

NOTES OF HDV HIGH COURT CASE

HIGH COURT HEARING 25TH AND 26TH OCTOBER 2017

**IN THE HIGH COURT OF JUSTICE
CO/3713/2017**

**QUEEN'S BENCH DIVISION
PLANNING COURT**

**BETWEEN: GORDON PETERS
(ON BEHALF OF THE STOP THE HDV CAMPAIGN GROUP) Claimant**

-and-

LONDON BOROUGH OF HARINGEY Defendant

-and-

LENDLEASE EUROPE HOLDINGS LIMITED - Interested Party

Heard by

JUSTICE OUSELEY

**MR GIFFIN AND MR BHOSE ON BEHALF HARINGEY,
MR GUADI ON BEHALF OF LEND LEASE,
MR WOLFE ON BEHALF GORDON PETERS AND STOP HDV CAMPAIGN.**

CONTENT:

Day 1 25.10.2017	p4
Claimant's case	p4
Haringey council's defence	p17
Day 2 26.10.2017	p19
Lend lease's case (interested party)	p34
Mr wolfe's response on behalf of gordon peters and stop hdv	p37

EXPLANATORY NOTES:

- This document represents our record of the presentations in the court it is not a perfect record.
- When we know the notes are unclear this is indicated in red.
- When narrative was missed this is indicated by a series of dots.....
- Brackets indicate our own explanatory notes.
- For full understanding of the case complementary reading of skeleton arguments from all parties along with witness statements is advised.

Day 1 25.10.2017

CLAIMANT's CASE

To begin David Wolfe QC presented the case on behalf of Gordon Peters and Stop HDV.

David Wolfe stated that there is concern about the way in which this “once in a lifetime” decision was made, the process followed, Lack of accountability, and the lack of consultation or Equality Impact Assessment.

[He presented the skeleton argument to the judge in which he outlined the concerns of Gordon Peters. They ranged from the magnitude of the HDV, the governance arrangements for the model, its effect on the public purse, the fact that it is a ‘once in a lifetime’ step, the process of negotiation suffering from a lack of transparency and bypassing a democratic process, the possible breach of Human Rights, and the Local Authority’s (LA) disregard of its Public Sector Equality Duty (PSED).]

He pointed the judge to the three bundles and a core bundle and outlined the key contents:

Ground 1: Is it lawful for the Council to set up the HDV as an LLP (rather than a company)

The decision of Cabinet on 3rd July 2017 including a summary of the Officers’ description of the key elements of the arrangements –

[G569] Para 1.3 Contains critical elements in relation to Governance, the Commercial Deal and work programme, the development returns to the Council and information set out in para 1.4 – All NEW information provided to Cabinet at that meeting.

In Para 3.1c Cabinet were asked to approve the HDV based on the proposed structure in the report.

Para 6.3.5 – Implementation and legal documentation described as “Governance arrangements”, for example, as set out in para 6.37 “This part of the Report is describing the governance of the HDV and includes the “Members Agreement” (Development Supplement Note), emphasises the Council’s control over the HDV via its nominees on the HDV Board, and the objectives of the HDV (taken from the Members’ Agreement) and the commercial return”

Para 8.4.9. Section 849 Para 6.2.6 Equality: refers to the Equality Assessment undertaken in 2015, referring to the transfer of commercial property at that point and to “future transfers” (not specific to this HDV) and to future Equality Assessments.

Para 6.2.9 List of appendices, the 1st part is the Legal Agreement, the 2nd part the Strategic Business Plan (Commercial and Financial). Most of which is held in the exempt reports.

Minutes of that meeting (3rd July): state that there were deputations from the Campaign group, that the documents including 1.500 pages had been provided one week prior to the meeting most of which had been redacted.

[D926 item 34] Housing and Regeneration Scrutiny Review, and the Chair of the panel Cllr Ibrahim raises concerns about the magnitude of the information in the appendices that had not been shared with the Scrutiny Panel or done so at a very late stage.

Recommendations of the Report:

[D938] The reasons for the decisions go over several pages include a long summary of a variety of options that include the choice of this particular Development Vehicle, showing it was not simply ticking boxes in relation to the Preferred Bidder procurement process, but that the procurement process was the process by which the scheme was devised. [D942]

[D944] 20th July 2017 Cabinet, following the Call In, sets out the decision of the July Cabinet meeting and [D959] details reasons for reaching a decision – identical to the 3rd July minutes [D950-956]

This report outlines the entire package of projected outcomes that will arise from these decisions.

Ground 1: HDV's constitution as an LLP unlawful

The essence is the question of whether the defendant has the power to do what it wanted to do via an LLP or whether this was required via a Company?

In the report of a case involving London Borough of Hammersmith and Fulham [B34.para10.10] there is a description of the Council's intention to change its LLP to a Company in the light of legal opinions it received. [P28] sets out how it came to trouble them and [para 5 .1] states "a funder had raised questions about the power as an LLP to enter into arrangements for transfers. [D20] Core Bundle, D217 para 7.42] Haringey were aware of this. Haringey Council was alerted to what Hammersmith and Fulham were doing, but was never informed of Hammersmith and Fulham's decision on this (to set up a company rather than an LLP)

Justice Ouseley: Why does it matter that 50/50 arrangement is done through an LLP rather than a Limited Company when there are tax advantages? I cannot see any particular advantage of one over the other.

David Wolfe Response: It matters because of the legal authority to enter into such an arrangement. Parliament's thinking is that when Commercial Agreements are entered into a level playing field is created for all Companies involved.

David Wolfe: The Council will be relying on a section 1 of the Localism Act in order to set up and participate in the HDV. Para 8.36 of the July Cabinet confronts Section 4 and says "In this instance, proposing to set up an HDV for purposes contained in the Members Agreement is a primary purpose and is non-commercial", but there is no "Primary Purpose rule here.

In terms of the law [Tab 10 S.1] Local Authorities have powers to do anything an individual can do subject to certain restrictions and Section 4 (3) refers to where there is a statutory duty to provide something without charge (they can't circumvent the "power").

Section 4 provides the general power to do things as a public authority for commercial purposes only where they are doing things within their general powers.

These are multiple things and one needs to see if they have a commercial purpose and the concern is that they must do them through a Company. There is also a need to look to what will an LA will do through that Company. You don't stop the scrutiny at 'entering into a contract' but need to look at what the Company will be doing. So, the council still have responsibility to continue scrutiny after establishment of a vehicle not just applying it to the setting up.

2000 Localism Act and Section 95 of the 2003 Local Government Act [Tab 8] this

provision may by order, allow a Public Authority to do for commercially purpose that which is within its general powers. This power will only be exercisable through a Company. [Tab 22] he decision of the Court of Appeal in relation to risk management refers to an analysis of the general law on vires and scrutiny of vires. S111-112 of the Local Government Act 2011 was referred to as an example of a Local Authority going beyond insuring itself and putting itself at financial risk.

One needs to identify the purpose for which an LA is acting, including the things that it will do via an LLP and if these are commercial they can only be done through a Company.

The Council characterises what it is doing and what the HDV will do as a commercial purpose. There are restrictions on the Council taking degree of risk to ensure a financial return. So, we say this is important to establish the causes of creation HDV and the actions they will take after creation. Para 7.19 of the Turnberry Business Case Report “If the Vehicle brings forward financial returns the Council will benefit”. Option 2 in [para 7.28a] says “This option will deliver considerably less financial benefit and lower returns”. These fed into the thinking of the Council. [Para 7.44] “Preferred Option”, states it is “preferred”. But one only gets to s4.2 if relying on s1 of the Act for a wide range of activities it will undertake. Para 7.28 of business case states this option would produce significantly lower financial returns, i.e The Local Authority thinking and direction of travel and procurement of Development Partner.

Justice Ouseley: are you saying this section of the Localism Act prevents the LA from doing something - cannot get around it by going some other route? Therefore, it is sensible to do something under another power available to them? Or do it another way?

David Wolfe Response: You can't use GEPOC to provide social services for example. In this instance the council state the primary purpose is non-commercial.

Justice Ouseley: so why does that make it a commercial purpose – what is it that is such – ie just getting a financial return

David Wolfe Response: We say the specific intention is to share with a commercial body the intention to share risk and reward. There are specific prohibitions that sit with these powers. [Para 9.3]: in this instance the LA is proposing a project in line with Appendix (number?), and its primary purpose set out in [para 7.16 and 7.19] is a non-commercial purpose, but the Council will be acting in a commercial way.

What constitutes a “Commercial” purpose? Is it financial, “May get a return”? No, the point is opportunistically

To process with the specific intention to share with a private owner, the financial rewards.

Justice Ouseley: Is your case that the HDV has a commercial purpose, whereas the LA says this is focussing on the wrong thing? This is the dividing line – to only look at the Council ‘s purposes rather than the HDV purpose?

David Wolfe Response: They accept the HDV has a commercial purpose.

Justice Ouseley: I'm sure Lend Lease has a commercial purpose. Yet the HDV purpose is to achieve a marriage of unlike minds where the interests of the LA were to be achieved by supping through a long spoon via the HDV.

David Wolfe Response: It is much more than the council aim to regenerate estates but the primary concern on the part of the LA reasoning is to maximise returns from the HDV, choosing a vehicle and partner by reference to commercial terms. Its purpose is to maximise returns, and is taking risks in doing so without evaluating the risk/profit

balance; and doing what not empowered to do, other than when specifically empowered to do through s139.

[para 9.3] The LA sets out its objectives and these lead into the business case. It states its primary purpose is “non-commercial” and then refers to maximising returns.

Justice Ouseley: Is that the crucial distinction of what makes it a commercial purpose. It doesn't matter what they call it, it's the substance that matters? I have to judge whether purposes of council are commercial purpose not influenced by their own characterisation. It is the substance of what they are going to do in their plans.

David Wolfe Response: Absolutely right. The Council's objectives, in Business Case bullet point 2, “to achieve and maintain a long term financial return. Line four on the next page states the HDV provides way in which these objectives can be achieved and set out options through which these objectives can be achieved. The flow chart (of the HDV Structure) shows profit flowing from the HDV to the LA maximising profit is key to what they are doing here. and therefore, is key to what the Local Authority are doing here.

Option 6 the Over-arching vehicle states it can also asset manage, deliver portfolios, sub portfolios, investments etc, all much wider than what an LA would normally do. Because the commercial impact/report is 'confidential' we don't know what they intend to do only the direction of travel as shown in public documents. Under “chosen partner” it states it will deliver best returns to the Council.

The September 2015 Cabinet Financial Model Report states how evaluated. “The Financial model must supply a split profit/return to council therefore profit key to the HDV. The Weighting Criteria shows “Funding” gets 20 points in the scoring. There were other criteria for choosing this approach and partner, but funding and profits were key.

The LA can't declare a dividend, it can only plough these back into the proper purposes of the LA. [The Scrutiny Report January 2017 para 5.10] asks “What is an LA DV? To use assets to bring the LA and Private Partner together to share in the skills and expertise and to create a balance of risks and returns between the partners”.

Cabinet 3rd July para 8.3 states a “Decision not to proceed with the HDV would need the LA having to find another way to obtain a share of the profits” and increased income'. It is clear that a share of the profits is key. Model based on bringing together risk and reward another reference to share of profits.

[D569] July 3rd Cabinet mentions the model bringing together the LA's land, to provide social benefits and a financial return in the form of profit. Report calls this a most significant development. “Homes will deliver a return to the Council of Millions of pounds”.

The reasons for the decision Paras 4.9-4.10 state the model is based on bringing together land of the Council and sharing the risks and rewards.

Para 6.3.8-9 of the Members Agreement Purpose, the objectives of the HDV are enshrined in the Members Agreement to achieve an acceptable return, [para 6.1] refers to the tax position. And [Para 6.93] says that in order to understand the commercial deal, partners will share in the risks and returns.

Para 8.34 - 8.36 The Council's proposed HDV contains a Members Agreement. The Council's purposes are completely aligned with the HDV. The Members Agreement, made available three days before the Cabinet meeting in July, delves into the purpose of the HDV and why the Council entered into it. Para 4.1.2 states “maintaining a long-term financial return of the Council” and [Para 4.1.2] refers to a “commercial return”.

Justice Ouseley: Do you say that 4.11 and 3.6 (para references may not be accurate here) are not commercial purposes?

David Wolfe response: May or may not be depending on what that ends up meaning.

Justice Ouseley: Are there other objectives?

David Wolfe response: There may or may not be “commercial “purpose but we don’t have access to the Strategic Plan that sets out the detail.

Justice Ouseley: In general terms the authority is looking to put assets in to achieve housing, jobs etc, which without a commercial partner could not happen. So, the question is whether they could deal with this by a different choice. Is only the company commercial or.....? The purpose of providing housing is to house people who will live in it. For example, housing growth and investment. Are these “commercial” or become “commercial” if done in this way? The Act requires a judgement about “Commercial” purpose. Are the objectives in themselves commercial or become commercial via the HDV?

David Wolfe response: The Act is not asking if the “things” done are “Commercial” but is the Purpose commercial? The way in which it will do it is via a package which has a commercial purpose. Are you doing things you are doing for a commercial purpose? We say yes, they are as illustrated above.

[971 para 7.28 and 7.29] The Parties are agreeing that nominees have a duty to act in the interest of the HDV. The Supplementary note says the Council will have a high degree of control over the HDV process and that, because of that control, the LA can exercise its PSED because LA will act through its nominees and will be exercising its public functions through the HDV. The focus is on the Council’s specific purpose, narrowly on the HDV purpose and on the fact that they have run these together because of control and objectives.

The Council relies on S1 of the Localism Act 2011. The Defendant says the LA is clearly acting in commercial purpose and the option and the partner reflect this, and tie together with the LA’s resources. The Statute asks one to look at the “things” and “a” purpose, not simply “the” purpose.

Regarding the Durham case, our position [Tab45] The argument is that the facts and grounds don’t support.....This Dictum in a tax case where a tentative analysis is set out. It only looks at the question of “profit” and “profit” does not amount to “commercial” activity. Also, the decision of O’Neal.

Mr Giffin (for LBH) interjected: our position is tentative analysis by Justice Warren says simply making a profit is not enough but we agree.....

Justice Ouseley: is there permission to cite it?

Mr Giffin: That is not clear. It is a Ground 3 suggestion.

Justice Ouseley: It is not wise to cite something without clarification.

Mr Giffin: An arrangement to share income does not make it predominantly commercial.

David Wolfe: Decision re O’Neil also tentative put in by other side- arrangement to share income was not making it commercial but the whole case was not really related to commercial purpose. They say section 12 of 2003 Local Government Act 'Power to Invest' we say this does not govern here.

(notes unclear who said): merely investing does not mean you are producing any particular product.

David Wolfe: This flies in the face of the LA relying on S1. The power on which it is relying is S12 of the Local Government Act 2003 [Tab 7]. the power to invest. This doesn't deal with the complexity of the HDV. If it is merely investing, the purpose is clear. S12 doesn't allow parallel powers to set up and operate within an HDV.

Justice Ouseley: You have pointed to passages where council talks about a return which is on commercial property and possibly other property that may go in at a later date. The LA is seeking a return on commercial property, but if doing so with a view to making a return why is that not an "investment"? If investing in M&S does that give power to set up a Company and operate an HDV as here?

LA is using other powers in combination with the power to invest. The LA is looking to make a return, if it can, on properties. The transfers are conducted under a power under s12, then a power for sale under another section.

It would be quite a development of the word invest. I would see it more as a combining of resources. Aim is Local Authority put in valuable land but looking in so doing on making a return if they can, so falls into categorisation of investment. We say judgement said fine to set up a simple action, fine to get maximum return on a sale.

David Wolfe Response: A Local Authority (LA) is free to undertake insurance but not free to set up an Insurance Company with risks shared by other LAs. It is fine to sell property but this is very different to setting up an HDV. Where is power to appoint nominees to the board of the HDV. And where is the power of the Nominees other than in S.1? Where is the LA's power for the LA to do all the things set out in the public document? These go well beyond selling and getting Best Value.

It is right to rely on Section 1 and is clearly doing so for a commercial purpose. But the LA is not saved by saying that the things to be done could be done by other powers. Powers that relate to things that have not yet been done but will be done in the future. The question is do they have the power to do what they are doing via the LLP? The LA is not saved by saying that it would not act "ultra vires" in the future.

Justice Ouseley: The LA accepts that what it is actually doing is set out in "what is your primary purpose".

David Wolfe's response: We don't have evidence on which to base this. We don't know what weight was given by Cabinet members to the different purposes or what the predominant purpose was. They said if test was one of primary purpose does not.....(Notes unclear) Problem lies within the redacted documents therefore no evidence to show their primary purpose.

Ground 2: Unlawful Failure to Consult

Justice Ouseley: Legislation has become very vague is it not possible to just put hand up and say we are a best value authority.

David Wolfe: We say idea is to provide challenge to improvement. Under S3 Local Government Act 1999, a Best Value Authority must have regard to certain things and must consult. They need to consult a range of representatives or persons and the LA claimed to have done so. "Nash" in which the Court of Appeal only looked at timelines.

Justice Ouseley: If they accept they have not consulted you don't need to argue it if they have conceded it. Nash case refused permission including court of appeal decision.

David Wolfe: [p137. Para 63] The substantive claim - the decision about procuring the outsourcing of the LA's functions. In July the decision was a High-Level decision about the Council's functions.

Justice Ouseley: The first High Level decision?

David Wolfe: July 3rd was the first High level decision because it was the first meeting with concrete information. They could have consulted previously but this wouldn't have been a meaningful S.3 consultation because not enough information was available. Cabinet papers say council only consulting about what we deliver not how we do it. We say this level of information was only made available at July cabinet.

The LA states "it could not consult on outsourcing without inviting views on our programme, and this is absolutely right. Every time the LA makes an operational decision it can't be considered a "High Level" decision. This is not about operational details but the approach and way in which the Council will participate in the HDV, only made clear at the July decision.

Justice Ouseley: Suppose section 3 didn't exist and you were looking for a common law decision needed..... Would you say consultation at July 3rd was required because the die had been cast, but the criteria couldn't be satisfied at this stage for the July decision because it was too far down the road. How in July was it supposed to provide enough information without having committed itself?

David Wolfe: So, we would then be saying you should have consulted earlier? (notes not clear on this point) This depends on the extent to which it had committed in 2015.

Justice Ouseley: In 2015 it committed money to pursuing an HDV.

David Wolfe: We have no problem with the preferred option and the decision to investigate it, as information (available then) that couldn't be evaluated and neither could consultees. There is a big gap between this and what was presented in July 2017. S.3 doesn't arise until the July 2017 meeting when key information was presented, the first time that there was clear information on a plan and at that point it should have consulted.

Justice Ouseley Isn't the 2015 decision set if further information backs it, if get a positive outcome to their investigation is positive. Then we should assume it is likely to go ahead and thus no need to consult now.

David Wolfe response: We say section 3 doesn't arise until 3rd July

David Wolfe: The S.3 obligation didn't crystallise until July. The October 2015 decision was merely about the direction of travel. November 2015 is understanding of what was understood then. Materials arising from 2015: the 10th November 2015 Report to Cabinet and Resolution [Para 7.40-42] sets out what is contemplated, not a "Proposal" and is way too tentative and not "high" level enough to warrant s3 Consultation. Essential information for the S.3 Obligation to arise was not provided at that point, only options for a 50/50 joint venture or an LLP likely to be for 20 years and options for governance subject to discussions with potential partners. Para 7.45 to 7.49 tell us all we can know at this stage re time-scale.

Justice Ouseley: The essential issue of approach you say is does it refer to do we use a corporate vehicle? How to discharge best value duty

David Wolfe response: No, we say as above, there is a need to know more by way of proposal to say whether this course should be taken or not.

Justice Ouseley: This course is not a commercial proposition, but to use housing and assets to meet its obligations. (presumably not use of its commercial property to provide capital to build housing). "We have no money, how are we going to address it?" Is that a s3? or should it examine options 1-6? or should it be on option 6 once this has

been decided? Are you saying we have these problems and limitations then consult – or wait until chosen option and then need to consult.

David Wolfe response: We say the proposal to set up HDV with key characteristics; The Issues of governance are such as diminishes the LA's Local Government role and the suspension of the Council from various statutes – the Public Equalities Duties, Human Rights Act etc. A range of factors that only becomes clear by July at which point we get a rush of massive detail including all above and more. What matters is regarding s.3 what is council contemplating, can meaningful consultation take place. Information provided was too vague in 2015 to consult on.

Equality Impact Assessment 2015 was referred to which states taking place to consider usual range of equality questions. It seeks to enable housing provision in the Borough, jobs and training - high level positive benefits. Then it states that an Equality Impact Assessments will be done on a scheme by scheme basis. Para 117 "The assessment of Equality Impact was necessarily High level due to the level of the proposals" i.e not enough is known therefore not enough is known to comment on. And they had not got to the point when they know enough. This is not a contradictory assessment.

November 2015 new Governance arrangements were said to be critical to enable transparency and accountability etc. That is right and underpins S3 consultation. There are various records where consultation was called for.

Justice Ouseley: The intervention by the Scrutiny Panel, was this commented on in later Council reports?

David Wolfe Response: Yes, the Cabinet response to Scrutiny at p.2.51 and 5.6 of cabinet 3rd July they (Scrutiny) commented that the LA had not consulted and the response says existing residents will be responsible for shaping the proposal at each site.

Justice Ouseley: It wasn't quite that, you say not enough known for even a High-level consultation to be meaningful; may not have considered S3; was there any comment that a great deal was known about governance was arrangements prior to 2017?

David Wolfe Response: The response says details will be made available and plans are being developed, nothing saying this information had already been provided.

[Para 3.1c] "The approval is based on Structures set out in the Report".

[Para 6.37] This Report draws out some of the key elements - Para 85 of the skeleton sets out how much of this is new, including financial structure, and Lend Lease and key elements from the Council of a proposal that only emerges in July 2017, and what is not in there [para72].

What is missing in the contractual agreement is that it will act by the Human Rights Act, so the Development is moving from an HRA compatible landlord to one who is not, a very watered-down freedom of Information obligation and then on PSD [Exiv 46] comments on this paragraph state "The Council will be aware that it may not be in the same legislative position. This will be monitored. The HDV governance arrangements will be monitored and doesn't absolve the Council of its legal obligations" i.e the Council will be bound but the HDV won't. Not meant to replace the Council's own PSD obligation. Could have included in member agreement a requirement to follow PSD requirement. Scrutiny points this out. These are All Key elements of a S3 proposal, with papers for 3rd July meeting, that came out on the 29th June and were not brought before scrutiny or anyone. Given the unusual nature of the proposal and the extent of this. The Council's response is "we will consult" on transferring Estates to the HDV. This is not an answer to the requirement to consult. By the time they get to this option

there is really only one show in town only one option for regeneration – to be put into the HDV this is an unacceptable Status Quo, as any chance of asking for different governance arrangements is not available, as the option of any other structure that will be subject to the Human Rights Act etc won't apply and this would not be meaningful consultation in any regard.

Para 7.55 and 7.56 provides the way in which this will be achieved “This remains the case subject to final agreement and approval” – only provides a way to achieve what is proposed, not final decisions regarding transfers for commercial and tenanted properties. And by the time the decision is to be made the vehicle will be in place.

The Leader of the Council's statement on website says it wants there to be a clear commitment to Estates Renewal, but ignores whether they want an HDV or not. But in fact, this further illustrates the above point such as the right to be consulted on being subject to the Human Rights legislation. Offers of future consultation doesn't help with the offer of discretionary Relief. The Key elements didn't emerge until papers were released on June 29th and clearly meaningful consultation has to be done in relation to the position on 3rd July.

This ends the case on the issue of consultation.

Ground 3: Unlawful Failure to discharge the Public Sector Equality Duty

David Wolfe: Court is very familiar with these grounds an earlier judgement Hurley stated need todecision making must be clear on implications when decidingDuty in substance must be made.....We say you did an Equality Impact assessment (EqIA) in 2015.....overarching point of law PSED overarching need- can it be a sufficient discharge of duty to do it in 2015. Cabinet papers refer to 2015 EqIA but no reference to any further EqIA (note a bit unclear on this para)

We say no reference directly to set up of the HDV We refer to how to embed equalities into the HDV and it is the governance of that which matters. Same day different item to substantive HDV on cabinet report, this is a report from the council project team- no date as set out in the March Cabinet. 'the decision in summer 2017 will be accompanied by EqIA at this point information is at too high a level' and so goes on to say will accompany report of 3rd July setting up HDV with an Equality Impact Assessment. None of this includes assessment of the principal of setting up the HDV.

Lord Justice McCombes's Summary of the obligations stemming from the duty under s149 of the Equality Act 2010 in the case of R (Bracking) v Sec of State for Work and Pensions.

Para 26.4 an assessment of risk and extent of adverse impact and ways in which risks may be eliminated must be carried out before the adoption of a policy not merely as a rear-guard action, after a decision. There must be substance, vigour and an open mind. Decision making must be clear and an open mind must be kept.

[Para 75] made clear in Bracking, the duty to observe the “Substance and open mind”. The Council says it did an Equality Impact Assessment in 2015 and we will do a detailed one when individual estates are transferred and didn't need to do one in 2017. That is not right. You can see the Council's own inability to assess the generality that there was in 2015. PSED is a continuing obligation and the question of whether it couldn't do it in 2017 because it is going to do it later, when critical issues relating to the scheme will have already been fixed.

..... shows how little an Equality Impact Assessment was considered.

Para 2.44 the Cabinet meeting in February 2017. Question re Equality states “Equality

Impact Assessment was carried out in 2015 and there are no further Equality Impact Assessments in relation to this Report – they had not yet decided what they would be doing to give rise to that.

Para 7.60 and 16.1 One reason given for not doing an Equality Impact Assessment is that the decision of Cabinet will be accompanied by a full EIA.

Missing is the promised /signposted EqIA' which by their own assessment could not have been done then, promised now and cannot be done in the future because by then only one show in town and therefore would be a rear-guard action. So, if consulted as a person with protected status- all high-level areas – simply too late to have those elements changed

Justice Ouseley: The Scrutiny is calling for assessment or assessments? What is it calling for?

David Wolfe Response: It is calling for an EIA in relation to the decision to establish the HDV and it was promised exactly what should have happened. It said the LA was examining how best to embed equalities into the Governance of the HDV. It is the governance of the HDV that matters.

At the 3rd July meeting the substantive question and consideration of the Scrutiny Report and the substantive HDV decision were all dealt with on the same day. The report from the Council's Project Team after February/March and before July stated that "the recommendation to Cabinet with the Business Plan is expected to be accompanied by an Equality Impact Assessment. The Business Plan and final plan of the HDV are still being developed and at a High level and we are not able to provide this at the moment". This is exactly our point. It is not until you have the Business case and the Governance arrangements that an Equality Impact Assessment can be done.

.....a parallel report to Cabinet in July 2017.

Para 6.2.6 sets out the Duties of Cabinet, the Strategic Business Plan (not made public) and states it is not able to provide an EIA and sets out the history, options and Governance arrangements.

Para 8.53 States Governance of the HDV will ensure it will be monitored with due regard to providing EqIA's.

That is the extent of what happens at this stage. The Council had assessments of particular business plans for commercial properties, but don't include an assessment of the impact of the HDV and nothing about an EQIA. This didn't materialise, they couldn't do it earlier and there it is no answer to say it will be done later because, as with these commercial properties, there will be no EQA because the HDV will already be established and no other option will be available.

Ground 4: Cabinet did not have the Power to take this decision

Local Government Act 2000 s9d: Subject to any provision in this Act, any function deliverable by an LA links to Executive Powers. Presumption in favour of the executive. [Reg4] Functions not to be the sole responsibility in common with the discharge of functions in formulating a plan re spending investments, capital holdings. What was happening here was the formulation of a plan in relation to investments and capital holdings. The legislation refers to "A Plan or Strategy for the control of" and the focus is on the substance of what is being done not the words used. What is the substance happening here?

In February 2015 they were considering a development vehicle as a meaningful option to discharge council functions because of access to land etc.

Para 2.1 refers to Haringey's ambitions for a range of things takes us to the next stage". We say this is fundamentally making a Plan or Strategy.

The reasons for the decision state that it was a question of establishing a Joint Development Vehicle for developing Council land "as a way of pursuing Council objectives consistent with a Plan or Strategy.

The Council further resolves that a Development Vehicle as the best solution to invest Council's own landholdings must play central role is evidence of the Formulation of a Plan or Strategy.

[Para 2.3] Refers to several options in deciding how to achieve growth on its own land, evidence of High Level formulation of a Strategy.

The Council's own landholding must drive the investment and [Para 10.8] refers to a range of options for developing the council's land.

[Para 7.15] refers to assessing a potential approach to developing the Council's assets. This is not the same as later stated "delivering returns"

The Turnberry Business Plan Nov 2015. The Council was seeking to meet the provisions of the Local Plan, London Plan, and says it is "Land Rich but unable to deliver the its objectives, and is therefore going to explore a Delivery approach" i.e A Plan or Strategy.

Para 6.2] refers to a "Strategic Review of Delivery Options". The Leader of the Council refers to "Growth on Council Land" and says this allows a huge opportunity to take control of assets beyond planning, to leverage these other things. "We can sell land and leave it to a private developer". Two strategic approaches are identified to deliver Council Property Investment agreeing that the plan doesn't mean the land is immediately transferred – Very High level indeed.

"We need to take a bold line to take steps to control our assets" "This is a Once in a Lifetime decision" all examples of a plan to control investments and property. Council who has complete control now – will then share control with Lend Lease in HDV so a major plan

A lawfully operative decision hasn't yet been taken, it will be taken by Cabinet – In relation to Grounds 1-4. We say Cabinet cannot authorise embarking on those steps.

Timing Issues:

Ground 1: Commercial purpose – the anticipatory question is whether the Council can act in a Vires position in relation to S1 without forming a Company.

Justice Ouseley: Not the establishment of the HDV but putting land into it?

David Wolfe Response: It is both the establishment of the HDV and the land transfers. One can't give Vires and then be waiting to implement it, or avoid challenge in advance and wait to be challenged.

Ground 3: The decision taken in July to set up the HDV is not a delayed challenge regarding November 2015 and is an "in time" challenge.

Ground 4: It is only in July that it becomes apparent that the Council is taking a decision outside of its full powers, and a subsequent Full Council Decision.

If the Court says we knew enough about the Plans for Equality Impact Assessments in November, the tentativeness of the decision in November rightly would have made challenge premature. In February 2017 the Council is signposting what is going to happen and a preferred model is put forward.

Only ground 2 problematic if told by the court we know enough in 2015 despite all said here, we still say the tentative nature then means any legal challenge would have been seen as premature.

The November 2015 documents [para 2.4] says the path towards an HDV is a long one, the need to take a strategic approach to the parties is vital. It is not feasible to continue to operate as previously. It is not establishing a Vehicle but procurement for a partner to establish a vehicle. "Members should note that the Council is not setting up an HDV until they have chosen a development partner" This was not a procurement exercise where it sets out the bid criteria. The process is completely bound up with the formulation of a proposal, and a challenge at that point would have been premature. This report does not open HDV simply open procurement process with decision to come back at a later date. More significant than a normal procurement process.

Justice Ouseley: Isn't your actual objection that a private company will be involved with the inevitable compromises and complications that brings in its train all the things that concern Mr Peters, and inevitable arrangements allied to a 50/50 partnership?

David Wolfe response: No, he is very clear that he is concerned about the decisions the Council has made, and even if we have a 50/50 partner there are a great many ways in which this arrangement could be improved.

Justice Ouseley: Not sure I have grasped the feel for what your objection really are.

David Wolfe response: Saying it is a 50/50 Company says nothing about how it will operate or its accountability. Our response is only when consider implications of democratic deficit. Impact on rights and how to exercise these rights. We resist the idea that this is of binary concern. Whatever the personal preferences of any individual person or group. Council tenants have direct access to a councillor, if they have a problem, that the councillor can take up. Once this goes into an HDV that is imperilled depending on the governance arrangements. If the Council had consulted with tenants and residents they might have wanted a whole host of other amendments. There are aspects about the way in which this is being done e.g. knocking down existing blocks and building new ones, through the 3rd July Policy. The "Right to Return" has gone and tenants had no knowledge of this until these papers were released for that meeting.

My client resists the idea that this is only a "tenancy" concern. The Cabinet response to Scrutiny for example at c) Scrutiny asked for full consultation to be done and the response is that the HDV was stated as a preferred approach, no longer just one of the options. The Officer's response was accepted by Cabinet.

The July Report covers all the ground, including Lend Lease, Cabinet Approval.

Para 5.1 refers to approval of the Business Case, accepting the analysis in there.

Para 5.2 states that throughout the process of procurement at own expense of the bidders

The Report includes the objectives, and the Benefits and Outcomes expected for the HDV.

This was not simply the end of a procurement exercise, but draws together all the stages and is now at the final stages, deciding whether to proceed or not.

Nash (Court of Appeal)[para14] "the applicable public procurement procedures ran their course". Technically that is what happened here.

[para 42] is dealing with the delay point. This is a case where a claimant challenged final stages of a procurement process.

If the earlier decision is no more than an initial decision to be followed in a later decision (consultation is deferred). No complaint here about Lend Lease or whole of private sector but central elements of this specific deal.

David Wolfe: We say they identified a preferred approach.

Justice Ouseley: Says it was more than this, they then took steps to bottom out the details

David Wolfe: Yes to get to point of proposal preferred approach authorises work to be done, may be determinative of the work you may do. Still premature because objecting to a plan, the details of which are yet to be known and thus any objections to those.

If indeed the 2015 decision was of the firmer type it was not made clearly enough to the public in order to understand what was implied.

The decision was to award a contract, with a final decision re procurement to be made in July. There is a duty to consult on the policy approach not just operational matters. The complaint is not about Lend Lease as such but concerned about the continual aspects of the HDV.

Nov 2015 would have been premature.

Justice Ouseley: Accept that a number of issues were thrown up leading into July 2017 decision. Whilst I understand the point about details coming out in the run up to July 3rd, does that mean, that you could leave a challenge until the establishment of a Company or Trust Venture, until that point?

David Wolfe: it was earlier stated as a “Preferred option” and the Council was going to work out a proposal, but steps were fundamental to that, as part of the procurement route. Had the challenge been done in November that would have been premature because the Council was still working up the substance of a High-Level proposal. It didn’t choose a preferred partner and then say we are working up a proposal to be consulted on.

In Nash [Para 53] The Council said it could lawfully have consulted and could have consulted throughout and the Court said “No”, the decision and S3 obligation crystallised at a certain point once the details were known.

If the November 2015 decision was of a firmer quality this wasn’t communicated with sufficient clarity in those terms and wouldn’t have been understood as a firm position at that point.

Discretionary Relief:

David Wolfe: Council made it clear to procurement bidders that was at their own cost – so we are not responsible. s31 prejudice due to unreasonable delay. The Council emphasises that the bid costs would be lost and they would be in a no worse position than that.

Mr Walters (Court of Appeal) reference where claimant was refused relief complaint about consultation failure. On analysis of the submissions the Council undertook to take all steps possible to ameliorate. This was a technical breach of consultation. Mr W was not in fact aware of the Council’s position - were aware but not formally consulted. The Judge erred on the basis that the Secretary of State, LA, and vast majority of tenants had all been in favour of this proceeding. This does not arise here where the Council is split into two and there is significant public opposition.

END OF CLAIMANTS SUBMISSION TO THE COURT

HARINGEY COUNCIL'S DEFENCE

Ground 1 - Is it lawful for the Council to set up the HDV as an LLP (rather than a company)

Mr Giffin QC for Haringey council presented argument in relation to Ground one (Vires Issue) re HDV's constitution as an LLP.

Mr Giffin: Case was as described in the skeleton argument. Worth thinking of the alternative powers argument. As the Judges questions reveal, this provides a dilemma for the claimant. There is an element of risk and return, that has been emphasised, but a transaction risk and return is the definition of an investment.

Here we have a transaction with Two elements: Land Disposal (s123 of the 1972 Act) and Investment in an LLP (s12 of the 2003 Act)

Section 12 of 2003 Act, gives a very general power to invest in anything, any purpose relevant to its function - thus broad. Mr Wolfe does not dispute this includes investment in the LLP because it applies to housing functions. Investment in an LLP is not disputed. One way of looking at this is that one form of investment i.e commercial property and land is being changed into equity in an LLP. It is accepted that there is a power to Transfer to an LLP but that there is no power to do the other things involved, and Mr Wolfe was not specific about these. He did give as an example, the appointment of nominees whereby 'Members' elect 3 council nominees as members to the board, but why is the LA not authorised, by the 1972 Act, to appoint Nominees?

We feel this is allowed under the 1972 Local Government Act. Which states "A local authority shall have power to dodischarge of their functions. Therefore, if it chooses to do this by virtue of setting up an LLP, why is this not conducive to do any of the things in the members agreement. He offered no serious answer.

Justice Ouseley: He was drawing a distinction between investment and being part of the body in which you are investing in. For that to become the tool for disposing of and developing property, *etc etc* which is different. This is how I understood it - difference between investment and all that goes with HDV and direct participation and whilst not directly parallel is the kind of thing that goes to risk management.

Mr Giffin This view of Mr Wolfe represents a misunderstanding of the case law and takes a High - level view of the court case "Nash" [Tab 22] London boroughs felt they were getting a bad deal from insurance so set up their own Insurance Company that would put up the Capital, would conclude contracts, and appointed **members** in order to achieve savings. The challenge on vires succeeded at the Court of Appeal then was overturned by Statute (s2 Local Government Act 2000 – The "Wellbeing Power") and they now have a general power of competence. This was not an investment exercise to generate financial returns but was to reduce premiums. There is no express function of "insuring" but it is incidental to its primary functions, not a substantive function. In this case the disposal of land (under s9 1989 Housing Act and the LA Acts), and investment are substantive functions. Disposing of land to Joint ownership and a Commercial LLP of which the LA is a member, having equity in it, and loan notes is an "Investment" function, needing express authorisation and with s111 enabling details to be put in place. S1 Local Government Act 1974 states that vires is needed for the Council, not that the HDV does as its powers are in the Partnership Act.

Therefore, the real substantive of the thing happening here will be transfer of land and transfer of the LLP win which it is held to a commercial company. All that really matters is substantive function section 111.....is that allows the necessary detail to be put in place.

Claimant has not provided the answer to these points. Local authorities are allowed to transfer any asset including intangible assets. Members Agreement is simply 1977 Act (?) section 1 contract i.e. how to run contracted services.

(Legal precedent was quoted possibly Nash) But that was overturned and I am bound by that decision.

Law allows Local authorities to transfer any asset including intangible assets, members agreement is simply 1977 action section 1 contract ie how to run contracted services.

The second answer of Mr Wolfe who questioned where the power to undertake those HDV tasksHowever the Council needs vires for the LLP and it is not Haringey's agent, if it was it would not work at all, rather it is a separate legal entity with its own rules and, and the Limited Liability Partnership has unlimited capacity. Every member of the LLP is an agent of that but not vice-versa. The council stands or falls by what the council itself does namely setting up LLP, signing members agreement, but if acting ultra vires.....if then necessary to show LLP was to be considered as subject to same requirements (as council) therefore contrary to.....Therefore out of time because if down the line an LLP does things

Justice Ouseley: Did not say first pointwould be acting ultra vires would not be upon passing property transfer - but not just the transfer - is being a member of it (the LLP)Grounds arise twice on each case identified, and on each, the Judge said that he had three questions to be answered the following day.

1. Are there any specific powers that allow a Local Authority, as part of an LLP, to enter into HDV type arrangement, claw back profit but yet require a right of return, retain right to nominate or veto tenants etc?
2. Is there anything the LLP does that involves doing something that a local authority would have no power to do itself - that it simply could not do?
3. Is it not, as you understand it, in so far as GEPOC (General Power of Competence) is concerned, if Mr Wolfe is correct that this is a commercial undertaking by the Local Authority are you disabled from doing other investments. Do you have to set GEPOC to one side?

END OF DAY ONE

Day 2 26.10.2017

In response to Judges questions on the previous day, Mr Giffin, Haringey's Barrister (in relation to Ground one HDV's constitution as an LLP) had this to say

Question 1) Are there any specific powers to allow a Local Authority to set up an LLP, claw back profit yet require a right of return (for tenants), to nominate or veto tenants.

Mr Giffin's reply: No there aren't any such specific provisions, but provisions of similar nature are common, near universal – unusual not to see this. We suggest this shows, for example, under the s 103 Disposal Power in which the words 'May Dispose of Land in any manner they wish' (s.i), 'for consideration best that they can obtain' (s.ii), if this is true, it generally shows that there are alternative powers and shows a benevolent view of what can be done under s.111. This needs to bear a lot of weight and reinforces my alternative powers.

In the Risk Management case, various examples are cited in the judgement, Lord Justice Pillis argument on Local Authority Powers cites Lord Hutton's' case in Northern Ireland, that cites, with approval, the New Zealand case. This takes a limited view of "consideration" and Courts do not think narrowly but are liberal in thinking.

Justice Ouseley asked: Did Justice Pills commented on this case or was it a submission?

Mr Giffin reply: I don't think he commented specifically on this case. I took you to his decision yesterday [para 121-124] and his conclusion doesn't comment on this case. [Pages 49-58] show contrary arguments posed and the "incidental on the incidentals are dealt with.

Question 2) Judge had asked: Whether the LLP would have no authority to do something that the Local Authority would have no power to do itself - that it simply would not do?

Mr Giffin reply: HDV gives this power.....

Justice Ouseley intervened. When submissions were made by Mr Wolfe the fact of the Vehicle means that various statutory provisions don't bite on the HDV, that would bite on the LA. The point underlying the concern is that there are statutory duties attached to the Council doing this, which the Council and Developers forgo under this arrangement"

Mr Giffin's response: Two answers in response to vires argument. Firstly, by reference to existing skeleton, the things the LLP will be doing will be things the Local Authority could do. Secondly, in terms of risk of abuse, it is clearly established that if a Local Authority takes a particular step in a particular way for the purpose of evading statutory controls, that is an improper purpose and would be rightly struck out if challenged. There is no such challenge here. [Volume 1] case referred to a local authority wanting to build a swimming pool, and not having the money to do so, it borrowed above its limit and the bank provided a guarantee and the guarantee was held to be ultra vires. Lord Justice Neale [p333/4 p334 paras b-h] stated 'the present case is an attempt to circumvent statutory borrowing controls and this was an improper purpose, and not a proper purpose for the Council to do. Conclusion this was to avoid those controls. (Conclusion these were not proper purposes for the local authority to pursue). There should be no concern that evasion of controls is intended here. There may be a concern, where there is no deliberate evasion, but the Broad Statutory

powers exist for the Secretary of State to regulate Local Authorities exercising their powers. Local Government Act 2003 section 18 'secretary of state may by regulations make provision for the bodies mentioned..... in accordance with regulations'. "Bodies" include "an entity" which is under the control of an LA or is "subject to the influence of an LA, by Order under sub-section 2A of section 217 of the 2007 Act. These powers are not ones that the Secretary of State has yet exercised, but the power is there if there are problems. These sections are concerned with Local Government finance in particular but there are more general provisions in the Local Authority Housing Act 1989, replaced by Part 12 of the Local Government and Health Act 2007, the Human Rights Act and Equalities Act. The Secretary of State has powers, by the schedule mentioned, to include these. I may be wrong.

The Basic point is powers of regulation are there but what is in force now or overlapped (details at this point not specified by LBH Barrister).

[Para 7] Powers set out in This is supported partly by the Sullivan case. It is unclear why the plaintiff says the activities will be outside the LA's power. At para 96 Mr Giffin says Mr Wolfe claims the HDV will be undertaking Ultra Vires activities, Giffin states the Local Authority are allowed to do the work the LLP will undertake. The list consists of acquiring, managing and selling property [in Para 97], and acquiring, managing and selling are all within the LA's powers. The other thing they have done in this case is actual development of the land. s52 LA Land Act 1963, mentioned in pre-action correspondence, states that an LA "may improve, construct or carry out works on that land".

Question 3): Is it not, as you understand it, in so far as GEPOC (General Power of Competence) is concerned, if Mr Wolfe is correct that this is a commercial undertaking by the Local Authority are you disabled from doing other investments. Do you have to set GEPOC to one side?

The judge intervened: If you are going down the investment route do you have to rely on GEPOC (General Power of Competence)? Or can you rely on another case? Not as you understand it is it not so far as GEPOC considered if Wolfe is correct there is a commercial undertaking by the Local Authority are you disabled from doing other investments do you have to set GEPOC to one side?

Mr Giffin's response: GEPOC is free standing both ways. The s1 Power is not limited by the existence of GEPOC. In the approach to a commercial purpose one can look at all the elements and every element of the transaction; in principal you can mix and match in any way you want. Each approach can be fragmented if that is right, and we think not – We don't take that approach. We say what is the LA's purpose in entering Its purpose is not so fragmented. What is the purpose here and what is the LA really trying to do? If it trying to do something for a commercial purpose it is unlikely to cause problems if it is doing anything within GEPOC unless it is done within a Company. But this doesn't help. Mr Wolfe says you have to look at each element, but his claim fails one way or another.

Well Being Power: [p106 Report, Part 8 of judgement s4.2 2(a)] we say is aimed at Local Authority trading Enterprise, and the requirement to act via a company, is to create a fiscal level playing field with private companies in the same field, where an LA is trading. (at this point Giffin produces a new document he came across overnight and presents to the court namely) A letter, dated 2011, from the Secretary of State to the Chair of the Local Government Select Committee, which said a Local Authority should not be able to use a Public Company to gain an advantage over trading Companies. The difference being Local Authorities don't pay corporation tax or VAT, for the sake of raising revenue, but the playing field had and the LA had to trade via a company. And if

doing that need to be on a level. Even though this vehicle may create financial benefits this wouldn't apply. We say this does not apply when Local Authority profiting in order to carry out normal duties.

Localism Act: There is no requirement to act through a company, where acting through GEPOC. 'In the exercise of the general power therefore no need to do via a company'. If the LA was doing the trading presumably corporation tax wouldn't be payable. If it was the Local Authority doing the trading this would undermine the whole position. In any case it is acting via an LLP.

When one asks whose purpose? It is clearly the Local Authority's purpose. The purpose of an entity established will be evidential as to the authority's aim. [pages 52 to 55 of our skeleton argument] Para 53 If an LA sets up a company, purely its own company or LLP set up to do certain things, it is hard to say it's not its purpose to do those things. The purpose is not that of the entity but that of the authority. In this case if the entity is a joint venture it could be a Company in which there are many participants and the constitution would reflect all the participants. This is evidentially incorrect and unsound and it is dangerous to equate the Local Authority's purpose with the entity's purpose. They are simply not the same thing. The LLP is a different entity - Solomon v Solomon referred to as reaffirmed by the Supreme Court [Tab 39] Prest v Petrodel case in which "an LLP has to be incorporated with a view to a profit" as dealt with in our skeleton.

s? says "does things for a commercial purpose, sub s 1 (4). Confers the power to do something for a commercial purpose. It's simply the authority's purpose. If the purpose is substantially and primarily to make money that is a commercial purpose but not if the purpose is to pursue the Council's social activities and objectives.

Yesterday the applicant said if there is any element of profit that was a commercial purpose, then said it would be alright in a normal case, whereas here the LA is deliberately setting out to seek profit. It is taken in order to carry out its normal functions including disposal of land at best value as part of its normal fiduciary duties.

He then claimed that providing a new income stream was a key aim of the LA. "key" is not a very satisfactory word if using the "substantial and primary" test. His argument would lead to very surprising consequences in the use of GEPOC, in terms of "Wednesbury" duty of the Council in minimising expenditure and maximising income, and not out of the ordinary for the LA to expect to do; and would severely limit the LA if every time it is making money it would restrict the LA from doing what it wants to do.

It is a duty for Local Authority to safeguard its financials, so need to use GEPOC if had been intended to be even more restrictive than previous provision.

Risk Management: Government Guidance re "wellbeing Power" [Tab 22, Para 10 page 108] Promotion of "wellbeing" – any LA has the power to do anything to promote environmental, social wellbeing of an area. It does not allow an LA to whether by precept or otherwise.

Court of Appeal said Guidance is something that can be looked at, in terms of mischief but couldn't drive instructions. Guidance said Wellbeing allows Local Authorities to participate Charities, Companies etc, and for an LA to receive a dividend in return for its investment, and be within wellbeing objectives. There is a restriction where the primary purpose is to raise money and they are prevented from seeking to primarily raise money. The idea is of looking to "Primary purpose" – it would be very surprising if the wellbeing power in conjunction with an LLP rather than a Company would be narrower than it previously had been. We now have different wording (in current guidance) but have principal well rooted in history but would be unusual if current LLP provision was narrower than the previous provision.

In Case of O'Neale referred to yesterday by the applicant, the issue was a variation of a lease. It may be an opportunity for the Lessee to obtain a commercial gain from the sale of a building on land where the Council is a freeholder, whereby the Council would receive a share of the commercial entity. It was said that if the Council took advantage of this income sharing mechanism this was not its primary purpose.

Judge then intervened saying: You have used the phrase "primary". In the way you use it what's left is that it is incidental. Whereas an alternative would be that there is a separate, but less important purpose. If one looks at it that way one might get a different answer, if primary and incidental, versus primary and secondary as the only one. (eg) Primary and Secondary, could say primary purpose to achieve something, e.g. jolly good wheeze to build some time share to sell off because if we do that we will have a separate revenue stream or we will set up a shop and be able to sell pencils in Haringey, and bread, and in that way, boost our sales and income.

Mr Giffin interjected: in terms of which is the correct approach my submission is in this case which is the correct approach? Does doing something for a commercial purpose only apply if it is the "primary purpose" or if done as a "Substantial" purpose?

Judge continued: I was not seeing it in this way. (Drawing the distinction, you claim), you said, why is council doing this? The Council is doing this in order to, break down in components and divide up the benefits. I was saying not only in the one way you present. You can say it's being done for a single purpose with financial returns as incidental or you could say, in certain circumstances, someone could set up a Company alone where there is more than one purpose. Can say perfectly possible for set up LLP where (there is) more than one purpose. Supposing Lendlease has a naked trading arm and the Vehicle would be much less risky and more viable if another transaction is added e.g. set up a shop. It would be difficult to know what the purpose is without knowing what makes up the totality of the purpose.

.....purpose existed with Lend Lease this would not be saved, if also add in a Local Authority central purpose, from being a Is that the difference you are trying to argue? confused between..... your use of primary and substantial.

Giffin responded: In this instance don't look at the different aspects of the vehicle – the transfer of land, members' agreement, loan notes etc – this is an artificial way of looking at it, but have to identify the relevant 'things' Local Authority seeking to do. Where entering into arrangement to build some social housing and on the back of that also set up a casino these are not part of the purpose, they are separate, and might be part of a "Wednesbury" purpose too. If you have, as in this case, a single transaction then you have to identify a single purpose – what is the "substantial" purpose and this has to be right because it is difficult to measure one up against the other. That is why the "substantial" purpose test is right.

Bowles/Durham Case: sets out the general approach to these issues. Durham Co. is a tax case in which it was a question of under what power the LA was acting is of critical significance because Local Authorities not subject to VAT, but not so if acting under a special legal regime. Paragraph 19 of that judgements sums up. In this case LAs were providing waste collection for businesses and charging. A private company challenge claiming they should be charging VAT. A judicial review that transferred to the Upper Chamber. Justice Warren held that they were subject to a special regime under s45 Environmental Protection Act and s95 3003 Act or under General Powers of Competence (GEPOC).

Page 201 of the judgement Para 61-63 referred to. Para 61 statutory provisions. Para62 if purpose commercial has to be done via a company, for a purpose must be a purpose and must be commercial even if it charges and some profit is made it is still not necessarily a commercial operation. An LA has wide social responsibilities that a

Company does not, and it is not specifically a commercial purpose unless it is specifically to make a profit just because a profit exists does not mean its purpose is to make a profit. It is not a commercial purpose if benefiting the community, even if making a profit.

Our submission is that it (this Obiter) fits our case, with the purpose where an LA is setting up trading ventures, and is a workable test unlike Wolfe's attempt to set a test and if our approach is right this should be the test your Lordship considers. Mr Wolfe conceded yesterday that he could not say whether the purpose is on the other side of the line redacted documents had not been released. We have not been asked for any further documents. Burden of proof in JR rests on the claimant. The overriding aim of the Local Authority is to provide rehousing, regeneration and economic growth. This is its (HDV/LLP) purpose –It does not believe it would achieve the social objectives in another way. This is a judgement only for the Local Authority to make and this has not been challenged. It is not acting for a commercial purpose, but even if it was it can rely on **its own activities**.

Mr Bhose (For Haringey) then proceeds with grounds 2,3 and 4

Ground 2: Unlawful Failure to Consult

This should be read in conjunction with Haringey's Skeleton Argument as much of what was stated in court is taken directly from there.

Mr Bhose started by referring to the February 2015 Corporate Plan reading out excerpts which on page 14 refers to growth of homes and jobs specifically in Wood Green and Tottenham. Page 15 states intention to increase new homes and building more council-owned homes. Page 17 describes working in partnership i.e. looking for partners in the private sector with agreement on common set of principles and to establish new partnership boards where gaps exist.

(Bhose then continues to describe the history, starting page 3 of skeleton argument with commentary as follows) Development Vehicle Study (Turnberry 2014 Business Case Report) as the first formal report on this issue (para 154 Page 199] with proposed timeline for procurement, with 2 further decisions to follow – 1) Preferred partner and 2) Summer 2017 Cabinet. This formal report and subsequent Cabinet Feb 2017 Report he suggests are the public notice of the HDV. Also, Haringey Housing Strategy page 22 of which describes the HDV..... , consulted on in July 2015 that then went to November 2015 Cabinet.

P190 para 4.3 Enhancing growth – The Council is rich in land, not borrowing ability or expertise and is exploring ways of establishing a development vehicle.

Housing Policy is adopted by Full Council November 2016 – draft for public consultation- the adopted strategy [page 158, then page 166] - A policy that the full Council determined will be adopted by it, and forms part of the “Development Policy Framework”, doing no more than what Authorities do within their duties.

Judge then asked: Is 'the Policy Framework a legal term.

Mr Bhose reply: Yes

Mr Bhose: Future of Housing Review Sept 2015 page 33 recommendation 2a A Strategic Approach, includes reference that a development vehicle is likely to be the most appropriate option. Page 14 at top recommends that a proposal be brought forward for a Development Vehicle either as a joint venture or solely owned by the council. This was approved.

Cabinet 4th Sept 2015 recommendation Paragraph 3.2 a) refers “Development Vehicle

– a separate report to be forthcoming re development vehicle potentially being a solution and potentially the best way forward. 3.2 b) highlights Northumberland Park.

November 2015 report to Cabinet, a year after the potential for partnership was explored by Turnberry Report, made clear that an overarching principle was that a Development Vehicle was the preferred option and it was the Council's desire to retain control over key decisions – ref to deadlock and role in decision making, and by then it is clear from these paragraphs that the proposals had developed significantly and reference is made to the business case from Turnberry and the financial approach under Appendix 5 and Appendix 6 on Structure and operation.

In Future of Housing Review key paragraphs are; 7.45 land to place in the vehicle, whereby the Council indicated to the market what sites are to be placed in the vehicle. 7.46 and 7.50 (he read these out) Bohse said absolutely clear all have developed proposals very significantly eg Turnberry Business Case and appendix 5 and 6

Para 221 does not change anything in relation to the duties of the Council and consultation with tenants. Wouldn't expect such consultation until vehicle established and there are detailed proposals in relation to specific estates. Nor did it expect any overarching consultation prior to the vehicle or prior to tender or Final award of contract.

Envisaged if there was to be land transfer would be limited in the first instance.

Paragraphs 7.5.3 and 7.5.4: We say not surprising because not possible to consult on inclusion the vehicle until it had been established.

Paragraph 7.5.5: considered Northumberland Park and refers to previous consultation with Northumberland Park Residents.

Judge Intervened: Consultation already undertaken?

Mr Bhose response: No consultation other than with tenants of Northumberland Park.

Paragraph 7.7.2 Procurement is legally required, prior to procurement more work will be done.

Paragraph 7.7.3 sets out procurement timetable, with contract award due Jan 2017.

paragraph 7.7.3 It was right that Cabinet not being asked to set up Vehicle in advance of procurement or choosing a partner - was not being asked to set up a vehicle naturally because it had not completed the necessary work. Was asked to authorise procurement with intention to make award some 13 months later.

Paragraph 10.2 refers to Equality Impact assessment. Assessment of Business Plans to be done on a project by project and must be considered by the Council before transfer.

Turnberry Business Plan Page 276 sets out Structure and operational set out in some detail. Page 285 pre-procurement work, particularly Turnberry Business Case para 10.2/2.2 states that uncertainty can devalue the deal so need to work up the detail, including structure and agreement and procurement prior to bidding.

The Financial Appraisal and Structural Operations were not provided.

2015 Cabinet meeting - By agreeing the preferred option, it was excluding that other options were to be taken forward at that time.

Resolution 3: Cabinet took decision designed to have formal legal consequences i.e procurement. Resolution 10: allocates £547.000 agreed for that purpose. This case falls within "Nash".

Resolution 5: is in similar vein

Resolution 6/7: Sites included as category 1) land and category 2) land for the purpose of procurement. No hiding of which was category 1 or 2 land for purposes of procurement this is made clear in Cabinet 2015

[Bundle? p104 para 13] In reference to the Claimants statement regarding knowledge that Council were engaging in procurement with contractors, but there was no consultation on this and when the plans were revealed local residents and councillors were not aware of these, Gordon Peters was present for part of the November 2015 Cabinet meeting, making a presentation, as part of a delegation, on adults' services. The agenda, report and resolutions were published in the usual way (and as such available to the public) and all those occupiers of Category 1 and 2 Sites were written to, and he could/should have known.

Newsletter to Woodside Avenue 2015 shows how LBH communicating with residents re improving the area – a new way to bring more and better housing, and identify Woodside and Cranwood as potential sites for development, but also says all other options will be explored and this does not mean they will be developed in the HDV.

November 2015 newsletter to residents and Businesses includes new way to win better housing, sets out consultation and what it means for the needs of a development partnership is and sets out what it means for Northumberland Park

Bundle 2. Page D138. Letter to commercial tenants Nov 2016 explains a 50/50 partnership and provides link to the minutes of council meeting in Nov 2015 re commercial portfolio, and says due to public sector procurement rules it can't give details of procurement but will provide further updates. They were later informed that Lend Lease was the preferred bidder (In impact assessment) It is a matter of record that there were few responses regarding category one sites and no concerns raised by businesses. This information was provided in answer to a question to Cabinet in Feb 2017.

This is not a claim brought on behalf of any of the commercial tenants, that in disposing of leases to the Vehicle it (the LA) has failed in its duties to those occupiers.

11th January 2016 memorandum and Pre-Qualifying Questionnaire (PQQ).

Page 64 Council objectives set out for preferred bidders.

Page 69 Lists Property Portfolio.

Page 72 Key principles of the structure are set out.

We are submitting this quality and nature of information would be sufficient to satisfy "meaningful" consultation on a question of Policy and the approach falls within the Local Government Act.

Process of Procurement ran for over a year and is summarised in the Feb 2017 Report.

Overview and Scrutiny Committee has been an important element in the cabinet decision making because went to matters of risk and democracy. Cabinet having given full consideration of this, the level of scrutiny given by the committee was in excess of any normally given or that necessary. (this para is a paraphrase)

Impact of Overview and Scrutiny Panel: it scrutinised matters relating to the democratic accountability and risk. Panel report gives attention to the enquires undertaken by the panel its view that there was unacceptable high risk and so at that stage it could not support HDV. Cabinet was satisfied with matters relating to these – that Equality

Impact Duty and duty to consult was met by Overview and Scrutiny, far and away in excess of that required by Local Government Legislation.

17th January 2017 Report:

Para 5.6/1.1 panel sets out its terms of reference – to scrutinise the HDV.

Para 5.8/1.2 describes the evidence gathering sessions and enquiries made by the panel in gatherings with councillors, residents, and service users, and the risks mean that Scrutiny Panel can't at this stage support it.

The scope of scrutiny of the HDV was very broad and covers the same grounds raised by the applicant. A number of sessions were recorded, officers attended, officers from further afield, and "our Tottenham", a group of residents and community groups.

Structure and Governance of the HDV: Panel shows a good understanding of the structures of the HDV.

Overview and Scrutiny Report made 14 recommendations to Cabinet on 14th February 2017, for consideration. Cabinet consideration [D197] shows the following:

Recommendation 1: Clear risks remain, and what they gain is less than what they will lose. Cabinet rejected this

Recommendation 1.1: Democratic Deficit. Cabinet rejected this - chose HDV specifically as it retains council involvement

Recommendation 1.2: Clarity needed re role of officers nominated to the Board (Nominees). Cabinet state they will always vote as a block on behalf of council.

Recommendation 4: The absence of a plan to investigate the risks. Cabinet refuted the level of risk claimed by Scrutiny and stated that it was designed to withstand cyclical movements of the market due to longevity of the Vehicle.

In response to the recommendation that the HDV should be halted because of the lack of detailed governance Cabinet responded that these emerging codes have management of risk at their core.

Cabinet partially accepted the recommendation for new business case.

Partially accepted the recommendation regarding risk analysis.

Cabinet rejected claim/recommendation that residents had not been kept informed.

Recommendation regarding elected officials on Board of HDV to resolve issues of deadlock (caused by 50/50 ownership with private company) refused by cabinet on grounds that in such situations escalation to the Cabinet could take place.

Recommendation of annual scrutiny of business plan by overview and scrutiny was accepted by Cabinet.

Recommendation 9 subsidiary: (Read out item from the report)

Recommendation 10 to adopt member enquiry system to be in place in HDV Cabinet was partially accepted.

All these points demonstrate these issues of risk and scrutiny were considered by the cabinet, shows there is no democratic deficit, and no equality issues or implications that give rise to need for Equality Impact Assessment (EQIA) in this instance.

July 2017 Cabinet Report. Governance Arrangements of the HDV.

Para 8.8 references EQIA Nov 2015 and states no assessments have been carried out and nothing has given rise to concerns under the Equality Duty

3.4.2 Cllr Strickland (lead Cabinet member) thanks Scrutiny Panel for their work and gives assurance that although HDV is a joint partnership, it will only be able to make decisions by full agreement because council have a powerful veto power, and councillors will be acting on the business plan and any variance would have to come back to Cabinet.

At the same meeting Para 3.24 sets out procurement process and steps.

Para 3.28 Governance arrangements will be set up in the members agreement as formulated during the procurement process. States that Report on preferred bidder was considered by cabinet (Feb 2017), refers to negotiations that took place during procurement.

David Wolfe challenged; because not in the public domain.

Judge intervened: I heard Mr Wolfe's question I don't want to be under any illusion as to what was published and what not. Agenda Yes, Reports No?

Mr Bhose response: Reports and Agenda published on the council website. what was not published were the legal documents referred to earlier (i.e. procurement and much of the members agreement).

Page 339 Minutes of this meeting show a Deputation from Defend Council Housing expressed their concern that this is privatisation scheme. This is an organisation linked to Stop HDV campaign and its principal concern is the 50/50 partnership with the private sector.

It was clear Lend Lease was the preferred bidder and the steps to be taken to set up the vehicle on 13th February 2017, and the pre-action letter was received but the claim was not issued for a further 5 and a half months.

Judge Intervened: Where were the documents published?

Mr Bhose response: Online and they were available at the Town Hall.

Overview and Scrutiny exercised its power of "call in"

[Page 273] of the Minutes of 7th March 2017 Special Cabinet, following this, made firm commitment that no site to go into HDV without a full EqIA had been carried out for each site. And a clear commitment to a right of return which I will take you to later. Wrong that Wolfe should claim no fundamental right to return.

Overview and Scrutiny Panel concluded on 13th June 2017 and a full report was made to the Cabinet meeting on 3rd July 2017 on Governance, an Interim Report having been issued in January 2017.

30 recommendations made to Cabinet (in Second Scrutiny report)

[Page 298 Para 4.4] Terms of Reference include to consider Equality Impact of the HDV as a specific role of the Overview and Scrutiny Committee.

[Page 331] List of those to whom they had spoken, including a list of witnesses. Notes wide range of expert contributors included in review.

The Core Bundle shows the 30 recommendations of the final Overview and Scrutiny Report together with the responses to these recommendations from Cabinet on 3rd July 2017.

- Full Risk Register should be made available to O &S and made public. Cabinet claimed integral to the whole process (thus no separate risk assessment necessary)
- Recommendation 5 - Concerns re 50/50 arrangement and whether the Council's objectives are achievable. Rejected by Cabinet because it is a fundamental principle of the arrangement with Lend Lease and the legal documentation. (Because core to both council and Lend Lease).
- Information to be provided to Cabinet by the HDV – Cabinet agreed that the HDV will report annually to Cabinet and this will be scrutinised by O &S Cttee in the normal way. (part accepted)
- Cabinet said it would be able to withhold transfers of property to the HDV where there is found to be poor performance. if Lend Lease windup or seeks to sell its interest in the HDV council have first option to buy

Partial agreement To EIA being done prior to transfers of land, and agreed the cabinet will undertake further EIA for parts of the Business. EqIA re commercial portfolio further promised, and we know this happened in this case.

- Page 396 Council Portfolio – EIA will be carried out whenever there are any changes to leases.

Cabinet was asked to consider the Council setting up a “Wholly owned” Company for housing and Cabinet agreed to continue to consider this and no issue preventing this happening. As and when housing is developed there will be a decision about the ownership – it could go to a private owner, the Council itself or a Council Owned Company. These are all proposals that will be brought forward. Property could also be transferred back from the HDV to the council these are all considerations to be considered possible one HDV up and running.

The legal obligation in the Land Assembly Agreement will comply with the Council's obligations. It is a legal obligation that HDV must comply with housing policy.

Noted that not even the Housing and Regeneration Scrutiny Panel or the Overview & Scrutiny Committee recommended the need for an overarching EIA of the Governance, Structure etc., of the vehicle and that is because there is simply no issue here. Therefore Ground 3 is entirely an artificial one.

Page 384 of Cabinet Report 3rd July 2017 report to cabinet Goes on to say Business plans will be accompanied by EqIA – no suggestion here of another equality issues arising.

Page 470 (para119) was referred to but not read out. The response to this from the Leader and relevant Cabinet member provides commitments including the “Right of Return”.

Page 481 Show the response from the Cabinet member for housing, and p409 refers to the Substantive Report in July 2017.

Page 411 maintains significant Democratic Control and the importance placed on this by the LA.

Para 4.1.3 recognises flexibility of the arrangement and in life of scheme allows for amendments to the business plan of HDV to allow.....

para 6.59 Category 1 B sites (Northumberland Park and Cranwood), No decision to be taken in relation to either site and can only be changed i.e. recognised as 1A Sites, if and when a decision is made to transfer in accordance with the 1985 Housing Act, and such transfers are entirely at the Council's discretion.

Para 6.89 Ref to Transparency and Accountability.

para 6.101 (commented that para numbering confused from this point) The Financial model is based on the forward sale of the housing portfolio. Anything remains possible...

para 6.103 Need consider category 1.b sites

para 6.122 Any new business plan and changes must be agreed by cabinet i.e by the Council and Lend Lease.

Para 6.123 – related to derogation from this plan.

Para 6.124 Extensive work is to be done including the strategic consultation with tenants and leaseholders and will require further Council agreement. Business plans for Northumberland Park etc.- full consultation then revised business plans because material change.....

Commercial Arrangements Para 8.3: No items fall outside budget requirements for 2017/18 and are within the budgetary framework. Any arrangements will fall within the budget arrangements for future years. The Cabinet decision on finance is not outside of the 2000 Act, and this was not contested by Overview & Scrutiny Committee when the decision was called in later.

Judge commented: Scrutiny did recommend that there should be a full Council decision because it is a big decision.

Response: But whole ethos is that decisions should be cabinet as enshrined in the Act because they are the ones who are democratically accountable. Under the 2000 Act it is an executive decision.

Minutes of July 2017 meeting – Para 481 was referred to. Summary of.....

END OF MORNING SESSION

Ground 2; Duty To Consult

1) No duty to consult on decision to enter into HDV although envisaged estates might transfer to it, that did not follow from the decision to establish it, that all estates would transfer to it.

3) If duty arose later no later than November 2015, when it took off the table the other options, the decision was public and clear and there was no reason for delay.

2015 November would have been the cut-off point. If this is right, time should not be extended and no reason for delay.

5) Permission should be refused under the s3 duty that applies to decisions of “High Level” because the outcome would not have been substantially different.

Duty to Consult [Nash].....

p69.1 High level choices are as much about principle as approach and how it goes about choices.... In partnership with others.

Paragraph 34 f & g: Seems clear doesn't involve any such question. whatever the scope - only can be concerned with development policy and approach not operational delivery details whatever they may be or however important. It is about the approach that forms the need to consult on a high level. Quoted case involving procurement, where Barnet was to contract out its services including back office services, and said question is what side of divide does this fall. This there is no duty under s3. Firstly, to join LLP had no effect on and the defendant or its functions. Second, disposal of commercial property has no impact on its functions. Third, disposal of sites is in accordance with the Business plan. Singly or together insufficient to engage s3. Legal consequences of legal decision were limited because dispose commercial property for best consideration of £45m (namely investment by Lendlease into HDV). Dispose of Wood Green sites in accordance of a business plan.

Second submission if there was a duty when does it arise? Necessarily arose at the stage High-level choices were at an early stage – this was in December 2015 when it decided to progress. (Because only high-level choices therefore only arise when they are at a formative stage quoted Nash and Underhill legal cases). In Nash Barnet seeking to outsource fall functions under Project “One Barnet” and a contract with Capita was to provide new customer services.

Judge interjected: reminding him he had only until 3pm and asked if he wished to progress with this level of detail or case law to be simply left with him.

Bhose continued: Para 3 of Judgement as to when the duty arose – clear under the duty relied on prior to the decision regarding outsourcing and procurement and seems fair.

Para 41: If earlier decision made, 2nd legal precedent was Davis at Appeal, if early decisions not challenged at high level stage cannot apply later. Case Burkett Bhose concludes this shows challenge should have been taken in 2015.

Time limits for JR.....

Para 49: Applies that approach to the facts – decisions were substantive (decided to pursue) not declaration of principle and that was the time action should have been taken.

The emphasis is on the importance of the time limits for Judicial Review.

Para50-51: s3 should apply at an early stage to consult before an officer is given permission to sign a contract

Judge: Do you say there never was a duty to consult?

Mr Bhose response: Yes there wasn't because not sufficiently high level.

Judge: so not high level enough in November 2015?

Mr Bhose response: Because whilst it contemplated that it could be used to include estates the scope of the decision was more limited to setting up a vehicle. The question is of where the line should be drawn.

The Duty to consult on a higher level HDV could not have arisen until November 2015 and this wasn't a Barnet case because the decision was to enter into procurement.

Lord Justice Davis goes onrefer to Cochran. Formative stage was 2015 this was only possible time to consult and therefore challenge.

The Claimant says that it was only in July 2017 that the terms of the HDV became clear. Section 3 duty is not to consult about terms of the agreement, it is about policy and approach, conflating when did the duty arise under s3 and was there sufficient information at that time to make it a material consultation. This claim is not brought properly and there is no case for the delay.

Delay by Claimant: he chose not to issue his claim for 5 and a half months, when Lend lease had been chosen as preferred bidder in that time. The reasons for delay given are 1) the Claimant always consistent with decision needed in July 2017, yet he claims LA in breach of duty to consult in February 2017. 2) February Pre-action letter-in name of Mr Thomas of Northumberland Park (our original legal aid claimant) then delay of 5 months before issuing. Mr Thomas response had been that his claim would have been premature because no decisions made in relation to him. Permission should be refused and be ruled out because of Scrutiny and Overviews' scrutiny and submissions.

Ground 3: Equalities Impact Assessments

November 2015 and five individual reports in July 2017, detailed proposal's characteristics and its impact. 5 detailed Equality Impact Assessments –Not been claimed erred in law. Apart from commercial properties - Only impact at 2015 were on commercial properties and no complaint received from them therefore no EqIA.

The Claim is that an overall Equality. Impact Assessment is needed of the HDV, considering financial control etc. [115 of claimant's grounds] Falls or stands on claim that over-arching EIA of vehicle needed, but as we have demonstrated cabinet considered all these issues in great detail, assisted by the Overview &Scrutiny Committee, and was satisfied these concerns not existing **none stacked up** and in so far as there were duties, it had met them - when concerned took or described steps to address this.

I struggle to understand who might be impacted by the creation of HDV only examples are of people and their homes but no decision has been taken in respect of those.

Retention by defendant of control, influence and democratic accountability are demonstrated by the Council. I struggle to understand which characteristics may have disadvantaged him such that he has a claim. There are no examples given in relation to him and no decisions taken in relation to individual estates – he can bring an action at that point if dissatisfied.

1.2.2 4 **Tribunals** cited in the skeleton.

Decision of 3rd July 2017 was an Executive decision i) member of LLP, ii) dispose of commercial property ii) to give option to dispose. At no point to attempt to control borrowing or expenditure in years to come, and would not concern the entire panoply of the Council's functions, only affects one element of Local Authority Responsibilities the Councils' Housing. An executive decision will be taken by the Cabinet if and when transfers are made, overseen by Overview and Scrutiny.

Regs. 4 and 5: Functions not the responsibility of the Executive

1a) In formulating a plan or strategy actions designated by para3 not designated responsibility of Executive, Para3 refers to a Plan or Strategy.

2) sets out the plans and strategies meant.

Reg. 41b): Formulation of a Plan or Strategy – borrowing, budget and investments for Council Expenditure, and medium term financial strategy, Capital Plan and Budget.

Reg. 4 Formulating any other Plan is a matter for determination by the Authority and shall not be the function of the Executive if in Schedule 2/4 (?). Adoption of a Plan or Strategy where the Authority determines decisions should be taken by them i.e Full Council. For example, the Housing Strategy. Back in the Court of Appeal, only Policies in the Constitution require Full Council approval.

Full Council will set the budget and overarching policies, policies and strategies within Schedule 3 and thereafter the Executive is required to make decisions within these overarching policies. Overarching policies set 14th Feb 2017 [Bundle 2] The Council recommendation is to adopt the Council budget and medium term financial strategy, within Reg 4. 16. And Cabinet required thereafter to act within those, which is what they did. Financial consideration of these matters did not fall outside the budget 2017/18 but would fall outside in years to come. They made a decision that comply with policies but not with the impact on the future overarching policy not yet **decided**.

If not undue delay under Ground 2 the Court has discretion to grant Relief. Relief could be granted because ground 2 dealt with by Overview and Scrutiny Committee and because future decision to be made.

Case Law Norton: S49a 1999 Act. The LA sought possession of a school caretakers' residence and he needed the accommodation for his disabled daughter. It was held that the LA had been found to have taken their duty into account before these proceedings. Tenant said possession should be set aside and the LA make correct decision. The judge decided not to set it aside but left it up to the Authority to exercise its duty in future.

Even if there was non-compliance, matters can be brought forward in future and there is nothing against this. A whole host of decisions to be taken by the Council although approval of the Business Plan they are indicative only. There will be extensive consultation with tenants re development, the landlord etc. and compliance with Equality obligations.

Justice Ouseley: Is the HDV subject to this or will the Council impose this obligation?

Mr Bhose's response: Council imposed this in clause 3 of the Land Agreement.

3.11 has to be consistent with Council policies. Consultation is required and legal regulations. include Council's powers, functions, pursuant to the Act.

(clarity re Equality Impact Assessment)

The Council itself has to approve Business Plans and variations and duties under s149. And the HDV would have to have close regard to these.

“Material Variations”: It is entirely for the Council Cabinet to decide on material variations, can approve, reject or vary, and then up to the HDV and Lend Lease to decide whether to accept these.

S105 Housing Act 1995: must undertake full consultation prior to development or transfer, whether should be undertaken by HDV or anyone else.

Clause 5.8: no legal obligation to..... Will be bound to consult and would be open to Cabinet not to dispose of any land. All decisions open in future not Hobsons Choice. If decision to dispose then taken, it requires consent of the Sec of State and only Full Council can make this request. It is at Full Council’s absolute discretion – no legal liability in this regard.

Added to that is the Planning process, engaging residents and groups – entirely different overarching process by which residents will be consulted.

The HDV is the preferred option but that doesn’t make consultation invalid.

Right of Return does apply to Northumberland Park. Every secure tenant or leaseholder and Housing Association Tenant, will have Right to Return. The only ones who can waive this right are the tenants themselves.

END OF HARINGEY’S DEFENCE

LEND LEASE'S CASE (Interested Party)

The LA acting commercially does not mean acting for a "commercial purpose".

Adopt all of Haringey's arguments and all in my own Skeleton:

1. Ground 1 Vires: Merits or lack of ground and Vires

1. The Council can rely on GEPOC.

2. In the alternative and in addition it can rely on other powers, a cocktail of powers, including GEPOC

3. What matters and all that matters is "a" commercial purpose.

4.All that matters is if council purpose is commercial not any other partner. If HDV.....

5. The Council's purpose is not a Commercial Purpose.

6. The HDV's purpose is not a Commercial purpose either. Vires Case (1.) is.....

Council can in post risk management rely on GEPOC. Can rely on other powers including GEPOC. Not prevented from relying of GEPOC by section

1. Test in either case is what is the true and dominant purpose (of the Council and the HDV)

2. True and dominant purpose impact **on the action taken?**

Case of Southwark (in Crown Court) ex parte Bowles: Power to instigate recovery of proceeds of crime, not the power to provide evidence of the alleged offence. The House of Lords (quoted section 931h most significant part of judgement from Lord Hutton) ruled in the case above that the application activated by dividing of purposes was right if the true and dominant purpose to recover proceeds of crime, even if establishing the alleged offence is another purpose.

What is the touchstone by which the application should be made – refers to two purposes above. An act may meet two or more purposes and the general rule is that it will be true and lawful providing the "True and dominant" purpose is lawful, even though another purpose exists, consider it clear that "Dominant" purpose is one that should apply even if incidental consequence, but if true and dominant purpose is to show offence committed, the application should be refused.

Submit the "True and dominant" purpose is the test in relation to every transaction and won't be satisfied if secondary to a greater purpose.

Here there is only one transaction in which to apply that test. With a wealth of material to show that this is not a "commercial" but a "Social" purpose - The November 2015 Report and reasons given in July 2017 [D574-79] and the objectives in the Members Agreement.

1. The true and dominant purpose is shown in the scoring scheme 20% funding 80% non-commercial as shown by Dan Hawthorn's statement. Whilst different formulations and different points will not apply to a secondary **purpose**.....HDV is not a commercial body but rather goes to housing provision.

.....

Delay on Ground 1

Grounds for challenge first arose in 2015 when Cabinet decided i) First, the adoption of the option to proceed with HDV as preferred option. ii) The approval of the Business case (ie Turnberry) and iii) approval of procurement of a joint venture partner. The latter was a very precise, and immediately applicable, definitive decision. Procurement was then duly implemented, and the process was begun and pursued for the perusal of matters thereafter.

That and that alone was the time for challenge if that was lawful.

The Council also authorised funding of half a million pounds and bidders at that point would incur heavy costs – that was the time to challenge in terms of Vires if argued that it should have been a Company rather than an LLP.

Judge intervened: That is the point.

Response: Para 9.3 of November 2015 report – grounds for challenge on basis of LLP arose at the latest in February 2017, many months before these proceedings started, in August 2017. February 2017 decided it would be an LLP and therefore this is out of time.

Judge: What do you say about the argument that time didn't run or won't run until land is transferred. The act strikes out "doing it" and that is when time begins to run. The act strikes at what it is immediately going to do. Could say but is when you Do It. My answer to your delay is that you have the advantage of us coming too early.

Response: First challenging establishing and then participating in the HDV. That decision made long ago and this is badly out of time. Test of when time starts to run – they have long since arisen and time had started to run before 3rd July decision. (What he is challenging is that time starts to run regarding a JR when grounds first arose therefore certainly time has started to run well before July 2017 - If the defence for not challenging was good, would still stand for 3rd July. Makes a monkey of the principals of JR. It can't be the case that JD can be started at any time (to challenge if Claimant can say I can take action at any time, and have a crack) regardless how much money spent, contracts started etc and not no matter 3rd party have committed to this in money or resources or the hopes of residents who stand to benefit. The decision was to establish an HDV as probably an LLP or a Company and when definitely a decision for an LLP was made in February 2017, this could have been quashed by Judicial Review. Implementing the decision is lawful and not ultra vires. Because lawfulness or otherwise can't be challenged, because out of date.

Even if not out of time previous decisions that were lawful at the time must remain so (otherwise?)detriment to and council (?) and third parties.

JR demands that proceedings are brought promptly. One cannot say at one point we are objecting to HDV then say no we are objecting to other things that may happen later.Not object to delay or cabinet/council split.....

Delay on Ground 3 (Equalities)

Delay – Supports Council on matters but supports delay argument Council failed in duty to conduct EqIA in setting up HDV. Failure to assess structure and transferring assets to HDV.

(To allege breach of Equality Duty Council, fail to consider impact of decision to set up HDV) But overarching structure, transferring the Council assets (commercial portfolio)

decision to set up HDV and undertake procurement were exactly what was resolved upon in Nov 2015 and then subject to EqIA done and via usual democratic process.

Feb 2016 decision taken to procure a partner and 14th February 2017 preferred bidder announced at conclusion of competitive dialogue procurement process, a process not challenged. My client, having gone through the process is now compromised as “preferred bidder”. No criticism of selection of Lend Lease as Private partner

Lend Lease having put in considerable expense find themselves subject to loss for reasons nothing to do with them. No complaint against Lend Lease just the notion of a private sector partner at all. (the claimant’s issue is about there being a private sector partner at all) It is out of time to say there should have been an EqIA when the bidder was chosen, (In February 2016 had not reached a definite position) because will be a duty when the transfers will be done.

This sits alongside continuing duties not reached a definitive decision re public sector duties but in a fallow land because past times when necessary and some future time. Fact that you have a complex developing situation cannot have a string of challenges. Yes, there may be future challenges..... Question is if at the time claimant knew enough to bring a challenge to the decisions made at 2015.

The 3rd July doesn’t change the decision of Nov 2015 and Feb 2017, it doesn’t give a second opportunity to challenge, and can’t have right to challenge decision at a later date after the opportunity has been missed. No right to challenge in July, but this is not to say won’t be able to challenge at a later date.

Ground 4 Cabinet Council split:

There is a division of responsibilities between the Council and the Cabinet. Clear in 2000 Act, redefined in Localism Act, both Council and Cabinet have certain duties and other duties fall to one or the other. Everything is for the Cabinet apart from a few items with some joint responsibility.

Duty to Report - July 3rd Cabinet Report sets out critical elements of HDV: i) governance of HDV ii) Commercial Deal with lend lease iii) Proposed Work Programme – all considered wholly responsibilities of the Cabinet not full council. Continuation with grounds for resistance (stressing Bank and Doncaster Case) Regarding the Whitstable Society case [Vol 2 Tab 46 and Tab 44] decision of Lord Justice Lewis arguments’ set out in Skeleton relevant passages and do not need to add to these. Found there was a breach but Refused relief on grounds of delay and commercial impact where contract already entered into. (due to time-scale, regardless of seriousness of issues involved). Strength of delay case varies from ground to ground – court has discretion with regard to detriment of good governance and to 3rd parties.

END OF LEND LEASE DEFENCE

MR WOLFE'S RESPONSE ON BEHALF OF GORDON PETERS AND STOP HDV

Case on Ground 1

Alternative Powers discussion. With respect to Mr Giffin on ground one takes us straight into s12 and s11, but now says s12 and GEPOC – here broadened the defence out – was originally just s12.

No interpretations of “May invest” entirely in common with the common meaning: Read out definition from Encyclopaedia (not a wide reading of the term) and Hansard clause changes this.....

Judge spoke:

David Wolfe response: Appendices to July Committee report (to be placed after July report D633). Printed document - agenda item 10 of the Committee Report.

D629 List of Legal Documents, the Pinsent Masons Summary legal documentation.

The investment Plan listed and three extracts submitted from this.

2b Strategic Plan Delivery.....

2c Strategic Business Plan Exempt report only.....

Investment business plan.....

.....extra bits paper.....

From Pinsent Masons Document

Page 97 74.3

Page 99 Structure Chart of HDV - The HDV has a number of subsidiaries, linked LLPs and LPs – the overall structure.

Page 102 Item 2 Limited Agreement Partnership – Agreed the “investment PPL shall be set up as an LP. The Council is here becoming a member of the HDV and the LP and Development LLP with the intention to “attract investment from pension partners”.

Page 107 Land Assembly Agreement. s5.3 general provision to comply with Council Policies.

P108 s5.4 prioritises “single move” of residents rather than “Right of Return”.

Mr.Wolfe then quoted from and referred the judge and defendants to the document ‘HDV Business Plan Delivery Strategy’, dated 3 July, 2017 -sub-titled Redacted Version.

Overarching plan agreed in July [Page 769] “to deliver regeneration it may be necessary to acquire private residences....., not just Council properties but expanding the portfolio.

Para 1.4.2/3.1.2 May be possible to enter into Joint Ventures through the HDV - to enter further partnerships with new partners

page 774 s3.3. Category 3 properties identifies “further areas not yet in our sights or not yet in Council ownership to build on Council portfolio

p778 May have reason to obtain clustering of commercial properties. May be able to acquire different assets to fulfil further ambitions such as Business case led Town Centre Development e.g. Wood Green. And the Plan referred to Members Agreement and an exempt document so we have no idea what the Council has signed up to

Page 778 para 4.2 Level of Affordable housing, INCLUDING social housing, is modelled on a 40% rate. Council housing provided by the Council – do not know what proportion will be Council and what proportion **other affordable?**

Judge: What point does this go to?

David Wolfe response: The **PDP** - don't know what % will go to those on waiting list. (Exact mix is set out in Businesses Plan, which is an exempt document unable to judge what goes to the waiting list). Recognition of pressure on affordable housing.

Potential for HDV to act as a **PDP** - potentially lead to a property portfolio that could stretch beyond the Borough. (**Registered.....lead to revenue generating portfolio even beyond the borders of Haringey**)

Judge: What is your point?

David Wolfe response: whether this can properly be characterised as “Investment” and the things “incidental” to it, or is this the Council taking part in a Commercial Property Development Agency with implications way beyond what the Council could contemplate?

Commercial Portfolio Investment plans are varied and agreed over time.

Par 18.4.1 of Members Agreement. 'These business plans are agreed and developed over time.'

Judge what goes to percentage that will go to the waiting list.....don't know who is on the waiting list who may have protected characteristics, hence need for new EqIA. Affordable housing at this level is challenging to deliver commercially further down the line.....

The 1A sites commercial portfolio [P13 49 para 3]: Strategic focus is income maximisation therefore not wider social purposes.

Members Agreement. The HDV objectives are to optimise: Para 4.1.2 – investments, maintain property portfolios. Information on the other organisation maintaining long term revenue stream.

Para 4.4.2 - HDV and its partners will have the power to do things. “Why not a casino or a shop?” well then why not. Participating in all this is way beyond the understanding of “investing”. Thus, falls foul of the risk management of LLP investment. Lend Lease said it is the HDV not Haringey Council which is a member of this.

One is concerned about what the Council is doing through the Vehicle, but for s12 purposes it needs to rely on how s12 fits with the incidental powers. How is the process of signing up to a complex framework and making decisions led by this and through the Council's Nominees – at best “incidental to the incidental”

Intervention of Defendant's Counsel: The HDV is a member of the LLP not the Council.

David Wolfe Responds: It appoints nominees to the Board of HDV..... those things....., acting in the company of the Council, on behalf of council. Even if some part “Investment” certainly can't be characterised as all “incidental” to Investments, would be incidental to the incidental. If this is the complex legal..... underpinning at the very least councillors should have been told of this, instead they were merely told they would be relying on general Wellbeing power and proceeded on an erroneous basis if they thought s.1 would do the job.

Regarding Land Disposal. section 123 Local Government Act builds in a 'Best Value' requirement. What if the LA enters into an agreement that later accrues incidental benefits down the line. This is a very long way away from simple land disposals.

Acquisition of Land Act 1963 (loose sheet submitted late from Mr Giffin) is about constructing buildings not acting as a developer as in this scheme and the LA can't rely on this.

In relation to construction section 4 and so on - at a general level Mr Giffin says need to look at A single purpose. The argument (from Giffin) as singular and plural is wrong does not refer to primary purpose only. This fails completely because of the language used in s4(2). It uses "a" and "Things" not "the" which might have covered it. Even if look at things in the round one still has to look at "a" purpose. The LA has to do things in these structures through Companies rather than any other way.

Judge interjected: that is the sting in what he is saying- He says a company is not required at all. This tells you how you have to do it.

David Wolfe: He refers to Company Tax example and precisely this Council shouldn't be exploiting that advantage unlawfully. It must do those "things" through a Company. That doesn't require an enquiry as to Lend Lease's intentions but what the Council intends to do through the HDV. Re level playing field if for e.g. the tax issue then this Local Authority should not be exploiting that inappropriately. We are not interested in Lend Lease aims only the Local Authority. Safeguarding the Council's financial position – always an issue for LAs and that is correct, what is in play here is a long way from safeguarding.

[S103 (O'Neale)]: With respect to the Garden Bridge legal case (one that judge Justice Ouseley was involved in). Recovering income is always going to be part of Best Value considerations – It is right this is not commercial, if the primary purpose test is fulfilled.

This is not the case here, with a primary purpose, but about primary and incidental we say these are multiple purposes and if "a" purpose is commercial then the point is satisfied. The LA purposes are tied to the objectives as listed in the Council document.

Multiple purposes are identified and set out here and in the Members Agreement, including obtaining a financial return etc. (David Wolfe read out all of the objectives listed)

Durham case Dicta is very tentative and limited we agree simply making a profit does not amount to a commercial activity, but what we have here (with the HDV) goes beyond that and clearly does amount to a commercial purpose.

Regarding the February 2015 Cabinet Report the Council is committing expenditure leading to an investigation of the HDV – nobody suggests committed to this,commits the council to the HDV. Committing to investigating the scheme doesn't commit it to the scheme "Committing money to investigate is not a decision to commit to it" – not a signing off of the HDV, but way too tentative and "high Level".

September 2015 Housing Review Group Document, is agreeing to bringing forward a development vehicle – as either a development vehicle or joint venture or council-owned - completely up in the air about the nature of the development vehicle.

Feb 2017 Governance Issues and risk. Mr Bhoose took us to a series of documents about Governance issues and associated risks which repeatedly identified the risks – Overview and Scrutiny Committee raised the issues but the Council simply repeatedly said we are working on the governance structure - which we know only emerged in July 2017. Overview and Scrutiny Committee repeatedly raised the importance of governance issues.

Judge interjected: s3 contemplated and comes in at a stage when the plans are cogent?

David Wolfe response: Has to be cogent enough to be able to comment.

Judge: This is a decision at a higher level,

Response: This isn't a plan decision, it's about how going to achieve Best Value, issues raised and what matters is governance and how the Council is going to exercise its plan. Until then this is an emerging plan. Scrutiny is asking the questions and being told "Wait and See", but the documents were not in the public domain. The Council Claimed reports in the public domain – emerging governance arrangements were not in the public domain.

Judge: Might this be seen as part of its attraction – that it can be fitted into the council document but doesn't seem to fit to consultation at the end. Judge if it doesn't really fit because often consulting after presentation of rather this allows the Council to feed the concerns into the project and eventual document.

David Wolfe: We say we only had the emerging proposal – not the proposal itself. Scrutiny was asking questions and being told effectively wait and see. But the documents were not in the public domain. Referring to Newsletters ..

Judge interjected: they are a fall back for those circumstances where consultation was necessary but not done. A development vehicle, joint venture – it's this structure with these governance arrangements.

David Wolfe's response: Simply to be told partner arrangements in a newsletter tells one nothing.

Deciding on a partner in Feb 2016 doesn't help them. Our submission is that illegality hasn't yet bitten – its' premature.

Judge: Your case is about governance vehicle of this sort.

David Wolfe: LLP point was decided in February 2015 – but doesn't help him on timing...

Scrutiny is not the decision maker so cannot help him.

Equalities issue was dealt with by Overview and Scrutiny Committee, but they weren't the decision makers. Relies on the Council saying because the (Cabinet) report said no equalities issues there was nothing to consider.

16.2 Cabinet requires a commitment to include full EqIA including on the establishment of the HDV Refers to doing a full EqIA at point of establishing HDV – the very thing about which we now complain. But now claiming this is not necessary and no plans to do one.

EqIA in relation to the setting up of the HDV:

14th March announcement of Lend Lease as preferred partner, and on 24th March the Council said it can't assess the impact of setting up the HDV until it has set up the governance arrangements.

Document annex to Letter from Dan Hawthorn to Secretary of State saying we can't assess Equality Issues until formulation of HDV and Governance.

Para 8.3 of 3rd July 2017 Cabinet report: Mr Bhoose said proposal consistent with budgetary framework, as if no Plan or Strategy was adopted. But the Budgetary framework is not proscribing investments or constraints for the next 10 to 20 years, so as such is it not a matter for full council. The Creation of an HDV and the documents around it is a Plan or Strategy that requires Full Council decisions. The fact that it complies with the budget framework does not get around this.

Re Mr Bhoose argument that s3 arose, as in Nash, in November 2015 - section 3 duty is clearly not same in Nash because nothing changed in the interim. Nothing changed

other than the decision to sign up with Capita, whereas here a “Material” change occurred from November 2015 to July 2017. Where all these significant material changes took place within that time. If this is wrong we don’t seek to extend the time from then. The Documents did not amount to taking a lawful decision.

Pre-action letter in February 2017, says in anticipatory sense that section 3 will only come into play when they make the decision (ie 3rd July). In Para 9 the Council indicated that there were two further decisions that needed to be taken – on 14th Feb and then the decision regarding the HDV in the Summer and that the Council considers it has a duty to consult on this decision.

?? interjected: Para 42 of the same letter applies.

David Wolfe response: The Fallow period argument is simply wrong. Equalities Impact arising and not assessable in the context of setting up the HDV. Have shown how these arise at that stage and the **Project Team document, and Business plan has no reference to equalities, assume HDV as pre.....**

Judge interjected: You’ve taken me to the need for EqIA. Is the issue touched on of EqIA in the preceding March Report and related decisions? Is there anything in relation to them here at some stage June?

David Wolfe response: [Para 16.3 D132] The Decision to establish the HDV and the Business Plans subject to full EqIA, and the Business Plans have not shown anything in them that assesses these matters.

p347 March Document and response to Scrutiny on the same day. Where the Council resolution, minutes, and Cabinet decision are available. You have not been shown anything from Cabinet saying that this is not needed.

Both Documents for March and June say there is a need to have an EqIA in relation to the HDV and Business Plans, and nothing meets these requirements or displaces that.

Nothing Mr Bhowe showed you subsequently

Judge asked: is he to be shown any comment about this by the decision makers (ie cabinet)

Bhowe replied: No there is nothing, only the response to Scrutiny Panel from the cabinet, included in the Cabinet Report, which was approved, that says there were no overarching Equalities Impact Assessment issues identified (P386 onward and p408 (14 and 15 questions from Scrutiny). However, if no duty to conduct EqIA no need to reference.....

24th March Document is repeated in the Scrutiny June Report.

David Wolfe responded: no what you have seen is promises to do it later. What you have adds nothing to the Council saying we will assess EqIA later.

Land Assembly Agreement:

In relation to category 1 HDV (para1.3.1) HDV drawing up a Business Plan is done in performance of Statutory Powers. (will be consistent with statutory responsibilities) - claimed only in relation to commercial property; Not in relation to anything in the future.

Judge interjected: Doesn't it only apply to Category 1 because to go in (the HDV) category 2 has to become category 1, and doesn’t cover Cat 3 because Cat 3 will become Cat 1. and have to be passed by Cabinet.

Wolfe response: This has to be passed by Cabinet and the LLP – Lend Lease would have to agree to them. Very narrowly focused discharge of statutory duties of the Council. E14 Para 46: didn’t claim HDV would discharge the PSED and we wouldn’t

have known that until 3d July or those carrying out EqIAs.

Dan Hawthorn did not claim in witness statement.....

Ground 4 – Matter for Full Council

We say this is not simply a plan or strategy to control investment over 20-30 years because it locks the Council into this arrangement where it has to agree everything unanimously with Lend Lease. It locks its property portfolio into 10-20 years contract subject to Lend Lease agreement. Everything else that may go in is subject to their agreement. It doesn't matter that only commercial property has been considered for transfer at this point. Article 20 still triggered in relation to consultation and will apply to everything down the track

Flexibility is allowed in a Plan or Strategy – overarching activities has a plan or strategy and this was a matter for Full Council.

Delay

Ground 1: We are told that the LLP decision hasn't yet bitten, in relation to the PSED no decision in July, and Delay only arises in relation to Ground 2. If decision taken in 2015, no argument on time – undue delay doesn't arise automatically other than through the "Walters" prism, and nothing raised on this in the last 24 hours. We don't seek to extend time, so prejudice cannot bite and does not arise.

Mr Guadi interjected: ground one, section 9.....H...of the act was in play.....

David Wolfe: The Primary Purpose point is touched on already

What are the purposes of the investigation. we are interested in a purpose so we start from a different place therefore Bowles not in play because we apply a different statutory provision. S93 h(i) in that case, for the purpose of an investigation – seeking to ascertain what was the purpose of the investigation. In that context the predominant purpose test applied, whereas we are looking at whether "a" purpose is fulfilled. We are looking at a different Statutory provision and therefore this case doesn't apply.

Decision re LLP February 2017. It was argued that time does not run until act in that way, suggesting premature rather than late. Then that took decision February 2017, that was vires and for all time. That can't be right. If they make a specific decision re a casino or shop would that be immune from argument re s1 and s4, that would be absurd. Every time an officer does something in the LLP they will be using s1 powers. It can't be made immune by a decision taken in February 2017. (If challenge from February 2017 not made they can do what they like. Vires will be enacted in LLP by nominees. They will be enacting section one powers

With respect to Mr Guadi's on behalf Lend Lease, up to and including 2013 the Council made clear it was not responsible for the bid costs and took decision in July on that basis. We say we cannot be in a worse position If that decision was unlawful it can't be liable for the costs and we can't be responsible for bid costs; those costs cannot fall on us.

We ask the court

To allow the JR on groundsfor the reasons set out, the court is invited to grant permission and the relief sought by the claimant.

To Declare that decision (the Cabinet's decision) to be unlawful, deciding that to

proceed in this way was within the power of Full Council. We want the quashing of that July decision.

The LLP point is premature and in relation to Full Council can't make objections because action hasn't yet happened. To the objections raised by the defendant we say not so.

END OF COURT HEARING