Neutral Citation Number: [2017] EWHC 1641 (Admin)

Case No: CO/2573/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2017

Before :

MR JUSTICE GREEN

- -

Between :

Hussain	**Claimant**
- and -	
Sandwell Metropolitan Borough Council	**Defendant**

- -
- -

Peter Oldham QC (instructed by **Weightmans LLP**) for the **Claimant**
James Goudie QC and Ronnie Dennis (instructed by **Maria Price of SMBC**) for the **Defendant**

Hearing dates: 3rd – 4th May 2017

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Approved Judgment

MR JUSTICE GREEN :

A. Introduction

(i) Introduction

1. This case concerns an attempt to prevent a local authority from continuing with an investigation into alleged wrongdoing by elected Council members. It also concerns a claim for a declaration and damages flowing out of the publication of three documents relating to the investigation which are said to be highly damaging professionally and personally to the Claimant and his family.

(ii) The parties

2. The Claimant is Councillor Hussain. The Defendant is Sandwell Metropolitan Borough Council ("the Authority" or "the Council"). The Council was a Labour controlled Council and the Claimant was an elected Labour member of the Council.

(iii) Overview of the facts

3. The Claimant is alleged to have been engaged, *inter alia*, in procuring the sale of Council assets (property) to family friends at a substantial undervalue. He is also alleged to have used his power and influence as a senior politician within the Council to have parking tickets issued to his family expunged.

4. Documents before the Court refer to a "*culture*" which pervaded the Authority whereby members were "*the bosses*" and the Council was "*open for business*". Documents also refer to members bullying employed officials and officers who were compliant in carrying out the members wishes. In 2014 various allegations were circulating in the press (including on the BBC) and on social media to the effect that there was serial and long standing wrongdoing by elected members especially in relation to the disposal of Council property.

5. The Audit Committee of the Council commenced an investigation into the conduct of several elected members, including the Claimant. The purpose was to determine whether there was substance in the allegations and, if so, to advise upon the appropriate next steps which could have entailed the making of a complaint under the formal Council's arrangements for investigating allegations of breach of standards by members, or it could have led to a complaint to the police upon the basis that it revealed possible criminality, or the commencement of civil proceedings, or disciplinary proceedings against Council employees. I refer to this investigation as the "*pre-formal investigation*" because it was not conducted under the arrangements put in place under the Localism Act 2011 ("LA 2011") for the formal investigation of allegations of breaches of the Authorities "Code of Conduct" applicable to elected members. During this pre-formal stage the Council purported to exercise powers conferred upon it pursuant to the Local Government Act 1972 ("LGA 1972").

6. To assist in the pre-formal investigation an external firm of solicitors was instructed to collect, collate and review the documentary evidence, to establish facts, and to formulate advice as to the appropriate action to take. The exercise included the conducting of voluntary interviews with relevant members. The solicitors interviewed

the Claimant upon two separate occasions about allegations made against him. The interviews were recorded and transcripts made.

7. Regrettably, towards the end of the process, the solicitor made some personal and derogatory observations about the Claimant and his family to a Council Official (the Chief Executive). This caused the Chief Executive to address whether it was proper to continue with the external lawyers given the risk of bias. Ultimately, it was decided that, given the advanced stage of the solicitor's investigation, the work should be completed but that all the evidence and the resultant report should then be submitted to Leading Counsel for independent and objective advice on the merits of the investigation, the implication of the solicitor's derogatory comments, as to whether the solicitors report should be published, and as to appropriate next steps.

8. The solicitor's report was presented to the Council in April 2016. Leading Counsel was instructed and he advised in May 2016. The gist of the advice was that there was a serious case to be met by the Claimant and that the solicitor's report and the Opinion should be placed into the public domain to address criticisms then being made in the press that the Authority was suppressing wrongdoing and not taking its investigatory obligations seriously. Counsel also advised that the formal arrangements under the LA 2011 for investigations into alleged breaches of the member's Code of Conduct should now be initiated. Leading Counsel considered that the strongest cases for a formal investigation were the allegations that (a) the Claimant had procured the sale of council property (some toilets) to a person connected to him at a substantial undervalue and (b) that the Claimant had used his position to have parking tickets issued to family members expunged.

9. This led the Chief Executive to initiate the formal investigatory procedures under the LA 2011. The investigation got underway. The Council's Monitoring Officer instructed two members of the Legal Service to act as Investigating Officers. The Claimant agreed to be interviewed as part of the process.

10. At about this time elections to appoint a new Leader of the Council occurred. Several members indicated that they would stand for election. This included a member who was a subject of the investigation (Councillor Jones). It is argued, by reference to contemporaneous press coverage, that certain Labour candidates (in particular Councillor Eling) used the press to promote their candidature for Leader. The ongoing investigations became a "*political*" issue with Councillor Eling, who was standing against Councillor Jones, pressing for publication of the solicitor's report and the Opinion and continuation of the investigation. The submission is now made that this was to undermine the position of Councillor Jones and that the decision by the Council to continue with the investigation and to publish the solicitor's Report and the Opinion was politically motivated.

11. Also at this time the Council indicated to the Claimant that it intended to publish the solicitor's report and the Opinion in accordance with Leading Counsel's advice. This led the Claimant to seek permission to apply for judicial review and an order prohibiting publication. Permission was refused by Mr Justice Cranston. On the day of the refusal the Council placed the solicitors report and the Opinion into the public domain. Later they also placed a report of the Council's Audit Committee into the public domain. Subsequently the Court of Appeal granted permission to claim judicial

review. By this point in time the application for an injunction to restrain publication was academic.

12. The Council's investigation into the allegations has now been stayed pending the outcome of this judicial review. The stay covers the matters that Leading Counsel identified as warranting investigation but also various other allegations, also involving property transactions, which are said to have occurred in the late 1990's and which also involve the Claimant. The stay prevents the reference of all the allegations to the Council's Standards Committee which is the body convened to hear and adjudicate upon allegations of breach of duty by members.

(iv) Overview of the Grounds

13. In this claim the Claimant has launched his attack deploying a wide variety of grounds which, broadly, challenge: (i) the power of the Council to conduct both formal and informal investigations of alleged wrongdoing by members under the LGA 1972 and the LA 2011; and (ii), the publication of the solicitor's report, Opinion and Audit Committee Report. I have grouped the various grounds under these headings. They are as follows.

(v) The power of the Council to conduct formal and informal investigations of alleged wrongdoing by members under the LGA 1972 and the LA 2011

14. The grounds under this head may be summarised as follows:

a) Ground 1 – Bias: The investigation is infected by actual or perceived bias.

b) Ground 2 – Investigation politically motivated: The investigation was politically motivated and thereby pursued for an improper purpose and/or was irrational.

c) Ground 3 – Investigation irrational: The continuation of the investigation in the light of the evidence of bias was irrational and/or Wednesbury unreasonable.

d) Ground 4 – Investigation *ultra vires*: There was no lawful power to investigate alleged misconduct pre-dating the coming into effect of the LA 2011 (1st July 2012).

e) Ground 5 – Section 151 LGA 1972: The Authority acted unlawfully under Section 151 and it is impermissible to rely upon the safe harbour provisions of the LA 2011.

f) Ground 6 – Investigation oppressive: The matters under investigation are stale and the continuation of the investigation is oppressive and unreasonable.

g) Ground 7 – Investigation process has been pre-determined and usurped: The investigatory proceedings are unlawful because the Investigating Officer appointed by the Monitoring Officer in her report made "*findings*" of breach by the Claimant and thereby she predetermined the outcome and usurped the adjudicatory function of the Standards Committee.

(vi) Publication of the solicitor's report, Opinion and Audit Committee Report

15. The grounds under this head may be summarised as follows:

    a) Ground 8 – Publication unlawful: Publication was a breach of the Data Protection Act 1998 ("DPA 1998") and/or Article 8 ECHR.

    b) Ground 9 – Publication politically motivated: Publication was politically motivated and thereby for an improper purpose and/or irrational.

    c) Ground 10 – Publication *ultra vires:* Publication was *ultra vires* the Council's powers and was not an act contemplated by the Council's formal arrangements in place for investigations under the LA 2011.

    d) Ground 11 – Publication biased: The solicitors report was infected with bias and publication was accordingly irrational and/or unreasonable as was any other document (such as the Opinion) which referred to it.

16. There is a good deal of overlap between some of the grounds. In the Judgment where there is overlap I have addressed the issues fully only once and then relied upon those findings in relation to other issues where a similar point arises.

(vii) Materiality

17. A final Ground 12 focuses upon whether any breach is material to the outcome of the claim.

(viii) Procedural observations

18. Before turning to the conclusions, I should mention three procedural matters which arose.

19. First, at the outset of the hearing the Claimant applied for an order that the Chief Executive of the Council, Mr Jan Britton, be tendered as a live witness to be cross examined by the Claimant on the process he went through in deciding to publish the solicitor's report and the Opinion and to continue with the investigation. There was no objection to this course of action by Mr Goudie QC for the Council and, without having to rule upon the application, I permitted Mr Britton to give live evidence and to be cross examined. This was in the context of the Grounds contending that the Defendant acted with an improper political motivation throughout, it being said, in effect, that Mr Britton acted to secure the appointment as Leader of the Council of one member (Councillor Eling) and thereby to prevent another member (Councillor Jones) being elected.

20. The second issue arose out of the oral evidence of Mr Britton which included an observation that he had been informed by a third party that if Councillor Jones became Leader of the Council then it was part of his "*manifesto*" to sack Mr Britton. Mr Jones was one of the members who was the subject of the ongoing investigation. On the second day of the hearing Mr Jones attended Court and he handed a manuscript note to Mr Oldham QC, for the Claimant, rejecting the suggestion that it had ever been part of his "*manifesto*" to sack Mr Britton. This note was not in the form of a witness statement and was, quite literally, a hand-written note passed up

from the back of the Court. There was no objection from Mr Goudie QC to this note being read out and being treated as admissible evidence. He did not seek to cross examine Mr Jones upon it. His response was that it was an irrelevance since Mr Britton's evidence was only that this information had been passed to him by a third party (not Mr Jones) and in any event it did not affect his decision which was based upon acceptance of the advice of Leading Counsel. He did not therefore seek to challenge Mr Jones's evidence.

21. The third procedural matter concerns the details of the Council's arrangements made under the LA 2011 for the formal investigation of allegations of breach of the Council's Code of conduct for members. At the end of the hearing I asked the Council to provide details of these formal arrangements and to permit the Claimant to comment upon them. In particular I sought evidence as to the *modus operandi* of the Standards Committee. This was in due course done in the form of a witness statement from the Defendant's legal officer which described the arrangements and exhibited the relevant institutional documentation.

(ix) Conclusion

22. I have concluded that the claim for judicial review fails.

23. On the evidence before the Court there is a serious *prima facie* case against the Claimant. The allegations should now be investigated properly in accordance with the formal arrangement instituted by the Council under the LA 2011, which seeks to govern the behaviour of those exercising public office in accordance with the "*Nolan Principles*".

24. I reject the submission that the Authority did not have the lawful power to conduct the initial pre-formal investigation. There was ample power under the LGA 1972. And there was also ample power under the LA 2011.

25. I also reject the submission that the Council did not have the power to investigate any alleged misconduct under the LA 2011 occurring prior to its coming into effect in July 2012. If this were so it would have the effect of creating an amnesty for all sorts of serious misconduct including covert and fraudulent practices. There is nothing in the statutory language or in any admissible pre-legislative material which could support such a surprising conclusion. On the contrary the right to investigate a breach of duty by a member arises when there is an "*allegation*" which is then submitted to the formal investigatory arrangements. That allegation can cover conduct pre and post-dating the coming into effect of the Act. There is no prejudice to a person subject to investigation. The Code that will govern the conduct being investigated is that operative at the time of the behaviour in question and any investigation which occurs will always be subject to an overriding principle of fairness so that, in the extreme, if a member could not get a fair hearing because of (say) the vintage of the allegation and the fact that critical exculpatory evidence might no longer be available that might serve to prevent or limit an investigation. In any event even if there was no express power under the specific provisions governing formal investigations under the LA 2011 the Council was not thereby debarred from conducting investigations under <u>other</u> more general powers under the LA 2011 and/or the LGA 1972 and in using the machinery put in place under the LA 2011 for this purpose.

26. I reject further the Claimant's submission that even if there was an existing overarching power on the part of the Authority to investigate, nonetheless the *manner* the Authority conducted the investigation in the past, and continues to do so now, renders the investigation unlawful. The Claimant argues that the investigation is tainted by bias and/or an improper political purpose and/or because the investigating officers have usurped the functions of the Standards Committee which will in due course be convened to determine the allegations, and/or because the investigations are oppressive unfair and/or irrational. I am quite satisfied on the facts that the Authority, in difficult and challenging circumstances, has acted throughout with objectivity, care and circumspection and has taken considerable steps to ensure that the Claimant has been given every opportunity to put forward his evidence and address evidence against him and that in the future, as the investigation progresses, he will continue to have every opportunity to present his case fairly and fully.

27. I have also decided (in the alternative) that even if I were wrong in my analysis of the powers of the Authority and the Authority had acted *ultra vires* or otherwise unlawfully that none of the alleged breaches would be material or have any real impact on the fairness of the investigatory procedure going forward. A striking feature of the case is that the Standards Committee which will be convened to hear and adjudicate upon allegations made against the Claimant has not yet been convened, due to the stay that the Claimant successfully obtained from the High Court. When the stay is lifted, which it will be by Order of this Court, the Claimant will have a full opportunity to present his case and establish that the allegations against him are to be rejected.

28. I agree generally with the position adopted by Mr Goudie QC for the Council that the allegations are serious and that there is a pressing public interest in those allegations being thoroughly and fairly tested and adjudicated upon. I also agree that the mere fact that the issues have acquired a "*political*" significance is not a reason for the Council, as a body, to succumb to political pressure. On the contrary it must act independently and objectively throughout.

29. I reject further the complaints that the Council erred by publishing the solicitor's report, the Opinion and the Audit Committee Report. The Authority had ample statutory powers under the LGA 1972 and the LA 2011 to publish the documents. There has been no need for me to consider common law powers of publication. There is an important public interest in openness and transparency both of which go hand in glove with accountability. These "*Nolan Principles*" are expressly enshrined in the LA 2011. The present claim involves an attempt to suppress independently collected and collated evidence and analysis about possible wrongdoing. No plausible justification has been advanced which overrides the importance of enabling a spotlight to be directed on the conduct of the Authority in seeking to address this sort of potentially serious misconduct. I reject the submission that publication amounted to a breach of the DPA 1998 or Article 8 ECHR or that it was irrational or Wednesbury unreasonable to publish the documents or that any risk of perceived bias sufficed to override the public interest in publication.

30. In conclusion, I reject the Claim for judicial review. I order that the stay on all proceedings be lifted forthwith.

B. The Facts

(i) Sandwell MBC

31. During the pendency of the present issue the Council has been under the control of the Labour Party. The Claimant is an elected Labour Member of the Council. In October 2014 officers from West Midlands Police attended the offices of the Council and removed files and computers. This was for the purpose of conducting an investigation into allegations of fraud and other criminal activity alleged to have been perpetrated by members of the Council. These allegations had been made by a third party external to the Council and reported online and in social media. Some of the allegations concerned the activities of Councillor Hussain, the Claimant.

(ii) The principal allegations against the Claimant

32. The principal allegations against the Claimant concerned the following matters:

a) the involvement of the Claimant in the sale at a substantial undervalue of public toilets owned by the Council to a person personally connected to the Claimant;

b) the involvement by the Claimant in the purchase of land at Lodge Street / Stone Street by his son, Azeem Hafeez;

c) the involvement of the Claimant in the sale of plots of land at Coroner's Office and 215 High Street to his son, Azeem Hafeez;

d) the involvement of the Claimant in the allocation of council housing by Sandwell Homes to his daughter, Noreen Bi;

e) the use of improper influence by the Claimant in the appointment as employees, or discipline of, members of his family by the Council;

f) the use of improper influence by the Claimant in cancelling or reducing parking tickets issued to the Claimant's wife and son;

g) the involvement of the Claimant in the release of restrictive covenants by property services;

h) the involvement by the Claimant in the scrutiny and approval of proposed sales under a "15 day sale scheme";

i) the use of influence on the part of the Claimant to persuade the Council to propose the purchase of land on Clifford Road for social housing by the Claimant's son, Azeem Hafeez;

j) the failure by the Claimant to declare his association with developers who were proposed to the Council as potential property development partners for sites within the Borough.

33. As the investigation has proceeded a number of these allegations have been dismissed. The investigation in relation to other matters continues. It is necessary to

set out in some detail the particulars of two of the allegations made against the Claimant which the Council now seeks actively to pursue. These are in relation to the sale of public toilets and in relation to parking offences. I start with the question of the sale of the public toilets.

(iii) The alleged misconduct by the Claimant in relation to the sale of assets (public toilets) at an undervalue to a person connected to the Claimant

34. On the 18th July 2011, an entity called Central Property Line ("CPL") wrote a letter to the office of Councillor Ian Jones expressing interest in the purchase of disused public toilets. On one copy of the letter there are manuscript annotations referring to both Councillor Jones and the Claimant.

35. On the 15th August 2011, a trainee surveyor in the Property Services Department of the Council wrote to CPL noting that a public auction was due to be held on the 22nd September 2011 and suggesting that the toilet blocks be added to that auction. The surveyor wrote a briefing note to Mr David Willetts, the then Head of Property Services, headed "Public conveniences in Sandwell". However, the toilets were not ultimately included in the public auction.

36. In October / November 2011 a meeting occurred between Council officers and CPL. Manuscript notes on emails sent on the 16th December 2011 and the 12th January 2012 indicate that Council officers consulted members about the interest shown by CPL. There are five documents referring to the involvement of the Claimant by name and a further five documents which refer more generically to "Councillors / Members" having been consulted between July 2011 and May 2012. There are also other non-specific references simply to "Members".

37. On the 30th January 2012, a letter was sent by a Council officer to CPL referring to previous correspondence and setting out proposed terms and conditions of sale. A hand written note prepared by the officer stated "*DW discussed contents of letter with Councillor Hussain Agreed okay to be sent*". The reference to "*DW*" is to Mr David Willetts.

38. On the 2nd March 2012, a second letter was sent by a Council officer to CPL with revised terms and conditions which stated: "*Further to my letter dated 30 January 2012 and discussions with Councillor Ian Jones and Councillor Mahboob Hussain, I outline the revised terms and conditions that the Council is prepared to proceed*". The letter listed the purchase prices and other terms and conditions.

39. On the 2nd March 2012, Mr David Willetts, stated that his "*gut-feel*" was that the toilets should be valued at £15,000 per toilet. Mr Willetts has accepted that there was a high degree of subjectivity about his valuation. On the 9th March 2012, CPL made a revised offer of £50,000 for all four toilets and this was accepted by the Council. The relevant officer who accepted the offer recorded, in an email, that he had consulted with members.

40. Between the 13th and 19th March 2012 there was an exchange of emails and documents relating to a change of identity of the purchasers and that of their solicitor. This did not result in any questions being posed by either the Property or Legal

Services of the Council as to why there was a change in identity or as to any connections between the new purchaser and Council members or officers.

41. In the course of April 2012 one of the toilets (at Bearwood) was withdrawn from the offer and, in consequence, CPL agreed to proceed with the sale of the three remaining toilets for £35,000.

42. On the 24th April 2012 Mr David Willetts explained that the members wanted an independent open market valuation of the toilets. There is some evidence that the request for an open market valuation was at the instigation of, *inter alia*, the Claimant. On the 23rd May 2012, the District Valuation Service ("DVS") completed a report concluding that the appropriate value for the three toilets was, in total, £130,000. An attendance note of a call by a Council officer with the Council's Legal Services stated: "*Told to hang fire and not proceed. Have received independent valuations in excess of what is agreed with the prospective buyer. Await further instructions*".

43. On the 24th May 2012 it was agreed that there would be no immediate exchange of contracts. Members were "*now considering options*". A few hours later, but on the same day (24th May 2012), a further email stated: "*Received further instructions from David via Councillors Hussain and Jones. The transaction you are dealing with can proceed as normal*".

44. On the 7th June 2012, solicitors acting for the purchaser confirmed that the identity of the purchaser was Mr Abdul Naeem Quyam, and not CPL. The conveyance of the three toilets was completed on the 13th August 2012 for £35,000.

45. Subsequently, Savills provided an independent expert opinion upon the value of the land at the time of the sale. They valued the total package at £130,000.

46. In the course of the subsequent investigation, Mr David Willetts gave evidence that at the time he was unaware of any personal relationship existing between the Claimant and the purchaser, Mr Abdul Naeem Quyam. He explained that the normal method of disposing of parcels of land and redundant buildings was by public auction and that the toilets could readily have been placed into the auction scheduled for September 2011. His evidence was that he did not place the toilets into an auction upon the direct instructions of the Claimant and Councillor Jones. Mr Willetts also gave evidence that the Claimant sat with him and went through the proposed price and terms and conditions which was ultimately included in the letter sent on the 30th January 2012 (see paragraph [37] above). Mr Willetts stated that the Claimant approved the terms on a line by line basis and signed the letter off. Mr Willetts also stated that following the sale the Claimant instructed him to obtain an external valuation which was unusual. Mr Willetts was surprised at the high level of the valuation but his "*gut feeling*" was not based upon any empirical evidence as in his view there was no market for redundant toilets. Mr Willetts gave evidence that the Claimant instructed him to "*bury the report*".

47. Mr Willetts also explained that in his view a number of members, including the Claimant, overstepped their legitimate role frequently enough for it to become a "*course of conduct*". The ethos was that the Council was "*open for business*" and that the members were "*the boss*".

48. The Claimant does not, of course, accept the version of events that I have recorded above. He denies placing pressure upon Mr Willetts to offer the terms and conditions in issue. The Claimant was initially clear that Mr Abdul Naeem Quyam of CPL was not his "*relative*" but he subsequently accepted that Mr Quyam was known to him and was a visitor to his home. Mr Quyam is the brother of Nigat Loreen who lives at the same address as the Claimant and has an Islamic marriage to Navid Hussain, one of the Claimant's sons. Ms Loreen is also a full time carer to the Claimant's wife.

(iv) The alleged misconduct by the Claimant in relation to the expunging of parking tickets issued to the Claimant's family

49. I turn now to the issue of the parking tickets. The central facts may be summarised as follows. Sandwell has a contractor, APCOA. When a parking ticket is issued by APCOA there are clear opportunities for appeals. Challenges are supposed to be communicated to APCOA but not to the Council. The particular allegations against the Claimant concern two parking tickets, one issued to the Claimant's wife and the other issued to one of his sons. There were no appeals or challenges to the issuance of these tickets. However the ticket issued to the Claimant's wife was cancelled and the fine issued to the Claimant's son was reduced. The cancellation was actioned pursuant to an entry on the record dated the 6th May 2014 which stated: "*Informed by KF to cancel case upon instructions received from Irfan Choudhry as directed by Councillor Hussain*". The reference to "KF" is to Ms Kira Fleck, who is the Principal Officer on the Parking Team. Irfan Choudhry was Head of Highways and was the superior to KF.

50. The evidence given by the Claimant was that he did speak to Irfan Choudhry about the ticket issued to his wife and asked Mr Choudhry to "*look at it*". With respect to the ticket issued to the Claimant's son there is documentary evidence relating to this issue dated the 26th September 2012 and the 16th October 2012. These indicate that the reduction in the fine was in implementation of an instruction from "IC" to "KF" and there was member involvement. The evidence given by the Claimant (during the subsequent inquiry) was that the system note was evidence only of the opinion of IC and whether he (i.e. the Claimant) had ever leant on IC to cancel parking tickets was a matter for IC only. There is also some evidence suggesting that the Claimant considered that it was commonplace (and hence acceptable) for members to use their influence to procure the cancellation or reduction of parking fines.

51. The above summary suffices for present purposes to illustrate the nature of the two main allegations against the Claimant.

52. It is important to reiterate that the allegations remain allegations; nothing has been definitely proven or established.

(v) Comments in the media

53. In or around October 2014 a number of allegations were made on social media relating to the sale of land and property by the Council. The story was picked up and reported by the BBC. The allegation was that sales of Council assets had been made on an irregular and improper basis. The Council considered that these constituted serious allegations and reports were made to the police. The allegations involved a number of individuals, including the Claimant.

54. A flavour of the allegations is found in articles authored by Mr Julian Saunders on his website "*Sandwell Skidder*". On the 23rd October 2014, Mr Saunders published an article entitled "*Bog-gate! Why did Ian Jones lie to the BBC?*". This article contained allegations against Councillor Jones and his involvement in the sale of the toilets and challenged the version of events he had given in a BBC interview. On the 30th September 2014 Mr Saunders published an article entitled "*Hurrah – a sale on the open market (to Hussain's son)!*" which contained allegations against the Claimant. The gist of the allegation was that the Claimant had sold Council land at an undervalue to his son.

55. On the 7th October 2014 Mr Saunders published another article entitled "*Another Labour Land Sale to Mahboob Hussain's son!*" concerning further allegations against the Claimant in respect of different land (Coroner's Office on Croquet Lane). Yet further articles followed on the 9th October 2014 entitled "*Second Sandwell Land Sale Scandal – it's worse than first thought!*". And on the 11th October 2014 Mr Saunders published a yet further article entitled "*Mahboob Hussain – audit or cover up?*" in which he objected to the proposal of the Council to conduct an internal audit into the allegations against the Claimant upon the basis that, according to Mr Saunders: "*This has all the hallmarks of the classic whitewash…*". Mr Saunders also focussed upon the relationship between the Claimant and the purchaser of the toilets:

> "Bog-gate!!!! … In a Skidder exclusive I am prepared to say that Quyam, who bought the bogs from Sandwell Labour, at a knockdown price IS related to Nigat Loreen. Who's she? She is the wife of Naveed Hussain, er, son of Mahboob Hussain. Whilst I believe Nigat and Naveed live at a different address in Oldbury. They are both registered on the electoral register at 51 McKean Road, home of, er, Labour Councillor, Mahboob Hussain."

(vi) The police investigation

56. On or around the 4th October 2014, officers from West Midlands Police attended the Council offices in Oldbury and served the Council with a Special Procedure Production Order under Schedule 1 paragraph 14 of the Police and Criminal Evidence Act 1984. The police seized Council files and computers in relation to the sale of Council land at Lodge Street / Stone Street and the Coroner's Office to the Claimant's son. The police investigation was initially limited to these matters but was later expanded to include other allegations including the sale of the toilets.

(vii) The Audit Committee investigation and the instruction of external solicitors

57. At about this time, Mr Jan Britton, the Chief Executive, had a conversation with the then Leader of the Council pursuant to which the Leader asked Mr Britton to commission an internal audit investigation into land and property sales involving the Claimant and his son. This is recorded in a letter from Mr Britton to Mr Stuart Kellas, with Ms Sharma, the Monitoring Officer, copied in. According to his evidence (which I accept), Mr Britton agreed with this suggestion and he decided to initiate enquiries. Mr Britton stated that the investigation needed to establish what land had been sold to the Claimant's son over the past five years, the approvals for the sales, the timeline

and process for the sales and the value for money for the land and property sold. The investigation needed to establish whether any improper or inappropriate decisions had been taken in relation to these sales. The letter recorded that there had been "*recent allegations*" concerning the sale of public toilets to a business associate of the Claimant and accordingly such sales were to be included within the investigation. Mr Britton sought advice upon the process and timeline for this work.

58. This is the context in which the Council's Audit Committee was instructed to conduct an investigation and concluded that it was appropriate to instruct an external law firm to investigate in order to provide additional resource and independence. On the 1st April 2015, the Council settled terms of reference to Wragge Lawrence Graham & Co LLP ("Wragge"). This firm has since become known as Gowling WLG ("Gowling"). For the purpose of this judgment I refer to the Report of this law firm as the "Wragge Report". The terms of reference required the firm to report on the extent to which, if at all, it considered that there was evidence of a breach of civil law or rules or procedures of the Council. Wragge invited the relevant individuals to be interviewed. Both the Claimant and Mr David Willetts agreed and gave evidence in interview which was recorded and transcribed. I return to these interviews later. Wragge was instructed to review the evidence in relation to each of the matters referred to in paragraph [32] above. This included the sale of the three toilets and the allegation that the Claimant attempted to have parking tickets expunged. Wragge was also instructed to review the declarations of interest made by the Claimant and any others connected with him. Wragge was required to provide a confidential report to the Chief Executive, Monitoring Officer and Chief Financial Officer of the Council as soon as possible. Wragge was also instructed to provide advice on how the Council should cooperate with West Midlands Police and on associated employment and standards matters.

(viii) The draft Wragge Report: The Maxwellisation process

59. A first draft of the Wragge Report was produced in October 2015. On the 27th November 2015 Wragge wrote to the Claimant inviting him to comment upon its contents in accordance with the well known "Maxwellisation" procedure whereby those likely to be subject to criticism in a report are given a chance to comment and respond before the report is finalised and / or published. The provisional view then arrived at by Wragge was that the Claimant had fallen into error in failing to identify and adhere to the line that exists between public and private interests and that there was substantial evidence that he had failed to declare personal and pecuniary interests at informal briefings and meetings with officers. With regard to the sale of the toilets, Wragge concluded that there had come a time when the Claimant was aware of the identity of the purchaser and the nexus between the Claimant and the purchaser was sufficiently clear and proximate such that the Claimant should have withdrawn from any discussions or involvements in relation to the sale. Wragge concluded that the negotiation of the heads of terms of sale was driven by the Claimant, effectively on both sides of the transaction. The Claimant was both consulted upon and agreed the final price and the terms of disposal and ignored the independent valuation, which valued the properties at £130,000. The Claimant was aware of the legal duty imposed upon Councils to obtain the best consideration available upon the disposal of the property and there was no evidence, known to the Claimant, which contradicted the independent valuation. On the balance of probability the Claimant "*steered*" the sale

through the Council and authorised the disposal of the toilets at £35,000 in the face of professional valuation advice that the property was worth many times more than that. Upon that basis the conduct amounted to serious misconduct in public office. Further, the Claimant exerted undue pressure upon David Willetts and, through him, upon the Property Services Team of the Council.

60. The draft contained additional criticisms of the Claimant in relation to the sale of Lodge Street / Stone Street to his son and to Council employee Azeem Hafeez. The draft criticised the lack of consistency on the part of the Claimant in declaring interests. It also criticised the Claimant for using his position to have parking tickets either cancelled or the fee payable reduced for the benefit of family members. In addition it criticised the Claimant in relation to the release of restrictive covenants and for his involvement in the "15 day sale scheme".

61. The Claimant's solicitors responded, in detail, by letter dated the 22nd January 2016. The Claimant accused the Council of being confused in relation to the purpose and scope of the investigation. The fairness of the procedure and process adopted was challenged. This criticism included alleged delays in the time taken to perform the investigation, and challenged the suitability of Wragge, and the relevant partner, Mr Mark Greenburgh, upon the basis of apparent conflicts of interest and bias (see paragraph [75ff] below for details). The Claimant also addressed the substantive allegations made. There was no requirement to make declarations at informal meetings and there had never been a practice that such declarations should be made. The Claimant had never been advised that the making of declarations was a requirement. It was denied that he took any part in the disposal of the toilet blocks. He denied that he was aware of the identity of the buyer. He denied that he was consulted upon or was aware of the price paid. He denied that he had ever given favourable treatment to his family in relation to parking tickets. The letter stated that the findings made were serious and that if the conclusions were upheld there could be "*serious consequences*".

62. Similar Maxwellisation letters were sent to all of the other persons who were the subject of criticism in the draft report, including Councillor Ian Jones and to Azeem Hafeez (the son of the Claimant and an employee of the Council).

63. A letter was also sent to Mr David Willetts in his capacity as a chartered surveyor and Head of Property Services in the Council from 2005 until his retirement in June 2015. Mr Willetts responded by way of letter dated the 6th January 2016. In large measure he accepted the criticisms and conclusions arrived at by Wragge and the consequences of his own inaction. It is right to record that he reiterated that his provisional view was that the DVS valuation of the toilet blocks was "*far too high*".

(ix) The comments of Mark Greenburgh on the 22nd October 2015

64. I turn now to record an event that occurred on the 22nd October 2015, during a meeting between senior Council officials (including the CEO, Mr Britton) and Mr Greenburgh of Wragge. At the meeting Mr Greenburgh made what was subsequently described by Mr Britton as "*... a passing quip about the disabilities of Cllr Hussain's daughter and her children being due to inbreeding*". This caused Mr Britton serious disquiet and he questioned whether this amounted to bias, whether this should lead to the investigation being halted, and whether in any event to overcome any risk of bias

a full review by Leading Counsel should be commissioned. Mr Britton set out his concerns in a letter dated 6th January 2016 to the Leader of the Council. The relevant part of the letter is in the following terms:

> "However, of greater concern is the allegation that Cllr Hussain made verbally to you and I in our meeting with him just before Christmas, that he feels Mr Greenburgh holds some antagonism towards him (i.e. Cllr Hussain) because of his race, religion or ethnicity – and that Cllr Hussain feels this may have influenced Mr Greenburgh's approach to the investigation.
>
> The issue of alleged antagonism towards Cllr Hussain because of his race, religion or ethnicity was not specifically referred to in the recent letter from Cllr Hussain's legal advisor.
>
> You will recall that, at our meeting with Mr Greenburgh on 22nd October 2015, he made a passing quip about the disabilities of Cllr Hussain's daughter and her children being due to inbreeding. While Mr Greenburgh did not explicitly relate this comment to race, religion or ethnicity, it was inappropriate, offensive and entirely unnecessary in the context of our discussion.
>
> You made Mr Greenburgh aware of your concern about this comment at the time and I reiterated our concern when I subsequently met Mr Greenburgh on 19th November 2015.
>
> Since our meeting with Cllr Hussain, I have given very serious consideration to his allegation and the weight that we should attach to Mr Greenburgh's comment to us at our meeting in October – and whether the two should be considered in relation to each other.
>
> I have considered whether these are such that they should affect our confidence in the conduct of this investigation by Wragge & Co. Amongst a number of options I have considered whether the investigation should be halted and re-commenced with a different legal provider and another 'appropriate person' to lead a new investigation, because of concern about bias or prejudice.
>
> As I said in our telephone conversation on 5th January, I have reached the conclusion that, on balance, there is insufficient evidence that the investigation has been compromised to warrant halting the entire process and re-starting a new investigation, as I feel that this would have a disproportionately significant negative impact in terms of the time delay, cost, distress to employees and councillors, and harm to the council's reputation with West Midlands Police and the public.
>
> I have reached this conclusion because I have no evidence to prove that Cllr Hussain's race, religion or ethnicity has had an

> inappropriate influence on the conduct of Wragge's investigation but, at the same time, the issues that have been raised are such that neither can I offer you as much assurance as I would like that they have not.
>
> Therefore, I think it is appropriate that we should take further steps to ensure our confidence and the confidence of others into the conduct of this investigation.
>
> In our telephone conversation, we agreed that Wragge & Co. should complete the Maxwellisation process on which they are so well-advanced. …
>
> Upon our receipt of this report, we agreed that we will instruct a QC to review the whole report and the evidence base on which it is drawn, in order to provide us with a further level of independent assurance upon its contents, findings and recommendations before we take any further action.
>
> Regrettably this will mean a further extension of time, … but it continues to be my view that the seriousness of the allegations that we are investigating and now the seriousness of the concerns raised by Cllr Hussain are such that the most thorough and independent investigation is required."

It appears that the comments by Mr Greenburgh were not revealed to the Claimant until he saw the Opinion of Mr Goudie when it was published on 20th May 2016: see paragraphs [87] – [90] below.

(x) The Wragge Report of 26th April 2016

65. On the 26th April 2016 Wragge completed its report. The Report states that as a result of the parallel investigation being conducted by West Midlands Police, and their concern not to do anything which could prejudice that investigation, there had been substantial delays. Wragge was informed on the 15th April 2016 that the police investigation was concluded and in the light of that decision the final report was communicated to the Defendant.

66. In paragraphs [1.10] – [1.12] of the Report, by way of declaration, Mr Greenburgh stated:

> "1.10 The author is a partner in the international firm, Gowling WLG (UK) LLP, formerly known as Wragge Lawrence Graham & Co LLP. He is a solicitor advocate and specialises in local government employment and corporate governance work. He leads the Public Sector Group which encompasses local and central government, social housing, social care and regeneration teams. His biographical details are attached at (pages 1-3), but as it has become a matter of some comment, we make clear that the author was a member of Buckinghamshire County Council between 1993 and 2001 and

> its Conservative Leader between 1997 and 2001. He served on the NDPB, the Beacon Councils Scheme from 2004 to 2010 concluding his tenure as vice chair; and now he sits on the City of London Corporation Standards Committee as an independent co-opted member. All of this background was known to the instructing team from Sandwell, indeed it is published on the website for our firm.
>
> The Councillors' response to the 'Maxwell' letter indicated a concern on their part that either an elected political service or indeed this firm's unsuccessful tenure (a significant time previously) for work from the Council, might in some way have swayed our judgment in the conduct of the investigation or the findings we have reached.
>
> 1.11 Whilst conscious of the need for transparency and the need for justice being seen to be done, all of the relevant facts were known to both the officer team and indeed the interviewees at the time of their meeting with the author to give evidence. Those issues were not raised then, nor at any subsequent point before the provisional views were shared in the 'Maxwell' letters.
>
> 1.12 We considered at the outset, as we must, whether there was any actual or perceived conflict of interest with the Council or any of the principal witnesses, or any confidential information that would preclude the writer or the firm from acting independently. We were, and have remained at all times, satisfied that we are independent and have approached the issues professionally, impartially and fairly, assessing each issue on its merits alone."

67. In relation to the toilets, the Wragge Report concluded that the Claimant was involved in the detail of the proposed sale to a degree which crossed the line between political oversight and day-to-day management of the property services function to a significant degree. The proposed purchaser, CPL, was not at the time of the initial letter to the Council incorporated and was run by its partners including Mr Abdul Naeem Quyam, who had a close relationship to the Claimant. He was an occasional visitor to the Claimant's home. His sister lived at the Claimant's home as a carer to the Claimant's wife. His sister was married to one of the Claimant's sons and was mother to the Claimant's grandchildren. It was probable that Mr Quyam contacted the Council to inquire if there were redundant toilets because the Claimant either directly, or through an undisclosed agent, suggested that he do this. Mr David Willetts consulted with the Claimant about the proposed terms of the offer and at that time the Claimant knew that CPL was the bidder and was likely to have seen Mr Quyam's name on correspondence. There was no formal requirement for the Claimant to register pecuniary interests but he failed to declare his relationship with Mr Quyam. This was a breach of the then applicable Member's Code. The Claimant's degree of interference in the sale and the level of control exercised amounted to an overstepping of his proper roles. The agreement to sell the toilets for a price lower than that identified by the independent valuer was a serious breach of the Member's Code and

the Council's Financial Regulations. The Claimant was aware of the independent valuation yet, with others, agreed to ignore it. He did so without contrary evidence and the evidence now commissioned from Savills suggested that the independent valuation acquired at the time was correct. In consequence, the Council had suffered financial loss. There was, however, no evidence that the Claimant had obtained an advantage for himself or that he would have acted any differently whether or not CPL included Mr Quyam.

68. In relation to the parking tickets, the Report found that the Claimant interfered in the due process of parking tickets issued to his wife and son and he did this by contacting the relevant officers directly and, in effect, asking for them to be cancelled. This was a breach of the Member's Code.

69. The Wragge Report also found that the Claimant was in breach of the Member's Code in relation to the sale to his son of the Coroner's Office and 215 High Street and in relation to his involvement in the 15 day sale scheme. There was also a violation of the Member's Code in relation to the purchase of land on Clifford Road and in relation to the events surrounding the "Rickshaw Restaurant".

70. The Wragge Report found no evidence of involvement by the Claimant in the allocation of council housing to his daughter. Nor did it find evidence that the Claimant interfered in the appointment or discipline of members of his family employed by the Council. In addition, there was no evidence that the Claimant was involved in the release of restrictive covenants.

(xi) The Goudie Opinion

71. Upon receipt of the Wragge Report, the Council instructed Mr James Goudie QC to review the Report and the evidence upon which it was based. The purpose was to obtain independent advice as to the action the Council should take in the light of the Wragge Report. The decision to commission the Report was taken by Mr Britton, the CEO of the Defendant. The context is set out at paragraph [64] above. Mr Goudie was provided with the entirety of the documentation collated and obtained during the Wragge investigation. This ran to approximately seven lever arch files and included transcripts of the interviews conducted. The Claimant's solicitors were invited to submit further evidence or information to Mr Goudie for his consideration.

72. Mr Goudie produced his opinion on 9th May 2016 ("the Opinion"). He set out that he was asked a series of questions. These may be summarised as follows. First, whether in the light of the evidence, the findings and conclusions in the Wragge Report were reasonable and supported by the evidence. Second, whether the evidence supported the findings contained in the Wragge Report. Third, whether the complaints made by, *inter alia*, the Claimant as to the initial and continued involvement of Mr Mark Greenburgh and his firm in the investigation affected the conclusions of the Wragge Report. Fourth, whether the personal, adverse, comments made by Mr Mark Greenburgh about the Claimant could be viewed as racist and whether they affected the findings and/or the conclusions of the Wragge Report. Fifth, whether the process followed by the Council was appropriate in the circumstances and reasonable. Sixth, as to the steps the Council should now take in relation to the complaints by, *inter alia*, the Claimant as to alleged bias on the part of Wragge or Mr Mark Greenburgh. Seventh, the issues, if any, which should be taken forward to the Council's Standards

Committee. Eighth, whether the Council could or should publish the Wragge Report and if the answer was in the affirmative, how issues relating to personal data and criticisms of individuals should be addressed and whether individuals should be given advanced notice of publication. Ninth, whether those who received "Maxwell" letters were now entitled to, or should, be shown and given a further opportunity to see and respond to those parts of the Wragge Report which related to them.

73. I summarise the answers given by Mr Goudie to the above questions as follows.

74. In relation to whether the findings and conclusions in the Wragge Report were reasonable and supported by the evidence, Mr Goudie believed they were. Though, in relation to the Claimant, Mr Goudie did not agree that he had ignored the independent valuation report *wholly* without any evidence because he had received the contrary advice of Mr David Willetts (see at paragraph [46] above), which was to be treated as "*some contrary evidence*". He also observed that the evidence from Savills was "*after the event*". Mr Goudie stated that in relation to the former Coroner's Office and 215 High Street, the Council's public advertisement sought combined offers in the region of £180,000 and in the region of £85,000 per property upon an individual basis. Accordingly, he did not consider that the offer by Azeem Hafeez of £80,000 for the former Coroner's Office alone was suspicious. Nonetheless, Mr Goudie believed there was *prima facie* evidence that the Claimant was involved with setting the price for the toilet blocks and the discrepancy in the price realised and the independent valuation was so great that even if the independent valuation was excessive the sale should not have proceeded. Mr Goudie was also of the opinion that the Claimant did contact directly the officer concerned in relation to the parking tickets and that it was no excuse (as the Claimant had claimed) that other Councillors may have done the same sort of thing.

75. In relation to whether Wragge had a conflict (see paragraphs [61] and [66] above in relation to paragraph [1.10] of the Wragge Report), Mr Goudie rejected the complaint of conflict of interest arising out of the earlier incident during which Wragge failed to win a tender for the provision of legal services to the Council. The complaint made was articulated in a letter dated 22nd December 2015 from Weightmans, acting for the Claimant. The complaint was that the Council had previously appointed Ashfords LLP as its sole legal provider and that the Claimant was the Cabinet Member responsible for legal services at the time. Wragge had submitted a tender to the Council in the process but had proven unsuccessful. It was understood that Mr Mark Greenburgh in his capacity as a partner in Wragge & Co. wrote to the Council at the time threatening legal action over the Council's decision. It was contended that Mr Greenburgh could not be objective in leading the investigation into the conduct of the Claimant. It was stated that: "*A fair minded observer would think that it would be impossible for Mr Greenburgh to be unbiased given the history. Therefore, we believe that in order for the Council and the public to have confidence in this process the Council should appoint someone to carry it out who has no history of previous animosity towards Councillor Hussain or the Council*".

76. Weightmans also contended that the Council had failed to comply with its own procurement and contract procedure rules in appointing Wragge to carry out the investigation. The investigation outcomes would lack credibility if the appointed investigator had a clear conflict of interest as a result of his previous involvement with the Claimant and if the rules for his appointment had not been followed. Weightmans

concluded that in the circumstances the Council should forthwith stop the present investigation.

77. In the light of this, Mr Goudie recorded that the Council had made inquiries as to the involvement of Wragge in the tender for the provision of legal services for Sandwell in 2011. On 30th December 2015 the CEO of Sandwell replied to Weightmans. He accepted that Wragge had tendered for legal services in 2011. He accepted that Mr Mark Greenburgh was at that time a partner and their head of public sector law.

78. Following the award of the contract to Ashfords, Mr Mark Greenburgh wrote to the CEO to express his surprise at not being awarded the contract and to ask for the full evaluation criteria and scoring to be revealed, as was his right as a tenderer. No litigation was threatened or commenced. Wragge accepted the explanation provided and the result. Wragge had continued to receive instructions from the Council during the course of the contract with Ashfords. This included for work which pre-dated the award of the contract to Ashfords, which could continue to be placed with whichever legal advisor held the commission prior to the commencement of the Ashfords contract. The CEO stated that, having conducted an investigation, Mr Greenburgh had no recollection of ever interacting or dealing directly with the Claimant on any matter prior to the present investigation. The recollection of the CEO of the tender process was that each tenderer made one short presentation of no more than one hour to a mixed group of Council employees and elected Members and that this was the only direct interaction between Councillors and tenderers in the course of the tender process. The award of the contract (to Ashfords) was approved collectively by the Council Cabinet on the professional recommendation of Council officers. The CEO did not therefore consider that the award of the legal contract was a basis for concern or bias nor was there any evidence of animosity on the part of Wragge towards either the Claimant or the Council, particularly as the contract itself was relatively small compared with the size of Wragge's overall public sector practice and the fact that Wragge had willingly continued to accept instructions from the Council in the four years which had elapsed since the award of the contract to Ashfords. Regarding the procurement of Wragge's services for the present investigation, the Council's standing orders and financial regulations provided for a waiver of normal competitive tendering requirements to secure particular expertise or experience. The Council approached Wragge directly to secure these services of Mr Greenburgh because of his substantial experience in the field.

79. Mr Goudie agreed with the view expressed by the CEO. He did not consider that any of the matters arising affected the conclusions set out in the Wragge Report.

80. With regard to whether the personal observations by Mr Greenburgh could be viewed as racist and whether they could affect the conclusions in the Wragge Report, Mr Goudie stated that the allegation of an appearance of bias was "*troubling*" but he did not ultimately consider that a well informed and fair minded observer would conclude from all of the circumstances that there was a "*real possibility of bias*".

81. Mr Goudie concluded that it was both appropriate and reasonable for the Council to: instruct external independent investigators; investigate the serious allegations that had in fact been made (whether or not they had been the subject matter of a formal complaint) and to pursue the investigation before dealing with complaints by the Claimant about the process of awarding the work to Wragge.

82. Mr Goudie advised the Council that it should investigate whether in granting a waiver of competitive tendering requirements it had failed to comply with its own procurement of contract procedure rules and standing orders in appointing Wragge to carry out the investigation. Further, that to the extent that further investigation was required it should ensure that it followed its normal practice.

83. Mr Goudie set out those matters which he considered should be now pursued by initiation of a formal investigation under the LA 2011. He also identified areas where he did not agree with the analysis contained in the Wragge Report.

84. In relation to publication, Mr Goudie concluded that this did not have to await the conclusion of the Standards Committee process or staff disciplinary processes. He concluded that the Claimant should be given copies of the Wragge Report. He thought that consideration should be given to redaction, but he doubted that this would be practicable. The Report and the Opinion should be published in the near future.

85. With regard to those who had received "Maxwell" letters, Mr Goudie concluded that they were not entitled to a further round of Maxwellisation and to do so would not amount to good practice. What was required was that the individuals criticised should be given "*a fair opportunity*" for correction, contradiction or criticism. Those criticised had received such a fair opportunity.

86. In his conclusion, Mr Goudie advised that the focus should, going forward, be on the initiation of a formal Standards Committee reference of the Claimant in relation (a) to the sale of the toilet blocks and (b) to the adjustment of parking tickets for members of the Claimant's family. He stated: "*Fair processes must obviously be observed in these contexts*". The Wragge Report and his own Opinion should be placed into the public domain on grounds of transparency and openness. He stated: "*It is necessary for the Council to demonstrate the seriousness and thoroughness with which it has approached these matters*". It was not tenable to withhold the Wragge Report from publication. The entirety of the Wragge Report would also need to be placed before the Council's Audit Committee and, at least in part, it would need to go to the Council's Standards Committee and thereby into the public domain. It could in any event have to be disclosed in response to a Freedom of Information Act request if such was made. He stated that there should be seven days prior notice of publication. He emphasised that: "*The main requirement is fairness*".

(xii) The Claimant is notified of the intention to publish

87. Mr Britton sent the Wragge Report and the Opinion to the Claimant on 10th May 2016. This gave the Claimant 7 days notice of an intention to publish the document. He explained the decision on the basis of "*... the interests of transparency and freedom of information and to demonstrate the seriousness and thoroughness with which the Council has investigated the allegations that have been made*". He considered that there was a "*compelling public interest*" in publication which outweighed contrary private interests. In his written and oral evidence Mr Britton categorically denied being affected by any of the politics which surrounded the postponement of the AGM of the Labour Party and the election of Leader of the Party and of the Council. I accept that evidence. On 12th May 2016 the Claimant's solicitors sent a pre-action protocol letter. It was agreed between the Claimant and the Defendant that publication would be delayed until 1st June 2016 to allow time for an

application for interim relief to be heard and determined. However, at about this time parts of the Wragge Report and the Opinion were leaked to the press and the issues were aired widely, including on the BBC. This led Mr Britton to conclude that the Authority needed to be seen to publish the documents forthwith. He was concerned to ensure that any portions of the documents already leaked did not convey a misleading impression. Again, I accept Mr Britton's evidence about this.

(xiii) The application for permission to apply for Judicial Review: 19th May 2016

88. On the 19th May 2016, the Claimant issued the present claim for Judicial Review. The claim was accompanied by an application for an urgent injunction to prevent publication of the Wragge Report and the Opinion. The Claimant did not include an application for a stay of any formal investigation into the Claimant's conduct. In his original Grounds of Claim the Claimant stated that it was "*important to note that although [the Claimant] says he has done nothing wrong… he is not saying that the Council has no right to investigate, which the pre-action response repeatedly tries to suggest [the Claimant] is arguing. As his pre-action correspondence has said, and which has not been denied, [the Claimant] has in fact throughout been very cooperative…*".

89. On the 20th May 2016 Mr Justice Cranston after an oral hearing refused the application for interim relief and he refused permission to apply for Judicial Review. In paragraph [6] of the reasons contained within the Order, the Judge stated as follows:

> "It is with no disrespect to Mr Oldham that I regard the first three and last two grounds as hopeless. The Council had ample vires to commission, accept and act on the Report. The comment about Councillor Hussain's family by one of the investigators was, in my view, extremely unfortunate (to put it no higher) but for the reasons given in the Chief Executive's letter, endorsed by Mr Goudie, it does not eviscerate the investigation or the Report. The argument about procedural flaws in the investigation falls away in the light of the Maxwellisation process, the subsequent opportunity to make representation and Mr Goudie's report. Political bias cannot come into it when such serious allegations demanded an investigation by the Council as a whole. It follows that Wednesbury unreasonableness does not enter the picture."

90. In the light of this, the Council published the Wragge Report and the Opinion that same day.

91. The Claimant appealed to the Court of Appeal. By an Order dated the 17th January 2017 of Lord Justice Sales permission was granted upon the basis that the claim was arguable "*… according to the low threshold of arguability suitable for the grant of permission to seek judicial review*". The Judge did not, however, grant permission in relation to the refusal of Cranston J to grant interim relief. This was upon the basis that any appeal was "*academic*" as the Wragge Report and the Opinion had already been placed into the public domain. Lord Justice Sales also granted permission to

amend the Grounds upon which Judicial Review was sought to take account of events occurring subsequent to the decision of Mr Justice Cranston.

(xiv) The initiation of the formal investigation: 3rd June 2016

92. On the 3rd June 2016, the Chief Executive having considered the Wragge Report and the Opinion made a formal complaint about the Claimant to the Monitoring Officer, Ms Neeraj Sharma. Mr Britton stated that the sale by the Council of redundant public toilets and the handling of parking tickets amounted to alleged breaches of the Council's standards under the Code applicable at the time. The Monitoring Officer consulted with the Independent Persons as to whether the allegations should be made subject to further investigation (see paragraph [106ff] below for a description of the role of the Independent Persons). On or about the 3rd June 2016 the Monitoring Officer determined that the allegations should be investigated in accordance with the Council's formal Arrangements.

93. The Monitoring Officer appointed Ms Maria Price, a solicitor and Legal Manager employed by the Council, and Ms Julia Lynch, also a solicitor employed by the Council, as Investigating Officers under the relevant arrangements. During June and July 2016, the Investigating Officers commenced gathering evidence. An interview with the Claimant took place on 26th September 2016. During the interview the Claimant raised several matters requiring further consideration. Following the interview other potential witnesses identified by the Claimant were interviewed. The Claimant was invited to further interviews. The offer was rejected upon the basis that the Claimant had by this time lodged a complaint against Ms Price in her capacity as investigator. That complaint was dealt with by the Council on 5th January 2017 and was rejected. She was then asked to continue with the investigation. A series of further requests to the Claimant to attend interviews was made. These were also declined. Ultimately, the Claimant submitted new written evidence.

(xv) The Audit Report and the extension of the investigation: 18th January 2017

94. On 18th January 2017, Mr Darren Carter, Interim Director – Resources, submitted a report ("the Audit Report") to the Audit Committee which was, then, due to convene on the 26th January 2017. The Report was intended to bring to a conclusion a number of new internal investigations "*alongside*" the Wragge review. Several issues went back "*many years*" and had only come to light following recent inquiries. The investigation underlined the Authority's commitment to investigate allegations in an "*open and transparent*" manner. The Council was determined to deal with any allegation "*properly, professionally and appropriately*":

> "114. It is important to the Council that the Committee, Council Members, staff, tax payers, wider public and the media can see these matters are being dealt with comprehensively and promptly, even when they relate to issues some years in the past. The Council needs to draw a line under these matters, taking action when necessary, so the whole organisation can look to the future."

95. In paragraph [1.5] Mr Carter summarised the investigations. Two matters concerned land sales to Councillor Bawa and Councillor Hussain when displaced from their homes by a Compulsory Purchase Order; and, housing allocations to members of Councillor Hussain's family. Mr Carter observed that evidence collected contained "*... indicators that suggest that potential collusion and fraudulent practice*" had occurred and there could be evidence of a conspiracy to defraud and / or misconduct in public office. These matters had been referred to West Midlands Police Regional Organised Crime Unit for consideration.

96. Mr Carter set out, in summary, the procedure which would ensue:

> "1.19 The Committee will know that the Council has, in accordance with statute, adopted specific arrangements for the handling of allegations of the breach [of the] Member Code of Conduct. The initial stage is for such allegations to be considered by the Council's Monitoring Officer. The Monitoring Officer will have to consider the conduct alleged; the applicable Code at the relevant time and whether additional information is required before deciding whether the formal Standards investigation is required. The Monitoring Officer may seek assistance from the Council's Independent Persons in making that decision. Should the Audit Committee refer matters to the Monitoring Officer then it will have the right of any other Complainant under these arrangements."

97. The Report recommended, *inter alia*, that the Audit Committee consider the summary attached to the Report to gain assurance that the identified issues were being comprehensively and promptly addressed and that the Committee should monitor progress through the receipt of regular progress reports and action plans.

98. Attached to the Report were summaries of the issue and provisional findings. In relation to concerns over land sales to the Claimant when displaced from his home by a Compulsory Purchase Order the Report stated that an issue arose as to: "*why an exclusive bid for self-build plots was only introduced in 1999 after the majority of residents affected by a CPO had already relocated and was restricted to plots of land that [the Claimant] had already expressed an interest in back in 1998*". Only the Claimant and immediate family members submitted bids for these plots in September 1999. The bids gave the impression of potential cover pricing and bid suppression. Four bids were received from the Claimant and members of his family without any declaration of interest to the Council. A second matter relating to the Claimant concerned housing allocations from 1997 to date. An investigation into the allocation of 10 Council owned properties had been undertaken. The investigators found patterns of behaviour exhibiting features of a conspiracy to defraud and / or misconduct in public office. The outcome of a number of housing allocation decisions appeared to benefit members of the Claimant's family. The evidence suggested a "*repeat pattern of use of a number of factors that allowed members of Councillor Hussain's family to be allocated Council properties*".

(xvi) Audit Committee accepts recommendations in Audit Report: 26th January 2017

99. On 26th January 2017 the Audit Committee accepted the recommendations in the Audit Report to refer two allegations relating to the Claimant to the Monitoring Officer. The Committee was briefed about the Council's Arrangements for the handling of allegations of breach of the Member's Code of Conduct. The Committee resolved that the summary of investigations into allegations of fraud and misconduct be received. The issues identified were to be "*comprehensively and promptly addressed*". Progress should take place via regular Progress Reports and Action Plans submitted to the Audit Committee.

(xvii) The draft Price Report

100. On the 18th January 2017 Ms Maria Price, Service Manager Legal Services, sent a draft of the Report she had prepared in the light of receipt of the Wragge Report and the Opinion. The draft was submitted to the Claimant's solicitor who was informed that pursuant to the formal Arrangements, the Claimant had 14 days in which to comment. The draft was accompanied by copies, contained in a number of bundles, of the evidence upon which the Report was based. The Claimant on the same day (18th January 2017) requested that the deadline for response be extended to 17th February 2017. Ms Price refused the request. On 23rd January 2017 the Claimant applied to the High Court for an Order either to stay the Council's procedure or for an extension of time to enable him to comment upon the draft to the 17th February 2017. By Order of the 24th January 2017, Mr Justice Dove ordered that the Defendant take no action until the 17th February 2017.

(xviii) The final Price Report: 20th February 2017

101. The final report of Ms Price was submitted to the Monitoring Officer on the 20th February 2017 ("the Price Report"). This sets out the background to the matter including the Wragge Report, the obtaining of the Opinion and later investigatory steps. The investigators recorded that their task had been to collate and present the relevant evidence but "*they are not decision makers*". The Claimant is recorded to have cooperated with the investigation. Ms Price annexed a copy of the interviews between Wragge and the Claimant which had been used as "*background*" to an interview conducted with the Claimant on 26th September 2016. Following that interview further witness statements were obtained and additional written questions were put to the Claimant. The Claimant's further evidence was also attached. Additional individuals (including Mr David Willetts, Mr Mitchell Spencer, Mr Matthew Lynch, Mr Kerry Jones, Ms Kira Fleck and Mr Nick Bubalo) had been invited to attend interviews. A number of those invited (including Mr Choudry and Mr Quyam) declined to attend for interview. In those cases the investigators relied upon such pre-existing evidence as had already been gathered from them.

102. The conclusion was that the Claimant had acted in breach of the 2007 Code of Conduct in relation to both the sale of the toilets and the parking tickets. The investigation had been of a "*different type*" to that performed by Wragge in that it was now conducted in accordance with the formal Arrangements under the LA 2011.

(xix) Reference of the Price Report to a hearing of the Standards Committee

103. On the 21st February 2017, Mr Sullivan-Gould, the Interim Monitoring Officer, took the decision to refer the Price Report to a hearing of the Standards Committee, then planned to be convened on the 9th and 10th March 2017.

(xx) The stay of the present investigation ordered by Mr Justice Andrew Baker

104. On the 23rd February 2017, on the application of the Claimant, Mr Justice Andrew Baker ordered that the Council's procedures be stayed pending the outcome of the present judicial review.

(xxi) The Standards Committee hearing

105. I turn now to consider the procedure that would apply to any hearing before the Standards Committee. The Council has adopted arrangements ("the Arrangements") in implementation of its duty pursuant to section 28(6) LA 2011. The relevant versions are those approved on 7th January 2014 and 17th January 2017. The purpose of the Standards Committee is set out in Article 9 of the Constitution of the Council and is to promote and maintain high standards of conduct by Members of the Authority and to implement the LA 2011 and the Council's Code of Conduct. Its functions include the consideration of investigation reports, the conducting of hearings and the imposition of sanctions and, more generally, to exercise any function which the Council may consider appropriate from time to time. The Committee comprises eight members. At the present time each member will be a member of the Labour Group, which reflects the general composition of the Council. New members were due for appointment as of 16th May 2017. Members are trained on the Arrangements and upon the conduct of standards hearings.

106. The Arrangements provide for the involvement of "*Independent Persons*". Members against whom complaints are directed may seek the views of an Independent Person at any stage as to the complaint itself, the process under which the complaint is to be dealt with or upon any other query the Member may have, though the Independent Person's role is not to act as an advisor to the Member. Independent Persons are invited to attend all meetings of the Standards Committee. Their views are taken into consideration before decisions in relation to the consideration of investigation reports, or whether a Member's conduct constitutes a failure to comply with a relevant Code, and as to any action to be taken following a finding of failure. The role of the Independent Person is voluntary and there is no remuneration or allowance, but reasonable expenses are paid.

107. The procedure for any hearing of the Standards Committee is set out in the Arrangements. In summary, under these the Monitoring Officer is required to review every complaint submitted and to instruct an Investigating Officer to conduct a fuller inquiry. If, upon receipt of that report, the Monitoring Officer concludes that there is evidence of a failure then the matter will be sent to a Sub-Committee of the Standards Committee to conduct a hearing before deciding whether the Member has failed to comply with the Code and if so whether to take any action. The hearing normally takes place within six weeks of the decision to proceed. The Monitoring Officer will conduct a pre-hearing process requiring the member to respond to the Investigating Officer's report in order to identify what is likely to be agreed and disagreed. The

chair of the relevant Committee may issue directions as to the manner in which the hearing will be conducted.

108. As applied to the present case, if the stay is lifted, the Claimant will be given an opportunity to respond to matters submitted to the Standards Committee (including those in the Price Report) in order to focus the subsequent hearing upon matters likely to be in disagreement. The chair of the Committee may issue directions as to the conduct of the hearing, including directions in relation to the disclosure of documents, the agreement of facts, and the conduct of the hearing itself. *Prima facie* hearings will be in public unless there are particular reasons relating to confidentiality. Consideration will be given to the necessity of transparency, the requirement of witnesses, and the applicability of legislation relating to data protection. At a hearing the Investigating Officer will present the case, call witnesses and make representations and submissions. The relevant member, in this case the Claimant, will have an opportunity to give evidence, call witnesses and make submissions. The Investigating Officer and the member may instruct legal representatives to act for them at the hearing.

109. The Committee is advised by a legally qualified Clerk, who is independent from the case and may be external or internal to the Council. In the present case the Council has indicated that it is likely to instruct an independent lawyer to act in this capacity.

110. The statements prepared from witnesses stand as their evidence in chief. Each party may cross examine opposing witnesses. The Committee, the Independent Persons, and the Clerk may pose questions of anyone attending the hearing. The Chair of the Committee, in consultation with the Monitoring Officer and / or Independent Person may depart from the Arrangements where expedient to secure the effective and fair consideration of a matter.

111. Upon consideration of all the evidence, the Committee may dismiss a complaint or conclude that the member failed to comply with the Code of Conduct. Notification of the decision is through the Chair of the Committee which then considers which action, if any, is appropriate to take. The Committee is required to publish the breach of the Code and the sanction on the member's profile on the Council's website. The list of sanctions open to the Committee falls short of a power to suspend or disqualify the member or to withdraw member's allowances. The Council has indicated that if the stay is lifted it would not seek to rely upon the Wragge Report before the Standards Committee.

C. The Statutory Framework Governing the Council's Investigatory Powers

(i) Introduction

112. I turn now to consider the legal framework governing the powers of Councils to conduct investigations of both an informal and a formal nature. It is necessary to consider both because of the Claimant's argument that the Council has no lawful power to conduct any investigation of a member outside of the formal procedure contemplated by the LA 2011. The dispute focuses upon the scope and applicability of powers in the LGA 1972 and LA 2011.

(ii) Local Government Act 1972 ("LGA 1972"): Sections 111, 123 and 151

113. I start by considering the position under the LGA 1972. This contains a variety of powers conferred upon local authorities. Three powers are in issue in the present case: Sections 111, 123 and 151.

114. Section 111 provides:

> "Subsidiary powers of local authorities.
>
> (1)Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

115. Section 111 is subject to well-known constraints. It confers a "*subsidiary*" power to take action designed to facilitate or be conducive or incidental to the discharge of a "*function*". It is not therefore a free standing power to act but is ancillary to a pre-existing "*function*": See e.g. *Hazell v Hammersmith LBC* [1992] 2 AC 1 ("*Hazell*") per Lord Templeman at page [29]. It has, though, been fairly generously applied in its subsidiary role. In *R v DPP ex parte Duckenfield* [2000] 1 WLR 55 the Court decided that under section 111 a police authority could fund a judicial review against the DPP since it could reasonably be considered to be ancillary to the maintenance of an efficient and effective police force. In *R (Comninos) v Bedford BC* [2003] EWHC 121 ("*Comninos*") the Court held under section 111 that an indemnity granted to Authority officers to pursue defamation proceedings could reasonably be concluded to be conducive or ancillary to the discharge of employment functions.

116. Section 123(1) and (2) empowers authorities to dispose of land but there is a duty ("*shall not*") not to dispose of land "*... for a consideration less than the best that can reasonably be obtained*". In *R (Midlands Co-op) v Birmingham City Council* [2012] EWHC 620 (Admin) Hickinbottom J stated (at paragraph [123]) that the duty was directed at outcome not process. I agree with this analysis but process is clearly not irrelevant. The adoption of the correct process may be instrumental to achievement of the "*best*" consideration. In the present case advice given was that the toilets were worth £130,000. This was an open market valuation. The way to test the valuation was *par excellence* through auction, which is a process. Selection of the appropriate process might accordingly be a factor in satisfying the duty to obtain the optimal outcome. The toilets were not sold by auction when, on the evidence, they could have generated a significantly higher consideration in auction than by private sale.

117. Next, Section 151 which imposes a broad duty to ensure "*proper*" financial administration:

> "Financial Administration

> Without prejudice to section 111 above, every local authority shall make arrangements for the proper administration of their financial affairs and shall secure that one of their officers has responsibility for the administration of those affairs."

118. The key phrase is "*proper administration*". The duty to make "*arrangements for the proper administration*" of financial affairs under section 151 is a "*function*" of a local authority. This is the express premise which underlies The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 ("*the Functions Regulations*"). Regulation 2 thereof stipulates that the "*functions of a local authority*" specified in column 1 of Schedule 1 are "*... not to be the responsibility of an executive of the authority*". Schedule 1 thus identifies "*functions*" for which the executive cannot be "*responsible*". The list of non-permitted activities is set out in Schedule 1. This contains two columns with the first column setting out "*functions*" and the second column the statutory derivation of the function. Under the heading "*Miscellaneous functions*" in Schedule 1 at paragraph 39 the "*duty to make arrangements for proper administration of financial affairs etc*" under Section 151 is specified. It follows from this that ensuring that financial affairs are "*properly*" regulated is a "*function*" of an authority and one which must not be entrusted to the executive. In *Hazell* (*ibid*) the House of Lords held that the power to borrow was a "*function*" of a local authority and that, in consequence, a local authority could rely upon section 111 LGA 1972 in relation to "*borrowing*". Indeed, it was held that "*... the word 'functions' embraces all the powers and duties of a local authority; the sum total of the activities Parliament has entrusted to it*".

119. Sections 123 and 151 LGA 1972 are complementary since the duty to regulate properly an authorities' finances would include rules and procedures designed to ensure the realisation of the best consideration available on the disposal of assets.

120. It follows from all of the above that the power conferred by section 111 LGA 1972 can be used in furtherance of the functions in sections 123 and 151 LGA 1972.

(iii) "Responsibility": Regulation 2 of the Functions Regulations

121. I now address a point of law which arose in argument about the word "*responsibility*" in Regulation 2 of the Functions Regulations. Mr Oldham QC, for the Claimant, argued that the Council's Chief Executive, Mr Britton, had in actual fact acted *ultra vires* because he had agreed the commissioning of the pre-formal investigation at, it is argued, the instigation of the then Leader of the Council, a member of the executive. Mr Oldham QC argued that properly construed the Functions Regulations prohibited any contact whatsoever as between officers and elected members of the executive on matters allocated to the executive. I do not accept this argument and accept the submission of Mr Goudie QC that there is no basis either in the legislative language or in practical common sense for officers, in relation to the matters which must not be the responsibility of the executive, to take "*vows of silence*" such that they must erect impenetrable Chinese walls between themselves and members of the executive. I accept Mr Goudie's analysis that "*responsibility*" means responsibility for the actual decision taken, which would include being accountable for the decision to members and to the public. But it does not prevent the officer in question from consulting members of the executive or others or engaging in discussions with or seeking advice from or even receiving requests to act from such members provided the decision to act

is then taken by the officer. The final decision must be that of the officer but the route by which the officer arrives at the decision is not one which must be hermetically sealed from any form of contribution from or dialogue with members of the executive.

(iv) Sections 1 and 2 of the Localism Act 2011

122. I turn now to the LA 2011. This is relevant because it is the statutory basis for the present formal investigation into the Claimant by the Council. It is also relevant because, as a fall back, the Council argues that although it initiated pre-formal investigation under section 151 LGA 1972 if it were wrong in this it could, in any event, justify its decisions under the LA 2011.

123. The LA 2011 replaced the provisions governing standards set out in the Local Government Act 2000 ("LGA 2000") and the Local Authorities (Model Code of Conduct) Order 2007. These earlier measures imposed requirements on local authorities to introduce codes governing elected members conduct. Authorities were required, under section 51, to adopt codes which incorporated the mandatory provisions of a Model Code promulgated by the Secretary of State. Under section 51(5) where an authority failed to promulgate its own code the mandatory provisions of the Model Code would apply. The LA 2011 was intended to strengthen the regime and incorporate expressly the "Nolan Principles" on standards in public life. The Parliamentary purpose behind the change was two-fold. First, to move from a centralised regulatory system to a decentralised system based on "*localism*". Second, to move away from a system which could amount to a vehicle for vexatious and politically motivated complaints which deterred freedom of speech and which could be used to silence or discourage members from whistle-blowing: see per Hickinbottom J (as he then was) in *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin) ("*Heesom*") at paragraphs [25] – [29].

124. The starting point is sections 1 and 2 LA 2011. These were introduced by Parliament to reduce the risk of challenges to decisions of local authorities to the *vires* of their decisions. The legislative device adopted was to confer on authorities a power to do "*anything*" that an individual "*generally may do*". This power, unlike that in Section 111 LGA 1972 (see paragraph [ ] above), is not limited by being subsidiary to an existing "*function*". Section 1 provides:

> "Local authority's general power of competence
>
> 1. A local authority has power to do anything that individuals generally may do.
>
> 2. Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—
>
> > unlike anything the authority may do apart from subsection (1), or
> >
> > unlike anything that other public bodies may do.
>
> In this section 'individual' means an individual with full capacity.

> Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including—
>
> > (a) power to do it anywhere in the United Kingdom or elsewhere,
> >
> > (b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
> >
> > (c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.
>
> …
>
> (5) The generality of the power conferred by subsection (1) ('the general power') is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.
>
> (6) Any such other power is not limited by the existence of the general power (but see section 5(2)).
>
> (7) Schedule 1 (consequential amendments) has effect."

125. The scope of sections 1 and 2 are not free from doubt. In *De Smith's Judicial Review* (7th ed.) at paragraph [5-100ff], pages [297] and [298] the intent behind the measures is said to be reflected in Ministerial statements made during the passage of the Act through Parliament to "*err on the side of permissiveness*" and take away work from "*fun loving guys who are involved in offering legal services to local authorities*". However, it is pointed out that there are inherent limitations on the powers of local authorities notwithstanding section 1. The authors state these limitations to be as follows. First, the fact that by equating local authority's powers with those of individuals (described by the authors as "*puzzling*") Parliament has created a difficulty arising from the fact that individuals cannot exercise governmental functions but can perform actions such as purchasing and managing land and entering into contracts. As such equating the powers of a public authority with those of an individual brings forth the argument that an individual is constrained and such constraint might be said, thereby, to be extended to public authorities. Individuals do not "*… generally have powers to regulate, inspect, legislate, create criminal offences or demand taxes*". Second, authorities remain obliged to adhere to existing statutory duties including (by way of example) those under the Human Rights Act 1998, the public sector equality legislation and rules concerning pubic procurement. Third, adherence to common law principles demanding the adoption of decisions and the taking of measures which are lawful, rational and procedurally fair. As the authors observe: "*The plain meaning of s.1(1) does not absolve councils from meeting these standards even though they do not generally apply to individuals acting in a private capacity*".

126. Section 2 lays down "*Boundaries*" to the exercise of the general power in section 1. In essence local authorities remain subject to any statutory limitation or restriction in overlapping legislation: There are other limits imposed by section 3-6. For present purposes it is section 2 that is relevant. Section 2(1) provides that: "*If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power*". Section 2(2)(a) provides: "*The general power does not enable a local authority to do—(a) anything which the authority is unable to do by virtue of a pre-commencement limitation…*".

127. To determine the boundary on the exercise of the section 1 "*general power*" it is accordingly necessary (under section 2(1)) to examine the restrictions which are imposed upon the exercise of a pre-existing power since these then fetter the exercise of the general power. The expression "*restrictions*" is not defined. But logically it involves construing both the express language of the pre-existing power and its purpose. The express language is relevant because the measure might, for example, provide that the power can only be exercised upon satisfaction of specified conditions. In such a case the conditions would be the "*restrictions*".

(v) Sections 27 and 28 Localism Act 2011: Statutory incorporation of the Nolan Principles

128. Sections 27 and 28 give formal expression to the "*Nolan Principles*". These principles in large measure now govern the conduct of all holders of public office engaged in public life. In October 1994, the then Prime Minister, John Major, announced the setting up of the Committee on Standards in Public Life, chaired by Lord Nolan ("the Nolan Committee"). The remit was "*to examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life*". The establishment of the Nolan Committee followed the "*cash for questions*" scandal, in which certain MPs were accused (*inter alia*) of accepting bribes in exchange for asking Parliamentary questions. The Nolan Committee published its First Report in May 1995. Its General Recommendations included a re-statement of seven principles which underpinned public life and which are now termed the "*Nolan Principles*": selflessness, integrity, objectivity, accountability, openness, honesty and leadership. These principles have been referred to and applied in a variety of different contexts. For instance, in *AB v A Chief Constable* [2014] EWHC 1965 (QB) Mr Justice Cranston stated of the application of the principles to the police:

> "The standards of professional behaviour in the Police (Conduct) Regulations and the guidance are underpinned by codes of ethics. The Association of Chief Police Officers has adopted the Nolan Principles as its code: selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. The College of Policing has published a code of ethics which builds on these principles. The code states that the principles should inform every decision and action across policing. The principles should be more than words on a page and must become embedded in the way police professionals think and behave. Under the code chief officers must, inter alia, show

> moral courage to do the right thing even in the face of criticism, and must promote openness and transparency within policing and to the public. In spelling out the standard of honesty and integrity, the code of ethics gives as one example 'not knowingly making a false, misleading or inaccurate oral or written statement in any professional context'."

129. The principles set out in sections 27 and 28 LA 2011 are express reflections of the Nolan Principles, as has been recognised in case law: See e.g. *Dennehy v London Borough of Ealing* [2013] EWHC 4102 (Admin) paragraphs [6] – [9] and in *R (Calver) v The Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) Beatson J held that there was a clear public interest in maintaining confidence in local government.

130. Section 27 on "*Standards*" imposes a duty on "*a relevant authority*" to "*promote and maintain high standards of conduct by members*". This is to be achieved "*in particular*" through the promulgation of Codes:

> "27. Duty to promote and maintain high standards of conduct
>
> (1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.
>
> (2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity."

131. It is relevant that the primary statutory duty is imposed on the authority itself. The reference to "*in particular*" in section 27(2) indicates that the promulgation of a code is only one of the ways by which the overarching duty to promote and maintain high standards of conduct is to be secured. The duty in section 27(1) is free standing and steps taken to secure the duty may extend beyond the adoption of a Code of Conduct.

132. Section 28 (1) implements section 27 and imposes a duty on authorities to adopt Codes reflecting the Nolan Principles:

> "28. Codes of conduct
>
> (1)A relevant authority must secure that a code adopted by it under section 27(2) (a 'code of conduct') is, when viewed as a whole, consistent with the following principles—
>
> (a) selflessness;
> (b) integrity;
> (c) objectivity;
> (d) accountability;
> (e) openness;
> (f) honesty;
> (g) leadership."

133. Section 28(2) – (12) lays down provisions governing the manner in which allegations of breach of a code are to be investigated.

134. Section 28(5) empowers authorities to revise and adopt new codes. Section 28(6) requires authorities to have in place arrangements whereby "*allegations*" can (a) be investigated and (b) made subject to a decision making process:

> "(5) A relevant authority may—
>
> (a) revise its existing code of conduct, or
> (b) adopt a code of conduct to replace its existing code of conduct.
>
> (6) A relevant authority other than a parish council must have in place—
>
> (a) arrangements under which allegations can be investigated, and
> (b) arrangements under which decisions on allegations can be made."

135. Section 28(6)(a) and (b) imposes a two-part duty on an authority to have in place "*arrangements under which allegations can be investigated*" as well as "*arrangements under which decisions on allegations can be made*". Section 28(6)(a) concerns investigatory arrangements and Section 28(6)(b) concerns the subsequent decision making arrangements.

136. Reference was made in argument to section 28(4) and (11) and to apparent inconsistencies between them. I deal with the arguments at paragraph [142] – [146] below. It is convenient in order to facilitate side by side comparison to set them both out. These provide:

> "(4) A failure to comply with a relevant authority's code of conduct is not to be dealt with otherwise than in accordance with arrangements made under subsection (6); in particular, a decision is not invalidated just because something that occurred in the process of making the decision involved a failure to comply with the code.
>
> …
>
> (11) If a relevant authority finds that a member or co-opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—
>
> (a) whether to take action in relation to the member or co-opted member, and
>
> (b) what action to take."

137. Section 28(7) compels authorities to provide for references to be made to so-called "*Independent Persons*" who can provide independent third party advice on standards matters, when they lead to decisions under section 28(6)(b). Section 28(8) then lays down rules for ensuring that the Independent Person selected is in fact independent. Section 28(7) provides:

> "(7) Arrangements put in place under subsection (6)(b) by a relevant authority must include provision for the appointment by the authority of at least one independent person—
>
> (a) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate, and
>
> (b) whose views may be sought—
>
> (i) by the authority in relation to an allegation in circumstances not within paragraph (a),
>
> (ii) by a member, or co-opted member, of the authority if that person's behaviour is the subject of an allegation, and
>
> (iii) by a member, or co-opted member, of a parish council if that person's behaviour is the subject of an allegation and the authority is the parish council's principal authority."

(vi) Interpretation of Section 28 LA 2011: Can a Council conduct a pre-formal investigation?

138. I consider now an issue relating to the proper interpretation of Section 28. In the hearing the Claimant argued that the regime set out in the LA 2011 was comprehensive and exclusive by virtue of section 28(4) (see paragraph [140] above) and therefore no allegation of breach of a standard in a Code could be dealt with by any means save those set out in the Council's formal arrangements adopted under section 28(6). Mr Oldham QC advanced this in support of the argument that (i) there was no power for the Council to commission a pre-formal investigation (i.e. the initial Audit Committee investigation and/or the Wragge Report and/or Goudie Opinion) because these were not obtained pursuant to the formal section 28(6) arrangements; and (ii), that in the subsequent formal investigation there was accordingly no power to use the Wragge Report, Opinion or Audit Report because, again, they were not created as part of the formal arrangements under section 28(6) and were therefore the fruits of unlawful conduct.

139. Mr Oldham QC referred me to *Credit Suisse v Waltham Forest* LBC [1997] QB 362 ("*Credit Suisse*") which he relied upon as authority for the proposition that when Parliament instituted a regime which amounted to a "*complete code for the discharge of the function in question*" then there was no scope for the power to be performed in any other way (see per Neill LJ at page [371G] – [374C]). In that case the authority set up a company to engage in property transactions for the specific reason that it was

concerned that the tight fiscal controls imposed upon it by central government would not allow it to perform its housing obligations. When the company became insolvent banks who had lent to it sought to enforce guarantees. But the Court of Appeal held that the authority acted unlawfully and *ultra vires* in setting up the company and the guarantee which was a consequence of that earlier unlawful action was unenforceable. Section 111 LGA 1972 did not extend to confer power because it was being sought to be used as a free standing power and not subsidiary to a pre-existing function.

140. Mr Goudie QC disputed the submission that the section 28(6) arrangements were wholly exclusive. He pointed out that other broad powers such as those contained in sections 111, 123 and 151 LGA 1972 still existed and operated in tandem with the LA 2011 powers. Under the LA 2011, the broad powers conferred by section 1 (see paragraph [122ff] above) militated against the narrow and constricting interpretation advanced by Mr Oldham QC. He pointed to section 28(11) (see paragraph [130] above) which, he argued, showed that the routes by which an authority might come to a decision were not confined to the formal arrangements: The parenthetical words – "*(whether or not the finding is made following an investigation under arrangements put in place under subsection (6))*" – had been inserted by the Parliamentary draftsman specifically to avoid undue rigidity and to ensure that authorities were empowered to undertake informal inquires and investigation which could, *then*, lead to the initiation of formal investigations. He argued that this flowed from the premise expressly set out in section 28(11) that the "*finding*" of a failure to adhere to a Code might arise outside of "*an investigation under arrangements*" convened under section 28(6). This, he argued, disproved Mr Oldham's analysis.

141. In my judgment nothing in the LA 2011 or in section 28 thereof prevents a Council performing pre-formal investigations. What the Act requires is that once an Authority determines upon a formal inquiry into an allegation of breach of a Code then it must, *prima facie*, utilise its formal arrangements. But there is no prohibition on pre-formal inquiries and investigations. Such pre-formal inquiries may be necessary to see whether a complaint brought to its attention is frivolous or vexatious or whether even if it has substance it should be dealt with by some other procedure or avenue such as civil proceedings in a Court or a complaint to the police. Pre-formal inquiries may also, as this case shows, involve alleged misconduct by members, officers and third parties whereas the formal Arrangements concern only members. In my view, a Council is entitled to investigate in order to find out whether a *prima facie* case exists and in order for them to receive advice as to the appropriate next steps. Were the distinction between pre-formal and formal inquiries not to exist it would mean that every allegation, however trivial or absurd, could only be investigated through a formal process even if that were wholly disproportionate and represented an unnecessary squandering of the Council's scarce resources or would involve the addressee of a complaint in an unnecessary expenditure of time, money and effort. To my mind this is the common sense interpretation of Section 28 LA 2011 and avoids undue rigidity and formalism.

142. There are six points to make about the construction of the LA 2011 which support this conclusion:

a) First, section 28(4) is concerned with what happens after there is a "*failure to comply*" with a Council's code. On its terms it says that it is concerned with how the failure is "*dealt with*". It does not address how the allegation of failure

is investigated, i.e. how the finding of failure comes about (under section 28(6)(a)). It is concerned with the later post-investigation Arrangements under section 28(6)(b).

b) Second, the conclusion that section 28(4) is concerned with the effects of prior findings of breach is confirmed by the second part of section 28(4) (cf the words after the semi-colon). The use of the phrase "*in particular*" indicates that the subject matter of this part of the section falls within the same subject matter of the first part. This part of section 28(4) concerns the legal consequences of a finding that a member has acted in breach of the code on consequential decisions. An example of such a "*decision*" might be the decision to convey or transfer a legal interest in land. The mere fact that there is a finding of failure does not by that fact alone invalidate the conveyance or transfer. This reinforces the conclusion that section 28(4) is generally concerned with a Council's Arrangements which address the position <u>following</u> a finding of breach.

c) Third, section 28(11) makes sense in this context. It is concerned with the "*action*" that may be taken following a finding of breach. The words in parenthesis are based upon the premise that there has been a finding of failure to comply which has arisen *outwith* the <u>formal</u> Arrangements under section 28(6). As Mr Goudie QC argued those words are inconsistent with the suggestion that investigations into alleged breaches can <u>only</u> ever be conducted under formal Arrangements.

d) Fourth, this analysis makes practical sense in the context of Parliament's intent. The provisions in the LA 2011 governing investigations were described as "*puzzling*" and unclear by Edis J in *John Taylor v Honniton Town Council et ors* [2016] EWHC 3307 (Admin) paragraphs [30], [34] and [39]. He rightly stated that the solution had to be found by identifying the Parliamentary intent. Allegations against members can be investigated formally or informally. If the Council finds a breach by a member then it can impose no sanction open to it under its arrangements <u>unless</u> it then invokes the formal Arrangements (as per section 28(4)). Only then does it become empowered to take "*action*" and impose any form of sanction. For the reasons I have given above I consider that this interpretation accords with the intent of Parliament. It eschews undue formality. It ensures however that no sanction can be imposed upon a member without the formal Arrangements having been invoked.

e) Fifth, the reliance placed on *Credit Suisse* (*ibid*) does not assist. A ruling on the interpretation of the LGA and section 111 thereof does not read across to the LA 2011 especially given section 1 LA 2011 which, unlike section 111 LGA 1972, is free standing and not subsidiary.

f) The net effect is that the Claimant's argument that the Council can only ever investigate an alleged failure to comply with a Code *via* the formal Arrangements and that there is no scope for pre-formal inquiries, is rejected.

D. Ground 1: Actual and Apparent Bias

(i) Introduction: The Claimant's submission

143. I turn now to the Claimant's Grounds. In Ground 1 the Claimant argues that the Wragge Report was tainted by bias and that all procedures based thereafter wholly or partially upon the Report are equally tainted by actual or apparent bias. This is because of comments made by Mr Mark Greenburgh during the investigatory process by Wragge. The comments in question are described in paragraph [64] above. It is said that the bias revealed by these comments was transmitted into the Wragge Report and into the *sequelae* including: (a) the Opinion; (b) the Price Report; (c) the Audit Report; and (d), will, inevitably, flow onwards into any future proceedings of the Standards Committee.

144. In the text below I consider first, whether the comments amount to actual and / or apparent bias. Second, I consider whether, if they are so capable, there is any risk in an ultimate decision arrived at by the Standards Committee being tainted or contaminated by that bias.

(ii) Existence of bias

145. As to bias, Mr Oldham QC realistically accepted that the high watermark of his case were the comments made by Mr Greenburgh in October 2015 and that other statements also said to reflect bias (some of which are disputed) do not add materially to the analysis. If the case fails on the basis of Mr Greenburgh's statements they will not succeed upon the other alleged observations and statements said to amount to bias. I agree with Mr Oldham QC on this and I therefore concentrate my analysis upon the statement of Mr Greenburgh referred to above.

146. I should observe, for the sake of completeness, that the allegations made at an earlier stage in the course of the investigations to the effect that Wragge (and therefore Mr Greenburgh) were biased by reason of their failure to win a contract for the provision of legal services (described in the Opinion and set out at paragraphs [75] – [79] above), are not pursued.

147. I turn to consider the comments made by Mr Greenburgh. As to these it is common ground between all parties that the statements were objectionable and wholly unacceptable. In my view they are capable of exhibiting racist undertones, especially given the ethnic background of the Claimant. I add that both Wragge and Mr Greenburgh subsequently apologised in writing for these comments.

148. As to the existence of actual bias, it is common ground that a decision will always be invalidated if actual bias on the part of the decision maker is proven. In the present case, the "*decision maker*" will be the Standards Committee, and because the investigatory process is stayed pending the outcome of this claim, the Committee proceedings have yet to be convened and no decision has been taken. Indeed, the panel, who would be appointed to hear the allegations, has yet to be identified. Accordingly, this is not a case where it can be sensibly argued that the decision maker is subject to actual bias. To overcome this difficulty Mr Oldham QC contends that Mr Greenburgh was *actually* biased and this tainted his Report and that the onward spread of contamination is unstoppable and incapable of being prevented. The logic of

the argument is that however remote the actual decision maker from the taint, and whatever steps are taken to protect the decision maker from the risk of contamination, prejudice will inevitably arise of a nature and character which the Court is bound, in law, to protect against by bringing the investigatory procedure to a complete and permanent halt.

149. So far as actual bias on the part of Mr Greenburgh is concerned, I have reviewed both the contents of the Wragge Report, and the interviews conducted by Wragge (by Mr Greenburgh and his associate) with the Claimant.

150. The first interview was conducted on the 4th June 2014. The second interview was conducted on the 16th July 2015. I have studied the content of the interviews carefully. In particular I have focussed upon the nature of the questions posed to the Claimant to identify whether they reveal any hint of bias. I have also concentrated upon the answers given by the Claimant to see whether it could be argued that they were given pursuant to pressure or duress or could otherwise have been affected adversely by any bias contained within questions posed. The first interview on the 4th June 2014 focused upon property transactions entered into by the Council when the Claimant was Chairman of the Land Committee, Asset Management in Land, Disposals Committee. The transcript of the interview spans 55 pages. The questions were posed by Mr Mark Greenburgh. The questions were comprehensive. The interview was courteously conducted and judging by the questions and answers was an exercise in cordiality. There is no evidence of animus on the part of Mr Greenburgh, nor of duress or pressure being imposed upon Councillor Hussain to give particular answers. The Claimant gave full answers to the questions posed to him. I am clear upon the basis of the actual evidence that there is no evidence of actual bias on the part of Mr Greenburgh towards the Claimant exhibited in the course of the interviews. It is of some significance that the comments made by Mr Greenburgh said to amount to bias did not occur until some 16 months later.

151. The second interview, conducted on the 16th July 2015 (also before the objected to comments were made), concerned other matters, including housing allocations. On this occasion questions were posed by both Mr Greenburgh and his assistant, Ms Vivienne Reeve. Again, I have reviewed very carefully the transcript. As with the first interview I can detect no hint of animus or bias and nor can I detect any evidence that Councillor Hussain considered himself to be under pressure or duress in relation to the answers that he gave to the questions posed.

152. It is right to record that on the 22nd January 2016, solicitors acting for the Claimant wrote to Wragge and Mr Greenburgh as part of the Maxwellisation process described above. The letter explains that the Claimant has taken the advice of Leading Counsel (Mr Oldham QC). The letter (starting at page [10]) makes a series of allegations which, *inter alia*, focus upon the style of questioning undertaken by Mr Greenburgh of Councillor Hussain. It is said: that the questioning was unfairly informal; that the questions were overly long and included compound issues; that the interview should, in any event, have taken place only after all other interviews had taken place and Councillor Hussain had an opportunity to review the transcripts of all such evidence. My review of the transcripts was made with these points in mind. These observations do not however alter the conclusion that I have arrived at, which is that Councillor Hussain gave his answers voluntarily, and free from duress or pressure. The Claimant understood the questions posed to him and answered accordingly. The probative

weight to be attached to any particular answer (if any) will ultimately be a matter for the Standards Committee in due course insofar as it is relied upon by any party.

153. I turn to consider the Wragge Report itself. This incorporates the inferences and conclusions which Mr Greenburgh drew from the underlying evidence, including the answers given by Councillor Hussain to questions posed in interview. I can, once again, detect no evidence of actual bias. The facts largely speak for themselves. Many of the facts are common ground and undisputed. The scope of the dispute in relation to the toilets is quite narrow and essentially focuses upon (a) the disagreement in the evidence between Councillor Hussain and Mr Willetts and (b) the inconsistency between the oral account given by Councillor Hussain and a number of documents and contemporaneous manuscript notes and records which contradict his version of events, viz. that he was not involved in the sale of the toilets and that he had, at the relevant time, no knowledge of the identity of the purchaser. Mr Greenburgh preferred, on the evidence, the account of Mr Willetts. That was his view about the evidence. Logically, it is at points in the analysis where there are disputes that the greatest potential for taint by bias could occur. Mr Goudie QC however arrived at a similar conclusion. On my reading of the evidence I have concluded, as they did, that there is a serious *prima facie* to answer. I note that Mr Justice Cranston formed the same view after an oral hearing when he refused permission (see paragraph [89] above).

154. As to the question of apparent bias, I accept that proof of actual bias may be exceedingly difficult to establish. It involves the drawing of conclusions about a person's state of mind and whether it is affected by irrelevant considerations and pressures. It also involves drawing a causal connection between the biased state of mind and the decision. As observed, as matters stand I can see no evidence of actual bias. However, the evidential difficulties inherent in proving a case of actual bias is the very reason why, as a ground of challenge, it invariably plays second fiddle to claims based upon apparent bias.

155. I have concluded that the comments of Mr Greenburgh could be viewed by an informed third party as reflecting a degree of personal hostility towards the Claimant. In this regard I apply the standard test for apparent bias laid down in such cases as *Porter v Magill* [2002] 2 AC 357, per Lord Hope at paragraph [102]: "*Whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased*". This is the test advanced by Mr Oldham QC in the present case and it was accepted as reflecting the law by Mr Goudie QC on behalf of the Defendant. I am also prepared to accept that a relevant third party might consider that there was a real possibility that the Wragge Report itself could be affected by bias. This is because the Report reflects the views and opinions of Mr Greenburgh, who was the author of the impugned observations. I do <u>not</u>, however, consider that the informed third party who read the transcript evidence would consider that Councillor Hussain's <u>own</u> evidence, given voluntarily and without any hint of duress or pressure, would be considered as unreliable or risked, in and of itself, being tainted as a result of any bias on the part of Mr Greenburgh. I therefore draw a distinction between the Wragge Report and Councillor Hussain's own oral testimony. The latter was under the control of the Claimant; the former was under the control of Mr Greenburgh.

(iii) The risk that bias could infect the decision

156. It seems to me, in the light of these conclusions, that the critical issue is whether there is a risk that any bias, which infected the Report, could ever, through a process of transmission of contagion, affect a future decision, and decision making process, adopted by the Standards Committee.

157. As to this I am clear that there is no risk. This is for the following reasons.

158. First, such bias as exists is not on the part of a decision maker. Mr Greenburgh was a third party instructed by the Audit Committee as part of the pre-formal investigation designed to determine (*inter alia*) whether any formal investigatory procedure should be initiated. Mr Greenburgh is, thus, far distant both temporally and hierarchically from the decision maker, which will be the Standards Committee when convened in due course.

159. Second, any bias, assuming it exists, is not capable of affecting the evidence given by the Claimant himself. His evidence was freely given, without pressure. His answers are clear and he has not sought to suggest that he was coerced or subjected to duress or that the substance and content of his answers is inaccurate. He was given a full chance through the Maxwellisation process to set out his views on all issues.

160. Third, the conclusions in the Wragge Report and the evidence upon which they are based have been subject to independent review by Leading Counsel in significant part precisely because the Council took the issue of bias seriously and wished to defer any decision as to whether, and if so how, to proceed until the Council was in receipt of a fully independent expert advice from Counsel. In giving advice, Leading Counsel was aware of the comments of Mr Greenburgh and took them into account. The Claimant was given a chance to make submissions to Leading Counsel. Counsel's view of the evidence was that there was a *prima facie* case which should be investigated by initiation of the formal procedure under the LA 2011 Arrangements. Counsel had access to the transcripts of relevant interviews and the documentary evidence. Counsel examined, deploying independent judgment, the Wragge Report, not accepting it at face value. In a number of respects, Counsel disagreed with the conclusions arrived at by Mr Greenburgh. In short, this intermediary analysis by Counsel very substantially reduces the risk of the transference of risk of bias to a level where it can essentially be discounted.

161. Fourth, the decision to proceed with an investigation was taken by the Chief Executive of the Council, Mr Britton, against whom there is no personal allegation of bias, (I address the separate complaint about political motivation at paragraphs [171] – [177] below). He proceeded to initiate the formal investigation relying upon the advice of Leading Counsel.

162. Fifth, the Chief Executive referred the allegations to the independent Monitoring Officer who, in turn, instructed the Defendant's legal officials to conduct an investigation as Investigating Officers. The Investigators re-interviewed the Claimant and he was permitted to submit new documentary and written evidence in support of his position. The voluntary evidence given, during this process, by the Claimant is consistent with that he gave to Wragge. The officers, considering the evidence in the

round, considered that there was a case to answer (see paragraph [102]). In the light of that review the Defendant has referred the matter to a Standards Committee hearing.

163. Sixth, the next stage is therefore the Standards Committee. The procedure which the Defendant has indicated will be adopted guarantees independence, objectivity and fairness. See paragraphs [105] – [111] above.

164. In the light of the above, any taint attaching to the Wragge Report is so remote from any future decision which will be taken by the Standards Committee that there is no discernable or identifiable risk that the decision would or could ever be affected by contamination. Between the Wragge Report and a future decision of the Standards Committee there have been a series of independent eyes reviewing the evidence which have concluded that there is a serious case to answer. The evidence now includes the fresh evidence given by the Claimant which, as observed, is not materially inconsistent with that given to Wragge. Further, in the course of the Standards Committee proceedings, the Claimant will be entitled to give evidence and legal representatives on his behalf will be able to question adverse witnesses.

165. I therefore conclude that there is no remotely plausible risk or possibility that any taint attaching to the Wragge Report could exert any adverse influence upon the decision making process to be carried out by the Standards Committee.

(iv) Precautionary safeguards

166. That is my clear conclusion. I have however considered, as an alternative, whether out of an abundance of caution there are directions that I can give to protect further the Claimant from even a hypothetical risk of bias. I have concluded that to provide further protection to the Claimant:

a) As part of the Standards Committee proceedings no use should be made of the contents of the Wragge Report. This does not, however, prevent subsequent analysis of the Wragge Report or references to it, for example contained in the Opinion or in the Price Report, being placed before the Standards Committee. Further, this does <u>not</u> prevent the evidence upon which the Wragge Report is based also being placed before the Committee. I note that the Council has already indicated that no reliance will be placed on the Wragge Report before the Standards Committee.

b) A concise statement should be prepared (with the Claimant being given an opportunity to comment upon a draft) by way of briefing to the Standards Committee. This should explain why the contents of the Wragge Report are not to be used. It will serve to provide explanatory context to any other documents which may be placed before the Committee which do refer to the Wragge Report. Nothing prevents this Judgment being provided to the Committee.

c) Nothing in these directions prevents the Claimant, should he so wish, referring to the Wragge Report. The direction I make is based upon the Claimant's argument that he risks prejudice by reason of the contents of the Wragge Report and the Claimant is entitled to waive any such concern if he feels it is in his advantage to do so. In the event that the Claimant decides to refer to the

contents of the Wragge Report, the Council will not then be precluded from referring to any other part of that Report in so far as reasonably necessary to provide context to any submissions made by the Claimant.

167. These safeguards are to be included in the Order of this Court.

(v) Guidance from case law

168. In arriving at the above conclusion, that the Claimant's case on bias fails, I am fortified by the approach adopted by the Court of Appeal in *Competition Commission v BAA Limited* [2010] EWCA Civ 1097 ("*BAA*"). In that case, the Competition Commission ("CC") came to the conclusion that the supply of airport services by BAA Limited ("BAA") exerted an adverse effect upon competition and the CC adopted a package of remedies including divestiture by BAA of Gatwick and Stansted airports and also one of Glasgow and Edinburgh airports. BAA appealed to the Competition Appeal Tribunal ("CAT") and as part of its arguments, it contended that there was apparent bias on the part of Professor Moizer, who was one of six members appointed to the CC panel to conduct the investigation. The gist of the allegation was that Professor Moizer had acted since 1987 as one of three external advisers to the Greater Manchester Pension Fund ("the Fund"). The Fund was administered by Tameside MBC. This comprised 10 local authorities who owned the issued share capital of Manchester Airport Group Plc ("MAG"). MAG owned and operated Manchester Airport as well as other airports in the United Kingdom. MAG played an active role, as a complainant, during the CC investigation. In particular, it made submissions as to the future business of BAA and it was interested in the possibility of acquiring any assets which the CC might direct were to be divested as part of its remedies package. There was thus the possibility that Professor Moizer, in his advisory role with the Fund, was in a conflict of interest with his adjudicatory role as part of the CC panel. On the 23rd February 2009, Professor Moizer stood down with immediate effect from the CC panel, though he only formally stood down on the 3rd March 2009. The CC Report was published on the 19th March 2009. The CAT concluded that BAA had not waived any right to object on grounds of apparent bias and concluded that the CC deliberations were tainted by bias. The decisions, findings and reasoning of the CC were quashed. On appeal, the Court of Appeal concluded that the CAT was correct to conclude that there was a risk of apparent bias. However the Court of Appeal disagreed with the CAT as to whether the ultimate decision of the CC, contained in its Report of the 19th March 2009, was vitiated by apparent bias. The Court of Appeal observed that the Report was signed off by the five remaining members of the panel and the Court accepted the argument that apparent bias on the part of Professor Moizer did not vitiate the decision of the five remaining members. The Court concluded that there was no invariable rule that when one member of a decision making body was tainted by apparent bias that the entire tribunal was "*affected second-hand by apparent bias*" citing *ASM Shipping Limited v Bruce Harris* [2007] EWHC 1513 (Comm) ("*ASM*") at paragraph [44] per Andrew Smith J. At paragraphs [34] and [35] Lord Justice Maurice Kay, having cited *ASM*, observed that: "*... cases in this area are necessarily fact-sensitive*". The Court focussed upon the causal connections that would need to occur between the apparent bias and the end decision. It concluded that there was no realistic prospect that any conceivable taint contaminated the end decision.

169. It seems to me, by analogy with the decision in *BAA* (which was a case – unlike the present – where the person exhibiting apparent bias was on the decision making panel), that the chain of causation between any possible taint contained in the Wragge Report and a final decision of the Standards Committee is so remote and hypothetical that it is not the sort of connection that any Court should, sensibly, take cognisance of.

(vi) Conclusion

170. For all these reasons I reject the Ground based upon bias.

E. Ground 2: The Investigation was Politically Motivated and Thereby Pursued for an Improper Purpose and/or was Irrational

(i) The Claimant's submission

171. The allegation of politically motivated decision making was levelled at the legality of the decision to publish and the decision to continue with the investigation. I address publication at paragraph [242] below. The Claimant argues that whilst party politics plays a legitimate part in much local authority business, the institution and pursuit of misconduct allegations against a member for political advantage or to settle political scores is unlawful because it uses a power for an improper purpose. Mr Goudie QC has not argued that any decision would have been lawful had it in fact been politically motivated. In particular it is not argued that section 1 LA 2011 would come to the rescue. The Claimant's case is that the decision to investigate following receipt of the Wragge Report and the Opinion was motivated politically upon the part of Mr Britton, the Council's Chief Executive. Mr Oldham QC did not argue that Mr Britton was personally biased, but that in the particular circumstances prevailing at the time, his decision became overwhelmed or subsumed by pressure imposed upon him by particular Labour Councillors, who had a political agenda to pursue, which would be advanced by the continuation of an investigation into the members referred to in the Wragge Report and Opinion, including the Claimant.

172. The facts relevant to this submission were developed at length during the hearing. They are set out in witness statement evidence adduced by the Claimant and those on his behalf and by reference to documentary evidence, such as extensive press coverage recording comments and observations made by particular Councillors about the investigation. The evidence can be summarised in the following way. The pivotal figure is said to be Councillor Eling. Mr Oldham QC pointed out that he had declined to give evidence in the present proceedings. In March 2016, the Leader of the Council who was also the Leader of the Labour Group, Councillor Cooper, died. It is said that Councillor Eling wished to become the new Leader. At this point, Councillor Eling did not wish the Wragge Report, which concerned Councillor Jones and the Claimant, to be published. He was of the view, according to the Claimant in his evidence, that there was "*nothing*" of substance in that Report. However, the position of Councillor Eling changed upon the declaration on 29th April 2016 by Councillor Jones that he intended to mount a challenge for the leadership of the Labour Group. At this point, Councillor Eling performed a *volte face*. It is said that Councillor Eling's wife joined in and threatened both Councillor Jones and the Claimant in an attempt to dissuade Councillor Jones from mounting a challenge. Councillor Eling now contemplated that a continuation of the investigation could be used as a weapon in the political fight against Councillor Jones and Councillor Eling thus endeavoured to ensure that the

material was published because it would harm Councillor Jones. At about this time, the AGM of the Labour Group was convened, at which the leadership was due to be decided. However, the AGM was adjourned until a later date. The Claimant contends that this was to accommodate publication thereby improving the prospects of Councillor Eling becoming leader and he says that there were multiple procedural irregularities in the way the election and appointment of the new Leader was conducted. The Wragge Report and Opinion were in fact published prior to the leadership election. The Claimant contends that the Council broke an undertaking given to his solicitor not to publish the documents prior to the 1st June 2016. The Council dropped certain allegations against the Claimant on the 27th April 2016 but these were reinstated on the 3rd June 2017. Councillor Hussain contends that "... *the catalyst for this was again Councillor Eling's political animus*".

173. The nub of the Claimant's contention, therefore, is that the decision to investigate including the decision to publish were motivated by a political animus and could not be justified simply by reference to the advice of Leading Counsel.

(ii) Findings of fact

174. On the evidence before the Court I do not accept the Claimant's ground of challenge. It is my judgment that Mr Britton decided to proceed for precisely the reasons that he set out in his witness statements, and which he repeated in oral evidence in Court in the course of cross examination by Mr Oldham QC. These reasons are short and simple and boil down to the fact that he received firm and unequivocal advice from Leading Counsel that there should be transparency and openness in relation to the investigation to establish to the public at large that the Council took seriously the allegations made and were investigating them thoroughly and that the allegations should be subject to formal investigation.

175. I accept, on the basis of the evidence before the Court, that there could well have occurred a significant amount of political game-playing at the time of these decisions. However this serves to reinforce the importance in the officers of the Council acting with impartiality. They must take their decisions without regard to political considerations and on objective grounds. The reasons set out in the Opinion were objective and cannot, in my view, be impugned. Mr Britton was not only entitled to rely upon those grounds; he would have been hard-pressed to resist them. Had he failed to proceed in the light of the advice given, then he would, undoubtedly, have been subject to severe criticism to the effect that he was sweeping allegations of serious misconduct under the carpet.

176. Moreover, it appears from the evidence that Mr Britton was, himself, subject to a certain amount of pressure. In his oral evidence, he accepted, in response to a question from Mr Oldham QC, that he believed, having been so informed by a third party, that it was part of the manifesto of Councillor Jones that were he to be elected then he (Mr Britton) would be dismissed from his post. In the event, Mr Jones, who was in Court during the cross examination of Mr Britton, passed a hand written note to Mr Oldham QC. In that note, he disputed that he had ever included as part of his manifesto that he would dismiss Mr Britton. This was not part of the formal evidence contained within the material before the Court. However, Mr Goudie QC did not object to the statement being treated as if it were in evidence and it was duly read out by Mr Oldham QC. Mr Goudie did not apply for Mr Jones to be cross examined upon it, commenting that in

his submission it was irrelevant and beside the point since Mr Britton's point was merely that this was what he had been told by a third party but, more critically, the perceived threat had not affected his decision to publish. I have accepted that explanation.

(iii) Conclusion

177. For the reasons given, I am satisfied that the decision to proceed with the investigation was justified upon proper reasons and was not in any material way motivated by improper political considerations.

F. Ground 3: The Decision to Continue the Investigation in the Light of the Evidence of Bias was Irrational and/or Wednesbury Unreasonable

(i) The Claimant's submission

178. The Claimant next argues that the decision by Mr Britton to "*plough on*" with the investigation in the light of the statements made by Mr Greenburgh, said to amount to bias, was unreasonable and irrational. The evidential base for this Ground is the letter of 6th January 2016, which has been set out at paragraph [64] above. The Claimant makes five points about the letter.

179. First, the observation that the statement by Mr Greenburgh was a "*passing quip*" belittles and undermines the seriousness of the statement and demonstrates that Mr Britton did not take the alleged bias seriously. Second, the reference by Mr Britton to delay was perverse, given that the investigation had commenced in early 2015 and delay could not justify the retention of an investigator who had misconducted himself towards the subject of the investigation. Third, the reference to costs was also misguided. The costs of the aborted investigation would have fallen upon Wragge by reason of their breach of contract with the Council and the Council did not address itself to making Wragge pay for any wasted expenditure. But in any event, the cost of repeating an investigation could not be a reason for tolerating discrimination against the person being investigated. Fourth, the reference by Mr Britton to "*distress to employees and Councillors*" is absurd. The only person whose distress was relevant was the person under investigation, namely the Claimant. It was he about whom the adverse and biased comments were made. The idea that employees or Members could be more distressed by the re-commencement of a process rather than the continuation of an improper process was "*fantastical*". Fifth, the reference by Mr Britton to the Council's "*reputation with the West Midlands Police and public*" was perverse. It suggests that the Council would prefer the police and public to have a misplaced confidence in the probity of an investigation rather than have a well-informed understanding of the behaviour of the investigator. It is stated that the continuation of the investigation whilst the Claimant faced a police investigation was reckless.

(ii) Analysis

180. I do not accept this complaint which is based upon an incomplete and exaggerated reading of the letter. It is apparent from the letter that Mr Britton took the complaints made by Councillor Hussain about bias and his own deep concerns about Mr Greenburgh's comments seriously. He addressed himself to whether the complaints were such that they should affect the Council's confidence in the conduct of the

investigation by Wragge. He was clear that such was the seriousness of the allegations against the Claimant that a thorough and independent investigation was required. He considered whether the investigation should be halted and recommenced with a difference legal provider and an additional "*appropriate person*". He accepted that, on balance, the matters referred to by the Claimant were relevant. It was in the light of these concerns that Mr Britton stated that he could not offer any assurance that the Wragge investigation could be relied upon. And it was for precisely this reason that Wragge was to be instructed to complete the Maxwellisation process but that upon receipt of the final Report the Council would instruct Leading Counsel to review the Report *and* the evidence base upon which it is drawn to provide the Authority with "*independent assurance upon its contents, findings and recommendations*". Independent advice was required before the Authority could take "*further action*".

181. On the evidence before this Court, Mr Britton was not guided in his decisions simply by the factors which the Claimant now complains of. To the contrary, Mr Britton saw real force in the objections about bias and committed the Council to instruct Leading Counsel to conduct an independent review of the findings and all the evidence before acting. This is precisely what happened. It is of significance that Councillor Hussain does not criticise Leading Counsel for the manner in which he conducted his independent review.

(iii) Conclusion

182. The decisions thus taken were, in my judgment, within the scope of the discretion available to the Chief Executive, acting on behalf of the Defendant. They were neither unreasonable nor irrational.

F. Ground 4: There was No Lawful Power to Investigate Alleged Misconduct Pre-Dating the Coming into Effect of the Localism Act 2011 (1st July 2012)

(i) Claimant's submissions

183. I now turn to a series of Grounds challenging the legality of the exercise of statutory powers. Under Ground 4 the Claimant argues that the Council has no power to investigate conduct which pre-dated the coming into effect of the LA 2011 which was on 1st July 2012. On the facts of the case the acts and omissions alleged to give rise to a breach on the part of the Claimant in relation to the sale of the toilet blocks predated July 2012 though it is accepted that the final act in the episode (namely registration of the properties by the purchaser) did not occur until August 2012 which post-dated the coming into force of the Act. Mr Oldham QC argued that the purpose of the LA 2011 was, in effect, to wipe the slate clean for all possible breaches occurring prior to July 2012 and to introduce an entirely new regime based upon the Nolan Principles. The system in place before then (under the LGA 2000) was very different in nature. He argued that misconduct predating July 2012 was not immune from challenge since it could be pursued under the criminal law or in civil proceedings before the Courts. The Claimant also submitted that the transitional provisions in the Localism Act 2011 (Commencement No 6 and Transitional, Savings and Transitory Provisions) Order 2012 could have, but did not, cover the case of all alleged breaches arising before 1st July 2012.

184. In particular Mr Oldham QC argued that the only allegations that could be investigated were those relating to a breach of a "*Code of Conduct*" which was defined under section 28(1) LA 2011 as a Code adopted under section 27 LA 2011 and, it necessarily followed, could not include an allegation of breach of some other Code adopted under now repealed legislation.

(ii) The Council's submissions

185. Mr Goudie QC argued that the jurisdiction of an Authority to investigate wrongdoing was triggered by an "*allegation*" which could, by its nature, relate to misconduct occurring at any point in time. Jurisdiction was not, he argued, predicated upon the date of the occurrence of the alleged breach or wrongdoing. If this were not so then covert and fraudulent misconduct deliberately kept secret by a wrongdoer would escape investigation and sanction. Mr Goudie QC argued that there was no proper, purposive, basis upon which the Court could construe the LA 2011 to lead to this result and indeed cited well known authority to the effect that a Court should seek to avoid obviously unreasonable and absurd results by applying a presumption that Parliament intended to act reasonably: see e.g. *IRC v Hinchy* [1961] AC 748 at page [767] per Lord Reid; and see also, *R (Edison First power Ltd v Secretary of State for the Environment and the Regions* [2003] UKHL 20 at paragraph [116] per Lord Millet:

> "The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless."

And at paragraph [117]:

> "But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it: see (in a contractual context) *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 at p 251 *per* Lord Reid. I do not, therefore, find it profitable to discuss whether the effect of the ESI Order amounts to 'double taxation' or 'double assessment' (whether straightforward or not) or the rather less objectionable 'double recovery'. I would prefer to go straight to the real question: whether the scheme established by the ESI Order is so oppressive, objectionable or unfair that it could only be authorised by Parliament by express words or necessary implication."

186. As to whether the alleged breach has to be of a Code adopted under the LA 2011 and not any pre-existing Code (adopted under earlier legislation) the Council argued that under section 28(6) LA 2011 the Authority must have in place "*arrangements under which allegations can be investigated*" and section 28(9)(a) defines an "*allegation*" for these purposes as "*… a written allegation – (a) that a member… has failed to comply with the authority's code of conduct…*". It is said that the Council can thus use its formal Arrangements to investigate any written allegation that a member has failed

to comply with its Code and that the key is the date on which the allegation is made and not the Code which was in force. Under the Council's formal Arrangements there is a specific complaints procedure whereby "*allegations*" can be made.

187. It is argued that the "*Code*" is not only one promulgated after the coming into effect of the LA 2011 but also any pre-existing code applicable at the date of the misconduct alleged. The Act acknowledges that Council's might already have codes of conduct in place before the Act became effective: See Section 28(5) LA 2011 (see paragraph [138] above). The phrase "C*ode of Conduct*" in section 28 when read purposively, means codes promulgated under the LA 2011 as well as pre-existing Codes.

(iii) Analysis

188. I start with the purpose of the legislation. I reject the submission that the Council did not have the power to investigate any alleged misconduct under the LA 2011 occurring prior to its coming into effect in July 2012: If this were so it would have the effect of creating an amnesty for all sorts of serious misconduct including covert and fraudulent practices. There is nothing in the statutory language or in any admissible pre-legislative material which supports such a surprising conclusion which would thwart the very Nolan Principles that Parliament was seeking to entrench in statutory language in the LA 2011. To construe the transitional provisions of the LA 2011 as leading to this result would be unreasonable and inconsistent with the principles that Parliament was seeking to endorse and give teeth to. This approach is consistent with case law on principles of interpretation: see paragraph [185] above. Nothing in the LA 2011 can therefore be construed as precluding a Council from investigating pre-July 2011 conduct and in using such investigatory machinery as it has in place for that purpose. I rely also on the analysis of Hickinbottom J in *Heesom* cited at paragraph [123] above where the Parliamentary intent was identified in terms of enhancing localism, deterring vexatious political complaints and facilitating whistle-blowing. Nothing suggests that an amnesty was contemplated.

189. The most logical way to construe the LA 2011 which avoids such consequences is, as the Council argues, by focusing upon the allegation as the trigger for an investigation under an Authorities' Arrangements, but not the date of the acts or omissions complained of, or, of the Code in place at the time of the allegation.

190. I conclude therefore that the right to investigate a breach of duty by a member arises when there is an "*allegation*" which is then submitted to the formal investigatory Arrangements. That allegation can cover conduct pre, and post-dating the coming into effect of the Act. There is no prejudice to a member subject to investigation. The Code that will govern the conduct being investigated is that operative at the time of the behaviour in question and any investigation which occurs will always be subject to an overriding principle of fairness so that, in the extreme, if a member could not get a fair hearing because of (say) the vintage of the allegation and the fact that critical exculpatory evidence might no longer be available that might serve to limit or prevent the investigation. But that would be a result of the operation of fairness principles and not some artificial constraint on the temporal jurisdiction of the Council.

191. This view is supported by Article 7 of the Localism Act 2011(Commencement No 6 and Transitional, Savings and Transitory Provisions) Order 2012 which (in Article 7(6)) provides that allegations made before the LA 2011 came into force "*Shall be*

treated as having been made under Chapter 7 of Part 1 of the Act". The Order thus deems pre-existing allegations under (*ex hypothesi*) old Codes as being nonetheless subject to the LA 2011 investigatory provisions. The trigger for the invocation of the formal LA 2011 powers is the allegation even where it pre-dates July 2012.

192. What if I am wrong in this? If the Arrangements under the LA 2011 can *only* be used to investigate allegations of breaches of codes adopted under the LA 2011 and/or conduct occurring post July 2012, does this imply that earlier misconduct cannot be investigated at all because (i) it occurred prior to the transitional date and (ii) it involved a possible breach of a Code pre-existing the LA 2011?

193. In my judgment the answer is "*no*": In such a circumstance a Council can use any other power that it possesses to conduct such an investigation. These could be under, as in this case, the LGA 1972 and/or section 1 LA 2011 alone and/or in conjunction with section 27. If the Council has in place a procedure or apparatus for investigating alleged wrongdoing (as the present Defendant does in relation to the LA 2011) I can see no reason why that procedure or apparatus should not be deployed in order to investigate "*old*" allegations, even if it is primarily intended to be used for formal investigations under the LA 2011. So, in this case, the Council could use its Standards Committee or some other body convened for the purpose as a suitable vehicle for conducting a fair investigation into the alleged "*old*" misconduct. A difference between an "*old*" and a "*new*" investigation may be as to the remedies and sanctions available. But that distinction does not bear upon the question arising here which is whether there is any power at all. I thus agree with the Council's submission that:

> "In any event there is nothing in ss 27 or 28 LA 2011 to preclude the Council from using its arrangements to investigate allegations outside the scope of those sections. The Council has a number of different powers to investigate allegations of wrongdoing… there is no reason why the Council should not use the procedures laid down by its arrangements in the exercise of those other powers."

194. I would add that since an individual could investigate an alleged wrongdoing (as the press and social commentators were doing throughout) section 1 LA 2011 would empower an Authority to conduct an investigation. There are no section 2 "*boundaries*" or restrictions to curb the use of the section 1 general power in this regard.

G. Ground 5: Section 151 LGA 1972: The Authority Acted Unlawfully under Section 151 and it is Impermissible to Rely Upon the Safe Harbour Provisions of the LA 2011

(i) Claimant's submissions

195. Ground 5 contains a variety of different challenges to the lawfulness of the exercise of the power by the Council to conduct the pre-formal investigation. I have, during my analysis of the legal framework, addressed two points of construction which were advanced by the Claimant. The first of these is that under Regulation 2 of the Functions Regulation the officer responsible for commissioning the pre-formal investigation acted unlawfully because he consulted and/or took advice from a member of the executive: See paragraph [121] above. The second is that the Council

had no power to conduct a pre-formal investigation *at all* upon the coming into effect of the LA 2011 on 1st July 2012: See paragraphs [138] – [142] above. I do not address these issues again here save to record that I have found in favour of the Council on both arguments. In addition to these arguments the Claimant now advances the following additional points relating to the scope and effect of section 151 LGA 1972: (1) that there was no basis upon which section 151 LGA 1972 could have been invoked since on the facts the investigation was conducted for reasons relating to employment and standards, not proper financial management; and (2), that even if the pre-formal inquiries were in relation to financial affairs, that under section 151 responsibility was allocated to a "*responsible officer*" who, in this case, was not Mr Britton who therefore did not have the power to initiate such an inquiry.

196. It is also argued that insofar as the Authority now seeks to say in the alternative that powers such as those contained in sections 1, 27 and/or 28 LA 2011 cannot come to its rescue: "*A public body cannot rely on safe harbour provisions in circumstances where it mistook or was unaware of what purpose or function it was discharging; further and in event when the exercise of the other power will involve different discretions and relevant factors: See R ots Comninos v Bedford BC…*".

(ii) Analysis

197. I will deal first with the position under section 151 LGA 1972. I have set out at paragraphs [117] – [120] above my analysis of section 151. In principle, an Authority has the power to conduct pre-formal investigations under section 151 (standing alone and/or in conjunction with section 111 LGA 1972). An investigation into alleged wrongdoing which has financial implications is clearly an integral part of making arrangements for the "*proper*" administration of the Council's financial affairs.

198. As to the argument that the commissioning of Wragge to conduct the investigation was not, in any event, an exercise of the section 151 power because it was more to do with employment than finance I reject this on the facts. The issues Wragge was asked to investigate were all allegations of financial irregularity and all involved, one way or another, the depletion of Council funds. The fact that at the same time the issues being investigated also involved potential breaches of conduct or ethical standards by officers and members is immaterial and does not disqualify the Council from deploying section 151. An inquiry into financial impropriety will, almost by its very nature, involve considerations of possible violations of ethical or other conduct based standards and where the investigation includes the conduct of an officer (in the present case a number of Council employees were also being investigated) employment issues will also almost inevitably arise.

199. To the extent that it is suggested that Mr Britton, *qua* Chief Executive, did not have the power to act because he was not the titular "*responsible officer*", I reject this submission. Section 151 imposes a duty on the Authority as a whole to make arrangements for the proper administration of its financial affairs. This is a free-standing duty. One part of that duty involves allocating responsibility to a specific officer for the administration of those affairs. The duty to appoint a responsible officer does not amount to the complete fulfilment of the section 151 duty which, by its nature, is much wider. And nowhere does the section say that the Chief Executive of an Authority cannot <u>also,</u> as part of the overall arrangements, assume responsibility for ensuring sound and proper financial administration. Put another way, section 151

does not confer an exclusive power and duty on the responsible officer which operates to exclude all other officers from taking steps to fulfil the section 151 duty.

200. I turn now to the alternative argument advanced by the Authority that it also had the power under the LA 2011. I conclude, in the alternative, that the Authority could justify the pre-formal investigation under sections 1 and/or 27 LA 2011. I have set out my analysis of sections 1 and 2 at paragraphs [122] – [127] above. Mr Oldham QC submitted that it was not open to the Authority to argue this since when it took the decision it did not address its mind to the LA 2011. He cited *R (Comninos) v Bedford BC* [2003] EWHC 121 (Admin) ("*Comninos*") at paragraph [32]. A careful analysis of that case and comparison with the present case does not support this submission. In that case an Authority had supported a defamation action brought by officers by *inter alia* giving to them an indemnity which covered adverse costs orders. The officers were ordered to pay 80% of the other side's costs, in a sum exceeding £500,000. The Claimants (rate payers) challenged by way of judicial review the funding agreement as being unlawful. It was argued that the funding agreement was *ultra vires* section 111 LGA 1972. Two issues arose: (1) Did the defendant have power to grant the indemnity; and (2), should the court refuse relief to the claimant upon the basis that there was undue delay in making the application for judicial review?

201. The Judge addressed issue (2), delay, first. He held that there had been extreme delay and to allow the claim to proceed would cause extreme hardship to the officers in question. The claim for judicial review was refused upon this basis. Hence, the answer to issue (1) was thus academic. As to this he stated:

> "It follows that my answer to question (1) is only of academic interest. In the circumstances, I propose to deal with it relatively briefly. The relevant powers are sections 111 and 112 of the 1972 Act, either alone or in combination. On behalf of Mr Gough, Mr Oldham referred, very much as a fallback position, to section 2 of the 2000 Act, which gives local authorities power to promote the economic, social and environmental well-being of their areas. This power cannot avail the council: section 2 did not come into force until 18 October 2000, and at no stage in the council's decision-making process thereafter did it consider, or purport to consider, the exercise of any power under section 2. It is not merely that the section was never mentioned by the council, the council never considered the substance of the discretions conferred by section 2 after they came into force on 18 October 2000."

202. Mr Oldham QC argued in the present case that the fact that the Authority did not address itself to section 27 meant that it could not, after the event, rely upon it. He equated the LA 2011 with section 2 LGA 2000 in *Comninos*. With respect to Mr Oldham QC I disagree.

203. First, the observations of the Judge are *obiter* and summary. There is no detailed analysis of the issue and little by way of general guidance to be gleaned from what is, on the Judge's own analysis, a brief dismissal of a "*fallback*" point.

204. Second, Sullivan J refused to consider section 2 LGA 2000 because as of the date of the decision in issue it was not in force: the funding decision was taken on 23rd June 2000 (cf *ibid* paragraph [10]) and section 2 LGA 2000 came into force on 18th October 2000. It was therefore not even a power which it was open to the Authority to exercise when it took the impugned decision. This is not a point that can be made in the present case.

205. Third, it is plain from section 2 LGA 2000 (the fall back relied upon) that the exercise of the power thereunder was contingent upon the Authority having regard to the well-being "*strategy*" of the Authority under section 4. As such the section 2 power was not freestanding or unconstrained. Before it could be exercised it required the Authority positively to address collateral strategy considerations. If an Authority did not address itself to these collateral matters then there could be no guarantee that the exercise of the power was in accordance with the intent of Parliament. This is the context to the observations of the Judge that the Defendant had not addressed the "*substance of the discretions*" in section 2 LGA 2000. Again, this distinguishes *Comninos* from the present case. In the present case the Authority addressed itself to section 151 LGA 1972 and the issue whether a pre-formal investigation amounted to "*proper*" financial administration. In my judgment sections 1 and 27 LA 2011 are much broader than section 151 LGA 1972 and encompass within them the matters addressed by the Authority under section 151. An informal investigation into alleged financial impropriety by an elected member to determine appropriate next steps is integral to the promotion and maintenance of high standards of conduct (section 27) and it also an activity that an individual might undertake or commission (section 1). The exercise of neither power is contingent upon the Authority being required to address collateral policies, strategies or matters such as conditioned the exercise of the power under section 2 LGA 2000. I am therefore able to conclude by reference to sections 1 and 27 LA 2011 that these <u>were</u> powers available to be exercised at the time of the decision. Sullivan J in *Comninos* could not say the same about section 2 LGA 2000 since he was not able to form an equivalent conclusion about the interrelationship between the exercise of the section 2 power and the section 4 well-being strategy.

206. Standing back if Mr Oldham QC is correct then what could be a perfectly lawful *intra vires* act would become unlawful simply because the relevant officer with authority to act for the Authority did not at the relevant time address himself to the fact that he was without more lawfully entitled to do what he was doing.

207. Finally, I consider the position if all the above is wrong. If (i) section 151 LGA 1972 did not apply and (ii) the Authority could not in principle justify the pre-formal investigation upon the LA 2011 then I must consider whether this affects the validity of the ongoing investigation. As to this even if the pre-formal investigation was unlawful this does not prevent the present, formal, inquiry under the LA 2011 being progressed. The present inquiry, when initiated, started *de novo*. No procedural short cuts have been taken. It now leads to a formal Standards Committee hearing where all the issues will be canvassed, once again, on an essentially *de novo* basis. There is, moreover, a very strong public interest in the Standards hearing progressing. Accordingly, even if I were to have held that the Authority acted unlawfully and *ultra vires* in relation to the pre-formal investigation I would not have held that in

consequence the present, formal, investigation was affected. I have addressed the law on materiality in greater detail at paragraphs [254] – [261] below

(iii) Conclusion

208. In summary: (i) the Authority acted lawfully under section 151 LGA 1972; (ii) in the alternative it acted lawfully under the LA 2011; (iii) but in any event if I am wrong on (i) and/or (ii) I would not hold that the present investigation is unlawful.

H. Ground 6: The Matters under Investigation are Stale and the Continuation of the Investigation is Oppressive and Unreasonable

(i) Claimant's submission

209. The Claimant objects to the continuation of the present investigation upon the basis that the Audit Report (summarised at paragraphs [94] – [98] above) incorporates new and unparticularised allegations of the "*vaguest nature*" going back to 1997. There has been no explanation to the Claimant of the "*several investigations*" upon which the Audit Report is based. Nor has the Claimant been informed of the evidence which supports the allegations. Nor has such evidence been placed before the Court. Some of the allegations have been raised and abandoned before (such as the housing allegations standards complaint). The publication of the Audit Report has inflicted damage upon the Claimant's reputation, which is continuing and which is likely to prejudice the fairness of any ongoing investigation. The latest information provided to the Claimant from the police (in March 2017) is that the Council has failed to provide the police with any information upon which they could even commence an investigation. The position adopted by the police reflects an independent and balanced view of the merits of the allegations which the Claimant faces.

210. The Claimant relies upon an observation of Laws LJ in *R ota Khatun v LB Newham* [2004] EWCA Civ 55 at paragraph [41]:

> "41. Clearly a public body may choose to deploy powers it enjoys under statute in so draconian a fashion that the hardships suffered by affected individuals in consequence will justify the Court in condemning the exercise as irrational or perverse. That is of course the language of *wednesbury*, as I have said. It may well be that the Court's decision in such cases today would more aptly be articulated in terms of the proportionality principle; indeed, as likely as not, one or other of the guarantees secured in the European Convention on Human Rights ("ECHR") would be engaged… At all events it is plain that oppressive decisions may be held repugnant to compulsory public law standards."

(ii) Analysis

211. I do not accept this submission. It is through the actions of the Claimant, in seeking and obtaining a stay of the present investigation pending the outcome of this judicial review, that the Council has been unable to continue with any sort of investigation into the allegations against the Claimant. If and when the Council decide to pursue

those matters, it will, in accordance with its procedures and ordinary principles of fairness, be required to spell out what the complaints are against the Claimant. To this extent, the objection is premature. I would add, however, that the mere fact that there are allegations going back to 1997 is by no means determinative. If, to take a hypothetical example, a member was found to have engaged in covert or clandestine behaviour which had only surfaced many years later, it is no defence to point to the fact that the alleged misconduct had not been discovered earlier. What ultimately matters is whether the allegations may be investigated in a manner which is fair to all concerned.

(iii) Conclusion

212. In conclusion, there is, on the evidence before the Court, nothing stale, oppressive or unreasonable in the Authority investigating allegations which are historical in nature. It will be for the Authority, in due course, to take decisions on whether, and if so how, to proceed with the investigation of such matters. The authority will, inevitably, take into account fairness, which will include the need to ensure that the Claimant is entitled to a fair hearing and this will take account of whether historical allegations can properly be adjudicated upon.

I. Ground 7: The Investigatory Proceedings are Unlawful because the Investigating Officer Appointed by the Monitoring Officer in her Report made "Findings" of Breach by the Claimant and Thereby she predetermined the Outcome and Usurped the Adjudicatory Function of the Standards Committee

213. The Claimant alleges in this Ground that the investigatory proceedings are unlawful because the Investigating Officer appointed by the Monitoring Officer in her report made "*findings*" of breach by the Claimant and thereby she predetermined the outcome and usurped the adjudicatory function of the Standards Committee. The relevant facts are set out at paragraphs [101] – [102] above.

214. I reject this complaint. It is not based upon a complete or fair reading of the Price Report which expressly confirms that the report writers were not decision makers (see paragraph [101] above) and which, read in context, makes clear that the report is for the Monitoring Officer who then has the responsibility for taking the investigation forward.

215. But even if I were wrong in this, the complaint is a classic illustration of the sort of administrative error which would have had no bearing at all upon the process going forward. No one has considered the Price Report to contain definitive findings or treated it as such and, as already explained, the next step is a full hearing before the Standards Committee where the Claimant can present his case fully and fairly before any decision is made and where any prior conclusion (if such it be) by the Investigating officer would not be binding or be capable of being treated as anything other than a provisional finding for the purpose of making a report to the Monitoring Officer.

J. Ground 8: The Disclosure of the Wragge Report, Opinion and Audit Committee Report Breaches the Data Protection Act 1998 (DPA 1998) / Article 8 ECHR

(i) Claimant's grounds of challenge

216. I turn now to Grounds concerned with publication. Leading Counsel advised in the Opinion that the Wragge Report and the Opinion should be placed in the public domain: "*Transparency and openness require it. It is necessary for the Council to demonstrate the seriousness and thoroughness with which it has approached these matters*". The evidence given by Mr Britton, both orally and in his witness statements, was that in deciding to publish he relied upon the advice of Leading Counsel.

217. The Defendant published the Wragge Report and the Opinion on 20th May 2016. It has not published any report or document which has been produced in the context of the formal standards investigation being conducted under Section 28 LA 2011, such as the Price Report. The Council's position is that the published documents were promulgated prior to and independent of the formal standard investigations now underway. Publication is said to be justified taking into account the Council's obligations under the DPA 1998.

218. The Claimant argues that the publications were unlawful under prohibitions contained in the DPA 1998 and Article 8 ECHR. The effect of publication upon the Claimant professionally and personally and upon his family personally has been serious. Evidence has been placed before the Court to this effect by the Claimant in his witness statements. It is also said that the documents, and in particular the Wragge Report, contain errors and are not therefore accurate. For the publications to have been justified they had to satisfy the principles laid down in the DPA 1988, and they did not. Publication was not necessary: to comply with any legal obligation that the authority was subject to; for the exercise of any of the authority's proper legal functions; for the exercise of any other functions of a public nature in the public interest; or, for the purposes of a legitimate interest pursued by the authority, these, in outline, being the legal bases under the DPA 1998 relied upon by the Council to justify publication. The Claimant recognises that it is now too late to seek relief preventing publication but he seeks a declaration and damages.

(ii) The test to be applied: Section 4(4) and Schedule 1(1) DPA 1998

219. The Claimant argues that the Council breached the DPA 1998 by publishing the documents in circumstances where publication was prohibited by a combination of Section 4(4) and Schedule 1(1).

220. Section 4(4) does not contain the prohibition but instead imposes a duty on a data controller. Under section 4(4) DPA 1998 the "*processing*" (i.e. disclosure) of personal data by a data controller must comply with the "*data protection principles*" ("the Principles") set out in Schedule 1 thereto. The Claimant relies upon the 1st, 3rd and 4th Principles set out in that Schedule to contend that the publication violates the DPA 1998.

221. Principle 1 in Schedule 1(1) sets out a positive and a negative duty and it is the latter which embodies the operative prohibition. The positive duty is to process personal data "*fairly and lawfully*". The negative duty is to refrain from publishing unless one

of the conditions set out therein is met. I read these duties as conjunctive, i.e. both must be met so that a data controller is prohibited from publishing unless at least one condition is met but, in any event, publication must also be fair and lawful.

222. The principles, in their entirety, are as follows:

> "The principles
>
> 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
>
> (a) at least one of the conditions in Schedule 2 is met, and
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
>
> 2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
>
> 3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
>
> 4. Personal data shall be accurate and, where necessary, kept up to date.
>
> 5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
>
> 6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
>
> 7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
>
> 8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data."

223. Schedule 2 contains the conditions referred to in the 1st principle:

> "Conditions relevant for purposes of the first principle: processing of any personal data
>
> 1. The data subject has given his consent to the processing.

> 2. The processing is necessary—
>
> (a) for the performance of a contract to which the data subject is a party, or
>
> (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
>
> 3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
>
> 4. The processing is necessary in order to protect the vital interests of the data subject.
>
> 5. The processing is necessary
>
> (a)for the administration of justice,
>
> (aa) for the exercise of any functions of either House of Parliament,
>
> (b) for the exercise of any functions conferred on any person by or under any enactment,
>
> (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
>
> (d) for the exercise of any other functions of a public nature exercised in the public interest by any person."
>
> 6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
>
> (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied."

224. Several matters are common ground. It is common ground that the Council is a "*data controller*", as defined in section 1(1) DPA 1998 and that the documents published contain "*personal data*" within the meaning of section 1(1) DPA 1998. This is not least because the documents contain expressions of opinion about the Claimant. It is also common ground that the placing of these documents into the public domain amounted to "*processing*" of such personal data within the definition of "*processing*" in section 1(1) which makes clear that "*processing*" includes "*disclosure of the information*".

225. There is also no dispute as to the legal framework governing enforcement.

226. Various rights are given to individuals under sections 10 – 12 DPA 1998 to apply to Court to curtail unjustified processing. Under section 10 an individual is entitled to require the data controller to cease processing where the processing (including disclosure) is causing or is likely to cause "*substantial damage or substantial distress to him or to another"* and that the damage or distress is "*unwarranted*". Under section 10(4) if a Court is satisfied that a data controller has unjustifiably failed to comply with such a request then it can take such steps as the Court thinks fit. Rights are accorded under sections 11 and 12 in relation to direct marketing and automated decision making. If a Court finds in favour of an individual then it is empowered, under section 13, to award compensation. A court can also order rectification, blocking, erasure and destruction under section 14. Jurisdiction lies with both the High Court and the County Court in England & Wales (section 15).

227. A criminal jurisdiction exists in relation to the obtaining, or obtaining and then disclosing, of personal data without the consent of the data processor: See section 55 which also sets out certain public interest defences.

(iii) Personal sensitive data

228. I should address, for the sake of completeness a further point initially raised by the Claimant under the DPA 1998 which was that the personal data in the Wragge Report and the Opinion included "*sensitive personal data*" within the meaning of section 2 and this triggered the (*prima facie*) more rigorous but in any event different pre-conditions to publication set out in Schedule 3. Mr Oldham QC, for the Claimant, had argued that because there was in the Wragge Report and Opinion references to the fact that the Claimant was a member of the Labour party this meant that the data related to "*... his political opinions*" in section 2(b) and was thus "*personal sensitive data*". I did during argument express scepticism at the notion that a person (such as the Claimant) who stood in a public election as a Labour candidate could have that same, very public, fact treated as "*sensitive personal data*" warranting any sort of heightened protection under privacy law. I was also sceptical that the publication of the mere, isolated, fact that the Claimant was an elected Labour Councillor amounted to information as to the expression of "*political opinions*" in any sensible way. This was the stance adopted by Mr Goudie QC, for the Defendant. He pointed out that under Condition 5 of Schedule 3 the information that the Claimant was a Labour Councillor amounted to information which "*... has been made public as a result of steps taken deliberately by the data subject*". As such the Condition was met. Ultimately, Mr Oldham QC accepted this analysis and he did not pursue a case under Schedule 3.

(iv) 1st principle: Conditions 3, 5(b) and 5(d) and 6

229. I turn now to the argument that publication violated the 1st principle. I start by considering whether one or more of the conditions are met. I then consider overarching fairness/legality. In the present case the Claimant's case is that: (i) none of the conditions for publication are met; (ii) in any event publication is unfair and/or (iii), publication is unlawful under Article 8 ECHR.

230. In the text below I set out my conclusions on the competing arguments under each condition relied upon by the Council to justify publication. The test of necessity in the conditions means more than desirable but less than indispensable or absolutely

necessary (see e.g. *Goldsmith International Business School v Information Commissioner* [2014] UKUT 0563 (AAC) at paragraphs [37]). A test of reasonable necessity should be applied (*ibid* paragraph [38]). This test implies that the Council has an appropriate margin of appreciation. The parties agreed that the power had to be exercised proportionately. The Council advances its case under Conditions 3, 5(b), 5(d) and 6. I deal with each separately below.

231. **Condition 3**: Condition 3 is that the "*processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract*". The Council relies primarily upon section 27 LA 2011 and the duty on local authorities to promote and maintain high standards: see paragraphs [128] – [131] above. I accept that the Council could, in fulfillment of this duty, properly take the view that it was necessary to publish the documents in question. This conclusion fell squarely within the scope of the Council's legitimate margin of appreciation. The reasons given in the Opinion of Leading Counsel, and relied upon by the Defendant, (see paragraphs [84] – [86] above) in favour of transparency are brief but their general import is clear and those reasons are unimpeachable.

232. Support for my conclusion lies in the incorporation of the Nolan Principles into section 28 LA 2011. That section (on Codes) makes clear that members are subject to principles of openness and accountability and it is the duty of the Council to enforce those standards. These are inherent in the broader duty in section 27 to promote and maintain high standards. In my judgment when construing section 27, and indeed all powers and duties of local authorities, full reflection must therefore be given to the Nolan Principles of openness and accountability.

233. An "*obligation*" imposed upon the Defendant also flows from section 151 LGA 1972 (see paragraphs [117] – [120] above). It is a component of the "*proper*" administration of the Council's financial affairs that the authority is seen to be enforcing high standards of financial scrutiny and probity. The Council also has an express duty to maximise revenues from land sales (section 123 LGA 1972, see paragraph [116] above), which would in any event be a requirement of the duty of "*proper*" management of financial affairs under section 151, even if section 123 did not spell out the obligation. Publicising the steps taken to investigate possible failures to maximise returns from the sale of capital assets may constitute a component of the section 123 duty. I am satisfied that Condition 3 is met.

234. **Condition 5(b**): Condition 5(b) is that the "*processing is necessary… for the exercise of any functions conferred on any person by or under any enactment*". A "*function*" includes both powers and duties. In the present case the Authority has "*functions*": to promote and maintain high standards on the part of members; to secure adherence to Nolan Principles of accountability and openness; to ensure financial integrity; and to maximise revenues from the sale of assets. In the exercise of these "*functions*" the Authority was well within its legitimate discretion to conclude that it was "*necessary*" to publish the documents. Condition 5(b) is met.

235. **Condition 5(d)**: Condition 5(d) is that the "*processing is necessary… for the exercise of any other functions of a public nature exercised in the public interest by any person*". For the reasons already given in relation to conditions 3 and 5(b) I find that it was necessary for the Defendant to disclose in order to exercise functions of a public nature and that the exercise was in the public interest. Condition 5(d) is met.

236. **Condition 6**: Condition 6 is that the "*processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*". For similar reasons to those set out above the Council had a legitimate interest in openness and transparency and in securing financial probity in publishing the documents in question. Moreover the public, including the press, who are "*parties to whom the data [is] disclosed*" had a strong interest, also based upon openness and accountability, in knowing what steps the Council was taking to investigate the alleged wrongdoing and potentially serious misuse of public assets and funds. This conclusion is supported by the fact that there were already comments in the press and on social media suggesting that the Council was seeking to suppress information about the investigation. Disclosure was necessary to dispel this impression and to maintain public confidence. I do not consider that any legitimate identifiable prejudice to the data subject (Mr Hussain) was unwarranted. Condition 6 is met.

237. **Overarching fairness factors:** Having concluded that at least one condition is met I turn to the overarching test of fairness set out in Principle 1. I conclude that publication was *fair* in all the circumstances. There is a degree of overlap between fairness and the conditions themselves and the factors that I identify below are also factors which may be said to go to the necessity of the disclosure for the purpose of the conditions. I summarise my conclusions on this below:

a) **Publication enabled the public to see the full picture**: By the time that the Wragge Report and the Opinion were published, on 20th May 2016, many of the allegations against the Claimant had been thoroughly aired in the press and on social media and the existence of the Report and the Opinion were also known in the public domain. The coverage of that material had, in some measure, been partisan and not always accurate. There were strong arguments for concluding that it was fair to all parties to ensure that the entire documents could be seen and evaluated by the public, rather than having snippets referred to and innuendoes drawn from those snippets. Fairness in this context does not necessarily indicate that all persons mentioned in the documents should be happy by publication; it means that the full picture is presented transparently. As Mr Goudie QC pointed out, the publication of the Opinion in conjunction with the Wragge Report mitigated various critical comments made in the Wragge Report. It provided a fuller and more rounded picture of the state of the investigation.

b) **The probability that information about the investigation had already been leaked by politicians for political purposes**: Mr Oldham QC argued that various politicians had been selectively briefing the press for their own reasons and this made publication an intrinsically political and unfair act. I disagree. It does not make publication unfair that much of the material which fell into the public domain prior to full publication had been leaked, and probably deliberately so, by various Labour party Councillors, MPs and/or the Labour party itself in an attempt to curry favour (or disfavour) with the electorate in the light of the imminent election. The decision on publication taken by Mr Britton, the Chief Executive, had to be taken on an apolitical basis. He was, it

seems to me, caught between the devil and the deep blue sea. Whichever decision he took could either advantage or disadvantage one member or another in the forthcoming election. If he published he risked being criticised for political partisanship (as he now is) but if he failed to publish he risked strong criticism for deliberately concealing serious wrongdoing (which he was at the time, prior to publication). At the end of the day he had a duty to adopt a dispassionate and objective conclusion as to what was best for the Authority as a whole in the light of his statutory duties, and he complied with that duty.

c) **Publication avoided an impression of concealment**: There was a strong public interest in the rate payers of the borough having explained to them the nature of the allegations, the evidence both for and against the Claimant, and the views of independent lawyers. It was fair to publish because it proved to the public that the officers were taking their responsibilities seriously and not concealing possible wrongdoing, which was the prevailing impression. Public confidence in financial probity, which includes transparency, especially in times of financial austerity, is very important.

d) **The disclosed material reflected a serious prima facie case to be answered**: The Wragge Report, the Opinion and the Audit Report, in my judgment, set out evidence which created a serious *prima facie* case of misconduct including breach of the Council's standards. There was, as of the date of publication, a case to be answered. Fairness takes into account the nature and depth of the investigations reflected by the documents published and the strength of the case reflected therein.

e) **The change from past practice**: The Claimant argues that the Council had not published equivalent material in the past. There was not much focus upon past-history in the course of the case and I do not have much (if any) evidence upon which to form any sort of a firm conclusion on this. But assuming the allegation to be true it is not in my view an answer. If, but for this point, there is a proper case for publication, then it does not become a bad case simply because a new and more transparent policy was adopted by the Council in this case than hitherto.

f) **Deterrent effects**: The Claimant says that it is "*impossible to see how publication of unproven allegations to anyone, let alone the world, would help maintain high standards*". I disagree: sunlight bleaches. If members know – because the Authority's policy is to publish in an appropriate case – that improper conduct, if it comes to light, will be exposed to the glare of public scrutiny then this, in and of itself, can act as a deterrent to misconduct in the first place. I do not accept that it is wrong or unfair in principle to publish allegations, as opposed to ultimate findings. Allegations are disclosed in every criminal court before a verdict by the very nature of the procedure. Regulatory and disciplinary proceedings that are held in public also involve disclosure of the allegations. And the same is true of civil claims, for instance alleging fraud, which takes place in the County Court or High Court. A hearing before the Standards Committee may, under the Arrangements, be held in public. The simple fact that publications address allegations but not findings is not therefore, *per se*, a reason not to publish.

g) **The private impact of publication on the subject of investigation and their affected families**: I accept that the impact on those who are the subject matter of the publication is relevant to fairness. Mr Hussain has put before the Court extensive evidence of the distress and concern felt by himself and his family. He argues that his private life and that of his family was violated by publication. I do not doubt that publication did have adverse effects upon the Claimant and his family. But the allegations are about Mr Hussain acting in his public capacity. The allegation in relation, for instance, to the toilets is that in his capacity as an important and influential local politician he used his power to confer a pecuniary advantage upon a third party with whom he had a close connection to the disadvantage of the rate payer. An allegation made in any sphere of public life about a politician may impact personally upon the politician and his or her family. But that does not alter the quintessential nature of the allegation and the issue to be resolved as one of public not private concern. I share the view expressed in *DH v Information Commissioner & Bolton Council* [2016] UKUT 0139 at paragraphs [41] and [53] that a Councillor should expect to be scrutinised as to and be accountable for his actions in so far as relevant to his public office and that those who take on public office should expect to be subject to a "*higher degree of scrutiny and that information which impinges on their public office might be disclosed*". In the present case whilst fairness requires me to take account of the impact of publication I do not consider that it outweighs the factors favouring publication.

(v) 3rd and 4th Principles

238. I turn now to the allegation that publication breached Principles 3 and 4. The 3rd Principle includes that the "*personal data shall be… relevant*" and the 4th Principle includes that it shall be "*accurate*". The Claimant argues that since Leading Counsel in the Opinion concluded that the Wragge Report was "*wrong, unfair or suspect in some respects*" then it is neither relevant nor accurate and accordingly the Wragge Report and the Opinion which repeats those errors by referring to them violate the DPA 1998. I do not accept this objection. First, I can see that when the personal data in issue relates to matters such as: name, address, age, marital status, nationality, etc, that accuracy is achievable. However, the concept of "*accuracy*" may need to be seen in a different context in relation to data contained in the Wragge Report, the Opinion and the Audit Report. These strive to make provisional findings only, not definitive findings. As a matter of logic a document can *accurately* set out findings which are understood as provisional or *prima facie* findings even if later those views are not upheld at a full hearing. The subsequent formal findings do not render inaccurate the earlier view inaccurate as provisional or *prima facie*. The Claimant's objection, if valid, would preclude the publication of *any* report containing provisional findings which by their nature run the risk of later turning out to be inaccurate when tested at a trial or subsequent hearing convened to determine their truth. In my view a document which contains provisional findings and sets out no more than a *prima facie* case for further investigation cannot for this reason be said to be inherently inaccurate. Second, the Claimant does not provide any particulars of those parts of the Report which are said to be irrelevant. All that he has done is identify the few occasions when Leading Counsel took a slightly different view of minor details to that in the Wragge Report. This was essentially in relation to the conclusion by Wragge that

there was no evidence to support the Claimant's view that the proper valuation of the toilets was far less than the independent valuer's assessment (see paragraph [74] above). Counsel pointed out that Mr Willets had also expressed a similar view, so that there was at least *some* evidence. The publication of both documents provides a balanced view to the public. The public now has before it a series of provisional views and opinions which it can read and evaluate in the round.

(vi) Article 8 ECHR

239. The Claimant submits that disclosure was unlawful for the purpose of Schedule 1(1) DPA 1998 and upon a free standing basis because of Article 8 ECHR. I reject the submission under Article 8 ECHR. Any prejudice caused to the Claimant and/or his family was far outweighed by the powerful public interest in openness, transparency and accountability.

(vii) Alternative remedies

240. Mr Goudie QC, for the Council, argued that if the Court found a breach of the DPA 1998 no relief should be granted because the Claimant had a perfectly adequate alternative remedy in a claim for a declaration and/or damages brought in the County or High Court under Section 10 DPA 1998. I can deal with this briefly. If I had concluded that the Defendant had breached the DPA 1998 I would not have refused relief upon the basis of the existence of an alternative remedy. First, the postulated alternative remedy is not in truth an alternative since it includes relief granted in the High Court of which the Administrative Court is a component part. This case is unlike one where an alternative remedy lies in (say) a specialist tribunal. Second, having heard full argument on the merits it could not serve any principle of good judicial administration or proportionality to refuse relief upon the basis that the Claimant could have commenced proceedings elsewhere in the High Court. In this regard it is common ground that a claim against a public body for breach of the DPA 1998 may sound in public law. Third, for related reasons there would have been no utility in refusing relief since to have done so would only have increased costs and delay.

(viii) Conclusion

241. In conclusion, the objections under the DPA 1988 and Article 8 ECHR fail. The publications were lawful.

K. Ground 9: Publication was Politically Motivated and thereby for an Improper Purpose and / or Irrational

242. I have dealt with this fully at paragraphs [171] – [177] above in the context of continuation of the investigation. On the facts I reject the submission that the decision to publish was politically motivated. And I also reject the argument that because (as seems to me to be perfectly possible) certain Labour elected members or even the Labour party had selectively leaked parts of the documents that this meant that the Authority was thereby, in some way, precluding from publication. To the contrary the Authority had a clear interest in ensuring that the full picture was disseminated and dispelling any rumour or misconception that it was not taking the alleged wrongdoing seriously.

L. Ground 10: Publication was *Ultra Vires* the Council's Powers and was Not an Act Contemplated by the Council's Formal Arrangements in Place for Investigations under the Localism Act 2011

243. It is argued that the Council had no power to publish the Wragge Report, Opinion and/or Audit Committee Report. I have addressed the Council's powers at Section F above. I have also addressed possible limitations on the Council's powers of publication under Conditions 3, 5(b) and (d), and 6 of Schedules 1 and 2 DPA 1998 (see paragraphs [216] – [241] above). For the reasons set out there I conclude that the Council had the power to publish the documents in issue.

244. On the facts it had powers under Sections 123 and/or 151 standing alone and/or in conjunction with section 111 LGA 1972. Openness and transparency can be a proper component of a policy designed to obtain the best consideration for property being disposed of (section 123) and can also be part of a policy designed to ensure the "*proper*" administration of an authorities' financial affairs (section 151) and in any event is an act which is ancillary to those functions (section 111).

245. Moreover, in my judgment Section 1 LA 2011 confers a clear power to publish, since an individual could publish the material (see paragraphs [122] – [127] above). That power is free standing and does not therefore have to be secondary or ancillary to some other statutory function of the Council.

246. In addition, Section 27 LA 2011 (see paragraph [128] – [131] above), on the duty to promote and maintain high standards, is also broad enough to encompass such a power of publication because publication is conducive to promoting and maintaining high standards. That conclusion is reinforced by reference to Section 28 (see paragraph [136] above) which reflects the wider Nolan Principles of accountability and openness which should pervade public life. Those principles, whilst directed in Section 28 at members, are also of considerable relevance to the way in which the Authority itself conducts its business and affairs. It can hardly be argued that the Authority, as a statutory body operating in the public interest, has a duty to ensure that members act in an accountable and open manner but that the Authority itself need not do so.

247. I accept that publication is not contemplated as part of the Arrangements under the LA 2011 but I do not accept that this is relevant. In this case publication was not part of the formal investigatory measures taken pursuant to the LA 2011 but was part of the pre-formal procedure and was focussed upon a primary purpose other than investigation, i.e. restoring and maintaining public confidence in the ability of the Authority to act with integrity. Publication was designed to show to the public that the Authority was taking its responsibilities seriously and not, as had been alleged in the press, sweeping bad news under the carpet. The "*purpose*" was to establish the credentials of the Authority and to show that it was acting in an accountable manner; it was <u>not</u> a step taken as part of any investigatory process albeit that, obviously, it related to the allegations being investigated. The error in the Claimant's analysis is to assume that it was a formal part of the investigatory process.

248. Finally, and in any event, even were I to be wrong in all of the above I would not have held that publication was material to the process going forward under which the Claimant is entitled to have a fair hearing of the allegations against him (see Section

N on materiality below) and where he is not in any sensible or discernible manner prejudiced by publication in that future process.

249. I therefore conclude that the Authority had the power to publish the documents in question.

M. Ground 11: The Solicitor's Report was infected with Bias and Publication was Accordingly Irrational and / or Unreasonable as was any Other Document (such as the Opinion) Which Referred to it

250. The Claimant alleges that, even if in principle publication was an act within the Council's powers, on the specific facts of the case it was nonetheless unlawful because the Wragge Report was infected with bias and publication was accordingly irrational and/or unreasonable as was any other document (such as the Opinion) which referred to it. The bias argument as advanced by the Claimant was primarily directed at seeking to prevent continuation of the investigation as a whole and I have addressed the question fully at Section D paragraphs [143] – [170] above. I deal with it here briefly. I reject this Ground.

251. First, as set out above I reject the submission that the Wragge Report is based upon actual bias. On the evidence I detect no indication that the report is in any way affected by bias.

252. Second, I do accept that a perception of bias could arise. However, the Council addressed itself to concerns about bias. The Council received advice that the Wragge Report should be published from Leading Counsel who also took concerns about bias into consideration. Counsel endorsed the conclusion that there was a serious *prima facie* case of breach of standards. I share that conclusion. The Council acted upon the advice of Counsel. Publication of the Wragge Report was balanced by simultaneous publication of the Opinion (the Audit Report was not published until later, so is essentially immaterial to this issue) so that anyone reading the documents would understand that there was a concern about bias which counsel found "*troubling*" but that Counsel had also endorsed the overall conclusion in the Wragge Report based upon the evidence. Any informed observer could form his or her own view and could review the analysis in the round.

253. At base this is a rationality or unreasonableness challenge. In my view publication was a judgment call for the Authority to make. It addressed all relevant considerations and it did not take into account any irrelevant matter. In my judgment the Council acted within the scope of its legitimate discretion. The ground of challenge fails.

N. Ground 12: Materiality

254. I turn now to consider the position if I am wrong about the above matters. I consider the position if, contrary to my conclusions, the Authority did act in breach of some applicable public law duty in relation to the investigation or publication. In such circumstances the question arises whether it matters. If the breach goes to the heart of the decision in issue, then it might well matter and the Court could then strike down the decision and (in *extremis*) prohibit its re-adoption. But if the breach is tangential or immaterial to the final outcome or if the Court decides that the breach has no prospective effects then the mere fact that there has been a breach may not be

dispositive. In such a case the Court might declare that there had been a breach but grant no other relief.

255. It is well established that where a public body acts unlawfully but in a manner which is not otherwise *ultra vires* then a materiality test applies. But even where an act is *ultra vires* the Courts do not always strike down the *sequelae* or consequences of the unlawful act. The tenor of recent judgments is that there are circumstances where the effects of an *ultra vires* and unlawful act may survive notwithstanding the unlawfulness. In such cases the Court has to address whether unlawful act exerts any consequences and if it does whether these invalidity effects are prospective and/or retrospective. Case law indicates that the evaluation is highly fact sensitive and a Court will examine all the surrounding facts and circumstances to see whether the consequential effects should also be rendered the unlawful. See e.g. per Lord Phillips in *Mossell (Jamaica) Ltd v Office Utilities Regulation* [2010] UKPC 1 at paragraph [44]: "*Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found, ultra vires, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called 'third actors') during the period before their invalidity is recognised by the court – see, for example, Percy v Hall [1997] QB 924*". In *Sabha v Attorney General* [2009] UKPC 17 at paragraph [42] a declaration was not to be treated as retrospective so as to affect honours previously granted. In *R v Governor of Brockhill Prison ex p. Evans (No 2)* [2001] 2AC 19 at page [26H] it was stated: "*... there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial ruling should be prospective or limited to certain claimants*". In *R (BASCA) v Secretary of State for Innovations and Skills et ors* [2015] EWHC (Admin) 2041 the Court, having held that certain copyright regulations were unlawful declared them to be so prospectively but not retrospectively. In *R (on the application of Shoesmith) v Ofsted* [2011] EWCA Civ 642 the Court generally accepted that the there was no inevitable and implacable rule that an invalid act always led to invalid results. The Court was however in disagreement on how that rule applied to the instant facts: See per Maurice Kay LJ at paragraphs [118] – [119] ("*... the act of a public authority which is done in good faith on the reasonably assumed legal validity of the act of another public authority, is not ipso facto vitiated by a later finding that the earlier act of the other public authority was unlawful*"), and, per Stanley Burton LJ at paragraph [141], and, per Lord Neuberger MR at paragraph [141] citing *Boddington v British Transport Police* [1999] 2 AC 143, 194.

256. A useful review of the authorities is found in De Smith's Judicial Review (7th edition, 2013) at paragraph [4-062ff].

257. In the present case section 28(4) LA 2011 makes clear that an act or omission on the part of a member which is in breach of the applicable Code of Conduct does not, without more, render decisions taken in breach of the Code invalid. This reflects the general case law.

258. In the present case my conclusion is that none of the acts complained of as unlawful could affect the investigations going forward.

259. As to alleged bias I have set out above my conclusion that any taint could not sensibly carry forward so as to exert any material impact upon the future investigation.

260. So far as my conclusions about publication of documents are concerned the relief sought in relation to these is declaratory and compensatory. There is no basis for a conclusion that the publications could exert any adverse impact on the investigation going forward and if and insofar as a risk arises it will be for the Standards Committee to manage and mitigate the risk.

261. So far as the other complaints are concerned they all predate the Standards Committee hearing which as of the date of this judgment has yet to be convened, because of the stay. The rules governing that hearing make clear that the Claimant will have full rights of representation and of defence. All that has gone before is water under the bridge. The Claimant can, if he chooses, give evidence and he can, through his legal representatives, test any evidence put up against him. It is no part of the Claim for judicial review that there is no case worthy of investigation. All the objections are essentially technical and irrespective of the merits of the case. There *is* a serious *prima facie* case to answer and a Standards Committee hearing properly conducted *is* a proper forum for the determination of the case against the Claimant. In my judgment, there is no nexus or connection between the allegations advanced and the fair conduct into a future hearing into the allegations by the Standards Committee. There is also and in any event a powerful public interest in the allegations being fully and fairly investigated. There is no basis why any such objection as is now made, even if valid, could or should affect the investigation going forward.

O. Conclusion

262. In conclusion, for the reasons set out in this judgement the claim for judicial review fails. The stay on proceedings is lifted. The safeguards set out in paragraph [170] above are to be included in the final Order of the Court.