

LATE ITEM

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Report of : Director of City Development

Report to : Executive Board

Date: 15 February 2013

Subject: LEEDS ARENA, LEGAL ACTION, MONTPPELLIER ESTATES LTD

Are specific electoral Wards affected?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, name(s) of Ward(s):	CITY & HUNSLET	
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, Access to Information Procedure Rule number:	10.4 (3) & (5)	
Appendix number:	1	

Summary of main issues

1. The report details the background to Montpellier Estates Limited's (MEL) legal claims against the City Council arising from the termination of the procurement process undertaken by the City Council to appoint a developer for the Leeds arena.
2. It summarises the main findings of the Hearing held at the High Court, London in autumn 2012 and, outlines the proposed action to be undertaken to recover costs incurred by the Council in successfully defending the claims brought by MEL against the City Council.
3. Members of Executive Board should note that this report is submitted as a late item, as the decision on the legal proceedings between the City Council and MEL was only handed down by the Rt. Hon. Mr Justice Supperstone on 6 February 2013. It was not possible for this report to be included within the formal agenda papers, however, it was deemed appropriate that Board Members be provided with a summary of the main finding of the Hearing at the earliest opportunity and, there is a need for the City Council to determine the approach to be pursued for the recovery of costs incurred by the Council in the legal action that can not wait until the next meeting of the Executive Board in March 2013. Accordingly, the report has been submitted as a late item of business.

Recommendations

3. Executive Board is requested to:-
 - i) Note the content of the report;
 - ii) Instruct and authorise the Director of Resources in consultation with the City Solicitor, to take all appropriate measures to ensure that the City Council maximises the costs recovered in successfully defending the claims brought by MEL against the City Council.
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1 Purpose of this report

- 1.1 The purpose of this report is to summarise the main findings of the judgement handed down by the Right Honourable Mr Justice Supperstone (Mr Justice Supperstone) on 6 February 2013, concerning the two actions brought by MEL against the Council relating to the competition held by the Council in 2007 and 2008 for the development of the Leeds arena. The report also outlines the proposed action to be pursued by the City Council to recover costs incurred by the Council in successfully defending the claims brought by MEL against the City Council.

2 Background information

- 2.1 MEL's legal claim against the City Council arose out of the procurement process undertaken by the Council using the Competitive Dialogue Procedure to appoint a developer for the Leeds arena.
- 2.2 In February 2009, following the Executive Board's decision at its meeting on 5 November 2008 to terminate the developer procurement competition without the award of a contract and, as a consequence of this decision to lead on the delivery of the arena itself, MEL submitted a claim against the Council for damages for breach of statutory duty pursuant to the Public Procurement Regulations 2006 and breach of contract. Specifically, MEL challenged the decision of the Council to abort the tender procedure and proceed with the proposed arena development on land it (the Council) now owned at Clay Pit Lane.
- 2.3 In May 2010, the City Council received notice from lawyers representing MEL that it was considering issuing a deceit claim against the Council in addition to the claim for alleged breaches of procurement legislation. The deceit action was issued on 14 December 2010.
- 2.4 In the deceit claim, MEL alleged that the Council (Council officers, Council Member and/or agent's of the Council) deceived it into entering and/or remaining in the procurement competition by false representation on the part of the Council to the effect that the Council had no preference for the arena to be built on its own land at Elland Road, that MEL was not a 'stalking horse' for the Council's own development of the arena, that the Council did not want to develop the arena itself and that the developer competition would be fair and transparent.
- 2.5 It was alleged by MEL that the Council had a preference for Elland Road, that MEL was a stalking horse, that the Council did want to build the arena itself and that the competition was not fair and transparent. MEL maintained this claim on the basis that the Council concealed from the company its own "Plan B" proposal to build the arena on its own site, that MEL was essentially bidding against the Council's Public

Sector Comparators (PSCs) based on development of its own sites at Clay Pit Lane and Elland Road and, that a flawed process was involved in comparing MEL's submission as against the PCSs that included, amongst other things, the misuse by the Council of the process of 'normalisation' and risk adjustment (used as part of the assessment process of the developer's best commercial submissions), so as falsely to show that MEL's submission made to the Council on 10 September 2008, did not represent value for money.

- 2.6 In the deceit claim MEL maintained that their main loss was the reduction in value of their City One site which formed the basis of the company's submission to develop the arena. MEL contended that had it not been for the representations it alleged were made by the Council, it would have sold the site prior to the collapse of the property market, which MEL argued was in late 2008. Since the fall in the property market, MEL maintained that it has not been possible for the company to sell City One. It was recognised that the calculation of damages would be dependent on the date of the alleged fraud and the date of the hypothetical sale of City One. MEL claimed in excess of £43.5 million in damages from the City Council, such damages representing a combination of the reduction in the value of its site, tax liabilities arising from holding the site longer than envisaged, costs incurred in servicing its debt in relation to the site and wasted costs incurred in the developer competition.
- 2.7 Members of the Executive Board should note that MEL's two claims (procurement and deceit claims) were consolidated on 23 May 2011, by Order of Master Eastman, with the deceit claim as the lead action.
- 2.8 The claims were heard in front of Mr Justice Supperstone in the High Court, London over an eight week period from 4 October 2012 through to 30 November 2012.

3 Main issues - Approved Judgement

3.1 Deceit Claim

- 3.1.1 The Hon Mr Justice Supperstone handed down his judgement on 6 February 2013. A link to the Approved Judgement is here <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2013/166.html&query=leeds&method=boolean>
- 3.1.2 In respect of the deceit claim, Mr Justice Supperstone rejected in their entirety the allegations of fraud and dishonesty made against each of the eight (8) named individuals in the proceedings and, accordingly, the claim in deceit against the City Council failed.
- 3.1.3 In his judgement, Mr Justice Supperstone commented on each of the thirty two (32) representations relied upon by MEL in support of their deceit claim. In each instance, Mr Justice Supperstone accepted and/or preferred the evidence of the Council's witnesses and did not accept the evidence presented by Ms Fletcher or other MEL witnesses. Indeed, Mr Justice Supperstone comments in paragraph 346 of the Approved Judgement.

"I found the evidence of Ms Fletcher to be unsatisfactory in material respects, in particular in relation to the representations that she claimed LCC made about the Council not intending to build the arena itself, which became the cornerstone of the deceit claim. In some instances she may have misunderstood what was being said to her. However, in other instances she appears to have heard that she wanted or expected to hear. She has a tendency to exaggerate. In a few instances (the

dinner on 17 September 2007; the dinner on 30 October 2007; and the luncheon on 11 December 2007) I am not satisfied that the conversations she related took place at all. Her note taking was coloured by her focus on her overriding concern that LCC had a preference for the arena to be built on its own land at Elland Road. Her notes contain significant inaccuracies”.

- 3.1.4 Elsewhere in his judgement (para 390 of the Approved Judgement) Mr Justice Supperstone confirmed that in his view the developer competition was ‘fair and transparent’, that the City Council did inform MEL about the use of the PSCs and their true purpose at meetings between 29 May and 14 July 2008, that the PSCs were not competing bids and that the Council’s Plan B was and remained a contingency plan. Mr Justice Supperstone goes on to say at paragraph 390 of the Approved Judgement:-

“In my view LCC acted throughout the (developer) competition in good faith. It took and acted upon legal advice as to compliance with public procurement law It is clear in my view that LCC embarked on the private developer competition because it did not want to develop the arena itself but wanted a private sector developer to bear the development risk and that remained the position until the Executive Board decided to terminate the competition on 5 November 2008”.

- 3.1.5 Furthermore, Mr Justice Supperstone confirmed that in his view the representation that MEL was not a ‘stalking horse’ was true when made and remained true (para 391 Approved Judgement) and, he rejected MEL’s suggestion that LCC “played with the figures” in order to get the figures on the PSC below those of the (developer) bidders” (para 395 of the Approved Judgement).

3.2 The Procurement Claim

- 3.2.1 MEL alleged that the City Council acted in breach of the Public Contract Regulations 2006, specifically that:-

3.2.1.1 The Council was in breach of its duty of transparency in not disclosing the true nature of Plan B to MEL.

3.2.1.2 A competition between the Council’s Plan B/PSC and the private developers was inherently unequal and lacking transparency.

3.2.1.3 There was a lack of transparency and fair treatment in the scoring of the bids.

- 3.2.2 Mr Justice Supperstone in his Approved Judgement (paragraphs 460 to 462 inclusive) advised that from 29 May 2008 onwards the Council informed MEL as to the PSC as it evolved and, that MEL were informed of and understood the true nature and purpose of the PSCs; that there was no competition between the Council’s Plan B/PSC and the private developers and that there was no scoring of “bids” as that stage in the competition had not been reached when the developer competition was terminated by the Council’s Executive Board at its meeting on 5 November 2008. Mr Justice Supperstone found that the Council’s evidence of how it assessed MEL’s proposal was “never seriously challenged”, that the City Council was entitled to develop this (Public Sector Comparator) fall back option and again found that MEL’s claim failed.

3.3 Costs

- 3.3.1 As the City Council has won the case both in respect of the deceit and procurement claims, it will be entitled to payment from MEL of its reasonable costs of the case. Members of the Executive Board should note that the Council's total legal costs as at the date of report preparation are estimated to be in the region of £4.6m, which may increase if further hearings in relation to the payment of costs and an application by MEL is made to appeal the decision. In part, the scale of the City Council's costs relate to the complexity of the case and, the fact that the Council had to defend and defeat 32 representations that MEL allege were made by the Council, its employees and/or agents in order to induce MEL to enter into and/or continue in the developer competition spanning a period covering more than 3 years. It was a 'document heavy' piece of litigation, with very extensive disclosure obligations (electronic and hard copy) placed on the Council, plus the compilation of 26 detailed witness statements, the preparation of expert evidence and numerous pre trial case management conferences and hearings.
- 3.3.2 Further information in respect of the Council's approach to ensuring that it maximises the recovery of its legal costs from MEL are detailed in the Appendix of the report, the content of which is Exempt/Confidential under Access to Information Procedure Rules 10.4(3) and (5),

3.4 Possible MEL Appeal

- 3.4.1 It is apparent from the press release issued by Ms Fletcher that MEL may appeal the Approved Judgement of Mr Justice Supperstone. Members of the Executive Board should note that if MEL intends to appeal the decision it will be necessary for it to obtain permission to do so. MEL may apply to Mr Justice Supperstone as the trial judge or directly to the Court of Appeal. MEL has 21 days from the decision to apply for permission to appeal the decision.
- 3.4.2 Further information on the possibility of MEL appealing the decision is detailed in the Appendix of the report, the content of which is Exempt/Confidential under Access to Information Procedure Rules 10.4(3) and (5).

4 Corporate Considerations

4.1 Consultation and Engagement

- 4.1.1 The City Solicitor has been consulted and is supportive of the recommendations detailed in the report.

4.2 Equality and Diversity / Cohesion and Integration

- 4.2.1 There is no expected impact on the protected equality characteristics and, therefore, it is not applicable for an EIA or screening form to be completed at this time.

4.3 Council Policies and City Priorities

- 4.3.1 The Vision for Leeds 2004 to 2020 identifies a major project to improve the cultural life of the City, including developing a new, large scale international cultural facility such as an arena.

4.4 Resources and Value for Money

- 4.4.1 Members of Executive Board are asked to refer to the content of paragraph 3.3.1 above and the Appendix of the report, the content of which is Exempt/Confidential under Access to Information Procedure Rules 10.4(3) and (5).

4.5 Legal Implications, Access to Information and Call In

- 4.5.1 The Appendix to this report is treated as Exempt as it details the actions likely to be pursued by the Council in recovering its legal costs from MEL and comments on the potential of MEL progressing an appeal of the decision. The content of the Appendix would be covered by legal privilege, as it includes the substance of communications between the Council and its lawyers, where the purpose of those communications is the giving of legal advice. It is acknowledged that there is a strong element of public interest inbuilt into the privilege itself and, that the general maintenance of confidentiality between client and lawyer is a matter which is in the public interest. Conversely, whilst there is always some public interest in disclosure and whilst there may be relatively strong public interest in the public knowing about the way forward in respect of the recovery of legal costs and the potential of an appeal, it would seem there is little public interest in the disclosure of the advice and information contained in the Appendix.
- 4.5.2 It is, therefore, considered that in all the circumstances of the case, the public interest in maintaining the content of the Appendix as Exempt outweighs the public interest in disclosing the information contained in the Appendix. In addition, the Appendix contains information about an individual's and companies financial and business affairs.

5 Recommendations

- 5.1 The Executive Board is requested to:
- 5.1.1 Note the content of the report.
- 5.1.2 Instruct and authorise the Director of Resources in consultation with the City Solicitor, to take all appropriate measures to ensure that the City Council maximises the costs recovered in successfully defending the claims brought by Montpellier Estates Ltd against the City Council.

6 Background documents¹; None

¹ The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.