Neutral Citation Number: [2022] EWHC 2685 (Ch)

BL-2019-002244

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUST AND PROBATE LIST

25 October 2022

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

PRIMAVERA ASSOCIATES LIMITED **Claimant**

- and –

HERTSMERE BOROUGH COUNCIL **Defendant**

- -

MR JOHN CAMPBELL (instructed by **New Media Law LLP**) appeared on behalf of the Claimant.

MR ALEXANDER BOOTH KC and **MR MICHAEL WALSH** (instructed by **Clyde & Co LLP**) appeared on behalf of the Defendant.

Hearing dates: 18-20 July 2022, 22 July 2022

- -

APPROVED JUDGMENT

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

This judgment was handed down remotely at 10.30 am on 25 October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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Mr Justice Leech:

I. Introduction

A. The Parties

1. The Claimant is Primavera Associates Ltd ("**Primavera**"). On 11 April 2011 Primavera was incorporated in the British Virgin Islands as a BVI Business Company under company no. 164205 and its sole director was Burhou Ltd. The company was managed by Stenham Trustees Ltd ("**Stenham**"), a trust company regulated by the Guernsey Financial Services Commission. Mr Andrew Down gave instructions for Primavera to be incorporated as a vehicle for the purpose of acquiring and developing 18 Watford Road Radlett Hertfordshire WD7 8LE (the "**Property**"). He is an experienced property developer and he operated through a company called Shandler Homes Ltd ("**Shandler Homes**"), of which he was a director and shareholder.

2. The Defendant is Hertsmere Borough Council (the "**Council**") which is the local planning authority for Radlett. Primavera's claim arises out of two planning applications which Shandler Homes submitted for the development of the Property and which the Council determined in its favour. Primavera's case is that the Council owed it a duty of care, that the Council was negligent in the progress and determination of both applications and that it has suffered substantial losses totalling £1,686,924.91 as a consequence.

3. This is my judgment on all issues of liability, causation and quantum. Mr John Campbell appeared on behalf of Primavera instructed by New Media Law LLP ("**New Media**"). Mr Alexander Booth KC and Mr Michael Walsh appeared on behalf of the Council instructed by Clyde & Co LLP ("**Clyde & Co**"). I am grateful to them all for their assistance.

4. The statutory background (Section II) and the primary facts (Section III) are not in dispute. For trial Mr Campbell also produced a chronology of the Second Application (as I have defined it below) which was agreed and which I have used as the principal basis for that section of the narrative.

5. The principal issue between the parties was whether the Council owed Primavera a duty of care (Section IV), which I have determined in the Council's favour. But in case I am

wrong or in case of any appeal, I go on to consider breach of duty (Section V), causation (Section VI) and loss (Section VII), including the defence of contributory negligence.

B. The Witnesses

(1) The Claimant

6. Mr Campbell called Mr Down to give evidence of fact. On 29 April 2022 Mr James Pickering QC, sitting as a judge of the High Court, ordered Primavera to re-draft Mr Down's witness statement on the basis that it did not comply with Practice Direction PD 57AC. On 25 May 2022 His Honour Judge Paul Matthews, also sitting as a judge of the High Court, struck out a number of paragraphs of Mr Down's revised statement: see [2022] EWHC 1240 (Ch). Mr Walsh, who cross-examined Mr Down and made closing submissions on the facts, submitted that Mr Down was not a credible witness and invited me to treat his evidence both written and oral "with the utmost caution".

7. Given the earlier judicial criticisms of Mr Down's evidence, I approached Mr Down's evidence with caution. He also made a serious allegation against the Council which he had to withdraw and he gave evidence on an important issue which he had not given in his witness statement. However, although I found Mr Down's evidence unsatisfactory in some respects and attributed little weight to his evidence on the expert issues, I found him to be a truthful witness trying to assist the Court. Moreover, I found him a credible witness and accepted his evidence on that key factual issue. I did not accept his evidence on one issue of fact, related to what took place at a meeting, but principally because he was not present at that meeting.

8. Primavera also called Mr Benjamin Simpson, who is a member of the Royal Town Planning Institute ("**RTPI**") and has considerable experience as a town planner, to give expert evidence. I found Mr Simpson to be a thoughtful and reliable witness and, subject to one point, I accepted his evidence without qualification. He thought carefully about the questions and he made concessions where he considered it appropriate to do so. I disagreed with Mr Simpson only where he gave evidence about the Council's conduct in 2015. That evidence did not relate to the professional practice of town planners but to the delay in the progress of a planning application. I took the view that the Court was in as good a position as he to assess whether the Council was responsible for the delay and, if so, whether it was negligent. Although I reached a different conclusion on my own

analysis of the correspondence, this did not affect my overall assessment of Mr Simpson's credibility.

9. Primavera originally purchased the Property from Fusion Residential Ltd ("**Fusion**") and later agreed to sell it back to the same company. Mr Antoine Christoforou either owned or controlled Fusion (through a number of other corporate entities) and Mr Iain Taylor was described in his emails as Fusion's Head of Planning. Mr Down also gave evidence that Mr Taylor was a former town planner for the local authority. Fusion was the ultimate developer of the Property and for most of the time period with which this action is concerned, it had a significant economic interest in the Property (if not greater than the interest of Primavera). However, Primavera did not call Mr Christoforou to give evidence. Further, from April 2013 onwards Mr Taylor was largely responsible for dealing with the Council and Mr Down had limited involvement in both planning applications (apart from a period in 2016 when Shandler Homes took back control of the Second Application). But Primavera did not call Mr Taylor to give evidence either.

10. This was not a case in which it was appropriate for the Court to draw adverse inferences from the failure to call either Mr Christoforou or Mr Taylor. But because a large part of Primavera's case depended upon the Court accepting complaints and criticisms made by Mr Taylor in correspondence, and to a lesser extent by Mr Christoforou, I had to form a view about their conduct from the contemporaneous documents and whether many of their complaints and criticisms were justified. I formed an adverse view of Mr Taylor and Mr Christoforou from the correspondence and found many of their criticisms to be unjustified and designed to put pressure on the Council, which had competing pressures and limited resources. If they had been called to give evidence and add context to the correspondence, it is possible that I might have formed a more favourable view of their conduct. But Primavera did not do so.

11. Primavera also adduced a report by Mr George Georgiou, a chartered certified accountant, who gave evidence about the individual heads of loss which Primavera claimed in both its particulars of loss (and a separate schedule of loss). Mr Georgiou's evidence was limited to examining certain underlying documents and confirming the accuracy of the pleaded figures. The Council did not challenge his evidence and it was unnecessary for him to give oral evidence. I accepted his evidence, but given the limited nature of the exercise which he had undertaken, I had to decide certain key issues on

which he did not give evidence by relying on Mr Down's evidence alone or the underlying documents themselves.

(2) The Defendant

12. The Council called Ms Anna Snow, who is also a member of the RTPI and had a similar level of experience. Mr Campbell did not mount a serious challenge to her evidence and I also found her to be a reliable witness. I accepted her evidence without qualification. The Council also adduced a number of reports by Mr Lewis Westhoff to deal with the assessment and calculation of certain charges imposed by the Council on the grant of planning permission at various times (which I set out below). He is also a member of the RTPI and has considerable experience in relation to CIL (as I define it below). In the event, Mr Campbell did not challenge his evidence and it was unnecessary for him to give oral evidence. I also accepted his evidence.

13. The Council did not call any of the Council officers who were the subject matter of the claims and, in particular, Ms Louise Sahlke (who was a planning officer), Ms June Taylor (who was a senior a planning officer), and Ms Chileme Hayes (who was a principal lawyer). I was faced with the same problem as I had with Mr Taylor and I had to form a view of their conduct on the basis of the contemporaneous documents alone. I formed a more favourable view of their conduct than of Mr Taylor's conduct and although I found that the Council was responsible for a significant period of delay between January and June 2015, Ms Sahlke had left the Council by then and Ms Taylor did not become involved until the end of that period.

14. In reaching this conclusion, I took account of the possibility that they might have made a less favourable impression if they had been subjected to cross-examination. But since the issues were well-documented and neither party called any witnesses to speak to the documents, I considered it fair to both of them to assess their conduct by reference to the documents alone. Indeed, many authorities suggest that the contemporaneous documents are the most reliable guide for making findings of fact.

II. Statutory Background

C. The Town and Country Planning Act 1990

(1) Planning Applications

15. The Town and Country Planning Act 1990 (the "**TCPA 1990**") provides the statutory context for this claim. Section 57 provides that planning permission is required for the carrying out of any development of land. Section 58(1)(b) provides that planning permission may be granted by the local planning authority on application to the local planning authority in accordance with a development order and section 62(1) provides that a development order may make provision for applications for planning permission.

16. It is common ground that the Council was the local planning authority for the Property. It is also common ground that the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) (the "**GDO 2010**") was in force when Primavera first applied for planning permission (below). Article 29 of the GDO 2010 which was then in force provided as follows:

> "(1) Subject to paragraph (7), where a valid application has been received by a local planning authority, they shall within the period specified or referred to in paragraph (2) give the applicant notice of their decision or determination or notice that the application has been referred to the Secretary of State.
>
> (2) The period specified or referred to in this paragraph is— (a) in relation to an application for major development, 13 weeks beginning with the day immediately following that on which the application is received by the local planning authority; (b) in relation to an application for development which is not major development, 8 weeks beginning with the day immediately following that on which the application is received by the local planning authority; or (c) in relation to any development, unless the applicant has already given notice of appeal to the Secretary of State, such extended period as may be agreed in writing between the applicant and the local planning authority.
>
> (3) In this article "valid application" means an application which consists of— (a) an application which complies with the requirements of article 5 or article 6, as the case may be; (b) in a case to which article 8 applies, the design and access statement; (c) the certificate required by article 12; (d) subject to paragraph (4), the particulars or evidence required by the authority under section 62(3) of the 1990 Act (applications for planning permission); and (e) any fee required to be paid in respect of the application and, for this purpose, lodging a cheque for the amount of a fee is to be taken as payment, and a valid application shall be taken to have been received when the application, and such of the documents, particulars or evidence referred to above as are required to be included in, or to accompany, the application have been lodged with the appropriate authority mentioned in article 10(1) and the fee required to be paid has been paid."

17. In practice, an applicant for planning permission submitted an online application to the Council which it uploaded onto the planning portal. The Council then entered the application on its register of pending applications from which the eight-week period (below) was to run. The Council would then verify whether the applicant had complied with the various statutory requirements (above) before "validating" the application. Article 29(3) (above) expressly provided that the application was not valid unless the applicant had paid the relevant fee.

18. It was also common ground that it was not (and is not) necessary for a party who applies for planning permission to own the relevant land in question. Mr Booth submitted (and I accept) that many applications are made by parties in relation to land they do not own. Government departments, for example, typically make applications for planning permission in relation to land which they intend to acquire (often using their compulsory powers). He also submitted that an applicant may approach a local planning authority in advance for "**Pre-Application Advice**" or discussions with planning officers before submitting the application and that this is a normal occurrence.

(2) Planning Decisions

19. Mr Booth also submitted (and I accept) that once an application has been submitted the local planning authority will go through a number of steps and that three of those steps are particularly important:

    (1) The local planning authority will consult local residents who live in the vicinity of the relevant site to make them aware of the application so that they can make representations.

    (2) It will consult local statutory bodies in relation to specialist and technical matters. In particular, where access to a highway is at issue, the local planning authority will consult the Highways authority.

    (3) It will analyse development proposals by reference to both national planning policy and local planning policy and, in particular, by reference to its own development plan.

20. These three steps are reflected in the TCPA 1990 (both then and now). Section 70

provided as follows between 14 January 2012 and 3 January 2016 (and there were no material changes after that date which are relevant for present purposes):

> "(1) Where an application is made to a local planning authority for planning permission— (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) they may refuse planning permission.
>
> (2) In dealing with such an application the authority shall have regard to— (a) the provisions of the development plan, so far as material to the application, (b) any local finance considerations, so far as material to the application, and (c) any other material considerations."

21. Mr Booth submitted that the National Planning Policy Framework ("**NPPF**") issued at a national level was a material consideration and Mr Simpson agreed this in his first report. Both also agreed that section 38 of the Planning and Compulsory Purchase Act 2004 provided statutory guidance in relation to the approach which a local planning authority should adopt to the development plan. Section 38 provided as follows between 15 November 2011 and 18 July 2017 (so far as relevant):

> "(1) A reference to the development plan in any enactment mentioned in subsection (7) must be construed in accordance with subsections (2) to (5).
>
> "(3) For the purposes of any other area in England the development plan is–(a) the regional strategy for the region in which the area is situated (if there is a regional strategy for that region) (b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area, and (c) the neighbourhood development plans which have been made in relation to that area."
>
> "(5) If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan."
>
> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

22. Once the local authority has carried out the relevant consultations and analysed the proposed development by reference to national and local planning policy, then the planning officer dealing with the case would prepare a detailed report (which I will call a "**Committee Report**") for submission to the planning committee (the "**Committee**"). The decision whether to grant planning permission was then taken by the elected

members of the committee. The members of the Committee could resolve to grant planning permission at the relevant Committee meeting or they could direct a planning officer to grant permission in exercise of delegated powers. In either case, a senior officer would issue a formal decision notice to the applicant.

(3) Failure to take a Planning Decision

23. It must have been rare for local planning authorities to process and decide all planning applications within the statutory determination periods set out in the GDO 2010 and this was reflected in the Planning Practice Guidance 2014 ("**PPG 2014**"), which stated at the relevant time that when an application took longer than the statutory period to decide, a decision should be made within twenty-six weeks (or the fee for the planning application returned).

24. Nevertheless, section 78 of the TCPA provided that an applicant for planning permission was entitled to appeal once the statutory period had expired and the local planning authority had not made a decision. Section 78 as it was in force between 15 November 2011 and 5 April 2012 provided as follows (and there were no material changes after that date which are relevant for present purposes):

> "(1) Where a local planning authority— (a) refuse an application for planning permission or grant it subject to conditions; (b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions; or (c) refuse an application for any approval of that authority required under a development order, a local development order or a neighbourhood development order or grant it subject to conditions, the applicant may by notice appeal to the Secretary of State.
>
> (2) A person who has made such an application may also appeal to the Secretary of State if the local planning authority have done none of the following— (a) given notice to the applicant of their decision on the application; (aa) given notice to the applicant that they have exercised their power under section 70A or 70B to decline to determine the application; (b) given notice to him that the application has been referred to the Secretary of State in accordance with directions given under section 77, within such period as may be prescribed by the development order or within such extended period as may at any time be agreed upon in writing between the applicant and the authority.
>
> (3) Any appeal under this section shall be made by notice served within such time and in such manner as may be prescribed by a development order.

> (4) The time prescribed for the service of such a notice must not be less than— (a) 28 days from the date of notification of the decision; or (b) in the case of an appeal under subsection (2), 28 days from the end of the period prescribed as mentioned in subsection (2) or, as the case may be, the extended period mentioned in that subsection."

25. Ms Snow gave evidence in her first report that the statutory determination period for both planning applications in the present case was eight weeks. She also gave evidence that the period during which an applicant may appeal against the non-determination of the application was six months (subject to any agreed extension). In cross-examination, she dealt with the average time for planning applications, the status of the PPG time limit of twenty-six weeks and the return of the application fee:

> "MR JUSTICE LEECH: Okay. Is it possible for you to sort of -- you're being asked in the abstract, is it possible for you to put an average length, or is that like asking how long is a piece of string? A. I could probably give a percentage that go over a year, say, and then -- so I'd say out of the applications I deal with, probably 70% go over a year in determination, and that could be from a single house to a 21-storey tower, and then probably about 40% could go over two years. So it's not insignificant. MR JUSTICE LEECH: So that's 40% of the total, was it? 40% of the 70, was it, 40% of the total? A. No, 40% of that 70, yeah, so ... MR CAMPBELL: So not much work being done between one and two years, if I look at those two figures, because you have 70% go over a year, and then over half of that have got to wait for another year. A. Yes. Q. Goodness, okay. All right, I mean, this is all very interesting. A. I mean, if you want me to quantify that, it's because my work is mainly in central London, so it is complex and complicated and often very large or small, but then very -- local issues with it. MR JUSTICE LEECH: So this is Radlett, isn't it, I think? A. No, Radlett is not the same as ... MR JUSTICE LEECH: Central London. A. Central London. MR JUSTICE LEECH: You would expect it to be slightly simpler. A. It would be slightly less, yeah, it would be less in a place like Radlett, definitely. MR CAMPBELL: Thank you, my Lord. So in the abstract, I think we agree with each other, it was a long period of time. The planning guidance requires it to be done in six months. What is the status of that guidance as regards a local planning authority? A. Well, it's guidance, it's -- that's what it is, guidance, so it's not -- it's of relevance, but the guidance is it should be decided within six months, and if not, then you're entitled to have your application fee back[1], so it's a target, it's guidelines, it's not mandatory. Q. Is the right of appeal, then, which comes eight weeks after submission, is that actually completely unrealistic, because from what you tell us, I mean, very few appeals will be done in eight weeks? A. In central London, that would be the case, but -- I think that's the point why you have a six-month -- I think you described it as

[1] Day 3, page 113, line 14 of the transcript records that Ms Snow said "feedback" but it is clear that what she said or meant was "fee back": see later in the passage.

> being a very long period earlier on, the six-month period from that eight weeks within which to make that appeal. MR JUSTICE LEECH: How much weight should I attach to the planning guidance? Is it aspirational? A. It's aspirational; it's guidance, rather than policy. MR JUSTICE LEECH: But there is a sanction in the sense that you have to repay the fee. A. Yes, there is a sanction, but it's guidance rather than policy, so it's not part of the development plan -- MR JUSTICE LEECH: But is it fair for me to adopt that as a yardstick, and say, well, there's got to be a decent explanation for a delay after six months; is that all right? A. Yes, a material consideration I would class it as. MR JUSTICE LEECH: So it would be quite reasonable for me in assessing whether the council was reasonable to say start with six months -- A. Yes. MR JUSTICE LEECH: -- and say what are the reasons. A. I would agree."

(4) S106 Agreements

26. The powers of a local planning authority to agree planning obligations with the recipient of a grant of planning permission under section 106 of the TCPA 1990 are well known and require little introduction in this judgment. I will refer to an agreement between a local planning authority and a recipient as a "**S106 Agreement**" and a unilateral undertaking given by a recipient (and usually by deed) as a "**S106 Undertaking**". Because of the importance of the S106 Agreements in the present case, I set out the text of the section (so far as relevant). Section 106 provided between 1 March 2010 and 24 April 2013 (and, again, there were no material changes after that date which are relevant for present purposes):

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as *"a planning obligation"*), enforceable to the extent mentioned in subsection (3)— (a) restricting the development or use of the land in any specified way; (b) requiring specified operations or activities to be carried out in, on, under or over the land; (c) requiring the land to be used in any specified way; or (d) requiring a sum or sums to be paid to the authority (or, in a case where section 2E applies, to the Greater London Authority) on a specified date or dates or periodically.
>
> (2) A planning obligation may— (a) be unconditional or subject to conditions; (b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and (c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period."

D. Local Planning Policy

(1) Affordable Housing Policy

27. The Council's affordable housing policy also provides important context for this claim. In 2003 the Council adopted the Hertsmere Local Plan (the "**2003 Plan**") and it governed planning applications until January 2013 when the Council adopted its Core Strategy 2013 (the "**Core Strategy 2013**"). Apart from the development plan itself, planning authorities often produce supplementary planning guidance ("**SPG**") and supplementary planning documents (an "**SPD**" or "**SPDs**"). In the present case the Council published and, in some cases, adopted the following SPDs for the relevant periods:

    (1) *2008 to September 2014:* the 2008 Affordable Housing SPD (the "**2008 SPD**");

    (2) *September 2014 to June 2015*: the September 2014 Draft Revised Affordable Housing SPD (the "**September 2014 Draft**");

    (3) *June 2015 to October 2015*: The 2015 Draft Affordable Housing SPD (the "**June 2015 Draft**"); and

    (4) *November 2015*: The Affordable Housing SPD (the "**Adopted SPD**").

28. Policy CS4 of the Core Strategy 2013 governed the Council's approach to affordable housing. The September 2014 Draft, the June 2015 Draft and the Adopted SPD were all prepared by the Council to update its approach to affordable housing contributions in the light of national developments. In the Committee Report prepared for the Second Application (as defined below), Ms Taylor set out in detail the policy and the changes made by each SPD.

29. In the Appendix to this judgment I have set out paragraphs 10.14 to 10.41 of that Committee Report. Rather than attempt to provide a precis of policy CS4 and the SPDs and then to explain how they applied to Primavera's applications for planning permission, it is easier simply to quote the relevant text. Primavera did not challenge the Committee Report or suggest that the analysis which I have extracted was flawed or incorrect. Moreover, Primavera's complaint was not that the Council came to the wrong decision for the wrong reasons but that it took so long to do so and that some of the investigations which it undertook were unnecessary.

(2) CIL Liability

30. In 2010 the Community Infrastructure Levy ("**CIL**") was introduced by central government and it enabled local authorities to levy a charge on new development to provide infrastructure in their area. CIL was also introduced to streamline S106 Agreements so that local planning authorities did not have to bargain with the recipients of planning permission to make contributions to local infrastructure. The Community Infrastructure Levy Regulations 2010 (SI 2010/948) introduced the CIL and I will refer to them (both in their original form and as amended) as the "**CIL Regulations**". I will also refer to the liability to pay CIL imposed upon the owner of development land as "**CIL Liability**".

31. Between February and September 2013 the Council consulted in relation to its CIL charging schedule and on 12 September 2013 it was submitted to the Planning Inspectorate. On 13 December 2013 the Planning Inspectorate endorsed it, on 17 September 2014 the Council approved it and on 1 December 2014 it took effect. In the extract from the Committee Report which I have set out in the Appendix, Ms Taylor explained the effect of CIL upon the Second Application (as I define it) and the assumptions upon which it had been based. At that stage, the Committee Report assumed that the CIL Liability for the development of the Property would be £316,260.

III. The Facts

E. The First Application

(1) Primavera

32. Mr Down gave evidence that throughout the period with which this action is concerned he was Primavera's authorised representative. He also gave evidence that he formed the company as a special purpose vehicle for the purpose of acquiring the Property and that it was owned by a consortium of shareholders and investors who were DAK Trust, Dionysia Kaplan, Louis and Carolyn Prades, Frank Kaplan, the Ruth Kaplan Estate, Mark Kaplan, Lionel Ziman, Flint Sperber, Sharon Down (his wife) and himself.

33. Mr Down stated in cross-examination that it was standard practice to form or acquire a special purpose vehicle for the acquisition of a development property but he also accepted

that in this case he did so to conceal the ultimate beneficial owners of Primavera from the vendor of the Property. He also gave evidence that the investors provided £1m of the capital for purchase of the Property and that the balance of £1.5m was lent by Fairbairn Private Bank (IOM) Ltd (the "**Fairbairn Bank**"), a private bank incorporated in the Isle of Man. On 25 October 2012 the Fairbairn Bank changed its name to Nedbank Private Wealth Ltd ("**Nedbank**"). I will refer to the bank either as the Fairbairn Bank or as Nedbank depending on the date and the way in which it was described in the relevant documents.

(2) The Purchase of the Property

34. It was also Mr Down's unchallenged evidence that in May 2010 the Property was first drawn to his attention by Mr Christoforou of Fusion and that in April 2011 Mr Kaplan and he agreed to buy it for £2,500,000 together with a finder's fee of £50,000. I was not taken to the contract for sale but there was no dispute that on 23 September 2011 completion took place and that Primavera paid the purchase price. Correspondence between the solicitors acting for the parties confirmed this to be the case.

35. The Property had a considerable planning history. Mr Down confirmed in evidence that in June or July he conducted a search of the Council's planning portal to establish the history of the site and that on 4 October 2011 he met Ms Sahlke with Mr Andrew Scott and Ms Helen Kyprianos, both architects from Andrew Scott Associates. On 5 October 2011 Mr Scott sent Mr Down a copy of Ms Sahlke's Pre-Application Advice dated 6 September 2011 in which she had set out the detailed planning history.

(3) The Application

36. On 13 January 2012 Mr Down submitted a planning application online to develop the Property (the "**First Application**"). In Box 1 the Applicant was identified as "Shandlers [sic] Homes". In Box 3 it stated that the proposal was for: "Demolition of existing single family dwelling and erection of 7 self-contained apartments." In Box 5 it stated that Pre-Application Advice had been given by Ms Sahlke. In Box 25 Mr Down certified that nobody apart from himself had been the owner of the Property twenty-one days before the date of the application and he also described himself as the "Applicant". Finally, in Box 26 he made a declaration that to the best of his knowledge the facts stated were true and accurate.

37. By letter dated 17 January 2012 Mr Scott wrote to Ms Sahlke enclosing a cheque for the fee of £2,345 and the Council's register sheet was completed showing that the application and the cheque had been received on 18 January 2012. It is common ground that the Council validated the First Application and then carried out consultations with various interested parties including the Hertfordshire County Council (the "**County Council**"). It was also common ground that the Council was not a unitary authority and that the County Council was a separate body with its own corporate identity.

38. Under cover of an email dated 7 March 2012 Ms Kyprianos submitted a plan (which I will call the "**Highways Plan**") to Ms Sahlke. The legend in the bottom left-hand corner described it as Revision A (although this was not entered into a revision box), its date as "07.03.2012" and the information which it contained as "Left turn diagrams added to stage 1 and 3 (shown in pink)." The Property was identified, the client named as Shandler Homes and the title of the drawing was given as "Highways". The legend is very small and difficult to read both on screen and in hard copy.

39. By 3 May 2012 the Council was aware that Primavera was the registered proprietor of the Property and that it was to be a party to a proposed S106 Agreement. In an email sent that day Ms Poonam Rathour of Wilson Barca LLP ("**Wilson Barca**"), Primavera's solicitors, wrote to Ms Brona Bell, a solicitor at the Council, enclosing official copies of the register, which recorded that Primavera was the registered proprietor of the freehold title and that the Fairbairn Bank was registered as the proprietor of a legal charge. Ms Bell wrote back stating that she would need to see an opinion letter confirming that whoever signed the agreement had the company's authority to do so.

40. On 24 May 2012 the Committee met to consider the First Application. Before the meeting Ms Sahlke submitted a detailed Committee Report in which she recommended that the Committee should delegate powers to grant planning permission subject to the conditions set out in her report and receipt of a S106 Agreement. In paragraph 27 she stated as follows:

> "Amendments have been made to the access point to widen and relocate it to the middle of the site to enable a service or fire vehicle to enter and turn within the site. The vehicular ramp to the underground car park through the relocation of the access point is now on the left hand site of the driveway. A pavement in front of the site has also been included which promotes visibility to Watford Road. This is following discussions

> between the Highways Department and the agent. These amendments have been sent to the Highways Department for a formal consultation response. If these are not received at the time of publication, any comments will be included within the update sheet."

41. Before the meeting, Ms Sahlke also submitted an update on the various applications which the Committee had to consider. She gave the members the following update about the response of the Highways Department of the County Council:

> "The amended design proposes to close both existing accesses and provide a new 6-metre wide central access. The swept path diagrams clearly indicate that large service/refuse vehicles can enter, turn and egress in a forward gear. A visibility splay of 70m in the westerly direction and 56im in the easterly direction can be achieved, which I consider is satisfactory at this location. The refuse storage area and visitor parking bays have therefore been relocated accordingly.
>
> It should also be noted that incorporated within the amended design, is a new section of footway adjacent to the carriageway. This will be 1.8 metres wide and will be dedicated as public highway. This will be constructed as part of the Section 278 Agreement with Herts County Council. This will link - up with the existing footway on the same side of Watford Road, thereby improving safety, both for the increased numbers of residents from the development and pedestrians generally.

42. Neither the Committee Report nor the update contained a specific reference to the Highways Plan containing the amended design. It is clear, however, from an exchange of emails which also took place before the Committee meeting that the County Council was responsible for approving both the amended design and also the form of the condition which was ultimately imposed. By email dated 24 May 2012 and timed at 14.10 Mr Peter Oliver of the County Council wrote to Ms Sahlke suggesting that the "vision splay condition" was altered to the following:

> "Prior to any part of the development commencing the visibility splays shown on the approved drawings shall be provided to the access road serving the development. The sight lines shall be permanently maintained in both directions. There shall be no obstruction to visibility between 0.6m and 2.0m above carriageway level."

43. The Committee Report was tabled at the Committee meeting on 24 May 2012 with a number of other reports. The minutes of that meeting record that if the Committee was to reject the recommendations of the planning officers, then the relevant planning applications would be referred to a "special referrals" committee. There is no suggestion

that the First Application was referred to this separate committee and although the minutes do not state in terms that the Committee approved Ms Sahlke's recommendation, it follows that they must have done so.

(4) The First S106 Agreement

44. In any event, by a deed dated 31 August 2012 and made between the County Council (1) the Council (2) Primavera as the owner (3) and the Fairbairn Bank as the mortgagee (4) the parties entered into a S106 Agreement (the "**First S106 Agreement**"). Recital (6) recorded that the Council had resolved to grant planning permission and in clause 4.1(i) and Schedule 1 Primavera (as the owner of the Property) covenanted with both the Council and the County Council to make various contributions totalling £80,846.27 (index-linked).

(5) The First Decision

45. On 3 September 2012 the Head of Planning and Building Control issued a decision notice and sent it to Andrew Scott Associates and Shandler Homes stating that the Council was granting full planning permission for the development (and I will refer to that decision as the "**First Decision**"). It imposed a number of conditions including the following (to which I will refer as "**Condition 17**" and "**Condition 21**"):

> "17. Prior to any part of the development commencing the visibility splays shown on the approved drawings shall be provided to the access road serving the development. The sight lines shall be permanently maintained in both directions. There shall be no obstruction to visibility between 0.6m and 2.0m above carriageway level."
>
> "21. The development hereby permitted shall be carried out in accordance with the following approved plans: Highways date stamped 7/3/2012…"

(6) The First Judicial Review

46. Dr Wayne Bickerton was the owner of 20 Watford Road Radlett Hertfordshire WD7 8LE ("**20 Watford Road**") and had made a number of applications for planning permission to develop both it and the Property together. On 20 September 2012 his solicitors, Ashfords LLP ("**Ashfords**"), sent a Letter of Claim threatening to issue an application for judicial review of the First Decision. The letter advanced a number of grounds, which included both the failure to have regard to previous decisions and also the approval of an

inadequate access scheme (or the failure to explain why such an inadequate scheme was acceptable). Mr Down gave the following description of Dr Bickerton:

> "A. No, he was the owner of 20 Watford Road, and he had been in partnership with Neil Agran of 18 Watford Road. They had secured the planning permission, after many attempts, to get a three-block development across the two sites. Number 18 was a larger, wider site, and basically the world changed after their first permission that they got. It wasn't viable to do the three sites -- the three blocks on the two sites. So Mr Agran then wanted to sell his land and not have any dealings with Dr Bickerton. We then came on the scene, bought the property from Mr Agran. Mr Bickerton was slightly aggrieved by that. MR WALSH: That's an understatement, isn't it? A. It's very much an understatement. Q. Dr Bickerton was hellbent on wrecking? A. Many times."

47. By letter dated 3 October 2012 Wilson Barca wrote to the Council stating that Dr Bickerton was suffering from "a case of sour grapes" and inviting the Council to reject Ashfords' submissions. By letter dated 8 October 2012 (copied to Wilson Barca) the Council replied stating that it had taken account of the earlier decisions, that the County Council had objected to the original access routes and that the plans had therefore been amended. In particular, they stated as follows:

> "The comments of the Highways Authority included in the 'Updates' document show that the officer was satisfied, considering the proposal in the round (and taking into account the highways improvements namely the relocation of the access nearest to the crossroads with Gill Hill Lane, the provision of a section of footway and provision of adequate turning facilities for refuse vehicles) that the proposal did not give rise to an objection in highways terms. This was notwithstanding that a visibility splay of 33.6 metres to the centre line was less than that recommended by Manual for Streets for a road of this kind."

48. By Claim Form dated 12 November 2012 Dr Bickerton applied for judicial review of the First Decision (the "**First Judicial Review**") and on 4 December 2012 the Council acknowledged service. It is unnecessary for me to set out or summarise the evidence which the parties exchanged because the Council chose to agree to the First Decision being quashed. By letter dated 3 April 2013 Ms Deborah Dymock, a principal solicitor, wrote to Wilson Barca stating that the Council had written to Dr Bickerton proposing to compromise the claim on the basis of an agreed order quashing the First Decision. The reasons which she gave were as follows:

> "Following a full re-evaluation of the Council's case and of the evidence,

> the Council has serious concerns as to whether it has a reasonable prospect of success in these proceedings. The reason for this is that the approved plan showing the access to the site and the highway visibility splay does not show a visibility splay that accords with the requirements of the Highways Authority as set out in the report to Committee."
>
> "The Council's Grounds for contesting the claim maintains that the approved plan shows a visibility splay to the east of 2.4 by 33.6m to the centre line and by 56.5m to the far kerb side. The witness statement of the County Highways engineer submitted in support of the Council's Grounds confirmed that the visibility splays shown on drawing 1325.P05 Rev A would be sufficient to deal with any highway implications of the proposed access.
>
> The planning permission is subject to a condition "17, Prior to the development commencing the visibility splays shown on the approved drawings shall be provided to the access road serving the development. .... " The approved plans are identified in the planning permission and include "highways date stamped 7/3/2012". This is the plan P05 Revision A which shows the visibility splays.
>
> However on a close examination of the approved plans it is evident that the x distance shown on the approved plan is only 0.9 metres. This is now acknowledged by the County's Highways engineer to be inadequate, and not a distance which they could approve.
>
> Following a full re-evaluation of the Council's case and of the evidence, the Council has serious concerns as to whether it has a reasonable prospect of success in these proceedings for the reasons set out above."

49. On 12 June 2013 the Administrative Court made an order by consent quashing the First Decision and ordering that the First Application be remitted to the Council for determination (the "**First Consent Order**"). The Court also ordered the Council to pay Dr Bickerton's costs of £20,100. The First Consent Order was also signed by Wilson Barca on behalf of both Primavera and Shandler Homes as interested parties. Mr Down accepted in evidence that Shandler Homes could have continued to defend the First Judicial Review but chose not to do so. He also accepted that it considered bringing a claim in negligence against the Council and by letter dated 10 April 2013 Wilson Barca wrote to Mr Down stating as follows:

> "Further to our letter of the 5th April and to our subsequent and several exchanges of emails, we have now received the draft Consent Order from Hertsmere Borough Council. We enclose herewith a copy of their letter of the 9th April confirming that you will not be responsible for the costs, as well as a copy of the Consent Order itself. The Consent Order is silent on the question of whether you can still make a claim against Hertsmere Borough Council for their (apparently admitted) negligence. Our advice is that rather than that such a claim remains live that we leave the order, as it

> is apart from seeking to introduce into the body of the order confirmation that as the Interested Parties you will not be responsible for any costs. We await your confirmation that we may proceed on that basis."

(7) The Sale Contract

50. Whilst the Council was considering the First Application, Mr Down and his investors were attempting to sell the Property on to another purchaser. In an email dated 4 October 2013 Mr Kaplan (who had first identified the Property) gave a progress report to the other investors. He stated that a sale to Wilson Homes for £4m had fallen through but that Fusion had agreed to buy the Property back for £3.5m with an overage of 50/50 on all gross sales revenue over £12.4m. It is clear from the email exchanges between Mr Kaplan and both Fusion and the investors that all of them were aware that there was a risk of judicial review. Indeed, Fusion was only prepared to pay a deposit of 5% of the purchase price to be held by a stakeholder because of this risk.

51. By a contract dated 29 October 2012 (the "**Sale Contract**") and made between Primavera (1) and Fusion Cockfosters Road LLP ("**FCRL**") (2) Primavera agreed to sell the Property for £3,500,000 to FCRL (which I understood to be an associated company of Fusion). The term "**Completion Date**" was defined as the later of 17 January 2013 and the date ascertained in accordance with clause 11.3. I set out clause 11 (below) but not the definitions because the defined terms used in that clause ought to be self-explanatory:

> "11.1 If :- 11 .1.1 by 17th January 2013 any issued Third Party Application has not been Finally Determined leaving the Planning Consent upheld and that decision to uphold cannot be open to challenge by the issue of any further Third Party Applications; or 11.1.2 at any time after the date of this agreement a Quashing Order is made in respect of the Planning Consent, the Buyer may at any time rescind this Agreement by service of written notice upon the Seller. Within three Working Days of receipt of that notice the Seller's solicitor shall return the Deposit to the Buyer's Solicitor in cleared funds, to the Buyer's solicitor's client account as notified to the Seller. Service of written notice shall determine this Agreement but without prejudice to the rights and remedies of either party in respect of any antecedent breach by the other party.
>
> 11.2 Where a Quashing Order is made in respect of the Planning Consent the Buyer's right to rescind shall determine 20 (twenty) working days following the date the Seller notifies the Buyer of the Quashing Order with a copy of the Quashing Order thereto otherwise the Buyer's right to rescind pursuant to this clause shall determine upon the date any Third Party Applications are Finally Determined leaving in place the Planning Consent upheld and that decision cannot be open to challenge by the issue of any

> further Third Party Applications.
>
> 11.3 In the event of any Third Party Application the Seller shall use all reasonable endeavours at its own cost to support the Local Planning Authority in any proceedings and the Completion Date shall be extended until the date 40 (forty) Working Days following the date that any such proceedings have been Finally Determined leaving in place the Planning Consent granted or upheld and that decision is no longer open to challenge by the issue of any further Third Party Application.
>
> 11.4 The conditionality in this clause is for the benefit of the Buyer who may waive the same in which event completion shall take place on notice by the Buyer."

(8) Fusion's Involvement

52. Once it had become clear that the First Decision would be quashed, Mr Taylor began to communicate with the Council directly. An exchange of emails dated 28 March 2013 shows that he attended a meeting with Ms Sahlke that day and in a series of emails dated 3 April 2013 and 10 April 2013 he pressed her to agree that he could submit revised plans ahead of the First Judicial Review. In an email dated 15 April 2013 he also pressed her for confirmation that the Council would reconsider the First Application by reference to the 2003 Plan. Mr Down accepted this in cross-examination:

> "Q. We see that in an email at {D1/465/1}. This is an email, you're copied into this, with Antoine Christoforou, from Iain Taylor to Louise Sahlke: "Dear all.…Having collated all correspondence from yourselves to date, we note that we still do not have written confirmation regarding point 2 of my 28/3 email; namely confirmation that ..."'... the scheme will not require the provision of/contribution towards affordable housing given it will be considered against the Development Plan as it stood at the time of validation of TP/12/0070.'" And: "Brett [that is Brett Leahy] ...you confirmed at the 28/3 meeting that you had instructed Officers to determine any applications registered before 17/1/13 against the 2003 Plan. You also confirmed that in light of this Policy Framework that the TP/12/0070 [that's the first application] scheme would not attract any affordable housing provision." So Iain Taylor was pressing this point, and he was trying hard to ensure that there was confirmation on the part of Hertsmere that it would grant any new planning permission on the basis of the old plan, so that he could avoid, or you could avoid, they could avoid because they were going to purchase, any provision for affordable housing; that's right, isn't it? A. Yes. It is."

53. By email dated 17 May 2013 Mr Taylor returned to the submission of plans. He stated that he could not really understand what possible harm or conflict would arise if Shandler Homes submitted plans as part of the Pre-Application Advice process. Ms Sahlke replied

on the same day. She did not agree and stated that she needed to obtain advice with regard to the pre-application process and that the County Council had not confirmed which officer would be involved with the case.

(9) The Second Decision

54. On 19 July 2013 Mr Taylor submitted revised plans to the Council in support of the First Application. On 22 July 2013 Ms Sahlke completed a register sheet stating that the statutory period for re-considering the First Application had begun on that day and would expire on 18 September 2013 and Mr Simpson confirmed that on 22 July 2013 the revised application was validated. By letter dated 2 September 2013 Barker Parry, Dr Bickerton's planning consultants, wrote to the Council objecting to the First Application again this time on the basis that it did not address the Core Strategy 2013.

55. By letter dated 19 September 2013 Mr Taylor wrote to the Council objecting strongly to Barker Parry's letter. Indeed, he asserted that the First Consent Order required the Council to determine the First Application by reference to the 2003 Plan:

> "The Consent Order requires HBC (re)determine the scheme against the Development Plan in place at the time of registration. This alone is the framework within which HBC are required to operate. Given this context it is irrelevant to critique differences between superseded and current drawings."

56. On 12 December 2013 a meeting of the Committee took place. The members had originally intended to reconsider the First Application at that meeting and Ms Sahlke's update for that meeting shows that they had already asked for a comparison between the current and previous policies to which her response was as follows:

> "The main changes to planning policy have been the introduction of the National Planning Policy Framework 2012, Adopted Core Strategy 2013 and Part D of the Planning and Design Guide 2013. The key topics which would impact on this application is the lower threshold of affordable housing under the Adopted Core Strategy 2013, the introduction in room standards and the rewording of how garden amenity space is calculated."

57. However, under cover of an email dated 9 December 2013 Ashfords sent the Council a copy of an opinion which they had received from Mr Rupert Warren QC (as he then was). Mr Warren expressed the view that the Committee's position (as set out below) was wrong as a matter of law because it was not open to a local planning authority to disapply

the current version of its development plan (which chiefly comprised the Core Strategy 2013).

58. In the light of Mr Warren's opinion and the representations of Ashfords and Barker Parry, the Committee chose to defer consideration of the application until their next meeting. It is clear, however, that the Council's officers were not persuaded by Mr Warren's opinion because Ms Sahlke reproduced in the Committee Report the same paragraph which had been in the report for the previous meeting (and which had been the subject of Mr Warren's criticism):

> "A representative acting for the owner of the neighbouring property, 20 Watford Road, has submitted a representation that the planning application should be re-determined in accordance with 'current prevailing policies, guidance and the situation at the site and surroundings. The Council's position on this point, however, is that schemes validated before 17 January 2013 are subject to the policies in place before that date. As TP/12/0070, therefore was validated, prior to the adoption of the Council's Core Strategy 2013 on 17 January 2013 this application is to be assessed against the policies in place at the time it was validated. This approach has been consistently applied to other planning applications."

59. On 9 January 2014 the next meeting of the Committee took place and the members resolved to approve the First Application subject to the conditions set out in the Committee report and the First S.106 Agreement. The minutes do not record any discussion of Mr Warren's opinion or the question whether the Council's position was correct. After recording the documents which had been tabled for the meeting, the minutes of the meeting then record as follows:

> "Following the officers' presentation the Chairman asked members of the committee if there were any matters raised in the additional papers that they wished to have clarified at this point. In response to questions from members, the Development Team Manager explained that:
>
> • while the current application was only in respect of 18 Watford Road, the earlier appeal decision in respect of 18 & 20 Watford Road, Radlett was one of many material considerations to be taken into account. The officer's presentation had demarcated the area equivalent to the site of the current proposal. This application had been refused by the committee on the grounds of scale, mass etc but the Inspector had found the relationship of the proposals to the street to be acceptable. The comparison had been provided to members in the presentation to aid debate;
>
> • an additional condition in respect of Japanese Knotweed management was proposed as set out at page 17 of the tabled addendum;

• details of the access were shown in principle on drawing number 10000/03/55B and not 1000/03/55B as stated on page 21 of the tabled addendum. The access arrangement had been amended to incorporate a wider bellmouth with access further to the left and a number of turning arrangements to allow vehicles to exit in forward gear;

• the site of 16 Watford Road was 'safeguarded' land within the Green Belt, available for residential development should it become necessary. Its status was similar to conventional Green Belt land, therefore the Green Belt boundary should be considered to be at the rear boundary of the application site.

Mr A Christoforou of The Green, Letchmore Heath, spoke in favour of the application as agent for the applicant.

Mr S Barker of Barker Parry Town Planning, Hitchin, spoke against the application on behalf of neighbours at 20 Watford Road.

The Principal Solicitor explained that the committee's original decision on this application had been quashed for highways reasons by the Judicial Review application. This covered purely procedural matters and had no relation to the planning merits. The application had returned to committee for determination because the original decision had been quashed. In response to concerns raised by members regarding the proposed access, the Area Highways Manager explained that the two existing access points had poor visibility in both directions. It was proposed to close the access closest to Radlett and widen the other. If vegetation were removed, the visibility standard requirement could be achieved to the right. Visibility to the left would be 11m short of guidance standards, however vehicles approaching from this direction would be on the other side of the road so this was considered to be less critical. Overall the proposals would improve on the existing access, which had very poor visibility and no footway, so the proposals were considered to be acceptable in highways terms.

In response to concerns raised by members in respect of the impact of the proposals on the Green Belt, the Development Team Manager explained that the site area included a hedge that could be removed at any time without planning permission. A landscaping condition would be included in any permission to reinforce the area's transitional appearance from Green Belt to urban. It was necessary to take into account the wider context, and there were larger properties near the site. While it was recognised that the issues were complex in respect of bulk, scale, mass and visual appearance, the footprint of the proposed development was similar to previous applications; it was likely that any refusal on Green Belt/effect on local context grounds would be dismissed by the Planning Inspector at appeal.

Officers acknowledged that the wording of proposed Condition 16 in respect of visibility splays was unclear and would be amended.

Officers confirmed that the provision of a footway was included in the application and that this would become the responsibility of the Highways Authority. Members requested that the footway be made to link in to the

> pavements on either side.
>
> A proposal by Councillor Graham, seconded by Councillor Gilligan, that planning permission be refused on the grounds that the application was contrary to Policies H8(i) and (xiii) was put to the vote and defeated."

60. On 28 January 2014 the Director of Environment issued a decision notice in relation to the Council's decision to grant planning permission (and I will call this decision the "**Second Decision**") and under cover of an email also dated 28 January 2014 Ms Sahlke sent Mr Down a copy of the notice. It continued to record that the Applicant was Shandler Homes and it stated in terms that it had been decided in accordance with those policies in place before the adoption of the Core Strategy 2013.

(10) The Second Judicial Review

61. On 10 February 2014 Ashfords sent another Letter of Claim enclosing draft grounds of challenge and stating that Dr Bickerton intended to commence proceedings within seven days "unless the Council is able to explain within that period why the analysis contained in the draft grounds are either not factually correct or legally unjustified". Mr Warren had settled the draft statement of facts and grounds which accompanied the letter and in paragraph 2 he stated as follows:

> "There is a single ground of challenge. Put simply, the Council granted the permission unlawfully because it failed to act in accordance with its duty, arising from s.38(6) of the Planning and Compulsory Purchase Act 2004, to determine planning applications "in accordance with the provisions of the development plan unless material considerations indicate otherwise". It applied the wrong document and expressly refused to test the application against the development plan."

62. By letter dated 19 February 2014 Ms Hayes, who was by now involved, wrote to Ashfords stating that the Council was prepared to submit to judgment and wished to limit its costs. By email dated 10 March 2014 Mr Down wrote to her asking the Council to pay Shandler Homes' costs of taking legal advice but on 7 March 2014 she replied stating that it was a matter for him to decide whether to defend the claim and that the Council could not provide an undertaking to pay his costs. She also stated that the Council had taken legal advice and been advised by counsel that there were no material prospects of success.

63. By Claim Form also dated 10 March 2014 Dr Bickerton applied for judicial review of

the Second Decision (the "**Second Judicial Review**"). On 24 March 2014 the Administrative Court made an order, again by consent, quashing the Second Decision and ordering that the First Application be remitted to the Council for re-determination (the "**Second Consent Order**"). The Court also ordered the Council to pay Dr Bickerton's reasonable costs of the claim. Primavera was not a party to the Second Judicial Review and the only interested party was Shandler Homes (and the Second Consent Order was signed by Wilson Barca on its behalf).

(11) The First Supplemental Agreement

64. By a supplemental agreement dated 17 May 2013 and made between Primavera (1), FCRL (2) and Aramis Developments Ltd ("**Aramis**") (3) (the "**First Supplemental Agreement**"), the parties agreed to vary the Sale Contract so that the completion date was ten working days after the satisfaction of the Planning Condition (as defined) or twenty working days after the date of any waiver. They also agreed to substitute a new clause 11 under which the Sale Contract was now conditional upon the grant of a satisfactory planning permission subject to a long stop date of 18 months after the date of the agreement. The recitals also recorded that on 4 March 2013 FCRL had assigned the benefit of the Sale Contract to Aramis. Neither party explained the relationship between Aramis and Fusion (or FCRL).

F. The Second Application

(1) The Application

65. Under cover of a letter dated 2 April 2014 Mr Taylor submitted a new application for planning permission (the "**Second Application**"). The only version of the application form in the trial bundle was described in the index as "Superseded Application Form" (and this may be because the Second Application was later re-validated for the reason which I explain below). In Box 1 of the application form Shandler Homes was named as the Applicant again and in Box 2 Fusion was named as the Agent. In Box 3 the proposed development was described as the demolition of the existing dwelling and the erection of a three-storey building comprising seven two-bedroom apartments with underground car park and refuse store. In Box 25 Mr Taylor gave the certificate that twenty-one days before the date of the Second Application nobody apart from himself or the Applicant was the owner of the Property. In Box 26 he also made the declaration that the facts stated

in the Second Application were true and accurate.

66. Mr Simpson's evidence was that the Second Application was almost identical to the First Application and that the only difference was a reduction in the width of one of the plot's gardens leading to the proposed building being slightly further away from 20 Watford Road. This evidence was not challenged and I approach Primavera's claim in relation to the Second Application on the basis that there was no material difference between the two applications. On 8 April 2014 Ms Sahlke completed the register sheet recording that the statutory period had begun on that date and would expire on 3 June 2014. It was common ground that the fee was paid and that the Second Application was originally validated on 2 May 2014. On the assumption that the Second Application was validly submitted, it was also common ground that the eight-week period arose before Shandler Homes' right of appeal arose, expired on 3 June 2014.

67. On or after 3 April 2014 Fusion also submitted or uploaded to the planning portal an Affordable Housing Statement which had been prepared by Pioneer Housing & Development Consultants ("**Pioneer**"). The statement set out the relevant national and local policies and then proposed that Shandler Homes should make a financial contribution of £303,600 in lieu of providing affordable housing at the Property. Pioneer argued that it was physically and logistically impractical to make on-site provision for 40% affordable housing in accordance with the Core Strategy 2013.

68. Because Shandler Homes had chosen to offer a financial contribution instead of providing affordable housing, the Council chose to obtain an independent consultant to review and comment on the Pioneer report. Mr Simpson accepted that this decision was both commonplace and reasonable:

> "The early stages of the application's consideration involved HBC appointing an independent consultant to review the Pioneer Report, a practice which is common-place where there are issues of viability involved. There was clearly a question-mark over whether provision of a commuted sum was appropriate in lieu of on-site provision, under the terms of policy CS4 of the Core Strategy and I consider that HBC's decision to instruct an independent consultant was reasonable."

69. By email dated 1 May 2014 Mr Taylor wrote to Ms Sahlke stating that he had spoken to Mr David Codling of Peter Brett Associates ("**PBA**") and suggesting that if a fee could be agreed, Fusion would nominate them as the independent consultants. By email dated

2 June 2014 Mr Taylor wrote to Mr Codling accepting his fee quote and asking him for a breakdown for both the Property and another site at Gills Hill Lane. He also gave Mr Codling the following guidance:

> "David - I would welcome receiving your edited list (based on the items in my 29/5 email), of the items you will require from us in order to carry out the assessment. I agree that Brett's email (attached) is rather open ended in terms of the number of sites we need to look at and the amount of assessment (if any) carried out in relation to the same. However it does at least point us at some definable sites given the site list he's provided from Aldenham Parish Council. I propose that Fusion Residential liaise direct with the Parish Council re some of the 'medium' and 'smaller' sites on the list (attached fyi). We can get on with this whilst we collate responses to the other information you will be confirming that you require. Antoine/Ben please can we discuss strategy re these sites."

70. Brett was a reference to Mr Brett Leahy, who was the Council's Area Team Leader, and by email dated 3 June 2014 Mr Taylor wrote to both Ms Sahlke and Mr Leahy informing them that Fusion had now instructed PBA. On the same day he chased Mr Codling for the breakdown of his fees. By email dated 24 June 2014 Mr Taylor wrote to Mr Leahy again copying in Mr Ciaran Allen of PBA (to whom the independent assessment had now been assigned). In that email he outlined the additional evidence which Fusion had obtained to establish local demand for affordable housing. He also stated that: "we have undertaken a more than sufficiently robust exercise to ascertain the availability of land for residential development in Radlett".

71. On 7 July 2014 Mr Taylor wrote to Mr Allen asking him to put a hold on the viability assessments for both the Property and for Gills Hill Lane because he thought that they might not now be needed. Subsequent emails in the same chain also show that Mr Taylor was not at that stage prepared to authorise or pay PBA's fees. However, Mr Taylor must have asked PBA to resume work later because they produced a report (at least in draft). Nevertheless, Mr Taylor's instructions to PBA to stop work not only delayed the preparation of that report but caused the Council to instruct new consultants (as I now explain).

72. In early July 2014 Ms Sahlke had informed Mr Taylor that it would be necessary for a body called the Affordable Housing Forum to consider Fusion's evidence. By email dated 26 August 2014 she wrote to Mr Taylor explaining the composition of this body and reporting the outcome of a meeting of the forum which had taken place that day:

> "After much delay we have very recently received (dated 20th August 2014) the draft independent viability review from Peter Brett Associates. Some of the findings and points expressed have raised several questions and require further clarification, which has now been advanced to Peter Brett Associates for further comment. However, given the need to move matters quickly forward, I have now presented the item to the Affordable Housing Forum, which took place today at midday.
>
> The Affordable Housing Forum is an informal discussion panel chaired by the Director of Environment where members of the Legal Department, Housing Department and Planning Department discussed the merits of the case.
>
> During discussions at the forum the Legal Department have raised serious concerns to the level of correspondence that has taken part between Peter Brett Associates and Fusion Residential. In particular, the key point raised is that the direct contact from Fusion Residential unilaterally confirming/ requesting to Peter Brett Associates that the review of the Independent Viability Assessment should stop. This has taken place without any prior contact/agreement from the Local Planning Authority and repeated requests were made that all correspondence should be channelled through me. In addition, Fusion Residential have made a direct request to Peter Brett Associates to merge Gills Hill Lane and the 18 Watford Road assessment without any discussion/agreement with the Local Planning Authority.
>
> The above has caused delays to the progress of the Independent Viability review. In addition, under the advice of the Legal Department, the above has now exposed any planning decision based on the advice of Peter Brett Associates to a successful Judicial Review if challenged. Consequently, the risks have become too great. The basis of this advice relates to the point that the integrity of the independent advice provided by Peter Brett Associates is called into question. It is called into question as Fusion Residential and Peter Brett Associates had no mandate from the Local Planning Authority to stop work. However work stopped against the wishes of the Local Planning Authority and so independence can be questioned."

73. Because of the concerns expressed at the meeting of the Affordable Housing Forum the Council now appointed Savills plc ("**Savills**") to replace PBA and by email dated 28 August 2014 Mr Christoforou reported to Mr Taylor that they were about to be instructed to carry out a new and independent viability review of the Second Application and that it was not likely to be considered by the Committee until November 2014. In the event, Savills' review was complicated by the changes in policy which were taking place at the same time and it was not completed until November 2014.

74. This time lag prompted Shandler Homes and Primavera to threaten legal proceedings. By letter dated 14 November 2014 Mr Adrian Ring of Lawrence Stephens, who were acting

on behalf of both companies, sent a Letter of Claim to Ms Sahlke and because Primavera pleaded this letter in the Particulars of Claim I must set out the principal parts of it:

> "As a direct consequence of your Council 's handling of the above planning application and of planning application TP/12/0070 (which has twice been granted planning permission by your Council only for your Council on both occasions to subsequently submit to judgment when judicial review applications had been brought against your Council by a neighbour, Dr Bickerton), we have been retained to advise. We have also sought the advice of planning counsel, Mr Martin Edwards of 39 Essex Street.
>
> We are advised that what should have been a straightforward planning application for residential development has been badly mishandled by your Council not once but twice. The mistakes that your Council made in relation to application TP/12/0070 were obvious and basic. However, as a direct consequence our client has suffered (and continues to suffer) a considerable loss due to what can only be described as your Council's grossly negligent handling of these planning applications. Whilst planning application TP/12/0070 was received by your Council on 18 January 2012, nearly three years later there remains little sign that planning permission will be forthcoming in the near future.

75. Mr Ring referred to a number of authorities and then relied on the *Caparo* test which I consider in greater detail below. Because Mr Campbell's submission was that this test no longer applied and I need not set out those parts of the letter and I repeat only the further factual allegations which Mr Ring made:

> "It is clear from the circumstances of this case that established case law demonstrates that your Council is in such a sufficiently proximate relationship to our client as the applicant that the Council owed a duty of care, that the duty was breached and that the result of that breach was that our client has suffered foreseeable harm.
>
> A recent example of the application of these principles in the context of the handling of a planning application can be found in the case of *Woolridge v Torridge DC* [2011] EWHC 1238 (QB) where the claimant incurred losses because a local planning authority had failed to provide reasons when granting planning permission so that an aggrieved third party was able to successfully apply to quash the decision. Although there was a relationship of proximity between it and the claimant, in that case the events which subsequently occurred were not foreseeable and it was not fair, just and reasonable to impose a duty of care upon the local authority. That decision involved a simple technical breach - a failure to attach reasons to a decision notice, the significance of which only became apparent following an unrelated High Court decision- whereas the circumstances facing our client are far more extreme. We are therefore confident that, should our client pursue a claim in negligence against your Council with regard to the handling of planning application TP/12/0070, it

> will succeed and our client therefore places you on notice of its intention to hold your council liable and reserves its rights in this regard.
>
> Furthermore, your client is continuing to aggravate the losses suffered by our client in the way that it is handling the above planning application which was submitted to your Council on 3 April 2014 but remains undetermined. As a result of your Council's continuing delay in determining this application, our client is suffering additional losses due to the fact that it will now have to pay both the Community Infrastructure Levy and provide an enhanced level of affordable housing (whether on site or elsewhere). Had this application been determined in a timely manner then neither of these additional costs would have been incurred. We are also advised that our client is still awaiting vital information from the Housing Officer with regard to the site selection criteria and the 2014 Affordable Housing SPD.
>
> We are aware that your Council has been influenced by the prospect of further judicial review proceedings and we have seen a copy of the advice of Rupert Warren QC dated 14 May 2014. However, we are advised that Mr Warren's conclusions are tenuous and concentrate on aspects of planning judgment which the courts have consistently refused to entertain. We are instructed therefore that should further judicial review proceedings be taken once planning permission is granted then our client will actively participate in those proceedings and vigorously oppose the application. It is clear that, notwithstanding your Council's submission to judgment, the two previous judicial review applications lacked any wider public interest and, in the light of the new regime in the Planning Court, our client will pursue a claim for costs against your council and/or the claimant.
>
> We note that the Committee sits next on 11 December. We therefore require your substantive response as a matter of urgency."

76. Despite this letter and the threat of legal proceedings, Fusion and the Council continued to engage with each other about the changes in the Council's affordable housing policy. Some of these matters were dealt with by Ms Taylor in the Committee Report and I have set out the relevant extracts in the Appendix. But Mr Simpson also summarised the events between November 2014 and February 2015 in his first report and since he accepted that the Council's conduct was reasonable during this period, I gratefully adopt his narrative (references removed):

> "113. At the same time as this instruction of Savills, HBC was preparing a draft Supplementary Planning Document (SPD) concerning Affordable Housing provision in relation to Core Strategy Policy CS4. This draft SPD became an additional focus for scrutiny and application to the proposals under 14/0486. Although the agent began by contesting the relevance of the draft SPD to the planning application (emails through September and October 2014) he subsequently accepted that it would need to be considered and addressed as part of the application process. This follows

> the fundamental principle that operates in the consideration of planning decisions, as covered under the assessment of TP/12/0070JR above, that evolution of policy and guidance up to the point at which the decision is taken must be taken into account, with the weight to be attached depending on the stage that policy/guidance preparation has reached.
>
> 114. There was a long debate around the clarity of the emerging SPD and in particular the tests on page 16 of the document. In my opinion, such uncertainties over interpretation are common (and indeed inherent) in the interpretation of planning policy and guidance, especially when documents are still in their preparation stages and I don't find carelessness or unreasonable delay in HBC's responses to these queries.
>
> 115. Savills requested various clarifications from the applicant as part of their assessment of the proposals in September 2014 (via HBC as their client) but there was obvious confusion over what was being requested and what Savills had been provided with by way of briefing material. Pioneer was subsequently instructed to update their viability assessment in late October 2014 and that was sent to Savills for their review. Savills subsequently produced their independent report on 14 November and it was circulated to the applicant by email of 20 November 2014.
>
> 116. In addition to the emerging SPD on Affordable Housing, HBC was also in the process of preparing its Community Infrastructure Levy (CIL) which was adopted by HBC on 17 September 2014 but did not become applicable to planning applications until 1st December 2014. Correspondence between HBC and the applicant during the autumn of 2014 shows that both Savills on behalf of HBC and the applicants were aware of the impending introduction of CIL and were attempting to factor it in to their calculations.
>
> 117. There was a change of Case Officer for 14/0486 at the end of 2014 – Louise Sahlke left and was replaced by Simon Smith. Pioneer prepared their Further Assessment (FASS) which was circulated to HBC and Savills for their review on 5 January 2015. There followed a number of chasing emails from the applicant and agent to try and move the application forward to a target committee date in March/April 2015. At the same time Dr Bickerton had raised and was pursuing a boundary dispute which was noted to be irrelevant to the planning case but was nevertheless a distraction.
>
> 118. The issues behind the delays were summarized in a report of a conversation between Adrian Ring of Lawrence Stephenson and Chileme Hayes (HBC's solicitor) that took place on Tuesday 17th February 2015. The continued objections of Dr Bickerton and nervousness over the prospect of another JR together with impending elections and intent to avoid the application's determination being potentially caught up in the run-up to the election is in my opinion a reasonable position for HBC to take, albeit I note that the application was at this point approaching its 1-year anniversary."

77. Although Mr Simpson accepted that it was reasonable for the Council to target a date in

June 2015, he did not accept that the Council acted reasonably in the run up to that meeting and it remains necessary for me to examine the Council's conduct during that period. In early January 2015 Savills sent an updated financial appraisal to Mr Simon Smith (above), who was now dealing with the Second Application. He failed to pass this information on to Pioneer or to provide them with a copy and on 4 March 2015 Mr Taylor had to chase him for it. By email also dated 4 March 2015 Mr Taylor updated Mr Hugh Lacey of Pioneer. However, Mr Smith was not prepared to release the new appraisal to Mr Lacey directly and he had to request it from Savills (with Mr Smith's authority) and Mr Lacey only received a copy five days later.

78. Under cover of an email dated 26 March 2015 Mr Taylor sent Mr Smith Fusion's "Affordable Housing Position Statement" (or "**AHPS**") for the Second Application. In the covering email Mr Taylor also stated that Fusion's solicitors had re-established contact with Ms Hayes with a view to re-commencing work on a new S106 Agreement. The AHPS contained the following background information which is relevant to the claim:

> "This Statement has been prepared in response to a March 2015 request from Mr Simon Smith, the application case officer at Hertsmere Borough Council (LPA), that the Applicant Shandler Homes provide a supporting statement setting out how the proposal was considered to comply with Policy CS4 of the Core Strategy and the guidance/tests contained in the Draft Revised Affordable Housing SPD (Sept 2014). This Statement is to be read in parallel to the Applicant's Financial Appraisal Supporting Statement, addendum update report to the same and associated submissions made by Mr Hugh Lacey of Pioneer Property Services on behalf of the Applicant and agent Fusion Residential.
>
> The SPD and CS4 state that the default presumption is that on all qualifying sites Affordable Housing (AH) will be provided within the confides of the development site. In this instance 7 units are proposed of which 40% (2.8 rounded to 3) would be sought in the form of Affordable Housing. Para 1.40 of the SPD advises that 'alternatives to on-site provision will only be agreed exceptionally and where off-site alternatives are considered to be the best way to achieve the delivery of more affordable units'. The alternatives to on-site provision are set out on p17 of the SPD in order of preference; namely (a) that an equivalent amount of AH be provided on an alternative site (b) that land will be purchased for a Registered Provider (RP) or the LPA to build the AH units within the same settlement (c) purchase of existing units within the Borough and onward discount sale to the LPA/RP (d) the purchase of land elsewhere in the Borough for the LPA/an RP to build AH on and, (e) the payment of a Commuted Sum.

> Paragraphs 1.41-1.46 elaborate upon the process by which these preferences for affordable housing delivery are to be considered by the Council. Paragraph 1.41 sets out further 'sub-tests' inherent in justifying the payment of a payment-in-lieu/commuted sum payment.
>
> This Statement is written against the above Policy framework and a background where the LPA, upon the advice of their advisors Savills, have accepted that a commuted sum payment towards off-site AH is in this case justified. Indeed the stance of the LPA is that in having taken into account all applicable circumstances and a viability appraisal prepared by the Applicant and appraised by Savills for the LPA, that the extent of the AH contribution amounts to £10,000. Confirmation was provided on 19th March 2015 by Savills to the LPA setting out that they supported the position that a payment of £10,000 towards AH was justifiable and vindicated."

79. By email dated 7 April 2015 Mr Christoforou wrote to Mr Smith himself asking for his help to "drive this application forward to the earliest possible committee meeting". By email dated 8 April 2015 Mr Ring of Lawrence Stephens also wrote to Ms Hayes chasing her to put Fusion's proposals before the Affordable Housing Forum. He received a short reply from her the following day and by email dated 21 April 2015 he wrote back stating that her reply was unacceptable and asking for further action. It was Mr Simpson's evidence that the AHPS was not made available to the public or to consultees until 30 April 2015 and by email dated 7 May 2015 Mr Taylor complained to both Mr Smith and Ms Hayes that it had not been made available to Dr Bickerton's advisers (who had now lodged further objections).

80. By email dated 18 May 2015 Mr Taylor wrote to Ms Pauline Glen. She was a solicitor at Ingram Walter Green LLP ("**IWG**"), the firm instructed by Fusion to agree the new S106 Agreement. He reported that Mr Smith had told him that the Council was happy to progress the new agreement and by email dated 18 May 2015 Mr Christoforou wrote to Ms Hayes personally asking her to move forward to a Committee meeting without any further delays.

81. By email dated 8 June 2015 Mr Taylor chased Mr Smith again stating that Ms Glen had not heard from Ms Hayes and on the same day Mr Charles Goldstein, a local councillor, also chased Mr Smith. On 10 June 2015 Ms Hayes sent a draft of a unilateral undertaking to be given by Primavera (the "**S106 Undertaking**"). By email dated 7 July 2015 Mr Martyn Emmens, the solicitor at IWG who was now dealing with the matter, wrote to Ms Hayes enclosing the travelling draft and on both 14 and 17 July 2015 he chased her for a

response.

82. By email dated 24 June 2015 Mr Taylor informed Mr Down that Mr Smith had now left the Council and by email dated 10 July 2015 Mr Scott Laban, a Development Team Manager, informed Mr Taylor that the Second Application had now been assigned to Ms Taylor. Mr Laban described her as having "a very thorough approach to matters". He also stated that he was planning to sit down with her and complete a Committee Report during the following week. By email dated 20 August 2015 Ms Taylor wrote to Mr Taylor informing him that the CIL Liability for the development would not be £316,260 but £337,422.22 (because of indexation) and that she had asked Savills to consider whether the development would support a financial contribution of £110,000 for affordable housing.

83. By email dated 9 September 2015 Ms Taylor wrote to Mr Taylor again stating that Committee members were unlikely to agree to a financial contribution of £10,000 and that the officers had agreed to recommend that the Council commission a further independent review of Pioneer's viability assessment. She also stated that the Council had a framework agreement with BNP Paribas Real Estate ("**BNPP**") under which it was offered the work first. Finally, she stated that it would probably be in Fusion's interests to supply an updated viability assessment for the independent consultant to review and she asked him to let her know whether Fusion wished to provide an updated assessment by 18 September 2015. At the end of her email she stated: "I'm sorry to introduce a further delay in the process and look forward to your response on the point above."

84. By email also dated 9 September 2015 Mr Taylor replied at some length complaining vigorously about the need for an updated independent review. However, he reluctantly agreed and asked Ms Taylor to instruct BNPP immediately. He also asked for a roundtable discussion. By email dated 16 September 2015 Mr Taylor then chased for a response complaining again that a further week had now passed. On 23 September 2015 Mr Christoforou himself followed up these exchanges threatening a complaint to the Local Government Ombudsman. By email dated 23 September 2015 Ms Taylor replied giving the following explanation:

> "Just to clarify, I had previously asked Savills for an opinion on two specific issues, namely the effect of CIL indexation on the viability appraisal and whether a recently refused scheme at 8 Watford Road could

> offer a useful comparator.
>
> We subsequently (on 9th September) had an internal officers meeting to decide how to take the case forward. It was at this meeting that the decision to commission a new review of the viability appraisal based on current market values (at the Council's cost) was taken. I emailed Iain later that day to explain this decision and to ask whether you wish to submit an updated viability appraisal at current market values or if you would prefer us to base the new review on the existing appraisal. I am still awaiting a reply on that point. I also explained that the Council now has a framework agreement with BNP Paribas which gives them first refusal of any viability review work undertaken on our behalf, and that we would therefore be approaching them in this instance. This is not intended as a reflection on the work undertaken by Savills to date.
>
> I was then on annual leave from 10th to 17th September inclusive and consequently was not able to progress the case during this time. Since my return to the office four days ago, I have been inundated with other urgent business, and I apologise if I have not given your case my immediate attention. However, if I could have your reply to my point above I will then approach BNP Paribas with a view to commissioning an updated review as soon as possible."

85. By email dated 25 September 2015 Mr Taylor wrote back disagreeing about who was to blame for failing to instruct the new consultants but asking Ms Taylor to approach them now. He also stated that Fusion would immediately commission a further viability assessment. As she had indicated, Ms Taylor then instructed BNPP to carry out the independent review and on 1 October 2015 the Council and BNP Paribas entered into a fee agreement. By email dated 9 October 2015, however, Mr Taylor expressed alarm that BNPP had been instructed to make their own viability assumptions and confirmed that Pioneer would be providing an updated assessment.

86. Fusion and Primavera now threatened legal proceedings again. By letter dated 14 October 2015 Mr Ring of Lawrence Stephens wrote to the Council setting out detailed criticisms of the Council's conduct in relation to the Second Application and rehearsing the correspondence between solicitors. Although I have referred in detail to the underlying correspondence and the letter contains Mr Ring's gloss on those documents (based on Mr Taylor's instructions), I should set out a number of extracts from the letter both because it is pleaded in the Particulars of Claim and because Mr Campbell relied on it in his chronology for the Second Application. In particular, Mr Ring made the following criticisms of Ms Taylor's conduct:

> "Even though my client was concerned about the lack of progress and the

> introduction of new elements, a number of weeks have passed and little or nothing appears to have progressed. There is no confirmation that BNP Paribas have been instructed or that the affordable housing panel have now met. Mr Taylor made a number of requests in his email dated 22 September, a copy of which I attach.
>
> On 23 September, June Taylor responded that there had been "an internal officers meeting to decide how to take the case forward'. it was only apparently at that meeting that a decision to commission a new review of the viability appraisal based on current market values was taken. It also confirmed that BNP Paribas had not been instructed but that they would be approached due to the Council's Framework Agreement to give them first refusal of any viability review of any work. The email also confirmed that June Taylor was on annual leave between 10-17 September and that since her return to the office she had "been inundated with other urgent business".
>
> Mr Taylor responded to a question about whether Hertsmere were waiting for a response regarding the commission of a third viability assessment - "we will now immediately commission a further viability assessment. Please do now approach BNP Paribas". My client has now commissioned this assessment. The final paragraph of Mr Taylor's email on 25 September asks "please do keep me apprised of what is happening in this regard and indeed in relation to all material circumstances relevant to this whole process".
>
> Mr Taylor spoke with June Taylor on Friday 9 October. It appears that BNP Paribas may have been instructed, although June Taylor did not inform them of Mr Taylor's email of 25 September in which he confirms my client would be immediately commissioning a further viability assessment. Mr Taylor stated- "As requested, please now inform BNP Paribas that our updated viability survey will be with them soon and they are to consider this once received. Please have them work everything else up as far as they can pending receipt of the same".
>
> It appears that BNP had been working on their own update. Had Mr Taylor not called June Taylor on 9 October, our client would have been entirely unaware of the nature of the instructions.
>
> In summary, the delays and lack of urgency are wholly unacceptable. Any claim my client may have against Hertsmere is exacerbated by these continuing failures, problems, delays and introduction of new issues."

87. In the event, it took Mr Taylor himself until 26 October 2015 to provide the Council with Pioneer's revised assessment (known as a "**Financial Appraisal Supporting Statement**" or "**FASS**"). By contrast, BNPP took just over two weeks to complete their own report and on 11 November 2015 Ms Taylor provided Mr Taylor with a copy. In the covering email she stated that the usual procedure was to allow applicants either an opportunity to provide any further information which might justify amendments to the report or to agree the report's conclusions.

88. Perhaps predictably, Mr Taylor did not agree the conclusions in the BNPP report and raised a number of objections. Between 11 and 26 November 2015 there was a large volume of email traffic between himself, Ms Taylor and Mr Laban addressing these issues. By 23 November 2015 the Council had received BNPP's revised report and by email dated 26 November 2015 Ms Taylor wrote to Mr Taylor informing him that she was confident that the officers could recommend approval of the development scheme subject to a further review by the Affordable Housing Forum. As Mr Simpson pointed out, she also stated: "I'm sorry for the delay in responding to you."

89. By email dated 15 December 2015 Ms Taylor now wrote to Mr Taylor (with a copy to Mr Christoforou) in relation to the terms of the S106 Undertaking. She stated that the Adopted SPD contained a clawback mechanism which applied to all sites eligible for affordable housing provision. She also stated that the Council's standard clawback provision entitled it to 60%, that the "policy compliant" commuted sum was now £381,634 and that the Council would seek to recover it through the clawback mechanism. This caused consternation at Fusion and by email dated 17 December 2015 Mr Christoforou wrote to Mr Down stating as follows:

> "We cannot have two overages on this site + a £380K odd of contributions on day 1! Despite Iain speaking to June Taylor at Hertsmere, it seems they are saying we must agree to this to get a favourable recommendation."

90. By letter dated 16 December 2015 Mr Emmens of IWG had also written to Mr Taylor explaining in more detail the provision which the Council wished to include in the S106 Undertaking (or any new S106 Agreement) and expressing a number of legal and practical concerns about it. He described the provision itself in the following terms:

> "I note that Hertsmere Council are now looking to provide in the S106 Agreement/approved form unilateral undertaking pursuant to S106 (Town and Country Planning Act 1990) for further viability appraisals later in the development, and the potential for a form of clawback requiring increased contributions in lieu of on-site affordable housing. These further contributions would become due, should a later viability appraisal show that the development could "support" further affordable housing due to, in essence, the private unit sales provingto [sic] be more profitable than originally anticipated."

91. By email dated 17 December 2015 Mr Taylor replied to Ms Taylor's email explaining Fusion's objections and offering to provide a copy of IWG's letter. In the last sentence

of his email (which he highlighted in bold) he said: "We absolutely do not want Hertsmere to rush to any decisions until we're all agreed on what is actually involved in the clawback process." By email dated 18 December 2015 Ms Taylor replied stating that the Adopted SPD (and its predecessors in draft) referred to both "clawback" and "deferred payments" and confirming that the Council was seeking a deferred payment rather than a clawback. She then set out in detail how such a provision was intended to work.

92. By email dated 6 January 2016 Mr Taylor wrote back to Ms Taylor stating that Fusion would be sitting down with Shandler Homes and its partners to consider the implications of her email. By email dated 15 January 2016 Mr Taylor reported to Mr Down that he had met Ms Taylor at the Property and that she had told him that she was ready to go to the next available Committee meeting once he had confirmed Fusion's position in relation to the clawback provision. He also reported that she had told him that the Council "was at the mercy of Counsel who had to review (and be seen to review) every step". By email dated 3 February 2016 Mr Taylor wrote to Ms Taylor in the following terms:

> "Further to our earlier conversation, my email of 6/1/16 below and to maintain a paper trail, I just wanted to confirm that we are continuing to discuss with the Applicant the implications of the "Review Mechanism". Accordingly please bear with us and we'll get back to yourselves on this to confirm whether the concept is accepted and we are happy to proceed to S106/Committee, or we are unable to accept."

93. In the meantime, Shandler Homes had taken back management of the Second Application from Fusion. By email dated 29 January 2016 Mr Down wrote to Ms Taylor informing her of this and stating that that he was prepared to accept Ms Taylor's proposal subject to two important issues: first, whether the viability review upon which the deferred payment should be calculated after the sale of the fourth rather than the final unit and, secondly, whether it should be calculated after the scheme had delivered a developer's profit of GDV plus 20%. By email dated 1 February 2016 Ms Taylor replied stating that she was prepared to accept GDV plus 20% but not that the viability review should take place after the sale of the final unit.

94. It is unclear from the correspondence in the trial bundle when this issue was resolved. But by email dated 18 February 2016 Mr Down wrote to Ms Hayes indicating that the "nuts and bolts of the affordable housing issue" had been agreed in the previous week.

However, a technical issue also arose at the last minute. By email dated 22 February 2016 Ms Taylor wrote to Mr Down drawing attention to a problem with the indicative plan showing the layout of footpaths and on 26 February 2016 Mr Taylor supplied a new one to put before the Committee. By this date, therefore, the information required for the Committee Report and the Committee meeting had finally been assembled.

95. By email dated 11 March 2016 Mr Ring wrote to Ms Hayes asking her to confirm that counsel's opinion had been sought and that it would be presented to the Committee in April. By emails dated 14, 15 and 16 March 2016 he chased her successively. By email dated 16 March 2016 she replied stating that counsel's opinion had been sought and that she was preparing detailed instructions to ensure that the advice which the Council received made the Committee report robust and "challenge proof". On 16 March 2016 Mr Ring sent two emails continuing to press for information and on 24 March 2016 Mr Christoforou got involved himself and asked for confirmation that counsel's opinion had been received. He chased on 30 and 31 March 2016 and on 31 March 2016 Ms Hayes confirmed that the Council was expecting to receive counsel's advice the following day.

(2) The Committee Report

96. Under cover of an email dated 1 April 2016 Ms Taylor sent Mr Down a final draft of the Committee report for comment and informed him that it would be finalised on 12 April 2016 for the next Committee meeting on 21 April 2016. I have set out in the Appendix the detailed explanation which Ms Taylor gave to the Committee in relation to the affordable housing issue in the final report. In the summary she recommended that powers be delegated to the Development Team Managers to grant planning permission subject to the receipt of a S106 Agreement or S106 Undertaking by 2 June 2016 or at a later date to be agreed in writing. She also made the following recommendations:

> "10.93 Contributions to affordable housing provision will be secured through a S106 Agreement to be signed with the applicant. This will require: a. a payment in lieu of affordable housing, of £10,000; b. a deferred payment in lieu of affordable housing, if the Gross Development Value (GDV) of the site increases, of 60% of the increase in GDV. The GDV will be assessed on the sale of the fourth flat, with the deferred payment due prior to the sale of the seventh flat. The deferred payment is capped at £371,634, representing the balance of the policy-compliant commuted sum."
>
> "10.95 The proposal is chargeable under the Community Infrastructure

> Levy Regulations 2010 (as amended) due to the gross floor space proposed being 2,161sqm and involving the creation of new dwellings. Taking consideration of any demolition and retained floor space (but prior to any claim for relief or exemption), the anticipated CIL charge including indexation amounts to £337,432.22."

97. In the Committee Report Ms Taylor also stated that the start date for the purpose of the statutory period was 14 May 2014 and not 8 April 2014 (as Mr Sahlke had originally recorded). She explained this in an email dated 6 April 2016. In particular, she explained that the Second Application as originally submitted was subsequently invalidated because it was later agreed that it would include a strip of land owned by the Council to provide a public footpath to the front of the Property and new notices had to be served. It follows, therefore, that the statutory period of eight weeks did not in fact expire until 9 July 2014.

(3) The Committee Meeting

98. It is common ground that on 21 April 2016 the Committee meeting took place and that the Committee resolved to grant the Second Application subject to completion of a new S106 Agreement by 2 June 2016. Primavera does not allege that this resolution was flawed in anyway. Nor does it challenge the accuracy of the Committee report or the lawfulness of the recommendation made by Ms Taylor. Indeed, Mr Simpson's evidence about the report and the meeting was limited to the following:

> "134. The application was indeed reported to the 21 April Committee where Councillors resolved to grant consent subject to the completion of the S106 Agreement (rather than the UU that had been prepared to date). The Committee agreed to a deadline of 2nd June for the completion of the Agreement. This allowed six weeks for the Agreement to be completed and engrossed which, given all of the previous work on the Unilateral Obligation, should have been achievable in my opinion."

(4) The Second S106 Agreement

99. Under cover of an email dated 25 April 2016 Ms Hayes sent a draft of a second S106 Agreement (the "**Second S106 Agreement**") to Mr Down. In the covering email she asked for an undertaking for costs of £1,500 and told him that she was sending the draft to him at the same time as her own clients. By email dated 28 April 2016 Mr Emmens (who was now a partner in IWG) wrote to Ms Hayes stating that he had certain

amendments to the document but that it gave rise to one crucial point of principle:

> "The draft provides that the developer pays by way of additional contribution 60% of any increase in the actual GDV over the base GDV. That's fine, but it is only the first limb of the calculation. GDV does not take into account, for example, build costs. There is supposed to be a second limb of the calculation whereby once that the difference in GDV is calculated, the developer only has to pay where they have made in excess of 17.5% profit on the development. See June Taylor's email of 18 December confirming this. Please confirm that this is agreed in principle, and how you would propose amending schedule 3 to deal with it."

100. By email dated 28 April 2016 Ms Hayes consulted Ms Taylor who confirmed that Mr Emmens' understanding was correct. By email dated 3 May 2016 Mr Emmens wrote to Ms Hayes again giving the undertaking in costs and chasing for an answer to the point of principle. By email dated 4 May 2016 Ms Hayes replied attaching an updated draft of the Second S106 Agreement. She explained the changes which she had made as follows:

> "Please find attached an updated version of the draft agreement taking into account that the Financial Appraisal to be submitted will include calculations which is less the build costs and the Developer's return on investment. This draft also includes the GDV Baseline figure of £8,952,803."

101. On 6 May 2016 Mr Emmens returned the travelling draft. He pointed out that the name of the mortgagee had changed. He also stated that he had "amended substantially" the mechanism for the payment of the additional affordable housing contribution (which was payable after the viability assessment had been made) by reference to a formula which he explained in the text. By email dated 11 May 2016 and timed at 13.50 Ms Hayes replied stating as follows:

> "I will review and come back to you. However, we have taken the view in the Legal Department that in order to maintain consistency with the [sic] our AH deferred payment clauses in all our legal agreements we will not use formulas."

102. Between 13.50 and 14.14 on 11 May 2016 Mr Emmens and Ms Hayes exchanged two emails each in which he tried to persuade her to give way and she pushed back against his suggestion. On the morning of 17 May 2016 Ms Hayes asked Mr Emmens to supply a clean copy of the draft (which he did so immediately). Under cover of an email also dated 17 May 2016 Ms Hayes sent him a revised draft with the following explanations:

> "Please find attach my further amendments done in tracked changes. In order to expedite action, I am sending it to you at the same time as to my clients, it is therefore subject to any comments that they may wish to make. You will see that I reverted to my previous format in order to maintain consistency across the board in all of our S106 clauses with deferred payment mechanisms, but I have taken into account the points made as per June's e-mail that you attached. The amendments give effect to making it absolutely clear that the calculations carried out in the Updated Financial Appraisal would inform any resulting Additional Affordable Housing Contribution. It is for the Viability Expert to include the details of what the Developer's costs includes in the updated Financial Appraisal and not an issue for lawyers in the S106. On this basis, I have replaced your definition of Developer's costs with a simpler definition which gives effect to the ratified heads of terms by the Planning Committee with in my view no detriment to your clients."

103. Ms Hayes had also deleted the provision relating to the CIL Liability on the basis that it had no place in the Second S106 Agreement because it was governed by the CIL Regulations. By email dated 18 May 2016 Mr Emmens wrote back objecting that "the amended wording changes the effect completely and is not correct". By email dated 23 May 2016 he chased for a response. On 26 May 2016 at 15.03 Mr Down intervened and wrote to Ms Hayes directly at 15.03. He stated as follows (original emphasis):

> "I refer to my emails to you of; ***3rd May, 11th May, 13th May, 16th May and 20th May***; all of which remain unanswered. Today is the 5th week anniversary of the Planning Committee where planning permission was granted subject to agreement of the 106. Can I ask why a relatively simple matter is taking so long to complete and why I have not had the courtesy of a reply to any of my communications? Please, please, please now arrange for the S.106 to be finalised so we can all move on with our lives."

104. By email timed at 15.16 Ms Hayes replied pointing out to him: "You have a Solicitor instructed and on this basis I will deal directly with your solicitor accordingly." Mr Taylor then got involved himself and at 15.18 he wrote to both Ms Hayes and Ms Taylor stating as follows:

> "I must add to Mr Down's comments by reminding Officers that Members specifically accepted the recommendation before them subject to the submission of a S106 by 2nd June 2016. Please see 1.1 of Committee Report. The Applicant is being prevented from adhering to this deadline by the Council not reverting on the matters in question. Whilst 1.1 does provide an "agreed later date" scenario, it is quite unreasonable that the Applicant is in effect being (potentially) forced into requesting an extension owing entirely to the Council not responding in a timely manner to the points raised. The Applicant and I look forward to the speedy return

> of the finalised draft the latest version of which we provided to yourselves and Chileme on 18th May."

105. A minute later, at 15.19 Mr Emmens wrote to Ms Hayes again stating: "May I please hear from you on my email of 18 May then." Ms Hayes replied at 15.22 stating that she had competing priorities and was planning to review the draft on 31 May 2016. At 15.25 Mr Emmens wrote again stating: "Then how are we supposed to meet the 2 June deadline for completion?" Ms Hayes replied stating: "This will be a matter that will need to be resolved by Planning and your clients." By email timed at 15.53 Mr Taylor wrote to Ms Taylor. This time he took a slightly less aggressive and more emollient stance and asked her to agree to an extension of time for completing the Second S106 Agreement until 1 July 2016. By email dated 1 June 2016 Ms Taylor agreed to the extension.

106. By email dated 13 June 2016 Mr Taylor wrote to both Ms Taylor and Mr Andrew Smith, the Development Management Team Leader, with a copy to Councillor Linda Silver. He stated as follows:

> "Please will you update us on what is going on with the S106 drafting? Neither I nor the Applicant Shandler Homes, cc'd, have heard back on this most pressing matter. We're now nearing the 8 week mark since the Committee at which Members agreed the resolution. We have already had to request an extension of time to complete the S106 - I don't want to have to extend the period again. It's really quite remarkable we're still unable to agree the wording. As Martyn opines below, surely this is not the first S106 with a clawback mechanism in it that HBC have been involved in? We have done everything asked of us, supplied all that requested, redrafted specifically within hours all in accordance with directions from yourselves – yet still we do not have HBC sign off of the draft nearly 8 weeks after the Committee agreed to the resolution."

107. By email dated 13 June 2016 Councillor Silver wrote to Mr Taylor stating that she had also requested an update and by email dated 16 June 2016 Ms Taylor replied to this email giving a detailed explanation for the current impasse. Because it is Primavera's case that this response was negligent, I must set it out in some detail:

> "The drafting process has been complicated by the following factors:
>
> (a) your financial appraisal did not follow the traditional format which includes Developer Profit as a cost and identifies a Residual Land Value as the output.
>
> (b) The Benchmark Land Value of the scheme was never agreed between us, with your assumption of £2m differing from our view that £1.3m is

> realistic.
>
> (c) We agreed, prior to taking the case to committee, that it would be reasonable to assume Developer Profit of 17.5% as opposed to the 8% (actually 7.92%) assumed in your appraisal. This is on the proviso that the Benchmark Land Value is agreed at £1.3m, as made clear in paras 10.37 and 10.38 of the committee report ie the two factors effectively cancelling each other out.
>
> (d) It is not our usual practice to accept an increased level of Developer Profit and consequently I think our solicitors were acting in our best interests in flagging this up as a concern. However I have not had time to give the matter my full attention until recently and so apologise for the delay.
>
> As you will remember this agreement was made in the spirit of moving the case on rather than spending more time arguing about what the Benchmark Land Value should be. I now need your confirmation that you agree to a Benchmark Land Value of £1.3m and Developer Profit of 17.5% before I can instruct our solicitors to amend the s106 to our mutual satisfaction."

108. By email dated 17 June 2016 Mr Taylor wrote back to Ms Taylor agreeing to use a Benchmark Land Value of £1.3m and a Developer's Profit of 17.5%. He also stated that this agreement was "very much given on the basis of the drafting of the S106 now proceeding to completion without further delay". By email dated Wednesday 22 June 2016 Mr Taylor chased again and by email dated Thursday 23 June 2016 Ms Taylor replied stating that she had "made some amendments to the s106 whilst working at home on Monday" but had forgotten to send it to them on Tuesday. She assured Mr Taylor that she would send it that day. By email dated 30 June 2016 Mr Taylor wrote to Mr Downs, Mr Emmens and Mr Christoforou stating that Ms Taylor had confirmed that she had done so.

109. By email dated 5 July 2016 and timed at 10.31 Mr Taylor chased Ms Hayes and by email timed at 11.05 she replied stating that "we are just so busy – there are other competing priorities". But she stated that she now had instructions and would try to respond that week. On 8 July 2016 Ms Hayes sent Mr Emmens a revised draft of the Second S106 Agreement. On the same day he replied to her raising the objection that it contained no definition of "Development Costs". By email dated 11 July 2016 Ms Hayes responded as follows:

> "The Council has taken specialist advice from our Viability Consultant in making amendments to this draft. We do not agree that Development Costs needs to be defined in the agreement. This will need to be stated cost in

> the updated appraisal to inform the review - the Development Costs is one of the important areas where input is required from the Council's Viability Consultant as to the acceptability of what is included in the Development Cost. The acceptability of what the Council accepts will clearly be based on accepted methodology in the industry and best practice. An Appraisal has already been submitted to the Council at the application stage which has been checked by various independent Consultants on behalf of the Council so your clients are familiar with their method of working."

110. Mr Emmens had not replied to this email by 21 July 2016 when Mr Taylor wrote to Ms Taylor stating that he was going on leave and asking for a further extension of time until 16 September 2016 to complete the Second S106 Agreement. It is unclear when Mr Emmens returned the travelling draft to Ms Hayes but by email dated 29 July 2016, he informed Mr Down and Mr Christoforou that he had now done so. Given the allegations of delay made by Primavera against the Council, I note that it took eighteen days for Mr Emmens to take instructions and return the draft to Ms Hayes.

111. On Friday 8 August 2016 Mr Richard Barca of Wilson Barca wrote to Ms Hayes forwarding an email chain which included comments on the draft of the Second S106 Agreement from Ms Carolyn Morgan-Welker, a solicitor at Irwin Mitchell LLP. In his email Mr Barca stated as follows:

> "We act for the current owners of the Property. Our client's bank have sent their comments as below and attached on the latest draft, which I understand was forwarded to you last week Could we have your comments on these matters?"

112. On Monday 11 August 2016 and Tuesday 12 August 2016 Mr Barca chased Ms Hayes. The tone of both emails implied that Ms Hayes had been discourteous in failing to reply to his first email. By email dated 12 August 2012 Mr Down also wrote to Ms Hayes criticising her for failing to respond:

> "I refer to Richard Barca's emails of 8th and 11th August and to my own email of 10th August all of which remain unanswered, not even with the courtesy of an acknowledgement. Other people's businesses and livelihoods are in your hands yet you do not seem to care one jot. The market is difficult, made even more difficult by the recent turn of events and we should, at least, have a fair chance of trying to conduct some business without bureaucratic red tape continuing to hold us up as has done so for the last FOUR years. Please, please, please, please may we now hear from you with hopefully an agreed 106 so that, finally, we can be issued with Planning Permission for this site."

113. I was not taken to Mr Down's email dated 10 August 2016 either in evidence or in submissions and I was unable to locate it in the trial bundle (although it is a pleaded document). But in any event 10 August 2016 was a Saturday and Mr Down could hardly have been surprised that Ms Hayes had not replied when Mr Barca and he started to chase her again. In any event, on 12 August 2016 Ms Hayes replied to Mr Down in the following terms (original emphasis):

> "As far as I am aware, Shandler Homes is not a party to the Section 106 agreement either as Owner or Developer and I do not know in what capacity that you are acting? Suffice it is to say that I have now responded (**as protocol requires - emphasis mine**) to Martyn Emmens, the Solicitors instructed on this matter with an amended draft for approval to enable me to issue the engrossments accordingly."

114. On 27 September 2016 completion of the Second S106 Agreement finally took place. The agreement was made between Primavera (1), Fusion Watford Road Ltd ("**FWRL**") (2), Nedbank Private Wealth Ltd ("**Nedbank**") (which was now the lender) (3) and the Council (4). By its terms Primavera agreed to pay an "**Affordable Housing Contribution**" of £10,000, an "**Additional Affordable Housing Contribution**" subject to a "**Maximum Sum**" of £412,694 and a "**Monitoring Contribution**" of £808.50.

(5) The Third Decision

115. On 28 September 2016 Ms Christine Lyons, the Head of Planning and Economic Development issued a decision notice in which the Council granted full planning permission to carry out the development of the Property (and I will call this decision the "**Third Decision**"). The decision notice described Shandler Homes as the Applicant and Fusion as the Agent. By email dated 30 September 2016 Mr Taylor circulated it to Mr Christoforou, Mr Emmens and Mr Down. The Third Decision was never implemented, however, for reasons which I explain (below).

(6) CIL Liability

116. Mr Georgiou gave written evidence that Primavera assumed a CIL liability of £316,260 in relation to the Second Application and the Third Decision. His evidence was based on paragraph 10.34 of the Committee report (which I have set out in the Appendix) but he had not verified the payment itself. Mr Westhoff gave written evidence that Primavera assumed a CIL Liability of £445,944. His evidence was based on his own calculations

using the formula set out in the CIL Regulations. However, Mr Simpson was not prepared to agree this figure in the joint statement which he signed on 9 June 2022 and Mr Westhoff signed on 10 June 2022.

G. The Third Application

(1) The Application

117. On 30 September 2016, only two days later, Fusion submitted a third planning application in relation to the Property (the "**Third Application**"). I was not taken to the application form or any documents relating to the application but I assume from the decision notice (below) that Fusion was named as both the Applicant and the Agent. Mr Westhoff's evidence was that the Third Application was materially different from both the First and Second Applications and resulted in different calculations for the CIL Liability and the other contributions (including any affordable housing contributions which the owner or developer was required to make):

> "The Third Planning Application (LPA ref. 16/1931/FUL) was materially different to both the First and Second Planning Applications. This scheme provided 3 x additional units, covered a larger footprint and therefore was required to make larger CIL and S106 financial contributions. As set out under the response to issue (v), I am of the view that this scheme could never have been assessed as an amendment to the 7 x unit applications (i.e. the First or Second Applications) as it would have been materially different. This conclusion is also supported by the fact that the Third Planning Application was assessed as a new, standalone planning application."

(2) The Third S106 Agreement

118. By a further agreement dated 14 March 2017 (the "**Third S106 Agreement**") and made between Primavera (1), FWRL (2), Nedbank (3) and the Council (4), Primavera agreed to pay an Affordable Housing Contribution of £130,000, and Additional Affordable Housing Contribution subject to a Maximum Sum of £414,176 and a Monitoring Contribution of £808.50. Schedule 1 to the agreement also imposed a covenant on the Owner not to commence development until the Affordable Housing Contribution had been paid.

119. Schedule 3 to the Third S106 Agreement also provided that Primavera was to submit a "**Financial Appraisal**" which would confirm the sales prices achieved for the first six

units and provide an estimate of the open market value for the remaining units based on a comparison between the "**Residual Land Value**" and the "**Benchmark Land Value**" set out in the agreement. Paragraphs 3 to 5 then provided as follows:

> "3. If the Financial Appraisal demonstrates that there is any Additional Affordable Housing Contribution due as a result of the Residual Land Value exceeding the Benchmark Land Value then Developer will pay the same within 28 days of the written acceptance of the Financial Appraisal by the Council.
>
> 4. If any Additional Affordable Housing Contribution is payable in accordance with paragraph 3 but the Additional Affordable Housing Contribution does not amount to the Maximum Sum then the Financial Appraisal shall be referred to a RICS qualified surveyor who by the terms of his appointment shall be required to make a decision as to the Financial Appraisal within 15 working days.
>
> 5. The Owner shall not complete the sale of the eighth (8) Housing Unit of the Housing Units within the Development until any outstanding Additional Affordable Housing Contribution due to the Council in respect of the Development has been paid to the Council (but this restriction will not apply where the Developer has made a payment pursuant to paragraph 3 of this schedule but the final Additional Affordable Housing Contribution is subject to dispute or determination pursuant to paragraphs 7-14 (inclusive) of this schedule)."

(3) The Fourth Decision

120. On 15 March 2017 Ms Lyons issued a decision notice in which the Council granted full planning permission to carry out the revised development of the Property (and I will refer to this decision as the "**Fourth Decision**"). This time Fusion was named as both Applicant and Agent in the decision notice and shortly after the Fourth Decision Primavera transferred the Property to Fusion (as I explain shortly). Primavera did not call any evidence to prove that the Fourth Decision was implemented and, if so, by whom. But Mr Walsh cross-examined Mr Down on the basis that Fusion rather than Primavera developed the Property in accordance with the Fourth Decision and that it sold the new units for £14.37m. Mr Walsh put this proposition to Mr Down on the basis of Land Registry searches and Mr Down did not disagree. I did not understand Mr Campbell to challenge this proposition but if it is necessary for me to do so, I find that Fusion (and not Primavera) developed the Property and sold the individual units for £14.37m.

(4) CIL Liability

121. Mr Westhoff's written evidence was that the CIL Liability for the development permitted by the Fourth Decision was £496,556. Mr Georgiou did not give evidence in relation to the appropriate figure and although Mr Westhoff and Mr Simpson signed a joint statement together, Mr Simpson did not state whether he agreed or disagreed with Mr Westhoff's figure. It is unnecessary for me to decide whether Mr Westhoff had accurately calculated the CIL Liability for the development of the Property because it is clear from the contemporaneous documents that the Council calculated and demanded a lower sum (as I now explain).

122. Under cover of a letter dated 13 April 2017 the Council served notice on Fusion's company secretary that it was liable to pay CIL of £410,752.47 (subject to indexation) on the commencement of the development of the Property. Under cover of a letter dated 10 August 2017 the Council also served notice of demand requiring payment on 1 December 2017. Finally, by letter dated 20 December 2017 the Council wrote to Fusion's company secretary acknowledging payment of the total sum of £410,752.47. There is no evidence that either Primavera or Fusion itself was required to pay an additional sum.

(5) The Sale of the Property

123. By an agreement dated 31 March 2017 (the "**Second Supplemental Agreement**") and made between Primavera (1) and FWRL (2), the parties agreed that the Fourth Decision was a Satisfactory Planning Permission (as defined) for the purposes of the original agreement and FWRL agreed to waive the Planning Condition (as defined). They also agreed to increase the purchase price from £3,515,000 to £3,765,000 and that no overage would be due to Primavera. Finally, they agreed to complete the sale on 30 June 2017 (subject to any application by a third party for judicial review).

124. Mr Down accepted in cross-examination that Fusion was entitled to rescind the Sale Contract after 17 January 2013. He also accepted that he had no choice but to accept Fusion's offer to buy out Primavera's contractual right to a share of the overage and that he tried to find an alternative purchaser but was unable to do so. I then asked him to explain the contractual position in a little more detail:

> "MR JUSTICE LEECH: I may have misheard you. 29 October 2012. Can we just go back to page 1 of the contract? {D2/112/1}. So you only had a very short window to make the contract go unconditional, if that's right. A. Yes. MR JUSTICE LEECH: It's only three months. A. Yes. MR JUSTICE

> LEECH: And it was dependent on effectively that? A. The quashing order. MR JUSTICE LEECH: The quashing order. So it was a contract which had a fair chance of going sour anyway. A. Yes. MR JUSTICE LEECH: So you never -- the overage was never really a slam dunk, was it? A. Never a slam dunk, but we were just hopeful working with Fusion that we would get past that issue with Dr Bickerton. When we couldn't, we stuck with them to keep the deal alive. MR JUSTICE LEECH: And once the first contract went off, presumably you became aware very soon after 17 January 2013 that it had gone off, that first contract. A. Yes. MR JUSTICE LEECH: Then you were looking to resell, or did you always regard Fusion as a sort of favoured buyer? A. We always regarded Fusion as a favoured buyer, and when we had supplemental agreements after that -- MR JUSTICE LEECH: So did you extend the time under the contract? A. Yes MR JUSTICE LEECH: How long did you extend it -- A. It was various, various amendments to the contract where we extended it. MR JUSTICE LEECH: I see. Those, presumably, are all going to be in the bundle. Do you actually have a date for when the contract was finally -- rescission of the contract finally took place? Maybe you can give -- MR WALSH: Completion. MR JUSTICE LEECH: Well, this contract presumably went off. It never went off. A. It never went off. No. It continued. MR JUSTICE LEECH: So the actual completion that we looked at -- A. Is on that contract. MR JUSTICE LEECH: -- is actually on this contract. A. Yes. MR JUSTICE LEECH: And it was a renegotiation of the terms -- A. Yes. JUSTICE LEECH: -- of this contract? A. Yes. MR JUSTICE LEECH: So it remained in place? A. Yes. MR JUSTICE LEECH: I see. I'm sorry. I had misunderstood. When I saw the date 17 January 2013, I just assumed it had gone off very quickly. But in fact you kept on extending and extending and extending. A. Yes. MR JUSTICE LEECH: And ultimately the decision, the waiver of the overage was a renegotiation of the terms of this contract. A. Correct. Yes."

125. The documentary evidence about the sale of the Property was not entirely satisfactory or consistent with Mr Down's evidence. In particular, the Second Supplemental Agreement referred to an agreement for sale dated 16 April 2014 as the original agreement (and not the Sale Contract). It also referred to three supplemental agreements dated 16 June 2015, 13 April 2016 and 9 September 2016. This suggested that my original assumption had been correct and that the Sale Contract went off and that Primavera and Fusion entered into a new contract. However, I was unable to find any of these documents in the trial bundle and I was never taken to a complete set of contractual documents (or, indeed, told where to find them).

126. Having said this, I am not satisfied that much (if anything) turns on the evolution of the contractual relationship between Primavera and Fusion and for present purposes I am prepared to accept Mr Down's evidence that in substance the parties agreed to extend the

completion date of the Sale Contract until 31 March 2017 when they entered into the Second Supplemental Agreement under which they agreed to complete on 30 June 2017 (subject to any application by a third party for judicial review).

(6) Completion

127. Mr Down was also taken to the completion statement in cross-examination. It showed that the original sale price was £3,515,000, that a deposit of £175,000 was paid on exchange of the Sale Contract on 30 October 2012, that the price was increased by £250,000 on 31 March 2017 and that Fusion paid 12 monthly payments of £5,000 and one monthly payment of £10,000. This produced a total sum of £3,660,000 and Mr Down accepted that Fusion paid this sum to Primavera on completion. Mr Down also accepted that on completion the net proceeds of sale and the net monthly payments amounted to £2,236,636.47 and £62,266.49 respectively and that all of the investors got their money back together with interest at 7% per annum. Earlier in his evidence, Mr Down had accepted that Fusion never paid the increase in the purchase price of £250,000. But given the figures shown on the completion statement, he must have been mistaken about this and, if necessary, I find that he was.

IV. Duty of Care

H. Primavera's Case

(1) The Particulars of Claim

128. Primavera's pleaded case was that by no later than 31 August 2012, i.e. the date of the First S106 Agreement, the Council had assumed a duty of care to Primavera and that there was a sufficient relationship of proximity to justify the voluntary assumption of such a duty. In particular, its case was as follows:

> "44. At all times material to this claim and by no later than 31st August 2012, which was the date of the first S.106 agreement in respect of the First Permission, HBC was aware that:
>
> (1) PAL was the owner of the Development Land;
>
> (2) SHL acted at all times as agent of PAL and as applicant for planning consent over the Development Land;
>
> (3) Fusion was intended developer of the Development Land and intended to purchase it from PAL when the planning process was

complete.

(4) Nedbank Private Wealth Limited was mortgagee of the Development Land and whose consent was required for the liabilities of PAL under the S.106 agreement such that (by Clause 7 of the S.106 agreement dated 27th September 2016) its charge over the Development Land was expressly subject to the S.106 agreement;

(5) All communications to Fusion and SHL were in fact communications also made to PAL;

(6) By letter dated 20th November 2014 from PAL's solicitors, HBC was expressly informed that delay in the determination of planning permission over the Development Land had caused and was continuing to cause loss to PAL and that such losses were aggravated by the then threatened continuing further delay. That letter expressly set out to HBC the basis upon which PAL alleged that HBC had voluntarily assumed to it a duty of care such that it would be liable to PAL to compensate it for its losses in the event of continued or further breaches of that duty. The letter expressly reserved PAL's right to advance the claim it now advances. HBC did not respond substantively to that notice, less still challenge the basis upon which it was argued.

(7) On 14th October 2015 PAL's solicitors wrote again to HBC setting out in detail the then catalogue of unacceptable and unreasonable continuing delays in the determination of planning permission over the Development Land. The letter concluded "…*the delays and lack of urgency are wholly unacceptable. Any claim my client may have against Hertsmere is exacerbated by these continuing failures, problems, delays and introduction of new issues*."

(8) By emails of 8th February and 12th August 2016 Andrew Down of SHL expressly reminded HBC of the severe adverse financial effects on PAL of HBC's delay in the determination of planning permission over the Development Land. The reminder to HBC concerned matters of which it had express notice since at least 31st August 2012, alternatively from the date of PAL's first de facto Letter of Claim dated 20th November 2014 and pleaded in sub-paragraph (6) above.

(9) At all times material to the period pleaded in sub-paragraphs (1)-(8) above, HBC knew that planning permission over the Development Land would always be subject to a S.106 agreement.

(10) Further, at all times material to the period pleaded in sub-paragraphs (1)-(8) above, HBC also knew that the liability of PAL to pay under the CIL and in lieu of affordable housing would increase the longer it took to determine planning permission over the Development Land.

(11) Specifically, HBC knew by October 2014, alternatively and by no later than February 2015 that the basis for calculating liability to CIL and payment in lieu of affordable housing was subject to revision and would substantially increase the liability of PAL to pay CIL.

45. Consequently, and in reliance on the matters set out in paragraph 44

above, PAL says that:

(1) The loss caused to PAL by HBC's unlawful and negligent handling of the First and Second Permissions and its negligence and negligent delay in the handling of the Third Permission was plainly foreseeable to HBC at the time of the acts complained of;

(2) There was between PAL and HBC a sufficient relationship of proximity to justify the voluntary assumption of a duty of care by HBC to PAL to carry out and administer the planning process in respect of the Development Land with the skill and care to be expected of an ordinarily and reasonably competent planning authority;

(3) It is fair, just and reasonable to impose that duty on HBC in the circumstances of the present case."

(2) Further Information

129. The Council made a Request for Further Information of the Particulars of Claim. It asked Primavera to identify precisely when the duty of care arose. It also asked Primavera to admit that it had a right to appeal the failure to determine the Second Application under section 78 and to explain why it failed to do so. The replies which Primavera gave to these requests were as follows:

"Request

1. Please identify the date on which the Claimant says the Defendant assumed the alleged duty of care.

Answer

1 The Defendant first assumed the alleged duty of care on 31 August 2012.

Further, or alternatively, by 20 November 2014.

Further, or alternatively, by 14 October 2015.

Further, or alternatively, by 12 August 2016.

The Defendant is referred to Paragraph 44, sub-paragraphs 1-8 of the Particulars of Claim.

2. Does the Claimant accept that it had a right to appeal the Claimant's failure to determine the Second Application under section 78 of the Town and Country Planning Act 1990?

3. Why did the Claimant not avail itself of its statutory right to appeal against non-determination of the Second Application at the expiry of the 8 week period following validation of the application?

Answer

2 Yes

3 The Claimant refers to paragraphs 94-109 of the Expert report of Mr

Ben Simpson dated 16 December 2021."

(3) Opening Submissions

130. At the very beginning of his oral opening submissions Mr Campbell submitted that the duty of care arose as soon as the First Application was made. He did not apply for permission to amend the Particulars of Claim or the Further Information because he submitted that the date was not material and it was sufficient for his purposes if the duty of care arose at the date of execution of the First S106 Agreement. However, it became clear, as he continued his submissions, that his case was that by accepting the planning applications carrying out its statutory functions the Council had assumed a duty of care. Because of its importance I set out the passage from the transcript:

> "But before I do that, I want to clarify some issues, and first of all, the first of those in brief is what the claimant's case is, and it's simply this: the assumption of responsibility arose in law, not as pleaded, in law, in January 2012 when the application was made. That is what the authorities hold. But of course in response to a question, we pleaded that it arose on 12 August 2012, and so we're happy for that date to be accepted. We're going to live with that. We've pleaded that and we're going to live with it. There are certain reasons given for the assumption of responsibility on that date. Those reasons are not irrelevant at all, because of course they will serve to extend the scope of the duty that we will ask your Lordship to find in due course. But in law, and the argument will proceed on this basis, the duty arose in January when the planning application was made. That is because an assumption of responsibility was made by the planning authority, and that assumption comes about on the basis of a number of propositions, all of which are at least emphasised, repeated, in Poole, but have antecedents in some cases long before.
>
> First, which *Poole* makes absolutely clear, is that a public authority has exactly the same liability as a private party, private individual or private company. Precisely the same liability. That is subject to the rider that there may be a statute that affects that. But absent an argument along those lines, it is the same liability. And I say to your Lordship that, of course, that is precisely the same as happens within the private sphere, because if -- where the parties are private and the assumption of responsibility comes about because of a contractual relationship, the contract itself may affect the -- either the existence or the extent and ambit of the assumption of responsibility. So even that is not a particular difference; it's simply saying you operate privately often in a contract. If you're a public authority, you operate always within the ambit of a statute, and they may have an effect. That's the first proposition. I've dealt with the second, which is the issue of the possibility of the statutory bar. The third proposition is that the assumption of

> responsibility comes about when a public authority undertakes a statutory duty that consists of the offering of a service, a service such as determination of a planning application, because there's an implied undertaking by the public authority to use reasonable care and skill relied upon by the applicant, and to the extent necessary and foreseen by that public authority. There's quite a lot in Poole on that last point. We'll get to that shortly."

131. There were a number of problems arising out of the way in which Primavera's case developed. First, the expression "assumption of responsibility" is not actually used in the Particulars of Claim. Indeed, it is clear that the case was originally formulated on the basis of the *Caparo* test which, so Mr Campbell submitted, no longer applied (see below). Secondly, there was no pleaded case of reasonable reliance by Primavera on the Council either in performing its statutory functions or in relation to any specific conduct. Thirdly, and most importantly, Primavera did not plead how the Council could have assumed a duty of care to Primavera when the First Application was made, if Primavera was not the Applicant and not named in the application form. To meet this point, Mr Campbell submitted that the Council assumed a duty of care not only to the applicant but to a class. I explored the difficulties with this submission in the following exchange:

> "And then 2.8 {A/28/3}. The point here is made, and this is another, with respect, misconception, the point is made that the claimant was not the applicant for permission. As if that was remotely important. It's unimportant, my Lord, because the assumption of responsibility is to prevent harm to anybody in a particular class of people. One doesn't have to know the exact identity. We can test that quite easily. The reckless driver who at 220 miles an hour kills a pedestrian, he's not required to know the name and address of that pedestrian in order to be liable. He is liable because he must be taken to have foreseen that a person might walk into the road or might be on the sidewalk or he might lose control of his car in the proximity close to somebody who might then be killed. You don't have to know exactly who it is. So there is nothing in that point, and we don't deal with it in evidence, and we're not going to deal with it much in argument. It's not an issue in this case at all. So long as there's a planning application, then any planning authority will understand that there are people who are going to be affected by the decision. MR JUSTICE LEECH: How do you define your class, then? You say there's a narrow class of people. MR CAMPBELL: It's those people with an interest in the property. You don't have to know who they are. MR JUSTICE LEECH: Anybody with an interest in the property. MR CAMPBELL: Yes. MR JUSTICE LEECH: At the time of making the planning application, or within -- what's the timescale? MR CAMPBELL: I would be quite happy with the time of application, and also, 31 August, I would have no difficulty

> with that. But there are cases, my Lord -- I haven't brought them with me, there's at least one case where somebody joined the class, obviously there was some sort of conventional transaction that went wrong, but it took time for the loss to manifest itself, and somebody during the class, during the syndicate or whenever it was, sometime after completion of the negligent act. And that person was held to be owed a duty because he was a person that could have been foreseen. Any member of that syndicate was a person who could have suffered loss and that had to have been foreseen. So it's not -- MR JUSTICE LEECH: And any interest? Any interest in the land? MR CAMPBELL: It's got to be a financial interest, my Lord -- MR JUSTICE LEECH: Any financial interest? MR CAMPBELL: No, people who would be affected by the fact the running costs continued for longer than they would have, and also by the introduction of the bigger payments: the community structure levy and the affordable housing. So that's people with a financial interest. Because their profit will be less at the end."

132. Mr Booth and Mr Walsh submitted in their written closing submissions that Primavera was not entitled to run this case at trial because it was wholly inconsistent with the Primavera's case as pleaded. They relied on the recent decisions of the Court of Appeal in *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 and *Dhillon v Barclays Bank plc* [2020] P&CR 19. In the first of those cases David Richards LJ (as he then was) stated this at [47]:

> "I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

133. I am not satisfied that the case which Mr Campbell advanced at trial was inconsistent with the case as pleaded. The primary facts upon which he relied were pleaded in paragraph 44(1) to paragraph 44(5) of the Particulars of Claim and he accepted that the

Court did not have to find that the Council had assumed a duty of care any earlier than 31 August 2012. The real sting of the complaint made by Mr Booth and Mr Walsh was that Mr Campbell had changed the way in which Primavera put its case on duty of care. But, as Mr Campbell observed, this was primarily a matter of law. I therefore reject the submission that Primavera was not entitled to advance the case as Mr Campbell argued it orally and in writing. But even if I am wrong and I should not have permitted Primavera to depart from its pleaded case, I would have been very reluctant to decide this case on a pleading point alone and would have considered it necessary to go and decide the case on the merits (as I now do).

I. Findings of Fact

(1) Ownership of the Property

134. Primavera's case is that at all material times and no later than 31 August 2012 the Council was aware that it was the owner of the Property. No further particulars of this allegation were given in the Particulars of Claim but in the Reply, paragraph 6(i)(a) leading counsel pleaded as follows:

> "The First Application was submitted on 13th January 2012 by Shandler Homes Ltd. On 29th November 2011 Andrew Scott and Helen Kyprianos of consultants Andrew Scott and Associates together with Andrew Down of Shandler Homes Ltd met with HBC's Planning Officer Louise Schalke [sic] for a Pre-Application Meeting. At the meeting Ms Schalke [sic] was informed expressly that Shandler Homes Ltd was agent for PAL, an offshore company, which owned the Development land. At no point thereafter and in no subsequent dealings between Shandler Homes Ltd, Andrew Scott Associates, PAL's solicitors Wilson Barca and HBC was HBC ever told nor was it told anything that could have reasonably implied, that PAL was no longer the owner of the Development Land."

(a) The First Application

135. It was common ground that Primavera was not named either as the Applicant or the owner of the Property in the First Application. Shandler Homes was stated to be the Applicant in the First Application but Mr Down described himself as the owner. Mr Down accepted in cross-examination that it was an error to describe himself in this way and that the certificate which he gave to verify the accuracy of the First Application was incorrect. On the other hand, it was also common ground and, if it was not common

ground, I find that the Council was aware that Primavera was the registered proprietor from (at the latest) 3 May 2012 in the context of negotiations for the First S106 Agreement.

136. Mr Down's witness statement contained no evidence about the meeting pleaded in the Reply. However, in cross-examination he gave evidence that Ms Sahlke was told that Primavera was the owner and of the importance to it of planning permission in the course of discussions before she gave the Pre-Application Advice (as pleaded in the Reply):

> "Q. That's what you knew. And what we see at the end of that report on page 11, if we could turn up page 11 under "conclusion" {D1/144/11} we see there that in principle development was considered acceptable, subject to significant amendments to its height, depth, width, etc, etc. So you've gone over the top with what you were asking for and now you're going to have to scale it back? A. Correct, yes. Q. This application was made by Andrew Scott of Andrew Scott Associates, wasn't it? A. It was, yes. Q. And there was no mention of Primavera in this pre-app? A. There was mention of Primavera in the meeting with Louise Sahlke, yes, because I told Louise Sahlke that we had a company that needed to get their money back pretty quickly, and therefore we needed a quick decision. So she was aware of Primavera at that time. Q. Just take me to where you say that in your witness statement? A. That's in my witness statement at the meeting with Louise Sahlke on -- I think it was 2011/2012. Can we look at my witness statement, please? Q. Yes, {B/1/1}. A. I have a hard copy here…So if we go to page {B/1/3}, and it's point 14. Q. Yes, but you don't say there, do you, that "I told Louise Sahlke that planning application --" A. No, it's not said there, but she was made aware then that Primavera were -- Q. Why didn't you put that in your witness statement? A. I omitted to do it. Sorry. Apologies. Q. You had three stabs at it, didn't you? A. But we are now talking about going from the date of the 106, so why go back when we don't need to? Q. But this is a key fact in this case: you knew that Hertsmere's case is that it knew nothing of Primavera until at least the section 106 negotiations, but yet you're telling this court that you had a meeting with an officer of Hertsmere and told her about Primavera? A. Correct. Q. That's a material fact. Why isn't it in your witness statement? A. Because I omitted to put it in there. We're going from the date of the 106. So rather than me going back and saying, "Oh, but," we're sticking with the 106 date. MR JUSTICE LEECH: Is there a record of this meeting, as a matter of interest, or just the planning report, is it? MR WALSH: I'm sorry, my Lord? MR JUSTICE LEECH: Is there an actual attendance note or record of the meeting itself? It's just the planning report. MR WALSH: Not of this meeting, as far as I'm aware. I'm sure Mr Down will be taken to it in due course by my learned friend if there is. But there's no mention of Primavera in the pre-application report -- A. No. Q. -- you accept that? A. Yeah. Q. So the only evidence we have is what you're now saying -- A. Correct. Q. --

> in the witness box, that you mentioned that to Louise Sahlke. A. Yes. Q. I suggest to you, you didn't mention anything to Louise Sahlke -- A. (Overspeaking) I disagree with you. Q. -- (Inaudible) had you would have put it in your witness statement."
>
> "MR JUSTICE LEECH: Sorry to go back to the previous meeting. You say you mentioned the existence of Primavera to Ms Sahlke. A. I did, yes. MR JUSTICE LEECH: Can you remember precisely what you told her about? A. I told her that there was a number of shareholders who had invested a lot of money into this deal, and that it was important that we got it right and got it done quickly, because we had a lot to lose. That was the gist of the conversation. MR JUSTICE LEECH: Did you identify the vehicle through which the shareholders were investing? A. I did tell her it was Primavera Associates Limited, yes. MR JUSTICE LEECH: You accepted I think in answer to a number of questions that it was quite important not to reveal to the vendor the fact that you were -- your involvement, or the fact that you were investing. A. Yes. MR JUSTICE LEECH: But that didn't necessarily apply to the local planning authority. A. No, no, not at all, no. MR JUSTICE LEECH: So you were happy to reveal to them who you were. A. Yes. MR JUSTICE LEECH: Precisely who you were. A. Correct. MR JUSTICE LEECH: And that you were going to be the beneficial owner through an SPV -- A. Yes. MR JUSTICE LEECH: -- with a number of investors. A. Yes. MR JUSTICE LEECH: Thank you."

137. I accept Mr Down's evidence. Although I found him an unsatisfactory witness in some respects (as I have explained above), I accept that he was not deliberately trying to mislead or deceive the Court. I am also satisfied that his failure to mention the discussion about Primavera in his witness statement was the result of a mistake in its preparation rather than recent fabrication and in reaching this conclusion I place particular weight on the fact that counsel had pleaded this meeting on instructions in the Reply (which was dated 12 June 2020).

138. I find, therefore, that Mr Down told Ms Sahlke that Primavera was the owner of the Property at their meeting before she produced the Pre-Application Advice for the First Application and that he told her that it was a special purpose vehicle through which Mr Down himself and a number of other investors were acquiring the Property as beneficial owners. But in my judgment, the legal department of the Council would probably have drawn that inference anyway when they came to negotiate the First S106 Agreement. The obvious conclusion to draw from the fact that Mr Down had certified that he was the owner of the Property but Primavera was the registered proprietor was that Primavera held it on some kind of trust for him (and, possibly, others).

139. I also accept that Mr Down told Ms Sahlke that it was important that he and the investors got the planning application right and got it done quickly, because they had a lot to lose. However, I do not accept that he said any more than this or that Ms Sahlke would have asked for any more information for the reasons given by Mr Simpson in cross-examination:

> "Q. You agree with what she [Ms Snow] has to say. And I'm going to summarise then the position as agreed. Firstly, commercial considerations in respect of a planning application are only relevant to determination of the application in the context of viability in determining the appropriate level of financial contributions and affordable housing. For example, pursuant to a 106 agreement; agreed? A. Yes. Q. Secondly, we know that the claimant in these proceedings was not identified in the relevant certificates for either application as being the owner of the land, or indeed the applicant for permission; that's right? A. Yes. Q. And in that regard, you agree that a planning authority would not ordinarily make any inquiries as to ownership, and go behind those certificates; yes? A. Yes. Q. There is no duty placed on an LPA in that regard, is there? Thirdly, we can agree that the commercial interests of the claimant, and indeed any loss it might or might not have suffered, were not a material planning consideration for the authority to consider, were they? A. No. Q. Those sorts of interests would be private interests, not public, and as such, not relevant to the plan? A. That's correct. Q. Fourthly, we can agree that a local planning authority would not ordinarily make any inquiries as to the funding or commercial arrangements of any land-owner or applicant for planning permission? A. Correct. Q. Again, no duty placed on a planning authority in that regard? A. No."

(b) The Second Application

140. The position is more complicated in relation to the Second Application. Although Shandler Homes was described on the application form as the Applicant, Mr Taylor certified that nobody else apart from himself or Shandler Homes was the owner. This certificate made the position opaque, to say the least. Given that Fusion (or an associated company) had entered into the Sale Contract to purchase the Property, a reasonable assumption might have been that Fusion was now the owner rather than Shandler Homes or Primavera.

141. Nevertheless, I am not satisfied that Ms Sahlke, Ms Taylor or Ms Hughes understood the position to have changed between the First Application and the Second Application despite the inaccuracy in the certificate. None of them gave evidence and I place

particular weight on the fact that when Ms Hughes sent a first draft of the Second S106 Agreement to Mr Down on 25 April 2016 Primavera was still named as the owner of the land. Primavera's case as pleaded in the Reply (above) was that in no subsequent dealings was the Council ever told that Primavera was not the owner of the Property. I was not taken to any correspondence which suggested otherwise and I accept that case. I therefore find that the Council's understanding remained the same as set out in [139] and [140] (above) during the period between the submission of the Second Application and the date on which the Second S106 Agreement was executed.

(2) Agency

142. It was also Primavera's case that the Council knew that Shandler Homes was acting as its agent and, in particular, that it was aware that Shandler Homes was acting as its agent when it completed and submitted the First Application in its own name. There was no evidence of any formal contract of agency and Mr Down did not give evidence that there was any express agreement between Primavera and Shandler Homes. In his witness statement he stated no more than that: "I was the main person working on this" through Shandler Homes. Nevertheless, I accept Mr Down's evidence on this point and although his evidence was that any agency was vague and informal, I am satisfied that it was sufficient to give rise to the legal relationship of principal and agent. I am also satisfied that it would have been obvious to Ms Sahlke that there was such an informal arrangement and that Shandler Homes was attempting to obtain planning permission on behalf of Primavera as the owner of the Property.

143. Again, the position is more complicated in relation to the Second Application. Shandler Homes was stated to be the Applicant and Mr Taylor of Fusion its agent and Mr Walsh suggested to Mr Down that Fusion were acting on behalf of Shandler Homes and not on behalf of Primavera:

> "Q. This is probably an apposite time to return to the answer that you gave to an earlier question, where I asked whether Fusion represented Shandler Homes. And you said: no, they represent Primavera. You're saying in terms here that they represent Shandler Homes; they're representing to Hertsmere something on your behalf? A. But we already know that Primavera are known to Hertsmere -- Primavera were doing the planning application. Q. That's not my question. Not my question. A. Can you repeat your question, please. Q. When you said to this court earlier on that Fusion were not representing Shandler Homes, they were

> representing Primavera, was that correct? A. Yes, it was correct. Q. So did they -- let me put it a different way: did they also represent Shandler Homes? A. I was a front for Primavera. I was the man that they were dealing with, and my company happened to be Shandler Homes. Q. You were quite careful to make the distinction in your answers to my questions earlier on. When I said that they represented Shandler Homes, you were quite clear: no, they represent Primavera. I asked you several times: are you sure about that? A. Yes, yes, but they are buying from Primavera -- Q. I get that. A. -- who are the applicants for the plans. I understand that, but they were your agent, weren't they? A. They were the agent of Primavera, not Shandler Homes. Q. They were representing your interests, weren't they? A. No, they were representing Primavera."

144. I accept Mr Down's evidence on this issue too. I also accept that his description of the relationship between the various parties as accurate. I find that he was the individual with overall responsibility for the Second Planning Application on behalf of Primavera, that he was operating through his own corporate vehicle, Shandler Homes, and that he was instructing Fusion on behalf of Primavera. I also find that Ms Sahlke, Ms Taylor and Ms Hughes were aware of this relationship. In reaching this conclusion, I place reliance on the fact that it would have been impossible for Fusion to negotiate the terms of the commuted payment for affordable housing unless they had the authority of Primavera.

(3) The Developer

145. It was also Primavera's case that the Council knew that Fusion was the intended developer of the Property and intended to purchase it from Primavera when the planning process was complete. Apart from noting that there was a limited denial in relation to this issue in his Skeleton Argument, Mr Campbell did not address me on this issue either in writing or orally. Nor did he take me to any documents to show when the Council first became aware that Fusion was the developer.

146. In relation to the First Application I find that the Council was not aware that Fusion was the intended developer of the Property and intended to purchase it from Primavera when the planning process was complete. Fusion was not named as a party to the First S106 Agreement. Moreover, Primavera did not call Mr Taylor to give evidence and none of the early exchanges between him and the Council to which I was taken in evidence showed that he disclosed Fusion's interest in the Property to Ms Sahlke.

147. Fusion was named as the "Developer" in the Second S106 Agreement. But I was not

taken to any correspondence by Mr Campbell to explain when the Council first became aware that Fusion (or an associated company) was the developer. The trial bundle shows that by email dated 7 July 2015 Mr Emmens first wrote to Ms Hayes stating that he was now dealing with the matter and enclosing a revised draft of the S106 Undertaking. In his revised draft he had added FWRL as a party and described it as "the Developer". He had also added the words "The Developer is a contractual purchaser of the Site" to the second recital. I therefore find that on 7 July 2015 the Council became aware for the first time that FWRL was the developer and intended to purchase the Property.

(4) The Lender

148. It was also Primavera's case that the Council knew that Nedbank was the mortgagee of the Property and that its consent was required for the liabilities of Primavera under a S106 Agreement. I find that the Council was aware that Fairbairn Bank (which later changed its name to Nedbank) was the mortgagee of the Property by 3 May 2012 when Ms Rathour of Wilson Barca informed Ms Bell of the Council of this fact. I also accept that the Council knew that the consent of Fairbairn Bank and then Nedbank was required to each S106 Agreement for the obvious reason that the bank was made a party to the very first draft of the First S106 Agreement.

(5) Communications

149. Finally, it was Primavera's case that all communications to Fusion and Shandler Homes were also made to Primavera. The correspondence in the trial bundle shows that Mr Down kept investors informed about the progress of both applications and that Mr Taylor kept him informed in a similar way. Indeed, the trial bundle shows that Mr Taylor forwarded most (if not all) important communications to both Mr Down and Mr Christoforou. But in any event, I have found that both Shandler Homes and Fusion were acting as agents for Primavera although their appointments were informal. I accept, therefore, that they had authority to communicate with the Council and to receive communications from the Council on Primavera's behalf.

(6) The Council's Conduct

150. Mr Down gave evidence in his witness statement that in the course of carrying out its statutory duty to determine the First and the Second Applications the Council gave

certain assurances to Primavera (or Fusion on its behalf). Mr Walsh challenged this evidence in cross-examination and I begin with a passage in Mr Down's statement which was the subject matter of the application before His Honour Judge Matthews but which he did not strike out:

> "25. We were not naive. Primavera used its commercial judgement about the risks. We were assured by HBC that they were correct and we relied upon that. Fusion agreed to exchange contracts despite the threat of a judicial review. Fusion, like us, were following the advice of HBC that they were right and any judicial review would be quashed. I refer to Mark's email dated 4 October 2012 MK to Investors relating to the sale to Fusion and the email dated 5 October 2012 from Fusion to me regarding the exchange and the judicial review. Exhibit AD1, pages 376-381 and 382 {D1/401}."

151. Mr Down was taken to this passage in cross-examination and he accepted that Primavera was not relying on the Council in assessing the commercial risks but on the statement that the Council intended to defend the First Judicial Review:

> "Q. Your statement that they were giving you assurances that they were right is false? A. No, it isn't. Q. And at no stage did they give you any assurances about the commercial risks involved in this site? A. About the commercial risks? Q. Well, you say you used your commercial judgment about the risks? A. We did use our commercial judgment, yes. Q. "We were assured by HBC ..." Are you saying there that they were assuring you and giving you advice about commercial risks? A. No, we were assured by HBC that they were correct, and we relied on that. They said they were correct in granting their planning permission. They didn't give us any advice on commercial judgment. They said they were correct in giving planning permission, and they were going to defend the judicial review. Q. You referred to some documents in support of what -- MR JUSTICE LEECH: Just before you leave there, I think there might be a slight misunderstanding. It was being put to you that when you were saying "we were assured by HBC that they were correct", I think that what Mr Walsh was putting to you was that you were right about the commercial risks, but as I understand your evidence, what you meant when you made this statement in paragraph 25, when you said "we were assured by HBC that they were correct", is that they were correct in granting planning permission. A. Correct, yes. MR JUSTICE LEECH: So nothing about the commercial risks? A. Nothing at all about the commercial, no. That was completely our call, and Fusion's. MR JUSTICE LEECH: So they were assuring you that they were right to grant planning permission. A. Yes."

152. Mr Walsh then took Mr Down to one of the documents to which he had referred in paragraph 25 (above) and suggested to him that he had exaggerated his evidence. Mr

Down accepted that the Council had not given an assurance that they would defend the First Judicial Review:

> "Q. On 4 October 2012. Then in the italics at the bottom there, you refer to the JR: "There is one other development which could complicate the proposed sale. The next door neighbour is not happy that the council gave us planning permission and has threatened to ask for a judicial review. It is highly unlikely he will be given leave to challenge the planning in the high court and in any event, if given leave to appeal, it would cost him a lot of money with very little chance of success. The council have indicated that they will defend the case in the unlikely event it goes ahead." So you're just trying to reassure your investors here, aren't you, that there's nothing to worry about. A. Yes, Mark Kaplan was. That's from Mark Kaplan. Q. Sorry, yes, Mark Kaplan. But I'm right, aren't I -- A. I'm copied in on that as an investor, yes. Q. Yes. You knew about this -- A. Yes. Q. -- and understood that. There's nothing here about any assurances from HBC, are there? You're saying that they say that they'll defend it, but that's not an assurance, is it? A. No, the council have indicated that they will defend the case. Q. Yes, but that's not an assurance, is it? Saying to someone I'll defend a case -- A. No, it's not -- Q. -- it's not an assurance -- A. It's not an assurance."

153. Mr Walsh took Mr Down next to the letter dated 3 April 2013 which Ms Dymock had sent to Wilson Barca. Mr Down accepted that it did not contain any advice and that the reason why Shandler Homes chose not to defend the First Judicial Review itself was that there was no merit in it:

> "Q. So this letter firstly isn't giving you any advice, is it? A. No. Q. And Shandler Homes was an interested party, and was entitled to carry on defending the judicial review; do you accept that? A. Yes. Q. And it didn't, did it? A. No. Q. And it didn't because there was no merit in it, was there? A. No. Q. And in paragraph 30 of your witness statement, if we could turn that up {B/1/5}, you say: "We knew (and HBC knew) that Dr Bickerton was well resourced and highly motivated." Yes, well, that was right, wasn't it? A. Yes. Q. As we said earlier on, Dr Bickerton was well resourced and he was motivated. He was going to judicially review any permission, come what may, wasn't he? A. He was, yes. Q. And this is precisely why Hertsmere were being so cautious, wasn't it? A. At the time they weren't aware of that, but, yes, they were being cautious because they were incorrect in what they'd done, yes. Q. Well, I think we've been over that ground already."

154. Mr Down also conceded in cross-examination that the Council did not give Primavera (or Fusion on its behalf) any special treatment in its approach to the revised First Application (after the First Judicial Review):

> "Q. If we come back to the previous page, we see Iain Taylor's response {D1/469/2}: "Dear Louise "Perhaps I wasn't been clear enough but for clarity I would stress that we only want to run the plans informally in front of yourselves/County Highways NOT to lodge them formally for assessment ..."It's a pre-app in effect that we wish to do now -- categorically not a formal submission ..." And what we see here is Louise Sahlke is just pushing back, isn't she? She says: no, you'll do it the proper way; once it's been quashed you can submit your plans. A. I can't see the second email on the screen. Q. Which second email are you referring to? A. Okay, I can see it now. Yes, she's pushing back, she's covering herself, yes. Q. Well, she's covering herself or she's trying to follow normal procedure? A. Yes. Q. Not much evidence of HBC giving you any special treatment here, is there? A. No."

155. Mr Down was asked next about the evidence which he had given in his witness statement that Primavera relied on the Council's decision not to put the revised First Application before the Committee in December 2013:

> "34. Iain Taylor informed us that on 3 November 2013, Dr Bickerton made further legal submissions relating to the revised planning application. HBC stated they needed legal advice. Exhibit AD1, page 459 35. The planning application was therefore withdrawn from the planning committee meeting for November 2013. 36. Primavera were left in the position that HBC let matters drift despite challenges from Dr Bickerton and in circumstances where HBC knew they needed to take legal advice but had not obtained any. 37. Primavera were not informed that HBC had not obtained legal advice. Had we known the true and full position, we would have considered seeking our own legal advice. We were therefore deprived of the opportunity as what HBC was stating internally was the opposite of what was being stated externally."

156. When Mr Walsh put paragraph 37 to him in cross-examination, Mr Down initially maintained both that Primavera relied on the Council and chose not to take its own advice. He also maintained that it was reasonable to do so:

> "Q. Why on earth didn't you seek your own independent legal advice? A. Because they had told us that they had sought their own legal advice which they had not, and that they were correct and that they were determining the application under the previous policy. Q. Do you recognise the absurdity of relying on a local planning authority's say-so, even if we accept you're correct, which, for the avoidance of doubt, Hertsmere do not accept, that they gave you assurances about legal advice. But do you accept that it is extraordinary, and it beggars belief that an experienced developer, which you profess to be, sitting at the apex of property investors, would not take its own legal advice and would merely rely on the say-so of a local authority? A. Well, the local

> authority are the people who determine the applications and tell us what the policies are. Q. If you built this out, you were looking at build costs of -- I think you said about 4.5 million to the bank, didn't you? A. At the first -- back in 2011, yes. Q. Big sums of money, aren't they? A. They are big sums of money. Q. You would have sold it on for multiples of that, wouldn't you? A. Yes. Q. So against that backdrop, do you seriously maintain that it was reasonable for you not to take legal advice? A. I do, when we were being told by Hertsmere that they were correct."

157. Mr Walsh then took Mr Down to Mr Taylor's letter dated 13 September 2013 in which Mr Taylor continued to urge the Council to apply the policies at the date on which the First Application had originally been submitted. He asked Mr Down whether Fusion had taken legal advice and Mr Down conceded that Mr Taylor had chosen not to do so:

> "Q. You accept that's wrong, don't you? A. Yes, I do. Q. Do you know if he took legal advice? A. Pardon? Q. Do you know if he took legal advice? A. I have no idea whether he did or not, no. Q. Right. A. I'm not -- Q. It could be on the basis of legal advice. A. It may well have been, it may well have not. I don't know. Q. But you were saying in paragraph 37 that you weren't able to obtain your own legal advice? A. Yes. Q. Yes. But -- and you're saying you don't know whether Fusion, who is purporting to represent -- A. No, Mr Taylor is a former town planner for the local authority, so whether he was working on his own bat, I don't know. Q. He was an informed correspondent, was he? A. Correct. Q. Right. MR JUSTICE LEECH: Did you not discuss taking legal -- I don't want to know what the legal advice was if you did, but did you not discuss taking legal advice with Mr Taylor? A. No, because Mr Taylor refused in light of the view that they had to massage this through, get it through, rather than get into a big court case."

158. Mr Down was also asked about the evidence which he had given in his witness statement that the Council's decision to consent to the Second Judicial Review put Primavera in an impossible position because it had not had an opportunity to take legal advice itself:

> "40. At the planning meeting on 9 January 2014, HBC stated they were adamant that their legal advice was correct and that the planning application should be dealt with under the previous legislation, with the previous planning reference. This would also mean that the new social housing provision was not applicable. Planning permission on that basis was granted for the second time. 41. However, in an email to counsellors and the planning department, the locum solicitor advised that HBC's position was wrong, although this was not known to Primavera or its advisors at the time. 42. HBC still maintained an incorrect and unlawful position in the subsequent public council planning meeting on 9 January 2014. 43. In the old versus new core

> strategy, HBC head planner Brett Leahy and planner Louise Schalke stated, wrongly, on several occasions that the planning permission would be under the existing structure from the time of application not from the time of grant. It is supported by Planning Committee Report dated 12 December 2013. Exhibit AD1, page 488-519. 44. On 10 February 2014, Shandler Homes was sent a letter from Ashfords confirming that Dr Bickerton would be instigating another judicial review. 45. HBC threw in the towel very quickly. Primavera now knows, but did not know at the time, that HBC knew they were wrong and were always going to capitulate when they were challenged. It put Primavera in an impossible situation. 46. Never at any time were Primavera (or Fusion, as confirmed to me by Mr Christoforou) ever invited to seek our own Counsel's advice on the Core Strategy or the proposed judicial review."

159. Mr Walsh suggested to Mr Down that the reason why Primavera had not known that the Council's position was wrong was because it had not taken its own legal advice and that it could have done so. Mr Down very fairly accepted this:

> "Q. It wasn't known to you because you say you hadn't sought legal advice. A. I'm saying that it wasn't known to us because we weren't privy to conversations going on behind closed doors at HBC. Q. But it was a matter of law, wasn't it? A. But the locum solicitor still said to go to plan, to the committee -- Q. In answer to my question, it was a matter of law, wasn't it? A. Sorry, what was your question? Q. It was a matter of law as to whether it was correct to apply -- A. Yes, it was. Q. -- the superseded? A. Yes. Q. So it doesn't matter what anybody at Hertsmere said; it's a matter of law -- A. Right. Q. -- for the lawyers? A. Yes. Q. For the court ultimately? A. Yes. Q. You accept that? A. Yes. Q. You could have got legal advice? A. Yes. Q. But you didn't? A. No."

160. Mr Walsh then put the following sentence in paragraph 45 to Mr Down: "Primavera now knows, but did not know at the time, that HBC knew they were wrong and were always going to capitulate when they were challenged." Mr Down initially asserted that the Council had deliberately made an unlawful decision. But when I pointed out the seriousness of this allegation, he properly withdrew it:

> "Q. Are you seriously saying that the council deliberately made a decision that they knew was going to be overturned on a judicial review, but made it anyway? A. Yes. Q. Mr Down, that is utterly incredible and false. There is no evidence to support it, is there? A. I believe there is, and I'm sure -- Q. I'm sure my learned friend will take you to it in due course. MR JUSTICE LEECH: It's quite a serious allegation to make, Mr Down, against a local planning authority. I think you should be careful. Do you want to reconsider? I am going to expect Mr Campbell to re-examine you and show you the documents that you have

> identified, because it's a serious allegation to make. A. I apologise if it is, sir. MR JUSTICE LEECH: Well, think about it. You're effectively alleging fraud, aren't you; you say they deliberately – or bad faith. They deliberately chose to make a decision which they knew was incorrect as a matter of law. A. I will retract that statement. MR JUSTICE LEECH: I think you should. MR WALSH: There's a difference, isn't there, Mr Down, between getting it wrong and deliberately seeking to make an unlawful decision as a planning authority? A. Yes, there is. MR JUSTICE LEECH: Just also look at your statement. Can you explain to me how you came to make that statement -- to make that statement in paragraph 45 of your witness statement. A. I was shown some documentation from HBC in which there was a conversation between some councillors, not members of HBC but councillors, and a locum solicitor, and they were shown the legal opinion of Dr Bickerton's QC. And that legal opinion said that they were on a sticky wicket, and they wouldn't succeed. And the locum solicitor then went on to say, let's basically -- I can't remember the exact wording, but let's let this go to the committee and see what happens, but please keep this to yourselves. MR WALSH: That's materially different to what you said a moment ago. A. Yes, it is, and I apologise for saying what I said earlier on. I didn't mean -- Q. Okay. So you retract that and -- A. I've rejected it already. Q. Equally, you don't allege that any of the officers or democratically elected councillors of the council deliberately made an unlawful decision? A. No, I don't mean that at all. Sorry. Q. This is the problem, though, isn't it, Mr Down, with what you say in your evidence throughout. Your witness statement is littered with inaccuracies and hyperbole, and you're prone to it in the witness box, because you're trying to create a narrative, aren't you; you're trying to create a narrative that HBC are the ones that are at fault for your losses as a developer? A. Well, they are. Q. Sorry, I should have inserted false narrative into that question. You're trying to create a false narrative, and that's what you were trying to do by your hyperbole a moment ago, isn't it? A. No."

161. Mr Walsh also put paragraph 46 to him and Mr Down accepted again that he could have taken legal advice but chose not to do so and that a reasonable developer would have taken its own legal advice in the face of Mr Warren's opinion:

> "Q. Again, we've been over this ground; you could have sought your own advice but you chose not to, didn't you? A. Correct, yes. Q. What developer worth their salt undertaking a project of this size doesn't seek their own counsel's view? And I say that -- I mean barrister's view, in circumstances where the first planning permission had been overturned at judicial review, in the face of significant local opposition, where Dr Bickerton had obtained his own opinion from a silk that said that the proposed basis for the second permission was unlawful? A. All I can say is that Fusion, who were running this, also chose not to do that, thinking that if Dr Bickerton were successful, then we would have to apply for another planning permission. Q. Wouldn't the reasonably

> competent developer, in the face of a silk's opinion saying the planning committee are wrong in law here, if they're going to determine this on the old plan, wouldn't a reasonably competent developer go and get their own silk's opinion or even junior counsel's opinion? A. Yes, they would have done."

162. Finally, Mr Walsh put Ms Hayes' email dated 10 March 2014 in cross-examination to Mr Down. In that email Ms Hayes had refused Mr Down's request that the Council should pay its legal costs. Mr Down accepted that the Council made it very clear to him that its interests were separate from Primavera's interests (and he also accepted that he had been trying it on):

> "Q. Hertsmere were very clear with you that it considered its interests separate to those of Primavera, didn't it, in these emails? A. Yes. Q. And that you had to make your own decisions about whether you opposed the judicial review? A. Correct. Q. And in fact, Ms Hayes replies to you once again at {D2/109/1} having again none of it. She says: "The Council is not liable ...(reading to the words)... legal costs for a judicial review claim against its decision." A. Yes. Q. What I'm intrigued to know, Mr Down, having looked at this exchange of correspondence, were you just trying it on, or did you really not know what you were doing? A. Could you elaborate? Q. Does it need elaboration? Were you trying it on by trying to get them to pay your costs, thinking, well, let's hope that they do, or did you genuinely not know what you were doing? A. I was being advised by Wilson Barca, and basically this was the stance that we were taking to say: pay our costs. Q. Right, so you were trying it on? A. If you want to put it in those words, yes. Q. So when you say in paragraph 46 of your statement, which we don't need to return to -- in fact it's not paragraph 46. In your statement you say you were put in an impossible position by HBC. It's not true, is it? It was a situation that in fact Iain Taylor sought to engineer on your behalf. He encouraged HBC? A. I'm saying there we were deprived of the opportunity of what HBC were stating internally and what they were conveying to us externally. Q. What you say in paragraphs 47 to 49 of your witness statement at {B/1/7} tries to paint a picture of you as a victim of Hertsmere's actions, doesn't it? A. Yes. Q. In fact, as we have seen, you were, and Fusion were on your behalf, an active proponent of the way that Hertsmere decided to redetermine the application, so that you could pocket the affordable housing? A. Not at all. Hertsmere told us what the policy was that they should be adopting; they adopted it and we followed it. Q. That's just not true, though, is it, Mr Down, for the reasons -- A. It's factual."

163. I am satisfied that the Council's officers and the Committee's members did not give any commercial or legal or advice to Primavera or to Fusion (on its behalf) upon which Primavera (or Fusion) relied. I am also satisfied that in its communications with Shandler

Homes and Fusion the Council was doing no more than carrying out its statutory functions. I have reached these conclusions for the following reasons:

(1) Mr Down conceded (and I accept) that the Council did not give any assurances to Primavera or Fusion about the commercial risks associated with both applications and that it did not rely on the Council for that purpose.

(2) Mr Down also conceded (and I accept) that the Council did not give an assurance that the First Decision was right and that it would defend the First Judicial Review. He accepted in cross-examination that the Council only indicated that it would defend the First Judicial Review and this was not an assurance.

(3) Mr Down also conceded that Shandler Homes was entitled to defend the First Application and that it did not do so because it had no merit. He also accepted that the Council chose not to defend the First Judicial Review because it was acting cautiously in the face of Dr Bickerton's opposition.

(4) Mr Down accepted that the Council gave Fusion no special treatment in relation to the revised First Application and, in particular, that it would not reconsider the application or accept revised plans until the First Decision had been quashed.

(5) After some prevarication, Mr Down accepted that Primavera could have taken legal advice in relation to the Second Decision and that a reasonable developer would have done so in the light of Mr Warren's opinion. He also confirmed that Fusion chose not to take legal advice in relation to the Second Decision because Mr Taylor took the view that he wanted to "massage" the revised First Application through rather than get into a big court case.

(6) However, I do not accept Mr Down's evidence that at the meeting on 9 January 2014 the Council stated they were adamant that their legal advice was correct and that the planning application should be dealt with under the previous legislation. Mr Down did not suggest that he was present at the meeting and it is clear from his cross-examination that his evidence was based on documents (one of which Mr Campbell took him to in re-examination). Moreover, he quite properly withdrew the allegation that the Council's statement was deliberately untrue.

(7) Finally, Mr Down accepted without qualification that the Council had made it clear to him that it considered its interests separate to those of Primavera and that he had to make his own decisions about whether to oppose the Second Judicial Review.

(7) Right of Appeal

164. Mr Booth and Mr Walsh relied heavily on the fact that Shandler Homes had a statutory right of appeal against the non-determination of the Second Application but that it did not exercise that right. It is necessary for me to consider, therefore, when that right arose, whether Shandler Homes could have exercised it, when the application might have been determined (if it had exercised that right) and why it chose not to do so.

(a) When did the right of appeal arise?

165. Mr Simpson's evidence was that the statutory right of appeal against the failure to determine the Second Application arose on 3 June 2014. Mr Campbell also put this date in his chronology and Ms Snow agreed it. The contemporaneous documents suggest that, in fact, the right of appeal did not arise until at least a month later. But in the light of the position agreed between experts and counsel, I accept that the right of appeal arose on 3 June 2014. It follows, therefore, that between 3 June 2014 and 3 December 2014 Shandler Homes could have appealed against the non-determination of the Second Application (if it had wished to do so). Mr Simpson also accepted that it was open to a local planning authority and an applicant for planning permission to agree an extension of time for an appeal (although Shandler Homes did not do so in the present case).

(b) Could Shandler Homes have exercised the right?

166. It appears to have been common ground that Mr Down was aware that Shandler Homes had the right to appeal and, if it was not common ground, I find that he was aware that Shandler Homes had such a right on or before 3 June 2014. It was implicit in the answers which he gave to Mr Walsh's questions about the reasons why the company did not appeal that he knew that it had the right. Furthermore, Mr Simpson accepted that it was commonplace to exercise such a right and that there was no legal or practical bar to Primavera doing so:

> "Q. Now, the statutory period for determination, coupled with the right of appeal where that determination doesn't happen within the statutory

> period, that is intended to address precisely such a situation as this one, isn't it, where the determination is too slow for an applicant's liking? A. Yes. Q. And that is the remedy which the scheme of legislation affords, isn't it? A. It is, yes. Q. It is in no way uncommon for appeals to be made in respect of a failure to determine an application within the statutory period, is it? A. No, it's not uncommon. Q. It's entirely commonplace. A. Yes. Q. Now, you consider the issue of why or why not, more accurately, an appeal was pursued in this instance, first of all in paragraph 101, which is at {C/2/18}? A. Yes. Q. And there are two issues that we need to unpack there. If we look at paragraph 101, firstly you say that the applicant may have considered an appeal, but elected not to pursue it because it wanted to bottom out the affordable housing contribution. A. Yes. Q. And your second point is that you asked Mr Down this question, and he gave you an answer that he couldn't appeal because he wouldn't have known what he was appealing against; yes? A. Yes. Q. Now, in terms of that first issue, because we'll take them in turn, in terms of that first issue, you reference the reply to the defence at paragraph 19, don't you? A. I do, yes. Q. Let's turn that up. Paragraph 19 is in {A/4/5}. I'm just going to read that out: "In reply to paragraph 2.17 of the Defence ... PAL serves a series of e-mails which show that it was unable to appeal to the Secretary of State under [section 78(2)] ... as HBC never completed the viability study and the application was not therefore complete. [the council] ... misunderstands the complaint of the delay ... Competent conduct ..." Now, we could take this very slowly or we could take it very quickly; that's just simply wrong, isn't it, Mr Simpson; as you say and as you note in your paragraph 101 {C/2/18}, there was no bar to an appeal being pursued, was there? A. No, there wasn't. Q. So insofar as in your paragraph 101 you point to this as a possibility, it's not, notwithstanding that's the pleaded case of the claimant, it is wrong, isn't it? A. Yes, there was no bar. Q. No. There was no bar. Okay. Insofar as the pleaded case of the claimant is concerned, they are simply wrong: there was no bar to an appeal being made."

(c) When would the Second Application have been determined?

167. Mr Simpson also gave evidence that if Shandler Homes had appealed, then he would have expected the appeal to have been dealt with by an inspector under the "written representations" procedure rather than at a hearing and that a decision could have been expected within approximately six months:

> "Q. Okay. Well, had an appeal been made, you rightly note that the way one would have expected matters to proceed is by way of a written reps determination by a Secretary of State-appointed inspector? A. Yes. Q. I mean, no guarantees obviously -- A. No. Q. -- because, one, it's up to PINS? A. Yes. Q. But in terms of your professional judgment, you say that is the likely outcome; yes? A. It would have been likely, possibly a hearing, but yes. Q. In circumstances where you have to put your money

> on an outcome, it's written reps, and that's what you say in your report. A. Yes. Q. And even if the process took as long as the six months you suggest, if the appeal had gone in at the beginning of June when the statutory period for determination concluded, even if it took as long as you say it would have taken, then one has a determination before the end of the year? A. On those assumptions, yes."

168. When this point was put to him Mr Down doubted whether an appeal could have been determined within six months. I prefer Mr Simpson's evidence on this issue. He was an expert with a great deal of experience about the planning process and, in my judgment, Mr Down's view as a developer carried little weight. I find, therefore, on a balance of probabilities that if Shandler Homes had appealed against the non-determination of the Second Application soon after 3 June 2014, the appeal would have been determined by approximately 31 December 2014.

(d) Why did Shandler Homes not appeal?

169. Mr Down gave evidence before Mr Simpson. When he was asked this question directly, Mr Down gave a simple answer, namely, that he took a calculated decision not to do so:

> "Q. Do you accept that in the face of -- my question was about Dr Bickerton. Do you accept in the face of his objections that three months or so is not letting matters drift, is it? A. Well, it is when they could have taken proactive action and got their legal advice. Q. You could have appealed, though, couldn't you? A. We could have appealed. Q. You chose not to, didn't you? A. We chose not to. Q. You're an experienced developer, you told us? A. Correct. Q. You took a calculated decision because you realised that objections and challenges aren't uncommon in the planning process, are they? A. Correct. Q. Especially for contentious local developments like this? Yes? A. Yes."

170. In his first report Mr Simpson gave evidence that he had asked Mr Down whether he had considered appealing against non-determination and Mr Down had said that Mr Taylor and he did not consider it to have been a realistic option because they did not know what they would have been appealing against. Primavera also pleaded this passage from his report in Answer 3 of the Further Information. When Mr Walsh put this conversation to Mr Down in cross-examination, his evidence was as follows:

> "Q. Just help me with this. At 101 of his report {C/2/18}, Mr Simpson -- I don't know if we can just go to it, you may remember it so we don't need to -- he says that you told him the reason you didn't appeal was because you didn't know what you were appealing against. Did you tell

> him that? A. We said that because of the ever-changing scene that we were facing, there was -- every week there seemed to be different things that we were up against, and we wanted to provide everything that we could do to Hertsmere so there could be no judicial review against it. We wanted it to be absolutely watertight. And things were being (inaudible). You can see that when June Taylor came on the scene, things changed again. Q. But that doesn't have any effect on your right to appeal, does it -- A. -- (overspeaking) -- It doesn't, no, absolutely not. Q. Hold on. Hold on. That may be your motivation, your business case, for sticking with Hertsmere, but Mr Simpson says you told him the reason you did not appeal was because you wouldn't know what you were appealing against? A. Yes. Q. That is, not to put too fine a point on it, Mr Down, nonsense, isn't it? A. I wouldn't say it's nonsense. You can have that opinion, but I wouldn't say it's nonsense. Q. You do accept, don't you, that you don't need anything to appeal against other than a non-determination? A. Correct. Correct. Q. You know that as an experienced developer, don't you? A. Yes. Q. Yes. So the whole point about appeals regarding non-determination is that you never know what the local planning authority's position is. By definition, they haven't adopted a position; yes? A. Yes. Q. So the fact is you're taking an application away from the local planning authority and putting it in the hands of an independent third party. A. Correct. Q. Yes. So what you said to Mr Simpson wasn't correct. It can't have been correct: you didn't know what you were appealing against. A. It was a conversation I had with Mr Simpson."

171. Mr Booth also asked Mr Simpson about this conversation. He accepted that the reason given to him by Mr Down for not appealing against the non-determination of the Second Application was not a reasonable one:

> "Secondly, we turn back to your paragraph 101, line 4: "I asked the Witness Andrew Down whether they had considered appealing against non-determination and he said that they did not consider that to have been a realistic option as they did not know what they would have been appealing against." Now, with respect again, that also is nonsense, isn't it? I mean, you say yourself by definition all appeals against non-determination are made in circumstances where the position of the LPA on one or more matters will be unknown. A. That's right, yes. Q. So neither of those justifications which you posit in paragraph 101, neither of those justifications for not appealing hold water? A. No. Q. Neither the pleaded case nor the explanation given to you by the client? A. No."

172. In the light of this evidence, I find that Mr Down took a calculated decision not to exercise the right of appeal against non-determination of the Second Application because of the risk that Dr Bickerton (and others) might oppose the appeal and that his challenge might be successful. I accept Mr Simpson's evidence that Mr Down told him that Mr Taylor

and he did not consider it to be realistic option because they did not know what they would have been appealing against. But I am satisfied that all Mr Down meant by this is that the risks associated with the determination of the Second Application either by the Council or on appeal were uncertain. As he said in the second passage (above), Shandler Homes and Fusion were facing an "ever-changing scene" and "every week there seemed to be different things that we were up against".

173. However, even if this finding is wrong and Mr Down believed that it was not possible to appeal because the planning issues remained unresolved, I find that this belief was an unreasonable one and was not induced by any representation or assurance made by the Council. Mr Simpson accepted that it was nonsense to suggest that Shandler Homes could not appeal and Mr Down knew (by the time of trial at least) that an applicant for planning permission had the right to appeal against non-determination of the application and that it would never know what the local planning authority's position was.

(8) The Later Period

174. Mr Simpson also gave evidence that after the right of appeal against the non-determination of the Second Appeal had expired, the Council had led Shandler Homes and Fusion to believe that it would continue to act "in a relatively efficient manner". Mr Booth challenged that evidence in the following passage from the transcript:

> "Q. Given that is the matrix, I'm interested in what you say at paragraph 141 of your report {C/2/26}. There you say: "That the applicant did not appeal is a fact but it does not derogate from the conduct of HBC who the Applicant was negotiating with in good faith towards what it expected to be a positive outcome (grant of planning permission). As I note in paragraph 109 and 137 above, the experience with the first two applications (despite the JR issues) may understandably have led the applicant to believe that HBC would continue to act in a relatively efficient manner ..." Now, how can you say on the one hand that the claimant knew that there had been two unlawful determinations, was actively considering suing them, but reasonably expected them to continue to act in a relatively efficient manner? I mean, that's not right, is it? It doesn't add up. A. I think from what I could see from the correspondence on the planning application, 14/0486, I understand and understood when I was writing this, that they were acting in good faith and expecting a positive outcome. When I said relatively efficient, I was referring to the time period within which the last two applications had been determined. Q. You can't divorce the time period from the substance of the determination, can you, Mr Simpson? It's a question of competence generally, isn't it? There's no point, there's no merit in

> having a decision rushed out within time which is going to be again subject to judicial review? I mean, it's a question of competence more generally, and in circumstances where your client thinks that the council has twice been negligent, you can't sensibly say, can you: well, it's reasonable for them to think they were going to get it right this time. A. I don't disagree from the correspondence you presented to me which was there, that yes, they were considering suing them for negligence in April 2013. I'm just trying to explain my view that I've set out in 141. Q. I'm understanding that, I'm understanding your position when you wrote it. I'm asking you to revisit that view, now that I have put that correspondence before you. I'm not suggesting that you were wrong to write that in circumstances where you hadn't seen this letter; I'm asking you, now that you have seen this letter, it's right, isn't it? A. Sorry, what's right? Q. That it is not reasonable for you to say that it was appropriate for them to continue with the local planning authority because they were reasonable -- I want to use your language: "... the experience with the first two applications ... may understandably have led the applicant to believe that HBC would continue to act in a relatively efficient manner..." Now, in light of the allegations of negligence, in light of the active discussions, what you said in that sentence, I think we can run a line through it, can we? A. I'm not sure we can run a line through it. I acknowledge that it would have been in their mind, it would have been part of their thinking; it should have been, must have been at the time. But I don't think it makes it unreasonable for them to have continued to act towards a local decision, a local -- yes, a local planning decision, rather than submit an appeal."

175. The letter to which Mr Booth took Mr Simpson was Wilson Barca's letter dated 13 April 2013 following the Council's decision to consent to the First Judicial Review. It is also a noticeable feature of the period between that letter on 13 April 2013 and the Third Decision on 27 September 2016 that both Mr Down and Mr Taylor frequently complained about the Council's conduct and on 20 November 2014 and 14 October 2015 Lawrence Stephens sent detailed Letters of Claim to the Council asserting that it had been negligent. Indeed, those two letters and some of Mr Down's complaints were expressly pleaded in the Particulars of Claim (above).

176. I am not satisfied that after April 2013 the Council led Shandler Homes or Fusion to believe that it would continue to act in a relatively efficient manner and I find on a balance of probabilities that it did not. This was a view expressed by Mr Simpson and Mr Simpson effectively conceded the point when it was put to him in cross-examination. Moreover, I have set out the text of the two Letters of Claim dated 20 November 2014 and 14 October 2015 and neither support Mr Simpson's view. If the Council had given assurances to Fusion or Primavera, I have no doubt that Lawrence Stephens would have

relied on them.

177. I am not satisfied either that Fusion or Primavera were negotiating with the Council "in good faith towards what it expected to be a positive outcome" or not without serious qualification. I find that both Fusion and Primavera adopted a confrontational and heavy-handed approach to its negotiations with the Council and that the complaints which it made were intended to put pressure on the Council to prioritise the Second Application and to position themselves for a claim in negligence (if it did not). Moreover, they did so in circumstances where they were responsible for the complexity of the Second Application because they were not prepared to provide affordable housing in accordance with the Council's policies but wanted the Council to agree to the payment of a commuted sum. In fairness to Mr Down I should record that I am satisfied that it was not he but Mr Taylor who was primarily responsible for these tactics.

178. Finally, I record that apart from the evidence of Mr Simpson (above) there was no evidence to suggest that the Council gave any other express or implied assurances to Fusion or Primavera which might give rise to an assumption of responsibility by the Council to progress the Second Application within a particular time or in a particular fashion. In the light of my findings about Mr Simpson's evidence and the conduct of Primavera and Fusion, I find that in the period between 13 April 2013 and 27 September 2013 the Council did not give any express or implied assurance to Fusion or Primavera from which an inference could be drawn that the Council assumed responsibility for the progress and determination of the Second Application either within a specified time or a time which Primavera or Fusion considered reasonable.

J. The Law

179. In opening Mr Campbell relied on three decisions of the Supreme Court which he described as the "holy trinity": *Michael v Chief Constable of South Wales Police* [2015] AC 1732 ("***Michael****"), Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 ("***Robinson***") and *GN v Poole Borough Council* [2020] AC 780 ("***Poole***"). Mr Campbell submitted that these three decisions and *Poole*, in particular, have changed the landscape in relation to the duty of care owed by a local planning authority. I begin, therefore, with an examination of each decision before considering the earlier authorities on planning decisions in the light of them.

(1) Michael

180. In *Michael* the Supreme Court dismissed an appeal against the decision of the Court of Appeal to grant reverse summary judgment on the claim by the estate of a murder victim against two police forces for their failure to respond reasonably to an emergency call (although the Court permitted a claim under Article 2 to go to trial). Lord Toulson JSC gave the judgment of the majority and he devoted much of his speech to the authorities concerned with the duties of the police and other emergency services. He summarised the general principles at [97] to [100] as follows:

> "97. English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 270 (a Scottish appeal in which a large number of English and Scottish cases were reviewed). The fundamental reason, as Lord Goff explained, is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.
>
> 98. The rule is not absolute. Apart from statutory exceptions, there are two well recognised types of situation in which the common law may impose liability for a careless omission.
>
> 99. The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control. The *Dorset Yacht* case [1970] AC 1004 is the classic example, and in that case, Lord Diplock set close limits to the scope of the liability. As Tipping J explained in *Couch v Attorney General* [2008] 3 NZLR 725, this type of case requires careful analysis of two special relationships, the relationship between D and T and the relationship between D and C. I would not wish to comment on Tipping J's formulation of the criteria for establishing the necessary special relationship between D and C without further argument. It is unnecessary to do so in this case, since Ms Michael's murderer was not under the control of the police, and therefore there is no question of liability under this exception.
>
> 100. The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in *Spring v Guardian Assurance plc* [1995] 2 AC 296. It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive. This principle is the basis for the claimants' main submission, to which I will come (issue 3). There has sometimes been a tendency for courts to use the expression "assumption of responsibility"

> when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially."

181. Lord Toulson then went on to consider whether there was a universal test for the imposition of a duty of care. He described the development of the law of negligence as an "incremental process rather than giant steps" and commented that the quest for a universal yardstick has been elusive. After briefly considering the two-stage test in *Anns v Merton LBC* [1978] AC 728, he made the following comments about the *Caparo* test at [106]:

> "In *Caparo Industries plc v Dickman* [1990] 2 AC 605 Lord Bridge (with whom Lords Roskill, Ackner and Oliver of Aylmerton agreed) emphasised the inability of any single general principle to provide a practical test which could be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope. He said, at pp 617—618, that there must be not only foreseeability of damage, but there must also exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood", and the situation should be one in which the court considers it fair, just and reasonable that the court should impose a duty of a given scope on one party for the benefit of the other. He added that the concepts both of "proximity" and "fairness" were not susceptible of any definition which would make them useful as practical tests, but were little more than labels to attach to features of situations which the law recognised as giving rise to a duty of care. Paradoxically, this passage in Lord Bridge's speech has sometimes come to be treated as a blueprint for deciding cases, despite the pains which the author took to make clear that it was not intended to be any such thing."

182. After dealing with *Murphy v Brentwood District Council* [1991] 1 AC 398 (and the disapproval of *Anns*) Lord Toulson considered next two cases which are <u>not</u> concerned with economic loss, namely, *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. He dealt with both cases at [109] to [111]:

> "109. In *Stovin v Wise* [1996] AC 923 a highway authority knew that a road junction was dangerous and that the cause of the danger could be removed simply and at little expense. A bank of earth on the corner of the junction obstructed the view of motorists turning right from one road into the other. The highway authority did not own the land but had a statutory power to remove the bank. After there had been a number of accidents it decided to take action. It wrote to the landowner with a proposal to realign the junction but did nothing more and the matter went to sleep until another accident happened. A motorist collided with a motorcyclist whom she had

> not been able to see until it was too late. The motorist accepted liability to the motorcyclist but claimed a contribution from the highway authority for its negligence. At the trial the judge found the highway authority liable and ordered it to pay a contribution of 30%. On appeal the sole issue was whether the highway authority owed to the injured person a duty of care. The House of Lords by a majority held that it did not.
>
> 110. Lord Hoffmann (with whom Lord Goff and Lord Jauncey of Tullichettle agreed) observed that it is one thing for a public authority to provide a service at the public expense, and quite another to require the public to pay compensation when a failure to provide the service has resulted in a loss. Apart from possible cases involving reliance on a representation by the authority, the same loss would have been suffered if the service had not been provided in the first place, and to require payment of compensation would impose an additional burden on public funds. There would, he said, have to be exceptional grounds for a court to hold that the policy of a statute required compensation to be paid because a power was not exercised.
>
> 111. *In Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 the House of Lords held that the general public law duty of a highway authority under the Road Traffic Act 1988 for the prevention of road accidents did not give rise to a private law duty of care to provide road warnings to alert motorists of hazards. Lord Hoffmann (with whom Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed) referred to the fact that in *Stovin v Wise* [1996] AC 923 the majority left open the possibility that there might somewhere be a statutory power or public duty which generated a common law duty, but he went on to say that he found it difficult to imagine a case in which a common law duty could be founded simply on the failure (however irrational) to provide some benefit which a public authority has a public law duty to provide: paras 31—32. He distinguished that situation from cases where a public authority did acts or entered into relationships or undertook responsibilities giving rise to a duty of care on an orthodox common law foundation: para 38."

183. Lord Toulson accepted that in some areas, such as health and education, public authorities provide services to members of the public which give rise to a recognised duty of care which is no different from the duty of care, which any other entity which provides the same service would owe. He gave as examples hospitals and medical staff in the NHS and private hospitals, teachers (whether they operate in the private or public sector) and educational psychologists: see [112]. He then turned to other governmental functions at [113] to [115]:

> "113. Besides the provision of such services, which are not peculiarly governmental in their nature, it is a feature of our system of government that many areas of life are subject to forms of state-controlled licensing, regulation, inspection, intervention and assistance aimed at protecting the

> general public from physical or economic harm caused by the activities of other members of society (or sometimes from natural disasters). Licensing of firearms, regulation of financial services, inspections of restaurants, factories and children's nurseries, and enforcement of building regulations are random examples. To compile a comprehensive list would be virtually impossible, because the systems designed to protect the public from harm of one kind or another are so extensive.
>
> 114. It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.
>
> 115. The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), *Murphy v Brentwood District Council* [1991] 1 AC 398 (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (no duty of care owed by a highway authority to take action to prevent accidents from known hazards)."

184. Having completed this analysis Lord Toulson rejected a series of arguments for imposing a duty in the instant case. Most of the points which he considered are not relevant here. But in considering the minority speech of Lord Kerr JSC (with whom Baroness Hale agreed) he rejected an argument based on the *Hedley Byrne* principle at [135]:

> "There is, however, nothing anomalous in the *Hedley Byrne* principle itself or in its limitation. The principle established by the *Hedley Byrne* case [1964] AC 465 is that a careless misrepresentation may give rise to a relationship akin to contract under which there is a positive duty to act. Lord Devlin spoke of "an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract" and he said that "wherever there is a relationship equivalent to contract, there is a duty of care": pp 529—530. To extend the principle to a case in which the core ingredients were absent would be to cut its moorings."

185. There is nothing in Lord Toulson's judgment in *Michael* which directly supports the

imposition of a duty of care upon a local planning authority. Mr Campbell and Mr Booth agreed that he exposed the fallacy that Lord Bridge intended to lay down an all-embracing test in *Caparo* and that he emphasised the importance of incremental development. However, it does not follow that the "service" which a local planning authority provides in determining planning applications gives rise to a duty of care in the same way as the services which a doctor, teacher or educational psychologist provide. Indeed, it is a governmental function which is not replicated in the private sector. Finally, Lord Toulson recognised that the *Hedley Byrne* principle may give rise to a separate duty of care. But he rejected the application of the *Hedley Byrne* principle on the facts: see [135] (above) and [138]. His approach on that point was, in my judgment, entirely orthodox.

(2) Robinson

186. In *Robinson* two police officers caused injury to a passer-by in the course of arresting a suspect. The trial judge held that they owed her a duty of care and that they were negligent in failing to have regard to the safety of members of the public. The Court of Appeal dismissed an appeal by the police officers and their decision was upheld by the Supreme Court. Lord Reed JSC delivered the judgment of the majority whilst Lord Mance DPSC and Lord Hughes JSC delivered concurring judgments in which they both expressed doubts about the finding of negligence. For present purposes it is sufficient to focus on the speech of Lord Reed.

187. The primary argument advanced by the police force was that even in cases where they had caused direct harm to the claimant, they enjoyed a special immunity from liability in negligence. In *Michael* (above) Lord Toulson had rejected this analysis in a case where the police had failed to act to protect a victim of crime but held that they owed no duty of care. In *Robinson* the Supreme Court adopted a similar analysis but held that a duty of care did arise. The first issue which the Court had to consider was whether the existence of a duty of care always depends on the application of the *Caparo* test and Lord Reed held that it did not (following *Michael*). He delivered the coup de grace to the *Caparo* test at [29] and [30]:

> "29. Properly understood, the *Caparo* case thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents

> (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries. 30. Addressing, then, the first of the issues identified in para 20 above, the existence of a duty of care does not depend on the application of a "*Caparo* test" to the facts of the particular case. In the present case, it depends on the application of established principles of the law of negligence."

188. Lord Reed turned next to the liability of public authorities. He stated that at common law public authorities are generally subject to the same liabilities in tort as private individuals and bodies and that if conduct would be tortious if committed by a private person or body it is in general equally tortious if committed by a public body: see [30] and [31]. On the other hand, he followed *Michael* and said that public authorities like private individuals and bodies are generally under no duty of care to prevent the occurrence of harm: see [34]. But he recognised that there are certain circumstances in which a public authority can owe such a duty including those situations in which the public authority has created the harm or has assumed a responsibility for an individual's safety on which the individual has relied: see [37] (below). Lord Reed then considered the authorities in relation to the police (including *Michael*) and reached the following conclusion at [68]:

> "On examination, therefore, there is nothing in the ratio of any of the authorities relied on by the respondent which is inconsistent with the police being under a liability for negligence resulting in personal injuries where such liability would arise under ordinary principles of the law of tort. That is so notwithstanding the existence of some dicta which might be read as suggesting the contrary."

189. Lord Reed also responded to a number of points on which he disagreed with the Lord Hughes. It is unnecessary for me to explore those differences apart from one point where Lord Reed dealt with the question whether a duty of care still depends on whether the actionable conduct is an act or an omission. Lord Reed dealt with this in [69] as follows:

> "4. The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to

> prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefit (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendants having acted so as to create or increase a risk of harm.
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> 5. The argument that most cases can be equally analysed in terms of either an act or an omission, sometimes illustrated by asking whether a road accident is caused by the negligent driver's act of driving or by his omission to apply the brakes or to keep a good lookout, does not reflect the true nature and purpose of the distinction, as explained above. The argument was answered by Lord Hoffmann in *Stovin v Wise* [1996] AC 923, 945:
>
> > "One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity. To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common-sense principles of causation, that the damage was caused by something which the defendant did. If I am driving at 50 miles an hour and fail to apply the brakes, the motorist with whom I collide can plausibly say that the damage was caused by my driving into him at 50 miles an hour.""

190. Again, there is nothing in Lord Reed's speech in *Robinson* which directly supports the imposition of a duty of care upon a local planning authority. Lord Reed's general statement that public authorities are generally subject to the same liabilities in tort as private individuals and bodies was made in the context of an argument that police officers should be treated as special cases and should not be held liable for personal injuries which

they cause in carrying out their duties. His speech does not provide authority for the proposition that a local authority which carries out a governmental function assumes a duty of care just because that function can plausibly be described as the provision of a service.

191. In my judgment, Lord Reed did not intend to expand the *Hedley Byrne* principle any more than Lord Toulson intended to do so in *Michael* (above). In reaching this conclusion I place particular emphasis on what he said at [37]:

> "A further point, closely related to the last, is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: see, for example, *Smith v Littlewoods Organisation Ltd* [1987] AC 241 and *Mitchell v Glasgow City Council* [2009] AC 874. In *Michael's* case [2015] AC 1732, para 97 Lord Toulson JSC explained the point in this way: "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else." There are however circumstances where such a duty may be owed, as Tofaris and Steele indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied. The first type of situation is illustrated by the *Dorset Yacht* case, and in relation to the police by the case of *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273, discussed below. The second type of situation is illustrated, in relation to the police, by the case of *An Informer v A Chief Constable* [2013] QB 579, as explained in *Michael's* case [2015] AC 1732, para 69."

(3) Poole

192. In *Poole* the Supreme Court rejected the argument that a local authority owed a duty of care to two children whilst they were placed in a house on an estate adjacent to another family who (to the local authority's knowledge) had persistently engaged in anti-social behaviour. The two children alleged that the abuse and harassment which they had undergone between 2006 and 2011 caused them both physical and psychological harm. Lord Reed DPSC (as he had become), with whom all of the other members of the Court agreed, gave the only judgment and he began by considering the local authority's statutory duties before moving on to an overview of the law of negligence: see [25] to [34]. Because of the reliance which Mr Campbell placed on the passage and on *Poole* more generally, I must set it out in full:

"25. It is accepted that the provisions of the 1989 Act which impose duties on local authorities do not create a statutory cause of action. The question is whether local authorities may instead be liable at common law for breach of a duty of care in relation to the performance of their functions under the Act. In order to answer that question, it will be necessary to consider a number of authorities decided over the period between about 1995 and the present day. Before doing so, it may be helpful to begin with an overview, necessarily stated in general and simplified terms, of how legal thinking about the liabilities of public authorities in negligence developed over that period. As will become apparent, the period has been marked by shifting approaches by the highest court. In its recent case law this court has attempted to establish a clearer framework.

26. As was explained in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736, paras 31-42, public authorities other than the Crown were traditionally understood to be subject to the same general principles of the law of tort, at common law, as private individuals and bodies: see, for example, *Entick v Carrington* (1765) 2 Wils KB 275 and *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93. That position might be altered by statute, by imposing duties whose breach gave rise to a statutory liability in tort towards private individuals, or by excluding liability for conduct which would otherwise be tortious at common law: see respectively *Gorris v Scott* (1874) LR 9 Ex 125 and *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430.

27. In particular, as Lord Reid explained in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1030, a person performing a statutory duty was liable for an act which, but for the statute, would be actionable at common law, if he performed the act carelessly so as to cause needless damage. His liability arose because the defence which the statute provided extended only to the careful performance of the act. The rationale, Lord Reid explained, was that:

> "Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage."

Lord Reid added at p 1031 that the position was not the same where Parliament conferred a discretion. If the discretion was exercised lawfully, then the act in question would be authorised by Parliament:

> "But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that."

28. Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm: see, for example, *Sheppard v Glossop Corpn* [1921] 3 KB 132 *and East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, as explained in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, para 39.

29. This traditional understanding was departed from in *Anns v Merton London Borough Council* [1978] AC 728, where Lord Wilberforce laid down a new approach to determining the existence of a duty of care. It had two stages. First, it was necessary to decide whether there was a prima facie duty of care, based on the foreseeability of harm. Secondly, in order to place limits on the breadth of the first stage, it was necessary to consider whether there were reasons of public policy for excluding or restricting any such prima facie duty. These included, in the case of public authorities exercising discretionary powers, the supposed non-justiciability of decisions falling into the category of policy as opposed to operations. That two-stage approach had major implications for public authorities, as they have a multitude of functions designed to protect members of the public from foreseeable harm of one kind or another, with the consequence that the first stage inquiry was readily satisfied, and the only limits to liability became public policy, including the distinction between policy and operations.

30. The *Anns* decision led to a period during which the courts struggled to contain liability, particularly for "pure" economic loss (ie, economic loss which was not the result of physical damage or personal injury) and for the failures of public authorities to perform their statutory functions with reasonable care. Clarification of the general approach to establishing a duty of care in novel situations was provided by *Caparo Industries plc v Dickman* [1990] 2 AC 605 , but the decision was widely misunderstood as establishing a general tripartite test which amounted to little more than an elaboration of the *Anns* approach, basing a prima facie duty on the foreseeability of harm and "proximity", and establishing a requirement that the imposition of a duty of care should also be fair, just and reasonable: a requirement that in practice led to evaluations of public policy which the courts were not well equipped to conduct in a convincing fashion.

31. Although the decision in *Anns* was departed from in *Murphy v Brentwood District Council* [1991] 1 AC 398, its reasoning in relation

to the liabilities of public authorities remained influential until *Stovin v Wise* [1996] AC 923, where a majority of the House of Lords reasserted the importance of the distinction in the law of negligence between harming the claimant and failing to confer a benefit on him or her, typically by protecting him or her from harm. The distinction between policy and operations was also rejected. The resultant position, as explained by Lord Hoffmann in a speech with which the other members of the majority agreed, was that "In the case of positive acts, therefore, the liability of a public authority in tort is in principle the same as that of a private person but may be restricted by its statutory powers and duties" (p 947: emphasis in original). In relation to failures to perform a statutory duty, Lord Hoffmann stated at p 952 that:

> "If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed."

32. Further clarification was provided by the decision in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. In a speech with which the other members of the Appellate Committee agreed, Lord Hoffmann reiterated at para 17 the importance of the distinction between causing harm and failing to protect from harm, in the context of a highway authority's alleged duty of care to provide warning signs on the road:

> "It is not sufficient that it might reasonably have foreseen that in the absence of such warnings, some road users might injure themselves or others. Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it."

Lord Hoffmann also emphasised the difficulty of finding that a statutory duty or power generated a common law duty of care, observing at para 32, that it was "difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide".

33. Lord Hoffmann stressed at para 38 that the House was "not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care". For example, "A hospital trust provides medical treatment pursuant to the public law duty in the [National Health Service Act 1977], but the existence of its common law duty is based simply upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice." The duty in such a case "rests upon a solid, orthodox common law foundation and the question is not

> whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it".
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> 34. It took time for the significance of *Stovin v Wise* and *Gorringe* to be fully appreciated: they were not cited, for example, in *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] 1 AC 225. Confusion also persisted concerning the effect of *Caparo* until clarification was provided in *Michael* and *Robinson*. The long shadow cast by *Anns* and the misunderstanding of *Caparo* have to be borne in mind when considering the reasoning of decisions concerned with the liabilities of public authorities in negligence which date from the intervening period. Although the decisions themselves are generally consistent with the principles explained in *Gorringe* and later cases and can be rationalised on that basis, their reasoning has in some cases, and to varying degrees, been superseded by those later developments."

193. Lord Reed followed this overview with a detailed discussion of the child abuse cases and education cases before considering both *Michael* and *Robinson*. Apart from a brief discussion of an argument raised in *Michael* about the Human Rights Act 1998 at [62], I set out his commentary on both cases at [61] and [63] to [65]:

> "61. The case of *Michael v Chief Constable of South Wales Police* [2015] AC 1732, decided by this court in 2015, concerned the question whether the police owed a duty of care to a person who made an emergency call reporting threats of violence by a third party. Following essentially the same approach as in *Stovin v Wise*, *Gorringe* and *Mitchell* [2009] AC 874, this court decided by a majority that no duty of care was owed. It was recognised that liability for harm caused by a third party could arise in certain situations, such as where the wrongdoer was under the defendant's control, or where the defendant had assumed a responsibility towards the claimant to protect her, but the situation in the case at hand was not considered to be of that kind."
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> "63. Most recently, the decision of this court in 2018 in the case of *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 drew together several strands in the previous case law. The case concerned the question whether police officers owed a duty to take reasonable care for the safety of an elderly pedestrian when they attempted to arrest a suspect who was standing beside her and was likely to attempt to escape. The court held that, since it was reasonably foreseeable that the claimant would suffer personal injury as a result of the officers' conduct unless reasonable care was taken, a duty of care arose in accordance with the principle in *Donoghue v Stevenson* [1932] AC 562. Such a duty might be excluded by statute or the common law if it was incompatible with the performance of the officers' functions, but no such incompatibility existed on the facts of the case. The court distinguished between a duty to take reasonable care not to cause injury

> and a duty to take reasonable care to protect against injury caused by a third party. A duty of care of the latter kind would not normally arise at common law in the absence of special circumstances, such as where the police had created the source of danger or had assumed a responsibility to protect the claimant against it. The decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 was explained as an example of the absence of a duty of care to protect against harm caused by a third party, in the absence of special circumstances. It did not lay down a general rule that, for reasons of public policy, the police could never owe a duty of care to members of the public.
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> 64. *Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo* [1990] 2 AC 605 did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy. Secondly, the decision reaffirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael*. Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority.
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> 65. It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

194. Lord Reed dealt next with assumption of responsibility stating that it was important in

the context of the instant case. He cited a passage in Lord Morris's speech in *Hedley Byrne* [1964] AC 465 at 502-3 for the width of the principle. He also cited the well-known passage in Lord Devlin's speech at 528-30 in which he stated that the special relationships which may give rise to a duty are "equivalent to contract". He also pointed out that the principle has been applied in a number of ways and he drew particular attention to the following passage in the speech of Lord Goff in *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 318 at [68]:

> "All the members of the Appellate Committee in [*Hedley Byrne*] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that 'the essence of the matter in the present case and in others of the same type is the acceptance of responsibility' … Furthermore, although Hedley Byrne itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client: see, in particular, Lord Devlin, at pp 529-530. Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct."

195. Lord Reed then analysed how *Hedley Byrne* and *Spring* had been applied in the child abuse and education cases before making the following statement of principle at [73] (upon which Mr Campbell placed great reliance):

> "73. There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon* [2001] 2 AC 619, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield* [2001] 2 AC 550, where the assumption of responsibility arose out of the local authority's performance of its functions under child-care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct

> pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne* [1964] AC 465 and *Spring v Guardian Assurance plc* [1995] 2 AC 296."

196. Finally, Lord Reed analysed the pleaded claim before him. He pointed out that it was based on an assumption of responsibility by the local authority and concluded that its functions in investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. He concluded that the nature of the statutory functions did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care: see [82]. He then continued at [83]:

> "It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike- out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred."

197. Mr Campbell cited *Hans Husson v Secretary of State for the Home Department* [2020] EWCA Civ 329 as a case in which *Poole* has been applied. In that case the Court of Appeal refused to strike out a claim for judicial review on the ground that it was arguable that the Home Office owed the claimant a common law duty to exercise reasonable care to issue him with a biometric residence permit. After referring to Lord Reed's speech at [63] to [65] and [73] (above), Simmler LJ stated as follows at [61] and [63]:

> "61…[A]s Lord Reed observed in *Poole*, there are several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme……63. I remind myself that the threshold at this stage is one of arguability. The circumstances in which a public authority, when exercising statutory functions, may be held liable in negligence gives rise to complex questions in what is an evolving area of law. The question whether this is a case where the respondent merely has statutory powers or duties, and could have

> prevented the appellant's harm by exercising them to supply a BRP promptly (so that no duty of care arises); or whether responsibility was in fact assumed here, is not straightforward and may depend on a greater exploration of the particular facts. It is in circumstances such as these that the courts have shown an understandable reluctance (as reflected in the authorities to which I have referred) to strike out claims as disclosing no reasonable (or arguable) cause of action, instead favouring leaving the individual facts of the case to be determined so that the evolution of the law can be based on actual factual findings."

198. Mr Booth and Mr Walsh relied on *DFX (A Protected Party) v Coventry City Council* [2021] PIQR P18 where Lambert J stated that in *Michael*, *Robinson*, and *Poole* Lord Toulson and Lord Reed had "applied the orthodox common law approach and the established principles of law". She then set out the following distillation of the key general principles to be drawn from all three cases:

> "i) At common law public authorities are generally subject to the same liabilities in tort as private individuals and bodies. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority. It follows therefore that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence (*Robinson* at [33]).
>
> ii) Like private individuals, public authorities are generally under no duty of care to prevent the occurrence of harm. In *Michael*, Lord Toulson said at [97]: "English law does not as a general rule impose liability on a Defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): *Smith v Littlewoods Organisation Ltd* [1987] AC 241. The fundamental reason as Lord Goff explained is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else".
>
> iii) The distinction between negligent acts and negligent omissions is therefore, as Lord Reed said in *Poole* at [28] of fundamental importance. Lord Reed reflected that the distinction to be drawn could be better expressed as a "distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale for the distinction drawn in the authorities and partly because the distinction between acts and omissions seems to be found difficult to apply".
>
> iv) Public authorities do not therefore owe a duty of care towards individuals to confer a benefit upon them by protecting them from

> harm, any more than would a private individual or body, see *Robinson* at [35]. Lord Reed continues at [36] "That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question". The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then "it would be to say the least unusual if the mere existence of the statutory duty (or a fortiori, a statutory power) could generate a common law duty of care". It follows that public authorities like private individuals and bodies generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.
>
> v) The general rule against liability for negligently failing to confer a benefit is subject to exceptions. The circumstances in which public authorities like private individuals and bodies may come under a duty of care to prevent the occurrence of harm were summarised by Tofaris and Steel in "Negligence Liability for Omissions and the Police" 2016 CLJ 128. They are: (i) when A has assumed responsibility to protect B from that danger; (ii) A has done something which prevents another from protecting B from that danger; (iii) A has a special level of control over that source of danger; or (iv) A's status creates an obligation to protect B from that danger."

199. Finally, Mr Campbell cited *J v South Wales Local Authority* [2021] EWCA Civ 1102 as another case in which *Poole* has been followed. In that case, the Court of Appeal held that Marcus Smith J had been right to allow a County Court appeal by permitting a local authority to withdraw admissions both that it owed a duty of care and that its conduct amounted to a breach of them. The Supreme Court's decision in *Poole* prompted the local authority to apply to withdraw them and in the course of his judgment Lewison LJ (with whom Moylan and Coulson LJJ agreed) made the following comment about Poole at [34]:

> "I confess that I do not entirely understand why *N v Poole* is said to have caused a sea change in the understanding of what (if any) duties a local authority owes a particular child under the Children Act 1989 or at common law, in circumstances where that child has not been taken into care. Put another way, it is not obvious (to me at least) why the local authority in the present case felt obliged to admit the existence of the alleged duty. As Lambert J put it in *DFX v Coventry City Council* [2021] EWHC 1382 (QB) at [169] Lord Reed "applied the orthodox common law approach and the established principles of law"."

200. I respectfully agree with both Lambert J *in DFX v Coventry City Council* and Lewison LJ in *J v South Wales Local Authority* that in *Poole* Lord Reed applied the orthodox

common law approach and established principles of law to the existence of a duty of care. Moreover, in rejecting the primacy of the *Caparo* test in *Robinson* he emphasised the importance of the incremental approach and testing the facts against decided cases which fall within the same or analogous categories: "The courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions."

201. Furthermore, there is nothing in *Poole* to suggest that the Court should adopt a new or different approach to the question whether a public authority has assumed responsibility to an individual or class of individuals. Indeed, Lord Reed chose to rely on well-known statements of principle in both *Hedley Byrne* and *Spring* (and both were decided before the planning authorities which I must shortly consider). The individual or class of individuals must establish "an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill": see *Spring* (above).

202. In my judgment, the great value of *Poole* in the present case is that it frames the question which the Court has to decide and it does so in two parts. First, the Court has to decide whether the Council assumed responsibility to Primavera to exercise reasonable care in carrying out its statutory function under section 70 from the very nature of that function itself. Secondly, if the answer to the first part of the question is negative, the Court must go on and consider whether the Council assumed such a responsibility from the manner in which it behaved towards the Primavera on the particular of facts of this case.

(4) The Planning Authorities

203. In *Lam v Brennan* [1997] PIQB 488 the Claimants brought a claim for negligence against a planning authority for granting planning permission to a manufacturer, who was alleged to have caused personal injury and property damage by fumes which had escaped from neighbouring premises. The Court of Appeal struck the claim out on the basis that the local planning authority owed no duty of care. Potter LJ (giving the judgment of the Court) summarised the position at 499:

> "The duty of care in relation to the planning functions of a local authority has received consideration in a number of cases. In *Dunlop v Woollahra Municipal Council* [1981] 1 All ER 1202, Lord Diplock, at p.1209C to E, while doubting that it was so, left open the question

> whether an individual injuriously affected by either the refusal of planning permission on the part of a planning authority or by the grant of planning permission to neighbouring property owners had a right of action for damages against the planning authority. However, in *Strable v Dartford Borough Council* [1984] JPL 329 this court held that no such action lay and that the remedy available to an individual in such a case was to object on appeal to the Secretary of State and, if still dissatisfied with the planning results of that appeal, to seek judicial review of the Secretary of State's decision. Stephenson LJ made clear, at p.331, that the question is always whether, looking at the whole statute and at all the circumstances, including the history of the legislation, the relevant Act was passed primarily for the benefit of the individual or for the public in general. In the case of the planning function of a local authority he held that the latter was the case: see also *Ryeford Homes v Sevenoaks District Council* [1989] 46 BLR 34 at pp 43, 44."

204. The Court of Appeal also accepted that the planning system was a regulatory system imposed for the benefit of the public at large and designed to regulate the development and use of land in the public interest (and in this respect it is helpful to compare the language used by Lord Toulson in *Michael* at [113] (above)). In particular, Potter LJ stated this at 502-3:

> "In our view, it is quite plain that the regime of the Town and Country Planning Acts is, in the words of Lord Browne-Wilkinson in *X*, at p731H: a regulatory system … for the benefit of the public at large … [involving] … general administrative functions imposed on public bodies and involving the exercise of administrative discretions. Such a system is one in respect of which reported decisions reveal no example of a private right of action for breach of statutory duty ever having been recognised by the court. Again, we consider Mr Stewart was right not to press his argument that the respondents were in breach of a parallel common law duty in granting planning permission to the first defendant without proper inquiry. For the broad purposes of a description of the policy and functions of the planning system in England and Wales as regulated by, inter alia, the Town and Country Planning Act 1990 and subordinate instruments made thereunder, we are content to adopt the description set out at Halsbury's Laws of England (4th ed reissue) vol 46 at p16 para 1:
>
> > "The … system is designed to regulate the development and use of land in the public interest; and it is an important instrument for protecting and enhancing the environment in town and country, preserving the built and natural heritage, conserving the rural landscape and maintaining Green Belts.
> >
> > [It] … has a positive role to play in guiding the appropriate development to the right place, as well as preventing development which is not acceptable. It must make adequate provision for development and at the same time take account of the need to protect

> the natural and built environment. It must also take account of international obligations. In this way, properly used, the planning system can secure economy efficiency and amenity in the use of land."
>
> Against that background, and given the discretionary nature of the power conferred to grant or refuse planning permission under section 29 of the 1971 Act, it seems to us clear that the policy of the Act conferring that power is not such as to create a duty of care at common law which would make the public authority liable to pay compensation for foreseeable loss caused by the exercise or non-exercise of that power."

205. The Court also rejected the claimants' attempt to reformulate their claim on the basis of an assumption of responsibility. Potter LJ concluded that there must be "something more" than the local planning authority's performance of the statutory function itself (at 504):

> "Nor does it seem to us that the appellant's position can be improved by some alternative formulation of his cause of action on the basis of "assumption of responsibility". Where an allegation of "assumption of responsibility" is made against a person or body carrying out a statutory function, there must be something more than the performance (negligent or otherwise) of the statutory function to establish such assumption of responsibility: see, for instance, the case of *Welton v North Cornwall District Council* [1997] 1 WLR 570, in which the plaintiffs were held to have established an assumption of responsibility on the part of a servant of the defendant authority in respect of statements made to the plaintiffs as to the alterations necessary to secure compliance with food regulations. The court held that, in making those statements he had acted far outside the ambit of his statutory powers and duties which were said to provide no more than "the backcloth and reason" for the relationship created which gave rise to a duty of care. The analysis of the position in the judgments of the members of the court in that case can give no comfort to Mr Stewart in this context.
>
> It is clear to us that the facts proposed to be pleaded fall well short of establishing any such assumption of responsibility. All relate to matters which arose in the course and scope of the respondents' planning and enforcement functions: cf the *Welton* case. Here there is no contract between the appellants and the respondents, nor any situation equivalent to it: cf *Henderson v Merrett*. Nor is any communication from the respondents said in itself to amount to such assumption of responsibility: cf *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The matters relied upon are essentially no more than the fact that the respondents, on the complaint and at the prompting of the appellants or their solicitors, set about seeking to remedy the situation but took inadequate steps to do so. Nor is any special reliance upon such putative assumption pleaded."

206. Although it contains general statements of principle which apply to the present case, *Brennan v Lam* is clearly distinguishable on the facts because it involved a claim by an aggrieved third party and not the applicant for planning permission (or a party with a financial or property interest in the development). The Court of Appeal held that there was no assumption of responsibility by the local planning authority to a neighbour of the applicant. But the Court did not decide whether there might be circumstances in which a local planning authority had assumed responsibility to an applicant (or a closely related party) for processing and deciding the application. In reaching its decision, however, the Court relied on its earlier decision in *Strable v Dartford Borough Council* [1984] JPL 329. The relevant facts are stated in the short report as follows:

> "The appellant, Mr. Strable was a property investor with a business in Dartford, Kent. On October 9, 1970, he entered into a contract to purchase property for £6,000, 67 and 69 Lowfield Street, Dartford, Kent acting in reliance on views allegedly negligently expressed by the respondents, planning officers and provisions of the Local Development Plan. Subsequently and contrary to the provisions of the Development Plan (the town map), the respondents refused to grant planning permission for change of use of No. 69 from residential to office use. Following the intervention of Kent County Planning Authority, the respondents later granted temporary permission for the change of use, but due to its temporary nature the appellant was obliged to accept low and uneconomic rent from his tenants.
>
> On October 2, 1974, the appellant applied for planning permission to construct offices on the property as previously proposed to the planning officers, but the respondents failed within a reasonable time (five months) to notify the appellant of their decision to refuse permission. The Department of Environment later persuaded the appellant to withdraw his notice of appeal……
>
> ….The appellant alleged that the respondents by their delay and subsequent refusal of permission on March 17, 1975, rendered worthless his exercise of his right of appeal to the Secretary of State due to the fall in the value of the property and the substantial increase in construction costs during the five-month period. The appellant further alleged that the respondents negligently failed to inform him that during the five-month period they were considering the application for 61 Lowfield Street, thereby preventing him from seeking a joint agreement with the owners of 61 Lowfield Street to provide a service road across the rear of both properties. In addition the appellant alleged that the respondents were in breach of their statutory duty by negligently failing to take into account sufficiently the provisions of the town map.
>
> All the above matters, it was alleged, rendered it impossible for the appellant to appeal to the Secretary of State on a realistic basis, and prevented him proposing plans for the development of his property. The

> respondents' conduct had also caused the appellant substantial financial loss of rental income from his property. The current market value of the property was £25,000 but with planning permission for the intended office block the value would be in excess of £146,000. The appellant accordingly claimed damages from the respondent council."

207. Stephenson LJ (with whom Donaldson LJ and Sir David Cairns agreed) began by summarising the judgment of Sir Douglas Frank QC at first instance and an authority upon which he had relied. It is clear from that summary that the first question which the judge had to decide was "whether a local planning authority can be liable in negligence in dealing with an application for planning permission": see 330 col 1. Stephenson LJ then continued in two passages at 330 col 2 to 331 col 1 and 331 col 1 to col 2:

> "[I]n his judgment that decision was right, and the decision of the learned judge in this case was right in saying that the position still was that an individual who was injuriously affected, either by the refusal of planning permission on the part of a planning authority or by the grant of planning permission to neighbouring property owners, had no right of action for damages against the planning authority. His remedy was to object on appeal to the Secretary of State and, if still dissatisfied with the planning results of that appeal, to seek judicial review of the Secretary of State's decision.
>
> The learned judge had come to the conclusion that there was no cause of action and no jurisdiction to entertain the action. He went on quite understandably, to consider what the position would have been if he could have considered the question of negligence, and he had come to the conclusion that the appellant had failed to establish negligence against the local planning authority. He asked himself, "What have they done wrong?"; he pointed out that the appellant's grievance was that a planning permission was granted for a doctor's surgery but, he said, "what could the local planning authority have done, short of exercising compulsory purchase powers, which" counsel for the plaintiff "does not contend for?"
>
> "He had read the statement of claim in extenso because it indicated the nature of the appellant's complaints. They were all complaints about the exercise of the planning authority's powers, discretionary powers entrusted to it by Parliament, which it obviously had to exercise, subject to review and revision by the Secretary of State, in the best interests of the section of the public for which it was responsible. It seemed as plain to him as it had done to the learned judge that in this field an authority's exercise of those powers, or performance of those duties, could not be made the subject of suits by individual property owners who were dissatisfied with its decisions in matters of administrative planning."

208. Mr Campbell submitted that the claim in *Strable* was not a claim for negligence but a

claim for statutory duty. He also submitted that *Lam v Brennan* had been decided *per incuriam* for the same reason. I reject that submission. It is clear from the passages which I have set out above that the claimant alleged negligence and at first instance Sir Douglas Frank QC decided that issue against him. It is also clear that Stephenson LJ decided the appeal on the same basis before observing that counsel had almost had to concede negligence because of the weakness of his case:

> "Mr. Bigham, discharging a task of almost impossible difficulty, had inclined to leave negligence behind – and to concede that his real claim here was a naked claim for breach of statutory duty, and that was really all it was."

209. Mr Campbell also submitted that *Strable* was distinguishable because it was concerned with the exercise of the discretion whether to grant planning permission and not the process itself. He accepted that it was far more difficult to find a local planning authority liable for exercising its discretion to grant or refuse planning permission but that it could be liable for delays or faults in the process. Because this was an important distinction which Mr Campbell drew at the beginning of his submissions, I cite the relevant passage from the transcript:

> "The other distinction that I want to be clear about, because it's a distinction that I think is elided by my learned friends in their skeleton, is between a discretionary decision and a carrying out of a service. Now, many of the cases sound powerful warnings about the court's power to interfere with discretionary decisions, but that's not our case. Our complaint isn't the fact -- isn't the grant of planning permission; our complaint is how long it took, and the fact that it was ineptly done, but we don't say that there was a decision, a planning decision, that was wrong. We don't seek to attack that. And what that means is that the very high bar that is required to be hurdled is a discretionary decision, doesn't apply in this case. The law now, confirmed in *Poole* but it has been the law for a long time, is where discretionary decision is attacked, the discretion has to have been exercised so badly that it in fact falls outside the statutory conferment of a discretion. In public law terms, judicially reviewable. But that's not my case."

210. Mr Campbell was correct to say that Lord Reed dealt with the difficult topic of statutory discretions and the law of negligence in *Poole.* He dealt with this issue in the course of his general survey (see [27]) and his analysis of the child abuse cases (see [39]) and he accepted the general proposition that if a decision falls within the ambit of a statutory discretion, then it cannot be actionable at common law. But it does not follow from these

statements that a public authority is liable at common law for the negligent exercise of those statutory functions which do not involve the exercise of a statutory discretion. Indeed, it is clear (even from the short report of the case) that the Court of Appeal in *Strable* was considering the same kind of allegations as Primavera makes in the present case. In particular, the plaintiff alleged that the planning officers had given negligent advice and that he suffered loss as a consequence of the local planning authority's delay in reaching its decision (or giving notice of the decision).

211. I also reject Mr Campbell's distinction between the decision to grant planning permission and the process by which the Council processed or dealt with the First and Second Applications (which Mr Campbell described as a "service"). That distinction comes very close to the now discredited distinction drawn in *Anns* between policy and operations. Moreover, the distinction breaks down in the present case. For example, Primavera alleges that the Second Decision was negligent because the Council failed to take account of policy changes which had taken effect after the First Application had been submitted. The flaw in the Second Decision can either be treated as a failure of process by officers (because they adopted an internal procedure which required planning applications to be considered by reference to policies in place when it was made) or a flaw in the Second Decision itself (because the Committee failed to have regard to a material consideration, namely, the emerging policy for affordable housing).

212. Mr Booth and Mr Walsh properly drew my attention to the more recent decision in *Kane v New Forest DC* [2002] 1 WLR 312 in which the Court of Appeal refused to strike out a claim against a local planning authority for negligence by insisting on the construction of a footpath before the necessary measures had been taken by the highway authority to improve visibility. Simon Brown LJ (as he then was) refused to accept that planning authorities had immunity from all claims in negligence on the basis of *Dunlop v Woollahra*, *Lam v Brennan* and *Strable* and he stated this at [22] and [23]:

> "22 *Dunlop v Woollahra Municipal Council* [1982] AC 158 and *Strable v Dartford Borough Council* [1984] JPL 329 were very different cases and really are authority for no more than that local planning authorities are not liable in damages for financial loss resulting from their negligent dealing with planning applications. 23. It seems to me far from clear on these authorities that a local planning authority would be immune from liability if they permitted (still less if they required) the construction of a foreseeably dangerous footpath or (which is perhaps the better way of

> putting the present case) if they failed when granting the planning permission (or requiring the work) to impose a condition forbidding the opening of the footpath to the public until the sightlines had been cleared. How could the imposition of such a condition be contrary to anyone's interest? How could it have been "wholly detrimental to the proper process of considering planning applications" (to use Collins J's words approved by the Court of Appeal in the *Lam* case [1997] PIQR P488) for the defendants to have had regard to the "private law interests" of those who would use this prospectively dangerous footpath? Why would the planning process be "adversely affected" by making the defendants potentially liable to an action in negligence for failing to take this elementary precaution?"

213. *Kane* can, in my judgment, be seen as an example of the first category case which Lord Reed identified in *Robinson* at [37] (above), namely, a case where the public authority had created a danger of harm which would not otherwise have existed, rather than the second category of case, where the public authority stepped outside its statutory function and assumed responsibility directly to the applicant for processing or determining a planning application with reasonable care.

214. The final planning decision to which I was taken was *R (D2 Solutions Ltd) v Secretary of State for Communities and Local Government* [2018] PTSR 1125. In that case, the claimant was refused planning permission to carry out a wind turbine development and an appeal against that decision was dismissed. However, that decision was later quashed because the inspector had made an error of fact. But by the time the appeal came to be determined again, substantial changes had been made to the Feed-in Tariffs scheme. The claimant applied for an *ex-gratia* payment under the PINS scheme and when that was refused, it applied for judicial review. Holgate J dismissed the application and one of the reasons which he gave was that the Secretary of State and the inspector owed no duty of care to the claimant. He stated this at [74]:

> "There are fundamental problems with the claimant's argument. It has to be accepted that the state is entitled to control the use and development of land in the public interest. Accordingly, a mere refusal of planning permission does not amount to an interference with the peaceful enjoyment of possessions under the first rule in AIPI. Furthermore, simply making a mistake in the exercise of planning control, even one which is required to be corrected, does not alter that analysis, a fortiori where the correction of that mistake either may, or may not, result in the same outcome. It is well established in our law of tort that local planning authorities are generally not liable in damages for financial loss resulting from alleged negligence in the determination

> of planning applications: *Dunlop v Woollahra Municipal Council* [1982] AC 158; *Strable v Dartford Borough Council* [1984] JPL 329; *Kane v New Forest District Council* [2002] 1 WLR 312, para 22. It is difficult to see how, within the statutory framework of the TCPA 1990, any duty of care could arise when an inspector or the Secretary of State discharges an appellate function, for example by determining a developer's appeal against a decision of a local planning authority. No duty of care recognised by the law of negligence is owed: *Caparo Industries plc v Dickman* [1990] 2 AC 605. Against that background it would be most surprising if AIPI could be used to create an entitlement to compensation for errors made in the determination of planning appeals. No authority was cited to support that notion."

215. Mr Booth submitted that this was an accurate statement of the law and, in general terms, I accept that submission. Holgate J's analysis of the law carries great authority in this field of the law. However, that analysis cannot be treated as determinative because *D2 Solutions* did not involve a claim for negligence but an application for judicial review and the judge was only considering liability for the tort of negligence in the most general terms. Moreover, he decided the point before the Supreme Court had decided both *Robinson* and *Poole*.

(5) Analogous Cases

216. Mr Campbell cited *Sebry v Companies House* [2015] EWHC 115 (QB) as an example of an analogous case in which the Court had held that a public authority had assumed responsibility for carrying out its statutory functions. In that case, Edis J held that the Companies Registrar owed a duty of care to a registered company to record information accurately about it at Companies House. He stated this at [111]:

> "It appears to me that where the Registrar undertakes to alter the status of a company on the Register which it is his duty to keep, in particular by recording a winding up order against it, he does assume a responsibility to that company (but not to anyone else) to take reasonable care to ensure that the winding up order is not registered against the wrong company. This does not impose a duty to verify information supplied by a third party such as an Insolvency Practitioner, but only to ensure that the information is accurately recorded on the Register. This special relationship between the Registrar and the company arises because it is foreseeable that if a company is wrongly said on the Register to be in liquidation it will suffer serious harm. My finding on the Causation Issue shows that in this case that harm amounted to the destruction of a company which had traded for over 100 years and which owned a valuable business. The nature of the exercise also supports the finding of such a relationship. The company

> is not consulted before its liquidation appears and has no opportunity to protest that the entry, if made, will be a mistake. Effectively, the system places a degree of trust therefore in the Registrar's staff to ensure that it does not damage companies which have no way of defending themselves against errors. When such an exercise is performed in private and behind closed doors, those doing it have truly assumed responsibility for it: indeed no-one else is in any way involved in it. The responsibility for it is entirely placed on the Registrar and his staff. At the time of each entry, it is not the case that a duty is owed to every company on the Register. The duty only arises when the record of a company is altered in a way which will probably cause serious harm if it is done carelessly. At that point the class of persons to whom the duty is owed is confined to one company. *White v. Jones* makes it clear that the class can be adjusted to meet considerations of practical justice and in my judgment practical justice suggests strongly that it should contain, but be limited to, the Company whose record is being changed."

217. Finally, Mr Booth and Mr Walsh took me to *Welton v North Cornwall DC* [1997] 570, in which a public authority went beyond its statutory functions and assumed responsibility to a landowner. In that case, an environmental health officer visited a guest house and negligently required the owner of premises to undertake unnecessary work to secure compliance with the Food Safety Act 1990 causing the owner to incur substantial and unnecessary expenditure. Rose LJ (with whom Ward and Judge LJJ agreed) considered that the judge's finding of assumption of responsibility was unassailable for the following reasons (references removed):

> "His unchallenged findings of fact included reliance by the plaintiffs on Mr. Evans and knowledge of such reliance on Mr. Evans's part. Accordingly, there was, within *Hedley Byrne* as subsequently analysed, an assumption of responsibility by Mr. Evans and hence a duty of care owed by him. Some of the authorities are expressed in terms of what is fair, just and reasonable and some in terms of policy considerations. But I confess that I am unable to discern in the authorities any material difference attributable to that difference in language, either in the route charted or in the ultimate destination, when the existence of a duty of care is recognised or denied. That said, where there is no statutory duty and a case of economic loss falls within the *Hedley Byrne* principle, no further inquiry is necessary as to whether it is fair and reasonable to impose liability. The defendants' assumption of responsibility for certain services founds liability for the negligent performance of those services."

218. Rose LJ then asked himself whether the existence of a statutory duty provided any reason for excluding from the *Hedley Byrne* principle any relationship derived from the exercise of statutory powers and duties. He held that the *Hedley Byrne* principle was not excluded

for the following reasons (references also removed):

> "When considering the impact of statutory duty on the relationship in the present case, it seems to me that there are at least three categories of conduct to which the existence of the defendants' statutory enforcement duties might have given rise. First, there might be conduct specifically directed to statutory enforcement, such as the institution of proceedings before the justices, the service of an improvement notice and the obtaining of a closure order, in an emergency or otherwise. Such conduct, even if careless, would only give rise to common law liability if the circumstances were such as to raise a duty of care at common law; and such a duty is not raised if it is inconsistent with, or has a tendency to discourage due performance of, the statutory duty. Secondly, there is the offering of an advisory service: in so far as this is merely part and parcel of the defendants' system for discharging its statutory duties, liability will be excluded so as not to impede the due performance of those duties. But, in so far as it goes beyond this, the advisory service is capable of giving rise to a duty of care; and the fact that the service is offered by reason of the statutory duty is immaterial. Thirdly, there is the conduct which is at the heart of this case, namely the imposition by Mr. Evans, outwith the legislation, of detailed requirements enforced by threat of closure and close supervision."

219. I find both cases of limited assistance. *Sebry* turned on the statutory scheme in question and the fact that it was within the power of the Registrar of Companies to register information without consulting the relevant company. *Welton* is clearly a case where there was "something more" than the performance of a statutory function. The officer in question both offered advice and imposed requirements upon the premises which were not required by the legislation.

K. Application

220. I turn, therefore, to the application of the law to the factual findings which I have made. I begin by addressing the first part of the question framed by Lord Reed in *Poole*, namely, whether by carrying out its statutory functions the Council assumed responsibility to Primavera for processing and determining the First and Second Applications with reasonable care. In answering this question I consider first whether the Council owed a duty of care to Shandler Homes as the Applicant named in both the First and Second Applications before going on to consider whether it assumed responsibility to a wider class including Primavera. I then address the second part of the question framed by Lord Reed in *Poole*, namely, whether by its conduct the Council assumed responsibility to Primavera for processing and determining the First and Second Applications with

reasonable care.

(1) The Council's statutory functions

221. Mr Campbell submitted that the Council assumed responsibility to an applicant for planning permission because its statutory function involved the provision of a service to Shandler Homes in circumstances which were equivalent to contract and that the *Hedley Byrne* principle was engaged. Mr Campbell also submitted that the relationship between Shandler Homes and the Council was equivalent to a contract because it paid a fee and there was consideration for the service provided. I reject those submissions for the following reasons:

(1) *Lam v Brennan* (above) provides clear authority for the proposition that the TCPA 1990 (and the legislation which preceded it) was not passed for the benefit of individual applicants for planning permission but was intended to provide a regulatory system for the benefit of the public as a whole: see the judgment of Potter LJ at 501-3 (above). In my judgment, the purpose of the Act is not to confer a private law benefit on the applicant but to prevent it from carrying out development except in accordance with statutory controls.

(2) There is nothing in *Michael*, *Robinson* or *Poole* to cast doubt on this proposition and Lord Toulson's judgment in *Michael* supports it. He drew a distinction between those functions of a public authority by which it provides services which are not particularly governmental in nature and those functions which involve "state-controlled licensing, regulation, inspection, intervention and assistance aimed at protecting the general public from physical or economic harm caused by the activities of other members of society": see [113]. In my judgment, the functions of a local planning authority clearly fall into the second category and not the first.

(3) As Stephenson LJ stated in *Strable*, a local planning authority has to exercise its functions in the best interests of the section of the public for which it is responsible (subject to review and revision by the Secretary of State). The interests of the local planning authority are, therefore, separate from the interests of the applicant and, indeed, may often conflict with those interests. Mr Down accepted this in cross-examination.

(4) Moreover, in carrying out its statutory functions the Council gave no assurance to Shandler Homes which might form the basis for an assumption of responsibility so as to give rise to a private law duty in tort. Section 70(2) imposed a duty to have regard to the provisions of the development plan and any other material considerations but, by assuming that duty, the Council was not giving any assurance to Shandler Homes that it would decide either application in a particular way or within a particular time. In either case, the remedy was to appeal.

(5) It is also important to note that there is no statutory time limit within which a local planning authority is obliged to decide a planning application upon which an applicant is entitled to rely. Then, as now, the PPG 2014 provided guidance that best practice was for a planning application to be decided in 26 weeks or the fee returned. But, as Ms Snow pointed out, this is no more than guidance. If an applicant is unhappy with the progress of a planning application, then the remedy is to appeal against its non-determination. The right to appeal arises after eight weeks and the applicant has six months within which to exercise it (subject to any agreed extension).

(6) An applicant may decide not to exercise the right of appeal for non-determination and for any number of reasons. But having taken that decision, the applicant then takes the risk of any flaw or delay in the process. In the present case, I have found that Mr Down took a calculated decision not to exercise that right. I have also found that he was aware of the risks associated with that decision. In those circumstances, he could not rely on the Council to compensate Shandler Homes (or, for that matter, Primavera) if the process took longer than expected and Mr Simpson accepted this in cross-examination:

> "Q. If an applicant is unhappy at the time taken for determination, as we've already agreed, its remedy is to exercise a right of appeal against the local planning authority for non-determination, isn't it? A. That's right, yes. Q. And it can exercise that right of appeal at any point during the six months following the date of expiry of a statutory determination period? A. It can, yeah. Q. What an applicant doesn't do is look to sit matters out and then secure a financial remedy from the courts, does it? A. No, not in my experience."

(7) I agree that Shandler Homes paid a fee for each application (and that it was not insubstantial). But in my judgment, this did not make the relationship between

applicant and local planning authority the equivalent of a contract or engage the *Hedley Byrne* principle both for the reasons which I have already given but also because there was no evidence that either party or either expert regarded the payment of the fee as the quid pro quo for deciding the planning application. Indeed, the Council returned the fee for the Second Application after six months in accordance with the PPG 2014. Mr Campbell did not suggest that the Council was no longer obliged to determine the Second Application after that date or that it ceased to owe a duty of care.

(8) Mr Booth and Mr Walsh did not submit that I was bound by *Strable* to decide this issue in the Council's favour and given the very short report, I would have been reluctant to decide the duty question purely on that basis. Nevertheless, the allegations in *Strable* were almost identical to the allegations in the present case and if I had been in any doubt about the existence of a duty of care, I would have been prepared to hold that I was bound to follow the decision of the Court of Appeal.

(2) The scope of any duty

222. Mr Campbell also submitted that the Council owed a duty of care not only to Shandler Homes as the Applicant for each planning application but also to a class of claimants which, on Primavera's pleaded case, included Primavera, Fusion (or its associated companies) as the developer and the Fairbairn Bank (or Nedbank) as the lender. Even if I am wrong and the Council owed a duty of care to Shandler Homes as applicant, I reject Mr Campbell's submission and I find that the Council owed no duty of care to any of these parties for the following reasons:

(1) I have found that Mr Down told Ms Sahlke that Primavera was the owner of the Property before the First Application was submitted and that he told her that it was a special purpose vehicle through which he and the investors were acquiring the Property as beneficial owners. I have also found that on 3 May 2012 the Council became aware of the interest of the Fairbairn Bank and on 7 July 2015 it became aware of Fusion's interest (through its associated company).

(2) However, by carrying out its statutory functions the Council did not assume responsibility to these parties because it was made aware of these interests. Mr

Simpson accepted that these interests were only relevant to the planning applications in determining the appropriate level of financial contributions and affordable housing, which was to be incorporated into a S106 Agreement.

(3) Further, when Mr Booth put the specific facts of this case to him, Mr Simpson accepted that the interests of Primavera, the Fairbairn Bank and Fusion were not relevant to the Council's determination:

> "Q. No. Okay. In light of those matters, I just want to touch on the particular facts of our case. We have a claimant, Primavera. That is a company incorporated in the British Virgin Islands, managed by trustees in Jersey, yes? A. I believe that's the case, yes. Q. Just in all fairness to you, let's look at the relevant, or one of the relevant documents. That's {D1/84/1}. We can see there, it's an email from Mr Down, who the court has already heard from? A. Yes. Q. And his third paragraph reads: "The SPV buying ...(reading to the words)... As you can see, a complex trail!!"A. Yes. Q. In terms of the first application, that is made on the basis -- on a basis, rather, that asserts that the owner of the land is Mr Down. And in light of the common ground that we've established, we're agreed that the council was fully entitled to rely upon the box 25 certification that Mr Down or Shandler was the owner? A. Yes. Q. And as regards the statement as to ownership made in the second application, and that identified the owner as being Fusion Residential, again, no reason, no obligation to go behind that statement, yes? A. No. Q. And in both cases, no reason for the local planning authority to seek out the funding arrangements or the corporate ownership of either Shandler Homes or Fusion Residential; there's no statutory obligation to look out any of that, is there? A. No, there isn't. Q. And it wouldn't be relevant to determination of the application? A. No. Q. And it's a point we have already touched on, again, I think perhaps relevant in this context. We can agree, can't we, that a party is entitled to make an application for planning permission in relation to land that it does not own? A. Correct."

(4) Mr Campbell did not submit that the Council assumed responsibility to Primavera by requiring it to enter into a S106 Agreement as the owner of the Property and, in my judgment, he was right not to do so. I accept that Primavera, FWRL and the Fairbairn Bank (and then Nedbank) were parties to either the First or Second S106 Agreement or both. But these agreements were not executed until the very end of the process and immediately before the relevant decision notice was issued. Moreover, neither S106 Agreement imposed any contractual obligations upon the Council to those parties or acknowledged the existence of any existing obligations. In the absence of any contractual duty (or any acknowledgment of such a duty in

the First or Second S106 Agreement), there is no basis for imposing a duty of care in the tort of negligence upon the Council.

(3) The Council's Conduct

223. I turn now to the second part of the question framed by Lord Reed in *Poole*, namely, whether an assumption of responsibility can be inferred from the manner in which the Council behaved towards Primavera on the facts of this particular case. I am satisfied that no such inference can be drawn and no assumption of responsibility can be implied from the communications between the parties for the following reasons:

(1) I have found that the Council's officers and the Committee's members did not give any commercial or legal advice to Primavera or to Fusion (on its behalf) upon which Primavera (or Fusion) relied in relation to the First Application either when it was originally submitted or when it was submitted in a revised form.

(2) I have also found that Mr Down took a calculated decision not to appeal against the non-determination of the Second Application in the knowledge that the position was uncertain and changing. I am satisfied that Primavera chose to take the risk of any delay or flaw in the statutory process rather than to appeal.

(3) But even if (contrary to my finding of fact) Mr Down did not consider an appeal to be a realistic option because Mr Taylor and he did not know what they would have been appealing against, I have also held this belief was an unreasonable one and not induced by any representation or assurance made by the Council.

(4) I have found that in the period between 13 April 2013 and 27 September 2016 the Council did not assume responsibility for the progress and determination of the Second Application within a specific time frame or within a time which Mr Taylor or Mr Down considered reasonable. I have also found that Fusion and Primavera adopted a confrontational and heavy-handed approach. In my judgment, Mr Taylor's complaints and the Letters of Claim which Lawrence Stephens sent to the Council negated any reliance by Primavera upon the competence or efficiency of the Council.

L. Decision

224. For these reasons I find that the Council did not owe a duty of care to Primavera to exercise reasonable care in processing and determining either the First or Second Application and I dismiss the claim. However, because the breach of duty, causation and assessment of damage issues were fully argued and in case my determination of the duty of care issue is wrong, I go on to decide each of those issues.

V. Breach of Duty

M. The First Application

(1) Standard of Care

225. In his first report, Mr Simpson drew attention to section 1 of the Royal Town Planning Institute Code of Professional Conduct dated February 2012 (the "**Code**") which imposed the following standards upon its members: to act with competence, honesty and integrity; and to discharge their duties to their employers, clients, colleagues and others with due care and diligence in accordance with the provisions of the code. He said in evidence that there was no other professional body of which town planners might be exclusive members. But he also accepted that the Code did not apply to planning officers who were not members of the Institute.

226. Mr Booth and Mr Walsh also referred to section 1(1) of the Compensation Act 2006 which provides as follows:

> "A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might— (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or (b) discourage persons from undertaking functions in connection with a desirable activity."

227. There is a substantial body of authority on the question whether the Court should adopt the code of conduct of a professional body as the standard of care in a claim for negligence. But in the present case, it is unnecessary for me to decide that issue. Mr Simpson did not identify any specific provisions of the Code which he considered the planning officers of the Council to have broken and the provisions upon which he relied impose general standards which do no more than mirror the common law. Likewise, Mr Booth did not argue that either limb of section 1(1) of the Compensation Act 2006 had

any direct application to the present case. I prefer, therefore, to consider the allegations of negligence by reference to the expert evidence, who were agreed on the standard of care to be expected of a local planning authority: see the extract from Ms Snow's evidence (below).

(2) The First Decision

228. Primavera advanced two allegations of negligence in relation to the First Decision in the Particulars of Claim. It alleged that the Council took account of draft policies and not the local development plan. It also alleged that the Council failed to apply the correct policy in relation to access to Watford Road:

> "HBC was negligent in its grant of the First and Second Permissions. In respect of the First Permission HBC took account of draft policies and not the local development plan as approved by the Secretary of State and adopted by HBC. Further, the First Permission was obviously flawed because it failed to apply approved policy and guidance on safe vehicular and service vehicular access onto Watford Road. Specifically the vision splays were inadequate and obviously so according to such policy and guidance."

229. Ms Snow dealt with the first allegation in her first report. She referred to the NPPF which stated that local planning authorities may give weight to relevant policies in emerging plans. She also noted the relevant policies at the date of the First Decision. She then expressed the following opinion:

> "3.20 At the time that the First Permission was granted in September 2012 the Local Plan Core Strategy DPD had already been through public examination. Two months after the First Permission was granted the Core Strategy was found to be sound. In the context of paragraph 48 of the NPPF the Core Strategy was at an advanced stage of preparation. In these circumstances I consider that HBC were correct to have regard to, and to attribute some weight to, the draft policies contained within the emerging Local Plan Core Strategy DPD when determining to grant the First Permission. 3.21 The degree of weight attached would be a matter of professional planning judgement for the officer concerned but it is my view that HBC were correct to give some weight to the draft policies when determining the grant the First Permission."

230. In the first joint report which he signed on 17 February 2022, Mr Simpson agreed with these paragraphs in Ms Snow's report without qualification. Although Mr Campbell

made no concession in relation to this allegation, he did not challenge Ms Snow's evidence either in cross-examination or in closing submissions. In the light of the agreement between the experts, I dismiss the first allegation of breach of duty in relation to the First Decision.

231. By the date of trial it was common ground between the experts that Conditions 17 and 21 were intended to refer to the Highways Plan which Ms Kyprianos had submitted to the County Council on 7 March 2012. It was also common ground that the visibility splays shown on the Highways Plan were deficient. Mr Simpson accepted in cross-examination that the County Council was responsible for the approving the Highways Plan and that it was not negligent for the Council to rely on the County Council's advice:

> "Q. So we're all agreed, indeed, Mr Down agreed, that the visibility splays, as shown on P05 rev A, were deficient. The county council belatedly found them to be deficient. You agree they were deficient. And this takes us to the very end of it. Hertsmere is not a unitary authority, is it? A. No, it's not. Q. It operates in this two-tier system? A. Yes. Q. It exercises a planning function, but with certain functions bounced up, strategic functions, if you will, bounced up to the county. And Hertsmere itself doesn't have highways officers, people with the technical highways qualifications? A. That's right. Q. So very fairly, if we turn up {C/12/4}, and can we have also {C/12/5}, we see in relation to Ms Snow's paragraph 3.9, you volunteer that you agree with what she says and you agree a responsibility for highways matters, including the assessment of splays, lies with the county? A. Yes. Q. And at 3.11, you say that you agree it was reasonable for Hertsmere to have relied upon the expert advice of the Highways Authority, as regards to the visibility splays? A. Yes. Q. So what we see, then, is a situation where the county council, who are the appropriate authority to assess visibility splays, they tell Hertsmere that in fact the splays are fine; but ultimately they realise that that advice was wrong, but it was reasonable of the borough council to rely upon that advice? A. Yes. Q. On that basis, we can agree, can't we, Mr Simpson, that Hertsmere Borough Council was not negligent in its determination of the first application the first time around? A. Yes."

232. Earlier, Mr Down had continued to assert that the Council was responsible for approving the Highways Plan and he refused to accept that he knew that the County Council was responsible for the mistake. I attach no weight to that evidence given Mr Simpson's later concession. Moreover, Mr Simpson also accepted that any reasonable developer would have been aware of the division of responsibility:

> "Q. So that's the plan which you say should have been identified. Now,

> that plan is at {D1/275/1} in the bundle, and it's attached, if we can have the other page, it's attached to an email at {D1/276/1}. The email at {D1/276/1} is an email from Helen Kyprianos, the agent, to the county council? A. Yes. Q. And that's significant, isn't it, because highways matters are the purview of the county council? A. Yes. Q. The fact of highways matters being a county council matter, is that a complicated planning issue, or is that relatively mundane; is that the sort of ABC issue that you would expect any developer worth their salt to understand? A. Yes. Q. Yes. Any developer worth their salt would understand that highways are the responsibility of county, not the borough, yes? A. Yes."

233. Mr Simpson's only criticism of the Council (as opposed to the County Council) was that the reference to the Highways Plan in Condition 21 was inadequate because it did not identify the plan sufficiently clearly and or adopt a standard plan reference. However, he accepted in his oral evidence that Condition 21 was referring to the Highways Plan (which did not display a standard reference) and that it was not negligent of the Council to require compliance with Condition 21 by reference to the Highways Plan:

> "Q. You are not going to maintain, are you, Mr Simpson, that insofar as the council required compliance with a plan, using the nomenclature on the plan, you're not going to maintain, I hope, that their conduct amounted to negligence, Mr Simpson? A. I think it was -- I do think it was unclear and regrettable that they didn't make the position clearer; and all through this process, there was lack of clarity which is seen on a number of occasions around this very drawing, and what it shows, and that speaks for itself, but ...Q. Mr Simpson, I'm going to take issue with you on those points if I need to, but I'm going to take you back to my question, which is that do you maintain that it was negligent of this authority to require compliance in condition 21 with a plan titled "Highways date stamped 7/3/12"; do you say that was negligent or not? It's binary. A. No."

234. Mr Campbell suggested to Ms Snow that the Council should have identified the Highways Plan by a proper plan reference. But she did not accept this and gave evidence that it did not matter provided that the means of identification shown on the plan was reflected in the decision notice. I accept the evidence of both Mr Simpson and Ms Snow and I find that the Council was not negligent by relying on the County Council's approval of the Highways Plan or by identifying the plan by reference to its date alone in Condition 21. For these reasons I would have dismissed its claim in relation to the First Decision even if I had found that the Council owed Primavera a duty of care.

(3) The Second Decision

235. Primavera alleged that the Council was negligent by determining the revised First Application by reference to the development plan and policies in place at the date on which it was originally submitted:

> "In respect of the Second Permission HBC acted in clear breach of the 1990 and 2004 Acts in ways of which it was expressly warned in advance. HBC re-determine [sic] the Second Application by reference to the development plan in place before the Revised Core Strategy adopted by HBC on 17th January 2013. The conduct of HBC was once again obviously flawed. S.38(6) of the Planning & Compulsory Purchase Act 2004 and S.70(2) of the Town & Country Planning Act 1990 ("the 1990 Act") required HBC to take account of the Revised Core Strategy in its consideration of the Second Application as the statutory development plan in force for its area at the date of the determination of the Second Application."

236. The Council did not admit this allegation in the Defence but Ms Snow accepted in her first report that it was a substantive error to approach the First Application in this way and that the Council fell below the standard of a reasonable planning authority in exercising its statutory duty in this regard. She also accepted that the Council was negligent in cross-examination:

> "Q. And so we can move to the second permission which will be quicker, I think, and easier. I'm going to cut to the chase. Tell me if you want to go to your supplemental report, but I think that we will agree with each other, and I think we already have agreed, that HBC were negligent in the granting of the second permission? A. Yes. Q. At least in one respect? A. Yes. Q. Okay. I'm not in fact particularly concerned with the other respects that Mr Simpson puts forward, because I think that we have gone far enough on that. A. Okay. Q. There was some debate about Mr Simpson's conception of negligence. Did you have any difficulty in characterising the second permission as negligent? A. No."

237. Finally, Mr Booth and Mr Walsh stated in their Skeleton Argument at the outset of the trial that the Council accepted that in proceeding to issue the Second Decision by reference to planning policy other than that which was extant at the date of that decision, its conduct fell below the standard of a reasonable planning authority (although they pointed out that Fusion repeatedly made representations to the Council that it should determine the revised First Application in that way).

238. If the Council owed a duty of care (contrary to my finding above), then I find that it committed a breach of that duty and failed to exercise reasonable skill and care by

determining the revised First Application by reference to the planning policy at the date on which the First Application was submitted and not by reference to the emerging planning policy at the date of the Second Decision. For the avoidance of any doubt, I add that I do not find that the Council failed to exercise reasonable care in relation to any other aspect of the First Application or the First and Second Decisions.

N. The Second Application

239. In the Particulars of Claim Primavera also alleged that the Council was guilty of unreasonable and unexplained delay from 14 May 2014 to 27 September 2016 in reaching the Third Decision. Primavera made a number of specific allegations about the Council's conduct which I also address (below). But I begin with my general approach to this claim. Ms Snow accepted in cross-examination that six months was a reasonable period within which to determine a planning application. She also accepted that it was reasonable for me to start with that period and then examine whether there were material reasons for extending that period. I have broken down the length of time between 14 May 2014 and 27 September 2016 into a number of different periods and for each one, I have adopted Ms Snow's approach and asked myself whether there was a reasonable explanation for the Council's conduct. I have then gone on to consider whether it fell below the standard of care to be expected of a reasonable planning authority.

(1) 14 May 2014 to 28 August 2014

240. By email dated 1 May 2014 Mr Taylor nominated PBA to act as independent viability consultants. There is no evidence, however, that he had instructed them before 3 June 2014 and on 7 July 2014 he asked them to stop work. It is also clear from Ms Sahlke's email dated 26 August 2014 that PBA did not submit a draft report until 20 August 2014 and that this report was considered at the meeting of the Affordable Housing Forum a few days later. Because of concerns expressed about the level of contact between Fusion and PBA, PBA's independence was compromised and it was necessary for the Council to instruct Savills to act as independent consultants.

241. Mr Down accepted in cross-examination that any delay to the progress of the Second Application during this first period was the fault of Fusion and PBA and not the fault of the Council. Mr Simpson also accepted this in cross-examination:

> "Q. PBA were appointed on a joint basis, and then the agent, I mean certainly representing the claimant because Mr Down has said so, and also representing Shandler because it said so, that is Fusion, approached and instructed them directly; yes? A. Yes. Q. And this led to the council disinstructing Peter Brett Associates, as it felt it couldn't be sure of their independence, certainly with Dr Bickerton looking over their shoulder, and so another consultant is instructed, as you note in your paragraph 112? A. Yes. Q. And that results in a three-month delay? A. Yes. Q. It certainly takes us from April 2014 through to August, doesn't it? A. It does. Q. There's no suggestion in your report that the council acted improperly or negligently in electing to dis-instruct Peter Brett and instructing Savills in their place? A. No. Q. And indeed Mr Down has told this court that in his view the fault here lay with Fusion. That would be your assessment? A. Yes, it would."

242. I am satisfied, therefore, that Fusion and PBA and not the Council were responsible for the delay in the progress of the Second Application in the period between 14 May 2014 and 28 August 2014. I am also satisfied that the Council did not fall below the standard to be expected of a local planning authority during this period. Council officers could not have been expected to progress the Second Application until PBA had submitted its independent assessment and when PBA's draft report was received, it was put before the Affordable Housing Forum immediately. The Council also acted promptly to instruct Savills to replace PBA once concerns had been raised about PBA's independence.

(2) 29 August 2014 to 4 January 2015

243. Savills did not complete their independent viability assessment until the end of November 2014 because of the changes in emerging planning policy. During the same period the Council also prepared its policy for the implementation of CIL and this was approved on 1 December 2014. At about this time Ms Sahlke left the Council and the Second Application was assigned to Mr Smith. I have set out the relevant passages from his report (above) but Mr Simpson accepted in cross-examination that the principal cause of any delay to the progress of the application during September and October 2014 was Fusion's resistance to the application of the emerging affordable housing policy. He also accepted that debates of this kind were quite common between agents and planning authorities. Finally, he accepted that the Council was not negligent in the period to the end of 2014:

> "MR BOOTH: As you rightly note, really, the emergence of new planning policy and the arguments as to its application, they're part and parcel of the planning process, and to the extent that it's your client's agents that are saying for a couple of months, it's not applicable, to the extent we have

> delay there, it lies at their door, doesn't it? A. Yes. Q. And we see you there accept at paragraph 114 {C/2/21} that there's no negligence or carelessness on the part of the council. Paragraph 115, we're well into {C/2/21} now, paragraph 115 and 116, we see toing and froing between Savills and the applicant? A. Yes. Q. Pioneer being instructed? A. Yes. Q. And you don't suggest any negligence or carelessness on the part of the council there, do you? A. I don't, no. Q. No. Nothing there. This takes us to the end of 2014 when the case officer leaves the council as per your paragraph 117. There was a change of case officer -- A. Yes. Q. -- at the end of 2014. Louise Sahlke leaves; she's replaced by Simon Smith. I mean, planning officers move authorities regularly, don't they? A. They do. Q. And this inevitably, in the handling of an application, leads to some delay whilst the new officer taking over brings themselves up to speed? A. Yes. Q. Nothing negligent in that regard and you don't suggest any negligence? A. No. Q. So that takes us into 2015, doesn't it? A. It does."

244. I am also satisfied, therefore, that the Council was not the principal cause of the delay or at fault during the period between 29 August 2014 and 5 January 2015. I find that the principal cause of any delay to the progress of the Second Application during that period was Fusion's resistance to the application of the September 2014 Draft and, although part of the subsequent delay is attributable to Ms Sahlke's departure, the Council cannot be criticised because it took the time to debate the application of the September 2014 Draft or because of the changeover in personnel. I am satisfied, therefore, that the Council did not fall below the standard of care to be expected of a local planning authority during this second period.

245. I add that I have also considered the contents of the Letter of Claim dated 14 November 2014 (upon which Primavera relied in the Particulars of Claim). The principal purpose of that letter was to put the Council on notice of a claim in relation to the First and Second Decisions and to assert the existence of a duty of care. Moreover, although Mr Ring complained about continuing delays, the complaint was general and not supported by the evidence of Mr Simpson. In my judgment, that letter does not justify a finding that the Council fell below the relevant standard of care.

(3) 6 January 2015 to 10 July 2015

246. Between 6 January 2015 and 4 March 2015 Mr Smith failed to pass on Savills' updated financial appraisal to Fusion or Pioneer and when Mr Taylor chased him, he was able to arrange for Savills to provide a copy within five days. I am satisfied that Mr Smith's failure to send the updated financial appraisal before 4 March 2014 delayed the

submission of Fusion's AHPS by two months and I am not satisfied that there was a reasonable explanation for this delay. I find, therefore, that in failing to pass on the updated financial appraisal for two months the Council fell below the relevant standard of care.

247. Further, the Council did not challenge Mr Simpson's evidence that the AHPS was not made available to the public or to consultees until 30 April 2015 and immediately after its publication Dr Bickerton raised yet further objections. Again, I accept Mr Simpson's evidence and I find that the failure to make the AHPS available to the public caused an additional delay of one month in resolving Dr Bickerton's objections. I am also satisfied that there was no reasonable explanation for this delay and that the Council fell below the relevant standard of care in failing to make the AHPS available to the public and to consultees for an additional one month.

248. By email dated 10 July 2015 Mr Laban informed Mr Down that the Second Application had been assigned to Ms Taylor. But there is no evidence that Council officers had taken any further steps to progress the application between the end of April and the date on which Ms Taylor took over apart from some brief correspondence between Ms Hayes and IWG relating to the S106 Undertaking. Moreover, Ms Hayes did not produce the draft until 10 June 2015.

249. Mr Booth and Mr Walsh submitted that the Council could not be held responsible for any inactivity before June 2015 because Mr Simpson accepted both in his report and in cross-examination that the Council could not be criticised for targeting a date of June 2015 for the Committee meeting to consider the Second Application (because of an imminent election). However, that submission would have carried greater weight if the Committee had actually determined the Second Application in June 2015 and the Council's officers had actively prepared for that meeting in the meantime, e.g., by preparing the relevant Committee Report. But the Committee did not determine the Second Application at its meeting in June 2015 and there was no evidence that Mr Smith or any other Council officers were actively preparing for that meeting or why they failed to meet their target.

250. Although I accept that it was reasonable for the Council to target a Committee date of June 2015 I am not satisfied that there was a reasonable explanation for the delay in the meantime and I find that that in failing to prepare for and determine the Second

Application at the Committee meeting in June, the Council fell below the relevant standard of care. If I had found that the Council owed a duty of care to Primavera, I would therefore have found that the Council negligently failed to progress the Second Application for six months between January and July 2015.

(4) June 2015 to 26 November 2015

251. In late June or early July 2015, when the Second Application was assigned to Ms Taylor, Mr Laban informed Mr Down that he was planning to sit down with her and complete a Committee Report the following week although she did not respond substantively to Mr Taylor until 20 August 2015. Despite Mr Laban's assurance I am satisfied that there was a reasonable explanation for this period of seven weeks. It is clear that Ms Taylor had a large number of matters with which to deal and Mr Simpson accepted that it was reasonable to expect a new planning officer to have a lead in period. Moreover, although Ms Taylor did not give evidence before me, I am satisfied that the way in which she dealt with the Second Application between July 2015 and April 2016 bears out Mr Laban's description of her as very thorough. I am satisfied, therefore, that the Council did not fall below the standard of care to be expected of a local planning authority between 24 June 2015 and 20 August 2015.

252. On 20 August 2015 Ms Taylor informed Mr Taylor that the CIL Liability for the development had increased and that she had asked Savills to consider whether the development of the Property would support a financial contribution of £110,000. On 9 September 2015 Ms Taylor also informed him that the Council had resolved to commission a further independent review and on 1 October 2015 the Council and BNPP entered into a fee agreement. On 11 November 2015 Ms Taylor forwarded BNPP's report to Mr Taylor and by email dated 26 November 2015 she informed him that she was confident that the Council's officers could recommend approval of the Second Application.

253. Mr Simpson's evidence in his report was that Ms Taylor's decision to advise the Council to commission a new independent review of Pioneer's viability assessment was "unjustified and unreasonable and demonstrates negligence". He also criticised the Council for the delay between August and November 2015. In particular, he relied on the apology which Ms Taylor gave to Mr Taylor in her email dated 26 November 2015

(above) and the second Letter of Claim dated 14 October 2015, which Mr Ring sent to the Council repeating many of the earlier criticisms made by Mr Taylor in correspondence.

254. Mr Campbell placed specific reliance upon the email dated 26 November 2015 in his chronology and Mr Booth did not challenge Mr Simpson's evidence in detail. I have, therefore, considered carefully whether it is right for me to reject his evidence on this point. Although I found him to be a reliable witness, it seems to me that the allegation of negligence in relation to the Second Application turns on an assessment of the contemporaneous correspondence and that this is a matter for the Court and not an expert. I am satisfied, therefore, that if I have formed a different view of the correspondence myself, I am entitled to reach a different conclusion.

255. Although Mr Simpson's evidence about this period has some force, I disagree with his assessment of the correspondence and, in my judgment, there is a reasonable explanation for the three-month delay between 20 August 2015 and 11 November 2015. I have reached this conclusion for the following reasons:

(1) In her email dated 9 September 2015 Ms Taylor asked Mr Taylor to confirm by 18 September 2015 whether Fusion wanted to provide an updated viability assessment. Mr Taylor complained vigorously about the delays in his replies dated 9 and 16 September 2016 but he could have avoided a two-week delay if he had read Ms Taylor's email carefully and had answered her question. Moreover, I cannot see how the Council could have given instructions to BNPP until he had answered it.

(2) In the event, Mr Taylor accepted Ms Taylor's invitation to provide an updated viability assessment and he gave those instructions to Pioneer on 25 September 2015. However, he did not provide Ms Taylor with the FASS prepared by Pioneer until 26 October 2015. I am satisfied that Fusion and not the Council was responsible for this one-month delay. If Mr Taylor had chosen not to instruct Pioneer to produce the FASS and Pioneer had not taken a whole month to do so, this delay would have been avoided altogether. Moreover, it is clear that Mr Taylor was alarmed by the prospect that BNPP might make its own assumptions rather than test those provided by Pioneer.

(3) I am also satisfied that the Council instructed BNPP promptly once Mr Taylor had confirmed that Fusion intended to instruct Pioneer to update its viability assessment and also that BNPP produced its own report promptly. The fee agreement was signed on 1 October 2015 and BNPP completed its report within two weeks of receiving the FASS.

(4) Furthermore, I am not satisfied that it was unreasonable or unjustified for Ms Taylor to advise the Council to commission a new independent review. This was a matter of judgment for Ms Taylor and Mr Simpson would have had to satisfy me that this was advice which no reasonable planning officer could have given. In my judgment, the failure to require Fusion to update the viability assessment and to commission an independent review of any revised figures was an obvious ground of challenge which Dr Bickerton would have taken.

(5) In particular, the Adopted SPD only permitted the Council to accept off-site provision in exceptional circumstances and updated the standard contributions. It also required Fusion "to set out and evidence the inputs and assumptions which inform their conclusions". If Fusion had failed to satisfy these criteria and the Council had relied on a historic viability assessment and review, it could have expected Dr Bickerton to challenge its decision.

(6) I am also satisfied that Ms Taylor was doing no more than being polite in her email dated 26 November 2015 and that she was not admitting responsibility for the delay since 20 August 2015.

(7) Finally, I am also satisfied that the personal criticisms made of Ms Taylor in Lawrence Stephens' letter dated 14 October 2015 were unjustified. This letter was of a piece with the first Letter of Claim and Mr Taylor's earlier correspondence and it adopted a similar tone.

256. I find, therefore, that the Council was not responsible for any delay in the progress of the Second Application between 20 August 2015 and 26 November 2015 and that the Council did not fall below the standard to be expected of a local planning authority during this period. In particular, I am satisfied that Ms Taylor acted thoroughly and with reasonable care throughout this entire period despite the almost constant complaints which Mr Taylor levelled against her and also the Letter of Claim (which contained

serious allegations against her).

(5) 27 November 2015 to 21 April 2016

257. On 15 December 2015 Ms Taylor informed Fusion that the Adopted SPD contained provision for a clawback mechanism or a deferred payment and on 18 December 2015 she clarified the position and informed Mr Taylor that the Council would be seeking a deferred payment. On 29 January 2016 Shandler Homes took back control of the Second Application and on or shortly before 18 February 2016 Mr Down agreed to Ms Taylor's proposals. On 22 February 2016 Ms Taylor also identified a defective plan which Mr Taylor replaced by 26 February 2016. Once she had received this plan, Ms Taylor had assembled all of the necessary materials to obtain counsel's opinion and put the Second Application before the Committee.

258. I am satisfied that the Council was not responsible for any delay in the progress of the Second Application between 15 December 2015 and 26 February 2016. It is clear that Mr Taylor was unaware of the provisions of the Adopted SPD relating to affordable housing and it took two months for Mr Down to reach agreement with Fusion and then to confirm to the Council that Shandler Homes was prepared to agree to make the deferred payment. Indeed, it is ironic both in the light of his earlier complaints and the nature of this claim itself that Mr Taylor wrote to Ms Taylor on 17 December stating (in bold): "We absolutely do not want Hertsmere to rush to any decisions until we're all agreed on what is actually involved in the clawback process."

259. I am also satisfied that the Council did not fall below the standard to be expected of a local planning authority during this period. Mr Simpson did not criticise the Council for its conduct during this period and rather skated over the correspondence. Nor did he suggest that the Council was unreasonable to insist on a deferred payment in accordance with the Adopted SPD. Indeed, Ms Taylor was prepared to make a valuable concession for the benefit of Fusion and Primavera, namely, that the deferred payment would not be triggered until the development had yielded a GDV of 20%.

260. I am also satisfied that there is a reasonable explanation for any delay in the progress of the Second Application between 27 February 2016 and 21 April 2016. Although there was a three-week hiatus between the date on which Ms Taylor received the revised plan and the date on which Ms Hayes instructed counsel to give advice, she had received

counsel's opinion three weeks before the Committee meeting at which it was to be considered. Ms Taylor had also circulated the final draft of the Committee Report. I find, therefore, that in the period between 27 November 2015 and 21 April 2016 the Council did not fall below the standard of care to be expected of a local planning authority.

(6) 21 April 2016 to 27 September 2016

261. Between 25 April 2016 and 1 June 2016 the parties exchanged drafts of the Second S106 Agreement and detailed correspondence. I have set out this correspondence in some detail (above) because Primavera's pleaded case was that the Council failed to respond to emails dated 3 May, 11 May, 13 May, 16 May, 20 May, 26 May and 13 June 2016. It advanced this case in reliance upon the email dated 26 May 2013 and timed at 15.03 which Mr Down sent to Ms Hayes (which I have also quoted above).

262. Primavera made no attempt to prove its case before me. Mr Down did not give evidence about his email dated 26 May 2016 in his witness statement or exhibit the relevant emails which he claimed went unanswered. Mr Simpson stated that these emails went unanswered but he did not exhibit them either. Finally, Mr Campbell did not open the relevant documents to the Court or put them to Ms Snow or even refer to them in his chronology. I, therefore, had to do the best I could by trawling the trial bundle to see if I could identify the relevant documents.

263. I am satisfied that there was no substance in Primavera's pleaded case and I dismiss it. Ms Hayes responded promptly to emails dated 3 and 11 May 2016 and I have set out or referred to her replies (above). I was unable to find any emails dated 13 May, 16 May and 20 May in the trial bundle whether from Mr Down himself or from Mr Emmens or Mr Taylor. I am also satisfied that Ms Taylor gave a reasoned and detailed response to the emails dated 13 June 2016 from both Mr Taylor and Councillor Silver. Finally, I am satisfied that Ms Hayes replied promptly to all of the emails with which Mr Emmens, Mr Down and Mr Taylor sent her (sometimes twice a day) within a reasonable time.

264. Primavera also relied on the emails dated 17 June 2016 and 23 June 2016 (above) in the Particulars of Claim. Primavera alleges that Ms Taylor was negligent because she had failed to send a revised draft of the Second S106 Agreement for six days and relied on the fact that she stated that she had completely forgotten to do so. I have set out the relevant correspondence in full (above) and it demonstrates that Primavera's real

complaint is that Ms Taylor had completed the relevant amendments on a Tuesday but had forgotten to send them to Mr Taylor until two days later. I do not consider it to be negligent for a busy planning officer to take six days (including a weekend) to update and send out the draft of a S106 Agreement and I also dismiss this allegation.

265. Finally, it was also Primavera's pleaded case that Shandler Homes chased for a further draft of the Second S106 Agreement by emails dated 8 August, 10 August, 11 August and 12 August 2016 and Ms Hayes' reply dated 12 August 2016 all of which I have set out (above). Again, Primavera advanced this case in reliance upon Mr Down's email dated 12 August 2016 and the fact that Ms Hayes would not respond to him directly but rather to Mr Emmens.

266. Again, Primavera made no attempt to prove its case before me. Mr Down did not give evidence about his email dated 12 August 2016 or exhibit the relevant emails which he claimed went unanswered. Mr Simpson did not refer to these emails either and Mr Campbell did not open them or put them to Ms Snow. Again, I had to do the best I could by trawling the trial bundle to see if I could identify the relevant documents. Again, I am satisfied that there was no substance in Primavera's case and I dismiss it. I am satisfied that Ms Hayes responded reasonably promptly to the emails which she received between 8 and 12 August 2016 or, at least, those which I could find in the trial bundle. Moreover, I do not consider it reasonable to require a local authority solicitor to reply to emails on a Saturday (in the absence of an emergency).

267. Finally, I am satisfied that Ms Hayes was entitled to take the view that she was not required to reply to Mr Down for the reasons which she gave. She was dealing with a solicitor, who had the authority of all of the counterparties to negotiate the terms of the Second S106 Agreement with her. In my judgment, it was reasonable for her to take the view that it would be improper to reply to Mr Emmens's client directly. But in any event, Shandler Homes was not a party to the Second S106 Agreement (as Ms Hayes correctly pointed out).

268. This disposes of the pleaded allegations. However, I am also satisfied that there was a reasonable explanation for any delay in the period between 21 April 2016 and the Second S106 Agreement taking effect on 27 September 2016 or that the Council was not responsible for it. I have reached those conclusions for the following reasons:

(1) Mr Simpson accepted that it was not unusual for the local planning authority and the interested parties to take between May and September to complete a S106 Agreement once planning permission had been approved.

(2) In her email dated 16 June 2016 (to which I have already referred) Ms Taylor raised an issue of principle which led to a substantive disagreement between the parties about the drafting of the Second S106 Agreement. It is unnecessary for me to explain that issue because Mr Simpson also accepted that it involved "substantive points of disagreement".

(3) This issue was not finally resolved until early August 2016 and, as I have noted above, the principal reason for the further delay in progressing the draft was that it took Mr Emmens eighteen days to take instructions and return it to Ms Hayes. Ms Hayes also had to respond to the queries raised by Ms Morgan-Welker.

(4) On 12 August 2016 Ms Hayes informed Mr Down that she was in a position to issue the engrossments of the Second S106 Agreement but the agreement itself did not take effect until 27 September 2016. Mr Simpson did not suggest that the Council was responsible for this six-week delay and he accepted that it took time for Primavera, Shandler Homes and Fusion to obtain the relevant signatures on the document. Moreover, he could not recall any further changes to the document after 12 August 2016.

269. For these reasons, therefore, I find that the Council did not fall below the standard to be expected of a reasonable planning authority in the period between 21 April 2016 and 27 September 2016. Mr Simpson accepted in cross-examination that he had no complaints about the Council's conduct during that period and for the detailed reasons which I have set out (above), I consider that he was right to make that concession.

N. Decision

270. If the Council owed a duty of care (contrary to my finding above), then I find that it committed a breach of that duty and failed to exercise reasonable skill and care by determining the revised First Application by reference to the planning policy at the date on which the First Application was submitted and not by reference to the emerging planning policy at the date of the Second Decision. I also find that the Council was

negligent and responsible for a six-month delay in the progress of the Second Application between January and July 2015. I dismiss all of the other allegations of negligence and lack of reasonable care against the Council.

VI. Causation

271. On 9 January 2014 the Committee considered the revised First Application and resolved to grant planning permission and on 28 January 2014 the Director of Environment issued the Second Decision. It is necessary to consider, therefore, whether the Committee would have resolved to grant planning permission (if the Council had acted with reasonable care) and, if so, whether Dr Bickerton would have continued to challenge the Second Decision and to issue the claim for the Second Judicial Review. In a professional negligence claim it would be normal to resolve the first question on a balance of probabilities and to resolve the second issue by "loss of a chance" principles.

272. Mr Booth and Mr Walsh did not submit that the Council would not have granted planning permission if the Committee had considered the First Application by reference to the relevant planning policies and neither of the parties addressed me on the approach which I should adopt to the second issue. This was entirely understandable because the principal issue between them was whether the Council owed a duty of care at all. If it is necessary for me to do so, therefore, I find on a balance of probabilities that the Council would have granted planning permission and issued the Second Decision if it had correctly considered the emerging planning policies at the meeting on 9 January 2014. I also find that there is a real and substantial chance amounting to a high probability that Dr Bickerton would not have challenged the Second Decision or issued the claim for the Second Judicial Review once the Council had done so. If it is necessary for me to attribute a percentage figure to that chance, I find that it was no less than a 60% chance.

273. I also find on a balance of probabilities that if the Council had acted with reasonable care throughout the period between the submission of the Second Application on 2 April 2014 and 27 September 2016 when the Second S106 Agreement took effect, it would have taken six months less to progress and determine the Second Application and the Council would have issued the Third Decision by 21 October 2015. However, I would also have found that the conduct of Shandler Homes broke the chain of causation because (as I have found) Mr Down took a calculated decision not to appeal against the non-

determination of the Second Application at any time between 3 June 2014 and 3 December 2014 (or to negotiate an extension of time for an appeal).

VII. Loss

O. Approach

274. Primavera's pleaded case is that it incurred a series of expenses as a result of the breaches of duty of the Council. I address the individual losses claimed in the next section but Mr Campbell made it clear in the opening section of his Skeleton Argument that Primavera was not claiming the loss of profit which it would have made if it had been able to develop the Property but only the extra costs and expenses which it incurred:

> "2. The entire planning process, from submission of the first application to lawful permission in September 2016 was approximately four years and eight months. While there were a number of acts and periods of negligence in this time, the effect, and Primavera's complaint, is of unconscionable delay over the entire period resulting in the incurral of very substantial and unnecessary extra costs and expenses. It is for these extra costs and expenses that Primavera now sues. 3 Primavera does not claim lost profits: only extra charges consequent upon the negligent handling of the entire planning process by HBC and the resultant delays."

275. Mr Campbell adopted this approach because he relied heavily on the distinction between causing harm and failing to prevent harm which he derived from *Poole*. He also submitted that the present case was a case of harm not prevention of harm:

> "The first, my Lord, is a distinction which one finds both -- which one finds in the law of negligence both in respect of private parties and public authorities, and that's the distinction between harming and failing to prevent harm. *Poole*, Lord Reed said that when harm, what that means is making things worse. Failing to prevent harm is when you fail to make things better. That's the distinction. And for Lord Reed, and I think one must accept this, that overtakes the old act/omission distinction. That's now how one sees it and that's how one determines it, and on the facts, we'll say it's quite clear that this is a case of harm, not prevention of, not failing to prevent harm. But that's an important distinction, and we don't really need to worry much about acts and omissions, because that's old law, that's the old way of seeing things."

276. There are two insuperable difficulties with this approach. The first is that Primavera did not incur any harm. Mr Down accepted in evidence that it made a profit (albeit not one as large as he had hoped). On 30 June 2017 Primavera completed the sale of the Property

to Fusion and Mr Down accepted in cross-examination that rather than suffering harm all of the investors made a small profit:

> "MR JUSTICE LEECH: So we've got a claim in the schedule of losses. And if we go to {C/6/6} and {C/6/7} first. You've got a claim for there £1,688,789.24, and we have seen that. And I just -- all of those, so for instance the investor interest we've seen at 508,000, that went back to investors, didn't it? A. Yes. MR JUSTICE LEECH: And presumably they wouldn't have been paid so much interest if planning permission had been granted -- A. Yes. MR JUSTICE LEECH: -- and (inaudible) challenged much earlier, so I understand the basis of the claim. But what I just want to understand is that of that total £1,688,789.24, Primavera was able to pay all of these expenses out of the proceeds of sale; is that right? A. Yes. MR JUSTICE LEECH: And if we go back to the completion statement, there presumably was a little bit left over? A. A tiny bit, yes. MR JUSTICE LEECH: And what was that, that was distributed to the individual investors -- A. Correct. MR JUSTICE LEECH: -- by way of profit? A. Yes. MR JUSTICE LEECH: Can you just, roughly speaking, remember what the figure was? It doesn't matter terribly. A. I can't. I'm so sorry, I can't. MR WALSH: Let me see if I can help you, Mr Down. Can you turn to {D4/86/8}. The main account goes to a zero balance on 3 August. Was that £125.25 what was left over, or was there another sum? A. Sorry, it's not come up on the screen. Q. I'm sorry, at the bottom there, before the second bank account. A. 2020, so this is -- Q. Yes. A. -- three years after the date, yes. Q. Yes. But then it comes to a zero balance. A. It did, yes. Q. So what I'm asking is: was the 125.25 the profit, or was there another amount that was -- A. (Overspeaking) No, there was another amount that was profit. The investors got paid profit, and from memory I think it was around about -- goodness, clutching at straws here, but I think it was £150,000 profit. Q. It was £150,000 profit -- A. Around about -- Q. -- distributed amongst the -- A. Yes, yes. Q. -- investors?"

277. The second insuperable difficulty for Mr Campbell is that Primavera either did not incur the expenses which it now claims or would have incurred them anyway or was able to pay them out of the proceeds of sale before distributing the net profit to the investors (as I set out below). In particular, Primavera adduced no evidence to prove that it incurred either the Affordable Housing Contribution of £130,000 or the Additional Affordable Housing Contribution of £414,176 and Fusion met the CIL Liability of £410,752.47.

278. In my judgment, Primavera's real claim was for the difference between the profit which it would have made if it had been able to enforce the Sale Contract against Fusion (and had received its share of the overage) and the profit which it actually made on the sale of the Property. However, Primavera did not plead this claim and if it had, I would have found that the Council owed no duty of care to prevent a loss of this nature. Indeed, the

Court of Appeal in *Strable* held that losses of this kind were not recoverable.

P. Heads of Loss

(1) Bank Interest: £255,309.77

279. Mr Georgiou's evidence was that the payments of interest were shown on Primavera's cash movements ledger (the "**Cash Ledger**") and he had checked the individual interest payments against this ledger. I am satisfied that Primavera paid a total sum of £255,309.77 in interest. However, I am also satisfied that this total sum was ultimately paid by Primavera or recouped by it out of the proceeds of the sale of the Property before the distribution of profit to investors. Mr Down was taken to the Cash Ledger by Mr Walsh in the extract from the transcript (above) and he confirmed this to be correct. For this reason, therefore, I find that Primavera did not suffer harm as a consequence or that this head of loss is recoverable.

(2) Investor Interest: £508,119.02

280. It was also Mr Georgiou's evidence that investor interest payments were calculated at 7% per annum from 31 August 2012 to 30 June 2017 and that these payments were also recorded on the Cash Ledger. Again, I am satisfied that Primavera paid the total sum of £508,119.02 to investors. However, Mr Down accepted in evidence that Primavera paid interest to investors out of the proceeds of sale. For this reason, therefore, I also find that Primavera did not suffer a recoverable loss.

(3) Company Agent Fees: £38,922.69

281. Mr Georgiou's evidence was that Primavera incurred these fees to Stenham, the trustee company, and its local lawyers. Mr Campbell did not submit that Primavera would have avoided these fees if the Council had not been negligent and I can see no reason why it would have done so. Mr Down would only have avoided these fees if it had been unnecessary to incorporate Primavera at all and to maintain it in good standing (in which case there would have been no claimant and no claim). Moreover, Mr Down chose to purchase the Property through a BVI company and the Council cannot be held responsible for that decision. But in any event, Mr Georgiou's evidence was that these fees were shown on the Cash Ledger and I am satisfied that Primavera either paid them

or recouped them out of the proceeds of the sale of the Property. Again, I find that this is not a recoverable loss.

(4) Council Tax: £16,362.90

282. Mr Georgiou's evidence was also that Primavera paid council tax totalling £15,860.22 to the Council (and this had increased slightly by trial). Again, Mr Campbell did not submit that Primavera would have avoided these payments if the Council had granted planning permission on 28 January 2014 and I am satisfied that either Primavera or Fusion would have continued to incur council tax until the development of the Property was completed. But in any event, these payments were shown on the Cash Ledger and I am satisfied that Primavera either paid them or recouped them out of the proceeds of sale of the Property. Again, I find that this is not a recoverable loss.

(5) Legal Fees re Planning: £24,112.00

283. Mr Georgiou produced a table showing that Primavera incurred legal expenses totalling £24,112 to Wilson Barca and Lawrence Stephens. I accept that Primavera (or Fusion) would have avoided some of these fees if the Council had not committed the breaches of duty, which I have identified. However, it would not have avoided all of them and without a proper breakdown of those fees, it is impossible for me to decide which of them are recoverable. But in any event, all of these payments were shown on the Cash Ledger and I am satisfied that Primavera either paid them or recouped them out of the proceeds of sale. Again, I find that this is not a recoverable loss.

(6) General Expenses: £19,294.02

284. Mr Georgiou also produced a table showing that Primavera incurred general expenses totalling £19,294.02. These expenses included Pioneer's fees, architects' fees, the costs of one S106 Agreement, insurance, fencing and landscaping. Again, Mr Campbell did not submit that Primavera would have avoided any of these payments if the Council had granted planning permission on 28 January 2014 and I am satisfied that it was necessary for Primavera to incur most (if not all) of them either in order to obtain planning permission or to maintain the Property until it was developed. But in any event, all of these payments were shown on the Cash Ledger and I am satisfied that Primavera either paid them or recouped them out of the proceeds of sale. Again, I find that this is not a

recoverable loss.

(7) Nedbank/the Fairbairn Bank Legal Fees: £4,150.88

285. Mr Georgiou also produced a table showing that Primavera had paid £4,150.88 in respect of fees incurred by the Fairbairn Bank or Nedbank. It is clear that these fees related not only to the grant of planning permission but also to the terms of the Sale Contract and the supplemental agreements. Moreover, £2,290.88 of these fees were incurred in October and November 2012 (and even before the First Decision). I can see no reason why Primavera would have avoided these fees if the Council had granted planning permission on 28 January 2014. Moreover, it would also have been necessary for the bank's solicitors to approve the Second S106 Agreement. But in any event, all of these payments were shown on the Cash Ledger and I am satisfied that Primavera either paid them or recouped them out of the proceeds of sale. Again, I find that this is not a recoverable loss.

(8) Bank Charges: £2,617.50

286. Mr Georgiou also produced a table showing that Primavera paid £2,617.50 in general bank charges. Moreover, it is clear from the Cash Ledger itself that Primavera's bankers charged a fee for almost every transaction on its account. I cannot see how Primavera could have avoided most (if not all) of these charges if the Council had granted planning permission on 28 January 2014. But in any event, I am satisfied that Primavera either paid these charges or recouped them out of the proceeds of sale. Again, I find that this is not a recoverable loss.

(9) Shandler Homes: £28,500

287. Mr Georgiou also produced a table showing that Primavera incurred management fees of £28,500 to Shandler Homes. He did not suggest, however, that these fees were shown on the Cash Ledger and when this claim was put to him, Mr Down had to accept that these fees were never paid (and should not now be paid):

> "Q. So you received also £28,500 through Shandler Homes -- A. No, I didn't receive that. Q. You didn't receive that? A. No. Q. Was it never paid to you? A. No. Q. Why is that? A. Because the deal couldn't fund it, so I agreed to waive it at the time. Q. Right. So why, then, is the claimant claiming that as a sum of damages in these proceedings? A. I believe

> because it's what should have been paid. Q. It's not a loss to the company, is it? A. No, it isn't. Q. (overspeaking -- inaudible) you? A. It isn't a loss, no. Q. Do accept that's not payable? A. Yes. Q. You seem to know very quickly, Mr Down, you have a quick answer to, why that was claimed -- A. (Overspeaking) Because -- Q. -- have you thought about it? A. -- it's never been paid. Of course I've thought of it, yeah. Q. You thought about it and you thought, well, we'll claim that anyway. You do understand the difference, don't you, between legal personality as a company, and that Shandler Homes is a separate legal personality to Primavera? A. Yes. But Shandler had done a considerable amount of work, which is why it was thought that a fee should be paid, but I agree that it shouldn't be paid. Q. You agree that it shouldn't be paid? A. Yes."

288. Whether or not Shandler Homes was entitled to charge a management fee for Mr Down's time (and this is an issue on which I express no view), Shandler Homes waived that fee and Mr Down did not suggest that there was any residual liability to pay it. Mr Down and his investors chose to incorporate a BVI company to acquire the Property (for its own commercial reasons) and they must live the consequences of its separate legal personality. I therefore dismiss the claim for management fees.

(10) Affordable Housing Contribution: £130,000

289. The Third S106 Agreement imposed a liability upon Primavera to pay £130,000 as an Affordable Housing Contribution. This payment was not recorded in the Cash Ledger and Primavera adduced no evidence to suggest that it ever paid this sum to the Council. Indeed, Mr Georgiou made it clear that his evidence was limited to confirming that the figure which Primavera had claimed in its schedule of loss was the same as the figure in the Third S106 Agreement (which he had only seen in draft). It seems very likely to me that Fusion paid the Affordable Housing Contribution once completion of the sale of the Property had taken place and it had submitted the Third Application in its own name. I, therefore, dismiss this head of loss on the basis that Primavera failed to prove this claim at trial.

290. I accept, however, that Primavera assumed a legal liability to make the Affordable Housing Contribution under the Third S106 Agreement and I have gone on to consider whether the Affordable Housing Contribution, the Additional Affordable Housing Contribution and the Monitoring Contribution are recoverable on the assumption that Fusion did not pay these sums or that Primavera remained liable for them. On the basis of the evidence presented at trial, I am not satisfied that Primavera would have been

entitled to recover any more than £134,724.80 in respect of all three contributions for the following reasons:

(1) On 28 January 2014 the Council made the Second Decision and granted planning permission for the revised Second Application. However, it did not require Primavera to enter into a new S106 Agreement and granted permission on the basis that it would comply with the First S106 Agreement and made the existing financial contributions of £80,846.27.

(2) It was Mr Westhoff's evidence that if the Council had applied the Core Strategy 2013, it would have required an Affordable Housing Contribution of £10,000, a Monitoring Contribution of £808.50 and an Additional Affordable Housing Contribution of £257,000 together with the other contributions in the First S106 Agreement. It was his evidence that if the Council had not been negligent, it would have required Primavera to enter into a new S106 Agreement and make total contributions of £337,846.27. This evidence was not challenged and I accept it.

(3) On 15 March 2017 the Council made the Fourth Decision and granted planning permission for the Third Application. The Third S106 Agreement required Primavera to make the Affordable Housing Contribution of £130,000 and the Monitoring Contribution of £808.50. It also required Primavera to make an Additional Affordable Housing Contribution of up to £414,176 (subject to the Financial Appraisal in the Third S106 Agreement). This gave rise to a potential liability of £627,364.50 which was £289,518.25 greater than the liability of £337,846.27, which the Council ought to have imposed when it made the Second Decision.

(4) However, it was also Mr Westhoff's evidence that the Third Application was materially different from the First and Second Applications. It provided for three additional units and a larger footprint. Mr Simpson did not accept this but Mr Campbell elected not to cross-examine Mr Westhoff and I accept his evidence on this point also. If I had found in Primavera's favour on liability, I would not have found that the Council was liable for the whole sum of £289,518.25 but only for that part of it which was due to the changes in affordable housing policy after the Second Decision and not for that part of it due to the increase in the size of the

development.

(5) Mr Booth and Mr Walsh submitted that even if the Council owed a duty of care to Primavera, the scope of the duty as pleaded in the Particulars of Claim was far too wide. In the event, it was unnecessary for me to decide that issue. But even if I had rejected that submission, I would not have found that the increase in the Affordable Housing Contribution and the Additional Affordable Housing Contribution due to the three new units and the larger footprint of the development fell within the scope of that duty.

(6) Finally, Mr Westhoff's evidence in relation to the effect of the changes in affordable housing policy was also unchallenged and I accept that too. I summarise that evidence and its effect as follows:

(a) The SPD 2008 imposed an obligation to pay 40% of the value of the development calculated on the basis of £92,000 per flat in lieu of providing affordable housing at the date of the Second Decision.

(b) The Adopted SPD also imposed an obligation to pay 40% of the total value of the development but this time on the basis of an increased value of £140,116 per flat in lieu of providing affordable housing at the date of the Fourth Decision.

(c) Between 28 January 2015 and 15 March 2017 the increase per flat was, therefore, £48,116 and the increase in the Affordable Housing Contribution or the Additional Housing Contribution based on the change in affordable housing policy was £134,724.80 (i.e. 40% of 7 x £48,116).

(7) But in any event, Primavera adduced no evidence to show what effect the Financial Appraisal had on the Additional Affordable Housing Contribution which Primavera or Fusion was required to pay. The documents in the trial bundle suggest that the Financial Appraisal was referred to an expert surveyor for determination and that the issue was finally resolved in April 2020. However, I was not taken to the decision or to any other evidence to establish what (if any) Additional Affordable Housing Contribution Primavera was ultimately liable to pay.

(11) Additional Affordable Housing Contribution: £414,176.00

291. I dismiss this head of loss on the basis that Primavera failed to prove this claim at trial. Moreover, Primavera failed to adduce any evidence to prove the final amount of the Additional Affordable Housing Contribution following the Financial Appraisal (even though it could have done so). But if I am wrong to dismiss this head of loss, I am not satisfied that Primavera would have been entitled to recover any more than £134,724.80 in respect of the Affordable Housing Contribution, the Additional Affordable Housing Contribution and the Monitoring Contribution for the reasons which I have set out above.

(12) Monitoring Fee: £808.50

292. I dismiss this head of loss on the basis that Primavera failed to prove this claim at trial. But even if I am wrong to do so, I am not satisfied that Primavera would have been entitled to recover more than £134,724.80 in respect of the Affordable Housing Contribution, the Additional Affordable Housing Contribution and the Monitoring Contribution for the reasons which I have set out above.

(13) CIL Liability: £326,000

293. This payment was not recorded in the Cash Ledger and Primavera adduced no evidence to suggest that it ever paid this sum to the Council. Mr Georgiou also made it clear that his evidence was based solely on the extract from the Committee Report set out in the Appendix. The Third S106 Agreement did not impose any obligation for CIL Liability upon Primavera and when it granted planning permission for the Third Application, the Council calculated the CIL Liability to be £410,752.47 and demanded payment from Fusion. The CIL Regulations expressly provided for a successor to assume the CIL Liability and I am satisfied that Fusion paid that sum to the Council and not Primavera. I, therefore, dismiss this head of loss.

(14) The First S106 Agreement: (£80,846.27)

294. Primavera gave credit for the sum of £80,846.27 in its particulars of loss. I make it clear that Mr Westhoff had included this figure in the total sum of £337,846.27 which the Council would have required Primavera to pay in January 2014. For this reason, therefore, I give no separate credit for this sum against the sum of £134,724.80 (above).

The issue does not arise in relation to any of the other heads of loss.

Q. Contributory Negligence

295. Finally, if I had found that the Council had owed a duty of care to Primavera and that it had suffered any loss as a consequence of the Council's failure to take into account its emerging planning policy in making the Second Decision, I would not have reduced the damages for contributory negligence even though Mr Taylor made sustained representations that the Council should make the Second Decision by reference to planning policy at the date of the First Application. Although Mr Taylor was acting as Primavera's agent and he was at fault, the Council adduced no evidence to prove that his representations had any causative effect on the Second Decision.

VIII. Disposal

296. I dismiss Primavera's claim on the basis that the Council owed no duty of care to it to progress or determine either of the First or Second Applications. If I had found that the Council owed such a duty of care, I would also have found that the Council had committed two breaches of duty and that if it had not committed the first of those breaches of duty, it would have granted planning permission for the Second Application on 28 January 2014. I would, however, have dismissed all of the heads of loss claimed by Primavera apart from the claim relating to the Affordable Housing Contribution and the Additional Housing Contribution.

297. Primavera adduced no evidence to prove these losses at trial and even this is wrong I would not have awarded any more than £134,724.80 in damages. However, if this issue had been a live one, I would probably have invited the parties to make further submissions in relation to the payment of those contributions and the precise quantum of the claim. But given my decision in relation to duty of care, this does not arise.