Neutral Citation Number: [2024] EWHC 1487 (Admin)

Case No: AC-2024-BHM-000002

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

Date: 17/06/2024

Before :

THE HONOURABLE MR JUSTICE MOULD

- -

Between :

THE KING **On the application of** **BIRMINGHAM CITY COUNCIL**	**Claimant**
- and - **SECRETARY OF STATE FOR TRANSPORT**	**Defendant**

- -
- -

PETER OLDHAM KC and **JOSEPH BARRETT KC** (instructed by **DLA Piper UK LLP**) for the **Claimant**
SARAH HANNAFORD KC, **EWAN WEST KC** and **WILL PERRY** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 21st and 22nd March 2024

- -

Approved Judgment

This judgment was handed down remotely at 2pm on Monday 17th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Mould -

The subject matter of these proceedings

1. This is an application for judicial review of the decision of the Defendant, the Secretary of State for Transport, not to support the revised Highways Maintenance Private Finance Initiative **["PFI"]** arrangement proposed by the Claimant, Birmingham City Council. The Defendant's decision was communicated by a letter sent by the Director General, Roads and Local Group at the Department for Transport **["DfT"]** to the Claimant's Chief Executive on 30 November 2023 **["the Decision"]**.

2. The Decision was in the following terms –

> *"I am writing to inform you that the Government has now made a decision on the Outline Business Case setting out Birmingham City Council's proposals for the revised Highway Maintenance PFI arrangement (the "Project"). I recognise the delay in reaching this decision has been challenging and am grateful for your patience while the Government considers this important decision. The Government has decided not to support the revised deal outlined in the Outline Business Case.*
>
> *The revised deal cannot be recorded "off balance sheet" in accordance with the relevant ESA 10 accounting rules because: (i) the proportion of capital work to be undertaken relative to the value of the asset on completion of the Project is insufficient; and (ii) there is insufficient risk transfer to the private sector. The revised deal would therefore need to be accounted for as "on balance sheet", which requires an up-front CDEL charge in the region of £200m to £250m. The Government has therefore rejected the Outline Business Case on the basis that this cost is unaffordable.*
>
> *In rejecting the revised deal, the Government is instead proposing to maintain provision of Highways Maintenance funding for BCC at the current level (£50m p.a.) until the end of the current Spending Review period (2024/25). This is expected to be delivered through an uplift to the West Midland Combined Authority (WMCA) CRSTS settlement.*
>
> *I appreciate this decision will be disappointing and I want to reassure you of the Government's commitment to supporting authorities to fulfil this critical function in the best way it can. My officials stand ready to work with your team and WMCA to ensure a smooth transition to the new arrangements, and the continuity of Highways Maintenance in Birmingham".*

3. The Claimant is the local highway authority for the City of Birmingham and responsible for the maintenance of the City's highways under Part 4 of the Highways Act 1980 (and other roads and highways legislation). The Claimant contends that in rejecting its proposals for a revised Highways Maintenance PFI arrangement, the Defendant acted in breach of the terms of DfT's letter dated 14 July 2010 and of the Local Government PFI Project Support Guide (2009-10) **["the Guide"]**. The Claimant says that under the terms of that letter and the Guide, the Defendant agreed

to pay to the Claimant some £625.2 million of PFI credits for the purpose of financing a £2.4 billion 25-year project for the design, build, financing and maintenance of Birmingham's highway network and related infrastructure **["the PFI Project"]**.

The grounds of challenge in summary

4. The Claimant's primary case is that DfT's letter of 14 July 2010 and the Guide gave rise to a substantive legitimate expectation that PFI credits would continue to be paid by the Defendant to the Claimant in accordance with the conditions stated in that letter and in the Guide. In particular, the effect of those conditions was that, after the Defendant had agreed the PFI credits and the PFI Project had come into operation, the Defendant may lawfully terminate or reduce the amount of PFI credits payable to the Claimant in support of the PFI Project only in exceptional circumstances.

5. The Claimant contends that in breach of that substantive legitimate expectation, on 30 November 2023 the Defendant decided to terminate payment of the PFI credits without regard to that expectation, without directing himself lawfully by reference to the conditions stated in the DfT's letter of 14 July 2010 and the Guide, and on the basis of considerations which did not constitute exceptional circumstances as defined in that letter and the Guide.

6. The Claimant further contends that the procedure which preceded the Decision was unfair and that the Decision letter discloses errors of law and of fact. The Claimant seeks an order quashing the Decision, a declaration that the Defendant remains obliged in law to continue to pay PFI credits and an order requiring the Defendant to continue to do so (including payment of any outstanding sums).

7. On 24 January 2024 Sir Duncan Ouseley sitting as a High Court Judge ordered a "rolled up" hearing, with the substantive claim to be heard immediately if permission to apply was granted. I shall address the grounds of challenge broadly in the order in which they are presented in the list of issues agreed by the parties before the hearing.

Factual background

PFI Agreements

8. PFI agreements were introduced by the government in the 1990s. Stephen Fidler OBE, a senior civil servant in the DfT who gives evidence on behalf of the Defendant in response to this claim, refers to the following description of PFI agreements published on the gov.uk website –

> *"A Private Finance Initiative (PFI) is a long-term contract between a private party and a government entity where the private sector designs, builds, finances and operates a public asset and related services. In a PFI contract the private party bears the risks associated with construction and maintenance and management responsibility, and remuneration is linked to performance.*
>
> ….
>
> *PFIs transfer delivery, cost and performance risk to the private sector – this protects the public sector from delays, cost overruns and poor performance".*

The Project Agreement

9. In the present case, on 6 May 2010 the Claimant entered into an agreement **["the Project Agreement"]** with Amey Birmingham Highways Limited **['Amey']** for delivery of the PFI Project. In his first witness statement the Claimant's Assistant Director of Highways and Infrastructure, Mark Shelswell, says that the highways infrastructure covered by the Project Agreement included 2,500 km of the City's road network, up to 100,000 street lighting columns, over 850 highway structures and bridges, three tunnels, 5,000 km of footways and a multiplicity of traffic signs and street furniture such as safety barriers and seating, and 76,000 street trees. The Project Agreement provided for an initial 5-year period of intensive investment in and rehabilitation of the highway network followed by a 20-year period of ongoing maintenance.

The Local Government PFI Project Support Guide (2009-10)

10. At the date of the Project Agreement, the Guide had replaced the government's previous 2008-09 PFI project support guide. The introductory paragraphs of the Guide said that PFI enabled local authorities to enter into a contract with the private sector for the provision of services involving new or improved capital assets. Support could be allocated by central government departments towards the cost of the capital element of PFI projects. The Guide stated –

> *"Notification that grant will be paid, the conditions and the level of capital investment which will be supported are set out by issuing a "PFI credit" in the form of a letter from the sponsoring department".*

11. In the present case, it was DfT's letter of 14 July 2010 to the Claimant's Chief Business Manager (PFI) **["the PFI Credit Letter"]** which issued the PFI credits for the PFI Project.

12. The Guide continued as follows –

> *"This guide provides advice to those local authorities seeking central government support for PFI or LIFT projects. Those authorities who wish to formally submit a grant claim should consult the Local Authority PFI Annuity Grant Determination (No 1) 2009 [No 31/1352]…."*.

13. The Guide was arranged in a series of sections, including *"A: Administrative arrangements for PFI credits; B1: Endorsement letter; B2: Promissory note; B3: PFI credit letter; … G: Post contract signature changes; and H: Administrative arrangements for PFI grant"*.

14. The introduction to the Guide also mentioned a number of *"significant changes"* from the 2008-09 guide including –

> *"More detailed guidance on possible re-assessment of support resulting from termination or major variations"*.

15. Section A of the Guide provided an outline of the administrative arrangements for central government support for a PFI project. Five stages in the process were

explained: (1) First Approach; (2) Project Endorsement; (3) Procurement to Preferred Bidder; (4) Contract Signature; and (5) Operational Projects.

16. Stage 2 (Project Endorsement) included the process of assessment of an outline business case **["OBC"]** for the proposed PFI project both by the sponsoring department and the government's Project Review Group **["PRG"]**. If a project received the PRG's endorsement, the sponsoring department issued a formal "endorsement letter", for which a general template was given in section B1 of the Guide. Paragraph 2.2 of Section A of the Guide stated –

> *"…each letter will be tailored to meet the specific needs of each sector and project….This letter will include standard and specific conditions, and set the endorsement date which is used to determine a number of rates used in grant and PFI credit calculations. Some conditions may need to be met before the project is taken to the market. A project with such conditions is nonetheless considered endorsed at the date of the relevant PRG meeting".*

17. Stage 3 (Procurement to Preferred Bidder) included the following advice at paragraph 3.5 –

> *"**Promissory note.** A promissory note does not need to be sent at any particular stage if the authority does not require it, but may be requested to provide assurances about the continued support in principle of the department if that is requested/needed. If that is requested prior to the [Full Business Case (FBC)] being agreed a template for use is at Section B2. More usually the promissory note is requested shortly before contract signature and the FBC will have been approved – a template for use in these circumstances is at Section B3 (note that the comments about the endorsement template at para. 2.2 also apply to these letters).*

18. Stage 4 (Contract signature) included the following advice at paragraph 4.2 –

> *"**PFI credit letter.** The authority should send written notification of the date financial close is reached. A PFI credit letter (template at Section B4 – note that the comments about the endorsement template at para. 2.2 above also apply to this letter) will always be sent by the sponsoring department when the project reaches financial close. This letter is the formal date at which a PFI credit is issued, and is the record of all factors used in calculating PFI grant".*

19. Stage 5 (Operational Projects) included the following advice at paragraph 5.2 –

> *"**Major post contract signature variations.** Any major variation which is being considered must be reported to the sponsoring department before it is agreed, including any contract extension (whether PFI credit is being sought for that extension or not). Where there is a change protocol which defines major variations that should be used. Where that does not exist, there is no simple definition of whether any variation is major or not. However, the standard change protocols can be used as a guide, and if in doubt the sponsoring department should be consulted. A department may wish to look at the [Value for Money (VfM)] or legal aspects of any such variation.*

The possible impact of such changes on the level of support is covered in Section G".

Section G of the Guide: Post Contract Signature Changes

20. Section G of the Guide, headed "Post Contract Signature Changes" gives the following advice –

> *"Changes to the contract, including possibly termination, may occur after it has reached financial close and the PFI credit has been issued. Any major variation must be reported to the sponsoring department who will consider whether there are PFI support implications".*

21. Section G then advises on "(1) Increases" and "(2) Decreases". Under the heading "Increases" there is a single paragraph of advice in relation to changes which will increase the capital value of the project, whether by adding to its scope or by extending the length of the contract –

> *"If a sponsoring department wishes to support such an increase, it will be treated for grant purposes as if it were a separate contract. The PFI credit calculation will use the discount rate in force when the variation is agreed, not that used for the original project, and a separate PFI credit letter will be issued. The same approach will be used in the grant calculation, i.e. the interest rate and scaling factor used will be those in force when the variation is agreed".*

22. Under the heading "Decreases" the Guide includes eight paragraphs of advice under a series of sub-headings: (2.1) Exceptional circumstances; (2.2) Reduction in assets delivered; (2.3) Changes in assets delivered; (2.4) Change in capital/revenue balance; (2.5) PFI credit re-calculation; (2.6) Grant recovery; (2.7) Lump sum payments; and (2.8) Changes to services or financing costs.

23. In the present case, the Claimant relied in particular on the advice given in paragraph 2.1 of Section G of the Guide –

> *"**Exceptional circumstances.** Government reserves the right to stop support in exceptional circumstances. Such circumstances could be where continuation of support would unduly enrich or reward an authority, for example where a contract was terminated by the authority despite that approach not being the best value for money. As a first step, sponsoring departments will therefore consider the circumstances of any major variation in this light.*
>
> *Even in such exceptional cases, steps would be taken to ensure that the local authority was not thereby prevented from meeting in full the resulting liabilities to the PFI contractor and its funders for capital assets already delivered".*

24. Reliance was also placed on paragraphs 2.2, 2.3 and 2.8 of Section G –

> *"**(2.2) Reductions in assets delivered.** Termination or variation of the contract (including as a result of planning permission difficulties) could result in a reduction in PFI credits and therefore grant. If substantially all of the assets have been delivered there will not be any change to the PFI credits or grant. However, if the change results in significantly reduced capital investment by the contractor, it will lead to a reduction in support.*
>
> *The interpretation of whether a reduction is significant or not is a matter for the sponsoring department, and should always be considered on a scheme-by-scheme basis after taking into account all the relevant circumstances. Where there is one or a limited number of large assets, it will be easier to reach a decision since the non-delivery of any would clearly be a significant change. Where there are a larger number of smaller assets involved, a decision will be more subjective, but a department needs to decide whether substantially all of the planned assets have been delivered or not.*
>
> ***(2.3) Changes in assets delivered.** In some cases the nature of the assets may change, e.g. a change in the number or location, but the overall capital value remain about the same. In such circumstances an authority should notify the sponsoring department who will consider whether the alternative proposals are acceptable to them. If they are, support will continue without interruption.*
>
> **….**
>
> ***(2.8) Changes to services or financing costs.** A variation may be agreed which reduces the local authority's costs because of changes in the service element or financing costs. Neither of these would result in any reduction in support. It is established policy that in the case of refinancing the benefits will be shared between the contractor and the local authority, and not by central government".*

The PFI Credits in this case

25. In the present case, on 9 April 2010 DfT sent to the Claimant both a PFI Promissory Note and a Covering Letter.

26. The Promissory Note was issued following approval of the full business case **["FBC"]** for the PFI Project and so followed the template at Section B3 of the Guide. It was in the following terms –

> *"This is to confirm that we have now received Project Review Group (PRG) approval for the Birmingham Highways Maintenance PFI Project. This follows the final version of the Final Business Case for the project which your Authority submitted to this Department on 23 November 2009 and the addendum submitted on 10 February 2010.*
>
> *This note confirms that if the transaction is entered into on the terms set out in that Business Case this Department will issue your authority with a PFI credit letter for an estimated £637 million. This amount is based on your own assumption of a 4.70% swap rate. The final amount will be determined at financial close based on the actual swap rate achieved up to a maximum of £650 million. We expect a transparent process to close with the actual amount of*

credits necessary re-confirmed after contract signature and this amount will form the basis of the PFI credit letter.

We also expect the Authority to supply the Department with a full set of documentation and a financial model after close and subsequently to help with lessons learnt and to give reasonable support to other authorities for the benefit of the ongoing highway maintenance PFI programme.

You should continue to seek prior approval if, between now and contract signature, different terms are negotiated which affect either the nature of the scheme or the potential amount of the PFI credit, or if those terms differ from those in the relevant PFI standardisation documents. Any departure from these terms could affect your authority's entitlement to PFI credits, and will in any case risk delay to the project if PRG decides to have the proposed departures reviewed. Should we wish to support the revised project we would issue a further letter".

27. DfT's Covering Letter of 9 April 2010 stated that the Promissory Note should provide the reassurance that it was committed to the PFI Project and would provide PFI credits to the project subject to the final contract agreement being in accordance with the FBC which the Claimant had submitted. The Covering Letter continued –

"In addition to the Promissory Note, there are a number of other conditions for your Authority with regards to the scheme which we wish to receive confirmation that your Authority accepts before financial close and which will also feature in the Department's final PFI credit letter".

The Covering Letter then set out certain specific and general conditions with which DfT expected the Claimant to adhere, including reserving Ministers' right to reconsider their decision on the funding if there are any significant changes to the project.

28. On 29 June 2010 the Claimant's Corporate Director of Resources and chief financial officer wrote to DfT in response to the Promissory Note and the Covering Letter of 9 April 2010. He said that the Claimant accepted the requirements spelt out in the Promissory Note and responded to the specific conditions stated in the Covering Letter. He confirmed that the Claimant had fully adhered to the general conditions set out in the Covering Letter. He said that the submitted FBC had remained intact at contract close and the PFI Project remained affordable as a result of the final swap rate remaining within the agreed swap rate buffer. He concluded –

"I trust that this letter provides appropriate confirmation and commentary upon the issues identified within your Covering Letter and that we can move towards the issue of the Final PFI Credit letter, which in turn would allow the Authority to make the necessary grant claim. As identified above the contract with Amey commenced on the 7th June 2010 and the first payment under the contract took place on Friday 25th June 2010".

29. The PFI Credit Letter issued by DfT to the Claimant on 14 July 2010 followed the template at Section B4 of the Guide. It stated as follows –

> *"We have now received confirmation that financial close was reached on the above transaction on 6 May 2010 and that the contract was agreed on the terms set out in your Final Business Case (FBC). This Department is therefore now formally issuing PFI credits for the project for an amount of £625,214, 302.*
>
> *You should publish your FBC (barring any sensitive information) on your website as soon as possible.*
>
> *Revenue support will be paid once a valid claim form has been received, as set out in the Local Government PFI Annuity Grant Determination for the financial year in which grant is first claimed. The interest rate which will be applied in calculating grant for your project will be 6.3%, and the scaling factor 1. Your authority will need to ensure that funds are available to cover that part of the payments to the contractor which will not be met by central Government…..*
>
> *Revenue support is not intended to match or correlate directly to the payments that arise under a PFI contract. However, the Government is committed to supporting good PFI projects and to assisting the development of PFI in the local authority sector. Its policy therefore to maintain revenue for PFI projects in the long term, consistent with the long-term nature of PFI contracts, even though formally such support cannot be guaranteed.*
>
> *Termination or variation of a PFI contract could in some circumstances (as set out in the Local Government PFI Project Support Guide) lead the Government to reassess the level of revenue support based on the extent to which the anticipated capital investment is delivered. Any plans for a major variation (including extension) to the contract must therefore be reported to this Department before it is agreed".*

Accounting Rules

30. At the date on which the Project Agreement was entered into in May 2010, the United Kingdom was required to comply with an accounting system promulgated by the European Union known as ESA 1995. In his witness statement Jonathan Turton, a chartered accountant who is a Director at Ove Arup and Partners Ltd with long experience in the transport and infrastructure sector, explains that ESA 1995 did not incorporate any requirement that the value of the capital works to be carried out under a PFI contract must satisfy any prescribed threshold in order for the project to be classified as a public/private partnership **["PPP project"]** or to be recorded as "off balance sheet".

31. In his first witness statement, Mr Fidler states that under ESA 1995, the PFI Project was accounted for as "off balance sheet", meaning that the level of risk transfer to the private sector was deemed to be sufficient to enable the PFI debt not to appear in UK debt statistics and the investment not to count as an upfront cost in the DfT's capital budget.

32. On 15 March 2010, the then Minister of State for Transport had written to the then Chief Secretary to the Treasury seeking confirmation of the treatment of the proposed PFI Project for balance sheet purposes -

> *"This letter seeks your agreement to an increase in the PFI credits to the Birmingham Highway Maintenance PFI from £608m to £637m (with provision to increase this to a maximum of £650m), as the scheme exceeds the Department's spending delegation. This increase is within the Departmental PFI credit allocation budget. My officials have undertaken a value for money assessment at the higher cost and I can confirm the scheme falls into the medium/high value for money category.*
>
> *…*
>
> *As part of the Final Business Case the authority provided an opinion (ESA95) from the financial advisers to the project that the project is considered to be off the Department's Balance Sheet. We are seeking confirmation from your officials that the project will be deemed to be off the Department's Balance Sheet. You will appreciate that the project could not proceed if there was any doubt on this matter, since it is completely outside our budget planning".*

33. On 18 March 2010, the Chief Secretary responded as follows –

> "*I also understand that discussions are ongoing with the ONS concerning the classification of the scheme for balance sheet purposes. In line with the advice given on 13 December 2007 (attached), we will ensure that Departments are no better, and no worse off, following the accounting changes. Therefore, if the scheme is deemed to be on balance sheet, your Department's budget will be increased as necessary to reflect this new pressure".*

34. In 2013, new EU accounting standards were issued known as ESA 2010. ESA 2010 came into force on 1 September 2014. Eurostat guidance entitled "A Guide to the Statistical Treatment of PPPs" (September 2016) stated as follows –

> *"For a project involving the refurbishment, renovation or upgrade of an existing asset to be considered a PPP, the amount of capital expenditure by the Partner under the contract must represent at least 50% of the value of the asset after completion of the works….If the Partner's capital expenditure does not meet the 50% threshold, the project is not considered to be a PPP and it will be on balance sheet for government".*

35. In his witness statement, Mr Turton states that the effect of DfT adopting ESA 2010 and in particular the capital expenditure threshold introduced by the 2016 Balance Sheet Guidance, was that if the PFI Project was re-assessed by DfT, it would not be considered a PPP and so would fall to be accounted for by DfT as "on balance sheet". There was a simple reason why this was the position: the "asset" for the purposes of the Project Agreement was the Claimant's highway network, which comprised over 2,500 km of roads and approximately 700 infrastructure assets. Although substantial, the amount of capital expenditure to be incurred by the Partner under the Project Agreement would not exceed 50% of the very high value of that asset. I did not understand Mr Turton's evidence on this point to be in dispute.

36. Mr Turton added –

> *"I should make clear that this outcome follows from the Capex Threshold irrespective of any assessment of the balance of allocation of risk effected by the Project Agreement. If the Capex Threshold is not satisfied then the Project could not be considered a PPP and the project would be required to be accounted for by DfT "on balance sheet" irrespective of the risk allocation that is given effect by the terms of the Project Agreement".*

37. In his first witness statement, from his experience Mr Fidler states that further assessments of balance sheet treatment under ESA 2010 for an existing PFI project would only be required where it was subject to a significant change in circumstances. Neither DfT nor HM Treasury reconsidered the balance sheet treatment for the then existing PFI projects in 2014 when the new accounting rules under ESA 2010 came into effect.

The Amey Settlement

38. In his first witness statement, Mr Shelswell says that following commencement of the Project Agreement, there were significant and wide-ranging breaches of contract and failures to perform by Amey. Following unsuccessful attempts to retrieve the position, the Claimant brought enforcement proceedings against Amey and on 29 June 2018 secured a judgment in its favour from the Court of Appeal. Mr Shelswell reports his understanding that the Government encouraged the Claimant not to enforce full recovery against Amey and risk rendering Amey insolvent. DfT wished to ensure Amey's survival as a provider of services to the public sector in the UK market.

39. In a report to the Claimant's Cabinet on 12 December 2017, the Claimant's Corporate Director, Economy advised –

> *"1.2 This report provides an update regarding discussions to reach a commercial settlement with Amey Birmingham Highways Limited in relation to a number of matters within the Highway Maintenance and Management PFI contract and bring to an end legal action undertaken.*
>
> *…*
>
> *5.7 Under the conditions of the PFI grant the Council is required to report any proposed major variation to the contract to DfT for prior approval, in their capacity as the sponsoring government department. The changes proposed constitute a major variation and DfT require a full business case, which, if supported, will then be submitted for consideration at the HM Treasury Board Investment Commercial Committee (BICC). In addition the Council is advised that the proposal may require ministerial approval.*
>
> *5.8 The review by government will involve two key elements:*
>
> *5.8.1 Consideration of the funding for the project against the original outcomes, to ensure that the proposed outcomes remain comparable with those when the PFI grant was originally awarded. For example, if there were to be a significant reduction in the capital investment made under the project (which is not being proposed), this could result in the grant being reduced.*

5.8.2 Consideration of the impact on the accounting treatment within the Whole of Government Accounts, to ascertain whether the proposed changes result in the recognition of a liability on the public sector Balance Sheet or not. This will require an assessment of each of the proposed changes to the contract against the existing accounting requirements. It should be noted that the existing requirements have been updated since the original assessment at contract commencement".

The Department's May 2019 Letter

40. On 16 May 2019, DfT's Director General for Roads, Places and Environment wrote to the Claimant's Chief Executive setting out how the Defendant proposed to proceed, following the anticipated withdrawal of Amey from the Project Agreement. That letter was the starting point for a prolonged process of negotiation between the Claimant and DfT, which culminated in the Decision. I should therefore set out its contents in full –

"The Department has been closely involved with the Birmingham City Council PFI as the options have developed, and supports the idea of a consensual exit for Amey that you and the partners to the PFI, including Amey, have been working to deliver. We are keen to see this result in a sufficiently funded and feasible project for Birmingham City Council, and we stand by the terms of our existing PFI agreement.

We support the two-stage approach that has now been agreed and which will involve further discussions between the Council, the lenders, the SPV, and the equity investors over the next 24 months. We recognise that this may result in an interim provider followed by a procurement exercise to secure a new sub-contractor to cover the remaining 15 years of the agreement.

The Department's view is that the Council, through its local accountability to members and residents, will not wish to accept wholesale changes to the contract that would result in poorer quality specifications or services. It is in all our interests to minimise substantive changes to the project agreement, although some change may be needed in order to secure a satisfactory replacement sub-contractor.

We believe that the Council should also review the contract management arrangements to make the project sufficiently attractive to bidders, and deal with any misconceptions in the market. If this is not done then it is likely that bidders will add a substantial risk premium, which the project may not be able to afford. The Department will need to see a substantive piece on the overall management case, including contract management arrangements, with BCC working with the SPV and involving some external challenge. We would be grateful for your early thoughts on how this might be done.

Our intention is to continue paying PFI grant at the current rate, subject to value for money. We understand that the Council may also be considering changes to the contract, and it is of course at liberty to submit other proposals for support from new and existing funding streams from Government. DfT will consider such

changes on their merits, provided always that the business case demonstrates continued value for money.

This will be greatly assisted by close and open working between the Council and DfT officials, and by putting in place suitable governance arrangements to oversee the second stage, as described earlier. But we must emphasise that the principals here are the SPV and BCC. The parties should avoid a sequential approach, in which the SPV propose changes in the light of market soundings, BCC review and agree them, and then at the end come to DfT for review. With that in mind I would be grateful if you could continue to liaise closely with Tony Boucher and Mohammed Aziz in the Department for Transport.

The renegotiation phase in coming months will be difficult, and I can confirm that the Infrastructure and Projects Authority will continue to support the project, for example by drawing on past experience and/or facilitating discussions with existing investors, and potentially with new ones (both debt and equity)".

41. On 29 June 2019 the Claimant reached a settlement agreement with Amey under which Amey exited the Project Agreement and agreed to pay compensation to the Claimant. The main contract passed to Birmingham Highways Limited **["BHL"]**. Mr Shelswell says that compensation was paid to the Claimant at a lesser sum than was owed by Amey to the Claimant for breach of the Project Agreement.

42. On 13 March 2020 the Claimant entered into an interim agreement with Kier Highways Limited for the provision of road maintenance services. That agreement has subsequently been extended. At the date of the hearing of this claim, the current extension of the interim agreement was until 31 May 2024.

Updating the business case 2021/2023

43. On 1 March 2021 the Claimant produced an updated business case. That business case proposed 3 "scenarios" for consideration by DfT for the purposes of continuing delivery of the PFI Project following the withdrawal of Amey. The Claimant's preferred option was scenario 3, under which BHL would become wholly owned by the Claimant –

"1.1.6 Following analysis, all Project stakeholders concur that the original outcomes from the Project are not now achievable, so the Authority has given consideration to delivering the optimum level of investment within the available resources.

1.1.7 This business case sets out the scenarios currently under consideration by the Authority, and reports on the analysis undertaken to date.

1.1.8 By submission of this business case, the Authority seeks approval from Government to proceed with the recommended approach, as described in this business case and recognising (i) the ongoing negotiations with stakeholders; and (ii) the planned market engagement and procurement exercises. The Authority also seeks confirmation from Government that the PFI credits / grant will continue to apply for the remainder of the Project term.

> …
>
> *Solution*
>
> *1.2.14 In further of its public law duties and in pursuit of best value, the Authority has therefore explored an alternative approach that could deliver the same or better asset condition outputs in a more efficient and flexible manner. A key consideration is whether market risk pricing and other overheads could be actively managed in a more effective way to achieve the best value for money possible with the available finding.*
>
> *1.2.15 The Authority therefore has three potential scenarios -*
>
> > *Scenario 1: the default scenario in which no agreement is reached with Senior Creditors prior to the expiry of the Restructuring Period, such that the Project Agreement terminates;*
> >
> > *Scenario 2: reduction in Project standards to a level allowing BHL to procure a long-term Replacement Subcontractor; and*
> >
> > *Scenario 3: the Authority's alternative approach, which would see BHL acquired by the Authority, implementation of active management by BHL and procurement of a suite of subcontracts intended to optimise project delivery".*

44. DfT did not support the Claimant's preferred scenario. On 14 June 2021, Mr Fidler wrote to the Claimant's Interim Director, Inclusive Growth Directorate –

> *"Our previous letter…dated 16 May 2019, set out the Department's expectations for the future contract. In that response, the Department committed to consider carefully any proposed changes to the contract to ensure they aligned with these expectations, including that any substantive changes to the project specification should be minimised, undertaking a review to the contract management arrangements to make the project commercially attractive, and that the business case demonstrated the proposals offered value for money.*
>
> *Following your submission of a business case in March 2021 along with additional supporting documents, the Department has now considered the two proposals you have put forward, each of which the Department understands you to consider offers a feasible alternative solution for the contract. We have concluded, following scrutiny of the material you submitted through Departmental governance processes, that we cannot support the Council's preferred proposal, put forward as Scenario 3….*
>
> *Although the Department cannot support your preferred proposed approach for the reasons given above, the Department remains content to continue paying the PFI credits if a workable proposal can be identified and can be delivered quickly, which meets our ongoing requirements and addresses the concerns set out above. It should align much more closely with the original policy aims of the project and provide clear evidence and assurance of a robust approach that offers value for*

money, does not expose HMG to additional financial costs, and is both deliverable and commercially viable".

45. On 27 July 2021, one of the Claimant's consultants wrote by email to DfT's Head of Highway Maintenance asking for further clarification regarding the question of balance sheet classification –

"As discussed this morning ... can you/DfT please respond to the following additional queries:

- *Recognising that neither BHL nor BCC can undertake the national balance sheet classification analysis for DfT/Treasury, can DfT confirm what specific information is required from BHL/BCC to assist DfT/Treasury in undertaking the analysis?*

- *In addition, can DfT confirm how national balance sheet assessment/classification will impact decision making at each business case stage, e.g. at what point will DfT approach ONS for a formal assessment of the contract's classification?*

- *Also, is an 'off balance sheet' classification a 'red line' requirement for DfT to approve Option 2?"*

46. On 5 August 2021, DfT responded as follows –

"Balance sheet classification is one of the considerations likely to be assessed when the business case is evaluated as a whole. It is likely to be considered at each stage of review – SOBC and OBC level as well as the full business case".

47. On 9 August 2021 the Claimant submitted its Strategic Outline Business Case **["SOBC"]**, now proposing Scenario 2 as the preferred option for continued operation of the Project Agreement –

"1.1.2 As part of its preparation, BCC and BHL have been cognisant of the unique circumstances presented by this Project and have sought to address the main areas of concern set out in the DfT Letter to BCC dated 14 June 2021. Appendix 1 sets out where each specific requirement of the DfT Letter has been considered within the SOBC.

...

1.2.4 This option, referred to as Scenario 2, would secure a scale of investment in highways infrastructure and support a long term proactive investment strategy which would significantly contribute towards achieving BCC's original Project objectives, arrest the current deterioration in the network condition, facilitate economic growth and deliver demonstrable value for money. It is aligned to BCC's current strategic outcomes and also supports the DfT's priority outcomes as set by the most recent Government Spending Review.

1.2.5 This proposed solution has been tested against the counterfactual, referred to as Scenario 1. This Scenario would see the PFI contract terminated and future funding of BCC's highway network be subject to short term local highways

maintenance funding allocations. Under such an outcome, BCC would only be capable of delivering the minimum requirements to fulfil its statutory obligations in respect to maintaining safety and usability of the highways and there would be very limited scope to enhance the highways network via capital investment".

48. The SOBC considered the question of balance sheet treatment under ESA 2010–

"1.4.4 The case goes on to consider the accounting classification implications of Scenario 2, from the perspective of both BCC and the National Accounts. It outlines that the changes to the contract anticipated as part of the re-procurement of a new subcontractor may trigger a National Accounts classification review, with the Project's balance sheet treatment being reassessed under the current ESA 2010 rules.

1.4.5 It explains that BCC and BHL intend to seek reassurances from DfT that should this result in an 'on balance sheet' classification in the National Accounts, this is not considered to be an insurmountable obstacle to receive approval to continue the PFI project and proceed with the subcontractor re-procurement exercise.

…

4.9.14 We understand that DfT will undertake its own assessment of the statistical treatment impact of the proposals under Scenario 2 based on the information that is made available as part of this SOBC. Given the possibility that the Project would no longer meet the requirements to remain off government balance sheet under ESA 2010 rules, BCC and BHL intend to seek reassurances from DfT that this is not considered to be an insurmountable obstacle before commencing the development of the OBC".

49. Paragraph 5.12.1 of the SOBC considered how matters might proceed in the event that Scenario 2 was not pursued –

"5.12.1 Should Scenario 2 not be pursued, BCC would revert to Scenario 1. As outlined in the Economic Case it is assumed that PFI Credits would be withdrawn and replaced by capital block funding. This would create a significant level of funding uncertainty in the medium to long term which would directly affect the ability of BCC to adopt a long-term asset management approach to the re-procurement of highway network investment".

50. On 27 September 2021, Mr Fidler notified Robert James, the Claimant's Managing Director City Operations, that on DfT's Investment Portfolio and Decision Committee's **["IPDC"]** recommendation the SOBC had received Ministerial approval –

"The next stage is for BCC, working with Birmingham Highways Ltd (BHL), to submit an Outline Business Case (OBC) and final procurement documents by 6 December 2021 which demonstrate that BCC has developed a credible proposition that will be acceptable to the market and which meets DfT requirements, including Value for Money for the PFI project in its remaining

years. As the team have discussed with you, to be approved the OBC will need to meet the following requirements agreed by IPDC and Ministers…".

One of those requirements was that the Claimant should continue to address the balance sheet and accounting treatment questions and work with DfT and Treasury **["HMT"]** to agree a final position.

51. On 28 October 2021 the Claimant wrote to the DfT about the question of balance sheet treatment –

"Through the Steering Group we have discussed the requirement to submit "final procurement documents" along with the Outline Business Case (OBC) on 6 December 2021 and have sought further clarification of what this means in practice. Specifically the following points have been accepted, noting that …. you will need to understand the risk transfer and pricing as part of the Economic Case…

…

We will continue to support DfT in its consideration of the balance sheet treatment questions, but you will appreciate that this is ultimately for DfT and HM Treasury to confirm. We will be grateful if this can be progressed as a matter of urgency."

52. In early December 2021 DfT provided the Claimant with a draft "PFI Credit Framework" document whose purpose was stated as follows –

"This framework establishes the requirements BCC must meet in order for DfT to continue paying PFI credits. It sets out the withdrawal process if BCC fail to meet these requirements. The document will be kept under regular review and revised where necessary".

This framework document appears not to have been discussed and was never signed by either DfT or the Claimant. Mr Shelswell says that the Claimant's position was that the PFI Credits continued to be governed by the terms on which they had been issued in 2010.

53. On 6 December 2021 the Claimant submitted its Outline Business Case **["OBC"]**. Paragraphs 3.6.10 to 3.6.21 of the OBC gave an overview of Scenario 2, including –

"3.6.10 Under Scenario 2, agreement is reached by BCC, BHL, DfT and Senior Creditors on the scope and terms of the revised Project Agreement and the future investment in highways infrastructure will be secured.

3.6.11 The PFI structure will remain in place and BHL will procure a Replacement Subcontractor. This will support a long-term proactive investment strategy that will significantly contribute towards BCC's Project objectives, arrest the current deterioration in the network condition, secure the legacy network condition and deliver demonstrable value for money.

3.6.12 The anticipated risk allocation is set out in more detail in the Commercial Case, but in summary is represented below. Those items marked in red represent

areas where there has been an increased transfer of risk back to BCC relative to the existing contract".

Table 6 of the OBC showed certain assets for which the Claimant would take back risk (either on a sole or shared basis) under the proposed arrangements for Scenario 2. Paragraphs 3.6.13 to 3.6.21 briefly explained the position.

54. Under the heading *"The Strategic Case"*, the OBC included the following summary paragraphs –

"1.2.5 ...Scenario 2 ... is aligned to BCC's current strategic outcomes and supports the DfT's priority outcomes as set by the most recent Government Spending Review.

1.2.6 This proposed solution has been tested against the counterfactual, referred to as Scenario 1. This Scenario would see the PFI contract terminated, and future capital funding of BCC's highway network be subject to short term local highways maintenance funding allocations. Under such an outcome, BCC would only be capable of delivering the minimum requirements to fulfil its statutory obligations in respect of maintaining safety and usability of the highways and there would be very limited scope to enhance the highways network via capital investment".

55. On 20 January 2022, DfT officials met with HMT officials to discuss certain aspects of the Claimant's proposals. There was discussion of classification change and on/off balance sheet treatment under current accounting rules (ESA 2010) –

"HMT stated that DfT should be no better or no worse off following any classification changes (in reference to the letters exchanged between HMT and DfT in 2010).

The classification change….would be prospective, so it would apply from the date the new Contract is let.

DfT will need to manage the budget arising from the project coming on-balance, almost certain to do when a new Contract is let.

HMT confirmed it would be one hit on Capital Departmental Expenditure Limits ***["CDEL"]*** *in one financial year. This is because National Accounts treat it as the purchase of an asset, calculated as the present value of the future PFI grant payments. It is not retrospective, so grant payments already made are not taken into account in the calculation".*

56. On 27 January 2022, DfT officials reported to Ministers following consideration of the OBC by IPDC. Their report included the following –

"4. ...The OBC continues to present BCC's preferred option of a project restructuring that maintains the PFI structure and full credit allocation but with a new subcontractor procured to deliver the highways services set out in a modified contract – in comparison to the counterfactual.

5. On 24 January, IPDC considered the OBC and the three options DfT could take: allowing BCC to straightforwardly continue to FBC; withdrawing support now; or allowing BCC to continue on the route to FBC but with additional checkpoints and requirements.

6. IPDC agreed that the project was too high risk to proceed straight to FBC but also noted that at this stage there are no material breaches of our requirements, instead many uncrystallised risks that BCC will not meet those requirements. Therefore, there are several risks associated with withdrawing support now …

7. On balance, IPDC agreed to support the option recommended by the policy team – allow BCC to continue on the route to [Final Business Case], but with additional checkpoints and robust requirements – including a specific requirement on the Department's role in assessing VfM and strategic priorities … The Board agreed that this option strikes the right balance between giving BCC the chance to secure arrangements that will give longer term and higher levels of investment into Birmingham's roads and minimise risk to taxpayer interests if the project does not proceed…

8. Allowing BCC to continue does not mean that we are committed to funding this project, we can still choose to withdraw support at a later checkpoint if BCC fail to meet our requirements. One of our requirements is for BCC to work with us and the West Midlands Combined Authority (WMCA) to agree contingency plans, which will make the transition much smoother if we do eventually withdraw PFI funding.

…

12. HMT officials have advised that, given the fiscal impacts of the options, HMT Ministers will also need to agree to the above recommendations".

57. On 14 February 2022, the Claimant began the process of procuring a sub-contractor to replace Amey in that role under the Project Agreement.

58. On 31 March 2022, DfT's Deputy Director Local Infrastructure wrote to Mr James of the Claimant informing him that Ministers had accepted IPDC's recommendations and were content for BHL to progress with the procurement. He continued –

"However, given the risks that remain with the project the Department requests an additional checkpoint to review an updated OBC in line with the requirements detailed in the annex to this letter.

I appreciate the hard work from all parties that has gone into the OBC and recognise that you have come a long way in delivering a revised contract that you can take to market. We are committed to working in collaboration with you and I know that the team has already sought both BCC's and BHL's view on the content of this letter.

I can confirm that a formal checkpoint will take place later this year, following the second round of dialogue with bidders. BCC will be required to complete a

formal submission with an updated OBC that demonstrates progress against the requirements below. The deadline for this submission is Monday 12 September 2022, to be considered at committee shortly thereafter. IPDC will review this submission before making recommendation to DfT Ministers and I hope it will prove sufficient to assuage the board of any concerns ahead of the FBC. In addition, HM Treasury (HMT) will review your submission. While we do not expect you to pause re-procurement while you wait for IPDC and HMT's views, if the submission fails to provide adequate assurance that you are meeting our requirements, then DfT may withdraw support at this stage. The continuation of PFI grant funding is not guaranteed".

59. On 8 July 2022, Mr James of the Claimant wrote to Mr Fidler in response to DfT's letter of 31 March 2022, including the following observations –

"I emphasise again that the council's primary aim is to achieve a successful project restructuring and business case approval to continue the PFI until 2035. However, as Highway Authority we also require robust contingency arrangements to deliver our statutory responsibilities should it not be possible to do so via the PFI structure.

Since your 31 March 2022 letter the council has worked with your officers to ensure that they understand the implications of the project's 2019 restructuring agreement ending. We have explained that there are a number of triggers that could set in chain a sequence of events that lead to the Restructuring Agreement, Project Agreement and PFI grant being sequentially terminated. While there are a number of potential routes, the most likely event to cause this to happen is Government (whether the Department or HM Treasury) not approving the council's business case at any point".

60. On 15 September 2022, DfT's Head of Local Infrastructure Division replied to Mr James' letter –

"Thank you for your letter to Stephen Fidler of 8 July, and our subsequent discussion, regarding post-PFI funding should the Outline Business Case (OBC) or Final Business Case (FBC) submissions be unsuccessful, or in the event that the PFI project ends for some other reason. I thought it would be helpful to follow up on some of the key issues in writing.

In particular, I wanted to reiterate our desire to continue to work collaboratively with you and that our support is behind developing the case for a successful re-procurement of the PFI. However, we have agreed that we should work together to develop possible alternative arrangements in the event that the government decides that the case for continuing to provide PFI funding has not been made and that funding should come to an end. For the avoidance of doubt, nothing referred to in this letter prejudices Birmingham City Council's (BCC) position in that regard or pre-empts the government's decision-making process in any way. The possible alternative arrangements set out below, including any estimated figures referred to, are for illustrative purposes only to assist with contingency planning".

The letter then went on to provide information about possible alternative arrangements in the event that PFI credits funding was withdrawn.

61. On 23 September 2022, Mr James responded –

> *"The council remains clear that its priority and preference is to work with Birmingham Highway Ltd (BHL) to deliver a successful procurement of the long-term replacement subcontractor for the PFI contract. Nonetheless, given our statutory duties as Highway Authority it is appropriate that if that is unsuccessful (for any reason) we have in place contingency arrangements that minimise the transitional period to a new long-term model. This aligns with the Department's requirement for the council to work with you on this in its 31 March 2022 letter.*
>
> *To support achieving this mutual objective, we will need to work together to understand one another's positions and drivers and then develop the answers to a number of key questions".*

The letter went on to raise detailed questions about the operation of transitional and alternative funding arrangements, were PFI Credit funding to be withdrawn.

62. On 30 September 2022 the Claimant submitted its Updated Outline Business Case **["UOBC"]**. In a covering letter of the same date, the Claimant provided a table whose purpose was to show how the Claimant had now satisfied DfT's requirements following consideration of the OBC earlier in 2022. The Claimant also confirmed that it was now in competitive dialogue with two bidders for the replacement sub-contract.

63. Paragraphs 4.8.18 and 4.8.19 of the UOBC stated –

> *"Under Scenario 2, the changes to the contract anticipated as part of the re-procurement of a new subcontractor, may trigger a classification review such that the Project will need to be reassessed under the current ESA 2010 rules. The latest rules generally consist of stricter interpretations than ESA 1995 and therefore there is a possibility that, even without significant changes to the contract, the Project could be determined to not meet these requirements and instead be brought on government balance sheet and impact DfT CDEL.*
>
> *We understand that DfT will undertake its own assessment of the statistical treatment impact of the proposals under Scenario 2 based on the information that is made available as part of this OBC. However, we believe there is a strong probability that the Project would no longer meet the requirements to remain off government balance sheet under ESA 2010 rules".*

Part 5 of the OBC stated the commercial case for Scenario 2. Section 5.2 included Table 20, which updated the risk allocation proposals in comparison to the existing Project Agreement. Paragraph 5.2.2 of the OBC then summarised the key changes in the proposed risk allocation.

64. On 23 January 2023, DfT's IPDC met and considered the UOBC. IPDC's recommendation to Ministers was as follows –

> *"The Committee approved the OBC and the decision to proceed to FBC stage subject to getting DfT Ministers' agreement and subject to HMT assurances of*

continued financial support. Senior engagement from HMT was needed. The Permanent Secretary also offered to have a discussion with the Chief Executive at BCC. It would be important to be frank about how finely balanced this decision was and the implications either way".

65. It is not said in evidence that the Permanent Secretary had that discussion with the Claimant's Chief Executive.

66. On 9 March 2023, DfT officials recommended that Ministers should now agree that the Claimant and BHL should proceed towards re-procurement of a highways maintenance contractor and submission of a FBC. Officials also recommended that Ministers should write to Treasury Ministers seeking their support. Ministers raised follow up questions about those recommendations which were answered by DfT officials on 14 April 2023.

67. On 26 April 2023, the Defendant wrote to the Chief Secretary to the Treasury seeking approval for the Claimant to move to submission of its FBC –

"I am writing to seek your approval to allow Birmingham City Council to proceed to Full Business Case for the re-procurement of a long-term replacement contractor for the 2010 Highways Maintenance Private Finance Initiative, through to the original planned end date in 2035.

Birmingham City Council have submitted a well-developed Enhanced Outline Business Case (OBC) which I believe meets previous conditions we have set and provides a good value for money case for their proposal to undertake the re-procurement based on receiving the same total funding currently received under existing PFI arrangements (£50.3m p.a.).

The strategic case for the continued investment in Birmingham's roads is strong, as it was in 2010 when the PFI began. Furthermore, continuing with a long-term approach of the PFI will provide more planned, preventative maintenance, which involves resurfacing at regular intervals, and which is the most cost-effective method of keeping the road surface in good repair. The consequence of delaying essential work on roads is often to increase the bill for fixing the problem in the future.

My approval of the OBC would also be subject to Birmingham City Council meeting certain conditions at the FBC stage. These include:

to demonstrate in the FBC that they are equipped and capable of managing the PFI to ensure that it delivers the outputs and outcomes the contract

to ensure that the Value for Money (VfM) position in the FBC does not deteriorate and seek opportunities to improve commercial arrangements

to ensure that competitive tension is retained through the procurement and that there is sufficient incentive for shareholders to remain dedicated to delivering the agreed outputs and outcomes through to hand-back

> *to ensure that there is sufficient incentive for shareholders to remain dedicated to delivering the agreed outputs and outcomes through to hand-back.*
>
> *I am conscious that owing to changes to ESA10 accounting guidance, that occurred after the original PFI was signed, a re-procured contract will likely no longer meet the rules for National Accounts that must be followed at any major change to a PFI. Therefore, the project will no longer be classified as a PFI for National Accounts purposes.*
>
> *The result of this is that the DfT would need up front CDEL budget cover for the discounted cumulative value of the Department's future grants towards capital components of the contract. I am therefore also asking for your agreement for HMT to provide the budgetary cover required to cover these costs if the project is also approved at the FBC stage. I would also like confirmation that HMT will honour the existing funding (£50.3m per year), which is part of our SR settlement, to pay the ongoing costs associated with the PFI if approved at FBC.*
>
> *This change in PFI classification is outside of DfT's control and I don't believe it should impact on the decision to continue to support this vital project.*
>
> *I understand your officials will also be reviewing the Enhanced Outline Business Case and be providing you with advice and I hope we are able to move quickly to provide Birmingham City Council with the approvals they need to develop their FBC, ahead of the planned Summer submission".*

68. On 5 June 2023, there was a telephone call between Ms De Vries, Head of Funding Interventions and Partnerships at DfT and Mr De Bechi, PFI Contract Manager at the Claimant. Following that call, Ms De Vries wrote an email to Mr De Bechi in the following terms –

> *"Thank you for your time earlier and sorry it was not the happiest of conversations. We discussed contingency planning and the potential risk that HMT officials are currently not minded to recommend the re-procurement to their Ministers. I had pushed back on many of the points they raised, in particular the fact it feels like the 2010 decision is being revisited, and Mo and I were clear on the challenges that you had faced with Amey.*
>
> *As discussed on our call, I said I would summarise the areas in which HMT had outlined concerns which are below:*
>
> - *showing the real benefits / better outcomes that Birmingham have achieved in the last 13 years through the uplift in funding (when compared to formula funding for the rest of the country);*
> - *the value for money argument, particularly given difficulties with affordability; and*
> - *if the PFI continues, what will the £50m per annum buy / what will there be to show for it.*

Whilst I believe the business case answers the above, it might be useful for us to put forward some tangible / real world examples of where the money has been sent and a short summary on the last bullet too".

69. The Claimant then sought a further meeting with both DfT and HMT in advance of responding to HMT's reported concerns. That meeting took place at DfT's offices on 21 June 2023 between the Claimant, BHL, DfT and HMT. In his first witness statement, Mr Shelswell states that the discussion focused upon the three points raised by Ms De Vries of DfT in her email of 5 June 2023. There was no discussion of the question of balance sheet treatment.

70. On 4 July 2023 the Claimant received final tender responses under the procurement process for a replacement sub-contractor.

71. On 6 July 2023, the Claimant provided DfT with a detailed written response to the points of concern raised by HMT as reported by Ms De Vries in her email of 5 June 2023. Paragraphs 1.2 to 1.5 of that written response stated –

"1.2 ...the Council considers it important to remind Government of the ramifications of a decision not to proceed with the project ahead of the imminent submission of the Full Business Case (FBC). Appropriate background and context is also shown in Appendix 1.

1.3 It is important to note that the Council has been:

i. working closely with Government on the restructuring of the contract since 2019 on the basis agreed by all parties;

ii. providing all the information and analysis requested to a significant range of changing officials; and

iii. (based upon methodologies discussed and agreed with those officials) produced a number of business case versions.

Throughout this process Government has re-confirmed its ongoing support for the project.

1.4 In the context of this collaborative process, the Council continues to work with BHL on the re-procurement of the long-term services subcontractor. This has now almost concluded, with two tenders having been received on 4 July 2023. An FBC based on the final preferred bid is due to be submitted to Government on 11 August.

1.5 The Council has worked on the assumption that, provided the re-procurement of the sub-contract was successful within the boundaries agreed by all parties in 2019, the restructuring of the project would be completed. The Council has invested heavily to allow a successful re-procurement in a way that delivers value for money, to enable the continuation of the funding that HMT committed in 2010".

72. Paragraph 3.1 of the Claimant's response stated –

> *"If Government withdraws its support now, it will require the Council to terminate the 25-year PFI contract… This would have grave consequences for the Council, including significant financial exposure that the Council neither considers itself directly responsible for nor has the financial means to manage".*

Paragraphs 3.3 and 3.4 then gave further information about the feared financial consequences of *"terminating the PFI contract at this late stage in the re-procurement process".*

73. On 10 August 2023, the Claimant submitted its FBC. In a covering letter, the Claimant said –

> *"The FBC builds on the confirmation of ministerial approval to proceed with the restructuring and re-procurement of the PFI Contract on 31 March 2022 in response to the Outline Business Case (OBC) and its subsequent update in September 2022 (UOBC). As you are aware, the project has continued to proceed, with the Department involved in the all-party steering group. The FBC has been developed in line with all the Department's and HM Treasury's additional requirements as communicated to us. This collaboration has been important in developing a successful restructuring of the PFI Contract and re-procurement of the operating sub-contract, following the settlement with Amey in 2019.*
>
> *Importantly, the FBC demonstrates how the value for money (VfM) proposition for the Project has improved substantively since the preparation of the OBC. The competitive procurement process has resulted in a preferred bidder whose submission significantly exceeds investment outcomes anticipated at the OBC stage. We believe we have now satisfied all of the Department's and HM Treasury's requirements as communicated to us through correspondence.*
>
> *…*
>
> *We have now reached a position where the restructuring agreed to by all parties in 2019 can be successfully completed. Our expectation and assumption is that the restructuring of the project will be completed following ministerial approval of the FBC. This is in line with the assurances we have received to date from the Department that the project will be supported as long as VfM continues to be demonstrated..".*

74. Paragraphs 1.1.2 and 1.1.3 of the FBC stated –

> *"BCC and BHL have been cognisant of the unique circumstances of this Project. We have also sought to address feedback received at previous business case stages. Since the submission of the Updated Outline Business Case (UOBC) we now have a Preferred Bidder, whose bid will deliver a quantitative value for money benefit of [sum]. This is significantly in excess of the [sum] envisaged at UOBC stage.*
>
> *We consider that this FBC presents a compelling, value for money approach to maintaining the city's highway network to 2035".*

Paragraph 3.3.12 of the FBC summarised the case in relation to risk allocation under Scenario 2 -

> *"The anticipated risk allocation (and mitigation against those risks, where applicable) is set out in more detail in the Commercial Case, but in summary is represented below in Table 6. The revised PFI contract is structured such that the majority of risk remains with the private sector in order to meet PFI principles (SOPC4), refined so as not to present a specific barrier for market acceptability. Those items marked in bold represent areas where there has been an increased transfer of risk back to BCC relative to the original PFI contract".*

75. On 20 September 2023, HMT officials informed DfT officials that HMT would –

> *"reject the revised PFI proposal because it involves substantially less risk transfer to the private sector compared with the original arrangement and is unaffordable to DfT due to the upfront CDEL charge associated with the accounting treatment of the revised deal. HMT propose to continue the current level of Highways Maintenance funding (£50m pa – the same level as the PFI deal) for BCC until the end of the SR period (24-25), via WMCA's CRSTS settlement".*

76. On 4 October 2023, at the Conservative Party Conference, the Prime Minister announced the cancellation of Phase 2 of High Speed Two **["HS2"]** and a £36 billion transport funding package.

77. Following a sequence of increasingly urgent chasing letters from 13 September 2023 to 27 October 2023 from the Claimant to DfT seeking DfT's formal response to the FBC so that the Claimant was able to complete the procurement of a replacement sub-contractor, on 27 October 2023 the Permanent Secretary at DfT wrote to the Claimant's Chief Executive with what was essentially a holding response.

78. On 6 November 2023, DfT officials put a submission before Ministers recommending that they reject the Claimant's outline business case for the restructured PFI Project. Paragraph 5 of that submission stated -

> *"On 19th September HMT officials confirmed that CST will reject the revised PFI proposal. The revised deal cannot be recorded "off balance sheet" in accordance with the relevant ESA 2010 accounting rules (as would be expected with any PFI/PPP and as was the case for the 2010 PFI) because: (i) the proportion of capital work to be undertaken relative to the value of the asset on completion of the Project is insufficient; and (ii) there is insufficient risk transferred to the private sector. The revised deal must therefore be accounted for as 'on balance sheet', which requires an up-front CDEL charge in the region of £200m to £250m. HMT have therefore rejected the OBC on the basis that DfT would need to cover this cost and it is unaffordable".*

Paragraphs 7 and 8 advised –

> *"We have been reviewing the rationale behind HMT's decision, looking carefully at DfT's financial position including the implications of the PM's announcement on the reallocation of HS2 funding to Network North.*

> *The accounting treatment of the revised deal has been understood for some time. In your letter to the CST requesting approval of the OBC, the department asked HMT to cover the up-front CDEL charge in line with our interpretation of HMT guidance covering charges arising from a change in accounting treatment. In taking a decision on the OBC, HMT have indicated that they expect the department to cover this. We were made aware of HMT's position just prior to the announcement on Network North, which allocates £8.3bn of additional funding to Highways Maintenance over 10 years. However, only £150m of this will be available nationally on both 2023/24 and 2024/25. The CDEL charge would fall in one of these two years and we therefore consider that the Network North funding does not change the affordability position. Consequently, the revised deal continues to be unaffordable to DfT".*

79. On 13 November 2023, the Defendant's private office responded stating that Ministers wished to consider whether there were other options, it being the ministerial view that the main reason HMT were refusing the restructured PFI was because of the debt on balance sheet. Officials were asked to explore alternative options or a revised PFI proposal which was not required to be accounted for as "on balance sheet". DfT officials responded that it was necessary to provide *"a clear decision on whether to accept or reject the proposed deal presented within the OBC (and subsequent FBC)"*. The Claimant would then need to judge whether they wished to develop *"a revised deal that provides greater risk transfer to the private sector and could therefore be considered off balance sheet (while still demonstrating vfm), and avoid the up front CDEL charge…BCC are best placed to make that judgment"*.

80. On 14 November 2023 DfT officials put a further "tactical update note" before Ministers recommending a *"clear and final decision"* rejecting the Claimant's OBC (i.e. the UOBC) and providing the Claimant with the option to develop a revised deal that delivers greater risk transfer to the private sector and a higher proportion of capital spend that would move the contract off balance sheet and avoid an upfront CDEL charge. The note recorded that –

> *"Although affordability, in view of the balance sheet treatment has been the main rationale for rejecting the proposed deal, HMT have raised wider concerns that mean they would be unlikely to approve the OBC if the affordability of the up-front CDEL cost were resolved".*

81. On 17 November 2023, the Defendant accepted that recommendation.

82. On 28 November 2023, the Chief Secretary to the Treasury wrote to the Defendant in response to the Defendant's letter of 26 April 2023. In her letter, the Chief Secretary declined to give her approval to allow the Claimant to proceed to FBC for the re-procurement of a long-term replacement contractor for the PFI Project –

> *"Thank you for your letter of 23 April seeking approval to allow Birmingham City Council to proceed to Full Business Case stage for the re-procurement of a long-term replacement contractor for the 2010 Highways Maintenance Private Finance Initiative (the "Project"). Thanks to your officials for the close work with my department on this proposal over the last few months.*

I agree with you on the importance of investing in local roads maintenance, including in Birmingham. This is an important part of ensuring we maintain a safe and secure network for road users and businesses. Given spending pressures across DfT and wider Government, we will need to consider how we balance these requirements with the need to put the public finances on a sustainable path in the medium term.

I understand that the Project cannot be recorded "off balance sheet" in accordance with the relevant ESA 10 accounting rules, as would be expected for any PFI/PPP and as was that case for the 2010 PFI. That is because (i) the proportion of capital work to be undertaken relative to the value of the asset on completion of the Project is insufficient, and (ii) insufficient risk is transferred to the private sector. Therefore, in accordance with ESA 10 accounting rules, DfT would be required to record a CDEL expense (equivalent to the discounted value of the lifetime grant element of capital works within the contract) in order to demonstrate the transfer of risk to your department. Your department has estimated this at £200-£250m, which as your department's Investment, Portfolio and Delivery Committee report states, would require significant CDEL budget cover, making this unaffordable for DfT. With this in mind, and the need to effectively control public spending in the current fiscal climate, I am therefore not content to approve of the re-procurement of a long-term replacement contractor.

However, I am conscious of the points you make in your letter on the importance of investing in cost-effective local roads maintenance. Noting your department has already been allocated c.£50m p.a. over SR21 for Birmingham local roads maintenance, I am content for this existing SR21 funding to be incorporated in to the CRSTS settlement for West Midlands Combined Authority (WMCA) through to the end of the SR21 period. Our officials should work together on this, including any required budget exchanges necessary to deliver this change, with any budgetary decisions to be signed-off by my officials.

We should then determine the future arrangements for funding local roads maintenance in the West Midlands in the round at the next SR, as part of the forthcoming Single Settlement for WMCA".

83. On 29 November 2023, the Claimant was invited to a virtual meeting with DfT officials, at which the Claimant was informed that the Defendant had decided to withdraw PFI credit funding for the PFI Project. On 30 November 2023, on receipt of the Decision the Claimant was notified in writing of the Defendant's stated reasons for withdrawal of PFI credit funding.

Legal framework

Statutory arrangements

84. Paragraph 1 of Section H of the Guide stated the legal basis on which the government provides grant funding for PFI projects –

*"**Legal basis of payments.** Grant for all projects other than those which involve HRA housing will be paid under section 31 of the Local Government Act 2003 to*

receiving authorities listed in Local Government PFI Grant Determinations".

85. Section 31 of the Local Government Act 2003 **["the 2003 Act"]** confers the power to pay a grant to a local authority towards its expenditure –

> *"31(1) A Minister of the Crown may pay a grant to a local authority in England towards expenditure incurred or to be incurred by it".*

86. Subsections 31(3)-(6) of the 2003 Act provide –

> *"(3) The amount of a grant under this section and the manner of its payment are to be such as the person paying it may determine.*
>
> *(4) A grant under this section may be paid on such conditions as the person paying it may determine.*
>
> *(5) Conditions under subsection (4) may, in particular, include—*
>
> > *(a) provision as to the use of the grant;*
> >
> > *(b) provision as to circumstances in which the whole or part of the grant must be repaid.*
>
> *(6) In the case of a grant to a local authority in England, the powers under this section are exercisable with the consent of the Treasury".*

Legitimate expectation – principles and approach

87. I was referred by counsel to a substantial number of authorities on legitimate expectation, both for the principles upon which the law is founded and the application of those principles. A recent review of those principles at the highest level of authority is to be found in the judgment of Lord Kerr at [55] to [64] in Re Finucane's application [2019] 3 All ER 191, beginning with the classic statements of principle by Bingham LJ in R v Board of Inland Revenue ex parte MFK Underwriting Agencies Ltd [1990] 1 All ER 91, 109-110 and Lord Woolf MR in R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at [37]. Having considered these and other authorities, at [62] Lord Kerr said –

> "*62. From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it".*

88. In R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 at [28], Laws LJ said –

> *"Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power:*

see for example Ex parte Coughlan paragraphs 67 ff, Ex p Begbie [2000] 1 WLR 1115, 1129F – H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker's stance or perception…".

89. The party claiming a legitimate expectation bears the onus of establishing that there is a sufficiently clear and unambiguous promise or undertaking, sufficient to give rise to a legitimate expectation. In Paponette v Attorney General of Trinidad and Tobago [2012] 1 AC 1 at [37] Lord Dyson said:

"The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too."

90. If it is established that there has been such a promise, the next question is whether departing from that promise and/or acting inconsistently with it amounts to an abuse of power. In Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363 at [68] Laws LJ spoke of –

"…the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. … Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances".

91. In R (Bibi) v Newham LBC [2002] 1 WLR 237, at [19] the Court of Appeal said that in all legitimate expectation cases, whether substantive or procedural, three practical questions arise –

(1) To what has the public authority committed itself, whether by promise or practice?

(2) Has the public authority acted (or does it propose to act) unlawfully in relation to its commitment?

(3) What should the court do?

92. At [20] to [21] the court made the following observations about the first question –

> *"20. The answer to the first is a question of analysing the evidence - it poses no jurisprudential problems.*
>
> *21. Sometimes, as in the first category of outcome analysed in Ex parte Coughlan [2000] 2 WLR 622 (para. 57) the answer to this first question is dispositive of the case. It seems to us that the present authorities in that group of cases (in particular In re Findlay [1985] AC 318, 338) make it generally appropriate to allocate the issue of legitimacy to this initial question. In other words, if the public body has done nothing and said nothing which can legitimately have generated the expectation that is advanced to the court, the case ends there. It seems likely that a representation made without lawful power will be in this class. In the present case the answer to the first question is not in dispute and is in favour of the applicants".*

93. At [22] to [23] the court said that the second and third questions were interrelated –

> *"22. Two problems face a court in answering these questions. The first is to find one or more measuring rods by which it can be objectively determined whether a certain action or inaction is an abuse of power. The second is what order to make once an abuse of power has been discerned – can the court come to a substantive decision itself or should it send the matter back to the decision taker to decide afresh according to law?*
>
> *23. To a degree the answer to the second depends on the approach one takes to the first. As Laws L.J. pointed out in R v Secretary of State for Education and Employment ex parte Begbie [2000] 1 WLR 1115 at page 1131C 'The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.'"*

94. In Bhatt Murphy at [41] and [42], Laws LJ made the following general observations as to the limits of the doctrine of legitimate expectation –

> *"[41] ...a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in….the entitlement of central government to formulate and re-formulate policy. This entitlement - in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit*

in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult."

[42] But the Court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it had earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate expectation we are now considering – something no less concrete must be found. ....what is fair or unfair is of course notoriously sensitive to factual nuance….".

95. Those observations were cited by Singh J at [59]-[60] in R (Dudley MBC v Secretary of State for Communities and Local Government [2012] EWHC 1729 (Admin), a case about a decision by government to change the way in which it would make payments under the PFI regime in respect of a schools project in the claimant local authority's area. At [77]-[78] in his judgment, Singh J referred to the judgment of Holman J in another case about the PFI regime, R (Luton BC and others v Secretary of State for Education [2011] EWHC 217 (Admin) and said –

"77. Furthermore, at paras. 80-81, Holman J accepted submissions made by counsel for the Secretary of State in that case. In particular he accepted the submission that governments may change at general elections, and even if there is an expectation that a given government will carry through its policies and assurances, there can be no legitimate expectation that a later and politically different one will do so, absent the kind of binding commitment that a promissory note contains. He also accepted the submission that:

> *"It was plainly implicit that the delivery of a project of such a scale, duration and ambition [as BSF] would always be conditional upon the availability of the requisite finance and the policy decisions of the government of the time. Had it been otherwise the present government's predecessor would have been guilty of unlawfully fettering a successor government."*

78. There are similar views expressed by Laws LJ in the Bhatt Murphy case, at para. 41, which I have already cited. It seems to me that such views reflect important constitutional principles as to the proper role of the courts in our democratic society and have particular resonance in the context of public finances, in which the Crown is responsible to the House of Commons in particular".

Ground 1 – Substantive legitimate expectation

96. The main issue arising under ground 1 is whether the PFI Credit Letter and the terms of the Guide gave rise to a substantive legitimate expectation that the Defendant was

able lawfully to terminate or to reduce the level of PFI credits in support of the PFI Project only if he found that there were exceptional circumstances to justify doing so, as referred to in paragraph 2.1 of Section G of the Guide.

Submissions

97. For the Claimant, Mr Peter Oldham KC drew attention to the PFI Credit Letter which stated –

> *"Termination or variation of a PFI contract could in some circumstances (as set out in the Local Government PFI Project Support Guide) lead the Government to reassess the level of revenue support based on the extent to which the anticipated capital investment is delivered…"*

The relevant section of the Guide was Section G. Paragraph 2.1 of Section G of the Guide provided that the Government reserved the right to stop support *"in exceptional circumstances"*. Mr Oldham KC characterised the terms of the PFI Credit Letter and the Guide as "the Conditions". It was submitted that the Conditions provided that the PFI Credits could be terminated or reduced by the Defendant only on the basis of a decision, lawfully made, that there were exceptional circumstances to justify doing so.

98. Mr Oldham KC submitted that the terms of the PFI Credit Letter and paragraph 2.1 of Section G of the Guide were clear and unambiguous. The language was certain and unequivocal. There was no relevant qualification. The effect of the "Conditions" was clear. The Defendant had promised that the PFI Credits would continue to be paid as they fell due save in the event of exceptional circumstances within the meaning of the Guide being established which justified resiling from that promise. There was therefore no difficulty in understanding to what the Defendant had committed himself.

99. Moreover, it was submitted that, although unnecessary to found the legitimacy of the Claimant's substantive expectation, the Claimant had relied heavily on the Defendant's clearly stated commitment that the PFI Credits would be maintained in accordance with the PFI Credit Letter. It was that commitment which had given the Claimant the reassurance it needed to enter into its long-term commitment to the PFI Project under the Project Agreement. The PFI Project was of very high value and involved many liabilities and commitments over the course of its 25-year term. Since the departure of Amey in 2019, in continuing reliance on the "Conditions" the Claimant had devoted very substantial expenditure and resources towards the procurement of a replacement sub-contractor, the preparation of its business case and the expensive interim contractual arrangements for highway maintenance services.

100. Mr Oldham KC said that the commitment had been given in the PFI Credit Letter by the Defendant to the Claimant. The Guide was directed to a defined and limited class of public authorities which entered into PFI arrangements. The subject matter was quasi-contractual in nature, rather than macro-economic and political in the sense described by the court in Ex parte Begbie. For all these reasons, a substantive legitimate expectation had arisen. It was clear from the evidence of Mr Fidler that the Defendant had failed to give any consideration to that expectation, let alone to make any judgment as to whether the circumstances against which the Defendant made the Decision were exceptional. The Defendant had acted unlawfully in failing to give

effect to the Claimant's substantive legitimate expectation and the Decision should be quashed.

Discussion

101. On the practical approach proposed by the court in Bibi's case, the first question is to ask what the Defendant committed to by virtue of the PFI Credit Letter and the Guide. It is those documents which are said by the Claimant to be the foundation for a clear and unambiguous promise that the PFI Credits would continue to be paid as they fell due, save in the event of exceptional circumstances within the meaning of the Guide being established which justified resiling from that promise.

102. The main purposes of the PFI Credit Letter were to confirm the issue of PFI credits for the PFI Project following completion of the Project Agreement and to set out the conditions for payment of the grant. However, the PFI Credit Letter did include guidance on the Government's approach to termination and/or variation of a PFI contract and referred the Claimant to the Guide for further advice on that topic. It is correct to say that the Government's advice on its approach to termination or variation of a PFI contract was set out in Section G of the Guide.

103. It was reasonably to be expected that the Claimant would rely on the guidance given both in the PFI Credit Letter and in Section G of the Guide on the topic of termination or variation of PFI contracts. The Claimant would have relied on Section G of the Guide as the Government's authoritative advice on the potential impact of such changes on the continuing payment of revenue support in the form of PFI credits.

104. In my view, the Government intended that the Claimant should rely on Section G of the Guide for that purpose. The Guide was produced for the purpose of giving advice to local authorities seeking central government support for PFI projects. It was to be expected that local authorities would proceed on the basis of the policy and practice stated in the Guide. Moreover, the Guide had been revised in order to give more detailed guidance on the possible re-assessment of support, in cases where the PFI contract was terminated or subject to major variation following its completion and whilst the project was in operation. It was reasonably to be expected that local authorities would place reliance on that more detailed guidance in Section G of the Guide. It was the Government's intention that the Claimant should do so, since particular reference was made to that more detailed guidance in the final paragraph of the PFI Credit Letter.

105. The critical question, therefore, is whether the PFI Credit Letter and Section G of the Guide were properly to be read as offering the clear and unambiguous promise or commitment for which the Claimant argues.

106. In my judgment, read together (as was clearly the Government's intention) the PFI Credit Letter and the opening paragraph of Section G of the Guide stated the following policy in respect of termination or major variation of PFI contracts after financial close and the issue of PFI credits –

(1) The Government had a policy of support for good PFI projects.

(2) In recognition of the long-term nature of PFI contracts, the Government's policy was to maintain revenue support for PFI projects in the long term.

(3) However, that support was not guaranteed.

(4) Where an existing PFI contract was either terminated or subject to major variation (including extension), the Government would wish to review the new arrangements or changed circumstances before deciding whether it would continue to provide the revenue support for the PFI project at its committed level.

(5) In the case of termination or major variation of a PFI contract, the local authority must therefore report the proposed arrangements for termination or variation to the relevant department of government before proceeding with it.

107. That policy sits comfortably with the constitutional position referred to by Singh J at [77]-[78] in Dudley to which I have referred in paragraph 95 above. Having outlined that policy position in the opening paragraph of Section G, the Government's purpose in promulgating the numbered paragraphs of Section G was to offer practical advice to local authorities. That advice consisted, at least in part, of identifying scenarios in which termination or major variation of a PFI contract may arise and indicating how the sponsoring government department was likely to manage those scenarios. In other words, the purpose and intention of Section G of the Guide was to explain how the policy which I have outlined in paragraph 106 above was likely to be applied in those scenarios.

108. In short summary, the policy itself was stated in the first paragraph of Section G –

> *"Changes to the contract, including possibly termination, may occur after it has reached financial close and the PFI credit has been issued. Any major variation must be reported to the sponsoring department who will consider whether there are PFI support implications".*

The advice given in the following, numbered paragraphs of Section G in relation to "Increases" and "Decreases" was intended to inform local authorities of the likely *"PFI support implications"* in the circumstances of the scenarios therein considered.

109. It is important to note that the final paragraph of the PFI Credit Letter was in substantially similar terms to the first paragraph of Section G of the Guide. In both paragraphs, the Government's policy was clear: in the event of termination or major variation of the PFI contract, the Government would wish to review the position in light of that termination or major variation and to decide whether to maintain revenue support for the PFI project. That policy applied both to cases in which the change in contractual arrangements would result in an increase and decrease in the level of capital investment delivered under the contract.

110. On the basis of that analysis, paragraphs 2.1 ff. of Section G are to be read and understood as offering advice and guidance on the application of that policy in circumstances in which termination or variation of a PFI contract led to a decrease in the capital value of the project. None of those paragraphs were intended to be read as

an unqualified commitment by the Government as to how it would proceed in the circumstances of any actual, given case.

111. I do not accept that any local authority reading those paragraphs would reasonably have understood them as stating such an unqualified commitment. On the contrary, those paragraphs are expressed in language which is deliberately qualified in its terms and reserves judgment to the sponsoring department on consideration of the circumstances of the particular case –

> *"(2.1) Government reserves the right to stop support in exceptional circumstances . Such circumstances could be where…"*
>
> *"(2.2) Termination or variation of the contract… could result…The interpretation of whether a reduction is significant or not is a matter for the sponsoring department, and should always be considered on a scheme-by-scheme basis after taking into account all the relevant circumstances".*
>
> *"(2.3) In some cases the nature of the assets may change…In such circumstances an authority should notify the sponsoring department who will consider whether the alternative proposals are acceptable to them".*
>
> (my emphases).

112. Paragraph 2.1 of Section G of the Guide is headed *"Exceptional circumstances"*. It states that the Government reserves the right *"to stop support"* in such circumstances. It goes on to give an example of circumstances in which the Government might judge it to be appropriate to stop support (*"Such circumstances could be where…."*). It is clear that the second sentence is intended to exemplify *"exceptional circumstances"*. It is not intended to provide a definition of such circumstances or an exclusive list of those cases of termination or variation of a PFI contract which will be judged to be exceptional.

113. Paragraph 2.1 then states –

> *"As a first step, sponsoring departments will therefore consider the circumstances of any major variation in this light."*
>
> (my emphasis)

The words which I have emphasised are important. They make clear that in any given case, the sponsoring government department will initially consider whether termination or variation of the contract justifies the immediate or early withdrawal of support. Such a peremptory response is, however, likely to be appropriate only in exceptional circumstances of the kind illustrated by the example given in that paragraph. Even then, the local authority would not be left in a position in which it was unable to meet its accrued liabilities.

114. It does not, however, follow that paragraph 2.1 of Section G of the Guide was to be understood as a promise or commitment that, in the absence of exceptional circumstances, the Government's support for the PFI project would be maintained, whether at the existing or a reduced level of grant funding. Section G of the Guide made no such promise or commitment. Instead, the recurring theme was that

termination or major variation of the contract might result in re-assessment of support for the project. That this was the Government's position was made clear to the Claimant in the PFI Credit Letter, which not only referred to the Guide but also stated that support throughout the lifetime of the project *"cannot be guaranteed"*.

115. I cannot, therefore, accept that the PFI Credit Letter and paragraph 2.1 of Section G of the Guide gave rise to the substantive legitimate expectation for which the Claimant contends. It was not the policy of the Government that PFI credits would be withdrawn from a project following termination or major variation of the contract only in exceptional circumstances as described in that paragraph of Section G of the Guide. The Government's policy was as stated in paragraph 106 above. Paragraph 2.1 of Section G of the Guide made no promise or commitment, still less a clear, unqualified and unambiguous promise or commitment, that the sponsoring department would withdraw PFI credits only in exceptional circumstances as described in that paragraph. Nor did the PFI Credit Letter communicate such a promise or commitment to the Claimant.

116. On a correct understanding of paragraph 2.1 of Section G of the Guide read in its context, the representation or commitment communicated by the Government by that paragraph was no more than as follows. Upon being notified of the actual or anticipated termination or major variation of a PFI contract, the first question for the sponsoring department would be whether the circumstances were exceptional, such as to warrant withdrawing support for the project immediately. If the sponsoring department did not take that view, then that department would go on to consider whether, in line with the Government's policy, arrangements could be made to maintain support for the PFI project for its lifetime, notwithstanding termination or major variation of the contract.

117. That is essentially how both DfT and the Claimant proceeded in the present case, in anticipation of the Claimant's settlement with Amey.

118. As I have already said, in December 2019 officers reported to the Claimant's Cabinet in anticipation of reaching a settlement with Amey. I have set out the relevant extracts from the Corporate Director, Economy's advice in paragraph 39 above, which included the following –

> *"Under the conditions of the PFI grant the Council is required to report any proposed major variation to the contract to DfT for prior approval, in their capacity as the sponsoring government department. The changes proposed constitute a major variation and DfT require a full business case, which, if supported, will then be submitted for consideration (etc)…"*.
>
> (my emphasis)

119. In the letter of 16 May 2019, DfT stated *"we stand by the terms of our existing PFI agreement"*. In other words, this was not an exceptional case which, in the view of the sponsoring government department, merited the immediate or early withdrawal of PFI support. On the contrary, that letter clearly contemplated and, in principle, supported the maintenance of Government support for the PFI Project in the long-term, securing *"a new sub-contractor to cover the remaining 15 years of the agreement"*.

120. DfT's stated intention was consistent with the policy outlined in both the PFI Credit Letter and the opening paragraph of Section G of the Guide –

> *"Our intention is to continue paying PFI grant at the current rate, subject to value for money. We understand that the Council may also be considering changes to the contract, and it is of course at liberty to submit other proposals for support from new and existing funding streams from Government. DfT will consider such changes on their merits, provided always that the business case demonstrates continued value for money".*

Conclusions

121. Ground 1 is clearly arguable and I grant permission. For these reasons I have given, however, ground 1 is rejected. The answer to the first question posed at [19] in Bibi is dispositive of the Claimant's case on ground 1. Applying the approach stated by Lord Dyson at [37] in Paponette, the Claimant has not shown that the PFI Credit Letter and the terms of the Guide gave rise to a substantive legitimate expectation that the Defendant was able lawfully to terminate or to reduce the level of PFI credits in support of the PFI Project only if he found that there were exceptional circumstances to justify doing so, as referred to in paragraph 2.1 of Section G of the Guide.

122. Given my conclusions on ground 1, it is unnecessary for me to address the submissions advanced by Ms Sarah Hannaford KC on behalf of the Defendant, in support of the Defendant's argument that the Claimant had waived the right to rely upon the legitimate expectation for which it contended.

Ground 2 – failure to have regard to the Claimant's substantive legitimate expectation

123. Ground 2 is founded on the establishment of the Claimant's substantive legitimate expectation contended for under ground 1. Given my conclusions in relation to ground 1, the Claimant's argument under ground 2 falls away.

124. In paragraph 71 of his first witness statement, Mr Fidler indicates that there was no mention of paragraph 2.1 of Section G of the Guide during the course of discussions between the parties which followed DfT's letter of 16 May 2019. I find that entirely unsurprising. On the basis of my own understanding of the Government's policy and of the advice given in paragraph 2.1 read in its proper context, it would have been highly surprising if either party had suggested that paragraph 2.1 had any relevance to the position that needed to be addressed following the withdrawal of Amey from the Project Agreement. This was plainly not an exceptional case in which the Defendant would have been justified in withdrawing financial support at the outset.

125. Both parties proceeded on the basis of the Government's policy as stated in the PFI Credit Letter and Section G of the Guide, which I have explained in paragraph 106 above. From 2019 onwards, DfT proceeded in accordance with the Government's policy as stated in the PFI Credit Letter and Section G of the Guide.

126. Ground 2 is arguable but is rejected.

Ground 3 – The Decision does not establish exceptional circumstances

127. Ground 3 also turns on the existence of the Claimant's substantive legitimate expectation contended for under ground 1. Again, this ground is arguable, but given my conclusions in relation to ground 1, there was no need for the Defendant to justify the Decision on the grounds of exceptional circumstances within the scope of paragraph 2.1 of Section G of the Guide, in order lawfully to withdraw his support for the PFI Project. For those short reasons, ground 3 must be rejected.

128. Had I concluded that the Claimant did enjoy the substantive legitimate expectation contended for under ground 1, I would not have accepted the Defendant's contentions that I should refuse relief on the basis that withdrawal of PFI credits was nevertheless justified in this case as the circumstances were exceptional. It would have been for the Defendant, and not for the court, to make the judgment whether there were indeed exceptional circumstances within the scope of paragraph 2.1 of Section G of the Guide which justified the termination of the PFI credits.

129. In his first witness statement, Mr Fidler states his view that the circumstances of this case following the exit of Amey and the resulting consequences amounted to exceptional circumstances, even if they did not fall within the scope of the examples given in paragraph 2.1 of Section G of the Guide.

130. In my judgment, that evidence misses the point. The Claimant's case for a substantive legitimate expectation was explicitly founded upon the need for the Defendant to justify withdrawing PFI credits within the scope or terms of the PFI Credit Letter and paragraph 2.1 of Section G of the Guide, as the Claimant argued that it had understood them to be. I have found that, on a true analysis, neither the PFI Credit Letter nor the Guide, read together, created the substantive legitimate expectation for which the Claimant argued. But had I found that they did so, the question whether the Defendant was able to justify the Decision without departing from that expectation could not properly be answered after the event by an official, simply by praying in aid the circumstances of the case. See Public and Commercial Services Union (and others) v Minister for the Cabinet Office [2017] EWHC 1787 (Admin) DC at [91].

131. Conversely, had the Defendant been advised that there were circumstances which justified departing from the Claimant's legitimate expectation, it would have been incumbent upon the Defendant to produce evidence to show that he had addressed the specific benefit which that expectation conferred upon the Claimant and, in light of that consideration, had evaluated the consequences of departing from it in making the Decision to withdraw financial support for the PFI Project. See Nadarajah at [68] (Laws LJ). It would plainly be suspect for the court to find that the Defendant had done so on the basis of evidence given after the event by one of his officials.

Ground 4 – Procedural legitimate expectation/ fairness

The issue

132. The issue under this ground is whether the Defendant failed to offer the Claimant a fair opportunity to be heard and to make representations in respect of those matters upon which the Decision was based.

Submissions

133. On behalf of the Claimant, it was submitted that the Decision was made in breach of the Defendant's duty to act fairly or a procedural legitimate expectation that the Claimant would be consulted on the matters upon which the Decision was ultimately founded.

134. Mr Oldham KC drew attention to Laws LJ's statement at [42] in Bhatt Murphy –

> *"But the Court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it had earlier conducted itself… What is fair or unfair is of course notoriously sensitive to factual nuance….[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage".*

135. At [49] in Bhatt Murphy, Laws LJ continued –

> *"…for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focused. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult".*

136. Those principles were applied by Holman J in finding that there had been an unfair procedure in Luton –

> *"93. …. I have rejected the argument that the claimants can have had a legitimate expectation that all or any of their stopped projects would necessarily continue; but that does not diminish that the five claimants all had their recent OBC approval letters and were continuing not only to act and spend in reliance upon them, but actively to engage in continuing dialogue with the department or PfS about them. It is, in my view, relevant also that the sums involved were very large: a hundred or more millions of pounds for most of these claimants. While the scale of the proposed expenditure may have added to the imperative to make substantial savings, it did also, in my view, fortify the duty to consult.*
>
> *94. In my view the impact of the department's past conduct on the five claimants was indeed "pressing and focussed" and change could not lawfully be made abruptly without some prior consultation".*

137. In Dudley, at [65] Singh J had also applied those principles –

> *"…although the source or origin of that decision is a change of policy by a public authority, it is not the change of policy itself that the claimant is entitled to complain about but its application to a particular claimant who has a legitimate expectation that a benefit or advantage will continue but which is now being withdrawn. This is because there is an element of retrospectivity in such a case. If a public authority simply changed its policy for the future, it is doubtful that anyone could complain about lack of consultation. However, if a particular*

> *person or small class of identifiable persons have enjoyed a benefit or advantage under the previous policy, they may, depending on the circumstances, have a claim to procedural fairness before the decision is made to apply the new policy to them and so to withdraw or discontinue that benefit or advantage".*

138. Mr Oldham KC submitted that those principles applied to the present case. The impact of the Defendant's past conduct on the Claimant had been *"pressing and focused"*. The Claimant was a particular person who had enjoyed a benefit under the Government policy of long term support for PFI projects. DfT's asserted position since the Amey settlement and the close and positive discussions which began with DfT's letter of 16 May 2019 had been consistently supportive of the Claimant's development of its business case for the re-structuring of the PFI Project, and of the procurement of a replacement sub-contractor under the Project Agreement. That had remained the position until the Claimant submitted its FBC in August 2023.

139. Then, unknown to the Claimant, the Government changed its position. From late September 2023 at the latest, it was known both within HMT and DfT that the question of accounting treatment was now to stand decisively against approval of the Claimant's proposals. Moreover, the question of risk transfer was now also raised for the first time within Government as a determinative factor against approval of the Claimant's proposals. Finally, by virtue of the change in classification of the PFI Project to "on balance sheet", the Claimant's proposals were now to be rejected as being unaffordable.

140. None of these matters had been advanced as determinative in previous discussions with the Claimant and no attempt was made to raise or to communicate them to the Claimant before the Decision was promulgated on 30 November 2023. The Claimant was accordingly denied the opportunity to respond to these issues in the light of the greatly heightened and ultimately determinative significance which they had for the Decision. This was unfair and in breach of the Claimant's procedural legitimate expectation that it would be given the opportunity to make its representations on those matters which were likely to be determinative of the outcome of the process which had begun shortly before the Amey settlement in June 2019.

141. In response, it was submitted on behalf of the Defendant that this case was clearly distinguishable on the facts from Luton and Dudley. In the present case, there had been a prolonged and sustained process of consultation with the Claimant. There had been discussion of all matter bearing upon the final decision to be made by the Defendant whether or not to support the Claimant's business case for the restructuring of the PFI Project. In particular DfT had made clear to the Claimant that balance sheet classification, the level of risk allocation and transfer and affordability were matters which would need to be evaluated as essential elements of a final decision. Moreover, DfT had repeatedly emphasised the need to obtain the approval of HMT.

142. Insofar, therefore, as the Defendant was under a duty to act fairly at common law or on the application of the principles of procedural legitimate expectation stated in Bhatt Murphy and applied to very different facts in Luton and Dudley, he had discharged that duty and fulfilled that expectation. The Claimant had been consulted at a formative stage and had the opportunity to make its case for the continuation of Government support for the PFI Project, with ample knowledge and understanding of the matters which the Defendant and HMT were likely to take into account and to

evaluate in reaching a final decision whether to continue to support that project in line with the Claimant's business case.

Conclusions

143. This ground is clearly arguable. I have found the arguments on this ground of challenge to be finely balanced. However, in the end I have come to the clear conclusion that on this ground the Claimant's argument should succeed. In my view, there was a clear shift in the Government's position following the Claimant's submission of its FBC in August 2023, which was not made known to the Claimant and upon which the Claimant had no opportunity to reflect or to engage, but which very significantly affected the outcome of the process upon which both parties had embarked in May 2019. In my judgment, in the light of what had gone before, in particular the close and open discussion which DfT had rightly encouraged since its letter of 16 May 2019, fairness demanded that the Claimant be given the further opportunity to engage and to respond in the light of the clear shift in the Government's position.

144. Since May 2019, there had been extensive engagement between the parties at each stage as the Claimant developed its proposals to procure a replacement sub-contractor following the settlement with Amey and prepared its business case for the Defendant's continued support for the PFI Project.

145. During that period of engagement and discussion between the Claimant and DfT, the Claimant had repeatedly raised the question of accounting treatment under ESA 2010 and the likelihood that the PFI Project would need to be treated as "on balance sheet" under the new rules. The Claimant had sought reassurance from DfT that accounting for the PFI Project as "off balance sheet" would not be a "red line" requirement for the Defendant. There had been no suggestion that balance sheet classification would be the key issue for Government in deciding whether to continue to support the PFI Project. Rather, DfT's response had been that it was merely one factor which would be assessed when the business case was evaluated as a whole.

146. It was to be noted that when the Defendant wrote to the Chief Secretary to the Treasury on 26 April 2023 seeking approval to move to FBC (following IPDC's approval of the Claimant's UOBC in late January 2023), he argued that the change in accounting classification should not affect the decision to continue to support a PFI Project which he considered to be worthy of approval.

147. Nor had HMT stated to the Claimant that balance sheet classification was the key issue which was likely to be determinative of the Government's decision whether to continue to support the PFI Project. When HMT commented on the Claimant's UOBC in June 2023, it outlined three areas of concern. None of those concerned the question of balance sheet classification. There was no discussion of that issue at the meeting subsequently held between the Claimant, HMT and DfT. Instead, the focus was on the three issues raised by HMT through earlier email correspondence. It was on responding to those three issues that the Claimant, understandably, focused in its detailed written response to the points of concern raised by HMT provided to DfT on 6 July 2023.

148. As the Claimant stated when submitting its FBC to DfT on 10 August 2023 –

> *"The FBC has been developed in line with all the Department's and HM Treasury's additional requirements as communicated to us. This collaboration has been important in developing a successful restructuring of the PFI Contract and re-procurement of the operating sub-contract, following the settlement with Amey".*
>
> (my emphasis)

149. The Claimant's submission of its FBC effectively brought to an end the discussions between the Claimant, DfT and HMT in relation to the proposed re-structuring of the Project Agreement and the PFI Project. Aside from increasingly urgent chasing letters from the Claimant to DfT asking for progress reports, the next following substantive communication received by the Claimant was the invitation to the virtual meeting with DfT on 29 November 2023, followed by receipt of the Decision on 30 November 2023.

150. The reasons given in the Decision were essentially those that HMT officials had communicated internally to DfT officials on 20 September 2023. They were essentially those that were the basis for the Chief Secretary's response to the Defendant on 28 November 2023. None of those reasons – the change in balance sheet treatment, the diminution in risk transfer and the unaffordable nature of the revised PFI proposal to DfT due to the upfront CDEL charge – had been communicated to the Claimant as key or insurmountable obstacles to approval during the long history of discussion since May 2019. They had been addressed by the Claimant in its extensive preparatory work without it being suggested that the results were dangerously deficient.

151. It is to be noted that Ministers had themselves questioned in early November 2023 whether there were other options which might be explored with the Claimant prior to a final decision. In my view, their instincts were procedurally correct on that point. Fairness and the Government's conduct since 2019 demanded that the Claimant be given the opportunity to engage following the change in Government's position which took place in September 2023, without being communicated to the Claimant, and which was the basis for the Decision.

152. The Defendant contended that the Claimant has not identified any further, relevant matters or representations which it could have made which might have materially affected the outcome of the Decision. In my judgment, the court should be very slow to accede to that argument, particularly in circumstances where the Claimant had invested so heavily in the preparation of its business case and had a detailed and highly developed understanding of the evidence. One of the key complaints urged upon the court by the Claimant was that the Defendant's criticisms of the adequacy of risk transfer under the revised PFI proposals in Scenario 2 were based on a misunderstanding of the position. That is a paradigm example of a matter which had not been communicated to the Claimant as a key source of concern following discussions in June 2023, but to which as Mr Fidler explains in some detail in his second witness statement, considerable attention had already been given during earlier reviews of the Claimant's business case (including seeking advice from another Government agency, the Infrastructure and Projects Authority, at the behest of HMT). Had the Claimant been informed in September 2023 that this issue had now emerged

as a key determining factor against its restructuring proposals, it seems highly likely that the Claimant would have had a good deal to say about it.

153. Another example of a matter on which, had the Claimant had the opportunity, it might realistically have been in a position to influence Ministerial thinking was the question of affordability. The Decision proceeded on the basis that the addition of the revised PFI proposals to the departmental balance sheet was unaffordable when set against existing spending commitments. Whilst that approach is of course understandable, it does not follow that the Claimant would have enjoyed no prospect of securing some reconsideration of spending priorities either at national or regional level, had the Claimant been offered the opportunity to try to do so. The tactical update notes produced for the benefit of Ministers in early November 2023 clearly record Ministers' willingness at that late stage to explore alternative options before a final decision was made by the Defendant.

154. It was in response to that request by Ministers that DfT officials stated that, even if the Claimant's proposals were to be rendered affordable by accommodating the up-front CDEL cost, HMT had *"raised wider concerns"*. It is unclear precisely what, at that time, those wider concerns were. Certainly, they were not shared with the Claimant, notwithstanding the Claimant's detailed response to HMT's communicated concerns in July 2023 and the submission in August 2023 of the Claimant's FBC. Had those wider concerns been shared with the Claimant in early November 2023, it is not fanciful to suggest that the Claimant would have sought to address them, as had been its consistent practice since May 2019.

155. In conclusion, in my judgment the Claimant is correct in its contention that the Defendant acted unfairly, in all the circumstances of this case, in not offering the Claimant a further opportunity to engage and make representations specifically in response to those factors which emerged for the first time within Government as determinative in September 2023. Ground 4 therefore succeeds.

Ground 5 – Failure to have regard to relevant considerations and irrationality

156. Under this ground of challenge, the Claimant either reformulates, as *Wednesbury* errors, contentions which have already been advanced under previous grounds; or seeks permission to amend its claim to advance further complaints about the inadequacy of the Defendant's consideration of potential alternative options to the Decision.

157. Insofar as the Claimant seeks permission to recast as a *Wednesbury* error its complaint about the failure of the Defendant to have regard to the terms of the PFI Credit Letter or paragraph 2.1 of Section G of the Guide, the argument adds nothing to earlier grounds. Insofar as the Claimant seeks permission (including by way of amendment of its statement of facts and grounds) to allege as *Wednesbury* errors the Defendant's failure to have proper regard to the budgetary implications of the change in balance sheet treatment, the degree of risk transfer and of affordability, those alleged failings relate to matters which have informed my conclusions under ground 4 above, on which the Claimant has succeeded.

158. The Defendant's position is that these complaints are not reasonably arguable as grounds of challenge to the Decision in their own right. I accept that submission. It is

beyond reasonable dispute that the classification of the PFI Project under ESA 2010 rules, accounting treatment, the degree of risk transfer and the affordability of the Claimant's proposals were material considerations to the Defendant's decision whether to continue support for the PFI Project. As the Decision itself shows, he took those matters into account for that purpose. There is no arguable basis for the contention that, having regard to those considerations, the Decision was irrational. That is a quite separate issue to that raised under ground 4.

159. In the light of those conclusions, although I would give the Claimant permission to make the proposed amendments to its statement of facts and grounds in advance of deciding the question of permission, I would refuse permission on this ground of challenge.

Ground 6 - Reasons

160. This ground of challenge was not advanced by the Claimant in its statement of facts and grounds when the Claim was originally formulated. As formulated in the list of issues, the question raised is whether the Decision lawfully recorded and communicated the Defendant's reasons for his decision not to approve the Claimant's revised proposals for the PFI Project as outlined in the UOBC.

161. As developed in submissions, there were essentially two aspects to the Claimant's complaint.

162. Firstly, it was contended that the reasons given in the Decision failed to address the Claimant's substantive legitimate expectation and the question whether there were exceptional circumstances within the scope of paragraph 2.1 of Section G of the Guide to justify the withdrawal of PFI credits. In the light of my conclusions on ground 1, that contention is not arguable.

163. Secondly, it was contended that the reasons given in the Decision did not properly disclose the real basis for the decision, which was that the Defendant wished to end the Government's long-term commitment to the PFI Project. I do not consider that there is any merit in that contention. The second paragraph of the Decision gave a succinct and clear explanation for the Defendant's decision as communicated in the final sentence of the first paragraph. That explanation reflected the interdepartmental and internal DfT discussions which had taken place between September and November 2023. I find no arguable basis for questioning the propriety or adequacy of those stated reasons. They were proper, adequate and intelligible.

164. I am willing to allow the Claimant to amend its claim so as to include the reasons challenge, but refuse permission on this ground.

Delay

165. The Defendant contended that I should refuse permission for the claim to proceed on the grounds of delay. I reject that contention. It was founded upon the submission that it should have been obvious to the Claimant as early as its receipt of DfT's letter of 16 May 2019, and in any event no later than 2021, that the Defendant did not recognise the existence of the substantive legitimate expectation alleged to have been created by the PFI Credit Letter and paragraph 2.1 of Section G of the Guide. DfT officials had

made clear both in correspondence and in discussions that the Defendant's assessment of the case for continued support for the PFI Project following the settlement with Amey would be guided by the approach set out in the letter of 16 May 2019. There was no suggestion that the Defendant would only withdraw support in exceptional circumstances within the scope of paragraph 2.1 of Section G of the Guide.

166. I do not accept these submissions. In my judgment, it is unrealistic to argue that the Claimant was in a position to pursue its claim for judicial review in advance of receiving the Decision on 30 November 2023. Until that point, the Defendant's position as communicated both in correspondence and through discussion between officials had been essentially positive and supportive of the Claimant's preparation of its business case for its revised proposals for the PFI Project and re-procurement of a replacement sub-contractor under the Project Agreement. The Claimant had no obvious reason to challenge the validity of the Defendant's approach to his decision on those matters until the Decision was communicated to it on 30 November 2023. Thereafter, the Claimant acted swiftly to assert it claim.

Disposal and Relief

167. I grant permission on grounds 1 to 4 inclusive and refuse permission on grounds 5 and 6. Grounds 1 to 3 fail. Ground 4 succeeds.

168. The Defendant submitted that I should refuse relief on ground 4 on the basis that section 31(3C) of the Senior Courts Act 1981 applies. I do not accept that submission. In the light of paragraphs 152 to 154 above, I am by no means confident that the Decision would have been substantially the same had the Claimant had a proper and fair opportunity to respond to the matters which emerged only in September 2023 as the determinative factors in Decision.

169. I shall make an order quashing the Decision on ground 4 only.