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Case No: CO/2027/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Birmingham Civil Justice Centre  
33 Bull St, Birmingham, B4 6DS

Date: 05/07/2023

**Before :**

**THE HON. MRS JUSTICE STEYN DBE**

**Between :**

<b>CILLDARA GROUP HOLDINGS LIMITED</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>WEST NORTHAMPTONSHIRE COUNCIL</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>(1) COUNTY DEVELOPMENTS (NORTHAMPTON) LIMITED</b>	
<b>(2) NORTHAMPTON TOWN FOOTBALL CLUB</b>	<b><u>Interested Parties</u></b>

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**Ewan West** (instructed by **TLT Solicitors**) for the **Claimant**  
**James Goudie KC and Ben Mitchell** (instructed by **West Northamptonshire Council Legal Service**) for the **Defendant**  
**Joshua Dubin** (instructed by **Bower Bailey LLP**) for the **Interested Parties**

Hearing dates: 28 & 29 March 2023

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 5 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

**Mrs Justice Steyn DBE :**

**A. Introduction**

1. On 8 March 2022 West Northamptonshire Council ('the Council') decided to sell about 8.25 Ha of land adjacent to Sixfields Stadium, the home ground of Northampton Town Football Club ('the Club') to County Developments (Northampton) Limited ('CDNL'), a company which is owned by the Club ('the decision'). The claimant company, Cillardara Group Holdings Ltd ('Cillardara' or 'the claimant'), which had made rival offers, seeks judicial review of the decision.
2. Permission was granted by HHJ Simon (sitting as a Judge of the High Court) on 7 November 2022 to pursue six grounds, namely:
  - i) The decision was taken in a procedurally improper fashion and/or the process adopted lacked for procedural fairness ('**Ground 1: procedural fairness**');
  - ii) The Council breached its Tameside duty of inquiry ('**Ground 2: Tameside duty of inquiry**');
  - iii) The Council predetermined the party to whom it intended to dispose of the relevant land ('**Ground 3: predetermination**');
  - iv) The Council breached its obligation not to dispose of land for less than the best consideration that can reasonably be obtained, contrary to s.123(2) of the Local Government Act 1972 ('LGA 1972') ('**Ground 4: section 123(2) LGA 1972**');
  - v) The decision was irrational and/or the Council failed to take into account relevant considerations and/or took into account irrelevant considerations ('**Ground 5: irrationality and relevant/irrelevant considerations**'); and
  - vi) The Council failed to provide any or any adequate reasons for the decision ('**Ground 6: reasons**').
3. The Council submits that each of these grounds should be dismissed and in the alternative that any procedural error Cillardara may succeed in establishing would not have made a difference to the outcome, and so relief should be refused pursuant to s.31(2A) of the Senior Courts Act 1981.

**B. The Site**

4. Following a local government reorganisation, the Council was vested on 1 April 2021 with the functions and land holdings of predecessor local authorities, Northampton Borough Council ('Northampton BC') and Northamptonshire County Council ('Northamptonshire CC'). The Council owns the freehold to approximately 10.01 Ha of former landfill land at Sixfields.
5. The tenure of the Site is complex. The decision relates to two principal areas of land, immediately adjacent to each other, referred to as 'the Main Site' and 'Running Track Land'.

*The Main Site*

6. CDNL has a long lease, due to end in April 2164, of the Main Site. This lease has a break clause allowing the Council to terminate it from April 2024 if CDNL has not carried out “*all necessary remediation works*” (**‘the Main Site Lease’**).
7. The Council has a sub-lease from CDNL of about 1.55 Ha of the Main Site, until February 2119 (but with a statutory right to renew), on which there is a household waste recycling centre (**‘the HWRC Lease’**). The HWRC Lease does not contain a break clause. The Council has no plans to dispose of this land, and it is excluded from the decision. CDNL’s obligation to remediate the Main Site includes such a requirement in respect of the HWRC site, although the HWRC Lease places no obligation on the Council to allow access for remediation.
8. The Main Site is also affected by a Clawback Deed (and Legal Charge) entered into by a predecessor authority with the Homes and Community Agency (now known as Homes England) (**‘the Clawback Deed’**). Until the Clawback Deed ceases to apply on 11 April 2035, Homes England is entitled to receive 50% of any uplift in value where the deemed value of a planning consent exceeds the value of the site under its permitted use (payable on implementation). The permitted use, both for the purposes of the Clawback Deed and the Main Site Lease, is defined as:
  - i) Up to 300 dwellings for open market sale (use Class C3), and
  - ii) Up to 85,000 sq ft net lettable area of retail floorspace within Use Classes A1 to A5 as defined in the Town and Country Planning Act Use Classes Order 1987 (as amended).

#### *The Running Track Land*

9. CDNL has a long lease (to February 2163, but with a statutory right to renew) of an area on which there is a former athletics track, immediately to the East of Sixfields Stadium (**‘the Running Track Lease’**).
10. The Club obtained a long sub-lease (to April 2154, but with a statutory right to renew) of the Stadium and part of the Running Track Land (**‘the NTFC Lease’**). The Club continues to hold the lease in respect of the part of the area subject to the NTFC Lease on which Sixfields Stadium is located, which is referred to as **‘the Stadium Lease’**. The Stadium is not part of the land which is the subject of the decision.
11. But the Club assigned part of the NTFC Lease to a predecessor of the Council. Consequently, while the Council is the freeholder of the whole of the Running Track Land, and CDNL has a long lease (the Running Track Lease) of the same area, the Council also has a long sub-lease from CDNL of the Eastern part of the Running Track Land (**‘the WNC Lease’**).
12. There are no break clauses in these leases. References below to ‘the Land’ are to the Main Site, excluding the HWRC, together with the Running Track Land.

#### **C. The facts**

13. Part of the reason for the complexity of tenure of the Site is that, in 2013, agreement was reached by the previous owners of CDNL and Northampton BC (one of the now

non-existent predecessor authorities) to develop the Land. This led to a series of property and loan transactions, including the Main Site Lease. The Club defaulted on the loans, and parts of the property agreements were cancelled. The housing development did not proceed, but the Main Site Lease (and the remediation obligations under it) remain.

14. In November 2015, Kelvin Thomas and David Bower bought the shares in the Club through Northampton Town Ventures Ltd. They both became Directors of the Club and Mr Thomas is the Chairman. Their acquisition of the Club prevented it being liquidated upon the petition of HMRC. Following the collapse of the arrangements with Northampton BC, CDNL became insolvent. Mr Thomas and Mr Bower bought CDNL and subsequently transferred ownership to the Club. Northampton BC agreed with the new owners not to pursue the Club for the missing loan monies, instead acquiring the rights in place of the Club to pursue parties previously connected with the Club who may have benefited from or held some of those monies.
15. On 27 January 2021, KPMG, Northampton BC's external auditors, published a public interest report under s.24 of and Schedule 7 to the Local Audit and Accountability Act 2014 regarding the previous disposal process, identifying a number of unlawful and unwise decisions made by Northampton BC. The KPMG report included a recommendation (Recommendation 10) that:

“Any future land sales should, other than in exceptional circumstances and where the law allows, be undertaken via means of a competitive process, in order that prospective parties are able to tender for the purchase, by submitting their plans for development. Each bid should be appropriately appraised, and consideration should be given to any relationships either with Council Members or related parties as part of the awarding process.

The ultimate decision on who to award the sale to, should in a matter of this significance be undertaken by Cabinet following receipt of a formal tender evaluation process, which includes the results of the due diligence undertaken against each bid. When considering best value for the land, the Council may (in limited circumstances and subject to the particular facts) be able to take into account ethical considerations.”

16. The Northamptonshire (Structural Changes) Order 2020 came into force in February 2020. Part of the process of transition involved the establishment of the Council initially as West Northamptonshire Shadow Authority ('the Shadow Authority'). It appointed the Leader of South Northamptonshire District Council, Councillor Ian McCord, as Leader of the Shadow Authority and held its first meeting in May 2020. Councillor McCord remained Leader of the Council when it acquired the statutory functions of a local authority and its predecessors were abolished on vesting day, 1 April 2021. Following the elections to the new Council, the former Leader of Northamptonshire Borough Council, Councillor Jonathan Nunn, was appointed Leader of the Council, and Councillor McCord stepped down.

17. The new owners of CDNL had initial discussions with Northampton BC in 2018 about acquiring the Land, without result. From 2020, Mr Thomas and Mr Bower had protracted discussions with initially the Shadow Authority and then, following vesting day, with the Council regarding their proposed acquisition of the Land.
18. The Council is an executive arrangements authority and, as such, decisions relating to the disposal of the Land are the responsibility of the Council's Leader and Cabinet. CDNL's first offer of £500,000 for the freehold of the Land, made on 30 April 2021, was not accepted.
19. The Shadow Authority appointed Lambert Smith Hampton ('LSH') to carry out an Initial Viability Assessment Report ('IVAR') to prepare for the potential disposal of the Land by the Council after vesting day. Stuart Timmiss, the Council's Executive Director of Place and Economy, describes LSH in his evidence as "*one of the market leaders in respect of industrial development*". The IVAR was provided to the Council by LSH on 30 September 2021, and the Council shared it with Mr Bower and Mr Thomas on 1 October 2021 to assist in its negotiations.
20. The Council subsequently commissioned LSH to provide a formal Red Book Valuation (that is, a report and valuation prepared in accordance with the Royal Institution of Chartered Surveyors' Valuation Guidance Standards – Global Standards). LSH provided its Red Book Valuation on 22 February 2022. The Red Book Valuation gave the market value of the Council's freehold and leasehold interests in the Land as £685,000, and the value including the 'marriage value' of the Running Track Land (i.e. if sold to a special purchaser, CDNL) as £820,000. The Red Book Valuation was a little lower than the initial valuation (including marriage value) of £865,000 given by LSH in the IVAR.
21. In addition to obtaining reports from LSH, the Council sought commercial property law advice from Browne Jacobson Solicitors to verify the assumptions made by LSH in relation to the leasehold interests in the site.
22. On 19 October 2021, CDNL made an offer of £890,000 for the freehold of the Land, with a condition precedent requiring it to construct the East Stand of the football stadium ('CDNL's second offer'). On 3 November 2021, the Council published a press release announcing that, based on LSH's assessment of the value of the Land,

“we are minded to agree a deal in principle, whereby CDNL will be able to buy the land for £890,000, but only when work on the stand is finished.

...

This matter will be considered at Full Council on Thursday 2 December and then Cabinet on Tuesday 7 December.”
23. In response to the press release, on Saturday 6 November 2021, Paul Rumens and Paul Scotney had a Zoom call with Councillor Nunn and asked for a meeting to discuss the interest of Patrick Kelly, a director of Cillardara, in acquiring the Land.

24. Mr Scotney is a Partner in Proactive Development Services. Mr Rumens is President (and a former Chairman) of Wealdstone Football Club. In 2019, Mr Scotney was introduced by Brian Binley MP to a “*wealthy friend*” who wished to acquire the Club and the land around it, but did not wish to run the Club. Mr Scotney approached Mr Rumens and asked if he would be interested in running the Club if a deal could be reached to buy the Club from Mr Bower and Mr Thomas. Mr Rumens agreed. Mr Scotney then approached Mr Bower and Mr Thomas about buying the Club, and Northampton BC about purchasing the land surrounding the football ground. But the “*wealthy friend*” backed out of the discussions in mid-July 2019. Mr Scotney and Mr Rumens “*then found an alternative investor who was involved between September 2019 and December 2019*”. On 17 October 2019, they met with Councillor Nunn and George Candler, who were then, respectively, the Leader and Chief Executive of Northampton BC, to discuss the potential sale of land adjacent to the Stadium to the “*potential investor*” they were then working with, in the context of that potential investor’s proposed acquisition of the Club. Mr Rumens states that they put forward a figure for purchase of the land (which at that stage they understood to include the HWRC area) of about £2.5 million. However, that potential investor also backed out so by December 2019 Mr Scotney and Mr Rumens were “*looking for alternative investors*”, and that was when they first met Mr Kelly, through a surveyor with whom he regularly works, Mr McBride.
25. On 14 January 2020, Mr Scotney, Mr Rumens, Mr Kelly and Mr McBride met with representatives of Northampton BC, including Councillor Nunn. I note that Mr Rumens describes this as a meeting with “*the Defendant*”, but that is clearly inaccurate. The discussions “*were about one of Mr Kelly’s companies buying part of the land adjacent to the Stadium ... in the event that it was also able to purchase*” the Club. The discussions centred around what to do with the HWRC, and the price discussed for the land was about £2.25 million. By February 2021, Mr Kelly had withdrawn his interest in acquiring the Club and adjacent land. Mr Scotney and Mr Rumens were again looking for potential investors. Mr Rumens states that they held talks with “*the Defendant*”, in fact Northampton BC, “*on behalf of 5 other potential investors who were interested in acquiring part of the land for c.£2.25 million to c. £2.5 million*”. But it is clear that none of those tentative expressions of interest resulted in an offer, rather, they all came to nothing in circumstances where “*it was not possible to reach agreement with NTFC’s owners for the sale of the club*”.
26. It is against that background that following the press release in November 2021, Mr Rumens and Mr Scotney again put forward Mr Kelly as a potential purchaser. None of the officers involved in advising the Council on the disposal had ever been employed by Northampton BC, and none had any involvement in the discussions between that authority and Mr Rumens, Mr Scotney and various potential purchasers of the Club and adjacent land.
27. On 8 November 2021, Councillor Nunn informed the Council’s Assistant Director Assets and Environment, Simon Bowers, of the potential for an offer from Cillardara. Mr Bowers wrote to Mr Scotney, and then met with Mr Scotney and Mr Rumens, to discuss a proposed offer from the claimant. In an email dated 26 November 2021, Mr Bowers stated that it would be helpful “*to have even a high level development appraisal showing how you anticipate generating the values needed to make the scheme work*”, to “*help give the Council confidence the offer is solid*”. The Council provided plans and shared

information with them to enable the claimant to make a formal offer. The Council postponed making a decision in response to CDNL's second offer, cancelling the decision-making timetable set out in the press release, pending receipt of an offer from Cilldara.

28. On 3 December 2021, Cilldara made an offer of £1,800,000 for the Land excluding the Running Track ('Cilldara's first offer'). This was conditional on the Council breaking the Main Site Lease and delivering vacant possession. Cilldara's first and subsequent offers were for the Land excluding the Running Track Land because CDNL held a long lease of the Running Track Land, without a break clause, and so purchase of its freehold would have been of little practical value to Cilldara.
29. CDNL then changed its offer to £890,000 for the freehold of the Land, with a condition requiring it to construct the East Stand of the football stadium within five years, and giving the Council the right to buy back the land for £1 if the construction were not completed in that time. In addition, the offer included an overage provision pursuant to which the Council would receive 80% of any saving (up to £770,000) if the amount required to satisfy the provisions of the Clawback Deed is lower than that currently allowed for in the valuation assumptions ('CDNL's third offer').
30. On 6 December 2021, the Council published a timeline for consideration of CDNL's third offer and Cilldara's first offer, to culminate with a final decision at the Cabinet meeting on 18 January 2022. However, on 5 January 2022, the Council decided to set a new timetable with a view to ensuring that it had the best offers to consider. On 7 January 2022, the Council asked CDNL and Cilldara to provide "*best and final offers*" by 5pm on Monday 17 January 2022. The plan at that stage was to finalise and publish the officer's report on 11 February 2022, to discuss the matter at a Council meeting on 21 February 2022, and for Cabinet to make a decision at a meeting to be held on 28 February 2022.
31. In response to the request for best and final offers:
  - i) on 17 January 2022, Cilldara offered £2,050,000 for the Land (excluding the Running Track), again conditional on the Council breaking the Main Site Lease and delivering vacant possession (Cilldara's second offer); and
  - ii) CDNL repeated its third offer.
32. Mr Kelly informed the Council that Cilldara is "*a vehicle company belonging to the Kelly family whose original business was DSM Demolition which has been involved with demolition and remediation for well over 40 years*". He provided a letter from Allied Irish Bank (GB) stating that Cilldara had sufficient funds to enable them to acquire the property for £2,100,000 without recourse to external financing.
33. On 11 February 2022, the officer's report for the Council meeting on 21 February 2022 on disposal of the land at Sixfields was published ('the first officer's report'). The first officer's report considered and compared Cilldara's second offer and CDNL's third offer, and concluded:

"6.1 The offers have been carefully considered. The conclusion is that, on balance, the CDNL offer is to be preferred on financial

grounds. This is primarily because whilst it is lower it is not subject to the risk and delay likely to result from an attempt by the Council to break the Main Site Lease (which could not occur earlier than 2024 in any event). It is anticipated that CDNL would robustly challenge any attempt by WNC to terminate the Main Site Lease and might litigate (arguing that the Council was not entitled to break the lease). Litigation is likely to be expensive and time-consuming and of uncertain outcome. So there are risks in seeking to terminate the Main Site Lease in order to progress a deal with Cillardara (or any other party). Accepting the CDNL offer removes those risks, although of course Cillardara may challenge a decision to proceed with CDNL and not with Cillardara, which would be limited to a challenge to the decision-making process. These are less likely to result in significant delay and the range of possible outcomes is more limited and therefore easier to assess.

6.2 On the basis that the CDNL offer is to be preferred financially, the question is then whether it should be accepted, as opposed to not disposing of the land at this time. ...

6.3 ... the conclusion is that it would be worthwhile disposing now, since (a) it would achieve a capital receipt, (b) this makes it likely the land will be developed, in line with the Council's planning policies and the aims of the Northampton Waterside Enterprise Zone, and (c) it makes it more likely that the East Stand will be completed as realistically only CDNL/NTFC would be able to deliver that and also ... in the event that the East Stand is not completed the Council would be entitled to exercise its option to repurchase the land for £1."

34. Shortly before publication of the first officer's report, Mr Bowers (the Assistant Director Assets & Environment) informed Mr Scotney and Mr Rumens (who were acting for the claimant) that the officers' advice to Members was that "*whilst the Cillardara offer was markedly higher it would only be received if the Council was able to break the Main Site Lease*"; as this was "*far from certain*" and "*likely to involve significant delay and cost in litigation*", the CDNL offer was "*to be preferred financially*".
35. In response to the first officer's report, on 14 February 2022, Cillardara made a revised offer of £2,050,000 for the freehold of the Land (excluding the Running Track), removing the obligation on the Council to break the Main Site Lease, with Cillardara instead taking on this burden ('Cillardara's third offer'). Mr Bowers wrote to Mr Kelly on 16 February seeking clarification as to how Cillardara envisaged a "*split landlord scenario*" would work. Loddars Solicitors responded on behalf of Cillardara on 18 February 2022, agreeing that a "*landowner's agreement*" would be needed and suggesting this "*should be straightforward and easy to document*". The letter stated that "*Cillardara would agree to indemnify WNC against any costs and liabilities incurred by WNC as a result of any action taken at the request of Cillardara*".



36. On 18 February 2022, the officer's report for the Cabinet meeting on 28 February 2022, at which it was proposed to decide on the disposal of the land at Sixfields was published ('the second officer's report'). The second officer's report, in similar but more detailed terms to the first officer's report, noted that Cillarda's second offer and CDNL's third offer had been carefully considered, and expressed the conclusion that CDNL's third offer was to be preferred on financial grounds.

37. The second officer's report noted:

“5.38 Following receipt of LSH's viability advice, WNC held initial discussions with Bower and Thomas on potential disposal options. Any proposal would need to address best consideration objectives. It was also considered important that any disposal to CDNL rationalised the site tenure, and also supported the completion of the East Stand at Sixfield Stadium.

5.39 For the avoidance of doubt. The LSH viability assessments make no allowance or deduction for the cost of completing the stand. The approach taken was that this proposal is first and foremost a property transaction that needed to address the Council's best consideration objectives. However, through its property holdings WNC was keen to ensure, if possible, that the East Stand would be completed for the benefit of its residents.

...

5.41 The LSH viability outputs ... highlighted that the residential led scheme proposed under the Clawback Deed would not be viable given the remediation costs (estimated to be c£12.65m). LSH considered various alternative development options ...

5.42 All these options produced negative land values. Such 'residual' viability assessments unavoidably use inputs which involve professional judgement but are nonetheless useful. In this case the assessment helped illustrate the significant challenges faced with this site and the impact that the required remediation works, and the ground conditions have on viability and value.

...

5.44 As the viability outputs for the 4 options produced negative land values, LSH also carried out a viability assessment having regard to land comparables. This assessment, based on the professional opinion of their agency team, suggested that pertinent industrial land values were in the range of £700,000 to £900,000 per acre. By adopting a rate of £900,000 per acre, and making allowances for reasonable abnormal costs, the potential value of the unencumbered freehold (assuming the freehold and various leasehold interests have been merged) would be approximately £2 million. This did not consider any payment

required to the HCA to satisfy the provisions of the Clawback Deed or the division of value between the relevant freehold and leasehold interests. Once these deductions have been made, LSH indicated that their assessment of the value of the Council's freehold interest, excluding the HWRC site, was £865,000."

38. With respect to Cillardara's third offer, which was received after the deadline for best and final offers, and after the second officer's report was substantially prepared, but before it was published, the report stated:

"2.15 Following publication of the Council report a further change has been proposed by Cillardara. This has been considered but given its lateness against the Council's published decision-making timetable it has not been assessed in detail, and therefore is not recommended.

...

5.54 Following publication of the Council report on these matters Cillardara made a further proposal. This was to modify its offer such that it was no longer a commitment to acquire the land when the Main Site had been ended, but rather to purchase it immediately.

5.55 Such a proposal has the attraction of a payment in the relatively short term, but it is problematic having arrived so late. The Council had already set up the Council and Cabinet meetings in order to take an informed decision, the Council report published, and the Cabinet report prepared.

5.56 The revised Cillardara proposal would also mean the main site lease would have two landlords. This is a complication which would need to be managed. The landlords would need to agree on matters relating to the lease, such as whether to exercise the break option, and each could also be liable for the actions of the other. Thus, some form of agreement between them would be necessary. Whilst Cillardara has made proposals for the basis of such an agreement negotiating it would still take time and might not be possible to resolve.

5.57 In these circumstances there is a risk of losing the ability to secure the firm offer from CDNL, and a lack of certainty about reaching satisfactory agreement on the management issues with Cillardara. It could continue a cycle of revised offers resulting in no decision and thus no resolution of the site ownership or capital receipt. There is a real benefit in having the confidence that a consistent offer from CDNL is likely to run to conclusion. Such a benefit is one with the Council is entitled to take into consideration.

5.58 In any event, if it was to fully explore the revised Cillarda offer it would be necessary to delay the decision currently planned to be taken at Cabinet on 28<sup>th</sup> February.

...

7.13 As noted in the body of the report, Cillarda has recently updated its offer to make it unconditional. Whilst this has the potential to resolve some of the legal risks highlighted it also raises new complications which are detailed in the report and require time to consider. There is case law which deals with the consideration of late offers and based on that case law the Council is entitled to recognise the benefits of what is known as ‘a bird in the hand’ and the risks of preferring a higher offer, the detail of which is yet to be fully resolved. This is particularly the case when the Council has set out and made public its decision-making timetable. The Council must consider later offers but is entitled to take these matters into consideration in doing so and to reach a conclusion that the best offer for the Council is one which can confidently be taken to completion.”

39. On 20 February 2022, Mr Rumens wrote to the Cabinet members, on behalf of Cillarda, expressing “*grave concerns*” that the second officer’s report did not address the contents of Cillarda’s (revised) bid correctly.
40. At the Council meeting on 21 February 2022, Council Members raised concerns, and asked detailed questions about, the offers from both CDNL and Cillarda. They requested further details about the legal and commercial risks associated with both offers and both bidders. On 23 February 2022, Mr Kelly wrote to the Cabinet Members, having viewed the live stream of the meeting two days earlier, providing a presentation about Cillarda and stating:

“The question was raised as to how Cillarda could offer more than double the valuation carried out by LSH for less land than that of the CDNL offer. The simple answer is that Cillarda and the Kelly family have more than 40 years’ experience in remediating contaminated land and have an extensive highly skilled workforce, together with the fact that we own all our own plant and machinery which enables us to make attractive offers to vendors for parcels of land.”
41. On 24 February 2022, Councillor John Shepherd, a retired solicitor, met with the Director of Legal Services and Mr Timmiss to review the legal advice. On 28 February 2022, Councillor Shepherd informed the Cabinet that having read the various legal opinions he was satisfied with the view presented in the reports about the legal risks. Also on 24 February 2022, members of the Cabinet met with Mr Timmiss and the Director of Legal Services, and the Executive Director of Finance and the Chief Executive. Mr Timmiss’s evidence is that they “*challenged officers robustly on the valuation of the land and the detail of the proposed disposal*”.

42. At 10.17am on 28 February 2022, CDNL made a revised offer of £2,050,000 for the freehold of the Land, on otherwise the same conditions as the previous offer except that the ‘buy back’ right was limited to the Running Track Land only (‘CDNL’s fourth offer’). Mr Thomas’ letter conveying CDNL’s fourth offer stated that although officers had recommended the Cabinet accept CDNL’s third offer, in view of the risk to the Club if the land were “*to fall into the hands of unknown property developers*”, “*we accept we had to increase our bid to make the decision much easier for Cabinet*”.
43. At the meeting on 28 February 2022, in circumstances where Cilldara’s third offer had not been addressed fully in the second officer’s report, the Red Book Valuation was available but had not yet been published as it was received the day after the second officer’s report was published, and CDNL’s fourth offer had been received that morning, the Cabinet decided to defer its decision to its ordinary meeting on 8 March 2022.
44. In preparation for the meeting on 8 March 2022, officers prepared an Addendum Report to address what they thought would be the final offers from Cilldara and CDNL, that is Cilldara’s third offer and CDNL’s fourth offer. The Addendum Report (with the Red Book Valuation attached as Appendix C) was published on 3 March 2022, five clear days prior to the meeting, in accordance with s.100B of the LGA 1972.
45. In the Addendum Report, officers recommended that the Cabinet agree to the disposal of the Land to CDNL, advising that:

“2.2 Having reviewed the offers it is concluded that the offer from CDNL represents the best consideration available to the Council. Whilst the offer is slightly lower on a per-acre basis it offers the immediate and unconditional release of the Main Site Lease and thus grants the Council freedom to use its HWRC site and ancillary land, and has the potential for financial upside through sharing of the benefits of reducing the Homes England overage otherwise payable on development of the land.

2.3 The CDNL offer also provide ancillary benefits in terms of making it likely that the East Stand of the Sixfields stadium will be completed.”

46. The Addendum Report stated:

“5.2 LSH has now completed its formal ‘Red Book’ valuation. This assesses the site as having a market value of the Council’s interests of £685,000, and its value to CDNL/NTFC as an interested party as £820,000. This value of £820,000 is slightly lower than its previous assessment, based on a more detailed understanding of the complex tenure position. ...

...

5.4 The £820,000 figure includes WNC’s value in relation to the Running Track. This is assessed based on the three sets of interlocking interests as giving WNC one-third of the unfettered

value (less WNC's existing use value of £36,099, which is included in the market value figure). This amounts to £136,634.

...

### Best consideration

6.1 The two revised proposals vary in the structure but also their deliverables. On the face of it, the Cillardara proposal offers the greatest financial return per unit area of land disposed of, although the difference is relatively modest. Both offers exceed the 'Red Book' residual market value of the site as assessed by LSH.

6.2 When evaluating best consideration, it is important that both financial proposals are evaluated in context and taking account of the ways the proposals differ. For the current proposals there are four key differentials:

- Extent of Site (the Cillardara offer does not include the running track site).
- Homes England overage potential upside.
- Impact of joint landlord arrangements, especially if the Main Site Lease turns out to be difficult to bring to an end.
- Litigation risk.”

47. The Addendum Report described the impact of joint landlord arrangements as follows:

“6.4 If the Cillardara deal was chosen, the Council and Cillardara would become joint landlords of the Main Site Lease. Whilst Cillardara has suggested sensible ways of managing this situation, as reflected in Appendix B, this would still generate a degree of complexity and require ongoing engagement from the Council. In particular, Cillardara would be expected to take the lead in seeking to break (or otherwise bring to an end) the Main Site Lease, with the Council essentially a passive partner but still needing to engage in some activity, potentially including legal action.

...

6.6 It is unknown if Cillardara (and the Council) would be able to break the lease from April 2024. The ability to do so could be removed by two factors (a) CDNL carrying out remediation sufficient to fulfil the requirements of the lease, or (b) some other legal factor; whilst these other factors currently appear unlikely

the nature of these factors is that they are often not seen in advance.

6.7 In terms of CDNL carrying out remediation works, Bower and Thomas have affirmed that they would do so if an agreement was not reached. The scale of remediation required is very hard to resolve without a detailed development scheme. This must therefore be considered a material risk.”

48. As regards “*litigation cost, delay, and risk*”, the Addendum Report noted that:

“6.8 CDNL is significantly invested in the site and the associated activities. If the Council proceeded with an alternative bid, there would be a strong incentive for CDNL to challenge that decision. CDNL would also have a strong incentive to resist breaking of the Main Site Lease. The complexity of the lease arrangements and the interaction of the provisions within the leases makes this situation very particular to these circumstances and makes it very difficult to be clear what the outcome would be if CDNL did bring a challenge.

6.9 The opportunities for Cillarda, given they have no existing rights over the land, would be limited to a challenge of the decision. This risk is easier to manage particularly in relation to the length of any delay associated with a challenge.”

49. The Addendum Report assessed the financial considerations as follows:

“6.10 In terms of assessing the proposals on a ‘like for like’ basis, the Cillarda offer covers the main site only. The two offers may be compared in cash terms as follows:

Offer	Area		Offered Price	Price per acre
	m <sup>2</sup>	Acres	£	£
CDNL	84,566	20.90	2,050,000	98,086
Cillarda	69,966	17.29	2,050,000	118,566

6.11 Alternatively, if the LSH figure of a value of £136,634 for Council’s interest in the Running Track is used, while this is not an exact science and is subject to several variables, if considered on a straight-line basis the figures for the Main Site only appear as follows:

Offer	Area		Offered Price	Price per acre
	m <sup>2</sup>	Acres	£	£
CDNL	69,966	17.29	1,913,366	110,663
Cillarda	69,966	17.29	2,050,000	118,566

6.12 Additionally, the following financial factors should be considered:

<b>CDNL</b>		<b>Cillarda</b>	
<b>Pros</b>	<b>Cons</b>	<b>Pros</b>	<b>Cons</b>
No need to manage joint landlord arrangements or negotiate joint landlord agreement.	Not highest cash offer.	Highest cash offer.	May not result in the HWRC site and ancillary land being freed from the Main Site Lease.
No risk involved in securing end of the Main Site Lease (as deal would require CDNL to surrender this.)	Litigation with Cillarda is possible. This may be expensive and protracted.		Risk of litigation with CDNL which may be protracted and disruptive, and with uncertain outcome.
Some potential for additional income from arrangements with HE clawback (the Council would be entitled to 80% of any saving from £770,000 in the clawback.)			
Council has the ability to repurchase the Running Track site for £1 if the East Stand is not completed within five years. (This is considered relatively unlikely.)			
Modest potential for overage from an early sale of all or part of the site.			

6.13 Both arrangements, if successful, would leave the Council with unfettered control of the HWRC site and adjacent land. With the CDNL deal the Council would also part with its interest in the running track site. The Cillardara deal would leave the Council with its freehold and leasehold interests in the running track site.

6.14 Overall, this suggests that the CDNL offer is to be preferred, on purely financial considerations. Whilst the Cillardara offer is theoretically marginally higher, the effort and risk attached to securing the return of the HWRC site and ancillary land, and the potential for HE clawback overage mean it is likely to be in the Council's financial interests to proceed with the CDNL offer."

50. On Friday 4 March 2022, the day after the Addendum Report had been published in which officers advised the Cabinet to accept CDNL's fourth offer, Cillardara made an offer of £3,000,000 for the Land excluding the Running Track Land ('Cillardara's fourth offer'). Save for the increased offer price (and a proposal to offer an overage provision, payable only if the Land is sold before various defined events occur), Cillardara's fourth offer was on the same terms as its third offer. Cillardara's fourth offer was sent to officers of the Council by email at 1.12pm on 4 March, at the same time as Cillardara sent it to the press and all members of the Cabinet. Cillardara's letter to Cabinet members also set out its analysis of its latest offer compared to CDNL's fourth offer.

51. Mr Timmiss states:

"In the very limited time available (Friday afternoon and Monday) before the Cabinet meeting on Tuesday 8<sup>th</sup> March 2022 it would not have been possible to prepare a further report addressing specifically the latest offer from Cillardara. Instead, on those days I had a number of meetings with Members about the bid and I also gave consideration to the bid upon reading it and afterwards (as I'm sure the other officers and the Members of the Council did too). As all of these meetings deal with existing reports, were advisory and not decision-making meetings, no minute was taken. The point of them was simply to explain to Members whether and if so how the existing reports provided the analysis necessary for them to consider when deciding which offer to accept."

52. Mr Timmiss met with the Portfolio Holder (Councillor Longley), the Leader (Councillor Nunn), and the Deputy Leader (Councillor Brown), at 9am on Monday 7 March 2022. He advised them that the features of Cillardara's fourth offer, other than the purchase amount which had increased from £2,050,000 to £3,000,000, were the same as those analysed in the Addendum Report. He advised where the values stated in the Addendum Report had changed. Mr Timmiss advised that the considerations set out in paragraph 6.2 and following of the Addendum Report applied equally to Cillardara's bid, and the chart in paragraph 6.12 would be the same, but the Cabinet "*should now place more weight on the difference between the higher and lower offer (from Cillardara and CDNL respectively) because the values had changed*".



53. Mr Timmiss states in his evidence that he explained that:

“... the choice of whether to reach a decision on 8<sup>th</sup> March 2022 or to have a further deferral was one for the Members, but I also explained that they had all the information they needed, including the now published Red Book Valuation. The key point was that the latest offer from Cillardara did not have elements that fundamentally change the analysis from that provided in the previous reports. Rather, the only change it introduced was a question of weight that members placed on the higher monetary value of the latest bid from Cillardara. I advised that that could be considered by the Members without the need for a further delay to the decision-making process.

In my view, members would have been entitled to decide in favour of either offer, as the decision was finely balanced. However, my recommendation was that the CDNL offered the best consideration available, based on the points set out in the analysis in the Addendum Report, while accounting for the extra weight to be given to it because of the increase in value.”

54. In their meetings with Mr Timmiss, the Portfolio Holder, Leader and Deputy Leader queried whether Cillardara’s willingness to offer an amount above the Red Book valuation might be based on a lack of understanding of the site and the complexities of the lease arrangements, or whether Cillardara’s motivation was to frustrate CDNL, such that there was a risk of Cillardara not proceeding with the purchase. Mr Timmiss advised that Members were entitled to evaluate any risks that the bid from Cillardara would not reach completion. In doing so, the Members could consider the value of the bid over the published valuation of the land, Cillardara’s prior stated interest in purchasing the Club, the pattern of bidding very late prior to decision-making meetings, alongside the apparent lack of detail in their proposals for the site, and balance these factors against Cillardara’s repeated bids, the size and nature of the bids offered, the financial status of Cillardara and the commitment of the individuals involved. Mr Timmiss considered that there were reasons to doubt the reliability of Cillardara’s offer and to be concerned that Cillardara’s bids were “*spoilers aimed, not at purchasing the site, but rather at preventing CDNL from commercially benefiting from a purchase*” in order then to weaken Mr Thomas’ and Mr Bower’s position in the event that Cillardara again sought to purchase the Club.

55. Mr Timmiss provided essentially the same advice at a meeting later the same morning with the Leader of the Liberal Democrat Group (Councillor Beardsworth) and the Leader of the Labour Group (Councillor Roberts), and they expressed broad support for the advice he gave. At 4pm, he met with the full Cabinet and Senior Leadership Team and gave advice to the same effect. Councillor Longley states, with respect to this meeting, that he and the Executive Director explained to Members:

“that they needed to take into consideration the increased size of the bid but also were entitled to account for the risk that it would not reach completion. It was explained to members they could decide to defer again and should do so if they did not feel they had the information necessary to take the decision. However, the

Executive Director explained that in his view the Members did have the information they needed to proceed.”

56. At 5pm on 8 March, there was a further meeting of all Members of the Cabinet. Members requested the attendance of Mr Timmiss and the Chief Legal Officer. Mr Timmiss advised that whilst breaking the Main Site Lease was possible, there was a high risk of challenge from CDNL if the Council (or a successor) sought to do so. He considered that although Cillardara’s fourth offer (as with its third) was on the basis that it would indemnify the Council for the costs associated with breaking the Main Site Lease, “*it was clear that WNC would be caught up in such a challenge if it occurred*”, and the inevitable interest from the press and public in the land “*would necessarily put significant pressure*” on the Council, as a local government body, “*to take a role in the dispute and be held accountable for the outcome*”. So even with an indemnity, the need for Cillardara to break the Main Site Lease had the potential to have a significant impact on the Council in terms of the resources required to deal with litigation, the press and requests for information. In addition, the Council had concerns about the level of indemnity that would be offered by Cillardara.
57. Mr Timmiss has also explained that he drew the conclusion from his many interactions with CDNL that their threats to walk away from the discussions and withdraw their offer if there was further delay beyond 8 March should be taken seriously.
58. The public Cabinet meeting followed later on the evening of 8 March 2022. The disposal of land at Sixfields was item 10 on the agenda, but the Cabinet decided to address it first. There was no express reference to Cillardara’s fourth offer during the brief discussion. The summary of the decisions taken at the Cabinet meeting records with respect to the disposal of land at Sixfields:

“RESOLVED: The Cabinet agreed to the disposal of the site to County Developments (Northampton) Limited and Northampton Town Football Club Limited as outlined in Appendix A subject to:

- a) The expiration of the Assets of Community Value moratorium period.
- b) Agreement from Homes England as required.
- c) The Assistant Director Assets and Environment in consultation with the Director of Legal and Democratic Services and the Portfolio Holder for Finance being satisfied that all necessary steps have been taken to proceed with the disposal.

REASONS RESOLVED:

1. To ensure that the Council complies with its legal obligations under the Localism Act 2011.
2. To meet the Council’s obligations to seek best consideration in relation to land disposals, as set out in the report.

3. In addition to achieve a number of wider benefits considered to be in the interests of the Council and the community in its area:

- Generate a substantial capital receipt in the short to medium term (anticipated before the end of 2022).
- Greatly assist in regularising the complex ownership position that exists on site:
  - Most immediately in relation to the HWRC site (which would be held by the Council free from any lease to CDNL) and the other retained land.
  - Also (at a later stage) in relation to the running track land if this was repurchased by WNC (as the relevant lease would be surrendered as part of the deal with CDNL).
- Remove the risks of legal challenges from CDNL to the Council's ability to break the Main Site Lease and the potential costs to the Council associated with that.
- Increase the likelihood that the East Stand would be completed.
- In the event that the East Stand was not completed, secure the return of the Running Track land to the Council's freehold ownership with very little further cost (a price of £1 with associated legal and other transactional costs).
- Making it likely the land will be developed, in line with the Council's planning policies and the aims of the Northampton Waterside Enterprise Zone.

#### ALTERNATIVE OPTIONS:

None of the alternative options previously identified appeared preferable, whether on purely financial or on wider policy terms, to accepting the CDNL offer.”

59. In a letter dated 15 March 2022 from the Council to Mr Kelly, the Council confirmed that the Cabinet had considered Cillarda's fourth offer, to which the advice in the Addendum Report remained relevant. The letter stated:

“Every member of Cabinet had been made aware not just of the existence of the additional bid but the precise terms of it as the letter including the bid had been sent directly to each member of Cabinet. It was also published through the local newspaper and social media. You can therefore be confident that Cabinet were very aware of the bid and considered it. The detailed advice on

the land and in particular the risks associated with the breaking of the leases was by this time familiar to members and they considered the bid against the detailed advice in the report. They were entitled, as they had done at the previous meeting on Monday 28<sup>th</sup> February 2022, to defer the meeting again to allow for further consideration but decided that they had considered the respective bids and the disposal did not warrant further adjournment. They were entitled to proceed with the bid which they considered provided best consideration for the Council and was most likely to deliver the capital receipt at completion.”

60. Councillor Malcolm Longley, the portfolio holder for the Sixfields land disposal, has given evidence that he had read LSH’s detailed report, was aware that they were professional valuers who had set out their reasoning, and so relied on their expert advice as to the value of the Land. He recognised that “*on paper*” Cillardara’s final offer was higher than CDNL’s final offer, but “*was very much aware that the biggest risk was that the deal may fall through after the Cabinet decision had been made*”. He states:

“I have my own property investment business and own a number of properties and am therefore familiar with the way that developers operate. Trust is a significant factor and we did not know whether we could trust either party. However, CDNL were already invested in the land and had a number of lease holdings on it. They owned the football club and had an interest in resolving these issues quickly. We believed that they were committed to and wanted to expedite a sale of the land. Even though the ACV on the running track could delay the capital receipt – the delay was time limited and was already factored in. We were confident that the motivation of CDNL was to acquire the land and to pay the Council for the land. We had nevertheless sought personal assurances from the individuals involved in relation to their commitments in their offer to further reinforce the position.

In relation to Cillardara, however, they had joined the negotiations much later and only when the Council had announced it was selling the land to CDNL. They had increased their offer every time it looked like the Council was likely to make a decision to sell to CDNL and had published their bids to drive public opinion in the media. We were aware that the individuals involved in Cillardara had tried to buy NTFC previously and were still interested in NTFC. I was concerned that a motivation for the bid by Cillardara was an attempt to frustrate CDNL in the hope that the inability to make progress with the Council would push them to walk away from buying the land and that they could then agree to sell NTFC out of financial necessity.

... I knew that there was a risk in any deal that it would not be completed. In my view this risk was higher with Cillardara than CDNL because it was not clear how the former intended to develop the site. If they weren’t motivated by a specific

development opportunity, this raised in my mind the possibility that their real intention was to obstruct a deal which would enable CDNL to increase their stranglehold over NTFC. Cillardara could [have] achieved this without the need to complete the deal themselves.

The LSH valuation had put the value of the land at less than the original offer from CDNL of £890k. Both bids were significantly above the valuation and so I was satisfied that the bids represented good value for the Council but my concern remained that the receipt might not be realised. This concern was much stronger with Cillardara because their bid was higher and their motivation was much less clear.

... We were also concerned that the proposed indemnity from Cillardara would not be able to protect the Council from protracted litigation from CDNL if the land was sold to Cillardara.

... I am satisfied that I had all the information to enable me to make this decision. ... Balancing the weight to be placed on the different risks was what made this particular decision difficult. The chart in [paragraph 6.2 of] the Addendum report was helpful in setting out the pros and cons, but the weight to be placed on those pros and cons rested with the elected members, who were the decision makers. Presenting additional information would not have made our decision easier, and could have made the situation worse as CDNL's bid may have been withdrawn ...

In conclusion we decided that on the balance of all the considerations, the CDNL bid was favoured on the basis of certainty of conclusion, lower risk, good return and lack of complexity.”

#### **D. The law**

##### ***Section 123(1) of the Local Government Act 1972***

61. The Council's power to dispose of land is contained in s.123(1) of the LGA 1972, and it is restricted by s.123(2):

“(1) Subject to the following provisions of this section ... a principal council may dispose of land held by them in any manner they wish.

(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.”

62. There is no dispute regarding the meaning of the term “*consideration*”. Mitting J observed in *R (London Jewish Girls High School Ltd) v Barnet London Borough*

*Council* [2013] EWHC 523 (Admin), [2013] LGR 387 at [16]-[17], with respect to s.123(2) of the LGA 1972:

“That provision has been the subject of previous judicial consideration in terms that I believe are now not controversial. Roch J in *R v Middlesbrough BC, ex p Frostree Ltd* (16 December 1988, unreported), observed:

‘In my judgment, the word ‘consideration’ in section 123(2) of the 1972 Act refers to the price payable for the land. That price may consist simply of a sum of money offered for the land or it may consist in part of such a sum and in part of other elements such as rights in the nature of easements or a right to re-purchase reserved by the selling authority provided that such elements have a commercial or monetary value which is capable of being assessed by those expert in the valuation of land.’

A differently phrased, arguably slightly wider, definition was adopted by Lightman J in *R v Pembrokeshire CC, ex p Coker* [1999] 4 All ER 1007 at 1013 (para 13):

‘... When deciding whether (for the purposes of s 123) the best consideration reasonably obtainable has been obtained, the only consideration to which regard may be had is that which consists of those elements of the transaction of commercial or monetary value to the local authority...’

63. It is uncontroversial that elements of social value, such as, in this case, completion of the East Stand of Sixfields Stadium, or increasing the likelihood that the Land will be developed in line with the Council’s planning policies and the aims of the Waterside Enterprise Zone, do not count.
64. In *Buttle v Saunders* [1950] 2 All ER 3, Wynn-Parry J observed that whereas persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of the property:

“Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: ‘A bird in the hand is worth two in the bush.’ I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must, of necessity, depend on its own facts.”

65. It is well established that the duty of a local authority under s.123(2) only to dispose of land for the best consideration reasonably obtainable is subject to the same considerations of prudence and common-sense as are discussed by Wynn-Parry J with respect to the duties of trustees: see *Tomkins v Commission for the New Towns* (1989) 58 P & CR 57, Dillon LJ at 64, applied by Roch J in *R v Middlesbrough BC, ex parte Frostree Ltd* (16 December 1988, unreported), who observed that the terms of s.37(3) of the New Towns and Urban Development Corporations Act 1985 (considered in *Tomkins*) were “essentially the same” as s.123(2) of the LGA 1972.
66. The policy embodied in s.123(2) is to ensure, so far as reasonably possible, that public assets are not sold at an undervalue, save on the authority of the Secretary of State. As Bingham LJ observed in *Tomkins* at 65, the public interest underlying this policy is obvious. In this context, the feature of assessing commercial value that is reflected in the “bird in the hand” adage is the likelihood that an offer, if accepted, will proceed to completion, and the countervailing risk that it will fall through. Depending on the facts, it may on occasion be open to a local authority to regard a lower offer with a substantially higher prospect of proceeding to completion as more commercially valuable than an offer for a higher sum which has a substantially lower prospect of coming to fruition.
67. What constitutes consideration that is “the best that can reasonably be obtained” is for the local authority to determine, subject only to challenge on public law grounds. The court is not entitled to substitute its own opinion on the facts and merits: *R (Salford Estates) v Salford City Council* [2011] EWHC 2135, HHJ Waksman QC (sitting as a Judge of the High Court), [95]-[96]; *R v Essex County Council ex parte Clearbrook Contractors Ltd* (unreported, 3 April 1981), McNeill J, p.4 of the transcript. In *R v Darlington Borough Council ex parte Indescon* [1990] 1 EGLR 278 at 282, Kennedy J held that the effect of the authorities is that:
- “a court is only likely to find a breach or an intended breach by a council of the provisions of section 123(2) of the Local Government Act 1972 if the council has (a) failed to take proper advice or (b) failed to follow proper advice for reasons which cannot be justified or (c), although following proper advice, followed advice which was so plainly erroneous that in accepting it the council must have known, or at least ought to have known, that it was acting unreasonably.”
68. In *Salford Estates*, HHJ Waksman QC observed that in the same case, Kennedy J:
- “... also noted that in a case like this a judge has the benefit of hindsight and full legal arguments, a benefit not enjoyed by the local authority taking a decision, and although there is a duty to probe and explore any offer that may be made there is also a danger of too much probing or that indecisiveness may lead to the loss of a bargain.”
69. The only point of law on which there was any dispute concerned the question whether s.123 of the LGA 1972 imposes any procedural obligation. The Council submits it does not, relying on the observation of the court in *Salford Estates* at [95] that “section 123 imposes a duty to achieve a particular outcome, namely the best price reasonably

*obtainable; it is not a duty to conduct a particular process, for example to have regard to particular factors*". The claimant contests that submission, contending that it is incorrect or at least overly simplistic. The claimant submits that the duty to obtain a particular outcome does not mean the Council was free to disregard the requirement to act fairly. There is no obligation to conduct *a particular process*, but that does not mean the Council was entitled to act in whatever manner it chose. It was only through "*an appropriate competitive process or some robust proxy*" that the outcome required by s.123(2) could be achieved.

70. I agree with the Council that any procedural obligation that the claimant relies on in this case would have to be derived from the common law, not from the applicable statute. Section 123(2) of the LGA 1972 imposes an obligation to achieve a particular outcome, namely the best price reasonably obtainable. The policy aim is to protect public assets in the public interest. It is clear that s.123(2) is not concerned with procedural fairness towards, or as between, rival bidders. There is no basis for implying a procedural obligation into the statutory provision.

### ***The duty of inquiry***

71. The basis of the obligation to make sufficient inquiry was first set out in *R v Secretary of State for Education and Science ex parte Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064-1065. The relevant principles were summarised by the Divisional Court in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [99]-[100], and approved by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, [70]. As summarised in *Balajigari*, the principles are:

"First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para.35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."



72. In *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, Lord Carnwath JSC (with whom all members of the Court agreed) observed at [62], in the context of a judicial review of a grant of planning permission for an extensive residential development, some parts of which lay within an area of outstanding natural beauty, that the *Tameside* duty “includes the need to allow the time reasonably necessary, not only to obtain the relevant information, but also to understand and take it properly into account”.

***Pre-determination***

73. When an allegation of pre-determination is raised, the question is whether a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that the decision-maker had predetermined the matter to be decided: see *R (Lewis) v Persimmon Homes Teesside Ltd* [2008] EWCA Civ 746, [2009] 1 WLR 83, Rix LJ, [96]-[97]. At [59] and [96], Pill LJ and Rix LJ, respectively, cited with approval the observation of Collins J in *R (Island Farm Development Ltd) v Bridgend CBC* [2006] EWHC 2189 (Admin), [2007] LGR 60 at [31]:

“The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should ... [U]nless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision.”

74. Pill LJ continued at [63]:

“Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting planning permission. It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence. Given the role of Councillors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision.”

75. The Court of Appeal also observed that the importance of appearances is generally more limited in this context than in the judicial context: Pill LJ, [71], Rix LJ, [98].

**E. Application to adduce expert evidence**

76. A preliminary question arises whether the claimant should be permitted to adduce expert evidence in the form of a report dated 19 December 2022 of Martin Patrick MRICS, a RICS Registered Valuer and Director within the Valuation Consultancy Department of the Birmingham office of Avison Young (UK) Ltd (‘the Patrick report’).

It is common ground that if I were to grant such permission, the Council should have permission to adduce a responsive report of Mark Weller MRICS, a RICS Registered Valuer and Director within the Valuation Consultancy Department of the Birmingham office of Lambert Smith Hampton ('the Weller report').

77. The claimant's statement of facts and grounds were accompanied by a report in the form of a letter from Mr Patrick dated 6 June 2022 ('Mr Patrick's letter'). The claimant indicated that it did not seek to adduce Mr Patrick's letter as expert evidence at that stage but that if permission were granted it would seek permission to adduce expert evidence. In granting permission, HHJ Simon indicated that the application to rely on expert evidence should be dealt with as a preliminary issue at the substantive hearing. Cillarda made its application to rely on the Patrick report on 19 December 2022. On 23 February 2023, the Council applied to rely on the Weller report in the event that the claimant is given permission to rely on the Patrick report.
78. Permission to rely on expert evidence will only be given where such evidence is reasonably required to resolve the proceedings: CPR 35.1. The Administrative Court Judicial Review Guide 2022 states:

“23.2.2 In judicial review proceedings, the Court's function is to determine whether the decision or conduct challenged was a lawful exercise of a public function, not to assess the merits of the decision or conduct under challenge. It is therefore seldom necessary or appropriate to consider any evidence going beyond what was before the decision-maker and evidence about the process by which the decision was taken – let alone any expert evidence.

23.2.3 The situations in which evidence other than of the decision under challenge is admissible in judicial review proceedings are limited. They include (a) evidence showing what material was before or available to the decision maker; (b) evidence relevant to the determination of a question of fact on which the jurisdiction of the decision-maker depended; (c) evidence relevant in determining whether a proper procedure was followed; and (d) evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.

23.2.4 Expert evidence not falling into these categories will be admissible only rarely. However, it may be admissible:

23.2.4.1 to explain technical matters, where an understanding of such matters is needed to enable the Court to understand the reasons relied on in making the decision in the context of a challenge to its rationality;

23.2.4.2 where it is alleged that the challenged decision was reached by a process which involved a serious – and incontrovertible – technical error which is not obvious to an untutored lay person but can be demonstrated by a person with the relevant technical expertise; and

23.2.4.3 where it is alleged that a process was unfair because of the failure to disclose information, expert evidence may assist in showing the importance of the information not disclosed, the submissions that would have been made in response to it and, therefore, the materiality of the failure.”

(The footnotes, which are omitted, cite (among other authorities) *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649, [36]-[41].)

79. The claimant’s application notice asserted that the Patrick Report is relevant (i) “*to whether a proper procedure was followed*”, (ii) “*to understand the technical matters affecting any valuation upon which the decision was taken*”; (iii) to understand “*any technical error which is not obvious to a lay person*”; and (iv) to “*the rationality of the Defendant’s reasoning*” and therefore compliance with s.123 of the LGA 1972. In its skeleton argument Cillardara states that the “*key issue*” so far as expert evidence is concerned is whether sufficient and appropriate value was attributed by the Council to the Running Track Land and/or whether there was a sufficient and/or adequate process of inquiry to determine what would be a reasonable range of value for the land.
80. Counsel for the claimant, Mr Ewan West, submits that Cillardara is not asking the court to decide whether to prefer the expert evidence of Mr Patrick or Mr Weller. But he submits the Patrick Report shows the Running Track Land has been undervalued, albeit not as substantially as suggested in Mr Patrick’s letter (which was based on inaccurate information regarding the tenure position), and he contends that the Council does not appear to have asked itself what the Running Track Land alone would be worth.
81. Mr James Goudie KC, leading Counsel for the Council, opposes the admission of the Patrick Report on the basis that it was not and could not have been available to the Council at the time of its decision, and it is not reasonably required for the resolution of the proceedings.
82. Mr Goudie contends that the core issue is whether the Council’s view regarding the reliability of Cillardara’s offer, the risk it would ultimately not be realisable, and that its complexities undermined its value, was reasonable; matters on which the expert evidence says nothing. Insofar as the Patrick Report supports Cillardara’s submission that its final offer was of a higher pound per acre headline amount than that of CDNL, the point is not and never has been in issue. The submission that the Council did not assess the value of the Running Track Land is simply inaccurate. The value of the freehold to anyone other than CDNL is nominal, given that CDNL has a long lease without a break clause. But the marriage value of the Council’s freehold interest in the Running Track Land was assessed by LSH initially, in the IVAR, as £200,000 (see the second officer’s report, paragraph 6.4), and ultimately, in the Red Book Valuation, as £136,634 (see paragraph 5.4 of the Addendum Report, quoted in paragraph 46 above). However, if I were to grant permission for it to be adduced, the Council would rely on aspects of Mr Patrick’s evidence.
83. Mr Joshua Dubin, Counsel for CDNL, submits that the development of the expert evidence shows that there is simply a difference of opinion, applying the same principles, between Mr Patrick and Mr Weller as to the value of the Running Track Land. Given that all parties agree that the resolution of that difference of opinion is not a matter for the court, and the claimant does not suggest that the marriage value

attributed to that land in the Red Book Valuation or the Weller Report was irrational, any justification for adducing expert evidence that was not before the Council when the decision was made has fallen away.

84. I agree with Mr Goudie and Mr Dubin that admission of the Patrick Report is not reasonably required to resolve the proceedings. None of the reasons given in the application notice apply. I agree with Mr Goudie that the premise that the Council did not consider the marriage value of the Running Track Land is plainly wrong. It did so. In particular, the Addendum Report expressly referred to the value provided by LSH in the Red Book Valuation, a copy of which was attached to that report. There is nothing in the Patrick Report to assist the claimant in this contention, which can be seen to be wrong on the basis of the documents that were before the Council when the decision was made.
85. The Council's share of the marriage value of £136,634 given in the Red Book Valuation represents one third of LSH's assessment of the total marriage value, reflecting the division of interest in the Running Track Land between the Council, CDNL and the Club. This is significantly lower than the revised figure of £1,297,750 given in the Patrick Report. Mr Weller has explained why he disagrees with Mr Patrick and continues to support the Red Book Valuation. Given that the claimant now accepts that Mr Weller's approach is reasonable, and does not invite the court to determine the disagreement between the experts, there is no foundation for the contention that the decision was based on an undervaluation of the marriage value of the Running Track Land; still less any basis for contending that in being guided by the Red Book Valuation the Council "*followed advice which was so plainly erroneous that in accepting it the council must have known, or at least ought to have known, that it was acting unreasonably*" (*ex parte Indescon*, see paragraph 67 above). I agree with Mr Dubin that any potential justification for adducing expert evidence fell away once Cillarda acknowledged that the Patrick letter was based on a flawed understanding of the tenure position, and that the remaining difference between the experts reflects nothing more than a disagreement between experts, both of whom adopt a reasonable approach.
86. Accordingly, I refuse permission to adduce the Patrick Report. As the Council's application to adduce the Weller Report was conditional on admission of the Patrick Report, that application falls away.

**F. Ground 1: procedural fairness**

87. The first ground raises the question whether the Council's consideration of the offers for disposal of the relevant land was infected by procedural impropriety and/or lack of procedural fairness.

***The parties' submissions***

88. Cillarda contends that the requirements of procedural fairness were heightened by the backdrop of poor decision-making highlighted in the KPMG report. Given Mr Kelly's previously expressed interest, prior to February 2021 (see paragraphs 24 to 25 above), Cillarda should not have been excluded in November 2021. Mr West acknowledges that the KPMG Report does not alter the applicable law (whether statute or common law) but submits that it affects the prism through which the Council's actions are seen. Cillarda was entitled to be included in the tender process, and not to be left in any doubt

as to what criteria would be applied in deciding between the offers: *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, [58].

89. Cillardara submits that the Council breached its duty of procedural fairness by:
- i) Taking into account non-monetary factors (in breach of s.123(2)) and failing to identify those factors to Cillardara so as to enable Cillardara address them.
  - ii) Adopting a conspicuously one-sided and unfair approach to the two bidders, by engaging in discussions with CDNL whilst failing to engage with Cillardara regarding its concerns about management of a split landlord scenario, or that it was putting in spoiling offers, to enable Cillardara to explain why any such concerns were misguided.
  - iii) Failing to permit Cillardara to bid for the Running Track Land by indicating that an offer that included that land would not be entertained; and failing to consider the procedural implications of encouraging rival bids on different bases.
  - iv) Failing to take proper account of the fact that the fourth CDNL Offer was for a larger tract of land, including the Running Track Land, than Cillardara's offer which did not include that land, by failing to make any proper inquiry as to how the value of that land reflected the overall consideration.
  - v) Having chosen to adopt a competitive process, abandoning that process in an unjustified and irrational rush to take a decision on the disposal, and failing to consider Cillardara's fourth offer adequately or at all, in circumstances where the offer CDNL made after the time for best and final offers had passed was properly analysed. Cillardara invites the court to infer from the startling lack of any contemporaneous reference to Cillardara's fourth offer that it was not considered. However, Mr West acknowledged that there is no basis for inviting the court to doubt Mr Timmiss's evidence.
90. Mr Goudie submits that the process was punctiliously fair as between the two bidders. The Council bent over backwards to accommodate both parties, deferring the decision and setting a clear timetable to give both bidders an opportunity to make best and final offers, and then deferring the decision again to consider their late offers. If the "*bird in the hand*" is not to be lost, there comes a time when a line has to be drawn. The Council was not required to be perpetually indecisive, not least given the danger of losing a good bid (considerably in excess of the Red Book Valuation from a thoroughly reputable source) as a consequence of the offeror becoming exasperated with the repeated postponements.
91. The sole challenge is to the decision of 8 March. By that stage, the Council had been engaging with Cillardara for many months. Any criticism of the provisional decision in November 2021 is irrelevant background noise. In any event, Cillardara had not indicated prior to the press release that it had any interest in purchasing the land outright, separately from its expressed interest in acquiring the Club.
92. Although it is usual for local authorities to have written reports, as reflected in the first and second officer's reports and the Addendum Report, Mr Goudie submits it is not

uncommon for advice to be given partly in writing and partly orally. The Council was not under any legal obligation to obtain a further written report addressing Cilldara's fourth offer. Cilldara would, or should, have known that the decision was due to be taken on 8 March and any reports would ordinarily be published at least five clear working days before the meeting. Cilldara's fourth offer was made after the Addendum Report was published and too close to the meeting for a further written report to be drafted, but the Cabinet was able to, and did, receive advice orally. Given the change made by Cilldara's fourth offer increased the price but did not otherwise alter the nature of the offer, it was not difficult for the Cabinet to apply the analysis already provided in the Addendum Report, while giving more weight to the higher price offered by Cilldara.

### *Analysis and decision*

93. What is required by the common law duty of fairness is acutely sensitive to the context. In circumstances where the Council was seeking to sell its interests in land, Cilldara had no existing right that was at risk of forfeiture, nor any expectation, such as an existing licence-holder may have when seeking renewal. This is akin to a pure application case. For the reasons I have given, I reject the contention that any reliance can be placed on s.123(2) itself in support of this ground. The common law duty of fairness applies in this context but, in my view, given the statutory purpose of protecting public assets in the interests of the public, the demands of procedural fairness towards bidders are at the lighter end of the spectrum. Moreover, I reject the contention that the requirements of fairness were heightened by the KPMG report. That report highlighted the importance of the Council ensuring it complied with its duty to protect public assets, in circumstances where a predecessor authority had failed to do so. It was not concerned with the private interests of potential bidders.
94. I reject the contention that the process was unfair towards Cilldara. The challenged decision is that made on 8 March 2022. By then the Council had deferred making a decision in November 2021, and engaged with Cilldara to give it an opportunity to put in an offer (see paragraph 27 above). The Council had deferred the decision a second time in January 2022, laying down a clear timetable for the provision of best and final offers, and for the Council to make its decision (paragraph 30 above). On 28 February 2022, the Council deferred the decision a third time, to 8 March, to enable officers to provide the Addendum Report addressing Cilldara's third offer and CDNL's fourth offer, both of which had been made after the deadline for the provision of best and final offers.
95. Cilldara chose to wait until the officer's updated report for the 8 March meeting (the Addendum Report) had been published before making a further, fourth, offer. Given the lateness of the offer, the history of deferrals, the risk (even if low) that CDNL would become so exasperated if the Council deferred a fourth time that it would withdraw its fourth offer (which was substantially above the Red Book Valuation), and the reasonable assessment of officers that the nature of the change in Cilldara's offer was such that the Cabinet had all the information that they needed to make a decision, I reject the implicit contention that fairness required the Council to defer yet again to receive a further updated written report addressing Cilldara's fourth offer.
96. I accept the evidence of Mr Timmiss and Councillor Longley regarding the oral advice given by officers with respect to Cilldara's fourth offer, and the Cabinet's discussion

and consideration of that offer. No basis for doubting their evidence has been put forward. It was suggested by Mr West that the alleged concern that Cilldara's bid was a spoiler bid was only raised for the first time in the witness evidence, but that is inaccurate. The point was taken at the outset in paragraph 33(e) of the response to the claimant's letter before claim, dated 14 April 2022, and in paragraph 59(b) of the Council's summary grounds of resistance. In the circumstances, I conclude that the Council gave fair and adequate consideration to Cilldara's fourth offer.

97. I have addressed, and rejected, the contention that the Council took into account non-commercial factors in breach of s.123(2) in the context of Ground 5 (see paragraph 136 below). It follows that there was no duty to identify those factors to Cilldara. Cilldara would have been well aware that the relevant criterion for the Council was whether the offer was the best consideration reasonably obtainable.
98. It is clear from the evidence and correspondence that the Council engaged with both bidders, including meeting with Cilldara on 19 November 2021. It was a matter for Cilldara whether it chose to speak to officers by phoning them, as CDNL chose on occasion to do, or to write to them or seek further meetings. The fact that officers were prepared to engage with CDNL in response to unsolicited calls is not indicative of a one-sided or unfair approach as between the two bidders.
99. The submission that there was any unfairness in failing to "*permit*" Cilldara to bid for the Running Track Land is misconceived. It was obviously open to Cilldara, as a commercial company, to design its bid as it saw fit. The advice of officers reflected the obvious fact that there would have been no point in Cilldara bidding for the freehold of land that was leased to CDNL until February 2163, with no break clause, and a statutory right to renew. The officers' reports show that the Council fully understood, and took into account, that Cilldara's offer was for a lesser tract of land than CDNL's, and so a 'like for like' comparison required account to be taken of the value of the Running Track Land (see paragraphs 6.10-6.12 of the Addendum Report, paragraph 49 above). It was for that reason that the Addendum Report recognised that even when the headline amounts in the rival offers were both £2,050,000 (Cilldara's third offer and CDNL's fourth offer), Cilldara's offer was higher than CDNL's. When Cilldara raised the headline amount to £3,000,000, the Council recognised the weight to be given to the fact that Cilldara's offer was higher increased, as the difference between the offers had increased.
100. The Council did not "*rush*" to take a decision, or "*abandon*" the competitive process. The Council made its decision on 8 March 2022, sticking to the timeline that it had announced when deferring the decision on 28 February. It considered the rival offers. It was inevitable that one of the bidders would be disappointed by the outcome. Accordingly, I reject this Ground.

**G. Ground 2: the *Tameside* duty of inquiry**

101. The question raised by Cilldara's second ground is whether the Council breached any duty of inquiry.

***The parties' submissions***

102. The claimant contends that, in view of the previous failures highlighted in the KPMG report, the Council was under a heightened duty to make sufficient inquiry to ensure that it could be confident it was obtaining best consideration for the disposal of its land interests.
103. Cillardara contends that the Council failed to take reasonable steps to investigate (i) the value of the Running Track Land in the hands of CDNL as a special purchaser; (ii) the alleged complexity and disadvantages of Cillardara's offer (as a result of the need to exercise the break clause in the Main Site Lease and the effect of having joint landlords), and the sufficiency of the indemnity offered by Cillardara; and (iii) the credibility and reliability of Cillardara's offer. The Council had to make sufficient inquiry to see if those alleged concerns were rooted in fact, but failed to do so. The Council contends that even a cursory review of the chronology demonstrates that this ground is misconceived.

### ***Analysis and decision***

104. I reject the contention that the KPMG report into decisions made by a predecessor authority alters the reasonable steps that were required of the Council to inform itself sufficiently to make the decision.
105. The Council commissioned two expert reports from LSH, including the Red Book Valuation dated 22 February 2022, prior to the decision. It also sought legal advice from independent solicitors to ensure that it understood the complex tenure position, and that the valuation was based on a proper understanding of the position. The extent of the steps the Council had taken to inform itself is evident from the detailed first and second officer's reports and the Addendum Report. The Council met with Cillardara and exchanged correspondence, as well as engaging with CDNL. The officer's reports setting out the Council's analysis of the offers were published and the bidders were able to, and did on occasion, respond to that analysis.
106. Both bidders were sophisticated commercial organisations that were able to engage with the Council, and provide such information as they wished in support of their offers. The Council had made clear from the outset of its discussions with Cillardara, in an email from Mr Bowers sent on 26 November 2021, that an important factor would be "*confidence that the offer is solid*", and expressly asked Cillardara "*how you anticipate generating the values needed to make the scheme work*".
107. The Council reasonably took the view that it was unnecessary to defer the decision on 8 March to analyse Cillardara's fourth offer given that the analysis in the Addendum Report applied, save to the extent that account needed to be taken of the extent to which the offer had increased. It was not irrational for the Council to consider that further inquiries were unnecessary and that there was a danger that "*indecisiveness may lead to the loss of a bargain*" (see paragraph 68 above). This ground, too, falls to be dismissed.

### **H. Ground 3: pre-determination**

#### ***The parties' submissions***



108. The claimant contends that the Council's decision to dispose of the Land to CDNL was pre-determined and/or the Council did not have a sufficiently open mind in taking the decision. As Mr West made clear, Cillarda makes no allegation of bias (whether actual or apparent).
109. The claimant submits that given the terms of the KPMG report, there is nothing to explain why the Council did not undertake a competitive process from the outset. The evidence of Mr Rumens and Mr Scotney shows that there was interest in buying the land for a far higher sum than the £890,000 provisionally agreed with CDNL in November 2021, including interest from Mr Kelly. Councillor Nunn was involved in those earlier discussions as well as the decision. Mr West describes him as the "*golden thread*", and points out that he has not provided a statement.
110. Once Cillarda indicated its interest following the press release, the Council appears to have accepted that it had to conduct some kind of competitive process. But Cillarda submits that the Council did not engage fairly or equally with Cillarda, and it is to be inferred that the Council did not wish to engage because it apprehended that there were in reality no difficulties with Cillarda's offers, and in particular no difficulties with Cillarda's fourth offer that could have justified turning it down. The claimant submits that a fair-minded and informed observer would conclude that although the Council purported to conduct a competitive process, it wished from the outset to dispose of the Land to CDNL.
111. The Council submits that its actions in extending its decision-making process three times to facilitate consideration of Cillarda's offers, which it was not obliged to do, are entirely inconsistent with a suggestion of predetermination. Mr Goudie and Mr Dubin submit that it is evident that both bidders were frustrated, in much the same measure, by the process. Mr Dubin draws attention to the evidence that Mr Thomas's impression was that CDNL had to work harder to make itself attractive to the Council, given the concerns about loss of funds caused by predecessors at the Club and CDNL to Northampton BC. Ultimately, a decision had to be made. The fact that Cillarda lost out is in no way suggestive of predetermination or a closed mind. Mr Goudie submits that the entire history flatly contradicts this allegation.

### ***Analysis and decision***

112. While it might have been more prudent, in light of the KPMG report, for the Council to have embarked on a competitive process from the outset, I do not accept that the evidence shows the Council knew that Cillarda, or any other investor, was willing to make a far higher offer than £890,000. Mr Scotney and Mr Rumens had put forward numerous potential investors, including Mr Kelly, but all of them had withdrawn any interest without making an offer. All of them had been put forward as being interested in acquiring the Club and the adjacent land, not as potential purchasers of the land alone. On his own evidence, Mr Kelly had withdrawn his interest in February 2021, in circumstances where Mr Thomas and Mr Bower had only been prepared to allow him a window of two weeks to assess the level of remediation required, which he considered inadequate to allow a proper assessment to be carried out.
113. As soon as the Council became aware of Cillarda's interest, they set aside the decision-making timetable and began a competitive process, giving Cillarda the necessary information and time to enable it to engage fully in the process and make offers. I have

already rejected the contention that the Council did not engage fairly or equally with Cillardara. That allegation therefore provides no support for the suggested inference that the Council had a closed mind in favour of selling to CDNL.

114. The evidence demonstrates that the Council sought and obtained detailed analysis of the respective offers, mostly in writing, but with the addition of the oral reports provided in respect of Cillardara's fourth offer. The Council's actions in repeatedly deferring the decision to consider the offers is inconsistent with an inference of predetermination. In particular, the Council was advised in the second officer's report that it could proceed to make a determination on 28 February 2022, and it had written advice that CDNL's offer was preferable, but Cabinet Members chose instead to defer the decision in order to receive a full analysis of Cillardara's third offer. This strongly suggests that the Council had an open mind. The evidence of Mr Timmiss and Councillor Longley as to the difficulty that Cabinet Members had in making this decision is also wholly inconsistent with the inference the claimant contends I should draw that their minds were closed to any possibility other than selling the land to CDNL.
115. In my judgment, this ground comes nowhere close to being made out on the evidence.

**I. Ground 4: section 123(2) of the LGA 1972**

116. At the heart of the claim is the question raised by this ground, whether the Council failed to obtain best consideration contrary to s.123 of the LGA 1972.

***The parties' submissions***

117. Cillardara's fourth offer was nearly £1 million higher than CDNL's fourth offer, and it was for a smaller extent of land, leaving the Council in possession of the "*extremely valuable*" freehold of the Running Track Land. The claimant submits that in the absence of a very cogent and plausible justification, it was irrational for the Council to have accepted a substantially less valuable offer, delivering nearly £1 million less to taxpayers and substantially undervaluing the Running Track Land.
118. The claimant submits that the concerns about the difficulties arising from a joint landlord scenario were misplaced as Cillardara had accepted responsibility for exercising the break clause, and had offered an indemnity. Even if time and resources likely to be expended by the Council on litigation arising from the exercise of the break clause could be treated as a commercial factor, despite the indemnity, on any view, an extra £1 million is worth more than such inconvenience. The Council gave manifestly disproportionate weight to the alleged disadvantages in rejecting Cillardara's higher offer.
119. The claimant contests the suggestion that the Council had any reasonable basis to regard Cillardara's offer as unreliable or a spoiler bid. In reaching this view, the Council has not treated the bidders equally, as the Council has expected more from Cillardara, in terms of explanation regarding how it proposes to develop the land and obtain value from it than it required from CDNL.
120. Mr Goudie submits that the Council approached s.123(2) correctly and came to a rational answer. He acknowledges that the litigation risk, although it is a significant factor that reduced the commercial value of Cillardara's offer, was not sufficient to have made a crucial difference on its own.

121. The vital factor was the Council's assessment of the comparative reliability of the offers. The Council was not bound to grasp for a superficially attractive, but illusory offer. The question what was the best consideration *reasonably obtainable* was a classic matter of judgement for the Council. The analogy with a "*bird in the hand*" oversimplifies the point, as the Council did not regard CDNL's fourth offer as certain to proceed to completion. But the Council had a much higher degree of confidence in CDNL's offer than Cillardara's. The Council had no reason to think that CDNL was showing a suspicious lack of interest in the detail: CDNL was a leaseholder in possession of the land seeking to buy the freehold and it clearly knew the land.
122. Whereas Cillardara had made offers substantially over the Red Book Valuation while paying remarkably little attention to the complex ground conditions, or to the complexities of the tenure position (even to the extent of instructing an expert in these proceedings on an admittedly inaccurate basis). Cillardara states that it had the remediation reports but Mr Kelly had withdrawn his interest in February 2021 because he considered he was being given insufficient opportunity to investigate the ground conditions, and yet a year later Cillardara's offers were made without any attempt to undertake those investigations. In circumstances where his previously expressed interest was in buying the Club with the adjacent land, and little analysis was provided to explain how Cillardara proposed to extract value from the land, the Council was reasonably entitled to reach the conclusion that Cillardara's fourth offer would not be realisable. Even if that was a cautious approach, it was nowhere near irrational.

### *Analysis and decision*

123. It is clear that the Council properly directed itself as to its duty under s.123(2) of the LGA 1972. It determined that CDNL's fourth offer constituted the best consideration that could reasonably be obtained. The question is whether that conclusion was rational.
124. I have already addressed, and rejected, the contention that the Council failed to value, or undervalued, the Running Track Land.
125. The Council's concerns regarding how the joint landlord scenario would be managed and the high risk of the Council being drawn into litigation when Cillardara sought to exercise the break clause in the Main Site Lease, and having to expend time and resources on such litigation which could not be fully mitigated by an indemnity, were rational commercial concerns. It was open to the Council to take the view that those factors diminished the value of Cillardara's offer, as advised by officers in the Addendum Report. However, in view of the extent of the difference between the headline amounts offered by Cillardara and CDNL, Mr Goudie is clearly right that these factors alone were not capable of swinging the decision in favour of CDNL once Cillardara's fourth offer was received.
126. The crux was the assessment of the risk that Cillardara's offer would not prove reliable. It is not for this court to determine whether the claimant in fact made spoiler bids. It was reasonably open to the Council, on the evidence, to form the view it did that Cillardara's offer was not a credible or reliable bid:
  - i) Cillardara's previously expressed interest had been in the Club, and it was only when a provisional decision to accept CDNL's £890,000 offer was announced that Cillardara made any separate offer for the land.

- ii) Cilldara was offering £3,000,000 for the Land (excluding the Running Track), in circumstances where the Red Book Valuation for the Land gave a market value of the Council's interests of £685,000, and its value to CDNL as £820,000. Cilldara was also offering to take on the burden of exercising the break clause in the Main Site (together with the risk of being unable to do so, and the high likelihood of litigation), as well as indemnifying the Council. Although this has to be viewed in the context of CDNL's offer of £2,050,000, in my view, it was not irrational in the circumstances for the Council to be highly suspicious that Cilldara's offer appeared to be too generous to be credible.
  - iii) The apparent lack of attention on Cilldara's part to the detail of the highly complex tenure of the Land, the apparent failure to take any steps to investigate the ground conditions to assess the remediation required for this former landfill site, and the lack of information regarding how Cilldara intended to develop and extract value from the site, combined to give the Council rational grounds for considering that there was a high risk Cilldara was not seriously considering purchasing the Land, but rather was seeking to disrupt the process to avoid CDNL doing so.
127. The Council's assessment that it had grounds to have much higher confidence that CDNL's fourth offer was reliable and would proceed to completion, albeit that too was uncertain, was also reasonable given CDNL's and the Club's existing interests in the Land, and CDNL's approach to the offer process.
128. It follows that the Council was reasonably entitled to take the view that Cilldara's offer was not reasonably obtainable, and that CDNL's fourth offer, which itself far exceeded the Red Book Valuation, represented the best consideration reasonably available. The Council complied with s.123(2) of the LGA 1972 and the claim based on Ground 4 is dismissed.

**J. Ground 5: irrationality and relevant/irrelevant considerations**

129. The claimant contends the decision was irrational, that the Council failed to take into account relevant considerations and that the Council took into account irrelevant considerations. I have already addressed, and rejected, the contention that the decision was irrational in the context of Ground 4. So I shall only address the submissions regarding relevant/irrelevant considerations under this head.
130. The claimant submits that the Council failed to take into account the following (mandatory) relevant considerations: (i) the substantially higher price offered by Cilldara on 4 March as compared to the CDNL's fourth offer; (ii) the fact that the indemnity offered by Cilldara removed any potential exposure arising out of the need to exercise the break clause in the Main Site Lease; (iii) the robustness of Cilldara's offer and its assurances concerning the ability to deal with the different land interests post acquisition; (iv) the robust evidence of third-party financial support provided by Cilldara compared to CDNL's limited assets; (v) the possibility that CDNL's offer might not proceed to completion; and (vi) KPMG's recommendation to pause the process when new material came to light.
131. I reject, as plainly inconsistent with the evidence, the contention that the Council failed to take into account the substantially higher price reflected in Cilldara's fourth offer

compared to CDNL's fourth offer. Cillardara sent that offer to every Cabinet Member and publicised it. The Members met with officers and discussed it. It is obvious that they were fully cognisant of the higher price offered by Cillardara; it was essentially that fact that made the decision a difficult one. It is also clear that Members took into account the offer of an indemnity. Their concerns as to whether any indemnity would fully remove the Council's exposure were rational. But in any event, as I have said, the crux of the issue was the reliability of Cillardara's offer rather than its precise terms.

132. As to (iii), (iv) and (v), the Council assessed the risks with respect to both bidders' offers. That assessment was rational. As regards KPMG's recommendation to pause the process when new material came to light, the Council had done precisely that when Cillardara indicated its intention to make an offer in November 2021. The recommendation obviously did not require the Council to continue deferring the decision endlessly in response to any new offer or information. What was required was for the Council to consider the matter and decide how to proceed. It did so. The Council's exercise of judgement on 8 March 2022, in deciding not to defer its decision any further, does not disclose any public law error.
133. The claimant further contends that the Council took into account the following irrelevant considerations: (i) the acquisition price of £1 for which the Council had acquired the land; (ii) CDNL's self-serving suggestion that its fourth offer would be available for only a limited time; (iii) the increased likelihood that the East Stand would be completed; and (iv) the likelihood that the land would be developed in line with the Council's planning policies and the aims of the Northampton Waterside Enterprise Zone. In relation to factors (iii) and (iv), Mr West acknowledges that it is possible for an authority to decide that an offer which is the best consideration in accordance with s.123(2) also has a number of other non-commercial benefits. But he submits that it is important that those other non-commercial benefits do not leach back into the s.123(2) analysis, and suggests that they did so here.
134. As to (i), this is based on a transcript of the livestream of the public Cabinet meeting on 8 March in which Councillor Longley is recorded as stating in respect of CDNL's bid, "*key points there are two million and fifty thousand pounds cash bearing in one [sic] we bought the land for one pound ...*". Such a remark, especially when considered in the context of the detailed analysis and evidence before me, provides no proper basis for a conclusion that the Cabinet took into account, in deciding which offer to accept, the amount for which the land was bought. Plainly they did not.
135. As to (ii), it was reasonably open to the Council to take into account, and assess as it did, the risk (even if not high) that CDNL would withdraw its offer if the Council deferred its decision for a fourth time.
136. As to (iii) and (iv), it was open to the Council to recognise in its decision that in achieving a sale for what it assessed to be the best consideration it had *also* secured community benefits. There must be no diluting of the requirement in s.123(2) to obtain the best consideration reasonably obtainable, but as Mr Goudie put it, a public authority which complies with that duty does not have to be ashamed of an outcome that also achieves community benefits. In this case, the Council correctly directed itself, repeatedly through the reports of its officers, about the necessity to obtain best consideration. The summary of the decision makes clear that the Council's decision was based on its obligation under s.123(2), as set out in the officer's reports. The

reference to community benefits such as the completion of the East Stand and development of the land in line with the Council's policies was "*in addition*" to, and did not qualify, the prior reason that CDNL's offer met the Council's obligation under s.123(2). The fact that some of the matters that the Council chose to highlight as "*wider benefits*" were commercial benefits which the Council had been able to take into account in assessing the best consideration does not suggest that the Council fell into error and took non-commercial benefits into account too. It is evident from the reports that that is not the approach the Council took.

137. For the reasons that I have given, I conclude that the Council's decision, which involved the assessment and weighing of risks, was rational; and I reject the contention that the Council took into account inadmissible factors or failed to take into account mandatory relevant considerations.

**K. Ground 6: reasons**

138. Finally, the claimant contends that the Council failed to give adequate reasons either at the time of the decision or in its letter of 15 March 2022 or the response to the letter before claim. The evidence has referred to a number of meetings on 7 and 8 March at which the Cabinet discussed Cillardara's fourth offer, and received advice from officers, yet there is no minute of any of those meetings, and no reference to that offer was made during the public meeting on 8 March or in the summary of reasons for the decision.
139. The Council submits that the duty to give reasons is context specific: *R (Asha Foundation) v Millennium Commission* [2003] EWCA Civ 88, [2203] ACD 50, [27]. In this case, the Council was unable to produce formal written reasons, in the form of an officer's report addressing Cillardara's fourth offer, because that offer was only received after the Addendum Report had been published, and too shortly before the meeting of 8 March to enable a further report to be written and published.
140. In this factual context, the Council contends that the duty to give reasons was satisfied by the combination of (i) the earlier officer's reports, particularly the Addendum Report, which contained analysis which applied in considering Cillardara's fourth offer; (ii) the minutes of the Cabinet meeting on 8 March 2022; (iii) the statement during the meeting on 8 March 2022 by the Portfolio holder, Councillor Longley; (iv) the Council's letter to Cillardara of 15 March 2022; (v) the Council's pre-action response; and (vi) the witness statements of Councillor Longley and Mr Timmiss. Although this was not the Council's preferred way to proceed, in the circumstances it was sufficient to meet "*the essence of the duty*", which is to leave no "*room for 'genuine doubt ... as to what (it) has decided and why'*": *CPRE Kent*, [42].
141. In any event, the Council submits that it had good reasons to consider the fourth CDNL offer represented the best consideration reasonably available, and so if the claimant were to succeed on this ground of claim, relief should be refused pursuant to s.31(2A) of the Senior Courts Act 1981 on the grounds that it is highly likely that the outcome would not have been substantially different.

***Analysis and decision***

142. It is common ground that the Council had a duty to give reasons for the decision. In principle, and in general, where reasons are called for, they should be given at the time

of the decision, or in some cases promptly on request, rather than articulated only later when defending a challenge.

143. The officer's reports, in particular the Addendum Report, provide the Council's reasons to a significant degree. Although the Addendum Report did not address Cillardara's fourth offer, as it had not been received, much of the analysis continued to apply given the limited, albeit important, change between Cillardara's third and fourth offers. However, there is no reference in the Addendum Report, minute or Councillor Longley's statement at the Cabinet meeting on 8 March to the key issue, namely the credibility or reliability of Cillardara's offer.
144. In circumstances where Cillardara's fourth offer was made very late, it seems to me that this was a case in which the duty to give reasons could be met, to the extent that it was not already met by the contemporaneous documents, by the Council explaining its reasons promptly after the decision in correspondence. On balance, I am persuaded that the Council has given adequate reasons through the combination of its letters of 15 March and 14 April 2022, when considered together with the officer's reports and the minute of 8 March. I accept the Council's submission that there is no room for genuine doubt as to the Council's reasons for the decision, and so the essence of the duty has been met.

**L. Conclusion**

145. The claim is dismissed on all grounds. Given the conclusions that I have reached, it is unnecessary to consider the Council's reliance on s.31(2A) of the Senior Courts Act 1981.