



Neutral Citation Number: [2009] EWHC 3204 (Ch)

Case No: HC09C04260

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2009

Before :

MR JUSTICE WARREN

Between :

CPC GROUP LIMITED	<u>Claimant</u>
- and -	
QATARI DIAR REAL ESTATE INVESTMENT COMPANY	<u>Defendant</u>

Lord Grabiner QC and Mr A Polley (instructed by Messrs Wragge & Co.) for the Claimant
Mr J Smouha QC and Mr A Twigger (instructed by Messrs Herbert Smith) for the
Defendant

Hearing date: 1st December 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE WARREN

Mr Justice Warren :

Introduction

1. This is an application by the Claimant (“CPC”) for directions for an expedited trial. The application is opposed by the defendant (“QD”).
2. The dispute concerns the site of the former Chelsea Barracks (“the Site”) which, until 2007 housed the Guards regiments. On 5 April 2007, the Site was acquired by Project Blue (Guernsey) Ltd (“PBGL”) for £959 million. PBGL was the joint venture company of CPC and QD, with CPC holding a minority share.
3. An application for planning permission was made to Westminster City Council (“WCC”) on 2 April 2008 based on a design by Rogers, Stirk Harbour + Partners.
4. During the course of late 2008, negotiations between CPC and QD resulted in the sale by CPC to QD of its interests, namely shares and loan notes, in PBGL. The sale and purchase agreement (“SPA”) is dated 6 November 2008.

The SPA

5. The SPA provides for an initial and a deferred consideration. The initial consideration was duly paid. The amount of the deferred consideration, calculated in accordance with Schedule 4, depends primarily on the scope of the planning permission eventually obtained. It is capped, in any event, at £81 million.
6. I need to refer to a number of paragraphs of Schedule 4. As well as providing the mechanism for the calculation of the deferred consideration, it imposes a number of obligations on QD designed to ensure that a suitable planning permission is obtained.
7. Paragraph 5(a)(i) requires QD to use all reasonable but commercially prudent endeavours to procure a Planning Permission free of Legal Challenge. “Planning Permission” is a term defined by reference to the Planning Application. “Planning Application” is another defined term; it is the original planning application

“as may be varied or any new application which may be made for the development of the [Site] by or consented to by [QD].....”

8. The SPA contains provision for variation of the Planning Application or even the making of a wholly new application. In the absence of a modified or new planning application, QD is under an obligation to procure planning consent in accordance with the original planning application.
9. Paragraphs 5(c) to (e) are placed under the heading “Changes to the Planning Application”. Paragraph 5(c) applies (subject to paragraphs 5(d), 5(e) and 5(f)) where a material variation is proposed to the Planning Application but the Planning Consultant (DP9 LLP) has expressed the view that such variation could prejudice the chance of obtaining Planning Permission but QD nonetheless still wishes to proceed with the variation. In such a case CPC and QD are to review the variation to see if it is in their

respective interests to make the variation. If they agree, then the variation forms part of the Planning Application for the purposes of Schedule 4.

10. If agreement cannot be reached, CPC and QD are to make a joint request to the Planning Consultant “to confirm whether such a variation would reduce the chance of successfully obtaining Planning Permission without Appeal to less than better than evens (meaning less than 55%)”.
11. The Planning Consultant will either give that confirmation or he will not. If he opines that the chance is better than evens, the variation takes effect. If he opines that the chance is less than evens, the variation may not be made unless QD pays to CPC the sum of £68.5 million, after which QD may make the variation and the provisions of the Schedule cease to apply save as they relate to an item defined as the Rights of Light Threshold Payment.
12. That last provision reflects, and is consistent with, the rather wider “get out of jail” (but not free) card given to QD by paragraph 5(aa) which gives QD a right of election at any time to pay CPC £68.5 million, upon which payment the obligations in Schedule 4 fall away save for any that relate to the Rights of Light Threshold Payment.
13. Paragraph 5(d) provides, (subject to paragraph 5(e)) that no variation which is likely to result in a material reduction of Developable Area may be made unless the Planning Consultant confirms to CPC and QD jointly that to maintain the Planning Application without such variation would reduce the chance of successfully obtaining Planning Permission without Appeal to less than better than evens or unless paragraph 5(c)(ii) is exercised *ie* payment of £68.5 million.
14. Paragraph 5(e) is not material for present purposes.
15. Paragraphs 5(a) to (e) deal with variations. Paragraph (f) deals with withdrawal and provides that the Planning Application shall not be withdrawn unless certain conditions are fulfilled. So far as relevant for present purposes the conditions are
 - “(i)the Mayor has indicated that he intends to exercise his power to direct [WCC] to refuse the Planning Application.....([one of the events amounting to] a “**Deemed Refusal**”); and
 - (ii) the Planning Consultant recommends to [QD] and [CPC] jointly that a revised Planning Application stands a better chance of a delivering a Planning Permission than the pursuit of an Appeal of the previous planning application”.
16. Where those conditions are both satisfied, QD has a choice under paragraph 5(f)(iii):
 - a. to withdraw the Planning Application provided that it submits a replacement application with a view to securing the objectives of paragraph 5 of Schedule 4

“with all due diligence and expedition to meet the reasons for the Deemed Refusal provided that such changes do not go further than is necessary to meet those reasons for the Deemed Refusal otherwise the

resubmission will be treated as a variation and the provisions of paragraph 5(c), 5(d) and 5(e) shall apply to the proposed changes”

- b. to continue with the Planning Application where the Planning Consultant has advised that there is a chance equal to or better than evens of success of an Appeal.
17. Paragraph 5(g) deals with new applications. If QD wishes to submit a planning application for the Site other than the Planning Application while the Planning Application and any Appeal remain undetermined, such application is to be referred to the Planning Consultant as if it were a material variation under paragraph 5(c) and is not to be submitted other than in accordance with that paragraph.
 18. Paragraph 9 of the SPA makes provision for what is to happen where under the SPA, CPC and QD are jointly to appoint any person or firm or to give joint instructions. If either party fails to engage in the process, the issue can be referred to expert determination under paragraph 10, the expert to determine the terms of appointment or instruction.

Observations on paragraph 5 Schedule 4 SPA

19. I make the following observations on the provisions of paragraph 5 Schedule 4 of the SPA at this stage:
 20. They are clearly designed to protect CPC by ensuring that the Planning Application with or without amendments, is pursued in order to deliver a planning consent leading to a development with the best developable area and the best financial return to CPC. QD can remove CPC by paying it £68.5 million at any time. And in no case is CPC to receive more than £81 million.
 21. Paragraph 5(c) covers cases where a material variation worsens the chances of success of the Planning Application, and describes the circumstances in which the variation may proceed. The paragraph does not cover a case where a variation improves the chances of success.
 22. However, paragraph (d) prevents a variation which reduces the Developable Area (and thus the amount payable to CPC) even if it improves the prospects of success unless proceeding with the unvaried Planning Application would “reduce” the chance of success to less than evens (in context meaning “result in” the chance of success being less than evens).
 23. Neither paragraph 5(f)(i) nor paragraph 5(f)(ii) is entirely clear in its effect. Paragraph 5(i) contemplates a case where the Mayor “has indicated that he intends to exercise his power”. His power only arises in fact when WCC has decided that it wishes to grant the permission, following which the Mayor has a period of time in which to direct WCC to refuse the permission. On one reading of paragraph 5(f)(i) it might be said that he cannot properly indicate an intention to exercise his power prior to WCC’s decision that it wishes to give permission. But there is another view: the Mayor can perfectly properly address his mind to the Planning Application at any time, and perfectly properly say to the parties that his current view is that he does not like the plans and that his current intention, if no

alterations were made, would be to exercise his power if and when WCC made its decision in favour of granting permission, albeit that he would have to give the matter fresh and formal consideration at that stage. Accordingly, on another reading of paragraph 5(f)(i), it might be said that such a warning to the parties is an indication of intention for the purposes of that paragraph.

24. Another matter which is not clear from paragraph 5(f)(i) is to whom the indication must be made in order to fall within paragraph 5(f)(i). Is it enough that he tells an official in a private meeting? Is it enough that he tells the Deputy Mayor who then tells outsiders? Or must there be an indication to the parties and, if so, what is sufficient, objectively, to amount to such an indication? These are matters for debate. As to the Mayor's formal role, see paragraph 35 below.
25. Paragraph 5(f)(ii) uses the word "recommends" rather than "advises", which might be seen as suggesting that the Planning Consultant is not only to express an expert opinion about the relative chances of a success of a revised Planning Application and an Appeal, but also that he actually goes further and suggests (*ie* recommends) that a revised Planning Application should be pursued.
26. Further, the use of the phrases "a revised Planning Application" with upper case P and A seems to be a reference back to the definition of "Planning Application" and not a reference to any old planning application (in which context, contrast the words of paragraph 5(g) which envisage a planning application other than the Planning Application). It may be, therefore, that the Planning Consultant has to do a notional comparison between the chances of success of some notional revision of the current Planning Application and of an Appeal. Otherwise the provision becomes almost otiose since in almost every case it is possible to imagine the possibility of some planning application (perhaps a commercially far less attractive application) being formulated which would stand a better chance of success than an Appeal of the Planning Application.
27. If the Planning Application is properly withdrawn, then a replacement application must be made. If it goes no further than meeting the reasons for the Deemed Refusal – in the present case to meet the Mayor's objections – then the new application can be made without the need for CPC's consent. Of course, difficult factual issues may arise about (a) the extent of the Mayor's objections and (b) whether the new application does or does not go further than making changes necessary to meet the objections. In that context, it may be possible to meet the objections by making variations, even substantial variations, to the original Planning Application, without interfering with its fundamental concept and design; if so, it must be questionable whether a new application which starts from scratch could be said to be one which makes only necessary changes.
28. If the intended new application does go further than making changes necessary to meet the objections, the resubmission is treated as a variation so that paragraphs 5(c), 5(d) and 5(e) apply. It is not entirely clear how paragraph 5(c) then needs to be modified in relation to its application to the new application. That paragraph proceeds on the premise that the proposed variation prejudices the chance of a Planning Application being successful. It is inherently unlikely that a new application following a withdrawal will stand less chance of success than the withdrawn original application since one, if not the whole, purpose behind a valid withdrawal will have been to meet objections to the original Planning Application.

29. I suppose that paragraph 5(c) could be made to operate in the following way, but this is not clear, namely: if the new application stands less chance of success, in the view of the Planning Consultant, than the (withdrawn) Planning Application would have done had it proceeded, then paragraph (i) and (ii) apply accordingly.
30. In any case, under paragraph 5(d), the new application (insofar as it goes further than meeting the Mayor's objections) must not result in a material reduction of Developable Area unless, probably, the Planning Consultant expresses the view that the withdrawn Planning Application stood a less than evens chance of success. Of course, QD has the option of paying £68.5 million (whether under paragraphs 5(aa) or 5(d) read with 5(c)).
31. Paragraph 5(g) says what is to happen if QD wishes to submit a planning application "other than the Planning Application" while the Planning Application or any Appeal remains undetermined. Such new application is to be referred to the Planning Consultant as if it were a material variation under paragraph 5(c). It is expressly provided that it may not be submitted other than in accordance with that paragraph. This is subject to paragraph 5(l) which allows QD to submit any application it likes if it is not under an obligation to pursue an Appeal under paragraph 5(i).
32. It is not clear whether paragraph 5(g) introduces the first part of paragraph 5(c) (*ie* the Planning Consultant must express the view that the new application seen as a variation prejudices the original Planning Application, that is to say has a smaller prospect of success) or whether it only introduces the "request to confirm" part. This could be of significance, because paragraph 5(g) does not expressly refer to paragraphs 5(d) and (e) as well as paragraph 5(c) (in contrast with the reference in paragraph 5(f)(iii)).
33. Suppose, for instance, that the new application stands a better chance of success than the original Planning Application but provides for a smaller Developable Area. If the first part of paragraph 5(c) is introduced into the process applicable under paragraph 5(g), then the new application cannot be made since it would not be submitted under paragraph 5(c). But if it is only the "request to confirm part" of paragraph 5(c) which is introduced, then the new application can be made notwithstanding that it results in a lesser Developable Area unless it can be said that paragraph 5(d) is impliedly introduced too.
34. I do not need to decide these issues – indeed they have not been argued. It is enough, for present purposes, for me to say that it is strongly arguable that there is intended to be the same treatment afforded to new applications as is afforded to material variations. It does not seem likely that the parties can have intended that QD should be entitled to make a new application during the currency of the Planning Application which improved the chances of success but reduced the Developable Area (at least unless the Planning Application stood a less than evens chance of success). Whether this is because the first part of paragraph (c) must be fulfilled (which on this scenario it would not be) or because paragraph 5(d) is impliedly incorporated does not matter.

The Mayor

35. The Mayor of London has a role in planning applications of this kind pursuant to the Town and Country Planning (Mayor of London) Order 2000 (since repealed and replaced by a 2008 statutory instrument). In particular, the legislation gives the Mayor a power in certain circumstances to direct the local planning authority (in this case WCC) to refuse

the application. This is the power which underlies paragraph 5(f)(i) of the SPA. Whether the Mayor gave such an indication, so that there was, as a consequence, a Deemed Refusal, is one of the central issues in this case.

Events following the SPA

36. In late 2008 and early 2009 there was no reason to doubt that in due course the Planning Application would be approved.
37. On 1 March 2009 the Prince of Wales (“the Prince”) wrote a private letter to His Excellency Sheikh Hamad bin Jassim bin Jabr Al Thani, who is Prime Minister of Qatar, cousin of His Highness the Emir of Qatar, and also Chairman of QD. The Prince criticised Lord Rogers’ modern design, and instead advocated a traditional design.
38. According to CPC, it was this intervention by the Prince in the planning process which set in motion a train of events which led ultimately to QD instructing that the Planning Application be withdrawn. This occurred on 11 June 2009 when the board of PBGL (on which CPC had, and I believe still has, representation) resolved to withdraw the original Planning Application, although CPC’s representatives on the board abstained from voting. The precise circumstances in which that was done, and the reasons for QD adopting the stance which it adopted, form the subject matter of the proceedings.
39. On 12 June 2009 the Planning Consultant, Mr Woodman sent an email to CPC and QD. CPC will suggest in due course that he was leant on to do so, but I am not sure that anything will turn on that. The fact is that he did send it. It includes the following:
- “we have been informed by GLA officers that the Mayor is not happy with the scheme in its current form and has said that he would be inclined to refuse it (this is why they have been pressing for changes). We have had the same view on a confidential basis from the Deputy Mayor;
...there is little or no chance of approval on 18th June, a very good chance of deferral and some chance of refusal;
the chances of the current scheme achieving consent at appeal are good; and
it seems to us that a new scheme would be likely to carry political support at the local and strategic levels and so, depending of course on its precise content, would have an even better chance of achieving consent than the chances for the current scheme at appeal.”
40. It should be noted that this email was not sent pursuant to a joint request of any sort from CPC and QD. The relevance of this is that CPC assert that paragraph 9 Schedule 4 applies with the effect that nothing which Mr Woodman says can fall within paragraph 5(f)(ii) as a recommendation unless he is asked by CPC and QD jointly for his recommendation – something which did not happen in the present case.
41. The original Planning Application was withdrawn on the same day as Mr Woodman’s email, 12 June 2009. There is a dispute on the facts whether this happened before or after that email.

The disputes

42. The effect of the withdrawal, if valid, is that a new planning application must be made under paragraph 5(f)(iii). QD assert that the withdrawal was valid and that a new

application will be made in due course. Such an application will take time to prepare, but CPC are proceeding on the working hypothesis that it will be some time in July 2010 at the earliest. QD says that, if that application is successful, CPC will be paid the sums it is due, calculated in accordance with Schedule 4 of the SPA and that there is no question of QD seeking to avoid its obligation to pay CPC. QD says that the withdrawal was valid because paragraphs 5(f)(i) and (ii) were both fulfilled.

43. As to paragraph 5(f)(i), QD contends that an indication can be made for the purposes of that paragraph before WCC have determined the Planning Application (a clearly arguable and quite possibly correct contention) and that the Mayor did so indicate. CPC say there was no indication prior to the withdrawal of the Planning Application and never has been. The only evidence at present before the Court is what is said in the first paragraph of Mr Woodman's email. Even assuming that what Mr Woodman says in the first paragraph is correct, it is clearly arguable and quite possibly correct that this is not enough to demonstrate a relevant indication. There is clearly a triable issue here.
44. As to paragraph 5(f)(ii), QD contends that Mr Woodman's email was a recommendation within the paragraph. CPC says that it is not. This is a short point of construction which is arguable either way. Its resolution may depend on further evidence concerning the matrix of fact against which the SPA is to be construed although, for my part, I doubt very much that further evidence will assist the Court in resolving the issue. CPC has another related point which is that Mr Woodman's advice cannot amount to a recommendation within the paragraph unless it was obtained pursuant to joint instructions from CPC and QD, which it was not. CPC relies on paragraph 9 of Schedule 5. I do not propose to go into the merits of that argument given that I consider the point of construction to be arguable, although I must say that I cannot see much in the point.

Procedural history

45. Immediately after the withdrawal of the original Planning Application, CPC disputed the validity of the withdrawal. Its then position was that it had a claim for the payment of a debt or for damages. It did not express any urgency about the resolution of any issues of construction or otherwise arising out of the SPA. I do not find that surprising in the light of the approach which it did take to the effect of the SPA because, under that approach, the sum of £68.5 million was due and was immediately due.
46. Thus on 15 June 2009, CPC wrote to QD indicating that it considered the withdrawal of the original Planning Application to be a breach of the SPA. By 29 June 2009, matters became more focused. On that date, a letter was sent to QD by Wragge & Co, acting for CPC. It contained the following allegations among other matters:
 - a. Since the unilateral withdrawal was not allowed within the framework of the SPA, it fell to be treated as an election under paragraph 5(aa) giving rise to an obligation to pay £68.5 million. Alternatively, it was a breach of contract giving rise to a damages claim of £81 million.
 - b. CPC was willing to defer the enforcement of its entitlement and co-operate with QD provided that QD complied with the variation procedure in paragraphs 5(c) to 5(f).

- c. The right to commence proceedings on 1 week's written notice was reserved in the event of no satisfactory response to the letter.
47. The contention referred to in paragraph a. that paragraph 5(aa) was triggered is not a claim for damages but a claim for payment in accordance with the terms of the SPA. It does not appear in the Particulars of Claim in the current proceedings. The alternative claim for damages of £81 million would be based, I think, on the loss of a chance (*ie* that the original Planning Application would have succeeded).
48. A lengthy reply was sent by QD's then solicitors, Berwin Leighton Paisner. Further correspondence followed over a period of months. It is said on behalf of QD that CPC displayed no particular urgency: at no stage did it indicate that there was any particular need for urgent early resolution. Indeed, having threatened proceedings, CPC did not in fact launch proceedings but instead made a pre-action application for disclosure, which it ultimately withdrew shortly before the hearing.
49. That application was issued in 17 September 2009 CPC. It identified 11 categories of documents of which CPC sought disclosure. It was put on the basis that the "intended claims" were for the payment of a sum of £68.5m on the basis of the election argument referred to above, or for damages for breach of contract in the sum of £81m, alternatively at least £68.5m. It is said by QD that it was not suggested in that application at any stage, including at the oral hearing relating to costs, that CPC would, or might, need to claim only declarations, nor was it suggested that the claim if issued would be urgent. That may be true; but urgency was mentioned in the witness statement of Mr Smith in support of the application when he said that "The issue of pre-action disclosure by QD has become urgent because of QD's delays".
50. Then, as it is put on behalf of QD, CPC without further explanation, and 5 months after its Letter of Claim, issued these proceedings on 12 November 2009.
51. CPC has, as one might expect, a rather different spin on the progress of matters after the Planning Application was withdrawn. I do not propose to go into that in detail, let alone into the detail of the correspondence. It is enough to say that a long letter dated 14 August 2009 from Wragge & Co (CPC's solicitors) and subsequent correspondence failed to elicit from QD information and documentation which CPC considered it required relating, in particular, to the Mayor's alleged indication that he would direct WCC to refuse the Planning Application and relating to the nature of QD's proposed new planning application.
52. Accordingly, CPC says that it launched its pre-action disclosure application to obtain the documents it required. It says that it withdrew the application not because it realised the application was in any sense misconceived, but because shortly before the hearing, QD in fact supplied some documentation and answered some outstanding questions with the result that CPC decided it had enough without needing to pursue the application.
53. Lord Gribiner QC (who appears for CPC) submits that the correspondence and associated disclosure clarified the parties' respective cases. CPC he says had sought to avoid holding up the project in a legal action, preferring to participate co-operatively in QD's plans for a revised application. He says that it was the result of that attempt at co-operation which demonstrated that the SPA had become unworkable in practice unless the

parties knew the meaning and effect of some of its key provisions, which meaning it is the purpose of these proceedings to establish.

The proceedings

54. The present proceedings do not seek damages for the alleged wrongful withdrawal of the Planning Application. Instead they seek declaratory relief about the meaning of the SPA. This, CPC says, will resolve issues between the parties not only about the validity of what QD has done (namely to withdraw the Planning Application) but also about what QD may and may not do in accordance with the provisions of the SPA. The declarations sought are, in summary, as follows:

- a. That there has been no Deemed Refusal (paragraph 50.1 of the Particulars of Claim).
- b. That the Planning Consultant has not recommended to QD and CPC jointly that a revised Planning Application stands a better chance of success than an Appeal of the original Planning Application (paragraph 50.2 of the Particulars of Claim).
- c. That QD has acted in breach of the terms of the SPA by withdrawing or causing PBGL to withdraw the Planning Application (paragraph 50.3 of the Particulars of Claim).
- d. That QD has acted in breach of the SPA by failing to support the Planning Application and/or to pursue (and procure that PBGL pursued) the Planning Application (paragraph 50.4 of the Particulars of Claim).
- e. That QD's breaches of the SPA and/or each of them are repudiatory of the SPA (paragraph 50.5 of the Particulars of Claim).

55. I am not sure what paragraph d. really adds. If CPC succeeds under paragraphs a. and b., it would necessarily follow that there was a breach of contract in withdrawing the Planning Application and thus a failure which would fall within paragraph d. Perhaps that paragraph is intended to go further and to allege also a breach of paragraph 5(a) of Schedule 4 and of clause 7 of the SPA (the latter imposing mutual obligations of good faith).

56. Further declaratory relief is sought on the footing (which is of course denied by CPC) that there has been a Deemed Refusal:

- a. That the Planning Consultant has advised within paragraph 5(f)(iv) that there is an equal to or greater than 55% chance of an appeal succeeding (paragraph 51.1 of the Particulars of Claim).
- b. Alternatively, that no advice has been given for paragraph 5(f)(iv) purposes (paragraph 51.2 of the Particulars of Claim).
- c. In any case that the reason for the Deemed Refusal was not the negligence of CPC (paragraph 51.3 of the Particulars of Claim).

- d. That, if there has been such a refusal, a declaration as to the reasons for the Deemed Refusal (paragraph 52 of the Particulars of Claim).

Discussion

57. I have gone into rather more detail than is usual in an application which is simply concerned with whether there should be an expedited hearing. In particular, I have dealt at some length with the provisions of the SPA. I have done so because it is essential to have as good an understanding as is possible about what the SPA means in certain important respects and about where the areas of uncertainty about that meaning are in other respects.
58. CPC's approach to the present application is that the underlying dispute raises a simple question namely whether QD was entitled under the SPA to withdraw the Planning Application in the events which took place. The answer will determine not only whether there have been historic breaches of contract by QD, but also what can legitimately replace the original Planning Application in about July 2010. It is important to know the answer to the question because the parties should be entitled to proceed with their contract, the SPA, knowing what, in certain important respects, it means.
59. QD's position is that the original Planning Application is at an end and cannot be revived. If its withdrawal was a breach of contract, CPC may have a claim for damages but it has no further rights in respect of the breach. Going forward, CPC will, if the new planning application is successful, become entitled to further monies under the SPA which it will be entitled to recover as a debt if QD fails to pay. As to that QD says that it has every intention of observing its obligations under the SPA including observance of paragraphs 5(c) to (e) if the new planning application goes further than is necessary to meet the reason for the Deemed Refusal; and that CPC will in due course be paid that to which it is entitled. Accordingly, it says that CPC's only interest in the new planning application is to protect its rights to payment, both in terms of timing and amount.
60. QD notes, or rather complains, that CPC's Particulars of Claim seek only declarations. Declaratory relief is, it says, inappropriate and unnecessary. CPC's ultimate right is to be paid a debt, or, if there has been a breach, damages. It is only if there is a failure to pay the debt which becomes due in the future that any claim for debt would lie – a declaration at this stage is not required. As to damages, CPC will only have suffered a loss as a result of the withdrawal of the Planning Application if the debt actually payable under the SPA ends up being less, or being paid later, than it would have been if the Original Planning Application had not been withdrawn and had ultimately been granted sooner and/or on terms more favourable than the Proposed Planning Application. If, for example, the original Planning Application was likely initially to be refused, but then to be successful on appeal, it may not have been granted any sooner than permission will be granted pursuant to the new planning application. And the Planning Permission eventually achieved may produce as good a return for CPC as the original Planning Application would have achieved.
61. QD acknowledges, as it must, that there are genuine disputes between itself and CPC about whether it was entitled to withdraw the original Planning Application. But all that turns on the rights and wrongs of that dispute is the amount of money – whether by way of debt or damages – which CPC will be entitled to recover. Ascertainment of that amount of debt or damages cannot, whatever the rights and wrongs, be ascertained until

the new planning application has proceeded through the planning process in the ordinary way. Not only is there no urgency, it says, in the present litigation, but it may never be necessary to answer the questions in issue at all. I deal with Mr Smouha's more detailed submissions concerning the declarations sought later.

62. CPC submit that QD's approach is mistaken, based as it is on the proposition that CPC has no proprietary interest (whatever that may mean) in the project and that it is adequately protected by an award of damages if, contrary to QD's case, there has been a breach of contract. As I see it, QD's approach amounts to this:
63. First, if it was entitled to withdraw the original Planning Application, it is to be the judge of the reasons for the Deemed Refusal and thus of the extent of the changes needed to meet those reasons. QD's stance appears to me to be that the Mayor's objections were based on the scale and massing of the original design and his fundamental objections to the style and variety of the architecture, a matter so fundamental in practice as to give it effectively *carte blanche* in formulating new proposals. CPC says that the practical result of a refusal to expedite the hearing will mean that the new planning application will be submitted, and quite possibly dealt with, before CPC has been able to establish that the reasons for the Deemed Refusal were rather more constrained than just indicated and thus to restrict what QD is entitled to do without going through the variation procedure. It may well be that that is what QD will in practice be able to achieve. But, for reasons which I will come to when considering Mr Smouha's submissions concerning the declaration sought in paragraph 52 of the Particulars of Claim, I do not consider that this is a good reason for ordering an expedited hearing of the claim for this declaration.
64. Secondly, if QD was not entitled to withdraw the original Planning Application, the result of its present stance is that it can proceed with its new application regardless of the breach and with precisely the same results as if it had in fact been entitled to withdraw the original Planning Application (and subject to the same objections on the part of CPC that its new planning application will have been dealt with before it is known whether QD was entitled to withdraw the original Planning Application in the first place). To the extent that there is any further breach of contract in doing so, that can be adequately addressed by an award of damages. This effectively overrides such protection as the SPA properly implemented, provides for CPC.
65. As to that, I have already expressed the view that it is well-arguable (at least) that there has not in fact been a Deemed Refusal under paragraph 5(f)(i) or a recommendation within paragraph 5(f)(ii). In those circumstances, two important consequences follow:
 - a. Paragraph 5(d) would continue to apply although its exact manner of application in circumstances where the original Planning Application is no longer live may be a matter for debate. There is no reason why QD should be allowed to proceed as if, by wrongly withdrawing the original Planning Application, the constraints on any new application can simply be ignored. Of course, at present CPC does not know if there will be a reduction in Developable Area. But by the time it does, it will be even later in the day and even more difficult for it to obtain an urgent answer to the question whether the original Planning Application was validly withdrawn.

- b. Paragraph 5(g) would need to be considered. Read literally, the paragraph does not apply: the Planning Application does not remain undetermined because it has been withdrawn. However, it cannot be right to allow QD to take advantage of its own wrong and to claim that paragraph 5(g) simply does not apply at all in these circumstances. It is at least strongly arguable that QD would have to implement paragraph 5(g) on the footing that the original Planning Application remained on foot. That requires it to refer the new application to the Planning Consultant as if it were a variation under paragraph 5(c).
- c. I have already addressed the difficulty of construction which would then arise. On one view, paragraphs 5(d) and (e) are implicitly incorporated into the process (in which case the position is as under paragraph a. above). On another view, it is only paragraph 5(c) which is incorporated into the process but then the new application may not, in accordance with the closing words of paragraph 5(g), be submitted at all. QD can then get rid of CPC by paying it £68.5 million under paragraph 5(aa); or it might argue that the mutual obligations of good faith oblige CPC to co-operate in obtaining a new permission. The extent to which such an obligation would compel CPC to agree to any particular proposal from QD must be a matter of considerable argument. Indeed, the answer to this may be that QD is obliged to resubmit the original Planning Application – although there are no doubt many considerations to take into account in deciding whether this could sensibly be done. WCC may have a very different and less favourable view of the original scheme today than it did in June.
66. It is obvious from the above discussion that CPC's negotiating position with QD would be stronger if (a) it were the case that the original Planning Application was improperly withdrawn and (b) the parties knew that to be so.
67. Other things being equal, it must surely be preferable for it to be established, as between the parties, whether the original Planning Permission was validly withdrawn. This is especially so given that QD's stated position is that it intends to observe the provisions of the SPA and that it was not in breach in withdrawing the original Planning Application.
68. For QD to accuse CPC of attempting to obtain a tactical advantage by dressing up its claim as one for declaratory relief, and thus providing a hook on which to hang an application for an expedited trial, is not a fair criticism. There is nothing unfair in a party to a contract wishing to know, in a case of dispute, what it means and what its effect is in order that he may then proceed on the basis of certainty rather than uncertainty. The criticism, if one is justified at all, is more in the other direction in that QD wishes to proceed on the basis that it has not been in breach of contract (when it may have been) and then to continue in a course of conduct which, if the withdrawal of the original Planning Permission was invalid, may give rise to a further breach of contract.
69. It is often the case, of course, in litigation that the parties would like to know the answer to disputes between them at a far earlier stage than the court process can deliver. In cases where interim relief is sought, it can often be said that the parties need to know the answer before they can know how to proceed; but very often, they will have to live with interim relief by way of injunction and cross-undertakings in damages (in cases where

damages of themselves do not provide an adequate protection). Thus it is common in cases of breach of covenant in restraint of trade and use of confidential information, for a former employer to obtain injunctive relief against a former employee on the basis that the employee would not be good for a money award against him and that use of confidential information would be highly detrimental, and cause irreparable damage, to the employer. It is not, or not usually, a reason for granting an expedited hearing that the parties need to know whether the restraint is valid or the information in fact confidential in order to manage their respective affairs into the future. But each case must be judged according to its own facts. If parties are contractually bound into an ongoing relationship they may well need to know as a matter of urgency what particular provisions mean or what, in a given turn of events, their respective obligations are; and they may need to do so in order to make their contract operate according to its proper meaning going forward.

70. I ought, in fairness to Mr Smouha's arguments, address what he has to say about each of the declarations sought.

71. The most important declarations are those found in paragraphs 50.1 to 50.3 of the Particulars of Claim. As to those, Mr Smouha says that if any one or more of them is granted, the effect is that the withdrawal of the original Planning Application was in breach of Schedule 4. By itself, a declaration to that effect goes nowhere. It could only be of utility to CPC if CPC sought to use it to found a claim to further relief. Such further relief could only be either:

- a. An application for a mandatory order (injunction or specific performance) requiring the original Planning Application to be resubmitted. As to this, he says that any such application would, to have had any prospect of success, have to have been made immediately after the original Planning Application was withdrawn. The application would, anyway, have been likely to fail (and would be even more likely to do so now) because damages were always an adequate remedy, resubmission was unlikely to be possible without harming the prospects of success and the longer the delay in applying for the relief, the greater the prejudice to QD of having incurred the cost of working towards the Proposed Planning Application.
- b. A claim for damages but this requires establishing a number of factual issues which will not be determined by this action. For instance, there are initial hypothetical questions, which are not addressed in the Particulars of Claim, as to whether the original Planning Application would have succeeded and, if it would when that would have happened and whether the scope of the permission ultimately granted would have been reduced in a way which would have adversely affected the amount payable to CPC. Further, in assessing damages, a comparison would need to be made with the permission which would have been granted pursuant to the original Planning Application and the permission actually obtained at a date after this action should, on CPC's timetable, have been completed. Accordingly, at the end of the day, CPC might obtain only nominal damages.

72. As to all of that, he says a declaration may go nowhere. But QD has consistently taken the stance that it will meet its contractual obligations. Accordingly, CPC can quite reasonably take the approach that it wishes to establish the correct legal position by

seeking declaratory relief, leaving QD to act according to its word. In any case, CPC might not need a mandatory injunction: an injunction prohibiting the making of the new planning application, for instance if it infringes paragraphs 5(d), might well be enough for CPC.

73. The prospect of obtaining a mandatory order requiring resubmission of the original Planning Application immediately after the withdrawal would surely have been very weak; and it hardly lies in the mouth of QD now to say that CPC must take the consequences of not having applied for mandatory interim relief. No doubt it will be investigated at a trial claiming damages in due course precisely why QD thought it necessary to act in haste itself rather than clarifying the Mayor's position and that of the Planning Consultant before acting as they did.
74. In any event, CPC would clearly be left with a damages claim if QD went ahead with a new planning application if, assuming the original Planning Application was not properly withdrawn, that application reduced the Developable Area in breach of paragraph 5(d). It does not seem to me that the measure of damage insofar as reliance is placed on paragraph 5(d) would differ depending on whether CPC had succeeded in obtaining the declarations which it seeks. In contrast, if declarations were obtained it would be in a stronger position in relation to paragraph 5(g) since QD would be unable to rely on paragraph 5(f)(iii). As already explained, CPC has a well-arguable case that paragraph 5(g) prevents the submission of any new planning application, thereby perhaps leaving QD with no alternative other than to get rid of CPC by paying it £68.5 million, the price it has to pay as a result of its own breach of contract.
75. The last factor is also, I think, capable of being reflected in a damages claim. If there is a breach of paragraph 5(g) as the result of the submission of a new planning application, CPC will be able to claim as a head of loss damages additional to those flowing from a breach of paragraph 5(d) namely the loss of the chance of forcing QD to adopt a new planning application which increases the amount of the deferred consideration payable to CPC and which may, to some extent at least, remain closer to the spirit of the SPA. Moreover, if it is in fact the case that paragraph 5(g), applied in the context of the present case, would not allow QD to submit any planning application, the court is capable of reflecting that possibility in a damages award. I appreciate however that a claim for a significant award under this head may face difficulties; it will no doubt be asserted that the court would need to undertake an unacceptable amount of speculation.
76. But faced with a problem of that sort, one can see that QD might well feel that it had no option other than to proceed with the new planning application. It is far from clear that, if it did, CPC would be entitled to obtain final injunctive relief (assuming that it could be obtained in time) to prevent submission of the new application. It would nonetheless remain open to CPC to claim damages reflecting the chance that it could have obtained the full £68.5 million. The argument could be that, had it been known when the new planning application was submitted, that this was a breach of paragraph 5(g), CPC would have been entitled to final injunctive relief from which QD could free itself in accordance with the freely negotiated contract by paying £68.5 million.
77. I have already looked briefly at what the declaration under paragraph 50.4 of the Particulars of Claim is focusing on. I do not think it is likely to add to the scope of the action or the evidence if I am right in thinking that its primary focus is to obtain a

declaration about the consequences of there being no Deemed Refusal or recommendation from the Planning Consultant. To the extent that it is intended to raise claims under clause 7 or paragraph 5(a), the case could, I accept, be significantly extended in its scope.

78. I agree with Mr Smouha, however, when he says that the declaration under paragraph 50.5 of the Particulars of Claim is not a matter of urgency (or indeed perhaps relevant at all). But it is not easy to see how the claim to this declaration can add to the length of the trial.

79. The declarations in paragraphs 51.1 to 51.3 of the Particulars of Claim are only of relevance if there has in fact been a Deemed Refusal. CPC apparently wishes to argue that paragraph 5(f)(iv) must be applied where the Planning Consultant has advised that there is a better than evens chance of success of an appeal. It is not easy to see how that can possibly be correct. The words after paragraph 5(f)(ii) are these:

“and in such circumstances [QD] shall either:

(iii).....; or

(iv).....”

80. I do not at present see how it can be argued that QD should have applied (iv) when it has in fact applied (iii). I do not, however, have a strike-out or summary judgment application by QD on this point before me, so I make no decision. I would certainly not allow this point to go forward as a matter of urgency if it stood by itself. But like some other points, it is a short point and turns, I imagine, on Mr Woodman’s email where he says the chances of success of an appeal are good.

81. The declaration concerning the reasons for the Deemed Refusal within paragraph 5(f)(iii) is more problematical. The relief sought does not identify what it is that CPC says were the reasons and is therefore inherently vague. This is not surprising, since CPC’s case is that there was no Deemed Refusal in the first place. It seems to me that there are really potentially two different questions. The first is whether the Mayor gave an indication within paragraph 5(f)(i) (which, incidentally, does not refer to his reasons at all). Under the hypothesis presently under consideration, it is to be assumed that he did, otherwise there would not be a Deemed Refusal in the first place. His indication may have given the most general reasons; in the present case, QD cannot really go beyond the general objection on the part of the Mayor to the scale and massing of the original design and his suggested fundamental objections concerning style and variety of the architecture.

82. However, when it comes to paragraph 5(f)(iii), reference is made to the Mayor’s reasons. But it seems to me that it is not possible to address whether changes to the design go further than is necessary to meet the reasons for the Deemed Refusal unless it is known in more detail what it was that the Mayor objected to. It seems to me that it is only in the context of an actual new planning application that it is possible sensibly to address the question whether the changes go beyond what is necessary. There are doubtless many different ways in which the Mayor’s concerns could be addressed. For instance, there may be two completely different ways of meeting an objection that the Developable Area is too large. Neither way can be said to be necessary, but equally it can be said that if

each of them delivers the required reduction in area but no more, then each of them satisfies the “going no further than necessary” test. It is not possible, I consider, to expect that a declaration of the sort which CPC seeks could sensibly be obtained in abstract. Indeed, it is probably only in the context of an actual new application that the Mayor himself would be able to express his general concerns in a more focused way in order to explain why a particular new design does, or does not, satisfy him. I certainly do not consider that a declaration of this sort is an appropriate matter for an expedited trial and think that it would be better left until after the new planning application has been finally formulated. CPC will no doubt take whatever steps are open to it (a) to ensure that it knows how the plans are developing and what they contain (b) to ascertain insofar as possible from the Mayor’s office more precisely what his concerns were (and are) and different ways in which they might be met and (c) in the light of that information to consider what, if any, steps might at a later stage be appropriate to have the question determined at the right moment, including, if necessary making any application to restrain the submission of the new application.

The Law

83. Before expressing my conclusion on whether there should be an expedited trial, I should briefly mention the law.
84. In *Wembley National Stadium v Wembley* (unreported, CA, 28 November 2000) Jonathan Parker LJ (with whom the other Lords Justice agreed) confirmed at paragraph 54 that “the issue whether to grant expedition, and if so how much and on what terms, was a matter essentially for the discretion of the judge”. That case was a fairly clear case of urgency, concerning the rectification of a lease which if not rectified prevented work commencing on the new stadium for 2 years. The consequences of delay could have been disastrous and the trial would result in the final resolution of the dispute between the parties.
85. Like any discretion, that discretion must of course be exercised judicially. It is “partly a question of principle and partly a question of practice”: *Daltel v Makki* [2004] EWHC 1631 (Ch), Lloyd J at paragraph 11, a case where an expedited trial was not, in fact, ordered.
86. The general principle under the CPR is that cases are to be brought to court as soon as reasonably possible, consistently, of course, with the overriding objective: see *Daltel* at paragraph 12; to similar effect, see also *Law Debenture Trust v Elektrim* [2008] EWHC 2187 (Ch), Morgan J at paragraph 11.
87. The Court has a wider responsibility. It must also take into account “the requirements of other litigants”: see *Elektrim* at paragraph 11 and *Daltel* at paragraph 11. This is because

“any order for expedition involves a disturbance of the normal procedure of a case to be got to trial. It involves giving preference to one case in the allocation of court time over other cases; it also involves requiring the lawyers on both sides to give preference to the tasks of preparation of a trial for that case as over tasks of a similar nature in relation to the affairs of other clients.”

This is an aspect which is of even more weight in relation to appeals to the Court of Appeal: see the remarks of Sir Thomas Bingham MR in *Unilever plc v Chefaro Ltd.* (Practice Note) [1995] 1 WLR 243, recognising that it was necessary to impose “a high

threshold which a party must cross before its application will be granted” because of the potential disruption and unfairness to other litigants caused by postponing their hearing until after the hearing in a matter which was commenced later.

88. The applicant must therefore satisfy the Court that there is an objective urgency to deciding the claim: see *Daltel* at paragraph 13.

89. The procedural history in any case is a relevant factor to take into account. Delay in seeking an order is a factor which may count against an applicant although it is not necessarily conclusive. Urgency, however, is a question for the court. The respondent’s attitude is not really of importance. It is only if he can show some real prejudice to him if a trial is expedited that he has a part to play. Morgan J put it this way in *Elektrim* at paragraph 9:

“...he has no particular *locus* to oppose expedition and to draw my attention to and emphasise the claimant’s earlier different attitude to the timing of these proceedings.”

90. That is a point which has some resonance in the present case since Mr Smouha has drawn my attention to what he says is the changing attitude of CPC and its attitude to urgency. That is not to say that a respondent has no standing to make submissions, as Mr Smouha has helpfully done, about why the nature of the dispute makes expedition inappropriate or unnecessary.

91. It should be noted that the first question is whether urgency is justified at all. In this context, urgency does not necessarily mean a need for the case to be heard in the immediate future. A case may be urgent in the sense that an answer is needed to a question before a date some weeks or even months away, but at a time before the hearing date would, in the ordinary course of proceedings, arrive. That sort of urgency is enough to justify expedition, although the actual timetable – the extent of expedition – can reflect the need for a decision only by that date; it is not necessary to impose a timetable of the most stringent sort. As it is put in *Elektrim* at paragraph 18, the court should resolve timetabling “in a way that is the least unjust to all the interests concerned”.

92. Lord Grabiner has referred me to a number of other cases where the court has ordered an expedited trial: *Loon Energy v Integra* [2007] EWHC 1876 (Comm); *Communications Technology v Gandhi* [2004] EWHC 24 (Ch); and *Cable & Wireless v IBM* [2003] EWHC 316 (Comm) The detailed reasoning is not apparent in all of them and they are, at best, only examples. I do not gain assistance from them.

Conclusion

93. I am not satisfied that there is a real need for any urgent decision in relation to the question whether QD was entitled to withdraw the Planning Application and thus to seek the declarations claimed in any of paragraphs 50 to 52 of the Particulars of Claim. I regard the position under paragraph 52 as clear. There is more difficulty in relation to paragraph 50, but my judgment is that the balance comes down in favour of refusing to make an order for an expedited trial. For reasons which I have attempted to explain, I consider that an award of damages will afford CPC an adequate remedy. I accept that, in some respects, CPC’s position is not as satisfactory as it would be if it knew for certain

that the original Planning Application had not been validly withdrawn. That is a matter to be brought into the balance which I have, of course, done.

94. One factor against ordering an expedited trial includes the pressure of a tight timetable. I take with a pinch of salt Mr Smouha's protestations about the difficulties which would be faced in complying with the timetable which Lord Grabiner proposes; I do not seriously doubt that, had I thought an expedited trial appropriate, an appropriate timetable could have been devised. I also regard with some scepticism Mr Smouha's trial estimate of 10 days. I would be surprised if the case could not be dealt with in the 5 days maximum which Lord Grabiner has estimated.
95. Another relevant factor is delay on the part of CPC in bringing its claim and making its application. I do not consider that CPC has in fact been guilty of any relevant delay so that this factor does not in fact come into play.
96. I do, however, take into account the possibility, to put it no higher, that the questions raised in these proceedings may never arise. Everything depends on the eventual new planning application and the deferred consideration which it and its implementation will deliver to CPC. I am bound to say that, as matters appear to me at the moment, the present action is about money at the end of the day. It has not been suggested that the real motive for obtaining the declarations is to force QD into resubmitting the original Planning Application with a view to obtaining for the citizens of London a prestigious modern design. Indeed, it is not easy to see how CPC could assert that that this is, and always has been, its overriding concern when the SPA itself entitles QD to acquire freedom for £68.5 million. I have also taken into account the fact that the declarations sought are unlikely finally to resolve the dispute between the parties.
97. Having rejected the proposition that there should be an expedited trial in relation to the declarations in paragraphs 50 and 52 (taken separately and *a fortiori* taken together) there is clearly no reason to have an expedited trial on the basis of the declarations sought in paragraph 51 of the Particulars of Claim.
98. Accordingly this application is dismissed.