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Case No: HT-2018-000212

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building,

London, EC4A 1NL

Date: 28 February 2020

Before His Honour Judge Stephen Davies sitting as a High Court Judge

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Between:

Ryhurst Limited	**Claimant**
- and -	
Whittington Health NHS Trust	**Defendant**

- -

Sarah Hannaford QC & Tom Coulson

(instructed by **Hempsons, Solicitors, Newcastle upon Tyne**) for the **Claimant**

Jason Coppel QC & Rupert Paines

(instructed by **Bevan Brittan LLP, Solicitors, Bristol**) for the **Defendant**

Hearing dates: 10, 11, 12, 19 December 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 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.

……..

His Honour Judge Stephen Davies

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Introduction and Decision

1. This is a public procurement case in which the claimant, Ryhurst Limited ("**Ryhurst**"), complains about the decision by the defendant, Whittington Health NHS Trust ("**the Trust**"), to abandon a procurement exercise for a 10 year strategic estates partnership ("**SEP**") contract, in circumstances where the Trust had previously made a decision to award the contract to Ryhurst.
2. Ryhurst claims that the central reason for the decision to abandon was pressure exerted upon the Trust from various individuals and entities, primarily a local campaigning group and a number of local MPs, including Jeremy Corbyn and Emily Thornberry, as well as the Trust's regulator, NHS Improvement ("**NHSI**").
3. Ryhurst claims that this pressure was exerted solely or primarily because it is part of the Rydon group of companies of which one company, Rydon Maintenance Ltd ("**Rydon Maintenance**"), had been responsible for the refurbishment, including the supply and installation of the cladding, at

Grenfell Tower in London where the devastating fire with tragic consequences occurred on 14 June 2017. Ryhurst contends that this ostensible connection with Grenfell was illusory and in any event of no relevance whatsoever to this procurement exercise, so that the Trust could and should never have allowed itself to be swayed by political pressure into abandoning the procurement for that reason.

4. Ryhurst claims that in abandoning the procurement in such circumstances the Trust was in breach of the duties which it owed to Ryhurst under the Public Contract Regulations 2015 and otherwise. It claims by way of compensation for such breaches damages for the loss which it says it has suffered as a result of such breaches.

5. The Trust contends that its decision to abandon the procurement was lawful and was taken for a number of proper reasons, as explained in the formal notification of its decision to abandon. It accepts that one of these reasons was the risk that some stakeholders would not engage in or support plans developed with Ryhurst. It also accepts that one of the reasons which motivated those stakeholders was the connection, real or perceived, between Ryhurst and with Grenfell but it denies that this was the sole or indeed the primary reason for its decision.

6. The Trust also contends that even if, contrary to that primary factual case, the sole or primary reason was the connection with Grenfell, on a proper analysis of the law that did not make its decision to abandon unlawful.

7. The scope of this trial is limited to the issues of liability, causation and whether or not any breaches made out under the Public Contracts Regulations are sufficiently serious to justify an award of damages. As the case has developed, it has become apparent that the key issues I will have to determine are:

   i) What was the real reason, or the real reasons, for the decision to abandon the procurement?

   ii) If the real reason, or one of the real reasons, was Ryhurst's connection with Grenfell, did the Trust act unlawfully in abandoning the procurement on that ground?

8. In the course of this trial I have been referred to voluminous contemporaneous documentation and have received evidence from a number of witnesses called by Ryhurst and by the Trust. I have also had the benefit of excellent written and oral submissions from leading and junior counsel for both parties for which I am very grateful.

9. Having considered the evidence and the arguments my decision is that Ryhurst has not succeeded in making out its case on liability so that its claim must fail. Had I found for Ryhurst on its primary case in relation to liability it would have succeeded in establishing causation and sufficiently serious breach.

10. My reasons for reaching those conclusions appear in the following sections of this judgment.

Relevant legal principles

11. Although there is common ground as to the fundamental principles, there are also a number of important disputes between the parties as to the precise nature and extent of the obligations owed by a contracting authority such as the Trust to a bidder such as Ryhurst in the context of the abandonment of a procurement exercise which I shall have to resolve.

12. Beginning with what is common ground, it is agreed that the Public Contracts Regulations applied to the procurement conducted by the Trust in this case. The Public Contracts Regulations offer various procurement options. In this case the Trust elected to use the competitive procedure with competitive dialogue option for the procurement, the rules for which appear at regulation 30. In very outline summary: (a) the Trust as the contracting authority begins the procurement process by issuing a contract notice which identifies its needs and requirements and its chosen award criteria; (b) interested economic operators (also referred to as bidders) submit a request to participate and provide the information requested; (c) the contracting authority assesses the information provided and invites selected bidders to participate in a dialogue; (d) the purpose of the dialogue is to identify and define the best means to satisfy the contracting authority's needs; (e) during the dialogue the contracting authority is obliged to ensure equality of treatment and not to provide information in a discriminatory manner; (f) following the dialogue process those bidders who wish to continue are then invited to submit final tenders; (g) the authority may ask for such tenders to be clarified, specified or optimised, but without changing the essential aspects of the procurement; (h) the authority assesses the tenders on the basis of the award criteria; (i) the authority may negotiate with the best tenderer to confirm financial commitments and to finalise the contract terms, but again without changing the essential aspects of the procurement or causing discrimination; and (j) the contract is awarded, on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

13. It is also common ground that it is open to an authority to abandon a procurement exercise at any stage of the process. That is of course a right which any party undertaking a tender process enjoys, in the absence of a contractual or statutory prohibition or restriction on its so doing. There was nothing in the tender information published by the Trust nor in any subsequent communications between the parties which imposed any such contractual prohibition or restriction. Nor do the relevant EU Directives nor the Public Contracts Regulations impose any such restriction. Indeed, the right to abandon is acknowledged in the Public Contracts Regulations, since regulation 55 imposes an obligation on an authority "as soon as possible to inform each candidate and tenderer of decisions reached concerning the … award of a contract … including the grounds for any decision … (b) not to award a contract for which there has been a call for competition". This obligation is a specific statutory reflection of the transparency obligation imposed by general EU law and by regulation 18 of the Public Contracts Regulations (discussed below).

14. Moreover, the Trust is under a statutory obligation by virtue of section 26 of the National Health Service Act 2006, titled "General duty of NHS trusts", to "exercise its functions effectively, efficiently and economically". It follows, as Mr Coppel submitted, that if a NHS trust decided that a procurement exercise would, if carried through to completion, result in it exercising its functions ineffectively, inefficiently or uneconomically, then it would be under a statutory duty to abandon the procurement so long, I would add, as it could lawfully do so.

15. I add that rider because it is common ground that there are limitations upon the right to abandon. Pursuant to regulation 89 of the Public Contracts Regulations a contracting authority is under a specific obligation to comply with the provisions of Part 2 of the Regulations and with any enforceable EU obligation in the field of public procurement in respect of a procurement exercise falling within the scope of Part 2.

16. These obligations include the obligation imposed by regulation 18 of the Public Contracts Regulations which, consistent with the fundamental principles of EU procurement law, requires the

Trust as a contracting authority to treat economic operators such as Ryhurst "equally and without discrimination" and to "act in a transparent and proportionate manner". It is common ground that the regulation 18 obligation applies as much to a decision to abandon a procurement as it does to any other aspect of a procurement exercise to which the Public Contracts Regulations apply. That is made clear by the decision of the ECJ in *Hospital Ingenieure Krankenhaustechnik PlanungsgesmbH ("HI") v Stadt Wien* [2002] EUECJ C-92/00, referred to and applied by Stuart-Smith J in the *Amey v West Sussex* decision to which I shall refer shortly. I shall also refer to the equality and anti-discrimination obligation and to the transparency and proportionality obligations in more detail below.

17. It is also common ground that another fundamental principle of EU procurement law, that a contracting authority should not commit "manifest errors" when exercising its procurement functions, also applies to a decision to abandon a procurement exercise. Again, I shall refer to the manifest error obligation in more detail below.

18. Regulation 91 provides that a breach of the duty owed in accordance with regulation 89 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage. Regulation 97 provides that where the court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 and the contract has not yet been entered into then the court may (amongst other things) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

19. The most recent authority addressing the legal principles which apply when a public authority decides to abandon a procurement exercise is the decision of Stuart-Smith J in *Amey v West Sussex CC* [2019] EWHC 1291 (TCC). I am grateful to the editors of the Building Law Reports for their helpful summary of the facts and the decision which I set out below, so far as relevant to this case:

> "The defendant local authority, "West Sussex", had decided to award a service contract for highway maintenance to a company X which it judged to have the highest score in the procurement exercise. The claimant, "Amey", started legal proceedings ("the First Action") alleging that but for a breach of the Public Contracts Regulations 2015 (SI 2015 No 102) it would have received a higher score than X and should have been awarded the contract. It made a claim for loss of anticipated profit and/or its tender preparation costs. West Sussex gave notice to all bidders of the legal challenge and that it considered the appropriate course of action was to terminate the procurement. West Sussex then claimed the procurement process had been lawfully abandoned and that Amey could not pursue proceedings relating to the award of a non-existent public contract nor alleged breaches of tender rules that no longer existed. Amey issued a second set of proceedings challenging the lawfulness and effect of the abandonment. West Sussex argued the decision to abandon the procurement was lawful and, in any event, did not cause Amey any loss. Held:
>
> (1) As to the lawfulness of abandonment decision: the court should only disturb the contracting authority's decision where there has been a manifest error. There is a broad equivalence between the concepts of manifest error and Wednesbury unreasonableness (see paragraph 81); *Lion Apparel Systems v Firebuy Ltd* [2007] EWHC 2179 (Ch), *Woods Building Services v Milton Keynes Council (No 2)* [2015] EWHC 2172 (TCC), followed.

(2) The decision to abandon the procurement had not been irrational. The hope and belief of West Sussex that the decision would cancel Amey's cause of action was only one element of the approach it took to the broad problem and was a rational attempt to preserve public funds taking into account a number of factors. Amey had not shown that there was any better approach for West Sussex to take than abandoning the procurement and starting again while securing the provision of interim services from another. Put another way, Amey had not shown that the decision was not expedient in the public interest (see paragraphs 82 to 83).

(3) The decision did not infringe the equal treatment obligation, since all bidders were equally placed, being bidders to whom no binding commitment had been made and who accepted the risk of a rational decision to withdraw the procurement (see paragraphs 84 to 85).

(4) Even though West Sussex could have explained its reasons more fully or in different terms, there was no lack of transparency which rendered its decision unlawful (see paragraph 86)."

20. In paragraph 12 of his judgment Stuart-Smith J identified a number of general principles of some relevance to this case in the following terms:

(a) A contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and therefore in respect of any decision not to award a contract and abandon a procurement (see *Embassy Limousines & Services v European Parliament* [1998] EUECJ T-203/96; [1999] 1 CMLR 667 at paragraph 56.

(b) The exercise of that discretion is not limited to exceptional cases or has necessarily to be based on serious grounds (see *Metalmeccanica Fracasso SpA v Amt de Salzburger Landesregierung* [1999] EUECJ C-27/98; [1999] ECR I-5697; [2000] 2 CMLR 1150 at paragraph 23.

(c) There is no implied obligation under the Public Contracts Directive or the Regulations to carry the award procedure to its conclusion (see *Metalmeccanica* supra at paragraphs 24 and 33).

(d) Neither the Public Contracts Directive nor the Regulations contain any specific provision concerning "the substantive or formal conditions" for the decision not to award a contract/to abandon a procurement. But, the decision is "subject to the fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services" (see *Hospital Ingenieure Krankenhaustechnik PlanungsgesmbH ("HI") v Stadt Wien* [2002] EUECJ C-92/00; [2002] ECR I-5553; [2004] 3 CMLR 16 at paragraphs 42 and 47).

(e) The duty to notify reasons in the Public Contracts Directive and the Regulations is "dictated precisely by concern to ensure a minimum level of transparency in the contract awarding procedures … and hence compliance with the principle of equal treatment" (see *HI* supra at paragraph 46).

(f) The courts of member states must be able to determine the lawfulness of a decision to abandon a procurement, and it is contrary to the provision of Directive 89/665/EEC ("the Remedies Directive") to limit the review of the legality of the decision to "mere examination of whether it was arbitrary" (see *HI* supra at paragraphs 61 to 64);

(g) …;

(h) EU law permits member states to provide in their legislation for "the possibility to withdraw an invitation to tender on grounds which may be based on reasons which reflect inter alia the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, amongst other things, to any change that may arise in the economic context or factual circumstances, or indeed the needs of the contracting authority concerned. The grounds for such a decision may also relate to there being an insufficient degree of competition, due to the fact that, at the conclusion of the award procedure in question, only one tenderer was qualified to perform the contract" (see *Croce Amica One Italia SrL v Azienda Regionale Emergenza Urgenza (AREU)* [2014] EUECJ C-440/13; ECLI:EU:C:2014:2435; EU:C:2014:2435; [2015] PTSR 600 at paragraph 35)."

21. I was referred to the decision of the CJEU in C-440/13 *Croce Amica One Italia SrL v Azienda Regionale Emergenza Urgenza (AREU)* [2015] PTSR 600, referred to by Stuart-Smith in *Amey* at paragraph 12(h) above. I gratefully take the facts and the decision, so far as relevant to this case, from the headnote of the report in the Public and Third Sector Reports:

"The Italian contracting authority provisionally awarded a public contract to the only remaining tenderer in a tendering procedure, the other tenderers having been rejected. The contracting authority subsequently concluded that the tenderer's bid was anomalous. At the same time preliminary criminal investigations were brought against the legal representative of the tenderer in respect of, inter alia, fraud. The contracting authority decided not to proceed with the definitive award of the contract to the tenderer and to cancel the related tendering procedure, in accordance with the power available to the administration under national law to withdraw, suspend or modify its own measures. The tenderer brought an action challenging the contracting authority's decision before the Regional Administrative Court, Lombardy, which considered that the contracting authority had failed to have regard to article 45 of Parliament and Council Directive 2004/18/EC, taking the view that under that article a tenderer might be excluded only where the tenderer had been convicted by a judgment having the force of res judicata. The court was, moreover, uncertain as to the full extent of its own jurisdiction to review the legality of a decision of a contracting authority. The court therefore referred to the Court of Justice for a preliminary ruling questions concerning the interpretation of articles 41(1), 43 and 45 of Directive 2004/18. In essence those questions were: (i) whether a contracting authority was permitted to withdraw an invitation to tender where the condition for excluding an economic operator under article 45 of Directive 2004/18 was not fulfilled; and (ii) whether, under European Union law, the national court could conduct a review of a contracting authority's decision to take account of the reliability and suitability of the tenderers' bids and to substitute its own assessment as to the expediency of withdrawing the invitation to tender. Held:

(1) That a decision to withdraw an invitation to tender for a public contract had to comply with articles 41(1) and 43 of Directive 2004/18 but the Directive did not contain any provision concerning the substantive or formal conditions for such a decision; that European Union law permitted member states to provide in their legislation for the possibility to withdraw an invitation to tender, which was different from a decision to exclude a tenderer under article 45 of Parliament and Council Directive 2004/18/EC; that the grounds for a decision to withdraw from the procedure could be based on reasons which reflected, inter alia, the assessment as to whether it was expedient, from the point of view of public interest, to carry an award procedure to its

conclusion, having regard, among other things, to any change that might arise in the economic context or factual circumstances, or the needs of the contracting authority concerned; that the grounds for such a decision might also relate to there being an insufficient degree of competition, due to the fact that, at the conclusion of the award procedure, only one tenderer was qualified to perform the contract; that, therefore, provided the principles of transparency and equal treatment were complied with, a contracting authority could not be required to carry to its conclusion an award procedure that had been initiated and to award the contract in question, even where there remained only one tenderer in contention; and that, accordingly, articles 41(1), 43 and 45 of Directive 2004/18 meant that, where the conditions for the application of the grounds for exclusion set out in article 45 were not fulfilled, that article did not preclude the adoption by the contracting authority of a decision not to award a contract for which a procurement procedure had been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded (post, paras 27, 29—30, 35—37, operative part, para 1).

(2) That a decision to withdraw an invitation to tender for a public procurement contract was a decision taken by a contracting authority in relation to which a member state was required, by the third sub-paragraph of article 1(1) of Council Directive 89/665/EEC, to establish in their national law review procedures designed to ensure that decisions relating to contracts falling within the scope of Directive 2004/18 might be reviewed effectively, and as rapidly as possible, on the grounds that such decisions had infringed European Union law in the field of public procurement or national rules transposing that law; that a review of the legality of a contracting authority's decision was as to whether an act was lawful, rather than expedient, and could not be confined to an examination of whether the decision was arbitrary; but that, in the absence of specific EU legislation, the national legislature might grant the competent national courts and tribunals more extensive powers to review whether a measure was expedient (post, paras 39—46, operative part, para 2). *Hospital Ingenieure Krankenhaustechnik Planungs GmbH (HI) v Stadt Wien* (Case C-92/00) [2002] ECR I-5553, ECJ applied."

22. Two issues arise from the decision in *Croce Amica*.

23. The first is that Mr Coppel submitted that the decision demonstrated that it was open to a contracting authority to decide to abandon a procurement on the basis of factors which turned on the identity of the bidder. Otherwise, he submitted, the decision in that case would have been held to offend against the equal treatment obligation. In that respect he also referred me to the decision of the EU Court of First Instance in *Embassy Limousines v European Parliament* [1999] CMLR 667, referred to by Stuart-Smith J in *Amey* at paragraph 12(a). In that case the Parliament as the contracting authority abandoned the procurement for a contract to provide taxi services following concerns being expressed as to the probity of the bidder and the quality of its services which an investigation had shown unfounded but about which the Parliament was still concerned. The Parliament contended that there were other legitimate reasons for its decision to abandon. The Court held at [56], following earlier authority, that the contracting authority had a broad discretion and that its review should be limited to checking that there had been no serious or manifest error. It held at [60] that although the remaining doubts about the competence of the drivers constituted a "decisive ground" of the decision not to accept the bid, nonetheless the tenderer had not shown that the contracting authority "went beyond the proper bounds given the broad discretion it enjoys in that regard".

24. Ms Hannaford submitted that the scheme of the Public Contracts Regulations was such that whilst contracting authorities were entitled to assess the characteristics of the bidder at selection or pre-qualification stage (under regulations 57 and 58), they were not entitled to re-assess the position unless the bidder's ability to comply with the selection criteria changed.

25. In my judgment Mr Coppel is right to submit that in principle a public authority may decide to abandon a procurement by reference to reasons connected with the individual circumstances of the tenderer concerned. That follows from the *Croce Amica* and the *Embassy Limousines* cases. However, I agree with Ms Hannaford that this is not the end of the inquiry and, in fairness to him, Mr Coppel did not suggest that it was. It must also be considered whether or not that decision was contrary to the fundamental principles of EU procurement law, which question must of course be determined by reference to those principles with a close focus upon the individual facts of the particular case.

26. There was some consideration at trial as to whether the *Croce Amica* decision also holds that the relevant question for the court on a review is whether or not the decision to abandon can be justified as being expedient in the public interest. It appears to me, from a reading of the decision in that case, that it does not. Instead the case establishes that: (a) the relevant question is one of lawfulness rather than mere lack of arbitrariness; but (b) the national legislature would be entitled, but not obliged, to grant to its courts a more extensive power to review the decision on the basis of whether or not it was expedient in the public interest to withdraw. Since: (i) there is no suggestion that the Public Contracts Regulations or any other instrument grants the UK courts the power to review whether or not the decision to abandon was expedient in the public interest; and (ii) there is no other apparent basis for suggesting that the UK courts are under such an obligation, in my judgment it is the lawfulness of the decision, to be determined by reference to the fundamental EU procurement principles, which it is for this court to review.

27. There was a debate in opening and closing submissions about whether each of the relevant fundamental EU procurement obligations is hard-edged (meaning that it is for the court to decide for itself whether or not the relevant obligation was complied with by the contracting authority) or whether the contracting authority has a margin of appreciation or discretion in relation to compliance with these obligations, to which the court should accord due respect. I shall consider this point by reference to each of the relevant obligations.

28. I begin with the transparency obligation. It is common ground (following *Lion Apparel* and *Woods Building Services (No 2)* referred to by Stuart-Smith in *Amey v West Sussex* above) that this is a "hard edged" obligation where there is no margin of appreciation to be afforded to the contracting authority.

29. As to the content of the transparency obligation, I have been assisted by and thus refer to the helpful analysis in the *Law of Public and Utilities Procurement* (3rd edition, 2018) by the respected academic Professor Sue Arrowsmith. She suggests at [3-13] and following that: "in the context of public procurement generally transparency has four distinct (though related) aspects", namely (1) publicity for contract opportunities; (2) publicity for the rules governing each award procedure; (3) rule-based decision-making, entailing that the award procedure is constrained by rules which limit the scope for discretion by decision-makers; and (4) the possibility for verification and enforcement, including the provision of timely information on reasons for decisions, to support the legal rights to review that

participants enjoy. Regulation 55 of the Public Contracts Regulations, to which I have already referred, is a concrete example of what the transparency obligation entails as regards (4). I have been referred to two cases, cited by Professor Arrowsmith at [13-70], which illustrate how and to what effect the transparency principle imposes obligations on a contracting authority.

30. The first is the *Embassy Limousine* case referred to above, where the court held at [86] that the failure by the Parliament to correct the impression previously given to Embassy that it had obtained the contract was a breach of the transparency principle and that this breach justified the imposition of non-contractual liability [88]. However, since the court had already held, as discussed above, that there was no contractual liability upon the Parliament for its decision to abandon the procurement it followed that there could be no right to claim for loss of profit, since that would result in giving effect to a contract which never existed [96]. Instead, Embassy was awarded compensation, limited to the losses it had incurred over the period when the Parliament was in breach of the transparency obligation [98].

31. The second is the decision of Supperstone J in *Montpellier Estates Ltd v Leeds City Council* [2013] EWHC 166 (QB). In that case, which concerned a procurement for the development of an arena in Leeds, one of the arguments advanced was that the defendant public authority (LCC) was in breach of its duty of transparency in not disclosing to the claimant tenderer (MEL) the true nature of what was referred to as "plan B" (which was LCC's plan to build the arena on one of its own sites). Having considered a number of authorities, including the *Embassy Limousine* case, Supperstone J said this at [442]:

> "In my view the decision of the ECJ in *Universale-Bau* does not assist MEL. It simply confirms that at every stage the procedure for awarding a public contract must comply with both the principle of equal treatment and the principle of transparency. It is the guidelines produced by the European Court of First Instance in *Citymo SA v Commission of the European Communities* (Case T-271/04) which are relevant in the present context. In that case liability arose under the Commission's Financial Regulation, rather than directly under Directive 2004/18/EC, however the principles of transparency, proportionality, equal treatment and non-discrimination still apply (see paras 122 and 123). Significantly, for present purposes the court made clear that the contracting authority has "a very broad discretion" to refuse to conclude the contract and, therefore, to terminate pre-contract negotiations which have been started (para 111). The Court stated:
>
> > "112. It follows that, in order for the condition concerning the existence of unlawful conduct to be fulfilled, the applicant must show not only that the Commission breached one of the rules of law relied on by the applicant, having regard to the circumstances of the decision not to take up the lease and consequently to terminate the pre-contract negotiations, but also that that breach constituted a manifest and serious disregard of the limits imposed on the Commission's discretion."
> >
> > Accordingly, if the contracting authority delays informing the other party to the negotiations of its decision to abandon the procurement and has thus continued the pre-contract negotiations which it knew were bound to fail, that conduct could breach the principle of good faith and amount to the abuse of its right not to contract (para 131)."

32. Both of these authorities are relevant to how claims founded upon breach of the transparency obligation require consideration as to the seriousness and impact of the breach, Having regard to those authorities I agree with Mr Coppel that it is not sufficient to establish a breach of the transparency obligation and it is necessary to go on to consider what the consequences of that breach were. In the *Embassy Limousines* case the point was made that the claimant could not use the breach of the transparency case to argue that it should recover damages for loss of profit under a contract which was never entered into. It follows in my view that it would be necessary for Ryhurst to establish on the facts that, had the Trust not breached the transparency obligation, it would either on the balance of probabilities have entered into the SEP or, alternatively, not have wasted further time and expenditure at a time when the Trust was in breach of its transparency obligation. However each causative connection would lead to different consequences in terms of the loss which Ryhurst could claim.

33. I next turn to the equal treatment obligation. In *Woods Building Services v Milton Keynes Council (No 1)* [2015] EWHC 2011 (TCC) Coulson J summarised the equal treatment duty as follows:

> "The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus "comparable situations must not be treated differently" and "different situations must not be treated in the same way unless such treatment is objectively justified": see *Fabricom v Belgium* [2005] ECR1-01559 at paragraph 27. Thus, the contracting authority must adopt the same approach to similar bids unless there is an objective justification for a difference in approach."

34. The principle requires not only equal treatment of firms within different EU member states but also firms within the same member state. As stated in *Arrowsmith* at [7-12], the purpose of equal treatment is:

> "In general … to ensure the development of effective competition, leading to selection of the best bid. Thus … the principle generally forbids different treatment of entities in a comparable competitive position. This approach to equal treatment, as articulated in the previous edition of the present book, was expressly endorsed in domestic law by Briggs J in the High Court in *Azam & Co. v Legal Services Commission* [2010] EWHC 960 (Ch) at [35], concluding that all potential bidders need to be given access to substantially the same information."

35. Mr Coppel submitted, relying upon the decision of Stuart-Smith J in *Amey v West Sussex*, that the equal treatment obligation could not apply in the context of a decision to abandon a procurement exercise, since all bidders were from the outset equally placed as firms to whom no binding commitment had been made and who accepted the risk of a rational decision to withdraw the procurement.

36. Ms Hannaford submitted that this was wrong in principle, arguing that the authorities clearly demonstrated that the equal treatment obligation may be engaged in the context of a decision to abandon a procurement. She referred me to the *HI* decision at [47]. She submitted that the obligation would clearly be engaged where a public authority decided to abandon the tender for reasons to do with the characteristics of that tenderer, in circumstances where the public authority would not have abandoned the procurement in the case of a tenderer in the same position but without those characteristics.

37. I agree with Ms Hannaford that the equal treatment obligation is plainly capable of application in relation to decisions to abandon. I do not read the judgment of Stuart-Smith J as stating that the equal treatment obligation could never apply in such circumstances. In my view he was only deciding that it was not breached in the case before him, where the decision was a rational one and was applied equally to both of the remaining tenderers who were, therefore, being treated in the same way.

38. As to whether the equal treatment obligation is a hard-edged principle, Ms Hannaford referred me to the decision of Coulson J in *Woods (No 2)* cited above, where he limited himself to observing at [10], in reliance upon what was said by Morgan J in the *Lion Apparel* case that: "when considering whether there has been compliance, there is no scope for any 'margin of appreciation' on the part of the contracting authority".

39. However, Mr Coppel referred me to the decision of the Supreme Court in *Rotherham MBC & others v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6. That case was not about procurement. It involved the allocation by the defendant of structural funds made available by the EU for under-performing regions. It was complained by the claimant local authorities that the way in which the funds had been allocated breached the EU principles of equality and proportionality. A majority of the court rejected the claim, concluding that the decision was a matter of discretion for the executive, involving balancing political considerations about the distribution of limited resources, with which the courts should not interfere unless the decision was clearly irrational, and that on the facts the decision was within the margin of appreciation allowed to the defendant. On that basis it was held that the claims for unequal or disproportionate treatment had not been made out.

40. The submission which was recorded at [25] as being made to the court by Mr Coppel, who also appeared in that case, was that the defendant had no discretion or margin of judgment on the general principle of equality and that his only discretion or margin of judgment related to the question as to whether or not the discrimination was objectively justifiable. In rejecting that submission Lord Sumption observed at [27] that whilst the two-stage process, by which courts in discrimination cases distinguish between comparability and objective justification, was a useful tool of analysis it was not a rule of law and that the question whether two situations are comparable will often overlap with the question whether the distinction is objectively justifiable.

41. I agree with Mr Coppel that the decision in *Rotherham* does show that equal treatment is not a hard edged issue where there are always two logical steps in the enquiry, with no room for a margin of appreciation in the first question as to whether or not the claimant has been treated unequally. It is also apparent from the decision that the extent of the margin of appreciation must depend on the particular circumstances of the individual case. It may be observed that the facts of the *Rotherham* case clearly justified the conclusion that a very large margin of appreciation was appropriate.

42. Mr Coppel also referred me to the more recent decision of Choudhury J in *Abbvie v NHS Commissioning Board* [2019] EWHC 61 (TCC) where, at [59] onwards, the judge considered the issue of margin of appreciation in the context of the equal treatment principle in a procurement case. He was referred to a number of domestic authorities, including *Lion Apparel* and *Woods (No 2)*, as well a decision of the European Court, *Case T-211/17 Amplexor Luxembourg Sarl v European Commission*, but not to the *Rotherham* case. Nonetheless, his conclusion at [65-67] was that the mere existence of differential treatment did not give rise to a breach of the equal treatment principle.

Instead, the court should first consider whether or not the differential treatment fell outside the margin of discretion available to the authority. If that investigation showed that there was a failure to confer equal treatment then, by reference to the analysis of the decision in *Lion Apparel*, no further margin of appreciation was to be afforded at that stage, so that the authority would have to show that the unequal treatment was objectively justified in order to avoid liability.

43. That analysis seems to me, with respect, to be entirely consistent with the decision in *Rotherham* in its essential conclusion that there is a margin of appreciation at the first stage as well as at the second objective justification stage. Insofar as the analysis needs to be read subject to the observation by Lord Sumption in *Rotherham* that it is not necessary to adopt the two-stage process in every case then I do so.

44. It follows, in my view, that Ms Hannaford is not correct in her submission that her complaint of unequal treatment is made out in this case purely and simply by reference to the fact that on her case the sole or principal reason for the decision to abandon the procurement as against Ryhurst, namely the Grenfell connection, would not have been applied to any other tenderer in the same position, so that unless the decision can be shown by the Trust to have been objectively justified it would be in breach of the equal treatment principle. Instead it seems to me that the Trust has a margin of appreciation in such cases and, in accordance with the approach in *Amey* and *Croce Amica*, in the context of abandonment decisions Ryhurst must go further and establish that the decision was manifestly erroneous or irrational or disproportionate or not objectively justified. I do not think that it matters much, if at all, which label is attached. It is sufficient to say that the onus of proof lies upon Ryhurst to establish that the decision was outside the range of reasonable decisions which the Trust, as a public authority having to balance a wide range of relevant factors and interests, could properly have arrived at in compliance with its fundamental EU procurement obligations.

45. Turning now to the allied non-discrimination principle, it is not suggested that this adds anything in this case to the equal treatment obligation. I note that *Arrowsmith* describes this principle at [7.17] as being "probably just a specific expression of the more general principle of equal treatment [and] as such, it serves merely as a reminder that non-discrimination on grounds of nationality is not permitted, and perhaps also to indicate that the existence of such discrimination is to be judged on the same basis as under the Treaty".

46. As regards the proportionality principle, *Arrowsmith* summarises the principle at [7-24] as being that: "The principle of proportionality requires in general terms that 'action undertaken must be proportionate to its objectives'".

47. Mr Coppel referred me to the decision of the Supreme Court in *Lumsdon v Legal Services Board* [2016] AC 697. In that case Lords Reed and Toulson (delivering a speech with which the other members agreed) clarified the principle of proportionality as it applies in EU law. As the headnote to the report states, the court decided that where the principle of proportionality applied a nuanced, fact and context sensitive approach applied, so that although the court was not restricted to review on the basis of manifest error it nonetheless had to approach the question on the basis that the decision maker was permitted to exercise a margin of appreciation, so long as the means chosen were not inappropriate.

48. In *Lumsdon* the court was considering the proportionality obligation in the context of the review of EU measures and national measures either implementing EU law or derogating from general EU

rights: see the decision at [35]. It explained at [26] that this was a different exercise to that conducted by the court when applying the principle of proportionality under the European Convention on Human Rights. In the context with which the instant case is concerned they said at [38] that: "Where member states adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, therefore, proportionality functions in that context as a conventional public law principle".

49. It is clear therefore in my judgment that the proportionality obligation is not a hard-edged obligation and that the decision maker is entitled to a margin of appreciation, the degree of that margin depending, as in the case of the equal treatment obligation, on the nature of the decision in question.

50. Mr Coppel submitted that the proportionality obligation could not be engaged in a case such as the present because, as stated by Lord Sumption in the *Rotherham* case at [47], it is a test for assessing the lawfulness of the decision-maker's choice between some legal norm and a competing public interest. Here, he submitted, since Ryhurst had no legal right to be awarded the contract and the Trust was completely free to abandon the procurement no question of proportionality could arise in terms of assessing the lawfulness of the Trust's decision to abandon.

51. I do not accept this submission. In my judgment the proportionality obligation is relevant in this way: the decision to abandon must be proportionate to the reasons given by the Trust for its decision to abandon, albeit allowing the Trust a proper margin of appreciation in making that decision. There may be cases where the reasons relied upon would justify taking some steps short of abandonment or, possibly, an abandonment followed by an appropriately revised procurement exercise, but would not justify a complete abandonment.

52. I turn finally in this review of the fundamental EU procurement obligations to "manifest error". This is described, helpfully, by the authors of *EU Public Procurement: Law and Practice* at [C1.35] as follows:

> "The test of "manifest error" is derived from EU law (see, for example, *Upjohn Ltd v Licensing Authority established under Medicines Act 1968 and others*, Case C-120/97, judgment of 21 January 1999). Manifest error is very similar to, if not the same as, the *Wednesbury* test of irrationality in judicial review proceedings (see *R. (Greenwich Community Law Centre) v London Borough of Greenwich* [2012] EWCA Civ 496 and *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC)).

53. *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch) describes how manifest error should be approached in public procurement cases:

> "35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the [...] principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.
>
> 36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations.
>
> 37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a 'manifest error'.

> 38. When referring to 'manifest' error, the word 'manifest' does not require an exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made (at para.15)."

54. Consistent with the above analysis the parties agree that the contracting authority does have a margin of appreciation as regards manifest error and they also agree that there is a broad equivalence between manifest error and *Wednesbury* unreasonableness in UK law.

55. A further legal issue which arises is whether or not Ryhurst is entitled to advance an argument, which would be available to it if making a public law challenge under domestic law, that in making the decision to abandon the Trust took into account a legally irrelevant and hence impermissible consideration, namely the opposition to Ryhurst based on the Grenfell connection. This might arguably assist Ryhurst's case if the court was not satisfied that the Grenfell connection was the sole or principal reason for the decision or that the decision overall was not irrational, but nonetheless found that the Grenfell connection was one of a number of factors which were taken into account by the Trust.

56. Ms Hannaford submitted, relying on domestic public law principles, that she could succeed on this basis alone. She referred in particular to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 as authority for the proposition that political considerations cannot be taken into account because they are "*pre-eminently extraneous*": see, per Lord Upjohn at 1058F-G and 1061E-F; see also Lord Reid at 1032D-E. She also referred to *R (McMorn) v Natural England* [2015] EWHC 3297; [2016] Env. LR 14, at paras. [160]-[167], a case concerning the EU Directive 2009/147/EC relating to the protection of wild birds. In that case, Ouseley J held that the public body was entitled to take particular care in making its decision because of the public controversy which the decision would generate, but what was unlawful was for a consideration of public opinion to affect the outcome.

57. Mr Coppel submitted that there was no legal foundation for this argument, since a contracting authority is under no duty to comply with the full gamut of domestic public law obligations when deciding whether or not to abandon a procurement exercise. He referred me to the decision of Coulson J in *Newlyn plc v Waltham Forest LBC* [2016] EWHC 771 (TCC) where, having concluded that the claim seeking to challenge a particular procurement exercise where the claimant's tender was unsuccessful did not fall within the Public Contracts Regulations, the judge had to consider a request to permit the claim to be amended to bring a claim for judicial review. Having noted the procedural objections to such a course he went on to consider whether a claim would lie as a matter of substantive public law. He concluded that it did not because the decision was not amenable to judicial review. He referred to three earlier decisions in support of that conclusion. The most pertinent is the decision of McCombe J in *R (on the application of Menai Collect Ltd and others) v Swift Credit Services Ltd* [2006] EWHC 724 (Admin) where he said:

> "47. Having regard to the authorities so helpfully cited to me by both counsel, I would resolve the principal challenge to the decision in the Defendant's favour both on the facts and on the law for the reasons given. In my view, for the reasons advanced by Mr. Coppel, the Board did have before it the material information required for it to take its decision and Mr. Matthews' statement on behalf of the Region was not inaccurate. Further, the tender evaluation process was an essentially commercial process, notwithstanding the nature of the services which are to be the

> subject of the contract. The manner in which the Defendant chose to inform itself as to the merits of the tenders was designed to be as objective as possible. It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review. It is, I think, for this reason that the examples given of cases where commercial processes such as these are likely to be subject to review are such as they are in the reported cases, namely bribery, corruption, implementation of unlawful policy and the like. In such cases, there is a true public law element. Here, as in ***Hibbit***, the fact that the decision sought to be reviewed is the placing of a contract with one bidder as opposed to another adds force to the contention that there is no relevant public law obligation in issue: see per Waller J at p. 26."

58. In my judgment there is no credible basis for finding that a different analysis should apply in this case. Moreover, as Mr Coppel observes, there are two further objections.

59. The first is that since this is now a claim for damages only it is not possible to obtain an award of damages for breach of a public law obligation. The position is summarised in *Supperstone, Goudie and Walker on Judicial Review* (6th edition) at [17.86] as follows:

> The mere fact that there has been a breach of a public law duty does not normally give rise to a cause of action for a money or restitutionary claim. As was said by Laws J in *R v Ealing London Borough Council, ex p Parkinson* (1995) 8 Admin LR 281:
>
> > "The starting point … consists in a general principle of administrative law, namely that the law recognises no right of compensation for administrative tort; by "administrative tort" I mean breach of a duty owed by a public body arising only in public law. This principle is clearly established. A public body condemned by the court as having acted irrationally, unfairly or illegally is not thereby rendered liable to damages. There are exceptions. If the public body is convicted of misfeasance in public office, damages may be recovered; strictly, however, this is no exception since misfeasance is recognised as a tort sounding in private law … There is a further, and true, exception where the public law breach consists in a failure to fulfil an obligation arising under EC law and is of a kind such that compensation may be payable according to the jurisprudence of the Court of Justice … There may also be cases where in the purported performance of a public duty, a body commits what is plainly a private wrong: it may be false imprisonment, or in some cases negligence … but again, these are not exceptions to the principle which I have stated."

60. The second is that no claim for judicial review has in fact been brought by Ryhurst in any event and there could have been no proper basis for acceding to any request, had one been made, to treat the claim as if it incorporated a claim for judicial review.

61. I should also for completeness refer to *Amey*, where Stuart-Smith J was asked to consider the nature of a claim for damages under the Public Contracts Regulations. In paragraph 11 he referred to dicta in the Court of Appeal decision in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011 at [76]-[78] which were relied upon by the defendant to emphasise the "public law aspects of breaches of duty in the course of a public procurement pursuant to the Public Contracts Regulations". He noted that:

> "*Chandler* was a claim for Judicial Review and the relevant passage was in response to a submission that a complaint that the public procurement regime had not been complied with was a matter for private, not public, law. That submission was rejected as an oversimplification

> because a failure to comply with the Public Contracts Regulations may give rise to situations where a public body may be subject to public law review and remedies."

62. That analysis makes it plain that there may be cases where a public law claim can be brought alongside the private law claim. However, Stuart-Smith did not suggest that this permitted the two claims to be treated as if they were one for all intents and purposes with the same legal principles applying to both.

63. Finally, I should note that this issue is considered in some detail in *Arrowsmith* at chapter 2 section 12 entitled "the common law principles of judicial review" where, although the author suggests that the law is not clear either as to whether or not judicial review principles apply at all to public procurement or, if they do, as to whether they add anything of substance to the rights afforded by the Public Contracts Regulations and other fundamental EU principles, at [2-151] she concludes that: "There are not yet any cases in which the application of judicial review principles has been accepted in a way that has clearly added to the obligations under the legislation itself." Nor have I been referred to any authority where a court has accepted that it is open to a claimant in a public procurement case to argue that a decision is subject to challenge simply because a legally irrelevant and hence impermissible consideration was taken into account in making the decision. I am quite satisfied that there is no proper basis for imposing such an obligation. In my view the question for the court in such a case is whether or not the error led to the decision being disproportionate or manifestly erroneous or irrational. If that is not the case, then there is no basis for granting relief.

64. Mr Coppel also submitted that even if the principle did apply the legal underpinning of the argument was deficient. He relied upon the decision of the Supreme Court in the case of *R (Carlile) v Secretary of State for the Home Department* [2015] 1 AC 945. In that case the court rejected an argument that the Home Secretary, when making a decision to deny entry to an Iranian national who was opposed to the current regime, had taken into account a legally irrelevant consideration, namely the risk of a threat to British nationals and British interest arising from a feared adverse reaction by the Iranian state to the British government allowing the national entry to articulate opposition to the current regime. It was argued by the claimant that it was improper to take into account a threat which only arose because such a response was not one which a foreign state which shared the values embodied in the European Convention of Human Rights, including the right of free speech, could have made. The court held that the risk of a threat was a relevant consideration, even though that threat arose from a response which would be unlawful in the UK. By parity of reasoning, submitted Mr Coppel, it could not properly be said that a decision taken on the ground of threat to the success of the SEP due to stakeholder opposition was wrongful, even if that opposition was founded – in whole or in part - on a wrongful equation of Ryhurst with Grenfell and with criticism of Rydon Maintenance in relation to the cause of the Grenfell fire.

65. Ms Hannaford submitted that the *Carlile* case, turning as it did on the claimant's challenge under Article 10 ECHR of the defendant's decision to direct that a particular person's exclusion from the UK was "conducive to the public good", could have no application to the facts of this case. I agree that the facts of *Carlile* are of course completely different to the facts of this case. Nonetheless, *Carlile* seems to me to establish a principle of general application which I must of course accept and apply, insofar as on my findings of fact I need to do so.

66. Ryhurst has also pleaded an alternative case based upon an allegation that an implied tender contract was created by the Trust's invitation to tender and its response. This was disputed by the Trust. However, since Ms Hannaford rightly accepted in her opening skeleton that this alternative case did not add anything to the case under the Public Contracts Regulations there is no need for me to say anything more about that.

67. After that lengthy consideration of the relevant legal principles I now turn to the facts.

The parties

68. Ryhurst is a company which has since 2010 carried on business as a specialist provider of health estate management services. Historically it was involved in PFI projects but subsequently evolved to provide a broader range of services, both as a consultant and through the SEP model, to which I will refer to in more detail below.

69. Ryhurst is part of a group of companies ("**the Rydon Group**"). Its parent company, Rydon Group Limited, is also the parent company of Rydon Maintenance, the company referred to in paragraph 3 above which, as its name indicates, undertakes maintenance works and did so in relation to Grenfell. There is also a separate subsidiary company, Rydon Construction Limited, of which Mr Rigby is a director and which undertakes construction works. Mr Collinson, the managing director of Ryhurst, is also a board member of the parent company. In that capacity Mr Collinson was of course involved in taking decisions relevant to the parent company's ownership of all of its subsidiary companies including Rydon Maintenance. He emphasises however, and this is not in dispute, that there is no operational or other connection between Ryhurst and Rydon Maintenance, which operate in entirely different fields and through entirely different personnel.

70. There was, however, a community of interest as between Ryhurst and the other companies within the Rydon Group in terms of opportunities for Rydon Group companies to undertake development projects and also to undertake construction work and facilities management work in relation to health estates where Ryhurst is involved through a SEP. (For ease of reference when I refer to the Rydon Group companies without differentiating between those of individual companies I shall simply refer to them collectively as "**Rydon**".)

71. So far as the Trust is concerned, it provides integrated hospital and community care services to residents of Islington and Haringey and surrounding areas. It is responsible for, and provides services from, the Whittington Hospital. This is a substantial site, sometimes also referred to as a "campus", which includes a number of buildings providing medical facilities as well as a number of buildings used for ancillary services such as office accommodation and staff living accommodation. It is located in Archway to the south west of Highgate Hill.

72. The Trust is also responsible for and provides services from a number of separate buildings in the surrounding area, referred to as the community estate, comprising 39 properties, of which some are freehold and some leasehold of various tenures. It has a substantial number of employees and a substantial budget. It is obviously a very important entity so far as the local community is concerned.

73. The decisions the subject of this case were taken, in accordance with the Trust's Scheme for the Reservation and Delegation of Powers, by the Trust Board in a formal meeting. The Trust Board comprised a number of executive members, being full time senior Trust employees, and six non-executive members. The latter were also referred to as non-executive directors, sometimes abbreviated to "NEDs". One of their number was the chair of the Trust Board who, over the period relevant to this case, was Mr Steve Hitchins. As non-executives they were not expected to become involved the day-to-day business of the Trust so as to maintain their independence from the Trust executive. However, they would be provided with papers on topics for discussion in advance of Trust Board meetings and with minutes of the meeting afterwards. They would also be provided with informal updates through regular emails from Mr Hitchins, but they would not normally be involved in the detail of what was happening within the Trust in between meetings. The Trust Board held meetings each month and monthly seminars were also arranged at which the non-executive directors had the opportunity to discuss matters of importance with Trust associate directors in more detail than would be possible at board meetings, where the time for discussion was relatively limited. These Trust Board seminars were not minuted because it was not expected that they would be decision-making events.

The witnesses

74. I heard from the following witnesses. This is not a case which turns to any great extent upon on my assessment of the credibility of the witnesses. Nonetheless since submissions have been made as to the credibility of some of the witnesses, my assessment of the witness who were called to give evidence is as follows.

75. Mr Stephen Collinson is the managing director of Ryhurst. He has substantial experience of healthcare and estate management. He led the procurement exercise for Ryhurst and has produced a detailed and substantial witness statement. Whilst undoubtedly honest and genuine and generally reliable, having a good grasp of the details, there were some significant differences between some parts of his oral evidence and the picture as revealed by the contemporaneous documents, which satisfied me that his recollection was somewhat impaired by his strong belief that Ryhurst had been let down by the Trust, so that it would be unsafe to place reliance on those parts of his oral evidence.

76. Mr Tom Rigby is a development director within the Rydon Group. His involvement, and hence his evidence, was much more limited than Mr Collinson. He was also honest, genuine and generally reliable.

77. Ms Siobhan Harrington has been the chief executive of the Trust since September 2017, taking over from her predecessor Mr Simon Pleydell. Before that she was the deputy chief executive and director of strategy and led on the procurement from the outset until she became chief executive, after which that role was taken over by Mr Bloomer. She was a member of the Trust Board over the whole of the procurement period. She was also honest, genuine and generally reliable. She did not profess to have a detailed knowledge of the tender or the contract documentation. Her knowledge of the detail of events reduced once she became chief executive and assumed a far wider range of responsibilities. I did not detect any conflict of any substance between her recollection and the contemporaneous documents.

78. Mr Stephen Bloomer has been the chief finance officer of the Trust since June 2015 and, as I have said, led on the procurement from September 2017. He was also a member of the Trust Board over the whole of the procurement period. On the essential factual issues, he came across as honest, genuine and generally reliable. He was however responsible for the procurement through its most difficult stages, where he had a difficult path to tread at times. In my view that was reflected in that there were some occasions where his contemporaneous communications contained an element of "spin", as did some parts of his evidence as contained in his witness statement, particularly in relation to the detail of some of the evidence about the financial position of the Trust. However, my impression was that when he was taken to these documents and these parts of his witness statement in cross-examination he did, albeit sometimes only after a little pressing, give genuine answers.

79. In relation to the Trust's three other witnesses they were: (a) Ms Sophie Harrison, who has been the assistant director of estates (strategy) at the Trust since May 2013 and who led the support on behalf of the estates team on the procurement; (b) Ms Harris-Ugbomah (Ms Harris for short, in accordance with her useage) and Ms Singh, who were both non-executive directors of the Trust Board at the material times. All three were honest, genuine and reliable witnesses. It was suggested that Ms Harrison had sought to avoid giving full answers as regards some of her contemporaneous handwritten notes but I do not accept that suggestion.

80. I was unable to hear from Mr Hitchins who had, as I have said, been the chair of the Trust Board over the relevant period and was deeply involved in the procurement and the decision to abandon the procurement. That is because, sadly, he died suddenly and unexpectedly in September 2019. He had previously been a leader of Islington Council and was clearly well-versed in local politics and affairs. He was also clearly passionate about the Trust and its success and devoted a large amount and time and effort to its affairs, above and beyond the other non-executive directors. He tended to send weekly updates by email to the non-executive directors in between meetings to keep them informed. Ms Harrington said that she used to meet with him on a weekly basis to discuss all of the matters in which the Trust was involved at the time. I have however been able to make findings by reference to his contemporaneous correspondence notwithstanding that the other Trust witnesses said that the way he often expressed himself was not necessarily always the way in which they would have done so.

81. Mr Holt was a non-executive director who was also more involved in the procurement than then other non-executive directors. He was not called as a witness. No reason was offered for the decision not to call him. However, there was no basis from the statements of case or from the case more generally for the Trust to have concluded that there were particular factual issues in respect of which it was obvious that his evidence would be important. It was not obvious from the contemporaneous documentary or other evidence that he had a particular involvement in the decision to abandon the procurement or that he had held a particular view which might have caused the Trust some difficulty with their case. In the circumstances there is no basis for concluding that the Trust had made a conscious decision not to call him so as to avoid that from happening and I do not, therefore, draw any adverse inference against the Trust from his absence as a witness.

82. In broad terms, the picture which emerges is that over the key period with which this case is concerned the two principal members of the executive dealing with this matter were Ms Harrington and Mr Bloomer, with Mr Hitchins acting as a sounding board and a conduit between the Trust executives and the non-executive directors. Where I refer in this judgment to the Trust executives I

am referring, save where indicated to the contrary, to Ms Harrington and Mr Bloomer acting with the benefit of input and advice from Mr Hitchins.

Other parties

83. During the course of the trial reference has been made to a bewildering number of other NHS Trusts and related organisations as well as to a number of local authorities. I will refer to the majority of them as and where necessary. I should however mention at this stage NHSI (NHS Improvement). This is a body which is described by the Trust's witnesses as having been responsible for the regulation of its affairs, including – and most importantly so far as this case is concerned – its finances and investment decisions.

84. In his witness statement Mr Collinson gave a little more detail, stating that NHSI: (a) "supports and assures NHS delivery performance and support system transformation and the development of sustainability and transformation partnerships and integrated care systems"; … (b) "issues guidance on the NHS capital regime which is applicable to all foundation trusts and NHS trusts"; … and (c) "approves and support Trusts in the preparation and approval of capital investment and property business cases".

85. What is clear is that the view which NHSI took as to the SEP and, in particular, the support which it was prepared to give the Trust in entering into the SEP was of great importance to the Trust, and understandably so given the importance of its role vis-à-vis the Trust.

Strategic Estate Partnerships

86. It is also important at the outset to say something about the nature of Strategic Estate Partnerships or SEPs. In his witness statement Mr Collinson explained that they are "… public / private partnership vehicles, utilising skills and resource from both partners. A SEP will generally be a legal agreement between a public sector organisation and another organisation, generally a private sector partner ("**PSP**"), under which some responsibility for the development and/or management of the public sector organisation's estate (land and property owned or leased by the public sector organisation) is delegated to a jointly-owned subsidiary controlled by the public sector organisation and PSP".

87. As he said at [20] SEPs may take many different forms. In some the private sector partner's role may be limited to the provision of services in relation to management and development, which may include securing external investment for development. In others the private sector partner may itself provide capital investment or finance for cash flow or both. In some cases, the private sector partner may also take on an element of development risk.

88. One of the issues which arises in this case is whether or not Ryhurst had always made it clear, and the Trust had accepted, that the SEP under consideration in this case had always involved Ryhurst or some other company within the Rydon Group taking on the role of developer of surplus land owned by the Trust.

89. There may be some SEPs where the private partner has the contractual right to insist that particular works or services are provided by it through the vehicle of the SEP and where it is agreed that

particular works or services will be undertaken. In other SEPs there may be no exclusivity and no contractual commitment to any particular works or services. In the latter case the private partner must operate on the basis that it will be appointed in relation to individual projects only on merit rather than as of right and, where necessary or appropriate, through a separate open procurement exercise.

90. It is clear that the issue of private sector involvement in the NHS is, and always has been, contentious. There is plainly a wide range of opinion, from positive support of full involvement at one extreme to passionate opposition to any form of involvement on the other. It is not, of course, the role of the court to express any view on the merits or otherwise of private sector involvement. That is a matter for democratic debate and decision. What is common ground is that opposition to private sector involvement in the NHS existed and was particularly vocal and well organised in the North Central London area in which the Trust is situated. This opposition long pre-dated the Grenfell fire and the suspicion among some that the involvement of the private sector in undertaking maintenance and repairs or improvements to council owned property was a causal or contributory factor of that fire.

Background to the procurement

91. It is common ground that as at 2016 the Trust's estate had been in need of investment and comprehensive transformation for some time. Since 2006 there had been no substantial improvements in or development of its estate. In 2013 the Trust failed to secure NHSI approval for a major development of the maternity and neonatal units, even though they were clearly in need of improvement. In the same year it produced an estates strategy paper which suggested that, unless steps were taken, it might be necessary to cap its provision of maternity services which would, of course, have been a cause for great concern. One option which the paper canvassed was to sell off existing parts of the estate to raise funds for development. This proposal generated significant adverse publicity and strong local opposition, in particular from a local protest group known as the Defend the Whittington Hospital Coalition ("**DWHC**"), as a result of which the Trust felt unable to take matters further at that stage. I refer to the DWHC at this early stage because they later played a significant role in rallying opposition to the proposed SEP in 2017 and 2018.

92. Nonetheless the Trust recognised that something had to be done and, in February 2016, the Trust Board approved a revised estates strategy paper, which advised that backlog costs amounted to c. £16.4M for the hospital and c. £6.5M for the community estate together with necessary investment costs for the hospital alone of c. £40M, compared with a projected financial deficit of £15M for 2015/16. It identified three of the required steps as being: (a) for the Trust Board to decide whether and how to proceed with the procurement of a partnership delivery vehicle; (b) to produce a development control plan (or "development masterplan") to identify what improvements should be undertaken and on what basis and in what sequence; (c) to continue engagement and communication with stakeholders. It was stated in section 4 that the rationale for the "partnership delivery vehicle" was to enable funding within the "current challenging capital funding environment" with the "possible release and/or redevelopment of assets to enable the necessary redevelopment on some

sites". In short, the Trust was suggesting that it might be possible to develop a plan similar to that which it had had to withdraw 3 years earlier if it could win sufficient stakeholder support.

93. In June 2016 the Trust Board considered an estates strategy delivery vehicle options appraisal paper produced by Ms Harrington which identified four potential options for the development and implementation of the development masterplan and considered the advantages and disadvantages associated with each. The recommended option was the SEP. It was envisaged that a Partnering Agreement would be entered into and that as part of the procurement process bidders would be required to submit an initial partnership plan which would by the time of entry into the SEP have become a "fully worked up business plan" for the SEP and be appended to the agreement for the formation of the jointly owned Limited Liability Partnership ("**LLP**"). The "traditional" option, under which the development masterplan would be developed and implemented in-house, with the estates team being responsible for commissioning the substantial external specialist services which would be required, came second in the appraisal.

94. The paper referred to the need to "enable funding within the current challenging public capital funding environment" and to the "possible release and/or redevelopment of assets to enable the necessary redevelopment on some sites". Ms Harrington accepted that the reference to release of assets meant the sale of such assets, whether by sale of freehold or by grant of a leasehold interest. However, it is important to note that: (a) this was only identified as a possibility; (b) there was no suggestion that any such sale would necessarily be to the Trust's SEP partner.

95. The Trust Board decided to proceed with the SEP option on the basis that a formal procurement procedure would be required.

The procurement

96. The procurement was formally commenced on 10 October 2016 by the issue of a contract notice in the Official Journal. The claimant said that it was seeking a partner to "deliver innovative estate proposals (including commercial and income generating opportunities) at pace to maximise the value of the estate to support clinical strategy and integrated health and social care objectives that will improve the quality of care for patients and drive efficiencies in the Trust's operations, maximise income or reduce costs to the Trust". It identified the opportunity as including, but not being limited to:

> "… Implementation of the Trust's estate strategy; estates rationalisation; capital programme planning; master-planning; raising finance and investment; strategic non-clinical or clinical service transformation planning; healthcare planning in relation to configuration of services in the estate; and also the procurement and project/contract management of a range of services in relation to the delivery of New Projects (including construction and FM[1]) and Secondary Services (as defined below). These services are expected to be provided through a joint venture body (JV) established between the Trust and the Partner."

[1] Facilities management.

97. It did however make it clear that: (a) any such new projects or secondary services would require separate approval by the Trust before they were delivered; and (b) the provision by the private sector partner of the detailed design and construction (and FM) aspects of any such new projects or secondary services themselves were outside the scope of the contract.

98. Accompanying the contract notice was the memorandum of information for tenderers, which provided more detailed information in the same vein. The priority services to be provided involved, effectively, the production of the development masterplan, as well as access to and delivery of capital where required to finance new projects, and assistance and support for the procurement of third-party providers to deliver capital projects and services.

99. It follows in my view that any bidder could not properly have believed that it was being invited to bid for the opportunity to undertake the development works itself as part of this procurement exercise.

100. Mr Collinson's evidence however was that at a presentation day which took place on 7 November 2016 Mr Pleydell, the then chief executive, explained that the Trust wanted and needed the involvement of an active partner from the commercial sector to undertake specific identified projects and also to identify and deliver other projects, all with a view to improving the existing estate in the context that the Trust did not have either the expertise or the financial wherewithal to do so itself. He said that the Trust wanted the programme to proceed "at pace" and for the successful bidder to provide cash flow, to provide or obtain capital investment and to take development risk.

101. Although this evidence was not challenged in terms by the Trust, there is no evidence that the tender information was ever varied or agreement reached so as to make clear that the Trust was committed to offering or allocating any development projects to the successful tenderer. In short, the Trust never entered into any contractually binding commitment to signing up to a SEP which would entitle Ryhurst or its nominee to undertake the development of any part of the Trust estate. I accept, however, that it was never suggested by the Trust, in the tender information or contract documents or otherwise, that Ryhurst or its nominee would be disabled from seeking or being awarded this opportunity.

102. It is clear that Ryhurst's primary interest was in obtaining the development opportunities for Rydon. This is because, as Mr Rigby said in cross-examination, the real money was in the speculative residential development work. Whilst Ryhurst was of course perfectly happy to provide fee paid consultancy services, and whilst Rydon was also keen to obtain any construction work, healthcare or residential, for Rydon Construction, the primary focus of its ambition was to secure the development opportunities.

103. It is also clear that the Trust decided to undertake this procurement even though it was aware that there was considerable local opposition to any form of private public initiative such as was contemplated by the tender documents. It appears that the Trust felt confident that with a positive campaign of stakeholder engagement it could win public support for these proposals. Indeed, the tender information emphasised that local community engagement was key and that the private partner should "add value to our relationship with the local community".

104. In my view the Trust believed that its best prospect of selling the SEP to its stakeholders was to make it clear that under the SEP it would preserve its right to decide whether, and if so when and

how, any release or redevelopment of any particular surplus land might take place and, if it did, whether and to what extent that would involve its SEP partner.

105. Ryhurst submitted its bid on 18 January 2017. It proposed the creation of a SEP through a contractual joint venture between Ryhurst and the Trust, in which Ryhurst and the Trust would be equal partners with a joint venture LLP being constituted so that nothing could be done without the agreement of both partners. Mr Collinson described the commercial proposal in his witness statement as involving an analysis of the Trust's existing property estate in order to identify methods by which the capital needed to invest in new affordable housing and healthcare facilities could be generated, with a particular focus on campus maternity and community children's services. He said that the proposal was that "the programme of works was to be paid for by releasing surplus land and adapting existing assets. A cross subsidy model was to be used, i.e. it would be a rolling programme where money could be released from different sites as and when it was needed that could then be used to fund the various new developments".

106. Ryhurst was invited by the Trust to submit a final tender (an "**ISFT**") and, on 12 April 2017, it duly did so. Reference should be made to the following sections of the final tender:

107. Section A1, entitled "resourcing the SEP partnership". This identified the various options being proposed by Ryhurst to provide the financial resources required by the Trust to finance the improvement works it needed to undertake. Ryhurst did not state that the only option which it was proposing involved it being appointed as developer and thereby being given the right to develop surplus parts of the Trust estate on a commercial basis in return for what has been referred to as "cross-subsidy funding", i.e. Ryhurst providing funds to the Trust to finance the maintenance and improvement works to the Trust estate. The section entitled "ability to raise finance and identify the most appropriate source of funding" on page 11 identified seven principal options for sourcing funding. Ryhurst did, however, refer under the section headed "development" on page 10 to having demonstrated in dialogue meetings how it envisaged "releasing value from the Trust's estate through mixed tenure and mixed use development", including mixed tenure new homes and retail outlets and also including working with the housing association Peabody to provide staff accommodation in an existing Peabody development across Highgate Hill.

108. Section A2, entitled "approach to support wider local health and social care integration initiatives and objectives". This included reference to the recent introduction of Sustainability Transformation Plans under which local NHS trusts and local authorities were encouraged to work together in relation to a wide range of matters, including capital programmes and investment decisions. It was recognised that Ryhurst would need to support engagement with the North Central London ("**NCL**") Strategic Transformation Partnership ("**STP**"), of which more later.

109. Section A3, entitled "approach to support delivery of the estate strategy". This acknowledged that the success of the relationships with local stakeholders would determine to a great extent the success of the planned changes, recognising how highly emotive and politically charged such changes could be, particularly in the local areas of Haringey, Islington and Camden.

110. Section B3, entitled "assessment of opportunities for generating income or revenue streams". This referred at p.92 to the "supply chain management" as being either: (a) the procurement of a developer to realise the value of the residential and commercial elements on the scheme through the provision of new facilities at no cost to the Trust through payment "in kind" via cross-subsidy,

alongside any capital receipts"; or (b) the procurement of consultants "to provide general property advice and the management of the tender process for acquiring rental streams to assist with revenue funding". Whilst Ryhurst was recommending the former, possibly through the housing association Peabody, it also stated its ability to offer the alternative "more traditional approach".

111. Section F5 was entitled "financial scenarios". This explained at p.203 that it "assumed that the SEP will oversee the appointment of a developer to deliver a portfolio of the Trust projects through a cross-subsidy model". Whilst Ryhurst said that it had "presented the case" for its being that developer it accepted, at p.204, that "the SEP was a non-exclusive arrangement between Ryhurst as private sector partner and the Trust and that a different organisation could fulfil the developer role".

112. Although Ryhurst placed reliance upon the power-point slides of a final presentation made by it to the Trust on 30 March 2017 and, in particular, a slide which suggested that the residential accommodation on the Hospital campus would be delivered by a joint venture between Rydon and Peabody in conjunction with the SEP between the Trust and Ryhurst, there is no basis for a suggestion that this represented anything more than Ryhurst's proposal. There is no basis for a suggestion that the Trust had expressly agreed to this.

113. Accordingly, I am unable to accept Mr Collinson's evidence in his witness statement at [30] that "Ryhurst's role as developer and the requirement for a development agreement was made clear during Ryhurst's bid discussions". I entirely accept that Ryhurst's aspiration to that effect was made clear but it is equally clear that Ryhurst never sought to make that a condition of its tender and nor can there be any suggestion therefore (or in any event) that the Trust accepted that there would necessarily be a development agreement or that Ryhurst would be entitled to be appointed as developer even if there was.

114. Following a further competitive dialogue phase Ryhurst received notification on 2 June 2017 that it was the Trust's preferred bidder. It was made clear that this was not a formal contract award and that the Trust reserved various rights, including the right to abandon the procurement. It was also made clear that Ryhurst was working at risk unless and until a contract was completed.

115. The fire at Grenfell Tower occurred on 14 June 2017 with, as is well known, tragic and devastating consequences. The Trust soon became aware of the connection between Ryhurst and Rydon Maintenance. It decided to pause the procurement process and to request further information from both bidders. Although Ryhurst contested the Trust's right to seek this information, and even went so far as to issue protective proceedings to seek to challenge the Trust's right to do so, in the event it provided the information requested and engaged in dialogue with the Trust, with a view to demonstrating that it was still ready, willing and able to proceed, notwithstanding any concerns which might have arisen as a result of the fire and its impact on Ryhurst as part of the Rydon Group.

116. A Trust Board meeting was held on 6 September 2017 at which the Trust Board considered a paper which identified the four options considered to be available to the Trust. The Board decided to proceed with the option of continuing with Ryhurst as the preferred bidder on the stated basis that they had "first taken soundings from key stakeholders on this proposed action". In a subsequent public meeting Mr Hitchins said, assuming as I do that his prepared note accurately records what he said, that the Board was "horrified that we might be working with anyone who might be implicated in the Grenfell tragedy", that it had "wrestled for over 3 months with this" and had "reluctantly" come to the conclusion that it was the only way forward.

117. Although it is clear, as Ms Harrington and other witnesses said, that Mr Hitchins did not speak for the Trust as a body and that his choice of language was sometimes rather more colourful and emphatic than they would have used, nonetheless there is no reason to believe that Mr Hitchins was not accurately expressing the general mood of the Trust Board at the time they made this decision.

118. I was referred to the uncorrected version of the minutes of the previous Trust Board meeting of 5 July 2017, which stated that the broad consensus accepted at the Trust Board meeting was to choose the alternative bidder, Cityheart, instead of Ryhurst. However, that was corrected at the subsequent board meeting to state that the broad consensus accepted was to explore the appointment of Cityheart. In my view the minutes, both in their uncorrected and corrected form, reflect the fact that there was a division of the Trust Board between those who wanted to re-evaluate the tenders with a view to selecting Cityheart in place of Ryhurst and those who believed that this would not be justified, both on the basis of the evidence obtained and, I have no doubt, by reference to the legal advice which the Trust Board had received. Ultimately, as is clear, the second view prevailed.

119. There is no basis in my judgment for any suggestion that the Trust did not genuinely intend at this point in time to enter into a SEP with Ryhurst and that its strategy from this point onwards was to seek to bring about a situation where it could extricate itself from any legal relationship with Ryhurst without exposure to liability. That would have meant that all of the activity undertaken by the Trust after that date, not least the activity which went into seeking to persuade the stakeholders that the Trust should indeed enter into the SEP with Ryhurst, was undertaken as a cynical charade, which I simply do not accept.

120. On 15 September 2017 the Trust confirmed its intention not to undertake a re-evaluation and to proceed with Ryhurst as preferred bidder to the confirming commitments stage under regulation 30 of the competitive dialogue procedure. Again the Trust reminded Ryhurst that this was not a contract award and that it was still proceeding at risk until a contact was concluded.

121. There was a meeting on 21 September 2017 at which Ryhurst tabled a proposal headed "role of developer and secondary procurement" which, referring to the proposed residential development, proposed that "the SEP or, at the Trust's request, Ryhurst directly, will take on the role of developer in relation to these residential facilities". The proposal also recorded that Rydon companies might be entitled to take part in any competition for the procurement of services or works to be undertaken. This of course implicitly recognised that there was no contractual right for any such company to be used. That was only a proposal and, even as a proposal, made clear that it was for the Trust to decide whether Ryhurst would be appointed as developer. It follows that I am unable to accept that Mr Collinson was right when he said in his witness statement at [46(a)] that it had been agreed that Ryhurst would act in the developer role.

122. One of the key stakeholders with whom the Trust was consulting was NHSI who, it was reported, had shown "some enthusiasm for and understanding of the model". On 26 September 2017 NHSI wrote to the Trust stating that it had "deemed" the procurement of a SEP to be "novel and contentious" and, having reviewed the business case, stated that whilst it agreed that the Trust could proceed with the procurement, that was "in pilot form only" and subject to three conditions which the Trust was required to accept, namely:

    (1) All business cases, regardless of value, derived through the SEP would be subject to NHSI consideration and/or approval.

(2) The production of reports to allow an assessment of the pilot.

(3) The SEP should not be formally signed until an agreed value has been decided upon between the Trust and Camden & Islington Foundation Trust ("**CIFT**") regarding the proposed purchase by CIFT of part of the hospital site.

123. The first condition, which flowed from NHSI deeming the project novel and contentious[2], was undoubtedly disappointing to the Trust, because it meant that all projects undertaken through the SEP would have to be separately submitted to and approved by NHSI. But for that decision the Trust would have had authority to enter into projects up to a value of £15M without separate NHSI approval. At the time of the decision to undertake the procurement exercise the limit had been £5M. The ability to enter into transactions under these limits without NHSI approval was undoubtedly seen as a benefit to entering into the SEP, because seeking and obtaining NHSI approval could be a time-consuming process with the risk of approval not being given. Mr Bloomer had made an effort to persuade NHSI not to treat the SEP as novel or contentious and had failed. Because this is something which was relied upon by the Trust as explaining in part its decision to abandon the SEP Ms Hannaford put to Mr Bloomer in cross-examination that the minutes of the Trust Board meeting held on 4 October 2017 record him as stating that this was a "routine business requirement and to be expected" and suggested that this was in fact the true position. In my view it is plain that Mr Bloomer was seeking at the meeting to put a positive spin on a development which, in fact, he had hoped could be avoided and about which he was, in fact, disappointed, at a time when he was clearly nonetheless very much in favour of the SEP proceeding.

124. The second condition was not of any great concern.

125. The third condition needs a little more explanation. There had been ongoing discussions about CIFT, one of the adjoining NHS Trusts, acquiring a part of the hospital site which the Trust did not need for development to provide an in-patient mental health unit. By January 2017 CIFT had offered £6.1M for the land in question which represented its "book value". In March 2017 Ryhurst and the other remaining bidder had been asked what the impact, if any, of the sale of this land to CIFT would have so far as the funds available to the proposed SEP from any development was concerned. Ryhurst had stated that it would have a very significant impact of between £23M and £27M, both directly and indirectly. Directly, because the sale would reduce the extent of the surplus land available for redevelopment. Indirectly, because siting an in-patient mental health unit adjacent to land proposed for private redevelopment would, it was believed, affect the value of that land. This caused the Trust to be resistant to selling the land at only book value. However, NHSI was keen for the project to proceed, which is why it was included as a condition of approval. Nonetheless, whilst negotiations were continuing between the Trust and CIFT, the parties were still some distance apart. This significant disparity between the Trust's valuation and CIFT's valuation is why, I accept, at the Trust Board meeting Mr Bloomer referred to this condition as "more challenging".

126. On 4 October 2017 the Trust Board met in private and discussed a paper which invited it to confirm the appointment of Ryhurst and to enable the creation of the SEP, subject to NHSI approval. It is clear from the paper that further drafting would be required to address the extent to which Ryhurst

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[2] Apparently, the full wording is "novel, contentious or repercussive".

should be permitted to act as "developer" and/or to undertake works or services packages. It is clear from the minutes of the meeting that after discussion the Trust Board approved the contract award to Ryhurst.

127. On 6 October 2017 the Trust issued the contract award notice, thereby notifying Ryhurst that it was the successful tenderer and that the Trust intended to accept its offer. Again, the Trust made clear that this did not amount to a binding contract, which it intended would be entered into upon the expiry of the mandatory standstill period without any legal challenge being made within that period and also upon receipt of NHSI approval.

128. Ms Harrington met Ms Franklin of DWHC on 16 October 2017 and told her what the Trust had decided. This provoked a furious reaction from DWHC. In Ms Franklin's email to the Trust she referred only to her concern about Ryhurst, given the connection with Grenfell (and also the fact that Rydon was involved in maintaining a block of flats in Camden where the same cladding had apparently been installed). However in its press release on 17 October 2017, complaining about the proposal to appoint Ryhurst to redevelop the Trust estate, DWHC made clear that it was opposed both to what it characterised as the strategy of selling off NHS land to fund improvements and to Ryhurst in particular, given its connection with Rydon and, hence, as DWHC saw it, with Grenfell. It is clear to me from this and subsequent evidence in relation to DWHC that although their primary focus was on Ryhurst's Grenfell connection that was not the only reason it gave for its opposition. One does not have to be an expert in community protest politics to know that a protest group will often concentrate its aim on what it judges to be the most effective message to garner support for a particular campaign, even though that does not represent its only or even its principal reason for objecting.

129. It is also clear from an internal email sent by Mr Rigby on 31 October 2017 and Mr Collinson's response that: (a) Rydon was aware of the risk of adverse publicity to the Trust should the proposed SEP be presented along the lines of: "Rydon developing new homes for sale to provide cross-subsidy for new health facilities"; (b) Ryhurst's strategy was to get the SEP signed before obtaining a commitment from the Trust to allow Rydon to develop any part of the Trust estate for private housing. It is also clear from a Rydon board meeting paper from November 2017 that Rydon was fully aware that the DWHC was opposed to the SEP for both of the reasons referred to above and not solely the alleged connection between Ryhurst and the Grenfell fire.

130. On 2 November 2017 the Trust notified Ryhurst that no challenges to the appointment had been received within the statutory standstill period and that the award of the contract could be confirmed subject to NHSI approval. It referred to the need for contract documentation to be concluded and for a commencement date to be agreed.

131. Email correspondence in early November 2017 made clear that no agreement had by then been reached as regards Rydon's involvement in relation to any development and construction. Ryhurst was plainly keen to ensure that the contract documents which were eventually signed would make it clear that Rydon would be appointed as developer by the SEP and that Rydon Construction Limited would be appointed to undertake the construction works (or at least permitted to tender for the construction works). In contrast the Trust was prepared to accept that Rydon would be entitled to tender for the development (but would not be entitled to be selected as developer) but even so there

was some uneasiness, expressed by Mr Hitchins in particular, at the prospect of any Rydon company being allowed to tender for, let alone undertake, the construction works.

132. In early December 2017 the external solicitors engaged by the Trust and Ryhurst's internal solicitor were discussing the terms of the contract documentation, including the initial partnership plan and the new projects approval procedure, being documents which it was expected would be appended to the SEP agreement. The wording proposed by the Trust's solicitors and accepted by Ryhurst's solicitor on 5 December 2017 make it clear that the wording proposed by Mr Collinson for the meeting on 21 September 2017 was to be included in the contract documents, so that the developer would be the SEP LLP "unless otherwise agreed". It is plain from this wording that Ryhurst was not being given the contractual right to be the developer, either in relation to all developments or in relation to any particular project; since the developer would be the LLP and since the LLP would be equally owned Ryhurst could not insist upon being appointed as developer without the Trust's agreement.

133. By the time a shadow SEP board meeting took place between representatives of Ryhurst and the Trust on 7 December 2017 it was recorded that all legal documents necessary to set up the SEP had been agreed. As relevant to this case they were in the same terms as proposed and agreed between the solicitors on 5 December 2017. They also provided that any works or services in relation to a new project should be procured in accordance with the new projects procurement methodology, so that, in the same way, there was no commitment to using any company within the Rydon Group for any construction or other works. Thus, the position is that by this date there had been no contractual commitment accepted by the Trust either for Ryhurst to be appointed as developer generally or for Ryhurst or any other member of the Rydon Group to be appointed as sub-developer in relation to any particular project, and any suggestion to the contrary is wrong.

134. As regards the third NHSI condition, the Trust had asked Ryhurst to assist in providing a more detailed analysis of the impact on the viability of the proposals put forward for the SEP of the proposed land sale to CIFT. Ryhurst commissioned a report from other consultants which was produced in October 2017 and which identified the likely diminution in value of the site if the sale to CIFT proceeded. The information provided by Ryhurst was used to persuade CIFT that it would be necessary for it to make a substantially increased offer for the land to reflect this financial effect. On 1 December 2017 the Trust wrote to CIFT to confirm that agreement had been reached in principle for the land purchase. Ultimately the sale proceeded at a value of some £23 million, as compared with the £6 million initial offer.

135. This was undoubtedly a significant development for the Trust and one which Ryhurst played a major part in securing. It is accepted that Ryhurst invoiced and was paid in respect of work done in this respect. It appears that the invoice only included for the external consultancy costs and did not include for Ryhurst's own time costs. This appears to have been Ryhurst's own decision on the basis that it expected that these would be recovered in due course through the SEP.

136. Ms Harrington wrote to NHSI on 14 December 2017, referring back to NHSI's letter of 28 September 2017 giving approval subject to conditions, and confirming that all three conditions had now been satisfied and seeking its approval for the Trust to sign the SEP contract. However, NHSI did not immediately respond. It is clear from the contemporaneous correspondence in January 2018 that Ryhurst was chasing the Trust for an update on a regular basis and the Trust was responding to

say that it was awaiting approval from NHSI. Until 5 February 2018 that was indeed the position. It is also clear that there was a perception that NHSI was not expressing itself entirely consistently as to its position and, in particular, whether it remained supportive of the Trust entering into the SEP with Ryhurst.

Events leading up to the abandonment

137. In the meantime, the Trust was also having to deal with the involvement of local MPs. The four such MPs who were directly involved were Jeremy Corbyn, Emily Thornberry, Catherine West and David Lammy. On 19 December 2017 Ms Harrington and Mr Hitchins met with three of those MPs, Mr Corbyn, Ms Thornberry and Ms West. The content is not separately evidenced, but its gist is clear from the subsequent letter which Ms Harrington wrote to Mr Corbyn on 10 January 2018 referring back to the meeting. She recorded that the concerns expressed by the MPs related both to the entry into the SEP as such and also to the selection of Ryhurst as the preferred partner and that they had suggested that the possibility of the Trust partnering with Islington Council should be explored instead. She reported that this had been investigated but Islington had said that it did not have the capacity or skills to partner or project manage the estates strategy implementation. She explained in some detail why the Trust had decided to enter into the SEP and to select Ryhurst. There is no suggestion in that letter that it was her perception that the only reason for the concerns raised by the MPs was the connection of Ryhurst to Grenfell and I reject the suggestion that it was. It is plain that opposition to the SEP as a public / private partnership ("**PPP**") was another significant reason for their opposition.

138. On 11 January 2018 a public meeting took place at which vociferous opposition to the SEP was widely expressed. Ms Harrington describes it as an extremely challenging meeting with significant hostility being expressed to the proposal. It is clear from their subsequent exchange of emails that Ms Harrington and Mr Hitchins were conscious of the need to ensure that the Trust Board as a whole were behind the SEP before proceeding with it, given the adverse views expressed by the local MPs and at the meeting. Ms Harrison explained in her witness statement how around this time she was asked by Mr Bloomer to prepare an options paper setting out in flowchart form the steps which would follow from either signing or not signing the SEP. She explains, and I am satisfied, that this did not reflect any decision having been taken to abandon the procurement, but it did reflect the perception that question might be asked, in the light of the continuing and increasingly forceful opposition to the SEP, as to the options available to the Trust and their consequences.

139. On 15 January 2018 the substantial construction company Carillion went into administration. It is well known that it had entered into a number of significant contracts with the public sector and that there was immediate and widespread concern that its going into administration might impact on the performance of those contracts, some with potentially very serious consequences to the public who depended on them.

140. It is a statement of the obvious that the involvement of any private sector company in the delivery of public services carries with it a risk that the delivery of those services will be jeopardised if the company goes into an insolvency procedure. There can be no doubt that this was a relevant matter for a public authority to take into consideration when deciding whether or not to enter into a PPP.

There can also be no doubt from the documents that those resistant to the involvement of private sector companies in the state sector, including the NHS, saw the collapse of Carillion as a further reason to oppose such involvement, and that this is what happened here. Rydon recognised as much in an internal strategy paper produced in February 2018. In the same month an internal briefing prepared by Mr Keen, a commercial manager at Ryhurst, suggested that the "greater focus" of the opposition was the sale of NHS assets rather than the perceived link to Grenfell.

141. On 17 January 2018 Ms Thornberry wrote to Ms Harrington asking her to reconsider the Trust's position. On 7 February 2018 Mr Corbyn posted a statement urging the Trust to explore alternative options which would exclude Ryhurst from partnership with the Trust. On 7 March 2018 Ms Harrington finally responded to Ms Thornberry's letter, reassuring her that the Trust would work closely with Islington Council and stating that the Trust would not enter into a contract unless satisfied that it fully met its intentions for the SEP. She explained how Ryhurst would not have decision making authority and how there would be no exclusivity given to Ryhurst under the SEP. On 11 April 2018 Ms Thornberry replied, clearly unimpressed by this response and asking Ms Harrington to confirm that the Trust would not be signing a contract with Ryhurst. Ms Harrington did not reply.

142. Whilst it is true that some of this correspondence only gives Ryhurst's connection with Grenfell as the reason for the objections raised by the MPs as I have said that is not true as regards the whole of the correspondence. It is clear that the MPs were also opposed to the SEP as a PPP but were particularly opposed to this proposal because of the Ryhurst Grenfell connection. I do not consider that the public statement from Mr Corbyn that he supported the Trust's estates strategy generally can be read as a clear statement that he supported the proposed SEP as a PPP and that his only objection was to Ryhurst as the proposed SEP partner.

143. It was not until 5 February 2018 that NHSI wrote a letter to the Trust which has assumed some importance in this case. It referred back to its letter of 28 September 2017 and confirmed NHSI's agreement for the Trust to "proceed in pilot form to appoint a preferred strategic estates partner".

144. The letter continued as follows: "I understand this decision is in line with the outcome of the Trust's procurement process and that you have discussed the matter with stakeholders, including local MPs, and as a Board have assured yourself on this decision."

145. It confirmed that condition 3 of its earlier letter (viz, sale value agreement with CIFT) had been satisfied. It stated that the Trust still needed to comply with conditions 1 and 2, which were post-SEP obligations and, thus, presented no obstacle to entry into the SEP itself.

146. It concluded: "Please confirm acceptance of the above, in writing, prior to signing any agreement with your proposed SEP".

147. Ryhurst's position is that this letter provided the Trust with the approval it required from NHSI, so that there was no longer any external impediment to entering into the SEP.

148. The Trust's position is that this letter introduced an additional requirement because it required the Trust to confirm that it had "discussed the matter with stakeholders, including local MPs" and that the Board had "assured itself on this decision". Ms Harrington's evidence was that this meant that the Trust had not been given the green light to proceed immediately and that NHSI, which was well aware of the vocal resistance to the SEP, was putting the onus on the Trust Board to satisfy itself that it had support from its stakeholders before entering into the SEP. She therefore proceeded on the

basis that it would be necessary to ensure that the Trust Board gave the go-ahead in the light of the recent developments before the Trust could safely enter into the SEP. Mr Bloomer's evidence was to similar effect, describing it a new condition imposed by NHSI.

149. Ms Harrington and Mr Bloomer were challenged about this in cross-examination. I think that the issue is really one of semantics. I agree with Ms Hannaford that the letter did not actually introduce a new condition. I accept however that the inclusion of the statement about NHSI's understanding was understood by Ms Harrington and Mr Bloomer as a coded reference to the fact that the Trust could not count on NHSI's support unless they had taken steps to address the political concerns and the Trust Board had taken the decision to proceed, having done so. This understanding is what explains in my view why they did not immediately inform Ryhurst that they had received NHSI approval, even though Ryhurst was chasing them on a regular basis for an update, and even though Mr Bloomer had a telephone conversation with Mr Collinson a few days later. I am satisfied that their understanding was soon confirmed in subsequent unofficial discussions with NHSI. Nonetheless, it is clearly also the case that the qualification introduced by the letter did not immediately lead the Trust to consider that NHSI had pulled the plug on its support for the SEP. In particular the emails sent by Ms Harrington and Mr Hitchins immediately on receipt of the letter from NHSI do not give any indication that either immediately believed that NHSI had performed a complete volte face.

150. On 19 February 2018 Mr Rigby emailed to Mr Bloomer and Ms Harrison a "draft terms document" which he described as a "discussion paper around the key terms for the development aspects of the SEP and how these could work". It is apparent from a subsequent internal email from Mr Rigby that one aim of this document was to "flush out a reaction" from the Trust. It was a reasonably detailed proposal, running to some 14 pages. It proposed that once the SEP had been signed negotiations would begin concerning what was described as a "principal development agreement" to be entered into between the SEP and a development company to be owned by Ryhurst. This would set out the agreement under which the development company would be permitted to undertake development works on part of the Trust estate in return for the cross-subsidy funding paid to the Trust which would enable it to undertake improvement works to the health estate. It was explained how this would involve the Trust granting long leasehold interests on land allocated for development in return for guaranteed land payments. It was recognised that NHSI would need to approve the terms of this agreement. It was suggested that the development company would negotiate with Peabody to enter into a sub-development agreement which would contain provisions in relation to sharing the costs and returns and also in relation to affordable and key worker housing. It was suggested that the development would include private residential housing as well as commercial floor space. It set out the various development options for consideration, with sites being identified within the main hospital area as well as some of the community sites. It was suggested that by October 2018 the envisaged agreements could be ready for signature and by December 2018 a planning application could be made.

151. On 23 February 2018 Mr Rigby and Mr Bloomer had a lengthy telephone conversation about the draft document. Mr Rigby sent an internal email immediately afterwards recording his impression of what was said, which I accept as broadly accurate. That email indicates that whilst Mr Bloomer was supportive Ms Harrington was very concerned and the Board were very nervous about the "privatisation agenda" and the "noise locally about us specifically". Mr Bloomer made it clear that it

would be "politically impossible" to sign a development agreement at that point although he was optimistic that later on – around spring 2019 - it might be possible to do so, albeit on a basis which would permit competition as regards the sale of any development land as well as any improvements to the health facilities. It is also apparent that the Trust was very nervous that any finalised document or official meeting minutes might be liable to production if any Freedom of Information Act request was made.

152. Mr Rigby clearly felt that it was "looking very difficult to see a clear way [for Rydon] through to some actual paying development work".

153. There is a dispute as to the significance of this document. In his witness statement Mr Bloomer said that it caused him "a great deal of concern and frustration" because the implicit assumptions made in the document, which as he saw it were that Ryhurst would be appointed developer for all of identified sites, were contrary to the way in which the SEP was intended to operate. He was very concerned at the political consequences of agreeing to Ryhurst's suggestion that the agreed version of this document be appended to the SEP as signed and concerned that Ryhurst did not appear to have appreciated how this document might be viewed if made public. However Ryhurst's position is that this was only ever put forward as a draft for discussion and that it should have been no surprise to the Trust that Ryhurst was looking to be appointed developer on the sites to be released for development because Ryhurst had never made any secret of its ambitions in that respect and the Trust had never suggested that this was not possible. Ryhurst points to Mr Collinson's subsequent email to Mr Bloomer on 25 February 2018 where he made these points in emollient terms, saying that he was aware of the support given to the programme in the face of "some challenging public reaction" and that Ryhurst was willing to "take this one step at a time".

154. As is often the case I am satisfied that the true position lies somewhere between the two competing positions. It is clear that the Trust always understood that the aim of the SEP was to deliver improvements to its estate through raising funding from the development of its surplus sites. It is also clear that the Trust knew that Ryhurst wanted to be appointed developer on the sites to be released for development. However Ryhurst was also clearly aware that the Trust was nervous about the adverse publicity which might flow from the publication of any document which suggested that the Trust had agreed to a member of the Rydon Group being appointed as developer of private housing on any part of the Trust estate or of being appointed to construct any such housing, especially before the SEP was entered into. It ought not, therefore, to have been any surprise to Ryhurst that the Trust would be concerned about a proposal by Ryhurst to write into the suite of contractual documents for the SEP that it had a right to develop private housing for profit on the Trust's surplus estate.

155. There was a meeting between representatives of Ryhurst and the Trust on 28 February 2018. No formal minutes were taken and although Rydon's in-house solicitor, who attended the meeting, took notes, Ryhurst has exercised its right to claim legal professional privilege in respect of those notes. Nonetheless a subsequent exchange of emails between Mr Collinson and Mr Keen of Ryhurst shows quite clearly that following the meeting Ryhurst's belief was that the Trust wanted to "wiggle out of [signing] the SEP" and, even if that did not happen, seeking to limit Rydon's involvement going forwards by ensuring that any construction work was not given to Rydon and by using Ryhurst only in relation to the production of the development masterplan to identify the works required to the

healthcare facilities rather than as developer. Mr Collinson accepted in cross-examination that by this stage the Trust was "talking in a very different way … about the development opportunity".

156. Following the meeting on 6 March 2018 Mr Collinson sent another emollient email to Ms Harrington, stating that Ryhurst was happy to engage with the opposition but would be guided by the Trust as to how best to do so. On the following day Ms Harrison sent an email asking for the initial partnership plan to be removed from the contract documentation for the SEP, which would instead record that the plan was to be agreed post signing. She also asked Ryhurst to assist in producing a project plan for the production of the development masterplan. This email therefore made it plain that the Trust would not agree to the SEP including any commitment in relation to development and that the first task for Ryhurst, if and when the SEP was signed, would be to assist the Trust in preparing the development masterplan.

157. Mr Collinson had asked for and arranged a meeting with Ms Harrington in late March to discuss matters. However at Mr Bloomer's suggestion Ms Harrington cancelled, saying that she had a commitment which she did not in fact have to avoid a meeting, clearly because Mr Bloomer was concerned that whatever might be said might be used against the Trust "in court". Mr Bloomer's nervousness about potential court action demonstrates that by this stage he was already concerned about the risk that it might face legal proceedings by Ryhurst if it did not proceed with the SEP. The fact that both were prepared to tell a minor untruth to get out of a meeting is a little unedifying but not uncommon in working life and has no impact on my assessment of their reliability.

158. In cross-examination Mr Collinson said that he believed that the Trust got "cold feet" when they thought that they might have to say publicly that they were working with Ryhurst in a development capacity, given the pressure they had faced from MPs and from the DWHC. In my view that is an accurate assessment in that it reflects the twin concerns of the Trust that: (a) any overt explicit agreement by the Trust to allow any private company to develop the Trust estate for private residential housing development for profit would provoke a damaging backlash in terms of adverse publicity; (b) any overt explicit agreement that Ryhurst had been selected as that private company would provoke even worse adverse publicity, especially if there was any suggestion that Rydon might also be involved in the construction works.

159. In my view both Ms Harrington and Mr Bloomer had begun to appreciate by this time that if the Trust entered into the SEP it would be putting itself in between a rock and a hard place. It had become increasingly apparent in the light of Ryhurst's production of the draft discussion document that its clear aim and ambition was to press the Trust to commit as soon as possible post signing of the SEP to the surplus sites to be developed and to their being developed by Ryhurst or some other Rydon company and if possible being constructed by a Rydon company as well. Ryhurst was unlikely to accept only being asked to produce the development masterplan or to act only as a consultant. The relationship between Ryhurst and the Trust was unlikely to be harmonious in such circumstances. However it had also become clear to them, following the events of January and February 2018, that the DWHC and the local MPs would continue to oppose any proposal to commit to Rydon having closer involvement and that any proposal or agreement to that effect would generate significant and unwelcome continuing publicity and hostility.

160. I am satisfied that by this time it had also become apparent to them that NHSI was getting cold feet and was effectively saying that the Trust could not rely on support from NHSI if it chose to proceed

with the SEP without first addressing the continuing negative publicity involving locally influential figures such as local MPs. The context is that on 8 March 2018 Ms West MP had written to Ms Harrington, enclosing a letter from a constituent written on behalf of a local residents association, raising concerns about the proposal to enter into the SEP (primarily, although not exclusively, relating to the Grenfell connection) and asking for action before NHSI "signs off on the deal". Ms West had written in similar terms to NHSI on 1 March 2018. By 13 March 2018 Ms Harrington had reported from speaking to her counterpart at NHSI that "some anxiety" was building in connection with that letter and the publicity it was engendering and, on the same day, Mr Bloomer reported that he had spent 1 hour in discussion with his NHSI counterpart. In his witness statement Mr Bloomer says that in the call: (a) he was made aware that NHSI had concerns about the Trust assuring itself it had sufficient stakeholder support to proceed with the SEP and needed full assurance that the Trust had worked with stakeholders and put everything in place to avoid the potential for unhelpful publicity; (b) he gained the impression that there had been contact between MPs and the Mayor of London's office of which NHSI was aware and that there was a concern that the SEP did not have wide political support.

161. In short, Ms Harrington and Mr Bloomer were beginning to see that the pressure on the Trust from Ryhurst on the one hand and from the opposition to Ryhurst and the SEP on the other was not going to go away and would continue unabated both directly as against the Trust and indirectly through its impact on the support the Trust could expect to receive from NHSI going forwards if it signed the SEP.

162. It is clear that by mid-March 2018 the Trust executives were actively investigating alternatives to entering into the SEP. This is apparent from the information provided to the Trust Board at a seminar which considered the SEP on 14 March 2018, in which alternatives to the SEP were being considered although, as is clear, the SEP was still being under active consideration. That is to be contrasted with the position a month later, where the information provided to a further Trust Board seminar held on 11 April 2018 considered a range of options, none of which included the SEP or Ryhurst. By that stage the alternatives were clearly under active consideration although, as I will explain, I do not consider that a decision to shelve the SEP had already been made.

163. As an aside, I note that in relation to the information provided for that seminar the financial assessment of proceeding "in-house" Ms Hannaford, in cross-examination and in closing submissions, treated the costs of undertaking the "master-planning" first stage, including the cost of three different options, as being cumulative as opposed to alternative costs, and also wrongly assumed that these costs would necessarily have been absorbed by Ryhurst had the SEP been entered into. I return to the relevance of this later.

164. Returning to the discussions which Ms Harrington and Mr Bloomer had with NHSI in March 2018, there is a paucity of documentation recording the further discussions between the Trust and NHSI which must have taken place prior to 26 March 2018, when Mr Bloomer sent an internal email asking a colleague to raise an invoice to NHSI for £200,000 on the basis that it was "their contribution towards SEP and legal costs". He added: "Not sure what they will want it badged as" and explained that it should be deferred so as to go into the following year's accounts.

165. Ms Harrington accepted that NHSI had indeed offered the Trust £200,000 in relation to potential legal costs. It is obvious that this offer cannot simply have come out of nowhere. It appears there

were regular update meetings held at the end of March and the end of April 2018 but nothing in writing save for an uninformative minute of a meeting and, more relevantly, a letter from NHSI to Ms Harrington dated 14 May 2018 which, referring to the continued concerns about the "political noise" generated as regards the SEP, asked her for an update and for "further assurance that this is all in hand".

166. I note however that Mr Rice made reference in his April 2018 email to NHSI's unwillingness to put anything regarding its support for the SEP on paper. I am therefore unable to conclude that the absence of documentation means that there were no such conversations. Indeed for reasons discussed below after I refer to the emails sent following the meeting of 11 April 2018 I am drawn to the irresistible inference that there were discussions between Mr Bloomer and NHSI from 13 March to 26 March 2018, which would either also have involved or at least been reported to Ms Harrington, at which NHSI made it clear that it no longer supported the Trust entering into the SEP with Ryhurst and, if the Trust nonetheless proceeded to do so, it would not approve any proposals involving the disposal of the Trust estate for private development.

167. Ryhurst places considerable emphasis upon the content of the exchange of emails sent between Mr Hitchins and other non-executive directors on 13 April 2018. The first email was sent by Mr Hitchins to update the other non-executive directors who had not attended the Board seminar held two days previously. As relevant it said this:

> "Unfortunately we had some important discussions this week when four of you were unavailable and not present. The first, I was surprised to hear about, is a complete turnaround on the estates plan. Not only are we abandoning it and looking at alternatives, we face an expensive legal action which NHSI will underwrite only to the extent of £200,000. I am struggling to separate my annoyance with NHSI, the manner in which we have been marched up and down and up and down this particular hill and how we handle the communications with the much bigger issues that this is a critical and major decision.
>
> I fear that it seems to me that the Executive have reacted rather than taken this as a positive and deliberate choice. Too many of the arguments that were deployed to make us back the original choice now seem to have evaporated.
>
> The biggest reason behind this is inevitably politics with NHSI completely compromised by the possibility of any political ripples and the London Mayor's intervention. Nothing will ever appear in writing or even be said but it has been made clear the SEP is dead!"
>
> I am meeting with [Ms Harrington] and [Mr Bloomer] next week and we are planning to call a special meeting of the Board (not necessarily a Board meeting) for us to have a longer and considered discussion. I feel strongly that after two years of debating this we cannot change our minds after 30 minutes!"

168. That provoked a response from Tony Rice which as relevant read as follows:

> "I fully agree. Not only do we look like complete incompetents (because of the behind the scenes machinations of NHSI, local politicians and City Hall) but a backdown now may result in us never being able to effect an estates plan of any kind, a certain path to merger and possibly closure in the future. If we can't reverse the direction of travel there are other actions we should consider especially re NHSI... I have consistently asked for us to secure written supporting

evidence of "guidance" from NHSI re the key actions of going with Ryhurst and the aftermath of that and have always been told that they won't put anything in writing."

169. Mr Hitchins responded:

"I don't disagree but I am certain the execs would tell it isn't for want of trying that we never get quick firm answers in writing from NHSI. It is a sure sign of a weak organisation that everyone is more concerned with minding their backs than making the right decision. However, we cannot fall out with them…

Meanwhile I think our media strategy must continue to be little more than "We haven't signed a contract".

170. David Holt wrote:

"I agree that we would benefit from further discussion around the way forward on Estates as I am keen that, regardless of NHSI's blocking tactics, we press on with our transformation plans, particularly the vision that a master plan will bring. I also think we need to be very clear how any change of heart on signing a SEP is communicated as it would be unfortunate if it increased the power of certain lobby groups!"

171. In a later email Mr Hitchins said this: "I met with both Steve Bloomer and Siobhan this afternoon and was taken step by step through the process with NHSI. Other elements have also played a part, though I still believe we are seeing off [DWHC] and the politicians are not engaging sufficiently to understand the complexities or the limits to how much we will use our 'preferred bidder'. But the involvement of the Mayor for entirely political reasons and the NHSI lack of backbone mean that there are no options. … The three phases [of the discussion we will have] are how we got to where we are including legal implications and risks, how we accelerate the master plan, and what vehicle we adopt to deliver the estates strategy. Only after that can we plan the PR strategy but for the present that will be to maintain the mantra "We haven't signed any contract. On the good news side Steve [Bloomer] believes we will secure more funding from NHSI not least because we are in their good books having hit the control total last year, agreed it for next year, reduced the overall deficit to approaching £1m, met the agency cap and delivered a surplus!..."

172. The emails from Mr Hitchins clearly demonstrate in my view that he believed that the Trust's executive had already decided that the SEP procurement would have to be abandoned. It is clear that he was extremely annoyed and believed that the real reason behind the decision was pressure being exerted on the executive by NHSI due to political pressure being exerted on NHSI. However, it is also clear that he believed that there should be a special Board meeting for a longer and more considered discussion with a view to fully discussing the options and making a decision.

173. Ms Harrington said in her witness statement that by the time of this meeting "I was beginning to feel that even if the Trust entered into the SEP it would be highly unlikely that the business cases for development schemes would be approved by NHSI with Ryhurst's involvement, given the significant opposition from the community and MPs". I accepted that this reflected the reality as she perceived it. It followed, as I am satisfied she was then fully aware, that there was no real point in entering into the SEP in such circumstances, given all the difficulty and negative publicity the Trust would face if it was constantly having to deal with Ryhurst's wish as a SEP partner to push forward with privately funded development on the one hand and the strong opposition to any such proposals on the other, particularly when the prospects of NHSI approving any development proposals

involving Ryhurst and the sale of NHS property for development appeared to be minimal. When she was asked whether the primary reason for her view that the SEP wouldn't work was because of the "noise" from stakeholders, she answered "and also the position of NHSI".

174. My clear assessment is that if the Trust executive had felt confident that it would have the support of NHSI if it entered into the SEP and, crucially, that NHSI would back proposals involving raising funds through selling off surplus Trust estate for development, then it would have concluded that the continued vociferous opposition would have been a price worth paying. Once, however, it became apparent that this was not the case then the Trust executive concluded that there was no point in even entering into the SEP, so that it would have to be abandoned and an alternative strategy found. They knew, however, that there was a real risk that Ryhurst would probably bring legal proceedings to challenge the abandonment and the only sensible reason, in my judgment, for NHSI being willing to provide £200,000 as a contribution to the anticipated legal costs was that it acknowledged that its change of heart was the real reason why the Trust would have to abandon the procurement.

175. I can well understand that NHSI would not have been so impolitic as to "instruct" the Trust not to sign the contract with Ryhurst, as it was expressed in a subsequent paper from the communications team, let alone to put any such instruction in writing. However I accept that this was how it was perceived within the Trust, in circumstances where it was understood that if NHSI was not going to approve individual projects under the SEP, all of which would have to be approved regardless of their value, then there would be no point whatsoever in entering into the SEP.

176. Returning to the 11 April 2018 meeting, it is apparent from the tenor of the emails referred to above that Ms Harrington explained to the non-executive directors at the meeting that this was the primary reason for coming to the conclusion that the SEP was not going to work and that the Trust needed to find an alternative approach. Ms Harris confirmed that she was informed that NHSI was strongly encouraging the Trust to reconsider the merits of the SEP and to consider other available options.

177. Nonetheless and importantly, in my view, there can be no suggestion that the non-executive directors were being asked to decide, or that they had decided, at the Trust Board seminar that the Trust should not proceed with the SEP. Ms Harris was clear in her evidence to this effect. That was not the purpose of the seminar which, as I have said, was intended as an opportunity for discussion rather than a decision-making forum. A number of non-executive directors had been unable to attend the seminar and their views had not been heard. It is apparent from the tenor of the emails and from the evidence of Ms Harris that the non-executive directors were not, from April 2018 onwards, abdicating responsibility for making the decision to the executive team without a further consideration of the options. Although it is clear that Mr Hitchins was expressing the view in April 2018 that there was, in reality, no other option than abandoning the procurement, there is no basis for a conclusion that this was the subject of express discussion and agreement by all Trust Board members at this time.

178. Ryhurst sought to place reliance upon various emails produced by the Trust's communications department in April 2018 which are said to show that the communications department clearly believed that the Trust would not be entering into the SEP. In my view they show no more than that this was something which was known to be a likely outcome, but by no means something which had already been decided upon by the Trust Board, whether formally or informally. In one email for

example the author merely sets out her "DRAFT thoughts on a potential announcement should the current direction of travel re SEP and estates carry on" (emphasis in original).

179. The same observations apply to the fact that in April 2018 Ms Harrison was asked to look at a number of alternative routes for delivery of the estates strategy. This is consistent with the Trust executive having concluded that alternatives would need to be found, but does not show in my judgment that a firm decision had already been taken by the Trust Board to that effect.

180. I should also note that Ryhurst complains that it was being kept completely in the dark about these developments. I accept that the Trust was indeed not keeping Ryhurst informed of recent events, particularly the change of heart by NHSI and the Trust's concern that this could well end up scuppering the prospects of entering into the SEP. Whilst I shall have to consider this criticism in the context of the claim that the Trust breached the transparency obligation, it is worth observing at this stage that the Trust was in a rather difficult position in that there was very little in hard terms that could be reported, given that NHSI was expressing itself very much "off the record". NHSI's public position was carefully expressed. I have been shown the letter which NHSI wrote to Ms West MP on 29 March 2018 in response to her request for an update which says that whilst NHSI had provided approval to proceed with the procurement it was aware of the Trust's engagement with stakeholders and understood that the Trust would not sign a contract until "the Trust Board is satisfied that any potential partnership fully meets the needs of the organisation". It said that it had "an ongoing dialogue with the Trust about the partnership, during which we continue to ask the Trust to update us of any changes to this position".

181. On 5 April 2018 Mr Bloomer did however email Mr Collinson in the following terms: "As the Trust is still not in a position to sign the contract I believe that we should hold off on any further activity / meetings so as not to incur additional costs at this time. We will review this regularly and move forward when the position changes". Whilst this email did not give any explanation as to why the Trust was in this position, and nor did Mr Bloomer respond to Mr Collinson's entirely reasonable request to know what the issues were which were preventing the SEP being entered into, nonetheless it is plain that Ryhurst must have known by this stage that there were clearly some significant difficulties. In that context it does not say that it carried on undertaking any work or incurring any expenses after this date in the belief that it was only a matter of time before the SEP was signed and development could begin.

The decision to abandon the procurement

182. It is clear that during April and May 2018 the Trust executive was busy working on alternatives to the SEP. The result of that work emerged on 29 May 2018, when the discussion paper for consideration at the Trust Board meeting to be held the following day was prepared. In his covering email Mr Bloomer said that it would be "the basis of the paper that makes any formal decision". It was a short report, containing only 3 sections extending over 3 pages. Sections 4 to 7 were added, along with a further 4 pages, in the June report. That is because the function of the May report, in contrast with the June report, was to provide a basis for discussion as opposed to providing advice or recommendations to the Trust Board. Whilst I will refer to the subsequent paper as a whole in more

detail below, it is worth summarising the structure and content of the May report at this point. In short:

(1) It explained that its purpose was to update the Trust Board on "the changing context in the last two years since the Trust took the decision to pursue a SEP and to consider whether these changes would affect signing a final agreed contract".

(2) Having summarised the background from 2016, it explained why the decision was taken to proceed with the SEP in 2016, with one reason being the provision of "flexible, bespoke funding and contractual solutions for delivery for individual projects (which may or may not include the transfer of land into the JV/subsidiary)", which is clearly a reference to the proposal to use surplus sites within the Trust estate for private development to fund the works required to the rest of the estate.

(3) It then identified a number of "developments within the NHS locally and nationally which mean that some of the objectives above cannot be fully achieved and other options available to the organisation that were not available at the point of the decision". These included what was said to be: (a) six changes in the funding available to the Trust for estate development (including a reference to the position of NHSI in relation to development through the SEP); (b) the continuing significant levels of concern from stakeholders regarding the decision to establish a SEP with Ryhurst; (c) the availability to the Trust of funding to pay for the upfront costs of the development masterplan; (d) the development of key relationships with other public sector organisations as an alternative to the commercial SEP relationship; (e) the potential impact of recent adverse developments in the PPP health market, specifically the Grenfell fire and the collapse of Carillion.

183. It recommended that the Trust Board discuss the update and consider future work to allow for a decision on SEP procurement at the June Trust Board meeting. The minutes of the meeting which took place on 30 May 2018 recorded that Mr Bloomer introduced the report, that it was discussed and that it was agreed that a "firm recommendation" should be brought to the next month's Trust Board meeting.

184. On 13 June 2018 Mr Collinson authored an internal Strategic Review for Ryhurst. It referred to the "market context" as including the impact of "Carillion, Grenfell, Interserve and Capita" (Interserve being another high profile insolvency and Capita being subject to adverse publicity for its performance of public sector contracts), "political focus on state run services, particularly in London", and "Health and Housing, one public estate, extra care, community focus, funding and change through NHS STPs". These were all factors which Mr Collinson saw at the time as affecting the opportunities for Ryhurst to enter into new profitable SEPs. It is clear that at the time Mr Collinson's perception was that the Grenfell connection was very far from being the only reason why Ryhurst was experiencing difficulties in the NHS sector.

185. On 17 June 2018 the DWHC wrote an open letter to the Trust Board requesting that it not enter into the SEP on the grounds of its concerns about Ryhurst, primarily in relation to its connection with the Grenfell fire, but more widely in relation to criticism of the construction sector generally. It requested that instead it should "manage the estate strategy in house". Thus, whilst it is clear that at this stage the Grenfell connection was the primary argument being deployed, it was not the only

argument and that the DWHC was still maintaining its opposition to the Trust appointing any private company. This letter was shown to the Trust Board at the 27 June 2018 meeting.

186. On 22 June 2018 reports appeared in a local newspaper and on social media to the effect that the Trust would not be proceeding to enter into the SEP with Ryhurst. In one such post it was said that the source was Mr Hitchins. This appears likely, whether directly or indirectly, since 2 days previously Mr Hitchins had emailed the leader of Islington Council to inform him that the Trust was "abandoning the SEP with Ryhurst". Although Ms Harrington was cross-examined on the basis that this showed that this had already been decided before the Trust Board meeting, I disagree. What it does show, I accept, is that Mr Hitchins was aware by then of what the forthcoming report would recommend and I have no doubt that he would, as a politically astute chair, already have known from previous meetings and discussions that the Trust Board as a whole would – or at least would almost certainly – agree with the recommendation. However, that is still very different in my view from saying that a decision had already been made by the Trust Board as a collective entity to abandon the procurement.

187. On 25 June 2018 the report for the meeting was produced by Ms Harrison and approved by Mr Bloomer. The executive summary stated that a decision was required as to whether or not to proceed with the final contract award for the SEP or to abandon it and take an alternative route. It stated that it would consider: (a) the developments and changes which have taken place since 2016 as regards funding, stakeholder engagement, STP and LEB and industry developments; (b) the options available to the Trust; (c) the key features of the SEP model, the impact of changes since 2016 and the new risks associated with the model. Its conclusion was that the Trust should abandon the SEP and progress through a more traditional route.

188. The report itself contained an introduction and a background section and then, in section 3, identified the developments and changes which had occurred since 2016 under the separate headings of: (i) funding; (ii) stakeholder engagement; (iii) the STP and LEB; and (iv) industry developments. Section 4, headed "options available to the Trust", identified the proposed alternative route as being the more traditional route of the Trust working in-house with stakeholders and key partners to produce a development masterplan and business cases for project delivery. It said that the changes and developments since 2016 suggested that it was "prudent" for the Trust to review its decision and to consider a more traditional alternative route. In section 4.1 it identified the key features that informed the decision to proceed with the SEP in 2016. It said that due to the Trust's improved financial position and strengthened relationships with key partners the features which had favoured the SEP approach in 2016 were no longer significant in differentiating the SEP solution from the traditional route. In section 4.2 it identified new risks associated with the SEP model in terms of stakeholder engagement and the need for NHSI approval for all new projects. Section 5 is redacted. In section 6 the conclusion was reached to abandon the procurement of a SEP and progress through the traditional route. Section 7 contains the recommendation to approve that proposal for the following reasons, which I quote in full:

> "Two of the key reasons for pursuing the SEP in preference to other options (namely (1) the need for JV partner investment and working capital; (2) the need for JV partner resource) have now fallen away due to the Trust's improved financial position and strengthened relationships with the NCL STP, Haringey and Islington Health and Wellbeing Partnership, the GLA, London Estates Board and neighbouring Trusts. The Trust is now in a stronger position to be able to

access additional support from a range of partner organisations (as opposed to a single JV partner) to produce the required capacity and capability, and through these relationships generate significant investment funds. The adoption of a more traditional approach to estates transformation is therefore preferred;

In addition, there are new risks associated with pursuing the SEP namely: (1) the risk that the Trust will not be able to engage stakeholders sufficiently in the development of a deliverable masterplan nor gain stakeholder support for business plans developed through a SEP; and (2) the fact that the Trust will face additional decision-making hurdles by NHSI that all developments undertaken through the SEP would be classed as 'novel and contentious', and therefore would require full business cases for all new projects, including business cases below £15million which would not be subject to the usual delegated authority for capital investment"

189. In cross-examination and in submissions Ms Hannaford was extremely critical of the report, which she compared unfavourably with the June 2016 estates strategy options appraisal paper in terms of its detail and, in particular, its failure to analyse, using a structured ranking system, the pro's and con's of the options of proceeding with the SEP or reverting to the traditional procurement route. There is clearly force in this criticism. It would clearly have been better if the report had adopted a similar structured system to that used in 2016. The failure to do so lends support to the criticism that the report was written on the basis of seeking to support and justify the option which the Trust executive had already decided was the right one.

190. However, in my view this criticism can be overstated. I agree with Ms Harrington's evidence that what was reasonably required in June 2018 was different to what was required in June 2016 because by June 2018 the Trust Board had, over the preceding 2 years, developed a detailed understanding of the estates strategy and the procurement for the SEP and the difficulties which had been encountered and, in particular, had already considered the pro's and con's of the alternatives in the Trust Board seminar meetings in March and April and had already considered and discussed the position at the May 2018 board meeting. There were only two options to consider and the Trust Board were familiar with the pro's and con's of both. It is true that the June report was in the form of a narrative which did not expressly consider the pro's and con's of both options, nor were they the subject of a formal structured scoring or ranking system. However, since the fundamental purpose of the June report was to consider whether the SEP procurement should be abandoned in favour of reverting to the traditional procurement route, in my view the relevant considerations were addressed in sufficient detail in the report.

191. Mr Coppel referred me to the well-known principles which are applied to reports which are placed before committees in connection with decisions on matters such as planning. I refer to and gratefully adopt the summary given by Lindblom L.J. in *Mansell v Tonbridge & Malling BC* [2017] EWCA Civ 1314 at [42], in particular that such reports are not to be read with undue rigour, but with "reasonable benevolence", bearing in mind that they are written for informed readers to enable them to make a decision rather than for detailed scrutiny by lawyers in subsequent litigation. I do not consider that the June 2018 report, read on that basis, could be said to have been plainly inadequate for the purpose of allowing the Trust Board to make an informed decision.

192. The Trust Board meeting took place in private on 27 June 2018. The minutes record that there were no absences although one party declared an interest and did not participate. The minutes record that Mr Bloomer spoke to the report and that there was discussion as regards the timescale for the

completion of the sale to CIFT (it was reported that it was anticipated within the financial year) and as regards whether or not the Trust's auditors had been kept informed (it was reported that they had and that they had tested the Trust's position). It was recorded that the SEP would be abandoned for the reasons set out at section 7 of the report.

193. Ms Harris confirmed that there was relatively limited discussion at the meeting since, in her view, the Trust Board was well informed and able to make a decision. She confirmed that the decision was made on the basis of the information considered and discussed over the previous months and for the reasons set out in the minutes. She said in her evidence that what particularly weighed in her mind was the change in financial circumstances, the change in the availability of support from other public sector partners and the dilution of support from the regulator (i.e. NHSI). She said that the impact of the pressure from DWHC and local MPs and others had less impact on her, but she accepted that it had more weight on other Trust Board members. As Mr Coppel submitted, that evidence, which I accept, does indicate that the weight which individual members ascribed to particular reasons varied, which in itself tends to show that Ryhurst cannot realistically seek to contend that there was only ever one reason for the decision, which was the pressure not to contract with Ryhurst because of its perceived connection with Grenfell.

194. Ms Harris also rejected in terms in her evidence that the decision taken in the June 2018 Trust Board meeting was a "sham" because the decision to abandon had already been taken by the Trust to abandon the SEP had already been made. The contrary was not suggested to her in cross-examination and, having considered her evidence and that of the other Trust witnesses and having weighed that evidence against the contemporaneous documentation I have no doubt that there could have been no proper basis for such a suggestion.

195. On 28 June 2018 the Trust uploaded an announcement onto the procurement portal so as to be visible to all procurement candidates and tenderers including Ryhurst, stating that "the Trust has decided to abandon the SEP procurement without entering into a contract". The reasons for the Trust's decision to abandon were provided by section 7 of the June report being reproduced in full as part of the announcement.

The reasons advanced for the abandonment

196. As is apparent from the notification and from section 7 of the June report, four principal reasons were advanced for the decision, namely:

i) The Trust's improved financial position.

ii) The Trust's strengthened relations with other partner organisations.

iii) NHSI approval required for sub-£15M projects.

iv) The risk of insufficient stakeholder engagement and stakeholder support.

197. Since Ryhurst challenges each of these reasons and contends that they are no more than smokescreens devised largely by Mr Bloomer from March 2018 onwards to seek to disguise the fact that the real reason for the decision was the perceived Grenfell connection and the pressure exerted on the Trust due to that perceived connection, I shall need to consider them separately.

Reason 1 – the Trust's improved financial position

198. Ryhurst disputes that the Trust's financial position had improved as at the date of the decision so as to justify the decision. This is contested by the Trust, which contends that it did indeed rely on its improved financial position in deciding to abandon the SEP procurement and that it acted entirely reasonably and rationally in so doing.

199. There were a number of separate developments identified in the June report, which I will address in turn.

(i) The Trust's general financial position

200. As explained by Mr Bloomer in his witness statement and in cross-examination, the finances of a NHS Trust differ (or at least in 2018 they differed) from those of a private company in that a trust is not so much concerned with break even as with matching or bettering the control total set by NHSI for the relevant year. For the year to 31 March 2018 the Trust had agreed a control target of a £0.6M surplus. It achieved and bettered, albeit by a relatively small margin of £200,000, that target. That, however, had a considerable impact since it entitled the Trust to receive a substantial sum under the Sustainability and Transformation Fund ("**STF**") introduced by NHS England in 2016-17, which it was entitled to use without the need for repayment or interest, and which therefore had the effect of increasing the total funds available to the Trust. In its annual report it was forecasting a further surplus over its control target for the following year, which would of course unlock payment of yet further STF payments.

201. As Mr Bloomer said in his witness statement at [111], the effect of all this was that by June 2018 the Trust had received £8.8M by way of STF payments in 2016/17 and a further £10.6M in 2017/18 and anticipated receiving a further £21.3M in 2018/19, actually receiving £27.6M. Although Mr Bloomer's cumulative total in his witness statement wrongly referred to a 2 year instead of a 3 year total, what cannot be disputed is that as at June 2018 the Trust had already received £19.4M and was expected to receive a further £21.3M the following year. Whilst it is not suggested that all of this could simply have been spent straight away on estate improvements, nonetheless on any view that represented a very significant change from the position as it was in 2016 before the procurement, where the Trust did not anticipate having any surplus funds to use for estate development.

202. It is true, as Ms Hannaford established in cross-examination, that the financial picture was not uniformly rosy. As Mr Bloomer accepted, the Trust still had a historic cumulative deficit and had failed in 2017/18 to meet its statutory obligation to break even over a three-year period. It had also failed in 2017/18 to meet in full its Cost Improvement Programme ("**CIP**") target of £17.315M, achieving a saving of only £11.635M. It also had loans outstanding to the Department of Health of £29.7 million, of which £18.45M was – at least in theory – repayable within one year. Mr Bloomer agreed that the Trust was still facing a challenging financial future.

203. Mr Bloomer was also cross-examined on the basis that the monthly figures available as at June 2018 showed that the Trust's financial position was worse than had been forecast at that point. Whilst this is true the shortfall was relatively modest in amount and was explained, according to the information provided, by a shortfall in income which was not expected to affect its performance over the course of the year. I do not therefore consider that there was any particular reason why the Trust Board needed to take that into account when it made its decision at that time, particularly in circumstances where it was still predicted that it would achieve its control total target. I have looked at the financial

performance report which was placed before the Trust Board at the meeting. There is no basis in my judgment for a conclusion that it showed such a serious disparity between the forecast and actual results that the content of the June report as regards the financial position of the Trust in relation to funding of improvements was invalidated.

204. In his witness statement Mr Bloomer had stated at [107] that as regards cash-in-hand there was a "significant and sustained upturn beginning in the first quarter of 2018/19". As he had to agree in cross-examination in fact the figures showed a decrease in that quarter, albeit that they also showed a subsequent sustained and substantial increase in later periods. Indeed, the graph forming part of the statement appeared worryingly inaccurate in that it seemed to overstate quite significantly the figure for cash-at-hand as at 2017/18 year end. Mr Bloomer struggled to explain this in cross-examination but in re-examination he said that the figure in question was accurate because it was the aggregate of 3 months' cash holdings rather than being the figure for cash-in-hand at the particular date. That explanation was a surprising one to me, but I am prepared to accept that it is a credible explanation for something which would otherwise make no sense. I am satisfied that Mr Bloomer did not set out to deceive anyone in producing this evidence in the way that he did, although it would have been far better if that had been explained. The failure to do so was, I am satisfied, a combination of carelessness and a desire to present the Trust's financial position in the best way possible. Most importantly however, I do not think that it is of any real relevance to the question I have to determined, since I do not consider that a relatively modest variation in cash-in-hand either way at that time could have been thought to be of any great relevance to the decision which had to be made about whether or not to abandon a long term project such as the SEP in June 2018.

205. In short, I am satisfied that: (a) the alteration in the Trust's position in relation to its income from STF payments did represent a significant change in the Trust's financial position which was a new development since June 2016 and which was directly relevant to the decision whether or not to abandon the SEP procurement; (b) the less positive aspects of the Trust's financial position referred to above were neither new development nor matters of such significance as to outweigh the impact of the STF payments.

(ii) The sale to CIFT

206. It is accepted by the Trust that the potential of a sale of part of the hospital site to CIFT for it to provide an in-patient mental health unit had been known about by the Trust since early 2017 at the latest and that since at least March 2017 it had become a relevant consideration so far as the SEP was concerned. It is also accepted by the Trust that a significant reason for the Trust securing a very substantial increase in the sale price was Ryhurst's involvement in putting together a much increased valuation on the basis of the impact that the sale of the site to CIFT would have on the development value of the site earmarked for private development under the SEP.

207. Nonetheless, it cannot in my judgment seriously be disputed by Ryhurst that this was a development that was not known about when the decision was made in June 2016 to begin the procurement. Nor can it seriously be disputed that it was not until late 2017 when it became apparent that the sale to CIF was in all likelihood going to proceed and at a very substantial capital sum. As at June 2018 this was indeed an extremely significant financial development in terms of the substantial capital sum that would be brought into the Trust and which would be available for spending on the redevelopment of its estate.

208. In cross-examination of Mr Bloomer Ms Hannaford made the point that the Trust could just as easily have decided to use the monies received from CIFT to inject into the SEP, so that this development did not in itself adversely impact on the viability of the SEP. Whilst that is clearly correct it does not detract from the fact that this development reduced the need for the Trust to enter into the SEP as the only practicable means of securing sufficient funds to achieve its objective of improving its estate.

209. In cross-examination of Mr Bloomer Ms Hannaford also made the point that by June 2018 the Trust had not received any monies from CIFT. Mr Bloomer accepted that this was the case, but again that does not detract in my view from the point that by June 2018 it was known that the funds would come in. It was not necessary for the funds to have been received before the decision was made to abandon the procurement. Ms Hannaford also made the point that in June 2018 there was some correspondence between NHSI and the Trust about the possibility that the Department of Health would seek to take some of the sale proceeds to repay the Trust's deficit to central government. However it is reasonably clear from the correspondence, and I accept Mr Bloomer's evidence on this point, that this was never thought to be a serious risk since it had never happened before, so long as the Trust could show that it intended to use the proceeds for redevelopment.

210. The reality, in my view, is that the prospect of this very substantial receipt from CIFT, coupled with the actual and projected very substantial receipts from the STF, can without over-exaggeration be said to have revolutionised the Trust's financial ability to fund substantial estate improvements without the need for a commercial partner when the position as at June 2018 was compared with the position as it had been in June 2016.

211. Whilst it is true, as Ryhurst submitted, that even these combined sums were comparatively modest compared to the £100M or so which at one stage was being estimated as being the total needed for improvements over the 10 year lifetime of the SEP, that ignores two points. The first is that it was not being suggested that these represented the only source of funding which would be available to the Trust over that period. Leaving aside the prospect of further STF receipts, one of the purposes of the development masterplan was to identify further sources of funding over the medium and longer term. The second is that insofar as the implication is that entering into the SEP somehow guaranteed the Trust this £100M there is simply no basis for that submission; Ryhurst had never suggested that it had secured access to guaranteed funding of £100M over the 10 year lifetime of the SEP.

(iii) The Greater London Authority ("GLA")

212. In the June 2018 paper reference was made to there being the potential for the GLA to purchase and develop smaller parts of the Trust estate for social housing which would provide funding. The GLA had done this with another local trust earlier in 2018, so that it was not entirely speculative. It was the subject of an attachment to an email from Mr Hitchins on 18 June 2018. Although Mr Hitchins included the potential receipts from this when referring to what he described as "back of the envelope guesswork" in the email, nonetheless this had been the subject of at least some discussion involving Mr Bloomer and the GLA so that so far as the Trust was concerned it was not completely speculative.

213. Again, therefore, it cannot in my judgment seriously be disputed by Ryhurst that this was a development that was not known about in June 2016 nor that the Trust was reasonably entitled to take it into account as a potentially significant financial development, since if it came to fruition it

would make available to the Trust a potentially significant capital sum which would be available for spending on its estate.

214. Although it is true that this was no more than a possibility, which has not so far materialised, Ryhurst cannot sensibly criticise the Trust Board as acting irrationally in taking this possibility into account in its collective thinking.

215. I should also record that in her evidence Ms Harris gave a detailed explanation as to why she personally considered that this possibility was a significant development, both from a financial and a wider perspective. I fully accept her evidence that this was something to which she had regard when deciding to support the abandonment. There can be no basis for a suggestion that it was irrational for her to do so.

(iv) Project Phoenix

216. This was a reference to the development of a national PPP model known as Project Phoenix. It appears that nothing has come of this and Ms Harrington was unable to answer questions about this in cross-examination. It was clearly no more than a possibility as at June 2018, but there is no basis for concluding that it could not properly have been included in the report.

(v) Funding of the development masterplan

217. Although not separately addressed in the June report, Ms Harrington was cross-examined on the basis that if the Trust decided to proceed with the in-house option rather than with the SEP it would have needed to find some £400,000 to fund the development masterplan. However as I have already said I do not accept that the Trust was proceeding on the basis that the full cost of procuring the development masterplan in-house would be £400,000 is a true reflection and nor, so far as I am aware, was it ever proposed by Ryhurst in its tender that it would fund upfront the full cost of procuring the development masterplan costs under the SEP.

218. In any event, however, since the Trust's financial position was significantly better in June 2018 than it had been in June 2016 it cannot be said that the Trust was not reasonably entitled to conclude that it could fund the costs needed to undertake the first stage in the project, namely the production of the development masterplan, from its own resources, or that this was not a change in its position since June 2016 when even that appeared doubtful.

(vi) Financial position – conclusions

219. In my judgment the Trust has made out its case that there was indeed a significant change in its financial position in June 2018 compared with June 2016 and that this was a genuine and a principal reason for the Trust Board making the decision at the June 2018 meeting to abandon the SEP procurement.

Reason 2 – the Trust's strengthened relations with other partner organisations

220. Mr Collinson asserted in his witness statement that there had been no material difference in the Trust's relationship with the identified partners as between September 2017 and June 2018. For reasons I have already explained I do not think that September 2017 is the appropriate starting point for the comparison; the appropriate starting point is June 2016 when the Trust decided to undertake the procurement.

221. Ms Harrison devoted a considerable amount of her witness statement to explaining the differences in the position as it was at the time of the decision to undertake the procurement and as at June 2018. She explained that the changes she identified were part of a more general move away from provider organisations such as the Trust working in isolation towards a more collaborative approach, which she claimed had brought real benefit to the Trust in terms of its ability to produce and implement its own development masterplan. She said that the estates team's capacity to undertake independent estates work had also improved since 2016.

222. She referred first to the formation in March 2016 of the NCL STP (the North Central London Sustainability and Transformation Partnership). Its purpose was to seek to bring together NHS, local authority and other health and care organisations to collaborate on the future of the health and care system in their area and, in particular, to 'provide a framework for setting estates strategy and capital investment; accelerating delivery and decision-making; and support STP alignment'. It was required to develop a five-year, place-based plan for health and social care within its footprint. In July 2016 it proposed the setting up of a working group for NCL estates, with a focus on producing an NCL estates strategy for the STP submission in 2016. Ms Harrison's evidence was that from early 2018 there were regular meetings of the NCL STP estates board, which had begun to offer real benefits to the Trust in terms of knowledge, support and advice and which had taken on a more central role in facilitating estates transformation in the NCL area.

223. She said that as well as these intangible benefits the establishment of the NCL STP has led to a new system whereby, instead of the Trust having to submit proposals for schemes direct to NHSI, proposals are proposed, discussed collaboratively and submitted through the STP to the London Estates Board and then on to NHSI. She said that in March 2018 it was anticipated that schemes of below £15 million in value which were submitted in this way would not require to go through the full business case approval process with NHSI and that regional investment companies would be formed to secure private funding.

224. In cross-examination of Ms Harrison Ms Hannaford established that it had always been intended that the services to be provided by the SEP would include supporting the Trust in local strategic health forums such as the STP. Whilst this is true it does not in my view detract from the evidence of Ms Harrison that by June 2018 the STP had become a resource which the Trust could access and which could, at least in part, provide assistance which otherwise would not have been available to the Trust without a SEP partner such as Ryhurst.

225. Ms Harrison explained that the London Estates Board ("**LEB**") was established in December 2016 to coordinate and bring together the work of the five London STPs in London in respect of estates. As well as the STPs its members include representatives of the local London councils and the GLA as well as from national NHS and governmental organisations, including NHSI and the Department of Health. Ms Harrison referred to the Board's operating framework as aiming to "solve some of the challenges involved in securing NHS estates approvals and disposals, through more transparent and collaborative working, for the benefit of London's health and care system". She explained that its aim was to become the formal decision-making body for public health sector capital investment decisions on projects in London up to a certain value. It is clear that the LEB offers benefits similar to those offered by the STP.

226. Ms Harrison also referred to the closer contact which the Trust had made with the GLA and which had led to the discovery of the prospect that the GLA might be willing to acquire surplus land from the Trust to develop for affordable housing, which would enable the Trust to use the sale proceeds to fund improvements to its estate. She said that by the date of the June meeting two meetings had already taken place between representatives of the Trust and the GLA to discuss this prospect. She said that since June 2018 discussions had continued in this respect although, as yet, nothing had come to fruition. This, she explained, was because of the need to complete stakeholder consultation as to what, if any, land might be suitable for release for such purposes. The Trust has in the meantime entered into a formal relationship with the GLA, whereby the latter will assist the Trust to develop its development masterplan, albeit on a paid consultancy basis. Again, I accept that this evidence does disclose a change in the position as between pre-procurement and June 2018.

227. Ms Harrison also referred to the establishment in March 2016 of the Haringey and Islington Health and Wellbeing Partnership ("**H&IHWP**") Estates Group, which became the vehicle for taking forward the requirement placed on Clinical Commissioning Groups ("**CCGs**") by NHS England ("**NHSE**") to develop local estates strategies. She said that by late 2017 it had developed an estates strategy and by early 2018 had agreed terms of reference and had begun to hold regular meetings. One result, albeit postdating June 2018, has been the successful submission of a Wave 7 One Public Estate Bid, resulting in an award to support the development of collaborative projects including Trust projects. As Ms Harrison agreed in cross-examination, this was a relatively modest award of £500,000 which was intended to provide "seed funding" for feasibility studies.

228. Ms Harrison also referred to the closer contacts which the Trust has developed with CIFT and with the University College London Hospitals NHS Foundation Trust ("**UCLH**") as a result of working together on specific contracts.

229. Reference was made to these developing relationships in the paper produced for the 30 May 2018 meeting.

230. In her evidence in cross-examination Ms Singh emphasised the importance to her of these public sector relationships. I have no doubt that this was indeed a factor which carried significant weight so far as she was concerned.

231. In my view the Trust was reasonably entitled to and did rely upon these developments since June 2016 as supporting the decision to abandon the SEP procurement. Whilst I fully accept that in the absence of the change in financial circumstances this reason would not have been sufficient in itself, nonetheless the Trust was reasonably entitled to consider that these developments were significant factors in the context of considering the alternative to entering into a 10 year SEP with a private sector partner for assistance and advice over that time period. It had been envisaged in June 2016 that the SEP partner would assist the Trust in developing these relationships, whereas by June 2018 it had become apparent that the Trust was in a position where it could do so without the need for assistance from Ryhurst. Indeed, by June 2018 it must have been apparent to the Trust that in some ways Ryhurst's own commercial interests were at odds with the Trust's interests, in that the Trust's ability to secure funding and assistance through public sector partnerships was a risk to Ryhurst's own ambition to be appointed developer and to undertake development of surplus land so as to provide the Trust with funding for improvement which otherwise it could not obtain elsewhere.

Reason 3 – the risk of insufficient stakeholder engagement and stakeholder support

232. This was described as a new risk associated with pursuing the SEP. Ryhurst's argument is that this ignores the fact that the Trust was fully aware that this was the case from well before it even decided to undertake the SEP procurement and, by reference to the chronology set out above, that is plainly the case.

233. However in my view the true position is that the Trust had believed at the time it commenced the procurement and when it selected Ryhurst in June 2017 that although there would be opposition to the SEP as a form of PPP and opposition to any perceived disposal of NHS land for private development, that opposition would be surmountable with support from the wider stakeholders, including local MPs, in circumstances where there was no real viable alternative if the Trust estate was to be improved as it plainly needed to be. It is apparent that by June 2018 that belief had been completely exploded. Not only was DWHC still active and vocal, but the local MPs had all come out in opposition, and there appeared to be no groundswell of support from the wider stakeholders. Instead, NHSI had withdrawn support, seemingly influenced not only by opposition from MPs but also from the Mayor's office.

234. In my judgment the Trust was perfectly justified in viewing this as a new risk in the sense that it had not in June 2016 expected that even after two years the opposition to entering into the SEP would still be so vociferous let alone so widespread and increasing in intensity at the very point when it was preparing to enter into the SEP and being working with its SEP partner.

235. Ryhurst submits that the report was inaccurate in referring to a lack of engagement with or opposition to the production of the development masterplan. It is true that the opposition was to putting future development through a SEP with Ryhurst and disposing of surplus parts of the Trust estate for private development to raise money to fund improvements. It could be said that involving Ryhurst in producing a development masterplan, when Ryhurst would inevitably have wanted to include reference to securing funding through selling off surplus land for private development and involving Rydon as developer and as building contractor, would itself be opposed. In any event I do not consider that there is any evidence to suggest that if this was an error it was material to the decision which was made.

236. Ryhurst also submits that the reason given was not a full and accurate statement of the true position so far as NHSI was concerned, in that it did not make clear that a new risk associated with pursuing the SEP was that NHSI as a key stakeholder had made it clear that it no longer supported the Trust entering into the SEP with Ryhurst and would be unlikely to approve any proposals made under the SEP involving the disposal of the Trust estate for private development which, given that Ryhurst's approach to the SEP was that it was really only interested in pursuing the SEP as an opportunity to secure private development, meant that entering into the SEP was unlikely to achieve a positive outcome. However, I do not consider that the Trust was required to go that far. As I have already said it is difficult to see what the Trust could really have said in circumstances where NHSI had not actually expressed its position in clear written terms. Moreover, the clear reference to the absence of stakeholder support seems to me to have been sufficient to cover the absence of support from NHSI as a key stakeholder.

237. I also need to consider whether, as Ryhurst submits, this stated reason was, on proper analysis, nothing more than a coded reference to the political pressure exerted upon the Trust due to the perceived connection between Ryhurst and Grenfell.

238. I should say at this stage that I have no doubt whatsoever that the reason for the decision was not that the Trust itself did not want to enter into the SEP with Ryhurst due to the Grenfell connection. I have already referred to the evidence as to the discussions at the Trust Board in July and October 2017. It is clear that the Trust Board was prepared to proceed with Ryhurst notwithstanding the concerns about its connection with Grenfell. There is no indication whatsoever in the evidence that subsequently the Trust Board or indeed the Trust executive was ever convinced by subsequent developments or the continued opposition into sharing the view that it was simply inappropriate to enter into the SEP because of the Grenfell connection.

239. However, was it the case, as Ryhurst contends as its fallback position, that the reason for the decision was that the Trust succumbed to the political pressure not to enter into the SEP with Ryhurst due to the Grenfell connection? It would be idle to dispute that opposition to Ryhurst due to the Grenfell connection was indeed a significant reason, almost certainly the principal reason, for many individuals opposed to the Trust entering into the SEP. However, as I have attempted to demonstrate in my review of the evidence, it would be quite wrong to consider that it was the only reason. There clearly was strong opposition to the SEP as a form of PPP, not purely as a visceral objection on narrow political grounds but also as a principled objection based on a view as to how a public sector organisation such as the NHS should organise its affairs. There was also pragmatic opposition based on the high visibility collapse of companies such as Carillion which had obtained substantial contracts with public sector organisations and whose collapse had led to significant difficulties and losses. That risk was of course particularly relevant to Ryhurst in the event that Rydon collapsed during the lifetime of the SEP, whether due to difficulty in obtaining work due solely to the stigma flowing from its involvement with Grenfell or due to adverse findings by the Grenfell inquiry in due course. There was clearly a perfectly reasonable concern as to the impact on stakeholder engagement with the SEP if, during its lifetime, the Grenfell inquiry was to make such adverse findings. Moreover, as I have said another reason for opposition was that other Rydon companies were involved in maintenance works on local authority or housing association owned properties in the North London area where there had been and were continuing concerns.

240. All of these considerations demonstrate the difficulty of disentangling the differing reasons for opposition. In my view it is too simplistic to say, as Ryhurst seeks to do, that the sole or principal reason for the political pressure placed on the Trust not to contract with Ryhurst was due to an ill-informed and impermissible equation of Ryhurst with Rydon as a group or with Rydon Maintenance and hence with the Grenfell fire, where Ryhurst contends that: (a) it was improper to make the connection between Ryhurst and Rydon as a whole; and (b) it was improper to pre-judge the outcome of the Grenfell inquiry.

241. In submissions Ms Hannaford invited me to conclude that the true position was that had it not been Ryhurst but one of the other bidders who had been in the same position as Ryhurst at that time the Trust would never have abandoned the procurement and, therefore, that the real or principal reason for the decision was abandon was the Grenfell connection. It is always difficult to make a decision based on a hypothetical, because one simply does not know whether or not DWHC and the local MPs would still have objected to another bidder on the basis that the SEP was still a PPP which

depended for its success on selling off NHS estate to a private company for private development and private profit. Whilst I am inclined on the evidence before me to conclude that the Trust would probably have been able to proceed with the SEP because the opposition would not have been able to trade on the emotive Grenfell connection to whip up sufficient support from local MPs and other influential stakeholders so that NHSI would have continued to support the SEP, in my view that is the wrong question to ask. The right question to ask in my judgment is whether or not the Trust was entitled to take the lack of stakeholder support into account. In my view the Trust was entitled to do so because in deciding whether or not to proceed with or to abandon the procurement it was entitled to have primary regard to its own interests. If it had concluded, as it plainly always had, that the SEP was only workable with wide stakeholder support, then if that wide stakeholder support was not present in June 2018 for a number of reasons, many if not most of which were in no way irrational or improper, then in my judgment the Trust Board did not act improperly in taking that factor into account in deciding to abandon the procurement, looking not just at the present but also to the future.

Reason 4 – NHSI approval required for sub-£15M projects

242. This was also described as a new risk associated with pursuing the SEP. Again, Ryhurst's argument is that this ignores the fact that the Trust was fully aware that this was known to be the case from September 2017 when Mr Bloomer informed the Trust Board that it was a "routine business requirement and to be expected". I have already addressed these points in my findings. In short, I am satisfied that as at the time the procurement commenced the Trust genuinely hoped and expected that NHSI would permit projects undertaken through the SEP below the then limit of £5M without the need for individual approval and that Mr Bloomer had genuinely hoped and expected that he could persuade NHSI to agree this at the time he was in discussions with them in summer 2017. He had been unable to do so, and whilst he downplayed the significance of that failure in his report to the Trust Board I accept his evidence that in fact it was a disappointment and that it would have had an impact on the attractiveness of undertaking projects through the SEP.

243. For the same reasons as previously, it is irrelevant in my view that the Trust already knew that this was the position in September 2017. The relevant comparison is the position at the time the Trust decided to undertake the procurement, in June 2016, and the date of the abandonment. Furthermore, it was not unreasonable in my view for the Trust to have taken the view in October 2017 that it could live with the decision when it made the decision to proceed to award the SEP to Ryhurst at a time when, broadly speaking, all else was going well with the project. That does not mean that later on, in June 2018, at a time when the decision had been taken to conduct a full re-assessment, it was unreasonable to take this into account when deciding whether or not to abandon the SEP procurement.

Breach

244. Given my conclusions in relation to the proper legal analysis and in relation to the reasons advanced for the abandonment of the SEP I can deal with the issues of breach relatively shortly.

(i) Breach of the obligations of equal treatment, non-discrimination, proportionality and avoiding manifest error

245. I can take these obligations together since, on my analysis of the law, they all involve essentially the same inquiry, which is whether or not the decision to abandon the SEP procurement exercise in the circumstances prevailing in June 2018 was one which the Trust, as a public authority having to balance a wide range of relevant factors and interests, could properly have arrived at in compliance with its fundamental EU procurement obligations.

246. In answering that question I have already found that: (a) the decision was made by the Trust Board at the meeting in June 2018, which was not – as Ryhurst has contended – simply a rubber stamping exercise for a decision taken some time earlier by the Trust executive and informally acquiesced in by the Trust Board in previous informal sessions; (b) the decision was made on the basis of the June report; (c) the June report made reference to there being four principal reasons justifying the decision to abandon, of which the Grenfell connection was only relevant to one (stakeholder support); (d) the first two reasons, namely the improved financial position of the Trust and the strengthened relations with other partner organisations, were both genuine and proper and rational reasons for making the decision; (e) the third reason, the stakeholder support reason was itself not solely or even principally to do with the Grenfell connection since: (i) although the Grenfell connection was plainly a significant reason underlying a large part of the political opposition to Ryhurst, it was not the only reason; (ii) there were other perfectly proper and rational reasons for the lack of stakeholder support; and (iii) it was the fact of the lack of stakeholder support and the lack of any reasonable prospect of that being overcome which was the real reason for the Trust to take this into account, rather than the reasons which underpinned the lack of stakeholder support; (f) the fourth reason, the need for NHSI approval for all projects under the SEP, was also a genuine and a proper and rational reason.

247. In all of those circumstances I am quite unable to conclude that the decision was one which breached the Trust's obligations of equal treatment, non-discrimination, proportionality or avoiding manifest error. Ryhurst has failed in its core case that the reason for the abandonment was political pressure based solely or primarily on the Grenfell connection. There were a number of rational reasons for abandoning the SEP procurement which the Trust Board was entitled to and did take into account in reaching its decision. One reason, which was indeed a primary reason, for the decision was the lack of stakeholder support. It is true that one reason, which was indeed a primary reason, for the lack of stakeholder support was the Grenfell connection. However, it was not the only reason and there were other reasons, and rational reasons, for the lack of stakeholder support which were either wholly unconnected with Grenfell or which were connected but rational (i.e. the risk that the SEP might be compromised during its lifetime by the failure of the Rydon Group due to Grenfell).

248. Applying the approach in *Lumsdon,* it cannot be said that the Trust Board was obliged to put out of its collective mind the fact that there was a lack of stakeholder support simply because one of the reasons, even a principal reason, was the Grenfell connection where one of the reasons, again even a principal reason, for the opposition due to the Grenfell connection was an unfocused belief that Ryhurst was in some way implicated in Grenfell and that the Rydon Group was in some way to blame for Grenfell, when that had not been authoritatively established by inquiry or other due process.

249. It is not often helpful to compare the facts of the instant case with a hypothetical case. However, by way of illustration, one can envisage a case where a contracting authority would clearly breach fundamental EU obligations if it decided to abandon a procurement exercise due to opposition to the successful bidder caused by the nationality of the successful bidder. If the contracting authority had sought to conceal the true reason for the decision by seeking to rely on a number of other trumped up reasons which would not rationally have justified, individually or collectively, a decision to abandon, then that would not avail it. However, on my findings this is not a similar case.

(ii) Breach of the transparency obligation

250. Ryhurst's primary complaint is that the reasons given by the Trust for the decision were not the real reasons. Since Ryhurst has failed to establish that the only real reasons were the perceived Grenfell connection and/or the political and public pressure not to contract with Ryhurst because of the perceived Grenfell connection, it fails in its case on transparency on that primary basis.

251. Insofar as Ryhurst also complains that the reasons given did not specifically refer to the influence of the political opposition or the decision made by NHSI no longer to support the SEP, I am satisfied for the reasons given above that there was no breach of the transparency obligation in not providing these specific details, because the transparency obligation does not require a contracting authority to give chapter and verse as to the reasons for every decision.

252. Ryhurst also contends that it ought to have been notified by the Trust on receipt of the letter from NHSI dated 5 February 2018 that NHSI had given its approval. However in my judgment the Trust was entitled, for reasons I have given, to take a cautious approach in the light of the way in which the letter was expressed and to consider whether or not it could confirm that it had discussed the matter with stakeholders, including local MPs and that the Trust Board had in the light of such discussion assured itself on this decision. I am satisfied that there was no breach of the transparency obligation in not communicating with Ryhurst immediately on receipt of the letter either to say that it could and would now enter into the SEP or to say that it considered that it was required to undertake further discussions with stakeholders and then for the Trust Board to consider its decision further in the light of those discussions before it could or would enter into the SEP.

253. Ryhurst also contends that it ought to have been notified by the Trust on receipt of the letter from NHSI dated 5 February 2018 that notwithstanding the approval given by NHSI it was not ready or willing to enter into the SEP and, instead, that it was still considering whether or not it should do so. It contends that the Trust failed in its duty of transparency by failing to keep Ryhurst updated as to such important matter as the withdrawal of support from NHSI, the decision by the Trust executive to abandon the SEP, the decision to re-investigate the options to entering into the SEP with Ryhurst and the decision to put the option of abandoning the SEP procurement in favour of reverting to the traditional procurement to a formal Trust Board meeting in June 2018.

254. Mr Coppel submitted that these contentions are misconceived and that the duty of transparency does not, in effect, require a contracting authority to provide a running commentary on its own internal decision making process and the factors which are influencing it one way or another.

255. I agree with the Trust. In my judgment the duty of transparency requires a contracting authority to notify a bidder in relation to specific occurrences of significance to the procurement. Here, as I have found, there was no change of real significance until the Trust Board formally decided to abandon the procurement at the June 2018 meeting. Anything which occurred before that was not a change

which was required to be notified under the transparency obligation. The events from 5 February 2018 to 27 June 2018 were part of a gradual process towards taking a formal decision to abandon the procurement. Ryhurst took the risk, like any other bidder, that the Trust might decide to abandon the procurement at any time before the SEP was formally entered into. Whilst there could be no expectation that the Trust would share all of its internal thinking or decision making processes with Ryhurst it is the case that: (a) by late February 2018 Ryhurst was already aware from the communications which had taken place that there was a real risk that the Trust would not enter into the SEP; (b) in early April 2018 the Trust emailed Ryhurst to inform it that the Trust was not in a position to sign the SEP, advising it to hold off further activity and that the Trust would review matters regularly and move forward when the position changed. In my judgment if anything was required in terms of notification prior to the formal decision being communicated that was sufficient.

Causation

256. Having decided that Ryhurst's case fails on liability, I address the question of causation shortly and only so as to indicate the findings I would have made had I found for Ryhurst on liability.

257. Ms Hannaford submitted that it was not open to the Trust to advance a positive case in relation to causation, since none had been pleaded in its Defence. I accept that submission, although it remains the case of course that Ryhurst must establish that any breach on the part of the Trust caused it to suffer loss and damage.

258. In written closings the Trust focussed on the question of causation as regards the issue of transparency. That was sensible, because if I had found for Ryhurst in relation to any of the other heads of claim it is difficult to see how a claim could have been defeated on the basis of causation.

259. It was submitted that if the only breach of the transparency obligation which was established was the Trust's failure to inform Ryhurst from 5 February 2018 onwards of the change in the Trust's position from intending to enter into the SEP to intending not to enter into the SEP then Ryhurst cannot establish any causal link between that breach and any claim for damages based on the Trust's subsequent abandonment of the procurement, because on the findings I have made the Trust would have been entitled to take a lawful decision to abandon in June 2018 in any event. It seems to me that there is no answer to that point and that it is a point which the Trust would have been entitled to take even though not positively pleaded.

260. It is not open on the facts of this case for Ryhurst to make an alternative claim for wasted expenditure on a similar basis to that which succeeded in the *Embassy Limousines* case, because Ryhurst has not pleaded or advanced a claim on that basis, no doubt because: (a) even before receipt of the Trust's email of 5 April 2018 it had undertaken little if any work and incurred little if any expenditure from 5 February 2018 onwards, due to its concerns that even if the Trust entered into the SEP there was no guarantee that it would give Ryhurst the role of developer; (b) after 5 April 2018 it could not reasonably have undertaken work or incurred expenditure in the belief that the Trust would still enter into the SEP.

261. It was also submitted that if the only breach of the transparency obligation was the failure to notify Ryhurst that one of the reasons for abandoning the procurement included opposition from stakeholders arising from the perceived connection between Ryhurst and Grenfell, that would not by

itself entitle Ryhurst to succeed on causation unless it was also established that the Trust could not have taken a lawful decision to abandon if that was a reason for the decision. I agree with this submission, given my above analysis of the case as regards breach of the obligations of equal treatment, non-discrimination, proportionality and avoiding manifest error.

262. Finally, I should record that the Trust also submitted in closing that Ryhurst's claim for substantial damages would always have foundered on the basis that the SEP was to be a non-exclusive relationship and the Trust would have been entitled not to agree to Ryhurst taking on the role of developer. Whilst I agree that this would probably have been a real problem for Ryhurst in any subsequent trial, I do not accept that this can be shown at this stage to amount to a complete defence on causation. That is because at the trial of the issue of causation it would be necessary to conduct an inquiry into what the Trust would actually have done in this counter-factual situation, rather than simply to assume that the Trust would necessarily have decided to perform its obligations under the SEP in a way which would not have enabled Ryhurst to earn any revenue at all.

Sufficiently serious breach

263. Again, I address this briefly in the light of my actual conclusions. It is common ground that the law is that Ryhurst can only recover damages if it can show a "sufficiently serious" breach of the Public Contracts Regulations: see the decision of Fraser J in *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2017] 1 W.L.R. 1373 applying the factors summarised in *Delaney v Secretary of State for Transport* [2015] 1 W.L.R. 5177 at [36]. It is well-established that this is a "fairly high threshold": see *R v Secretary of State for Transport ex p. Factortame Ltd (No. 5)* [2000] 1 AC 524 [auth/17] at 550E. By reference to European authority, the intention is to provide compensation only for "flagrant legislative or administrative misconduct" and Ryhurst must show that the Trust "manifestly and gravely disregarded the limits on its discretion": see C-2/94 *Denkavit International BV* [1996] ECR I-05063 at [78] and C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 at [55].

264. Ryhurst's position was that since in *EnergySolutions* Fraser J held that in a public procurement case concerned with the legality of a decision to award a contract to a particular bidder, any award to the 'wrong' bidder – that is, the bidder whose tender was not the most economically advantageous - would be "sufficiently serious" as to justify an award of damages, it was apparent that by parity of reasoning if Ryhurst succeeded in its substantive arguments the breach would be regarded as sufficiently serious to justify an award of damages. In response the Trust noted that *EnergySolutions* could be distinguished from the present case since in that case the heart of the reasoning at [56]-[57] was that the obligation to award to the most economically advantageous tender was clear, precise, unequivocal, and of the greatest importance, and also noted that the Court of Appeal has recently stated in *Ocean Outdoor UK Ltd v London Borough of Hammersmith and Fulham* [2019] EWCA Civ 1642 at [85] that a determination of 'sufficient seriousness' will "always depend on the individual facts of the case".

265. It is sufficient for me to say that if I had found for Ryhurst on the basis that the Trust had breached its obligations of equal treatment, non-discrimination, proportionality and avoiding manifest error then I would also have found that the breach was sufficiently serious to justify an award of damages.

It would not be sufficient in such circumstances for the Trust to say that it was only guilty of a good faith error of judgment. On this hypothesis the Trust would have committed a serious breach of fundamental obligations of EU procurement law by abandoning a significant and substantial procurement exercise at a very late stage for reasons which could not properly be justified.

Glossary of acronyms

266. This is not intended to be exhaustive, only to refer to the more common acronyms which have littered this judgment.

CIFT: Camden & Islington Foundation Trust; the adjoining NHS Trust which was interested in acquiring part of the Hospital site to develop a new mental health unit.

CIP: Costs Improvement Programme

DWHC: Defend the Whittington Hospital Coalition; a local protest group.

H&IHWP: Haringey & Islington Health and Wellbeing Partnership

ISFT: Invitation to submit final tender proposals; part of the competitive dialogue procurement process.

NCL: North Central London; the NHS region of which the Trust formed part.

NHSI: NHS Improvement; the Trust's regulator

PPP: Public Private Partnership.

SEP: Strategic Estate Partnership. Also, sometimes a Strategic Estate Partner.

STP: Sustainability Transformation Partnership. Also, sometimes a Strategic Transformation Plan.