Case No: CO/767/2017

Neutral Citation Number: [2018] EWHC 464 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT AT MANCHESTER

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ.

Date: 12 March 2018

Before :

His Honour Judge Stephen Davies sitting as a High Court Judge

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Between :

Daniel Johns Manchester Limited	**Claimant**
- and -	
Manchester City Council	**Defendant**

- -
- -

John Hunter (instructed by **Ramsdens Solicitors, Huddersfield**) for the **Claimant**
Paul Greatorex (instructed by **City Solicitor, Manchester**) for the **Defendant**

Hearing dates: **20 February 2018**
Draft judgment circulated: **22 February 2018**

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JUDGMENT

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies sitting as a High Court Judge:

Introduction

1. In this case the claimant, Daniel Johns Manchester Limited, seeks to judicially review what it describes as the "continued refusal" by the defendant, Manchester City Council ("the city council") to "consider its offers" to purchase the freehold of a commercial property at 9a Church Street, Manchester M40 2JE ("the property").

2. The case was listed for a rolled up hearing on the basis that in addition to the substantive issues there were issues in relation to: (a) the amenability of the challenge to judicial review; (b) the standing of the claimant to bring the challenge; (c) whether the claimant was out of time to bring the challenge and if so whether time ought to be extended, all of which were better considered at the same time as the substantive issues. The case was well argued at the hearing by Mr Hunter on behalf of the claimant and by Mr Greatorex on behalf of the city council.

3. The case raises issues as to the amenability of the decision to challenge on public law grounds (and, if so, which public law grounds) when: (a) the decision in question was one rescinding a previous resolution authorising the sale by private treaty of the freehold of the property to the claimant; (b) the city council had previously indicated its willingness to sell the freehold to the previous owner of the long leasehold interest in the property but only on terms which were expressly marked "without prejudice and subject to contract"; (c) the claimant's primary complaint is that the refusal to sell was rendered unlawful because it was motivated, substantially if not wholly, by the defendant's disapproval of the claimant's intention to develop the property in accordance with a planning permission which the defendant had previously granted in its capacity as local planning authority.

4. In summary, my decision is that whilst permission should be granted the claim fails substantively on all of the three grounds which have been advanced.

5. I will deal with the facts first, then refer to the law before addressing the grounds. Finally I will address the parties' respective submissions as to permission to appeal and costs.

The facts

6. The case management directions given required both parties to provide standard disclosure of documents relevant to specified issues and to serve any witness

statements to be relied upon relevant to those issues. They also provided for either party to apply for permission to cross-examine the other party's witnesses by a specified date. Both parties provided disclosure and served witness statements, in the claimant's case from its sole director, Mr Bhatti, and from its architect and director of its holding company, Mr Summersgill, and in the defendant's case from Ms Boyle, a development manager in its strategic development department. At the outset of the hearing a number of preliminary procedural issues were raised by the parties in relation to that evidence. Thus: (a) Mr Hunter for the claimant complained that the evidence given by Ms Boyle as to the reasons for the defendant's decision contradicted the reasons previously given and had not been relied upon in the defendant's pleaded case, whereas: (b) Mr Greatorex for the defendant contended that in the absence of an application by the claimant by the specified time for permission to cross examine Ms Boyle it was not open to the claimant to invite the court to reject her evidence. The view which I took and communicated to counsel, from which they did not dissent, was that it was appropriate to allow the defendant to give the evidence which it wished to give as to its reasons but to consider whether or not I should accept that evidence by reference to all of the relevant circumstances including – most importantly – the relevant contemporaneous documentation and that there was no need for Ms Boyle to be cross-examined in that respect or indeed in any other respect.

7. The property is a vacant plot of land in the Newton Heath area of Manchester. The city council is the freehold owner of the property. The property is the subject of a 125 year lease dating from 2001. Before the claimant the previous holder of the leasehold interest was a development company known as Cityscape Estates Ltd ("Cityscape"). Immediately adjacent to the property is a commercial property known as the Rosedale property which was formerly a Co-operative department store but is now vacant. Before the claimant the previous owner of the Rosedale property was also Cityscape. To the rear of both properties is another site, of which the city council is also the freehold owner and in respect of which there is also a 125 year lease in favour of a company known as Yikman Credit and Finance Company Limited ("Yikman"), known as the "Yikman site".

8. Since 1999 the Newton Heath area has formed part of a regeneration area in which the city council has led a major programme of regeneration activity. In her witness statement Ms Boyle explains how regeneration activity is more problematic in what she refers to as more marginal areas such as Newton Heath when compared to the Manchester city centre and immediately adjacent areas.

9. In 2007 Cityscape obtained planning permission to erect a multi-storey apartment building at the rear of the Rosedale building façade, with retail development at the ground floor and two levels of underground parking. The

planning permission related both to the Rosedale property and to the property the subject of this case. The permission was renewed in 2011 on condition that development commenced within a specified time. Sufficient works were undertaken to comply with that permission so that the planning permission is and remains live. It is common ground that one reason for the lack of development since 2007 has been the downturn in the property market following the banking crisis.

10. Ms Boyle said in her witness statement that in 2009 she met with a Mr Richard Ward of Millerbrook Properties, who represented Cityscape, and that his view even at that stage was that development in accordance with the existing planning permission was not viable. This was a view which was shared by the city council, who had instructed DTZ to conduct a commercial review of the Newton Heath district centre in 2014. In the same year the idea of addressing the viability concerns by extending the development site to include a part of the Yikman site ("the Yikman proposal") was first raised by Mr Ward. In late 2015 / early 2016 the Yikman proposal took on fresh impetus because Yikman were willing in principle to sell and Mr Ward had found someone who was willing in principle to take the larger portion of the Yikman site which Cityscape did not need for the Rosedale development. The city council was an enthusiastic supporter of the Yikman proposal, considering that the Rosedale development needed more room than was available on the Rosedale property and the property combined in order to make it viable, so as to provide sufficient space for amenities and also for car parking other than via the (expensive) underground parking provided for by the permitted scheme. Unfortunately, however, the Yikman proposal could not proceed because the person interested in taking the remainder of the Yikman site withdrew interest, which led to a decision by Cityscape in early 2016 to sell both the Rosedale property and the property.

11. By February 2016 the claimant had become interested in acquiring both properties. Earlier, in 2013, the city council had been asked to sell the freehold of the property to Cityscape. It had agreed to do so and had authorised its agents, Jacobs, to produce heads of terms, which were expressly marked "without prejudice and subject to contract", stating that they would "recommend the disposal" of the freehold of the property to Cityscape for £10,000, but only on "completion of redevelopment works in line with current planning consent". The claimant had understood that it would be acquiring the freehold of both properties and, once its conveyancing solicitors discovered that Cityscape held only a leasehold interest in the property, asked Cityscape's conveyancing solicitors to confirm that the city council was still willing to sell the freehold. Mr Ward was asked to make contact and did so, emailing Ms Boyle in late February 2016 explaining that the claimant "needed certainty on the purchase of the freehold". The city council was quite prepared to do this and on 5 April 2016 issued an updated version of the heads of terms to Cityscape, also

expressly marked "without prejudice and subject to contract" and also expressly stating that the sale would only take place on completion of the development works in line with the current planning consent, but also expressly conferring on Cityscape the right to assign the benefit of the agreement on condition that the assignee also purchased Cityscape's freehold interest in the Rosedale property.

12. It is of course accepted by the claimant that as a matter of law these heads of terms imposed no legally enforceable obligation of any kind upon the city council to sell the freehold, whether to Cityscape or to the claimant as the incoming proposed purchaser of the leasehold interest in the property. Nonetheless, it is apparent that it provided sufficient comfort to the claimant for it to enter into a contract with Cityscape on 12 April 2016 to acquire the leasehold interest in the property and the freehold interest in the Rosedale property, which was not conditional in any way upon the city council either selling the freehold of the property or entering into a legally binding obligation to do so. Furthermore, there is no suggestion that either the claimant or its conveyancing solicitors or other representatives entered into any direct discussions with the city council at this time as regards its intentions in that respect, still less that anything was said or done by the city council which gave rise to any legitimate expectation that it would be bound to transfer the freehold interest in the property to the claimant as and when it required the city council to do so in accordance with the heads of terms.

13. However a little earlier, on 4 April 2016, Mr Summersgill had made contact with the city council's planning department to arrange an appointment to discuss the claimant's[1] proposals to apply for an amendment to the existing planning permission to add sports and recreation facilities to make the development more attractive to prospective residents. In fact, the proposals which were submitted also included changes to the elevations and increased the number of apartments. The immediate response of Mr Jones, the relevant planning officer, was – as set out in an internal email – as follows:

"The existing permission for redevelopment of the site is a product of the past and as discussed yesterday I think our preference would be to see a more comprehensive approach to development including the adjacent site. However, we could not prevent the existing scheme from being implemented. On this basis it would be worth meeting with these potential owners to understand how serious their intentions are for building out any scheme."

14. This view was clearly shared by Ms Boyle and a meeting was arranged to take place with Mr Summersgill on 25 May 2016. In the meantime Ms Boyle instructed Jacobs "to put a hold on the disposal of the freehold for now", although there is no suggestion that this precaution was communicated either to

[1] In fact the reference was to the claimant's parent company, but nothing turns on that.

the claimants or to Mr Ward, who appeared by now to be representing – albeit in some unspecified way – the claimant in place of Cityscape.

15. The meeting took place and was attended by Mr Summersgill, Ms Boyle, Mr Jones and another planning officer, Ms Hodgett. The only contemporaneous record of any relevance of that meeting is the minutes subsequently produced by Ms Boyle, but which were only produced for internal purposes and were not sent to Mr Summersgill or any other representative of the claimant. Although Mr Hunter submitted, rightly, that there is some indication on the face of the minutes that they were not produced completely contemporaneously, so that some subsequent comments appear to have been added later, there is no reason in my view to doubt that they are substantially contemporaneous and are a substantially accurate record of what was discussed. Insofar as there is a difference between what the minutes record and what Mr Summersgill says in his witness statement I have no doubt that I should prefer the minutes, especially since Mr Summersgill gives no indication of having been able to refer to, let alone produce, any contemporaneous note or record which he made of the meeting.

16. In short, it is clear that Mr Summersgill was unable to provide very much information in relation to the claimant's track record, experience or nature of its business which would have provided the city council with any comfort as to its proven ability to undertake the Rosedale development. It is also clear that Mr Summersgill indicated, consistently with the proposals he had already sent, that the claimant's desire was for a revised development. However, as Mr Jones made clear, this in the city council's view would amount to a material amendment which would require a new planning application to be submitted, at which point the city council would have to re-examine the proposals from scratch, given various changes in material considerations which had taken place since 2007 when the original planning permission was granted. It is clear that the city council's intention was to seek to persuade the claimant to re-investigate the Yikman proposal, on the basis that this would allow the claimant to introduce the improvements it wanted to make to the scheme without increasing the scale and density of the existing scheme. It is also clear that Mr Summersgill's response to Mr Jones was robust, saying that if that was the city council's position the claimant would simply start work under the existing development and then proceed to alter the scheme and make application for an amendment to the planning permission at that stage. Finally, it is clear that reference was made by Ms Boyle to the fact that the agreement to sell the freehold to Cityscape was only "provisional" and also only subject to completion of an "acceptable scheme".

17. It is clear that the meeting was not a success and that Mr Summersgill was left in no doubt that the city council was not necessarily prepared to sell the freehold

unless some more constructive outcome could be achieved as regards the proposed development. Ms Boyle gives evidence that later that day she spoke to Mr Ward and explained the position, specifically stating that due to her concerns about the claimant, their lack of proven experience, their proposed determination to proceed with a different and more intensive scheme than was currently permitted and their apparent unwillingness to engage with the city council as regards the Yikman option, the city council was no longer prepared to proceed with the sale of the freehold, although they "would be willing to engage constructively with [the claimant] on a revised scheme in the future and … would be prepared to reconsider [the decision not to sell the freehold] if they could demonstrate that they had the experience and track record to deliver a good quality scheme on the site that would be properly managed" (paragraph 46 of her witness statement). Her evidence is that this provoked a furious response from Mr Ward. That this conversation took place in these general terms is consistent with the terms of the later email from Mr Ward dated 22 November 2016, to which I shall refer later.

18. The claimant's position is, as shown by their disclosure, that they were sufficiently concerned to raise this issue with Cityscape's solicitors but that having done so they were reassured that others within the city council had confirmed that Ms Boyle was speaking without authority and that the sale of the freehold had not been halted. However, as Mr Greatorex submitted, there is no evidence whatsoever to indicate that anyone at the city council had in fact said anything of the kind and, moreover, the documentary evidence produced by the defendant demonstrates quite clearly that there was agreement within the city council to rescinding the resolution to proceed with the disposal of the freehold of the property and that this was formally actioned by memorandum signed by the responsible person on 29 June 2016.

19. At the time the claimant did not make any direct contact with the city council to obtain confirmation of what they were being told by Cityscape's solicitors; had they done so they would have discovered the true position. Equally however the city council did not contact either Cityscape or the claimant to advise them of the rescission of the resolution. An email from Ms Boyle to Jacobs dated 6 June 2016 indicates that she believed there was no need to do so as the position had been made clear at the meeting and in her subsequent conversation with Mr Ward. The internal email correspondence within the city council at this time also makes it clear, consistently with Ms Boyle's evidence summarised in paragraph 17 above, that whilst Ms Boyle and others within the city council were aware that they had no basis for refusing consent to the assignment by Cityscape to the claimant of the long leasehold interest in the property, other than by reference to the financial standing of the claimant, they could at least seek to use their perceived freedom to sell or not to sell the freehold of the property to the claimant as a lever to exert pressure on the claimant to move

away from its existing apparent intention of using the existing permission as a platform for a more intensive development in favour of co-operating with the city council to seek to resurrect the Yikman proposal which was the city council's preferred outcome.

20. Nothing more of any consequence occurred until September 2016, when the city council provided its licence to assign and the transfer of the leasehold interest in the property was completed. The claimant's conveyancing solicitors subsequently wrote to the city council on 8 November 2016, referring to the claimant's recent acquisition of the leasehold title, referring to the April 2016 heads of terms, and stating that: "my client has confirmed that they wish to proceed with the acquisition of the freehold reversion of this property and as such I would be grateful if you could arrange for the relevant contract documentation to be forwarded to me".

21. As Mr Greatorex submitted, on any view this request was premature given that under the heads of terms the freehold would not be transferred until the development had been completed in accordance with the current permission. Nonetheless, Ms Boyle responded by email on 14 November 2016, referring to the fact that the heads of terms were "subject to contract" and stating: "For various reasons the council decided some months ago that it did not wish to pursue the agreement to transfer the freehold of its leasehold interest in the site and this remains the position". Mr Ward then became involved again, emailing on 22 November 2016 to say that he had been asked by the claimant to see if the situation could be resolved amicably and flexibly. After a chasing email Ms Boyle responded on 28 November 2016 within minutes of the chasing email, stating that:

"The heads of terms … are, as you will appreciate "subject to contract". As previously discussed, the council has concerns about the scale and density of the proposed scheme and whilst these concerns stand we will not be pursuing any agreement to transfer the freehold of its leasehold interest in the site on completion of the scheme."

22. The claimant's case has always been that this demonstrates that the only, or at least a substantial, reason for the refusal to transfer the freehold was the city council's objection to the development as permitted by the existing planning permission. In oral submissions Mr Hunter was, sensibly and realistically, prepared to accept what I would have found anyway, which was that:

    (1) The fact that the email was composed and sent in some haste indicates that this was not the only reason. He did however also submit, and I accept, that this was a summary of what was the most important reason.

(2) The subsequent statement by the city council's solicitor in his letter dated 7 December 2016 that the reasons were: "(a) concerns about the proposed scheme; (b) insufficient information as to who the scheme was intended for; (c) concerns about whether it could be delivered and effectively managed by Cityscape" indicates that: (i) there were other reasons, although: (ii) reason (c) was clearly mistaken in referring to Cityscape, when it should have referred to the claimant. He also submitted, and I accept, that reason (a) was clearly the most important reason and that it also clearly referred back to the one reason stated in the email of 28 November 2016. No real attention has been paid to reason (b) either in the grounds or the evidence or in submissions.

23. In her witness statement Ms Boyle summarised at paragraph 52 the reasons for the council's decision as being that:

(a) The claimant was clearly intending to develop the Rosedale building site only, rather than the proposed extended site, including the Yikman site.

(b) The city council did not consider such a development to be viable.

(c) The city council did not consider the claimant to have sufficient experience or ability to deliver the development.

24. As Mr Hunter submitted, it was surprising that this summary of reasons did not include Ms Boyle's previously stated objection to the scale and density of the development, and it is quite clear in my judgment from the evidence overall that this was indeed a relevant factor or reason behind the council's decision. In short, it is quite clear that the city council's preference was for a development on the proposed extended site, including the Yikman site. It is also quite clear that the city council was extremely concerned about the claimant's stated intention to start development ostensibly in accordance with the existing planning permission but then to seek to make changes to increase the scale and density of the development in the course of construction and to seek to treat those changes merely as an amendment to the existing permission. It is also quite clear that the city council's preference was not for the claimant to undertake the development in accordance with the existing planning permission, at least until the Yikman proposal had been re-investigated, even if it did not seek to make changes along the way, but that it was aware that it had no legal basis for objecting to development in accordance with the existing permission.

25. In my judgment it is also quite clear that the city council's primary motive for rescinding the resolution and for refusing to proceed with any sale of the freehold in accordance with the heads of terms as matters stood was its wish to exert such pressure upon the claimant as it could – given that it could not

prevent the claimant from obtaining an assignment of the lease or to prevent it from undertaking the development in accordance with the existing planning permission – to persuade it: (a) preferably, to engage and to co-operate with the city council with a view to investigating and, if possible, implementing the Yikman proposal, which the city council genuinely and not obviously irrationally believed to be the preferable and viable solution, as an alternative to the existing planning permission, failing which; (b) to abandon its idea of increasing the scale and density of the proposed development beyond that permitted by the existing planning permission.

26. I am quite satisfied that the city council did not have the simple intention of forcing the claimant to abandon the existing development because it did not approve of the scale and density of the existing planning permission. That is because the city council knew that the only other viable option to the existing development was to resurrect the Yikman proposal or some alternative equivalent proposal, the former only being practicable if Yikman would still sell and if some third party could be found to take that part of the Yikman site which was surplus to requirements, and there is no indication in the evidence that the city council believed that no development at all was better than the existing permitted development. I am satisfied that if the Yikman or equivalent proposal proved not be possible and if the claimant could not be persuaded to make other changes to the existing planning permission to meet any other concerns that the city council might have then the city council's preference would have been for the claimant to develop in accordance with the existing permission rather than for it to become involved in some protracted planning dispute with the claimant whereby the claimant was seeking to build to an increased scale and density and to legitimise such changes via the back-door of seeking an amendment to the existing permission. I am also satisfied that the city council did have a legitimate concern that if the claimant attempted to proceed down this route there was the possibility of the development becoming mired in a protracted planning dispute which might either result in the claimant succeeding in building to an increased scale and density or in the development stalling because building to the existing permission was not viable. I am satisfied that the city council did have a legitimate concern that the claimant might end up making what the city council not irrationally believed would be the wrong decision, not only for itself but also for the city council, both in its capacity as planning authority and in its wider capacity as responsible for leading the regeneration of the area. Whilst Mr Hunter submits that the city council could have protected against this concern in its capacity as local planning authority by ensuring that inappropriate amendments were not passed and/or in its capacity as landowner by refusing to sell if the development was not completed in accordance with the current planning consent, that does not answer the point that the city council were reasonably entitled to take the view that it was better to seek to persuade the claimant not to go down this road in the first place.

27. Above all I am quite satisfied that there is no evidence that the city council believed that by refusing to sell the freehold it could somehow prevent the claimant from developing in accordance with the existing permission, because there is simply no evidence that anyone said or believed at the time that the development was legally or commercially unfeasible without the claimant acquiring the freehold. The most that the claimant can and does say is that the individual apartments may be worth less on the open market if they cannot be sold with freehold title. Moreover, I am also quite satisfied that this was not a decision taken by the city council with the motive or intention of punishing the defendant if it should proceed to develop in accordance with the existing planning permission.

The law

28. I was referred to my earlier decision in Trafford v Blackpool Borough Council [2014] EWHC 85 (Admin) in which I was asked to and did consider a number of authorities and textbooks relevant to the issue as to whether or not, and if so in what circumstances, a public body acting under the statutory power conferred by s.123 Local Government Act 1972 (which provides that: "*Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish*") will come under public law duties and, if so, which duties. In particular I was referred both in that case and in this to the decisions of Keene J in R v Bolsover DC ex p Pepper (3 October 2000, unrep.) and Elias J in Molinaro v Kensington & Chelsea BC [2001] EWHC Admin 896 which were both directly concerned with s.123 and to the decision of the Court of Appeal in Hampshire County Council v Supportways [2006] EWCA Civ 1035 which addressed the issue in a wider context.

29. Having considered those and other authorities and certain textbooks I summarised my conclusions in Trafford as follows:

> "55. Having considered these authorities my conclusions are as follows:
>
> (1) In a case such as the present, involving a challenge to a decision of a public body in relation to a contract, it is necessary to consider:
>
> (a) by reference to the contract in question, to the relevant statutory power, to the statutory framework (if relevant), and to all other relevant matters, whether or not, and if so to what extent, the defendant is exercising a public function in making the decision complained of;
>
> (b) whether, and if so to what extent, the grounds of challenge involve genuine and substantial public law challenges to the decision complained of, or whether, and if so to what extent, they are in reality private law challenges to decisions made under and by reference to the terms of the relevant contract.

(2) In a case involving a challenge to a decision of a public body acting under a statutory power but in relation to a contract and in the absence of a substantial public function element, a claimant will nonetheless normally be entitled to raise genuine and substantial challenges based on fraud, corruption, bad faith, and improper motive (in the sense identified by De Smith of the knowing pursuit of an improper purpose).

(3) The extent to which a claimant will be entitled to raise genuine and substantial public law challenges beyond those limited classes will depend on a careful analysis of all of the relevant circumstances so as to see whether or not there is a relevant and sufficient nexus between the decision in relation to the contract which is challenged and the grounds complained of."

30. Neither counsel has submitted that these conclusions were erroneous or referred me to any subsequent authority in which those conclusions were considered or their correctness doubted. In the circumstances I propose to apply them in this case.

31. Mr Hunter has also referred me to the decisions of the Court of Appeal in R v Warwickshire CC ex p Powergen (1998) 75 P&CR 89 (where the leading judgment was given by Simon Brown LJ) and Carnwath J in R v Cardiff CC ex p Sears Group [1998] PCLR 262 which, he submitted, were authority for the proposition that: "Where a formal decision has been made by a competent authority on a matter affecting private rights, such as a grant of planning permission, the authority and others are required to respect the decision and treat it as binding upon them in the exercise of other functions unless and until circumstances can be said to have changed so significantly that the basis for the original decision has been undermined. Consequently, unless that is the case, an authority which acts on the basis of reasons which are inconsistent with such a decision, or with the intention of undermining the decision or impeding its implementation, will be acting unreasonably and unlawfully".

32. In both cases the challenge was to a decision made by a council, as highway authority, to refuse to enter into an agreement under section 278 Highways Act 1980 in circumstances where (in Powergen) its earlier objection to granting planning permission in its capacity as local planning authority on highways safety grounds had been determined against it on appeal and where (in Sears) it had resiled from its earlier non-objection in its capacity as highways authority in the course of a planning permission to a scheme on highways safety grounds subject to entry into a section 278 agreement.

33. Mr Greatorex did not formally concede that this general principle could be derived from these authorities. Instead, he concentrated his attack on the basis that such a principle has no application to the facts of this case in circumstances,

he submitted, where this is not a challenge to a formal decision made by the city council as a public authority in the exercise of a public function. Whilst I will consider this submission under ground 1 below in my judgment Mr Greatorex is correct in submitting that this cannot be regarded as a principle of universal application and that whether or not it will apply in a given situation must depend on an analysis of all of the relevant circumstances.

34. Whilst I was referred to other authorities and textbooks in relation to other points I do not consider that I need to make specific reference to them in this part of my judgement.

Ground 1

35. By ground 1 the claimant contends that it was unlawful for the city council to refuse to transfer the freehold on the grounds of an objection to the development proceeding in accordance with the 2011 planning permission.

36. Mr Hunter submitted that since it was clear that the primary reason for the refusal was that the city council wished to see a different form of development on the property from that which it had previously permitted, the principle derived from the Powergen and Sears cases was engaged and was breached by the city council which, in so doing, had acted in a way which was public law irrational or unreasonable and/or which amounted to an abuse of power. He submitted that it was sufficient that the city council was acting under a statutory power in making the decision whether or not to sell the freehold to the claimant and that it was no more than common sense that a authority in the defendant's position could not refuse to transfer the freehold on the basis of a reason which directly undermined the planning decision which had already been taken. Whilst he accepted that the claimant could not compel the city council to sell the freehold to it and that the city council was free to decide whether or not to sell the freehold to the claimant for any legitimate reason, what the city council could not do was to make its decision in reliance upon a reason which was illegitimate in public law terms. He submitted that it was sufficient to identify any of the recognised grounds of public law challenge and that it was not necessary to establish either fraud, corruption, bad faith or improper motive (in the sense of the knowing pursuit of an improper purpose), although he also submitted that in this case an improper motive was present, since the city council knew that it was improper to refuse to sell the freehold in order to frustrate the existing planning permission. He therefore submitted that it was appropriate to quash the decision and to require the city council to retake the decision by reference only to public law legitimate considerations.

37. Mr Greatorex submitted that there was no scope for the application of the principle said to be derived from the Powergen and Sears cases in circumstances

where the city council was not acting in the discharge of a statutory function but merely deciding whether or not to exercise a discretionary statutory power. He also submitted that since the council had never entered into any legally binding commitment either to sell the freehold to the claimant or even to give proper consideration as to whether or not to do so by reference to some statutory or extra-statutory criteria, and since there was no claim and no basis for a claim by the claimant based on any legitimate expectation that the city council would sell the freehold to it other than in specific defined circumstances, there was no basis for interfering with the exercise of the city council's discretion in the absence of fraud, corruption, bad faith or improper motive as the knowing pursuit of an improper purpose. He submitted that the evidence showed that none of these circumstances were present. He also submitted that there could be no question of the decision being regarded as public law irrational or unreasonable or otherwise vitiated by any other public law error. He submitted that even if the Powergen / Sears principle was engaged, it had no application in this case since it was clear that there had been a material change in circumstances since 2007 when the original planning permission was granted.

38. In my judgement Mr Greatorex's submissions are to be preferred. As I said in Trafford, decisions such as the present are fact sensitive. In my judgment the fact that the city council in its capacity as local planning authority had previously granted planning permission for a particular development in relation to the property has no sufficient connection with its subsequent decision, in its capacity as a private landowner, to refuse to proceed further with a proposal to sell the freehold to the claimant, to impose the full range of public law obligations upon the city council. That is particularly so in circumstances where all that it had previously done was indicate, on a without prejudice and subject to contract basis, that it was prepared to consider transferring the freehold to Cityscape as the claimant's predecessor or to the claimant as its proposed assignee, but without giving any commitment beyond that. In my view it cannot be said that there would be grounds for interference other than in the case of fraud, corruption, bad faith or improper motive as the knowing pursuit of an improper purpose. There is plainly no question of fraud, corruption or bad faith. In my judgment this cannot be categorised as the knowing pursuit of an improper purpose. As I have already found, the city council was motivated by a perfectly legitimate and genuine desire to seek to persuade the claimant to enter into constructive discussions in relation to the Yikman or some other alternative proposal or, at the very least, not to pursue its stated intention to build to a greater scale and density than permitted by the existing permission. As I have already found, what I am satisfied that the city council was not doing was either seeking to compel the claimant not to develop in accordance with the existing permission or refusing to transfer the freehold out of a vindictive desire to punish the claimant for refusing to entertain the Yikman or some other alternative proposal. This is not a case where the refusal to transfer the freehold

to the claimant could, or could have been intended to, frustrate the development in accordance with the existing permission.

39. Insofar as it is appropriate to have regard to wider public law grounds of challenge, I am satisfied that there is no question of the city council having acted in a public law irrational or unreasonable manner. It is clear from my factual findings that the city council had perfectly lawful and legitimate reasons for acting as it did, arising from its interest in the wider regeneration of the Newton Heath area as well as in its interest as local planning authority. Mr Hunter's criticism that the decision was irrational since refusing to sell the freehold would not prevent the claimant from developing in accordance with the existing permission misses the point, given my clear conclusion that what the city council was seeking to do was not to prevent development in accordance with the existing permission but to seek to persuade the claimant to enter into further discussions.

40. Finally, I agree with Mr Greatorex that in any event the city council has demonstrated that the wider planning-related circumstances as they existed in 2016 were so different from the circumstances as they existed in 2007 or even in 2011 that the city council was reasonably entitled to refuse to transfer the freehold to the claimant on that basis even if, contrary to my previous conclusions, its motivation was to prevent the claimant from developing in accordance with the existing permission. There can be no challenge in the context of judicial review on rationality grounds to the genuinely held view by the city council that if the claimant had applied for the same planning permission in 2016 it would not have obtained it and that this, coupled with its concerns about how the claimant would in fact act if it began development purportedly in accordance with the existing planning permission, and the potential consequences if the project then became bogged down in a planning dispute, entirely justified its decision to refuse to proceed further to contemplate transferring the freehold to the claimant.

41. After production of this judgment in draft Mr Hunter drew my attention to an email from Ms Hodgett dated 3 March 2017 and invited me to reconsider my finding in paragraph 40 above on the basis of that email and – he submitted – the absence of any countervailing evidence that the wider planning related circumstances had so changed since 2011 as would have justified refusal of the same application had it been made in 2016. I do not change my view I expressed in paragraph 40, for the following reasons:

    (a) All that Ms Hodgett said in that internal email was that if a new application was made the fact that there was an existing consent which had been implemented would be a material consideration and that if the new application was of the same nature as the existing permission the

principle of development would be acceptable unless there were material changes in circumstances.

(b) However what I concluded in paragraph 40 was that the city council had a genuinely held view, held on rational grounds, that if the claimant had applied for the same planning permission from scratch in 2016 it would not have obtained it. I was not considering and was not invited to address the entirely separate question as to whether or not if the claimant, already having the benefit of the 2011 permission, had decided to make a further application for precisely the same scheme in 2016 the city council would have been obliged to grant it on the basis that there were no or insufficient material changes in circumstances to justify refusal.

(c) The evidence that this was the city council's view, that it was genuine and that it was held on grounds which are not evidently irrational emanates from what Mr Jones said at the meeting of 25 May 2016 as was recorded by Ms Boyle at section 3.3 and as further stated by her in paragraph 44 of her witness statement at bullet point 2.

42. In the circumstances it is unnecessary to consider the city council's fall-back argument under section 31(2A) of the Senior Courts Act 1981 that, even if the decision was unlawful, since it is highly likely that the outcome for the claimant would not be substantially different even if the unlawful decision by the city council was set aside or remedied the court should not grant relief. If I had found that the decision was rendered unlawful on public law grounds because the reason to do with the city council's objection to the development proceeding in accordance with the existing planning permission was an improper reason, I would have considered that the appropriate course was to quash the decision. I do not think that I would have felt able to conclude in such circumstances that the outcome would not have been substantially different if the city council was then required to re-take the decision putting aside that reason. Whether I would also have considered that it was appropriate to require the city council to retake the decision, in circumstances where under the heads of terms the city council was not even obliged to do so unless and until the development had been completed in accordance with the current planning consent, I have rather more doubt.

Ground 2

43. By ground 2 as pleaded the claimant contends that the city council's concerns about Cityscape's ability to deliver and manage the scheme and insufficient information about whom the scheme is intended for were irrelevant considerations. As already explained [paragraph 22 above] Mr Hunter clarified in oral submissions that this was a reference to what was said by the city

council's solicitor in his letter dated 7 December 2016 which, mistakenly, referred to Cityscape rather than to the claimant.

44. In its grounds the claimant had contended that even if this was a mistaken reference to Cityscape, such concerns were immaterial in any event, because the city council would have been able to take enforcement action against anyone responsible if the development was not delivered or managed in accordance with the existing planning permission. In my judgment this submission fails for the following reasons:

    (1) For the reasons already given, I am satisfied that the claimant is not entitled to challenge this decision other than on the grounds of fraud, corruption, bad faith or improper motive as the knowing pursuit of an improper purpose.

    (2) Even if that was wrong, I am also satisfied that the city council was entitled to have regard to its concerns about the claimant's ability to deliver and manage the scheme. Those concerns related not just to the claimant's willingness to undertake the development in accordance with the existing permission, and the consequences if the city council became embroiled in a planning dispute as a result of the claimant seeking to amend the permission during the course of development but also, as Ms Boyle said, to the wider impact upon the city council's regeneration strategy if the claimant could not or would not do so.

45. In his skeleton argument Mr Hunter took a further point, which was that insofar as the city council's concerns related to the claimant, it was procedurally unfair for the city council to do so in that the claimant was not given any, or any proper, opportunity to respond to them. Even if it was properly open to the claimant to rely upon this ground, I am satisfied that it does not avail the claimant. In the context of this case, and my conclusion as to the available grounds of challenge, I am quite satisfied that the claimant is not entitled to say that the city council was obliged, following the May 2016 meeting, to provide formal notice of its concerns and to allow the claimant the opportunity to address them, before taking a decision as to whether or not to rescind the resolution. As stated in De Smith's Judicial Review 7th edition at paragraph 7–039, "the content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject matter … What is required in any particular case is incapable of definition in abstract terms." In my judgment, this is not a case where it can be said that, even if the city council was required to do anything at all, it was required to do any more than was done by the city council in relaying its concerns both to Mr Summersgill at the meeting and to Mr Ward thereafter and, then, leaving it to the claimant to seek to address those concerns if that is what it wished to do.

Ground 3

46. By ground 3 the claimant complains that the city council failed to take into account material considerations. In its grounds this was advanced on the basis of what was said by Carnwath J in Sears to the effect that where an authority is deciding whether circumstances have changed so as to justify departing from an earlier grant of permission, it must consider whether this will result, in practical terms, in the nullification of the permission without compensation and, if so, have regard to this as an "important factor" creating a "strong presumption" in favour of respecting the original decision unless there has been a "fundamental change of circumstances". The complaint was that in this case the city council did not approach the matter in this structured way, taking into account the consequences for the claimant of a refusal to transfer the freehold to it.

47. For the reasons already given, I am satisfied that this is not a case to which the Powergen / Sears principle relied upon by Mr Hunter applies or one where the claimant can challenge the decision on the basis of a failure to take into account material considerations. Furthermore, as Mr Greatorex submitted, the fundamental flaw with this argument is that: (a) the only consequence for the claimant of a refusal to transfer the freehold was that it would, or might, be unable to transfer some or all of any newly constructed apartments with freehold title thus, apparently, rendering them less valuable; (b) it has never been the claimant's case that this would make the development unviable, whereas otherwise it would have been viable; (c) neither of these potential consequences were adverted it to by the claimant at the time. Moreover, I have no doubt that the city council was not reasonably required in acting fairly to have to approach this particular decision in his particular way. Thus I am satisfied that there is no merit in this argument.

48. In his skeleton argument Mr Hunter also submitted that the city council ought to have specifically considered whether it was equitable for it to refuse to sell the freehold. In my judgment there is no warrant for imposing any such obligation upon the city council in such a case but, even if I was wrong about that, there is no basis for considering that the city council did not consider, on rational grounds, that it was equitable to do so in all of the circumstances.

49. Finally, in his skeleton argument Mr Hunter also submitted that if the council had given proper consideration as to whether or not its decision was likely to achieve any beneficial purpose it would have appreciated that it was highly unlikely to do so in any event. This, in my judgment, is clearly simply another way of arguing the rationality point which I considered and rejected above at paragraph 39.

Standing and delay

50. In the circumstances it is unnecessary to consider the arguments about standing or delay other than to determine the question of permission.

51. For completeness however I am satisfied that on the evidence the claimant did have sufficient standing to present the claim given that the claimant, as the intended assignee of the leasehold, was clearly someone who the city council must have known was liable to be affected if the city council declined to proceed with the sale of the freehold in accordance with the heads of terms, especially given that the city council: (a) was aware of the proposed assignment at the time it entered into the head of terms; (b) had agreed to the previous heads of terms being amended so as to permit assignment of the rights – such as they were – enjoyed by Cityscape under that document.

52. As regards delay, the city council's submission was that since it had rescinded the resolution in June 2016 and since it had notified the claimant's representatives that it was not willing to proceed with the sale at the May 2016 meeting and thereafter the claimant was clearly out of time, given that the claim was not issued until 13 February 2017. The claimant's submission was that it was not out of time, since it had issued the claim within 3 months of the email dated 14 November 2016 which was the first clear statement from the city council that it was not prepared to transfer the freehold. In my view the relevant decision was the rescission in June 2016. I have accepted [paragraph 17 above] that on the evidence Ms Boyle had communicated to Mr Summersgill and then to Mr Ward that at that point in time and as matters stood it was not prepared to sell the freehold to the claimant. However no formal notice of the rescission was given to the claimant (or to Cityscape for that matter). Moreover, it is clear that the claimant was re-assured by Cityscape's representatives, albeit incorrectly, that the city council had not taken a formal decision not to transfer the freehold and, whilst one can criticise the claimant for not contacting the city council to clarify the matter, the fact is that it was not until 14 November 2016 that it was expressly made aware of the formal position. Thereafter I accept that the claimant acted reasonably in seeking to clarify the city council's reasons and in engaging in pre-action protocol correspondence, so that I would have been satisfied that it would be just and fair to extend time.

Conclusion

53. Thus, whilst I formally grant permission, I dismiss the substantive challenge.

Consequential matters – permission to appeal and costs

54. I agreed to deal with consequential matters by way of supplemental written submissions in order to save the time and cost of a further hearing.

55. As regards permission to appeal, Mr Hunter submitted that the question as to the ambit of the public law review properly to be applied in this case raised a wider legal issue of some significance, that it was at least arguable that it was wider than I have held it to be, and that there was a real prospect of successfully appealing the alternative basis for my decision in paragraph 40 above. Whilst I agree that the ambit of public law review is a legal issue of some significance I am not satisfied that on the facts of this case the claimant has any real prospect of success whatever the applicable ambit of public law review nor am I satisfied that in such circumstances there is some other compelling reason why permission to appeal should be granted. Accordingly I refuse permission.

56. As regards costs, Mr Hunter submitted that although the city council was the successful party it should not recover any of its costs, or at least all of them, on the grounds that:

    (1) The city council had failed to provide from the outset a full and proper account of its reasons for not proceeding with the transfer of the freehold from the outset, since its position had shifted dramatically from the sole reason stated by Ms Boyle on 28 November 2016 (paragraph 21 above) as clarified and amplified in the city council's solicitor's letter of 7 December 2016 (paragraph 22(2) above) to the more wide-ranging reasons and concerns subsequently given by the city council in Ms Boyle's witness statement as relied upon in the Detailed Grounds of Defence at paragraph 15.

    (2) If the city council had said in November 2016 what it said in Ms Boyle's witness statement at paragraph 60, which was that "the door remains open to … the claimant to try and address the Council's concerns as set out above" then the claimant would have attempted to address those concerns in a constructive manner before resorting to proceedings so that there was at least a real prospect that these proceedings might have been unnecessary.

57. As to (1), it is true that the reasons and concerns as stated by Ms Boyle in her witness statement were considerably wider than those stated in the 28 November 2016. However, as I have already recorded, in fact what the email said was that: "As previously discussed, the council has concerns about the

scale and density of the proposed scheme and whilst these concerns stand we will not be pursuing any agreement to transfer the freehold of its leasehold interest in the site on completion of the scheme". It is apparent from my previous findings that the reference back to the previous discussions is plainly a reference to the meeting with Mr Summersgill and the subsequent conversation with Mr Ward. In that context the reference to the scale and density of the proposed scheme was as much a reference to the revised scheme being put forward by the claimant as it was to the permitted scheme. There was no warrant for the claimant, had it made proper enquiries from those with knowledge of the background, to read it in the limited way that it appears to have done. Moreover, and as to (2), it is plain from the words "whilst these concerns stand" that the city council was making it clear that it was open to the claimant to seek to address those concerns. In the circumstances, whilst I accept that the city council's case was clarified and expanded in the evidence of Mrs Boyle, I do not accept that the city council acted contrary to its duty of candour or that it is solely to blame for the failure to explore alternatives to judicial review before this action was issued. As Mr Greatorex submitted, the claimant did not seek to persuade the city council to re-open discussions even on sight of Ms Boyle's witness statement but instead took the case forwards to the substantive hearing.

58. Further and in any event in my view these submissions ignore the fundamental point that the claimant sought to persuade the court that it was entitled to judicial review on the basis that this decision was fatally flawed because it was fully amenable to judicial review and because it was public law wrongful, but failed on both grounds. In the circumstances I am satisfied that the claimant ought to pay the city council's costs of defending the claim without reduction.

59. Having resolved those points the parties are agreed as to the form of order which should be made, which will be as follows:

    (1) Permission be granted.

    (2) The claim be dismissed.

    (3) Permission to appeal be refused.

    (4) The Claimant do pay the Defendant's costs of the claim to be assessed on the standard basis if not agreed.

    (5) If, 21 days after the amount of costs has been agreed or assessed, the Claimant has not paid them to the Defendant as required by paragraph (4), the Defendant do have liberty to apply to vary this order and to seek a

non-party costs order against Daniel Johns Ltd and/or Mr Khalid Iqbal Bhatti.