Appeal numbers: EA/2016/0069 & 0073

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

KATHERINE BERGEN	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**First Respondent**
-and-	
LONDON BOROUGH OF LEWISHAM	**Appellant and Second Respondent**

TRIBUNAL: **JUDGE ALISON MCKENNA**
Ms ROSALIND TATAM
Ms SUZANNE COSGRAVE

Sitting in public at Fleetbank House on 19, 20 and 21 June 2017 and at Alfred Place on 3 July 2017

Ms Bergen was represented by Gerry Facenna QC and Laura John, counsel.
The London Borough of Lewisham was represented by Anya Proops QC.
The Information Commissioner was represented by Elizabeth Kelsey, counsel.

DECISION

Appeal number EA/2016/0069 (in which Ms Bergen is the Appellant) is dismissed.

Appeal number EA/2016/0073 (in which the London Borough of Lewisham is the Appellant) is allowed in part.

The Decision Notice is amended so that the information referred to at paragraph 171 below and described in detail in the Open Schedule to this Decision must be disclosed.

REASONS

1.The Appeals

Background to the Appeals

1. This case concerns a request for information about the arrangements entered into by the London Borough of Lewisham ("LBL") with the privately-owned Renewal Group ("Renewal") in respect of the proposed development of the Surrey Canal Triangle, now known as "New Bermondsey". The designated development area consists mainly of industrial sites but there are also a few dwellings within and adjacent to it. The development land abuts "The Den", which is the home of Millwall Football Club ("MFC"), part of which is leased to the charity Millwall Community Trust ("MCT")[1]. Further details about the development scheme are set out at paragraphs 32 to 42 below.

2. Katherine Bergen, who we understand is a journalist, made two information requests to the London Borough of Lewisham ("LBL"). This appeal is concerned with just two paragraphs of the request she made on 6 March 2014 in the following terms:

> *"1. With reference to the contract for the disposal of the Council's freehold interest in the land adjoining The Den – and leased to Millwall Football Club – to Renewal, what was the consideration payable (money or money's worth) and what were the principal terms and conditions of the disposal?*

[1] Registered charity number 1082274

5. What due diligence has the Council carried out on Renewal and why does it believe that only Renewal can exclusively undertake the redevelopment of the Surrey Canal Triangle?"

3. LBL refused the information requested in reliance upon the Environmental Information Regulations 2004 regulation 12 (5) (e). Ms Bergen asked for an internal review, to which LBL responded on 30 October and 6 November 2014 with the same result.

4. Ms Bergen complained to the Information Commissioner ("IC") on 29 December 2014 (OB/1/172)[2]. Following an investigation, the IC issued a Decision Notice on 23 February 2016[3], upholding LBL's stance in respect of some of the requested information but requiring the disclosure of other parts of the requested information. In particular, the IC decided that:

(i) The contract price (mentioned in part 1 of Ms Bergen's question 1) had been correctly withheld by LBL in reliance upon regulation 12 (5) (e) EIRs;

(ii) The other contractual terms (mentioned in part 2 of Ms Bergen's question 1) did not engage regulation 12 (5) (e) EIRs so must be disclosed;

(iii) That a due diligence report prepared for LBL by PWC in September 2013 (information held within the scope of Ms Bergen's question 5) did not engage regulation 12 (5) (e) EIRs and so must be disclosed.

5. During the course of the IC's investigation, and subsequently, LBL disclosed some but not all of the requested information. After receipt of the IC's Decision Notice, LBL decided to withhold schedule 4 to the sale contract, because it said that its contents were revelatory of the price information which the IC had said could be withheld. By the time of the hearing, the information still in dispute between the parties was (i) the contract price (ii) schedule 4 to the conditional sale agreement[4] and (iii) the remaining parts of the due diligence report[5]. This is the information on which the Tribunal was asked to rule.

6. Both Katherine Bergen and the London Borough of Lewisham filed Notices of Appeal to the Tribunal in respect of the IC's Decision Notice. Ms Bergen's case, in short, was that all the remaining withheld information should be disclosed. LBL's case, in short, was that it had lawfully withheld the disputed information. We consider the detail of their respective submissions further below.

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[2] "OB" refers to the Tribunal's Open Bundle – see footnote 8 below.

[3] Decision Notice reference FER0566728

[4] OB/1/235 and CB/43

[5] OB/303 and CB/18

Applications to the Tribunal

7. Ms Bergen's Notice of Appeal dated 19 March 2016 (OB/1/22) set out the following grounds of appeal. (i) That it is "*not appropriate*" for a local government authority to be permitted to withhold the price at which it is disposing of land; (ii) that LBL had mislead the IC during the course of her investigation; (iii) that by acceding to the Council's request not to disclose the price of the land, the IC is allowing an "*extraordinarily inappropriate but very real potential scenario to take place*"; (iv) that LBL's arguments in favour of price confidentiality are "*disingenuous if not misleading*"; (v) that "*Millwall Football Club has a professional team assembled to carry out the development and its shareholders have sufficient funds to carry out and complete the development without recourse to other funding sources*". These grounds barely engage with the statutory basis for an appeal to this Tribunal, but through her subsequent submissions, we understand Ms Bergen's case to be that (i) the EIR exceptions relied on by LBL were not engaged and (ii) that even if they were, the public interest favours disclosure of the withheld information so that the IC's Decision Notice was erroneous.

8. LBL's Notice of Appeal dated 22 March 2016 (OB/1/33) relies on grounds of appeal that: (i) the IC erred in concluding that regulation 12 (5) (e) EIRs was not engaged by the PWC report; (ii) that the PWC report also falls within the scope of regulation 12 (4) (d) EIRs; (iii) that the PWC report also falls within the scope of regulation 12 (5) (f) EIRs; (iv) that the public interest favours withholding the report; (v) that the IC's decision that the price information could be withheld should be understood to include withholding schedule 4 to the sale contract and, if not, then the IC's conclusion on that point was erroneous.

9. The IC's Response to the Notices of Appeal dated 2 June 2016 (OB/1/84) was as follows. In respect of Ms Bergen's appeal, the IC resisted the appeal and maintained her position as set out in the Decision Notice. In respect of LBL's appeal, the IC acknowledged that the Decision Notice had not separately considered whether schedule 4 to the sale contract formed part of the contract price information. She resisted LBL's contention that it should be viewed in this way. In relation to PWC's due diligence report, the IC maintained her view that regulation 12 (5) (e) EIRs was not engaged. In relation to LBL's reliance on regulation 12 (4) (d) and 12 (5) (f) EIRs, the IC reserved her position until she had considered the evidence.

10. In its Reply to the IC dated 29 June 2016 (OB/1/106), LBL developed the argument that schedule 4 was an inextricable part of the consideration, when the contract was viewed as a whole. LBL also refuted Ms Bergen's suggestions of impropriety on its part and raised a query as to Ms Bergen's relationship with MFC (this is considered further below).

11. In a submission lodged with the Tribunal dated 4 May 2016 by Ms Bergen's then-solicitor, Andrew Barrow, it appeared that a concession had been made in relation to the PWC report because it is stated at paragraph 19[6] that "*It is accepted*

[6] OB/1/71

that the PWC report must have contained some commercial and confidential information which, if disclosed, would have damaged Renewal's legitimate economic interests. Of the examples given, it must be right to withhold detailed information on Renewal's estimate of the costs of acquiring remaining land, the pricing of elements of the development, and cash flow projections". However, by the time of the hearing (and following a change of solicitors by Ms Bergen) it was said on Ms Bergen's behalf that no concession had in fact been made. At the hearing, the Tribunal decided it was fairest to Ms Bergen to address the issue of the PWC report as though no concession has been made and the entirety of its contents was still at issue. However, it does seem to us arguable that the making of that statement followed by its retraction, by the solicitor on the record during the course of proceedings concerned with disclosure of that very information, is so likely to cause confusion as to that party's stance on an important issue that it is capable of amounting to "unreasonable conduct" of the proceedings within rule 10 of the Tribunal's Rules. We note that it was necessary for the Tribunal to intervene and write to the parties about it[7]. It follows that we will be prepared to consider a costs application against Ms Bergen under rule 10 of the Tribunal's Rules if LBL and the IC are able to furnish the Tribunal with a schedule of any identifiable additional costs incurred in relation to the confusion that Mr Barrow's statement understandably generated.

The Hearing

12. The two appeals were listed together for an oral hearing on 19 to 21 June 2017. In the event, the evidence stretched to four full days and the Tribunal then adjourned part-heard with directions for the parties' closing submissions to be provided in writing. We are indebted to all counsel for their clear oral and written submissions.

13. The Tribunal had before it an Open Bundle and a Closed Bundle[8]. Ms Bergen's legal team was provided with the Open Bundle and with redacted copies of the documents contained in the Closed Bundle. The Tribunal was satisfied that Ms Bergen's legal team was provided with all the relevant material apart from, for obvious reasons, the withheld information itself and any documents which were revelatory of its contents.

14. The hearing was conducted in open session so far as possible. Where evidence was heard in closed session, Ms Kelsey on behalf of the IC tested the witnesses' evidence, adopting the IC's role of guardian of the legislation, as referred to by the Court of Appeal in *Browning v IC* [2014] EWCA Civ 1050. After each closed session, the Tribunal provided Ms Bergen's legal team with a "gist" of the evidence it had heard and Judge McKenna also read out the "gist" in open session for the benefit of the observers in the public gallery. The "gists" are referred to in this open part of this Decision.

[7] OB/1/136.31

[8] These are referred to as "OB" or "CB", followed by the OB volume and page number (there were 3 volumes) and the CB page number only (one volume).

15. The closing submissions of the IC and LBL (and their Replies) were also provided in both open and closed format, with the open submissions only being provided to Ms Bergen's legal team. The Tribunal's Registrar made a Direction under rule 14 of the Tribunal's Rules to permit this.

16. This Decision has a short, closed annexe which has not been provided to Ms Bergen or her legal team. It records the closed evidence and closed submissions only. We have given the fullest possible statement of our conclusions in this open part of the Decision.

Ms Bergen's Position before the Tribunal

17. As noted above, Ms Bergen was the formal requester of the information which gave rise to this case. She was also the person who formally complained to the IC and she was the recipient of the Decision Notice issued by the IC and with which this appeal is concerned. Ms Bergen was also the person who signed the Notice of Appeal to the Tribunal (OB/1/26). She has been represented by solicitors throughout these proceedings, although she had a change of solicitors in late 2016.

18. Before the case came to a final hearing, the Tribunal was informed that Ms Bergen had at all times been acting "on behalf of" MFC. This information was revealed for the first time in an e mail to LBL's solicitors from her then-solicitor Andrew Barrow dated 13 July 2016, in which he described his client as acting at MFC's request (OB/1/132). This information was disclosed only as a result of enquiries made by LBL's solicitors (they first raised the issue in April 2016) and it clearly impacted on the preparation of the case for hearing (OB/1/133-135 and OB/1/136.18-21). We note that Ms Bergen's true position was revealed over two years after her information request was made.

19. An application was made under rule 9 of the Tribunal's Rules to substitute MFC as the Appellant in place of Ms Bergen. The Tribunal refused that application as MFC, not having applied for the Decision Notice, had no standing to bring appeal against it to the Tribunal[9] (OB/1/136.20). By the time of the hearing, LBL was referring to the Appellant as "*Katherine Bergen on behalf of MFC*" which, whilst apparently being factually correct, was not a formulation approved by the Tribunal. So far as we are aware, Ms Bergen did not attend the hearing but was represented by MFC's legal team. She did not file a witness statement or appear to participate in the proceedings to which she was a party.

20. The Tribunal records its disappointment that Ms Bergen chose to conduct herself in this manner. Any Court or Tribunal reasonably expects parties to be open and honest in their dealings with each other and with it, and to have due regard to their duties under the overriding objective. We would expect Ms Bergen's legal representatives to have advised her of these obligations from the outset. It is apparent from the exchanges of correspondence in our bundle that Ms Bergen's actions in concealing the true identity of the information requester/complainant/Appellant has

[9] S.57 (1) Freedom of Information Act 2000

caused the parties and the Tribunal both difficulty and delay. There was also clear a time and cost consequence in dealing with the belated rule 9 application[10].

21. We accept that a request for information under the EIRs is "applicant blind" so that the identity of the requester is not at issue in the decision about whether the requested information should be disclosed. We also accept that Ms Bergen was, and is, perfectly within her rights to pass any information disclosed to her as a result of this Decision to MFC, or to anyone else for that matter. But the conduct of parties to litigation is a different matter. The Tribunal has the power, under rule 10 (1) (b) of the Rules, to award costs against any party who has acted unreasonably in bringing or conducting the proceedings. We are minded to take the view that Ms Bergen's concealment of important information affected the conduct of these proceedings and constituted unreasonable conduct. We invite the IC and LBL to make a costs application and to provide the Tribunal with a schedule of legal costs, directly attributable to the concealment of relevant information from the Tribunal, within 14 days of the date appearing below. Following receipt of this information we would need formally to investigate Ms Bergen's personal financial circumstances under rule 10 (5) before making a final decision whether to make any order for costs against her.

22. Finally, on the question of costs, we understand LBL's closing submissions to have "reserved its position" in respect of a costs application against MFC. As MFC is not a party to these proceedings we do not presently consider that we have any power to award costs against MFC, but we are of course willing to consider any such application formally, if it is made.

2. The Legal Framework

23. It was common ground that Ms Bergen's information request fell to be considered under the Environmental Information Regulations 2004[11] ("EIRs").

24. The EIRs define "environmental information" as follows:

> "*..any information in written...form on –*
>
> > *(a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites…*
> >
> > *(b) Factors such as substances, energy, noise, radiation or waste…emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
> >
> > *(c) Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in (a) and (b) …*

[10] OB/1/130 – 135 and OB/1/136.18 - 21;

[11] SI/2004/3391

(d) …

(e) Cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) …"

25. The EIRs set out exceptions to the duty to disclose environmental information as follows:

"12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12 (2) A public authority shall apply a presumption in favour of disclosure."

26. The categories of exception relied upon by LBL in this case are: regulations 12 (4) (d), 12 (5) (e), and 12 (5) (f).

27. Regulation 12 (4) (d) EIRs provides that:

"*for the purposes of paragraph 1 (a) a public authority may refuse to disclose information to the extent that –*

…

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;"

28. Regulations 12 (5) (e) and (f) provide that:

"(5) for the purposes of paragraph 1 (a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

…

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure...".

29. The powers of the Tribunal in determining this appeal are set out in s.58 of the Freedom of Information Act, as applied by regulation 18 EIRs, as follows:

> *"(1) If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

30. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant in each appeal.

31. In assessing the "public interest" test under EIRs regulation 12 (1) (b), the Tribunal must consider the public interest as it stood at the date the public authority answered the request and so relied on the exemption(s) claimed. In this case, that was late October/early November 2014 when LBL completed its internal review.

3. The Evidence

The Development

32. We summarise here the undisputed evidence about the Development. The evidence of the witnesses called by the parties and the documentary evidence containing the requested information is described more particularly at paragraphs 43 to 102 below.

33. LBL owns freehold land in the Surrey Canal Triangle. Most of the other land in this area was, by 2014, owned by a private company called Renewal. LBL has considered the possibility of developing the area and has engaged in discussions about this possibility for some years with both MFC and Renewal. Renewal made an application for outline planning permission in 2011, which was granted in 2012 following completion of a s. 106 agreement (revised in 2015). MFC has never made a formal planning application although it has informed LBL that it has proposals for the development of the land it leases.

34. MFC occupies the stadium and surrounding land on a 150-year lease, granted by LBL (for no consideration) in 1993. MCT occupies its premises, the Lion's Centre,

on a leasehold of 25 years' duration granted by LBL (for no consideration) in 2004, so it has 12 years left to run. It pays a peppercorn rent to LBL. As a charity, MCT is subject to certain legal obligations under part 7 of the Charities Act 2011 which affect the process and terms on which it may surrender its lease.

35. LBL is empowered by statute to sell land in such manner "as it sees fit" and is not obliged to follow any particular process for disposing of its land. However, it is required by s. 123 of the Local Government Act 1972 to obtain a formal certification from a professional valuer that it has obtained "*best consideration*" for the sale of its land. LBL obtained and relied upon such a valuation report from professional advisers GL Hearn in September 2013. This provided formal certification that the price to be paid under the sale contract with Renewal represented "*best consideration*" for these purposes. That report is not in the public domain.

36. In November 2013, solicitors acting for MFC sent LBL the type of formal legal letter which is required to be sent before applying to the High Court for judicial review. It proposed to issue proceedings to challenge the proposed disposal of LBL's land to Renewal. However, no Court proceedings were ever issued.

37. In December 2013, LBL entered into a conditional sale agreement with Renewal. This constituted a legal agreement by which LBL agreed to sell its land to Renewal on certain terms, including that Renewal must acquire 100% of the non-LBL owned land in the Development area before proceeding with the Development. The sale of this land (if completed) would enable Renewal to take forward the Development in accordance with the outline planning permission which it has obtained. The sale has not yet been completed because Renewal has not acquired all the land. Renewal also entered into a Compulsory Purchase Indemnity Agreement with LBL on 20 December 2013, so that LBL is protected in respect of the costs of a CPO procedure (see below).

38. The outline planning permission which was granted to Renewal permits the construction of 2400 housing units (including affordable accommodation), offices, a hotel and conference centre, improved road, rail, pedestrian and cycle links, improvements to the stadium, a new GP facility, the development of open spaces, new health and wellbeing facilities, a faith and community centre, and it is estimated by LBL that it will create 1500 permanent new jobs in the area (plus 450 temporary construction jobs). The grant of planning permission is tied to the land, so any subsequent land-owner/developer would also be obliged to comply with its terms. The planning permission process undertaken included public consultation by way of thousands of letters, public meetings, and an exhibition. LBL received 21 written comments and objections. When the revised s. 106 agreement was made in 2015, LBL received just one objection (from MFC).

39. In order to take forward the development of the site, Renewal needs to acquire the leasehold interests held by MFC, MCT and some other leaseholders. Renewal has made offers to MFC and MCT for the surrender of (a) MFC's car park and surrounding land (not the stadium itself, as this is not in the Development area) and

(b) the Lions Centre. It offered MFC £1,000,000 and MCT £350,000. These offers were not accepted.

40. Renewal has obtained valuations of the leasehold interests and has made compensation offers to leaseholders in the Development area. In some instances, it has also provided funding for the leaseholders to obtain their own valuations. LBL resolved in 2012 "in principle" to use its powers of compulsory purchase ("CPO") in respect of land which Renewal did not manage to acquire through negotiation. If it were to set the CPO process in train, a public inquiry may need to be held, and the ultimate decision as to whether to proceed with making a CPO would be made by Central Government rather than LBL itself.

41. Public funding known as "Housing Zone" funding has been allocated to the Development by the Greater London Authority, but this funding does not go to Renewal. It will be used to fund the infrastructure improvements needed for the Development, such as transport links, and the indirect benefit to Renewal which is gained will be offset by an uplift in the number of affordable housing units to be provided by Renewal. This arrangement is contained in the s. 106 agreement.

42. Various allegations have been made as to the propriety of the arrangements between Renewal and LBL. For these and other reasons, LBL resolved in February 2017 to set up a judge-led inquiry. That inquiry (the "Dyson Inquiry") has not yet published its findings.

LBL's witnesses

43. LBL filed a witness statement made by Robert Holmans dated 25 October 2016 (OB/2/917). Mr Holmans is now employed in the private sector but was previously LBL's Director for Regeneration and Asset Management from 2012 to 2016. He explained that the development site is in an area which "*suffers from serious physical, social and economic deprivation, with high levels of unemployment, low skills and qualification attainment, health inequality and issues of housing affordability and overcrowding. Renewal's Development seeks to address these issues and will bring a number of significant benefits to the area*". Mr Holman expressed the view that "*MFC has demonstrated its intention to thwart the Development*" through its objections to planning permission, the expression of negative views about Renewal in the media, and its stated intention to prevent the CPO. He considered that disclosure of the withheld information in 2014 would have been used by MFC to thwart the Development.

44. Mr Holmans' evidence was that the PWC report was a necessary precursor to LBL making a CPO but was not necessary to the agreement of the sale price and was not relied on by LBL to inform the decision whether to enter into the sale contract. He stated that the report was based on information voluntarily provided to PWC by Renewal and that the September 2013 report was an "*early draft*" which was treated as confidential from the outset and was intended to evolve. PWC's instructions were amended in February 2014 to include a request for a development appraisal and a further version of the report was consequently produced in April 2014. He said that

further iterations of the report have been produced since then. Mr Holmans identified the harm flowing from the disclosure of the September 2013 report as the damage to Renewal's commercial interests with a *"knock-on"* effect on the viability of the Development; also a distortion of open market competition and a chilling effect on other developers in the future. In relation to the sale price (including schedule 4) he stated that the persons with whom Renewal was required to negotiate would have been able to use price information as a benchmark for their own negotiations and that this would have seriously harmed Renewal's position by making the negotiations more protracted and making it harder for it to obtain the best possible deals. He thought that this would have delayed the land-assembly process necessary for the Development to proceed and could have affected viability by increasing costs. Further, if Renewal's Development had not been able to proceed and LBL had been forced to identify new developers, he thought that LBL would have been put at a serious disadvantage in such negotiations through the disclosure of the contract price which it had previously agreed with Renewal.

45. In his oral evidence, Mr Holmans said that the only owner-occupier within the Development area was Ms Winston because although there were two other live in/work in units they were not in fact lived in. Mr Holmans took the Tribunal through the provisions of the sale contract, drawing our attention to several features. He noted that clause 11 gave LBL the option to purchase the land back from Renewal at the same price it had sold it. He thought that disclosure of the price information would assist MFC and MCT in negotiating a price for the surrender of their respective leasehold interests. He noted that clause 3 set a long-stop date for the Development (with a possibility of extension). He said that this was in case of a legal challenge to the scheme. He explained that LBL's planning policy dictated that there should be a comprehensive redevelopment of the land, and that the concern about the alternative proposals made was that they were not comprehensive. He said that LBL was concerned not to disaggregate the development because only a whole scheme would bring the significant employment and other benefits to the borough. He described the "Master Developer" concept and said that, although there was scope for partnerships with sub-developers, there was no room for competing master plans.

46. In cross examination by Ms Bergen's counsel, Mr Holmans was asked about LBL's decision not to "go out to tender" for the Development. Mr Holmans explained that local authorities have no obligation to tender for land sales and that, in any event, this was a privately-led development not a public procurement project. He explained that there was no express overage provision in the sale agreement because the s. 106 agreement effectively provided overage by invoking a "clawback" to increase the amount of affordable housing in the scheme. He denied that GL Hearn had suffered from a conflict of interest in advising LBL and Renewal jointly on the scheme and said that professional surveyors often owe a duty of care to more than one party.

47. It was put to Mr Holmans that Renewal had no relevant experience of development. He accepted that Renewal had not brought forward a development of this size before, but said that it was known to have been involved in smaller development projects. He said he had been aware that Mr Mushtaq Malik of Renewal

had worked for LBL some eighteen to twenty years previously but did not understand the nature of the criticism being made about that. He had been aware that the Renewal Group was based off-shore. He said it was possible that overseas investors may choose to invest elsewhere if their confidential information is published. He believed that the LBL councillors also knew all these facts when they made the decision to enter into the agreements with Renewal.

48. In relation to the 2013 PWC report, Mr Holmans said that he believed it had been provided to the Mayor and Cabinet although he accepted, when it was pointed out to him, that it was not listed in the appendices to the committee report. His recollection was that it had been made available to members as background information but that it had not been relied on in relation to the sale contract. The PWC report is described in paragraph 90 of Mr Holman's witness statement as an "*early draft*" but PWC itself uses only the word "*draft*" (OB/1/303.2). He said that it wasn't unusual to send draft reports to Councillors and that it formed a backdrop to the process.

49. Mr Holmans said that there had been no significant concerns that Renewal would not be able to finance the Development and that, although the draft PWC report refers to limited access to management information, the due diligence process had in fact facilitated further disclosure. He acknowledged that more information had been needed in relation to progressing a possible CPO. Mr Holmans accepted that neither the PWC report nor information about the identity of the owners of Renewal had been in the public domain in 2014.

50. Ms Kelsey, on behalf of the IC, asked Mr Holmans to identify the harm that would flow from disclosure of the sale price. Mr Holmans replied that disclosure of the freehold price would assist MFC and MCT in establishing the value of their leasehold interests. This provided an opportunity for there to be a "*spiral of offers and counter-offers*", which would not support the progression of LBL's policy objectives. He said he was aware of MFC's public relations campaign against Renewal and thought that the Development had been affected by it. With regard to the possible "chilling effect" on other developers of disclosure of the information in the PWC report, his evidence was that he could not provide the Tribunal with an actual example of a developer refusing to provide information to LBL as a result of the Freedom of Information regime, but said that he knew developers were interested in this case because he had been asked about it.

51. In his closed evidence (of which a gist was provided in open session) Mr Holmans took the Tribunal through schedule 4 to the sale contract. In response to Ms Kelsey's questions, he described the risk he thought resulted from disclosure of that information and from disclosure of the contract price. He described the particular concerns he felt about disclosure of this information, and of the information in the PWC report, to MFC given his past experience of dealing with it. He also described the formal process by which LBL had received certification of "*best consideration*".

52. LBL also relied on witness statements (OB/2/911 and OB/3/1195) made by Emma Talbot on 26 October 2016 and 3 February 2017. Ms Talbot described her 10

years' experience at LBL and her current role as Head of Planning, which she had held since April 2016. She described LBL's Core Strategy over the period until 2025, which identified the Deptford/New Cross area as a Regeneration and Growth area, involving the creation of new housing, retail and employment opportunities. Ms Talbot's evidence was that, from a planning perspective, the only permitted use of the MFC land is as a football stadium and car park and that there have been no alternative planning proposals submitted by MFC. She noted that, in any event, MFC has no right to develop the land which its holds under a lease.

53. In her supplemental witness statement, Ms Talbot outlined the protections afforded to MFC and MCT in the s. 106 agreement, as shown in the Tribunal's bundle (OB/3/1212). She directed our attention to the provisions which state that the Lions Centre cannot be demolished until the replacement facilities have been completed and are open to the public; that the replacement facility must be of the same quality and nature as MCT's existing premises; and that a relocation strategy must be submitted by the developer and approved by LBL, which MCT must have agreed to before it can be approved. She said she did not understand the basis on which Mr Bradshaw had expressed in his witness statement a concern for the viability of MCT, or the basis on which he had expressed (to the extent he was able to speak on its behalf) similar concerns apparently felt by MFC. She explained that, if the replacement facility is not delivered, then MCT will simply stay in its existing premises and there is no risk of the charity being left without a home as a result of the Development.

54. Ms Talbot's evidence was that if the development proposal put forward by Renewal did not proceed then there were "*no credible alternatives for the comprehensive redevelopment of the site. The clear, extensive and significant public benefits…would be lost*". She also explained that if the Development did not proceed, there would be an adverse impact on LBL's ability to meet its housing supply target. Ms Talbot also gave evidence that the disclosure of a developer's confidential information by a local authority would have a chilling effect on the local authority's ability to work constructively with developers in the future. She thought that disclosure of the withheld information in this case would frustrate LBL's ability to secure the best development for the borough in future.

55. In her oral evidence, Ms Talbot described how "Housing Zone" funding was designed to speed up the delivery of development schemes for the benefit of London as a whole. In relation to the "affordable housing" to be provided in the Development, she explained that there is currently provision for 12% affordable housing, which translates to 288 units. She said that the level of affordable housing had been raised as a concern by local residents in the planning consultation and that the s. 106 Agreement therefore included a review mechanism for the percentage of affordable housing. She said that the 12% to be provided in this Development included 75% of the 288 units being shared ownership and the remaining 25% for affordable rent. She explained that the Government defines what is an "affordable rent" by reference to 60% of the market rent level in the area of the development. She said that LBL's policy objective is to create a mixed community occupying their homes under different tenures and that the higher level of shared ownership units in

this Development was intended to address the existing high level of rented accommodation in the area.

56. Ms Talbot said that in 2011, 5,400 letters had been sent out to everyone within 400 metres of the Development land and that only 21 objections had been received. She said she had in the past received more objections to the proposed height of a boundary wall. She did not agree that there was widespread concern and objection to the scheme, as was suggested on behalf of Ms Bergen. She thought that LBL had been very transparent about the scheme, holding a public consultation and a meeting on site. There had been publication of a preferred option, a final draft and then the adoption of the plan. She accepted that one resident's home had been affected (Ms Winston) but said that LBL has to balance that against the provision of thousands of homes and thousands of jobs. Ms Talbot said that she would have been aware if MCT had raised concerns about its position in 2014 but that it had not done so.

57. In response to questions from Ms Kelsey on behalf of the IC, Ms Talbot said that in her experience developers had tried to provide information "from consultant to consultant" in an attempt to avoid the freedom of information regime. She thought there was a reluctance to provide detailed information which might be disclosed. She said it would damage the reputation of LBL to release sensitive commercial information which had been provided to it by developers. In respect of the use of CPO powers, Ms Talbot said that they can only be triggered if the land cannot be acquired by agreement and that the Guidance for local authorities states that a decision to use CPOs can be used to "focus minds". If a CPO has to be used, there may be a public inquiry at which both sides would be heard and the Secretary of State must make the final decision as to whether there is a public interest in making the CPO.

58. Ms Jordana Malik is a Director of Renewal Management Ltd and gave evidence on behalf of Renewal Group Ltd. She made three witness statements for the Tribunal, signed on 19 April 2017, 3 February 2017, and 29 June 2017 (OB/2/947, OB/3/1157 and OB/3/tab 17)). She explained that Renewal began acquiring land in the Development area in 2004 and since that time has acquired 80% of the titles in the 30-acre area by private treaty. In March 2014 (the date of Ms Bergen's request) there remained 28 leasehold and freehold interests yet to be acquired, including MFC's leasehold of the stadium car park and surrounding area (but not the stadium itself, which is not in the Development area) and MCT's leasehold of its premises at the Lion's Centre. Ms Malik's evidence was that there had been discussions between MFC and Renewal about a possible joint venture from 2006 onwards and she still understood MFC to be in favour of regeneration of the area. However, the terms of a joint venture between Renewal and MFC had not been agreed and MFC had subsequently raised objections to Renewal's initial 2011 planning application. Renewal had worked with MFC to address its concerns and to revise the application, as a result of which MFC's objections were withdrawn. Ms Malik's evidence was that efforts had also been made to include MFC as a signatory to the revised s. 106 agreement executed in 2015, but that these had proved unsuccessful.

59. Ms Malik's evidence was that, prior to the outline planning application in 2011, Renewal promoted the scheme to 76,074 members of the local community and spoke directly to 4,825 people. In addition, 5,400 letters were delivered to local properties. She described attending a public meeting in 2011 at which Ms Winston had spoken.

60. Ms Malik described the "*sustained press and public relations campaign against Renewal*" which she said has gained momentum since the execution of the sale contract in 2013. She exhibited to her first witness statement examples of negative press reports which she described as containing misleading information, in particular the rumour that MFC's ability to stage a football match would be impacted by the Development. She explained that MFC is protected by the s. 106 agreement so that this is not the case. In these circumstances, she expressed the view that MFC would seek to use any commercially sensitive information about Renewal which is disclosed to Ms Bergen in these proceedings to thwart the Development. Ms Malik stated that MCT is also protected by the s. 106 agreement, under which it must be re-located to the new sports complex, and from where it will be able to deliver the same charitable activities as it does now. She added that the s. 106 agreement in fact provides that MCT cannot be relocated without first being provided with replacement facilities. She did not agree with the contents of Mr Bradshaw's statement for the Tribunal in which he had expressed concern about MCT's continuing viability as a result of the Development.

61. Turning to the information in the 2013 PWC report, Ms Malik's evidence was that Renewal had voluntarily provided to PWC corporate information including (a) its company structure; (b) the statutory accounts for all members of the Group; (c) a schedule of assets; (d) a schedule of the expenditure required to undertake the Development and (e) cash flow projections over the first three stages of the Development[12]. She said that Renewal had understood that this information was required in order for LBL to consider using its CPO powers. Ms Malik stated that Renewal regarded the information provided as confidential and commercially sensitive and, whilst generally aware of the freedom of information regime, had understood that such information would be exempt from disclosure. She said that this was also the view expressed by the LBL officers present at the meeting between PWC, Renewal and its accountants. Her evidence was that disclosure of the remaining redacted parts of the PWC report would cause Renewal reputational damage and provide competitors with a commercial advantage in future negotiations by having access to Renewal's sensitive commercial information.

62. Ms Malik confirmed that the information contained in the PWC report was not in the public domain and described in both open and closed sessions why the remaining information which LBL sought to withhold was sensitive.

63. Ms Malik's evidence about the price information (including schedule 4) was that disclosure in 2014 would have harmed Renewal's negotiating position with not only MFC but also other leaseholders and would have allowed MFC to continue its

[12] The detail of the information provided is considered further in the Closed Annexe to this Decision.

policy of disruption of the Development. The parties with whom Renewal was negotiating would, Ms Malik considered, have sought to use the price information as a benchmark in their own negotiations, which would have protracted the negotiation process and possibly inflated the overall cost of the Development. She explained that a CPO can only be made if there are no impediments to the delivery of the scheme which it is intended to facilitate, so that MFC's potential use of the confidential information to thwart Renewal's negotiations with the remaining leaseholders could ultimately prevent the making of a CPO and mean that the Development would not be able to proceed.

64. In her oral evidence, Ms Malik stated that Renewal now owns 80 out of the total 102 legal titles in the Development area. At the time of Ms Bergen's request, she thought it had owned 74 of those titles. She said that apart from Ms Winston's property and the MFC and MCT land, the other remaining units were small industrial units. She said that Renewal had seen an opportunity back in 2004, had purchased a few titles and then approached LBL to support a change of designation for the land. She said that the Greater London Authority had also supported the re-designation and then the final decision about that issue was taken by Central Government. She said there had been nothing to stop MFC or anyone else from bidding on any one of the 102 titles or indeed from making a planning application, which they had not. She thought that the local community wanted the Development to proceed because there had only been 20 objections made after thousands of letters were sent out. She did not agree with the description of local opposition to the scheme put forward by the witnesses for Ms Bergen.

65. In relation to the PWC report, Ms Malik said that she had understood that the due diligence process required was in relation to the CPO, not the sale contract. She said that Renewal had not in fact seen PWC's report until Ms Bergen's request was made and had had no idea that it was being sent to the Mayor and Cabinet when it was deciding about the sale contract. She said that Renewal had not been through a due diligence process like this one before, so had started from a position of non-disclosure but later on had been more forthcoming. She said this was in part because Renewal had received intimidation and death threats about the Development and the Malik family was therefore reluctant to put itself in the spot light. She explained that the reason Renewal had off-shore companies in the Group was "*not mysterious*" and was just that money towards the Development had been contributed by her grandparents in Pakistan. When asked whether Renewal expected its profits from the Development to be subject to UK Corporation Tax, she answered "*Yes, absolutely*".

66. In cross examination by Mr Facenna QC on behalf of Ms Bergen, Ms Malik was asked questions about how much of the redacted information in the PWC report was in the public domain or could be assembled from other information in the public domain. She admitted that she had limited knowledge of what information might be available at the Land Registry or at Companies House in the Isle of Man, but she went away and took advice and filed a third witness statement to clarify these matters for the Tribunal. Ms Malik said that she knew it was possible for the public to access some information from Companies House in the Isle of Man because someone had been there and copied the home addresses of the directors of Renewal and then put the

locations of their homes on the internet. She thought this must have been someone connected with MFC. Her evidence was that none of the redacted information in the PWC report was obtainable from the Isle of Man. She had also checked about the Land Registry and ascertained that in 2014 only five of the titles acquired by Renewal had been listed at the Land Registry.

67. Ms Malik described the harm flowing from disclosure of the redacted information in 2014 as that, if people knew how much Renewal had set aside for the Development then the contractors and sub-developers would have inflated their prices. She said that disclosure of the price information would have coloured the negotiations for the land purchased by Renewal, as it would have affected their background flavour. She thought that disclosure would have caused further delay and possibly thwarted the scheme.

68. In her closed evidence (of which a gist was provided in open session) Ms Malik took the Tribunal through each of the redacted parts of the PWC report and explained why it was commercially sensitive and why in her view it would be harmful for it to be disclosed.

69. LBL's final witness was Mr David Conboy, who provided a witness statement dated 3 February 2017 (OB/3/1294). Mr Conboy is a surveyor and currently the CPO and Regeneration Director of GL Hearn, where he has been employed since 2008. Mr Conboy provided expert evidence[13] to the Tribunal and set out his professional experience and views of matters concerning land assembly, CPO processes, development agreements, and the assessment of compensation in the context of CPOs. He listed the several major developments on which he has previously advised both local authorities and developers. At paragraphs 58 to 68 of his witness statement he listed his professional qualifications, acknowledged his duty to the Tribunal as an expert witness, and provided confirmation that his evidence complied with the RICS practice statement for surveyors acting as expert witnesses.

70. Mr Conboy explained his familiarity with the New Bermondsey Development. Since 2013, GL Hearn has acted for Renewal and LBL to provide valuation and compulsory purchase advice on the Development. His evidence was that GL Hearn had provided the Valuation Report to LBL which formed the basis for the compensation offered to both MCT and MFC. GL Hearn had also provided the formal certification to LBL that the price payable under the sale contract was "*best consideration*" for the purposes of s. 123 of the Local Government Act 1972.

71. Mr Conboy explained how LBL was able to satisfy itself that "*best consideration*" was achieved in the sale contract with Renewal. His evidence was that local authorities may sell land in any way they think fit and are not required to follow any particular procedure, but they must obtain certification that best consideration is obtained. They do this by obtaining professional advice from a suitably-qualified surveyor as to the market value of the land. The opinion as to the market value of the

[13] "Expert witnesses" are allowed to give opinion evidence to a Court or Tribunal whereas other witnesses are generally not permitted to do this.

land was reached in this case after a due diligence process involving the identification of the nature of the land interests held, the rents receivable and the planning considerations. Renewal was considered to have "special purchaser" status in view of its significant land-holdings in the area and MFC's stated interest in developing the land was considered, although its lack of ability to develop its own land (due to the terms of its lease and planning constraints) had also been taken into consideration. Mr Conboy said he continued to be confident that the opinion he had provided to LBL was accurate and well-reasoned and that it stands up to scrutiny. Mr Conboy referred to the absence of an overage provision as this had been raised as a matter of concern by Ms Bergen. His expert view was that, whilst overage is commonplace in the simplest developments, it was not always suitable for more complex projects. His evidence was that *"The relatively recent insertion of affordable housing review mechanisms by Local Planning Authorities into section 106 Agreements makes the inclusion of an overage provision in any land sale agreement in respect of the land included in that section 106 Agreement complicated and often unviable. These review mechanisms…are generally the reserve of larger schemes and are used where, for viability reasons, there is a shortfall in the level of affordable housing against the policy target when planning permission is granted. The review mechanism enables the LPA to later review the finances of the scheme and secure additional affordable housing towards the policy target in the event that the development is more viable than when originally assessed. The presence of such a review mechanism means that the LPA has the first opportunity to "take" any over-performance of the development in respect of its profitability to the developer and, mindful of this, developers and house-builders will consider an overage agreement unsuitable on account of any calculation of 'super profit' being very complex"*. He confirmed that the s. 106 agreement in this Development does include an affordable housing review mechanism, and that the inclusion of an overage provision had been considered but rejected in favour of the provisions in the s. 106 agreement.

72. Mr Conboy considered that disclosure of the sale price would prejudice Renewal's negotiating position with MFC and MCT and other third parties. He stated that in his opinion the disclosure of this information would harm the legitimate economic interests of Renewal and LBL as it would affect the ability to negotiate for the surrender of the leases. His experience suggested that parties would seek to interpret the price paid for the freehold (in an inappropriate fashion) to inform their view of the value of their own property. In his oral evidence, he said that *"Any leasehold interest sitting under a freehold would be influenced by the value of the freehold"*. In cross examination, it was put to Mr Conboy on behalf of Ms Bergen that he was wrong about that. Mr Conboy replied that the nature of the land interests above and below always has an effect. For example, it is possible to "reverse engineer" the value of a freehold by looking at rental income and the rent review period. He said that having all the information allows you to form a reasoned view, even though it is not a precise mathematical formula.

73. Mr Conboy explained that the Development was a private development, which LBL was facilitating, rather than a public development. He regarded this as an important distinction. There was therefore no obligation for LBL to conduct a procurement exercise, as had been suggested on behalf of Ms Bergen. He noted that

LBL was protected if the scheme did not go ahead, as the sale contract provided for it to buy back the land it had sold to Renewal at the same price. He commented that Ms Bergen's witnesses' concerns about the "enforceability" of the contract with Renewal were also misplaced because the agreement did not obligate Renewal to carry out the Development on behalf of LBL so there was nothing to "enforce". He described the "master developer" structure which allowed Renewal to sub-contract the development of parcels of land by selling them on to sub-developers. He said this was a common method of securing cash-flow for development and noted that any sub-developers would also be bound by the terms of the s. 106 agreement and planning consents granted. He described this process as one commonly used on large complex development schemes.

74. In respect of the compensation offered to MCT, Mr Conboy's evidence was that MCT's own surveyor had agreed with his approach to the assessment of the value of the lease. Mr Conboy was asked why he had not discussed the price that MFC would be prepared to pay for land before giving his valuation advice to LBL. He said this was not necessary and *"not industry practice"* and that it would have distorted the dynamics of his role as valuer, which was to determine the market value as between a willing buyer and a willing seller. He said that *"in no valuation report that I have produced have I enquired of a specific party what they'd pay for the land"* and that MFC had not been regarded as a "special purchaser" because it had never made a bid.

75. Mr Conboy confirmed in his oral evidence that the "market value" took into account the development potential. In his letter setting out his valuation of MFC's land (OB/21/890) he said he had reflected the fact that MFC was being provided with "like for like" car parking facilities so there was no compensation included for the loss of a car park. He said he was aware that Renewal had offered MFC £ 1million but said he understood that it had been refused and no counter offer had been made.

76. In relation to MCT's land, he said that the "market value" did not vary according to the activities of the occupier. He said his calculation of valuation took account of market value, the disturbance, severance (not applicable where the tenant was being relocated) and a statutory payment for loss, including professional fees. On this basis, he had valued MCT's land as having nil value but recommended compensation for disturbance. He said he had communicated with MCT's director of finance about its revenue streams and the savings it would make from not having a requirement to maintain the new facilities. He thought that MCT could include a bid for additional funds in its grant applications if it needed more money. He confirmed that MCT's surveyor had been appointed to act solely for MCT but that the professional fees incurred were reimbursed to MCT by Renewal.

77. In his oral evidence, Mr Conboy described the four tests to be applied before a CPO would be granted. These were: (i) would it achieve compliance with planning policy; (ii) was there a public benefit to be achieved; (iii) is the CPO a measure of last resort; and (iv) is there any impediment to the delivery of the project. His evidence was that, in this context, the making of "*derisory*" offers by Renewal would be counter-productive because the planning inspector would be unlikely to make a CPO in such circumstances. He said that only 5 to 10% of CPOs are not confirmed, which

shows the work that goes into negotiations beforehand. He said he had not been aware of any objections to the scheme being expressed in 2014, which was before making a CPO had been formally considered by LBL. He confirmed that it was normal practice for a surveyor to work for two partners jointly and that this was compliant with RICS guidance.

78. In Mr Conboy's closed evidence (a gist of which was proved in open session), he described the function of schedule 4 to the sale contract and the harm said to arise from its disclosure.

Ms Bergen's witnesses

79. Mr Stephen Bradshaw is the Chief Executive of MCT and he made a witness statement dated 10 January 2017 (OB/3/1309). He has been in post since February 2015 but confirmed in his oral evidence that he had been informed by others of events which took place prior to his appointment and that he was giving his evidence on behalf of the charity trustees.

80. Mr Bradshaw described the charitable activities of MCT in providing, amongst other things, schools coaching, sports participation programmes, and disability sports programmes. MCT is based at the Lions Centre, which his witness statement describes the charity as having *"purchased"* (but when asked about this in his oral evidence he accepted that the charity has a lease from LBL for which no premium was paid). Mr Bradshaw described MCT's opposition to Renewal's proposed Development and stated that MCT *"has been challenging the CPO with MFC and other members of the community for five years"*. He explained that MCT's concerns are based on the requirement for MCT to re-locate into premises which are not within MFC's grounds, so that the affiliation between MCT and MFC may be weakened. Mr Bradshaw's witness statement records that *"The Trust…is inseparably linked with and reliant on MFC's brand and support. Only MFC can guarantee the long-term future of the Trust. If we are physically separated from MFC as a consequence of Renewal proposals, we cannot rely on the long term continuing support of a football community"*.

81. Mr Bradshaw's witness statement described Renewal's offer of £350,000 for the surrender of MCT's lease as "*derisory*". He said that had been the only offer made to date. In relation to the proposed relocation of the charity, he stated that this "*would place the Trust in a very disadvantageous position and would in my view undermine its long-term viability. Based on anticipated additional costs and loss of income under a new model, the Trust estimates that it would be significantly short of funding within four years"*. Mr Bradshaw's oral evidence was that Renewal's offer to MCT had only looked at the value of the lease whereas the charity would lose income and incur internal costs under the proposal. He said that the charity had appointed its own valuer but had disagreed with the advice it was given. When questioned further about this, he suggested that the valuation obtained by the charity could not be relied upon because the valuation report had been paid for by Renewal. He said he had not seen the report himself and that the charity had not obtained a further report. Mr Bradshaw told the Tribunal that he was aware of the Charities Act requirements for the surrender

of MCT's lease but that "*the trustees hadn't got to the point of taking that advice yet*". He said that MCT had not contacted the Charity Commission for advice about its situation. When asked why, if MCT thought its viability was at stake, it had not taken advice about its position or contacted the Charity Commission, he said that the charity was waiting to see if the Development goes forward but that there was "*minimal impact"* on it so long as it remained in the Lions Centre.

82. Mr Bradshaw's witness statement expressed the view that Renewal's level of ownership of land within the redevelopment area was not as high as has been publicly stated by LBL. He also commented on MFC's financial position and its wish to develop the area around the stadium. When asked in his oral evidence, he confirmed that he could not speak for MFC.

83. He described Renewal as having been "*appointed*" by LBL, described a "*real risk*" of Renewal selling the land to a third party who would not then build the replacement facility, and described MCT as living under threat of a CPO which "*undermines all of the Trust's day-to-day activities and suppresses future Trust planning and community initiatives. It is very difficult to plan for the future in times where the Trust does not know where its home lies or even if it will be in a position to continue"*. He said his staff were concerned that the re-location may never happen but then accepted when it was put to him that the s. 106 agreement provides that, if the alternative facility were not provided, then MCT would stay where it is now.

84. With regard to the disputed information, Mr Bradshaw's evidence in paragraph 29 of his witness statement was that the price information was valuable as a means of holding LBL to account and that "*The consideration is…a critical factor to allow the Trust and MFC to understand the basis of the approach to negotiations to date and…its disclosure will encourage a more open dialogue and engagement in future negotiations, perhaps with a greater sense of trust"*. In his oral evidence, he said he didn't agree that the information had been requested to strengthen MCT and MFC's hands in their negotiations with Renewal. He said the price information would not affect whether they would be better or worse off. He said he had not meant to suggest in his witness statement that the price information was relevant to these negotiations and "*if it came out that way I'm sorry"*.

85. Turning to the PWC report, Mr Bradshaw's evidence was that its disclosure would provide the public with insight as to Renewal's ability to deliver the Development and would provide MCT with insight as to the likelihood of alternative premises being delivered. In relation to his suggested aim of encouraging transparency and accountability in relation to LBL's decision-making, he accepted when it was put to him that the CPO process would ultimately be assisted by the contemporary information available as at the time of considering the CPO, whereas Ms Bergen's request was for historical information.

86. In cross-examination by Ms Proops QC on behalf of LBL, Mr Bradshaw said that MCT had been involved in discussions with Renewal about the scheme from September 2014 onwards. He did not think there were any minutes of those meetings. He accepted that he had not mentioned this in his witness statement. He said "*I'm not*

saying we raised any formal concerns with the Council. Or informal, although our Chair at the time was a former Councillor. We were trying to understand the proposal. Fact finding rather than raising objections". Ms Proops suggested to Mr Bradshaw that the part of his witness statement where he said that MCT *"has been challenging the CPO with MFC and other members of the community for five years"* was therefore misleading the Tribunal, but he did not accept this. In relation to the discussions with Renewal, Ms Proops put to Mr Bradshaw that MCT had failed to provide Renewal with the financial data to support its claim that it would be disadvantaged by the move to new premises. Mr Bradshaw replied that a letter had been sent in 2015 (which had not been provided to the Tribunal).

87. Mr Bradshaw later produced for the Tribunal some correspondence consisting of a letter from MCT to Renewal dated December 2015 and Renewal's reply dated January 2016. He was re-called to give evidence about this and it was once again put to him by Ms Proops that the evidence in his witness statement about MCT "*challenging*" the Development for five years was misleading. Mr Bradshaw said that he did not see the use of the word "*challenging*" as negative and that that line could be taken out of context as it was *"loosely worded"*. He said *"My understanding is that the trustees did challenge the CPO but I can't say on what date...the trustees discharged their fiduciary responsibilities by challenging and engaging in the process"*. Ms Proops asked him twice to clarify what process he was now talking about and he responded *"I wasn't there at the time"*. The Tribunal asked Mr Bradshaw if we could rely on what he had said in his witness statement or not. He said we could.

88. Ms Bergen's next witness was Ms Willow Winston, who provided a witness statement for the Tribunal dated 10 January 2017 (OB/3/1359). Ms Winston is an artist who lives and works at her studio in the Development area. She acquired her studio in 2000 and has refurbished it so that it particularly meets her needs, for example in relation to the height of her sculptures. Understandably, she is strongly opposed to being re-located from her studio and the evidence shows that she has made her views known to Renewal and LBL over the course of several years. The Tribunal heard that she had stood as a candidate in the recent General Election on a platform of opposing the Development.

89. Ms Winston expressed the view in her witness statement that MFC and MCT would be adversely impacted by the Development, also that local businesses (including hers) would be shut down by it and also that there has been no genuine public consultation by LBL. She also stated that she does not trust Renewal or LBL. She accused LBL of being undemocratic and Renewal of using "bullying" tactics.

90. Ms Winston's witness statement states that she regards the disclosure of the sale price as being necessary to show that LBL has not sold the land below its proper value and that disclosure of the PWC report would allow her to reach a judgement as to whether it makes sense for the Council to go into the scheme with Renewal and the basis on which such decisions are being taken.

91. In her oral evidence, Ms Winston described there being *"tremendous support"* in the community for her point of view about the Development. She said she is supported by MFC. When asked why so few objections had been received by LBL, she said *"people are not prepared to fight"*. When asked about the public meeting she had attended in 2011, she said it had taken place in her studio but that she had been *"tricked into it"*. She described the receipt of a letter from solicitors about the Development in 2010 as having made her ill for two weeks but that she had then decided to stand up and fight. Ms Winston said that she is not opposed to the regeneration of the local area but that she wanted it to be more inclusive and for there to be a consultation as to how creative industries could be included. She did not agree with LBL's assessment of the number of employment opportunities which the Development would generate and thought that there should be social housing rather than affordable housing in the Development. She was concerned about schools, GP's surgeries, and other community facilities.

92. Ms Winston said that she had obtained her own valuation report from a surveyor paid for by Renewal, but she had not disclosed the valuation figure. She had rejected Renewal's offer of £50,000 for her property as she considered it *"derisory"* but said she had not made a counter offer. She described the possibility of a CPO as like having a knife held to her throat. In relation to the benefit of releasing the withheld information, she said that *"because the price was kept secret all sorts of imaginings go on in the public mind"*. She thought that there was a public benefit in releasing historic as well as contemporary information about the Development.

93. Ms Bergen's final witness was Mr Christopher Adams, who was relied upon as an expert witness. He is a surveyor and partner at CBGA Robson LLP, which provides advice on commercial property investment, development and asset management and provides a full property management service. Mr Adams' witness statement dated 10 January 2017 (OB/3/1387) provides details of his experience in property investment and development over 29 years. He acknowledged there his duty to the Tribunal as an expert witness.

94. Mr Adams unfortunately did not set out in his witness statement the list of documents he had been provided with in order to form his expert opinion. He referred in his witness statement only to having been told about the Development by Andrew Barrow (who is MFC's solicitor and was Ms Bergen's first solicitor) but in his oral evidence he said he was provided with an information pack and also did some research of his own. Mr Adams said in his witness statement that he "*understands*" (presumably also from Mr Barrow) that MFC, local residents, businesses, councillors and MPs, are "*concerned*" about various aspects of the Development. (He did not say whether this was a concern about current events or the situation as at the time of Ms Bergen's request).

95. Mr Adams' witness statement described these concerns as follows: firstly, a concern that LBL may not have achieved the best *"best value"* from the sale of properties. He described it as *"unusual"* and *"poor practice"* for the agreements between Renewal and LBL not to control the onward sale of land by Renewal and for LBL not to be entitled to receive a share of the profit from any future land sales. He

stated *"I would go as far as to say that I can't think of any situation where the lack of an overage provision in that kind of contract would be justified"*. Mr Adams also described his concern that LBL's freehold interest was *"not being sold at the best price*" to Renewal, because there had been no tender process. Secondly, he described a concern about the financial standing and track record of Renewal. Thirdly, a concern about the ownership structure of Renewal because it was "*poor practice"* for LBL to deal with offshore companies because it put LBL in a vulnerable position if it had to pursue Renewal for failure to deliver the scheme. Fourthly, he described a concern that Renewal may not pay tax in the UK. Fifthly, a concern that that there may be inappropriate links between Renewal and former officers and councillors of LBL.

96. In relation to the PWC report, Mr Adams' opinion was that disclosure would help to answer the public's questions about the financial standing of Renewal. He stated that *"This is a public project, not a private development"* and that developers may reasonably expect transparency in relation to their financial information. He referred to LBL selecting Renewal as its preferred developer and suggested that the Development should have been divided up into smaller projects with specialist developers being assigned to different parts of the overall project based on their areas of expertise.

97. Mr Adams' opinion was that disclosure of the price information (including schedule 4) would enable the public to assess whether the purchase price was in fact less than the "*best price*" which could reasonably have been obtained. His opinion (without having seen the withheld information) was that it was not commercially sensitive information, and that its disclosure would not prejudice Renewal and/or LBL in negotiations as the price payable under the contract would not be illustrative of the value of any other parcels of land.

98. In his oral evidence, Mr Adams accepted that he is not a registered valuer and that he was not an expert in CPOs or urban regeneration, but confirmed that he has worked in the property industry for many years. When asked about the evidence which the Tribunal had heard from Mr Holmans (paragraph 46 above) and Mr Conboy (paragraph 71 above) as to why there was no overage provision in the sale contract, Mr Adams confirmed that he had heard that evidence but disagreed with it and said that in his opinion "*there could still be overage"*. In relation to the price information, he said that he could not understand why the independent valuation report provided to LBL was not in the public domain. He did not think that the withheld price information would affect negotiations for the MFC or MCT land because he said that all negotiations start with a blank sheet and then take into account the unique features of the land. He did not suggest that it was unethical for GL Hearn to have provided valuation advice to LBL and Renewal jointly but said he thought it would have been "*prudent"* for LBL to have engaged an independent valuer.

99. In cross examination by Ms Proops, Mr Adams accepted that he had not himself been involved in a development of the nature of this one. He readily accepted that Mr Conboy had a greater level of expertise than himself in relation to the schemes he had referred to in his witness statement. He was asked whether he had actually

understood the features of the Development about which he was giving expert evidence, given that he had described it as a "*public project.*" He answered that he had understood the Development and that these words were being taken out of context as he had wanted to make the point that more information should be in the public domain. It was also put to him that his description of LBL "*selecting*" Renewal indicated a misunderstanding of the scheme, but he denied this. It was put to him that he had erroneously referred to a concern that LBL may not have achieved "*best price*", whereas the statutory test was "*best consideration*". He apologised if his witness statement had been misleading. He confirmed that he had not intended to suggest that LBL had acted improperly in using a "*best consideration*" process. He said he was not aware that the possibility of judicial review proceedings had been raised but not pursued. In describing the "Master Developer" concept, Mr Adams' evidence was that he is familiar with this and that in his view it implied particular expertise on the part of the developer at the top of the tree.

100. In relation to the public interest in disclosing the PWC report, Mr Adams accepted that, for the purpose of any future CPO process, the information of most use would be contemporary information about the standing of the developer at that stage. He said he was aware that MFC had a foreign owner so the concerns about contract enforceability and tax would have applied equally to a development brought forward by MFC. He said that he was not a tax expert and so his witness statement was merely pointing out some issues worthy of further consideration.

101. Mr Adams said that, at the time he made his witness statement, he was not privy to the contractual terms between Renewal and LBL and he now understood that there were no provisions which would need to be enforced by LBL. However, he said it remained his view that if Renewal failed mid-scheme, LBL would be required to salvage the Development. He accepted when it was put to him that in those circumstances the land would revert to LBL and he said he "*didn't know*" what contractual obligations LBL would be required to enforce in such circumstances. In response to a question from the Tribunal, Mr Adams confirmed that his expert evidence complied with the RICS guidance for surveyors as expert witnesses.

The Documentary Evidence

102. The Tribunal had before it a bundle of over 2000 pages of documentary evidence. This included the disputed information (the sale contract in redacted form at OB/1/235 and un-redacted at CB/43) and the 2013 PWC report (in redacted form at OB/1/210 and un-redacted at CB/18), the correspondence between the parties, the documents provided to the IC during her investigation, and the relevant LBL committee reports and minutes. Further documents handed up during the hearing were placed into OB/3 at tab 17, but were not paginated.

4. Submissions

The IC's Case

103. By the close of the hearing, the IC's position in respect of the issues before the Tribunal was as follows. She noted that the scope of the disputed information had changed considerably over the course of the case, including after the publication of the IC's Decision Notice.

104. Having considered all the evidence, the IC's submission was that the Tribunal should:

(i) Dismiss Ms Bergen's appeal in respect of the price information in the sale contract, which had been correctly withheld under regulation 12 (5) (e) EIRs;

(ii) Dismiss Ms Bergen's appeal but allow in part LBL's cross-appeal in respect of schedule 4 to the sale contract, the majority of which had been correctly withheld under regulation 12 (5) (e) EIRs. The IC identified some parts of schedule 4 which she submitted ought to be disclosed because they did not engage regulation 12 (5) (e) EIRs;

(iii) Dismiss Ms Bergen's appeal but allow in part LBL's cross-appeal in respect of the PWC report, some of which engaged regulation 12 (5) (e) and (f) and so had been correctly withheld.

105. In respect of (i) the price information, it was submitted that regulation 12 (5) (e) EIRs was engaged where disclosure would adversely affect the confidentiality of commercial information where such confidentiality is provided by law to protect a legitimate economic interest. The requirement is to show that such disclosure *would* adversely affect the relevant interest and it was submitted that the evidence called by LBL, particularly Mr Conboy's evidence, showed that disclosure would have affected Renewal's negotiating position not only in respect of the leaseholds held by MFC and MCT but also the other occupiers with whom it was negotiating in 2014. The IC submitted that the weight of evidence supported LBL's case that the value of the freehold would have been relevant information in negotiations for the purchase of the underlying leasehold interest even if it were not possible directly to extrapolate one from the other. The evidence that it would have affected the parties' approach to the negotiations was, in the IC's view, sufficient to engage the exception.

106. Turning to the public interest, the IC's submission was that the evidence showed that the public interest lay in the Development as a whole proceeding, and that it would be contrary to the public interest for the benefits flowing from the Development to be jeopardised by the adverse impact on the negotiations which the disclosure of the price information would have had. The IC agreed that there was a public interest in transparency and accountability by LBL but considered it relevant that there was a statutory process for ensuring that LBL obtained "*best consideration*" and that there was information in the public domain about how LBL had satisfied the statutory requirements. In that context, it was submitted that the additional public interest in knowing the price itself was limited.

107. In respect of (ii) the schedule 4 information, the IC submitted that most, but not all, of the schedule engaged regulation 12 (5) (e) EIRs and that the balance of public interest favoured withholding that information from disclosure. The IC also provided closed submissions on this point which we consider further in the closed annexe to this Decision.

108. In respect of (iii) the PWC report, the IC submitted that, although the report was marked "draft", this was insufficient in itself to engage regulation 12 (4) (d) EIRs. Looking at the report in context, the IC submitted that the PWC report was shown by the evidence to have been taken into account by LBL when making its decision to enter the sale contract because it is mentioned in the officer's report and LBL's grounds of appeal describe it as having been "duly considered". Mr Holmans' evidence was that it had not been relied on for the purpose of entering into the sale contract but he thought it had been taken into account, albeit as background information. In those circumstances the IC submitted that the PWC report could not be regarded as "*unfinished, incomplete or in the course of production*".

109. The IC submitted that regulation 12 (5) (f) was engaged by some of the information in the PWC report which had been provided voluntarily by Renewal to PWC and without consent to disclosure. However, the IC submitted that PWC's own commentary on that information did not engage the exception.

110. In respect of LBL's claimed exception under regulation 12 (5) (e) EIRs, the IC submitted that Ms Malik's evidence (in both open and closed session) identified the harm which would arise from disclosure (that MFC and others would use the information out of context, or "cherry-pick", to paint Renewal unfairly in a negative light) and that this engaged the exception. The IC submitted that the Tribunal should accept Ms Malik's evidence in this regard and also her evidence that such behaviour would cause reputational damage to Renewal. The IC submitted that Ms Malik had given the Tribunal cogent evidence of instances in which the PR campaign against Renewal had adversely affected its business activities and commercial interests, so that there was a believable likelihood that these predicted adverse events would eventuate.

111. Turning to the public interest test, the IC took the approach of dividing the information in the PWC report into three categories (set out in a schedule to her open closing submissions). She submitted that the information in category 1 was relatively high-level, including expressions of PWC's own views, and in respect of which there was a high degree of public interest with relatively limited harm identified from disclosure, so that category 1 information should be disclosed. In respect of category 2, this information was commercially sensitive information which was "live" at the time of the request and in respect of which there was limited public interest in disclosure in the light of the disclosure of PWC's conclusions about it and a relatively high risk of harmful "cherry-picking" to the detriment of Renewal and of a "chilling effect" on other developers dealing with LBL. Category 2 information should be withheld. The IC identified a small amount of category 3 information, being high level information from Renewal which was said not to be as commercially sensitive as category 2 information and where there was a stronger public interest in disclosure,

with less significant prejudice arising from disclosure. Whilst said to be finely balanced, the IC submitted that category 3 information should also be disclosed.

112. In reply to the other parties' submissions, the IC confirmed that she considered that the price information was "relevant" to the negotiations between the parties in the sense that it would be taken into account and affect the negotiating position of the parties. She also confirmed that, in assessing the public interest, she regarded LBL's "*best consideration*" certification as relevant to the public interest in disclosure but not determinative of it. Finally, she confirmed that she regarded the reliance placed by LBL on the PWC report when making the sale contract decision as a relevant factor in determining the engagement or otherwise of regulation 12 (4) (d), but she submitted that there was no evidence before the Tribunal that it had been of "marginal relevance" in LBL's decision-making, as had been submitted by Ms Proops.

Ms Bergen's case

113. The closing submissions made on behalf of Ms Bergen incorporated the submissions made in her counsel's skeleton argument. These were that the exceptions to disclosure relied upon by LBL were either not engaged, or if they were engaged then the public interest favoured disclosure in any event. Ms Bergen refuted the suggestion that any witness she had called had either intended to mislead, or had actually misled the Tribunal. It was suggested that the most relevant and available witnesses had been called and that any criticism of Ms Bergen for failing to call a witness from MFC was inappropriate.

114. In relation to the price information, it was submitted that the Tribunal should question seriously whether this information *would* adversely affect the economic interests identified, as the withheld information related to the freehold value whereas the negotiations were in respect of the leasehold value and there was evidence before the Tribunal from the expert witness Mr Adams that the first did not influence the second. It was submitted that Mr Adams' evidence on this point should be preferred to Mr Conboy's evidence in view of his long experience of valuing all manner of property in the UK. It was submitted that there was no evidence before the Tribunal to the effect that the Development *would* be put in jeopardy by the disclosure of the disputed information.

115. As to the public interest, it was submitted that LBL's February 2017 decision to establish an inquiry was a relevant consideration for the Tribunal, because disclosure of the disputed information may yet assist members of the public to participate in the inquiry and the fact of the inquiry being established in itself supported the strong public interest in disclosure. It was submitted that there is a "*greater requirement for transparency than in an ordinary case*" in the light of public and media concerns about possible wrongdoing, the lack of a procurement process, the failure to benchmark the value of the land against the market, the fact that Renewal is an un-tested developer, and the fact that it has offshore ownership. We consider this argument further below.

116. The closing submissions made on Ms Bergen's behalf raised, for the first time, an issue about the *Nolan Principles*. These had not been referred to in any evidence before the Tribunal, but it was submitted that they supported disclosure, especially in circumstances where LBL had entered into commercial arrangements with a third party who was known to have a historic personal connection with the Council and Council officers. The submissions also referred the Tribunal to an authority which is not in our bundle, namely *Hussain v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin) in which it was said that the *Nolan Principles* of openness and accountability should be applied to all powers and duties of local authorities.

117. The Tribunal was reminded that there is a presumption in favour of disclosure under the EIRs; that the Development is a major redevelopment project in which it was desirable for the public to have trust and confidence; and that the public cannot have confidence that the sale contract represents the best value without disclosure of the price and the related information. It was submitted that the terms of the contractual arrangement, with no obligation for Renewal to complete the Development and the ability for Renewal to sell the land on, and the absence of an overage clause, means that there is a legitimate concern that LBL has failed to protect taxpayers' interests in its dealings with Renewal. It was submitted that the statutory certification process about which the Tribunal had heard served to heighten, rather than reduce, the public interest in disclosure because it suggested that LBL had achieved the minimum price necessary to meet its legal obligations.

118. Turning to the PWC report, it was submitted that Ms Bergen now accepts in the light of the IC's closing submissions, that there was an evidential basis for concluding that regulation 12 (5) (e) was engaged by some of the withheld information in the report. However, a concern was expressed that the aim of "preventing public criticism of Renewal" went wider than the exception, which should be narrowly construed in any event. It was suggested that more, rather than less, disclosure was the way to deal with concerns about "cherry-picking".

119. It was submitted that regulation 12 (4) (d) EIRs was not engaged because the content of the report is finished and complete, notwithstanding the fact that PWC's work was continuing. The Tribunal was reminded that Mr Holmans' report to the Council describes it as "*a preliminary due diligence evaluation*…" (OB/3/1151) rather than a "draft", and LBL's initial response to Ms Bergen's request (OB/1/141) described it as "*an initial financial due diligence exercise.*…". Further, that the report had been necessary for the purpose of resolving to enter into the indemnity agreement so it was material which was complete for the purposes for which it was used and relied on at that time.

120. It was submitted that regulation 12 (5) (f) EIRs was not engaged by all the information in the report because a distinction must be drawn between information provided to the public authority and conclusions reached on the basis of that information which are not themselves revelatory of it.

121. As to the public interest balance, it was submitted on behalf of Ms Bergen that the public interest lies in disclosure for the same reason that there is a public interest

in the disclosure of the price information. Further, if Renewal faced criticism for failing to provide information during a due diligence exercise then that would be a legitimate criticism. Disclosure of financial information about Renewal would not, it was submitted, have a "chilling" effect on other developers because Renewal's circumstances are unique.

122. In reply to the other parties' open submissions, Mr Facenna QC submitted that LBL's case was inappropriately concerned with the motives of the requester because disclosure under the EIRs is "disclosure to the world" and therefore "applicant blind". The Tribunal was invited to infer that the low level of public opposition to the Development was due to the belief by local people prior to 2013 that MFC would be Renewal's partner in the regeneration of the area and it was only after LBL decided to work exclusively with Renewal that public concern crystallised.

LBL's Case

123. Ms Proops QC, on behalf of LBL, referred to the non-appearance of MFC before the Tribunal as "*the elephant in the room*". She submitted that, whilst MFC has clearly taken a close interest in these proceedings and, by its own admission, had asked Ms Bergen to make the information request on its behalf, we do not know why that was thought to be appropriate.

124. LBL's response to the IC's closing submissions was as follows:

(i) it agreed that the price information should be withheld;

(ii) it disagreed that *any* of the information in schedule 4 should be disclosed for reasons set out in its closed submissions;

(iii) it disagreed that any of the disputed information in the PWC Report should be disclosed because it submitted that the public interest favours withholding the additional information;

(iv) it maintained that regulations 12 (5) (f) and 12 (4) (d) were engaged. In particular, under regulation 12 (4) (d), that the PWC report was not relied upon in any meaningful sense in relation to the sale contract (as this was not its purpose) and it was submitted that, even if the Council did rely on it, that does not prevent it having the status of a draft or "render finished that which is unfinished". It was submitted that the public interest in disclosure was marginal given the report's lack of relevance to the decision-making process and that the public interest in maintaining the exception was high given the risks of disclosure. In relation to regulation 12 (5) (f), it was submitted that the proper analysis is that PWCs commentary explicitly or implicitly reveals the information voluntarily provided by Renewal so that regulation 12 (5) (f) is engaged by it;

(v) it disputed that the presumption of disclosure applies to commercial information as it does to other information in reliance upon the First-tier Tribunal's decision in *Sibelco* (see below), but acknowledged that this was

academic because the IC's view in any event is that the information was correctly withheld;

125. As to the public interest, it was submitted that the evidence before the Tribunal showed that third parties would use the disputed information to the detriment of Renewal, LBL, and of the wider Development.

126. In reply to the other parties' submissions, LBL responded issue by issue to the submissions made on behalf of Ms Bergen and sought to introduce fresh evidence. In particular, it was submitted that in addressing the public interest test as at October 2014, it would not be right for the Tribunal to take into account the fact that an inquiry was commissioned in 2017. Furthermore, that there was no evidence before the Tribunal to support Mr Facenna's submission that release of the price information would assist the public in any future CPO inquiry.

Authorities

127. LBL and the IC disagreed about the effect of the Court of Appeal's judgment in *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council* [2010] EWCA Civ 1214 and the First-tier Tribunal's interpretation of that judgment in *Sibelco* [2010] UKFTT 573 (GRC). The IC sought to distinguish the Court of Appeal's judgment on the basis that it did not involve the application of the EIRs and she did not consider the First-tier Tribunal's approach to be correct as it did not take into account that a fact-sensitive balancing exercise was incorporated into the EIRs in any event and so was not required to be addressed as a separate consideration. We note that we are not bound by decisions made by other First-tier Tribunal panels and, as Ms Proops has conceded that the issue is academic in any event, we do not need to decide it here.

128. Mr Facenna QC raised, for the first time in his closing submissions, the matter of compliance with the *Nolan Principles* and the High Court's judgment in *Hussain* (referred to at paragraph 116 above). We note that the Court in *Hussain* was dealing with a situation in which there had already been a significant finding that there was a case of impropriety to be answered.

5. Conclusions

129. These are our conclusions.

130. As we near the end of this long process we find ourselves in a position whereby MFC's stance has not been put in evidence before us on any of the issues we must decide. It chose not to be directly involved in these proceedings but to make its information request through Ms Bergen; she did not put forward any witnesses who could speak authoritatively on MFC's behalf. We find that situation regrettable, but we draw no direct adverse conclusions from it as it is ultimately a matter for Ms Bergen which witnesses she wishes to call.

131. Ms Proops submitted that we should conclude that MFC's conduct before the Tribunal (in asking Ms Bergen to act on its behalf and not itself appearing) is itself illustrative of an inflammatory role in this matter and of an intention to mislead us.

As noted above, we do not draw that conclusion merely from MFC's formal absence from the Tribunal, but we do note that, where a witness has given evidence which is critical of MFC's conduct, we must now evaluate that evidence without also having heard any evidence in reply from MFC. Given its close relationship with Ms Bergen, we conclude that MFC was aware that criticism would be made of its conduct in these proceedings but that it nevertheless decided not to defend its position.

132. It was common ground before us that the information requested in this case falls to be considered under the Environmental Information Regulations 2004, so we do not examine that issue further except to remind ourselves of the presumption of disclosure contained in EIRs regulation 12 (1) (b) – see paragraph 25 above. In respect of each category of information which is in dispute in this case, we must consider whether the exception from the presumption of disclosure relied on by LBL is engaged by that information and, if so, whether the public interest (as at October/November 2014) favoured maintaining the exception or in disclosing the information requested. In respect of the sale price and schedule 4 information, LBL relied on one exception only. In respect of the PWC report, LBL relied on three separate exceptions being engaged.

(i) *The Sale Price*

133. Our conclusion in relation to the sale price is that the IC's Decision Notice correctly concluded that it should be withheld from publication. We agree with the IC's submissions set out at paragraph 105 above that the exception under regulation 12 (5) (e) EIRs was engaged and that the public interest favoured withholding the information from disclosure in October/November 2014. We accept Mr Holmans' evidence (described at paragraphs 44 and 50 above) of the several types of harm that would have flowed from disclosure of the sale price at the relevant time. These were firstly, that the leaseholders with whom Renewal was negotiating, including MFC and MCT, would have used the information in seeking to determine the value of their leasehold interests, leading to a *"spiral of offers and counter-offers"* which would have adversely affected Renewal's negotiating position, affected the progression of the Development and the achievement of LBL's policy objectives. Secondly, his evidence that the increased costs of such behaviour could have affected the viability of the Development. Thirdly, that the information would have been used by MFC in its negative public relations campaign against Renewal, which negatively affected the Development. Fourthly, that if Renewal's plans became unviable, disclosure would have adversely affected the negotiating position of LBL in working with alternative developers. Mr Holmans' assessment of the harm flowing from disclosure of the sale price was supported by the expert evidence of Mr Conboy (described at paragraph 72 above) and we also accept his evidence.

134. It was submitted on behalf of Ms Bergen that there was no evidence before us that disclosure of the price information would put the Development in jeopardy. We reject that submission in reliance upon the evidence of Mr Holmans, as described at paragraph 44 above.

135. We are satisfied from Mr Holmans' and Mr Conboy's evidence, taking into account their professional roles and experience, that these identified dis-benefits were sufficiently likely to occur that they satisfy the legislative test of "would" in regulation 12 (5) (e) EIRs. We also take this evidence of harm into account in assessing the balance of public interest.

136. Ms Bergen's case, that we should direct disclosure of the price information, was supported by the expert evidence of Mr Adams (described at paragraph 97 above) but we did not find his evidence on this point persuasive in view of his evidently limited understanding of the Development with which we are concerned. We attribute this to his having received an inadequate briefing rather than to a lack of professional ability on his part. However, we also note that, in giving evidence about the public interest in transparency about the sale price, he repeatedly failed to address the correct statutory test of "*best consideration"* and referred variously to *"best value"* and "*best price"*. We conclude that his failure to address the correct criteria on a fundamental point at issue undermined his credibility as an expert witness on this point and accordingly we prefer the expert evidence of Mr Conboy, who demonstrated by his evidence his greater knowledge of the Development and his sure-footed appreciation of the statutory framework within which it sits.

137. We have nevertheless considered carefully Ms Bergen's argument that there was a prevailing public interest in disclosure of the price information in order to further transparency and accountability. We agree with the IC and LBL that the statutory certification process by which a professional valuer reported to LBL that best consideration had been achieved served to provide the public with considerable reassurance in this regard and we take that into account in considering the case for greater transparency. We consider Ms Bergen's argument that there is a heightened public interest in transparency in the particular circumstances of this case further below and our assessment of the "*red flag*" issues set out there applies equally to our assessment of the public interest test in relation to disclosure of the sale price.

138. In all the circumstances, and having carried out a careful balancing exercise, we conclude that the public interest favours maintaining the regulation 12 (5) (e) exception in this case. We agree with the IC's submissions about the public interest set out at paragraph 106 above. We have reminded ourselves of the presumption at regulation 12 (2) EIRs, but we have finally concluded that the weight of the evidence of harm flowing from disclosure outweighs the evidence in favour of disclosure in respect of the sale price.

(ii) Schedule 4

139. Schedule 4 was not separately considered in the IC's Decision Notice and it follows that there was some confusion as between LBL and the IC as to whether LBL was required by the terms of the Decision Notice to disclose schedule 4. To that extent, we conclude that the Decision Notice contained an error of law or judgement. The Tribunal's role in such circumstances is to re-take the decision about schedule 4.

140. We have considered carefully the evidence before us from Ms Malik (described at paragraph 63 above) that the harm flowing from disclosure of the price information applied equally to disclosure of the information contained in schedule 4. Mr Conboy's expert evidence (described at paragraph 72 above and given in more detail in his closed evidence) supported this view.

141. The IC submitted that certain, very limited, parts of schedule 4 should be disclosed on the basis that they did not engage regulation 12 (5) (e) EIRs. We have considered this argument carefully but disagree with the IC's approach. We agree with LBL that schedule 4 is an inextricable part of the sale contract when the contract is viewed as a whole, and that a decision to withhold the contract price from disclosure therefore necessarily involves withholding the schedule 4 information. We discuss this conclusion in greater detail in the Closed Annexe to this Decision, with reference to the schedule itself.

Having reached the view that the entirety of schedule 4 engages the exception in regulation 12 (5) (e) EIRs, we have proceeded to consider whether the public interest favours disclosure of that information, or whether it favours maintaining the exception. We adopt the conclusions we reached in relation to the sale price in deciding that the public interest favours withholding the entirely of schedule 4. We refer to the detail of schedule 4 in the Closed Annexe to this Decision.

(iii) The PWC Report

142. LBL's case was that the 2013 PWC report engaged three separate exceptions. Firstly, that regulation 12 (4) (d) EIRs was engaged ("*unfinished, incomplete or in the course of production*").

143. The IC submitted that, although the report was marked "*draft*", this was insufficient in itself to engage regulation 12 (4) (d) EIRs. Looking at the report in context, the IC submitted that the PWC report was shown by the evidence to have been taken into account by LBL when making its decision to enter the sale contract because it is mentioned in the officer's report and LBL's grounds of appeal describe it as having been "*duly considered*".

144. Mr Holmans' evidence was that the 2013 report was an "*early draft*" and that it was still "*evolving*" at the time of Ms Bergen's request (paragraph 44 above), however we note that his report describes it as "*preliminary*". He said that it was not unusual for draft reports to be provided as "background information" to members (paragraph 48 above) although there was some confusion as to whether it had actually been provided to members in December 2013 because it was not mentioned in the list of enclosures. Mr Holmans' final view (which we accept) was that it had been made available to members separately but that it had not been necessary to LBL's decision to enter into the sale contract because it was designed to address the due diligence information which would be needed for a later decision about the use of CPO powers. It did, however, seem to have been relied upon in connection with the decision to enter into the indemnity agreement at that time.

145. We would have preferred to have heard directly from PWC about its own methodology for such reports, as we found it confusing that earlier and later versions of the report were all labelled "draft". In the absence of such evidence, we have considered the report in the light of how it was described by witnesses and the uses to which it was put. We attach negligible weight to its label in circumstances where the word "draft" was applied to successive reports.

146. It seems to us that the PWC report was indeed a preliminary or initial report, designed to be built upon later, but complete in its own terms as at the time of the request. We note that it was sufficiently complete to have been taken into account by LBL, albeit to a limited extent, in December 2013. It seems likely to us that a preliminary report would be provided to members with an official report, but less likely that an unfinished report would be so provided. Having considered the evidence, we conclude that we are not satisfied that the exception in regulation 12 (4) (d) EIRs is engaged.

147. The second exception relied on by LBL was regulation 12 (5) (f) which was said to be engaged by some of the information in the PWC report which would adversely affect the interests of Renewal, which had provided it voluntarily and without consent to its disclosure. The IC submitted that this exception was engaged by information that Renewal had supplied but was not engaged by PWC's own commentary on that information. LBL submitted that the information supplied and the commentary were indivisible so that both were engaged by the exception. Ms Bergen submitted that the commentary should be disclosed provided it was not revelatory of the information provided.

148. We are satisfied on the basis of Ms Malik's evidence in both open and closed session that this exception is engaged by the raw data supplied by Renewal and reproduced in the report. Having considered counsels' submissions carefully, we agree with LBL that, in the context of this report, PWC's commentary is so closely entwined with the data to which it relates that the exception is engaged in relation to the commentary also. We consider the evidence further in the Closed Annexe to this Decision. We consider the public interest balancing exercise below.

149. In respect of LBL's claimed exception under regulation 12 (5) (e) EIRs, by the close of the evidence Ms Bergen had conceded that there was an evidential basis for concluding that this exception was engaged (although she argued that the public interest favoured disclosure). The IC submitted that Ms Malik's evidence (in both open and closed session) identified the harm which would arise from disclosure (that MFC and others would use the information out of context, or "cherry-pick", to paint Renewal unfairly in a negative light) and that this engaged the exception. We agree.

150. We accept Ms Malik's evidence in this regard and also her evidence that the "cherry-picking" behaviour would cause reputational damage to Renewal. We agree with the IC that Ms Malik gave the Tribunal cogent evidence of instances in which the PR campaign against Renewal had adversely affected its business activities and commercial interests, so that there was a believable likelihood that these predicted

adverse events would eventuate. We consider this evidence further in the Closed Annexe to this Decision. We consider the public interest balancing exercise below.

151. We therefore conclude that two of the three claimed exceptions under the EIRs are engaged by the remaining disputed information in the PWC report. However, that is not the end of the matter, because we must go on to consider the question of the public interest test under EIRs regulation 12 (1) (b). Much of the evidence about the harm said to flow from disclosure was given in closed session so that the un-redacted report could be considered in detail. This is recorded in the Closed Annexe to this Decision. We accept and rely on that evidence.

152. In open session, we heard evidence that the public interest in disclosure of the withheld information in the PWC report lay in providing the public with insight into Renewal's ability to deliver the Development (Mr Bradshaw, paragraph 85 above); to provide reassurance that it makes sense for LBL to go into the scheme with Renewal (Ms Winston, paragraph 90 above) and that it would help to answer the public's questions about the financial standing of Renewal (Mr Adams, paragraph 96 above). These are all matters concerned with public accountability and transparency, in which we accept there is a public interest. This was not disputed by LBL or the IC.

153. As against that, we heard evidence about the harm which would flow from disclosure as follows. Mr Holmans said that the resulting damage to Renewal's commercial interests would have a "*knock on*" effect on the viability of the Development. He also said that it would distort open-market competition in relation to the Development and have a "chilling effect" on LBL's ability to secure deals with other developers in the future (paragraph 44 above). On the last point, Ms Talbot was unable to give specific examples of the "chilling" effect, but thought that developers had tried to provide sensitive information from consultant to consultant in order to try to avoid disclosure (paragraph 57 above). We agree with the IC that Ms Malik's evidence was persuasive about the risks of reputational damage to Renewal from "cherry picking" and the commercial disadvantage which would arise from competitors gaining access to Renewal's confidential financial information (paragraph 61 above).

154. In making submissions about how we should undertake the public interest balancing exercise, the IC suggested the approach of dividing the withheld information in the PWC report into three categories (set out in a schedule to her open closing submissions). She submitted that the information in category 1 was relatively high-level, including expressions of PWC's own views, and in respect of which there was a high degree of public interest with relatively limited harm identified from disclosure, so that category 1 information should be disclosed. In respect of category 2, this information was commercially sensitive information which was "live" at the time of the request and in respect of which there was limited public interest in disclosure in the light of the disclosure of PWC's conclusions about it and a relatively high risk of harmful "cherry-picking" to the detriment of Renewal and of a "chilling effect" on other developers dealing with LBL. Category 2 information should be withheld. The IC identified a small amount of category 3 information, being high level information from Renewal which was said not to be as commercially sensitive

as category 2 information and where there was a stronger public interest in disclosure, with less significant prejudice arising from disclosure. Whilst said to be finely balanced, the IC submitted that category 3 information should also be disclosed.

155. We have found this approach helpful and we are grateful to Ms Kelsey for her work in producing the schedule, which we have used in an amended form in the Open Schedule to this Decision. However, we have not adopted precisely her approach either to categorisation or to the allocation of information into each category. This is for the following reasons. Firstly, our conclusion about the engagement of regulation 12 (5) (f) (paragraph 149 above) has an impact on the information to be disclosed. Secondly, we agree with LBL that there is not a sufficient evidential basis to found the nuance that the IC asks us to draw between category 1 and category 3. In taking this view, we note that none of LBL's witnesses was asked to comment on the relative commercial sensitivity of some parts of the withheld information as against other parts or on the relative degree of prejudice arising from some parts of the withheld information over others. As we agree that the withheld information which the IC allocates to category 3 engages an exception and as there was both evidence of harm from disclosure and of a public interest in disclosure which we agree was finely balanced, we have taken the view that the correct approach is for us to apply the presumption in favour of disclosure under the EIRs. This tips the balance in favour of disclosure of the information which the IC placed in category 3.

156. In the circumstances, we have adopted the approach of dividing, in the attached schedule, the remaining withheld information into two categories: category 1 (to be disclosed), or category 2 (to be withheld). In relation to the category 1 information, we are satisfied on the basis of the evidence that it engages the exception(s) but that there was a high degree of public interest evidenced with relatively limited harm identified from disclosure at the relevant time, so that the balance of public interest favours disclosure. In relation to the category 2 information, we are satisfied on the basis of the evidence that this information was commercially sensitive information in respect of which there was limited public interest in disclosure and a relatively high risk of harmful "cherry-picking" to the detriment of Renewal and of a "chilling effect" on other developers dealing with LBL at the relevant time. The public interest favours maintaining the exception in relation to this category of information. We would be grateful if LBL and the IC could agree between them a fresh redacted version of the PWC report for disclosure in accordance with the Open Schedule to this Decision.

157. We have considered the alternative approach of whether it could be in the public interest to disclose any more of the withheld information on the basis that LBL and/or Renewal could provide an explanatory statement alongside it in order to contextualise the information and mitigate any reputational harm. In the very particular circumstances of this case, where we are satisfied that a negative public relations campaign was in operation at the time of the request and that selective use of information (or "cherry-picking") has occurred in that campaign, we do not consider that this is a realistic option.

"Red Flags"

158. As noted above, there is a presumption in favour of disclosure under the EIRs, so the scales are weighted in favour of disclosure at the commencement of our balancing exercise. We add to that the undoubted public interest which lies in transparency and in the accountability of public authorities, which was not disputed before us by LBL or the IC either as a matter of general principle or in relation to the specifics of this case. That factor tips the scales in principle still further in the direction of disclosure. However, Ms Bergen's case is that the public interest in disclosure of all the disputed information in this case is heightened by what her counsel terms "*red flag*" factors affecting the Development.

159. We accept that, if there is before us an evidential basis for concluding that there was wrongdoing by LBL and/or Renewal, then that evidence would serve to heighten the public interest in disclosure of information which would tend to reveal the wrongdoing complained of. We draw support for that view from the consideration given to the public interest in the "*disclosure of iniquity*" at page 815 of Philip Coppel's textbook *Information Rights Law and Practice* (fourth edition), which states as follows:

> *The courts have always refused to uphold the right to confidence when to do so would cover up wrongdoing….the reason that exposure of wrongdoing should not be prevented, even if it is in breach of confidence, is that 'no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of the society to destroy the public welfare'. An allegation of wrongdoing will justify exposure in the public interest if it is a credible allegation from an apparently reliable source".*

160. The evidence from Ms Bergen's witnesses was that concern about "*red flags*" was widespread, but we saw little in the way of evidence to substantiate that view. Ms Malik exhibited to her witness statement press reports which she said were inaccurate. Ms Winston said that she had much support for her viewpoint, although she accepted that very few people had been motivated to raise a formal objection to the Development with LBL. Mr Adams referred to his "*understanding*" of local concerns but he did not describe how he had come to this understanding. Mr Bradshaw described MCT and others as having "*campaigned*" against the Development for five years but failed to substantiate that claim with evidence. Nevertheless, for the purposes of making our Decision, we are prepared to accept that the "*red flags*" described by Ms Bergen's counsel have gained some currency and we treat them as a genuine expression of concern by the local population about a complicated commercial transaction about which some key facts are as yet unknown. As Ms Winston put it *"…all sorts of imaginings go on in the public mind"* in such circumstances.

161. We note here that, whilst multiple allegations of impropriety have been levelled at LBL and Renewal, we have heard no evidence of criminal complaints, police investigations or charges brought; no evidence of investigations by the Local

Government Ombudsman, or by the relevant bodies concerned with officers' or members' conduct in local authorities (in relation to the *Nolan Principles* or otherwise); and no evidence of professional misconduct proceedings against LBL's external advisers. We also note that whilst a judicial review was threatened by MFC in a formal letter, no application was made. We also note also that LBL has recently established its own inquiry into aspects of the Development about which concerns have been raised, which is being conducted by a senior retired Judge and that it is not our role to second-guess the outcome of that inquiry, which has yet to report its findings. These circumstances distinguish the situation with which we are faced from that considered by the Court in *Hussain* (see paragraph 128 above).

162. Nevertheless, it is right for us to assess the "*red flag*" allegations which have been made to us in evaluating the public interest in disclosure of the requested information. We accept that there is a public interest in (a) uncovering wrong doing and (b) "setting the record straight" where a credible concern is established, but we conclude that we should place the "*red flag*" factors relied on by Ms Bergen onto the side of the scales supporting disclosure only if they are (a) based on credible evidence put before us in these proceedings; (b) reasonably arrived at on the basis of that evidence; and if so, (c) where disclosure of the information requested would tend to assist in uncovering wrong doing or in resolving concerns about the particular "*red flag*" identified.

163. We take that view because, however strongly held, it would not be right for us to attribute weight to concerns expressed which are merely speculative or which are maintained in the face of credible evidence to the contrary. It would also not be right for us to take into account generalised concerns which have no clear connection with the information in dispute. We now turn to consider the evidence and submissions through that paradigm.

164. The "*red flag*" factors we have identified from Ms Bergen and her witnesses in this case are as follows:

(i) *That LBL did not receive the "best price" for the land it has agreed to sell to Renewal, or that it had sold the land at an undervalue.* This concern was articulated by Ms Winston (at paragraph 90 above) who said she did not trust LBL not to sell its land at an undervalue. Mr Adams also expressed this concern on the basis of his expert evaluation of the overall deal between LBL and Renewal. As noted above, we found Mr Adams' evidence unpersuasive on this point given that he repeatedly referred to the wrong statutory test and appeared to us to have an insufficiently detailed knowledge of the Development and the contractual arrangements between LBL and Renewal on which to base his opinion. We contrast those expressions of concern with Mr Conboy's detailed expert evidence about how LBL satisfied the statutory "*best consideration*" process (described at paragraphs 70 and 71 above), and with Mr Holmans' evidence (paragraph 45 above) that LBL is protected in the contractual arrangements because it can buy back the land for the same price it sold it for if the Development does not go ahead. Having considered the evidence placed before us about this "*red flag*", we do not consider that a

concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(ii) *That Renewal can "sell on" the land it has contracted to buy from LBL at a profit.* This was a concern expressed by Mr Adams, whose expert evidence we found unpersuasive in relation to the details of the contractual arrangements for the reasons given above. We contrast it with the expert evidence given by Mr Conboy (paragraph 73 above) about how a "Master Developer" arrangement works and how any subsequent owner/developer would be bound to comply with the s. 106 agreement, which runs with the land. We conclude that the ability for Renewal to sell parcels of land on to sub-developers is an integral feature of a Master Developer arrangement and that the concern that has been expressed before us takes insufficient account of the totality of the contractual arrangements between LBL and Renewal. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(iii) *That LBL did not hold a competitive tender for the land so as to test the market.* This was a concern expressed by Mr Adams (paragraph 95). We repeat our reservations about his evidence, especially at it appeared in relation to this point to be based on an understanding that "*this is a public not a private development*". Mr Adams accepted in cross-examination that this was not an accurate characterisation of the Development and said he had meant something else by that phrase. He confirmed that he was not suggesting that LBL had acted wrongly in adopting its approach to selling the land. We contrast Mr Adams' confused and confusing evidence on this point with Mr Holmans' evidence (at paragraph 46) and Mr Conboy's evidence (at paragraph 73 above), which confirmed that there was no legal requirement for local authorities to tender for the sale of land, and that this was not a public procurement exercise. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(iv) *That the contractual arrangements between LBL and Renewal did not contain an overage clause.* This was a concern expressed by Mr Adams (paragraph 95 above) who went so far as to say that he could not think of any reason why an overage clause would not have been included in the sale contract. We contrast his view with the detailed explanation of the mechanism of the s. 106 agreement and the effective overage provided thereby in relation to additional affordable housing given by expert witness Mr Conboy (paragraph 71) and by Mr Holmans (paragraph 46 above). Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(v) *That the professional valuer, Mr Conboy of GL Hearn, was subject to a conflict of interest in advising both LBL and Renewal.* This was based on a concern expressed by Mr Adams (paragraph 98 above). Mr Adams' oral evidence stopped short of criticising the professional judgment of GL Hearn and suggested only that it would have been "*prudent*" for LBL to have engaged a separate surveyor. We note that, when Mr Conboy gave his evidence to the Tribunal, it was not suggested to him by Ms Bergen's counsel that he had acted in breach of his professional code of conduct. Mr Holmans dealt with this point shortly, rebuffing the suggestion of impropriety, as described at paragraph 46 above. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(vi) *That the contractual arrangements between LBL and Renewal did not provide for LBL to enforce Renewal's obligations.* This was, once again, based on a concern expressed by Mr Adams who accepted that he had not had a full understanding of the contractual arrangements between LBL and Renewal at the time he made his expert witness statement. He accepted in cross-examination that he "*did not know*" which contractual obligations LBL would be required to enforce when he expressed this concern. Mr Conboy dealt with the point in his expert evidence described at paragraph 73 above, where he characterised Mr Adams' concern as "*mis-placed*". Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(vii) *That LBL's ability to take enforcement action against Renewal would be impeded by the offshore status of Renewal.* This was a concern expressed by Mr Adams, who described it as "*poor practice*" for LBL to contract with a company based off-shore. As noted at (vi) above, the issue of enforcement by LBL of Renewal's contractual obligations is not so much a "*red flag*" as a red herring. If there is no call for enforcement, there can be no concern about an inability to enforce against a contracting party which is based off-shore. Ms Malik explained the reason for Renewal's offshore structure, and said it was *"not mysterious"* (see paragraph 65 above). Mr Holmans confirmed that LBL was aware of this fact when it decided to enter into the contract with Renewal (paragraph 46). Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(viii) *That Renewal had no prior track record of development.* This was a concern put to Mr Holmans in cross-examination. Mr Holmans accepted (see paragraph 47 above) that Renewal had only developed smaller sites before. We can see why there might be a public concern about Renewal's ability to deliver the Development, however that was not the concern we understood to have been expressed, which seemed to be directed to the question of

competence. In any event, Mr Holmans' evidence (paragraph 49) was that there had been no significant concern that Renewal would not be able to finance the Development. Mr Adams suggested that sub-developers should be appointed on the basis of greater expertise (paragraph 96) but he seemed to be talking about a different sort of Master Developer scheme to the one before us and he accepted that he was not privy to the contractual arrangements at the time he made his witness statement. In any event, it is difficult to see how disclosure of the withheld information with which we are concerned could satisfy a concern about Renewal's competence. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(ix) *That Renewal would not be paying UK corporation tax on its profits.* This was based on an opinion given by Mr Adams (paragraph 95) but he sensibly pointed out that he is not a taxation expert. Ms Malik's evidence (paragraph 65) was that Renewal *absolutely* expected to pay UK tax on its profits from the Development. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(x) *That Mushtaq Malik of Renewal had an inappropriate relationship with LBL officers or members due to having worked for LBL in the past and, conversely, that LBL had a conflict of interest in its dealings with Mr Malik given that he was a former LBL employee.* The unchallenged evidence from Mr Holmans (paragraph 47) was that Mr Malik had worked for LBL twenty years before the information request was made. He said he did not understand the basis of this concern. No evidence was produced about the rules prohibiting former public sector employees from entering into commercial transactions with their former public sector employers, but we are confident that any "cooling off" period imposed by such rules would not extend to a period of twenty years. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(xi) *That there was reason to doubt the robustness of the statutory certification process by which LBL was satisfied that it had achieved "best consideration" in relation to the contract price (or that it was not an appropriate mechanism for LBL to rely on).* This was a concern expressed by Mr Adams (paragraph 48), and linked to red flag (v) above. Mr Adams also said he did not understand why the independent valuation report was not in the public domain, but that is not a matter before us. Mr Conboy (at paragraph 71) and Mr Holmans (at paragraph 51 above and in closed session) gave evidence about LBL's statutory obligations and its compliance with the statutory test for the disposal of local authority land. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to

heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(xii) *That an opportunity to provide a greater degree of social housing had been missed in the Development, to the advantage of Renewal.* This was concern was expressed in Ms Winston's evidence. We found the detailed evidence of Ms Talbot at paragraph 55 above helpful and persuasive in describing the statutory framework within which LBL and Renewal are working in relation to social/affordable housing. Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(xiii) *That there had been insufficient or inadequate public consultation about the Development.* This was also Ms Winston's concern. We found that her recollection of events was affected by her strong opposition to the scheme. We accept the evidence of Ms Talbot (paragraph 55 above) and Ms Malik (paragraph 59 above) that there was extensive public consultation. Having considered the evidence placed before us about this "*red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

(xiv) *That LBL considering was using the threat of a CPO like "holding a knife to the throat" of the land occupiers in the development area.* This was Ms Winston's view (paragraph 92 above). We contrast this with the evidence of Ms Talbot at paragraph 57 above that the CPO is used to "*focus minds*" and the expert evidence of Mr Conboy about the CPO process and the multiple tests that a local authority would have to meet in order for central government to approve it (paragraph 77). Having considered the evidence placed before us about this *"red flag"*, we do not consider that a concern sufficient to heighten the public interest in disclosure of any of the disputed information has been established by the evidence.

165. Having considered the "*red flags*" evidence carefully, we conclude that none of the factors identified above has passed the test of (a) being based on credible evidence, and (b) being a view reasonably arrived at on the basis of that evidence. We have not therefore found it necessary to go on to consider (c) whether the evidence supports disclosure of withheld information which would tend to prove or disprove the particular concerns which have been appropriately established. We remind ourselves that there is a presumption in favour of disclosure and whilst we are satisfied that there is a public interest in disclosure arising from the desirability of transparency and accountability by public authorities, we conclude that there is no heightened public interest to be placed into the scales as a result of the *"red flags"* alleged in this case.

166. In contrast to the "*red flags"*, we accept the evidence before us that the Development will confer significant public benefits. Mr Holmans described (see paragraph 43 above) the significant benefits that the Development would bring to a

deprived area. We accept Ms Malik's evidence (paragraph 64 above) that there was scant public opposition. Ms Talbot (paragraph 54 above) described the risk to the local population of the loss of this public benefit if the Development is thwarted. We accept that there may be a dis-benefit arising from the Development in the cases of MCT and Ms Winston, who would both suffer the inconvenience of relocation. However, as Ms Talbot said (paragraph 56), that has to be balanced against the opportunity to provide a significant number of homes and jobs.

167. Whilst disclosure of the disputed information is correctly to be viewed as disclosure "to the world at large", we accept that in the particular circumstances of this case, the withheld information would be used by MFC to attempt to thwart the Development, in reliance upon the evidence of Ms Malik about the "*sustained press and public relations campaign"* (paragraph 60) which forms a back drop to this case. MFC's campaign was also described by Mr Holmans in closed session ("gisted" at paragraph 51 above) and we accept his evidence. As we noted earlier, we are satisfied that MFC was aware that such criticisms would be made of it but chose not to defend itself. We have taken account of these factors in weighing the public interest in disclosure.

The Substituted Decision Notice

168. **The Information Commissioner's Decision Notice is substituted as follows:**

169. **In respect of the Price Information: no amendment is made.**

170. **In respect of schedule 4: this may be withheld in its entirety because regulation 12 (5) (e) EIRs is engaged by the entirety of the schedule and the public interest favours maintaining the exception.**

171. **In respect of the PWC report: the remaining redacted sections of the report engage regulations 12 (5) (e) and/or regulation 12 (5) (f) EIRs. The public interest favours disclosure of the information identified in category 1 in the Open Schedule to this Decision.**

Dated: 29 August 2017

Alison McKenna
Principal Judge