Neutral Citation Number: [2017] EWHC 254 (Admin)

Case No: CO/857/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2017

Before :

MR JUSTICE DOVE

- -

Between :

WHITSTABLE SOCIETY	**Claimant**
- and -	
CANTERBURY CITY COUNCIL	**Defendant**

- -
- -

Daniel Stedman Jones (instructed by **Richard Buxtons**) for the **Claimant**
James Goudie QC and Edward Capewell (instructed by **Canterbury City Council Legal Services**) for the **Defendant**

Hearing dates: 12th – 14th December 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. This case concerns actions taken by the defendant in relation to their ownership of a former outdoor roller skating rink adjacent to the seafront at Whitstable, known for the purposes of these proceedings as the Oval Chalet. On 11th December 2014 the defendant's Executive resolved to authorise its Head of Property to conclude a sale of the Oval Chalet and on 21st January 2015 a contract for this sale was entered into. Both of those actions are the target of these proceedings.

2. The challenge is based upon five grounds. Ground 1 is that the notification and consultation proceedings required in relation to open space land owned by a local authority ought to have been gone through in respect of the sale of the Oval Chalet. Ground 2 is that the contract which was entered into was ultra vires the resolution made on 11th December 2014 and the contract should therefore be quashed. Ground 3 is the contention that the business of the Executive on 11th December 2014 was improperly and unlawfully advertised in breach of the relevant requirements of the Local Government Act 1972. Ground 4 is the contention that the contract for the sale of the land was entered into at a value which is less that the best which could reasonably been have been obtained for the land and therefore in breach of the relevant legal requirements under the Local Government Act 1972. Finally, by Ground 5 the claimant contends that the defendant was in breach of the Public Sector Equality Duty when they reached the resolution which they did and, consequently, entered into the contract for the sale of the land.

3. The structure of this judgment is as follows. Firstly, I propose to set out the history of the Oval Chalet up to the point in time when the defendant commenced consideration of the disposal of the land in 2013. I then propose to set out a narrative of what occurred from 2013 onwards including the history of these proceedings. I shall then deal with each of the Grounds in turn setting out the relevant legal principles and my conclusions in respect of each of those Grounds. Finally, I propose to turn to the question of whether or not in all of the circumstances relief should be granted to the claimant in the event that I am satisfied that any of the Grounds are made out. I am grateful to all those who were involved in the preparation of this case for the hearing, and also wish to thank counsel for their helpful and focussed submissions.

History of the Oval Chalet

4. The Oval Chalet is part of a wider area of land in Whitstable bounded by Sea Wall in the west and Sea Street in the east. The surface of the Oval Chalet site is below the level of Sea Wall and at various times steps and a ramp have been provided in order to permit pedestrian and vehicular access to it. Beyond Sea Wall is Reeves Beech and the seafront. From about 1914 the Oval Chalet was used as an outdoor roller skating rink together with associated tea rooms. Adjacent to the Oval Chalet site to the south and east is an area which was originally part of a single ownership and used as an indoor roller skating rink for a period of time prior to the Second World War. At some point before 1944 this southern and eastern part of the wider site which is enclosed by a building became separated from the ownership of the Oval Chalet and known as the Tile Warehouse.

5. In 1944 the executors of the estate of Walter Reeves entered into negotiations to sell the Oval Chalet to a local business known as Rybar Laboratories Ltd ("Rybar"). During the course of these negotiations Rybar were approached by a local councillor and as a result a letter was written to Whitstable Urban District Council ("WUDC"), who were the relevant local authority at the time in the following terms:

> "We refer to the Oval, Whitstable and our professional purchase through Messrs. J.T Reeves of this site for the sum of £300. When this purchase was made by us we were not aware that the Council had any interest whatever in this property. We now learn, however, through Councillor Bartlett that negotiations were entered into some months back by you through him, and that as far as he was concerned he believed that Mr. Franklin of Messrs. J.T. Reeves had practically agreed a price and that nothing remained except the difficulties surrounding the transfer of the property to the Council. Mr. Bartlett did us the honour of calling on us this morning and we are satisfied that it is our duty and pleasure to withdraw from this purchase in favour of the Council provided that the Council pay no greater sum than that agreed by us namely £300, and that the property is developed and kept as an open space in the interests of the aged of the town."

6. On 18th December 1944 the minutes of the Town Planning and Public Works Committee of WUDC recorded the following resolution:

> "9/33 The Oval
>
> The Chairman of the Committee reported upon negotiations undertaken for the purchase of The Oval site and stated that Messrs. Rybar Laboratories Ltd., had agreed to cancel their negotiations for the purchase of the site, subject to the property being developed and kept as an open space ~~in the interests of the aged of the town.~~
>
> **Resolved –** That if approved the purchase price of The Oval be included in the Draft Annual Estimates for the next financial year." (The text struck through reflects the original document)

7. On the following day, 19th December 1944, the Acting Clerk to WUDC wrote to Rybar in the following terms:

> "I am in receipt of your letter of the 18th instance, and have to inform you that your letter of the 5th instant was duly submitted to the Town Planning and Public Works Committee of my Council yesterday, when it was resolved that I should convey to you my Committee's thanks for your public-spirited action in connection with the conveyance of the above property, and to state that the purchase of The Oval at £300 will be carried through by the Whitstable Urban District Council, and that the property will be developed and kept as an open space by them."

8. Pursuant to this exchange of correspondence, on 1st May 1945 the executors of Mr Reeves' conveyed title to the land to WUDC. Within the conveyance there are no covenants entered into which restrict the use of the land, nor is there anything within the conveyance which stipulates the purpose for which WUDC were acquiring and proposed to hold the land.

9. On 29th April 1946 having advertised the premises for letting purposes WUDC resolved to grant a lease of the Oval Chalet to a Mrs Comber from 1st June 1946 to 1st March 1947. The purpose of the letting was to enable the Oval Chalet to be used as a "good class tea rooms and during winter months as a Youth Club". No plan of the premises or the land which was let exists as part of the archive in relation to this or indeed any of the other land agreements until the subsequent agreement reached between WUDC and the Whitstable Yacht Club ("WYC") to which I shall turn below.

10. On 17th February 1947 Mrs Comber wrote to WUDC asking, amongst other matters, whether they had any thoughts about what she described as the tiled area adjoining the Oval Chalet and which was, as she described, "untidy and unused". She was also seeking a renewal of her lease. It seems that the lease to Mrs Comber was not renewed and in March 1947 WUDC are recorded in committee minutes as resolving to inform the incoming tenant, a Mr Collins, that "he may have the use of the Oval Area for purposes in connection with his café business…if he is prepared to execute, at his own expense, the work of clearing and tidying the site".

11. It appears that at some point in 1947 an offer to lease the Oval Chalet was accepted from a Mr Thomas for the purposes of a snack bar selling teas, ice cream, sweets and fancy goods. On 28th April 1947 WUDC's clerk wrote to a Mr Bennett, a resident of Sea Wall the adjacent street, as follows:

> "In reply to your letter of the 29th instant. I have to inform you that arrangements are being made with the new tenant of the Oval Chalet for the paved area to be cleaned and tidied with a view to its being used in connection with his catering business, i.e. setting it out with tea tables and chairs.
>
> It is proposed to erect a new boundary fence along Sea Wall.
>
> Apart from this, I am not aware of any immediate plan in the Council's programme involving the development of this property."

12. In 1947 it appears from committee records that WUDC seem to have had some internal discussions about the future development of the Oval Chalet site. By 1950 the site had been let again to a Mr Mann. There is within the archive a draft lease which it appears from correspondence was executed and sent to Mr Mann, which contains within it a covenant of quiet enjoyment of the premises in his favour. The correspondence shows that after the lease had been entered into Mr Mann raised complaints about parking in the Oval Chalet obstructing access to his café. WUDC wrote to Mr Mann explaining that they were prepared to permit parking for Mr Mann's café patrons in what is described in the correspondence as the yard. It appears a reasonable inference that is a reference to the open part of the site which had previously been used for roller skating.

13. The claimant has produced witness evidence from local residents who recall using the site during the 1950's and the currency of Mr Mann's leases. In particular Mr Rouse and Mr Darby recall using the Oval Chalet site as a place to play informal games of football and cricket when they were youngsters. Mrs Shirley gives evidence in her witness statement that she was taken to the Oval Chalet site by her father when she was first bought a bicycle at the age of eight and that she learnt to ride the bicycle on the Oval Chalet site and returned to cycle on the Oval Chalet site during this time.

14. In 1959 development proposals promoted by WUDC emerged for the site. On 7th October 1959 Rybar wrote to WUDC expressing their concern about having learned of plans for luxury flats to be developed on the Oval Chalet site and reminded WUDC of the correspondence from 1944 which has been set out above. In their letter they called upon WUDC to "honour your obligations" in relation to that correspondence. It appears that this correspondence was followed up by a telephone call between a representative of Rybar and a WUDC officer. Following the telephone call a file note was produced in the following terms:

> "Dr. T. Ryan of Rybar Laboratories Limited rang Mr. Tomlinson on the 5th November, 1959, to ask what notice the Council were taking of the letter he had written protesting against the suggested development of Reeves Beach. Mr Tomlinson said that a recommendation was being made to the Council on Tuesday night that development should go ahead, but that we should write to Dr. Ryan, saying we were only going to develop part of the site. Dr. Ryan asked what was the position regarding the agreement he alleged was made when his father stood down in connection with this purchase so that the Council could buy the land, but only on the understanding that it would be developed as an open space. Mr. Tomlinson told Dr. Ryan that the Council was being advised that in Law it appeared Rybar Laboratories Limited or Dr. Ryan's father, had no agreement they could enforce, and if the Council wished it could take no notice of what was said several years ago. Dr. Ryan stated that they were viewing the situation most seriously, that they proposed to take Counsel's Opinion as to whether any action was open to them. Mr. Tomlinson said that he would not object to a "without prejudice" discussion at any time, but the matter was one for the Council to decide and they apparently were going to maintain their proposals to develop the site."

15. Alongside these discussions the local MP of the time became involved and an officer of WUDC responded to him explaining the same view as to the absence of any legally enforceable obligation which was set out in the file note.

16. On 16th November 1959 WUDC applied to Kent County Council for planning permission for a block of residential flats and a restaurant. The proposals were ranged over seven stories and contained 14 flats. The site was described in its then present condition in the application form as "café and private car park". Permission for this development was granted by Kent County Council on 29th January 1960. On 2nd February 1960 the public works committee of WUDC resolved in relation to the development and ancillary matters in the following terms:

"6/163 DEVELOPMENT OF REEVES BEACH SITE.

A. The Committee gave further consideration to the letter from Rybar Laboratories Limited regarding the undertaking given by the Council at the time the site was acquired.

Resolved – That Rybar Laboratories Limited be informed that the council intend proceeding with their plan for the development of this site.

B. The Committee also considered the next steps which should be taken for the implementation of this policy.

C. Further consideration was given to the Oval Chalet tenant's application to be granted a further term of occupation in the event of the premises not being required immediately on the expiration of the Notice to Quit."

17. This development was time limited to three years. It was, in fact, never implemented. On 29th September 1961, following discussions which had occurred over a considerable period of time prior to this date, WUDC entered into an agreement with WYC to enable to WYC to use the Oval Chalet site for the parking of sailing boats and dinghies. The agreement provided as follows:

"1. IN CONSIDERATION of the sum of TWENTY-SIX POUNDS now paid by the Licensees to the Council the Council hereby licence and authorises the Licencees their servants and agents and all persons duly authorised by them to enter upon and use for the purpose of a parking place for sailing dinghies from the First day of April One thousand nine hundred and sixty-one to the Thirty-first day of March One thousand nine hundred and sixty-two the premises in the possession of the Council being the land known as the Oval Chalet Car Park Whitstable aforesaid and more particularly described and delineated on the plan attached hereto and thereon coloured pink subject to the conditions hereinafter contained

2. THE LICENSEES undertake:-

(i) to use the said premises for the purpose of a parking place for sailing dinghies and for no other purpose whatsoever and in particular not to allow any sailing dinghies to be displayed thereon for sale or placed thereon for the purposes of repair…

(vi) to maintain the surface of the dinghy park in good and substantial repair in a condition as the same now is to the reasonable satisfaction of the Council fair wear and tear always expected

> (vii) to maintain in good repair and condition to the satisfaction of the Council the fences bounding the premises in particular as marked on the plan annexed hereto
>
> (viii) to permit the Council and their agents at all reasonable times to enter upon the said premises for the purpose of viewing and seeing the condition thereof and forthwith to execute all repairs and works required to be done by written notice given by the Council PROVIDED THAT if such notice be not complied with within one month it shall be lawful for the Council to carry out the work referred to in such notice and the expense of carrying out such work shall be repaid by the Licensees to the Council on demand
>
> (ix) to maintain the said premises in a clean and tidy condition at all times to the reasonable satisfaction of the Council"

18. The plan which accompanied this agreement related it to all of the open land at the Oval Chalet site together with the access to Sea Street, but did not include with it the small building, which the parties accepted at the hearing it is reasonable to infer was used as the café by other earlier occupiers of the site and which was in the north-east corner of the Oval Chalet site.

19. On 24th April 1963 an application for comprehensive development of Whitstable Harbour, including the Oval Chalet Site, was submitted to Kent County Council. Within the application the Oval Chalet was identified for redevelopment as part of a proposed garage, the roof of which would have formed a deck, with shops and a restaurant and a pub around it. That application, it appears, generated some objection and controversy and ended up being refused. Proposals contemplating the redevelopment of the Oval Chalet site were, over the years, periodically expressed and formulated in planning documents prepared for the area. In December 1974 the draft Whitstable Town Centre Informal District Plan was prepared by Kent County Council. Within that plan the Oval Chalet site was proposed for a housing use. In June 1990 the defendant published a consultation document entitled the Horsebridge Area Redevelopment Study. That document addressed the Oval Chalet site in the following terms:

> "10.2 In order to avoid the unsightly appearance of a car park in this location, a deck will be constructed over the top of the whole site and the car park would be disguised by a carefully designed housing development. The site naturally lends itself to this approach because of the higher level of Sea Wall. Initial thoughts were to locate the housing along the Sea Wall frontage. This approach has been abandoned for three reasons. In the first instance it is doubtful whether historically there was any frontage here and by forming it now it would result in the blocking out of sea views from the buildings down the side of Bryce Alley as well as obscuring the attractive view when walking along from the Horsebridge of the group of buildings on the north side of Sea Wall beyond Reeves Beach. At present

> you can look across the curve of Sea Wall and this provides a wider vista. Secondly there has been in the past views expressed that this area immediately opposite Reeves Beach should remain as 'open space' and although there is no legal requirement for the City Council to maintain it as such, it does, it is felt, look right to have a gap in the frontage at this point."

20. In around 1990, and certainly no later than 1990, the relevant entry for the Oval Chalet site in the defendant's land terrier was created. This indication of a date can be derived from the fact that the land terrier was accompanied and informed by a memo from Mr Phillip Wilson-Sharp who was the defendant's then Chief Solicitor. The land terrier describes the land in the following terms:

> "Development as an Open Space for the aged of the town"

21. The memo from Mr Wilson-Sharp dated 18th June 1990, which was written to the city estates officer, appears to respond to a memorandum from that officer dated 26th April 1990. Mr Wilson-Sharp's memorandum provides as follows:

> "Thank you for your memorandum of the 26th April. This is an unusual case in that there is no record of a covenant in the conveyance of the land to the Whitstable Urban District Council, but there appear to have been certain written undertakings given at the time of the purchase, when an original intended purchaser dropped out to allow the Council to purchase the property. The purchase would have been by Rybar Laboratories Limited and a minute was passed that the property would be developed and kept as an open space by Whitstable Urban District Council.
>
> In the light of this and in view of the public concern in the matter I consider it is appropriate to regard the land as held as public open space and I am accordingly placing a copy of this memorandum in the deed packet and in the Council terrier.
>
> You will in any case appreciate that pursuant to the amendments of the Local Government Act brought about by the Local Government Planning and Land Act in 1980, that the Council may appropriate or dispose of public open space provided they advertise the intention so to do in a local newspaper for two weeks (i.e. in two editions), and invite objections to the proposal. They (sic) actually, of course, carry out the proposal until they have considered any such objections.
>
> I trust that this will enable you to deal with the matter."

22. In 1996 Mr Wilson-Sharp returned to the question of the basis upon which the Council owned the Oval Chalet site in the context of responding to a query which had been raised by a Councillor Seath. He wrote to her on 20th September 1996 responding to her enquiry in the following terms:

> "The city Council owns the land edged red on the attached plan. It was brought from the personal representatives of W.H. Reeves on 1 May 1945 for £300.
>
> There was no covenant in the conveyance restricting the use to which the land can be put, but written undertakings were given prior to purchase. In 1990 I therefore advised the City Estates Officer that this land should be treated as held, in accordance with those undertakings, as public open space."

23. In 1998 the defendant prepared the Canterbury District Local Plan. That document contained a policy in respect of land which included the Oval Chalet site in the following terms:

> "Land is allocated at the Horsebridge, as shown on the Proposals Map, for mixed use development. The following planning principles should form the basis of any proposal for development:
>
> …
>
> c) the site of Green's warehouse to be developed with residential use above a surface car park with the retention of the area opposite Reeves Beach as an open space."

24. In 2002 the defendant registered with the Land Registry their ownership of the Oval Chalet. In order to accomplish this, a form FR1 was completed. The officer completing that form erroneously filled in section 10 of the form which is in fact only relevant where there are joint proprietors. In any event, the entry which was made in section 10 of the FR1 was in the following terms:

> "the owners are holding the land as open space amenity land"

25. The form was apparently signed by Mr Mark Ellender as Head of Legal and Committee Services. This entry is, for reasons which will become apparent later in this judgment, relied upon by the claimants, in particular in support of their arguments under Ground 1. In response to the claim, Mr Ellender has produced a witness statement in which he explains his involvement in the preparation of that form and the signing of it in his name. He explains the position in his evidence in the following terms:

> "3… the form was not signed by me personally. Looking at the signature and the reference in Section 7 of the form, I believe it was signed by Mrs Sue Trevett a Legal Executive working within the Legal Section who dealt with the great majority of land registrations. These registrations are very formulaic in nature and were dealt with at Mrs Trevett's level. They were a regular occurrence and in no way exceptional. An application for first registration is a routine administrative task and form FR1 is not a type of document which I would have signed in the normal course of business. I inherited from Mr Wilson-

> Sharp a practice whereby members of staff tended to sign in my name although rubber stamps with my signature were available. I signed my own post but otherwise only signed post or other documents produced by my staff where the matter was of particularly sensitivity or importance…
>
> 4… I had not seen the Land Registry form previously mentioned and enclosed with this letter until the Councillor showed it to me. I was unaware of its content until it was shown to me. The form was not signed by me but signed on my behalf."

26. Forward planning policy was the subject of review by the defendant in the production of the Canterbury District Local Plan First Review which was adopted by them in July 2006. The plan addressed proposed development for the Oval Chalet site. It identified the Oval Chalet site as part of a large area of land including the tile warehouse as a mixed use development site. The relevant policy within the plan is policy TC4(s). That policy provides as follows:

> "(s) The Warehouse, Sea Street: residential or offices or hotel with public open space"

27. This policy is taken forward in the defendant's emerging Local Plan which was published in June 2014. In the emerging local plan there is an identical proposal identified as TCL10. It is these policies which effectively underpinned the development proposals leading to the defendant's disposal which is in dispute in this case.

28. It is important to consider the evidence which has been produced by both parties in relation to the use of the land by the WYC pursuant to their agreement with the defendant to use the land. Their use continued from year to year under the same agreement until that agreement was terminated by the defendant on 15th January 2013. At the point when it was terminated the defendant and WYC entered into a tenancy at will which took effect from 18th February 2013.

29. Over the period of time when the WYC were using the land for sailing boat, dinghy and trailer storage witness evidence has been provided as to the nature, extent and character of that use. Mr Terry Davis has been a member of WYC from 1968 to date and during the course of his membership he was responsible for the lease with the defendant from 1994 and acted during that time as both a General Committee member and also Vice-Commodore, and then Commodore, of the WYC. In his evidence he explains that the WYC had exclusive occupation of the Oval Chalet site whilst they were using it pursuant to the agreement. He explains in evidence provided to the defendant that he didn't see members of the public on the site whilst it was used by the WYC and had he done so he would have asked them to leave. In a second witness statement he explains that whilst this would have been the intention, he doubts whether in practice that in fact occurred. The site was secured to the extent that it was fenced and there were gates to the access at Sea Street which were padlocked shut. He explains in his evidence it was used throughout the period of the agreement with WYC for boat and trailer storage and that whilst the numbers of boats and trailers

fluctuated over the course of time, generally speaking there would be at any given time 10-30 dinghies stored at the site and 15-30 trailers.

30. Further witnesses whose evidence is adduced by the defendant, but who are representatives of the interested party, confirm the general position in relation to the fencing and gating of the site and the occupation of it by WYC for parking boats and trailers. It is accepted that there was no gating to the ramp which led up from the Oval Chalet site to Sea Wall and thereafter Reeves Beach. Mr Davis explains that the rationale for this was that the boats within the Oval Chalet parking site were no more exposed than boats which were left on the beach and so no specific steps were taken to gate or fence off the ramp.

31. The claimant's witnesses present a different, but not radically different, picture of the way in which the site was used. Various witnesses describe in their witness statements members of the public walking across the site whilst it was occupied by the boats and trailers, and indeed one records that her son would use the ramp to practice BMX stunts on his bicycle. Mrs Blaustone, who is a resident of Sea Street, states that from 1999 until 2013 she would see children playing on the site and recalls shouting over to them to take care to respect the boats parked upon it. There is also evidence that people would walk their dog on the site whilst the agreement between the defendant and WYC persisted.

32. The tenancy at will enjoyed by WYC was brought to a close in April 2013. However, before that happened events had commenced which are part of the substance of the various Grounds which the claimant raises, and to which it is now necessary to turn.

The events leading to the decisions under challenge

33. Having created a tenancy at will in favour of the WYC in February 2013 it appears that discussions had been occurring both prior to this event and afterwards in relation to the development of the site. It appears that pre-application discussions occurred between the defendant and the interested party in relation to a scheme which became known in these proceedings as the "Piazza" scheme. It acquired this nickname on the basis that it incorporated a large provision of public open space as part of the development broadly speaking within the area covered by the Oval Chalet site.

34. This scheme was presented to a meeting of the Executive on 10th October 2013 which considered proposals in relation to the redevelopment and disposal of the Oval Chalet site. As part of the preparations for the development of the land and its disposal an Equality Impact Assessment ("EIA") was prepared in relation to the decision on 9th August 2013. Findings of the EIA were as follows:

> "This is a neutral decision. It is not considered that the sale of this land will affect those with the protected characteristic either positively or negatively. Due to the nature of any development there is inevitably an impact on local residents in terms of noise, dust and (business) interruption for the duration of the construction period, which may cause inconvenience and impact on the elderly if they are at home, or the younger family with small children living at home. However, any inconvenience will be temporary only."

35. The Executive Committee meeting in October 2013 was attended by Mr Cox on behalf of the claimant, and during the public part of the meeting he made oral representations to the Executive about the proposals for redevelopment of the Oval Chalet. It appears that by this stage the claimant had become aware that there were schemes afoot to redevelop the site and for the Council to dispose of their land ownership interests. The meeting was recorded and the transcript of the public part of the meeting records Mr Cox's representations as follows:

> "The history of public use of this site goes back a very long way indeed and between the wars it was used as a skating rink and I brought Brian Baker in my car today and he remembers skating on there. When it was sold to the council, the council committed in writing that it would always be kept for public use. This was re-rehearsed in the 60s and in a letter in 1996 to Councillor Julia Seath to Mark's predecessor and then on to make some observations about the perpetuity of the lease for the Yatch (sic) Club which I wont go into, but I have tabled that and I hope that that is shown to you…
>
> So our appeal to you, is to have a Public Space there equivalent to the area. For example, if a four storey hotel was built, much of the storey which is level with the sea wall could be open for public use, that would be covered against the rain. The original undertaking related to public open space for old people. All those people who were children and teenagers when the promise was made are now our elderly and the promise was for them. If the hotel were in a c-shape for example maybe there would be a large piazza. I don't know what exactly is proposed because its secret at the moment. We've had lots of comments from some councillors that you shouldn't worry so much because the planning process will look after all this. Well it can't. I know the planning process very well now and the planning process does not consider any of these legal or honour matters. It just looks at pure planning and its allocated in the draft local plan for three kinds of development. Therefore we ask the Executive to make sure that whichever private party if is contracted with, knows and signs in the legal agreement the condition, that this public realm will be preserved in some form of equivalent and if you consult with the community we can work with you and then there will be no grounds for complaint in the future. There could be a design guide but again the design guide does not have to respect this legal background and historical background of its use by the public. This is a very very sensitive site for Whitstable people. In connection with that, I don't want to go into the details, and you wont, but we don't understand why you are just talking to one party. It's really hard to understand. I can guess now from the minutes of the overview committee that's on your agenda, that its going to be a green space with a capital G and a small s. But never mind whether it's the Oyster company or not, please negotiate with

> several companies. There are many people who will be interested to develop this site and as with the Horsebridge we need at least three designs to choose between and also to maximise the quality of the public realm."

36. In response to these contentions Mr Ellender provided the following advice to the committee, again in the public part of the agenda.

> "Yes he referred to a letter from Phillip Wilson Sharp which was sent in 1996 referring to advice that he gave the then estates officer in 1990. And the relevant bit of the letter was this. *There was no covenant in the conveyance restricting use to which the land can be put, but written undertakings were given prior to the purchase. In 1990 I therefore advised the city estates officer that this land should be treated as held in accordance with those undertakings as public open space*. Now I think there are a number of points to make about this. The first is as Mr Wilson Sharp says there is nothing in the deeds which suggest it was purchased as public open space, there is no restriction in them. Secondly, with the papers that Mr Cox submitted was a very interesting newspaper report from 1960, showing that things don't change very much in Whitstable. There was clearly a lively debate about what this land should be used for and it seems as though the then Urban District Council were not minded to follow whatever might have been said in 1944 when the land was originally acquired. What they did do the year after, was to let the land to the Yacht Club for the purposes of a dingy park and for over 50 years that's what it remained. I mean there is no question of any public open space there, any use of it. The Yatch (sic) Club have given the lease up, which is why the land is vacant. So in other words there is nothing on the deeds that says it is public open space, de facto (sorry, legal speak), in fact it hasn't been used as public open space and I suppose the third point to make as Mr Wilson Sharp said in his letter. He'd given advice to the estates officer, but on the face of it that advice was not accepted because as I say on our own records, not necessarily in the deeds, but on our own records, there is no indication that it was to be used as public open space. So therefore I would say with great respect to my predecessor there's nothing I've seen yet which persuades me that it is indeed public open space."

37. In his witness statement in these proceedings Mr Ellender accepts that he fell into error when he said to the committee that "there is no indication in those records that it was to be used as public open space". For reasons which will be obvious from the matters which have been set out above, that was not an accurate piece of advice. In his witness statement, however, he stands by his view, which is to be considered below, that the Oval Chalet was not held by the defendant as public open space.

38. The officer's report to the Executive meeting on 10th October 2013 was on the private part of the agenda and not for publication on the basis that it affected the financial

interests of the defendant. The report was finally disclosed to the claimant during the hearing. In that report the officers set out that the interested party had presented to them a scheme for the redevelopment of the wider site including the Oval Chalet and the Tile Warehouse for a mixed use development across the entirety of the site. The report addressed issues in relation to both ownership and also open space. In relation to open space the report provided as follows:

> "There was no reference in the purchase deed as to the purpose for which the property was acquired, although the purpose of acquisition was indicated in the summary register of Council's Titles [black book] to be for the development as open space for the aged of the town.
>
> The Whitstable Yacht Club has leased the site since 1 April 1961, so clearly the site has not been available to the public at large for over 52 years. However the current proposal will, by provision of the open plaza within the proposed development looking out towards Reeves Beach, to a very great extent meet that early aspiration"

39. In relation to ownership and potential disposal the report provided as follows:

> "**6. Financial Transaction.**
>
> Because the value of the Council's interest cannot yet be fully determined in the absence of any planning input, the financial aspects of the transaction have not yet been fully dealt with: however, if the Council's position on this development can be agreed, and a formal planning application can be made, the financial element can be fully negotiated. A significant benefit to the Council of any such development is that a large element of the Oval Chalet will form a quality public space in the form of a plaza., A Legal Agreement covering the terms of a joint venture development between the Council and the developer will be documented to secure the development of the site in the manner currently proposed, and securing the provision of the plaza area for the benefit of the public in conjunction with use by the commercial units."

40. At the executive meeting they resolved as follows:

> "1. That the Property Services Manager be authorised to negotiate terms for the development of the Council's site jointly with the adjoining warehouse, and a sale of Oval site be supported subject to suitable terms being agreed and the Property Services Manager being satisfied the sale complies with Section 123 of the Local Government Act 1972."

41. To assist in the implementation of that resolution in January 2014, following a tendering exercise, the defendant appointed Urban Delivery ("UD") as consultants to advise them in valuing the Oval Chalet site for the purposes of disposal, and in

particular to assist in relation to the exercise required by section 123 of the Local Government Act 1972 (the legal details of which are set out below). In their fee proposals UD provided as follows in relation to the work which would be required and the approach which would be necessary in respect of valuation and discharge of the section 123 duty:

> "*Task 1 – Initial Briefing with Council Officers*
>
> We will attend an initial meeting with Council Officers in order to receive a detailed briefing on the background to the project. This meeting will also agree the methodology and scope of our work to ensure it meets the needs of the Council based on the development proposal.
>
> We will follow this with a further meeting with the developer to discuss their proposals and how they see the scheme progressing. We will undertake a site visit and investigate surrounding land uses in Whitstable. Following on-going work we are undertaking for the Council in connection with the harbour, and in preparing this proposal we are already familiar with this location and the land uses in proximity to this site. We are also familiar with a number of property transactions and the implications these have on local property and land values…
>
> *Task 6 & 7 – Updates and Miscellaneous Tasks*
>
> In order to assist the Council pursue this matter to successful completion we will be on hand to provide further advice relating to this proposal, meet with Council Officers, the developer and other stakeholders to answer any questions or resolve any previously unforeseen issues that may arise.
>
> Should the proposed development alter as a result of planning issues or the potential to increase value, we will be available to advise the Council whether such alterations could materially impact on values and advise whether a revised appraisal or s123 Valuation is required."

42. Following the appointment of UD Mr David Kemp, who is the Portfolio Property Asset Manager for the defendant, held meetings with the interested party. In particular, on 7th February 2014 and 28th February 2014 he had meetings involving both UD and also the interested party in order to discuss the valuation and viability exercises which had been presented to the defendant by the interested party. It appears, naturally, that there were also other conversations between Mr Kemp and UD in the course of preparing UD's advice.

43. In April 2014 UD produced their valuation report. They explained within the report that they had undertaken an assessment of the IP's viability appraisals and had commissioned a cross check by an independent third party consultancy of the build costs which had been factored into the viability exercise. They noted, as is common knowledge, that appraisals of this kind are sensitive to their inputs, and that changes

in those inputs can lead to significant changes to the valuations produced. In their report they provided as follows:

> "5.14 The Councils land extends to approximately 0.072 hectares (0.179 acres) and is included in the Canterbury Local Plan as suitable for mixed-use development comprising residential, offices or hotel plus public open space.
>
> 5.15 We have not been able to seek internal advice from the Council's planners as to what may constitute a permissible scheme and have therefore relied on the policies set out in the current planning documents and from discussions with Council Officers in the Property Services Department.
>
> 5.16 Based on these discussions it is felt that it would be very difficult to develop this site in isolation and any development would have to include on-site open space because of the significant public and political sensitivities regarding the Oval Chalet site. In order to comply with this policy we have assumed that it could be feasible to develop four houses on the site while leaving part of the site available for open space. This open space could accommodate a temporary kiosk during the peak summer period and therefore generate an income for the Council. Based on license fees from other kiosk operators and ice cream vans operating in the harbour area we have assumed this could amount to approximately £10,000 per annum…
>
> 5.21 As it is unlikely any such scheme would be designed or permission granted before September 2014, we have been advised that changes to Canterbury"s planning policy may require all residential schemes to include a provision for affordable housing. As such, we have assumed that one unit would be required for affordable housing.
>
> 5.22 Our appraisal reflects a standard developer profit of 17% profit on GDV that most housing developers regard as a minimum return, this also equates to around 20% profit on cost.
>
> 5.23 Adopting these assumptions we have estimated that the Council land has a residual value of approximately £166,000. A copy of our summary appraisal is included at Appendix 4.
>
> Alternative Scenarios
>
> 5.24 In looking at this alternative opportunity we have also run our appraisal on the basis that no affordable housing would be required on-site and also that the Council could make provision for open space provision or enhancements elsewhere in Whitstable, thereby allowing more of the Oval Chalet site to be developed for housing. If this was possible, we estimate it could be feasible to develop six houses rather than the four.

5.25 In devising such a proposal to appraise we have not had any discussion with the planners and cannot therefore be certain that such a proposal would be acceptable to the Council, although we are aware that the sensitivities referred to above relating to development and open space provision are likely to prevent the full redevelopment of the Council's site without some open space on site.

5.26 We provide a summary residual land value on the following bases (see stated Appendix for full summary print out):

Four Houses, Nil Affordable Housing: £337,000 (Appendix 5)

Six Houses, 33% Affordable Housing: £127,000 (Appendix 6)

Six Houses, Nil Affordable Housing: £472,000 (Appendix 7)

5.27 In the above scenarios we have assumed that each of the affordable housing units would achieve a capital receipt of £140,000 from a Registered Provider and where there is no on-site open space a provision of £100,000 is made for off-site provision or enhancements. Were any of these assumptions to change, this would have a significant impact on the residual land values suggested.

5.28 On the basis of the above appraisals it could be suggested that depending on the planning policy acceptable to the Council, the Council's land could be worth between £127,000 and £472,000. As advised by Council Officers, we would comment however that the opportunity to develop six houses on this site with the exclusion of public open space and affordable housing may not be favoured politically for this site.

5.29 As such it is perhaps more likely that the proposal for four houses plus an area of open space may be more feasible for the Council‟s land. If so, this would put the residual land value in a range of £166,000 to £337,000. The determination of which figure is more achievable will be guided by the Council‟s policy on affordable housing and the timing of any land deal. If the land could be sold prior to any change in affordable housing policy then it is feasible that the higher value could be achieved. If however it is accepted that no scheme for the Council's land in isolation could achieve a planning consent prior to any change in policy then the Council may have to accept the lower land value...

6.2 The current scheme proposed by the Developer does not achieve a sufficient developer profit to suggest it is a viable scheme. As such, the overall provision of £600,000 for land acquisition would appear to be too high. However, only

£150,000 of this sum has been attributed to the Council land, reflecting only 25% of land value, which arguably has the greater benefit with more valuable views out to sea.

6.3 As identified by the appraisals for a stand-alone scheme, depending on the stance that the Council takes with regard to its emerging planning policy and the timing of any land deal there may be potential to extract greater value from this site. Such a stance may however conflict with previous intentions to provide public open space to the people of Whitstable.

6.4 The negotiating position could be to suggest the Council land is worth the full £337,000 for four private dwellings on the basis that the deal will be completed before any future changes in planning policy and a requirement for affordable housing.

6.5 On the more realistic basis that the Council would be unable to complete a sale of the land or work-up a planning permission before alterations to planning policy on affordable housing are implemented, we would suggest that the Council should be in a position to negotiate an improved land value than that offered of £150,000 and should look to secure a price of at least £165,000. As such, we would certify that £165,000 represents best value for the Council"s land in regard to satisfying Section 123 of the Local Government Act 1972." (emphasis added)

44. Following internal discussions in relation to this report between officers and leading members it was concluded that a report needed to be prepared in November in order to seek approval from the Executive for the disposal of the Oval Chalet site to the interested party. On 11th November 2014 notice of the meeting of the Executive to be held on 11th December 2014 was given. That public notice contained the following information in relation to the particular item on the agenda with which this case is concerned:

"

The Oval (Former rink rear of The Tile Warehouse), Sea Street. Whitstable	Approval of terms for the development of the site. Financial or business affairs of the Council and other persons. (Paragraph 3 of Schedule 12A of the Local Government Act 1972)	Regulation 5: Private

”

45. On 28th November 2014 the Minister of State for Housing and Planning issued a Written Ministerial Statement entitled “Support for small scale developers, custom and self builders”. That document set out a number of changes to planning policy and included in particular the following:

> “Due to the disproportionate burden of developer contributions on small scale developers, for sites of 10-units or less, and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions.”

46. Prior to the executive meeting, and in accordance with the defendant’s practices, the agenda to be presented to the Executive meeting was considered by the defendant’s Overview Committee on 4th December 2014. That committee resolved to recommend to the Executive in the following terms:

> “1. That the Head of Property be authorised to conclude the sale of the land on the terms set out in this report
>
> 2. That the Head of Legal be authorised to prepare sale contracts and all other legal documentation as is appropriate to conclude this transaction.”

47. On 10th December 2014 the Local Plan Steering Group met to discuss progress on the emerging local plan. It was noted at the steering group meeting, which occurred a day prior to the Executive meeting and was chaired by the same Councillor, that whilst the local plan had been submitted on 21st November 2014 the Inspector who had been appointed to conduct the examination was already involved in other examination hearings and thus the examination hearing would not be before March 2015. The Local Development Scheme published by the Council, and current at the time of this steering group meeting, forecast that the examination hearings would occur in December 2014 with adoption intended for March 2015. Clearly in the light of the fact that the examinations would be unable to take place as forecast by the Local Development Scheme, adoption of the local plan by March 2015 was also not going to occur.

48. The Overview and Executive committees considered in private a paper prepared by the Director of Resources bearing upon the decisions in relation to disposal of the Oval Chalet site. The plan which was incorporated within the report at its outset excluded the defendant’s ownership of the access to Sea Street when identifying the land concerned in the sale. For the purposes of these proceedings it is necessary to quote the following extracts of the report:

> “**4. Local Plan Implications**
>
> The policies in the Local Plan ensure that any future development of this site within the Conservation Area will include the provision for open space and access to the sea front.

Indeed, the developer is keen to provide this – and enter a legal agreement with the Council in that respect, and sees it as an important part of the scheme to be put forward…

5. Financial Transaction.

Having examined the proposals, Urban Delivery have advised that the Council should be seeking an offer from the developer of £165,000 for the freehold interest of its land, on the basis of a scheme as envisaged, and on that basis would certify that this figure represents best value for the Council's land in regard to satisfying S.123 of the Local Government Act 1972. This would be on the proviso that the land sale includes a provision of an overage clause to seek a share of any future uplift in scheme value resulting from alterations to the scheme planning permission which allows a greater density than currently expected. The developer is agreeable to this.

In considering the Council's land on a stand-alone basis, and recognising the significant public and political sensitivities for the Oval Chalet site, it has been assumed that an element of public space would need to be provided if the site were to be released for any development. On this basis, assuming four dwellings might be constructed, but recognising the difficulties of the site, and taking into account that an income might be generated by placing a kiosk on the space during the peak summer period which could generate a rent of £10k each year, a residual site value might reach a figure of £166,000.

Urban Delivery have also run the viability scenarios on three other bases for the Council's land in isolation. These show possible residual land values as follows:

Four Houses, Nil Affordable Housing: £337,000 retail kiosk on open space

Six Houses, 33% Affordable Housing: £127,000 No on-site open space

Six Houses, Nil Affordable Housing: £472,000 No on-site open space

The nil affordable housing provision above pre-supposes the Council could prepare a fully-worked up scheme with planning consent, before the new affordable housing requirements in the emerging local plan take effect – the local plan may become formally Adopted around March 2015, although the emerging plan will be accorded greater weight the further it progresses through its formal process up to adoption. The emerging plan under Policy HD2 requires 30% on-site Affordable Housing, for schemes of 7 or more units. For schemes of 2 to 6 units

either on-site provision or a financial contribution in lieu will be sought. Between now and Spring (March) 2015 the council would have 4 months in which to formally decide not to pursue the joint scheme for Oval Chalet, procure and appoint suitable architects to draw up a full design, and apply and secure planning permission for the site ready for a disposal. This time scale is tight. Even with planning consent, the time-frame for securing planning takes the application significantly closer to the Local Plan Adoption, and a graduated application of the Affordable Housing requirements it likely to be applied against this site, thereby eroding the above reported figures. There is also the risk if the Council attempts to develop its site in isolation without the significant provision of public space that is provided by a joint scheme – that a pressure group of local residents will seek to thwart any development proposals.

Whilst the sale of the Council's land at the above figure to secure this development will satisfy S.123 considerations, additional significant benefits to the locality will be felt from the wider Whitstable townscape improvements, as well as improvements to the economic, social and environmental well-being of the area.

The warehouse site could easily be developed in isolation, and indeed alternative block plans were drawn up for schemes not involving the Council's land, although these did not provide any open space. That outcome would be less satisfactory from an urban townscape perspective than a comprehensive development of the combined sites incorporating enhanced public open space provision.

A Legal Agreement covering the terms of any sale between the Council and the developer will be documented to secure the development of the site in the manner currently proposed or similar, subject to planning, and securing the provision of the plaza area for the benefit of the public in conjunction with use by the scheme occupers...

7. Implications

…

(d) Legal Implications: The council's disposal of land and property is subject to statutory provisions, in particular, to the overriding duty on the council under Section 123 of the LGA 1972 to obtain best consideration that can reasonably be obtained…

(k) Equality Impact assessment: no adverse implications are envisaged…

> **8. Conclusion**
>
> A sale of the Council's interest to a developer who happens also to own large areas of the adjoining land will maximise any likely value. However, and perhaps more importantly for such a visible site in Whitstable on the main traffic route through the town, a comprehensive development scheme for the whole site would be an opportunity to bring significant aesthetic improvements to the locality and meet the desired objectives of many to reintroduce an element of public open space within this site.
>
> A legal agreement will be entered into with the developer as part of the sale, to safeguard the Council's position and expectations for the site.
>
> On this basis it is therefore strongly recommended that Option (2) is agreed. I am happy on that basis of the scheme in contemplation, Section 123 Local Government Act considerations have been satisfied, as confirmed by the Council's consultants – Urban Delivery – on this matter. Further, in the event of any significant alteration to the scheme which increases the net developable floor area, an overage payment will also be due to the Council." (emphasis added)

49. The report also included a section on the Heads of Terms on which the transaction was intended to proceed. That part of the report noted as follows:

> "Open space: a planning condition to preserve an area within the development for open space purposes."

50. On 21st January 2015 the defendant entered into a conditional contract to sell the land to the interested party for the sum of £165,000. It is common ground between the parties that the contract does not contain any contractual obligation to deliver open space as part of the development facilitated by the entering into of the agreement.

Events after the decisions under challenge and in these proceedings

51. On 15th July 2015 the defendant registered a planning application made by the interested party for a mixed use scheme across the wider site including the Oval Chalet, comprising seven self-contained holiday lets, eight town houses, two apartments and one duplex apartment together with a commercial/community building and open space. This scheme was markedly different in the claimant's view from the Piazza scheme which has been described above. The element of open space within the proposal had been reduced to a terrace for the café rather than the open plaza which formed part of the earlier design. This was a feature which caused the claimant to be particularly concerned about the development.

52. In fact that concern about the proposed design had emerged during the course of pre-application public consultation when the scheme had been publicly aired and views formed about its planning merits. A member of the public submitted a petition to Full

Council which was received at a meeting on 23rd July 2015. That resolution read, in part, as follows:

> "We, the undersigned, petition the Leader of Canterbury Council to call for the relevant Committee of the Council to formally review the decision of the Executive, taken in closed session on 11 December 2014, to enter into a conditional contract to dispose of the Oval Chalet Site in Whitstable to Sea Street Developments Ltd to enable to new Council to:
>
> 1. Satisfy itself that statutory best value considerations have been met in terms of the valuation and sale price of the site: given that Best Value does not relate to money alone.
>
> 2. Check that the conditionality applied to the contact reflects the spirit of:
>
> (a)The undertaking given about its use as public open space when the ownership was originally transferred to the predecessor local authority.
>
> (b) The multiple requests by residents to the Council, over many years, for action to be taken to bring the land back into the public realm."

53. This petition was referred to the defendant's Regeneration and Property Committee who were addressed by representatives of the claimants and other concerned local bodies at their meeting on 17th September 2015. Amongst the concerns which were expressed at that time were whether the defendant had achieved best consideration in the contract which had been entered into, and also whether provision of open space had been secured as part and parcel of the land disposal. Ultimately, the Regeneration and Property Committee resolved to continue to fulfil the defendant's obligations under the contract and also to review the way in which the decision which had raised these concerns had been taken.

54. To that end a review was prepared by the defendant's Chief Executive and presented to the Regeneration and Property Committee on 22nd October 2015. Having reviewed all of the material the Chief Executive was satisfied that the defendant's processes for seeking political guidance were sound and also he accepted that the defendant's officers had conducted themselves correctly. He had the following to say in relation to the terms of the contract which had been agreed and also the extent of the information which was provided by the defendant in the public domain as to their decision-making processes:

> "4. The contract entered into seems generally appropriate except in one sense. The clear desire of the Executive to achieve open space as part of the joint development has not been clearly translated into the contract. There is mention of 'landscaping' but that isn't necessarily open space. The contract places reliance on delivering that in the planning

> process. In hindsight I think more could have been done to require this contractually, though of course that ran the risk of sabotaging the scheme by making it unviable. There was a difficult balance to be achieved…
>
> 6. However, all the reports put to those Committees both in 2013 and 2014, were wholly in the confidential part of the agenda, and I believe that was not necessary. Some elements of the reports – values, legal advice – were clearly confidential but much of the remaining issues were not. Confusing though it can make a report, it would in hindsight have been better to divide the report into its two component parts. The concepts and many of the issues would then have been publically accessible and the Council could not have been accused of operating in secret. In my view we need to separate reports in this way as much as possible in future."

55. Around this time the claimant obtained their own advice from counsel who provided them with an opinion dated 19th October 2015. In that advice counsel concluded that a judicial review would not be successful because the time for commencing such an action had expired. He concluded that he had insufficient evidence to form a definitive conclusion as to whether or not the land was held as open space and further whether the defendant had achieved best consideration for the disposal.

56. On 17th November 2015 the defendant published on their website advice that they had received about the legality of the transaction which had been entered into from Mr James Goudie QC, who represented them at the hearing of this matter. Mr Goudie concluded that there was no illegality in the way in which the Council had proceeded.

57. Also on 17th November 2015 the defendant published a redacted version of the Director of Resources' report to the Executive Committee of 11th December 2014. Having taken stock of the position on 22nd December 2015, the claimants instructed their present solicitors. On 31st December 2015 those solicitors sent a pre-action protocol letter to the defendant. This letter raised many grounds including those upon which the claim is presently based. The defendant replied to this letter on 15th January 2016. On 1st February 2016 the claimant's solicitor requested that the defendant provide them with any documents upon which the defendant wish to rely in defending the grounds which had been raised. On 10th February 2016 the defendant provided to the claimant the internal memo dated 18th June 1990 which had been written by Mr Wilson-Sharp which is referred to above and also the land terrier summary from their internal records. On 17th February 2016 proceedings were issued.

58. In addition, on 17th February 2016 the interested party submitted a second application for planning permission to the defendant. The description of the development remained similar to that which has been set out above. However, the design of the development materially changed from the application which had been made in July 2015. Indeed, at the date of the hearing of this matter that application from July 2015 remained undetermined and currently before the defendants. On 26th April 2016 the defendant resolved to approve the application which had been made on 17th February 2016 subject to the provision of a section 106 planning obligation. No affordable housing was in fact sought as part of that section 106 obligation and the question of

affordable housing is not addressed at all in the officer's report that led to the resolution to grant permission. No consent pursuant to that resolution had been issued at the time when these proceedings were heard.

59. On 21st April 2016 permission to apply for judicial review was refused on the papers by Hickinbottom J. On 8th June 2016 Supperstone J dealt with the oral renewal of the application for permission and in particular received submissions in respect of the question of delay in bringing the proceedings. Supperstone J concluded in respect of that issue as follows:

> "Despite the closing words of Mr Goudie QC, I am persuaded that the disclosure of material documents post November 2015, in particular the memorandum of the chief in solicitor (sic) in 1990, warrants extension of time. In reaching this conclusion, I have had regard to the fact that this claim raises issues of general public importance. So time will be extended."

60. Following the grant of permission to apply for judicial review the defendant lodged a substantial quantity of evidence in the form of both witness statements and also documentation. That documentation included the UD report and also an unredacted version of the Director of Resources' report from the 11th December 2014 meeting.

61. It appears that prior to the commencement of proceedings the defendant had commissioned the District Valuer Service ("DVS") to undertake a valuation exercise in relation to the contention that that best consideration had not been obtained under the contract. The valuation report provided by the DVS on 13th July 2016 formed part of the evidence lodged by the defendant. In that valuation report a valuation date of 1st April 2014 was adopted so as to match the work which had been undertaken by UD. In a like manner similar assumptions in relation to the scheme which would be built and was to be valued were taken by DVS. The positions on valuation between DVS and UD are set out in a comparison table within the DVS report as follows:

"

Site	Valuation basis	DVS valuation	Urban Delivery Valuation
Combined site: Oval Chalet &	No affordable housing pro	£750,000 (Oval Chalet to 34% equates to £1225,	£600,000 (Oval Chalet at 27.5 %

17-20 Sea Street, Whitstable (Valuation 4.2)	vision 3 affordable housing units	000) £320,000 (Oval Chalet at 34% equates to £108,800)	equates to £165,000) No valuation
Oval Chalet Site, Sea Wall, Whitstable (Valuation 4.3)	No affordable housing provision 1 affordable housing unit	£603,700 £490,500	£337,136 £166,449

”

62. The differences in the valuations prepared by UD and DVS in relation to the combined site relate to, firstly, a difference over the rent which DVS believe could have been achieved in the café unit and, secondly, an understatement of the income derived from holiday lets made by UD. DVS, in their report, also differed as to the appropriate apportionment of value in relation to the whole site between the Oval Chalet holding and the warehouse holding. In their report DVS note that there is no rationale provided for the UD apportionment of 27.5% of the total value to the Oval Chalet holding; they reject using an approach based upon the actual proportion of the two site areas (which would give 44% of the overall value to the Oval Chalet site) and adopt a proportion of the respective individual valuations which leads to their attribution of 34% of the combined site value to the Oval Chalet site. The difference between UD and DVS in relation to the valuation of the Oval Chalet site alone is that

DVS assessed the market value for the houses proposed on the site for valuation purposes at £475,000 as at 1st April 2014 as opposed to the £400,000 proposed by UD. This difference is based upon an analysis of comparable transactions to arrive at their alternative valuations.

The Grounds

Ground 1

63. Ground 1 is the claimant's contention that the defendant was required by virtue of section 123 of the Local Government Act 1972 to advertise their proposal to dispose of the land, and then consider any representations and objections, as a consequence of the Oval Chalet site being open space. The legal framework for the evaluation of that contention is as follows.

64. A local authority can only act in relation to matters in which they are authorised to act by statute. At the time of the purchase of the Oval Chalet site the power for a local authority to acquire land was comprised in section 157 of the Local Government Act 1933 which provided as follows:

> "157 – Power of local authorities to acquire land by agreement.
>
> (1) A local authority may, for the purpose of any of their functions under this or any other public general Act, by agreement acquire, whether by way of purchase, lease, or exchange, any land, whether situate within or without the area of the local authority."

65. As can be seen, this links the power to acquire land to the functions of a local authority under the 1933 Act or any other Act. The functions which the claimant relies upon in this connection are those which are related to open space. They are contained firstly within section 164 of the Public Health Act 1875 which provides as follows:

> "164. Urban authority may provide places of public recreation.
>
> Any [local authority] may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever."

66. In addition, the claimant relies upon the powers contained within the Open Spaces Act 1906. Sections 9 and 10 of the 1906 Act provide as follows:

> "9 Power of local authority to acquire open space or burial ground.
>
> A local authority may, subject to the provisions of this Act,—
>
> (a)acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or

otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not; and

(b)undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and

(c)for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein.

10 Maintenance of open spaces and burial grounds by local authority.

A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

(a)hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose: and

(b)maintain and keep the open space or burial ground in a good and decent state.

and may enclose it or keep it enclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them."

67. Other aspects of the powers and functions related to open space which are also relied upon by the claimant are as follows. Firstly, section 76 of the Public Health Acts Amendment Act 1907 which provides as follows:

"76 Powers as to parks and pleasure gardens

(1) . . .the local authority shall, in addition to any powers under any general Act, have the following powers with respect to any public park or pleasure ground provided by them or under their management and control, namely, powers—

(a)To enclose during time of frost any part of the park or ground for the purpose of protecting ice for skating, and charge

admission to the part enclosed, but only on condition that at least three-quarters of the ice available for the purpose of skating is open to the use of the public free of charge;

(b)To set apart any such part of the park or ground as may be fixed by the local authority, and may be described in a notice board affixed set up in some conspicuous position in the park or ground for the purpose of cricket, football, or any other game or recreation, and to exclude the public from the part set apart while it is in actual use for that purpose;

(c)To provide any apparatus for games and recreations, and charge for the use thereof, or let the right of providing any such apparatus for any term not exceeding three years to any person;

. . .

(f)To place, or authorise any person to place, chairs or seats in any such park or ground, and charge for, or authorise any person to charge for, the use of the chairs so provided;

(g)To provide and maintain any reading rooms, pavilions, or other buildings and conveniences, and to charge for admission thereto, subject in the case of reading rooms to the limitation that such a charge shall not be made on more than twelve days in any one year, nor on more than four consecutive days;

. . .

(i)To provide and maintain refreshment rooms in any such park, and either manage them themselves, or, if they think fit, let them to any person for any term not exceeding three years."

68. Secondly, the claimant relies upon section 52(2) of the Public Health Act 1961 which provides as follows:

"(2) When any part of a park or pleasure-ground is set apart by a local authority under paragraph (b) of subsection (1) of the said section seventy-six for the purpose of cricket, football or any other game or recreation, the local authority may, subject to the restrictions or conditions, if any, prescribed by rules made under that section, permit the exclusive use by any club or other body of persons of—

(a)any portion of the part set apart as aforesaid, and

(b)the whole or any part of any pavilion, convenience, refreshment room or other building provided under that section,

subject to such charges and conditions as the local authority think fit."

69. Thirdly, the claimant relies upon section 19(1) of the Local Government (Miscellaneous Provisions) Act 1976 which provides as follows:

> "19 Recreational facilities.
>
> (1) A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and, without prejudice to the generality of the powers conferred by the preceding provisions of this subsection, those powers include in particular powers to provide—
>
> (a) indoor facilities consisting of sports centres, swimming pools, skating rinks, tennis, squash and badminton courts, bowling centres, dance studios and riding schools;
>
> (b) outdoor facilities consisting of pitches for team games, athletics grounds, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding;
>
> (c) facilities for boating and water ski-ing on inland and coastal waters and for fishing in such waters;
>
> (d) premises for the use of clubs or societies having athletic, social or recreational objects;
>
> (e) staff, including instructors, in connection with any such facilities or premises as are mentioned in the preceding paragraphs and in connection with any other recreational facilities provided by the authority;
>
> (f) such facilities in connection with any other recreational facilities as the authority considers it appropriate to provide including, without prejudice to the generality of the preceding provisions of this paragraph, facilities by way of parking spaces and places at which food, drink and tobacco may be bought from the authority or another person;
>
> and it is hereby declared that the powers conferred by this subsection to provide facilities include powers to provide buildings, equipment, supplies and assistance of any kind."

70. The particular features of these latter three sections relied upon by the claimant are as follows. Firstly, the ability under section 76 of the 1907 Act to exclude the public from any part of a park or recreation ground whilst it is in use for the purpose of being a recreation ground. Next, the claimant also draws attention to the ability under section 52(2) of the 1962 Act to permit the exclusive use by any club of any part of a park or pleasure ground. Further, the claimant draws attention to the description under section 19(1) of the 1976 Act of facilities for boating on inland or coastal waters as falling within the definition of recreational facilities along with the provision of

premises with the use of clubs or societies having "athletic, social or recreational objects".

71. The claimant's case is that the Oval Chalet site was acquired by the defendant and held by them as open space, and that the ways in which it was let out or deployed by the defendant were entirely consistent with the suite of powers which have been set out above.

72. The key issues for this Ground depend, in my view, most importantly on the relevant provisions of section 123 of the 1972 Act. Section 123 so far as relevant here provides as follows:

> "123 Disposal of land by principal councils.
>
> (1) Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.
>
> (2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.
>
> (2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.
>
> (2B) Where by virtue of subsection (2A) above a council dispose of land which is held—
>
> (a) for the purpose of section 164 of the Public Health Act 1875 (pleasure grounds); or
>
> (b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),
>
> the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10.]"

73. The defendant's answer to the claimant's contentions is that section 123(2A) simply did not apply to the Oval Chalet site. Their submission is that it is important to understand when considering section 123(2A) that the 1972 Act, by virtue of section

270, adopts the definition of open space which is contained within section 336 of the Town and Country Planning Act 1990. That definition is as follows:

> " "open space" means any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground"

74. The defendant contends that since at the date of disposal of the land the Oval Chalet was neither laid out as a public garden, nor used for the purposes of public recreation, the section 123(2A) duty simply did not arise in the present case. The claimant's case is contended by the defendant to be built upon a misconception as to the actual status and usage of the land at the point in time when disposal was being processed.

75. The starting point for considering this Ground is inevitably by what power or, more pertinently, pursuant to which of its functions, did the defendant acquire the Oval Chalet site. During the course of his submissions Mr Goudie contended that it was unknown by what function the land was acquired and therefore it could not be said to have been acquired pursuant to the local authority's open space powers. In my view that submission is difficult to sustain on the evidence which is before the court. It is clear from the contemporaneous documents which have been set out above that the land was acquired for the purpose of being developed as open space. The word "developed" requires some emphasis for reasons which will become apparent shortly. Nevertheless the minute of the Council's committee proceedings which led to acquisition on 18th December 1944 is clear, and sets out that it was agreed to be purchased "subject to the property being developed and kept as an open space". This was reiterated in the letter the following day written on behalf of the WUDC to Rybar in terms. No other potential functional use of the land is identified at the time of its acquisition and the land was therefore in my view clearly purchased with a view to its being developed at some point in the future and used as open space.

76. That conclusion is, however, far from the end of the analysis. Two things are tolerably clear from the subsequent history of the land up to 2013. The first is that not a great deal of thought was devoted by WUDC and the defendant to the statutory authority pursuant to which the land was held other than the memos from Mr Wilson-Sharp with his conclusions which are set out above. Secondly, no steps were taken to develop the land for the originally contemplated open space use. Indeed, it is clear that other uses were actively considered in the form of the redevelopment of the land. Although those other uses in terms of redevelopment were clearly considered and actioned there does not appear to have been any formal appropriation of the land from being held to be developed as an open space to any other function. Such a formal appropriation along with a deliberative process as to whether or not the land was no longer required for development into an open space use would have been required: see R (on the application of Goodman) v SSEC [2015] EWHC 2576 paragraphs 24-29.

77. Equally, the letting of the land for the purpose of a tea rooms or a snack bar or as a place for the WYC to store their boats does not in my view amount to its development or use as open space. The use as a tea rooms or snack bar was effectively a commercial use of this previously developed site, and the granting of exclusive occupation of the site to the yacht club for them to store boats and trailers upon it did not, for reasons which I shall set out shortly, bring the Oval Chalet site within the

purview of section 123. It appears on the evidence that this again was essentially a commercial arrangement between the defendant and WYC to enable them to leave their boats on the site which was conveniently located for the beach.

78. In my view the key issue in applying section 123(2A) is whether, at the time of the disposal of the land, it consisted or formed part of an open space. That is the specific language of the section. In my view that is not solely determined by use, if in fact the land has been laid out as a public garden (the breadth of which term does not arise for determination in this case). If the land were to be a public garden the section 123(2A) requirements could not be evaded simply by excluding the public. Thus the phrase "consisting or forming part of an open space" would also include land which might not actually at the point of disposal be being used by the public but which, by virtue of the manner in which it had been landscaped, would consist of or form part of an open space.

79. In the present case I am entirely satisfied that the Oval Chalet site did not consist of or form part of an open space. It was clearly not one at the point of acquisition since at the time at which it was acquired the consistent description was that it was to be "developed" as an open space. It is clear that no action was taken in respect of the site and that that development as open space never in fact occurred. What actually happened was that the land was let out for use as a tea room or snack bar and was then subsequently let out for the storage or parking of boats and trailers. Nothing actually took place so as to develop the Oval Chalet site such that it consisted of or formed part of an open space in the sense of the definition provided by section 336 of the 1990 Act.

80. The fact that there is evidence which has been set out above that from time to time people entered onto the Oval Chalet site or walked through it does not in my view in any way affect that position. I accept the submission made on behalf of the defendant that in the light in particular of the lease granted to the WYC, which was a lease in substance in the sense that the WYC were afforded exclusive occupation of the site for the purpose of parking their boats and trailers, the occasional casual presence of members of the public upon the land was simply trespass. Whether or not that trespass was tolerated by the WYC again does not affect the position in relation to whether or not the Oval Chalet site in reality comprised land which consisted or formed part of an open space.

81. There is force in Mr Stedman Jones' submission on behalf of the claimants that the language of section 123(2B), which speaks of land being "held" for open space under section 164 of the 1875 Act or section 10 of the 1906 Act, potentially supports a view that simply holding land for a proposed open space use might suffice to engage the requirements of section 123(2A). As Mr Stedman Jones points out there is power to hold land for a purpose for which it is not presently used so as to use it for the purpose for which it was acquired subsequently under, for example, section 158 of the 1933 Act (to use the powers pertinent at the time of acquisition). That, however, is not in my view conclusive. It is the language of section 123(2A) which must itself be determinative of the issue, and that language clearly requires land to consist or form part of an open space at the time when disposal is being undertaken.

82. I do not foresee any particular difficulty in the notion which this construction implies, that land could be held with the future intention of developing it to consist or form

part of an open space without that occurring prior to disposal, and in those circumstances the requirements under section 123(2A) would not arise. It is simply that the section does not contemplate the consultation requirements of section 123(2A) arising in the case of land where there is merely the lost opportunity for it to potentially be developed so as to consist of or form part of an open space. As Mr Goudie pointed out in argument, the public has a remedy in the event that a local authority fails to bring land forward and develop it as open space, by virtue of section 10 of the 1906 Act.

83. For all of these reasons I am not satisfied that the claimant's case in relation to Ground 1 is made out.

Ground 2

84. Ground 2 is the contention that the contract which was entered in to with the interested party was ultra vires or outside the scope of the Executive resolution upon which it was based. This is, in particular, the allegation that the members were misled by the information in the Director of Resources' report and further that the resolution which was passed by the Executive at their meeting of 11th December 2014, which specified that the Head of Property be authorised "to conclude the sale of the land on the terms set out in this report", was not followed. The claimant relies upon the fact that the Director of Resources' report relied upon a plan which did not in its notation include within the Council's ownership for disposal the access strip to the main part of the Oval Chalet site. The contract which was entered into included the access strip along with the rest of the land and it is contended therefore that the report was misleading and that the contract exceeded the authority which was granted. Furthermore, the claimant emphasises the fact that the Director of Resources' report noted that there would be a legal agreement entered into with the interested party for the provision of open space within the development but in fact the contract contained no such requirement for the provision of open space. Again, it is contended that in this respect the contract which was entered into was outside the authorisation granted by the executive.

85. I am not satisfied that there is any substance in these contentions. The exclusion of the access strip from the plan within the Director of Resources' was clearly a minor error in the drafting of that plan. Nobody in reality could have been under any illusion but that the whole of the defendant's freehold ownership was to be the subject of the contract and that clearly the access strip to the land was involved since it was part and parcel of the development which lay behind the purpose of the disposal.

86. As the defendant points out in relation to the provision of open space, there was no requirement in the resolution which was passed for open space to be explicitly included within the terms of the contract. In fact, on analysis the Director of Resources' report was equivocal about the mechanism whereby open space was to be provided. It is correct to note that the report observes that a legal agreement for the provision of open space would be sought. However, the report also includes a reference to securing open space by a condition on any planning permission which was granted for the redevelopment of the site. As this was at a time when there was no approved scheme for development the use of such a planning condition was a mechanism which was in my view clearly realistic. In the light of these alternatives having been canvassed in the report it cannot be said that by not including a

requirement for open space in the legal agreement that the agreement was outside the scope of the Executive's resolution. For these reasons I consider that Ground 2 must be dismissed.

Ground 3

87. This is the contention that the resolution to sell was entered into following a breach of Section 100B(4) of the 1972 Act. Section 100B(4) provides as follows:

> "(4) An item of business may not be considered at a meeting of a principal council unless either—
>
> (a) a copy of the agenda including the item (or a copy of the item) is open to inspection by members of the public in pursuance of subsection (1) above for at least [five clear days] before the meeting or, where the meeting is convened at shorter notice, from the time the meeting is convened; or
>
> (b) by reason of special circumstances, which shall be specified in the minutes, the chairman of the meeting is of the opinion that the item should be considered at the meeting as a matter of urgency."

88. The Claimant complains that the notification which was made by the defendant 28 days prior to the meeting, which referred to "Approval of terms for development of the site", was an inadequate advertisement of the business to be considered at the meeting of the Executive since it did not mention in terms the sale and disposal of the Oval Chalet site. As such the Claimant's contention is that the disposal was in effect hidden from the public as the objective of the item being included on the Executive's agenda.

89. I am unconvinced that there is any substance in this complaint. In my view it was perfectly clear from the use of the phrase "Approval of terms" that the disposal of the site, which it was well known was in public ownership, was what was going to be discussed at the Executive Committee meeting. The fact that the item was to be included on the private part of the agenda made clear that it was the defendant's commercial arrangements in relation to the site which were being discussed. I am not satisfied that the substance of this item for the Executive meeting was in any way hidden, or that anyone was misled by the advertisement of the meeting. It was clear that the purpose of the item was consideration of the terms for the disposal of the land and that that is what the Executive would be discussing. Thus ground 3 is in my view without substance.

Ground 4

90. Section 123(2) of the 1972 Act has been cited above but since it is the centrepiece of this ground it is worthwhile setting it out again:

> "(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by

way of a short tenancy, for a consideration less than the best that can reasonably be obtained."

91. The relevant principles to be applied when the court is considering an allegation that there has been a breach of Section 123(2) were recently distilled by Holgate J in Faraday Development Limited v West Berkshire [2016] EWHC 2166 as follows:

> "131. The following principles may be distilled from the case law as to the circumstances in which the Court may or may not intervene in relation to the application of section 123:-
>
> (i) The Court is not entitled to substitute its own view on the facts and merits for that of the local authority. The Court may only interfere if there was no material upon which the authority's decision could have been reached, or if in reaching that decision, the authority disregarded matters it ought to have taken into consideration, or if it took into account matters which were irrelevant, or if its decision was irrational (R v Essex County Council *ex parte* Clearbrook Contracts Limited Mc Neill J, 3 April 1981):
>
> (ii) The Court is only likely to find a breach of section 123(2) if the local authority:
>
> (a) has failed to take proper advice, or (b) failed to follow proper advice for reasons which cannot be justified, or (c) although following advice, it followed advice which was so plainly erroneous that in accepting it the authority must have known, or at least ought to have known, that it was acting unreasonably (R v Darlington B.C *ex parte* Indescon Ltd [1990] 1 EGLR 278, 282);
>
> (iii) Section 123(2) does not mandate the authority to have regard to any particular factors (R (on the application of Salford Estates (No.2) Ltd) v Salford City Council [2011] LGR 982 at paragraph 95);
>
> (iv) There is no need for the authority's decision-making process to refer to section 123(2) explicitly, provided that the Court is able to see that the duty has in substance been performed (Salford at paragraph 103);
>
> (v) The obligation under section 123 is not to conduct a particular process, but to achieve a particular outcome (Salford at paragraph 95). But process may have an important, or even determinative, evidential role in deciding whether the authority has complied with section 123(2)) (R (Midlands Co-operative Society Ltd) v Birmingham City Council [2012] LGR 393 at paragraphs 122-3).

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

(vii) The deliverability or credibility of a bid, or the care with which it has been prepared, are commercial factors which are relevant to an assessment of whether the "consideration" offered is the best reasonably obtainable. Likewise, the highest offer on the table need not represent the best "consideration", because an authority may conclude that "a bird in the hand is worth two in the bush" (R (Lidl (UK) GmbH) v Swale BC [2001] EWHC Admin 405 at paragraph 18);

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

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

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

> Findlay that that test is satisfied where in the circumstances a matter is so "obviously material" to a particular decision that a failure to take it into account would not be in accordance with the intention of the legislation, "notwithstanding the silence of the statute".”

92. Whilst all of the principles identified by Holgate J are of course relevant, principles (i) and (ii) are particularly in point in the present case. The claimant has a number of criticisms which are comprised within this ground to which those principles relate. Firstly, the claimant contends that the process of UD valuing the site for the purposes of the disposal was infected and flawed by the information which they received, which it is contended essentially came entirely from the interested party. Further that material was received by UD at meetings which occurred between UD and the defendant at which the interested party was present, notwithstanding the interested party's obvious interest in the outcome of UD's deliberations.

93. Secondly, it is contended that UD's advice to the Defendant was flawed in particular because it was not informed by any proper understanding of planning policy of what would be the best use of the site. An instance of this upon which the Claimant relies is the mistaken citation of policy TCL10 within the report.

94. Thirdly, the Claimant contends that there was a fundamental misunderstanding not so much within UD's report but more pertinently within the Director of Resources report underpinning the decision to dispose, about whether or not there would be a requirement for affordable housing. It is clear that the provision of affordable housing had a significant and obvious impact on the value of the land. UD had assumed that affordable housing would be required on the basis that the new local plan policy which required it on all small sites would be in place and adopted by March 2015. The Claimant contends that in fact by the time of the decision to dispose and the contract being entered into that assumption was fundamentally misconceived. By the time of the date of the decision the local plan timetable had clearly slipped and, moreover, the Written Ministerial Statement had been published which sought to preclude the requirement for affordable housing on small sites given the impact which such a requirement had upon site viability. The Claimant contends therefore that firstly, there should have been a revaluation of the site based on the change of circumstances in respect of any affordable housing requirement and, secondly, that the disposal ought not to have proceeded on the basis that any planning permission obtained was bound to include a requirement for affordable housing. The Claimant contends that its view that the sale was at an undervalue was effectively underlined and reinforced by the valuation undertaken by its own valuer BTF, but perhaps more pertinently by the valuation undertaken the DVS.

95. Turning to my evaluation of these contentions, in my view the first two points which are raised are relatively easily dealt with. The mistaken citation by UD of the policy TCL10 is in my view a minor detail. The important point in this respect is that it is clear from the UD report that they were fully aware of the supportive policy context for the redevelopment of the Oval Chalet site as part of a wider project. Further, I am unable to accept that UD were in any way impeded in exercising their own objective and independent judgment by the meetings which were held by the interested party. That was in my view an entirely sensible approach in order to understand the nature of the interested party's viability exercise. It is important to note that UD

commissioned their own independent evaluation of the costs that had been used by the Interested Party in their valuation exercise.

96. I have no difficulty in accepting the Defendant's contention that UD were a reliable source of advice and provided, in principle, an accurate valuation assessment. However, that valuation assessment was, like all valuation assessments, subject to limitations and qualifications. In particular, in the present case it was a valuation undertaken as at the 1st April 2014. Secondly, as UD identified they had not had access to internal advice from the Defendant's planning department, and had simply relied upon their review of planning documents and discussions with the Defendant's Property Services Department. In that connection whilst that was adequate for their purposes at the time of their report, in particular as they provided alternative valuations depending upon whether affordable housing was or was not a requirement of any planning permission, nevertheless the valuation was only as good as the assumptions that fed into it as at the time when it was undertaken. If relevant circumstances changed then so would the analysis of value.

97. I turn to consider the claimant's case based upon the fact that the defendant agreed a price predicated on the basis that it was inevitable that there would be a requirement in any planning permission that affordable housing must be provided or contributed to. Applying the principles which have been set out above the first question is whether or not the question of any affordable housing requirement was a material consideration in the assessment of whether or not the best consideration reasonably obtainable was being secured. In my view it is beyond argument that affordable housing was indeed a material consideration in the evaluation. Firstly, UD identified it as a material consideration and one which had a significant bearing on the final output of the valuation exercise. Secondly, the Director of Resources report identified in terms the importance of the proposed adoption of the local plan, and the change which it would make to affordable housing policy, as material to the establishment of the appropriate level of value of the land. It is undeniable whether based upon the UD report or the Director of Resources' report that the existence of the requirement for affordable housing would have a very significant effect of the question of valuation of the land. Using UD's figures for a four house scheme on the Oval Chalet site the value without affordable housing it will be recalled was £337,000, whereas with an affordable housing requirement it was effectively halved to £166,000.

98. It is equally beyond argument that the Director of Resources' report was in error when it reported, as part and parcel of the consideration of the effect of an affordable housing requirement on value, that the new local plan affordable housing policy would be adopted "around March 2015". This assumption, and the implication that the Council had some four months (albeit in truth perhaps three months) to secure planning permission prior to the introduction of the new policy clearly underpinned the conclusion that a value which accepted a requirement for affordable housing as an inevitability should be accepted. This was a clear error in the process of endorsing the offer from the interested party for the land as being compliant with Section 123(2), but as the authorities made clear it is the outcome rather than the process which is determinative, albeit that the process can be informative as to whether or not any legal error has occurred. The key question is whether no reasonable local authority would have failed to make further enquiries in relation to the material consideration as to whether or not an affordable housing requirement would arise, and whether no

reasonable local authority would have agreed to dispose of the site on the basis that an affordable housing requirement was inevitable and that there was no prospect of the affordable housing requirement being avoided, coupled with the consideration of whether the outcome would have been materially different.

99. In my view the following factors are of importance in considering these questions. Firstly, the valuation exercise which had been undertaken by UD was around 8 months old at the time when the Director of Resources report was being considered. Secondly, in my view it is clear that there had been a significant and material change in circumstances since the UD report had been compiled, namely that the local plan was being delayed to an unspecified extent, such that the basis upon which the Director of Resources report had been predicated was now incorrect. Since the postponement of the local plan process was a matter which was clearly known to the defendant, it cannot be contended that the defendant was unaware of this position. Further, whilst by no means determinative, the written Ministerial Statement adds further grist to the mill. Whilst I accept the evidence given that the Property Services Department of the defendant may not have been aware of it, it is in my view inconceivable that the defendant as a planning authority was not aware of this document. The Ministerial Statement adds a little further colour to the context of the local plan slipping, and the question of whether in truth it was inevitable that any planning consent would be accompanied by a requirement for affordable housing.

100. Ultimately against the background of these significant and material changes in my view no reasonable local authority could have concluded that they were bound to accept a price based on there being no prospect at all of affordable housing not being required on any planning permission which could be obtained. Mr Goudie contended in the course of argument that even if the Director of Resources had reported on an accurate basis as to the slippage of the local plan the decision would have been the same because the conclusion would remain that it was not possible to obtain planning permission before the local plan had come into force. In my view that contention is essentially speculation driven to some extent by hindsight in respect of what happened in respect of the planning applications made. Whilst the obtaining of planning permission would depend upon the strength of the advice and the skills of either or both of the interested party or the defendant (if they went alone), the contention that it would be impossible to obtain planning permission within 6 months, where the prize would be a consent unencumbered by an affordable housing requirement, is not in my view an inevitability. At the very least the prospect of securing a consent without an affordable housing requirement in the light of the slippage to the local plan and the publication of the Ministerial Statement had a significant value which was not to any extent reflected in the sum obtained by the Defendant.

101. Thus I am satisfied that no reasonable local authority would have failed to re-enquire as to the position in relation to the prospects for imposition of an affordable housing requirement bearing in mind the very significant impact it had on value and, secondly, having made any such enquiry of itself (since all of the requisite knowledge would have been held by the defendant's planning department) no reasonable authority would have proceeded knowing that the local plan timescale had slipped on the basis that there was no prospect whatsoever of an affordable housing requirement being avoided. To some extent the prospect of achieving planning permission without an affordable housing requirement was reinforced by the publication of the Written

Ministerial Statement albeit the more important factor was the delay in the local plan process. A planning permission unencumbered by an affordable housing requirement would have had a substantially higher value than the defendant achieved, as would a valuation of the land which included the prospect of achieving such a planning permission bearing in mind the factual position as it existed as at the 11th of December 2014. In my view there is substance therefore in the Claimant's contention that there has been a breach of s123(2) of the 1972 Act and a legal error by the defendant, in that the defendant failed to obtain best consideration for the land since the sum it accepted was based on a valuation predicated on it being inevitable that affordable housing would be required.

Ground 5

102. There is no dispute between the parties that the Defendant has to operate its activities under the Public Sector Equality Duty which is established by Section 149 of the Equality Act 2010. Section 149 provides as follows:

> "Section 149(1) Public Sector Equality Duty
> A public authority must, in the exercise of its functions, have due regard to the need to

i) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

ii) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it…

> (3) having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic which are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low
>
> (4) steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons disabilities.

(5) having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the to –

(a) tackle prejudice and

(b) promote understanding.

(6) compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this act.

(7) the protected characteristics are

(a) age;

(b) disability;

(c) gender reassignment;

(d) pregnancy and maternity;

(e) race;

(f) religion or beliefs;

(g) sex;

(h) sexual orientation.

103. In Hotak v London Borough of Southwark [2015] UKSC 30, Lord Neuberger provided the following understanding of the correct approach to section 149:

> "74. As Dyson LJ emphasised, the equality duty is "not a duty to achieve a result", but a duty "to have due regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the Parliamentary intention behind section 149 was that there should "be a culture of greater awareness of the existence and legal consequences of disability". He went on to say in para 33 that the extent of the "regard" which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is "appropriate in all the circumstances". Lord Clarke suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word "due" in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment.

> 75. As was made clear in a passage quoted in Bracking, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in Hurley and Moore, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision"."

104. It is accepted by the claimant that in August 2013 an EIA was undertaken. However, the claimants contend that there was a continuing duty on the defendant to discharge the public sector equalities duty and that they failed to do so in the light of, in particular, the circumstances which had changed here related to the nature of the interested party's proposed scheme. The proposed scheme had altered from the "piazza" scheme which has been referred to above to a scheme which had much more restricted and far less accessible open space. This change is contended by the claimant to have had equality implications which required the defendant to undertake further evaluation of the position and the failure to do so was a breach of the duty.

105. In my view it is important to appreciate that the content of the public sector equality duty must be informed by the precise nature of the decision which is being reached. The decision which is in point in the present case was the decision to dispose of the land for redevelopment purposes. As the defendant points out as part of its submissions, the disposal itself had no immediate impact on anybody with a protected characteristic. It will be recalled that that is a point which in my view was properly observed in the EIA undertaken by the defendant in August 2013. It is clear in my judgment that the defendant had regard to the question of the public sector equality duty both in August 2013 and also in December 2014 when the Director of Resources' report noted that "no adverse implications are envisaged" in relation to EIA. I am satisfied that the defendant had due regard to the need to achieve the goals which are set out in section 149(1)(a)-(c).

106. In truth, the equality implications of the sale itself were extremely limited. The redevelopment proposals which are in reality the subject of the claimant's criticisms, would themselves be the subject of the exercise of the public sector equality duty in terms of the details which they presented since it is now well settled that the exercise of planning powers are subject to the public sector equalities duty (see R (Coleman) v London Borough of Barnet [2012] EWHC 3725; Moore and Coates v SSCLG [2015] EWHC 44 and most recently LDRA limited v SSCLG [2016] EWHC 950). Thus regard was had by the defendant to the duty under section 149 and in my view that regard was due regard bearing in mind the content of the decision to dispose of the land which was under consideration and also the context of that decision in terms of any redevelopment proposals being themselves the subject of EIA as part and parcel of the planning process. I am unable therefore to accept the claimant's criticisms of the defendant's decision under Ground 5.

Discretion and Relief

107. It follows from the conclusions which I have set out above that the claimant's contentions fail in relation to Grounds 1,2,3 and 5 but succeed under Ground 4. In the eventuality of any of the claimant's Grounds being accepted the defendant contended that in any event relief should be refused both under section 31(6) of the Senior Courts Act 1981 as a result of the delay in bringing these proceedings and also under section 31(2A) of the 1981 Act on the basis that it is highly likely that the outcome would not be substantially different if the public law error had not occurred. I propose to commence addressing these considerations by starting with the issue of delay under section 31(6). That section provides as follows:

> "(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

108. This provision was recently considered by the Court of Appeal in the case of Gerber v Wiltshire Council [2016] EWCA Civ 84. Whilst the exercise of discretion to decline relief on the basis of delay will inevitably be fact sensitive and will depend on the circumstances of any particular case, it is instructive to note the following aspects of the exercise of discretion which were emphasised when considering this issue by Sales LJ in his judgment at paragraphs 66-69. Firstly, substantial weight was given to the length of delay and the absence of justification for it in bringing the proceedings. Secondly, substantial weight was given to the impact on the financial interests of third parties who had the benefit of the decision which had been reached. Thirdly, consideration was given to the impact of the unlawful decision upon the claimant and an assessment made of the weight to be given to the fact there had been found to be an unlawful decision. Fourthly, substantial weight was given to the need for finality in the decision-making process. These factors, in my view, must therefore bear upon the exercise of the question of whether or not relief should be refused as an exercise of discretion.

109. This approach is consistent with the approach of the Court of Appeal in R v CICB ex p A [1998] QB 659. That case was concerned with the question of whether if there was undue delay, but no substantial hardship or prejudice to a third party or detriment to good administration, relief could be refused under s31(6)(b) at the substantive hearing after a decision had been found to be unlawful. Simon Brown LJ stated as follows:

"It therefore seems to me logical to construe these provisions as Mr Blake invites us to do: to treat the application for leave and the substantive hearing as two distinct stages: to grant leave unless (a) there is no good reason for extending time…, or (b) it is already apparent that the eventual grant of relief would be likely to cause hardship, prejudice or detriment (section 31(6)(a)); and to accept that once one reaches the substantive hearing delay is only relevant on section 31(6)(b) grounds. Once time had been extended by the grant of leave then that, unless the leave is later set aside, is that. There will, of course, by definition have been undue delay in making the application (see Ex parte Caswell [1990] 2 AC 738), so that at the substantive hearing relief can be refused under section 31(6)(b) if it would cause hardship, prejudice or detriment. Absent any of those, however, the court cannot as it were simply cancel the earlier extension of time for all the world as if leave had never been given and the substantive application had never been made.

If, of course, at the substantive hearing it appears that the grant of relief would be likely to cause hardship, prejudice or detriment, then clearly the reasons for the earlier delay may come back into play. But by that stage the applicant will have established his substantive challenge (else he will in any event fail on the merits and all questions of delay will be irrelevant) and the question will be: should the applicant have to suffer an unlawful decision or should the respondent (or third party) have to suffer the hardship, prejudice or detriment which would result from its being quashed?...It is into that balance that the earlier "undue delay" must then be put, its weight in the scales being affected principally by the following considerations.

(i)The length of the delay in seeking leave.

(ii)The extent to which the applicant was to blame for the undue delay. He may, or course, have been wholly blameless: three months may have passed before he could possibly have discovered any basis for challenge yet the grounds would nevertheless have arisen…so as to set time running, and "there is undue delay for the purposes of section 31(6) whenever the application for leave to apply is not made promptly and in any event within three months from the relevant date": see Ex parte Caswell [1990] 2 AC 738

(iii)The extent, if at all, to which the hardship, prejudice or detriment that would result from the quashing, results also from the delay. It does not, or course, need to-that was precisely the point decided in Furneaux [1994] 2 All ER 652. It is, perhaps, unlikely that it will; the period of delay in applying for leave is likely to be far shorter than the subsequent time taken to bring the substantive challenge to court. But if there is a causal

> connection between the original delay and the hardship, prejudice or detriment (as, for example, when a developer commits himself to implement a planning permission before it is challenged but after it could have been challenged), then the applicant can hardly complain if that delay weighs heavily against him in the final balance.
>
> (iv)Whether the applicant can be shown to have misled the court when he obtained leave. If he did, then again he can hardly complain if it weighs heavily against him. Indeed, if the extension of time is shown to have been obtained in bad faith, then the court in its discretion can properly refuse relief irrespective of whether the respondent makes out a case of hardship, prejudice or detriment."

110. This case was considered on appeal by the House of Lords: R v CICB ex p A [1999] 2 AC 330. Lord Slynn, upholding the decision of the Court of Appeal in respect of the issues raised under section 31(6), provided as follows:

> "The co-existence of these two provisions [section 31(6) and 31(7)] is perhaps curious and has led to differences of interpretation and practice. In R v Dairy Produce Quota Tribunal for England and Wales Ex parte Caswell [1990] 2 AC 738, 746-747, per Lord Goff of Chieveley, the House considered, however, that the two can be read together. Thus, even if an application is not made promptly (and in any event from three months from the relevant date) the court may extend the period if it finds good reason for extending the time to make the application…There is undue delay for the purposes of section 31(6) if the application for leave is not made promptly or within three months of the relevant date. But even if it considers that there is good reason for extending the period, the court may refuse leave or may refuse the relief sought if in its opinion to grant relief would be likely to cause hardship or prejudice or would be detrimental to good administration…
>
> It seems to me that the two provisions produce the following result:
>
> (a)On an ex parte application, leave to apply for judicial review can be refused, deferred to the substantive hearing or given.
>
> (b)Leave may be given if the court considers that good reason for extending the period has been shown. The good reason on an ex parte application is generally to be seen from the standpoint, as here, of the applicant. Thus the reason for the delay here was "the practical difficulties [the applicants solicitors] have encountered in trying to bring this matter before the court" (counsel for the applicant before Carnwath J). It is possible (though it would be unusual on an ex parte application) that if the court considers that the hardship,

> prejudice or detriment to good administration have been shown, leave may still be refused even if good reason for an extension has been shown.
>
> (c)If leave is given, then an application to set it aside may be made, though as the Court of Appeal stressed, this is not to be encouraged.
>
> (d) If leave is given, then unless set aside, it does not fall to be re-opened at the substantive hearing on the basis that there is no ground for extending time…At the substantive hearing there is no "application for leave to apply for judicial review", leave having been already given.
>
> (e)Nor in my provisional view, though the matter has not been argued and the question does not arise here, is there power to refuse "to grant…leave" at the substantive hearing on the basis of hardship or prejudice or detriment to good administration. The court has already granted leave; it is too late to "refuse" unless the court sets aside the initial grant without a separate application having been made for that to be done. What the court can do under section 31(6) is to refuse to grant relief.
>
> (f)If the application is adjourned to the substantive hearing, the question under both Order 53, r4(1) (good reason for an extension of time) and section 31(6) (hardship, prejudice, detriment, justifying a refusal of leave) may fall for determination."

Whilst not commenting directly on the exposition of the position set out by Simon Brown LJ, Lord Slynn did not express any demur from that explanation of the approach in endorsing the conclusions the Court of Appeal had reached on this aspect of the case.

111. Against that authority I turn to consider the questions in the present case. As set out above, Supperstone J concluded that there was good reason to extend time and grant permission to make the application for judicial review, notwithstanding the "in principle" undue delay of the application having been made more than three months after the decision being attacked. Nonetheless that is not conclusive of the issue in relation to the grant of relief under section 31(6)(b), as the case-law set out above establishes.

112. It is important to examine the nature of the relief which is sought by the claimant in this case, so far as relevant at this stage. The claimant in its pleaded case seeks a declaration that the decision of the Executive to enter into the contract was unlawful. The claimant then seeks an order quashing the contract which the defendant entered into with the interested party. I consider these two elements of relief separately. I start with considering whether relief should be granted in relation to the decision of the Executive to enter into the contract. My conclusions would be equally applicable to either a declaration that the decision of the Executive was unlawful, or an application that the decision of the Executive should be quashed.

113. The starting point for consideration of whether relief should be granted in relation to the decision of the Executive must be that the interested party have a distinct and obvious interest in the decision which is under challenge, since in reliance on the decision of the Executive on 11th December 2014 they have committed themselves to purchase the Oval Chalet for a substantial sum of money. It is clear from the factual evidence which has been set out above that resources and time have been expended by the interested party in completing the transaction authorised by the decision of 11th December 2014 and committing to pay the price for acquiring the land. In addition, significant time, effort and resources have been expended in reliance upon that decision in prosecuting two separate planning applications one of which leading to the obtaining of a resolution to grant planning permission. The witness evidence of Mr Hunter identifies that exceptional costs and fees have resulted from the extra work and delays which have been experienced. He also states that recovery of the interested party's capital costs continues to be postponed and that there has been significant impact on its business, in particular the holiday lettings which are part of the proposed redevelopment.

114. The interested party has therefore relied upon the validity of the decision, and acted to its financial prejudice in reliance on the decision being valid and thus its conditional acquisition of the site being reliable. They have now proceeded for many months on the basis that the defendant's decision was valid. I am entirely satisfied that were substantive relief to be granted they would suffer substantial hardship and prejudice based on the time and resources they have expended on the basis of the legality of the defendant's decision. This is a factor telling against the grant of relief to which in my judgment substantial weight should be attached.

115. A further factor in support of an exercise of discretion not to quash the decision in this case is the importance of certainty and reliability in the Council's decision-making process. There is undoubtedly a requirement, and especially in relation to decisions affecting the entering into of commercial arrangements with third parties, for there to be certainty and reliability in a local authority's decision-making process such that those decisions are not susceptible to challenge or disturbance many months after decisions have been made and have been acted upon. As has been emphasised in the authorities there is a clear need for finality in administrative decision-making. That is particularly the case in my view when dealing with financial arrangements of the local authority which are made with third parties, such as, for instance, the making of contracts or the giving of grants. There is a clear and obvious importance to good administration for both the local authority and such third parties to be able to know where they stand in relation to these arrangements, and for the authority and those with whom they deal not finding these arrangements subject to attack and disturbance many months after they have been decided upon. I am satisfied that if I were to grant relief that would give rise to significant detriment to good administration and that this is a further factor to which in my view substantial weight should attach.

116. As set out by Simon Brown LJ, once it has been concluded that there is substantial hardship or prejudice to a third party, or detriment to good administration (as in the present case) then the question of undue delay must be weighed in the balance. My overview of factors in relation to delay are as follows. Firstly, it is clear that the claimant has been aware of the proposal by the defendant to dispose of the Oval Chalet site for redevelopment since at least Autumn 2013. It will be recalled that at

that time Mr Cox addressed the defendant's Executive Committee in relation to that issue as set out above. Further, I am quite satisfied that the decision to sell the land was clearly in the public domain by January 2015. In addition, it is beyond doubt that the claimant was well aware of that decision by July 2015 when the petition was presented to the Council which contained in essence the substance of the concerns and complaints which underpin this application for judicial review both as to the contention that the land was open space and also that it had been disposed of at an undervalue. It follows that when proceedings were commenced on 17th February 2016 they were, in principle, many months if not over a year out of time.

117. The claimant contends that as a result of the failure of the defendant to either publish material into the public domain or disclose it to them that they did not have the information which it was necessary for them to have to obtain full advice and form a view about whether or not they had a viable basis to bring proceedings. In this respect the claimant relies on the failure of the defendant to put into the public domain the Director of Resources' report which underpinned the decision to dispose until 17th November 2015 when, in any event, solely a redacted version was published by the defendant. The claimant further submits that it was not until 10th February 2016 when the defendant voluntarily disclosed to them for the first time the entry in the defendant's land terrier and the memo dated 18th June 1990 from Mr Wilson-Sharp that they were finally able to form the view that they had a reliable basis upon which to bring proceedings. This absence of information had plainly impeded counsel from providing a full opinion to them when they first instructed counsel in the autumn of 2015, and their contention is that it was as a consequence of the defendant failing to be candid with information about the circumstances leading to the disposal which prevented them from issuing proceedings prior to when they did and which justified the delays involved in issuing the proceedings.

118. An issue as to the test to be applied when considering whether a claimant had sufficient knowledge to bring a claim, and therefore for time to commence running for the purposes of any time limitation upon bringing a claim, arose before the Court of Appeal in Sita UK Limited v Greater Manchester Waste Disposal Authority [2011] EWCA Civ 156. That was a case concerned with public procurement. Drawing on the decision of the House of Lords in Haward and others v Fawcett (a firm) [2006] 1 WLR 68, which concerned a latent damage claim, Elias LJ endorsed in a public law context the test which had been applied by Mann J at first instance in relation to the standard of knowledge required for time to start running expressed in the following terms: "the standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement". That in my view is the approach which must be adopted in the present case.

119. In my view it is clear that the claimant was aware of sufficient information at the latest by July 2015 for these proceedings to have been commenced. As set out above, by that time clear issues were being raised in relation to the contention that the Oval Chalet was open space and as to whether or not the statutory requirements obtained best consideration had been discharged in relation to the disposal. There was at that stage sufficient information which provided a clear indication of the infringements which have been relied upon, if not absolute proof of them. There was, therefore, sufficient information to justify the issuing of proceedings. Certainly in my view no delay beyond that time (which was already a significant period after the three months

for challenging the decision of 11th December 2014 had elapsed) could be justified or legitimate.

120. Whilst it might be argued that there was not sufficient detail in relation to the claimant's concerns in respect of the discharge of the section 123(2) duty until receipt of the Director of Resources' report I am unable to accept that is a justification for delaying issuing proceedings when the concern in respect of that aspect of the case had arisen a long time earlier. In any event that would not justify the delay in issuing these proceedings since, firstly, the concerns in relation to open space status and sufficient evidence in relation to that issue were known well before November 2015 and, secondly, in the context of the delays which had already occurred waiting a further three months from the disclosure of that report before proceedings were issued could not be justified. It will be apparent from the conclusions which I have set out above that the public law criticisms of what the defendant did do not depend upon the absolute figures in any of the valuation reports, but the failures in relation to the factual circumstances as to affordable housing at the time when the decision was taken, all of which were readily evidenced from the redacted report.

121. I am in particular not satisfied that it was necessary for the claimant to receive the disclosure in February of the land terrier and Mr Wilson-Sharp's 1990 memo before they could issue proceedings. Those aspects of the evidence were further detail but they were no more than that: there was a sufficient framework of material to justify the issuing of proceedings which existed long before that disclosure. I would, for these reasons and with respect, differ from the observations of Supperstone J on this aspect. Whilst the claimant relies upon the fact that counsel who was instructed in the autumn of 2015 advised that he had insufficient information to form a conclusive view that there had been illegality in relation to the open spaces and consideration issues that is not the test to be applied. For the reasons I have set out above there was sufficient information to clearly indicate, if not conclusively or absolutely prove, the infringement upon which the claimants rely at the latest by July 2015.

122. Putting this assessment into the framework of considerations provided by Simon Brown LJ I am satisfied that there has been extensive and undue delay in bringing these proceedings which have been commenced, taking the most generous view possible, six to eight months after there was sufficient material available to justify the issuing of proceedings and over a year after the decision which is now being challenged. For the reasons given I do not accept that the delay in bringing the proceedings can all be laid at the door of the defendant: I consider that the claimants have been to blame for delay and that they had sufficient knowledge available to them to bring the claim far earlier. The hardship and prejudice to the interested party, in particular in terms of investing time and resources in pursuing their planning applications after they had entered into the contract, did arise during the course of the claimant's delays. It follows that the extensive nature of those delays must weigh heavily against the grant of relief in this case.

123. On the other side of the balance it is necessary to bear in mind that I have concluded that there was a public law error in relation to the Council's decision to enter in to the transaction, and, it is necessary to consider whether the claimants should have to suffer the unlawful decision. Whilst I am satisfied that best consideration was not achieved, and the fact that there was a breach of section 123(2) of the 1972 Act is a matter of substance and concern to which weight must be given in the exercise of

discretion, this finding in the circumstances of the case is not in my judgment capable of outweighing the other factors supporting an exercise of discretion to refuse relief. In my view the factors which weigh against the grant of relief are extensive and weighty, and the decision to refuse relief is clear cut. Indeed, such is the weight to be attached to the detriment to good administration and delay in this case that on their own they would in my view justify the refusal of relief in this case.

124. For the reasons which have been set out above I am satisfied that in the circumstances it would not be appropriate to grant any form of relief in relation to the decision of the Executive to enter into the contract with the interested party, whether in the form of a declaration (as sought) or in the form of quashing that decision if that point had been raised.

125. I turn to consider whether it would be appropriate to grant relief in the form of quashing the contract which the defendant entered into with the interested party. I do so as the point was raised on a free-standing basis by the defendant in the following terms. It was submitted that any illegality found would not affect the private law obligation which the Council had entered into in their contract with the interested party, and that that contract could not in any event therefore be quashed as the claimant sought. This submission was based upon the decision of the Court of Appeal in Charles Terence Estates Limited v Cornwall Council [2012] EWCA Civ 1439. In that case the local authority concerned had provided grants and loans to the claimant property company in order to acquire and renovate properties which the claimant then leased back to the Councils as part of a scheme designed to house the homeless. The defendant local authority was the successor to the district councils who had entered into this scheme, and having reviewed it they ceased to pay rents under the leases and demanded immediate repayments of the grants and loans. The claimants brought a private law action in respect of rent arrears and by way of defence the defendant local authority asserted that the leases had been entered in to without lawful authority and were void and unenforceable.

126. At first instance the Judge concluded that the original transactions had been entered into in breach of the Council's fiduciary duty to tax payers as they failed to have regard to the need for the properties to be acquired at a reasonable price and not had regard to market rents when the lease agreements were entered in to. The Court of Appeal concluded that in fact there was no breach of fiduciary duty and went on, in any event, to consider whether or not if there had been such a breach it would have amounted to a defence to the claimant's private law claim. The view of the Court of Appeal is most succinctly expressed in the judgment of Etherton LJ (as he then was) in the following terms:

> "51 Cornwall relies on the reasoning of Neill LJ in *Credit Suisse v Allerdale Borough Council* [1997] QB 306. That case was about capacity. Having found that the council in that case had no capacity, Neill LJ went on to consider (obiter) improper purpose. Insofar as he indicated that any decision of a public body which could be impugned in judicial review proceedings is a nullity for all purposes, including the enforcement in civil proceedings of private law rights under a commercial agreement between the public authority and a third party, I respectfully do not agree with him. I agree with the different

analysis of Hobhouse LJ in *Credit Suisse*, particularly his comments at pages 355, 356 and 357 as follows:

"Before using the phrase "ultra vires" or the words "void" and "nullity," it is necessary to pause and consider the breadth of the meaning which one is giving them. It is not correct to take terminology from administrative law and apply it without the necessary adjustment and refinement of meaning to private law. Where private law rights are concerned, as in the present case, the terminology must be used in the sense which is appropriate to private law. … Private law issues must be decided in accordance with the rules of private law. The broader and less rigorous rules of administrative law should not without adjustment be applied to the resolution of private law disputes in civil proceedings. Public law, that is to say, the law governing public law entities and their activities, is a primary source of the principles applied in administrative law proceedings. The decisions of such entities are the normal subject matter of applications for judicial review. When the activities of a public law body, or individual, are relevant to a private law dispute in civil proceedings, public law may in a similar way provide answers which are relevant to the resolution of the private law issue. But after taking into account the applicable public law, the civil proceedings have to be decided as a matter of private law. The issue does not become an administrative law issue; administrative law remedies are irrelevant. … In the present case, counsel have advanced arguments which have called into question the relationship between private law and administrative law. ... It remains necessary to ask what amounts to a defence to a private law cause of action. Want of capacity is a defence to a contractual claim; breach of duty, fiduciary or otherwise, may be a defence depending upon the circumstances. To say that administrative law categorises all grounds for judicial review as "ultra vires' does not assist. In civil proceedings the question is whether, after taking into account the relevant public law, there is on the facts a private law defence. By a parity of reasoning, how a Divisional Court would have decided an application for judicial review and what remedy, if any, it would have granted in the exercise of its discretion is not material."

52 There is an important practical aspect to this difference between public law and private law concepts and remedies. A remedy may be unavailable by way of judicial review because, for example, there has been delay in bringing the proceedings or the court refuses relief in the exercise of its discretion. By contrast, a transaction or act which is void for want of capacity is a nullity in private law whether or not proceedings are brought and irrespective of any lapse of time before any proceedings are brought, and there is no question of the court

> having any discretion or power to validate the transaction or act. Furthermore, as Hobhouse LJ pointed out in *Credit Suisse* judicial review can be brought by anyone who has a sufficient interest (presumably, in the present case, anyone who pays council tax or business rates) and is not limited to the parties to the private commercial transaction. As Sedley LJ pithily observed in *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678 at [52]:
>
> "It is serious enough if a private law corporation reneges on its agreements for want of power to make them ... . It is even more serious if a body incorporated by statute for public purposes can do so in a case such as the one before the court. This is not only because public bodies, with access to competent legal advice, can be expected not to act on whims and, when accused of doing so, are generally found not to have done so. It is because if a public body can denounce its own commercial agreements as having been excessively generous – in other words can invite the court to recalculate its liability – it will not be only at the authority's own instance that this can happen. It will be able to happen at the instance of any person or body with a sufficient interest - here, for example, a local patients' organisation or the Secretary of State or even … a dissident member of the body itself. It does not matter, I readily accept, that this might create an entire new litigation industry: as Holt CJ said in *Ashby v White* (1703) 2 Ld. Raym. 938, "if men will multiply injuries, actions must be multiplied too". What matters is that the autonomy of statutory bodies like the Trust will be irrevocably compromised: the enlargement of what counts as a public law wrong will mean that every financial decision of a public body is open to scrutiny by the courts on the motion of anyone with a sufficient interest. Only the legal profession would regard such a development as desirable."
>
> 53 For those reasons I do not agree with Cornwall or the Judge that, if (contrary to my view) Restormel and Penwith were in breach of their fiduciary or quasi fiduciary duties in taking the leases from CTE having regard to the rents reserved, the grant of the leases was a nullity even if their acquisition was within the legal capacity of Restormel and Penwith."

127. It follows from this, and I accept, that the defendant is correct that any illegality would not affect the private law arrangements entered into between the defendant and the interested party and that it would be inappropriate therefore to quash the private law contractual arrangements between the defendant and the interested party. Thus it would not be appropriate in any event to grant relief in the form of a quashing of the contract between the defendant and the interested party.

128. As set out above the defendant also sought to contend that relief should be refused on the basis that section 31(2A) applied in this instance and that it would be highly likely that the outcome of the decision would not be substantially different if the matters

complained of had not occurred. Since I am entirely satisfied that discretion should not be exercised to grant relief under section 31(6) it is unnecessary for me to consider in detail this separate basis upon which it was contended that relief should be refused.

Conclusions

129. For the reasons which have been set out above I am satisfied that the claimant's claim under Grounds 1,2,3 and 5 must be dismissed. Whilst I have found their case under Ground 4 made out in my view this is not an appropriate case bearing in mind the undue delay which has occurred and the prejudice to third parties and good administration which would occur for relief by way of quashing the decision of 11th December 2014 to be granted.