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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE APPLICANT SHERIDAN MILLENNIUM LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE DEPARTMENT FOR SOCIAL DEVELOPMENT

AND IN THE MATTER OF A DECISION BY LAGANSIDE CORPORATION

GILLEN J

The Application

[1] In this matter Sheridan Millenium Limited ("the applicant") seeks first to quash decisions of the Department for Social Development (DSD) made on 12 December 2006 to terminate the applicant's appointment as a preferred developer for the Queen's Quay development and, secondly, a decision of Laganside Corporation ("the Corporation") made on 6 November 2006 that it cannot make a recommendation as to whether or not the DSD should enter into a development agreement with the applicant. A third application is for a declaration that the said decisions were unlawful, ultra vires and of no force or effect. In the course of this case Mr Horner QC, who appeared on behalf of the applicant with Mr McMahon, indicated that the remedies sought amount to a request that the process for the appointment of preferred developer be re-opened and the applicant's request to be so appointed be fairly considered.

Background

[2] Laganside Corporation was established by the Laganside Development (Northern Ireland) Order 1989 ("the 1989 Order"). Under Article 10 of the 1989 Order, the object of the corporation is to secure regeneration of designated areas. The object is to be achieved, inter alia, by:

(i) bringing land and buildings into effective use; and

(ii) encouraging public and private investment and the development of existing and new industry and commerce.

[3] Under Article 10(3)(a) of the 1989 Order the Corporation is empowered for the purposes of achieving the objects to acquire, hold, manage, reclaim and dispose of land and other property. Under Article 13(a) the Corporation may enter into an agreement with any person to develop any land in the designated area, whether or not the Corporation has any estate on that land. By virtue of Article 11, the Department of the Environment may give directions of a general or specific nature to the Corporation as to the manner in which it is to discharge its function under the Order and the Corporation shall act in accordance with any such direction.

[4] By virtue of the Laganside Corporation Dissolution Order (Northern Ireland) 2006 the Corporation shall be dissolved and the functions of the Corporation transferred to the DSD on 1 April 2007.

[5] In January 2005 the Corporation issued a brief for the development of Queen's Quay, Belfast ("QQ") along the East Bank of the Lagan from Bridge End to just beyond the Odyssey building. The development proposal for the land comprised:

- Site one – a mix of uses including cafes, bars and niche retail together with office and residential uses.
- Site two – mixed use with commercial, office and residential.
- Site three – Budget hotel, offices and an option for affordable housing.

The construction costs were estimated to be in the order of £60m with completion of site one by October 2009, site two by February 2012 and site three by July 2013. The proposed development was subject to planning approval. The applicant would pay in the region of £7m to the Government for acquiring those land holdings within the proposed development held by the Corporation and would then have the potential for a return on its investment in developing the site.

[6] At a meeting on 20 June 2006 the Corporation Board considered a paper concerning the selection of a preferred developer in response to the QQ development brief. The Chief Executive recommended that the Board should ratify the unanimous decision of the judging panel and appoint the applicant as the preferred developer for the three development sites at QQ. The minutes of the meeting recorded inter alia:

> "That, at this stage, approval was being sought for the appointment of a preferred developer. This would be followed by the negotiation of a development agreement and approval would be sought for

> appointment as developer in due course. Due diligence would include confirming the financial standing of the developer. After discussing the matter fully, the Members unanimously ratified the decision of the judging panel in appointing Sheridan Millennium as the preferred developer".

[7] Accordingly on 21 June 2005 the applicant was appointed preferred developer subject to a due diligence process. MAPC Developments was created by the applicant as a special purpose vehicle to develop the project. Peter Curistan is the Chairman of the Sheridan Group of companies ("the Group") and a Director of Sheridan Millennium Limited. The Corporation undertook to prepare and provide a draft development agreement for signature by the end of November 2005. On 27 July 2005 the applicant was advised that the respondents would undertake a due diligence assessment of the applicant.

[8] On 31 July 2005 the Sunday Independent newspaper published allegations which were allegedly defamatory of the applicant concerning, inter alia, the financial relationship between Peter Curistan, a Director of the applicant and Des Mackin, a member of Sinn Fein.

[9] On 8 February 2006 Peter Robinson MP made a statement in the House of Commons which accused the applicant of money laundering and of association with IRA "dirty money". The applicant alleges that further defamatory claims were made against Peter Curistan in the Sunday Times newspaper on 19 February 2006 and in the Sunday World on 5 March 2006. Mr Robinson on 9 March 2006 wrote to the Secretary of State for Northern Ireland stating that he was in no doubt about the Sheridan group's capability to develop the proposed scheme and that the BDO investigation would be of no value unless it looked at the validity of the sources of finance of the applicant. Mr Robinson again wrote to Government Ministers on the matter on 12 May 2006 and 30 June 2006 on the same topic. (This correspondence is hereinafter referred to as "the Robinson correspondence". The allegations contained in paragraphs 8 and 9 are referred to as "the allegations").

[10] I pause to observe that in the course of these proceedings Mr Shaw QC, who appeared on behalf of the Respondents with Mr McMillen, unequivocally stated that the Respondents regarded the allegations as baseless.

[11] The Respondents appointed BDO Stoy Hayward (BDO) to undertake due diligence under Terms of Reference issued on 2 November 2005. This due diligence exercise was to be in respect of the accounts, organisation and activities of the Sheridan Group in order to make an independent assessment of its ability to deliver the project, certify its ability to fund site assembly costs

and construction finance, highlight and quantify areas of developer commercial and financial risk that could be anticipated in proceeding with the project and to comment specifically on the risks to Laganside Corporation/Department for Social Development. BDO issued a first draft of its due diligence report on 24 February 2006. It completed its detailed due diligence on 5 May 2006 and a summary of findings was submitted on 12 June 2006. The report concluded, inter alia, that the applicant had access to the necessary financial resources and was positioned to deliver the QQ project. BDO had initially inserted certain conditions which it thought fit to be imposed on the applicant. When the Respondents insisted that those conditions be removed, BDO did so but maintained its original recommendation.

[12] There is a clear dispute between the applicant and the Respondents about the ensuing developments. It is the applicant's case that the Corporation was kept informed at all times of the timetable for submission of its accounts under the due diligence process supported by BDO. In the summer of 2006 the Corporation requested the Government's Central Procurement Division (CPD) to employ a firm of accountants to review the BDO reports and the accounts filed by the applicant. It is common case that up to this stage no contract had been signed with the applicant and indeed the whole matter was subject to contract. The preferred developer status appears to have conferred on the applicant only a preference in terms of negotiating a possible contract with the Corporation and/or the DSD.

[13] On 13 September 2006 Deloitte and Touché LLP (Deloitte) was appointed following a tendering process to undertake a detailed assessment of the due diligence reports of BDO and the 2005 audited reports belatedly submitted by the applicant. Following a series of meetings with the respondents Deloitte submitted a draft report on 16 October 2006 concluding, inter alia, that:

- The actual net asset position and trading performance of the applicant could not be properly assessed.
- There might be other liabilities within the Sheridan Millennium Group which would have an adverse effect on the Group's ability to deliver the project.
- The continuing lack of satisfactory financial information reflected poor governance within the Group.
- From the available information it appeared that the financial position of the Group was weak.
- Based on the available information provided by the Group, the Department/Corporation could not properly form an opinion on the ability of the Group to deliver.

[14] On 6 November 2006 the Board of Laganside Corporation decided that it could not make a recommendation as to whether or not the DSD could enter into a development agreement with the applicant. The decision was communicated to the applicant by letter dated 12 December 2006. This letter also informed the applicant of the Department's decision that it could not properly form an opinion on the deliverability of the project and the applicant's appointment as preferred developer for the QQ development was terminated.

The Applicant's Case

[15] Mr Horner, in the course of a comprehensive skeleton argument augmented by well-marshalled oral submissions, made a case which included the following points:

(1) As conceded by the Respondents, the applicant and Mr Curistan were entirely innocent of any of the allegations made against them about money laundering or involvement in unlawful acts. It readily recognised that any firm engaged in such activity would immediately forfeit the right to Government funding. Equally, the political consequences for a Government which publicly funded such a company would be severe.

[16] It was counsel's submission that the allegations which had been made had poisoned the due diligence process and the appointment of the applicant as preferred developer. The Respondents had determined that the applicant would not get the development agreement at any cost and/or alternatively applied different standards to the applicant than they would have applied to a developer against whom no such allegations were made. Mr Horner asserted that the Respondents had weighed in the balance a consideration which they should not have taken into account namely unproven allegations of criminal wrongdoing and that the applicant was discriminated against by reason of that consideration.

[17] It was the applicant's case that this was a "fact specific" case of bad faith and or impermissible or unlawful considerations on the part of the Respondents in coming to these decisions. Mr Horner asserted that the Respondents, including a number of senior civil servants together with the chief executive and chairman of the Corporation, knew full well that these allegations were so serious that they created a risk which required to be assessed in the course of the due diligence process and pursuant to the HM Treasury guideline criteria. They palpably failed to do this, permitted the terms of reference to both BDO and Deloitte to contain no reference to the money laundering allegations and pursued a different standard re interpretation of the HM Treasury guidelines (which in effect were breached) when dealing with the applicant from that adopted in a comparable scheme in Victoria Square("VS"). Bent on a refusal to accept the favourable

conclusions of BDO, the Respondents invoked the assistance of Deloitte, and changed the initial terms of reference for it to ensure a predetermined outcome portraying this as a due diligence exercise when it was patently not. The Respondents, it is asserted, deliberately deflected Deloitte from conducting a proper exercise and persuaded the firm to alter their initial conclusions. These actions were the product of a process that had been infected by these unsubstantiated and uninvestigated allegations. It was the applicant's case that the Respondents were guilty of a lack of candour and proceeded to cover up their actions by a series of statements and affidavits that contained half truths, misleading statements and inconsistencies which included misleading information to a public representative and deliberately flawed advice to the Minister responsible. The applicant went on to assert that the Board of the Corporation was kept in the dark about these developments. In short the applicant alleges that the Respondents abused their power in manipulating the due diligence process for reasons of political expediency. See R (on the application of Molinaro) v Kensington and Chelsea Royal London Borough Council (2002) LGR336 and Padfield v Ministry of Agriculture Fisheries and Feeds (1986) AC 997.

[18] Mr Horner rejected the Respondents' case that the allegations were dealt with through the avenue of the PSNI and the Northern Ireland Office ("NIO") submitting that it was fruitless to ask PSNI or NIO to investigate such allegations since they would have no access to the applicant's financial records.

[19] If the case failed on the grounds of mala fide counsel argued in the alternative that this case had a public law element in it which took it beyond the exercise of private rights. Consequently he relied on that category of Wednesbury irrationality consisting of the failure to take account of relevant considerations or the taking account of irrelevant considerations which would of course include the adoption of an improper purpose.

[20] Finally Mr Horner submitted that this was an instance of procedural unfairness where the decision makers had failed to facilitate the participation of the applicant in the decision making process to the extent that it, and its bankers and accountants, had been deliberately excluded from meeting with or providing relevant and up to date information to BDO or Deloitte before the decisions were made. Moreover the applicant had not been permitted to fulfil his reasonable or legitimate expectation that it be consulted to enable comment to be made on the respective reports before the decision was finalised. See Council of Civil Service Unions v Ministry for the Civil Service (1985) AC 374 per Lord Roskill at p415D/E/F.

The Respondents' Case

[21] Mr Shaw submitted that it was wholly implausible to suggest that rather than simply investigate the allegations, the Respondents would create a farrago of untruths and misdeeds to cover up not having done so and for the sole purpose of either excluding a party against whom there was no evidence of wrongdoing or at least setting a higher standard than would otherwise have been the case.

[22] Counsel argued that the Government (via the NIO) did investigate these speculative allegations through the proper channels of the PSNI and no information was forthcoming to support them. In light of that no further inquiry could have been justified. He asserts that all documents in DSD's possession relating to this investigation re money laundering have been disclosed.

[23] The due diligence exercise was tasked to BDO without ever requiring it to investigate the criminal allegations because there was no factual basis to make such a request in light of the PSNI advice and in any event this would not be standard due diligence practice. The role of BDO was to review the financial information and controls to ensure the applicant could meet the financial obligations under the proposed development together with a requirement to highlight and quantify areas of commercial and financial risk. Money laundering did not fall within that remit.

[24] Mr Shaw asserted that risk management is not due diligence. Hence when BDO trespassed into this area it was asked to retract. Counsel contrasted the depth and extent of the BDO QQ recommendations with the VS recommendations which he submitted were little more than statements of the obvious. The former however, argued Mr Shaw, were onerous and inappropriate for a government body to impose on a bidder. The task set BDO was not to see if the Applicant could be *made* fit but whether it was *in fact* fit to carry out the project. It was Mr Shaw's case that the applicant misconceived the role of due diligence. That stage was calculated to identify risks. If the Respondents concluded the applicant could deliver the project, then, and only then, would the Orange Book process of assessment of risk take place in line with the DSD Risk Policy Statement.

[25] The applicant had failed to produce the relevant accounts in time to meet the deadlines for the due diligence exercise. It was the Respondents' case that there was a consistent lack of information running through the applicant's accounts for several years and that position had not fundamentally changed by August 2006. A full opportunity was given to the applicant to provide all information it wished. Its failure to do so did not trigger thereafter any necessity to be afforded further opportunity for comment.

[26] Counsel advanced the proposition that the applicants had misunderstood the role of Deloitte. It was not to carry out a due diligence report but rather to advise on the adequacy of information in the BDO report. The fundamental issue that the DSD took with BDO was that the conclusions did not match its findings. Hence the role of Deloitte did not involve anything other than a review of the adequacy of BDO's report and the up to date 2005 audited reports. A whole scale reassessment of the applicant by re-interviewing it, speaking to its bankers and accountants and looking at information not available to BDO such as up to date figures other than the 2005 audited reports would have been outside its remit.

[27] The Respondents argued that the actions of the Chairman and the Chief Executive of the Corporation were consonant with the appropriate roles and the division of responsibilities between Board members and Executives.

[28] Finally Mr Shaw insisted that only the allegation of mala fide invested this claim with any public law element and that once this was disposed of, the case made by the applicant became one of private law unsuitable for determination in Judicial Review.

Conclusions

[29] I commence by dismissing an issue of delay which was somewhat tentatively raised by Mr Shaw. Although I had given permission for it to be revisited at the time of granting leave to the applicant I consider it unnecessary for me to render a detailed analysis of this matter other than to say that having reviewed all the facts I am entirely satisfied that the applicant in the circumstances of this case acted sufficiently promptly within the terms of Article 53 of the RSC to defeat Mr Shaw's submission of unreasonable delay.

Mala Fide

[30] This is a concept that has never been precisely defined but it clearly includes, inter alia, acting dishonestly and or with improper motive under the pretence of a proper purpose. It is an accusation not lightly to be made and one which is difficult to prove. Good faith is an indispensable element of the lawful exercise of power . Bad faith amounts to an abuse of power contrary to the public good. It requires clear pleading and cogent evidence. The burden of proof lies on the applicant .

[31] In approaching my task I have been mindful of what Laws LJ said in Quark Fishing Limited v Secretary of State for Foreign Affairs[2002]EWCA 149 at paragraph 50:

> "There is a very high duty on public authority respondents, not least central government to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The question here is to decide whether in his evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in this case were arrived at. If the court has not been given a true and comprehensive account but has had to tease the truth out of late discovery it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure."

[32] I am also conscious that it has often been observed that judicial review is unsuitable for resolving disputes of fact. Although it may well be appropriate in certain instances, in essence judicial review is not a fact finding exercise. It is an extremely unsatisfactory tool by which to determine matters of factual dispute such as many of those that have arisen in this instance. See R v Chief Constable of Warwickshire Constabulary, ex p Fitzpatrick (1999) 1 WLR 564 at 579D. I have to decide this case without the benefit of cross-examination as would be the case in a witness action. As I will outline later in this judgment, the case resonated with argument and counter-argument as to the appropriate standard to be adopted in due diligence exercises, accountancy competence and practice, boardroom practice and other disputes of fact. Thus I found it necessary to remind the parties on several occasions of the nature of judicial review. Moreover a distinction has to be drawn between allegations of bad faith on the one hand and allegations simply of poor ,inefficient or questionable practice on the other. Whilst the latter can be evidence of the former, this conclusion can only be reached on the basis of compelling or cogent evidence.

[33] I am not satisfied that the evidence before me is sufficiently compelling to establish bad faith for the reasons I shall now set out. Before doing so however I pause to make two general comments about my conclusions. First I consider that Mr Curistan on behalf of the applicant has permitted his understandable indignation at the baseless allegations of money laundering to combine with his profound disappointment at losing the position of preferred developer to so colour his attitude to the whole process of due diligence that he has lost sight of the deficiencies in corporate governance identified in the applicant. It is these identified deficiencies which are the real reasons why the decisions of the Respondents have been made in my view. Secondly the climate of suspicion engendered on the part of the applicant in this case has in no small measure been contributed to by some incautious and infelicitous statements and correspondence emanating from a

few senior civil servants to which I shall make reference in the course of this judgment. It has been this which has in part served to fuel the suspicions of the applicant and has triggered Counsel's submission that the Respondents have filed affidavits that "contain half truths, misleading statements and inconsistencies". Whilst such material could have provided a basis to draw adverse inferences against the deponents, I am not in the event persuaded by the overall evidence that there was a deliberate lack of candour or an intention to wilfully mislead on the part of these Respondents. Nonetheless, in an era when discovery of correspondence is an increasing feature in judicial review cases, it is concerning that in a few instances some civil servants were not more jealous of the reputation for balanced excellence with due regard for accuracy and clarity which the Civil Service in Northern Ireland has always enjoyed.

The twin track process (paragraphs 34-64)

[34] The first reason why I reject the applicant's case is that I am satisfied on the evidence before me that the DSD had embarked upon a twin track approach to due diligence and the allegations. On the one hand, the task of due diligence carried out by BDO was to establish whether there was any foreseeable financial or other corporate risk leading to the applicant defaulting. On the other hand there was a quite separate investigation into the allegations of criminality in which BDO played no part ("the twin track process").

[35] I consider it was a plausible and recognised method of investigating the criminal allegations made against the applicant to invoke the assistance of the NIO and PSNI rather than rely on the accountancy skills of BDO in the course of a due diligence exercise. The NIO is self evidently the department of government responsible for criminal justice and policing in N. Ireland. The PSNI is equally a clear source of criminal investigation of money laundering. These bodies have access to the necessary intelligence and information to ascertain any basis for such allegations.

[36] In the wake of the allegations made, how could the DSD have justified authorising appointing the applicant as preferred developer without having tapped such sources? Understandably those at the highest level were alerted to these allegations and plotted the course to be followed. Hence Mr Nigel Hamilton as Head of the Civil Service and Mr Shannon as Permanent Secretary in the DSD were involved in this process. It seems inconceivable to me that these two officers alone would not have ensured that steps were taken to investigate this very serious matter in a manner they deemed to be appropriate. What possible motivation could either of them or indeed any official under their direction have for not investigating the allegations at the earliest moment or indeed at any stage during the due diligence process? What reason could there logically be for not enlisting the services of the

NIO/PSNI.? How could they ever justify not having done so or conceal ,not least from the NIO or PSNI, the fact that they had not done so by falsely asserting that they had ?

[37] For the applicant to sustain its case of bad faith it has to establish that for some reason civil servants and executives of the Corporation decided to mislead the Head of the Civil Service and the board of the Corporation that this task was to be or had been done when there was no intention of doing it . They then embarked on a whole scale cover up to ensure that this oversight, deliberate or otherwise, did not emerge by removing the applicant from the position of preferred developer without in fact taking any step to investigate the rumours. Why weave this web of deceit instead of simply triggering an investigation? Why depend on a large number of senior civil servants and Corporation executives being prepared to behave in this disreputable way rather than take the simple step of properly investigating the allegations?

[38] Such a scenario seems inherently improbable in my view, lacking any logical or rational basis. The time at which these rumours arose was after all only at the consideration of preferred developer. This appointment was subject to contract and the due diligence process. What possible reason could there be for not considering the allegations at this comparatively early stage? Proof of the veracity of the allegations through proper investigation would have inevitably led to the termination of the applicant's tender without any prospect of justifiable protest being raised from any quarter . Common sense demanded it, public representatives had requested it and the public good obviously required it.

[39] Moreover it seems undeniable that Mr Nick Perry the Senior Director (Belfast) in the NIO was tasked to look into the matter. Memoranda from Mr Hamilton were clearly copied to him on the subject, on 12 April he emailed Mr Hamilton indicating he would alert him if anything relevant emerged from the PSNI in relation to the allegations and he was content with and approved the assertion made to Mr Robinson MP on the 12 August 2006 by the Minister Mr Hanson that "I am not aware of any evidence that would call into question the source and legitimacy of the finances of the Sheridan Group". In the context of Mr Perry's approval of the Ministerial letter I had before me an email of August 2006 from Elaine Wilkinson, an official in the NIO, to Neill Jackson at the OFMDFMNI stating:

> "Nick (*I assume this to be Nick* Perry) has spoken with ACC Peter Sheridan and confirmed that PSNI had nothing new to add from their prospective. He is content with the proposed DSD line in response to Peter Robinson, as is Nick."

It seems inconceivable to me that such serious allegations made in the wake of future possible government involvement with the alleged miscreant would not have triggered anxious scrutiny on the part of Mr Perry and the NIO/PSNI. This email is a clear indication that the PSNI had been contacted at a very high level on more than one occasion on the topic. Hence I remain singularly unpersuaded by Horner's assertion that these allegations were either ignored or perfunctorily considered leading to an orchestrated and nefarious campaign to wrongfully remove the applicant from the position of preferred developer.

[40] Doubtless some of those making affidavits on behalf of the first respondent could have couched their account of this process in somewhat less ambiguous and more transparent terminology but that must not deflect me from ascertaining where the truth lies. Mr Nigel Hamilton, the Head of the Northern Ireland Civil Service, in the course of an affidavit of 5 June 2007 averred as follows at paragraph 4:

> "On 5 August 2005 I was made aware of a Sunday Independent article of 31 July 2005 which made serious allegations against Peter Curistan. The allegations about Peter Curistan and his company gave rise to a concern about the financial management of the Sheridan Group. Although I had not read the article, I took the opportunity at the regular weekly meeting to speak to Alan Shannon and asked him whether the Department was taking any steps in response to the newspaper allegations or whether the Department should be taking any such steps. Alan Shannon advised me that the applicant was a subject of a due diligence exercise which would look into the details of the finances and whether it was, financially, in any fit state to complete the Queen's Quay development."

[41] On the face of it, one obvious interpretation of this memorandum is that Mr Hamilton was indicating that he expected the serious allegations about Peter Curistan to be addressed in the due diligence exercise. This interpretation gathers further strength at paragraph 5 as follows:

> "I was reassured by Alan Shannon's position on this matter. As he also states in his affidavit I followed up our discussion with a memorandum dated 9 August 2005 (which appears at pages 10-18 of the bundle of exhibits to Alan Shannon's affidavit), after I had read the Sunday Independent articles. The purpose of this memorandum was to formally record that I endorsed

> Alan Shannon's intention to address this matter by means of the due diligence investigation."

[42] However the matter does become clearer when the actual memorandum of 9 August 2005 is considered. I regard this as an important document and for that reason I shall set it out in extenso:

> "The Sheridan Group
>
> 1. I have now had the opportunity to read the Sunday Independent article of 31 July about the Sheridan Group, and, in particular, Peter Curistan (copy attached).
>
> 2. I fully endorse Alan's intention of carrying out a due diligence investigation of the Company, in relation to financial/contractual liabilities with the Laganside Corporation. As we mentioned briefly during our discussion last Friday, Aideen also has an interest, given the BCAL sponsorship role in respect of the Odyssey.
>
> 3. I am also copying this to Nick Perry who will be interested from the wider perspective, particularly the organised crime task force."

I consider that this memorandum does indicate the twin track approach that was being invoked i.e. a close investigation of the financial competence through due diligence and the wider issues of criminal investigations being considered through other avenues.

[43] That conclusion is strengthened by the later paragraphs in Mr Hamilton's affidavit of 5 June 2007 viz:

> "7. The allegations were such that I was of the view that they should be brought to the attention of the Northern Ireland Office because they raised wider issues which fell within the responsibility of the Northern Ireland Office. I copied that memorandum to Nick Perry given his responsibilities for policing and security in the Northern Ireland Office to give them the opportunity, if he wished to make available to me, any relevant information. No such information was forthcoming.

> 8. I also copied it to John Hunter (Permanent Secretary in the Department of Finance and Personnel). The Department of Finance and Personnel is ultimately responsible for ensuring propriety in economic appraisal and disposal of public land and the Government's value for money policy. The purpose of doing this was to make sure that all colleagues who might have an interest were kept properly informed.
>
> 9. The role that I took here demonstrates the overarching role that I have in relation to devolved matters generally."

[44] Further articles containing allegations against the applicant were produced to Mr Hamilton. Mr McGrath, the Deputy Secretary in DSD had assured him that the Department would be addressing exhaustive due diligence in the context of the Sheridan Group being selected by Laganside. Mr Hamilton records "in my view due diligence was an appropriate and proper course of action". Mr Hamilton followed this up with a memorandum to Mr Shannon of 20 February 2006. That memorandum records:

> "1. We have already discussed this briefly and I am aware that both DSD and the Laganside Corporation will be robust in the due diligence work currently being undertaken by financial consultants.
>
> 2. Simultaneously you may have seen the attached article in the Sunday Times edition of 19 February. If true, this would be of major concern since – I presume – it would be very difficult indeed for BDO Stoy Hayward to provide complete assurance. I have also copied this to Bruce Robinson since finance colleagues in DFP will also have a significant interest.
>
> 3. I am still awaiting further information and advice from NIO colleagues on this."

[45] I am unpersuaded that the reference to "robust" due diligence necessarily connoted a requirement to investigate the allegations per se. On the contrary the reference to the difficulty in BDO providing "complete assurance" seems clearly to indicate that its task did not involve assessment of the Sunday Times allegation. I am satisfied that paragraph 3 of this memorandum is yet another reference to the twin track approach of financial investigation through due diligence on the one hand and wider issues of

criminal investigation with the NIO on the other, information on the latter being awaited.

[46] Further evidence of the twin track process is to be found in the memorandum of 6 April 2006 which Mr Hamilton sent to the office of the First and Deputy Minister in the context of certain letters which had arisen on the subject of Sheridan Millennium from two public representatives namely Gerry Adams and Peter Robinson. In the context of this case, once again that memorandum bears repetition in extenso:

> "Rosalie
>
> 1. I am grateful to you, Neil, Deidre and you for your work on this.
>
> 2. I have copied the papers to Nick Perry who was unaware of the letters both from Gerry Adams and Peter Robinson. Clearly, as we all recognised, the 'due diligence' exercise will not extend as far as some of the allegations being made. In that context, Nick and colleagues in NIO will want to give careful consideration to the draft responses which ultimately issue.
>
> 3. We would not of course be in a position to respond substantively until we have appropriate input from NIO, as well as DSD. This is one of those cases which it is important to make haste slowly!"

I believe this draws the clearest of distinctions between the two separate exercises.

[47] This therefore explains the reference in paragraph 17 of Mr Hamilton affidavit of 5 June 2007 as follows:

> "17. With regard to the wider issues, on 12 April 2006 Nick Perry sent an e-mail to my secretary indicating that he would alert me if anything relevant emerged from PSNI in relation to this. Subsequently the position of the NIO and the PSNI was made clear as explained in the affidavit of John Johnston and particularly pages 79-84 of the bundle of exhibits (JJ1). In summary, both were content with the proposed response to Peter Robinson (at page 84) which found expression in the letter from Minister David Hanson dated 12 August 2006 … that 'I am not aware of any

> evidence that would call into question the source and legitimacy of the finances of the Sheridan Group'. In my view this concluded the response to the wider issues. I was satisfied at that stage that the only material consideration related to the due diligence exercise. Apart from an update on the state reached by the Department in its due diligence on 13 October 2006, I had no further discussion with Alan Shannon or the Department on these issues until after the decision was taken which is the subject of these proceedings."

[48] I am therefore satisfied that not only was there a twin track approach adopted by the Respondents, but Mr Hamilton was well aware of it and lent his imprimatur to this approach in his role as someone who took an overarching view of the functions of the Northern Ireland departments. I reject the suggestion that any official attempted to mislead him or that in the event he was misled in any way as to the process that was being pursued. It is unfortunate that the terms of paragraphs 4 and 5 of his affidavit were somewhat ambiguously drafted so as to create a possible contra-indication.

[49] The affidavit of Mr Shannon, the Permanent Secretary in the DSD, also the object also of criticism by Mr Horner , strengthens my conclusions as to the twin track procedure albeit that affidavit in part betrays the same concerning ambiguity as that of Mr Hamilton. Paragraph 3 of Mr Shannon's affidavit ("the Shannon affidavit") of 23 May 2007 states as follows:

> "I next became directly concerned in the matters before the Court when I received correspondence relating to the Sheridan Group ('Sheridan'). In this regard I would first refer to our memorandum from Nigel Hamilton the Head of the Northern Ireland Civil Service which was sent to me dated 9 August 2005. This relates to the fact that Nigel Hamilton had read the Sunday Independent article of 31 July 2005 which made serious allegations against Peter Curistan. This memorandum was written shortly after I had a discussion with Nigel Hamilton in the margins of another meeting on 5 August 2005. The discussion was not minuted due to the informal nature of the same. In essence Nigel Hamilton asked me whether we were doing, or should be doing, anything in relation to the allegations. I advised Nigel Hamilton that the financial position of the applicant would be properly considered to meet DSD's assurance requirements in the course of the

> due diligence exercise. This was the thrust of the Department's approach to this matter all through the process. The Department would not react to uncorroborated allegations in themselves. The whole purpose of the due diligence exercise was that any risk to the Department proceeding should be shown up in the due diligence exercise on the Sheridan Group's audited accounts."

[50] This paragraph is ambiguous in that one possible interpretation is that the concerns arising from the allegations and the risk they contained to the Department proceeding would be dealt with in the due diligence exercise. It drew the fire of Mr Horner for this very reason. However any such interpretation is in my view quickly dispelled upon reading the subsequent paragraph 4:

> "On reading Nigel Hamilton's memorandum, I noted that it had been copied to Nick Perry, Head of Security and Policing in NIO, who represented NIO on the Organised Crime Task Force. As Accounting Officer, I have to give full regard to issues of propriety and regularity in the Department's affairs. Therefore with regard to the wider allegations of criminality I consider that copying Nick Perry into this matter was a prudent step to take. It had alerted a senior official who was in a position to notify me as Accounting Officer about any information in existence regarding the wider allegations. If we had been provided with evidence of some wrongdoing, we would have considered such evidence. No such evidence was ever brought to my attention."

I am satisfied that this again serves to corroborate the assertions by the Respondents that the criminal aspect of the allegations was being dealt with outside the due diligence process. DSD confined its assessment to the financial capability in due diligence subject to what might emerge on the criminal front from other sources.

[51] Mr McGrath the Deputy Secretary in the DSD also provided an affidavit dated 11 May 2007 which constitutes further evidence of the existence of a twin track process . He was the person responsible for and in charge of the Urban Regeneration and Community Development Group one part of which was the sponsoring team for Laganside from May 2003 to 1 April 2007. As Head of the URCDG, he had knowledge of the due diligence process carried out on the Sheridan Group and was involved in the decision-making process which resulted in the termination of Queen's Quay

development competition. At paragraph 14 of his affidavit he also makes clear that the Government response to the wider allegations of criminality took place within a separate process and played no part in the due diligence exercise. Having described what due diligence amounted to, a matter to which I will return later in this judgment, he records at paragraph 14:

> "At around this time a note from Nigel Hamilton to Alan Shannon drew my attention to the potential relationship between the due diligence exercise and the wider allegations of criminality and I e-mailed Jackie Johnston in this regard. I do not recall all of the circumstances surrounding this e-mail. However, I do recall indicating that it would not be just of 'major concern' if BDO did not give full assurance. In my view if this were the case, we would have little choice but to not confirm Sheridan's preferred developer status. As a result there would have been a consequent considerable delay in the key project going ahead. A due diligence exercise is designed to provide assurance; if this cannot be provided for any reason at all, it would mean that the developer had failed due diligence. As matters move forward, Government's response to the wider allegations took place within a separate process and played no part in the due diligence exercise."

This seems to me not only to represent common sense but it illustrates the extent of the conspiracy that the applicant has to establish to prove mala fide. Why would Mr McGrath have fabricated this twin process when it was easy for Government to have the allegations authenticated or otherwise in the conventional manner? Why do this when it is clear that the NIO and PSNI had no evidence to substantiate them?

[52] Nonetheless that the applicant has steadfastly refused to accept that the Respondents were embarked on such a twin process investigation, has, as I have already indicated in paragraph 32 of this judgment ,been contributed to in no small measure by the Respondents themselves. In addition to the ambiguities I have earlier referred to, the "Robinson correspondence" is an even stronger example of a bewildering lack of clarity on the part of the Respondents thus fuelling suspicion in the collective minds of the applicant in the context of the BDO due diligence.

[53] Following Mr Robinson MP's comments in Parliament, there ensued an exchange of correspondence between Mr Robinson and the Secretary of State and more particularly Mr David Hanson the Minister of State for Northern Ireland which I have referred to in paragraph 9 of this judgment as

"The Robinson correspondence". Understandably, the Ministers relied upon the advice of civil servants in providing responses to Mr Robinson and I absolve them from all criticism in this matter. It was clear from the correspondence starting 9 March 2006 from Mr Robinson that he was seeking confirmation "that the Laganside Corporation is investigating the wider issues" i.e. the allegations he had made in the House of Commons. Mr Robinson asserted that the due diligence exercise would be of no value if it simply looked at Sheridan's capacity to finance the project rather than the validity of the sources of finance. On the Respondents' case now made before me, the plain and simple answer was that there was a twin track process whereby the financial capability of the applicant was considered in the due diligence exercise and wider allegations were considered in a separate exercise carried out by the NIO.

[54] Mr Johnston was the Director of Belfast City Centre Regeneration Directorate in the DSD who provided advice both to Mr Hanson the Minister with the responsibility for social development and the Secretary of State for Northern Ireland Mr Hain, on Peter Robinson's letter. He recommended as follows:

> "I recommend that the Secretary of State should reply advising Mr Robinson that DSD is satisfied that the terms of reference for the due diligence on the Sheridan Millennium Group's capability to develop the proposed scheme are sufficient to meet the Department and Laganside's requirements to establish whether the Group should be confirmed as a preferred developer for the proposed Queen's Quay development."

[55] This recommendation crystallised into the response of the Minister of 3 May 2007. Although this recommendation was drafted by Mr Johnston it had received the imprimatur of a number of other senior civil servants au fait with the scheme within the DSD, copies of the recommendation having been sent to Alan Shannon, Nick Perry and John McGrath inter alios. It self-evidently failed to answer the query raised by Mr Robinson about the wider investigation. The failure to do so encouraged Mr Horner on behalf of the applicant to allege that there was a cover up to deceive Mr Robinson into believing that the due diligence exercise would deal with the allegations of money laundering. I observe that the letter does not say this and strictly speaking it does confine the question of due diligence to the preferred developers capability to develop the proposed scheme. Nonetheless it avoided answering the issue of the wider allegations investigation and could conceivably have left the impression that due diligence would deal with the MP's query. Unsurprisingly Mr Robinson found the response unsatisfactory and on 12 May 2006 wrote to Mr Hanson in these terms:

> "I have received your communication dated 3 May 2006 and found your response to be unsatisfactory. I shall again raise this matter publicly as it is clear that you are avoiding the due diligence issue which is of public concern whether i.e. the funds being raised by Sheridan are legitimate. It seems your approach is intended to act as a cover up and produce only one possible result in favour of the Group who practices I questioned in the House of Commons."

[56] Again Mr Johnston, copying his response to a number of the same persons as previously , recommended that the Minister reply in similar terms to that set out in the letter of 3 May 2007. A further letter from Mr Hanson to Mr Robinson was sent on 13 June 2006 borrowing the terms of the recommendation. Once more Mr Robinson found this response unsatisfactory in light of the question he had raised about the source of the funds being used by the applicant rather than the capability of the applicant to develop the scheme. Accordingly he sought by way of letter dated 30 June 2006 a direct answer to the specific point as to whether the Minister responsible for the Department for Social Development was satisfied with the source and legitimacy of the funding of the Sheridan Millennium.

[57] The advice to the Minister once more underwent consideration by a number of civil servants including Mr Johnston. The input appeared to come from the DSD, largely through Mr Johnston, the NIO, and OFMDFM NI. It may be, as submitted by Mr Shaw albeit not quite in these terms , that the obfuscation that surfaced in the earlier correspondence was due to a lack of co-ordination of the various interests concerned and the different government departments. Mr Johnston, who made the final recommendation to the Minister in each case, was somewhat pedantically confining the recommendation to the area in which he was involved on behalf of DSD namely the due diligence which was to deal with the financial capability of the applicant albeit it must have been obvious to him, and those approving his response, that he was not answering the question raised . However it is clear in an e-mail from Neil Jackson of the OFMDFM NI to Elaine Wilkinson at the NIO of 1 August 2006 that the stage had now been reached where it was patently clear to at least some of those advising the Minister that the earlier responses were inadequate and unlikely to close the issue. That e-mail records:

> "It is clear that the scope and nature of the Due Diligence exercise, to which previous replies have referred, is insufficient to answer this question as

> posed. Our view therefore is that a reply on the following lines or similar will need to be provided:
>
> 'I am not aware of any evidence that would call into question the source and legitimacy of the finances of the Sheridan Group and I can therefore offer no further comment. Should you have such evidence I shall encourage you to make this available to the PSNI for further investigation."

[58] This proposed format eventually made its way through Mr Johnston and a further recommendation by him along these lines into a letter from the Minister to Mr Robinson. Curiously that recommendation to the Minister again fails to record the fact of investigation by the NIO into the wider issues. Since I am satisfied that this investigation had taken place and was a separate issue from the due diligence exercise. I find it difficult to understand why Mr Johnston failed to appraise the Minister and thus Mr Robinson of this in the early stages, notwithstanding that the narrow confines of his remit may have been to deal only with the due diligence aspect. Not only is this an example of the concerns I have expressed in paragraph 32 but it is an exercise which at the very least has fallen short of the standards of accuracy and clarity which the public is entitled to expect of civil servants. Mr Horner seized upon the Robinson correspondence as another example of a cover-up on the part of the first named Respondent for its failure to investigate the allegations and to depict the due diligence exercise as the investigation of the allegations notwithstanding that it patently was not. Since I am completely satisfied that such an investigation did take place outside the remit of the due diligence and that there was therefore no purpose in concealing it from the Minister or Mr Robinson , I can quite understand why this correspondence did generate suspicion on the part of the applicant.

[59] Having set out my views on the deficiencies in the first named Respondents correspondence ,nevertheless I observe at this stage that I do not believe that the applicant or Mr Curistan did have any genuine difficulty understanding the conceptual difference between a due diligence exercise on the one hand which dealt with the financial capability of the Sheridan Group and on the other hand a wholly different exercise which would deal with the allegations of criminality surfacing in the media. Indeed I consider that the desirability of such a twin track process was present in his mind . Several pieces of evidence before me convince me of that proposition.

[60] First, a memorandum of 22 March 2006 passing from Nigel Hamilton to Alan Shannon, a copy of which was sent to Nick Perry, recorded an intervention by Peter Holmes of Sheridan Millennium wishing to discuss with Mr Hamilton background information about the Sheridan Group in light of the allegations in Parliament and the press. Mr Hamilton declined the

invitation to meet Mr Holmes but recorded as follows in the memorandum to Shannon:

> "3. I did indicate to him however that I would advise you of this approach, given the importance of this matter to both DSD and the Laganside Corporation, and advise you that Peter believes that there is certain factual information around these issues of which he would want you to be aware. He went on to indicate that:
>
> (a) He was satisfied, so far, with the due diligence exercise and had worked closely with those involved in that. He believed that Sheridan will be given a clean bill of health on that matter; but
>
> (b) There were certain other allegations being made which could not fall within the due diligence exercise, and it was these in particular on which he wished to offer further information and comment."

[61] I consider that this note, which I have no reason to disbelieve in terms of its accuracy, clearly records that Mr Holmes recognised the difference between the due diligence exercise by BDO which did not contain the allegations of money laundering within its remit and a separate investigation into those allegations by some other body.

[62] Secondly nowhere in the papers do I find any suggestion by Mr Curistan e.g. in a letter he wrote to Mr Hamilton of 13 April 2006, that he felt the due diligence exercise should deal with the money laundering allegations. On the contrary, the annex to the letter of 13 April 2006 passing from Mr Curistan to Mr Hamilton contained the following reference to due diligence:

> "4. <u>Due diligence</u>
>
> The due diligence exercise just completed by BDO Stoy Hayward was not, as implied, occasioned by any doubts as to the regularity of Sheridan's financial dealings or overall financial position. It was a normal procedure commissioned by Laganside Corporation to confirm the financial and managerial capability to undertake the Quay's project successfully."

Certainly this letter and annex portrayed no misunderstanding whatsoever as to the nature of the due diligence exercised by BDO and contradicts any

assertion now made that it should or ought to have had a role to play in assessing the money laundering allegations.

[63] Thirdly Mr Curistan, an accountant, echoed similar sentiments in the course of a letter he had written to Mr Gerry Adams MP of 1 March 2006. In the course of that letter, he was drawing attention to the allegations that had been made against him. The letter included the following references:

> "It is no coincidence, I am sure, that the campaign re-emerged in recent weeks, first with the allegation by Peter Robinson in the House of Commons that the Sheridan Group was involved with 'dirty IRA money', and then in the Sunday Times in an article which headlined me as an 'IRA developer', and which sought to demonstrate that I was guilty of money laundering and financial malpractice. These allegations come at time when Laganside has commissioned a due diligence exercise – a perfectly normal procedure where a brief of this magnitude and importance is involved – and when BDO Stoy Hayward (appointed to undertake the due diligence) are due to report to both Laganside and the Department for Social Development which will ultimately take the decision as to confirmation of Sheridan as developer.
>
> ….
>
> As you would expect, we are taking other steps, including involving the Ulster Society of Chartered Accountants in seeking independent, third party corroboration of the factual position regarding our accounts. In addition, the due diligence exercise has been completed. While, by its nature, it has not – and cannot – investigate claims of money laundering, it has had access to the full accounts for the group companies and will comment on these."

[64] Whilst I am not satisfied that investigating the money laundering allegations would in all circumstances have been outside the nature of due diligence (see e.g. report of Ms Longworth, a forensic accountant retained by the applicants for this hearing) or outside the terms of the HM Treasury guidelines – the fact remains that Mr Curistan is here evincing as a plausible argument the very point now made on behalf of the Respondents that money laundering investigations would have been outside the remit of due diligence carried out by BDO.

The due diligence exercise (paras 65-82)

[65] The second reason why I reject the applicant's case stems from the fact that I am unpersuaded that there was anything untoward or improper about the decision on the part of the Respondents firstly to confine the due diligence terms of reference on the part of BDO to exclude the money laundering investigation,, secondly to remove the conditions BDO imposed in its conclusions or thirdly to countenance a review of the BDO recommendation by invoking the assistance of Deloitte. Moreover the applicant has failed to convince me to the requisite standard that the respondents wilfully intended to depict BDO as having investigated the money laundering allegations.

[66] As I have already outlined in paragraph 31 of this judgment, judicial review is an extremely unsatisfactory tool by which to determine disputes of fact in the absence of cross-examination of witnesses. I recognise only too well that a plausible argument can perhaps be made, given the degree of Government involvement in this project, to have extended the investigation already being made by NIO and PSNI to the due diligence exercise to enable BDO to carefully peruse the financial records of the applicant in order to ascertain a basis for money laundering. Indeed its accountancy skills might well have provided a very useful adjunct to any police enquiries given that such expertise might not have been readily within the reach of NIO and PSNI. Ms Longworth a partner in Grant Thornton UK LLP, Chartered Accountants retained on behalf of the applicant in this litigation also made the point that under the Orange Book Guidelines, she would have expected a risk assessment to have been performed to address the risk associated with the allegations made by Peter Robinson and their effect on the outcome of the Queen's Quay development. That of course fails to take into account the strength of the argument, perhaps to be couched in terms of practicality or realpolitik, that it would have been difficult perhaps for the Respondents to have insisted on such a searching and intrusive inquiry in the absence of any evidence to justify it coming from the NIO/PSNI. This is a classic example of where an accountancy expectation does not reflect the totality of those factors which go into the discretion to be exercised by the DSD.

[67] Decisions such as this are matters of fine judgment into which courts should be wary of trespassing and which do not make for suitable factual areas of judicial review enquiry. The balancing and weighing of relevant considerations as to how such investigations should be pursued is primarily a matter for the decision-making public authorities and not the courts. The Respondents, through Mr Shaw, make what I consider to be a perfectly plausible argument that it would have been an unacceptable and indeed unwelcome intrusion into the affairs of the applicant and Mr Curistan if BDO had been directed to carry out a money laundering investigation into his financial affairs in the absence of any justification for so doing emanating

from the appropriate services in the NIO and PSNI. I can readily imagine that the respondents would have anticipated a chorus of protest had they insisted on an in depth investigation into money laundering allegations against the applicant in circumstances where information from the NIO/PSNI had not been sought or was to the effect that there was no evidence to substantiate the allegations.

[68] The poisoned atmosphere between the applicant and the respondents to which I have earlier referred has again materially contributed to the dispute which has arisen concerning the terms of reference of BDO and the perceived reaction of the respondents to its conclusion. I have had the benefit of reading, on behalf of the applicants, a lengthy, detailed and careful analysis of Sally Longworth. Her task was to prepare a report on the due diligence process initiated by the respondents. Her analysis serves to highlight one well argued view in favour of the approach adopted towards due diligence by BDO together with a critique of the counter-approach suggested by the DSD largely through Mr McGrath and of the analysis by Deloitte. Indeed Mr Curistan in two comprehensive affidavits with equally detailed appendices also presented a closely argued criticism of the Deloitte report as I will later discuss. I fear however the applicant has failed to recognise that this is not an appeal against the accountancy practices or standards of the Respondents, BDO or Deloitte. The applicant has lost the wood for the trees becoming embroiled in a detailed accountancy analysis and failing to recognise that an allegation of bad faith requires more that an assertion that accountancy standards could have been improved. Even had it been illustrated that the Respondents' approach was flawed, lacking in efficiency or misplaced in accountancy terms, that is not the test that is before me. Such defects would not without more prove mala fide. That in my view is what the applicant has singularly failed to address throughout this case.

[69] Some instances in relation to the BDO issue will suffice to illustrate this. Clearly the terms of reference in respect of financial due diligence can vary significantly between assignments (see Ms Longworth's first report at paragraph 3.4). Nothing is therefore cast in stone as to what should come within the remit of due diligence. Conceptually it cannot be looked at through an external ideology that prescribes what must or must not be contained therein The key objective set out in the terms of reference in this instance was to "assure the Laganside Corporation/Department for Social Development that the proposed developer, can meet the financial obligations under the proposed development agreement." The money laundering allegations were not part of that remit expressly or impliedly. BDO proceeded to carry out and make documented findings based on its professional opinion after an extensive due diligence process. Inter alia, BDO stated that it had been unable to estimate the Group net asset position as it did not have available accounts with co-terminous statutory reporting period ends, nor readily available current, accurate financial information for all

Group companies. However they did add that there appeared to be adequate security for funding all borrowings if there are no significant additional borrowings required for other Sheridan Group companies. It concluded that "it is our opinion, having regard to inherent weaknesses highlighted, the non-availability of the audited financial statements for the period ended 31 March 2005 on which our terms of reference were based and limitations in the scope of our work therefore arising, the Group is positioned to deliver the Queen's Quay project". In paragraph 13.3 of its draft due diligence report, BDO makes reference to a number of both pre-conditions and general conditions that it recommended should form "part of the award of any contract by DSD". Those pre-conditions and general conditions require to be set out in full for their significance to be appreciated and were as follows:

"**Pre-conditions**

The Group will:

- Put in place adequate key man insurance on Peter Curistan throughout the period of the project
- Employ a Building Contractor to sit on the Project Management Team with the primary role of building the relationship with the contractor, including attendance at all site meetings
- Recruit a Financial Director (and consider the appointment of an Operations Director)
- Demonstrate to the satisfaction of DSD, the development of adequate financial reporting systems in respect of Queen's Quay
- Provide to DSD a current RICS approved independent valuation of the Odyssey Pavilion and IMAX Centre property (and consider seeking a RICS approved independent valuation on the Tannery building)
- Provide evidence to DSD that funding for the project will be ring fenced.

In addition, Peter Curistan will provide written confirmation to DSD that he will not remove any material personal monies owed to him by the Group during the course of the project, which would materially impact on the funding position of the group, MAPC or the Queen's Quay Development.

General conditions

The group shall:

- Provide DSD with quarterly updates of actual versus proposed progress against the Project Management Plan
- Provide DSD with quarterly updates of progress with regard to off-loading operating activities
- Provide regular updates to DSD of the progress on its withdrawal from operating activities
- Provide to DSD, within a timeframe and format to be agreed, financial information relating to MPAC and the wider Group
- Provide to DSD updates of progress on operations and details of the new leases entered into
- Inform DSD in advance of any decision by the Group to refinance SML's borrowings
- Give DSD the right to have an independent commercial/retail specialist review the related party rents in light of current market conditions to obtain a view as to the financial impact of SML in the future."

[70] Mr McGrath, in his affidavit of 11 May 2007, made the case on behalf of the Respondents that these conditions were akin to introducing further criteria thus unfairly advantaging the applicant over the other bidders and exposing DSD to challenge on the grounds that there had been a separate process with the applicant. Mr Shaw forcefully made the point that the competition as to who was to be the preferred developer was not over at this stage because it all depended on the due diligence exercise. The other competitors for the position of preferred developer were still therefore in the frame. It was also Mr McGrath's argument that these recommendations took BDO outside the terms of reference for the due diligence because it had not been asked to make recommendations regarding the Department's next step but simply to do a due diligence on the area set out in the terms of reference and report their views. I recognise that some or even many due diligence exercises might have recommendations attached particularly if those recommendations were short or not onerous. However the context is everything. Mr Shaw argued that the goal of due diligence in this case was to get an independent examination of the proposed preferred developer at a point in time to decide if it was fit to deliver the project in commercial terms. It fell to the applicant, as the proposed preferred developer, to provide the necessary information to convince BDO. Mr Shaw asserted that it was

necessary to this process to have the best available information i.e. audited accounts and not simply management accounts. In short, it was the Respondents' case that the applicant failed to comply with this crucial aspect of due diligence.

[71] This point of view, which I consider to be plausible , is summarised in the first place in the affidavit of Mr Alexander of 9 March 2007 where he states:

> "13. A programme for due diligence was agreed with the applicant from the outset. Procurement of a consultant through competitive tender by the central procurement Directorate of the Department of Finance and Personnel would take until November 2005. The Applicant confirmed by letter of 19 September 2005 that audited accounts for the period ending March 2005 would be available by early November. ….
>
> 14. The Applicant clearly understood from immediately after their appointment as preferred developer that due diligence was required and that they would be required to submit up-to-date audited accounts. The applicant was keen to move quickly towards developing the site and progressed the design of the scheme quickly and efficiently. In contrast to progress with design, progress with submission of the required accounts, which was the priority – was slow. Their repeated assurances and repeated failure to submit their accounts within timescales that they had agreed is well documented. I consider that Laganside exercised considerable patience in this area and even when 'final deadlines' were missed, gave further opportunity for submission of the accounts until they were finally received some 14 months after the applicant's appointment (*i.e. this would have been in July/August 2006*).
>
> 15. At the next Laganside Board meeting in September 2005 the applicant's status as preferred developer and the role of the Department was outlined in detail. … The next steps in the process were also outlined. The next steps were to include due diligence based on audited March 2005 accounts, the completion of an economic appraisal, the preparation of a draft development agreement, the

design of infrastructure works to be undertaken by Laganside and the transfer of land from the Department for Regional Development Roads Service. The Board noted the actions and that it was to be regularly advised of progress. ….

18. The accounts to March 2005 were not submitted as expected by November 2005. By this time BDO had been appointed to undertake due diligence. At meetings in December 2005 between Laganside, BDO and the applicant a programme for submission of information and due diligence was agreed with a view to completion of a draft report by February 2006. ….

22. I had a discussion with Mr Curistan on 4 April 2006 following a workshop organised by SDLP on a Future Vision for Belfast. ….. I was concerned at this stage that the 2005 accounts had not been submitted. I had written to Sheridan the day before, 3 April, stating 'It is disappointing that the previously timescale was not achieved. As you are aware review of these accounts was a fundamental aspect of the terms of reference for due diligence'. I considered the opportunity to talk directly to Mr Curistan at this time gave me the chance to emphasise the need for him to submit these accounts, to advise him of my frustration that we had commenced the BDO commission based on a programme he had agreed for the provision of the accounts and now three months later they were still unavailable.

…..

24. The applicant advised on 25 April 2006 that on advice of their auditors they had sought an extension of time for submission of accounts from the companies registrar .

…..

25. BDO completed their commissioned examination without the 2005 accounts with a submission of a summary report on 12 June 2006 supported by a detailed report."

[72] These concerns echoed those expressed by John McGrath the Deputy Secretary of the DSD in his affidavit of 11 May 2007 at paragraph 13 where he stated:

> "The Department also took the view that the fact that accounts were not available was an issue of corporate governance in itself and that BDO should comment on the issue rather than amending the timetable to accommodate it.
>
> …..
>
> 15. BDO submitted a draft report to Laganside in February 2006. This is normal practice. Amongst other things, it allows us to check that the proposed report meets the terms of reference. The report highlighted a number of areas of concern, particularly in regard to
>
> - the complexity of the corporate structure;
> - the poor corporate governance procedures;
> - incomplete financial information;
> - the variety of 'clean', 'limitation of scope' and 'adverse' opinions given by auditors.
>
> …..
>
> 16. The Department and Laganside's accounting officer identified a number of serious concerns raised by the draft report. The overall picture of the Sheridan Group presented by the draft report concerned us because of the serious nature of the situation identified by BDO which in our view identified unsatisfactory assurance across a wide range of due diligence checks. Furthermore, whilst the report was comprehensive and well researched, we were perturbed that notwithstanding the widespread unsatisfactory assurance and incomplete accounting information BDO had reached a conclusion at variance with the evidence presented in the draft report. Furthermore BDO had proceeded to recommend that the Department should impose a number of conditions on the Sheridan Group as pre-requisite to entering into a development agreement in order to mitigate the risks to the Department arising from the unsatisfactory assurance. Given the nature

> of the development competition, this was not a reasonable position in which to place the Department as, in our view, the Department had not proper role to play, within the context of the competition, in what would amount to regulating the internal affairs of the Sheridan Group in order to meet our requirements. This was akin to introducing further criteria, thus unfairly advantaging Sheridan Millennium Limited."

[73] In the course of the BDO draft report, it exhibited a list of 34 corporate vehicles within the Sheridan Group. Even a cursory glance revealed the gaps within the Group in terms of audited reports as far back as the year ending 2002/2003 with approximately only two thirds of the 34 corporate vehicles audited to 2003 and virtually none until 2005. Unsurprisingly the BDO report recorded:

> "The above table highlights the absence of and non-coterminous nature of accounting periods within a considerable number of Group entities which therefore does not permit for any meaningful consolidation and performance."

It goes on to record the lack of information available for a number of the companies. Further weaknesses depicted in that report included:

> "
>
> - The group structure is currently unnecessarily complex, is confusing and adds unduly to administrative and reporting burdens within the Group.
> - Reliance on Peter Curistan.
> - The absence of a full-time finance director and an operations director.
> - The Group's Board membership is considered inadequate and too small for the scale of the company, consisting only of Peter Curistan and Peter Holmes.
> - Severe lack of key corporate governance procedures.
> - The availability, quality and frequency of financial information and of particular note the unavailability of regular monthly management accounts.
> - Absence of a financial direction: having been with the company for three years, Stephen

Crickaird does not appear to have the capability, on his own, to address the complexities of the corporate structure and management reporting needs of the Group.

- The Group does not consist of coterminous accounting periods.
- There are material gaps in preparation of financial information throughout the Group, particularly with respect to ('*a number of companies*').
- There is a considerable and concerning number of audit qualifications throughout the Group, particularly in respect of UK companies.
- In light of the most recent audited financial statements available, it is clearly apparent that the Group does not have sufficient evidence or appropriate information to satisfy its auditors."

[74] Notwithstanding these deficiencies, the conclusion of BDO was as follows:

> "On the basis of our review it is our opinion, having regard to inherent weaknesses highlighted, the non-availability of the audited financial statements for the period ended 31 March 2005 on which our terms of reference were based, and the limitations in the scope of our work therefore arising, the Group is positioned to deliver the Queen's Quay project."

[75] In the wake of that conclusion, Mr McGrath, records in his first affidavit at paragraph 17:

> "Following discussions between the Department and Laganside, Laganside raised this issue with CPD and the report was amended to take account of some of our concerns; this included the removal of the recommendations on pre-requisite conditions. However, despite the removal of the recommendations, BDO's conclusion remained unchanged. …. We disagreed with this conclusion because we did not think that it followed from the evidence presented or had sufficient regard to the public interest given the serious nature of the unsatisfactory assurance across a range of due diligence checks, the associated risks and the problems identified and the incomplete accounting

> information. It was therefore not reasonable to suggest that we should proceed. The report was also considered by the URCDG Financial Controller who agreed that, in his professional opinion, the associated risks were such that to proceed, solely on the basis of this report, would be imprudent."

[76] I observe at this stage that I consider these comments constitute a plausible argument for the DSD/Corporation to put forward. I am satisfied that the Respondents did have discretion in determining how to deal with this report and the court must have regard to the expertise of the decision-makers. The DSD was not bound by the conclusions of BDO particularly when the conditions initially included therein seemingly placed a heavy burden of supervision on the Respondents To disturb the exercise of that discretion, the applicant has to establish that the decision-makers erred in law in holding that the BDO report was unsatisfactory and/or was motivated by mala fide.

[77] I have read the detailed analysis and criticism of the decision of the respondents with reference to BDO carefully set out by Ms Longworth. She raises what is, on one view, a plausible argument that the BDO report in its final form was unobjectionable. Inter alia, she makes the following comments in the course of her first affidavit/report:

> "In my opinion the conclusions (*of BDO*) appear to be supported by the documented findings. The conclusion is the key piece of information provided by BDO and is formed based on its professional opinion after performing what appears to have been an extensive due diligence process. A review of the findings, set out in the BDO report, by someone who has not undertaken the detailed work may not necessarily lead them to the same conclusion.
>
> …. In my opinion these issues (*i.e. those issues raised as a matter of concern by BDO*) are not deal breakers but are issues which can be resolved or controlled, and the BDO discloses that measures are being taken to actively address such measures.
>
> ….
>
> However, based on the findings as presented, the recommended pre-conditions and other conditions are, in my opinion, in line with (*their*) findings. It provides practical actions that could be undertaken to

> mitigate a number of risk areas identified within its report.
>
> ….
>
> In my opinion, and in line with Grant Thornton's best practice guidelines, the inclusion of the recommendations should form part of all quality due diligence assignments. Therefore I do not consider the recommended pre-conditions and other conditions to be unusual.
>
> But John McGrath has stated in his affidavit that 'HM Treasury Guidance states that risk attachment to major products should be identified and managed as far as possible'. It follows that, for the due diligence to be rigorous, BDO should have been expected to investigate the risk and use that knowledge to make recommendations to manage the risk."

[78] It is illustrative of the spectrum of opinion which can be honestly held on such matters that in an affidavit of David Epstein, Director of Forensic Accounting, Haslers, who had been instructed to provide an independent report dealing with the matters raised by Ms Longworth on behalf of the Respondents, he recorded a wholly different perspective on the matter .In the course of his report the following matters are outlined:

> "5.7. Therefore, in my opinion, although the inclusions of recommendations and/or conditions precedent are common practice, under the specific terms of reference of the assignment issued by Laganside/DSD, no recommendations and/or conditions precedent would have been appropriate.
>
> ….
>
> 5.15. I find it difficult to understand how BDO could have drawn their conclusion in the first report on a basis other than that it was conditional upon the recommendations and pre-conditions being implemented and then conclude, on the same basis, a positive opinion when the recommendations and pre-conditions had been excluded.
>
> 5.16. In my opinion, even if the opinion remained unchanged, a far more specific reference should have

> been made to the weaknesses requiring remedial action even if the recommendations and pre-conditions were not specified.
>
> ….
>
> 6.11. There is no doubt in my mind that several of the issues raised by BDO as weaknesses were significant issues and, taken together, if not resolved would be deal breakers."

[79] These extracts serve to illustrate to me that the opinion held by the Respondents about the BDO report was within the bracket of discretion invested in them as decision-makers in this matter and that there was nothing about the decision to invoke the further assistance of Deloitte which smacked of mala fide. I emphasise again that it is not the role of this court to make an accountancy assessment as to which approach i.e. the Respondents approach or the Longworth approach was the better from an accountancy point of view. It is not my task to preside over a seminar on best practice and appropriate standards in accountancy matters. Such a genuine difference in professional opinion is far removed from establishing evidence of mala fide.

[80] Before leaving the BDO report, I shall briefly refer to the distinction that was drawn by Mr Horner between the approach adopted in the QQ due diligence exercise and a similar exercise carried out with reference to VS.

[81] Ms Longworth pointed to significant similarities in the terms of reference for both the QQ and VS due diligence assignments which included an assessment of the historical trading performance of each organisation, the need to certify the ability of each organisation to fund their obligations under each project, to make an independent assessment of the ability to deliver the project and to highlight and quantify areas of developer, commercial and financial risk to be anticipated. Hence when she found recommendations in the VS report i.e. that the DSD should make it a condition that a named person was tied into the project for its duration and that DSD should regularly monitor the financial performance of the suggested preferred developer, she found it contradictory that Mr McGrath had found recommendations by BDO in relation to QQ to be outside the terms of reference for that due diligence exercise.

[82] For my own part I consider that this assessment overlooks the counterargument cogently deployed by Mr Shaw that in the case of VS the company being scrutinised was a well run and efficient public company. This contrasted markedly with the applicant, allegedly described by Mr Martin on behalf of BDO to Mr Alexander as the "worst case of corporate governance "he had seen, and the deficiencies highlighted in the BDO report.

Moreover the recommendations in VS were 2 matters which were short and "trite and obvious "according to Mr Shaw. With some justification he compared these to the 14 detailed step programme prescribed by BDO for the applicant. I find this argument persuasive and certainly sufficient to deflect me from any conclusion of bad faith on the part of the Respondents in demanding their pre determination removal in this context.

The Deloitte Exercise paragraphs (82--98)

[83] The third reason why I reject the applicants argument of bad faith is that I am satisfied that it was not the role of Deloitte to carry out a new or further due diligence on BDO. The reality of the matter is that for the reasons I have already set out the Respondents had a plausible argument for questioning the conclusion of the BDO report. They therefore decided to employ the services of Deloitte to advise them on the adequacy of the information in that report and the conclusion arrived at. I consider that Mr Shaw has sufficient grounds therefore to submit that the thinking behind the employment of Deloitte was to avoid precipitately rejecting the BDO report – which presumably it was open to them to do – and to postpone a decision until Deloitte had offered up its analysis . That course of action seems to me to have been a step within the spectrum of a reasonable exercise of discretion albeit not the only alternative that might have been contemplated by the Respondents.

[84] That approach is certainly the case made by Mr Hopkins, the Chairman of the Corporation and the Chairman of its Board since January 1997 in the course of his affidavit of 30 April 2007 at paragraph 14 where he stated:

> "In discussion at senior level with colleagues in DSD (mainly Alan Shannon, Permanent Secretary, John McGrath, Deputy Secretary and Jackie Johnston, Assistant Secretary), Kyle Alexander and I discussed the best way forward. We did not believe we could make a decision on the basis of the BDO report which, at best, was looking at information roughly three years or four years old and given the negative description of the information by BDO and the auditors' major qualifications on the accounts. We were concerned of course with the passage of time since it had been intended to complete due diligence process by early 2006 and hopefully move to a development agreement between the preferred developer and DSD and get the project started. We were also concerned about the position of other bidders whose position might be prejudiced by

> further delay, but we concluded that in fairness to the company we should give some more time for the submission of the 2005 accounts and completion of the due diligence process by involving a review of those accounts together with an independent professional consideration as to whether or not the information provided throughout the due diligence exercise was sufficient to enable us to make a decision."

[85] Mr Shannon, in his advice to the Minister Mr Hanson on 28 November 2006, has described precisely the same process as that outlined by Mr Hopkins. Having indicated that subsequent to the presentation of the BDO report, it was decided to allow Sheridan Millennium yet a further opportunity to provide up-to-date accounts, he records as follows:

> "13. Deloitte's were appointed through a competitive tender process, to report to the following:
>
> (a) Availability and quality of the information provided by the Sheridan Group
>
> - Comment on the quality of the financial information provided and the extent to which this provides a sound basis for decision-making by Laganside/DSD in respect to whether the preferred developer can meet the financial obligations under the proposed development agreement.
>
> (b) 05 Accounts
>
> - Comment on the extent to which the further information received from the Sheridan Group since the completion of the BDO Stoy Hayward report mitigate the inherent weaknesses highlighted by BDO in their report.
>
> (c) Conclusion
>
> - Conclude on the adequacy of information as set out in the BDO report, updated by the new information supplied as a sound basis on which to arrive at a decision on whether to proceed to enter into a development agreement with the proposed developer, clearly

> highlighting any risks involved to the decision-making process through not having the appropriate level of information required."

-

I pause to note that I attach no weight to Mr Horner's criticism that neither of these witnesses recorded that legal advice had apparently been received to the effect that it would be prudent to permit the 2005 audit to be introduced however late. The fact is that the audit was considered and the presence of legal opinion as to the necessity of so doing adds little to the relevance of its presence in the overall Deloitte remit and conclusion .

[86] The Hopkins and Shannon explanations lend a tenable basis to the reason why the audited accounts were only required by Deloitte up to 2005. Mr Horner highlighted that they were by now 18 months out of date. This fails to recognise the true purpose of the Deloitte exercise which was not to update the entire financial situation but to look at the matter as it obtained, or should have obtained, when BDO was considering the issue. Similarly it was expressly deleted from the terms of reference to Deloitte that it should provide an independent view if the applicant could deliver the project. Once again that was not the role of a firm confined to commenting on the BDO approach.

[87] Given that that was the rationale behind the decision to invoke the assistance of Deloitte, I find nothing inherently suspicious about the fact that the Respondents wished to narrow the original terms of reference to focus on the quality and availability of information omitting comment on corporate governance and on BDO's conclusions. Mr Alexander in his affidavit of 17 August 2007 at paragraph 11 states:

> "11. …. Comment on corporate governance had already been provided in the BDO report and the factual basis was clear. There was no need to repeat this exercise. The advice we required was whether the financial information provided gave a sound basis for reaching a decision and the terms of reference were revised to reflect this.
>
> …..
>
> 12. …. We already had BDO's due diligence report. This commission was very different in nature. It was complementary to the BDO report and focused on a review of the audited 05 accounts and of the information received. Further a wide ranging commission would have been inappropriate in terms of equity to the other participants in the Queen's

> Quay development competition, some of whom were continuing to contact me to ask why a decision had not been reached."

[88] Doubtless an equally plausible case could have been made to have asked Deloitte to carry out a complete revision of the whole due diligence process carried out by BDO or to have engaged Deloitte with terms of reference similar to the initial more wide ranging remit . This however is another area where the measure of discretion given to DSD and the Corporation to determine the best manner in which the overall process of due diligence should be completed was well within their remit and it is not for this court to make a qualitative judgment on whether some other approach would have been preferable provided that adopted by the Respondents was not wholly irrational or seared with elements of bad faith. The judge is not the primary decision-maker, entrusted with the primary judgment and discretion. It is important to recognise this built in restraint which the reasonableness principle invokes. For my own part, I find no substance in Mr Horner's assertion that the narrow remit to Deloitte somehow pre-determined the outcome. That is self-evidently incorrect given the opportunity that was afforded to the applicant to update the 05 accounts which both BDO and the Respondents had been pressing for some time. The applicant's argument once more assumes that which it needs to prove.

[89] Once the fundamental concept behind Deloitte's retention is understood, it can readily be seen that the remit given to Deloitte would not need to include interviewing banks, valuing the assets, considering the banking facilities, the up to date trading accounts , speaking to the auditors or directors. making contact with Mr Curistan or other directors, having other information about lending facilities or changes in corporate governance subsequent to the BDO report etc. All of this would have been perhaps appropriate if it was a de novo due diligence exercise replicating what BDO had done. That however was not the purpose of the exercise which was purely to comment on and complement what BDO had done given the reservations which the respondents held about that report.

[90] Whilst I am satisfied that there is no reason to doubt that the Deloitte involvement was premised on the conceptual basis that I have hitherto set out, I also recognise that in the margins the clarity and accuracy with which the Respondents have articulated the Deloitte involvement may betray a recurring unsatisfactory aspect in some instances, thereby once again investing the whole process with an aura of suspicion in the mind of the applicant and Mr Curistan.

[91] Two instances will suffice to illustrate the point. Ms Deborah Brown of the DSD in a memo of 30 October 2006 to the Permanent Secretary Alan

Shannon, presumably in preparation for Mr Shannon's final advice to the Minister, commenced the introduction of the memorandum as follows:

> "This is bring you up-to-date on the current issues on Queen's Quay and to alert you to the findings from the further due diligence report from Deloitte's."

[92] In paragraph 10 of Ms Brown's memorandum she further adds "A further due diligence report was commission from Deloitte's to update due diligence financial information submitted by Sheridan after the BDO report was completed".) The fact of the matter is that this was not a due diligence report as such. The terms of reference made this clear and, in the interests of accuracy, should not have been described as such.

[93] However the memorandum was sent to Mr Shannon who was clearly aware of what the process involved. He in turn in his memorandum to the Minister explaining the sequence of events leading up to the Deloitte report said at paragraph 12:

> "12. Subsequent to the eventual receipt of the audited accounts to March 2005, the Department at Laganside agreed that a further diligence exercise focussed on the March 2005 audited accounts should be carried out to enable the overall process which had begun in January 2005 to be brought to a conclusion."

Mr Horner seized upon these expressions to found his submission that the Minister was being misled and was in fact being told that another due diligence exercise was being carried out by Deloitte's whereas in fact it was not.

[94] Notwithstanding what are arguably more instances of the incautious descriptive terminology which has beset the Respondents role in this matter , I regard these assertions on the part of the applicant as semantic opportunism. For example paragraph 13 of Mr Shannon's affidavit made it perfectly clear on what Deloitte had been appointed to report. Anyone reading that account of what Deloitte's had been appointed to do would not have understood this to be a new revamped due diligence exercise on the same lines as that carried out by BDO. Its confines were clearly depicted and I find nothing materially misleading about the overall description given by Mr Shannon when looked at in the round .It would have invested the note to the Minister with unnecessary and perhaps unwelcome detail to have explained the change of the terms of reference . Indeed insofar as the Deloitte

exercise complemented and completed the due diligence exercise which was in the main initiated by BDO, it could arguably be loosely described as a further diligence exercise.

[95] The exercise carried out by Deloitte came under close scrutiny from Mr Curistan and Ms Longworth. In his second affidavit of 12 June 2007 Mr Curistan develops a detailed and comprehensive critique of the terms of reference of Deloitte which he claimed had been prepared to obtain a pre-determined result with a two week desk review severely restricted in scope and artificially limited in terms of reference set against what he described as a comprehensive study of 24 man weeks carried out by BDO. He accused the DSD of failing to hand over information obtained from the applicant to Deloitte and criticises the Deloitte report in its analysis of 27 entities in the group which Deloitte had described as trading entities. Mr Curistan asserted that a number of these were non-trading and thus Deloitte was in error in its conclusions. He drew attention to the fact that Laganside did not provide Deloitte with all the relevant information in terms of up-to-date information available. In particular he pointed out that Deloitte were not in possession of information financial or otherwise either up to or after 25 October 2006. Not only does this analysis betray a misconception of what I am satisfied the task of Deloitte was but the detailed analysis by Mr Curistan fails to recognise that it is not the role of this court to determine whether Deloitte was inefficient, inadequate or lacking in accountancy skills. It is only if such matters, even if they were established, are the badge of bad faith or Wednesbury unreasonableness that the court will intervene. As I have indicated in paragraph 87 of this judgment the applicant has again failed to recognise the built in restraint which judicial review imposes upon the court. The judge is not the primary decision-maker entrusted with the primary judgment and discretion in accountancy matters.

[96] Similarly Ms Longworth, in an equally detailed and comprehensive critique of the Deloitte approach made a number of detailed attacks upon the terms of reference and contents of the Deloitte report. She criticised the narrowing of the terms of reference, the limitations imposed upon Deloitte and its conclusions in the following terms:

> "The conclusions of Deloitte reflect the limited information available to them. In my opinion it was inappropriate to instruct Deloitte to rely solely on the statutory audited accounts for the 18 month period to 3 April 2005 as a basis for concluding on whether the inherent weaknesses highlighted by BDO in its report had been mitigated. The purpose of the note to the statutory financial statements is to ensure adequate disclosure of all the information relevant to the proper understanding of the financial statements in

> accordance with the relevant legislation, regulations and applicable accounting standards. Any mitigation would only be clear with discussions with management and a review of more current financial information.
>
> ……..
>
> In my opinion a review limited to the tender information is not an appropriate basis for concluding on whether the preferred developer can meet the financial obligations under the proposed development agreement, due to the limitations of the information provided and the limitations imposed on the scope of Deloitte's due diligence process. I would say further that the limited review is particularly inappropriate in respect of Sheridan, where key strategic decisions being made about the operation of the business would not be apparent from the tender information."

[97] A wholly different accountancy perspective and, in turn, a criticism of Ms Longworth's report, is provided by Mr Epstein the Director of Forensic Accounting of Haslers in his report appended to his affidavit of 15 November 2007. He states, inter alia:

> "8.48. I think Ms Longworth is missing the point, to some extent, in that the terms of reference to Deloitte were to comment on the quality of the information provided but only insofar as it was referred to in the report by BDO. As far as I can tell from my examination of the documents given to me, Deloitte were not required to look at any information that was provided to BDO and were requested to review BDO's report and to consider the 2005 accounts.
>
> 8.49. Therefore in my opinion, her comment as to Deloitte's inability to report due to not being given information is irrelevant as, in my opinion, they were only commenting on the information as described by BDO and whether the now available 2005 audited accounts affected the conclusions.
>
> 8.50. Therefore, it was incumbent, in my opinion, on Deloitte to accept that BDO received information as stated and to advise Laganside/DSD in their report of

> 25 October as to whether the information should have been sufficient to provide a sound basis for decision-making by Laganside/DSD.
>
> 8.51. My understanding is that Deloitte were not to repeat the due diligence process undertaken by BDO but simply to comment as to whether BDO's report and the information as described therein would have been sufficient for the purpose that Laganside/DSD required of it.
>
> …….
>
> 8.68. The exact terms of reference to Deloitte, as set out in Ms Longworth's report at paragraph 3.43, make it clear that what was required of Deloitte was that the comment on the extent to which the further, in this case the 2005,report, mitigated the inherent weaknesses.
>
> 8.69. My understanding of this instruction is that one of the main items of missing information was the audited accounts on what Laganside/DSD wanted to know was whether the audited accounts alone would have mitigated any or enough of the weaknesses.
>
> 8.70. Deloitte seemed to have missed this point and did not really answer the question."

[98] There is therefore a clear difference in approach by the experts Ms Longworth and Mr Epstein as to the significance and interpretation of the instructions given to Deloitte. My conclusion is that Ms Longworth has approached the matter on the basis of what the Respondents *ought* to have instructed Deloitte to undertake. Her view was that it should have been to undertake further research and advice on whether the shortcomings highlighted by BDO had been mitigated. The instruction that in fact it *was* given was to ascertain whether the information that had been provided to BDO was sufficient to form an opinion as to whether the supply of the missing 2005 audited accounts would have made any difference to its opinion. The limitations to be imposed on the scope and terms of reference and indeed the conclusions made by Deloitte in my view are matters properly within the discretion of the primary decision-makers namely the Respondents. It is not the role of this court to determine whether or not better or more appropriate instructions should have been given unless such a failure points to bad faith or Wednesbury unreasonableness. I find nothing in the evidence which so indicates .Assertions to the contrary assume that which it

is required to prove. The clear conflict between the experts in their assessment of the BDO and Deloitte reports illustrates the room for plausible professional dispute in such accountancy matters and lends no weight to the allegations of mala fide.

The Corporation Board (paragraphs 98 –103)

[99] The fourth reason why I find no evidence of mala fide in this suit is that I am not persuaded that the Board of the Corporation have been treated inappropriately by the Respondents or that the Chief Executive or Chairman of the Board have lacked in candour or been motivated by bad faith or indeed acted unreasonably.

[100] Mr Horner asserted that Mr Alexander the Chief Executive of Laganside and Mr Hopkins the Chairman of Laganside had caused information about BDO's deployment and Deloitte's retention to be withheld from the Board. They had allegedly been in breach of their duty of candour in maintaining a silence on issues such as the failure to investigate the money laundering. The case is made that the Board was not kept regularly advised of the progress of the investigations being conducted through the due diligence process notwithstanding a Board report of 5 September 2005 recording that the Board would be regularly advised of "progress both with negotiations, investigations and developments of the scheme". It was Mr Horner's case that the Board was treated with disdain by these executives and misled or kept in the dark about such matters as the BDO completion of its draft report, the decision to procure a second consultant, the changes of terms of reference for Deloitte and the status of the Deloitte report.

[101] I find no basis for these allegations which it is asserted amount to instances of bad faith. The relationship between the Boards and Executives of Corporations is a complex and at times unpredictable one which forbids accurate measurement in every instance . I am satisfied that Mr Alexander the Chief Executive involved the Chairman of the Board in the consideration of the BDO report. The fact that the Chairman did not draw all the matters complained of by the applicant to the attention of the Board by way of information provided at Board meetings does not strike me necessarily as an unusual or irregular division of responsibilities between some Boards and some Executives. Certainly as Mr Alexander's affidavit of 9 March 2007 asserts at paragraph 15 there evidently were communications between him and the Board as to the ongoing process (see paragraph 69 of this judgment). It is significant that no member of the Board has gone on affidavit to complain about the working of this relationship in this instance. I find nothing that necessarily smacks of bad faith or irregularity in the description that Mr Alexander gives of the relationship at paragraph 50 of his affidavit of 9 March 2007 as follows:

> "The decision to procure a consultant to undertake this work was taken following discussion between myself, the Chairman and the Department. Be that as it may the Board does not get involved in the selection of consultants. This is a matter for the Executive staff. It is up to staff to ensure that the Board has an adequate basis upon which to make a decision. The BDO report did not consider the final audited accounts. There were questions in my mind that needed to be addressed as to the BDO report. It is my job to ensure that if the Board is asked to make a decision it has adequate expert advice which does not contain any such questions. If I had gone to the Board and said, in terms:
>
> > 'Here is the BDO report, I don't think that it is adequate but would you please come to a decision'.
>
> I expected the Board members would question what I was being paid for. Accordingly I have no hesitation in standing over the decision to seek a further report from accountants."

[102] This is an area of discretion vested in a Chief Executive and a Chairman which the court should be slow to question unless there is some cogent evidence indicating that such an approach is completely irregular or different from any other similar situation in standard corporate governance . I find no evidence that substantiates these allegations and I am not persuaded that this Board was not appropriately dealt with. Even had I have been satisfied that the approach of the Chairman or Chief Executive was heavy handed or dismissive of the Board this would not have been a clear indicator of bad faith vis a vis the applicant on the evidence presented to me .

[103] Counsel also sought to find some significance in the fact that neither Mr Hopkins nor Mr Alexander of the Corporation mention in their affidavits how they considered the allegations would be investigated. It was alleged that this evinced an absence of candour on their part. This is again to lose the wood for the trees. It was not the role of the Corporation to investigate such allegations – how could they? – and I have no doubt that it would have readily recognised that this process fell within the remit of the DSD which I am satisfied was taking appropriate steps to have this aspect explored. A cursory glance by these executives or board members at the remit given to BDO or Deloitte would have made clear that the allegations of money laundering were not to be included within the terms of reference. Even had they been, I would have found it somewhat surprising if they had not sought

to invoke the assistance of the NIO and the police sources. Their silence does no more than indicate a recognition of their role in such maters. They made clear that the allegations played no part in their deliberations and since it became clear that they were groundless they could have adopted no other course.

Procedural Unfairness and Wednesbury Unreasonableness

[104] As an alternative to bad faith Mr Horner submitted that I should quash the impugned decisions on the grounds of procedural unfairness and Wednesbury unreasonableness because the Respondents had taken into account irrelevant material in the decision making process and ignored relevant material.

[105] Mr Shaw resisted me even considering this aspect of the applicant's case on the basis it was premised on a private law basis and was not a public law matter thus precluding Judicial Review.

[106] In granting leave in this matter, in a decision of the same title as this case 2007 NIQB 27 (a copy of which judgment I have already handed down to the parties), I outlined fully the principles that I consider apply to the private /public law issue in Judicial Review. It is therefore unnecessary for me to repeat them at this stage other than to record the following that I set out at paragraphs 2 and 5 of that judgment –

> " (2) In deciding whether a body is or is not amenable to judicial review, the prime focus is not so much on the status and nature of the body, as the particular function being exercised by it. The boundary between public law and private law is not capable of precise definition and thus the emphasis on function provides an important criterion. In R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy (1993) 2 AER 207 Neill LJ said at 220D:
>
> > "In order to succeed in obtaining an order for judicial review it is necessary for (a claimant) to show not only that the body concerned is one whose decisions are susceptible to judicial review but also that the relevant decision was one which infringed or affected some public law right of the claimant.""

The emphasis on the function of the body has found favour in a number of Northern Ireland cases. In Re Phillips Application (1995) NI 322 at page 332 Carswell LJ said:

> "The court went on to consider an alternative approach to the jurisdiction question, which in many ways I find more attractive than an attempt to classify the nature of the employment. It looked at the nature of the dispute to see if a sufficient public law element was involved, accepting the Crown's argument that it is necessary to find this to ground jurisdiction in judicial review, and that the mere fact that the person may not have a private law remedy does not mean that he has one in public law."

And at page 334:

> "For my own part I would regard it as a preferable approach to consider the nature of the issue itself and whether it has characteristics which import an element of public law, rather than to focus on the classification of the civil servant's employment or office."

Kerr J in Re McBride's application (1999) NI 299(McBride's case) said at page 310:

> "It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interests to qualify as a public law issue. It seems to be equally clear that a matter may be one of public law whilst having a specific impact on an individual in his personal capacity."

……..

(5) An analysis of these principles therefore leads to the conclusion that it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision and unless the obligation involves breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable. However this should not mask the purity of the principle that a public body in exercising a statutory function cannot escape being subject to judicial review if it abuses the power vested in it. Public bodies are not free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal address. In R (on the

application of Cookson and Clegg Limited) v. Ministry of Defence (2005) EWCA Civ. 811(Cookson's case) Buxton LJ said:

> "This analysis makes a distinction between statutory fault in not following statutory rules . . . on the one hand; and actions of what might be called a normal commercial nature in awarding the contract itself. I would, however, immediately agree that analysis does not and should not exclude public law entirely from the contract awarding process, even if there were no statutory breaches involved: for instance if there were bribery, corruption or the implementation of a policy unlawful in itself, either because it was ultra vires or for other reasons."

[107] The issue has recently been revisited by the House of Lords in YL -v- Birmingham City Council and Others (Secretary of State for Constitutional Affairs Intervening) [2007] 3 WLR 112. In that case the House of Lords held that a private company providing services under a contract with a local authority was not exercising public functions. Lord Bingham at paragraph 5 stated:

> "A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case. Tempting as it is to try and formulate a general test applicable to all cases which may arise, I think there are serious dangers in doing so. The draughtsman was wise to express himself as he did, and leave it to the Courts to decide on the facts of particular cases where the dividing line should be drawn".

[108] I am satisfied there is a sufficient element of public law in this case to justify Mr Horner continuing to make these alternative submissions. This is a key strategic site in a development in which the citizens of Belfast have a major interest given the huge investment of public money and land . The decisions taken are a matter of public importance The Corporation is a creature of statute and the DSD a government department holding this land on trust for those citizens. The allegations made by Mr Horner even in this section of his case are serious and if true would render the actions of the Respondents unlawful. Cookson's case reaffirms the principle that all alternative remedies must be exhausted before resorting to or instead of judicial review in cases where the alternative remedy is adequate to resolve the dispute. I do not consider that to be the case here. I therefore reject Mr Shaw's preliminary point of objection.

[109] Turning to the substantive submissions of Mr Horner I have concluded however that they are without substance for the following reasons. First I find no basis for the suggestion that the principle of fairness and the need to listen fairly required Deloitte(or for that matter BDO) to meet with the applicant, to allow him to comment on the process upon which they were engaged or to allow the applicant to see the report before it was furnished to the Respondents. Once again this misconceives the whole nature of the due diligence process in this instance and the role of Deloitte which was confined exclusively to the review of the work carried out by BDO on certain narrow issues not involving a reassessment of evidence past or new to be tendered by the applicant. A review of the BDO workings and conclusions together with the missing accounts up to March 2005 by its very nature did not predicate the necessity of inviting the applicant's views or interviewing Mr Curistan. Mr Horner highlighted the De Loitte reference to not having the opportunity to interview Mr Curistan as evidence to contradict the Respondents ' assertion that it was open to De Loitte to do so if it wished. Given the nature of the task prescribed for Deloitte I have concluded this apparent discrepancy has emerged from an unnecessarily detailed dissection of an accountancy report which did not expect to be so analysed and where the author may not have been weighing every word in anticipation of same. The reality of the matter is that the nature of the task did not require such steps.

[110] Secondly in light of the task which Deloitte was set and for reasons that I have set out in earlier in this judgment e.g. at paragraph 88, I do not consider it necessary or reasonable for De Loitte to have sought out, or to have been instructed to seek out, up to date financial information on the applicant or any of the other information or consultation that the applicant asserts it was necessary for them to do .

[111] Mr Horner sought to rely on the principle of legitimate expectation to ground his claim that the applicant should have been afforded the opportunities advanced in paragraphs 101 and 102 above .It is important to recognise as Lord Donaldson said in R v ITC ,ex p TSW 1998 EMLR 291 that this doctrine is "not a magic password ". There must be a basis to invoke it. In R v Devon County Council ex p Baker (1995) 1 AER 73 Simon Brown LJ outlined 4 categories—expectation resulting from the nature of the interests, procedural safeguards resulting from past assurances or practice, expectation conferred by substantive rights and expectation where the a clamant has a basic right to be treated fairly. I find that given the nature of the exercise being carried out in this instance with all the attendant trappings of commercial and accountancy practice inherent in the process, despite the public element, to which I have referred in great detail in this judgment, the applicant cannot avail of a breach of any of these categories. It could have had no legitimate expectation springing from past practice, the nature of the exercise, any rights contractual or otherwise or ordinary fairness that it would

have been treated other than occurred in this instance until the process of assessment was completed. The due diligence in this instance could not have triggered the factual expectations alleged on any of these grounds for the simple reason that the instances relied on by counsel would not have been relevant to the task in hand. In short I find no unfairness ,procedural or otherwise, in this case , I am satisfied there was no instance where irrelevant matters were taken into account or relevant matters ignored and I reject any suggestion that the principle of legitimate expectation was breached given the nature of the process.

[112] I therefore dismiss the applicant's case. I shall invite counsel to address me on the issue of costs.