

PROJECT OSPREY

OPINION

INTRODUCTION

1. I am instructed to advise Sandwell MBC (“the Council”). The Council at all material times has operated executive arrangements.
2. The advice sought is in connection with a final Report (“the Gowling Report”) for and to the Council. I am asked to review the Gowling Report and the evidence base on which its conclusions are drawn, and to advise the Council on the action that it should take.
3. The Gowling Report is by Mark Greenburgh (“MG”) Partner of Gowling WLG (UK) LLP, formerly known as Wragge Lawrence Graham & Co (“WLG”), and Head of Public Sector. It follows their external Investigation into various allegations that the Council had received, from about October 2014.

4. It is addressed to the Council's Chief Executive ("the CEO"), the Assistant CEO, the Monitoring Officer ("the MO") and the Chief Financial Officer ("the CFO"). It is marked confidential to the named recipients.

BRIEF BACKGROUND

5. Initial investigations were carried out by the Council's internal audit. These were taken over by MG and his firm from March 2015. This was for reasons both of capacity and independence. These were to my mind good and sufficient reasons. They were commissioned by the late Leader of the Council and the CEO, to enquire into a number of very serious allegations about conduct within the Council that were made on social media and in complaints to West Midlands Police.

6. There has also been in parallel a police investigation. The investigations cover the period 2011-2013. They straddle different legislative regimes.

7. During the interviews by internal audit there was a "whistleblowing" allegation when a member of staff alleged being put under inappropriate Member pressure to act in an unprofessional manner and contrary to the Council's processes and procedures. This was specifically in relation to the

sale by the Council of three redundant toilet blocks in the Council's area ("the toilet blocks"). The Council has at all material times had a "whistleblowing" Policy and "whistleblowing" arrangements.

8. A first draft of the Gowling Report was produced in October 2015. Maxwell letters were sent. Replies were received.

9. The present position with regard to the police as I understand it is that they have concluded their investigations and have not taken and are not contemplating any action. The Gowling Report was finalised on 27 April 2016.

THE CORE OF THE MATTER

10. At the heart of the matter are two Members of the Council, Councillor Maboob Hussain ("H") and Councillor Ian Jones ("J"). Both have been Cabinet Members. H was a non-statutory Deputy Leader.

11. Since the commencement of the investigations they have stepped down from their respective Council roles. Both H and J had some involvement with the toilet blocks. The parking tickets concern H.

12. In December 2015 H and J and their respective Solicitors raised issues as to the appropriateness or otherwise of MG and his firm for the task. H has by a letter to the CEO from his Solicitors dated 11 February 2016, and subsequently, further pursued issues as to the fairness of the process; and others also have alleged unfairness in the conduct of the investigation.

MY TASK

13. I have been asked to, and have, read the entirety of the voluminous documentation (seven lever arch files), and seen transcripts of interviews, both by the Council's Internal Audit and by WLG/Gowling. I am asked to review the content of the Gowling Report and to answer ten specific questions. I will address these in the order in which they are raised in my Instructions and in a subsequent e-mail. However, I start at, or near, the beginning, and endeavor to avoid this Opinion being unduly lengthy.

THE TOILET BLOCKS

14. The following facts appear in barest outline from the contemporaneous documentation:-

- (1) On 18 July 2011 a letter was received at J's office from ^{A3} [REDACTED] [REDACTED] ("CPL"), expressing interest in disused public toilets, on one copy of which there is annotation referring to J and H;
- (2) On 15 August 2011 ^{A9} [REDACTED], Trainee Surveyor, Property Services, (i) wrote to CPL, and (ii) wrote a Briefing Note to David Willetts ("DW"), then (now retired) Head of Property Services, headed "Public Conveniences in Sandwell", noting, amongst other things, that a Public Auction was due to be held (on 22 September 2011) and suggesting that the Toilet Blocks be added to that Auction;
- (3) On 22 September 2011 no toilets were included in the Public Auction;
- (4) In October/November 2011 there was e-mail traffic and it would seem a meeting between Council officers and CPL;
- (5) On 15 December 2011 and 12 January 2012 there are e-mails upon which appear notes indicating that Members were consulted about the interest shown in the Toilet Blocks by CPL, and referring to H and J by name;

- (6) On 30 January 2012 ^{A9} [REDACTED] wrote to CPL a letter a handwritten note upon which by ^{A9} [REDACTED] states that DW discussed the contents of the letter with H who had agreed that the letter was OK to be sent;
- (7) On 2 March 2012 (i) a second letter was sent by ^{A9} [REDACTED] to CPL with revised terms and conditions, including prices, referring to discussions with J and H, and (ii) DW stated in relation to prices that there was a “high degree of subjectivity” and that the prices represented his “gut feel” as to value;
- (8) On 8/9 March 2012 CPL offered the Council £46,000 for four toilet blocks;
- (9) Initially CPL communicated through ^{A3} ‘[REDACTED]’, but subsequently through ^{A3} ‘[REDACTED]’;
- (10) This offer was rejected the same day: the Council pressed for £55,000;
- (11) The following day CPL went up to £50,000 and the Council accepted this: a manuscript note indicated that it was DW who confirmed that the £50,000 (£15,000 + £15,000 + £10,000 + £10,000) was acceptable;

- (12) Members' involvement was stated to be with respect to their wish to see the buildings brought back into use;
- (13) When the Council's lawyers were instructed (on 13 March 2012) the purchaser was named as "^{A3} [REDACTED]", who continued to be so regarded on 23 April, and is named as such in the initial draft contract;
- (14) When one of the four toilet blocks was omitted the price for the other three was agreed at £35,000;
- (15) A District Valuer valuation was requested by Members on 24 April 2012;
- (16) His Report ("the DV Report") was forthcoming on 23 May 2012: there is nothing on the face of the DV Report to suggest that it should have been rejected;
- (17) This gave a value of £130,000;
- (18) DW did not substitute any (written) Valuation of his own (or of anyone else);
- (19) On 25 May 2012 it was decided nonetheless to proceed at £35,000;

- (20) This was described as an "instruction from DW via H and J";
- (21) On 7 June 2012 the Purchaser's Solicitors said that their client's name was "^{A3} [REDACTED]";
- (22) On 12 June 2012 that name appeared on the draft contract, but without an address for him;
- (23) On 22 June 2012 the contract was entered into with ^{A3} [REDACTED];
- (24) The contract was completed for £35,000 in total and on 13 August 2012 ^{A3} [REDACTED] was registered as the purchaser; and
- (25) On 2 April 2014 one of the three toilet blocks was sold by him for £40,000.

15. H, J and DW were witnesses with respect to the Toilet Blocks. The Gowling Report (paragraph 4.133) accepts, in very large part, the evidence tendered by DW as to his contact with Members and their involvement. I have the disadvantage of not having been present at the interviews. From what I do know, however, I would not for my part be inclined, where DW is not corroborated, to place much reliance on DW's credibility, where the Members are concerned.

PARKING TICKETS

16. The background to the parking tickets appears to be that:-
- (1) The Council has a contractor, APCOA;
 - (2) There are clear opportunities to appeal; and
 - (3) Challenges are supposed to be sent to APCOA, not to the Council.
17. Two parking tickets are particularly involved. One was for H's wife. The other was for one of his sons.
18. There was no appeal or challenge in either case. One, that of H's wife, was cancelled. The other, that of H's son, was reduced.
19. The cancellation was actioned pursuant to an entry on the record (6 May 2014) which stated "informed by ^{A27} [redacted] to cancel case upon instructions received from ^{A29} [redacted] as directed by Councillor Hussain".
20. ^{A27} [redacted] is ^{A29} [redacted] the Principal Officer on the Parking Team. ^{A29} [redacted] was Head of Highways and her superior.

21. H's evidence included (16 July 2015) that:-

- (1) He spoke with ^{A29} [redacted] about his wife's ticket; and
- (2) He asked ^{A29} [redacted] to "look at it".

22. With respect to H's son's parking ticket, there are documents on 26 September and 16 October 2012. They evidence that the reduction was the implementation of an instruction from ^{A29} [redacted] to ^{A27} [redacted] and that there was Member involvement.

23. H's evidence included (16 July 2015) that:-

- (1) The system note was evidence only of ^{A29} [redacted] opinion; and
- (2) Whether he (H) had ever leant on ^{A29} [redacted] to cancel parking tickets was a matter for ^{A29} [redacted]

WLG'S TERMS OF REFERENCE

24. Terms of Reference for "Project Osprey" were settled on 1 April 2015, to establish the initial scope. Two amendments were made in the life of the investigation to add new issues that emerged.

25. It is appropriate to set out the major part of the Revised Terms of Reference, as follows (emphasis added):-

“1 COUNCILLOR MABOOB HUSSAIN

- 1.1 To review the file evidence in relation to Councillor Maboob Hussain, relating to the sale of three plots of land which were formerly public conveniences located within the borough to ^{A3} [REDACTED] of Central Property Line;
- 1.2 the sale of the plot of land at Lodge Street/Stone Street ...;
- 1.3 the sale of Coroner’s Court and 215 High Street;
- 1.4 Housing allocations made by the Council to relatives of Councillor Hussain;
- 1.5 The employment of members of Councillor Hussain’s extended family; and
- 1.6 In relation to 1.1 above, the involvement of Councillor Ian Jones.
- 1.7 The allegation that Councillor Hussain has attempted to have parking tickets expunged which related to his family members.

...

3 DECLARATIONS OF INTEREST

- 3.1 To review the relevant declarations of interest in respect of Councillors Hussain and Jones, ... Mr Azeem Hafeez and any other officer implicated above.

4 PROCESS

4.1 In respect of each matter, WLG is instructed to:

- (a) review the factual matrix and offer an opinion as to whether there has been any breach of the civil law, Council rules or procedures; and
- (b) state if so, what; and
- (c) to identify who is responsible for any such breach; and
- (d) offer recommendations as to what remedial action, if any, is required.

4.2 To interview any employees and/or elected members and review any papers in the Council's possession or control, as required, to reach such conclusions.

4.3 To present a confidential report to the Chief Executive, Monitoring Officer and Chief Financial Officer of the Council as soon as they are able.

...

5 ADVICE

5.1 To manage and/or advise the Council with regard to its relationship and co-operation with West Midlands Police.

...

5.2 To advise on and deal with any associated employment and/or Standards advice required by the Monitoring Officer.

- 5.3 To review the Codes of Conduct for both elected members and employees and make appropriate recommendations to reflect the findings of paragraphs 1 to 3 above.”

STANDARDS: THE FRAMEWORK

26. The Council can deal with matters pertaining to standards and Member and Officer conduct under its general powers. See R (Lashley) v Broadland DC (2001) EWCA Civ 179, (2001) LGR 264.

27. There are, however, in addition specific statutory provisions. Currently, Chapter 7 (Sections 26-37 inclusive and Schedule 4) in Part 1 of the Localism Act 2011 (“the 2011 Act”) relates to “Standards”. It amends previous provisions, in particular in Part III of the Local Government Act 2000 (“LGA 2000”).

28. Section 27 of the 2011 Act, in force from 22 November 2012, imposes (i) a duty upon the Council to “promote and maintain high standards of conduct” by its Members, and (ii) a requirement for the Council, in discharging that duty, to adopt, by Full Council, a Code of Conduct.

29. The Council adopted a Code of Conduct in July 2012 in place of the Code it had previously had, under Sections 50-52 of LGA 2000. It adopted a further Code in May 2015, after the events that are relevant for present purposes. I refer to the Code from time to time as “the Member Code”.

30. Section 28 of the 2011 Act, in force from 7 July 2012, (i) sets out the principles (the Nolan Principles) that a Code must secure, (ii) requires the Code to include provision in respect of registration and disclosure of pecuniary and other interests, (iii) allows for the revision and adoption of replacement Codes, (iv) requires arrangements to be put in place for investigation of and decisions upon written allegations that a Member has failed to comply with the Code, (v) requires the involvement of at least one “independent person”, and (vi) contains provisions with respect to sanctions and with respect to publicising the Code.

31. Section 29 of the 2011 Act, effective from 7 July 2012, relates to a Register of Interests. (Registration under the 2011 Act was not required upon the 2011 Act coming into force.) Section 30, effective from 31 January 2012, relates to disclosure of pecuniary interests on taking office, i.e. on election and reelection. It is supplemented by the Relevant Authorities (Disclosable Pecuniary Interests Regulations 2012, SI 2012/1464 (“the 2012 Regulations”).

32. The authority's MO must maintain the Register. The MO at material times has been Neeraj Sharma ("NS").

33. Section 31, which applies at all times, relates to pecuniary interests in matters (i) considered at Meetings or (ii) by a single Member discharging a function of the authority alone. If an interest is not entered in the Register the Member must generally disclose the interest to the Meeting and to the MO; and there are restrictions on participation. Section 32 relates to sensitive interests; Section 33 to dispensations; and Section 34 to offences. Section 37, together with an Order thereunder, SI 2012/57, is a transitional provision. In conjunction with its Member Code, the Council has adopted "Rules for Registration of Interests and Conflicts of Interest".

34. In terms of whether there is a breach of the disclosure and non-participation requirements of Section 31, matters which need to be considered include (i) whether at the material time LA 2011 was in force, (ii) whether the Member was discharging a function of the authority or rather the function (if it did not come before Cabinet or a Cabinet Committee) was being discharged by a chief officer under that officer's delegated powers, and (iii) whether an encounter between Member(s) and Officer(s) was a meeting for disclosure purposes. However, there not being a breach of Section 31 of LA 2011 would

not rule out there being a breach of the general principles of conduct, for example, in circumstances where there was a sale in which the Member was involved to someone with whom he had a relationship and the relationship was not revealed.

35. Here it is the general principles that are principally engaged. They include, in both the pre and post July 2012 versions (albeit not in all respects so directly in the pre July 2012 version):-

- (1) To treat others with respect;
- (2) Not to bully any person;
- (3) Not to do anything which compromises or is likely to compromise the impartiality of those who work for, or on behalf of the Council;
- (4) Not to disclose confidential information;
- (5) Not to conduct oneself in a manner which could reasonably be regarded as bringing one's office or the Council into disrepute;

- (6) Not to use or attempt to use one's position as a Member to improperly confer on or secure for oneself or any other person an advantage or disadvantage; and
- (7) To abide by the Ten Nolan Principles -
 - (i) Selflessness: Members should serve only the public interest and should never improperly confer an advantage or disadvantage on any person;
 - (ii) Honesty and integrity: Members (a) should not place themselves in situations where their honesty and integrity may be questioned, (b) should not behave improperly, and (c) should on all occasions avoid the appearance of such behaviour;
 - (iii) Objectivity: Members should make decisions on merit, including when awarding contracts;
 - (iv) Accountability;
 - (v) Openness;
 - (vi) Personal Judgment;

- (vii) Respect for others;
- (viii) Duty to uphold the Law: Members should uphold the law, and, on all occasions, act in accordance with the trust that the public is entitled to place in them;
- (ix) Stewardship; and
- (x) Leadership: Members (a) should promote and support the Principles by leadership and by example, and (b) should act in a way that secures or preserves public confidence.

36. When there has been a breach of standards which was continuing when the 2011 Act came into force, then it can, and should be, dealt with under the 2011 Act. The Member Code which will be applicable will be the version current at the time of the alleged breach.

37. Registration and disclosure of interests were requirements before the 2011 Act, under previous legislation, namely LGA 2000, especially Section 81. Moreover, Sections 115 and 117 of the Local Government Act 1972 (“LGA 1972”) relate respectively to accountability of Officers, and disclosure by Officers of direct or indirect pecuniary interests in contracts to which the Officer himself is not a party.

38. In addition, and importantly for present purposes, Section 123 of LGA 1972 relates to disposal of local authority land. Generally the best consideration reasonably obtainable must be obtained. Public assets are not to be sold at an undervalue.

39. The duty is to achieve a particular outcome, rather than a duty to conduct a particular process. As Hickinbottom J observed in R (Midlands Co-Op) v Birmingham City Council (2012) EWHC 620 (Admin), (2012) LGR 393, at paragraph 123: “The duty ... is directed at outcome, not process, but that does not mean that process is irrelevant. Whilst the circumstances of particular cases are infinitely variable, in deciding whether an authority has or has not breached its ... obligation, the process it adopted may have an important, and possibly determinative, evidential role ...”.

40. The Gowling Report understates the position when it refers to the (general) best value duty (under the Local Government Act 1999). The most relevant duty for present purposes is the, stricter, best consideration (land disposal price) duty.

41. Section 135 of LGA 1972 relates to contracts and Standing Orders. Section 151 (financial administration) requires every local authority to make

arrangements for the proper administration of their financial affairs and to secure that one of their officers (the CFO) has responsibility for the administration of those affairs. This importantly includes internal audit and audit investigation.

42. Moreover, pursuant to Section 37 of LGA 2000, the Council must have, and does have, a Constitution. Further, the Council has since 1995 had an Officer Code of Conduct. It also has Guidance on employee declarations of interest. The Council has the full panoply of governance arrangements.

THE COUNCIL'S CONSTITUTION

43. Article 2 of the Council's Constitution relates to Members of the Council. Article 2.03 sets out the key roles and functions of all Councillors, and their rights and duties. It therefore does not purport to be exhaustive as to the role of Members. In particular it does not address any additional responsibilities of Members who occupy executive positions.

44. Its provisions include (emphasis added):-

“(a) KEY ROLES. All councillors:

- (i) will collectively be the ultimate policy makers and carry out a number of strategic and corporate management functions;
 - (ii) will represent their communities ...
 - (iii) will deal with individual casework ...
 - (iv) may use the councillor call for action process ...
 - (v) will balance different interests ...and represent the ward or electoral division as a whole;
 - (vi) will be engaged in decision making as a community representative and as appropriate to any role they may be appointed to by the Council;
- ... and
- (ix) will maintain the highest standards of conduct and ethics.

(b) Rights and Duties

- (i) Councillors will have such rights of access to documents, information, land and buildings of the Council as are necessary for the proper discharge of their functions and in accordance with the law.
- (ii) Councillors will not disclose or cause to be disclosed information which is confidential or exempt without the consent of the Council or divulge information given in

confidence to anyone other than a councillor or officer entitled to know it. ...”

45. Article 2.04 of the Council’s Constitution relates to Member Conduct.

It states:-

“Councillors will at all times be guided by the Members’ Code of Conduct and the protocol on Member/Officer Relations set out in Part 5 of this Constitution.”

46. Article 7 of the Constitution relates to the Executive; Article 9 to the Council’s statutory Standards Committee; Article 12 to Officers, including the role of the MO; and Article 13 to decision making.

47. The principles of decision making include:-

- (1) That decisions are taken “on the basis of due consultation and professional advice from officers”;
- (2) That decisions taken by elected members will be based on information provided in a written report prepared by the responsible officer(s);
- (3) A presumption in favour of openness.

48. Article 14 of the Constitution relates to Finance, Contracts and Legal Matters. Every contract made by the Council must comply with the Contracts Procedure Rules set out in Part 4 of the Constitution.

49. Part 3 of the Constitution deals with responsibility for functions, including Executive Portfolios, and non-executive Member roles, such as the Chair and members of the Standards Committee. Part 4 contains, amongst other things, the Council's Procedure Rules, its Standing Orders, which contain provisions with respect to Members' Interests and Officers' Interests; the access to Information Rules, the Budget and Policy Framework; the Executive Procedure Rules, which contain a provision with respect to conflicts of interest; Financial Regulations and Procedures; and Procurement and Contract Procedure Rules.

50. The provisions of the latter include that:-

- (1) Every Member and employee of the Council shall declare any personal or prejudicial interest in any contract;
- (2) Such interest should also be recorded in the Members' and employees' Registers of Interest;

- (3) The Council must ensure that they are fully transparent with regard to any disposal of Council land, which “must be advertised as widely as possible to ensure that the maximum level of interest is attained;
- (4) All disposals above £5,000 have to be advertised on the Council’s agreed portal;
- (5) All advertisements will be placed via the Corporate Procurement Team;
- (6) The relevant Cabinet Member shall be advised of any contract over £5,000;
- (7) A land disposal must be “advertised as widely as possible to attract sufficient competition”;
- (8) Time limits for the return of quotations will vary dependent upon the complexity of the process in question;
- (9) It is the responsibility of the officer undertaking the procurement to decide an appropriate timescale for the return of quotations;
- (10) Advice can be sought from the Procurement Services Manager with regard to what is deemed acceptable;

- (11) If only one quotation has been received then an “Exemption Report” will need to be submitted to the Cabinet Member for Strategic Resources (£5,000 to £250,000);
- (12) It is the “primary responsibility” of the officer procuring the disposal of Council land to “ensure that value for money is obtained”; and
- (13) The documentation showing this must be retained on the contract file.

51. Part 5 of the Constitution includes the Member Code, the Officer Code of Conduct, and a Protocol on Member/Employee Relations. The provisions of the latter include that:-

- (1) Its purpose is to guide Members and Employees of the Council in their relations with one another in such a way as to ensure the smooth running of the Council;
- (2) It is important that neither party should seek to “take unfair advantage of their position”;

- (3) The shared objective of the Member and Officer Codes of Conduct is to “enhance and maintain the integrity (real and perceived) of local government”;
- (4) The Codes “demand very high standards of personal conduct”;
- (5) Members and Officers must at all times embrace the Protocol;
- (6) The Protocol should be read in conjunction with any Guidance issued by the Standards Committee and/or the MO; and
- (7) If the Protocol and the Codes are followed it should ensure that
 - (i) Members receive objective and impartial advice and (ii)Employees are protected from accusations of bias and any undue influence from Members.

THE COUNCIL’S ARRANGEMENTS

52. The Council duly has “Arrangements for dealing with standards allegations under the Localism Act 2011”, in particular complaints. Amongst other matters, these set out how the Council will deal with allegations of a failure to comply with the Code of Conduct. The MO has confirmed to H’s Solicitors that there is not, nor has there been, an investigation against him

pursuant to Section 28(6) of the 2011 Act, and that there are no complaints against him being considered under the Council's "Arrangement" for dealing with allegations under the standards regime. This, however, following the Gowling Report, may be about to change.

53. The Arrangements include for the Council to appoint at least one Independent Person, whose views must be sought by the Council before it takes a decision on an allegation which it has decided shall be investigated, and whose views can be sought by the Council at any other stage, or by a Member against whom an allegation has been made. The Council advertised for Independent Persons in or about May 2014. Going forward, an Independent Person will have an important role.

54. The provisions of the Arrangements include what action the Standards Committee (or a sub-committee of the Standards Committee) can take where, following due process, a Member is found to have failed to comply with the Code of Conduct. There are eight specified actions. They do not include suspension or disqualification or withdrawal of allowances.

55. There is no right of appeal, but a review may be sought. The Arrangements state that the Independent Person(s) is/are invited to attend all

meetings of the Standards Committee and his/her/their views are sought and taken into consideration before a Sub-Committee of the Standards Committee takes any decision on consideration of an investigation report on whether the member's conduct constitutes a failure to comply with the Code of Conduct and as to any action to be taken following a finding of failure to comply with the Code of Conduct.

MAXWELLISATION IN SUMMARY

56. By letter dated 5 November 2015 WLG wrote to J, with attached summary of evidence. The letter was headed "Investigation into the disposal of public toilets to CPL".

57. The conclusions were stated to be:-

- (1) J was present at key meetings;
- (2) J knew far more of what was going on with regard to the sale of the toilet blocks than his memory suggests;
- (3) J appears to have been complicit in the sale of the toilet blocks at an undervalue;

- (4) J did not know the relationship between H and the purchaser of the toilet blocks: this is important in J's case and is a distinction between J and H;
- (5) This was an issue on J's part of recklessness and lack of diligence;
- (6) It was not, however, an issue of misconduct by him.

58. J's Solicitors responded by letter dated 19 November 2015. They stated that a number of findings were apparently unsupported by evidence. They further responded in more detail on 8 December 2015.

59. By letter dated 27 November 2015 WLG wrote to H. The general conclusions included that:-

- (1) H was a credible witness;
- (2) He appeared motivated by public spirited considerations;
- (3) Where he appears to have fallen into error is in failing to identify and adhere to the line that exists between public and private interests; and

- (4) There is substantial evidence that he failed to declare personal and pecuniary interests at informal briefings and meetings with officers;

60. With respect to the sale of the toilet blocks, the conclusions included that:-

- (1) There came a time when H knew the identity of the purchaser;
- (2) The nexus between H and ^{A3} [REDACTED] was sufficiently clear and proximate that H should have withdrawn from any discussions or involvement involving the sale of the toilet blocks to ^{A3} [REDACTED];
- (3) It seems likely that the negotiation of Heads of Terms was driven by H, effectively on both sides;
- (4) H, and J, were consulted upon, and did agree, the final price (£35,000) and terms of disposal;
- (5) That ignored the DV Report as to price (£130,000);
- (6) H knew of the legal duty to obtain best price;
- (7) H knew that there was no evidence to contradict the DV Report;

- (8) On the balance of probabilities, H “steered” the sale through the Council and authorised the disposal at £35,000 in the face of professional valuation advice (the DV Report) that the property was worth many times that;
- (9) If that is so, it is serious misconduct in a public office; and
- (10) H exerted undue pressure on DW and, through him, on the Property Services Team (“the PST”).

61. It is to be noted, however, that:-

- (1) It was H, not Officers who sought the DV Report, albeit at a late stage; and
- (2) The professional advice of DW was that the price in the DV’s Report was far too high, and unrealistic.

62. The letter further contained criticisms of H with respect especially to:-

- (1) The sale of Lodge Street/Stone Street to his son and Council employee Azeem Hafeez (“AH”): “there is a risk that the sale was substantially tainted”;

- (2) The sale of the former Coroner's Office to AH: AH did obtain an advantage both as to pre-empting the public and as to the indicative sale price being known to him by reason of disclosures to him by H, his father;
- (3) H's Declaration of Interest: H has not been assiduous in declaring his interests, and at private meetings has not declared any interests at all, even when his son has been the counter-party, and/or has been working for the Council;
- (4) H attempting to use his position to have parking tickets either cancelled or the fee payable reduced, for the benefit of his family or others;
- (5) The release of restrictive covenants; and
- (6) The 15 day sale scheme.

63. H's Solicitors responded by letter dated 22 January 2016. They made general comments about:-

- (1) Confusion over purpose and scope of the investigation;

- (2) Procedural concerns about the process adopted, under six headings;
- (3) The impact on H;
- (4) The time elapsed;
- (5) Allegations of criminal offences;
- (6) WLG/MG's suitability to carry out the investigation, given apparent conflicts of interest/bias;
- (7) Failure to follow the Council's Procurement and Contract Procedure Rules in appointing WLG/MG to carry out the investigation;
- (8) The inclusion in the draft Report of matters which are outside the terms of reference for the investigation; and
- (9) Flaws in natural justice.

64. From pages 11-27 inclusive of their letter H's Solicitors set out their substantive response. It includes that:-

- (1) There is no requirement to make declarations at informal meetings;
 - (2) It has never been the practice to do so;
 - (3) H has never been advised that this is a requirement;
 - (4) H did not take any part in the disposal of the toilet blocks;
 - (5) H did not know the buyer's identity;
 - (6) H was not consulted on and was not aware of the price;
 - (7) No concerns have ever been raised with H that his dealings with officers have been inappropriate;
 - (8) H refutes that he has failed to make appropriate declarations; and
 - (9) H did not seek nor was he given favourable treatment in relation to parking tickets: he simply raised issues in his personal capacity or his capacity as a Councillor.
65. It is to be noted, however, that there is no dispute that:-
- (1) The purchaser of the Toilet Blocks was [REDACTED] ^{A3}
 - (2) There were links between H and [REDACTED] ^{A3}, and

- (3) H had some involvement with the sale of the Toilet Blocks.

66. Maxwell letters were also sent, between 10 and 18 December 2015, expressed to be by reference to the civil standard of proof, the balance of probabilities, to:-

- AK
- (1) [REDACTED], son of H and Council employee, with respect especially to the sales to him of land at Lodge Street/Stone Street and the Coroner's former offices, and declarations of interest, stating that "the findings we have made are serious" and that, if the conclusions remain, there could be "serious consequences" for him;
- (2) Adrian Scarrott ("AS"), Director of Neighbourhoods, in relation to housing allocations;
- (3) Pardip Sharma ("PS"), Service Manager for Legal Services, in relation to land sales;
- (4) Nick Bubalo ("NB"), Director of Regeneration and Economy, responsible for Property Services since July 2011, in relation to land sales;

- (5) DW, a Chartered Surveyor, and Head of Property Services from 2005 until his retirement in June 2015, in relation to land sales, with respect to which the conclusion was that he did not discharge his duties to the Council with the firmness or attention to compliance that they and the public might reasonably have expected, and that his failure to obtain any (sic) alternative valuation evidence in relation to the former public toilets is “especially concerning” and directly led the Council into error; and
- (6) NS, Director of Legal and Governance Services, in relation to the sale of the toilet blocks and declarations of interest.

67. DW responded by letter dated 6 January 2016, accepting at that time WLG’s broad conclusions and the consequences of his own inactions, and saying, amongst other matters, that his “professional view” was, and is, that the valuation in the DV Report of the toilet blocks was “far too high”. PS responded by letter dated 12 January 2016. NB responded by letter dated 13 January 2016, with attachment. AS responded by letter dated 18 January 2016. NS responded by letter dated 18 January 2016.

68. AH did not reply. Moreover, the investigators had asked for a meeting with him, but despite their requests, and the Council's instructions as employer, and the adjustments to the process offered to assist his ill health, he has not made himself available or provided any evidence.

THE GOWLING REPORT IN SUMMARY

H: Toilet Blocks

69. The findings of the Gowling Report are that:-

- (1) The evidence suggests that H was involved in the detail of the proposed sale of the toilet blocks to a degree which crossed the line between political oversight and day-to-day management of the Property Services function to a significant degree;
- (2) The proposed purchaser, CPL, was not, at the time of the initial letter to the Council, incorporated, and thus was run by its partners, including ^{A3} [REDACTED];

(3) H knew ^{A3} [REDACTED] socially, ^{A3} [REDACTED] was an [REDACTED]
[REDACTED]

(4) It is probable that –

(i) ^{A3} [REDACTED] contacted the Council to enquire if there were any redundant toilet blocks that he could let or buy because someone suggested that to him, and

(ii) That someone was likely to have been H, either directly or through an undisclosed agent;

(5) DW consulted H and J about ^{A3} [REDACTED]'s letter;

(6) The evidence suggests that H knew CPL was the bidder;

(7) H is likely to have seen ^{A3} [REDACTED]'s name on the letter and elsewhere;

(8) There was no requirement for H to register any pecuniary interest;

(9) However, H failed to declare any knowledge of or relationship with ^{A3} [REDACTED];

(10) This appears to be a breach of the Member Code;

- (11) H's degree of interference in the sale and level of control over DW regarding the details of the sale amounted to an overstepping of H's roles;
- (12) The agreement to sell the toilet blocks for a price lower than that identified by the DV was a serious breach of the Member Code and the Council's Financial Regulations;
- (13) H knew of the DV Report;
- (14) Yet (jointly with J and DW) he agreed to ignore it;
- (15) He did so without any contrary evidence;
- (16) The evidence now commissioned from Savills suggests that the DV Report was correct; and
- (17) As a result the Council has suffered financial loss; but
- (18) There is no evidence that –
 - (i) H obtained any advantage himself, or
 - (ii) He would have acted any differently whether or not CPL included ^{A3} [REDACTED]

H: Lodge Street/Stone Street

70. The Gowling Report found no evidence of H's involvement in the purchase of this land by his son, AH.

H: Coroner's Office and 215 High Street

71. The findings in the Gowling Report are that:-

- (1) There is evidence that suggests H was involved in the sale of these plots to his son, AH;
- (2) AH submitted a bid to the PST for the premises the day before the property was advertised by the Council;
- (3) AH's bid was for the Coroner's Office only notwithstanding that the Council was offering the two premises jointly;
- (4) It is possible that AH discovered the up-coming sales from other sources;
- (5) However, on balance it seems likely to be the result of confidential information being shared with him by his father;

- (6) On the balance of probabilities, AH found out about (i) the sale of the premises and (ii) the indicative price from his father;
- (7) This is a breach of the Member Code –
 - (i) the duty of selflessness,
 - (ii) the duty of honesty,
 - (iii) the duty not to use a position to secure an advantage, and
 - (iv) the duty not improperly to disclose confidential information.

H: Housing Allocations

72. The Gowling Report finds no evidence of any involvement by H in the allocation of council housing to his daughter.

73. However, the Gowling Report finds that there is evidence to suggest that H crossed the line between political oversight and day-to-day management of the housing allocation functions.

H: Employment Issues

74. The Gowling Report found no evidence of H interfering in the (i) appointment or (ii) discipline of members of his family employed by the Council.

H: Parking Tickets

75. The Gowling Report finds that:-

- (1) The evidence suggests that H did interfere in the due process of parking tickets issued to his wife and son;
- (2) He did so by contacting directly the officer concerned;
- (3) He asked, in effect, for them to be cancelled;
- (4) That appears to be a breach of the Member Code.

H: Release of Restrictive Covenants

76. The Gowling Report found no evidence of H being involved in the release of restrictive covenants. On the contrary, this was the responsibility of DW.

H: 15 day Sale Scheme

77. The Gowling Report finds that:-

- (1) H once again crossed the line;
- (2) He required officers to provide him with (i) the detail of every proposed sale and (ii) the price being charged;
- (3) However, there is no evidence of H's influence being used for any improper purpose;
- (4) Nonetheless there was a breach of (i) the Member Code and (ii) the Member/Officer Protocol.

H: Purchase of Land on Clifford Road

78. The Gowling Report finds that:-

- (1) H knew that AH was the owner of this strip of land;
- (2) He used his influence over DW to persuade the Council to seek to purchase it;
- (3) The relationship was not revealed to officers; and
- (4) This was a breach of the Member Code.

H: Rickshaw Restaurant

79. The Gowling Report finds (without this however featuring in the Maxwell letter) that:-

- (1) H failed to declare his association (based on his proprietary interest in Five Star Taxis and his relationship with AH) with the developer;
- (2) This was at least in breach of the Code.

J: Toilet Blocks

80. The Gowling Report's conclusion in relation to J is that he was a "passive by-stander". The findings are that:-

- (1) J attended meetings and briefings, often jointly with H;
- (2) However, the "driving force" behind the property services function of the Council was H, and not J, or DW;
- (3) The evidence suggests that J was aware of the sale to CPL;
- (4) However, J was unaware of any association between H and ^{A3} [REDACTED];
- (5) The evidence suggests that J was consulted alongside H on (i) the terms and conditions, (ii) the revisions to those terms and conditions, and (iii) crucially, the sale price;
- (6) On balance it seems that J (i) knew of the DV Report, (ii) agreed with H and DW that the sale should proceed, and (iii) did so without (a) there being any evidence that the DV's valuation was wrong or (b) obtaining an alternative valuation;
- (7) However, the evidence suggests that it was DW who suggested the sale price (at the invitation of H), and J, in ignorance of any

association between H and [REDACTED], was entitled to rely on DW's advice;

- (8) Nonetheless, J should not have allowed H to dominate the property services function to the extent that he did, and should have been more robust in his expectations of DW.

81. The Gowling Report holds to MG's initial view that J had not breached the Member Code.

Declarations of Interest

82. The Gowling Report finds that, in general, compliance with written declarations of interests by Members appears to be satisfactory. However, the Gowling Report finds that:-

- (1) The evidence suggests that H (initially) failed to declare his (disclosable) pecuniary interest as a proprietor of Five Star Taxis when the Council was entering into a contract with that company, and it is a rather generous view to conclude that was an oversight;
- (2) AH appears to have done nothing to declare his interest as either (i) an employee or (ii) H's son when bidding for the purchase of

any property owned by the Council or completing on those transactions where his bid was successful; and

- (3) This was a breach by AH of (i) Section 117 of LGA 1972 and (ii) the Officer Code of Conduct.

Officers: DW

83. The Gowling Report's findings include that:-

- (1) The evidence suggests that DW allowed himself to be bullied and coerced by H over a long period of time;
- (2) His most gross and obvious (but by no means only) dereliction of duty was in relation to the former public toilet blocks.

Officers: NB

84. The Gowling Report finds that there is no evidence that NB took any adequate measures to stop H's misbehaviour.

Officers: AS

85. The Gowling Report finds that AS failed to address concerns about one of his officers being bullied and harassed by H.

Officers: PS

86. The Gowling Report finds that she failed in reporting procedures and supervision.

Officers: NS

87. The Gowling Report finds that she did not in her role as MO secure adequate reporting of concerns or make checks that she should have made.

FIRST QUESTION

88. I am asked whether, in my opinion, taking into account all the evidence, the findings and conclusions in the Gowling Report are reasonable and supported by the evidence base.

89. In my opinion, broadly, they are. This, however, is subject especially to the following and as hereinafter appears:-

- (1) I do not agree that H ignored the DV Report without any evidence: the emphatic professional advice of DW was to my mind some contrary evidence, and the evidence from Savills (value of £130,000) is after the event;
- (2) In the case of the Former Coroner's Office and 215 High Street Smethwick, the Council's public advertisement sought combined offers in the region of £180,000 and in the region of £85,000 per property on an individual basis, so that I do not consider that AH's offer of £80,000 for the Former Coroner's Office alone is suspicious on account of its proximity to readvertisement.

90. Nonetheless, in my view:-

- (1) There is prima facie evidence that H knew that ^{A3} [REDACTED] was the purchaser of the Toilet Blocks;
- (2) There is prima facie evidence that H was involved with (i) the price for the Toilet Blocks and (ii) the DV Report;

- (3) The discrepancy in the price for the Toilet Blocks (the DV Report was almost four times more than the price paid) was to such a high degree that, even if the DV Report was, as DW advised, excessive (at £130,000) the sale (at £35,000) should not have proceeded;
- (4) H did contact directly the officer concerned and seek the cancellation of parking tickets issued to his close relatives and/or the reduction of parking penalties imposed upon them; and
- (5) It is no excuse with respect to the parking tickets that some other councillors may have done the same.

SECOND QUESTION

91. The second question is clearly related to the first. It is whether the evidence supports the findings.

92. In my opinion, subject as above, it does. However, I consider the first two questions further below in the light of observations that have been made on the summary conclusions of the Gowling Report.

THIRD QUESTION

93. I am asked to advise as to the nature of the formal complaints and whether they affect the findings and conclusion of the Gowling Report. By formal complaints, I understand to mean the complaints by H and J as to the initial and continued involvement of MG and his firm.

94. On 14 December 2015 J sent an e-mail to the MO. J stated:-

“I have grave concerns and about the severe conflict of interests by The Independent person that I have been made aware of recently and has arisen during the length of time this investigation has taken but pre date the appointment of Wragges.”

95. J elaborated as follows:-

“I wish to draw to your attention that I believe “The Independent Person” the Council has appointed through Wragges has suffered significant past financial loss either personally or through the firm which would constitute a severe pecuniary preferential interest in matters that would have led him to have formed an adverse opinion of The Council’s processes and procedures prior to him being appointed.

These substantial financial interests would debar him from being an independent person in any test of impartiality and means that

this investigation will not pass any test of reasonable independence or impartiality from the very beginning.

I'm not aware whether the appointed Independent Person had divulged these severe financial conflicts prior to being appointed and that The Council decided that they would chose to ignore them, or he did not disclose them.

It has come to my attention and prior to his being appointed, that he made severe criticism and threatened legal action by Wragges because of the loss of a millions pound legal services contract which had previously been supplied by Wragges and had been awarded to another solicitors firm Ashford's through a procurement and tendering process.

I'm told that the councillors involved in the decision to award the contract to Ashford's and away from Wragges which led to the severe criticism and threatening legal action against The Council challenging it's policies and procedures was by the deputy leaders Cllr Eling and Cllr Hussain and ratified by The Cabinet of which I would have been a member.

I cannot comprehend how the councillors involved can then be investigated by a person who has lost millions of pounds by way of his firm Wragges and this then by a person who in no way could be classed as independent."

96. J further elaborated as follows:-

“I’m also told that the same independent person has been involved in advising The Council and being present on the contract terminations of very senior council officers who have been unsuccessful in interview which I have been involved in these interviews and which led to other officers of their departments targeting councillors saying “we are going to get these bastards” and which led to the interview of Dave Willetts by these same officers, that also led to the appointment of Wragges and the same person as The Independent person.

A clear conflict of interest and would have led to privileged information from officers who would have had an axe to grind with those who had made the decision to not appoint them, again pre dating the investigation an his appointment.

As the investigation all along has been about process and procedures and not individuals The Independent Person appointed has demonstrated through his previous threats of legal action and criticism of council processes and procedures that he is not independent.”

97. J yet further elaborated as follows:-

“I am also aware that the Independent Person was indeed a former council leader of a conservative authority and is a strong supporter of the current governments policies and uses social media to promote these views which are diametrically opposite to my views and indeed could have been said that these views came through in the interview of myself which I was concerned of at the time, I am

now even more concerned that these political views together with the prejudicial conflicts listed above have led me to conclude that this Independent Investigation is tainted from the very outset and I would ask you to seek urgent legal advice in view of the information I have stated and consider these serious concerns.”

98. On 22 December 2015 Simon Goacher of Weightmans wrote on behalf of H to the Council as follows:-

“We are writing to express our concern about the appointment of Wragge Lawrence Graham and Co to carry out this Investigation. We are concerned for a number of reasons.

Firstly we understand that the Council appointed Ashfords LLP as its sole legal provider and Councillor Hussain was the Cabinet member responsible for legal services at that time. We are instructed that Wragge & Co submitted a tender to the Council in this process but was unsuccessful. We understand that Mark Greenburgh in his capacity as a partner in Wragge and Co wrote to the Council at the time and threatened legal action over the Council’s decision. We do not believe that Mr Greenburgh can be objective in leading this Investigation given the history of this matter and we are surprised given the history the Council appointed him to carry out the Investigation.

We believe that as a result of this previous interaction between Councillor Hussain and Mr Greenburgh it would be impossible for Mr Greenburgh to investigate matters relating to Councillor

Hussain independently and impartially. ... A fair minded observer would think that it would be impossible for Mr Greenburgh to be unbiased given the history.

Therefore, we believe that in order for the Council and the public to have confidence in this process the Council should appoint someone to carry it out who has no history of previous animosity towards Councillor Hussain or the Council.”

99. Weightmans added:-

“We are also concerned that the Council failed to comply with its own Procurement and Contract Procedure Rules in appointing Wragge Lawrence Graham and Co to carry out this Investigation. As you are no doubt aware the rules require the council to seek 3 written quotes for contracts for services valued between £5,001 and £60,000 and to invite tenders for contracts with a value in excess of £60,000. We understand that no such process was followed and if authority was given to waive this requirement the basis upon which that authority was provided is unclear.

It is clearly crucially important that the Council follows its rules in appointments of this nature and even more so when the purpose of the investigation is to identify whether the Council has complied with its own rules. The investigation outcomes will lack credibility if the investigator who has been appointed has a clear conflict of interest as a result of his previous involvement with Councillor Hussain and if the rules have not been followed in making the appointment.”

“In the circumstances we believe that the Council should stop the current investigation and, if it feels that such an investigation is necessary follow its rules to properly appoint a new investigator.”

100. The CEO replied to Weightmans by letter dated 30 December 2015, as follows:-

“I have considered your letter and I address the questions you have raised below, but it continues to be my view that the council can have confidence in Wragge Lawrence Graham & Co. and specifically Mr Mark Greenburgh as an Appropriate Person to conduct the ongoing investigation.”

101. The CEO continued:-

“With regard to the first substantive point in your letter, it is the case that Wragge & Co tendered for the legal services contract for Sandwell in 2011. Mark Greenburgh was at that time and continues to be a partner at Wragge’s and their Head of Public Sector Law, although my understanding is that Jane Fielding, another partner in the firm, was client partner for the purpose of the Sandwell legal tender.

It is also the case that following the award of this contract to Ashfords, Mark Greenburgh wrote to me on Wragge’s behalf, to express his surprise at not being awarded the contract and to ask for the full evaluation criteria and scoring to be revealed – as was

his right as a tenderer. To my recollection, no litigation was threatened or commenced in the course of this correspondence and my understanding is that Wragge's accepted the explanation we provided and the result.

Wragge have continued to receive instructions from the council during the course of the contract with Ashfords, as there was provision for work or issues that pre-dated the award of the contract to continue to be placed with whichever legal adviser held the commission prior to the commencement of the contract. In a number of significant instances, this continuing work was with Wragge & Co

In the fourth paragraph of your letter you refer to previous interaction between Cllr Hussain and Mr Greenburgh. I have questioned Mr Greenburgh on this and he has no recollection of ever interacting or dealing directly with Cllr Hussain at all, on any matter, prior to the current investigation. My own recollection of the tender process for the legal contract is that tenderers made one, short presentation of no more than one hour to a mixed group of council employees and elected Members – and that this was the only direct interaction between Councillors and tenderers in the course of the tender process.

The award of the contract was then approved collectively by the council's Cabinet on the professional recommendation of council officers, following a procurement process which Wragge's themselves appear to have accepted albeit that the outcome was not to their liking.

In conclusion, I do not feel that the award of the legal contract is a basis for concern about bias nor can I see any evidence of animosity on the part of Wragge's towards either Cllr Hussain or the council, particularly as the contract itself was relatively small compared with the size of Wragge's overall public sector practice and the fact that they have willingly continued to accept the councils instructions in the four years since the letting of the contract."

102. The CEO further stated:-

"With regard to the procurement of Wragge's services for this investigation, the council's standing orders and financial regulations provide for a waiver of normal competitive tendering requirements to secure particular expertise or experience.

Therefore, we approached Wragge & Co. directly to secure Mr Greenburgh as an Appropriate Person to conduct this investigation, in accordance with the waiver provision, because of his substantial experience in this field, ..."

103. On 31 December 2015 the CEO e-mailed J in similar terms, saying:-

"While I have not undertaken a year-by-year assessment, I would be surprised if the value of work placed with Wragge & Co. by the council was very much different pre and post the award of contract to Ashfords.

Therefore, I do not feel that the award of the legal contract is a basis for concern about bias nor can I see any evidence of animosity on the part of Wragge's towards either yourself or the council, particularly as the contract itself was relatively small compared with the size of Wragge's public sector practice and the fact that they have willingly continued to accept the councils instructions in the four years since the letting of the contract.

With regard to the decision to appoint Wragge's, this was made by the Leader and myself, on the basis that we are committed to ensuring a full and thorough investigation of the allegations that have been made. The recommendation to appoint Wragge & Co was also supported by the Monitoring Officer and the Deputy Chief Executive.

We recommended this appointment in the knowledge of Mr Greenburgh's personal political affiliations but in the confidence that these would not influence his professional judgement. Mr Greenburgh has substantial experience in the field of local authority investigations, ..."

104. On 6 January 2016 the CEO wrote to the late Leader of the Council, on the basis that:-

"As you know, both Cllr Hussain's legal adviser and Cllr Jones have recently written to the Monitoring Officer or myself to express their lack of confidence in the investigation currently being carried out by Wragge & Co. and specifically in Mr Mark

Greenburgh as an “appropriate person” to conduct this investigation.

The specific concerns raised by Cllr Hussain and Cllr Jones were primarily about Wragge & Co.’s tender for the Sandwell legal services contract in 2011 and Mr Greenburgh’s political affiliations to the Conservative Party.”

105. The CEO concluded:-

“I do not think that the concerns around a relatively small contract that was tendered over four years ago, and has now ended, or Mr Greenburgh’s well-known political affiliations are matters that should reduce our confidence in Wragge’s investigation for the reasons I have set out in the letter to Cllr Hussain’s legal adviser.”

106. I entirely agree. I do not consider that these matters affect the findings and/or conclusions of the Gowling Report.

FOURTH QUESTION

107. I am asked whether certain comments by MG could be viewed as racist and whether they affect the findings and/or the conclusions of the Gowling Report.

108. This aspect is dealt with in the CEO's letter to the late Leader referred to above, which continues:-

"However, of greater concern is the allegation that Cllr Hussain made verbally to you and I in our meeting with him just before Christmas, that he feels Mr Greenburgh holds some antagonism towards him (i.e. Cllr Hussain) because of his race, religion or ethnicity – and that Cllr Hussain feels this may have influenced Mr Greenburgh's approach to the investigation.

This issue of alleged antagonism towards Cllr Hussain because of his race, religion or ethnicity was not specifically referred to in the recent letter from Cllr Hussain's legal advisor.

You will recall that, at our meeting with Mr Greenburgh on 22nd October 2015, he made a passing quip about [REDACTED] inbreeding.

While Mr Greenburgh did not explicitly relate this comment to race, religion or ethnicity, it was inappropriate, offensive and entirely unnecessary in the context of our discussion.

You made Mr Greenburgh aware of your concern about this comment at the time and I reiterated our concern when I subsequently met Mr Greenburgh on 19th November 2015.

Since our meeting with Cllr Hussain, I have given very serious consideration to his allegation and the weight that we should attach to Mr Greenburgh's comment to us at our meeting in October – and whether the two should be considered in relation to each other.

I have considered whether these are such that they should affect our confidence in the conduct of this investigation by Wragge & Co. Amongst a number of options I have considered whether the investigation should be halted and re-commenced with a different legal provider and another “appropriate person” to lead a new investigation, because of concern about bias or prejudice.

As I said in our telephone conversation on 5th January, I have reached the conclusion that, on balance, there is insufficient evidence that the investigation has been compromised to warrant halting the entire process and re-starting a new investigation, as I feel that this would have a disproportionately significant negative impact in terms of the time delay, cost, distress to employees and councillors, and harm to the council’s reputation with West Midlands Police and the public.

I have reached this conclusion because I have no evidence to prove that Cllr Hussain’s race, religion or ethnicity has had an inappropriate influence on the conduct of Wragge’s investigation but, at the same time, the issues that have been raised are such that neither can I offer you as much assurance as I would like that they have not.

Therefore, I think it is appropriate that we should take further steps to ensure our confidence and the confidence of others into the conduct of this investigation.

In our telephone conversation, we agreed that Wragge & Co. should complete the Maxwellisation process on which they are so well-advanced. ...

Upon our receipt of this report, we agreed that we will instruct a QC to review the whole report and the evidence base on which it is drawn, in order to provide us with a further level of independent assurance upon its contents, findings and recommendations before we take any further action.

Regrettably this will mean a further extension of time, ... but it continues to be my view that the seriousness of the allegations that we are investigating and now the seriousness of the concerns raised by Cllr Hussain are such that the most thorough and independent investigation is required.”

109. On balance, I agree.

FIFTH QUESTION

110. I am asked whether the complaints considered under the Third Question and/or the comments considered under the Fourth Question affect the independence of the Investigators, and what impact any lack of independence, or appearance of bias, has upon the findings and conclusion of the Gowling Report.

111. I do not consider that there is a lack of independence. I do not consider that the findings or conclusions of the Gowling Report are invalidated.

112. The allegation of appearance of bias is troubling. I do not, however, ultimately consider that a well-informed and fair-minded observer might conclude from all the circumstances that there was a real possibility of bias.

SIXTH QUESTION

113. I am asked to advise whether the process followed by the Council was appropriate in the circumstances and reasonable. I am asked to consider particular matters. With respect to them, in my opinion, it was both appropriate and reasonable for the Council:-

- (1) To instruct external independent investigators;
- (2) To investigate serious allegations that had in fact been made, whether or not they had been the subject matter of any formal complaint;
- (3) To pursue the investigation before dealing with complaints by H and J about the process for awarding the work to MG's firm; and
- (4) Following the first draft Gowling Report, to withdraw allegations against J.

SEVENTH QUESTION

114. I am asked what steps the Council should now take in relation to those complaints by H and J and what process should be followed. In my view:-

- (1) The Council should, to the extent, if any, that it has not already adequately done so, investigate whether, in granting a waiver of competitive tendering requirements, it failed to comply with its own Procurement and Contract Procedure Rules and Standing Orders in appointing MG's firm to carry out the investigation; and
- (2) It should, to the extent that further investigation is required, follow its normal practice in investigating such a matter. However, it may well be that appropriate authorities were in place for the appointment of MG's firm under those Rules and the Standing Orders, and that both the CFO and the CEO are satisfied as to this, subject to documentary verification.

EIGHTH QUESTION

115. I am asked to advise, and provide a brief report, as to which issues should be taken forward to the Council's Standards Committee.

116. I attach a brief draft Report as to which issues should in my opinion be considered for being taken forward to the Council's Standards Committee. It will be noted that they relate only to H, and not also to J.

117. It will also be noted that I have not followed the Gowling Report in its reliance on the version of the Member Code of Conduct that was not approved until 3 July 2012 save in respect of matters after that date. Broadly speaking, the Toilet Blocks are before that date and the other allegations after it.

118. The position going forward must be considered not only with respect to Members, but also with respect to officers. Disciplinary action is called for in the case of AH, but not in my view in any other case of an officer still employed by the Council.

119. It is for consideration whether a claim should be pursued against DW with respect to financial loss for the Council on the sale of the Toilet Blocks.

NINTH QUESTION

120. I am asked a number of questions about publication of the Gowling Report, namely:-

- (1) To what extent the Council could or should publish the Report;
- (2) If they were to do so, what should be done about personal data and judgments about individuals;
- (3) What comments, if any, should be published about J;
- (4) Whether J should be given advance notice of any publication.

121. There is a further, related, question with respect to publication, namely timing, that is whether any publication should await the conclusion of the Standards Committee process, save insofar as publication occurs during the course of that process.

122. In my opinion, any publication does not have to await the conclusion of the Standards Committee process or any staff disciplinary process.

123. J and H should be given copies of the Gowling Report. Others should be given copies of at least the parts relevant to them. Consideration should be given to redactions, but I doubt that this will be practicable. Generally, the Report should be published, and in the near future. The question is as to precise timing.

TENTH QUESTION

124. Finally, I am asked whether those who received Maxwell letters are entitled to or should be shown and given an opportunity to see and respond to parts of the Gowling Report which relate to them. To my mind, they are not entitled to a further round of Maxwellisation by Gowling and this would not be good practice in the circumstances. What is required is “a fair opportunity” for correction or contradiction of criticism: Maxwell v Department of Trade [1974] QB 523 (Court of Appeal).

125. In any event, on 23 March 2016 the individuals concerned (or their Solicitors, in the cases of H and J) were sent the summary conclusions of the Gowling Report, and invited to submit further evidence or information to be forwarded to me, which I have considered.

FURTHER REPRESENTATIONS IN SUMMARY**H**

126. H’s Solicitors responded on his behalf. They make a number of process points:-

- (1) They complain about a lack of alignment between complaint made and what has been investigated and by whom: I regard that as a bad point – all the matters investigated were a proper subject matter for investigation, indeed the Council would have been in serious dereliction of duty had it not investigated them, and an external independent investigation procedure was appropriately adopted;
- (2) They complain that the Rickshaw Restaurant and Five Star Taxis should not have been added to the Gowling Report: I regard this as a good point;
- (3) They rely upon events having occurred before the current Code of Conduct was adopted and/or under the old standards regime and upon issues being historic: I regard this as a good point only to the extent that (i) events have to be considered in the light of the version of the Code of Conduct applicable at the time of those events and (ii) it is the current standards regime which applies as regards procedure and (limited) sanctions.

127. On substance, H's Solicitors address first the issue of the public toilets. I find what they have to say unpersuasive. The general obligations under the Code are not "nebulous".

128. H has a case to answer that he knew the identity of the purchaser, that he involved himself with the price, and that according to DW, he was informed about the DV Report and nonetheless was party to instructions to proceed. The officers indeed had delegated authority. However, there is material which suggests members were involved.

129. On 30 January 2012 there is a note by ^{A9} [REDACTED] stating that DW had discussed the contents of a letter to the purchaser with H and it was agreed to be sent. On 2 March 2012 ^{A9} [REDACTED] wrote referring to discussions with J and H in the context of revised terms and conditions and the purchase price. On 24 April 2012 it is recorded that members requested an independent valuation. Following the DV Report on 23 May 2012 ^{A9} [REDACTED] properly awaited further instructions. The following day he wrote that he had received further instruction, from DW via H and J, and that the transaction could proceed.

130. H has a case to answer that officers did not exercise their delegated authority without participation by H, in circumstances where H should not have participated at all, and where in any event he participated to an impermissible degree, and in an impermissible way, and without revealing his interest. It is highly unlikely that members having requested an independent valuation they were not made aware at least in outline of the outcome of that valuation. It is

highly likely that the acute discrepancy in figures would then have been readily apparent. The DV Report should not have been disregarded. Not all the blame for that attaches to DW. H (and J) were experienced members.

131. On the parking tickets, I do not find what H's Solicitors say persuasive. A note on the system is material, albeit not conclusive. It records that a ticket issued to H's wife was cancelled upon being informed by ^{A 27} [redacted] to cancel upon instructions received from ^{A 29} [redacted] as directed by H.

NB

132. NB responded by letter dated 30 March 2016. I consider that he makes good points. I do not believe that it is fair to criticize him.

AS

133. AS responded by letter dated 13 April 2016, with attachments. I consider that he is open to some limited criticism in terms of failure to address concerns about one of the officers for whom he was responsible being bullied and harassed.

NS

134. NS responded by letters dated 14 April 2016, with appendices, and 4 May 2016. I find what she has to say as to her strategic role and appropriate supervision and as to the soundness of the whistleblowing regime persuasive. It can no doubt be said that some of the necessary process improvements, in particular in relation to sales, that were required should have been made earlier, and of course the duty to obtain best consideration on land disposals is one of the more important obligations to which the Council is subject and has legal as well as valuation components, but without the benefit of hindsight I do not consider that it is fair to criticize her.

DW

135. DW responded by letter dated 15 April 2016, together with attachments. Suffice it to say that there is cogent evidence that he badly mishandled at least the disposal of the toilet blocks and that this very well may have caused the Council significant financial loss. In particular, the DV Report (the conclusions of which have since been confirmed by Savills) should not simply have been swept aside.

136. DW now says that it was extremely difficult, if not impossible, to provide a definitive market value. If that was the case then it is well established that there should have been an auction or tender/sealed bid process: R v CNT, ex p Tomkins (1988) 87 LGR 207 (Court of Appeal), R (Salford Estates) v Salford Council (2011) EWHC 2135 (Admin), (2011) LGR 982, at paragraph 98. Auction indeed was the original offer intention, but was not proceeded with, apparently after DW discussed with members.

137. Nor was an alternative external or internal valuation sought. Further, (i) in the case of Lodge Street, no proper valuation, internal or external, was sought, and the price appears to have been substantially too low, and (ii) in the case of Clifford Road, DW it seems instructed the sale be by private treaty notwithstanding that ^{Al} [REDACTED] former Senior Development Surveyor, told DW that he, ^{Al} [REDACTED] was not happy with an absence of market testing and preferred the usual practice of sealed bids.

J

138. On 24 March 2016 Kerr J lifted J's suspension, imposed on 3 March 2015, from holding office in or representing the Labour Party. The short point (Judgment, paragraph 46) was that the suspension had gone on too long. Also

it seemed (paragraph 50) that there was at least a good and arguable case that the Party lost sight of elementary fairness by inaction.

139. On 21 April 2016 J's Solicitors provided their response to the 23 March 2016 summary. It begins with observations on the Investigation. It makes allegations including that:-

- (1) There has been bad faith in the provision of documents from the Council to WLG and tampering or interference with documents;
- (2) Some Council officers have manipulated their evidence;
- (3) The Council's internal audit lacked independence;
- (4) Key witnesses seem not to have been approached; and
- (5) He and H seem to have been targeted.

140. The Gowling Report states that no evidence was found to support an allegation of conspiracy against J and H on the part of certain unnamed Council Officers. I have seen none.

141. The response also made observations about:-

- (1) The duration of J's responsibility as the relevant Council member: until May 2012;
- (3) The DV's valuation: J was not party to any discussion as to price;
- (3) The extent of J's knowledge at the time: he was unaware of the specific details of the sales of the toilets blocks;
- (4) His current memory of events: the removal of adverse passages from the draft Gowling Report is an indicator that MG was keen to note negative remarks about J rather than to take a more objective view.

142. I consider that the Gowling Report's ultimate conclusions about J are well balanced and fair.

PS

143. PS responded by letter dated 21 April 2016. She refutes all criticism. Her approach, which is by no means confined to Sandwell, may be said to have been unduly passive. This is for three related reasons. First, the "client" of the in-house local government lawyer is always the Council as a whole. Second,

whereas the solicitor of a private client has a merely responsive role, local authority lawyers have a proactive responsibility towards the Council. Third, there is a particular significance where asset disposal is concerned and the Council's fiduciary duty is conspicuously engaged. Reporting procedures and supervision are vital, both on paper and in practice.

144. The position with respect to land transactions was, until improved, not ideal, albeit this was primarily a problem within property services. However, as with NS, without the benefit of hindsight, I do not consider that it is fair to criticize her for what are now rightly seen as having been inadequacies of process.

CONCLUSION

145. I advise that the Council should regard the non-statutory investigation stage as being at an end. I do not advise further investigation, save as may be required for the purposes of the Standards Committee and/or staff discipline. I am far from suggesting that the entirety of the Gowling Report should be rejected out of hand. On the contrary, I advise that the Council should move forward, and do so with the Gowling Report and the evidence underlying it as a

major part of the material before the Council, but in some respects being critical of the Gowling Report itself.

146. I advise that the focus in the near future should, in the public interest, be on a Standards Committee reference in the case of H, especially with respect to the sale of the toilet blocks and with respect to the parking tickets for members of his family, and disciplinary action in the case of AH. Fair processes must obviously be observed in these contexts.

147. The Gowling Report (and this Opinion if desired) should be put into the public domain. Transparency and openness require it. It is necessary for the Council to demonstrate the seriousness and thoroughness with which it has approached these matters: and for the CEO to make referrals (i) to the MO, regarding alleged breaches of the Member Code, to be considered by the Standards Committee, (ii) to the CFO, for transmission to the Council's Audit Committee, and (iii) to the Assistant CEO, for matters relating to Council employees.

148. I do not regard it as tenable or sustainable not to publish. Apart from anything else, the Gowling Report as a whole will need to go to the Council's Audit Committee, at least in part may need to go to the Council's Standards

Committee, and likely thereby into the public domain, and may well have to be disclosed in response to a FoIA request, as to which of course the Information Commissioner or Tribunal is the ultimate arbiter. Some of the individual interests will not be capable of being fully protected if there is ever going to be publication, because the stigma for them is likely to be pretty much the same when publication occurs irrespective of precisely when that may be.

149. Given the impracticability of publishing in part and/or redacting, the question is between publication in the near future and delaying publication for some time. I do not see much point in delay.

150. The main requirement is fairness. That is being provided. First, there was Maxwellisation. Second, there was the recent opportunity to make further representations. Third, 7 days advance notice of publication is being given.

151. I do not consider that the prospect of referrals prevents any publication until the various processes have eventually been completed. That apart it is difficult to see until when delay would be.

152. Obviously full account must be taken of DPA/ECHR Article 8/ confidentiality etc/employer duty of care/defamation. However, all that goes,

at least primarily, to whether (and what) to publish, rather than to timing. Publication is in order, and is likely to be required under FoIA, if the conditions in Schedule 2 to the Data Protection Act 1998 are met. I believe that they are under any one or more or all of the following: necessary for compliance with any legal obligation to which the data controller is subject/necessary for the exercise of any functions conferred on any person by or under any enactment/necessary for the exercise of functions of a public nature exercised in the public interest/necessary for the purposes of legitimate interests pursued by the data controller etc and not unwarranted by reason of prejudice to the data subject. It is neither necessary nor desirable to wait for a valid FoIA request.

153. Release into the public domain is strongly in the public interest. Such release being imminent rather than deferred is in the public interest. The interest of individuals in mere (further) delay is weak.

154. I shall be happy to advise further as may be required.

9 May 2016


James Goudie QC

PROJECT OSPREY

OPINION

SG
09/05/16

Sandwell Metropolitan Borough Council
Legal Services
Maria Price