Case No: CO/5673/2015

Neutral Citation Number: [2016] EWHC 2166 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/08/2016

Before :

THE HONOURABLE MR JUSTICE HOLGATE

- -

Between :

	THE QUEEN ON THE APPLICATION OF FARADAY DEVELOPMENT LIMITED	**Claimant**
	- and -	
	WEST BERKSHIRE COUNCIL	**Defendant**
	- and -	
	ST MODWEN DEVELOPMENTS LIMITED	**Interested Party**

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- -

Mr Charles Banner and Ms Heather Sargent (instructed by **DAC Beachcroft**) for the **Claimant**
Mr David Elvin QC and Luke Wilcox (instructed by **Bond Dickinson**) for the **Defendant**

Hearing dates: 5-7 July 2016

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Judgment**MR JUSTICE HOLGATE :**

Introduction

1. Faraday Development Limited ("Faraday") challenges the decision of West Berkshire District Council ("WBDC") on 4 September 2015 to enter into a Development Agreement ("DA") with the Interested Party, St Modwen Developments Limited ("SMDL") "to facilitate the comprehensive regeneration" of an area of land at the London Road Industrial Estate, Newbury, Berkshire ("LRIE") of which WBDC is the freehold owner.

2. The challenge has been made in two sets of proceedings. First, a claim for judicial review was issued on 20 November 2015. Initially, Faraday pursued two grounds:-

   (1) WBDC failed to have regard to and/or to comply with its duty under section 123 of the Local Government Act 1972 ("LGA 1972"), to obtain the best consideration reasonably obtainable for the disposal of interests in its land and for the same reason WBDC made an impermissible grant of state aid to SMDL contrary to Article 107 of the Treaty on the Functioning of the European Union ("TFEU");

   (2) The DA is a "public works contract" and/or a "public service contract" within the meaning of the Directive 2014/24/EU (which is transposed into English law by the Public Contracts Regulations 2015 ("the 2015 Regulations") and therefore WBDC's decision not to comply with the public procurement regime in that legislation was unlawful.

   As regards ground (1) Mr Banner, who together with Ms Sargent appeared on behalf of the Claimant, stated that if the challenge relating to section 123 fails, the "state aid" challenge falls away. Because in the circumstances of this case the Claimant did not consider the "state aid" point to add anything of significance to its challenge, neither party made any submissions on that aspect and I am not asked to deal with it.

3. On 24 March 2016 Mr Justice Gilbart granted permission to apply for judicial review.

4. On 13 May 2016 Faraday applied for permission to rely upon an additional ground of challenge. On 17 May 2016 Mr Justice Cranston granted that permission. In its final form the additional ground of challenge is:-

   > (3) The Council in entering into the DA deliberately sought to avoid imposing any directly or indirectly enforceable obligation on SMDL to carry out or procure works on the LRIE, so as to avoid the public procurement regime, on the basis that this would increase market interest in the DA. That was irrational because it was founded on (i) a misunderstanding of the advice given to WBDC by its experts Strutt & Parker, and/or (ii) a fundamental misconception of the public procurement regime.

5. Pleadings have been amended on both sides. The parties have since consolidated their respective arguments in skeletons filed for the substantive hearing. In its skeleton argument the Claimant has also updated the factual account upon which it relies from the Amended Statement of Facts and Grounds.

6. On 22 January 2016 Faraday issued a second claim in the Technology and Construction Court. This claim challenged WBDC's decision to enter into the DA under Part 6 of the 2015 Regulations. It raised the same issue as ground 2 of the judicial review, but was brought in order to avoid any dispute as to whether Faraday's proper remedy in relation to that ground was by way of judicial review or a statutory claim made under Part 6 of

the 2015 Regulations. A Part 6 claim could only have been made in this case by an "economic operator" (as defined in regulation 2(1)) to whom the "contracting authority" owed a duty. But where that remedy is not available, a breach of the 2015 Regulations may form a legitimate ground for judicial review (R (Chandler) v Camden LBC [2010] PTSR 749 at paragraph 77). Thus, it was common ground that it is unnecessary for the Court to determine whether Faraday qualifies in this case as an "economic operator" in order to bring a claim under Part 6 of the 2015 Regulations. On 9 February 2016 Mr Justice Edward-Stuart ordered the Part 6 claim to be transferred to the Administrative Court to be heard together with the judicial review. At the hearing before me neither party raised any issue needing to be dealt with specifically under the Part 6 claim and it was common ground that nothing more need be said about it in this judgment.

7. Although the object of the skeleton argument for Faraday was to consolidate the Claimant's arguments it was nevertheless 64 pages long and accompanied by a summary. Ground 1 itself was subdivided into eight sub-grounds 1A to 1H. The Claimant also produced a prodigious amount of evidence, notably four witness statements and an affidavit by Mr Duncan Crook (a director of and major shareholder in Faraday) taking up some 52 pages or so of closely typed text. Much of this material was unnecessary or inappropriate. Mr Crook's statements went way beyond setting out the essential facts of the claim and producing relevant documents. For example, he offered an extensive commentary on the documents (see also his exhibit DC1, document 43). As was pointed out by the Chancellor Sir Terence Etherton in JD Wetherspoon plc v Harris [2013] 1 WLR 3296 (paragraph 39), it is generally not the function of a witness statement to provide a commentary on the documents in a trial bundle, especially where the points made are essentially matters for legal argument or submission. Much of Mr Crook's commentary on documents overlapped with points taken in the Claimant's skeleton argument, but it also raised additional observations not relied upon in the skeleton. That approach created unnecessary uncertainty for WBDC and for the Court as to the scope of Faraday's case. For that reason I asked Mr Banner to identify whether there were any additional points in Mr Crook's material upon which the Claimant would wish to rely, failing which they would not be dealt with in this judgment. He told me that there were none.

8. Unfortunately, important sections of Faraday's skeleton argument did not indicate which particular documents or passages are relied upon to support the legal criticisms being made of WBDC. However, I am grateful to Faraday's counsel for producing during the hearing two succinct documents, "Claimant's key references" and "Reply", which not only identified the specific materials relied upon but also refined the legal criticisms of WBDC very considerably. For example, it became clear that Grounds 1A to H now largely turn upon Grounds 1D and 1E. It would have been of even more assistance to the Court if this process of refinement had been carried out at an earlier stage, especially when the skeleton argument was being prepared.

9. I am bound to add that despite the prolixity of Faraday's material, the references it made to certain parts of the documentation (for example in the skeleton argument) were somewhat selective. There was a failure to deal with other passages which tended to undermine certain of the criticisms being made against WBDC. This unfortunate lack of objectivity meant that Faraday pursued some sub-grounds unnecessarily before they

were sieved out, or reduced, in its written submissions produced during the hearing.

10. On the first day of the hearing I drew Mr Banner's attention to the inclusion of opinion evidence in parts of the witness statements relied upon by the Claimant, notably those of Mr Crook. Generally evidence of this kind can only be given by an expert acting within the scope of his expertise. Furthermore, it is generally a pre-requisite for the giving of expert opinion evidence that the expert in question is independent and impartial. (The Ikarian Reefer [1993] 2 Lloyd's Rep 68; Kennedy v Cordia (Services) LLP [2016] 1 WLR 597 paragraphs 51-52). It was not suggested on behalf of the Claimant that Mr Crook had the necessary degree of independence to be able to proffer expert opinion evidence, for example, on the satisfaction of the duty under section 123 (see his first witness statement and paragraph 36 of his fourth witness statement), or on whether, in the absence of regeneration, WBDC's rental income was at risk in the longer term (see paragraphs 6 to 8 of his fourth witness statement). I also note that the Claimant's Solicitor, Mr Kelly, gave his opinion on non-legal matters to do with valuation practice (see paragraphs 34 to 37 of his second witness statement). The rejection by Mr Justice Cranston on 17 May 2016 of a late attempt by the Claimant to adduce expert evidence (see the Application Notice dated 13 May 2016) may perhaps explain this attempt to include such material in the witness statements for the Claimant dated 10 June 2016. Fortunately, I need say no more about this inappropriate material, as it did not form any part of the more refined contentions which Mr Banner put forward during the hearing both orally and in writing. However, it is unfortunate that these arguments were not refined or focused at an earlier stage so as to make it unnecessary for such material to be prepared or read.

11. The remainder of this judgment deals with matters under the following headings:

    (i) Factual background (paragraphs 12 to 21);

    (ii) Local planning policies (paragraphs 22 to 26);

    (iii) WBDC's process leading to the Development Agreement (paragraphs 27 to 109);

    (iv) The Development Agreement (paragraphs 110 to 128);

    (v) Ground 1 – WBDC's duty under s. 123 of the LGA 1972 (paragraphs 129 to 161);

    (vi) Ground 2 – the procurement regime (paragraphs 162 to 223);

    (vii) Ground 3 – irrationality (paragraphs 224 to 230).

Factual background

12. The LRIE lies about 0.25 miles to the east of Newbury Town Centre and occupies an area of about 25 acres. It is bordered by the A4 to the north east, the A339 to the west and the Kennet and Avon Canal to the south. Access to the estate is currently taken from the A4, but WBDC's planning policies envisage an additional access being taken from the A339. Faraday says that this access would run across part of its landholding.

13. Most of the freehold of the LRIE belongs to WBDC (it is shown edged red on the plan at page 345 of the court bundle). A relatively small part of the estate to the north west falls outside WBDC's ownership. There are 26 plots within that ownership (shown on the plan at page 1 of the court bundle). One area (comprising plots 8, 25 and the land in between) was formerly occupied by Council Offices but is now vacant. WBDC receives ground rent from long leases on the other plots within the LRIE totalling £330,000 a year. Most of the ground leases were granted in the late 1970's and early 1980's and will not expire until 2044 to 2110. There has been little new investment in the estate over the last 40 years.

14. Faraday is a special purpose vehicle incorporated on 25 June 2004 in order to assemble land for redevelopment within the LRIE. Faraday holds long leaseholds from WBDC in respect of plots 1, 9 and 22 and an option to acquire the long leasehold of an adjoining area, plot 6. This land lies on the western part of LRIE adjacent to the A339 and just to the south of the north western corner of the estate (which lies outside WBDC's ownership). Plots 1, 9 and 22 are let by Faraday to commercial companies on short term leases and licences. Plot 6 is currently owned and occupied by a business selling cars. Mr Crook states that the aggregate ground rent received by WBDC for these four plots is £82,000 a year, that rent has not increased for several years and it is unlikely to increase in the foreseeable future in the absence of redevelopment (paragraph 21 of his first witness statement).

15. Directors and shareholders of Faraday are also directors and shareholders of Ressance Limited, a property development and investment group based in Newbury which has interests in and has been redeveloping the land lying to the north west of WBDC's freehold ownership.

16. On 21 October 2011 Faraday entered into a joint venture agreement with Wilson Bowden Developments Limited ("WBD"), the commercial development division of Barratt Developments plc. The aim was to give WBD a right to acquire a 50% shareholding in Faraday and to participate in the redevelopment of Faraday's leasehold land. The agreement also required the parties to work together if other land within the LRIE should become available for redevelopment.

17. Faraday has secured planning permission for a mixed-use redevelopment on its leasehold area, referred to as the Faraday Plaza Scheme. The planning permission was renewed in an appeal decision by a Planning Inspector issued on 1 February 2016. Mr Crook states that Faraday was and remains committed to the implementation of that scheme. He says that it would increase the ground rent payable to WBDC on Faraday's land by about £195,000 a year and provide a new access to the LRIE from the A339 at no cost to the Council.

18. Following the grant of the original planning permission for the Faraday Plaza Scheme, Faraday negotiated with WBDC for the grant of a new consolidated ground lease for a term of 250 years in respect of plots 1, 6, 9 and 22. By April 2011 Faraday and WBDC had agreed heads of terms and drafted the lease. In the meantime, Faraday reached heads of terms or pre-let agreements with a number of occupiers for its scheme. However, from July 2011 onwards WBDC ceased to negotiate with Faraday for the grant of a new consolidated lease.

19. Subsequently in 2013 WBD and David Wilson Homes ("DWH") (another subsidiary of Barratt Developments plc) made a bid in the Council's tender process for the regeneration of the LRIE. The bid was wholly funded and largely prepared by WBD and DWH. The bid included Faraday's land at a substantially reduced value in return for a share of the profits. It was also envisaged that Faraday would develop the flats proposed on its land and 25% of all other residential development proposed by the bid.

20. On 27 March 2014 WBDC's Executive chose SMDL's bid in preference to WBD's.

21. In paragraphs 5 to 29 of his affidavit dated 23 February 2016, Mr Crook elaborates on the joint venture between Faraday and WBD. It was established under a share purchase agreement dated 21 November 2011. The agreement gave WBD the right to purchase 50% of the issued share capital in Faraday. Pending completion of that share purchase, Faraday and WBD were required to establish a project panel to promote the Faraday Plaza Scheme and pursue other opportunities within the LRIE. On completion of the share purchase WBD would have been entitled to appoint 50% of the directors of Faraday, thereby securing joint control of Faraday. In February 2013 the project panel agreed that WBD and Faraday would promote a bid to WBDC under the umbrella of the share purchase agreement, with WBD fronting the bid and Faraday identified as a joint venture partner. On 4 March 2015 the share purchase agreement was terminated consensually. WBD has not joined in this challenge to WBDC's decision to enter into the DA with SMDL. However, Mr Crook says that if the Court should decide to quash the decision to enter into the DA, and if WBDC decides to retender "the LRIE regeneration opportunity", Faraday would be very interested in taking part in a new bid with a joint venture partner, whether WBD or another partner.

Local Planning Policies

22. In October 2003 WBDC as local planning authority produced "Newbury 2025: A Vision for Newbury Town Centre". Paragraphs 5.20 to 5.23 dealt with LRIE. The document referred to:-

> "…. encouraging redevelopment of this area for higher density primarily business uses which contribute to the visual enhancement of the area and which also provide the opportunity for locating local businesses with large numbers of employees close to the Town Centre".

23. In March 2005, Atkins Transport Planning produced a Movement Framework for

Newbury: Final Report. This document recommended the provision of a new access from the A339 to LRIE.

24. In July 2012 WBDC adopted West Berkshire Core Strategy (2006–2026). Area Delivery Plan Policy 2 states that:-

> "Regeneration of the Faraday Road area immediately to the east of the town centre for mixed use and office development will create additional jobs and improve the environment of this part of the town."

25. The policy acknowledged that permission had been granted for the Faraday Plaza Scheme.

26. Paragraph 5.54 of the Core Strategy identified LRIE as a Protected Employment Area within an edge of centre location. Policy CS9 provides that proposals for industry, distribution and storage uses will be directed to the District's Protected Employment Areas. In addition, new office development will be directed towards the Council's town and district centres. However, if no suitable sites are available within those existing centres then a sequential approach is taken which gives priority next to locating office development on edge of centre sites, including Protected Employment Areas with an edge of centre location such as the LRIE. The Core Strategy states that the LRIE has the "potential for redevelopment and the ability to deliver a greater employment base" (paragraph 5.53). The Protected Employment Areas have been designated for B Class uses to ensure sufficient sites are provided in suitable locations to foster business development and promote sustainable economic growth across the District. Policy CS9 also allows other employment generating uses outside Class B to be located within these Areas if they are complementary to existing business uses in that location and consistent with the functioning of that location for employment purposes.

WBDC's process leading to the Development Agreement

Strategic Feasibility Study (SFS) Specification

27. At the beginning of 2011 WBDC decided to commission a Strategic Feasibility Study (SFS) of the LRIE from consultants. To that end WBDC issued a Specification to enable consultancies to bid for this task. It pointed out that the LRIE is a valuable asset for the Council, but had not received substantial investment for some 40 years. The estate comprised a wide range of building types and uses which had materialised over the years as a result of individual commercial requirements. Some of the buildings were in need of repair. Otherwise they were generally unsuited to modern working practices. The Council was concerned about facing a gradual decline in the commercial viability of its estate. This ineffective use of land so close to the town centre created an environment which could lead to dereliction and neglect and would not achieve the "optimisation of the potential for the area". It was pointed out that although the Council has considerable property holdings in the LRIE from which it receives a substantial rental income, there had been no attempt to properly protect the Council's revenue or to encourage growth

and sustainability for the future, or to secure and enhance the viability of the area.

28. WBDC stated that it did not envisage seeking to generate one-off capital receipts by disposing of any of its assets in the LRIE (paragraph 2.1). Consultants were told that the SFS would need to consider options both with and without the Faraday Plaza Scheme. They would be required to address a number of issues within the strategy including a health check of the Council's existing property interests, an overview of the investment market (including factors for determining the nature of and most appropriate timing of any future regeneration initiative), and a review of occupier demand so that the type of occupier and uses which could be attracted to the LRIE in the future could be identified.

29. The Specification also stated that WBDC's property income from the LRIE is an important resource provided by rents from existing ground leases. Most of the leases had between 75 and 100 years left to run and so there was some potential marriage value to be secured for the Council following redevelopment (paragraph 5.2(b)). Of particular note was paragraph 5.2(c)(ii) which stated:-

> "For the successful regeneration of the area to take place there needs to be an environment in place which should provide an acceptable return to the Council's selected development partners whilst also delivering … "best consideration" to the Council, following an appropriate procurement process."

30. Thus, it is plain that from the outset the Council had well in mind its statutory obligation under section 123(2) of the Local Government Act 1972 to achieve the best consideration reasonably obtainable on a disposal of its property.

31. In late May 2011 Strutt & Parker ("S&P") were appointed by WBDC to prepare the SFS.

32. On 8th September 2011 the Council's Executive accepted a recommendation from S&P to bring negotiations with Faraday about a new consolidated ground lease temporarily to an end so as to allow the Council to determine a strategy for the whole of the LRIE. The section of the officer's report dealing with financial implications stated:-

> "The Council will want to ensure that *maximum* long term value from the LRIE asset is secured in the future and professional advice recently received suggests that continuing with these lease negotiations at present will have a detrimental impact on this" (emphasis added).

Strutt & Parker's Strategic Feasibility Study – December 2011

33. In December 2011 S&P produced the final draft of their SFS. In paragraph 1.3 the consultants identified a number of weaknesses in the LRIE including the lack of any substantial investment for the last 40 years and the absence of any formal estate management regime or structure. They agreed that the estate "has a number of buildings in a poor state of repair which, particularly over time, will become even less well suited

to modern business practices". In addition, they stated that the estate, "fails to maximise the potential of this high profile, prominent site and largely turns its back" on the surrounding road and canal network. Paragraph 1.6 noted the Council's "strong emphasis" on "examination of ways to increase the Council's revenue from the site as well as the importance of the area's designation as a "Protected Employment Area" in seeking an appropriate mixed-use solution."

34. In paragraph 2.11 S&P pointed out that the Council's existing ground lease structure "does not create a cohesive asset and estate management strategy and this has impeded the ability to regenerate here…". Paragraph 2.12 continued "we would therefore expect the Council to be in a position to generate significant financial benefit by creating modern institutional leases". S&P advised the Council to consider the additional value that could be obtained from allowing uses to be changed within the estate. In paragraph 2.13 they said:-

> "It is therefore significant that the Council is working to put in place a clear strategy for all of its ownerships in the LRIE and for this agreed comprehensive approach also to seek to *maximise* the benefit which can be obtained by updating and modernising the planning framework for the area as a whole. These two steps separately are a significant factor in value terms. This is a key part of the context for the SFS and it underlines why it would potentially be inappropriate to agree the terms for any potential ground lease restructuring deals until the *maximum* potential benefit has been established and clarified through this study…" (emphasis added)

35. In paragraph 2.16 S&P said that it was more likely that the LRIE site would be redeveloped in phases, albeit within the context of a comprehensive strategy. This reflected the number of existing users needing to be relocated and the complexity of finding alternatives sites for them.

36. Section 4 of the document set out S&P's advice on property issues and redevelopment strategy. Paragraph 4.28 reiterated their advice that the Faraday site should not be progressed in isolation. Having assessed market demand and risk factors, section 5 of the document advised the Council on the main redevelopment options. Paragraph 5.2 emphasised that there would need to be a "degree of flexibility with regard to the detailed master planning of each of the five areas, and for this to *evolve as market circumstances changed*" (emphasis added).

37. Section 6 of S&P's document was entitled "Overcoming the Barriers to Redevelopment – the Implementation Strategy". S&P pointed out that the regeneration of the area would involve a high level of complexity, not least because of the number of head leases and occupational leases needing to be acquired on most of the plots and the requirement to have a clear relocation strategy in place before any redevelopment could take place. S&P advised the Council to "work towards" a strategy for securing the completion of a new access from the A339 to LRIE at the outset (paragraph 6.3) and to put in place "as much certainty as possible at an early date, as regards the context for development to enable its

potential private sector partners to assess the levels of risk associated with implementing any scheme" (paragraph 6.4).

38. Paragraph 6.7 of the document recorded WBDC's wish to explore future ownership structures which "could generate an income stream for the Council".

39. Section 7 of the document set out S&P's conclusions and recommendations. The strategy devised by S&P was based on a commercially realistic view on what could potentially be delivered in the medium term (paragraph 7.2). It assumed that "comprehensive redevelopment will ultimately be implemented by an experienced developer" (paragraph 7.3). S&P had also "assumed that the Council would potentially be obliged to initiate this selection process [of a developer] by some form of formal OJEU advertisement – or similar procurement route" (paragraph 7.4).

S&P Supplementary Advice on LRIE – Initial Update Report to WBDC – May 2012

40. Following discussions with the Council, S&P carried out further work to update its December 2011 SFS. This was presented to the Council in May 2012. Neither party has identified any material difference between these two documents for the purposes of this case.

Report to WBDC's Executive on 6 September 2012

41. At its meeting on 6 September 2012 the Council's Executive agreed to accept S&P's SFS.

42. The Executive also accepted a recommendation that S&P be commissioned to produce an Opportunity Document to enable WBDC to test market interest in the LRIE and find a suitable development partner. In the section entitled "Reason for decision to be taken" the Executive was advised:-

> "Without input from the Council, the market will not on its own precipitate the redevelopment of the LRIE in accordance with both Newbury Vision 2025 and West Berkshire Core Strategy Area Delivery Plan Policy 2. If the Council is to *maximise* its financial interest in the LRIE, it must create a clear development strategy that retains control where possible of how the LRIE is developed over time and in such a way that *maximises* benefit to the Council. If the Council does not take the lead, the LRIE will see over time "ad-hoc" unconnected pockets of development. This will result in the LRIE's full potential not being realised and reduce the LRIE's ability as an asset to produce increased revenue for the Council, increased value in Council assets and generally regenerate a substantial area of Newbury" (emphasis added).

43. Under "financial implications" the report advised the Executive that "the controlled regeneration of the LRIE, based on a clear development strategy over time, will protect existing Council income generated by the LRIE and also enhance income generation".

44. Thus, from the outset of this process, it is plain that the twin objectives of promoting the regeneration of the LRIE and enhancing WBDC's income were referred to by the Council in the context of its fundamental objective to maximise its financial receipts. Therefore, the Claimant has been incorrect to suggest that references by the Council to enhancing or increasing its income are to be treated as incompatible with, or as ignoring, the Council's obligation under section 123(2) of the l972 Act.

The "Opportunity Document" – January 2013

45. The Opportunity Document produced by S&P was approved by WBDC's Executive at its meeting on 17 January 2013. Its purpose was to test market interest in the redevelopment of the LRIE. Paragraph 2.1 of the report to the Executive stated that S&P would produce a report on the outcome of the exercise, from which the Council would be able to decide whether to proceed with redevelopment or to put that on hold until market conditions improved. The Opportunity Document was deliberately short and non-prescriptive and drafted so as to generate interest. The site presented good opportunities for developers interested in "long term regeneration" but the land assembly exercise would be long and complex (paragraphs 2.1 and 3.1). The Document did not prescribe any specific procurement route by which the Council might select a development partner (paragraph 3.2). The Council was not in a position to underwrite the redevelopment on its own and so, if a comprehensive redevelopment were to be initiated, the Council would have to do this in partnership with a developer prepared to develop the site in phases and over a 10 to 15 year period (paragraph 5.1). Paragraph 5.2 advised that "the existing LRIE is in poor condition and though existing levels of revenue are secure, this security will diminish as the site further degrades and occupiers are faced with expensive occupier funded improvements or move out".

46. The Opportunity Document stated that it was a "preliminary brochure" setting out "initial information" for the submission of "initial responses" (paragraph 1.0). Paragraph 6.0 described the document as a "soft market testing" exercise through which a number of prospective developers would be invited to consider how the LRIE might best be regenerated. Paragraph 5.0 stated that "new development is likely to comprise a series of phased projects built out across the 25 acres over a 10 year period or longer" because of the pattern of existing leasehold interest and other factors. Paragraph 7.0 explained that the extended timescale was partly the result of the need for existing major occupiers to be relocated. Paragraph 9.0 stated that the Council would look to its appointed development partner "to take the principal responsibility for land assembly, although it may, at the appropriate time, also be willing to help deliver a comprehensive project by using its compulsory purchase powers".

47. Paragraph 19.0 of the Opportunity Document stated unequivocally:-

> "The analysis in the main SFS has shown the Council that it is more likely the LRIE site would be *redeveloped in phases* but

> within the context of a comprehensive strategy. This is not least because of the number of relocations which will be required and the issues associated with finding alternative sites for some of the existing users within the area. This SFS therefore provides the "route map" which is being used by the Council to guide the next stage of the process. This "Opportunity Document" has therefore been produced as the basis for the Council to invite a selected number of experienced developers to submit proposals and to demonstrate how to take forward the wider treatment of *most or all* of the relevant parts of the LRIE area" (emphasis added)

48. Even at this early stage the deliverability of bids from prospective developers was seen as being an important consideration. Paragraph 22.0 stated that they should provide details of their development track record, including information about comparable projects undertaken – especially those with mixed uses of a similar nature to the LRIE. "For these examples of previous experience details are to be supplied of the current status of the project and the development programme and scheme outputs expected from these schemes during the next 5 years". Paragraph 23.0 made it plain that because of the Council's important financial and property requirements, its financial return in terms of future rental income needed to be enhanced. Paragraph 24.0 made it plain that the Council's aim was to see how growth above the level of the Council's current ground rental income could "best be delivered" through a mixed use regeneration project, consistently with the recently adopted core strategy and other planning policy.

49. Paragraph 25.0 stated that the Opportunity Document should be seen as a precursor to the Council disposing of its land interests under a land transaction. That was because the Council intended to proceed on a basis falling outside the scope of the EU Procurement Directive. The development agreement envisaged would not provide for the Council to commission any works and/or services and was not intended to comprise a public works or works concession contract in any way. Paragraph 26.0 also stated in the clearest terms that the development agreement envisaged was expected "to proceed on the basis of a long lease for each phase of development".

50. On 26 January 2013 the Opportunity Document was given to interested parties and was also advertised in Property Week and the Estates Gazette. The deadline for proposals was 18th March 2013. S&P received ten responses in total. The market interest was regarded as being sufficiently strong to justify the Council proceeding to the next stage with a shortlist of six candidates to become the development partner.

51. In paragraphs 48 to 53 of his witness statement, Mr William Bagnell, a construction project manager in WBDC's Property Services Department, explained how on 29 and 30 July 2013 the six shortlisted candidates were interviewed by S&P together with representatives of the Council. Each candidate was supplied with ten questions. Each answer was scored. The Claimant says that none of these questions were directed to the issue of obtaining "best value" for the disposal of the Council's interests. But that is incorrect. The questions were aimed at testing the experience and expertise of potential candidates in *delivering* regeneration on such a challenging and complex site as the LRIE which is relevant to achieving "best value" (see paragraph 131 below). Following

the interviews S&P and the Council identified a shortlist of three potential developers. The list included both SMDL and WBD/Faraday.

The Estates Brief – August 2013

52. In August 2013 S&P produced a document entitled the "Estates Brief" which was supplied to each of the three shortlisted developer candidates. Section 4 set out the basis of the financial offers sought by the Council. It stated that the Council did not wish to impose detailed guidelines as to the form and content of the offers but it was expected that a "Base Offer" would be included as part of the financial proposals. The Brief gave guidance on matters which would apply to all offers and financial proposals. Paragraph 4.1 stated that ideally the Council wished to retain its freehold interest in most of the land it currently owns at the LRIE. However, it was recognised that some proposals might include, for example, phases of residential development where it could be reasonable to agree a freehold disposal.

53. The Claimant attaches particular importance to the second sentence of paragraph 4.3:-

> "The Council will potentially consider a number of alternative forms of financial offer which will form the basis of an agreed development partnership. Developers are however required to submit a 'Base Offer' in respect of a new overriding 250 year ground lease for the entire LRIE area within the red line …."
>
> But that sentence went on to add some "key assumptions"
>
> which included:-
>
> 4.3.1 The developer will be responsible for all asset management and property negotiations with the individual head lessee and/or with the occupiers of the properties on the site …
>
> 4.3.3 During the agreed period of the regeneration strategy, the parties will work together to *maximise* Council revenue at all times. However, if there are circumstances where existing revenues in real terms drop at periods below the Council's existing revenue stream of £330,000 per annum, the Council will require the developer to maintain at all times during each phase of redevelopment, as a minimum, a total ground rent of £200,000 per annum. If this minimum level of income is potentially not capable of being derived directly from the properties remaining undeveloped during any particular period, the developer will be expected to make up any 'shortfall' …
>
> *4.3.5 The new overriding 250 year ground lease is expected to be granted on a phased basis, so that phased redevelopment can occur …*
>
> 4.3.6 The Council will consider any alternative structures that might be put

forward, but only on the basis that these can be considered in the context of the rest of this Brief" (emphasis added)."

Supplementary Estates Brief – October 2013

54. This document, also prepared by S&P, expanded on the Council's requirements for the information to be submitted by developer candidates. They were required to address (inter alia) the proposed structure of financial returns during the redevelopment. The Claimant places some reliance upon the passage in which developers were reminded that WBDC was promoting the regeneration strategy with "the twin objectives of securing increased employment and improving the revenue stream from the LRIE site and by the redevelopment substantially improve this run down part of central Newbury." But the document must be read as a whole. It plainly required developers to submit their bids in the context of section 4 of the August 2013 brief, which had required them to address the *maximisation* of the Council's income. In a section headed "Financial" the supplementary brief required the candidates to submit "financial modelling for the overall duration and the key phases of the project. This should include expected price-income returns, including anticipated cash-flow projections".

Final Guidance on Submissions – 6 November 2013

55. This document was prepared by S&P in order to assist the three short-listed candidates in the final preparation of their bids to WBDC. The document stated:-

> "For the avoidance of doubt, we have been asked to emphasise that the Council is treating this project as a property transaction, with *the aim of enhancing its property income long term* – i.e. *the Council is not seeking short term gain, either in capital or income terms*. Among the factors which it will take into account are the following:-
>
> 1) *the suitability, experience and relevant expertise of the developer*...
>
> 3) the proposed structure for the transaction, the financial offers and the underlying assumptions.
>
> 4) the level of realism on delivery and phasing matters…" emphasis added)

56. This Final Guidance document plainly reiterated that the Council's requirements were to be understood by reference also to the earlier Estates Brief of August 2013 as well as the Supplementary Estates Brief of October 2013.

Bid by WBD and Faraday – November 2013

57. This document illustrates the context in which developers were bidding to become

WBDC's development partner. In section 2.1 under the heading "Economic Viability" WBD/Faraday explained that there were a number of key items which could not be estimated with reliable accuracy, not least because of the absence of comprehensive design details. They included the costs of land acquisition, infrastructure and dealing with ground conditions. WBD/Faraday also pointed out that it was inappropriate to forecast market conditions over the next several years. These observations reflected both the complexity and the long timescale involved in the redevelopment of the LRIE.

58. Section 3.1 of the document described WBD/Faraday's "Base Proposal". Their bid sought to meet the Council's "twin objectives" of "securing increased employment and improving revenue stream from the LRIE site". In addition, they stated in paragraph 3.6 that "we have applied considerable thought to *maximising* the Council's income and asset value". Thus the Claimant itself understood and accepted that the "twin objectives" of the Council were compatible with the obligation to achieve maximum financial receipts for the Council.

59. WBD/Faraday's base proposal involved the purchase of an overarching lease for the entirety of the LRIE site from WBDC for a term of 250 years for the sum of £1 million. During the redevelopment period it was proposed that the ground rent receivable by the Council would be "collared" at a minimum of £200,000, although it was expected that a level substantially in excess of that figure could be achieved during that period. The developers enclosed a cash flow for their projected redevelopment proposals. They predicted that upon completion of all redevelopment WBDC's ground rent would rise to a minimum of £345,000 per annum plus annual inflation-based growth.

60. Under the heading "Structure" WBD/Faraday proposed the setting up of a Steering Group, the members of which would comprise representatives of the Council and its advisors together with senior directors from Barratt's team. This group would be responsible for approving the strategic business plan for the regeneration project, comprising a master plan, financial objectives, community objectives, planning objectives, a programme plan and structure for the delivery organisation and performance assessment measures. The bidders indicated that they were willing to consider the formation of a joint venture company with the Council if required to do so, but they suggested that a simpler approach might be to enshrine the Council's objectives within the structure of a development agreement. It is noteworthy that the structure proposed by Faraday was very similar to provisions of the DA.

61. The Claimant has confirmed to the Court that it took part in WBDC's process on the understanding that the contract it was bidding for would be a development agreement outside the scope of the public procurement regime. By that agreement WBDC would dispose of interests in land and would not commission any works (paragraph 10 of the Claimant's Reply referring to paragraph 25.0 of the Opportunity Document – see paragraph 49 above). In accordance with that understanding, the bid from WBD/Faraday did not suggest that they would enter into an enforceable legal obligation to carry out the redevelopment of the LRIE. That is consistent with the basic structure of the DA that was subsequently entered into by WBDC and SMDL.

62. On 11 December 2013 the three final bidders were interviewed by S&P together with representatives from WBDC. Following the interviews on 18 December 2013 S&P sent written follow up questions to each of the three bidders. The questions from S&P gave WBD/Faraday the opportunity to deal with the possibility of their offer being structured without the payment of a £1 million premium so as to increase the ground rent payable to WBDC.

63. Question 11 asked WBD/Faraday "it is anticipated that much of the viability of the regeneration is reliant on the capital that can be raised through selling the Council owned land for residential development. How can the Council be satisfied that it will be obtaining *best value for this land without it being market tested*?" (emphasis added). The answer given was:-

> "The viability of the overall scheme is dependent on a mix of uses…We understand that the Council has undertaken the current competitive process for the Estate in order to determine the best approach to redeveloping the Estate….Our market knowledge and strong local brand will enable us to achieve *best prices* for private housing and this will *optimise land value*…. The normal approach to determining land value is to subtract costs (which includes the developer's margin) from revenue. We have taken this approach in our bid. Our proposal is to form a development partnership with the Council which will be subject to an open reporting regime. The profit margin to be retained by the Barratt Team will be pre-agreed and any improvement in profitability will be distributed between the Council and the Barratt Team on an agreed apportionment basis. In our case, the Council can therefore be entirely confident that it will achieve *best value for its land* and benefit from additional value derived from our other land-holdings" (emphasis added)

64. In answer to question 16 WBD/Faraday explained that the developer's return they were seeking reflected the "considerable risk in bringing the project forward from this stage, particularly elements such as the land assembly cost, which we are anticipating will require a CPO process to be followed and which will need great care and diligence in insuring that the integrity of the CPO case is not put at risk." Other risks were said to include technical issues, ground conditions, servicing and possible flooding issues all of which could considerably affect the viability of the overall scheme as the development unfolds. The bidders indicated that they were willing to consider a shared-risk arrangement if WBDC should prefer, implying of course, that their returns would be reduced if the Council itself were to be willing to take on some of the risk.

65. Questions 29 and 30 raised by S&P asked what was the contractual relationship between Faraday and Wilson Bowden/Barratt and with which party would the Council be contracting, bearing in mind the involvement of Faraday. The bidders replied that the Council would contract with Barratt Development, but they were prepared to be flexible should the Council wish to have a contractual relationship which included Faraday. But the structure of an agreement between Barratt and Faraday did not necessitate this. The

response also explained that Barratt had the right to purchase Faraday.

The bid by St Modwen (SMDL)

66. Page 2 of their bid demonstrates that SMDL had appreciated the significance of paragraph 26.0 of the Opportunity Document (January 2013) and paragraph 4.3.5 of the Estates Brief (August 2013) in which the Council had stated that a new 250 year ground lease would be granted on a phased basis. It had been confirmed with WBDC that 250 year ground leases could be granted on a plot by plot basis.

67. SMDL stated in section 4(a) of their bid that they would be responsible at all times for "*maximising* the value of the Council's interest in LRIE. Direct development will be preceded by the securing of a planning permission for a master plan which *maximises* value … ." (emphasis added). Section 4(b) stated:-

> "St Modwen will assemble the best team of professional advisers in devising a strategy to promote the estate for the *most valuable form of mixed use development achievable*. A market informed master plan will then be developed on which an appropriate planning permission will be secured for the regeneration of the estate. This process will be based on the combination of achievable uses that will generate the greatest land value for the benefit of the Council *to meet the requirements of section 123 of the Local Government Act of 1972*" (emphasis added).

68. S&P also raised questions about SMDL's bid. Question 13 asked "in relation to the residential elements, would St Modwen seek some form of "market testing" to determine market value, and if so, how would this operate?" SMDL responded that they would accept the principle of market testing in order to ensure that WBDC were satisfied that it was achieving "*best value*" for its land. They added "ultimately, paying land premiums which have been calculated based on forecasts and actual revenues and a combination of actual and accurately forecast infrastructure costs is in itself a form of market testing" and that the developer's return used in their bid was competitive.

S&Ps Report on the candidates' submissions and recommendation on development partner – February 2014

69. On 14 February 2014 S&P provided WBDC with its report on the appointment of a development partner. Paragraph 1.2 stated:-

> "The Opportunity Document explained that the Council's existing ground rental income from the entire LRIE estate is over £300,000 per annum, and that its aim is therefore to see *how growth above this level could best be delivered* by a mixed use regeneration project, which would *be broadly consistent with the recently adopted Core Strategy and other emerging planning policy advice*" (emphasis added)

70. Paragraph 1.3 confirmed that the Council remained of the view that the disposal of its interest under a land transaction should be outside the scope of the EU Procurement Directive.

71. Section 2 of the Report appraised the content of each of the three bids received and the key differences between them. It commented on the "market realism of the proposed schemes", including the respective delivery programmes.

72. The tables at the end of section 2 of the Report compared the content of each of the schemes put forward by the three bidders. For example, SMDL put forward proposals for the residential part of the project at a range of densities from low to very high.

73. Section 3 of the Report appraised all aspects of the financial offers proposed by each of the three bids. S&P's advice also covered the partnership structure and ownership arrangements proposed. The bids were appraised against the Estates Brief and subsequent guidance, which included the requirement for the Council's revenue to be maximised.

74. Paragraph 3.2 recorded that each developer had based its financial proposals on a similar leasehold approach. SMDL had stated that they would expect to be granted 250 year ground leases on a plot by plot basis. Similarly, the third bidder had expected WBDC to grant a head lease, or sectional head lease for a period of 250 years for commercially-led scheme phases, immediately prior to the construction of each such phase. Only WBD had expected a 250 year lease to be granted at the outset for the entirety of the LRIE.

75. Paragraph 3.9 explained that SMDL's bid demonstrated how they would seek to maintain the Council's *existing* plot income levels as a minimum.

76. By contrast paragraph 3.14 explained that WBD's financial proposal collared the Council's rent at a lesser minimum of £200,000 per annum during the development. Post-development ground rent for the whole LRIE area would gradually rise as development phases proceed and reach close to £345,000 per annum, but only if all phases of commercial development are completed. WBD had indicated that this figure would "only be achievable towards the end of the overall programme, by around mid-2021."

77. Paragraph 3.15 recorded an alternative financial proposal by WBD which involved no initial capital repayment of £1,000,000 but which increased the income for WBDC derived from ground rents. However, the report added that, as with all of the financial proposals from each of the three developers, there could be no guarantee that the projected increases in ground rent income would occur, because this would be entirely dependent on *future market circumstances*.

78. As to "structure/ownership" paragraph 3.21 stated:-

"all developers confirm that WBDC would retain the freehold of

the entirety of the commercial parts of the LRIE site, with leases being granted for 250 years, as was initially set out by WBC in the Opportunity Document."

79. Paragraphs 3.23 and 3.24 explained that both SMDL and WBD had adopted similar approaches which involved disposals by way of ground lease for commercial phases and disposals on a freehold basis for residential sites.

80. The tables at the end of section 3 of the report compared economic parameters such as the rents and the yields achievable for WBDC from different elements of the proposals and also the level of profit assumed for the developer in each case. The tables also gave a comparative breakdown of the total development costs.

81. In section 4 of the report S&P set out their conclusions on the main factors to be taken into account by WBDC in selecting a development partner.

82. Paragraph 4.1 recorded that throughout the process the Council had emphasised that the project was seen "as a property transaction, devised with the aim of enhancing Council property income *in the long term* while securing substantial regeneration of the LRIE area. As we explained to developers in the final bidding guidance, dated 6 November 2013, the Council is *not seeking short term gain* either in capital or in income terms" (emphasis added). Paragraph 4.2 stated that WBDC would need to select the partner it considered would be most likely to deliver a project meeting its objectives.

83. The report then appraised the strengths and weaknesses of each of the bids in terms of the content of the scheme proposals and the financial proposals. For example, in respect of the financial proposals by WBD/Faraday the report noted as a weakness the fact that "the total ground rent (i.e. combining the ground rent from the existing retained uses with the new ground rents) only exceeds the Council's existing level of income in phase 5 of the development, and only if the new offices are built at the southern end of the site."

84. Paragraph 4.4 of the report concluded that there were a significant number of more positive aspects associated with the bids by SMDL and WBD than from the third bidder. Consequently, in deciding on what recommendation to make to the Council the remainder of the report focused just on those two bids.

85. In paragraph 4.7 S&P advised WBDC to take into account the information gained during site visits about the nature and relevance of each developer's regeneration experience in circumstances similar to LRIE. This was one of four factors which S&P advised the Council to treat as being particularly important, when choosing a long term development partner on an income producing asset. "Elsewhere the choice could be different, e.g. if the Council was just selling a site so that a simple new mixed use development could be built on a greenfield or vacant site. This situation at LRIE is much more complex and hence the choice needs to reflect this."

86. In paragraph 4.9 S&P advised:-

> "In reaching a conclusion, the Council may consider that in some respects there is relatively little to choose between the submissions from St Modwen and Wilson Bowden. In terms of scheme content, scale, mix and range of uses, there are relatively few differences, although Wilson Bowden propose a higher density solution throughout. …"

87. Paragraph 4.10 stated that both sets of proposals were likely to generate the same main components and in practice a broadly similar number of jobs. However, 4.11 advised:-

> "There are arguably greater risks (but under some scenarios possibly a slightly greater prospect of a better financial return) for the Council in choosing mixed use proposals at a higher density. There are elements which could represent a greater challenge or difficulty for Wilson Bowden to overcome."

That distinction between the proposals of WBD and SMDL would favour the latter, given the evidence that WBDC as a local authority did not have an appetite for risk.

88. Paragraph 4.12 stated:-

> "For either developer the challenge for conducting the land assembly and relocation process, even in the context of a potential Council CPO, is another major challenge. Both companies have experience of dealing with some similar circumstances on CPOs elsewhere, *although St Modwen's regeneration experience, across the UK, is much more extensive*. Wilson Bowden, in conjunction with [Faraday], do, however, already have a certain level of knowledge about land assembly issues at LRIE, not least from working on the Faraday Plaza proposals …." (emphasis added)

89. Paragraph 4.13 and 4.14 stated:-

> "4.13 Nor is there sufficiently firm supporting financial information here which can be used to help choose decisively between the two companies. *Indeed, this is not a tender with fixed financial bids attached. Both developers consider that their financial proposals are based on reasonable estimates as at today* (e.g. of total land assembly and infrastructure costs) but *equally these estimates may mean that the indicative capital sums mentioned in their bids as "offers" to the Council may be changed subsequently as assumptions change.*
>
> 4.14 It is however important to emphasise that there is nothing that we have seen in the financial assumptions set out by either company which would cause us to recommend that the

> Council should set aside one in favour of the other. Both St Modwen and Wilson Bowden have used some "conservative" financial assumptions; equally other elements may prove to be over optimistic. Experience tells us that higher density proposals can often take longer to resolve, not only in planning but also in construction/delivery terms, *there may, overall therefore be a slightly greater level of risk associated with the Wilson Bowden proposal, and this factor needs to be assessed as part of the Council's final decision*" (emphasis added).

90. In paragraph 4.15 the authors drew on conclusions which had been reached by the Council's Core Member Team which included:-

> "The information obtained about comparable or relevant experience, during the scheme visits and at other times, led the Council to conclude that for a complex, mixed use project on a site with retained income and important tenants, it would find that St Modwen had *significantly more expertise and experience to offer than Wilson Bowden*" (emphasis added).

91. This theme which pervaded several paragraphs of the report appeared once again in S&P's final recommendation in paragraph 6.1:-

> "All three developers have demonstrated they have the capability and expertise required to carry out this complex project, but the more robust proposals are clearly those submitted by St Modwen and Wilson Bowden. In choosing between these two, the Council *needs to have particular regard to the fact that this will be a long term and unusual development/investment partnership, requiring a wide range of commercial and residential skills to deliver a truly successful mixed use product. The Council has seen more evidence that St Modwen will be the better partner to deliver the type of scheme which will meet its objectives*… Accordingly, we recommend that St Modwen be appointed as the Council's partner to carry forward the regeneration of the London Road Industrial Estate, Newbury" (emphasis added).

The Report to the meeting of WBDC's Executive on 27 March 2014

92. This Report was accompanied by S&P's report produced in February 2014 and draft heads of terms with SMDL dated 26 March 2014.

93. The Executive accepted the recommendation to choose SMDL as its development partner and to delegate to the Chief Executive authority to enter into and complete negotiations with SMDL. The resolution required the terms of any proposed agreement with the development partner to be brought back to the Executive for approval before contracts were signed.

94. The Report noted that the proposed contract would pass development risk to SMDL and thus there would be no development risk to the Council. It was also confirmed that where SMDL redevelops existing properties on the basis of new leases granted by WBDC, the Council would continue to be paid the existing ground rent for that property during the redevelopment period.

95. Under the heading "Financial Implications" the Report stated that:-

> "The proposed redevelopment will have as a primary objective the securing and enhancement of existing Council revenue from the LRIE which, without redevelopment, will cease to have long term security."

96. It was also noted that:-

> "In order to *maximise* the commercial benefit of any redevelopment proposal the Council will need to be prepared, if necessary, to use its powers of compulsory purchase …" (emphasis added).

Report by S&P dated 23 October 2014

97. Prior to the matter being taken back to the Executive, S&P gave further advice (letter dated 23 October 2014) on the proposed development agreement with SMDL. S&P recorded that the Council's preference had been for a partnership structure which would require the funding of the project to be provided by the development partner whilst still allowing WBDC "a degree of control over the development process", in preference to a development management approach whereby the Council would fund the costs of land assembly, infrastructure and development and simply pay a fee to a development manager for managing that process. By now the development agreement had been produced in final draft form.

98. S&P summarised the position by stating that the proposed appointment had been "the culmination of a rigorous selection process and market testing" and "the financial terms have been bench marked against alternative proposals, both identified through the selection process and from our knowledge of similar developer partnering arrangements with both private and public sectors." WBDC were also advised that:-

> "Whilst the economic outlook has improved significantly since 2011 and the development industry is in better shape, it is important not to lose sight of the enormous complexity that this regeneration will bring and not without commercial risk on the part of the developer. There is both a market risk i.e. demand and pricing of employment and residential land and also the upfront commitment to land assembly and infrastructure, which can only be estimated approximately at this stage. It is also a project that is likely to endure through other low points in the economic cycle and we believe that St Modwen are the calibre of partner that will

stand by the agreement through all cycles."

99. S&P went on to make some very important points, namely:-

> "We consider that the terms of the Agreement and financial terms present an appropriate balance of risk and reward. The developer expects to make a normal 'open market' margin of … for using its capital resources and development skills to achieve the regeneration objectives. Whilst the Council shares risk in terms of any surplus that may be created from the development, it retains a substantial part of the freehold and its ground rent is underwritten. The Council, in our opinion, does not have the necessary expertise, financial resources or risk appetite to take a more proactive role in the regeneration. Whilst there is evidence of larger local authorities taking a more proactive role in regeneration, these, from our knowledge, involve taking a significantly higher level of financial risk in either sharing or fully committing to the upfront funding requirements. Also, where regeneration and development is concerned, they are in any event working with professional development partners on a fee and usually profit share basis."

100. The letter concluded by stating:-

> "We believe that the proposed Development Agreement will achieve the Council's twin objectives to secure regeneration of this important part of the town and provide the Council with the opportunity to provide an enhanced ground rent income and either capital receipts or additional investment income."

101. That reference to the Council's twin objectives must be understood in the context of the earlier documents in which it was made clear that those objectives accorded with the Council's obligation to achieve the best consideration reasonably obtainable, or in other words to maximise value for the Council.

Meeting of WBDC's Executive on 20 November 2014

102. At this meeting the letter from S&P dated 23 October 2014 was presented along with the final draft DA and an officer's report recommending the Executive to delegate authority to the Chief Executive to enter into the DA. The Executive accepted the recommendation.

103. The report gave a number of reasons for the recommendation, including:-

> "3. St Modwen have a national reputation for delivering long term complex redevelopment projects, which in the case of the LRIE will deliver increased employment opportunities both in number and type, secure and enhance existing estate rental

> income, deliver new town centre housing and generally deliver regeneration which will greatly rejuvenate what is otherwise a large run down town centre site …..
>
> 5. The DA protects the Council from the financial risks associated with the LRIE redevelopment.
>
> 6. The DA commits St Modwen to providing as a minimum to the Council, during the entire regeneration, the Council's existing levels of income from estate plots including where a plot, or portions of plots, have been cleared and are being redeveloped."

104. The Report strongly recommended against the Council itself undertaking the LRIE redevelopment without a development partner because that course of action would represent a very great financial risk to WBDC and the Council had neither the experience nor the resources to undertake such a project.

105. The Report reiterated:-

> "That in order to *maximise* the commercial benefit of any redevelopment proposals the Council will need to be prepared, if necessary, to use its powers of compulsory purchase …" (emphasis added)

106. The Report also summarised the principles of the Development Agreement. "The DA demonstrates how market values will be tested and fairly arrived at" and "the DA contains *reasonable mechanisms* to ensure that St Modwen pursue redevelopment across the whole estate – the employment zone as well as the residential zone" (emphasis added).

107. Paragraph 6.2 concluded that:-

> "The overarching principle of the Development Agreement is that St Modwen have the right to bring forward development plots based on pre-agreed master planned proposals mirroring the original Strategic Feasibility Study and where those plots *deliver acceptable returns to both parties*; *where returns are not reasonably acceptable to either one* or both parties, the contracting parties will simply leave those areas of estate as they are until such a time as delivery *is viable or otherwise.* St Modwen have an outstanding track record for determined and committed long term development partnerships. St Modwen see the LRIE as a probable ten year redevelopment but have no issue if the process takes longer and thereby ensures the best and most appropriate urban regeneration – St Modwen are a committed partner (emphasis added)."

108. A report was provided by officers to the full Council meeting on 19 May 2015 to obtain authority to purchase private land by agreement, or if necessary by using compulsory purchase powers, to enable a new access road to be built from the A339 into the LRIE. The Report explained that numerous attempts had been made to acquire by agreement the long leasehold interests of land necessary to construct that access, but they had been unsuccessful. The Council passed a resolution to make a CPO in accordance with the recommendation in the report.

Summary

109. It is plain from the contemporaneous documentation that:

(i) WBDC considered it to be in the Council's best interests that as far as possible they should retain ownership of the LRIE as an asset generating income in the form of ground rents;

(ii) There had been no substantial investment in LRIE for about 40 years, the buildings were becoming increasingly less suited to modern business requirements and the estate needed to be redeveloped in order to secure and enhance WBDC's existing income;

(iii) The Council's twin objectives of encouraging regeneration/ employment and enhancing its income were advanced in the context of the Council's obligation to "maximise" its financial receipts, or achieve "best value";

(iv) The redevelopment of LRIE would be a long term project, involving a risky and complex land assembly exercise and relocation of existing businesses;

(v) Redevelopment was dependent upon ascertaining the levels of market interest to occupy new buildings on the LRIE site and devising a scheme to meet that demand and maximise returns for WBDC. There were also uncertainties about development costs and future market conditions. It was impossible for any bidder to put forward a fixed price or financial bid. Given the long timescale, the future uncertainties and other risks, it was only possible for each bidder to put forward cash flow projections using reasonable estimates. The financial assumptions used were therefore liable to change. Both WBD/Faraday and SMDL put forward their bids on the basis that they were being tested against WBDC's obligation to achieve "best value";

(vi) WBDC did not have the experience, financial resources or the appetite to be involved in the risks of redeveloping the site. Instead, the Council wished to rely upon the developer it considered to be the most experienced, with a proven track record of delivering similar schemes

over a long time scale, and who would be able to fund, promote and carry out the scheme. WBDC was advised by S&P that SMDL had significantly more expertise and experience to offer for this type of project than WBD/Faraday;

(vii) The redevelopment risks, including costs of land assembly and relocation and changes in market conditions, were to be borne by the development partner, not WBDC. The risks could potentially affect the viability of the scheme as it unfolds. Where returns are not reasonably acceptable then an area of the estate might not be redeveloped until delivery is "viable or otherwise". Because WBDC will not be participating in the risks of redevelopment (and its current level of ground rent is secured by the DA), the Council was advised that its level of influence over the redevelopment (leaving aside planning controls) would be substantially less than if it were to incur such risks.

The Development Agreement

110. The DA was entered into on 4 September 2015 between WBDC (referred to in the DA as the "Council") and SMDL (referred to as the "Developer"). The following summary of its provisions is drawn from an agreed document prepared during the hearing by counsel for both parties, for which I am grateful.

111. The DA begins with two recitals:-

> "(A) The Council is the freeholder of the Property and proposes the comprehensive development of the Property for the purposes of regeneration and maximising income.
>
> (B) The Council wishes to appoint the Developer to act as a master and plot developer and estate management advisor in relation to the various aspects of the Project in accordance with this agreement."

112. Section 2 of the DA is headed "Objectives". Clause 2.1 provides (*inter alia*):-

> "The objectives of the Council and the Developer in entering into this Agreement are to facilitate the comprehensive regeneration of the Property by its redevelopment for mixed uses in such a way as to maximise, preserve and improve (having regard to market conditions at the relevant time and taking account of any changes in market conditions from time to time) the performance and total returns from the Property and the development potential of the Development Sites as far as reasonably possible and to increase the level of income shown in the Council's Current Rental Income Schedule … "

113. There then follows a non-exhaustive list of objectives, which include increasing

employment opportunities, mixed residential development, improved infrastructure, the "establishment and implementation of a cohesive estate management structure and strategy for the Property" and sites retained by the Council, and the establishment and implementation of a "Development Strategy for the Development and Disposal of the Development Sites." There are general obligations under clause 2.3 for the parties to "cooperate fully with each other in relation to the achievement of the Objectives" and to "do all reasonable acts and things in order to achieve the Objectives" and under Clause 33 to act in good faith in their dealings with each other.

114. Clause 3.1 requires a Steering Group ("SG") to be established "for the purpose of reviewing strategic objectives and monitoring the progress of the Project" including such matters as the evolution of the Project Plans, Development Strategies and the Estate Management Strategy, the implementation of each Development Strategy, and the approval of infrastructure cost budgets, valuation appraisals, and disposals of commercial plots to third parties.

115. The SG comprises two members representing SMDL and two members representing WBDC (clause 3.5). The decisions of the SG are required to be unanimous (Clause 3.6). If the SG is unable to reach a unanimous decision, any voting member can refer the matter to the DA's dispute resolution mechanism contained in clause 28. There is no express obligation to refer any such matter for dispute resolution (but see clause 2.3 in paragraph 113 above).

116. The DA is based upon an elaborate series of definitions set out in clause 1.1 which include:

- The "Property" is the LRIE Site, together with such other adjacent or neighbouring land which is nominated by SMDL, approved for acquisition by the SG and in fact acquired;
- The "Project" refers to achieving the Objectives set out in clause 2.1 in accordance with the "Approved Form" Project Plans and each Development Strategy.
- An "Approved Form" is a document proposed by SMDL and approved by the SG;
- "Project Plans" is the composite term for the Business Plan and the Master Plan;
- The "Business Plan" is a plan for the Property prepared by SMDL for approval by the SG in the form of the Indicative Business Plan. It identifies the initial categorisation of Development Sites and Retained Sites (ie. sites approved by the SG to be retained by WBDC where existing ground leases are to be re-geared), initial Infrastructure Works, and Outstanding Interests to be acquired. From time to time SMDL may propose variations to the Business Plan for approval by the SG under clause 6;
- The "Indicative Business Plan" is defined as "the structure of the indicative Business Plan", the elements of which are shown on the two page document at Appendix 1 to the DA. Those elements include a land appraisal for the whole site with plot appraisals for the Development Sites (accompanied by a cash flow model) and an estate management strategy;
- The "Master Plan" is a plan prepared by SMDL for approval by the SG in the form of the Indicative Master Plan, which identifies the Retained Sites, the

Development Sites and their proposed uses; provides a Land Appraisal; and provides an indicative implementation programme for the Business Plan. From time to time SMDL may propose variations to the Master Plan for approval by the SG under clause 6;

- The "Indicative Master Plan" is the single indicative plan at Appendix 5 to the DA;
- "Development" comprises both (a) the development of the Development Sites and (b) the Infrastructure Works, in accordance with the Project Plans, the relevant Development Strategy, the DA and the Outline Planning Permission;
- "Development Sites" is the composite term for the Commercial Plots (those parts of the Property intended for commercial or mixed use development) and the Residential Plots (those parts of the Property intended for residential development). In essence, the term "Development Sites" encapsulates all those parts of the LRIE Site intended to be developed under the DA;
- "Infrastructure Works" refers to a non-exhaustive list of broad categories of work necessary or appropriate for the Project. "Infrastructure Land" means those parts of the Property which are required for carrying out the Infrastructure Works;
- The "Works" means the Development and the Infrastructure Works;
- "Outline Planning Permission" means Planning Permission for the Works comprised in the Approved Form Master Plan;
- "Planning Permission" means any planning permission, including an Outline Planning Permission or a Reserved Matters approval, for all or any part of the Works;
- "Development Strategy" is the detailed strategy for the Development of a Plot, specifying "the Works" relevant to the Plot, the timing of the Works, the method and details for the proposed disposal of the Plot, a Plot Appraisal, and relevant outstanding interests;
- A "Plot Appraisal" is the development appraisal prepared for any given Plot, modelled on the form at Appendix 3 to the DA, using specified assumptions and calculations so as to arrive at the required valuations;
- "Ground Lease" is a lease of a relevant commercial plot in the form at Appendix 7 to the DA and otherwise agreed or determined under clauses 13.7 and 13.8. Clause 3.20 of the draft Ground Lease at Appendix 7 requires the Tenant to comply with SMDL's obligations as set out in Schedule 1 to the DA during the Development Period. WBDC is to receive (a) whilst the development is being carried out, the same ground rent as was payable immediately prior to the commencement of that development and (b) from practical completion of that development, the rent for the redeveloped plot;
- "Master Planning Services" refers to ten activities all of which are preliminary to securing a Planning Permission and the undertaking of Works.

117. The DA imposes certain obligations on SMDL in relation to masterplanning, preparing strategies and obtaining planning approvals which are unconditional. Others do not arise at all unless SMDL elects to exercise its option to draw down interests in WBDC's land (see below clause 9 on infrastructure works and clause 14 on plot development).

118. Clause 6 imposes a number of obligations on SMDL:

(i) To provide or procure Master Planning Services, which include

preparing and reviewing Project Plans and Land Appraisals, identifying Plots, preparing a Development Strategy for each Plot, and identifying and assessing likely Infrastructure Works for each Development Site (clause 6.1);

(ii) Within 4 months of the Commencement Date SMDL is to prepare draft Project Plans (ie. a Business Plan and Master Plan) and submit them to the SG for approval (clause 6.2). Each of such Project Plans (or any variations proposed thereto) "shall be consistent with" the Indicative Business Plan and the Indicative Master Plan, the Objectives and the terms of the DA generally, and market conditions prevailing at the time and shall identify Development Sites or Retained Sites (clause 6.3). The "Commencement Date" is the day following either (a) the period of 80 days after the date of the DA or (b) the dismissal of any legal challenge based upon (inter alia) public procurement legislation (clauses 1.1 and 25A);

(iii) Within 4 months from the approval of each Project Plan, SMDL is to prepare for approval by the SG an initial budget for the anticipated Infrastructure Cost ("LIC Budget"). The approval of a Business Plan and an LIC Budget triggers the obligation on SMDL in clause 8 to negotiate for outstanding land interests. At 6 monthly intervals SMDL is to review and submit to SG its review of the LIC Budget, Business and Master Plans (clauses 6.4 and 6.5). Reviews of the LIC Budget, Master Plan and Business Plan must be consistent with and promote the Objectives, take forward, develop or adapt the principles etc of the preceding approved documents (clause 6.6). The SG may accept, reject or require reasonable changes to these draft documents, but may only reject or require changes if the documents are inconsistent with each other or with the Objectives (clauses 6.7 and 6.8);

(iv) Following approval of the Master Plan, Business Plan and LIC Budget and receipt of an Outline Permission satisfactory to SMDL, and prior to the commencement of development on any plot, SMDL is to prepare and submit to the SG for its approval a Development Strategy for that Plot which is consistent with the approved Master Plan, Business Plan and LIC Budget, the Objectives, prevailing market conditions and terms of the DA (clause 6.12). The Development Strategy must include an indicative implementation programme. The SG is not required to approve a Development Strategy for a Commercial Plot where the Plot Appraisal shows that the ground rent payable to WBDC during the development period would be less than the ground rent currently payable to WBDC for that area (clause 6.13).

119. Clause 7 provides for the submission of planning applications:

(i) SMDL is required to prepare and submit as soon as reasonably practicable a planning application for Outline Planning Permission for

the Works as a whole (i.e. for the whole site) together with an Environmental Statement and other supporting documents. That application must be in accordance with the Project Plans (Master Plan and Business Plan) as approved by the SG (clause 7.1). The obligation to submit a planning application therefore only arises once the Master Plan and Business Plan have been approved by the SG; and

(ii) As soon as reasonably practicable after the approval of a Development Strategy for a Plot, SMDL must submit an application for detailed planning permission or approval of reserved matters for the Works in that approved Development Strategy (clause 7.2(a)). SMDL must use all reasonable endeavours to obtain a "Satisfactory Planning Permission" (ie. a detailed planning permission or approval of reserved matters free from any onerous condition as defined in clause 1.1). The procedure for dealing with onerous conditions is set out in clause 7.5.

120. Within 4 months of the dismissal of, or the expiry of the time limit for bringing, any claim for judicial review relating to an outline planning permission, SMDL is required by clause 5 to prepare and submit for the SG's approval an Estate Management Strategy setting out its proposed strategy for the management of the Property and Retained Sites. Thereafter SMDL is to review the strategy every six months (during the first three years) and thereafter at intervals agreed by the parties.

121. Clause 13 deals with Plot Appraisals and the drafting of ground leases and transfers for individual development plots. Within 10 business days of receiving a Satisfactory Planning Permission, SMDL must submit a Plot Appraisal to the SG for approval (clause 13.1). Any dispute or failure to approve that appraisal is referred to dispute resolution under clause 28 (clauses 13.5 and 13.6). Within one month of the SG receiving a Plot Appraisal, SMDL and WBDC must use reasonable endeavours to agree the form of a Ground Lease or Transfer for the plot. That form of agreement must include (inter alia) "an obligation on the part of SMDL to carry out or procure the carrying out of the Works relating to the relevant Plot" in accordance with the terms of schedule 1 to the DA (see clause 13.7(b)). Any failure to agree the form of the Ground Lease or Transfer must be referred to dispute resolution in accordance with clause 28 (clause 13.8).

122. Clause 14 deals with the drawdown of land by SMDL. Within 10 business days of the approval under condition 13 of a Plot Appraisal and the satisfaction (or waiver by SMDL) of Pre-Commencement Conditions (conditions specified by SMDL in an approved Development Strategy as conditions which must be discharged before development begins), SMDL is entitled under clause 14.1 to serve a notice that it wishes to purchase a ground lease (if a commercial plot) or freehold (if a residential plot) and carry out the development of that plot. If no such notice is served within that 10 day period, then SMDL may still serve such a notice at a late date subject to having previously prepared a further Plot Appraisal for that plot (in effect an updated valuation). Any such notice which SMDL elects to serve must include an Implementation Programme for the development plot. If SMDL has already granted an occupational underlease of a commercial plot, WBDC may within 20 business days of SMDL's notice elect to retain that plot. Subject to that sole exception, service of a notice by SMDL gives

rise to a binding contract for the grant of the Ground Lease or transfer of the freehold of the relevant plot, containing in either case SMDL's development obligation in clause 13.7(b) (see clauses 14.4 and 14.5). In other words, SMDL has an option to enter into an obligation to acquire a ground lease or a freehold on terms which include an obligation to carry out the redevelopment on that plot.

123. On the completion of a Ground Lease or the transfer of a freehold, clause 14.6 requires SMDL to pay residual land values to a bank account held as stakeholder for WBDC. Those proceeds are distributed in accordance with clause 17 which includes a confidential formula (clause 17.2 (b)). Following (inter alia) the practical completion of commercial development or completion of the final dwelling on a residential plot, overage is payable under clause 18 in accordance with a confidential formula.

124. The rents to be paid following drawdown of Ground Leases for each plot are set out in clause 2.1(c) and Schedule 2 of the form of Ground Lease at Appendix 7 to the DA. In summary, the initial rent until practical completion is the previous passing rent and, following completion, the rent for the developed plot according to the approved Plot Appraisal.

125. Clause 9 applies where the approved Business Plan or Development Strategy provides for construction of Infrastructure Works. "In considering the nature and extent of [those works]", SMDL must have regard to the Objectives, the Management and Business Plans, the likely programme for commencement of the works, and the marketing and disposal of the Development Sites (clause 9.2). Under clause 9.4 "SMDL may serve a written notice at any time" calling for the transfer of Infrastructure Land as specified in the notice (other than land which is to become highway land). The service of such a notice gives rise to a binding contract for the transfer of that land (clause 9.5). Following that transfer, SMDL is obliged to procure that such land is managed in accordance with the Estate Management Strategy (clause 9.9) and the development of the Infrastructure Works in accordance with specified standards (clause 9.10). If SMDL elects to serve a notice under clause 9.4 calling for the transfer of Infrastructure Land and defaults on any of its obligations under clause 9, WBDC may carry out works to secure compliance with that obligation and recover the costs of so doing (clause 9.12).

126. Clause 28 provides for the resolution of disputes by an expert or, if the parties otherwise agree, by an arbitrator.

Summary of Development Agreement

127. The DA imposes upon SMDL an initial obligation to prepare Project Plans for the SG's approval, that is a Business Plan and Master Plan covering the whole of LRIE setting out development plots, sites to be retained (so that a lease previously granted by WBDC may be re-geared), initial infrastructure works and a land appraisal. SMDL must also take steps to assemble the necessary land interests. Following approval of the Project Plans, SMDL is to prepare a budget for the Infrastructure Costs (for approval by the SG) and an application for outline planning permission in accordance with the Project Plans. Once an outline permission satisfactory to SMDL is obtained, SMDL is to

prepare for the SG's approval a Development Strategy and Plot Appraisal for each of the Development Plots. Following such approval SMDL is to use all reasonable endeavours to obtain detailed planning approval for the work covered by each Development Strategy. The securing of an outline planning permission also gives rise to an obligation upon SMDL to prepare an Estate Management Strategy for the SG's approval. Once a Plot Appraisal has been approved, SMDL may elect to enter into obligations to acquire and redevelop the land to which that appraisal relates, but it is under no legal obligation to do so.

128. The DA has a number of features which are important for this case:

(i) It is a matter for SMDL to propose the content of the plans and strategy documents, consistent with WBDC's decision to rely upon the expertise and experience of SMDL and the fact that risks are borne by SMDL not WBDC;

(ii) The Indicative Business Plan provides only a framework for the items to be covered by the plan to be prepared by SMDL. It does not prescribe in any detail the development to be carried out or specify the consideration which is to be paid for disposals by WBDC of interests in its land. The Indicative Master Plan is an outline or broad brush drawing. It does not give, for example, a specification of WMBC's requirements;

(iii) The documents containing proposals by SMDL are subject to the approval of the SG (where SMDL and WBDC have an equal voice) and not the approval of WBDC alone. Where the SG is unable to reach unanimous agreement, the issue is resolved under clause 28 in accordance with the DA and its Objectives;

(iv) It is a matter for SMDL to determine the content of the planning applications it submits, so long as they accord with the plans and strategy documents approved by the SG;

(v) The same approach applies to reviews or variations of the plans and strategy documents under the DA;

(vi) The various plans and development strategies must be consistent with the market conditions prevailing at the time and the Objectives in clause 2.1 of the DA, which include maximizing the returns from the LRIE for WBDC. The DA recognises that the redevelopment of the LRIE will take a substantial period of time to achieve and that market conditions are likely to change during that period. Accordingly, the DA relies upon regular review mechanisms and up to date Plot Appraisals before land can be drawn down by SMDL. The DA is structured so as to ascertain best value as WBDC disposes of interests in individual plots of land, consistent with the Project Plans and Land Appraisal for the whole

site;

(vii) SMDL has a choice, not a legal obligation, as to whether to take on the obligations of acquiring a ground lease (or freehold) and carrying out the redevelopment on a plot. Instead, SMDL has a commercial incentive to draw down land because of its substantial commitment to (inter alia) master planning the whole site, preparing development strategies for each plot and obtaining outline and detailed planning approvals and because of the opportunity to carry out a profitable development.

(viii) The DA is structured so that WBDC retains its ability to receive the existing level of ground rents and also increased returns through ground rents payable on redeveloped sites. SMDL's obligation to carry out development on land drawn down is a necessary mechanism, because WBDC's entitlement (inter alia) to receive an increased ground rent begins when that new development is completed and therefore available to be let to new occupiers paying enhanced occupational rents.

Ground 1: WBDC's duty under section 123 of the Local Government Act 1972

129. Section 123 provides (so far as is material):

> "(1) Subject to the following provisions of this section, ….. a principal council may dispose of land held by them in any manner they wish. "
>
> (2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.
>
> (2A) …..
>
> (2AA) …..
>
> (2B) …..
>
> (7) For the purposes of this section a disposal of land is a disposal by way of a short tenancy if it consists—
>
> (a) of the grant of a term not exceeding seven years, or
>
> (b) of the assignment of a term which at the date of the assignment has not more than seven years to run ….."

Legal principles

130. In R v Commissions for New Towns *ex parte* Tomkins [1988] 87 LGR 207, Bingham LJ held (page 218) that the policy of legislation such as section 123 is to

ensure, so far as reasonably possible, that public assets are not sold at an undervalue, save with the authority of the Secretary of State.

131. The following principles may be distilled from the case law as to the circumstances in which the Court may or may not intervene in relation to the application of section 123:-

(i) The Court is not entitled to substitute its own view on the facts and merits for that of the local authority. The Court may only interfere if there was no material upon which the authority's decision could have been reached, or if in reaching that decision, the authority disregarded matters it ought to have taken into consideration, or if it took into account matters which were irrelevant, or if its decision was irrational (R v Essex County Council *ex parte* Clearbrook Contracts Limited Mc Neill J, 3 April 1981):

(ii) The Court is only likely to find a breach of section 123(2) if the local authority:

(a) has failed to take proper advice, or (b) failed to follow proper advice for reasons which cannot be justified, or (c) although following advice, it followed advice which was so plainly erroneous that in accepting it the authority must have known, or at least ought to have known, that it was acting unreasonably (R v Darlington B.C *ex parte* Indescon Ltd [1990] 1 EGLR 278, 282);

(iii) Section 123(2) does not mandate the authority to have regard to any particular factors (R (on the application of Salford Estates (No.2) Ltd) v Salford City Council [2011] LGR 982 at paragraph 95);

(iv) There is no need for the authority's decision-making process to refer to section 123(2) explicitly, provided that the Court is able to see that the duty has in substance been performed (Salford at paragraph 103);

(v) The obligation under section 123 is not to conduct a particular process, but to achieve a particular outcome (Salford at paragraph 95). But process may have an important, or even determinative, evidential role in deciding whether the authority has complied with section 123(2)) (R (Midlands Co-operative Society Ltd) v Birmingham City Council [2012] LGR 393 at paragraphs 122-3).

(vi) "Consideration" in section 123(2) is confined to those elements of a transaction which are of commercial or monetary value. Therefore the Court will quash a decision to sell property where the authority has taken into account an irrelevant factor, eg. job creation, when assessing whether it is obtaining the best "consideration" reasonably obtainable (R v Pembrokeshire County Council *ex parte* Coker [1999] 4 All ER 1007; R v Hackney L.B.C. *ex parte* Lemon Land Ltd [2001] LGR 555);

(vii) The deliverability or credibility of a bid, or the care with which it has been prepared, are commercial factors which are relevant to an assessment of whether the "consideration" offered is the best reasonably obtainable. Likewise, the highest offer on the table need not represent the best "consideration", because an authority may conclude that "a bird in the hand is worth two in the bush" (R

(Lidl (UK) GmbH) v Swale BC [2001] EWHC Admin 405 at paragraph 18);

(viii) In order to discharge the duty under section 123(2) there is no absolute requirement to market the land being disposed of, or to obtain an independent valuation (Lidl at paragraph 18).

132. I return to principles (i) to (iii). A case in which an authority takes into account a consideration which is legally irrelevant is a straightforward example of a public law error normally justifying intervention by the Court. But a failure to have regard to a material consideration needs further examination, given that the legislation does not mandate any specific matters which must be taken into account by the authority. Although, it is for the Court to determine whether a consideration is legally capable of being relevant, the general principle is that it is for the decision-maker, the authority, to decide (a) whether to take a relevant consideration into account and, if it does so decide, (b) how far to go in obtaining information relating to that matter. Such decisions may only be challenged on the grounds that it was *irrational* for the authority not to take a legally relevant consideration into account or, having done so, not to obtain particular information (see CREEDNZ Inc. v Governor General [1981] 1 NZLR 172; In Re Findlay [1985] AC 318, 333-4; R (Khatun) v Newham LBC [2005] QB 37 at paragraphs 34-35). Mr Banner accepted that this is the approach which should be followed when reviewing a decision taken under section 123 of the LGA 1972. It follows that earlier authorities referred to in paragraph 131 above, such as Clearbrook and Indescon need to be read in this light.

133. In Clearbrook McNeill J stated:

> "I accept that there is a duty to probe or explore; to investigate *as far as reasonable* the limits of the bids of opposing bidders. It is not an auction where each opposing bidder knows of the bids of the other but the vendor, be he trustee or local authority, must *take reasonable steps* to see how far each will go to commit himself to the highest offer he is prepared to make and to take the contract. Thus here, too, what is *reasonable* depends entirely on the particular transaction" (emphasis added).

This passage has been approved in subsequent decisions of the High Court (see eg. R v Lancashire County Council *ex parte* Telegraph Service Stations Ltd [1989] Local Government Review 510; Indescon at page 279). However, it should be noted that in other parts of his judgment, McNeill J accepted that the position of trustees and local authorities should not be equated, not least because the decisions of local authorities may only be challenged on public law principles. Thus, although McNeill J referred to a duty to investigate rival bids as far as reasonable, in a judicial review of a local authority's decision by reference to section 123(2), the true question is whether that authority acted irrationally, whether through not taking a particular consideration into account, or by not obtaining more information, for example, by not exploring competing bids further.

134. Thus, the test is whether, in the circumstances of the case, no reasonable authority would have failed to take into account the specific consideration relied upon by the claimant, or to probe the bid or rival bids further. Lord Scarman also held in Findlay that

that test is satisfied where in the circumstances a matter is so "obviously material" to a particular decision that a failure to take it into account would not be in accordance with the intention of the legislation, "notwithstanding the silence of the statute" (see also Derbyshire Dales D.C. v Secretary of State for Communities and Local Government [2010] 1 P&CR 19; R (Hurst) v HM Coroner for Northern District London [2007] 2 AC 189 at paragraphs 57-59 (and also paragraphs 18 and 79); R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at paragraphs 63 and 75; De Smith's Judicial Review (7th edition) paragraph 5-126); Wade & Forsyth: Administrative Law (11th edition) pages 324-5). Particularly in view of the ratio of the House of Lords in Hurst, I will apply this broader understanding of Findlay, rather than the more restrictive approach advocated by Mr. John Howell QC (sitting as a deputy High Court judge) in paragraphs 74 to 76 of R (Cooper) v Ashford BC [2016] EWHC 1525 (Admin). The authorities cited in Cooper did not decide that the "obviously material" test applied in Hurst is incorrect.

The grounds

135. Ground 1F alleged that WBDC made a material error of fact as to the increase in income resulting from WBD's bid. That criticism has been abandoned (paragraph 94 of the Claimant's skeleton).

136. Mr Banner accepted that grounds 1G and 1H (paragraphs 95 to 96 of the Claimant's skeleton) add nothing to the Claimant's other contentions under ground 1 and do not provide any additional support for the challenge. I therefore say nothing further about them.

137. In Counsels' Note dated 6 July 2016 it is accepted on behalf of the Claimant that Grounds 1A, B, C and D "collapse into the same essential complaint" (paragraph 5). During the hearing the issues under ground 1 became "relatively narrow" (paragraph 17 of the Reply). The complaint now relates essentially to ground 1D, namely an alleged failure by WBDC to seek further information from bidders given that the Council had been advised by S&P that there was "insufficient financial evidence to choose between WBD's bid and St Modwen's bid" (the Claimant's paraphrase rather than the advice actually given by S&P).

138. Leaving ground 1E to one side for the moment, the other grounds as set out in the Amended Statement of Facts and Grounds were in summary as follows:

Ground 1A: WBDC failed to have regard to the duty under section 123(2). Instead, it pursued the "twin objectives" of securing regeneration and employment and an improved financial return. No expert valuation advice was obtained as to the totality of each party's bid against the requirements of section 123(2);

Ground 1B: The Council's objective of securing an "improved return" from the LRIE did not equate to the best consideration reasonably obtainable and so involved a

misdirection in law.

Ground 1C: The Council took into account irrelevant considerations, namely the ability to deliver regeneration and increased employment.

Self-evidently there is a good deal of overlap between these grounds.

139. In the light of the contemporaneous material summarised earlier in this judgment, it is self-evident that WBDC did have its obligation under section 123(2) to achieve the best price reasonably obtainable well in mind. WBDC did not set out merely to obtain an "increase" in its return from the LRIE. First, there were explicit references to the statutory provision or to the substance of that provision. Second, the context for the Council's consideration of the opportunities for redevelopment and the bids it received was the maximisation of the receipts it will obtain from its landholding. Third, the Council did not treat employment generation as part of the consideration it would receive on a disposal of an interest in its land (as in the Lemon Land case) or as in some way offsetting the obligation to obtain best consideration. The Council was seeking to maximise its income in the future from an estate which needed to be redeveloped taking into account the lack of investment for 40 years, the age of the existing buildings, their limited life and unsuitability to satisfy modern business requirements. The Council as landowner had to proceed on the basis that redevelopment proposals will fall to be assessed against the planning policies for the LRIE which promote the regeneration of the estate primarily for business uses at a greater density which will (inter alia) create additional jobs. A regeneration scheme which failed to comply with those policies would be unlikely to receive planning permission. Fourth, the evidence in this case plainly shows that the Council's twin objectives were entirely compatible with compliance with its duty under section 123(2). Fifth, WBDC received proper professional advice throughout on how to protect and maximise their income from the LRIE.

140. Acknowledging that the sweeping assertions in grounds 1A to 1C as originally formulated could not be sustained, the Claimant's case has been altered in Counsels' note dated 6 July to the following complaints:-

Ground 1D: Given that this was a situation in which the authority had received competing bids, there was uncertainty regarding the financial information received and no urgency to conclude an agreement, WBDC had been obliged to probe the bids further in order to satisfy its duty under section 123(2) and failed to do so.

Grounds 1A and 1C: Qualitative issues such as the deliverability of a particular bid, whilst relevant, could not obviate a requirement to assess which bid offered the highest quantum.

Ground 1B: the generation of increased income was improperly treated as sufficient to dispose of the best "quantum" issue (This ground has already been rejected for the reasons given in paragraph 139 above based upon my review of the

contemporaneous documentation).

"Ground 1C fall-back": It was irrational for WBDC to treat deliverability of SMDL's bid as determinative and yet enter into a DA which does not contain any obligation requiring SMDL to carry out the redevelopment.

Context

141. In my judgment there is no substance in any of these criticisms, which completely fail to acknowledge the context in which WBDC was acting which, in summary, was as follows:-

(i) LRIE needed to be redeveloped in order to avoid the Council's current rental income being put at risk and to increase that income in the future;

(ii) WBDC wished to retain LRIE as an income generating asset as far as possible, rather than dispose of freehold interests in return for capital receipts. The LRIE represents one of the last major assets held by the Council and the income it derives from it is relatively settled, thereby reducing the pressure upon the authority to increase Council tax or to borrow money. Maintaining and enhancing this increase stream was vital to the underpinning of WBDC's budgetary position (paragraph 22 of Mr Bagnell's witness statement);

(iii) The redevelopment of LRIE would be a long term exercise, involving complex land assembly and relocation issues and uncertainties as to development costs and future market conditions. The project was dependent upon ascertaining market interest and demand to occupy different types of development on various parts of the site;

(iv) WBDC does not have the experience or expertise to deal with these issues and is not in a position to take on the risks involved. It depended upon entering into an agreement with a developer with the greatest expertise and a proven track record for similar projects, who would assume those risks;

(v) Given the inherent uncertainties described above, none of the bids offered WBDC specific prices or values for all of the various components of the redevelopment. Instead they (including WBD/Faraday) all presented estimates in the form of projections of future cash flows. *Actual* rental values and capital payments for the whole of the development remain to be ascertained in the future under the DA in the light of such matters as the planning approvals obtained, further market testing and future market conditions;

(vi) In any event, S&P did probe WBD's offer, for example by putting forward some 32 questions for WBD to answer. Similarly, questions were put to SMDL.

Whether WBDC should have probed the bids further

142. Mr Banner accepted on behalf of the Claimant that there was no freestanding obligation on WBDC to probe the financial bids made by WBD and SMDL further. Instead, the merits of ground 1D depend upon the Claimant satisfying the Court that it was irrational for WBDC not to have probed the bids further (see paragraphs 131-134 above), because the advice it had received from S&P was, according to the Claimant, that there was "insufficient financial information to choose" between the two developers or "insufficient evidence" (see paragraphs 5d and 5i of Counsels' note dated 6 July 2016).

143. The Claimant's submission is based solely upon paragraph 4.13 of S&P's Report in February 2014 (quoted at paragraph 89 above). But the submission is misconceived because the Claimant has failed to read paragraph 4.13 correctly. S&P did not advise WBDC that there was insufficient financial information to enable them to choose between the two bidders *so that the Council should require further financial information to be provided by them* before the Council proceeded to a decision. That was neither said nor implied by S&P. Instead, they advised that there was not "sufficiently *firm* supporting financial information" which "can be used to help choose decisively between the two companies." Given the various uncertainties inherent in the appraisal of this particular project to which I have already referred, there was no implication by S&P that this was a case where further financial information ought to be, or even could be, sought or obtained from the bidders. S&P went on to explain that this was not a tender with fixed financial bids. Instead, each developer had put forward financial reports based on reasonable *current* estimates. It therefore followed that, for example, the indicative capital sums which had been put forward as "offers" could change in the future as assumptions change.

144. S&P added that there was nothing in the financial assumptions of either bidder which could lead them to recommend one bidder rather than the other on this particular ground (see paragraph 4.14). However, S&P pointed to the proposals by WBD for higher density development as posing a "slightly greater level of risk" and a factor which the Council should bear in mind in its financial decision.

145. Reading the S&P report fairly and as a whole, it is clear that the consultants were not advising the Council that the information put forward by the bidders was lacking in the sort of detail which could reasonably be expected at this stage for this project. If they had taken a different view, undoubtedly they would have said so. Instead, it is clear that the thrust of the advice to WBDC in paragraphs 4.13 and 4.14 was that the information provided by the two bidders was at the level to be expected for the long term project proposed for this site.

146. The Claimant's criticism narrowed in the Reply (paragraph 18a) to asserting that "whilst there was inherent uncertainty in the precise financial quantum ultimately to be received by the Council, that did not mean that further clarification of the "not sufficient" information to which paragraph 4.13 referred would be incapable of reducing the uncertainty and assisting in identifying which of the two final bidders offered the highest quantum". The argument is wholly fallacious. It begins with the Claimant's unjustifiable

gloss ("not sufficient information") and ignores the advice given in the remainder of paragraph 4.13 and in paragraph 4.14 of the report. At this stage the bidders could only put forward estimated figures for a scheme even the content of which remained to be defined, and then carried out in the longer term. The Claimant now simply relies upon a negative assertion that the possibility of reducing uncertainty by seeking "further clarification" could not be ruled out. As is plain from the Claimant's written submissions, this is a speculative argument at best. But it ignores the legal test which the Court has to apply, namely whether the only possible rational response of a local authority in WBDC's position was that it should seek more financial information, or probe the bids further before reaching a decision, because this was an "obviously material" consideration, notwithstanding the advice it had received in S&P's report read as a whole, including paragraphs 4.13 and 4.14.

147. For the reasons I have set out above, not least the advice given by S&P, the Council's response to the information it received cannot possibly be criticised as irrational. Indeed, in my judgment it was entirely sensible. In view of the future uncertainties of the project, WBDC cannot be criticised for not seeking further information on the financial estimates. Rather, WBDC was entitled to focus on its assessment of the experience and expertise of the developers bidding in order to form a view as to how those uncertainties could best be addressed. In this case that approach was directly relevant, indeed critical, to the satisfaction of the obligation under section 123(2).

148. The Claimant also seeks to rely upon comments made by WBDC's Chief Executive after the Council had decided to select SMDL as its development partner to the effect that "financial gain was not the Council's top priority" and "the scheme was not going to generate vast amounts of income for the Council". He also said that given "the commerciality of this site" there was not a "great opportunity to increase rent". Mr Banner suggested that these comments show that WBDC ignored its obligation under section 123(2). I firmly disagree. These comments, when read fairly and in context, are wholly consistent with the contemporaneous documentation I have already summarised at length relating to the process followed by WBDC before deciding to enter into the DA, including the difficulties of redeveloping LRIE, the advice it received and the steps taken by the Council to comply with section 123(2) (see eg. paragraphs 28, 53, 55, 63, 75 to 76, 79, 81, 82 and 85 to 89 above).

149. Ground 1A and 1C, as reformulated by the Claimant, fall away. Once it is concluded that it was not irrational for WBDC to accept the advice that the financial information (ie. estimates) was not "sufficiently firm" to help the Council choose decisively between the two bidders, and the Council was not obliged to seek further financial information at the stage of selecting a developer partner, there was nothing irrational or unlawful in WBDC proceeding to evaluate other aspects such as experience, expertise and deliverability.

150. It was common ground between the parties that section 123(2) was engaged when the decision to enter into the DA was made. But the application of the duty does not end there. The DA provides a framework for defining the redevelopment which will take place on each plot at some point in the future, obtaining the necessary planning

approvals and valuing the interests to be disposed of by WBDC, whether freehold or leasehold. A number of key provisions require consistency to be achieved with the objectives of the DA, notably the maximisation of returns from the LRIE. When a disposal takes place WBDC will need to ensure that it is obtaining the best consideration reasonably obtainable for that disposal so as to satisfy section 123(2). In order to avoid plots being considered in isolation, the DA requires any individual Development Strategy coming forward to be consistent also with the Project Plans and Land Appraisal for the whole estate. It has not been suggested by the Claimant that the structure or terms of the DA could prevent WBDC from complying with section 123(2) in the future. Plainly if WBD/Faraday had been the successful bidder they would themselves have needed to enter into an agreement with WBDC similar in structure to the DA, as their own bid indicates (see paragraph 60 above).

Irrationality

151. I also reject the Claimant's "Fall-back Ground 1C" in which it is contended that it was irrational for WBDC to place importance upon the expertise of the developer and the deliverability of the project without also imposing an obligation upon SMDL in the DA to carry out the redevelopment or "works". In essence I accept the analysis of Mr David Elvin QC and Mr. Luke Wilcox, who appeared on behalf of WBDC. I reject ground 1C for the following reasons-

(i) At least as far back as the Opportunity Document publicised to the market in January 2013, and consistently since then, WBDC made plain its intention to enter into an agreement with the selected development partner which would fall outside the EU Procurement Directive;

(ii) In the Midlands Co-operative case Hickinbottom J held that it is not unlawful for a local authority to sell land for development purposes without a legally enforceable obligation by the purchaser to carry out the development in order to avoid the onerous provisions of the Procurement Directive (see [2012] BLGR at page 423 paragraph 116). Subject to one argument raised under ground 2 (see eg. paragraph 3b of Counsels' Note dated 6 July 2016), the Claimant accepts that a public authority is entitled to enter into arrangements with the effect that the Procurement Directive does not apply;

(iii) In accordance with (ii) above, WBDC decided to enter into the DA which did not require SMDL to carry out the redevelopment. SMDL has an option as to whether in the future it will draw down land and at the same time take on an obligation to redevelop that plot (Midlands Co-operative at paragraph 100 et seq);

(iv) Given WBDC's decision not to include in the DA an enforceable obligation by SMDL to carry out redevelopment, it was important for the Council to select a partner with the best expertise and experience to provide sufficient commercial assurance that the project will be delivered;

(v) The DA obliges SMDL to prepare Project Plans, appraisals, Development Strategies and an Estate Management Strategy, and to obtain planning approvals. SMDL has to bear the considerable costs of carrying out these steps, which it cannot recover under the DA unless it draws down the relevant land and carries out the redevelopment. There is therefore a clear commercial incentive on SMDL to carry out redevelopment, subject to the timing of any individual drawdown which, as the DA recognises, may be affected by, for example, relocation issues and changes in market conditions;

(vi) For these reasons, it was not irrational for WBDC to rely upon SMDL's expertise and experience to give sufficient assurance on the deliverability of a bid, without requiring SMDL to enter into a legal obligation to carry out redevelopment which is enforceable from the outset.

Whether WBDC "moved the goal posts"

152. Ground 1E raises a separate point that WBDC "moved the goal posts" in relation to WBD's bid, by accepting SMDL's bid without a requirement to relocate Bayer and to take the *entire* LRIE site. In his oral submissions Mr Banner confirmed that the "Bayer" point was not being pursued.

153. In paragraph 6 of Counsels' note dated 6 July 2016 the Claimant's complaint under ground 1E is that WBDC failed to test whether another bidder would have increased its offer and, if facing such increased competition, whether SMDL would have increased its bid, given WBDC's abandonment of its requirement that a 250 year lease be taken of the *entire* site.

154. WBD's bid involved the purchase from WBDC of an overarching lease for the entirety of the LRIE for a term of 250 years for an initial payment of £1m (see section 3.1 of WBD's bid document). Mr Crook complains that WBD/Faraday should have been informed by the Council that it was not necessary for them to provide for an overarching ground lease covering the entire area of the LRIE (see paragraph 123 of his first witness statement).

155. In fact, the Estates Brief issued in August 2013, upon which Mr Banner seeks to rely, is perfectly clear and refutes the complaint. First, the requirement to submit an offer for a 250 year ground lease of the entire LRIE related to the "base offer" requested (see the text quoted at paragraph 53 above). But paragraphs 4.3 and 4.3.6 of the Opportunity Document made it clear that the Council would consider alternative structures to that "base offer". Moreover, the document was expressly stated to be non-prescriptive and a "preliminary brochure" for "soft market testing" (see paragraphs 45 to 46 above). From those passages alone WBD/Faraday were given the opportunity to put forward any alternative offer of the kind to which Mr Crook's witness statement refers. In addition, if WBD had been at all interested in putting forward an alternative and additional framework for its bid it could easily have contacted WBDC.

156. Second, paragraph 26.0 of the Opportunity Document and paragraph 4.3.5 of the

Estates Brief made it clear that the new overarching lease was expected to be granted on a phased basis, so that phased redevelopment could occur.

157. Third, it was envisaged that the Council would dispose of residential plots by freehold transfers and not as part of an overarching ground lease of the entire site. That was understood by WBD (see paragraph 3.24 of S&P's report in February 2014).

158. Fourth, when WBD had been questioned about its bid, including the payment of additional ground rent rather than an initial capital payment of £1m, WBD adhered to the structure of a 250 year overarching ground lease, notwithstanding WBDC's preference for more flexible approaches (see points 4 and 5 of S&P's note of the debrief meeting on 5 June 2014).

159. Fifth, and in any event, the bids were based upon estimates of values, and, given the uncertainties of the project, an important consideration for WBDC was its deliverability by the development partner it judged to be the most experienced and best qualified.

160. I therefore conclude that the briefing material supplied to bidders was sufficiently clear as to WBDC's willingness to be flexible, such that no "moving of goalposts" occurred. Furthermore, in view of all the circumstances to which I have referred, the Council did not act irrationally or unreasonably by not inviting WBD specifically to submit an alternative bid without an overarching 250 year ground lease of the entire LRIE site.

Conclusion on ground 1

161. For all these reasons ground 1 must be rejected.

Ground 2: Whether the Development Agreement was subject to public procurement legislation

Statutory Framework

162. The Public Contracts Directives introduced a common framework for public procurement arrangements within the European Union so as to open them up to competition (recital (1) to Directive 2014/24/EU). In Risk Management Partners Ltd v Brent LBC [2011] 2 AC 34 Lord Hope DPSC, with whom the other members of the Supreme Court agreed, stated at paragraph 10 that:-

> "The broad object of Directive 2004/18/EC and the Regulations that give effect to it, is to ensure that public bodies award certain

> contracts above a minimum value only after fair competition, and that the award is made to the person offering the lowest price or making the most economically advantageous offer."

163. Similarly, in Edenred (UK Group) ltd v HM Treasury [2015] PTSR 1088 Lord Hodge JSC said at paragraph 28:-

> "The principal purpose of EU procurement law…. is to develop effective competition in the field of public contracts…..Thus if a public body decides to obtain services by a public contract, and the contract exceeds the prescribed threshold…., the public body must advertise the opportunity and follow fair and transparent procedures ensuring equality of treatment, to enable potential service providers to compete for the work."

164. Directive 2004/18/EC was transposed into English law by the Public Contracts Regulations 2006 (SI 2006 No.5) ("the 2006 Regulations"). It was repealed with effect from 18 April 2006 by Directive 2014/24/EU (Article 91). The 2014 Directive was transposed into English law by the Public Contracts Regulations 2015 (SI 2015 No.102) ("the 2015 Regulations"). The 2015 Regulations generally came into force on 26 February 2015 (regulation 1(1)) and revoked the 2006 Regulations (regulation 115).

165. There was some discussion as to whether ground 2 should be determined by reference to the 2006 Regulations or the 2015 Regulations. Regulation 118(1) of the 2015 Regulations provides that nothing in those regulations affects "any contract award procedure commenced before 26 February 2015." A contract award procedure is treated as having commenced before that date if before then the contracting authority had (inter alia) published any advertisement seeking offers or expressions of interest in "a proposed public contract…." (regulation 118(2)(b)), or alternatively a contract notice had been sent to OJEU (regulation 118(2)(a)). It is common ground that in the present case "the contract award procedure" began before 26 February 2015, in the sense that prior to that date WBDC invited expressions of interest and offers for a development agreement, albeit outside the scope of the public procurement legislation. Accordingly, if the proposed contract did fall within that legislation, contrary to the contentions of WBDC, then the procedure which ought to have been followed at the time was that laid down by the 2006 Regulations and not the 2015 Regulations.

166. Thus the issue whether between 2013 to 2015 WBDC should have complied with the procurement regime for public contracts depended at the time upon the application of Directive 2004/18/EC and the 2006 Regulations. However, if the Court should decide that issue against the Council and the decision to award the DA is quashed, any fresh process for awarding a similarly structured development agreement would have to comply with Directive 2014/24/EU and the 2015 Regulations. Fortunately, the parties are agreed that for the purposes of these proceedings there is no material difference between the earlier legislation and the current legislation which replaces it. They also agree that it would be convenient for the reasoning in this judgment to be expressed by reference to the current legislation. I will adopt that course.

167. The critical issue under ground 2 is whether the DA was a "public contract" to which public procurement legislation applied. If it was, then it is common ground that the contract exceeded the "value" thresholds defined in regulations 5 to 6 of the 2015 Regulations. In that event, regulation 26(1) required the contracting authority, in this case WBDC, to apply one of the procedures conforming to Part 2 of the 2015 Regulations (eg. open procedure, restricted procedure, competitive procedure with negotiation etc, laid down in regulations 27 to 32). Moreover, regulation 26(2) and (8) required a call for competition to be published (a contract notice under regulation 49). It is common ground that WBDC did not comply with any such requirements because it believed that the contract fell outside the scope of public procurement legislation.

168. By regulation 2(1) "public contracts" means:-

> "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services"…

Thus to qualify as a "public contract", a contract must fall within one of those three headings (or be a mixed procurement contract – see regulation 4). An "economic operator" means (regulation 2(1)):-

> "any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market"

"Contracting authorities" means (regulation 2(1)):-

> "the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, ….."

169. "Public service contracts" means (regulation 2(1)):-

> "public contracts which have as their object the provision of services other than those referred to in the definition of "public works contracts"

170. By regulation 2(1) "public works contracts" means:-

> "public contracts which have as their object any of the following:-
>
> (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work."

A "work" means "the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function." The effect of regulation 2(2) is that the term "work" must be given the meaning it bears in Directive 2014/24/EU. The "activities" listed in Annex II of the Directive and Schedule 2 to the 2015 Regulations include site preparation and the construction of new buildings.

Principles concerning the "main object" of a contract

171. It is now a well-established principle that a contract with a "contracting authority" only falls within the scope of the procurement regulation if its *main object corresponds* to the definition of one of the three types of "public contract". If therefore the execution, or realisation, of "works" is *ancillary* to the main purpose of the contract, that agreement cannot be a "public works" type of "public contract" (see Gestion Hotelera Internacional SA v Comunidad Autonoma de Canarias [1994] ECR I – 1329 at paragraph 27; Commission v Italy (2008) (case C-412/04 paragraph 46). Likewise, a contract for the transfer of land does not fall within the scope of the Directive and that still holds good if the carrying out of "works" under such a contract is merely incidental to that contract rather than its main object.

172. In Commission v Italy it was also decided that the "main purpose" of a contract must be determined by "an objective examination of the entire transaction to which the contract relates". That assessment "must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very purpose of the contract" (paragraphs 48 to 49).

173. At one stage in his argument Mr Banner sought to rely upon paragraph 91 of Commission v Spain [2011] 3 CMLR 43 for the proposition that "the main purpose of a contract is something in relation to which there are obligations" (see eg. paragraph 3 of the Reply). In other words, that purpose is defined by, or co-extensive with, the essential obligations, of the contract. I do not accept that submission. That part of the decision in the Spain case merely summarised and adopted the reasoning in Commission v Italy (at paragraphs 46 to 49) from which it is plain that:-

(i) The main purpose of the contract must be determined by an objective examination of the *entire* transaction to which the contract relates;

(ii) That assessment must be made *in the light of*, or having regard to, the essential obligations which predominate and characterise the transaction.

Thus, the case law does *not restrict* the identification of the *main purpose* of a contract to matters contained in its "essential obligations", or to essential matters which the party contracting with the public authority is obligated to carry out or perform. For example, as Mr Banner accepted in oral argument, the main purpose of a contract may be the grant by the public authority of an *option* to the other party (eg to acquire land or chattels).

174. In the light of the authorities I would suggest that it is helpful to approach the matter in the following way:-

(i) What is the main object of the contract having regard to (a) the transaction *as a whole* and (b) any obligations which are essential to the transaction?

(ii) Does that main object correspond to the definition of one of the three types of "public contract"?

(iii) If the answer to (ii) is no, then the contract falls outside the scope of public procurement legislation;

(iv) If the answer to (ii) is yes, is the contractor under an enforceable legal obligation to carry out that main object (e.g. works) which is legally enforceable by the contracting authority? (see Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben [2010] ECR I-2673 at paragraph 63; the Midlands Co-Operative case [2012] BLGR 393, 417 at paragraphs 100-101);

(v) If the answer to (iv) is no, then the contract falls outside the scope of public procurement legislation. If the answer to (iv) is yes, then the contract *may* fall within the scope of that legislation subject to applying other criteria (eg. the definition of "public contracts", the threshold values and the exclusions from the procurement regime).

If the issues are approached in that order, the error of pre-determining the object of a transaction by beginning with and simply focussing upon the obligations in the contract is avoided.

Direct and indirect obligations

175. It is necessary to consider principle (iv) in paragraph 174 above further. In many cases the "economic operator" or contractor will enter into an obligation to carry out works or provide services itself; in other words a *direct* obligation. However, in Auroux v Roanne [2007] ECR I – 387 the contractor, a semi-public urban development company, agreed to organise an engineering competition and to have certain works carried out (paragraph 11 of the Advocate General's opinion). The Court rejected the argument that an obligation by a contractor to have the works carried out by another party rather than by itself fell outside the scope of the Directive (see paragraphs 28, 38 and 44):-

> "….according to settled case law, in order to be classed as a contractor under a public works contract… it is not necessary that a person who enters into a contract with a contracting authority is capable of direct performance using his own resources (… Case C – 389/92 Ballast Needam Groep [1994] I – 1289, paragraph 13 and Case C – 176/98 Holst Italia [1996] ECR I – 8607, paragraph 26). It follows that in order to ascertain whether the main purpose of the agreement is the execution of works it is irrelevant that SEDL does not execute those works itself and that it has the works carried out by sub contractors".

Thus the question whether an *indirect* obligation is sufficient to bring a contract within the scope of the Directive was indeed an issue which fell to be decided in the Roanne case. The indirect nature of the obligation which sufficed in that case, was that the "economic operator" was obliged to have the works carried out by third parties (see to like effect the judgment of Hickinbottom J in the Midlands Co-operative case at paragraph 100).

176. The same point of principle was decided by the ECJ in Ordine degli Architetti and others [2001] ECR I – 5049 (see paragraphs 90 and 94).

177. In the Helmut Müller case the question formulated by the national court for decision by the CJEU was whether it was necessary that the contractor be "directly or indirectly obliged to provide the works" (paragraph 33 of judgment). When dealing with that simple, broad issue the ECJ reiterated the principles laid down in the earlier decisions (see paragraphs 60 to 63). Thus, the Court held once again that "by concluding a public works contract, the contractor therefore undertakes to carry out, *or have carried out*, the works which form the subject of that contract" (emphasis added) and "it is irrelevant whether the contractor carries out the works itself or uses subcontractors for that purpose." But the CJEU was not asked to consider, and did not decide, whether *indirect* obligations in any wider or different sense may suffice for public procurement legislation to be engaged.

178. The Claimant submits that the DA imposes a number of direct obligations upon SMDL, which are not dependent upon an election or choice being made by SMDL, dealing with (inter alia) master planning, obtaining planning approvals and negotiating for outstanding land interests (see paragraphs 118 to 121 above), and which lead to an option for SMDL to draw down land which, if exercised, results in SMDL becoming under an enforceable obligation to carry out works defined in accordance with the provisions of the DA. The Claimant submits that this is sufficient to qualify as an *indirect* obligation on SMDL to carry out public works and engage the public procurement regime.

179. Mr Banner accepted that this broader concept of an "indirect obligation" is not the subject of any European or UK decision. However, he submits that this approach is justified (see paragraphs 140 to 141 of the Claimant's skeleton and the Reply) because in summary:-

(i) Artificial mechanisms intended to avoid the application of public procurement legislation are to be disregarded;

(ii) WBDC accepts that it deliberately drafted the DA so as to avoid the procurement regime, whereas in reality it entered into a long-term relationship with SMDL because of the latter's *commercial* commitment or assurance that the redevelopment of the whole of the LRIE would be delivered;

(iii) According to the evidence before the Court, SMDL considered the possibility of it not drawing down all of the land so as to become obliged to deliver the whole of the redevelopment eventually approved to be "highly remote";

(iv) SMDL is not entitled to walk away from the DA without providing any benefit to WBDC at all (unlike the Midlands Co-operative case). It has to provide planning and strategic services to WBDC and thereby obtains a valuable option to draw down land in order to carry out redevelopment for profit. At that point SMDL becomes obliged to carry out the works, but without the DA having been exposed to competition under public procurement legislation. The purported avoidance of that legislation is artificial and therefore legally ineffective.

180. Thus, the Claimant's extension of the concept of an *indirect* obligation to cover an option to take a freehold or ground lease of land containing an obligation to redevelop that land depends essentially upon an anti-avoidance principle directed at artificial measures. That was plain from the primary authority relied upon in paragraph 141 of the Claimant's Skeleton, Commission v Austria [2006] CMLR 40**.**

181. In that case a local authority had carried out what appeared to be three separate transactions but which occurred within the space of only 4 months: (1) it created a company to carry out its waste disposal functions, then (2) entered into a contract with the company for the latter to have exclusive responsibility for the collection and treatment of waste within the authority's area, and then (3) transferred 49% of the company's shares to a private entity. Shortly thereafter the company commenced waste operations. The Court noted that there was no dispute that "by means of an artificial construction comprising several distinct stages" a public service contract had been awarded to a semi-public company (paragraph 40). The Court rejected the argument of the Austrian Government that the status of the contract should only be considered as at the date when it was awarded and held that instead all stages, being closely connected in point of time, both before and after the award, would be taken into account when determining the object of the contract. The objective of the procurement legislation to promote undistorted competition would be jeopardised it if were to be permissible "for contracting authorities to resort to devices designed to conceal the award of public service contracts to semi-public companies" (see paragraphs 38 to 42).

182. The principle in the Austria case is similar to the principle applied in UK law whereby intermediate steps or transactions devoid of business or commercial purpose and carried out solely in order to avoid tax may be disregarded (UBS AG v Revenue and Customs Commissioners [2016] 1 WLR 1005 at paragraphs 62 – 68; and see also

Gisborne v Burton [1989] QB 390 for an example outside tax law).

183. However, the second authority cited by Mr Banner on this part of his argument, Ordine degli Architettti [2001] ECR I – 5409 was not concerned with the application of an anti-avoidance principle to artificial transactions or measures. Instead, it dealt with the incompatibility with the Procurement Directive of domestic legislation requiring municipal authorities to contract solely with specified parties. The Court held that the definition of "public works contracts" should be interpreted so as to ensure that the Directive was given full effect notwithstanding the domestic legislation (paragraphs 52 and 55). That general, uncontroversial proposition does not assist in determining whether the Claimant's approach to what may qualify as an "indirect obligation" is sound. The same applies to the passage cited by Mr Banner from paragraph 28 of Edenred [2015] PTSR 1088, dealing with the narrow construction to be given to derogations from public procurement rules.

184. Although the Austria case decided that artificial transactions or devices designed to avoid the procurement regime are to be disregarded or treated as ineffective, neither the 2014 Directive nor the 2015 Regulations contain any general anti-avoidance principle. Indeed, recital (5) of the Directive states:-

> "It should be recalled that nothing in the Directive obliges Member of States to contract out or externalise services that *they wish* to provide themselves or *to organise by means other than public contracts within the meaning of this Directive*" (emphasis added)

185. I am unable to accept the Claimant's argument that an anti-avoidance role or interpretation should be given to the term "indirect obligation". The phrase does not appear in the substantive provisions of the Directive. However, it is referred to in recital (9) as follows:-

> "Whether *the contractor realises all or part of the work by his own means or ensures their realisation by other means* should not change the classification of the contract as a works contract, as long as the contractor assumes *a direct or indirect obligation that is legally enforceable to ensure that the works will be realised"* (emphasis added)

Thus the language of the 2014 Directive reiterates the principle laid down in the decisions of the CJEU referred to in paragraphs 175 to 177 above. When the most recent Directive came to be drafted and adopted there was an opportunity to widen the concept of an "indirect obligation" if it had been thought appropriate to do so as an anti-avoidance measure. That step was not taken. The Claimant's argument flies in the face of the express language used in the 2014 Directive.

186. I am reinforced in these conclusions by observations in recent CJEU decisions on the approach which should be taken to the reach of procurement legislation, at a time when the 2004 Directive was in force. Once again the 2014 Directive has subsequently

been adopted without changing the approach laid down by the Court. In paragraph 34 of his opinion in the Helmut Müller case Advocate General Mengozzi referred to the principal objectives of the Directives on public contracts as being to abolish restrictions on fundamental freedoms (eg. movement of goods, establishment and to provide services) and to encourage competition. However, he stated that it should not be assumed that the scope of the legislation can be "extended indefinitely" in reliance upon those objectives. Thus, a purely "functional" interpretation based exclusively on the fundamental objectives of the Directive is impermissible, thereby disagreeing with the contentions which the Commission had advanced (paragraphs AG 35 and 50). The mere fact that a party obtains an economic benefit from a public authority (eg. an increase in the value of land) without any prior competition with others interested in acquiring that benefit is insufficient to engage procurement legislation (paragraph AG 36). The scope of the Directive should be identified first by reference to the *objective requirements* specified in the Directive itself. The *objectives* of the legislation are among the principal points of reference for the interpretation of that legislation, "but they cannot constitute the only reference parameter" (paragraph AG 39). The Court did not disagree with any of that reasoning. It certainly did not adopt the purely "functional" approach to the interpretation of the legislation which the Commission had advanced.

187. The same theme was taken up by the Advocate General in Commission v Spain [2011] 3 CMLR 43. That case was concerned with a certain type of land use agreement under which a local authority would give assurances regarding the exercise of planning powers (by adopting a detailed plan) in return for a commitment by a developer to finance and execute infrastructure contained in the plan and possibly buildings needed for public purposes, including social housing (paragraph AG 69). Owners of land affected by such a plan might choose to participate in the development or be expropriated, the developer being responsible for paying any compensation due (paragraphs AG 31 and 40). The Advocate General referred to the rejection of the "functional" interpretation of the Directive in the Helmut Müller case (paragraph AG 74) and added that the Court should exercise some restraint if a broad interpretation of an EU legal concept would lead to detailed EU legislation applying to situations not considered in the legislative process (paragraph AG 75). Likewise, in paragraph AG 77 the Advocate General advised against "over-stretching" the meaning of certain criteria in the procurement legislation. He had in mind the possibility that a broad approach might discourage private initiatives in the field of planning and land development and therefore could result in public authorities having to take on direct responsibility for financing and executing development more often, rather than relying on the "land use agreement" model (paragraph AG 76). A particular problem in the Spain case was whether the attribution of new building rights by the public authority could be considered to represent financial consideration in exchange for the infrastructure which the developer was obliged to build for the authority (paragraph AG 73). The Court decided that the developer's obligation to provide infrastructure was not the main object of the contract (paragraph 96 of the judgment).

188. In the Midlands Cooperative case Hickinbottom J accepted (paragraph 116) that a public authority could choose to enter into a contract which avoids the onerous requirements of the procurement legislation. That is consistent with the conclusion I have reached that the legislation does not contain any general anti-avoidance principle. Instead, leaving to one side cases where the agreement contains an artificial device for the avoidance of the procurement regime, the question is an objective one: irrespective

of whether the parties intended their agreement to fall inside or outside the public procurement regime, does the contract fall within the legal definitions of a "public contract"?

Contracts outside the reach of public procurement legislation

189. In order to put the issues under ground 2 regarding the DA into context, it is helpful to identify certain situations which Mr Banner accepts would fall outside public procurement legislation. Paragraph 10 of the Claimant's Reply referred to three such cases:

(i) A contract the main purpose of which is the transfer of land by a public authority to another party, and where any services or works provided by that party to the authority are ancillary (see eg. Gestion Hotelera);

(ii) Where the public authority facilitates development solely though the use of planning powers, eg. to approve building plans (paragraphs 67 to 69 of Helmut Müller and paragraphs 73 to 77 of the Advocate General's Opinion in European Commission v Spain [2011] 3 CMCR 43);

(iii) Where the contractor is able to walk away from a relationship with a public authority at its unfettered discretion (see Midlands Co-operative case at paragraphs 110 to 111 and the decision of the European Commission on the Flensburg case IP/08/867 dated 5 June 2008).

190. Case (iii) needs to be examined further. In Flensburg a public authority's utility company had sold land to a private developer for the construction of a building that would meet certain urban development needs. However, the agreement did not impose an enforceable obligation on the purchaser to construct the building. It merely contained a statement of the purchaser's intent to carry out that work. But in the event of the building not being constructed, the contract gave the authority the right to repurchase the land. The Commission decided that any sanction involved in that right of re-purchase was insufficient to result in the purchaser being under a *legal* obligation to carry out the works, as distinct from having a *commercial* incentive or imperative to do so.

191. In the Midlands Co-operative case the local authority entered into a contract following a tender process for the sale of its freehold and leasehold interests in a community centre. The terms of the tender process required the successful bidder to pay 50% of the purchase price on exchange of contracts as a non-refundable deposit. Thereafter, the sale and purchase was to be conditional upon the authority serving a put option notice within 2 years from the date of exchange of contracts that it was ready, able and willing to complete the sale with vacant possession and requiring the purchaser to exercise a call option within 5 days. The call option enabled the purchaser to buy the property within a fixed period (paragraph 53). The 2 year period allowed for the arrangements which needed to be put in place for the redevelopment of the property and the overall site of which it formed a part. If the put option notice was served by the authority, the purchaser was still able to walk away from the agreement by not serving a

call notice, but the purchaser would lose the 50% of the purchase price it had already paid (paragraph 54). The successful bidder, a retail developer, entered into an agreement substantially in the same terms as the tender documents (paragraphs 67 and 72).

192. The critical question in the Midlands Co-operative case was whether the purchaser was under an enforceable legal obligation to carry out works specified by the contracting authority, in that case a replacement community facility. Absent such an obligation, the public procurement regime could not be applicable (see paragraphs 96 to 102).

193. Hickinbottom J accepted that the court should look at the whole of the arrangements between the authority and the contractor and, in particular, whether there was in reality a multi-stage award procedure which included an obligation on the contractor to carry out the works. For example, there might be a separate contract for the disposal of land by the authority to the contractor and a prior or simultaneous contract requiring the contractor to carry out the works. In such a case the public procurement legislation *might* be applicable. But it is insufficient that at the time of the land transaction the authority merely intends or is very likely to enter into a works contract with the purchaser (paragraph 107) or that the purchaser is very likely to do the works because of commercial imperatives (see below).

194. The judge also held that the purchaser's obligation in an agreement under section 106 of the Town and County Planning Act 1990 to provide a community facility did not satisfy the "enforceable obligation" requirement for procurement purposes, because that obligation only arose if the purchaser *decided to implement a particular planning permission* and, like the decision whether to complete the purchase of the site, that was an option for the purchaser. "Whether they decide to proceed, and impose upon themselves any obligation to perform any works, is entirely in their own hands". The Court held that it was insufficient that the purchaser was very likely to exercise these options given the considerable money and effort they had already invested in the site over a long period of time, including the 50% of the purchase price paid as a non-refundable deposit (paragraphs 110 to 112).

195. Mr Banner confirmed in oral submissions that I am not being asked to depart from any of the reasoning in the Midlands Co-operative case. Furthermore, although SMDL will become obliged to redevelop in accordance with the relevant Development Strategy *if and in so far as* it chooses to draw down relevant land, Mr Banner did not seek to equate that situation with the example given by Hickinbottom J in paragraph 107 of his judgment whereby separate, but co-existing, contracts for the sale of land and for the carrying out of works might be treated as a single transaction to which the procurement regime applies. I think that he was correct not to do so. There are significant distinctions. First, when the DA was executed SMDL did not come under any obligation to take a transfer or ground lease of any part of the site. Whether any such disposal takes place in the future is entirely a matter for SMDL to decide. Second, when the DA was entered into SMDL did not become subject to an obligation enforceable by WBDC to carry out "works". Any such obligation is entirely confined to any ground lease or freehold which SMDL opts to take in accordance with the DA. Third, the redevelopment, or likely redevelopment, of the LRIE depends instead upon the commercial experience, aptitude and commitment of SMDL to deliver such a scheme. Fourth, it is common ground that

redevelopment of the site will be a long and complex process dependent upon (inter alia) achieving the relocation of existing occupiers, market and best value testing and obtaining planning approvals. Fifth, whether, and if so the extent to which, SMDL exercises its future right to draw down land (on terms that it carries out redevelopment) will depend upon future market conditions and circumstances. In summary, therefore, SMDL is free under the DA to "walk away", in the sense that it can choose not to come under an obligation to acquire and carry out works on any of the redevelopment land in the LRIE.

Whether the Development Agreement contains artificial measures or devices to avoid public procurement legislation

196. The Claimant submits that the public procurement code cannot he avoided where an obligation to undertake works is deferred because it is subject to the exercise by the authority's development partner of a land option. It is suggested (but only by way of submission) that the insertion of (1) an option to draw down land following completion of the preparatory steps required under clauses 4 to 7 of the DA and (2) an obligation to carry out the development in the ground lease or freehold transfer of such land, are simply artificial measures or devices to circumvent the procurement legislation and, as such, should be disregarded. The argument invokes Commission v Austria (see paragraph 181 above). However, no evidence was adduced by the Claimant specifically to demonstrate that these provisions serve no proper commercial purpose, but are simply devices for avoiding the procurement regime.

197. First, in my judgment it is plain that the DA does not contain a *deferred* obligation on the part of SMDL to carry out redevelopment works because that obligation may never come into existence. Whether it does, and if so the extent to which it does, will depend upon whether SMDL decides in the future to take up a ground lease or freehold transfer of a particular plot. SMDL has an option as to whether it will undertake redevelopment, or "works", within the LRIE. The arrangement is plainly analogous to option arrangements which the Claimant accepts fall outside the scope of the public procurement regime (paragraphs 189 to 195 above).

198. Second, in my judgment the DA does not contain any artificial measures or devices which have been included to avoid the procurement regime. It is plain from the contemporaneous material leading up to the execution of the DA that the regeneration of the LRIE was complex and risky, WBDC was unable to assume any of the risk of land assembly and development, its development partner would have to assume that risk, regeneration would take many years to achieve, the content of the scheme was subject to market testing and obtaining planning approvals, and market conditions would alter over the duration of the DA. Furthermore, it was a particular requirement of WBDC that it should, as far as possible, retain its freehold interest and achieve financial returns through the receipt of ground rents.

199. At the same time the DA imposed onerous and costly requirements upon SMDL to carry out the strategic and planning work necessary before the carrying out of infrastructure works and development can take place. Although it is to be expected that SMDL will want to recoup the costs it incurs and earn a return by drawing down land so

that development for profit can be carried out, the long timescales involved make it perfectly understandable, given the risks it alone bears, that the company should have the option of not going ahead with the purchase/lease and redevelopment of a particular plot at the particular time envisaged by clause 14.1 (see paragraph 122 above), or in some circumstances not at all. The option arrangement in the DA is not artificial or an improper device, any more than the call option provision in the Midlands Co-operative case.

200. Likewise, the obligation to carry out development contained in any ground lease or freehold transfer which SMDL elects to take, cannot be described as artificial or as forming part of a device to avoid the procurement legislation. The DA preserves WBDC's ability to receive pre-existing levels of rent during a redevelopment phase. But the Council's ability to maximise its rental income by attracting a new tenant to a modern building depends upon SMDL completing its construction (see paragraph 124 above). Similarly, WBDC's entitlement under clause 18 of the DA to overage in respect of residential as well as commercial plots is dependent upon the sale of the last dwelling on a residential plot or the practical completion of a commercial development (except where SMDL sells on a commercial plot for development by a third party) (see paragraph 123 above).

The main object of the Development Agreement

201. On 14 August 2015 WBDC issued a Voluntary ex ante Transparency Notice (see Regulation 99(4) of the 2015 Regulations) stating that it considered the DA to fall outside public procurement legislation for a number of reasons, including the status of the DA as an "exempt land transaction" and also that the agreement placed no binding obligation on SMDL to undertake any works. During the hearing Mr Elvin QC confirmed that WBDC does not rely upon either (a) the notice or (b) the land transfer point in order to defeat the claim. WBDC submits that ground 2 should fail in any event. Accordingly, I did not hear any argument as to whether the main object of the DA could be considered to be a land transfer or land disposal. That issue may fall to be revisited in any future case concerned with a similar type of agreement.

The Claimant's submissions on "main object"

202. The Claimant's submissions were eventually brought together and refined on pages 1 to 2 of Counsel's Note dated 6th July 2016 and in paragraphs 1 to 10 of the Reply. In summary, it was submitted that:-

(i) The Claimant's primary case is that the main object of the DA is the "design and execution" of works within parts (a) or (b) of the definition of "public works contracts" in regulation 2 (1) of the 2015 Regulations. It is sufficient that SMDL's obligation relates to "design" of the works, or development, because that "design" forms an integral part of the overall "design and execution" package. SMDL cannot walk away without performing the "design" related obligations in clauses 4 to 7 of the DA;

(ii) As the first fall-back argument, if the DA has only one main object, it is the provision of "design services" falling within the definition of "public service contracts" in regulation 2 (1). This argument was based on paragraph 139 of the Claimant's skeleton.;

(iii) As a second fall-back argument, if the main object of the DA is not the "design and execution of works", or the "provision of design services", then it is the "realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of work" within part (c) of the definition of "public works contracts".

(iv) Whilst disputing that the main object of the DA was the "execution of works" alone (rather than the "design and execution of works"), the Claimant submits that even on that basis the DA fell within the public procurement regime because (a) it suffices that SMDL is under a legal obligation to perform the "design" services in clauses 4 to 7 of the DA, albeit that, on this footing, those services are merely *ancillary* to the main object of the DA *or* (b) it suffices that the DA is *capable* of giving rise to a legal obligation on SMDL to carry out the development (said by the Claimant to be an "indirect obligation") or that that *outcome is very likely to occur*. To hold otherwise would frustrate the purpose of the Directive to expose public contracts to competition before they are awarded.

The Defendant's submissions on "main object"

203. In its skeleton argument (eg. paragraphs 59 and 64) the Defendant submits that the main object of the DA is the execution of works, but the agreement falls outside public procurement legislation because SMDL is under no legally enforceable obligation to carry out works. Obligations to carry out development are entirely contained in any ground lease or freehold transfer which SMDL chooses to acquire under clause 9 or clause 14. It is entirely a matter for SMDL at the appropriate time to choose whether to serve an Acquisition Notice (or a Residential Plot Notice). Accordingly, there is no enforceable obligation to carry out works and the procurement regime does not apply to the DA. In his oral submissions Mr Elvin QC referred to the main object of the DA as being to "facilitate the regeneration" of the LRIE by redevelopment, so as to reflect all the key provisions of the DA (see the summary in paragraphs 127 to 128 above).

Discussion on the "main object" of the Development Agreement

204. The diffuse manner in which the Claimant has presented a range of alternative claims as to what is the main object of the DA has not been of great assistance to the Court or ultimately the Claimant. Indeed, there has sometimes been a lack of coherence. For example, in one instance the Claimant relies upon the scope of SMDL's contractual obligations to define the main purpose of the DA (ie. a contract to provide "design services" in the Claimant's first fall-back argument, see paragraph 2 of Counsel's Note dated 6 July 2016), whereas in its other arguments it does not (ie. "design and execution of works", "realisation of a work", "execution of works"). I have already explained that the use of contractual obligations as the sole basis for determining the main object of an

agreement does not accord with the existing authorities (paragraphs 172 to 174 above).

A contract for the provision of services

205. In any event, the suggestion that the single main object of the DA is the "provision of services" in clauses 4 to 7 (paragraph 202(ii) above) is wholly untenable. That would depend upon the provision of those services being an end in itself, which it plainly is not. Here the Claimant's submission fails to accord with the legal principle that the main purpose of the contract must be determined by reference to the entire transaction (see paragraphs 173 to 174 above). The main object of the DA is not limited to the assembly of a professional team, the preparation of a master plan, business plans, developmental strategies, costs budgets and plot appraisals and the obtaining of planning approvals. These steps are intended to facilitate the regeneration or redevelopment of the LRIE so as to maximise WBDC's financial receipts in accordance with the objectives in clause 2.1. The achievement of that regeneration or redevelopment is undoubtedly a main object of the DA, notwithstanding that the Council decided to achieve it by reliance upon the non-binding assurance provided by SMDL's proven experience, expertise and commercial commitment to bring it about, rather than a legal obligation.

A contract for the execution of works

206. Turning to the suggestion that the main purpose of the DA is the "execution of works", I have no hesitation in rejecting the Claimant's argument summarised in paragraph 202 (iv) above. It is perfectly plain from (inter alia) Helmut Müller and the Midlands Co-operative case that a contract cannot fall within the public procurement regime unless its *main purpose* corresponds to one of the definitions of a "public contract" *and* the contractor is under an *enforceable obligation to carry out* that *main purpose* (see paragraphs 171 to 174 and 192 above). Mr Banner's suggestion that public procurement legislation applies if there is an obligation on the part of the contractor to undertake works or services which are merely ancillary to the main object of the contract must be rejected as contrary to the established case law to which I have already referred, going at least as far back as the Gestion Hotelera International case. The Claimant cited no other authority which could support this novel proposition.

207. Mr Banner's alternative submission under paragraph 202 (iv) above is that SMDL's obligation to carry out "works", although confined to any ground lease or freehold transfer which SMDL elects to take, should be treated as an "indirect obligation" sufficient to engage the procurement regime, in order to avoid an outcome which would frustrate the purpose of the Directive. I cannot accept this argument for a number of reasons. First, it relies essentially upon the "competition" objective of the Directive to justify bringing a contract within its scope. Here the Claimant says that the Directive applies because the contractor gains a valuable benefit from WBDC (ie. an option to acquire land in order to carry out development for profit) in return for services provided under clauses 4 to 7 (see paragraph 3 of Counsels' Note dated 6 July 2016 and paragraph 7c of the Reply). However, this is simply a "functional" interpretation of the Directive, an approach which has been rejected in recent European jurisprudence (see paragraphs 186 to 187 above). Second, I cannot accept the contention that the concept of an "indirect obligation" should be widened beyond the sub-contracting or agency

arrangements acknowledged in, for example, Auroux v Roanne and recital (9) of the 2014 directive so as to take on an anti-avoidance role (see paragraphs 178 to 188 above). Third, I reject any suggestion that the DA in fact contains any devices or artificial provisions which should be disregarded or otherwise treated so that the public procurement regime was engaged in this case (paragraphs 196 to 200 above). Finally, evidence that it was highly unlikely that SMDL would fail to draw down all of the land in the estate or to redevelop the estate, is not a substitute for a legally enforceable obligation to carry out the main object of the DA or otherwise a legally sufficient basis to engage the Directive (applying paragraphs 110 to 112 of the judgment in the Midlands Co-operative case – see paragraph 194 above). For all these reasons, ground 2 cannot succeed on the basis that the main object of the DA is taken to be the "execution of works".

A contract for both the design and execution of works

208. However, the Claimant's primary case is that the main object of the contract is "both the design and execution of works", and not simply the execution of works (see paragraph 202(i) above). My rejection of the Claimant's "indirect obligation" argument (see paragraph 207 above) applies equally here. Therefore, the Claimant's primary case that the 2015 Regulations are engaged depends upon its contention that it is sufficient that the legally enforceable obligations imposed on SMDL extend to only *part* of the main object of the contract, namely the "design" services.

209. I accept the submission of Mr Elvin Q.C. that the Claimant's reliance upon the "design and execution" limb of parts (a) and (b) in the definition of "public work contracts" is misconceived. This limb is an alternative to "the execution" of works or a work. The object of the contract must be "*both* the design and execution" (emphasis added) of a work or works. Read properly in context the "execution" and "both the design and execution" limbs of the definition each specifies a single purpose as the main object of a contract. The "design and execution" limb specifies a combination of *both* "design and execution" as the single main purpose qualifying as a public works contract. In order to comply with the principle laid down in Helmut Müller and the Midlands Co-operative case it is also essential that the contractor be legally obliged to carry out the main purpose of a "public works contract" falling within parts (a) or (b) of the definition, whether that be "execution" of works or "both design and execution" of works. Thus, it is essential that the contractor is obliged to *execute* works and not simply to *design* them. In the present case SMDL is not subject to a legally enforceable obligation to *execute* works, whether direct or indirect. This is sufficient for the Court to decide that the DA does not fall within the "design and execution of works" definition of a "public works contract", but I will nevertheless deal with the other arguments advanced on behalf of the Claimant.

210. Mr Banner suggested that it is sufficient that the contractor is under an obligation to "start to deliver the package" which constitutes the main object of the contract (paragraph 1c of Counsel's note dated 6 July 2016 – relying upon the services in clauses 4 to 7 of the DA). He cited no authority to support that proposition. Whether an obligation to initiate only some part of a defined programme of *works* (the remaining works being optional) does not need to be determined in this case. However, what is

clear is that both limbs of parts (a) and (b) of the definition of "public works contracts" have as a common and essential ingredient "the execution" of works, which is hardly surprising. An obligation simply to provide design services and not to execute the works which are so designed is insufficient for the contract to qualify as a contract for "both the design and execution" of works. In terms of procurement law, such an arrangement would essentially be no different from a contract to provide design services.

211. Mr Banner sought to distinguish the Midlands Co-operative case on the basis that here under the DA SMDL is not able to "walk away completely", whereas in the former case the developer was. He argues that SMDL has to provide the services set out in clauses 4 to 7 before it becomes entitled to choose whether to exercise the drawdown option, and WBDC is entitled to retain and use the valuable design information and project plans produced by SMDL even if drawdown does not take place (clause 26). But as a matter of principle the position is no different from the obligation of the developer in the Midlands Co-operative case to pay 50% of the purchase price under the contract by which it was granted an option to acquire the development site, which sum the local authority was entitled to keep even if the option was not exercised.

212. Mr Banner puts forward two lines of argument in an attempt to overcome these flaws in the Claimant's case. First, he submitted that it is sufficient that the contractor is subject to enforceable obligations which "form an integral part" of the contract. He cites no authority in which that proposition has been accepted. In any event, in my judgment it does not address the point that the SMDL is not subject to an enforceable obligation to perform an essential part of a "design and execute" agreement namely the execution of the works. Simply to point to an obligation to perform *another* essential part of such an agreement is nothing to the point.

213. Second, Mr Banner sought to justify his contention by relying upon a principle of "reciprocity" derived from paragraphs AG76 to AG77 of the Opinion of the Advocate General Mengozzi in Helmut Müller, which read as follows:-

> "AG 76 In my view, however, it is clear that the answer to the questions should be in the alternative and that the obligation to carry out the work and/or works constitutes an essential element in order for there to be a public works contract or public works concession.
>
> AG 77 This follows, first and foremost, from the provisions of Directive 2004/18 itself which, as we have seen, defines public works contracts as contracts for pecuniary interest. The concept is therefore based on the idea of an exchange of services between the contracting authority, which pays a price (or, alternatively, grants a right of use), and the contractor, who is required to execute a work or works. Thus, public contracts are clearly mutually binding. *It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercussions, simply decide unilaterally not to carry out the specified work.* Otherwise, it would mean that contractors were entitled to exercise discretion

with regard to the requirements and needs of the contracting authority" (emphasis added)

214. The "reciprocity" principle does not support Mr Banner's novel argument. The Advocate General in Helmut Müller simply referred to the mutually binding nature of "public contracts" in order to answer the question from the German court which had asked whether there must be an enforceable direct or indirect legal obligation on the part of the contractor to provide the work the subject of a "public works contract". Both he and the CJEU stated that it is essential for the contractor to be legally obliged by the terms of the contract to carry out the works the subject of the contract (whether directly or indirectly) for the contract to fall within Article 1 (b) of the 2004 Directive (which covered all three types of "public works contracts"). It is plain from the reasoning of the Advocate General (paragraphs AG26 to AG30 and AG76) and of the Court (paragraphs 34 to 39, 41, 48, 60 and 63) that no distinction was drawn between the three "variants" of "public works" contracts in this respect. The notion of "reciprocity" was not referred to in Helmut Müller in order to decide that it is sufficient for the procurement regime to apply that the contractor is obliged to carry out part of the main purpose of a contract so long as it represents an integral part. That point simply did not arise in that case for decision.

215. At this point Mr Banner relied once again upon the "valuable benefit" which SMDL obtains through being given an option to take leasehold/freehold interests in the LRIE so that it may develop them for profit, thus engaging a principle upon which the Directive has been founded, namely the promotion of effective competition. This reliance upon the "competition" objective of the Directive, a "functional" approach to interpretation, was rejected in Helmut Müller and Commission v Spain as a sufficient basis in itself for determining whether an agreement falls within the scope of public procurement legislation (paragraphs 186 to 187 above). Similarly, I cannot see how it can be used to justify Mr Banner's contention that the contractor's obligation need not relate to an essential part of the main purpose of the contract, *a fortiori* the "execution of works" which is an intrinsic characteristic of parts (a) and (b) of the definition of a "public works" contract. I note that in Helmut Müller (and in the Midlands Co-operative case) the fact that the purchaser of the land stood to make a profit from redevelopment made no difference to the Court's analysis.

216. For these reasons I reject the Claimant's contention that if the main object of the DA was the "design and execution" of works (paragraph 202(i) above), then SMDL's obligation to provide the services set out in clauses 4 to 7 was sufficient to satisfy the requirement that the contractor be legally obliged to deliver that main purpose.

A contract for the realisation of a work by whatever means

217. For the same reasons, I also reject the Claimant's final fall-back argument (paragraph 202 (iii) above) that the DA was a contract for the "realisation by whatever means" of a work (part (c) of the definition of "public works" contracts in regulation 2(1) of the 2015 Regulations). The fourth question posed by the German court in Helmut Müller was whether this third variant of a "public works contract" requires "that the contractor be obliged to carry out works, or that works form the subject matter of the

contract". The answer given by the CJEU at paragraph 63 of its judgement, namely that the contractor must be legally obliged to carry out the works the subject of the contract applied just as much to the third variant of "public works contracts" as to the first and second variants (ie. to all three parts (a), (b) and (c) of the definition of "public works contracts").

218. Under part (c) a "work" must at least comprise "the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function". Thus, the Advocate General spoke of "the realisation … of specific "complete" properties" (paragraph AG 28). "Realisation" involves bringing a "work" into existence. Here, SMDL is not under an enforceable legal obligation to carry out or realise redevelopment within the LRIE, even if such redevelopment is assumed to constitute "a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work". Mr Banner's submissions focused simply on the "specification" requirement (see eg. page 2 of Counsels' Note dated 6 July 2016 and paragraph 9 of the Reply). His reliance upon part (c) of the definition of a "public works contract" is not a true fall-back argument, because the "enforceable legal obligation" requirement laid down in Helmut Müller is not satisfied.

219. The Claimant's reliance upon part (c) also fails in relation to a second essential matter, the "specification" requirement. It is common ground that this requirement may be met by the public authority exercising "decisive influence" over either the "*type* of the work" or "*design* of the work". In paragraph 113c of its skeleton the Claimant submits that it was sufficient in Auroux v Roanne that the "work" was referred to in the relevant agreement as "the leisure centre as a whole, including the construction of a multiplex cinema, services premises, a car park and, possibly a hotel" relying upon paragraph 42 of the judgment. But it is plain that the Court had in mind, and based their conclusion upon, the detailed provisions of the development agreement in that case which are not set out in the judgment. Paragraph 33 of the Advocate General's Opinion makes it clear that *the contract* required the approval of the public authority to all plans and a wide range of other documents prepared by the developer.

220. I accept the submissions of Mr Elvin QC that in the present case the DA did not require the works being provided to correspond to requirements specified by WBDC exercising a *decisive influence* on either the type or the design of the works. Mr Banner relies upon the general parameters fixed by the Indicative Masterplan and the content of the Indicative Business Plan, together with the alleged ability of WBDC to veto Project Plans and Development Strategies proposed by SMDL (paragraph 138 of the Claimant's skeleton). But I do not accept his argument for the following reasons:-

(i) The Indicative Masterplan shows a distribution of general types of land use across the site on a single, broad-brush drawing. The Indicative Business Plan merely listed the contents of what should be put forward in a Business Plan for approval by the SG. It did not set out any further description of "works" required by WBDC to be carried out.

(ii) The DA leaves it to SMDL to prepare the content of the subsequent plans and

strategy documents for approval by the SG. It is plain from the documents which led to the decision to award the DA to SMDL that market demand for land uses within the LRIE over the lifetime of the project remains to be ascertained by SMDL. The developer is responsible for assessing the viability of potential uses, so as not only to meet development costs and SMDL's agreed return, but also to maximise income and receipts for WBDC. Thus it was for SMDL to decide upon the content of the proposed documents which the SG would be asked to approve. This structure is consistent with the fact that the risks of the redevelopment project are to be borne by SMDL;

(iii) The DA did not simply require that the subsequent plans and strategies submitted to the SG for approval should be consistent with the Indicative Masterplan and Business Plan. Instead, the DA required that the submitted documents be consistent with a basket of considerations, not only the Indicative Masterplan and Business Plan, but also the objectives in clause 2.1 and "the market conditions prevailing at the time". The "objectives" themselves require a range of matters to be addressed, such as maximisation of total income from the LRIE (taking into account changes in market conditions) and also the provision of increased employment opportunities, a mix of residential units, improved pedestrian and transport infrastructure and a cohesive management strategy for the LRIE. The SG may only reject or require reasonable changes to a Master Plan or Business Plan on the grounds of inconsistency *inter se* or with the objectives in clause 2.1 and not simply because of inconsistency with either of the Indicative Plans (see also paragraph 118 above). Even where a draft plan is rejected, it is for SMDL to decide what revisions should be proposed for further consideration by the SG (clause 6.9).

(iv) The documents submitted to the SG require the unanimous approval of the 4 members of the SG. They are not subject to the approval of WBDC alone. Nor is the Council able to veto these documents as the Claimant asserts. It does not have the potential to block, and therefore exercise "decisive influence" over draft plans and strategies proposed by SMDL, whether as to type or design of works. If the SG does not approve a proposed document, acting within its remit as set out in the DA, the issue is resolved under clause 28 by an entirely independent expert or arbitrator (contrast Alstom Transport v Eurostar International Ltd [2013] PTSR 454 at paragraphs 102 to 107).

221. For the freestanding reasons set out firstly in paragraphs 217 to 218 above and secondly in paragraphs 219 to 220 above, I reject the Claimant's contention that the DA falls within part (c) of the definition of "public works contracts".

Other matters

222. The judgment in the Midlands Co-operative case referred to Information Note 12/10 issued on 30 June 2010 by the Office of Government Commerce in the UK – Public Procurement Rules, Development Agreements and s 106 Planning Agreements Guidance. The Note recognised that development agreements vary widely in nature and suggested that an agreement is more or less likely to fall within the public procurement

regime according to the extent to which it does or does not share some of the characteristics listed in paragraph 55. In other words, the document identified a spectrum of circumstances which may need to be considered on a case by case basis. The argument in the present case focused on two prerequisites for the 2015 Regulations to apply, the "main object" of the contract and the "enforceable legal obligation" principle. Applying those two principles alone leads to the conclusion that the DA falls outside the scope of the public procurement regime. But that is not to say that there may not be other points referred to in the Note supporting that conclusion but not the subject of argument in these proceedings (see eg. paragraphs 31, 42 and 55).

Conclusions on ground 2

223. For the above reasons I reject each of the routes by which the Claimant has sought to argue that the DA is a "public contract" within the scope of the 2015 Regulations and consequently I must reject ground 2. In my judgment the DA is a contract to facilitate regeneration by the carrying out of works of redevelopment and to maximise WBDC's financial receipts, particularly rent, from the LRIE. The provision of services under clauses 4 to 7 and land assembly do not represent a main purpose in themselves, but simply facilitate the Council's regeneration and financial objectives, the "twin objectives" with which WBDC's process began (see paragraph 29 above). WBDC lawfully decided that the DA itself should not impose upon the developer an enforceable obligation to carry out the redevelopment. It is therefore not a "public works contract."

Ground 3

224. The irrationality challenge under ground 3 is "predicated upon the Defendant's analysis that the main purpose of the DA is the execution of works" (paragraph 1 on page 2 of Counsels' Note dated 6 July 2016). The Claimant relies upon the judgment made by WBDC that because the redevelopment will take a long time to complete, SMDL should be selected as the developer because of its track record and commitment and the deliverability of its bid. Nonetheless, WBDC deliberately chose not to include in the DA a legal obligation requiring SMDL to deliver or execute the regeneration works, in order that the proposed contract would fall outside the public procurement regime. In line with that thinking paragraph 4.1(7) of the officer's report to the meeting of WBDC's Executive on 20 November 2014 stated:-

> "the DA contains reasonable mechanisms to ensure that St. Modwen pursue redevelopment across the whole estate – the employment zone as well as the residential zone.

There is no dispute between the parties that the only reason WBDC had for taking this course is set out in paragraph 10 of the witness statement of Mr Bagnell, where he says:-

> "We were also advised by S&P that market appetite for the LRIE opportunity *would be (and then was)* enhanced precisely because the process was not regulated" (emphasis added)

225. The Claimant submits that the WBDC's reason for entering into an agreement outside the public procurement regime was irrational on two grounds. First, it is said that WBDC misunderstood the advice it received from S&P, which was not to the effect claimed. In an email from S&P dated 12 April 2013 (ie. after WBDC had received responses to the Opportunity Document – see paragraph 51 above) the Council was advised that:-

> "I can certainly confirm that the positive response from developers has – at least in part – arisen from the clear understanding which they have that this is not an OJEU process. Indeed, paragraph 25 of the Opportunity Document explains the position and this document has been approved by Executive" (original emphasis)

The Claimant submits that WBDC misunderstood this advice in so far as it thought that it was being advised that the market appetite for the LRIE would be enhanced by avoiding the OJEU process.

226. In my judgment this criticism is wholly untenable. It is clear that by the time WBDC issued its Opportunity Document in February 2013 it had decided to test market interest in redeveloping the site (which in turn depended upon ascertaining market interest to occupy redeveloped buildings on the site), through a process outside the public procurement regime. It is abundantly plain from the contemporaneous documents that there was a good deal of uncertainty involved and so WBDC was concerned to stimulate market interest as much as possible. It was even thought that the regeneration of LRIE might need to be put on hold until market conditions improved. Accordingly, the Opportunity Document was issued as a non-prescriptive statement (see paragraph 45 above). It is well understood that the public procurement process is onerous for participants (see eg. Hickinbottom J at paragraph 116 of the Midlands Co-operative case). Seen in context, therefore, it is clear that S&P did confirm that WBDC had received a more positive response from the market because the exercise was being undertaken outside the scope of what are now the 2015 Regulations. The "confirmation" of that advice indicates that it had been given to WBDC at an earlier stage, which accords with paragraph 10 of Mr Bagnell's statement. There is no basis for impugning the decision on the grounds that WBDC proceeded on a mistaken view as to the advice it had been given.

227. The second complaint is that, even if the advice from S&P was correctly understood by WBDC, it was nevertheless irrational for the Council to follow it. Given that one of the objectives of the procurement legislation is to promote competition, it is submitted that there was no rational basis for WBDC to conclude that the application of the procedures laid down by the procurement regime would reduce market interest in the opportunity at the LRIE site. It is said that the Council must therefore have misunderstood the legislation.

228. The short answer to this complaint is to be found in paragraph 77(6) of the Defendant's skeleton. The Claimant's argument assumes that WBDC's objectives for the site could only rationally (and therefore lawfully) be secured by proposing, and then entering into, a development agreement which imposed an obligation on the contractor

to carry out the redevelopment works, rather than confer an option on SMDL to decide whether to proceed with a drawdown for development of each of the plots. Having taken into account the long term uncertainties and risks of the project, it was perfectly rational for the Council to accept the advice it had been given by S&P in order to stimulate market interest in the LRIE opportunity and also to rely upon a commercial assurance that the redevelopment would be completed over time in accordance with the DA, based upon the expertise and past performance of SMDL and the credibility and deliverability of its bid (see also paragraph 151 above). That was entirely a matter for the judgment of the Council, with which this Court is not entitled to interfere.

229. The Claimant's argument under ground 3 appeared to shift during oral submissions. It was suggested that WBDC had failed to compare the pros and cons of proceeding either inside or outside the public procurement regime. Mr Banner added that if it had done so, then perhaps the Council's decision might not be faulted for irrationality. By implication the Claimant appeared to be arguing that WBDC was obliged to carry out a comparative exercise of that kind or was otherwise obliged to justify following a course which fell outside the procurement legislation. However, no authority was cited to support this additional argument. In my judgment the Council was no more obliged to compare the pros and cons of proceeding inside or outside the procurement regime than it would be obliged to compare the pros and cons of using alternative or overlapping powers. In any event, I have already accepted that WBDC did have a rational reason for proceeding outside the scope of the 2015 Regulations. The Council did not act in an arbitrary manner.

230. For these reasons ground 3 must be rejected.

Conclusion

231. For the above reasons each of the grounds of challenge fail and the claims for judicial review and under part 6 of the 2015 Regulations are dismissed.

Costs

232. There is no dispute that the Defendant is entitled to the costs of both the claim for judicial review and the claim issued in the Technology and Construction Court under part 6 of the 2015 Regulations. However, the Claimant opposes the Defendant's submission that its costs should be awarded on the indemnity basis. I am grateful to both parties for their written submissions on the point.

233. The Defendant submits that indemnity costs should be awarded in order to mark the court's disapproval of the Claimant's conduct of this litigation which can be described as "out of the norm." It relies upon the principles summarised by Barling J in Catalyst Investment Group Limited v Lewinsohn [2009] EWHC 3501 (Ch) at paragraphs 17 to 18.

234. The application is based primarily upon observations made in this judgment about

certain aspects of the Claimant's handling of this litigation. Taking all of the points made by the Defendant, both individually and cumulatively, I do not consider that the Claimant's conduct was so out of the norm as to justify an award of indemnity costs whether in relation to the whole or any part of the Defendant's costs. In summary, the Claimant received permission to argue all of the points pleaded and the abandonment of points and refinement of argument does not merit the Court's disapproval by an award of indemnity costs. The same goes for the criticisms of the evidence produced on behalf of the Claimant.

Permission to appeal

235. The Claimant seeks permission to appeal under both limbs of CPR 52.3(6) but only in respect of ground 2 and, as I understand it, only in respect of the specific points identified in the written application dated 24 August 2016. I am grateful to both parties for their written submissions.

236. The first point the Claimant seeks to argue is that, in the context of public procurement legislation, "the main purpose of a contract cannot be something in relation to which the contract contains no obligations" on the part of the contractor (paragraph 2(a) of the application). But the contrary was accepted by the Claimant in argument, for example where the main purpose of a contract is related to an option arrangement (see paragraphs 173 and 189(iii) et seq above). Indeed, it was for this reason that the Claimant sought to argue that the options granted to SMDL were artificial devices and therefore should be disregarded as such (see paragraphs 196 to 200 above).

237. The Claimant's second point (paragraph 2(b) of the application) is that where the main purpose of a contract is found to be "both the design and execution of works", there is no authority to the effect that the contractor must be under an obligation to execute those works in order for the contract to fall within the definition of a "public works contract". However, the Claimant does not deny that there is clear authority that the contractor must be under a legally enforceable obligation to carry out the main purpose of the contract (see paragraphs 174(iv) and 192 to 193 above). Therefore, the Claimant's argument is simply that when that principle comes to be applied to a contract for "both the design and execution of the works", the word "both" in the legislation can in effect be disregarded, it is sufficient that the contractor's obligation is limited to the provision of design services and the contract can thus be treated as a "public works contract". The argument flies in the face of the legislation and has no real prospect of success.

238. The Claimant's third point returns to one of the fall-back arguments (paragraph 2(c) of the application). The judgment *does* reject (rather than merely *appearing* to reject) the Claimant's argument that the DA qualified as a contract for "both the design and execution of works", essentially because of the absence of an enforceable obligation to execute works. Indeed, the Claimant must have understood that to be the case in order to be seeking permission to appeal in respect of the argument in paragraph 2(b) of its application (see paragraph 237 above). There is no real prospect of success in relation to this alternative argument that the provision of design services was "the" main purpose of

the DA for the reasons set out in the judgment (see paragraphs 205 and 223 above).

239. The Claimant's fourth point (paragraph 2(d) of the application) returns to another fall-back argument, namely that the contract was "for the execution of works", by treating SMDL's option to acquire land and carry out works as an "indirect obligation" to carry out works. The Claimant recognises that this argument involves widening the meaning of "indirect obligation" beyond sub-contracting and other third party arrangements to include optional arrangements. It goes against the express wording of recital (9) in the 2014 Directive (see paragraph 185 above). The Claimant accepts that there is no authority to support this extension of the concept. Although the Claimant has otherwise accepted that option arrangements fall outside the scope of the legislation (paragraph 236 above), here the Claimant seeks to rely upon the Austria case for the proposition that the intention of the parties to avoid the Directive is "relevant" (ie a sufficient basis for treating an agreement as falling within the scope of the procurement regime). The Austria case did not lay down any such sweeping anti-avoidance approach to the application of the legislation. It only decided that *artificial measures or devices* intended to avoid the legislation should be disregarded. The Claimant does not seek to challenge the conclusions in paragraphs 196 to 200 and 207 to 208 above that the DA did not involve any artificial measures or devices. For that reason alone, this ground is unarguable. Moreover, the wide anti-avoidance approach for which the Claimant contends was not rejected solely for the reasons in paragraphs 186 to 187 above. The Claimant has misread the judgment.

240. There is no other compelling reason for permission to be appeal to be granted. The legislation and the case law are sufficiently clear to enable the Claimant's arguments on the specific circumstances of the DA to be rejected as unsound. In response to a question during the hearing, the Claimant stated that it was not asking for an opportunity to have the matter referred to the CJEU.

241. For these reasons the application for permission to appeal is refused.