment, conclusions which led the court to conclude that three out of five appeals must be allowed. I recognise that long before 5 May 1987 Dame Shirley, but not Mr Weeks, had received legal advice from [the city solicitor], but on 5 May 1987 the possibility of targeting sales in marginal wards for political gain was put to leading counsel of considerable standing. Mr England, who received and reported upon counsel's advice, was led to believe that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards. The judgment of the Divisional Court simply does not explain why the advice of leading counsel did not affect Dame Shirley and Mr Weeks as it affected Mr England, and for that matter Mr Hartley and Mr Phillips, and I cannot make good the omission because there seems to have been no reason to make any distinction. The Divisional Court said that the purpose of the appellant throughout was 'to achieve unlawful electoral advantage'. The use of the word 'unlawful' begs the question. Their submission is that having taken legal advice they, like the others, believed that electoral advantage could lawfully be pursued by the route envisaged in Mr England's report of his consultation with Mr Sullivan, and thereafter the route chosen was, they believed, entirely legitimate . . . I recognise, of course, that in the Divisional Court the appellants contended that the great increase in the number of designated properties was not promoted in order to achieve 250 sales per annum in marginal wards, and that the Divisional Court held otherwise, but in all essential matters the records speak for themselves. On 5 May 1987 counsel and the officers who attended on him knew all there was to know about Dame Shirley's ambition as to sales in marginal wards. The Divisional Court was critical of both appellants for saying that, in the light of Mr Sullivan's advice, the policy was abandoned. The court said, 96 LGR 157, 185, that they 'lied', but on any view option 3 was not the proposal which Mr Sullivan was asked to consider. It was only formulated as a result of his advice. As Mr McMullen pointed out, those who wish to offend against the law do not usually consult lawyers of good reputation, give them access to all relevant information, and then act in accordance with their

understanding of the lawyer's advice, arranging for further advice to be obtained as events progress. In most cases where a breach of section 20 has been found proved, the evidence shows an unwillingness to obtain or a defiance of legal advice. That is not this case."

Schiemann LJ (at p 1453) said:

"As the division of opinion in this court shows, there is no doubt that the borderline between what is permissible and what is not permissible in the context of what Dame Shirley was trying to achieve is not easily perceived by lawyers and even less easily perceived by laymen. It is clear to me that Dame Shirley was seeking to avoid doing anything illegal and that this was the reason why she laid bare her hopes to her legal advisers and asked for legal advice."

39. The issue of inconsistency of findings is one which I consider separately below. The issue here is whether the majority of the Court of Appeal had any sustainable grounds for rejecting the very clear conclusions reached by the primary fact-finders, the auditor and the Divisional Court. Before the auditor Dame Shirley Porter and Mr Weeks did not contend that they had pursued the designated sales policy on legal advice. At that stage they were seeking to distance themselves from the policy. In the Divisional Court they contended that the policy had been abandoned after 5 May 1987, a contention found by that court to be dishonest and untrue. Only in the Court of Appeal was the case made that reliance had been placed on legal advice, as Robert Walker LJ pointed out in the passage quoted in paragraph 37 above. It is not clear to me how the Court of Appeal majority felt able to reject the very clear findings of the auditor and the Divisional Court, which in my opinion are entitled to stand. But I draw attention to two particular, in my view fatal, weaknesses in the majority reasoning. First, it is simply not true that Mr Sullivan was given access to all relevant information or that Dame Shirley laid bare her hopes to her legal advisers. Mr Sullivan received no written instructions and gave no written advice. There were two questions which the council should have put to him. The first was whether it was lawful to promote a policy of designating council properties for sale in marginal wards for the purpose of securing an electoral advantage for the majority party at the forthcoming council elections. That question was put to Mr Sullivan and he answered it in the negative, as he was bound to do. The second, follow-up, question should have been whether, if that policy would be unlawful, the policy would become lawful if, with the same objective, and in order to conceal the targeting of sales in marginal wards, the designated sales policy were extended across the City of Westminster. That question was never put. No one, including Dame Shirley Porter and Mr Weeks, could have had any doubt at all what the answer would have been if it had. Mr Sullivan was never told of the course on which the council proposed to embark or had embarked. The second weakness is found in the history of pretence, obfuscation and prevarication which surrounded the policy from May 1987 onwards. If the policy was genuinely believed to be lawful, albeit controversial, there was no need for such intensive camouflage.

40. I can for my part see no reason to question the very clear findings made by the auditor and the Divisional Court on this question.

Inconsistency

41. The auditor's findings of wilful misconduct against Mr Hartley, Mr England and Mr Phillips were not upheld by the Divisional Court, and it is argued on behalf of Dame Shirley Porter and Mr Weeks that they cannot fairly or rationally be found liable if those others are to be exonerated. The inconsistency, as he saw it, of the Divisional Court findings was the main ground upon which Kennedy LJ allowed the appeal by Dame Shirley Porter and Mr Weeks.

42. In the case of Mr Hartley the Divisional Court found his conduct to be unlawful and so to amount to misconduct because of the improper motives of others of which he was aware. But the

Divisional Court was prepared to accept that he did not appreciate the unlawfulness of his conduct and genuinely believed that his own overriding belief in wider home ownership rendered his conduct lawful (p 199). It accordingly found that his misconduct was not wilful.

43. In the case of Mr England the Divisional Court found that he was not guilty of wilful misconduct down to 8 July 1987, whatever his doubts and equivocations, and although critical of his conduct thereafter the Divisional Court did not find him guilty of wilful misconduct (p 195).

44. The Divisional Court found that Mr Phillips was guilty of misconduct. But it was not prepared to conclude that he must have known that what was proposed was unlawful as well as improper (p 202). The Divisional Court considered whether he was reckless. In the results it was not satisfied to the standard required that he had been reckless (p 203).

45. Robert Walker LJ found this the most difficult aspect of the whole case and it caused him some anxiety (p 1494) and unease (p 1496) and he thought there had perhaps been some element of mercy in the Divisional Court's conclusions (pp 1494, 1495). But he could not say they were not conclusions which were open to the Divisional Court (p 1496). I share Robert Walker LJ's anxiety and unease. It is understandable that the Divisional Court was reluctant to be excessively critical of officers, who were subject to considerable pressure from elected members, as the Divisional Court pointed out (p 186). Mr Hartley's conduct does not earn that measure of indulgence. But the Divisional Court had the advantage of hearing these three witnesses. It was rightly alert to the high standard required before a finding of this gravity could be sustained. It may very well be that Messrs Hartley, England and Phillips were fortunate to be exonerated, to the limited extent that they were exonerated. But the findings made against Dame Shirley Porter and Mr Weeks were, in truth, very strong. They were the leader and deputy leader of the council, and were respectively the prime architect and midwife of this policy. I am satisfied that no injustice is done to either of them by upholding the findings of the auditor and the Divisional Court.

Causation

46. At the forefront of their submissions on behalf of Dame Shirley Porter and Mr Weeks counsel advanced an argument to the effect that whatever the impropriety or unlawfulness of their clients' purpose and motive this did not render the decision of the Housing Committee on 8 July 1987 unlawful. That was a decision lawfully made by the members of the committee (not including Dame Shirley Porter and Mr Weeks) for lawful housing reasons, untainted by the unlawful designated sales policy, and accordingly anything which happened thereafter was not attributable to any unlawful motivation on the part of Dame Shirley Porter and Mr Weeks. As Schiemann LJ made plain at pp 1451-1453 of his judgment, this was an argument which particularly impressed him (although he made plain at p 1453 that he did not accept that Dame Shirley Porter had been either dishonest or improperly motivated). In my opinion this argument must be rejected. It is an agreed fact (recited in paragraph 14 above) that once the city-wide designated sales policy had been adopted by the majority party it was to all intents and purposes bound to be approved by the committee. The auditor concluded (p 325 of his decision, para 885):

> "In the event that taking into account party electoral advantage does not invalidate a decision unless it becomes the dominant factor, I give my view as to whether party electoral advantage was such a dominant factor. I have concluded that the overwhelming inference to be drawn from the evidence is that party electoral advantage was the dominant consideration which influenced the Housing Committee in reaching a decision to adopt option 3 (increase designated sales by 500 per annum) and in selecting the properties designated for sale. I find as a fact that the electoral advantage of the majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant

consideration which influenced both the decision to adopt option 3 and the selection of the properties designated for sale."

The conclusion of the Divisional Court on the committee's decision of 8 July 1987 (at p 181) is one that I would, for my part, accept:

"In our view this decision was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful. The policy proposed at the meeting by [Mr Hartley] and adopted by the committee was one which gave effect to this purpose, whatever may have been the reasons for the votes of individual members. It is perfectly possible, in law and common sense, for a corrupt principal to cause a result through an innocent agent or (in the context discussed by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385) a dishonest third party to be liable for a breach of trust perpetrated by a trustee acting innocently. In the present case, whatever the reasons of individual members for voting as they did, the option for which they voted was placed before the committee, in part at least, in order to achieve the improper purpose to which we have referred."

47. If however it is appropriate to inquire into the motivation of the majority party members who voted for option 3 in the committee on 8 July 1987, the conclusion does not assist Dame Shirley Porter and Mr Weeks. Whatever his own reasons for supporting that option, Mr Hartley was very well aware of the purpose which underlay the policy. He was, as already noted, found guilty of misconduct by the Divisional Court. In the auditor's decision he said that the late Dr Dutt, who was Vice-Chairman of the committee,

"was also aware of the objective to increase the majority party's voting strength in marginal wards by the adoption of an extended programme of designated sales in those wards. In my view, he took into account the electoral advantage of the Conservative Party and sought to promote it in his voting and otherwise."

(The auditor in his provisional findings expressed conclusions adverse to Dr Dutt, who disputed those findings and took his own life. The auditor, in his decision, made no finding of personal liability against Dr Dutt). If those two tainted votes are discounted, the majority party had no majority of votes on the committee. The auditor found that Councillor Warner tried to exercise an independent judgment but was influenced by the joint report laid before the committee (which contained no hint of the true purpose of the policy) and by the views of Mr Hartley (p 323, para 879). The same finding was made in relation to Councillors Bianco and Hooper, save that they were unable to and did not exercise any independent judgment in relation to adoption of the list of properties for designation circulated at the meeting, which had been devised by officers working with the chairman to achieve target numbers of sales in certain marginal wards in order to secure an electorate advantage for the majority party in those wards (pp 323-324, para 880). In the case of Councillors Evans and Buxton the auditor found that they neither sought to exercise nor exercised any independent judgment in relation to voting for the adoption for option 3: they simply relied on the joint report and the views of Mr Hartley. The inescapable truth is that while the chairman and vice-chairman of the committee knew of the purpose which underlay option 3, the back bench members were in no position to exercise an informed independent judgment because they were never given a clear picture of why the policy had been adopted and what it was intended to achieve. The committee was used by the party leadership to secure approval of a policy of which the purpose was never fully explained. In my opinion there was no informed exercise of independent judgment by members of the committee such as could break the chain of causation between the conduct of Dame Shirley Porter and Mr Weeks and the consequences which followed.

The liability of Dame Shirley Porter and Mr Weeks

48. The Divisional Court's findings adverse to Dame Shirley Porter and Mr Weeks, reached on a mass of evidence, were fully justified, if not inevitable. The Court of Appeal majority erred in departing from them. The passage of time and the familiarity of the accusations made against Dame Shirley Porter and Mr Weeks cannot and should not obscure the unpalatable truth that this was a deliberate, blatant and dishonest misuse of public power. It was a misuse of power by both of them not for the purpose of financial gain but for that of electoral advantage. In that sense it was corrupt. The auditor may have been strictly wrong to describe their conduct as gerrymandering, but it was certainly unlawful and he was right to stigmatise it as disgraceful.

Preparation of Papers

49. The auditor held Dame Shirley Porter and Mr Weeks responsible for a sum amounting (with interest) to £10,126 attributable to the cost of preparing papers relating to the promotion of the electoral advantage of the majority party. The basis of his finding was that this was an unlawful misuse of the time of council officers. There is no dispute concerning the quantum of this sum. The Court of Appeal held by a majority that since Dame Shirley Porter and Mr Weeks did not transgress, the cost of preparing these papers could not be laid at their door (p 1447). For reasons already given, I would hold that they did transgress and would hold them liable to make good this sum.

Quantum

50. The power of local authorities to dispose of land held by them under section 32(1) of the Housing Act 1985 was subject to the consent of the secretary of state. By section 34(2) of that Act the secretary of state's consent could be given generally, and was so given by a ministerial letter issued in 1981 and continuing to have effect under the 1985 Act by virtue of section 2(2) of the Housing (Consequential Provisions) Act 1985. By paragraph B(2) of this letter it was stated:

> "A local authority may dispose of any house, if that house is vacant, to any individual who intends to use it as his only or principal home, provided that the disposal is effected for a price, consideration or rent which is equal to the current market value of the house with vacant possession."

It was also open to a local authority to dispose of properties at a discount of between 30% and 70%, which is what the council in fact did.

51. As explained by the Divisional Court at p 204 of its judgment, the auditor certified in accordance with section 20(1) of the Local Government Finance Act 1982 that some £31.67m was due jointly and severally from Dame Shirley Porter and Mr Weeks (in addition, at that stage, to Mr Hartley, Mr England, Mr Phillips and another officer). This was a net sum, arrived at by calculating the gross loss or deficiency and then deducting from that figure the financial benefits enjoyed by the council as a result of the sale of designated dwellings, such as the reduced cost of management and maintenance of the council - owned housing stock. The net sum also allowed for interest on the net losses. Most of the items in the auditor's computation are not (subject to liability) in dispute. But there is one major issue: the treatment of the discounts allowed by the council on selling designated properties pursuant to what must, for present purposes, be treated as an unlawful policy. The auditor based his calculation on the open market value, with vacant possession, of the properties sold. He did not reduce his calculated figure of loss to reflect the discounted prices at which the council sold, and at which the council would have sold even if the policy had been a lawful one, if pursuant to a lawful policy the council would have sold at all. On this basis he reached a loss figure under this head of £15.476m.

52. Robert Walker LJ (with, as already noted, the assent of Kennedy LJ on this point) took a different view. He said (at p 1502):

> "In this case the relevant element of loss is the loss of part of the council's stock of social housing. It was not a loss in a commercial venture of selling dwellings with vacant possession. In my judgment the Divisional Court erred in its approach. It should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. There was ample evidence that the discounted prices did exceed that value, and it is not necessary to go into the subsidiary issue as to Ellis & Co's valuations. Any other approach would, it seems to me, be inconsistent with the auditor's separate investigation and conclusion as to the additional costs of housing homeless persons which the council had to incur as a result of its own stock of social housing having been depleted by the designated sales policy."

On this basis he would have disallowed the full sum for which the auditor held Dame Shirley Porter and Mr Weeks liable under this head.

53. Although the sum involved is very considerable, the point which divides the parties is (as it seems to me) a very narrow one. Should the prices at which the council actually sold be compared with the prices at which it would have sold if selling in lawful pursuance of its powers under section 32? If so, it has suffered no loss under this head. Or should the prices at which the council actually sold be compared with the open market value of the properties with vacant possession at the time of sale? If so, it has suffered the loss certified by the auditor.

54. Section 20(1) of the 1982 Act provides for the certification by the auditor of the amount of a loss or deficiency incurred or caused by the wilful misconduct of any person. It is that amount which is due and recoverable for the benefit of the body which has suffered the loss or deficiency. The underlying principle is one of compensation, to put the body which has suffered the loss or deficiency in the same position as it would have been in had the wilful misconduct which caused the loss or deficiency never occurred.

55. In this case the council was the freehold owner of a number of properties. The wilful misconduct of Dame Shirley Porter and Mr Weeks caused the sale of some of those properties pursuant to an unlawful policy of designated sales. Thus the council parted with those properties. The council did not lose the full market value of the properties because it received discounted prices for them. But it lost the difference between the full market value of the properties and the discounted prices received. Had the council wished to replace the properties sold under the unlawful policy it would have had to pay the full market value of comparable properties. I do not think it is open to those responsible for an unlawful sales policy to contend that if the properties had been sold under a lawful policy they would have been sold at equally discounted prices since, if the policy of the council had been lawful the council might never have sold the properties at all, and it is in any event a matter for the owner of an asset to decide whether he will exploit its value to the maximum extent or not. A wrongdoer is not entitled to reap the benefit of a benign policy which might, but only might, have been pursued by the owner had it not been unlawfully deprived of the asset.

56. I do not for my part detect any element of double counting in the auditor's calculation, which is in my opinion correct.

Impartiality, fairness and delay

57. Before the Divisional Court and in the Court of Appeal Dame Shirley Porter and Mr

Weeks challenged the impartiality of the auditor, the fairness of his investigation and the time taken to carry out the audit. This challenge was very fully considered by the Divisional Court, but failed both in that court and in the Court of Appeal. The challenge has been further pursued before the House. It must in my opinion be rejected for the detailed reasons given by my noble and learned friend Lord Hope of Craighead.

58. For all these reasons I would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court. The parties (and Westminster City Council, if so advised) are invited to make written submissions on costs. I would in conclusion pay tribute to the clear and comprehensive judgment of the Divisional Court.

LORD STEYN

My Lords,

59. I am in complete agreement with the opinion of Lord Bingham of Cornhill. I am also in complete agreement with the reasons given by my noble and learned friend Lord Hope of Craighead in regard to the issues of impartiality, fairness and delay. I would therefore also allow the auditor's appeal and restore the certificate in the sum upheld by the Divisional Court.

LORD HOPE OF CRAIGHEAD

My Lords,

60. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with all that he has said on the issue of liability and, subject to some observations of my own, with what he has said on the issue of quantum. I wish to concentrate in this speech with the remaining issues in the case, which are those of impartiality, fairness and delay.

Introduction

61. In the Court of Appeal four matters were identified under the broad heading of unfairness: [2000] 2 WLR 1420, per Schiemann LJ, at p 1453H. These were (a) apparent bias on the part of the auditor, (b) unreasonable delay on the part both of the auditor and on the part of the Divisional Court in confirming the decision by the auditor, (c) failure on the part of the Divisional Court to hold a fair balance between the auditor and Dame Shirley Porter and (d) breach by the Divisional Court of the presumption of innocence. The Court of Appeal was not persuaded that there had been any unfairness which would justify allowing the appeal.

62. Before your Lordships the respondents have contended that the Court of Appeal should have upheld their appeals on the ground that the proceedings were unfair, applying common law principles as understood before the coming into force of the relevant provisions of the Human Rights Act 1998. They also contend that the auditor violated their Convention rights and that, as victims, they are entitled to rely directly on those rights under the 1998 Act. In addition they contend that the Divisional Court violated their Convention rights, that these are legal proceedings brought by the auditor and they are entitled to rely on that violation in these proceedings under the Act. The main thrust of their contentions on the issue of unfairness was directed to their arguments that the auditor lacked the Convention requirements of independence and impartiality, that he gave the appearance of bias contrary to the requirements of the common law and that there was unreasonable delay.

63. Before dealing with the substance of the points raised by these arguments I must first outline the statutory background and set out the facts. I shall then deal with a preliminary

question which must be addressed. This is whether it is open to the respondents to rely directly on the provisions of the Human Rights Act 1998 in this appeal. I shall explain why, notwithstanding the decision of this House in *R v Kansal (No 2)* [2001] UKHL 62, I consider it appropriate to deal with the merits of the points which have been raised on the assumption that they can do so. As to the merits, I shall deal first with the questions relating to independence and impartiality and to the appearance of bias on the part of the auditor. I shall then deal with the issue of delay. Finally I shall deal with the points which have been raised about the conduct of the hearing by the Divisional Court.

The statutory background

64. Provision has been made for many years in local government legislation to protect ratepayers against losses caused by unlawful expenditure or wilful misconduct on the part of members or senior officers of local authorities. Procedures were laid down for the audit of local authority accounts and, in the event of unlawful expenditure or wilful misconduct by of a member or senior officer, for the surcharge of that member or officer on a certificate given by the auditor. The provisions which were in force during the period to which this case relates were those in Part III of the Local Government Finance Act 1982. These provisions were repealed by and re-enacted in the Audit Commission Act 1998, but I shall concentrate on those which are to be found in the 1982 Act.

65. Prior to the coming into force of the 1982 Act local authorities and other bodies subject to audit were able to choose whether their accounts should be audited by a district auditor appointed by the Secretary of State or by a private auditor. The Layfield Committee of Inquiry into Local Government Finance considered that it was wrong in principle that any public body should be able to choose its own auditor. It recommended that the audit service should be made completely independent of both central government and local authorities, with a head of local audit reporting to a specially constituted higher institution (Cmnd 6453, 1976, Ch 6, paras 18, 30-31). Section 11 of the 1982 Act provided for the establishment of a body to be known as the Audit Commission for Local Authorities in England and Wales. Section 12 provided that local authority accounts were in future to be subject to audit by an auditor or auditors appointed by the Commission. Section 13 provided that an auditor appointed by the Commission to audit the accounts might be an officer of the Commission, an individual with prescribed qualifications who was not such an officer or a firm of such individuals. Section 14 provided that the Commission was to prepare and keep under review a code of audit practice prescribing the way in which auditors were to carry out their functions under the Act. It was to be laid before Parliament and approved by a resolution of each House. Section 15 sets out the general duties of auditors when auditing accounts in accordance with Part III of the Act. Among these, in terms of subsection (3), is the auditor's duty to consider whether in the public interest he should make a report on any matter coming to his notice in the course of the audit.

66. That, in brief, was the system under which Mr John Magill was appointed by the Commission under sections 12 and 13 of the 1982 Act. His task was to audit the Council's accounts for the years 1987-88 to 1994-95. The Code of Audit Practice for Local Authorities and the National Health Service in England and Wales 1990 stated in paragraph 10 that, in order that his opinions, conclusions, judgments and recommendations would be and would be seen to be impartial, he was to maintain an independent and objective attitude of mind and ensure that his independence was not impaired in any way. Paragraph 15 of the Code stated that the audit was to be carried out in a professional and timely fashion. His duties and powers in respect of hearing objections by local government electors and in regard to loss due to wilful misconduct were those set out in sections 17, 19 and 20 of the Act.

67. Section 17(1) of the 1982 Act deals with the right of members of the public to inspect the

accounts to be audited and all books and other documents relating to them, and subsection (2) of the section provides that at the request of any local government elector the auditor shall give the elector, or any representative of his, an opportunity to question him about the accounts. Sections 17(3) and 17(4) provide:

> "(3) Subject to subsection (4) below, any local government elector . . ., or any representative of his, may attend before the auditor and make objections -
>
> (a) as to any matter in respect of which the auditor could take action under section 19 or 20 below; or
>
> (b) as to any other matter in respect of which the auditor could make a report under section 15(3) above.
>
> (4) No objection may be made under subsection (3) above by or on behalf of a local government elector unless the auditor has previously received written notice of the proposed objection and of the grounds on which it is to be made."

68. Section 19(1) of the Act provides that, where it appears to the auditor that any item of account is contrary to law, he may apply to the court for a declaration that the item of account was unlawful except where it is sanctioned by the Secretary of State. Where the court is persuaded that it should make the declaration, it has power under section 19(2) to order any person responsible for incurring or authorising the unlawful expenditure to repay it in whole or in part to the body in question, if the expenditure exceeded £2,000 to order the person responsible who was a member of a local authority to be disqualified from being a member of a local authority and to order rectification of the accounts.

69. Section 20(1) of the 1982 Act provides:

> "Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act -
>
> (a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or
>
> (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person,
>
> he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount."

70. Section 20(2)(b) of the 1982 Act provides that a person who is aggrieved by a decision of an auditor to certify under that section that a sum or amount is due from him may require the auditor to state in writing the reasons for his decision. Section 20(3) provides:

> "Any such person who is aggrieved by such a decision may appeal against the decision to the court and -
>
> (a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given;

(b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given;

and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above."

Section 20 (4) provides for the disqualification of a member of a local authority if a certificate relates to a loss or deficiency caused by his wilful misconduct and the amount due from him exceeds £2,000.

The facts in outline

71. This narrative begins where that set out in paragraphs 4 to 18 of Lord Bingham's speech breaks off. Like him, I have taken much of it from the agreed statement of facts.

72. By letters dated 18 and 20 July 1989 Councillor Neale Coleman, an opposition member of the housing committee, and a number of other local government electors made objections to the auditor under section 17(3) of the 1982 Act and invited him to take action under sections 19 and 20 of the Act and to make a report in the public interest under section 15(3). 28 individuals were named or referred to in the objections as persons against whom the objectors invited the auditor to take action. They included the respondents Dame Shirley Porter and Mr Weeks. By letter dated 8 November 1989 Councillor Coleman made further submissions in support of the original objection and added a further objection. Following receipt of the objections the auditor embarked on an investigation, the main stages of which were as follows.

73. In October 1989 the auditor requested a formal response from the Council to the initial objections. The Council provided its formal response on 27 November 1989. On 5 December 1989 he asked the Council if it wished to supplement that formal response to deal with the matters raised in the letter of 8 November. On 1 May 1990 the Council provided its supplementary response to the auditor. During the period from June to December 1990 he carried out a review of the documentation at City Hall and obtained preliminary legal advice on matters arising from the objection. The documentation was extensive but it was incomplete, and he asked the Council to provide further documents. In December 1990 he commenced his programme of interviews. From January to April 1991 he visited council offices to inspect further documents made available by the Council, requested further documents and continued his programme of interviews. He completed his initial round of interviews in November 1992. He reviewed the evidence which he had received by that date, obtained further legal advice and in January 1993 began a second round of interviews which lasted from January to July 1993. He found it necessary to conduct further interviews in September and October 1993.

74. On 29 September 1993, at the request of counsel and solicitors acting for Dame Shirley Porter the auditor issued a preliminary provisional indication of net expenditure and loss. He invited representations by 15 October 1993. Written submissions on this preliminary indication were made on 15 October 1993 on behalf of Dame Shirley Porter and on 27 October 1993 by Mr Weeks. On 13 January 1994 the auditor gave notice of his provisional findings to ten individuals and provided copies of them to the objectors and to the Council. He invited those concerned to indicate whether they wished him to hold an oral hearing. He made a public statement on the same date which representatives of the media were invited to attend. This statement attracted widespread publicity. Recordings of the auditor reading parts of the statement appeared on television news, and the statement was referred to and discussed in Parliament and the media. Three parties and the Council, but not Dame Shirley Porter or Mr Weeks, then requested the

auditor to hold an oral hearing and the auditor agreed to do so. All parties were informed on 25 March 1994 that there would be an oral hearing starting on 17 October 1994.

75. The public statement by the auditor raised questions about his impartiality. Solicitors for Mr Phillips and Dame Shirley Porter applied to the Audit Commission on 29 March and 19 April 1994 to replace Mr Magill with a new auditor. The Audit Commission refused to do so. At a preliminary meeting on June 1994 applications were made on behalf of Dame Shirley Porter and Mr Phillips that the auditor should disqualify himself from further consideration of the objections. On 7 October 1994 the auditor held a meeting to consider oral submissions on this matter. Written representations in support of the application were made on behalf of, among others, Mr Weeks. Further oral submissions were made on behalf of Dame Shirley Porter on 17 October 1994. The auditor decided that he should not disqualify himself. He gave his reasons in writing on 18 October 1994.

76. The auditor held an audit hearing which sat for a total of 32 days between 19 October 1994 and 7 February 1995. He received further representations and evidence after the hearing. On 17 August 1995 he circulated a revised provisional calculation of net expenditure and loss. He invited representations on this calculation by 5 October 1995. He received representations on it from the objectors. The parties were informed by him that notification of the arrangements for the issuing of his decision would be given on 21 March 1996. On 19 March 1996 the solicitors for Dame Shirley Porter wrote to the Audit Commission to request an investigation into the auditor's conduct. On 16 April 1996 the Audit Commission rejected her complaint. On 9 May 1996 the auditor issued his decision on the objections, in which he issued certificates in the sum of £31.677m against Dame Shirley Porter and Mr Weeks and four others. They appealed to the Divisional Court. The appeal by one of the other four was stayed on the ground of ill health. The appeals by Dame Shirley Porter and Mr Weeks and the other three were heard between 1 October and 4 November 1997. On 19 December 1997 the Divisional Court dismissed their appeals but allowed the appeals by the three others. Their appeals to the Court of Appeal were heard between 22 and 26 March 1999. On 30 April 1999 the Court of Appeal allowed the appeals by Dame Shirley Porter and Mr Weeks.

77. There are two key points in this history in regard to the respondent's argument about the fairness of the conduct of the proceedings by the auditor and the conduct of the Divisional Court when it dismissed their appeal. The first relates to the auditor's public statement on 13 January 1994. It is said that his conduct on this occasion gave rise to the appearance of bias on his part which could only be cured in the Divisional Court by quashing his certificate. The second relates to delay. The auditor issued his report and the certificate of surcharge on 9 May 1996. The respondents say that this was 15 months after the conclusion of the audit hearing on 7 February 1995, almost seven years after the objection was made on 18 July 1989, nearly nine years after the decision of the housing committee of 8 July 1987 against which the objection was taken and exactly ten years after start of the events following the local government elections on 8 May 1986. They contend that there had been such excessive delay that for the Divisional Court to quash the decision was the only appropriate remedy.

The Human Rights Act 1998

78. The respondents' argument on unfairness was presented on the assumption that they were entitled under section 22(4) of the Human Rights Act 1998 to rely in these proceedings on an alleged infringement of their Convention rights by acts of the auditor and of the Divisional Court, all of which took place before the relevant sections of that Act were brought into force on 2 October 2000. It assumed that these are proceedings by or at the instance of Mr Magill as auditor, and that an auditor appointed by the Audit Commission under section 12 and 13 of the Local Government Finance Act 1982 was a public authority within the meaning of section 6(1)

of the 1998 Act. It also assumed that section 22(4), which states that section 7(1)(b) applies to proceedings by or at the instigation of a public authority whenever the act in question took place, applies to an appeal in these proceedings.

79. Mr Howell did not challenge the proposition, which I would accept, that an auditor appointed by the Audit Commission to audit the accounts of a local authority is a public authority. But he submitted that the proceedings which were conducted by the auditor and by the Divisional Court in the appeal to that court under section 20(3) of the 1982 Act were proceedings by or at the instigation of the objectors and not the auditor. He also submitted, following observations which I made in *R v Lambert* [2001] 3 WLR 206, that the acts of the Divisional Court which were complained of were outside the scope of section 7(1)(b) of the 1998 Act as they were acts of a court. I would reject both of these arguments.

80. As to the first point, the function of the auditor under Part III of the 1982 Act is to audit the accounts which require to be audited. It is his duty to satisfy himself by examination of the accounts and otherwise that the requirements of the statute have been complied with, that proper practices have been observed and proper arrangements have been made to obtain value for money in the use of resources: section 15(1). He must also consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the body concerned or brought to the attention of the public: section 15(3). He has power under sections 19 and 20 to declare an item of account unlawful and to recover a loss incurred or deficiency caused by wilful misconduct irrespective of whether there has been any objection to the accounts. It is in that context that the right of any local government elector under section 17(3) to attend before the auditor and make objections as to any matter in respect of which he could take action under section 19 or 20, or as to any matter in respect of which he could make a report under section 15(3), must be seen. The essence of these proceedings, from start to finish, is that they are proceedings by the auditor.

81. As to the second point, it has now been held in *R v Kansal (No 2)* [2001] UKHL 62 that section 7(1)(b) of the 1998 Act applies to acts of courts and tribunals in the same way as it applies to acts of other public authorities. There has been no suggestion that the acts of the Divisional Court which are complained of are acts to which section 6(2) of that Act applies. It has not been argued that, as the result of primary legislation, the court could not have acted differently or it was acting so as to give effect to primary legislation which could not be read or given effect in a way which was compatible with the respondents' Convention rights. It follows that the acts of the Divisional Court which are under challenge are in the same position in this respect as the acts of the auditor.

82. There remains however the question whether the benefit of retrospectivity under section 22(4) of the 1998 Act is available at the stage of an appeal. The hearing of this appeal took place before judgment was delivered in *R v Kansal (No 2)*. In that case it was held that section 22(4) does not apply to an appeal against a conviction which took place before 2 October 2000. One of the points which I made in my dissenting judgment was that I did not see how it would be possible to confine the decision in that case to criminal cases only: see para 48 of my judgment. But this point has yet to be decided in a civil appeal, and it is perhaps still open to argument. As your Lordships did not hear any argument on it, I would prefer to approach the respondents' submissions as to fairness on the assumption that they are entitled to rely on their Convention rights in this appeal irrespective of the fact that all the acts in question took place before 2 October 2000.

Whether the proceedings are civil or criminal

83. On the assumption that they were entitled in this appeal to rely on their Convention rights,

the respondents submitted that in substance the proceedings under section 20 of the 1982 Act were in the nature of a criminal charge. This argument was considered and rejected by the auditor. It was also rejected by the Divisional Court, which held that English law treats the matter as one of civil not criminal liability: (1997) 96 LGR 157, 171D. Schiemann LJ did not mention the question of classification when he was dealing in the Court of Appeal with the issues of fairness [2000] 2 WLR 1420, 1453-1463. But this question was addressed by Mr McMullen in the course of his argument in this House, and it is the subject of detailed submissions in his written case. The Strasbourg cases were reviewed by Lord Bingham of Cornhill in *McIntosh v Lord Advocate* [2001] 3 WLR 107, 114-119, where the issue was whether a person against whom an application had been made for a confiscation order was, by virtue of that application, charged with a criminal offence: see also *Phillips v United Kingdom*, (2001) 11 BHRC 280.

84. For the purposes of the Convention the category into which the proceedings are placed by domestic law, while relevant, is not the only consideration. The court is required to look at the substance of the matter rather than its form, to look behind the appearances and to investigate the realities of the procedure: *Deweer v Belgium* (1980) 2 EHRR 439, 458, para 44. The nature of the offence and the nature and degree of severity of the sanction must be taken into account also. As to the sanction, the question is whether, by reason of its nature and degree of severity, it amounts to a penalty in the sense of punishment: *Engel v Netherlands (No 1)* (1976) 1 EHRR 647, 678-679, paras 82, 83; *Lutz v Germany* (1987) 10 EHRR 182, 197, para 54; *Demicoli v Malta* (1991) 14 EHRR 47, 62-63, para 34. For example, *Engel v Netherlands* concerned proceedings in a military court for disciplinary offences for which one of the sanctions liable to be imposed as punishment was deprivation of liberty. In *Demicoli v Malta* too the applicant was at risk of imprisonment if the fine was not paid. In *AP, MP and TP v Switzerland* (1997) 26 EHRR 541, 559 para 42, the court said that it attached great weight to the domestic court's finding that the fine in question was penal in character and depended on the "guilt" of the offending taxpayer. In *DC, HS and AD v United Kingdom* [2000] BCC 710 the European Court held that proceedings for the disqualification of directors on the ground of unfitness under section 6 of the Company Directors Disqualification Act 1986 were inherently regulatory in character, and that for this reason they could not be said to involve the determination of a criminal charge within the meaning of article 6(1) of the Convention. 85. I consider that the nature of the proceedings under section 20 of the 1982 Act is compensatory and regulatory, not punitive. Section 20(1) provides that the amount certifiable by the auditor, where it appears to him that a loss has been incurred or deficiency caused by wilful misconduct, is the amount of the loss or deficiency and that both he and the body in question may recover that amount for the benefit of that body. The object of the procedure is to compensate the body concerned, and the measure of the compensation is the amount of the loss suffered. In the present case the amount certified was very large, but the nature of the proceedings does not alter depending on the amount certified. No fine is involved, nor does the section provide for a penalty by way of imprisonment. Section 20(4) provides for the respondents' disqualification from being members of a local authority. But this outcome is similar to that where a trustee is removed after being found to have been in serious breach of trust, or a person is disqualified from acting as a director of a company. In my opinion measures of the kind provided for by section 20, which apply to persons having a special status or responsibility and are compensatory and regulatory rather than penal in character, lie outside the criminal sphere for the purposes of article 6 of the Convention.

86. For these reasons I would hold that section 20 of the 1982 Act does not involve the making of a criminal charge within the meaning of article 6. But that does not mean that the respondents lack protection. They are entitled to all the protections afforded to them by article 6(1), the first sentence of which provides that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The independence and impartiality of the auditor

87. The protections which article 6(1) lays down are that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. As I shall explain later when dealing with delay, I consider that this sentence creates a number of rights which, although closely related, can and should be considered separately. The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached cannot be answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see *Millar v Dickson*, 2001 SLT 988, 994D-E per Lord Bingham of Cornhill and my own observations in that case, at p 1003C-F. Under this heading the question is whether the auditor lacked the independence and impartiality which is required by article 6(1).

88. There is a close relationship between the concept of independence and that of impartiality. In *Findlay v United Kingdom* (1997) 24 EHRR 221, 244, para 73 the European Court said:

> "The Court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.
>
> The concepts of independence and objective impartiality are closely linked…"

In both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these essential qualities.

89. I shall leave over to the next heading the question whether the auditor's public statement on 13 January 1994 showed that he lacked the appearance of impartiality for the purposes of the article 6(1) Convention right. At this stage the matter for consideration is the respondents' complaint that the circumstances and nature of his appointment and the investigation which he then conducted were such that the requirements of independence and impartiality in his case were not satisfied. At the heart of the argument is the multiplicity of roles which were being performed by the auditor. The respondents say that the procedure which he adopted on receipt of the objections violated their Convention right because he acted as investigator, prosecutor and judge in the investigation which he carried out. He conducted the investigation, took the decision whether there was a case to answer, tried the case, assessed the loss and then appeared in the Divisional Court to defend his decision and his conduct.

90. The Divisional Court said (1997) 96 LGR 157, 168 E-F that the 1982 Act imposes on the auditor the roles of investigator, prosecutor and judge which might be thought an almost impossible burden, and it referred to the recommendation in paragraph 223 of the Third Report of the Nolan Committee on Standards in Public Life: Standards of Conduct in Local Government in England, Scotland and Wales (1997) (Cm 3702-1), which has now been implemented for

England and Wales by Part III of the Local Government Act 2000, that surcharging by an auditor be abolished and replaced by other remedies. At p 169G the court said, after reviewing his conduct of the hearing, that it was not persuaded that the auditor's final conclusions could be impeached on the grounds of unfairness. But, at p172E-F, it said that it appeared to it that the roles which the auditor played would not meet the requirements of independence and apparent impartiality demanded by the Convention.

91. In my opinion the conduct of the auditor requires to be looked at as a whole and in the context of the procedure which is laid down in the statute. Part III of the 1982 Act starts, as one would expect, by placing the responsibility for auditing the accounts on the auditor. It seeks to ensure his independence from the body whose accounts he is auditing by requiring in sections 12 and 13 that his appointment is to be by the Audit Commission and not by the body itself. His responsibilities include making reports under section 15 on any matter coming to his notice in the course of the audit and dealing with objections made by any local government elector under section 17. Where objections are made, it is his duty to consider under section 17(3) whether they relate to any matter in respect of which he could take action under section 19 (items contrary to law) or section 20 (wilful misconduct) or to any matter in respect of which he could make a report under section 15. The Act does not enable him to pass this responsibility to someone else. It is his duty, as the person in charge of the audit within the context of which the objections are made, to deal with them himself and, if they are well founded, to take such action as he is required to take on them by the statute. The auditing process, which is in his hands, is not complete until this has been done.

92. That being the structure of the procedure laid down by the statute, there is inevitably some force in the criticism that, where accusations of wilful misconduct are involved, the auditor is being required to act not only as an investigator but also as prosecutor and as judge. But this problem has been recognised and dealt with in section 20(3). It provides not only that any person aggrieved by his decision may appeal against the decision to the court but also that the court "may confirm, vary or quash the decision and give any certificate which the auditor could have given." The solution to the problem which section 20(3) provides is that of a complete rehearing by the Divisional Court. The court can exercise afresh all the powers of decision which were given to the auditor. In *Lloyd v McMahon* [1987] AC 625, 697F-G Lord Keith of Kinkel said that, while there might be extreme cases where it would be appropriate to quash the auditor's decision, the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course.

93. In *Kingsley v United Kingdom* (Application no 35605/97), 7 November 2000, the European Court said in paragraph 51 that, even if an adjudicatory body determining disputes over "civil rights and obligations" does not comply with article 6(1), there is no breach of the article if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1); see also *Bryan v United Kingdom* (1995) 21 EHRR 342, 360-361, paras 44 and 46. The court went on to say this in *Kingsley v United Kingdom*, at para 58:

> "The court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of 'full jurisdiction' involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body."

The powers which the Divisional Court has been given by section 20(3) fully satisfy these requirements. Not only does it have power to quash the decision taken by the auditor. It has power to rehear the case, and to take a fresh decision itself in the exercise of the powers given to the auditor. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1407C-D Lord Slynn of Hadley observed that the principle of judicial control did not go so far as to provide for a complete rehearing on the merits of the decision. In the case of the procedure governed by section 20(3) however a rehearing on the merits can be conducted, and that is what was done in this case.

94. In these circumstances it is not necessary to examine the various grounds on which the procedure adopted by the auditor was criticised. The issue at this stage is whether the Divisional Court satisfied the requirements of article 6(1) in regard to the scope of the jurisdiction which it was entitled to exercise. I would answer this question in the affirmative. There has been no suggestion that the proceedings in that court, which were conducted with conspicuous care and attention to detail, lacked the appearance of independence and impartiality. In my opinion those elements of the respondents' article 6(1) Convention rights were fully protected by the proceedings in the Divisional Court, having regard to the powers which that court was entitled to exercise.

Apparent bias

95. I turn now to the question whether the auditor's certificate should have been quashed on the ground of apparent bias. The respondents submit that the way in which the auditor conducted himself when he made his statement on 13 January 1994 indicated an appearance of bias on his part which affected all stages of his investigation both before and after that date. Both the article 6(1) Convention right to an independent and impartial tribunal and the respondents' rights to an unbiased judge at common law as it was understood before the coming into effect of the relevant provisions of the Human Rights Act 1998 are invoked under this heading.

96. As I have said, the statement which the auditor made on 13 January 1994 received considerable publicity on television and in the newspapers. The Divisional Court saw video recordings of the relevant item on the 1 pm and 9 pm BBC TV news. The following description of the event is given in its judgment (1997) 96 LGR 157, 173G-H:

> "A televised announcement was arranged at which the auditor himself appeared and, although he said that his views were provisional, he expressed them in florid language and supported them by reference to the thoroughness of the investigation which he claimed to have carried out. There was a further feature of the event which should have had no place in the middle of a quasi-judicial inquiry. A stack of ring binders on the desk at which the auditor sat bearing the name of his firm for the benefit of the cameras was, ostensibly, under the protection of a security guard: unless it was being implied that the persons under investigation might wish to steal the documents, it is not clear what was the purpose of this posturing."

97. In the reasons which he gave on 18 October 1994 for deciding not to disqualify himself the auditor said that he was mindful of the serious nature of the allegations made against the respondents, that he had been careful to give them a full opportunity to respond to these allegations and his provisional findings, that he retained an open mind and that he was not biased against any individual or the council. He went on to say:

> "114. I am not biased. I have acted fairly and will continue to do so. I will exercise impartial, independent and objective judgment. I will reach a decision on the evidence and submissions before me. I will not reach any decision adverse to the council and/or to any respondent

unless I am satisfied on the basis of the evidence that I am under a duty to do so. All parties will get a fair hearing from me.

115. In my consideration of the disqualification application, I have sought to apply the test formulated in *R v Gough* [1993] AC 646, namely *'whether, in all the circumstances of the case, there appeared to be a real danger of bias…'*. In my view, a person having ascertained the relevant circumstances would not consider that I will regard unfairly any person's case with disfavour. It has been suggested that I will find it difficult to depart from my provisional findings and views because of the publicity given to these. I feel no such inhibition. Nor, in my view, is there any ground on which I should reasonably be thought to be so inhibited. I have always made it plain that before reaching any conclusion I will consider any representations made to me. In my view, that is a process which necessarily conveys to any reasonable person the point that my conclusions may not coincide with my provisional findings and views. My view is that no real danger of bias exists and nor is there any other basis on which I should disqualify myself."

98. The Divisional Court set out its conclusions on this issue in this way (1997) 96 LGR 157, 174A-C:

"In the light of the material before us, including, in particular, the auditor's reasons for declining to recuse himself, we accept that, despite such inferences to the contrary as might have been drawn from the press conference, the auditor did have an open mind and was justified in continuing with the subsequent hearings. We note that he did not confirm his preliminary findings in respect of those who gave evidence at those hearings. The error of judgment which we find he made, in holding the press conference as he did, did not, in our view, demonstrate bias on his part. He was at pains to stress the provisional nature of his findings and it is pertinent that in his final decision he made no finding of wilful misconduct against three people in relation to whom he had, provisionally, been minded so to find. In any event, as with the investigation, any possible unfairness to the appellants has been cured by the hearing before us."

99. The test for apparent bias which the auditor sought to apply to himself, and was applied in its turn by the Divisional Court, was that which was described in *R v Gough* [1993] AC 646 by Lord Goff of Chieveley where he said at p 670:

"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…"

100. The "reasonable likelihood" and "real danger" tests which Lord Goff described in *R v Gough* have been criticised by the High Court of Australia on the ground that they tend to emphasise the court's view of the facts and to place inadequate emphasis on the public perception of the irregular incident: *Webb v The Queen* (1994) 181 CLR 41, 50 per Mason CJ and McHugh J. There is an uneasy tension between these tests and that which was adopted in Scotland by the

High Court of Justiciary in *Bradford v McLeod*, 1986 SLT 244. Following Eve J's reference in *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 (which was not referred to in *R v Gough*), the High Court of Justiciary adopted a test which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances: see also *Millar v Dickson* 2001 SLT 988, 1002L-1003B. This approach, which has been described as "the reasonable apprehension of bias" test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified: *Piersack v Belgium* (1982) 5 EHRR 169, 179-180, paras 30-31; *De Cubber v Belgium* (1984) 7 EHRR 236, 246, para 30; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402-403, para 30. In *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, para 48 the court also observed that, in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive:

> "What is decisive is whether this fear can be held objectively justified."

101. The English courts have been reluctant, for obvious reasons, to depart from the test which Lord Goff of Chieveley so carefully formulated in *R v Gough.* In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 136A-C Lord Browne-Wilkinson said that it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said, at p 142F-G, that, although the tests in Scotland and England were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. The Court of Appeal, having examined the question whether the "real danger" test might lead to a different result from that which the informed observer would reach on the same facts, concluded in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477 that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

102. In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp726H-727C:

> "85 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is

considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

104. Turning to the facts, there are two points that need to be made at the outset. The first relates to the auditor's own assertion that he was not biased. The Divisional Court said, at p 174A-B, that it had had particular regard to his reasons for declining to recuse himself in reaching its conclusion that he had an open mind and was justified in continuing with the subsequent hearings. I would agree that the reasons that he gave were relevant, but an examination of them shows that they consisted largely of assertions that he was unbiased. Looking at the matter from the standpoint of the fair-minded and informed observer, protestations of that kind are unlikely to be helpful. I think that Schiemann LJ adopted the right approach in the Court of Appeal when he said that he would give no weight to the auditor's reasons: [2000] 2 WLR 1420, 1457H. The second point relates to the emphasis which the respondents place on how the auditor's conduct appeared from the standpoint of the complainer. There is, as I have said, some support in the jurisprudence of the Strasbourg court for the proposition that the standpoint of the complainer is important. But in *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, para 48 the court emphasised that what is decisive is whether any fears expressed by the complainer are objectively justified. The complainer's fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated. But they lose their importance once the stage is reached of looking at the matter objectively.

105. I think that it is plain, as the Divisional Court observed, at p 174B, that the auditor made an error of judgment when he decided to make his statement in public at a press conference. The main impression which this would have conveyed to the fair-minded observer was that the purpose of this exercise was to attract publicity to himself, and perhaps also to his firm. It was an exercise in self-promotion in which he should not have indulged. But it is quite another matter to conclude from this that there was a real possibility that he was biased. Schiemann LJ said, at p 1457D-E, that there was room for a casual observer to form the view after the press conference that the auditor might be biased. Nevertheless he concluded, at p 1457H, having examined the facts more closely, that there was no real danger that this was so. I would take the same view. The question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias. The auditor's conduct must be seen in the context of the investigation which he was carrying out, which had generated a great deal of public interest. A statement as to his progress would not have been inappropriate. His error was to make it at a press conference. This created the risk of unfair reporting, but there was nothing in the words he used to indicate that there was a real possibility that he was biased. He was at pains to point out to the press that his findings were provisional. There is no reason to doubt his word on this point, as his subsequent conduct demonstrates. I would hold, looking at the matter objectively, that a real possibility that he was biased has not been demonstrated.

Unreasonable Delay

106. The respondents' argument under this heading is directed to their article 6(1) Convention right to the determination of their civil rights and obligations within a reasonable time. They contend that the auditor was guilty of inordinate delay in breach of the article 6(1) requirement and that they were at an unfair disadvantage due to delay when they were giving evidence before the Divisional Court. They also submit, under reference to constitutional provisions considered

by the Privy Council, that they had a right to a determination within a reasonable time at common law which did not require them to demonstrate actual prejudice: *Bell v Director of Public Prosecutions* [1985] 1 AC 937; *Director of Public Prosecutions v Tokai* [1996] AC 856. The Divisional Court held, at p 169D-E, that the test at common law was whether delay had given rise to such prejudice that no fair trial could be held: *Tan v Cameron* [1992] 2 AC 205, 222-224, per Lord Mustill. In its judgment no such prejudice was shown, and in the Court of Appeal Schiemann LJ was of the same opinion: [2000] 2 WLR 1420, 1459A-B. The respondents say that the approach taken by these courts was wrong in law, as there was no requirement to show actual prejudice. The nature of the common law right which they asserted in your Lordships' House appeared to me to be virtually indistinguishable in this respect from the right under article 6(1), so I do not need to dwell on this part of their argument. I shall deal with the issue of delay on the assumption that the test which they must satisfy is that which requires to be satisfied to demonstrate that there was a breach of the Convention right and that prejudice, while relevant if it exists, does not require to be demonstrated.

107. In their overall complaint about delay they have included the time which elapsed from the local government elections on 8 May 1986 and the decision of the housing committee on 8 July 1987. The period that has elapsed since the event in question may be a relevant factor when considering the question whether the delay was unreasonable. But they accept that the obligation under the Convention relates only to the conduct of the proceedings. Time usually begins to run in civil cases for the purposes of article 6(1) from the date when the proceedings in question are initiated: *Ausiello v Italy* (1996) 24 EHRR 568, 571, para 18. I would hold that time began to run in this case from the date when the objections which gave rise to the investigation were received by the auditor, and that it includes the stage of the appeal to the Divisional Court. The period under review can therefore be divided into four distinct periods: (a) that from the receipt of the original objection on 18 July 1989 to the issuing by the auditor of his provisional views on 13 January 1994; (b) that from 13 January 1994 to the end of the audit hearing on 7 February 1995; (c) that from 7 February 1995 to the issuing by the auditor of his decision and the certificates of surcharge on 9 May 1996; and (d) that from 9 May 1996 to the decision of the Divisional Court, which was given on 19 December 1997. No complaint is made about any delay after that date.

108. I would also hold that the right in article 6(1) to a determination within a reasonable time is an independent right, and that it is to be distinguished from the article 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the article which creates a number of rights which, although closely related, can and should be considered separately. This means that it is no answer to a complaint that one of these rights was breached that the other rights were not. To take a simple example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law.

109. I would respectfully follow Lord Steyn's observation in *Darmalingum v The State* [2000] 1 WLR 2303 about the effect of section 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay. In *Flowers v The Queen* [2000] 1 WLR 2396 a differently constituted Board, following *Bell v Director of Public Prosecutions* [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in section 20(1) of the Constitution of Jamaica. In the context of article 6(1) of the Convention however the way this right was construed in *Darmalingum v The State* seems to

me to be preferable. In *Crummock (Scotland) Ltd v H M Advocate*, 2000 SLT 677, 679A-B, Lord Weir, delivering the opinion of the High Court of Justiciary, said that under article 6(1) it was not necessary for an accused to show that prejudice has been, or is likely to be, caused, as a result of delay. The article 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the article as implied rights which are capable of modification on grounds of proportionality: see *Brown v Stott* [2001] 2 WLR 817, 851B-E; *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, para 90. The only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable.

110. In *König v Federal Republic of Germany* (1978) 2 EHHR 170, 197, para 99 the European Court gave the following guidance as to the test to be applied in civil proceedings on the question of delay:

> "The reasonableness of the duration of proceedings covered by article 6(1) of the Convention must be assessed in each case according to its circumstances. When inquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by article 6(1)."

111. Applying this test to the facts, it will be convenient to examine separately the conduct of the auditor and that of the Divisional Court. I start with the Divisional Court. It seems to me that there is no basis whatever for the suggestion that there was an unreasonable delay at this stage. The auditor issued his certificate in May 1996. It was not until December 1996 that the respondents filed their evidence on the main issues. The accounting evidence was not filed until April 1997. A procedural hearing was heard shortly afterwards in May 1997. The case proceeded to a hearing in the Divisional Court in October 1997, which lasted for 23 days. Judgment was given on 19 December 1997. I would conclude without any difficulty, having regard to the complexity of the issues and the volume of evidence that had to be prepared and presented, that the proceedings in that court were concluded within a reasonable time.

112. As for the conduct of the investigation by the auditor, there is a much more extended timetable. A period of about three and a half years elapsed between the receipt of the first objection in July 1989 and the issuing of the provisional findings in January 1994. A further period of about two years and five months then elapsed before he issued his decision and the certificates of surcharge. But this brief narrative has to be seen in the light of the nature of the exercise on which he was engaged. The Divisional Court, at p 161C-D, described his investigation as vast. It referred, at p 169D to its mammoth nature, bearing in mind that the objections related to 28 individuals. I do not need to go over the details which are set out in the agreed statement of facts. I have already provided my own summary in an earlier part of this judgment, and some further details are given by the Divisional Court at pp 161-162 and at p 168.

113. In my opinion the most striking feature which emerges from all the facts relating to the conduct of the investigation by the auditor is that, far from causing delay by inaction, he was constantly in action. He was seeking out information wherever it could be found, often with considerable difficulty. He was interviewing and re-interviewing many witnesses, recovering and perusing thousands of documents, calculating amounts of loss and expenditure and then gathering all this information together into a decision which eventually extended to almost 2000 pages including the appendices. It has been suggested that his investigation was over-elaborate.

There are comments to that effect in the Divisional Court's judgment at p 161D. But the auditor had to form his own judgment on this matter. He had to take account of the importance of the exercise to all parties, including those who were at risk of being surcharged, and he was entitled to have regard to its obvious political sensitivity. I would attach particular significance to these factors and to the fact that it has not been suggested that the auditor caused delay at any stage by inactivity.

114. Applying the test described in *König v Federal Republic of Germany* (1978) 2 EHRR 170, 197, para 99 which directs attention to the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the authorities, and leaving aside the question whether the respondents have shown that they were prejudiced, I would hold that the proceedings did not exceed the reasonable time requirement which article 6(1) lays down.

115. In view of the conclusion which I have reached I do not need to deal with the respondents' submissions about the remedy to which they were entitled if there had been undue delay. Schiemann LJ, said at p 1460F, that it would not have been appropriate in that event to quash the auditor's certificate. He had in mind the remedy which was available in the Divisional Court to ensure that, despite the delay, there was a fair trial and the possibility instead of a remedy in damages. The appellant supported this approach. But these are difficult issues, and I would prefer to reserve my opinion on them.

The Divisional Court

116. The respondents submit that the Divisional Court made errors of law by applying the wrong tests to their arguments on apparent bias and delay. Their argument is that it dealt with the case as if their complaint was one of actual bias and with their complaint of delay on the basis that it was necessary to establish prejudice. It is true that the Divisional Court took particular account of the auditor's assertions that he was not biased and that, basing itself on the common law authorities, it had regard to the question whether the delay resulted in prejudice. But I do not think that, read as a whole, the judgment is vulnerable to such serious criticism that their decision to uphold the certificates against Dame Shirley Porter and Mr Weeks should, as the respondents assert, have been set aside by the Court of Appeal on that ground alone. Mistakes of law of this kind, if they are made, do not in themselves amount to breaches of the article 6 Convention rights of the kind which must inevitably attract that remedy. They can be corrected on appeal. I have taken full account of the respondents' arguments in my review of their case on unfairness and of their criticisms of this part of the Divisional Court's reasoning.

117. They also submit that the Divisional Court ought to have quashed the certificates on the ground that the injury done to her public reputation by reason of the auditor's conduct in making his statement at a press conference was so severe that to quash the certificate was the only possible remedy. I would reject this argument also. The question which the Divisional Court had to address was whether the defects in the investigation conducted by the auditor were so prejudicial to the respondents that it should in its discretion quash the certificates or whether it should proceed to a re-hearing on the merits and decide the issue on the evidence presented to the court: see *Lloyd v McMahon* [1987] AC 625, 716F-G per Lord Templeman. Various factors had to be taken into account in this case, including the inevitable consequence of the passage of time on the recollection of witnesses to which the Divisional Court refers at p 162D-E. But the fact that the press conference gave rise to adverse publicity, albeit that this was severe, would not of itself have justified quashing the certificates. There were other interests to be taken into account, namely those of the objectors and of the council and its electors. The respondents were given the opportunity, to which they were entitled, to raise the issue in the context of their arguments on unfairness. In my opinion their rights were sufficiently protected by the way in which this issue was examined in that court and by the remedies that were available to them by

way of appeal.

Conclusion on Unfairness

118. For these reasons I would hold that the proceedings as a whole did not infringe the respondents' Convention rights and that there was no unfairness at common law on the ground either of apparent bias or of delay.

Quantum

119. The auditor included in the amount which he certified under section 20(1)(b) of the Local Government Finance Act 1982 as one of the items of loss in consequence of the respondents' wilful misconduct a sum amounting to £15.476m for discounts on the sale of dwellings sold at a discount. He took as the measure of this loss the difference between the open market value of the dwellings with vacant possession, as estimated at the time of the sales by the council's valuers Ellis & Co for the purpose of arriving at a discounted price, and the discounted prices at which they were actually disposed of. Most of the dwellings included in this item were not sold outright but were let on long leases granted in consideration of substantial premiums. For convenience however all the transactions were referred to as sales. The discount was 30 per cent to purchasers who were not already tenants of the council. For existing tenants with the right to buy it was a variable amount, but it was always more than 30 per cent.

120. As the Divisional Court said (1997) 96 LGR 157, 205B, the question whether this amount was properly certified was by far the most significant issue in terms of quantum. Two main challenges to the auditor's approach to it were advanced in that court. The first, which raised an issue of principle, was whether the auditor was right to use the open market value of the unoccupied dwellings as his starting point. The second was directed to the figures which he used for assessing their market value which, it was said, were unreliable. The Divisional Court upheld the auditors' approach on both points. It concluded, at p 207E, that the loss arising from the sales at a discount was correctly calculated at £15.476m.

121. The issue whether this amount was correctly calculated was raised again in the Court of Appeal. Robert Walker LJ said [2000] 2 WLR 1420, 1502C that in his judgment the Divisional Court erred in its approach, as it should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. His conclusion on this issue was rendered academic by the decision of the majority to allow the appeals and discharge the certificates. Kennedy LJ said, at p 1429A, that he agreed with that part of the judgment of Robert Walker LJ which dealt with quantum, but Schiemann LJ said, at p 1447D, that he preferred to express no opinion on the point. As your Lordships have decided to allow the appeal, the issue as to quantum is once again a live issue. The auditor submits that the amount which was found to have been correctly calculated by the Divisional Court should be included in the certificates.

122. It may be convenient for me to set out again the provisions of section 20(1) of the 1982 Act:

> "Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act -
>
> (a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or
>
> (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person,

he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or in the case of a parish meeting, the chairman of that meeting) may recover that sum or amount for the benefit of that body…"

123. The task of the auditor in this case was to certify the amount of the loss or deficiency caused by the wilful misconduct. The loss or deficiency which he identified as due to wilful misconduct fell into two distinct parts. The first part consisted of expenditure incurred in the preparation of papers for the purpose of discussing the promotion of the electoral advantage of the majority party. This part raised no issue of principle. It was simply a matter of arriving at an appropriate figure to restore to the council's account the amount of the expenditure. The auditor made a broad estimate under this heading of £5,000 which, when interest was added, amounted to £10,126. No appeal was taken against the calculation of this amount. By far the greater part of the loss which he identified fell into the second part. This was the result of the resolution of the Housing Committee on 8 July 1987 to extend the programme of designated sales of dwellings from the council's social housing stock. After agreed corrections in the Divisional Court, the total amount of this loss was £26.462m. The figure of £15.476m for losses resulting from sales of dwellings at a discount is included in this figure.

124. The auditor's approach, as explained by him in paragraph 43 of his report, was a simple one. He said that the sale of property such as housing accommodation at less than its market value involves a loss or deficiency to the authority which is equal to the difference between the market value of the asset and the proceeds of sale. In his view, the amount of this difference was the amount that should be certified as due from any person by whose wilful misconduct that loss or deficiency has been incurred. It is this approach that the respondents have challenged as being wrong in principle.

125. I agree that the sale of a dwelling which is unoccupied at less than its open market value with vacant possession can be regarded as producing a loss or deficiency for the purposes of section 20(1)(b) of the 1982 Act. This assumes that those who were responsible for the sale were under a duty to obtain a full price for it, measured by its value with vacant possession in the open market. But I do not think that this can be regarded as a universal rule. The proper starting point is to identify the act of wilful misconduct. The next step is to determine what items of loss, if any, were caused by it. In the case of the designated dwellings, the act of wilful misconduct for which the respondents must be held accountable was the promotion of the policy which the Housing Committee adopted on 8 July 1987. The effect of its resolution was to remove the designated dwellings from the council's social housing stock as they became vacant. What the council lost as a result of the adoption of the policy were 618 dwellings from its social housing stock. Its capacity to perform its obligation to house the homeless under Part III of the Housing Act 1985 was correspondingly reduced.

126. Nevertheless, when these dwellings became vacant they could have been sold with vacant possession on the open market. Robert Walker LJ said at p 1502C that there was no loss to the council so long as the discounted prices actually received by it exceeded the value of the dwellings as tenanted social housing. They exceeded this value in all cases, so he was of the view that the auditor ought to have found that their sale did not result in any loss or deficiency. But I agree with Lord Bingham that the principle which underlies the statutory procedure is one of compensation. What the auditor is directed by section 20(1) to certify is the amount of the loss or deficiency, and it is for the benefit of the body that the amount certified is recoverable. The aim of the procedure is to put the body in the same position that it would have been in but for the wilful misconduct. Applying this approach, the loss to the council due to the sales for which it ought to be compensated was the difference between the full market price of the dwellings and

the discounted prices which were received for them.

127. That however does not conclude the argument. This is because the auditor included in his calculation of this amount a sum amounting to £4.237m for extra homelessness costs. These costs were directly attributable to the removal of the designated dwellings from the social housing stock. Robert Walker LJ said, at p 1502D, that to include this figure in the amount of the loss or deficiency as well as a figure for loss on the sale of the dwellings at a discount would result in double counting. In his view it would be inconsistent with the auditor's decision to include an amount for homelessness costs due to the depletion of the council's social housing stock to assume that those dwellings would have been sold with vacant possession at their full value on the open market.

128. I think that there is considerable force in the point which Robert Walker LJ made on this issue in his careful judgment. It seems to me that these two items were arrived at by the auditor on two different and arguably inconsistent assumptions. On the one hand the figure of £15.476m representing the loss arising from sales at a discount assumes that the council would, but for the unlawful policy, have obtained full value for dwellings as they no longer required to be treated as part of the social housing stock when they were sold. On the other hand the figure of £4.237m for extra homelessness costs is based upon costs for which it is assumed the council should be compensated on the ground that the dwellings ought to have been retained for social housing purposes. The principle of compensation requires that the council should be fully compensated, but it does not permit the council to be overcompensated. An auditor who seeks to apply this principle must guard against the risk of double counting. The effect of doing so would be to penalise the person from whom the amount was due, which is not the object of the procedure. It would also enable the body to recover more than was needed to make good the loss or deficiency.

129. In my opinion however the point about double counting is not free from difficulty. The principles are clear enough, but they depend for their application on the facts. It seems to me that the point ought to have been raised when the facts about the extra costs of homelessness were being inquired into by the auditor or by the Divisional Court. That was not done, with the result that your Lordships do not have the findings of fact which would be needed to disturb the calculations made by the auditor on this issue. With some hesitation therefore I have come to the conclusion, in agreement with your Lordships, that it would not be right to hold that the auditor fell into the obvious trap of double counting and that the sum upheld by the Divisional Court should not be departed from.

Conclusion

130. I too would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

131. I agree that the appeal should be allowed and the judgment of the Divisional Court restored as proposed by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead and for the reasons which they have given. The question of quantum referred to in the penultimate section of Lord Bingham's speech gave me some anxiety but was effectively concluded by the limited way in which the arguments of the respondents were put. The respondents (no doubt for some good reason) did not deploy or support by evidence the arguments which might have displaced the valid primary measure of the Council's capital

account loss. I agree that what Robert Walker LJ said in his judgment at p 1502 did not, on examination, suffice to displace the primary measure nor did it show that there had been any double counting.

LORD SCOTT OF FOSCOTE

My Lords,

132. This is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government. Like Viola's "worm i' the bud" it feeds upon democratic institutions from within (Twelfth Night).

133. When detected and exposed it must be expected, or at least it must be hoped, that political corruption will receive its just deserts at the polls. Detection and exposure is, however, often difficult and, where it happens, is usually attributable to determined efforts by political opponents or by investigative journalists or by both in tandem. But, where local government is concerned, there is an additional very important bulwark guarding against misconduct. The Local Government Finance Act 1982 (now repealed but in force until 11 September 1998) required the annual accounts of a local authority to be audited by an independent auditor appointed by the Audit Commission (sections 12 and 13). The auditor had to satisfy himself that the local authority's accounts were in order (section 15(1) and (2)) and, also, had to "consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the [local authority] concerned or brought to the attention of the public … " (section 15(3)).

134. If, in the course of the audit, it came to the attention of the auditor that municipal powers had been used not in the general public interest but, selectively, for party political advantage, it was plainly right that the political corruption in question should be exposed in a report under section 15(3).

135. Section 16 of the Act gave the auditor extensive powers to obtain documents and information for the purposes of the statutory functions. These included the power to require any officer or member of the local authority "to give him such information or explanation as he thinks necessary . . . " (section 16(2)). Any report made by the auditor under section 15(3) became a public document open to inspection by any member of the public (section 18A).

136. The statutory provisions to which I have referred provided an institutional means whereby political corruption consisting of the use of municipal powers for party political advantage might be detected and cauterized by public exposure. These provisions were repealed by the Audit Commission Act 1998 but replaced by provisions in Part II of that Act which are to much the same effect (see, in particular, section 8 of the 1998 Act).

137. In addition, however, where the misconduct in question had caused loss to the local authority, section 20 of the 1982 Act enabled the auditor to require those responsible to make good the loss. Section 20(1) provided:

"(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of

this Act …

(a) … , or

(b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person,

he shall certify that … the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the [local authority] in question … may recover that … amount for the benefit of that [local authority] …"

138. Subsection (3) permitted an appeal against the auditor's certificate to be made to the court. Subsection (4) applied where a certificate requiring payment of more than £2000 had been made, or upheld, and disqualified the individual concerned from being a member of any local authority for a period of five years. And subsection (5) required payment of the certified sum to be made within fourteen days of the certificate becoming final.

139. The purpose of a section 20 certificate was compensatory, not penal. Its purpose was not to punish the wrongdoer but to require the quantified loss caused to the local authority by the "wilful misconduct" to be made good. There was no element of discretion. If the officer or member had been guilty of "wilful misconduct" as a result of which loss had been incurred it was the duty of the auditor to issue a section 20 certificate specifying the amount of the loss. Of course, it will not be every case of political corruption, or other misconduct, in local government that will lead to financial loss to the local authority concerned. But many will do so and, in those cases, the powers and duties of auditors under section 20 of the 1982 Act (and under section 19 as well, although nothing turns on that section in this case) constituted, in my opinion, powerful and valuable protection to the public.

140. Section 20 of the 1982 Act was replaced by section 18 of the 1998 Act which was to the same effect. But section 18 of the 1998 Act has been repealed by the Local Government Act 2000 and not replaced. The 2000 Act also substantially re-cast the investigation and report provisions that had been contained first in the 1982 Act and then in the 1998 Act. The institutional protection provided by statute against political corruption and other misconduct by members of local authorities is now confined to the investigation, report and publicity for which the 2000 Act and an amended version of section 17 of the 1998 Act (formerly section 19 of the 1982 Act) make provision. There is now no statutory provision directed to restitution or compensation for loss caused by any wrongdoing that the investigation and report may have exposed. Certificates such as those issued against and challenged by Dame Shirley Porter and Mr David Weeks in the present case cannot now be issued. Local authorities that want to recover from delinquent councillors the loss caused by the delinquency must now do so by means of legal remedies available under the general law. However, section 20 of the 1982 Act was in force at the time the events material to this case took place and the propriety of the auditor's certificates against Dame Shirley and Mr Weeks must be tested on that footing.

141. My Lords, I have had the advantage of reading in draft the opinion on this appeal of my noble and learned friend, Lord Bingham of Cornhill. As Lord Bingham has observed, the facts that have given rise to the appeal are set out at some length in the judgments of the Divisional Court and the Court of Appeal. Lord Bingham has highlighted some of the key events. I gratefully adopt and need not repeat those highlights.

142. The factual findings made by the auditor, Mr John Magill, and by the Divisional Court against Dame Shirley Porter and Mr David Weeks were findings that justify being described as findings of political corruption. Dame Shirley and Mr Weeks, having appealed unsuccessfully to the Divisional Court, appealed successfully to the Court of Appeal. Mr Magill has appealed to this House. For the purposes of this appeal the parties have prepared a statement of agreed facts and issues. The contents of the statement were agreed by Mr Howell QC on behalf of Mr Magill, by Mr McMullen QC on behalf of Dame Shirley and by Mr Cakebread of counsel on behalf of Mr Weeks. The contents of the statement, in my opinion, endorse the essential findings of the auditor and of the Divisional Court regarding the conduct of Dame Shirley and Mr Weeks and justify the description of that conduct as political corruption. Thus:

(1) As a consequence of local government elections in May 1986 reducing the Conservative majority from 26 to 4, Dame Shirley, the leader of the Conservatives on the Westminster Council, was determined that a greater majority should be achieved at the 1990 elections (paragraphs 9 and 10 of the statement).

(2) Eight marginal wards, the "key wards", were identified. The intention of Dame Shirley and Mr Weeks was to reduce the number of Labour voters and increase the number of Conservative voters in these key wards. The target was an overall increase of 2,200 Conservative supporters in these wards (paragraphs 13 to 15).

(3) This increase was to be brought about by selling council-owned residential properties in the eight key wards when they became vacant. It was believed that owner-occupiers were more likely to vote Conservative than were council tenants (paragraphs 16 and 28).

(4) The Director of Housing advised in May 1986 and again in March 1987 that if all council properties in the eight key wards were designated for selling, the council would not be able to meet its statutory housing obligations (paragraphs 18 and 29).

(5) Nonetheless, at a meeting on 24 March 1987, attended by Dame Shirley and Mr Weeks, it was decided to sell annually 250 properties in the eight key wards (paragraph 35).

(6) On 5 May 1987 Mr Sullivan QC met council officials in consultation. He was informed that the majority (Conservative) group wished to target sales in marginal wards for electoral advantage. He advised that this would not be lawful, that the designation of properties for sale had to be done for proper reasons and that, in identifying the properties to be sold, the same criteria had to be applied across the whole city (paragraph 40).

(7) The critical paragraph in the agreed statement of facts is paragraph 42. It reads:

> "On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course … of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards."

143. That was the policy eventually carried into effect via the housing committee decision on 8 July 1987 (paragraph 58 of the statement). It led to the sale of 618 council properties (some were let on long leases for substantial premiums). It is clear that the policy was adopted by the chairmen's group, led by Dame Shirley and Mr Weeks, and was thereafter promoted by Dame Shirley and Mr Weeks, as well as by others, not in order to achieve sales city-wide but in order to achieve 250 sales per annum in the eight key wards. And those sales were for the purpose of replacing probable Labour voters by probable Conservative voters. The city-wide policy was no more than a cloak to give apparent legality to the sales in the eight key wards which leading counsel had rightly warned would be unlawful unless part of a city-wide policy adopted for a

proper reason. The sales of the 618 properties involved the exercise of local government powers to sell council properties (see section 32, Housing Act 1985) not for the purpose for which those powers were granted but in order to increase the number of Conservative voters in marginal wards. It has not been in dispute before your Lordships that this purpose for selling is an unlawful purpose.

144. In the Court of Appeal Kennedy LJ commented on the political reality that many government decisions, whether at local government level or in central government, are taken with an eye to the electoral effect they may have. He said:

> "Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. In local, as in national, politics many if not most decisions carry an electoral tag, and all politicians are aware of it." ([2000] 2 WLR 1420, 1444)."

The Lord Justice was, of course, correct. But there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage. The agreed statement of facts places the policy adopted by the chairmen's group on 5 May 1987 fairly and squarely in the former category.

145. My Lords, there are three issues which arise on this appeal on which I wish to comment. The first is whether Dame Shirley and Mr Weeks were, for section 20 purposes, guilty of wilful misconduct. The second is whether, if they were, that misconduct was causative of loss to the council. The third is how such loss should be quantified. But, my Lords, the backcloth to each of these issues is that Dame Shirley and Mr Weeks stand convicted of political corruption. They stand so convicted on the basis of facts which are not now in dispute.

Wilful misconduct

146. It has been submitted on behalf of Dame Shirley and Mr Weeks that whether or not their conduct in promoting the policy of designated sales in the eight key wards was misconduct, it lacked the quality of being "wilful". This, it is said, is because, relying on advice which they believed had been given by Mr Sullivan QC, they did not realise that the policy was unlawful. In *Lloyd v McMahon* [1987] AC 625 Woolf LJ said that misconduct "would only be wilful if the councillors were doing something which they knew to be wrong or about which they were recklessly indifferent as to whether it was wrong or not" (p 674). It has been common ground before your Lordships that this is the correct test.

147. It is said that, in reliance on Mr England's note of what Mr Sullivan QC had said in consultation on 5 May 1987, Dame Shirley and Mr Weeks thought that it would be lawful for them to achieve their purpose of designating properties for sale in the eight key wards in order to achieve annual sales of 250 properties in those wards provided that there were similar designations of properties for sale city-wide. Mr England's note reads, so far as material, as follows:

> "Counsel advises that designated estates should be identified in marginal and non-marginal wards in order to protect the council. The group will, therefore, need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300-350 properties will need to be sold across the city."

148. But Dame Shirley and Mr Weeks knew that a policy adopted for the purpose of electoral advantage in the key wards would be unlawful. And nothing in Mr England's note of what Mr Sullivan QC had said, or indeed in what Mr Sullivan had actually said, indicated that the adoption of the city-wide policy in order to achieve the unlawful electoral purpose in the eight key wards would be any less unlawful than the adoption for that purpose of a policy in respect of the eight key wards alone. As Lord Bingham has noted in paragraph 39 of his opinion, Mr Sullivan was never asked the critical question, namely, whether the designated sales policy would become lawful if, with the same objective, the designated sales policy were extended city-wide. I agree with Lord Bingham that no reason for doubting the clear findings, adverse to Dame Shirley and Mr Weeks, of the auditor and the Divisional Court has been shown.

Causation

149. Dame Shirley and Mr Weeks rely on the housing committee's decision of 8 July 1987 as breaking the chain of causation. The designated sales policy was implemented because the housing committee had resolved to adopt it. If the housing committee had not so resolved, the policy would not have been implemented. Neither Dame Shirley nor Mr Weeks was a member of the housing committee. Neither of them was present at the 8 July meeting. Mr McMullen submitted that a city-wide designated sales policy was a policy capable of being a lawful one. So it was. He submitted that the housing committee resolution that adopted the policy was capable of being a lawful resolution. I agree. He submitted that if a majority of members of the committee voted in favour of the resolution for reasons that were lawful, then the resolution would have been lawful, notwithstanding that misconduct on the part of the leader of the council and her deputy had attended the formulation and promotion of the policy adopted by the resolution. Again, I agree.

150. It was argued on behalf of Mr Magill that even if the resolution were a lawful one, nonetheless the misconduct of Dame Shirley and Mr Weeks was not spent and could still be regarded, for section 20 purposes, as having "caused the loss". But for their misconduct, the designated sales policy would not have been formulated and placed before the housing committee for approval. I agree that, applying a "but for" test, it could be said that their misconduct had caused the loss. But I do not think that that is enough. If the housing committee resolution was a lawful one, then it was lawful for it to be implemented by the council. Its implementation was within the statutory powers of the council. This is not a case in which the council lacked power to carry out the property sales contemplated by the policy.

151. So, if the improper electoral advantage in the eight key wards, the purpose of the designated sales policy, had been made plain at the housing committee meeting and had been repudiated by a majority of those present who had then voted in favour of the policy for unimpeachable reasons, it would have been plain that the misconduct had become spent even if, without the misconduct, the policy would never have found its way to the committee. I find it difficult to follow why the case would be different if, without an explicit disclosure and repudiation of the policy, a lawful resolution adopting the policy were passed. I accept that a corrupt principal can attain his unlawful object via the medium of an innocent agent (see *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 385), but I do not think a local authority committee can be treated as merely an agent for the leader of the council, no matter how influential he or she may be. I am, therefore, disposed to agree with Mr McMullen, and to disagree with the Divisional Court (see 96 LGR, 157, 181), that if the Housing Committee resolution could be shown to have been a lawful resolution, the causative effect of Dame Shirley's and Mr Weeks' misconduct would, for section 20 purposes, be spent.

152. There were twelve members of the housing committee. Seven of them voted in favour of the designated sales policy. Five voted against. Of the seven, two of them, Mr Hartley and Dr

Dutt, were found guilty of misconduct by the auditor. Each, in the auditor's opinion, "took into account the electoral advantage of the Conservative party and sought to promote it in his voting … ". The auditor issued a section 20 certificate against Mr Hartley but Mr Hartley succeeded on appeal to the Divisional Court. In the view of the Divisional Court he was guilty of misconduct but not of wilful misconduct (see p 199). It follows, however, from the finding of misconduct that Mr Hartley's vote at the housing committee meeting was invalid.

153. As to Dr Dutt, he took his own life before the auditor made his final findings. The auditor, in his report, said:

> "My provisional findings and views were adverse to Dr Dutt . . . In letters to me Dr Dutt disputed my provisional findings and views. Shortly thereafter, he took his own life. I make no findings of personal liability of Dr Dutt." (para 1903)

154. Mr McMullen has submitted that Dr Dutt must be treated as exonerated from misconduct. I do not agree. Dr Dutt was exonerated from wilful misconduct, but the provisional findings of misconduct were unchanged. In my opinion Dr Dutt's vote falls into the same state as that of Mr Hartley. It was invalid. As for the other five members of the committee who voted in favour of the resolution, they so voted because the resolution was Conservative party policy. They did not know that the purpose of the resolution was to obtain electoral advantage in the eight key wards. They did not know that that was the reason why the policy had been adopted. They may very well have supposed that the resolution reflected their party's general dislike of social housing and bias in favour of owner occupation. I do not think, in these circumstances, that their votes can be disregarded on the ground that they were invalid. But their votes were insufficient in number to carry the resolution. Five valid votes in favour of the resolution and five against would have produced a tie which, in theory, could have been resolved by the chairman's casting vote. But the chairman was Mr Hartley and any casting vote of his would, for the reasons already discussed, have been an invalid vote.

155. In my opinion, therefore, the resolution purportedly passed at the housing committee meeting was not a valid resolution, the wilful misconduct of Dame Shirley and Mr Weeks in promoting the policy purportedly adopted by the resolution was not spent and the chain of causation was not broken. In my opinion, their misconduct caused, for section 20 purposes, the 618 sales by the council that produced the loss.

Quantification of the loss

156. The issue is whether Walker LJ's disagreement with the basis on which the Divisional Court had quantified the loss was correct.

157. The 618 designated properties were sold with vacant possession. They were sold by the council at a discount against their vacant possession market value. The council had power to sell at a discount. If the sales had been lawful, no complaint about the discount could have been made. The question is whether, the sales being unlawful, the amount of the discount represents an item of loss caused by the wilful misconduct. The rival arguments, as I understand them, are these:

(1) The properties were, before being designated for sale and becoming vacant, occupied by council tenants. Their value so tenanted was a good deal less than their value with vacant possession. If, on becoming vacant, they had been re-let to those on the council's waiting list for social housing, their value so re-let would, similarly, have been a good deal less than their value with vacant possession. The amount of the discount at which the properties were sold may be taken, on a rough and ready footing, as representing the difference in value between the

properties let as social housing and the properties with vacant possession. So, if the council recover the amount of the discount the council will be in a better financial position than it would have been if the unlawful designated sales policy had never been adopted. This argument, expressed by Robert Walker LJ more lucidly than I have done, was concurred in by Kennedy LJ. It has been espoused by Mr McMullen and Mr Cakebread.

(2) The alternative argument proceeds like this. The council has a statutory housing obligation and a long list of people who need to be housed. The unlawful sales reduced the council's stock of social housing. In order to replenish its stock and restore the position to what it was before the sales took place, the council would have to purchase properties in the open market. It would have to pay vacant possession prices. Accordingly, the loss it suffered by reason of the misconduct included the discounts at which the properties were sold. This was the approach of the Divisional Count. It was supported by Mr Howell.

158. The answer to the question as to which approach is the right one does not, in my opinion, depend at all upon the manner in which the properties appeared in the council's accounts. The quantification of loss for section 20 purposes should, in my view, apply the same principles as are applicable to quantification of damages in tort. As a result of the wrongful acts of Dame Shirley and Mr Weeks the council suffered loss. What was that loss? It lost the properties that were sold, but it received the purchase price that was paid for them. Immediately before sale, the properties were vacant. They were sold with vacant possession but the council did not receive a vacant possession price. In my opinion, the discount represented a true loss suffered by the council. Interest on the discounted purchase price since its receipt and interest on the amount of the discount from the date of the sale ought, on the assumption that interest rates more or less reflect rates of inflation in property values, to enable the council to replace the sold housing stock. Thus, to treat the discounts as items of loss seems to me to produce a just result, in line with the intentions underlying section 20.

159. The problem, as it seems to me, with Robert Walker LJ's approach, is that it attributes no value to the benefit to the council of owning properties which are available to be used for social housing. The sale of the properties deprived the council of that benefit. The council can restore that benefit only by purchasing similar properties in the open market. The value of that benefit can be taken, again on a rough and ready basis, as being equivalent to the discounts.

160. To allow the council to recover the discounts as items of loss does not, in my opinion, involve any element of double counting. A separate item of loss allowed by the Divisional Court was £4.237m, representing extra costs of housing homeless people which the council had to incur as a result of its own stock of social housing having been depleted by the sales of the 618 properties. Robert Walker LJ thought that to allow the discounts to be recovered as well as the £4.237m would be inconsistent and involve double counting. I do not think so. The £4.237m covered the extra costs of homelessness over the period starting from the date on which the properties, on becoming vacant, were available for re-letting and ending on the date of the auditor's certificate. Thereafter the loss of the 618 properties from the housing stock is covered by the capital sum received (or receivable) by the council (ie the discounted proceeds of sale plus the amount of the discounts) that enables it to replace the sold properties. There is no double counting.

Bias and Unfairness

161. There was a fourth issue raised by Dame Shirley and Mr Weeks. They submitted that the manner in which the auditor had gone about his task of fact finding was attended by at least the appearance of bias against them and that that feature of the case, coupled with the time it has taken for the case to come to finality, represented such a degree of unfairness as to infringe their

right to a fair trial (see article 6, ECHR). These submissions fail, in my opinion, for the reasons given by my noble and learned friend Lord Hope of Craighead. I want to add just one comment on the issue of unfairness

162. One of the most striking features of the case is the enormous amount that under the auditor's certificates Dame Shirley and Mr Weeks were adjudged liable to pay. The amount, £31m odd, seems enormous not because it does not accurately reflect the loss caused to the council by Dame Shirley's and Mr Weeks' misconduct but because it is so out of line with what most people would regard as a proportionate punishment for their misconduct. There is, I think, an almost instinctive feeling that the requirement that they pay the certified amount is unfair.

163. This instinctive feeling, however, overlooks the very important fact that the purpose of a section 20 certificate is to compensate the local authority for loss. The purpose is not one of punishment. Nor does the amount to be certified lie in the discretion of the certifying auditor. If wilful misconduct has been proved it is his duty to certify the full amount of the loss thereby caused. The size of the amount so certified can no more represent an article 6 unfairness than can the size of an award of damages for tort or breach of contract. Since, for the reasons given by Lord Hope, there was no procedural unfairness in the proceedings which have culminated in the appeal to this House, there is no further ECHR point that can be taken.

Conclusion

164. For the reasons given in this opinion in addition to those given by Lord Bingham, with which I am in full agreement, I would allow the appeal and restore the order of the Divisional Court.