



Neutral Citation Number: [2023] EWHC 2937 (Admin)

Case No: CO/4124/2022
AC-2022-MAN-000427

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

Tuesday, 21st November 2023

Before:
FORDHAM J

Between:
THE KING (on the application of **Claimant**
RIVERSIDE PARK LTD)
- and -
SECRETARY OF STATE FOR LEVELLING UP, **Defendant**
HOUSING AND COMMUNITIES
- and -
WIRRAL METROPOLITAN BOROUGH **Interested Party**
COUNCIL

John Hunter (instructed by BRM Solicitors) for the **Claimant**
Alan Bates (instructed by GLD) for the **Defendant**

Hearing date: 24.10.23
Written submissions: 26.10.23 and 27.10.23
Draft Judgment Circulated: 14.11.23
Judgment Released: 21.11.23
Further Formal Hand-Down: 22.11.23

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

FORDHAM J

FORDHAM J:

Introduction

1. This is a case about the clawback of EU funding. The Claimant (Riverside) is what is known as the final beneficiary of part-funding under the European Regional Development Fund (ERDF). The funded project was a fixed assets project, for new office buildings. The funding was in two stages: a Phase 1 decision in March 2005 and a Phase 2 decision in June 2007. At that time, Riverside was known as Oracle Business Park Ltd. Phase 1 involved Riverside receiving EU funding of £2,774,000. For Phase 2 it was £1,970,582. Those decisions were part of the Merseyside Objective 1 Programme 2000-2006. Riverside's ERDF funding was, and still is, regulated by EU Regulation 1260/1999 (for the Phase 1 funding) and EU Regulation 1083/2006 (for the Phase 2 funding). I will call these the "1999 EU Regulation" and the "2006 EU Regulation". Each is an instrument "laying down general provisions on structural funds".
2. So, the EU was the ultimate source of the ERDF funding; Riverside was its final beneficiary. In between them were – and are – intermediary UK public authorities with important roles. These were central and local government authorities. I am going to speak of these as "the Department" and "the Council". In 2005 and 2007 the Department's functions were being discharged by the Government Office for the North West acting for the First Secretary of State. Today, the Department's functions are being discharged by the Defendant's Communities, European and Programmes Division, of which Sharon Shattock is a Team Leader. The Council is the Interested Party. The Council has had the direct dealings and direct relationship with the Department in relation to the ERDF funding for Riverside's project. The Council has also had the direct dealings and direct relationship with Riverside. It was the Council which made the bids for the allocation of funding, within a competitive tendering process. It was the Council who received the money, which it paid on to Riverside. It is the Council who faces any clawback of money by the Department, which the Council would then itself clawback from Riverside.
3. The terms of the Department's funding decisions were embodied in "Grant Funding Agreements" entered into by the Department with the Council. These Grant Funding Agreements were dated 30 March 2005 (Phase 1) and 27 June 2007 (Phase 2). The terms of the Council's onward provision of the funding to Riverside were embodied in "Grant Agreements" entered into by the Council with Riverside. These Grant Agreements were dated 16 September 2005 (Phase 1) and 30 November 2007 (Phase 2).
4. At the heart of this case are the clawback provisions found in the 1999 EU Regulation, the 2006 EU Regulation, the Grant Funding Agreements and the Grant Agreements (§§13-17 below). At issue is the lawfulness of decisions made by the Department in 2022. Those 2022 Decisions (§§27-29 below) were that clawback would be pursued by the Department, from the Council, pursuant to Annex 7 §1(f) of the Grant Funding Agreements, in the following situation: if Riverside's project were to undergo substantial change, by conversion from offices to housing, within the 20 year period specified in the Grant Funding Agreements. Riverside says that the Department is prohibited by law from pursuing clawback, or alternatively that the 2022 Decisions mean that any discretionary power of clawback has been exercised

unlawfully. The Department accepts that it is not under a duty to pursue clawback. It maintains that there is no prohibition on clawback. It says it has a discretionary power, which it has exercised lawfully. I am going to use the phrase ‘relief from clawback’ to describe an exercise of a discretionary power in Riverside’s favour.

Issues

5. The central issues in this case resolve, in my judgment, into the following. (1) Whether the clawback power in the Grant Funding Agreements Annex 7 §1(f) is lawfully open to the Department. This is the EU-Legality Issue: §§44-62 below. (2) Whether it is too late for Riverside to bring a judicial review claim disputing that this clawback power is lawfully open to the Department. This is the Delay Issue: §§63-67 below. (3) Whether the refusal of the Department to give Riverside relief from clawback is, in any event, unlawful. This is the Unreasonable Refusal of Relief Issue: §§68-80 below. (4) Whether the Department’s decision to use a ‘Straight-Line Method’ to calculate the amount of clawback is, in any event, unlawful. This is the Straight-Line Method Issue: §§81-83 below. There is also an agreed satellite issue about candid disclosure (§§40-43 below).

Common Ground

6. The following points are agreed by the parties. First, that the 2022 Decisions are amenable to judicial review, as a public function with a statutory underpinning. Secondly, that Riverside has standing – a sufficient interest – to challenge the 2022 Decisions. Thirdly, that nothing turns on points previously raised by Riverside about state aid and about whether clawed back monies would or would not be onward-payable to the EU Commission. Fourthly, that by virtue of s.3(1) of the European Union (Withdrawal) Act 2018 the EU Regulations remain part of domestic law, that I must decide their meaning and effect in accordance with CJEU (Luxembourg Court) case-law which predated completion day, and that I may choose to have regard to CJEU case-law on or after that day.

Programme Eligibility Rules

7. The 2000-2006 Programme involved “Programme Eligibility Rules”, written by the Department, against which funding allocation decisions were made by the Department. These were national rules applicable to eligible expenditure for the purposes of Article 30(3) of the 1999 EU Regulation and Article 56 of the 2006 EU Regulation (§11 below). Riverside’s project was for new office space in a business park. That was a species of project falling within the Programme Eligibility Rules. Another species, given to me at the hearing, which would have been within the Programme Eligibility Rules is a project for “community activities”, such as a community fire station. Importantly, housing projects are outside the Programme Eligibility Rules for the 2000-2006 Programme. In essence, the 2022 Decisions refuse relief from clawback because (see §§27-30 below) housing was always outside the Programme Eligibility Rules.

TFEU Article 2

8. Before we get to the EU Clawback Provisions, it helps to describe the setting in which they appear. Article 2 of the Treaty on the Functioning of the European Union makes overarching provision about EU and member state competence. It provides:

(1) When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. (2) When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. (3) The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide. (4) The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy. (5) In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations. (6) The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Recital 41 to the 1999 EU Regulation

9. Recital 41 to the 1999 EU Regulation is in two parts. The first part says this about “rules on eligible expenditure”:

Whereas, in accordance with the principle of subsidiarity, the rules on eligible expenditure should be the relevant national rules where there are no Community rules, although they may be laid down by the Commission where they are clearly needed for the uniform and equitable implementation of the Structural Funds across the Community; whereas, however, the starting and closing dates for the eligibility of expenditure should be defined
...

The Programme Eligibility Rules are “national rules” within this description.

10. The second part of Recital 41 says this about “major modification”, “durable impact” and “substantial modification”:

Whereas, however, ... it should be stipulated that investment projects may not undergo major modification; whereas consequently, in order to ensure the efficiency and durable impact of the Funds' assistance, all or part of the assistance from a Fund should remain attached to an operation only where its nature or its implementation conditions do not undergo a substantial modification which would result in diverting the assisted operation from its original objectives;

The reference to “assistance” which “should remain attached to an operation” reflects the fact that “substantial modification” can lead to clawback.

The EU ‘National Rules’ Provisions

11. Article 30 of the 1999 EU Regulation is headed “Eligibility” and Article 30(4) provides for “relevant national rules”. This links to the first part of Recital 41. Article 56 of the 2006 EU Regulation is headed “Eligibility of expenditure”. It contains the

corresponding provision for “relevant national rules”. Recital 41 from the 1999 EU Regulation is not repeated in the 2006 EU Regulation. But the same structure is unmistakable.

The EU ‘Financial Control’ Provisions

12. In the 1999 EU Regulation, Article 39 delineates the responsibilities of the Member State and the EU Commission to make “financial corrections” arising out of “irregularities” including from a relevant “major change”. Article 38(1)(h) provides for “financial control” including recovering amounts lost as a result of an “irregularity”. In the 2006 EU Regulation, Articles 98-102 deal with “financial corrections”, “financial control”, and “irregularities” including “major change”.

The ‘EU Clawback Provisions’

13. Having described the setting in which they appear, I can now turn to identify the two EU Clawback Provisions. In the 1999 EU Regulation, Article 30(4) links to the second part of Recital 41 (§10 above) and provides as follows:

The Member States shall ensure that an operation retains the contribution from the Funds only if that operation does not, within five years of the date of the decision of the competent national authorities or the managing authority on the contribution of the Funds, undergo a substantial modification: (a) affecting its nature or its implementation conditions or giving to a firm or a public body an undue advantage; and (b) resulting either from a change in the nature of ownership in an item of infrastructure or a cessation or change of location in a productive activity. The Member States shall inform the Commission of any such modification. Where such a modification occurs, Article 39 shall apply.

This is saying that member state authorities are to “ensure” that the project “retains” the EU funding, where five years have passed without a “substantial modification” having taken place. A substantial modification within the five years is in the nature of ‘disqualifying action’, which means the project will not retain the funding. The funding is subject to clawback, using the ‘financial control’ provisions.

14. In the 2006 EU Regulation, Article 57 is headed “durability of operations”. It is sufficient to quote from Article 57(1) and (3), which provide as follows:

(1) The Member State or managing authority shall ensure that an operation comprising investment in infrastructure or productive investment retains the contribution from the Funds only if it does not, within five years from its completion, undergo a substantial modification which is caused by a change in the nature of ownership of an item of infrastructure or the cessation of a productive activity and which affects the nature or the implementation conditions of the operation or gives to a firm or a public body an undue advantage... (3) Sums unduly paid shall be recovered in accordance with Articles 98 to 102...

This EU Clawback Provision has the same essential nature and wording as Article 30(4) of the 1999 EU Regulation. There is, however, a difference in wording: it refers to five years from “completion”, rather than five years from “the date of the decision ... on the contribution of the Funds”.

The Domestic Clawback Provisions

15. There are Domestic Clawback Provisions in each of the Grant Funding Agreements between the Department and the Council. Clauses 10 and 11 of the Grant Funding Agreements are headed “Changes to the Project” and provide:

10. The following changes must be agreed in advance by the Government Office in writing: (i) any change that alters the nature of the project; (ii) significant changes over the lifetime of the project to the individual categories of expenditure or expenditure profile or quantifiable targets set out in Annex 1; (iii) any change to the project’s use, its financing or ownership.

11. Failure to do so may result in the termination of grant and we may require you to repay any grant paid.

Annex 7 of the Grant Funding Agreements is headed “Withholding and Repayment of Grant”. It provides as follows, by Annex 7 paragraphs 1(a)(i), 1(f) and Note (i):

1. The Secretary of State for Communities and Local Government reserves the right to withhold any or all of the payments and/or to require part or the entire grant to be repaid if: (a) the Secretary of State for Communities and Local Government considers that: (i) there is a material change in the nature, implementation, scale, costs or timing of the Project such that the project no longer complies with the description set out in the application and any amendments that may have been agreed subsequently ... (f) during its economic life, the project undergoes substantial change defined as being used for purposes other than those specified in the application or having a change of owner. Note: (i) The economic life of the project is taken to be 20 years for fixed assets, unless otherwise agreed by us ...

Annex 7 paragraph 1(f) is saying that the UK authorities are empowered to act so that a project does not retain the EU funding, where a substantial modification (“substantial change”) takes place within 20 years.

16. The Domestic Clawback Provision in Annex 7 paragraph 1(f) was a standard contract term used by the Department for all EU funding under the 2000-2006 Programme. In fact, according to the 2007-13 Handbook at §7 (§32 below), it had appeared in all EU funding arrangements since the start of the 1994-1999 Programme.
17. There are equivalent Domestic Clawback Provisions in each of the Grant Agreements between the Council and Riverside (described as the Grantee). Clause 8.13 of the Grant Agreements provides:

If within a period of twenty years commencing on the date of the payment of the final instalment of the Grant hereunder or (if earlier) the date when the Grantee shall have completed the disposal or disposals of all its estate and interest in the Property at Market Value the Project shall undergo substantial change (if requested by the Council in writing to do so) the Grantee shall repay to the Council the whole or a part of the Grant. For the purposes of this Agreement “substantial change” is defined as any change that results in the Property or any asset purchased as part of the Project being used for purposes other than those specified in the Application.

The Domestic Clawback Provision in clause 8.13 of the Grant Agreements were ‘back-to-back’ provisions to match the Domestic Clawback Provision in Annex 7 paragraph 1(f) of the Grant Funding Agreements.

Five Years and Twenty Years

18. As has been seen, the EU Clawback Provisions are saying that the member state authorities are to “ensure” that the project “retains” the EU funding, where five years have passed without the disqualifying action of a “substantial modification” having taken place. The Domestic Clawback Provisions, on the other hand, are saying that the UK authorities are empowered to act so that a project does not retain the EU funding, where a substantial modification (change) takes place within 20 years.

The Department’s Interpretation

19. In her witness statement in these proceedings, Ms Shattock explains the Department’s interpretation of the EU Regulations and the EU Clawback Provisions, which it treated as preserving a national autonomy to impose the Domestic Clawback Provisions. She says this at §14 (emphasis in original):

14. The EU laid down a requirement for the 2000-2006 programming period that assets built with the assistance of ERDF funding had to be retained for at least five years. This was a minimum requirement, as the relevant national authorities were responsible for laying down a fuller set of requirements, including the economic lifetime of the asset (i.e. the period over which the asset was expected to be used for its intended purpose, failing which a proportion of the grant amount would be clawed back).

Here, “retained” is a word referable to assets, describing the project not undergoing a substantial modification. In the EU Clawback Provisions, “retains” is a word referable to funding, describing the project keeping the EU funding.

20. So, the Department’s interpretation of the EU Regulations was – and is – that “five years” without a substantial modification, described in the EU Clawback Provisions, is a “minimum” obligation on the beneficiary of the EU funding. The Department regarded the “20 years” in the Domestic Clawback Provisions within the Grant Funding Agreements as being a legally permissible, more exacting, requirement. It was part of the “fuller set of requirements” which the national authorities were “responsible for laying down”.
21. This thinking was linked to the EU ‘National Rules’ Provisions (§11 above). In her witness statement, Ms Shattock next sets out (at §15) Article 30(3) of the 1999 EU Regulation and Article 56(4) of the 2006 EU Regulation. She then says this (at §16):

16. The EU Regulations therefore envisaged that national rules on eligibility would be determined by each Member State’s relevant national authority. We, the Department domestically, took the view that an economic life of 20 years should generally be specified for public funding of assets such as buildings...

Riverside’s Project in 2005/2008

22. It is time to fill in some more detail about the facts of the present case, and the sequence of events. The Council’s applications for the Phase 1 and Phase 2 EU funding related to the Wirral International Business Park in Bromborough, Merseyside. The Business Park is owned by Riverside. The purpose for which the funding was sought was to help Riverside develop the Business Park by building additional office accommodation. That was 5,230m² of office accommodation in Phase 1 and 2,722m² of office accommodation in Phase 2. The Council’s funding application told the Department that a detailed legal agreement would be entered into between the Council and Riverside. There were “quantifiable targets”, as reflected in

Clause 10(ii) of the Grant Funding Agreements (§15 above). The quantifiable targets for Phase 1 were the new office floorspace (5,230m²) delivered by 2005 together with new additional jobs delivered in a specified period 2005 to 2008. The equivalent quantifiable targets for Phase 2 were the new additional office floorspace (2,722m²) delivered by 2008 together with the new additional jobs delivered that year. The aims of the project were described in Riverside's business plans, accompanying the Council's funding applications: making a positive contribution towards the achievement of premises which would contribute to meeting the needs of existing businesses and potential investors in Merseyside; working in partnership with the private sector to implement a programme of regeneration; all in a context of "market failure" in the office premises market related to a lack of supply rather than a lack of demand.

Riverside's Project in 2022

23. A report dated 25 June 2022 was written for Riverside by Aspinall Verdi Property Regeneration Consultants ("the Aspinall Report"). Here is what it said. The business park had been in a spiral of decline since 2019. This was now terminal. The useful economic life of this major asset had now passed. The vacancy rates and patterns showed that the economic life of the Business Park was ebbing away, and it was no longer fit for purpose.
24. Riverside's idea was – and remains – to switch from office space to residential housing at the site of the Business Park. This switch to housing has the indicative support of the Council as a planning authority. In January 2020 the Council had issued a draft local plan designating the site for housing. In December 2021 the Council granted Riverside's application for outline planning permission for a change of use to residential properties. Mr Hunter for Riverside emphasises these circumstances, the fact that the quantifiable targets for 2005-2008 had all been met, and the fact that 17 years (Phase 1) and 15 years (Phase 2) had passed. Mr Bates for the Department emphasises that these were 20 year projects, which is what Riverside had signed up for when taking the EU funding, knowing it could be clawed back, and knowing that housing was outside the Programme Eligibility Rules.

The July 2022 Application

25. The prospect was recognised in 2022 that – if there were a switch from office space to housing before the end of the 20 year periods – the Department would seek to invoke the clawback power in Annex 7 §1(f) of the Grant Funding Agreements, with the consequential need for the Council then to exercise its back-to-back clawback power in clause 8.13 of the Grant Agreements. The Council and Riverside wanted to get this sorted out. They combined to raise the issue of clawback with the Department. A period of correspondence ensued. This culminated in the Council's application on 6 July 2022, accompanied by a "Submission" from Riverside and by the Aspinall Report. The Council described the switch to a housing development as an option being explored. It described Riverside as seeking to determine the potential level of the clawback that would be due if Riverside did seek to pursue such a change in land use. The July 2022 Application described the grant conditions – of developing office floorspace and creating new employment – as having been met. It described Riverside as intending to secure residential planning consent for the land, and then to dispose of the site on the open market. The Council said that its application form was intended to

trigger negotiations around the potential clawback amount that would have to be repaid if the change of use were pursued.

26. Riverside's July 2022 Submission included three key points. First, referring to previous correspondence, Riverside repeated an EU law-based point which it had made before. Its position was that, under the EU legislation, "once 5 years has elapsed with no change in use or ownership, any subsequent change of use or ownership does not entitle any request for repayment of ERDF funding". Secondly, Riverside raised a point about the site's 'economic life as a fact', asking the Department to recognise that the site's economic life had ended so that no clawback was due. As to that, reliance was placed on the factual position on the ground and the Aspinall Report. This is linked to the idea that 20 years in Annex 7 Note (i) was a placeholder and that "otherwise agreed by us" raised a factual question as to what was the actual "economic life of the project". Thirdly, Riverside said that if there were a proposed clawback the Department ought not to apply a 'Straight-Line' method. Instead, the Department should apply a particular weighted amortisation approach described as the 'sum of the years digits method'.

The 2022 Decisions

27. A "Decision Letter" dated 10 August 2022 was written by Jo Penter of the Cities and Local Growth Unit, responding to the July 2022 Application. This one-page letter described the likely clawback as having been assessed by the Department at £842,737.34 (as at 10 August 2022). Clawback was appropriate because:

the proposal is for the disposal of the land for housing use which is ineligible under the ERDF terms and conditions.

That was a reference to the Programme Eligibility Rules. The quantum of the clawback sum was calculated using a 'Straight-Line' method: the straight proportion of funding referable to the unelapsed portion of the 20 year project life.

28. There then followed a detailed letter before claim from Riverside. Among the points raised were these: (1) the EU law-based point about 5 years having elapsed; (2) a claimed unreasonableness and breach of a duty of enquiry in relation to the 'economic life as a fact'; (3) a claimed unreasonableness, the adoption of a closed mind, and what was called procedural unfairness, pointing to an inconsistency when compared with the ERDF Handbook for the 2007-2013 Programme; and (4) unfairness in the application of a 'Straight-Line' method.
29. In response, a second Decision Letter dated 21 December 2022 was written, this time by Ms Shattock. This was a three-page letter which described itself as a "fuller and more detailed explanation as to how the Department has arrived at its decision". This letter emphasised the terms of the Grant Fundings Agreements. It calculated the clawback as £696,050.15 (as at 31 December 2022). Under headings "Our Policy" and "Decision", the December 2022 Decision Letter said this (the paragraph numbering is mine, for ease of later cross-referencing):

Our Policy. [1] As you will be aware whilst each case is considered on the basis of the information provided by the Grant Recipient detailing the case for a proposed change of use or disposal, there is a robust and consistent process in place for considering change of use and disposal cases that come forward from applicants, whose projects were funded

during the 2000-2006 ERDF programming period. [2] For each case, the Department considers the eligibility of what is being proposed within the regulatory framework for that funding period. [3] The current proposal to sell the land upon which the SME [small and medium size enterprise] units sit and demolish those units to make way for housing is an ineligible activity, as per the eligibility guidance set down for the 2000-2006 funding period. This guidance stated that ERDF cannot be used for the building or renovation of housing. [4] In addition, consideration is given to the length of economic life left within the assets funded. In respect of your Grant, a 20 year economic life was included within the grant offer letters which allowed UK Government to manage the risk in the event that an owner wished to change the use or dispose of assets funded through ERDF. [5] Should a decision be taken to clawback a proportion of ERDF funds, a Straight-Line calculation is conducted based on the proportion of economic life remaining in those asset(s) against the amount of ERDF grant awarded.

...

Decision. [6] Taking into consideration that the proposal as it currently stands constitutes an ineligible activity and that the proposed change will occur within the 20 year economic life of the assets; clawback is appropriate in this case and as of 31 December 2022 will amount to £696,050.15.

Paragraphs [2], [3] and [6] were clearly referring to the Programme Eligibility Rules.

The Focus on Ineligibility

30. As has been seen (§§27-29 above), it is unmistakable from the 2022 Decision Letters that the Department was insisting on clawback, and declining relief from clawback, because the proposed new use – housing – was “ineligible” for the purposes of the Programme Eligibility Rules. This was the application of a “robust and consistent process” within “Our Policy”: Decision Letter 21 December 2022 at [1]. This same focus on ineligibility is also found in Ms Shattock’s witness statement for these proceedings at §§45-46:

45. The Claimant now wishes to demolish or repurpose business units built with ERDF funding, prior to the ending of what was agreed to be their economic life period, and to replace them with residential units. This would (a) be in breach of their contractual obligations and (b) be in breach of the 2000-2006 programme eligibility rules. In those circumstances, clawback is entirely appropriate as the proposed use is an ineligible activity.

46. Although in some other cases the Department has been willing to show a degree of flexibility to refrain from clawing back funds, this has been applied only to situations where applicants propose that the assets still within the agreed economic life period will continue to be used for activities which remain in keeping with the programme eligibility rules...

Background to the Focus on Ineligibility

31. Ms Shattock’s witness statement gives the Court an explanation of how this focus on ineligibility under the Programme Eligibility Rules had developed. She said this about “procedure” (or “process”) (§43):

43. My team deals with all submitted ‘legacy’ cases and has done so since the abolishment of the regional Government Offices network in 2011. These are cases where an asset has benefitted from EU funding under previous Programmes and where a disposal, change of use or ownership is proposed and the 20-year period has not yet expired. In taking on the responsibility for this policy area we established a set procedure for applicants to make their submissions to the Department. A robust and auditable process was agreed with input from the Audit Authority.

Ms Shattock then said this, as to substance (§44):

44. The Senior Reporting Officer (“SRO”) for the ERDF Closure Programme 2011 was asked to consider recommendations on how the Department would continue to manage and monitor assets funded through the 2000-2006 programme. On 3rd May 2011 the SRO was of the view that the stipulation of a 20-year economic life for fixed assets should not be abolished but instead allowed the Secretary of State to exercise his discretion to reduce this period on a case-by-case basis, the circumstances for which are described below and evidenced in a note from that date (Exhibited ...). This was the starting point for developing the business process for reviewing cases submitted by applicants involving the disposal, change of use and change of ownership of ERDF funded assets. This note demonstrates that the Department has at all times been willing to consider proposals from applicants to vary the use of assets funded through ERDF within the 20 year economic life provided it still complied with the programme eligibility rules. However, the starting point has always been the 20-year economic life as per the contractual agreements.

I will need to return to this May 2011 Policy Decision of the SRO, and the May 2011 Note to which Ms Shattock was referring and which she was exhibiting (see §§34-39 below).

The 2007-2013 Handbook

32. I have already mentioned (§28 above) that Riverside’s letter before claim made a point about inconsistency with the ERDF Handbook for the 2007-2013 Programme. That Programme had also used a 20-year economic life for fixed assets. The 2007-2013 Handbook was available in the public domain. It harks back to April 2011, but I was shown the second edition (version 2), published on 24 September 2012. The 2007-2013 Handbook says this, at §§7-8:

History. 7. The concept of ensuring that a capital asset is used for its ‘approved use’ throughout a ‘useful economic life’, and the 20 year condition in relation to land (‘Fixed Assets’) has appeared in ERDF offer letters at least since the start of the 1994-99 programmes. It is not set out in any EC Regulations covering the 1994-99, 2000-06 or 2007-13 periods. 8. We have also checked with colleagues in HM Treasury [HMT], and also checked current and earlier versions of the HMT Green Book, and there is no reference to the 20 year rule therein. HMT colleagues advise that it is probably a decision that the ERDF programme management Division in our Department would have taken some years ago, presumably following legal advice. DCLG [Department] lawyers are also unable to identify the source of the rule.

There is then a discussion of the EU Clawback Provision, which for the 2007-2013 Programme was Article 57 of the 2006 EU Regulation (§14 above).

33. The 2007-2013 Handbook then describes this new approach, applicable both to “new projects” (§§16-18(a)) and to “historic projects” prior to April 2011:

New projects. 16. Capital projects tend to ... fall within three main types: Managed workspaces for SME occupants, speculative and bespoke developments, and pure public infrastructure. 17. The ‘Useful Economic Life’ of an Asset should be more flexible and take account of depreciation, the purpose of the grant (the ‘Output Targets’) state aid concerns and structural funds legislation 18. As a guide we suggest as follows: (a) for Fixed Assets in capital projects covered by the ‘speculative and bespoke gap funding’ scheme: If the Output Target is brownfield land regeneration/floorspace created to stimulate the economy, once the Fixed Asset is completed and ready to put to the market this Output Target has been achieved. Article 57 would prohibit any undue advantage accruing to the developer and would require the Fixed Asset’s approved use (‘its nature or implementation conditions’) to be maintained for 5 years. This accords with the state aid scheme which expects to see the

benefit to the grant recipient being measured after 5 years. Therefore in the grant funding agreement conditions, the ‘Useful Economic Life’ should be defined as 5 years;...

Historic projects prior to April 2011. We consider that the change in the rule should be retrospective to cover all capital projects approved under this programme period to which the 20 year rule currently applies.

The May 2011 Note

34. The Note of the meeting on 3 May 2011, at which the SRO made the decision described in §44 of Ms Shattock’s witness statement (§31 above), included the following:

Asset Disposal. (1) The approach and recommendation outlined in the paper (“DCLG Policy on Disposal of ERDF Funded Assets 2000-2006”) was approved, with the rider that (i) we make clear that the stipulation of a 20 year economic life for fixed assets is not being abolished (ii) we are instead allowing the SoS [Secretary of State] to exercise his discretion to reduce this period on a case-by-case basis...

I will record that the name of the decision-maker was carelessly redacted from the Note as disclosed. The decision-maker was the SRO, David Rossington. The Department apologised to the Court for that careless redaction. I accept that apology.

The May 2011 Paper

35. As has just been seen, the May 2011 Note recorded the approval, subject to the “rider”, of the approach and recommendation outlined in “the paper”. That was the May 2011 Paper. It was disclosed in the run up to the substantive hearing. Its author was Ms Shattock, and it was written for Mr Rossington, for the meeting on 3 May 2011. It is entitled:

DCLG POLICY ON DISPOSAL OF ERDF FUNDED ASSETS 2000-2006.

36. The May 2011 Paper contains a discussion under 5 headings (the paragraph numbering in square brackets is mine, for ease of later cross-referencing). The first two headings are “issue” and “recommendation”. The Paper says:

Issue. [1] This paper clarifies the policy that DCLG will apply to the retention and disposal of assets part funded with ERDF from the 2000-2006 Programme period.

Recommendation. [2] That you note the contents of this paper and agree that, as a general guide, assets can be disposed of after 5 years without any clawback of ERDF, but that the asset retention period for a given project will need to be considered in light of the particular circumstances of the project (including the nature and purpose of the project and whether there are any state aid requirements).

37. The next heading is “background”. The Paper says:

Background. [3] The overall objective of the European Closure Division is to reduce the liability to DCLG arising from the closure of the 2000-2006 ERDF Programmes and to mitigate the risk of qualification of the DCLG accounts arising from ERDF liabilities. An important strand of that work is to manage the asset legacy process to ensure that it is fully compliant with EC requirements whilst, at the same time, minimising any liabilities to the Department.

[4] The SoS has previously agreed to remove the Department's capital clawback rights from accountable bodies that are either a public body or a body that is subject to an asset lock, from the following four historic DCLG grant programmes: Single Regeneration Budget (SRB); Urban Programme; City Challenge; Inner Area Grants.

[5] The rationale for this was that, where grant programmes have long since come to an end but clawback restrictions remain, there is evidence that public and community owned assets can be forced to hold to a business model which may no longer be viable nor meet community needs, thereby undermining their future and the public investment in them. The removal of capital clawback restrictions will be a significant freedom that can enable councils and communities to use their assets as security to obtain loans to sustain and/or expand their activities, or to rationalise their assets to best serve communities.

[6] It has not been possible to do this for ERDF because of the requirements of the EC Regulations, but we have been considering how we can relax the requirements, particularly as: [6](a) A large number of asset disposals are being sought by the Regional Development Agencies (RDAs) so that they can realise their assets in order to fund the transitional period between now and abolition; [6](b) We are developing the strategy for asset monitoring going forward and the decision will impact both on the resource required and the additional liabilities that will be identified; [6](c) The 2007-13 Programmes are also reviewing their policy and we need to make sure that we have a consistent approach.

38. The next heading in the May 2011 Paper is “compliance and regulations”. The Paper says:

Compliance and Regulations. [7] The current requirements on asset disposal stem from three key areas:

[7](i) Grant Offer Letter 2000-2006. ERDF grant offer letters typically include a right for the Secretary of State to clawback grant if: (a) during its economic life a project undergoes substantial change defined as being used for purposes other than those specified in the application or having a change of owner; or (b) assets wholly or partially funded by grant are disposed of during their economic life. The economic life for fixed assets is defined as 20 years unless otherwise agreed. Despite extensive research we have not been able to definitively establish where the requirement for the 20 year period comes from – it is not a BIS or Treasury requirement. This means that the offer letter wording provides the flexibility to reduce the minimum asset retention period from the default position of 20 years. DCLG legal are content with this approach.

[7](ii) EC Regulations. Disposals of assets within 5 years are dealt with under Article 30(4) of EU Regulation 1260/1999. Our interpretation of this provision as it applies to asset disposals is that a financial correction may be imposed if a project undergoes a substantial modification within 5 years of the decision to award grant which: (a) affects its nature or its implementation conditions or gives a firm or public body an undue advantage; and (b) results from a change in the nature of ownership in an item of infrastructure. This is the minimum requirement that we must adhere to. Given that the Programmes ended on 31st December 2008, many projects will be outside the scope of this provision. However, there may be circumstances in which disposals after 5 years could result in an irregularity. This will depend on the facts of the particular case, in particular the purpose of the project, what measure the project comes under and whether there are any end-user requirements. For example if there was a requirement that a development be used for SME block units there may be an irregularity if the developer then built housing on the site more than 5 years after grant was awarded.

[7](iii) State Aid rules. State aid can be applied in a variety of ways depending on the type of project funded (and predominantly but not exclusively relate to the private sector). We are in the process of clarifying the rules around state aids and how they affect the disposal of assets.

39. The final heading is “the 2007-13 Programmes”. The May 2011 Paper says:

The 2007-13 Programmes. [8] The requirements for the disposal of assets [have] been similarly considered by the 2007-13 Programme team and their recommendation to the ERDF Programme board will be consistent with the approach taken in this paper.

The Candid Disclosure Issue

40. One of the agreed issues between the parties is the ancillary question of whether there has been any breach of the duty of candour in this case. The Department’s disclosure proceeded in the following three stages. First, at the permission stage, the Department resisted permission for judicial review. Its summary grounds of resistance denied that there was any public law unreasonableness in the 2022 Decisions. At that stage, there was no reference to the May 2011 Decision and no disclosure of documents relating to it. Secondly, at the post-permission stage, the Department resisted the claim for judicial review. Its detailed grounds of resistance repeated the same denial of public law unreasonableness in the 2022 Decisions. At this stage, Ms Shattock’s witness statement was filed, the May 2011 Decision was described, and the May 2011 Note was disclosed. Thirdly, in the run up to the substantive hearing, there was disclosure of the May 2011 Paper to which the May 2011 Note makes reference. This disclosure took place when Riverside requested disclosure of the May 2011 Paper, having been alerted to it by the witness statement and the contents of the Note, and having chased the point when there was a lack of a response.
41. Mr Bates gave me the following explanation as to why, at the second stage, Ms Shattock did not exhibit the May 2011 Paper to her witness statement. Ms Shattock and the Department had the May 2011 Note and could see that it referred to the May 2011 Paper. But the Paper itself was not available within the Department’s files. It had to be located externally. That was what happened when the question of disclosure was pursued by Riverside. I accept that explanation.
42. The May 2011 Paper addressed clawback for the relevant Programme (2000-2006) and: (a) described in the recommendation at [2] a “general guide” that disposal after 5 years would not attract clawback; (b) described at [6][c] and [8] the virtues of consistency with the 2007-13 Programme; and (c) did not refer to making adverse decisions on the basis of ineligibility of the changed use under the Programme Eligibility Rules. Points (a) and (b) were capable of assisting the claims being made by Riverside. Point (c) was capable of undermining the clear focus of the Decision Letters (§27-30 above) and undermining the claim which came to be made in Ms Shattock’s witness statement at §44 about the May 2011 Decision (§31 above).
43. The Department had a choice as to whether to resist permission for judicial review. If it had chosen not to resist permission, it could have deferred thinking about questions of candid disclosure until later. What, in my judgment, it ought not to have done was to resist permission for judicial review without a due diligence exercise involving locating and disclosing the May 2011 Note and Paper. The witness statement of Ms Shattock shows (§44) that – when the Department did come to articulate the relevant background and identify the relevant materials – the May 2011 Policy Decision was understood to be significant. Moreover, Ms Shattock’s witness statement made a claim about what the exhibited Note “demonstrates”. Again, in my judgment, the May 2011 Paper should have been located and disclosed. I have accepted the explanation

given: that the May 2011 Paper was not available to Ms Shattock or within the Department's records. I also accept that May 2011 was 11 years before the impugned Decision Letters in 2022. But the significance of what had happened in May 2011 was recognisable. It was recognised by Ms Shattock. She had written the May 2011 Paper. The Note referred to the May 2011 Paper. What, in my judgment, was needed was a prompt and diligent search. My conclusion is that there was a failure of candid disclosure, at the permission and at the substantive stages. The outcome of this case does not in any way turn on this question of disclosure. But this is an agreed issue. And lessons will not be learned, in the application of the 'self-policing' duty of candid disclosure, unless Courts are prepared to make observations when matters do come to light.

The EU-Legality Issue

44. The issue is whether the clawback power in the Grant Funding Agreements Annex 7 §1(f) is lawfully open to the Department.
45. On this issue, Riverside is making the same EU-legality point which it raised before and at the time of the July 2022 Submission, and in the letter before claim. The argument runs as follows. There is a single exclusive power of clawback triggered by a change in the project during a prescribed period. That exclusive power, and the relevant criteria, are to be found in the applicable EU Clawback Provision. That means Article 30(4) of the 1999 EU Regulation in relation to Phase 1. It means Article 57(1) of the 2006 EU Regulation in relation to Phase 2. These are not a "minimum requirement", as the unpublished May 2011 Paper at [8] had characterised them, and as the Department has continued to regard them. It is legally incorrect to say, on the questions addressed in the EU Clawback Provision, that the relevant national authorities were "responsible for laying down a fuller set of requirements, including the economic lifetime of the asset", as Ms Shattock's witness statement §14 puts the Department's interpretation. The EU Clawback Provisions are an exclusive, controlling provision. They occupy the field. State authorities are not entitled to impose more extensive clawback powers, arising out of a substantial change in use other than for specified purposes, beyond the 5 year period laid down in the applicable EU Clawback Provision. The power to impose national rules on eligibility does not extend to cutting across those EU Clawback Provisions. The phrase "only if" in the EU Clawback Provisions means "provided that". And, so far as these 'durability' concerns go – including substantial change in use other than for specified purposes – the member state "shall ensure" that the beneficiary retains the funding "provided that" there is no specified disqualifying action within the specified 5 years. Put another way, absent such a disqualifying action, as specified, the EU funds are "definitively retained" by virtue of the EU Clawback Provisions. This is the legally correct interpretation. Once it is recognised that national rules cannot cut across the EU Clawback Provisions, that applies to a national enactment, regulation or policy. But it also applies to nationally imposed contract terms. Otherwise, a state could do through the back-door or universally imposed contract terms that which it could not do through the front-door of an enactment, regulation or policy provision.
46. The Department's primary answer – as Mr Bates characterised it – is the delay objection which is the distinct issue to which I will return (§§63-67 below). But the Department also maintains that Annex 7 §1(a)(f) of the Grant Funding Agreements is a Domestic Clawback Provision which is compatible with the EU Regulations. The

Department invokes the overarching autonomy of EU member states found in Article 2 of the TFEU (§8 above). The Department also submits that there is a principled difference between a legislative enactment on the one hand, and contractual provisions on the other. The Luxembourg cases are about legislative enactments. Emphasising these points, Mr Bates submits that it was open to the Department to deploy National Clawback Provisions – at least in the form of contractual provisions rather than in a legislative enactment – triggered by a substantial change in use, beyond the 5 year “minimum” period identified in the EU Clawback Provisions. Accordingly, he submits, it is open to the Department to enforce those national clawback powers.

47. In my judgment, Riverside is right on this first issue. It is not in law open to the Department to enforce a clawback pursuant to Annex 7 §1(a)(f) of the Grant Funding Agreements, for a substantial change in use which has taken place after the 5 year periods specified in the EU Clawback Provisions. I will explain why.

The Provisions Themselves

48. The analysis starts with the EU Clawback Provisions themselves. There is a clear distinction, first encountered in Recital 41 of the 1999 EU Regulation (§§9-10 above), between national rules on eligible expenditure on the one hand and stipulations about durable impact and substantial modification on the other. The provision for national rules on eligible expenditure is in Article 30(3) of the 1999 EU Regulation and Article 56 of the 2006 EU Regulation. But the stipulations about durable impact and substantial modification are in Article 30(4) of the 1999 EU Regulation and Article 57 of the 2006 EU Regulation. The EU Clawback Provisions are identifying the relevant prescribed criteria, as regards durable impact and substantial modification, which trigger a mandatory retention by the beneficiary of the funding. The language used is that of mandatory retention: “shall ensure that an operation retains”. This is EU funds being ‘definitively retained’ by virtue of the EU Clawback Provisions. There is no scope for national provisions which made stricter provision than the EU Clawback Provisions, whether as to the type of change (in the EU Regulations, a “substantial modification”) which triggers clawback; as to the start-date for the prescribed period in which the disqualifying action must occur (in the 1999 EU Regulation “the date of the decision ... on the contribution of the Funds”, and in the 2006 EU Regulation “completion”); or as to the length of the prescribed period in which the disqualifying action must occur (in the EU Regulations, five years).

The Luxembourg Cases

49. The case-law of the Court of Justice of the EU in Luxembourg, in my judgment, puts the substantive position beyond doubt. Three cases were cited to me in this line of authority. The first is Case C-388/12 Comune di Ancona v Regione Marche. This was a judgment dated 14 November 2013 on a reference from an Italian court. The case was about substantial modifications relating to an EU-funded project for a slipway in a port area. The beneficiary had obtained ERDF 2000-2006 funding for the slipway project. The governing instrument was the 1999 EU Regulation. Concerns arose relating to the management of the slipway, including an untendered contracting-out and an under-use. In light of these concerns, the Italian national managing authority decided to pursue a clawback. The beneficiary challenged the clawback decision and the reference to the CJEU led to an analysis of the EU Clawback Provision in Article

30(4) of the 1999 EU Regulation. The Luxembourg Court: explained that issues of application of the EU Clawback Provision (as distinct from questions of interpretation) were for the member state authorities; identified the correct sequence of questions; discussed the interpretation of “modification”, and its relationship with “irregularity”; and referred to the significance of the 5 years. The judgment in Ancona contained no support to the idea that the Italian authorities could impose more stringent requirements, regarding durable impact and substantial modification, than those found in the EU Clawback Provision.

50. The second case is Case C-580/17 Mittetulundusühing Järvelaev v Põllumajanduse Registrate ja Informatsiooni Amet. In order to understand Järvelaev it is necessary to give an outline as to the applicable EU instruments. Järvelaev featured European Agricultural Fund for Rural Development (EAFRD) funding. The relevant provision on eligibility and national rules was Article 71 of EU Regulation 1698/2005 (“the 2005 EU Regulation”) (see Järvelaev at §5). The relevant EU Clawback Provision was in Article 72 of the 2005 EU Regulation, entitled “Durability of investment-related operations”. Article 72(1) provided (see Järvelaev at §6):

Without prejudice to the rules relating to the freedom of establishment and the free provision of services within the meaning of Articles 43 and 49 of the Treaty, the Member State shall ensure that an investment operation retains the EAFRD contribution if that operation does not, within five years of the Managing Authority’s funding decision, undergo a substantial modification that: (a) affects its nature or implementation conditions or gives undue advantage to a firm or public body; (b) results either from a change in the nature of ownership of an item of infrastructure, or the cessation or relocation of a productive activity.

The provisions regarding “financial adjustments” arising out of “irregularities” (see Järvelaev at §§13-14) were in a linked instrument: EU Regulation 1306/2013 (“the 2013 EU Regulation”) at Article 56 (together with Article 54). The structure and content of the provisions involved no material divergence from the 1999 EU Regulation and the 2006 EU Regulation.

51. Järvelaev was a judgment dated 8 May 2019 on a reference from an Estonian court. The case was about substantial modifications relating to an EU-funded project for a traditional boat. The beneficiary had obtained EAFRD 2007-2013 funding on 6 September 2011 for the boat project. Concerns arose relating to the lease of the boat to a third party (on 1 July 2014) and whether the purpose of the funding had been met. In light of these concerns, the Estonian authorities decided (in January and April 2015) to pursue clawback. Estonian national rules included a 2010 Decree and a 2014 Law (see Järvelaev at §§18-21). The 2010 Decree required that changes to the project could take place only with consent of the Estonian authorities (Decree §35(2)) and required the beneficiary of EU funding to retain the asset and maintain its specified use for a period of “5 years from the date of payment of the final instalment” (Decree §36(3)(1)). The 2014 Law imposed a duty to recover funding in cases of irregularities or unmet purpose. The beneficiary challenged the clawback decisions and the reference to the CJEU led to an analysis of the EU Clawback Provision in Article 72(1) of the 2005 EU Regulation read with Article 56 of the 2013 EU Regulation.
52. The Luxembourg Court applied the Ancona case, once again: explaining that issues of ‘application’ of the EU Clawback Provision were for the member state authorities; identifying the same correct sequence of questions: discussing the interpretation of

“substantial modification” and its relationship with “irregularity”; and referring to the significance of the 5 years. The read across to Ancona reinforces the equivalence between the 1999 EU Regulation (in Ancona and in Phase 1 of the present case) and the 2005 and 2013 EU Regulations being analysed in Järvelaev.

53. Among the referred questions in Järvelaev, the Luxembourg Court was asked whether Estonia’s 2010 Decree §36(3)(1) (“5 years from the date of payment of the final instalment”) was unlawful because it was stricter than Article 72(1) (“five years of the ... funding decision”). The Estonian authorities advanced an argument about the autonomy (or “latitude”) which they said were enjoyed by member state national authorities to set more exacting standards. The Court’s summary of that argument included this (Järvelaev §71):

the Estonian Government considers that the rule precluding a beneficiary of funding from making any substantial modification to the investment operation for five years from the date of the funding decision, laid down in Article 72(1) of Regulation No. 1698/2005, is not sufficient, in every case, to ensure an effective investigation of the implementation of the operation or of the intended use of that funding... It also considers that the EU legislature has given the Member States a certain degree of latitude ...

Mr Bates accepts – rightly in my judgment – that the overarching competence provisions of Article 2 of the TFEU (§8 above) would have been well-known and well-understood by Estonia and by the Luxembourg Court.

54. The Luxembourg Court’s judgment in Järvelaev made clear that the Estonian authorities could not, through their national legislation, impose more stringent requirements, regarding durable impact and substantial modification, than arose under the EU Clawback Provision. The Court emphasised the contrast between national rules as to eligibility (Article 71 of the 2005 EU Regulation) and the exclusive conditions as to durability (Article 72 of the 2005 EU Regulation) (§79):

As for Article 71 of Regulation No 1698/2005, that article relates to the eligibility conditions against which expenditure must be assessed for a contribution from the EAFRD, those conditions being distinct from those laid down in Article 72 of that regulation relating to the durability of investment operations. Accordingly, since Article 72 does not contain any rule similar to that in Article 71(3) of Regulation No 1698/2005, it must be found that it is in fact that regulation itself, and in particular Article 72 thereof, rather than national law, which exclusively determines the conditions for the durability of those operations.

The language of “exclusively determines” is unmistakable. The autonomy argument did not prevail. TFEU Article 2 could not assist. The conditions are exclusively determined by the EU Clawback Provision, “rather than national law”.

55. The Court explained the EU law-incompatibility of the 2010 Decree, as follows (§§81-82):

81. [A]s regards the duration, of at least five years from the payment of the final instalment of the funding, during which the beneficiary is required, under the national legislation, to retain and use itself the asset in question, failing which the funding paid must be reimbursed, it must be found that, in accordance with Article 72(1) of Regulation No 1698/2005, the contribution from the EAFRD is to be maintained if the operation for which that contribution has been made does not undergo any substantial modification, within the meaning of that provision, within five years of the national managing authority’s funding decision, since that period of time is thus ordinarily shorter than the period laid down in that national legislation.

82. In those circumstances ... Article 72(1) of Regulation No. 1698/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which requires the beneficiary of funding paid as part of an investment operation co-financed by the EAFRD to retain and use itself the asset acquired by means of that investment operation for at least five years from the payment of the final instalment of the funding.

The language of “is to be maintained”, and of “precluded”, is unmistakable.

56. There was another issue in Järvelaev. It concerned the position in law, where a substantial change in the project was a departure from something other than the “relevant national legislation”. This was raised in a referred question about whether an “irregularity” (for the purposes of Article 56 of the 2013 EU Regulation) could include a beneficiary’s failure to carry out the operation, albeit without there being any breach of any “criterion ... required by the relevant national legislation” (see §83). It was posited in the Court’s discussion that the failure to carry out the operation could be a failure to comply: with what had been “set out by the beneficiary in its application for funding” (§83); with “one of the criteria on the basis of which the applications for funding were assessed for the purpose of ranking them” (§83); with a “contractual condition agreed as part of the funding at issue” (§85); or with action which the beneficiary “undertook” to carry out (§§87-88).
57. The Court’s answer made clear that – yes – clawback action could be taken against actions of this kind, but only if a proviso was satisfied. The proviso was that clawback fell within the EU Clawback Provision (Article 72 of the 2005 EU Regulation). This proviso was spelled out as follows (§§89, 92):

89. ... [I]t is not inconceivable that a failure to carry out a part of the application for funding would amount, if it were fundamental in the light of the objective pursued, to a substantial modification, within the meaning of Article 72(1) of Regulation 1698/2005 ... If relevant, it will be for the referring court to examine the significance of such failure in the light of the conditions laid down in that provision...

92. ... failure, by the beneficiary ... to carry out a part of the operation set out by the beneficiary in its application for funding which was one of the criteria on the basis of which the applications for funding were assessed for the purpose of ranking them, despite the fact that that criterion was not required by the relevant national legislation, amounts to an irregularity within the meaning of that provision, provided that the failure to perform such a factor resulted in a substantial modification within the meaning of Article 72(1) of Regulation No 1698/2005 ...

The proviso is unmistakable, in the reference (§89) to the national court needing to “examine the significance of such failure in the light of the conditions laid down in [Article 72(1)]” and in the phrase (§92) “provided that the failure to perform such a factor resulted in a substantial modification within the meaning of Article 72(1)”.

58. The Ancona and Järvelaev CJEU judgments pre-date the relevant Brexit date and are authoritative as to the meaning of the EU Clawback Provisions to which they apply. I would in any event have chosen to apply them.
59. The third case is Case C-313/22 Achilleion Anonymi Xenodocheiaki Etaireia v Dimosio. This was a judgment dated 13 July 2023, on a reference from a Greek court. The case was about substantial modifications relating to an EU-funded project for a hotel refurbishment. The beneficiary had obtained ERDF 2000-2006 funding for the

hotel project. The governing instrument was the 1999 EU Regulation. Reference was also made to Article 4 of Regulation No 438/2001, under which Member States were to adopt “management and control systems” (Achilleion at §17). Concerns arose relating to a transfer to a third party. In light of these concerns, the Greek national authority decided to pursue a clawback. The beneficiary challenged the clawback decision and the reference to the CJEU was – like Ancona – a case directly concerned with the EU Clawback Provision in Article 30(4) of the 1999 EU Regulation (Achilleion at §5).

60. It was a third case where there was a national clawback provision. Article 18(5) of a Greek Joint Ministerial Order (Achilleion at §75) required the beneficiary to refrain from transfer of the fixed assets, for a prescribed period of 5 years from the “completion decision”, a breach of which triggered automatic clawback as a “financial correction”. The Luxembourg Court applied Järvelaev. It identified two aspects of EU-incompatibility in the Greek Joint Ministerial Order. The first was that the beneficiary who had transferred the fixed asset was denied the opportunity to demonstrate that this was not disqualifying action as a “substantial modification” within the meaning of the EU Clawback Provision (Achilleion §77). The second was that 5 years from the “completion decision” was a period impermissibly longer than 5 years from “the date of the decision of the competent national authorities or the managing authority on the contribution of the Funds” prescribed in the EU Clawback provision (Achilleion §79).
61. The Court in Achilleion described the EU Clawback Provision as setting out the principle of durability according to which the EU funding was to be “definitively retained” (§40). It went on to describe the EU Clawback Provision as “laying down exclusively” the “conditions relating to durability”, which therefore removed the durability question from national law and precluded “new conditions”, including as management and control provisions under Article 4 of Regulation 438/2001. That can be seen from these passages at §§74 and 84:

74. By laying down exclusively, in Article 30(4) thereof, the conditions relating to the durability of co-financed operations, Regulation No 1260/1999 clearly removed that question from national law (see, by analogy, judgment of 8 May 2019, Järvelaev, C-580/17, EU:C:2019:391, paragraph 79)...

84. ... [I]t should be noted that Article 4 of Regulation No 438/2001, under which Member States may adopt procedures to check, inter alia, the veracity of the expenditure claimed by way of assistance from the Structural Funds concerned, does not allow Member States to introduce new conditions as regards the rules relating to the durability of operations.

Only a Contractual Provision

62. Mr Bates says that the exclusivity and conclusivity seen in the Luxembourg cases applies only to preclude ‘national legislation’ which cuts across the EU Clawback Provisions, leaving the member state authorities entitled to adopt ‘contractual provisions’ having that same nature. I cannot accept that submission. What matters must be substance rather than form. The EU Clawback Provisions must be interpreted by reference to their manifest purpose, which would be seriously undermined. What Article 30(3) of the 1999 EU Regulation and Article 56(4) of the 2006 EU Regulation describe are “rules” at “national” level. National rules may be embodied in non-legislative instruments. A policy or practice of insistence on an agreement – for

example, in a contract or an undertaking – can perfectly well constitute a national rule. The Department’s understanding was, moreover, precisely that. This is seen in Ms Shattock’s witness statement §16 (§21 above). If Domestic Clawback Provisions would be unlawful where imposed by enactment, regulation or policy, they cannot become lawful by being imposed through the practice or action of a contract or undertaking. This, moreover, is entirely in step with the analysis of the Luxembourg Court itself when it considered the position outside “national legislation” in Järvelaev at §§83-92 (§§56-57 above). It is also in step with the question of durability being addressed “exclusively” and removed from “national law” (Achilleion at §74) including by imposing “new conditions” (Achilleion at §84).

The Delay Issue

63. The question is whether it is too late for Riverside to bring a judicial review claim disputing that the clawback power in the Grant Funding Agreements Annex 7 §1(f) is lawfully open to the Department.
64. The Department says that it is indeed too late for Riverside to contest the EU-compatibility of the Domestic Clawback Provisions. If the Department is right about that, then the analysis on the first issue (§§44-62 above) cannot avail Riverside and the claim on that issue must fail. That is how I approach the delay issue.
65. Mr Bates submits, in essence as I see it, as follows. The logic of the EU-incompatibility argument is that the Department acted unlawfully in 2005 and 2007 when it insisted on the Domestic Clawback Provisions in the Grant Funding Agreements. Riverside was very well aware of that provision. It signed up for its funding on the express basis of the equivalent, back-to-back provision in the Grant Agreement. Riverside could and should have raised its EU legality point at that stage. That was when the grounds for judicial review “first arose”. Indeed, the evidence of Riverside’s Mr Henley explains that he and Riverside were well aware of the point at that time. That was when any questions of legality needed to be raised, to establish the correct position for the benefit of all funding applicants. Having gone along with a competitive tendering process in which all candidates were treated alike, having prevailed, and having signed up for the funding on the specified 20 year basis, Riverside cannot now seek to raise a legal challenge to impugn clawback action pursuant to Annex 7 §1(a)(f). That would be to unravel all the arrangements. Nor, in fact, could Riverside raise its EU legality point as a public law defence to clawback action. That is because it would not be the Department’s Annex 7 §1(a)(f) of the Grant Funding Agreements – but rather the Council’s legally distinct clause 8.13 of the Grant Agreements – which would be being enforced against Riverside. Whether or not the Council could raise a defence to a clawback, pursued under the Department’s Annex 7 §1(a)(f) of the Grant Funding Agreements, is nothing to the point. Riverside cannot raise a claim. The point now being raised is years out of time and should not be entertained.
66. I cannot accept these submissions. It is frequently the case that the legal validity of a provision may appropriately be raised in a legal challenge to the decision or action which applies that provision to the person affected. That legal validity may also be raised by the person affected defending enforcement action based on the impugned provision. That is not to state a rigid or blanket position. Cases can turn on their particular features and facts. In the present case, the EU Clawback Provisions

themselves have a present and ongoing temporal focus. They are framed to address what happens during the life of the EU-funded project. So far as concerns post-funding changes in the nature of the project, the position is this. There is a clear focus on the position at, and after, the end of the prescribed 5 year period in the EU Clawback Provisions. Provided that the prescribed disqualifying conduct has not occurred during that 5 year period, the state authorities are mandated – on an ongoing basis – to allow the EU funding to be retained. That is the language and structure of the EU Clawback Provisions. The action of trying to clawback the EU funding on the basis of a substantial change in the nature of the project, whether in year 6 or in year 16, is action incompatible with the EU Clawback Provisions. That attempted clawback action is, in principle, a proper target of an EU-law based challenge. It is in their defence that the member state authorities point to a national rule which purports to reserve to them a power of clawback cutting across the terms of the EU Clawback Provision. The compatibility of that national rule with the EU instrument thus arises for decision. It arises collaterally, and properly. Indeed, that is what happened in all three of the Luxembourg cases. This is not, in those cases or in this case, somehow unfair to others who had applied to be beneficiaries of funding. Any one of them, had they succeeded, would have had the same legal protection and could have invoked it in the same way.

67. It is right that Riverside was aware from the start of the Domestic Clawback Provisions, and of this EU law-based issue. It is right that a claim in 2005 or 2007 might have been entertained by the Court. The Department might have supported the timing of such a challenge. On the other hand, it is also right that Riverside did not set out intending to change the project after the end of 5 years and before the end of 20 years. Riverside has run the Business Park, with the newly created office premises, for 17 out of 20 years (Phase 1) and 15 out of 20 years (Phase 2). Indeed, if Riverside had brought a claim at the outset, to get legal clarity as to its and the Department's rights and obligations in the years after the 5 year period, the Court might have said the claim was hypothetical and premature. The Department might have said that too. It was not, at that stage, on the cards that there would be a substantial modification after 5 years but before 20 years. The argument would have centred on what "shall secure" and "retains" meant in an EU Clawback Provision describing a future state of affairs. It could powerfully have been said that the issue should be left to be raised as and when it crystallised. Even if the challenge could have been made, and would have been addressed, at the outset I cannot accept that this was the one and only opportunity for legal challenge in which the issue could be raised.

The Unreasonable Refusal of Relief Issue

68. The Issue is whether the refusal of the Department to give Riverside relief from clawback was, in any event, unlawful. In light of my conclusions on those issues already addressed, the resolution of the remaining issues cannot make a difference to the outcome. They are fallback arguments which would arise only if Riverside had failed on points where it has succeeded. However, all issues were fully argued, and I will deal with them all. I proceed on the basis that the Domestic Clawback Provision in Annex 7 §1(f) is lawfully open to the Department, engaging a discretionary power. That discretionary power is to pursue clawback or to give relief from clawback.
69. Mr Hunter for Riverside submits that the proposed exercise of power embodied in the 2022 Decision Letters is unlawful, essentially by reference to three public law bases

which fall within the overarching principle of reasonableness. He submits that the sole justifiable outcome was to exercise the discretionary power to give relief from clawback. Alternatively, he submits that the 2022 Decisions involved an error of approach, meaning that they fall to be quashed and the matter remitted for reconsideration afresh. In support of his arguments on unreasonableness Mr Hunter emphasises that the purposes of the funding had been satisfied, meaning that the targets and objectives having been delivered and the project having been achieved. That is a point made in the 2007-2013 Handbook at §18(a) (§33 above).

70. As to the nature and origin of the discretionary power, Mr Hunter says there are two parallel sources. The first is the Department's ongoing reserved power, in Note (i) to Annex 7 §1(f), to 'agree' that the economic life of the project can be less than 20 years. The second is the Department's reservation of a 'right' not a duty, in Annex 7 §1, to pursue clawback. Mr Bates says that Note (i) is better read as requiring the Department's 'agreement' to have been at the outset. I think Mr Hunter is right. I do not read "unless otherwise agreed by us" as limited to "unless otherwise *already* agreed by us". Nor did the Department. What was recorded at [7](i) of the May 2011 Paper (§38 above) – written in the context of the ongoing position – was that the "wording" of Annex 7 §1 "provides the flexibility to reduce the minimum asset period from the default position of 20 years", with which the Department's "Legal" section was content. This was also the approach adopted in the May 2011 Note, which spoke of the "discretion to reduce this period" (§34 above). Having said that, in my judgment, nothing of materiality turns on where the discretionary power to grant relief from clawback is located. What I cannot accept is Riverside's contention that 20 years in Annex 7 Note (i) is no more than a "placeholder", with "economic life" being interpreted as engaging a question of fact turning on the practical ongoing economic viability of the project. That approach is contrary to the express design and manifest purpose of the Domestic Clawback Provisions. It mischaracterises the discretionary power by recasting it as a factual criterion.

The Inconsistency Basis

71. So, Mr Hunter identifies three public law bases on which he says it was unreasonable for the Department to refuse relief from clawback. The first basis is that the refusal of relief involves an unjustified inconsistency when put alongside the position adopted in the 2007-2013 Handbook (§§32-33 above). The argument runs as follows. The Handbook identifies a history and rationale which are plainly equally applicable to the 2000-2006 Programme, including a retrospective application to pre-existing projects. Projects with 20 year economic lives and Domestic Clawback Provisions are plainly mutually analogous, whether they arose under the 2000-2006 Programme or the 2007-2013 Programme. That is the very point emphasised in the May 2011 Paper when at [6](c) and [8] it described the virtues of – and the need for – a consistent approach across the two Programmes. Neither the 2022 Decisions Letters nor the materials in defence of this judicial review claim give any justification – still less a reasonable justification – for this manifest inconsistency. This constitutes public law unreasonableness, in the application of the legal value of consistency identified in R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6 [2015] PTSR 322 at §26.

The Fettering Basis

72. Riverside’s second basis of unreasonableness is that the clear focus on ineligibility (§§27-30 above), seen in the 2022 Decision Letters and the Department’s witness statement evidence, involves a fettering of discretion. The argument runs as follows. The Department is approaching the discretionary power, to grant or refuse relief from clawback, by allowing a single criterion to dictate the answer. That criterion is whether the new use would have been eligible under the Programme Eligibility Rules. This constitutes a public law error because it is an approach “so rigid as to amount to a fetter on the discretion of decision-makers”, as identified in Mandalia v Secretary of State for the Home Department [2015] UKSC 59 [2015] 1 WLR 4546 at §31.

The Policy Non-Adherence Basis

73. Riverside’s third basis of unreasonableness is unjustified departure from a policy. The argument runs as follows. The May 2011 Policy Decision – embodied in the May 2011 Paper read with the May 2011 Note – had the legal status of a “policy” to which the public law duty of policy-adherence was applicable. That means the Department had a public law duty to follow the policy unless there were good reasons for departing from it, as identified in Mandalia at §§29-31, after R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12 [2012] 1 AC 245. This principle is linked to the public law duty exemplified by planning policy cases like Gransden & Co Ltd v Secretary of State for the Environment (1987) 54 P & CR 86 where (at 94) the Court said that “the body determining an application must have regard to the policy”, which “does not mean that it needs necessarily to follow the policy” but “if it is going to depart from the policy, it must give clear reasons for not doing so”. Here, the May 2011 Paper, read with the May 2011 Note, identified the “DCLG Policy”. That was the heading to both documents. There has been a clear departure from that “policy”, for several reasons. One is that the 2022 Decisions did not adopt the “general guide” (in the approved May 2011 Paper recommendation at [2]) that assets can be disposed of after 5 years without ERDF clawback. Another is that the 2022 Decisions focused on ineligibility under the Programme Eligibility Rules, a factor which nowhere appears in the May 2011 Paper or Note. Another is that the 2022 Decisions did not treat consistency with the 2007-2013 Programme as a virtue, despite this twice being recognised in the May 2011 Paper at [6](c) and [8]. The description in the 21 December 2022 Decision Letter of “Our Policy” does not reflect the contents of the May 2011 Policy Decision. Nor does the claim made by Ms Shattock in her witness statement at §44 (§31 above) accurately reflect the May 2011 Policy Decision, notwithstanding that she is purporting to describe it. The departure is clear, but unacknowledged, and no good reason has been identified to justify it.

Unreasonableness: Discussion

74. Taking first the Inconsistency Basis, I would not accept that there is public law unreasonableness on this ground. On this, I agree with the submissions of Mr Bates. The 2007-2013 Handbook was addressing the position, at and after April 2011, under a live and open Programme. This was a Programme, for 2007-2013, where many EU-funding decisions and funding arrangements yet to be made or finalised, some decision-making processes were in progress, and some decision-making processes were at an end. In those circumstances change was being made prospectively for new projects. But that left the position of pipeline projects, and those projects previously approved. That was the context in which the retrospective change was being made, specifically for that 2007-2011 Programme. It provided consistency within that

Programme. It was not unreasonable for the Handbook to identify an approach for that Programme. It was not unreasonable for Mr Rossington to have made the Policy Decision that he did on 3 May 2011, approving the recommendation in the May 2011 Paper only with the two-pronged “rider” recorded in the May 2011 Note.

75. Turning next to the Fettering Basis, I would not accept that there is public law unreasonableness on this ground. There is undoubtedly force in the points made by Mr Hunter. Ms Shattock’s evidence does say that “the Department has at all times been willing to consider” proposals to vary the use of EDRF-funded assets within the 20 year period “provided it still complied with the programme eligibility rules”. She also says that: “Although ... the Department has been willing to show a degree of flexibility to refrain from clawing back funds, this has been applied only to situations where ... the assets ... will continue to be used for activities which remain in keeping with the programme eligibility rules”. I do not think Mr Bates is right to characterise Ms Shattock’s evidence as describing a limited knowledge or recollection. But, in the end, I am not persuaded that the evidence shows a completely closed mind, to any possibility of being persuaded to give relief from clawback in a case where the change is to a use falling outside the Programme Eligibility Rules. I would accept that the Department had suffered institutional loss of memory so far as the May 2011 Paper was concerned. This could not be located within the Department and its contents were not reflected in Ms Shattock’s witness statement. But I do not accept that the same is true of the May 2011 Note. That document was retained and readily located. It was identified. It recorded that the discretion would be exercised “on a case by case basis”. It is possible for a series of discretionary decisions, on their individual merits, to have treated an absent factor as being decisive. That is how I read the evidence here. I do not think that is necessarily to be equated to a decision-maker having a ‘closed mind’ as to whether it need always necessarily be so, so that the merits of an individual case could never justify a favourable decision, despite that absent factor. That is not how I read the evidence here. Mr Bates fairly makes the following point, which I think serves as an illustration. The individual merits put forward by Riverside did not involve the contention that the business park had become ‘sterilised’ from utility absent a switch to housing. Had they done so, the merits of that contention would need to have been considered, to see whether relief from clawback was justified, albeit that the new use was outside the Programme Eligibility Rules.
76. Turning finally to the Policy Non-Adherence Basis, I have found this the hardest question in the case. The Lumba public law duty of adherence to a policy, absent a good reason justifying departure, is well established. But there are limitations as to whether the duty is in play. And there are difficulties in the word “policy”, since that word can mean different things. Many public authority decisions or actions are “policy” decisions or actions, but they do not constitute a “policy” in the public law adherence-duty sense. In my judgment, the Courts will generally expect there to be two features before the Lumba duty is engaged: (i) an identifiable external decision-making function; (ii) a document which, viewed objectively, serves as a prescriptive instrument for that function. By “external decision-making function” I mean an identifiable outward-looking function of making decisions about affected persons. By “prescriptive” I mean providing a set of criteria or considerations whose purpose is to promote consistency and foreseeability in the discharge of the decision-making function. These, as I see it, are the values which are in play in R (Good Law Project Ltd) v Prime Minister [2022] EWCA Civ 1580 [2023] 1 WLR 785 at §§55-66; as they

were in R (ZLL) v Secretary of State for Housing, Communities and Local Government [2022] EWHC 85 (Admin). In the present case, in my judgment, there is an identifiable external decision-making function. But, subject to one point (§80 below), Mr Bates has persuaded me that the May 2011 Policy Decision is not a policy document which – viewed objectively – serves as a prescriptive instrument for that function.

77. In my judgment, the true character of the May 2011 Paper, read with the May 2011 Note, is this. The Department was making a “policy decision”, rather than adopting a prescriptive instrument. The essential elements of the “policy decision” were: (a) the 20 year economic life was not being abolished; (b) the Department would exercise a discretion on a case by case basis; and (c) as a “general guide”, assets could be disposed of after 5 years without any clawback. These essential elements arise from the decision, recorded in the May 2011 Note, that the May 2011 Paper “recommendation” was being “approved”, subject to the identified “rider”. I would agree with Mr Bates that this policy decision does not go as far as being a prescriptive instrument engaging the public law duty of adherence, provided that the policy decision does not lose all public law relevance. I cannot agree with him that the May 2011 Policy Decision was simply recording a particular view which prevailed at a particular time at a particular meeting. That is not how Ms Shattock’s witness statement regarded it or presented it.
78. The May 2011 Paper and Note were, in combination, an important Policy Decision. That fact is reflected in Ms Shattock’s witness statement (§31 above). Unless and until some new policy decision replaced them, the May 2011 Policy Decision was – in my judgment – so obviously relevant to a decision taken subsequently that to disregard its contents would be an elementary public law error. I do not agree with Mr Bates that this imposes an unreasonable burden on officials. The Department could not, in my judgment, lose sight of – or suffer institutional loss of memory as to – the nature and substance of the policy decision. Yet plainly that is what has happened. The May 2011 Paper, whose contents were necessary to make sense of the May 2011 Note, was lost within the Department. The view was taken that the May 2011 Note was adopting a position which emphasised the Programme Eligibility Rules. That is the claim made by Ms Shattock in her witness statement at §44 (§31 above), but I cannot accept that characterisation. The “recommendation” to which the May 2011 Note referred had not said anything about the Programme Eligibility Rules. Mr Bates – rightly in my judgment – accepts that the Programme Eligibility Rules point does not feature in the May 2011 Paper. Moreover, what the May 2011 Policy Decision had done, which is also entirely missing from the narrative, was to identify the 5 year “general guide” in the approved recommendation.
79. On this part of the case, I would have quashed the 2022 Decisions and remitted them for reconsideration, on the basis that the May 2011 Policy Decision was a public law relevant consideration to which the Department was obliged to have regard. This is undoubtedly a ‘middle way’ between the parties’ positions. But, in my judgment, it is an alternative analysis properly open to Riverside. When the grounds were pleaded Riverside was not even aware of the May 2011 Policy Decision. Within the framework of the pleaded grounds, Riverside advanced the Lumba analysis. Riverside’s written arguments included failure to “apply, or even have regard to” applicable policy. The greater includes the lesser. In any event, this is a pure point of

legal analysis and both parties had a clear and fair opportunity to address it, by written submissions after the hearing. I think it is right to address the point on its legal merits. I see no conflict here between procedural rigour and the interests of justice.

80. The most powerful point made by Mr Bates in response is that ‘Lumba-lite’ undermines the coherence of public law. Either there is a policy attracting the duty of adherence (absent good reason for departure), or the policy has no mandatory legal relevance at all. It is ‘all or nothing’. I do not accept that submission. The ‘relevancy’ principle is a well-established general public law doctrine which has not in my judgment been emasculated by the question whether the more specific Mandalia/Lumba principle is applicable. But I ought to be transparent about where an ‘all or nothing’ choice would have led me. I would not have felt able to afford the May 2011 Policy Decision no public law relevance. Had Mr Bates persuaded me that the law is ‘all or nothing’ – a choice between the Lumba policy-adherence duty or no legal relevance for a policy decision – he would not in this case then also have won me over to ‘nothing’. Had I been faced with that stark – and, I think, unfortunate – choice, I would have found the policy-adherence duty to be applicable. My reason would have been this. If the Lumba policy-adherence duty really has swallowed up the public law principle of legal relevancy – and I do not think it has – then it must have expanded. Its spread would need to be sufficiently expansive to avoid an obviously relevant ‘policy decision’ from becoming bereft of any public law significance.

The Straight-Line Method Issue

81. The final issue is whether the Department’s decision to use a ‘Straight-Line Method’ to calculate the amount of clawback was, in any event, unlawful. In light of my earlier conclusions, nothing turns on this fallback ground for judicial review. But I will deal with the issue, assuming that there was a clawback power which could reasonably be exercised. The ‘Straight-Line Method’ means that if two-thirds of the economic life remains, the clawback is two-thirds of the EU funding; if one-third of the economic life remains, the clawback is one-third.
82. Mr Hunter accepts that there is nothing in the EU Regulations or Luxembourg case-law which touches on the method of calculating clawback quantum. He submits that it is nothing to the point that this ‘Straight-Line Method’ is routinely and regularly applied in clawback cases. He emphasises that the discretionary clawback power is untrammelled; and is not an ‘all or nothing’ power. He advances two reasons of principle as to why Straight-Line Method is not reasonably sustainable. The first is that the EU funds were providing funding for the construction of an asset. Across time, there can be expected to be a “depreciation” of assets, as is familiar in asset valuation and is recognised in the 2007-2013 Handbook at §17 (§33 above). The second is that, on the facts of the present case, these assets had been depreciating, as reflected in the Aspinall Report. A Straight-Line Method treats the asset value as identical – whether in year 1, year 5 or year 15 – and therefore ignores depreciation. Other ‘weighted’ methods were available, and far more suitable. Among them, the July 2022 Submission (§26 above) advocated the weighted amortisation ‘sum of the years digits method’. For these reasons, and in all the circumstances, it was unreasonable simply to adopt the Straight-Line Method.

83. I cannot accept those submissions. On this issue, I accept the submissions of Mr Bates. In my judgment, once the position is reached that there is power of clawback whose exercise is reasonable, the choice of the method for a partial clawback was a classic exercise of evaluative judgment for the Department as the primary decision-maker acting within its institutional autonomy. The arguments do not provide a proper basis for intervention by the High Court, in the exercise of its secondary and supervisory role. As Mr Bates submitted, this is a case where the purpose of the funding – from the Department’s perspective – had been designed to provide office space with a durable economic lifetime. It is a classic judgment for the primary decision-maker to identify the appropriate methodology in the context of a partial clawback. The attack on the Straight-Line Method is a classic merits disagreement.

Conclusion

84. For the reasons that I have given the claim for judicial review succeeds. My conclusions on the EU-Legality Issue, together with the Delay Issue, are determinative and are the basis for any remedies which I will grant.

Consequential

85. Having circulated this judgment as a confidential draft I am able to deal here with the appropriate Order, including resolution of any contested consequential matter. The parties agreed that, in light of the judgment, I should dismiss the claim, quashing the Department’s decision in the 10 August 2022 Decision Letter (including the further reasons provided in the 21 December 2022 Decision Letter), and ordering the Department to pay Riverside’s costs in the agreed sum of £30,000. The parties were also agreed that I should make a declaration, which I will do in the following terms:

It is declared that the Defendant is not entitled to require, by reason of a change of use of the site, the Interested Party to pay any amount to the Defendant in respect of clawback of the European Regional Development Fund grants provided by the Defendant to the Interested Party in 2005 and 2007 for the office accommodation development project at the site now known as ‘Riverside Park’. That is because the proposed change of use of that site from use for office accommodation would occur after the end of the 5 year periods specified in the following provisions of EU Regulations which constitute Retained EU Legislation: (a) in relation to the 2005 grant, Article 30(4) of Council Regulation (EC) No 1260/1999 ; and (b) in relation to the 2006 grant, Article 57(1) of Council Regulation (EC) No 1083/2006.

Consent to Change of Use

86. Riverside asked me to order that: “The Department reconsider the Council’s applications for consent to change to change the use and/or dispose of Riverside Park in light of the Court’s judgment and issue a decision within 21 days of the date of this order. If, following that reconsideration, the Defendant refuses to grant consent, the Claimant has liberty to apply for further relief.” I decline to do so. True, that remedy was included in the judicial review grounds. But no decision was identified or impugned in the claim and no argument was advanced at the hearing. I am not prepared to determine this new and potentially distinct issue in finalising a judgment; nor direct that determined proceedings remain alive as a vehicle for a future claim to any future adverse decision or failure to make a positive decision. I record that the Department’s position is that there has been no decision to refuse to give consent; that

it and the Council will now need to consider their positions; and that any unlawful future act should be challenged by a fresh claim.

Department's Clarification

87. I record that Mr Bates has raised with me that (with regard to the word “externally” in §41 above) he wishes to clarify: Ms Shattock was aware that the May 2011 Paper must exist or must have existed; she did not know “how such a historical document could be located”; but she was “subsequently able ... to obtain the document by way of its extraction from electronic storage” from an “archive ... under the Department’s control” rather than an “external” source “such as the National Archives”. This description, including as to “archive” and “control”, does not affect my conclusions on any of the issues. In cases where it could make a difference, it may illustrate the risks of dealing with an aspect of a known issue ‘orally on instructions’ rather than with precision in a document.

Permission to Appeal

88. Finally, Mr Bates seeks permission to appeal on three grounds:

Ground 1: That the learned Judge erred in law in deciding that the proper interpretation of Article 30(4) of Council Regulation (EC) No 1260/1999, and Article 57(1) of Council Regulation (EC) No 1083/2006, is that a Member State is required to ensure that the grant recipient is able to retain the full amount of grant funding after the 5-year period specified in those provisions has passed.

Ground 2: That the learned Judge erred in law in finding that the Claimant was not out of time to bring the claim

Ground 3: That the learned Judge erred in law in finding that the Defendant was legally obliged to have regard to the policy position that was determined internally within a predecessor government department in 2011.

89. The formulation in Ground 1 is over-expansive. It omits the fact that my decision (and the CJEU judgments) identifies a mandatory retention “as regards durable impact and substantial modification” (§48 above). Mr Bates’s Ground 1 permission to appeal submissions maintain that the CJEU cases are distinguishable as being about national “legislation”. But they do not confront the implications (§62 above); nor the CJEU’s reasoning, in addressing the position outside “national legislation”, in *Järvelaev* at §§83-92 (§§56-57 above). I have not been enabled to see a realistic prospect of success and I do not agree, absent one, that there is a compelling reason for an appeal. Ground 2 is presented as parasitic (“For the reasons set out under Ground 1 ...”), which means it has no freestanding viability. In any event, I have not been enabled to see a realistic prospect of its success. As to Ground 3 – with or without Mr Bates’s new focus on “predecessor” – I would have granted permission to appeal, as to my analysis at §§76-80 above, if anything turned on it. I do not find it unrealistic to suppose a different view being taken as to that analysis, at higher judicial altitude. But the outcome and relief in this judgment turn squarely on the EU-based legality and delay issues (§§68, 84 above), to which Grounds 1 and 2 relate. Since I am refusing permission to appeal on those issues, I do not grant it on an issue lacking materiality (Ground 3).

Formal Hand-Down

90. This judgment was due to be handed down at 10am on 21 November 2023 and the parties were preparing on that basis. Unfortunately, this is another case where the hand-down judgment was missed in preparing the Cause List. Having discovered this on the morning of 21 November 2023, I decided that the non-confidential judgment should be released to the parties and into the public domain on 21 November 2023 – as the parties had been led to expect – but with a further formal hand-down on 22 November 2023, published in the Cause List, to secure the open justice principle.