The Sizewell C Project

9.74 Written Summaries of Oral Submissions made at Compulsory Acquisition Hearing 1 Part 1 (17 August 2021)

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APPENDICES

1 COMPULSORY ACQUISITION HEARING 1 PART 1

1.1 Introduction

1.1.1 This document contains the Applicant's written summaries of the oral submissions made at Compulsory Acquisition Hearing 1 Part 1 (CAH1) held on 17 August 2021.

1.1.2 In attendance at CAH1 on behalf of the Applicant was:

- Hereward Phillpot QC of Francis Taylor Building (HPQC);
- John Rhodes of Quod (Planning Manager (Strategic));
- Alan Lewis of AECOM (Technical Lead (Ecology));
- Ian Cunliffe of Gateley Hamer (Land Programme Manager)
- Jonathan Smith of Dalcour McLaren (Land Team Lead)
- Joseph Rippon (Sizewell C Financing Programme Manager)

1.1.3 Where further information was requested by the Examining Authority (ExA) at CAH1, this is contained separately in the Applicant's **Written Submissions Responding to Actions Arising from CAH1 Part 1** (Doc Ref. 9.76).

1.2 Agenda Item 2: The statutory conditions and general principles applicable to the exercise of powers of compulsory acquisition

a) Whether the purpose for which Compulsory Acquisition powers are sought would comply with section 122(2) of the PA2008?

1.2.2 In response to the ExA's queries regarding Suffolk County Council's (SCC) position with respect to section 122(2) of the PA2008 and the Sizewell Link Road (SLR) in particular, HPQC explained that there are two conditions under s122(2) that are relevant in this case: the first being sub para (a) which states that the land must be required for the development to which the development consent relates; and sub para (b) which states that the land must be required to facilitate or is incidental to that development. There is no doubt that the land sought to be acquired, including that required for the SLR meets these conditions because it is either land that is required for the development to which the development consent relates or, where the use proposed to be made of the land does not involve development it is land required to facilitate or is incidental to the development. The SLR is

part of the development for which consent is sought under the Order. The Applicant's response to the question as to whether the SLR is associated development is set out in response to ExQ1, see in particular the Applicant's response to CA.1.0 [REP2-100]. The SLR supports the construction and operation of the Sizewell C nuclear power station, and helps to address the adverse effects that would otherwise occur. It very clearly complies with section 122(2).

1.2.3 In respect of SCC's concerns regarding the proportionality of the use of compulsory acquisition powers, HPQC stated that the permanent retention of the SLR is proportionate to the nature and scale of Sizewell C and it goes no further than is needed to avoid the adverse effects that would otherwise occur. When compared with the alternative suggested by SCC, it is notable that SCC is not arguing for an alternative that would involve significantly different physical development and thus any material difference in land take.

1.2.4 HPQC highlighted the ambiguous and ill-defined nature of SCC's position on the SLR, in particular that it is still not clear whether SCC invites the ExA to recommend that the Application for a DCO be refused on the basis of its proposed alternative. The Application to be examined and determined is for a permanent SLR, and not a temporary one. It is, therefore, a matter for SCC to be clear in its submissions to the ExA as to how its suggested alternative should influence the Secretary of State's decision on whether the proposed development should be approved. SZC Co's position is that SCC's alternative could not be incorporated into the Order sought by the Applicant in the current Application. A decision to authorise the SLR only on a temporary basis lies outside the scope of what the Secretary of State could authorise in response to the Application. If SCC's suggested alternative was to be delivered it would require a different Order. If SCC's position is that in fact their suggested alternative can be considered within the existing Order then it is expected that they will identify with sufficient detail all of the changes required to the Application and the consequences of those changes in respect of environmental assessments, transport assessments, consultation and consequent delay and uncertainty for example. At this point, the Applicant does not consider that SCC's case in relation to its suggested alternative option is sufficiently developed for it to be treated as a serious alternative.

1.2.5 The ExA and the Secretary of State must make a decision on the merits of the Application before them. Unless SCC is clearly inviting the Secretary of State to refuse to grant the DCO having regard to its preferred alternative of a temporary SLR, it is hard to see how its alternative could be said to be important and relevant to the Secretary of State's decision. If SCC does wish to change its position at this late stage, and argue for refusal of the

Application on that basis, it would need to grapple clearly and explicitly with the implications of such a decision having regard to national policy and in particular the national policy tests on alternatives in EN1 section 4.4. Its failure to do so throughout the examination has been telling.

1.2.6 HPQC stated that the Applicant's position is that the SLR is very clearly associated development, and that the permanent retention of the SLR is proportionate and clearly justified.

b) Whether all reasonable alternatives to Compulsory Acquisition have been explored?

1.2.7 In response to the ExA's query about why it is not necessary to consider alternatives to the geographical location of the power station and design of the nuclear reactors, Mr Rhodes confirmed that the Applicant's position is set out in the **Statement of Reasons** [APP-062]. Mr Rhodes explained that it is an unusual situation in this case because the site is identified as a potentially suitable site in national policy, specifically NPS-EN6, which was arrived at through a very detailed analysis of alternative sites. NPS-EN6 Annex C explains the position in relation to Sizewell C. Paragraph 4.4.1 of NPS EN-1 explains that there is no general requirement arising from the NPS to consider alternatives to the proposed development and Paragraph 2.4.4 of NPS-EN6 states that each of the sites identified as potentially suitable for new nuclear power stations are considered to be required. Due to this policy position, it is not appropriate to consider alternative geographical locations to site the power station nor consider alternatives to the design of the nuclear reactors.

1.2.8 In response to the ExA's query concerning the justification for permanent acquisition for the SLR, Mr Rhodes explained that this proposal was subject to consultation at Stage 4 where the results of that consultation indicated that the balance of benefit lay in retaining the SLR in the long term. The benefits of retention of the SLR include that it would act as a bypass to the B1122 route which would provide relief to the B1122 communities and enable the B1122 to be a quiet rural road bringing forward the legacy benefits that the community have been seeking for a long time. It would not now be possible to simply change the SLR to a temporary road rather than a permanent one. A temporary haul road would not be appropriate given the scale and length of the construction period. A road of the scale and quality proposed is necessary and its removal at the end of construction would cause significant environmental effects. There would also be potentially complex 'knock-on' consequences for matters such as drainage and materials quantities if the road had to be removed. Such a fundamental change would require consultation with the affected communities. Such a change could not be achieved in the timescales of this Application.

1.2.9 In response to a point made by Mr Grant concerning an informal questionnaire carried out on behalf of the Grant and Bacon facilities, Mr Rhodes stated that the Applicant was not aware of such a survey, nor was the Applicant aware of any other survey which produced results contrary to those of the Stage 4 consultation which showed that 68% of respondents who were asked the question supported permanent retention of the SLR. *[Post-hearing note: Mr Grant clarified that the questionnaire had not been made available to the Applicant or to the ExA but would be submitted to the ExA at Deadline 7. The Applicant is aware of a survey conducted by the Parish Council and this is addressed in the **Written Submissions responding to Actions Arising from CAH1 Part 1** (Doc Ref. 9.76).*

1.2.10 In response to the ExA's query regarding whether there has been a detailed assessment of heritage assets on alternative routes, Mr Rhodes explained that the Response Paper [REP2-108] includes a detailed critique of route taking account of heritage issues. The LDA assessment was one of many assessments, including a subsequent AECOM paper which addressed heritage matters and which show the balance is very conclusively in favour of the SLR route proposed in the Application. *[The Applicant has reviewed the heritage assessments and the position is explained in the **Written Submissions responding to Actions Arising from CAH1 Part 1** (Doc Ref. 9.76).*

1.2.11 Mr Rhodes agreed that heritage impacts resulting from the proposed Yoxford roundabout need to be considered, and in fact have been considered, including the relief that the SLR, with its Middleton link would bring to Yoxford.

1.2.12 Mr Rhodes stated in response to SCC's comments on deliverability of alternative routes that Route W is not a deliverable route, nor one that has been designed in any detail. It exists as a line on a plan dating from the 1980s and has not been worked up in more detail. It is not really an alternative at all for this reason but also because it now conflicts with planning policy land allocations and could not be delivered. The various assessments undertaken, also identify its significant disadvantages from environmental, landscape and other perspectives.

1.2.13 In response to the ExA's query concerning the proposed Pakenham Fen Meadow site, Mr Lewis confirmed that the requested details are set out in the **Fen Meadow Plan** submitted at Deadline 6 [REP6-026] which provides details of the Applicant's updated proposals which still include all three proposed fen meadow sites (Pakenham, Benhall and Halesworth). The Fen Meadow Plan provides updated details of the target for each habitat (fen meadow and wet woodland) at all three sites. The Applicant is working with landowners to acquire all sites on a leasehold basis. In terms of the size of

the area over which compulsory acquisition powers are sought, the Applicant has sought to reduce the area significantly as a result of further engagement with landowners and due to the results of hydrological studies. The Applicant will submit revised plans to the ExA to show the reduced areas at each of the three sites. The Applicant will provide further written submissions (Doc Ref. 9.76) detailing the revised proposals at the Pakenham site where the proposed revised site extent, including the access route which has been reduced to about 10.5 hectares.

1.2.14 In response to the ExA's query regarding the consideration of alternatives to Pakenham, Mr Lewis confirmed that the Wood site selection reports (Wood, 2018 [REP4-007] and Wood, 2019 [APP-258]) address the evaluation of alternative sites.

1.2.15 HPQC clarified that in addition to the proposed reduction in the extent of compulsory acquisition powers sought in respect of the land at Pakenham, there are two other instances where there will be a reduction in the scope of acquisition as a result of further engagement with landowners. These reductions will involve a change to the Application and the Applicant will submit full details of these proposals including an explanation of the changes together with revised plans in the ***Written Submissions responding to Actions Arising from CAH1 Part 1*** *(Doc Ref. 9.76)*.

1.2.16 In response to points raised by Ms Watts concerning the consideration of alternative sites on a wider geographical basis, HPQC clarified that there are two separate issues regarding consideration of alternative sites: firstly, consideration of specific sites on which the applicant could recreate the habitat itself under the terms of the DCO (undertaken by means of a site selection process), and secondly, the issue of the contingency provision set out in the **Draft Deed of Obligation** [REP5-082] which provides funds for habitats on other sites in East Anglia if the habitat establishment works are not successful.

1.2.17 Mr Lewis provided an update on the position, as stated at Deadline 6 in the **Fen Meadow Plan** [REP6-026], which confirms that based on detailed studies, conditions can be created for the establishment of 4.73 ha of fen meadow habitat and 1.76 ha of wet woodland at the Pakenham site.

c) Whether the Secretary of State could be satisfied that the land proposed to be acquired is no more than is reasonably necessary for the purposes of the Proposed Development?

1.2.18 HPQC noted that the Applicant will provide an update to the Examining Authority on the status of negotiations for acquisition of property at Deadline

7 in the Statement of Reasons Appendix B 'Status of Negotiations with Owners of the Order Land' - Revision 7.0 (Doc Ref. 4.1 B (F)).

1.2.19 Mr Cunliffe confirmed that the Statement of Reasons Appendix B 'Status of Negotiations with Owners of the Order Land' - Revision 7.0 (Doc Ref. 4.1 B (F) is reflective of the approach taken by SZC Co. in its significant efforts to secure all land and rights required for the project by private treaty agreement, wherever possible, with compulsory acquisition powers to only be used as a last resort. Mr Cunliffe expanded on the efforts made by the Applicant as follows –

- Engagement with landowners initiated in 2009.
- The environmental enhancements delivered at Aldhurst Farm have been made possible by the acquisition of the land by private treaty agreement in 2015.
- Other key sites that were identified early in the development of the project proposals, including the Northern Park and Ride site, the Southern Park and Ride site, and the Land to East of Eastlands Industrial Estate are all secured by means of private treaty (option) agreements.
- Following the signing of Heads of Terms, precedent option agreements have now been agreed between the Applicant's solicitors and solicitors instructed to represent the Land Interest Group ('LIG') (the group of agents, solicitors and NFU established to represent the landowners). This has resulted in 35 sets of individual option agreements being issued to landowners' solicitors. These option agreements will now proceed to review and signing, with engagement on technical matters, such as drainage and irrigation infrastructure and accommodation works continuing in parallel. There has already been considerable work done to understand landowner specific issues, such as access requirements, boundary treatments and concerns related to severance, which has resulted in changes to design or landowner specific detail being incorporated into agreed terms. The option agreements will also allow for additional heads of claim following the option being 'called,' where losses can't be evidenced or detailed before the option is exchanged.
- The Applicant has also worked constructively with the NFU's representative, to agree the Interface Arrangements document that will be appended to the option agreements. The document includes the measures to be undertaken before land is taken, during construction and details the reinstatement requirements.

- The Applicant has ensured that landowners have had the reasonable costs of surveyors and solicitors to pursue the private treaty agreements has been underwritten and landowners' reasonable losses in respect of time spent engaging in the project has also been reimbursed. Ensuring landowners have had access to the appropriate professional advice to advise them in respect of the terms provided by the Applicant has been essential, to ensure that they are properly (and independently) advised on the commercial and technical terms of the agreements. The Applicant has ensured that the agreements also provide the flexibility to prevent any landowners from being (financially) disadvantaged as a consequence of entering into private treaty agreements. The Applicant has also engaged a specialist Land Drainage Consultant to liaise with landowners to confirm existing drainage and irrigation infrastructure and identify mitigation proposals. The Applicant has also offered to undertake detailed Farm (or Estate) Impact Assessments to consider in further detail the anticipated impacts of the project proposals on rural businesses.

- Although substantial progress has been made, the Applicant will continue to pursue agreements with those limited number of landowners with whom agreements remain outstanding. All landowners from whom the project requires land have received Heads of Terms from the Applicant, and the intention is to continue to advance negotiations to ensure that terms are agreed, wherever possible, prior to the close of examination.

1.2.20 In response to the ExA's query in respect of the status of agreement of the Northern Park and Ride land, Mr Cunliffe confirmed that there needs to be an alteration to the existing agreement but the acquisition is secured by a historic option agreement.

1.2.21 In response to the ExA's query regarding SCC's concerns about the extent of land required, Mr Rhodes confirmed that discussions on highway boundaries are continuing with SCC and the Applicant is working to settle as much detail as possible at this stage. It is anticipated, however, that precise boundary details and the extent to which landscaping associated with highway schemes, and whether they will fall within the highway boundary to be maintained by the highways authority will not be settled before the end of examination. The Applicant is considering whether a mechanism is required to secure the long-term maintenance of any landscaping area that may be located outside of the area adopted by the highways authority. Requirement 22 in the draft DCO [REP6-006] requires the detailed design to be approved by SCC. The Application provides the limited flexibility necessary at this stage, whilst ensuring that an appropriate

approval mechanism exists for matters including the details of layout and drainage.

1.2.22 In response to the ExA's query regarding the necessity for the land at Pakenham, HPQC confirmed that the broad outline of the principles has been explained earlier and that having had further discussions with affected landowners and carried out more assessments, the Applicant is proposing to reduce the boundaries in order to reduce the impact on landowners without compromising the ability to deliver the quantum of habitat that needs to be delivered at this site. The Applicant will submit its detailed proposals to the ExA in further written submissions (Doc Ref. 9.76).

1.2.23 Mr Lewis noted that rationale behind the requirement to deliver 4.5ha of fen meadow is based on pre-application advice from Natural England that the extent of compensatory habitat for fen meadow should be provided at a level of 9x that which would be destroyed by the proposed development on the Sizewell Marshes SSSI. The 4.5ha was based on a land take figure of 0.5ha of fen meadow that was predicted to be lost from the SSSI. This land take figure was revised down slightly to 0.46ha in January 2021 [AS-181] which means that the fen meadow compensatory habitat requirement has been revised down slightly to 4.14ha.

1.2.24 Natural England has since confirmed as detailed in issue 49 of its Written Representations [REP2-153] that it now considers the quantum proposed, based on the 9x multiplier, to be sufficient.

1.2.25 The Applicant is proposing to acquire a greater extent of land than the 4.14ha to ensure that the required habitat quantum of 4.14ha can be delivered. It is not possible to set a single ground level for fen meadow at any one site as there is limited ability to control water levels. Therefore, the approach to fen meadow establishment will be based on a sculpting approach involving shallow ground excavation to intercept groundwater so there are varying topographical and hydrological conditions across target areas. By doing this, the Applicant is confident that a range of water levels can be provided and the target quantum delivered. This approach of shallow excavations is used, both to remove nutrient rich topsoils and intercept groundwaters, without affecting adjacent non target land areas, which would likely be the case with more extensive manipulation of drainage.

d) Whether having regard to section 122(3) of the PA2008 there is a compelling case in the public interest for the land to be acquired compulsorily and the public benefit would outweigh the private loss?

1.2.26 In response to the ExA's query as to the relative importance of the various public benefits of the Project identified in the Statement of Reasons, HPQC noted that the public benefits of the Project need to be considered as a whole. Government policy as to the need for this type of infrastructure and the urgency of that need is clear, and thus any analysis of whether a compelling case would exist in the absence of an urgent need was necessarily counter-factual and required speculation as to what the factual position might be in such an alternative scenario. For example, would there be a need, but less urgency? In such circumstances it may well be that a compelling case would still exist to justify the proposed compulsory acquisition. Nevertheless, speculation as to the position in an alternative factual scenario was considered unlikely to assist the ExA in its consideration of the Application.

1.2.27 HPQC confirmed that the most significant public benefit is that the proposed development addresses the urgent need for low carbon energy generation, but emphasised that the benefits need to be considered as a whole and that the other benefits identified in the Statement of Reasons are substantial. The economic benefits, for example, are of regional and national importance. There is no doubt that the public interest benefits are very substantial and outweigh decisively the impacts on private loss to those whose interests would be affected. In light of Mr Cunliffe's update, the balance has shifted even further in favour of authorising compulsory acquisition powers as most of the land required has been secured via private treaty (or heads of terms) which deal with the impacts on the individual landowners as well as the acquisition of the necessary interests in property, and so the use of compulsory acquisition powers would be very limited. Hence the extent of impact of the use of such powers on the private interests of those affected would be less than assumed at the time of drafting of the Statement of Reasons.

1.2.28 HPQC confirmed that the assessment of private loss is comprised in responses to the ExA's first written questions (ExQ1) [REP2-100] (in particular CA 1.11, CA1.40 and CA 1.38), the Site Selection Report [APP-591] and the Environment Statement. *[Post-hearing note: The Written Submissions responding to CAH1 Part 1 (Doc Ref. 9.76) sets out where private loss is assessed within the ES documentation].* When considered as a whole, it is clear that the extent of private loss has been considered and weighted appropriately in looking at alternatives, and in some instances has led to changes in the scheme design.

1.2.29 In respect of the points raised by Mr Grant, HPQC noted that heads of terms have been signed by Mr Grant and as a result the Applicant understands that he is not objecting to the proposed compulsory acquisition powers over his land. Discussions are ongoing with Mr Grant in respect of accommodation works. *[Post-hearing note: The Written Submissions responding to CAH1 Part 1 (Doc Ref. 9.76) provides a further update on these discussions.]*

1.2.30 Mr Jonathan Smith noted that **Appendix B** to the **Statement of Reasons** has been updated and recently submitted at Deadline 6 [REP6-011]. The Applicant has engaged extensively with landowners and agents over recent years. In respect of Mr Grant's circumstances, Heads of Terms have been signed and the option documents are now being drafted by solicitors and completion is expected by the end of examination. Discussions are ongoing in respect of the feasibility of a 2.8m underpass to accommodate certain farm vehicles. The 2.8 m underpass option would not result in an increase to the order limits and would not require the SLR to increase in height. The underpass proposal would not result in any new or materially different likely significant effects on the environment. Suffolk County Council have not raised any concerns with the underpass proposal. There is engagement with Mr Grant to discuss the merits of the underpass with the possibility that a private land agreement is entered into to secure the provision of the underpass. The plans would be updated and details submitted through the discharge of Requirement 22. Mr Grant is discussing the underpass option with his farm contractor and advisors to understand what benefits the underpass will provide, based on current and potential future farming systems.

1.2.31 The Applicant will provide a written response setting out the full details of engagement with Mr Grant in the Written Submissions responding to CAH1 Part 1 (Doc Ref. 9.76).

1.2.32 HPQC noted in summary that the significant extent to which heads of terms have been agreed with private landowners and land interests had been or would be acquired by negotiation, is inconsistent with the submissions made by affected persons that there has been inadequate attempt to engage with landowners to negotiate acquisition as an alternative to compulsory acquisition. That is an important point when considering the test in section 122(3) PA2008. Where discussions are ongoing in relation to works that can be incorporated into detailed design, the Applicant is seeking to agree those works now but they do not go to the question of whether there is compelling case in the public interest to justify compulsory acquisition (no objection being maintained to such acquisition by the relevant landowners) save to the extent the ExA considers there would be a further reduction to private loss as a result of any such works. The

Applicant's case is that the public benefits of the Project would clearly and decisively outweigh the private loss as matters stand, and that the position can only be improved if it is possible to achieve further accommodation works to benefit individual landowners which the Applicant is seeking to do as a responsible promoter. However, those matters do not change the overall balance position which is overwhelmingly in favour of approving compulsory acquisition powers.

1.2.33 HPQC noted that in terms of consequences for the Secretary of State, there is no scheme for a temporary link road, so it is irrelevant whether in an alternative world it might be possible to justify compulsory acquisition powers such a scheme as that is not the scheme that is before the Secretary of State nor is it a scheme which could be accommodated in the existing Application.

1.2.34 In relation to balancing exercise, HPQC summarised the position made in written responses that significant weight has been attributed to private loss and the Applicant has sought to reduce private loss where possible, through site selection and route selection of associated development. In addition and importantly, the way the compulsory acquisition powers have been framed allows the Applicant to take lesser interests than would otherwise be the case. The way that the compulsory acquisition powers enable this to be done has been explained in response to ExQ1 written questions and would be further elaborated in response to the second written questions (ExQ2) on this point. The Applicant has sought to take a proportionate approach at every stage and at both a macro and micro level, and the Applicant will continue to do so throughout detailed design and subsequent stages. The public benefit this scheme would deliver meets the national policy imperative for the urgent delivery of new nuclear generating capacity, and ultimately the balance is in favour of the proposed compulsory acquisition powers and it is a proportionate request for such powers.

1.2.35 Mr Rhodes also clarified that from a planning perspective, a lot of the design effort has ensured that no more land than is necessary is proposed to be compulsorily acquired. The **Associated Development Design Principles** [REP2-041] support this as the first principle requires the authorities to be satisfied that detailed designs have been optimised to reduce the overall land take. Some flexibility is contained in the Application but the limited nature of this should be understood. The limits of deviation are only vertical and do not affect land take, whilst the parameter plans provide for some flexibility for the precise layout of components but only within the sites' defined boundaries. Through close working with SCC and landowners, SZC Co. has been able to significantly reduce the proposed land take at the SLR and TVB, for example, in the January 2021 Application changes and again at Deadline 4, which supports the Applicant's position that it is

proposing to take no more land than is necessary at every stage of the development. Only the land which is ultimately determined to be necessary through the detailed design process would be the subject of permanent land take.

1.2.36 In response to the ExA's query on Natural England's comment stating that establishment of fen meadow would be near impossible, Mr Lewis stated that Natural England's submission also draws attention to examples of successful delivery of fen meadow and whilst the Applicant accepts that it will be challenging, it does not accept that it will be impossible to establish the requisite fen meadow quantum. The 9x multiplier reflects that difficulty of establishing this type of habitat and SZC Co. takes comfort from the fact that Natural England have proposed the multiplier. The Applicant has proposed a contingency position within the **Fen Meadow Strategy** [AS-209], secured by Requirement 14A, if the requisite quantum is not delivered, but that is a last resort and SZC Co. is confident that fen meadow will be successfully established, particularly given the suitability of the sites, which have been carefully selected. SZC Co. is aware of other sites in East Anglia that would be suitable where those funds could be directed to ensure the quantum is ultimately delivered, although that is unlikely to be necessary. The Applicant's position is that it is preferable and feasible to deliver the fen meadow habitat on land proposed in the Application.

1.2.37 Mr Lewis confirmed that Pakenham was included after the Applicant accepted the 9x multiplier. It was initially not included because an additional site had not been considered necessary (before the larger multiplier was established) and because it was thought to be more challenging in terms or hydrology than the selected sites. However, further investigations set out in the **Fen Meadow Plan** [REP6-026] show that those challenges are not insurmountable. The two site selection reports (Wood 2018 [REP4-007] and Wood 2019 [APP-258] explain that Pakenham was one of the short-listed reserve sites.

1.2.38 Mr Lewis confirmed that a written note will be provided in the **Written Submissions responding to Actions Arising from CAH1 Part 1** (Doc Ref. 9.76) following this hearing to explain the rationale behind why the applicant is now seeking to use 8.31ha of land to create 4.14ha of fen meadow which, effectively doubling the land requirement. Mr Lewis confirmed that the 9x multiplier was a starting point and the detailed work undertaken now on the sites show that it is necessary to build in some contingency to ensure that the 4.14ha will in fact be met.

1.2.39 In response to the ExA query about the Westleton marsh harrier land to provide foraging land and whether it is proposed to be acquired temporarily or permanently, Mr Lewis confirmed that the Applicant only requires the

land for the duration of the temporary construction period. He noted that the Westleton land is included in the Application as a contingency position if the Secretary of State determines that the onsite provision on the EDF Energy estate (at Upper Abbey Farm) is insufficient. However, it is the Applicant's position that the onsite provision is sufficient. *[Post-hearing note: the Applicant confirmed it would provide a note* [AS-408] *confirming the temporary/permanent acquisition position and signposting to where the explanation of the criteria and tests that the Secretary of State needs to consider when assessing if this land is required.]*

1.3 Agenda Item 3: Whether there is a reasonable prospect of the requisite funds becoming available

a) The resource implications of both acquiring the land and implementing the project for which the land is required.

1.3.1 In response to the ExA's query as to whether there has been an update to the cost estimate figure, Mr Rippon explained that there is no further update on the cost estimate since the ExQ1 response [REP2-100] but confirmed that work is progressing in the background and there will be a number of updates before Final Investment Decision (FID). Mr Rippon explained the commercial sensitives and would confirm if the update cost estimate could be provided to the ExA. The Applicant will provide a response in the ***Written Submissions responding to Actions Arising from CAH1 Part 1*** *(Doc Ref. 9.76).*

b) Whether adequate funding is likely to be available to enable the Compulsory Acquisition to proceed within the statutory period following the draft DCO being made?

1.3.2 In response to the ExA's queries on the RAB funding model and the legislation required to secure this, Mr Rippon confirmed that discussions are ongoing with the Government. The RAB model has a successful track record of providing funding for projects in the UK and internationally and the Applicant considers that if RAB is approved there will be adequate funding. The Applicant is confident that the funding model will be determined within the examination period. (***Post hearing note: Mr Rippon clarified this at ISH9 to make clear that the timing for determining the funding model was consistent with SZC Co.'s programme for project delivery***).

1.3.3 HPQC noted that a new article will be included in the revised **draft DCO** submitted at Deadline 7 (Doc Ref. 3.1(G)) which provides for a bond capable of being drawn upon prior to implementation of any compulsory acquisition powers. This will ensure that the funds needed for compulsory acquisition would be available before those powers are exercised.

1.3.4 HPQC noted that the test set by the CA Guidance (paragraph 9) was whether the Applicant was able to demonstrate that there is a '*reasonable prospect'* of the requisite funds '*for acquisition'* becoming available, also expressed as whether adequate funding was *likely* to be available to enable the promoter '*to carry out the compulsory acquisition within'* the statutory period. Both focus on funding for compulsory acquisition, and require a consideration of what is likely to occur in the future, i.e. after the Order is made. It is not a question of whether funding is available or certain at present. If there is a reasonable prospect of the requisite funding becoming available in the statutory period, the requisite degree of likelihood will have been demonstrated.

1.3.5 That reflects the inevitable degree of uncertainty that commonly exists with regard to the funding of major infrastructure projects ahead of a decision on the DCO (see paragraph 17 of the CA guidance). Moreover, it recognises the need for the ExA and the Secretary of State to avoid having to pre-judge decisions which will be made by other bodies, whether Government, regulators and/or investors pursuant to different processes after the DCO has been made.

1.3.6 The additional draft DCO provision to be added at Deadline 7 would provide additional certainty on the availability of the requisite funds for the proposed compulsory acquisition.

1.3.7 Funding of the project more widely was also relevant, in the context of considering potential impediments to implementation (and is appropriately covered in the Funding Statement). Again, and for the same reasons, certainty is not required. A reasonable prospect would be sufficient.

1.3.8 The Applicant's position on the funding of the project generally is well-rehearsed in the written material, with more to follow in response to ExQ2 (Doc Ref. 9.71). In summary, there are good prospects of the scheme being funded, most likely using the RAB model that the Government favours and which is a tried and tested approach to funding such infrastructure. It is notable that as recently as 20 July 2021 the Minister for Energy, Clean Growth and Climate Change reaffirmed the Government's position that RAB is *'a credible model for financing large scale nuclear projects'*. The ExA does not itself have to go behind the Government's position and seek to duplicate the separate process being undertaken to assess whether a RAB model is appropriate.

1.3.9 He added that the likelihood of funding being available is bolstered by the strong Government support for new nuclear projects, as reflected in the fact that agreement was reached on Hinkley Point C, that it is actively engaged in negotiating how best to fund Sizewell C and that those negotiations are

progressing well. The Applicant is firmly committed to the scheme and has undertaken considerable expenditure in pursuit of the Application which reflects its confidence that the funding will be agreed and at the very least, there is a reasonable prospect of the requisite funding becoming available. The costs associated with compulsory acquisition are relatively insubstantial when viewed in the context of the costs of the Project as a whole. *[Post-hearing note: The Applicant's response to the Examining Authority's First Written Question (ExQ1) CA.1.31 [REP2-100] sets out the compensation liability to be £42million in the Property Cost Estimate (PCE). This is against a total projected project cost of £20 billion as set out in the* ***Funding Statement*** *[APP-066].*

1.3.10 In response to the ExA's request for clarity as to whether the additional provision to be added to the draft DCO would be addressed only to funding for compulsory acquisition, or more widely to funding for the implementation of the scheme as in the Wylfa draft DCO, HPQC clarified that it would be the former. He explained that the position at Sizewell C is entirely different from the highly unusual situation that arose at Wylfa, where the project had been publicly suspended by its promoters at the time the ExA was preparing its report because it had not proved possible to reach agreement with the Government on funding.

1.3.11 HPQC stated that SZC Co. will not be proposing an article in the draft DCO akin to that inserted in the draft DCO at Wylfa, which effectively sought to defer the decision on whether the scheme had met the CA guidance to a post-DCO stage. It was SZC Co.'s view that the approach taken in the Wylfa draft DCO was unsatisfactory because the issue of funding for the implementation of the scheme is relevant when deciding whether there is a compelling case to authorise powers of compulsory acquisition and a judgment needs to be made at the time of making that decision. It is understandable why that highly unusual approach was taken in the peculiar circumstances at Wylfa: there appears to have been no other option available to the Applicant other than withdrawal of the application, and it appears to have been an option of last resort.

1.3.12 The circumstances are entirely different here, and so it is not an option that has to be considered. In any event, it is not an option SZC Co. would support because an approach that effectively defers consideration of the issue of the prospects of funding for implementation in its entirety until after the decision to authorise compulsory acquisition powers has been made is not considered legally robust.

1.3.13 In this case the ExA and Secretary of State can and will need to make a judgment on this issue in the normal way, having regard to the evidence presented to them. That includes all that has been said and done by the

Government to develop and negotiate a funding model which would apply to the development of Sizewell C.

1.3.14 In response to the ExA's query regarding timing of availability of funding, HPQC stated that Implementation Plan is linked to FID. Mr Rippon stated that the Applicant is working towards FID occurring in 2022 which is consistent with the Implementation Plan.

1.3.15 In response to the ExA's query as to whether a different funding model should be considered, Mr Rippon confirmed that the Applicant has full confidence that the RAB funding model will be confirmed.

1.3.16 In relation to the matter raised by Mr Grant in relation to the statement made in the EDF Group Annual Report about additional funding the Applicant will address this within ***Written Submissions Responding to Actions Arising from CAH1 Part 1*** *(Doc Ref. 9.76).*

1.3.17 In relation to SCC's concerns about Part 1 claims under the Land Compensation Act 1973, HPQC confirmed that a meeting between SCC and the Applicant is due to take place on 18 August and the Applicant would report back on the position reached. *[This is contained in the Applicant's* ***Written Submissions Responding to Actions Arising from CAH1 Part 1*** *(Doc Ref. 9.76)]*

1.4 Agenda Item 4: Whether the purposes of the proposed compulsory acquisition are legitimate and would justify interfering with the human rights of those with an interest in the land affected

a) What regard has been had to Articles 8 and 6 of the European Convention on Human Rights (ECHR) and Article 1 of the First Protocol?

1.4.2 In response to the ExA's query regarding Article 8 of the ECHR and the Applicant's response to the ExA's first written questions on the topic, HPQC referred to the ExA's second written questions (ExQ2) and confirmed the Applicant would respond to this matter in written responses to those questions.

b) The degree of importance attributed to the existing uses of the land proposed to be acquired.

1.4.3 In response to points raised by SCC regarding its interests in the household waste recycling facility and the Academy land, HPQC sought clarification of SCC's position regarding the engagement of the Human Rights Act in

relation to its interests. He also noted that in respect of these two sites, there are ongoing negotiations and discussions outside the examination with the hope that these points will be resolved.

c) The weighing of any potential infringement of ECHR rights against the potential public benefits if the draft DCO is made.

1.4.4 HPQC stated that as explained in section 9 of the Statement of Reasons there would be no violation of the rights in question where it has been demonstrated that the proposed interference is in the public interest. The tests for lawful interference with the relevant rights in the ECHR mirror the tests for compulsory acquisition, namely that there must be a compelling case in the public interest (see e.g. Clays Lane Housing Co-Operative Ltd. v. Housing Corporation [2005] 1 WLR 2229[1]). For the reasons identified in the **Statement of Reasons** [APP-062] and the updated **Statement of Reasons Appendix A** [REP2-020], the interference with ECHR rights is justified and lawful.

1.5 Agenda Item 5: Consideration of duties under the Equality Act 2010

The Applicant to provide an update in relation to compliance with any duties under section 149 of the Equalities Act 2010.

1.5.2 Mr Rhodes confirmed the **Equality Statement** [APP-158] would be updated for Deadline 8. [*Post-hearing note: the Applicant has now seen the agendas for the September Issue Specific Hearings and considers that it would be beneficial for the Equality Statement to be updated at Deadline 9 rather than Deadline 8 in order to reflect any final matters arising from those hearings].* The updates would report on the further engagement with those that have protected characteristics which may make it difficult for them to engage with the Application and, particularly on the way in which mitigation proposals have been developed across a range of topics to address potential issues for vulnerable sections of the community.

1.6 Agenda item 6: Sections 127 and 138 of the PA2008 – the acquisition of statutory undertaker's land and the extinguishment of rights and removal of apparatus of statutory undertakers

a) The current position in relation to negotiations with Statutory Undertakers.

[1] A copy of the report of this case appended to this written summary at **Appendix A**

1.6.1 HPQC provided an overview on the significant and positive engagement with statutory undertakers which is reported in the **Statement of Reasons, Appendix C**, Status of Negotiations with Statutory Undertakers table, which was last updated at Deadline 6 [REP6-012]. A further update will be provided at Deadline 7 (Doc Ref. 4.1 C (E)).

1.6.2 In response to the ExA's query on whether the Ministry of Defence have protective provisions, HPQC confirmed that they do not have an interest in land so are unaffected and do not require protective provisions. *[The Applicant has reviewed the Ministry of Defence's Relevant Representation [RR-0800] regarding protective provisions and provided a response in the Applicant's* ***Written Submissions Responding to Actions Arising from CAH1 Part 1*** *(Doc Ref. 9.76)].*

b) Whether Protective Provisions have been agreed with all Statutory Undertakers.

1.6.3 In response to the ExA's query on the status of engagement on protective provisions with SCC, HPQC noted that SCC have not to date justified the need for such provisions in Schedule 18 of the Order. He noted that it is the Applicant's case that SCC's legitimate interests are protected by Articles 20 and 21 of the Order which provide appropriate protections. It was noted that this matter was due to be discussed at the meeting on 18 August and the Applicant would respond in writing if agreement could not be reached. *[An update on discussions with SCC regarding protective provisions is provided in the Applicant's* ***Written Submissions Responding to Actions Arising from CAH1 Part 1*** *(Doc Ref 9.76)].*

c) In the event that agreement is not reached with all Statutory Undertakers, whether the relevant tests for the exercise of powers pursuant to sections 127 and 138 PA2008 would be met.

1.6.4 In response to the ExA's query about how rights could be acquired without serious detriment to Statutory Undertakers, HPQC stated that the approach the Applicant has taken has been to work with Statutory Undertakers to reduce the extent to which there would be any impact on their apparatus and the carrying on of their undertakings. The Applicant will provide an updated table at Deadline 7 identifying the relevant statutory undertakers whose apparatus may need to be removed or rights extinguished in order to facilitate the delivery of the project in response to ExQ2 CA.2.21 (Doc Ref. 9.71). HPQC noted that all interactions with relevant Statutory Undertakers will be regulated through appropriate protective provisions which provide statutory protection so that matters can be progressed by agreement and ensures appropriate protection of apparatus.

1.6.5 Where bespoke provisions are not yet agreed, the Applicant's position is that the Secretary of State will still be able to conclude that the section 127 and 138 PA2008 tests are met, in particular in relation to serous detriment, because no Statutory Undertaker is submitting that protective provisions are in principle incapable of adequately protecting its interest. Where there is disagreement relating to the drafting of those provisions, the Applicant will submit its preferred drafting accompanied by written submissions by Deadline 8 and will respond to any contrary submissions by Deadline 9. To the extent that any differences then remain, the Secretary of State would have two options before it:

- to accept the Applicant's case as to the adequacy of the protective provisions which appear on the face of the Order and confirm the draft Order; or
- to accept the relevant Statutory Undertaker's case as to the need for a different form of words to protect its position in which case the DCO as made would include the Statutory Undertaker's preferred wording.

1.6.6 HPQC stated that with benefit of that procedure, a positive answer can be provided to the question as to whether the relevant tests for the exercise of powers pursuant to sections 127 and 138 PA2008 would be met because it is capable of being dealt with in the provisions of the Order.

1.7 Agenda item 7: Section 135 of the PA2008 - Crown Land

The Applicant to provide an update in relation to the position on Crown Land.

1.7.2 HPQC noted that so far as there is a requirement for consents for the use of the sports facility, that is being discussed and anticipated to be resolved. He also confirmed that SZC Co. shares SCC's understanding that this is not in fact a Crown interest in land.

1.7.3 This leaves two areas where the Crown has an interest and in respect of which an update will be provided at Deadline 7:

a) Department for Business, Energy and Industrial Strategy (BEIS)

BEIS has an interest in land within the Main Development Site. Consent has not yet been obtained from BEIS, however discussions are ongoing between the Applicant and BEIS with regards to this consent and a further update will be provided to the Examining Authority as progress is made. The Applicant is confident that this

consent will be obtained imminently and before the end of examination.

b) *The Queen's Most Excellent Majesty in Right of Her Crown*

Consent has not yet been obtained from the Crown Estate, however discussions are ongoing between the Applicant and the Crown Estate with regards to this consent and a further update will be provided to the Examining Authority as progress is made. The Applicant is confident that this consent will be obtained imminently and before the end of examination.

APPENDIX A: CLAYS LANE HOUSING CO-OPERATIVE LTD. V. HOUSING CORPORATION [2005] 1 WLR 2229

A

Court of Appeal

*Regina (Clays Lane Housing Co-operative Ltd) *v* The Housing Corporation

[2004] EWCA Civ 1658

B 2004 Sept 23, 24; Dec 8

Brooke, Waller and Maurice Kay LJJ

Housing — Registered social landlord — Regulation — Housing Corporation directing transfer of housing co-operative's land following mismanagement — Housing co-operative preferring voluntary transfer elsewhere — Whether decision disproportionate interference with Convention right against deprivation C *of property — Housing Act 1996 (c 52), Sch 1, para 27 — Human Rights Act 1998 (c 42), Sch 1, Pt II, art 1*

Human rights — Right to peaceful enjoyment of possessions — Deprivation of property — Whether decision to direct transfer of housing co-operative's land disproportionate interference with Convention right — Human Rights Act 1998 (c 42), Sch 1, Pt II, art 1

D The Housing Corporation, the regulatory body for registered social landlords under the Housing Act 1996[1], conducted an inquiry into the management of the claimant housing co-operative, a registered social landlord, and concluded that there had been mismanagement in its administration within the meaning of paragraph 27(1)(a) of Schedule 1 to the 1996 Act. In exercise of its powers under paragraph 27 the Housing Corporation directed the claimant, against its wishes, to transfer its land to another registered social landlord, PT, instead of permitting a E voluntarily transfer to another housing co-operative, TFHC, a social landlord registered in Scotland. The claimant sought judicial review of the Housing Corporation's decision on the ground, among others, that a transfer to PT against its preferred wishes amounted to an unlawful interference with its rights under article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms in Part II of Schedule 1 to the Human Rights Act 1998[2]. The judge held that the Housing Corporation had asked itself the correct question, namely whether a compelling case in the public interest had been established for the F transfer of the housing stock to PT, had properly balanced the comparative benefits of the compulsory transfer to PT and the claimant's preferred voluntary transfer to TFHC and had properly found in favour of compulsory transfer, and he dismissed the claim.

On the claimant's appeal and on the question, inter alia, whether it was disproportionate for the Housing Corporation to adopt a course that was not the least intrusive of the claimant's rights under article 1 of the First Protocol—

G *Held*, dismissing the appeal, that the case was not one of naked property deprivation but one where the statutory regulator, having unobjectionably decided upon a transfer, had to choose between alternative courses of action and in that context the appropriate test of proportionality required a balancing exercise and a decision which was justified both on the basis of a compelling case in the public interest and as being reasonably necessary to accomplish the objective; that proportionality did not necessarily oblige the Housing Corporation to choose the H course of action which involved the least interference with the claimant's rights under article 1 of the First Protocol; and that, although neither the judge nor the Housing Corporation had applied the correct test in its entirety, had the Housing Corporation

[1] Housing Act 1996, Sch 1, para 27: see post, para 2.
[2] Human Rights Act 1998, Sch 1, Pt II, art 1: see post, para 11.

done so it would have reached the same conclusion (post, paras 23–25, 28, 44, 45, 46, 60). A

James v United Kingdom (1986) 8 EHRR 123, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, HL(E) and *R v Shayler* [2003] 1 AC 247, HL(E) considered.

Samaroo v Secretary of State for the Home Department [2001] UKHRR 1150, CA distinguished.

Decision of Keith J [2004] EWHC 1084 (Admin) affirmed on different grounds. B

The following cases are referred to in the judgments:

Bexley London Borough Council v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 323

Chassagnou v France (1999) 29 EHRR 615

Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117 C

E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351, CA

Handyside v United Kingdom (1976) 1 EHRR 737

Holy Monasteries v Greece (1994) 20 EHRR 1

International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158; [2003] QB 728; [2002] 3 WLR 344, CA

James v United Kingdom (1986) 8 EHRR 123 D

Jokela v Finland (2002) 37 EHRR 581

Lough v First Secretary of State [2004] EWCA Civ 905; [2004] 1 WLR 2557, CA

R v Shayler [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)

R (Baker) v First Secretary of State [2003] EWHC 2511 (Admin)

R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)

R (Fisher) v English Nature [2003] EWHC 1599 (Admin); [2004] 1 WLR 503; [2003] 4 All ER 366 E

Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139; [2001] UKHRR 1150, CA

Tesco Stores Ltd v Secretary of State for the Environment, Transport and the Regions (2000) 80 P & CR 427

The following additional cases were cited in argument: F

Ainsdale Investments Ltd v First Secretary of State [2004] EWHC 1010 (QB); The Times, 2 June 2004

Arscott v Coal Authority [2004] EWCA Civ 892, CA

Bäck v Finland (2004) 40 EHRR 1184

Chapman v United Kingdom (2001) 33 EHRR 399

Fredin v Sweden (1991) 13 EHRR 784

Greece (Former King of) v Greece (2000) 33 EHRR 516 G

John v Rees [1970] Ch 345; [1969] 2 WLR 1294; [1969] 2 All ER 274

Marcic v Thames Water Utilities Ltd [2003] UKHL 66; [2004] 2 AC 42; [2003] 3 WLR 1603; [2004] 1 All ER 135, HL(E)

Mellacher v Austria (1989) 12 EHRR 391

National and Provincial Building Society v United Kingdom (1997) 25 EHRR 127

Pressos Cia Naviera SA v Belgium (1995) 21 EHRR 301

R v Criminal Injuries Compensation Board, Ex p A [1999] 2 AC 330; [1999] 2 WLR 974, HL(E) H

R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)

R v Secretary of State for Transport, Ex p de Rothschild [1989] 1 All ER 933; 87 LGR 511, CA

R (Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ 606; [2002] QB 1391; [2002] 3 WLR 481; [2002] 4 All ER 289, CA
R (Fisher) v English Nature [2004] EWCA Civ 663; [2005] 1 WLR 147; [2004] 4 All ER 861, CA
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
R (Ponting) v Governor of Whitemoor Prison [2002] EWCA Civ 224, CA
R (ProLife Alliance) v British Broadcasting Corpn [2003] UKHL 23; [2004] 1 AC 185; [2003] 2 WLR 1403; [2003] 2 All ER 977, HL(E)
R (S) v Brent London Borough Council [2002] EWCA Civ 693; The Times, 4 June 2002, CA
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Stretch v United Kingdom (2003) 38 EHRR 196

APPEAL from Keith J

By a claim form filed on 12 September 2003 the claimant, Clays Lane Housing Co-operative Ltd, sought permission to claim judicial review of the decision of the Housing Corporation dated 24 July 2003 directing the claimant to transfer its land to the Governors of the Peabody Trust ("Peabody"), by way of orders declaring that the Housing Corporation had acted unlawfully and quashing the decision. By order dated 14 May 2004 Keith J granted permission but dismissed the claim [2004] EWHC 1084 (Admin).

By an appellant's notice filed on 28 May 2004, and pursuant to permission given by the Court of Appeal (Auld and Jacob LJJ) on 28 July 2004, the claimant appealed the judge's order on, inter alia, the following grounds. (1) In considering whether a compulsory appropriation of property was lawful having regard to article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, in Part II of Schedule 1 to the Human Rights Act 1998, the judge had erred in law in applying the test of a compelling case in the public interest instead of asking whether compulsory appropriation was necessary and the minimum interference with the claimant's Convention rights. (2) The judge had failed to undertake the rigorous and intrusive review required by law of a decision to appropriate property contrary to article 1 of the First Protocol. (3) The judge had reached a conclusion which was wrong and unsustainable on the evidence that the Housing Corporation had not taken into account its concerns about the regulatory difficulties of the claimant's voluntary transfer to a Scottish registered housing co-operative. Such matters were not legally irrelevant, and, in any event, the Housing Corporation had taken them into account without giving the claimant a proper opportunity to meet with the various bodies to discuss the concerns, in breach of basic principles of procedural fairness. (4) The judge had wrongly failed to hold that the Housing Corporation's failure to make financial information relating to Peabody available to the claimant so as to make representations upon it was procedurally unfair, since that information was of direct relevance to the issue of the relative financial strengths of the potential transferees.

The facts are stated in the judgment of Maurice Kay LJ.

David Wolfe for the claimant.
Paul Stanley for the Housing Corporation.

Cur adv vult

8 December. The following judgments were handed down. A

MAURICE KAY LJ

1 Clays Lane Housing Co-operative Ltd ("CLHC") is a housing co-operative whose members are the residents of premises in Clays Lane, Stratford, East London. The premises are held by CLHC on long leases from the London Borough of Newham. They comprise 50 self-contained flats and 400 rooms in 57 houses. They are let to members of CLHC. CLHC is run by B a management committee which is largely elected from its membership. It is a non-profit making body and as such is registered and incorporated under the Industrial and Provident Societies Act 1965. It is also registered as a social landlord under section 2(1) of the Housing Act 1996.

2 The Housing Corporation ("HC") is the regulatory body for registered social landlords. It has statutory powers under Schedule 1 to the C 1996 Act. They include the following:

> "20(1) The corporation may direct an inquiry into the affairs of a registered social landlord if it appears to the corporation that there may have been . . . mismanagement."
>
> "27(1) Where as a result of an inquiry under paragraph 20 . . . the corporation is satisfied as regards a social landlord—(a) that there has D been . . . mismanagement in its administration, or (b) that the management of its land would be improved if its land were transferred in accordance with the provisions of this paragraph, the corporation may, with the consent of the Secretary of State, direct the registered social landlord to make such a transfer . . ."
>
> "(3) . . . the corporation may direct a transfer to be made to the corporation or to another registered social landlord. E
>
> "(4) The transfer shall be on such terms as the corporation may direct on the basis of principles determined by it. The consent of the Secretary of State is required both for the terms of the transfer and for the determination of the principles on which it is based.
>
> "(5) The price shall not be less than the amount certified by the district valuer to be the amount the property would command if sold by a willing F seller to another registered social landlord."

In addition, by section 9(1), the consent of the corporation is required for any disposal of land by a registered social landlord.

3 An inquiry pursuant to paragraph 20(1) took place in 2000. The ensuing report was submitted to HC in March 2001. It concluded that there had been mismanagement of CLHC's affairs in a number of areas including G a complete lack of effectiveness in the work of the management committee, a lack of proper financial controls and a lack of proper day-to-day management and governance. It further concluded that CLHC was being mismanaged to such an extent that its assets and the welfare of its tenants were at risk unless urgent action was taken to address the failings of management and to bring good order to such fundamental tasks as H collecting rent and controlling expenditure.

4 The report was accepted by HC which was therefore satisfied that there had been mismanagement within the meaning of paragraph 27(1)(a). It considered that the appropriate course was to direct the transfer of CLHC's land to the Governors of the Peabody Trust ("Peabody"). Peabody

A is a large registered social landlord but it is not a co-operative. On 14 March 2002 the Secretary of State gave his consent to the proposal and on 20 March 2002 HC directed that the transfer should take place. CLHC issued an application for judicial review of HC's transfer direction and the Secretary of State's consent. That application was settled when HC agreed to reconsider the matter.

B **5** At some stage the problems of CLHC came to the notice of Tenants First Housing Co-operative ("TFHC"). TFHC is a large social landlord registered in Scotland. As such, its affairs are regulated by Communities Scotland, the statutory equivalent of HC in England. TFHC is also a housing co-operative. Indeed, it is the largest mutual co-operative housing association in the United Kingdom. In or about March 2002 it became interested in the possibility of a merger with CLHC. By April 2002 C CLHC had also become interested in such a merger. TFHC proposed a meeting with representatives of CLHC, HC and Communities Scotland to discuss the matter. HC did not think that such a meeting would serve any useful purpose. At that time the first application for judicial review had not been issued and HC was expecting that the transfer to Peabody would take effect.

D **6** Following the settlement of the first application for judicial review, it fell to HC to reconsider its position. By this time, the position of CLHC was that the finding of mismanagement was unchallengeable but it wanted to ensure that any transfer would be to another co-operative rather than to Peabody. On 24 June 2002 HC decided again that CLHC's land should be transferred because of the mismanagement. However, it agreed to a request from CLHC to defer the decision as to the identity of the transferee. The E perceived alternatives were a transfer of the land to Peabody under paragraph 27 of Schedule 1 or a transfer of CLHC's engagements to TFHC with the consent of HC under section 9(1) of the 1996 Act. The reasons for the deferral were to enable HC to consider with Communities Scotland the regulatory implications of a cross-border transfer to TFHC and to give CLHC and TFHC more time to refine their proposal. It was made clear that matters would not be allowed to drift and that rapid progress was F expected.

7 On 24 September 2002 HC decided upon a transfer to Peabody under paragraph 27 and against a transfer to TFHC. On 9 July 2003 the consent of the Secretary of State was communicated. Nevertheless HC gave further and final consideration to the matter at a board meeting on 24 July 2003. It concluded that there had been no material change since 24 September 2002 G and it confirmed the decision to direct a transfer to Peabody. Under the transfer Peabody would assume CLHC's liability for the repayment of a loan and would carry out remedial works on the housing stock.

8 The decision of 24 July 2003 gave rise to a second application for judicial review. Inevitably any challenge to the decision of 24 July 2003 would involve scrutiny of the decision of 24 September 2002 as well. Ouseley J refused permission to apply for judicial review following a H consideration of the papers. The application for permission was renewed before Stanley Burnton J who adjourned it and ordered that it be considered, together with the substantive hearing if permission were granted, at a single hearing. On 14 May 2004 Keith J granted permission but dismissed the substantive application. He refused permission to appeal to this court. On

29 June 2004 Buxton LJ refused permission to appeal and gave detailed reasons for so doing. However, permission to appeal was granted (save on one ground) by Auld and Jacob LJJ following a hearing on 28 July 2004.

9 The judgment of Keith J considered challenges under three broad headings. First, it was submitted on behalf of CLHC that a compulsory transfer to Peabody amounted to an unlawful interference with CLHC's rights under article 1 of the First Protocol to the Convention on Human Rights and Fundamental Freedoms in Part II of Schedule 1 to the Human Rights Act 1998 and/or contravened its right of association under article 11 of the Convention. Secondly, it was contended that the decision was made on the basis that the cross-border implications of the proposed merger with TFHC would create practical regulatory difficulties but HC had not observed the requirements of procedural fairness in that it had not given CLHC and TFHC an opportunity to discuss that issue with a view to resolving any difficulties. Thirdly, there was a specific challenge to the decision of 24 July 2003 to the effect that there had been no material change of circumstance since 24 September 2002. The case for CLHC was that between the two meetings there were concerns about Peabody's financial position which were known to officers of HC and ought to have been known to its board. As the board had placed reliance on Peabody's financial strength, this change in circumstances ought to have been considered and CLHC ought to have been given the opportunity to make further representations about it. Save for the issue under article 11, upon which permission to appeal was refused, the present appeal raises issues in relation to all three of the heads of challenge that were canvassed before Keith J. Although the grounds of appeal number six, in essence they fall under the same three headings.

10 Before considering the grounds of appeal, it is appropriate to set out the factual basis of the decision of 22 September 2002 upon which Keith J based his judgment. It is to be found [2004] EWHC 1084 (Admin) at [13]–[15]:

> "13. The board's approach was to compare the relative merits of a compulsory transfer of [CLHC's] housing stock to Peabody with the voluntary transfer of [its] engagements to [TFHC]. Thus, it took into account its belief that (a) public funding would be more at risk if [CLHC's] engagements were transferred to [TFHC] because of the 'relative financial strengths' of [TFHC] and Peabody . . . (b) Peabody would be more likely than [TFHC] to attract new public funding for the . . . housing stock from the London Borough of Newham . . . (c) tenants would have greater security as assured tenants of Peabody than as contractual tenants of a fully mutual co-operative . . . and (d) Peabody provided the board with the necessary level of certainty which the board required that it would be able to discharge its regulatory responsibilities, in view of its 'long history of working in Inner London, its financial strength and its commitment to tenant participation at Clays Lane', whereas [TFHC's] proposals did not give the board that level of certainty . . . The board recognised that a voluntary transfer of . . . engagements to [TFHC] 'would ensure continuing mutuality', but it noted that Peabody's proposal 'would also provide the opportunity for

A tenant involvement in the management and development of the housing stock' . . .

"14. The board was aware of problems about cross-border regulation which a transfer of . . . engagements to [TFHC] might raise, i e the transfer of housing stock in an area governed by one regulator [HC] to a body regulated by a different regulator (Communities Scotland). It noted that Communities Scotland had raised a number of regulatory concerns, B 'in particular those relating to control, policy, planning, risk management, and a complex governance framework . . . [and] about the potential impact on [TFHC] were its proposed transfer engagements to proceed' . . . The board also noted that the London Borough of Newham did not support the proposed transfer of engagements to [TFHC], but did support the transfer of the housing stock to Peabody . . .

C "15. Finally, the board had permitted counsel for [CLHC] to address it. It noted that he had submitted that it would be wrong for [HC] to consider the relative merits of the two proposals because the exercise was not a comparative one. The board did not agree . . . and to the extent that a compulsory transfer of its housing stock to Peabody amounted to an interference with its property rights and its rights of association . . . the board concluded that 'the public interest concerns in favour of a statutory D transfer were sufficient to justify' any such interference . . ."

I now turn to the grounds of appeal.

Issue 1: article 1 of the First Protocol

11 The primary question arising under this issue relates to the test to be E applied by the court when considering whether or not there has been a breach of article 1 of the First Protocol. Article 1 of the First Protocol provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by F the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

It is common ground that the part of article 1 which is engaged in the present G case is the second sentence. It is a "deprivation" case rather than a "peaceful enjoyment" or "use" case. The primary issue between the parties is as to the test which has to be applied when considering the justification for a deprivation. Keith J concluded [2004] EWHC 1084 (Admin) at [29]:

"What the board had to determine was whether a compelling case in the public interest had been established for the transfer of the . . . housing H stock to Peabody, having balanced the comparative benefits of the compulsory transfer of the housing stock to Peabody and a voluntary transfer of the housing stock to [TFHC], and [CLHC's] wish for the latter so that its members could continue to enjoy the benefits of a co-operative. If a comparison of the benefits and disadvantages of the two alternative options compellingly shows that the option which results in the

deprivation of property is much to be preferred, a compelling case for adopting that option in the public interest will have been established."

Keith J was satisfied that that was the test which the board had applied. In reviewing the board's decision he said, at para 30:

"It cannot be said that the board made the wrong judgment as to where the 'fair balance lay', nor can it be said that the board did not have rational grounds for concluding that the public interest in favour of a transfer to Peabody was such that it outweighed [CLHC's] right, subject to [HC's] consent, to dispose of its housing stock as it wished."

In a nutshell, the criticism which Mr Wolfe, on behalf of CLHC, makes of these passages is that they fail to apply a sufficiently rigorous test of proportionality, having regard to the decisions of the House of Lords in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 and *R v Shayler* [2003] 1 AC 247 and the decision of the Court of Appeal in *Samaroo v Secretary of State for the Home Department* [2001] UKHRR 1150.

12 It is appropriate to begin with a consideration of the origin and development of the test of "a compelling case in the public interest". Even before the Human Rights Act 1998 the courts of this country were alert to the need to scrutinise compulsory purchase orders with rigour. The most recent authority was *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117 in which it was held that for a compulsory purchase order to withstand challenge it must be demonstrated that the Secretary of State had rational grounds to conclude that a substantial public interest existed which outweighed the landowner's rights. After the enactment of the Human Rights Act 1998, but before it came into force on 2 October 2000, Sullivan J considered the implications of article 1 of the First Protocol in *Tesco Stores Ltd v Secretary of State for the Environment, Transport and the Regions* (2000) 80 P & CR 427. He said, at p 429:

"In very broad terms, the Convention requires that a fair balance must be struck between the public interest, in the present case in securing much needed redevelopment of the western sector . . . and an individual's right to the peaceful enjoyment of his possessions. Any interference with that right must be necessary and proportionate. Although the Human Rights Act 1998 does not come into force until 2 October, I am satisfied that for present purposes the Secretary of State's policy, as set out in Circular 14 of 94 that a compulsory purchase order should not be made unless there is 'a compelling case in the public interest', fairly reflects that necessary element of balance."

Soon after the coming into force of the Human Rights Act 1998 Harrison J expressly approved that approach in *Bexley London Borough Council v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323 at [46].

13 There is no doubt that these decisions were informed and influenced by the decision of the European Court of Human Rights in *James v United Kingdom* (1986) 8 EHRR 123. The issue in that case related to the impact of article 1 of the First Protocol on the rights of tenants under the Leasehold

Reform Act 1967 to acquire the freehold of their properties at a price below market value. The court identified the aim of the 1967 Act as being the remedying of an injustice whereby a long leaseholder who may have expended large sums of money improving and maintaining his property was required to return the property to the lessor at the end of the lease without compensation. The court observed, at p 145, para 50: "there must . . . be a reasonable relationship of proportionality between the means employed and the aim sought to be realised." It then set out and rejected the landlord's case in the following passage, at p 145, para 51:

> "According to the applicants, the security of tenure that tenants already had under the law in force provided an adequate response and the draconian nature of the means devised to give effect to the alleged moral entitlement, namely deprivation of property, went too far. This was said to be confirmed by the absence of any true equivalent to the [Leasehold Reform Act 1967] in the municipal legislation of the other contracting states and, indeed, generally in democratic societies. It is, so the applicants argued, only if there was no other less drastic remedy for the perceived injustice that the extreme remedy of expropriation could satisfy the requirements of article 1. This amounts to reading a test of strict necessity into the article, an interpretation which the court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving a legitimate aim being pursued, having regard to the need to strike a 'fair balance'. Provided the legislature remained within these bounds, it is not for the court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way. The occupying leaseholder was considered by Parliament to have a 'moral entitlement' to ownership of the house, of which inadequate account was taken under the existing law. The concern of the legislature was not simply to regulate more fairly the relationship of landlord and tenant but to right a perceived injustice that went to the very issue of ownership. Allowing a mechanism for the compulsory transfer of the freehold interest in the house and the land to the tenant, with financial compensation to the landlord, cannot in itself be qualified in the circumstances as an inappropriate or disproportionate method for readjusting the law so as to meet that concern."

This approach was followed in *Holy Monasteries v Greece* (1994) 20 EHRR 1 and *Chassagnou v France* (1999) 29 EHRR 615. It was also followed by Lightman J in *R (Fisher) v English Nature* [2004] 1 WLR 503, in which *James v United Kingdom* was cited by the judge, at para 46, as authority for the proposition that "The fact that there may be other even better methods of achieving the same ends does not necessarily mean that any particular measure is disproportionate under article 1". It is evident that in the present case Keith J founded his conclusion on this line of authority.

14 Mr Wolfe submits that, in the light of other authority, Keith J was wrong to approach proportionality in the context of article 1 of the First Protocol on a less rigorous basis than is generally required when considering breaches of Convention rights. He relies on *Daly's* case [2001] 2 AC 532,

Shayler's case [2003] 1 AC 247 and *Samaroo's* case [2001] UKHRR 1150, none of which was specifically concerned with article 1 of the First Protocol, but which, it is suggested, have mapped out general principles of proportionality where Convention rights are in issue.

15 In *Daly's* case [2001] 2 AC 532, para 27 Lord Steyn said:

> "The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'"

Mr Wolfe emphasises the "no more than . . . necessary" requirement. In *Shayler's* case [2003] 1 AC 247, para 77, Lord Hope of Craighead adopted a passage from an article by Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 679. Professor Jowell described proportionality in this way:

> "It starts by asking whether the breach is justifiable in terms of the aims it seeks. Some Convention rights can only be violated for a specific purpose (such as national security) and therefore other aims would not be legitimate, whatever their rationale. It then proceeds to consider whether in reality those aims are capable of being achieved. Spurious or impractical aims will not suffice. It then goes on to consider whether less restrictive means could have been employed. The breach must be the minimum necessary. Finally it asks whether the breach is necessary (not merely desirable or reasonable) in the interest of democracy. Only a 'pressing social need' can justify the breach of a fundamental right."

Again, Mr Wolfe emphasises consideration of whether "less restrictive means could have been employed" and the requirement that "the breach must be the minimum necessary".

16 In *Samaroo's* case [2001] UKHRR 1150 the issue related to impact of deportation upon Mr Samaroo's rights under article 8 of the Convention. Dyson LJ said, at paras 19–20:

> "19. . . . in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?"
>
> "20. At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"

17 All this leads Mr Wolfe to submit that whilst there must be "a compelling case in the public interest" to justify a deprivation of property,

A that is a necessary but not a sufficient test. It must also be established that the chosen course of action is "the least interfering with human rights, having regard to the public benefit to be achieved and the different means of achieving it". That this applies as much in relation to article 1 of the First Protocol as it does to other Convention rights is illustrated by the observation of Dyson LJ in *Samaroo's* case [2001] UKHRR 1150, para 17, that "it is clear that what Lord Steyn said about proportionality"—in *Daly's*
B case—"was intended to be of general application". An illustration of this is to be found in the decision of Mr Nicholas Blake QC sitting as a deputy judge of the High Court in *R (Baker) v First Secretary of State* [2003] EWHC 2511 (Admin). The latter was a case concerning compulsory acquisition of a house deemed to be statutorily unfit for habitation. The deputy judge said, at para 45:

C

> "Proportionality is not simply whether at the end result the balance is fair, but whether, in getting there, it has been decided that the most appropriate course of conduct is also the least interfering with human rights, having regard to the public benefit to be achieved and the different means of achieving it."

D On this basis, it is suggested that the board of HC and Keith J failed to ask the right question. It was not enough to decide in favour of Peabody and against TFHC simply because a compelling case in the public interest had been established. It was necessary also to consider whether such a decision was the least intrusive of CLHC's rights under article 1 of the First Protocol. That in turn required a consideration of the relative intrusiveness of a decision in favour of Peabody and a decision in favour of TF but that was
E never carried out by the board or by Keith J, who specifically rejected such an approach.

Discussion

18 If I may begin with a statement of the obvious, this court is bound by decisions of the House of Lords and by previous decisions of this court.
F Accordingly, *Daly's* case [2001] 2 AC 532, *Shayler's* case [2003] 1 AC 247 and *Samaroo's* case [2001] UKHRR 1150 are binding upon us, provided that their rationes apply to the circumstances of the present case. So far as *James v United Kingdom* 8 EHRR 123 and other decisions of the European Court of Human Rights are concerned, we are enjoined by section 2 of the Human Rights Act 1998 to "take [them] into account". We of course accord them the utmost respect. However, if it be the case that binding decisions
G of domestic courts impose an additional or more rigorous test of proportionality than is required by *James v United Kingdom*, then that additional or more rigorous test will fall to be applied by this court. Thus, if the correct analysis is that Strasbourg jurisprudence applies a less rigorous test of proportionality in the context of article 1 of the First Protocol than it applies in the context of other Convention rights but the House of Lords and previous decisions of the Court of Appeal demand a more rigorous test and
H one which equiparates to that applicable in the context of other Convention rights, then we must apply the more rigorous test, over and above the Strasbourg test. It is no doubt on this basis that Mr Wolfe refers to the Strasbourg (*James v United Kingdom*) test as necessary but not sufficient in English law.

19 The first ground of appeal is that the judge fell into error in identifying the correct test. Mr Wolfe submits that the existence of a "compelling case in the public interest" is a necessary but not a sufficient condition and that the requirements of proportionality inherent in article 1 of the First Protocol are such that if the objective in question can be met by measures which interfere less with individual rights, then those measures must be preferred. His argument is that, whatever domestic and Strasbourg authority had decided about proportionality in the context of the second sentence of article 1 (and I shall come to that), the approach which must now prevail is that propounded by the House of Lords in *Daly's* case [2001] 2 AC 532 and *Shayler's* case [2003] 1 AC 247. Although *Daly's* and *Shayler's* cases were not cases in which article 1 of the First Protocol was engaged, the principles there propounded are, submits Mr Wolfe, applicable to all cases in which Convention rights and proportionality are in issue. Clearly, this raises an important point of principle and it is necessary to consider it in some detail.

20 The centre piece of the Strasbourg jurisprudence on this point is *James v United Kingdom* 8 EHRR 123. The European Court of Human Rights, at para 51, plainly rejected a test of "strict necessity" and emphasised "the need to strike a 'fair balance'" in relation to article 1 of the First Protocol. The speech of Lord Steyn in *Daly's* case [2001] 2 AC 532, para 27, adopts the language of "no more than . . . necessary to accomplish the objective". Although *Daly's* case concerned article 8 it was no doubt because it has been authoritatively applied more generally, and specifically to article 1 of the First Protocol (see *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, per Simon Brown LJ, at para 51) that Mr Stanley accepted in the course of his submissions that "necessity" is a requirement of proportionality in the present case. His point is that "necessity" is a more flexible concept than the "strict necessity" that was rejected in *James v United Kingdom*. In particular, he submits, it does not compel and is not to be equated with the least intrusive option. To this extent, he seeks to distinguish *Samaroo's* case [2001] UKHRR 1150, another article 8 case.

21 That *Samaroo's* case is not of universal application has been accepted by this court in *Lough v First Secretary of State* [2004] 1 WLR 2557, which was concerned with the application of article 8 and article 1 of the First Protocol to a grant of planning permission. Pill LJ said, at para 49:

> "The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson LJ in *Samaroo's* case [2001] UKHRR 1150 . . . is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson LJ does not require, nor was it intended to require that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must, however, be considered in the context of article 8, and a balancing of interests is necessary . . . Dyson LJ

A stated, at para 26: "It is important to emphasise that the striking of a fair balance lies at the heart of proportionality.'"

Keene LJ agreeing, said, at para 55:

> "the process outlined in *Samaroo's* case, while appropriate where there is direct interference with article 8 rights by a public body, cannot be
B applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality."

I interpret this as signifying that what is "necessary" is driven by the balancing exercise rather than by a "least intrusive" requirement.

C **22** There is nothing new about interpreting the word "necessary" in a less than absolute way. In *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48, the European Court of Human Rights observed that, in the context of article 10(2), "the adjective 'necessary ' . . . is not synonymous with 'indispensable'". It compared the position with that arising under article 6(1) where the words are "strictly necessary" and article 2(2) ("absolutely necessary"). It seems to me that it was these more rigorous tests
D that were rejected by the court in *James v United Kingdom* 8 EHRR 123 in the context of article 1 of the First Protocol.

23 As the word adopted by Lord Steyn in *Daly's* case [2001] 2 AC 532 was "necessary" and not "strictly necessary", I conclude that there is no real inconsistency between *Daly's* case and *James v United Kingdom*. They both allow "necessary", where appropriate, to mean "reasonably", rather than
E "strictly" or "absolutely" necessary. Everything then depends on the context because, as Lord Steyn reminds us, at para 28: "In law context is everything." In the present context, I do not regard what Lord Hope said in *Shayler's* case [2003] 1 AC 247 as having been intended to go further than Lord Steyn had gone in *Daly's* case.

24 I therefore focus on the context in this case. It is not a case of naked property deprivation. It is common ground that the decision of 24 June
F 2002 that there should be a transfer by reason of mismanagement of CLHC is unassailable. The context is one wherein a statutory regulator, HC, having unobjectionably decided upon a transfer, then had to choose between two alternatives, Peabody or TFHC. It chose Peabody.

25 In my judgment, the task in which HC was engaged was wholly different from the task of the Secretary of State in *Samaroo's* case [2001]
G UKHRR 1150. Having lawfully decided that there would have to be a transfer, the decision was then one between two proferred alternatives. Although not in every respect the same as a planning decision, it approximated to what Keene LJ was describing in *Lough v First Secretary of State* [2004] 1 WLR 2557, para 55, namely "a situation where the essential conflict is between two or more groups of private interests". I conclude that the appropriate test of proportionality requires a balancing exercise and a
H decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If "strict necessity" were to compel the

"least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as *Lough v First Secretary of State* and the present case.

26 Where does this leave this ground of appeal? By accepting that there is a requirement of "reasonable necessity", I am adding to the test formulated by Keith J but rejecting the more demanding approach advocated by Mr Wolfe. What then has to be considered is whether the challenged decisions are vitiated by the application of the enlarged test.

27 It is clear from the minutes that HC did not apply the test advocated by Mr Wolfe—they expressly rejected it. What the board did was to explore "the public interest considerations of both options". It compared them. It concluded: "the TFHC proposals did not provide the necessary level of certainty that the board required in order to properly discharge its regulatory responsibilities in the public interest" whereas "a statutory transfer to Peabody would provide the certainty that it required". It further considered that any interference with the right enshrined in article 1 of the First Protocol was "lawful, in the public interest and proportionate".

28 Whilst it cannot be said that HC consciously and specifically applied the whole of the test which I have concluded is the appropriate test of proportionality in this context, I am entirely satisfied that, if it had done so, it would have come to the same conclusion and for the same reasons. I regard that as inevitable in the light of the language of the minutes and the material that was before the board. Accordingly, although I am differing from Keith J as regards the appropriate test, I would not allow the appeal on this ground.

Issue 2: regulatory concerns

29 This ground of appeal relates to the way in which HC considered the implications of dual, cross-border regulation and the extent to which it permitted CLHC to make representations on the subject. In his skeleton argument, Mr Wolfe puts his case in this way:

> "In essence, (1) the HC's concerns about the practicality of regulation were an important factor in its decision; and (2) the HC failed to explain those concerns to CLHC and TFHC or to give them a reasonable opportunity to deal with them, by meeting to discuss them."

The first of the enumerated points takes issue with the following conclusion of the judge [2004] EWHC 1084 (Admin) at [38]:

> "Since the legal and practical problems said to have been posed by [TFHC's] presence in Scotland, though referred to at the meeting on 24 September 2002, did not play, on my reading of the minutes, any part in the board's ultimate decision to direct the transfer of [CLHC's] housing stock to Peabody, the challenge to the board's decision on this topic must fail."

A Before this court it is common ground that the implications of dual, cross-border regulation were of concern to the HC and did play a part in the board's ultimate decision. To that extent the judge was in error in stating otherwise. However, the real issue is whether HC failed to comply with the requirements of procedural fairness when considering the problem. Mr Wolfe relies on the common law requirement of procedural fairness and also article 1 of the First Protocol which has a procedural component: see
B *Jokela v Finland* (2002) 37 EHRR 581, para 45. However, I perceive no significant difference between the requirements of the common law and of the First Protocol in this regard. His complaint is that HC failed to comply with the requirements of procedural fairness in that it did not communicate its concerns to CLHC with sufficient clarity and it did not hold a meeting with CLHC's representatives to enable those concerns to be considered. In
C order to address these points it is first necessary to refer to more of the factual background.

30 On 20 June 2002 HC's solicitors wrote to CLHC's solicitors. Having just received advice from leading counsel, HC's solicitors expressed the view that, whilst the legislation does not forbid a transfer of engagements by an English co-operative to a Scottish co-operative, "there is . . . real
D difficulty as regards the regulatory framework if that were to happen". They added:

> "The problem is the exercise of what are very similar regulatory functions in respect of the same body by two separate regulators . . . In summary, there are potentially inconsistent regulatory actions or approaches in relation to the same [registered social landlord], and inevitable administrative complexity which will be involved in 'dual'
E regulation."

These are extracts from a lengthy letter which went into some detail before inviting comment. Six days later HC's assistant chief executive wrote to CLHC referring to "unique regulatory problems" arising from the cross-border implications. The letter communicated a decision in the form of a
F resolution of the board that there should be a transfer following the findings of the statutory inquiry but the question whether it should be to TFHC or to Peabody should be deferred to enable HC to assess the regulatory implications in concert with Communities Scotland and to allow CLHC more time "to work up their proposals". It was made clear that the matter would not be allowed to drift and that there must be "a strong commitment to rapid progress from all parties".

G 31 On 11 July HC's solicitors wrote to CLHC's solicitors chasing them for a reply to the letter of 20 June. They said: "we have heard nothing, apart from the brief statement by counsel instructed by your firm that it is not a 'significant problem' as it is . . . merely 'an administrative challenge'." The reference to the statement by counsel relates to the board meeting of HC which had taken place on 22 June and which had been attended by
H members of CLHC, its solicitor and counsel (in fact, Mr Wolfe), who had been permitted to address the board.

32 CLHC's solicitors wrote to HC's solicitors on 16 July. They took the position that the regulators should resolve any practical difficulties between them, "with appropriate consultation with our clients" and TFHC. On the same day, HC's assistant chief executive wrote to CLHC, stating that

Communities Scotland "share our serious concerns" and referring to doubt about compliance with the legislation. On 17 July HC's solicitors wrote to CLHC's solicitors, noting their letter of 16 July and adding: "We presume you have nothing further to add as to the substance" of the concerns about regulation. This prompted a reply dated 19 July which expressed the view that "it ought to be possible for the parties to [reach] a sensible agreement regarding the practicalities of regulation". On 12 August CLHC's solicitors wrote again but concentrated more on the legality of cross-border regulation rather than any practical difficulties. On 5 September HC's solicitors said that HC "cannot lawfully give its consent" to a transfer to TFHC—a proposition with which CLHC's solicitors took issue in a letter dated 9 September. By this time there was a further board meeting arranged for 24 September. On 13 September HC's solicitors wrote to CLHC's solicitors informing them that the meeting would be requested to consider the position on the assumption that there was no statutory impediment. They reiterated the view that "regulatory difficulties" remained. This again prompted the reply that any regulatory difficulties should be resolved between the regulators but that CLHC and TFHC remained ready to meet with the regulators "to discuss ways of resolving any perceived difficulties".

33 In advance of the meeting of 24 September, CLHC and its representatives were given notice of the concerns about dual regulation. HC's officer's report, of which CLHC had sight, said:

> "it is also relevant for the board to consider whether it believes it will be possible to achieve satisfactory arrangements for the dual regulation of a single legal entity operating on both sides of the border. The board needs to consider whether it will be possible to put in place satisfactory arrangements on fundamentally important issues such as the protection of the public funding invested in the housing stock at CLHC, or the protection of the interests of CLHC's tenants. It also needs to consider the danger of potentially inconsistent and contradictory regulatory action and the administrative and legal complexity involved in dual regulation by [HC] and Communities Scotland. Solicitors acting for CLHC have argued that these concerns could be overcome through negotiation and agreement between [HC] and Communities Scotland *following any transfer of engagements*." (Emphasis added.)

It also disclosed a letter from Communities Scotland dated 10 September stating that "we remain unclear about the issue of dual regulation and whether this is (a) legally possible or (b) practicable".

34 The board meeting took place on 24 September. Mr Wolfe was again permitted to address the board. The transcript discloses that he encouraged it to proceed on the assumption that a transfer to TFHC would be lawful. He does not appear to have referred to practical difficulties. Understandably, he and others were more concerned about the business case which took up most of the available time. The minutes of the meeting record that "very serious reservations would remain about [HC's] ability to discharge its statutory responsibilities as regulator effectively" following any transfer to TFHC. The board resolved to direct CLHC to make a statutory transfer to Peabody and to authorise officers to seek the consent of the Secretary of State.

A 35 Does this history demonstrate a lack of procedural fairness? In my judgment, it does not. I am prepared to accept that it was incumbent upon HC to make known to CLHC its concerns about dual regulation and to give due consideration to any representations made by CLHC. I do not accept that it was obligatory to meet with CLHC's representatives for this purpose. We have not been referred to any authority which goes that far. In any event, there *was* a meeting in this case, in particular that of 24 September. It was B preceded by disclosure of HC's concerns, together with those of Communities Scotland. CLHC was able to make representations in writing and at the meeting through counsel. It adopted the position that any practical problems could be resolved later, after a decision in its favour. It made no complaint about a lack of opportunity to make representations. There was no such lack.

C 36 Mr Wolfe submits that HC was shifting its ground in such a way as to render it difficult to make effective representations. I do not accept this submission. By 24 September HC was no longer taking a point about legality. It was prepared to assume it, as CLHC accepted. We are invited to conclude that there was a muddying of the waters and that it was unclear whether the remaining concerns went to "practicalities" or "effectiveness". D This is a distinction which has been iterated by both Mr Wolfe and Mr Stanley. In my judgment, it is a distinction without a difference or a sterile exercise in semantics.

37 I am wholly unpersuaded that there was any procedural unfairness in the way in which HC dealt with its reasonable concerns about the regulatory implications of CLHC's proposals.

E *Issue 3: Peabody*

38 The minutes of the board meeting of 24 September 2002, at which HC resolved to direct a transfer to Peabody, disclose that a factor taken into account was the financial position of Peabody. They state:

> "The £5·6m of public funding would be at more risk on TFHC's balance sheet, because of the relative financial strengths of the two F registered social landlords. [The board] further noted Peabody's . . . financial strength . . ."

As a regulatory body, HC is engaged in informing itself about the position, including the financial position, of its regulated subjects. It carries out assessments, the results of which are categorised as green, amber or red under a "traffic lights" system. At the time of the decision of 24 September G 2002, the current assessment of Peabody's financial position was dated 24 February 2002. It stated: "Financial performance has been satisfactory and we have no concerns regarding the financial health of this association." That remained the current assessment until 1 September 2003, when a further assessment resulted in Peabody remaining in the green category but in a lower sub-category which meant that its "financial condition is H presently acceptable but exposures exist which make it vulnerable to deteriation." The September 2003 assessment described the position as follows:

> "Whilst the financial position is acceptable, there are areas of potential vulnerability. However, the group operates in areas where demand for

housing is likely to remain high and it has a strong asset base. It will also benefit financially from the impact of rent restructuring. A key challenge facing [Peabody] is the condition of its stock and the costs involved in meeting the Decent Homes Standard, with the age of the stock being a major factor. An updated asset management strategy is being prepared and the associated costs will feed into the next business planning round. Any significant increase in costs could affect the financial position adversely. Another challenge is [Peabody's] need to make continued efficiency savings in operational costs year on year."

39 There ensued a dialogue between officers of HC and Peabody. It embraced meetings on 18 November 2003 and 29 January 2004. As a result, HC published a further assessment of Peabody on 5 February 2004. It relegated Peabody from the green category to the higher of two amber sub-categories. An amber categorisation signifies "some material concerns about performance, resulting in regulatory action above the minimum". It seems that the requirements of the Decent Homes Standard were proving to be more expensive than had been anticipated, as a result of which Peabody "has . . . accepted the need for a substantial change in its business strategy in order to focus the necessary resources on improving its existing stock". Remedial measures were being undertaken. However, the assessment would remain amber "until the trust is demonstrating delivery of the planned savings in 2004/05 and progress is being made in delivering the new asset management strategy". All this reflected news and comment which had appeared in the housing press in late 2003 and early 2004.

40 It follows from this chronology that at the time of HC's original decision in favour of Peabody on 24 September 2002 and at the time of its decision of 24 July 2003 that there had been no material change of circumstances to cause it to alter its earlier decision, the assessment of Peabody's financial position remained in the green category. Indeed, the reassessment of September 2003 was still green, the reduction to amber only taking place in February 2004.

41 The complaint which Mr Wolfe seeks to advance on behalf of CLHC is that the decision of 24 July 2003, confirming a transfer to Peabody, was vitiated by a mistake of fact. He seeks to fit the facts into the principle formulated in *E v Secretary for the Home Department* [2004] QB 1044, in which Carnwath LJ, giving the judgment of the Court of Appeal, said, at para 66:

"In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result . . . Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are . . . First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

A Although the present case involves a regulatory decision and not a statutory appeal, Mr Stanley, rightly in my view, is content to accept that, as a matter of law, the principles articulated by Carnwath LJ are capable of applying in the present context.

42 On the face of it, Mr Wolfe's submission is somewhat bold, as it appears to challenge the decision of 24 July 2003 by reference to material which only came into existence significantly after that date. However, this is B how he puts it in his skeleton argument:

> "62. [The] approach and assessment was entirely based (at least from the point of view of the HC's board—which took the decision—and the Secretary of State) on the understanding that there was nothing which cast any doubt at all on Peabody's financial strength.
>
> "63. In fact there was such information. Not information which C would suggest that Peabody is/was financially *in*secure in absolute terms . . . but information which *might* . . . have led the board and/or [the] Secretary of State to shift the balance in relation to relative financial strength and thus . . . where the overall balance in the decision-making process lay.
>
> "64. The information in question was known to the HC's officers, but D not disclosed to the board, or the Secretary of State or CLHC . . .
>
> "65. As a result, the board made its decision ignorant of a material fact, namely the existence of material which might shift the balance of relative financial strength . . .
>
> "66. The threshold is whether the HC's view on *relative* financial strength might have been different, which plainly it might. And the court is not in a position to say that it would not have been." (Original E emphasis.)

I am bound to say that these submissions, which were reiterated with confidence before us, are, in my judgment, utterly unsustainable. They are built upon the proposition that HC's officers were in possession of material before July 2003 but failed to disclose it to the board. The thread upon which this proposition hangs is that the assessment of September 2003, F which kept Peabody in the green category but on the basis that "exposures exist which make it vulnerable to deterioration", was based on material which was derived at least in part from contacts, meetings and reviews to which HC officials had been party in 2002 and the first half of 2003. The September 2003 assessment says as much. However, that takes the submission nowhere. The clear evidence is that Peabody retained green G status in September 2003 on the basis of the totality of information then in possession of HC. The witness statement of Adrian Rowland, a senior adviser in the employment of HC, makes it clear that the subsequent relegation of HC to amber in January 2004 was the result of the asset management strategy pursued after 1 September 2003 and meetings held between HC officials and Peabody between September 2003 and 29 January 2004. H

43 In these circumstances, it simply cannot be said that on 24 July 2003, the board was mistaken as to an existing and established fact, in the sense of *E v Secretary of State for the Home Department* [2004] QB 1044. Moreover, the matter does not rest there. The respective accounts of Peabody, CLHC and TFHC show just why there were no material concerns

about Peabody's viability as a transferee and why the balance of relative financial strength inevitably favoured Peabody. It is a large organisation with net assets of £481m as against TFHC's £18m. It has resources of £105m as against £4m; a turnover of £79m as against £3m. On any basis, the consideration that Peabody had relative financial strength, was not put in the balance in a way that could possibly be described as unfair. For these reasons I reject Mr Wolfe's submission and this ground of appeal. I also reject his associated submission that CLHC was treated unfairly because HC did not disclose its concerns to CLHC as and when they arose so as to enable CLHC to make further representations on relative financial strength. Again the chronology of events does not accommodate that submission and, in any event, I am unpersuaded that HC, as regulator, is under any obligation to canvass the views of representatives of one body upon the financial position of another—at least not in the circumstances of this case.

Conclusion

44 I find no merit in any of the grounds of appeal which I have grouped under three headings or issues. I would dismiss the appeal.

WALLER LJ

45 I agree. I also agree with the judgment of Brooke LJ which follows and which I have read in draft.

BROOKE LJ

46 I also agree with the judgment of Maurice Kay LJ.

47 So far as the second issue is concerned, HC's solicitors spelt out to CLHC's solicitors in some detail in their letter dated 20 June 2002 the nature of the regulatory concerns which their client's proposal had engendered. They explained that the broad intention of the relevant statutory provisions was for HC to regulate English bodies registered by it as social landlords, for the Secretary of State to perform the same functions in Wales, and for the Scottish ministers to perform them in Scotland. There was nothing on the face of paragraph 12 of Schedule 1 to the Housing Act 1996 to prevent HC from giving its consent to a transfer of engagements to a Scottish registered society, but on a transfer of engagements the transferee is deemed to be "registered as a social landlord" upon the transfer taking effect: see paragraph 12(3) of Schedule 1.

48 They were not aware of anything in the relevant provisions which expressly prevented HC registering a Scottish body as a registered social landlord. The "real difficulty" they identified would arise if HC registered such a transferee body when it was also a registered social landlord for the purposes of the Housing (Scotland) Act 2001. Two separate regulators would then be exercising very similar regulatory functions in respect of the same body. This constituted a problem.

49 It might be argued that HC's regulatory functions should be regarded as applying only to the activities of TFHC as regards land held by it in England. But what if HC wished to exercise its regulatory power to appoint a committee member to TFHC because of some concern about its management of land in England, and the Scottish ministers were not willing to agree? Although in theory HC might take unilateral regulatory action, disagreement with the other regulator would clearly be unsatisfactory.

Similar difficulties would arise if HC were willing to consent to a proposed change to TFHC's rules, but the Scottish ministers were not. HC's solicitors ended their letter by saying that there was real doubt as to whether such a transfer would be compatible with the statutory scheme contained in the Housing Act 1985 and the Housing Associations Act 1985. They invited CLHC's solicitors to consider these issues with their client and to convey their views on the matters raised in their letter as soon as possible.

50 At HC's special board meeting on 22 June 2002, which was attended by representatives of CLHC and TFHC and junior counsel for CLHC, counsel's initial submissions understandably did not engage the detailed points raised in this very recent letter. At the end of that meeting, however, these points were specifically raised, and after discussing the matter with his clients Mr Wolfe said: "That is obviously again something which will need to be worked up in discussion between [HC, CLHC, TFHC] and Communities Scotland. So there is another process to be gone through there."

51 It was this face to face discussion which led to HC's letter dated 26 June 2002 to which Maurice Kay LJ has referred in para 30 of his judgment. HC's letter dated 16 July then put CLHC on express notice that HC had honoured its undertaking to assess the regulatory implications in concert with Communities Scotland. The writer said in terms:

> "You are, of course, already aware that [HC] had serious reservations about the regulatory implications of the proposed transfer of engagements to TFHC. Since I last wrote to you, we have continued to explore these issues with our lawyers, and we have commenced our dialogue with Communities Scotland. We await a response to the letter from [HC's] solicitors to [CLHC's] solicitors dated 20 June 2002, in which we asked them to explain how the many regulatory difficulties which we perceive could be overcome. Given that our colleagues at Communities Scotland share our serious concerns, it is, I think, essential that we receive a very early and satisfactory response to that letter, particularly as we now have some doubt that (notwithstanding our satisfaction that the [Industrial and Provident Societies Act 1965] would not prevent what is being proposed) when read together, the English and Scottish legislation actually enables [HC] to consent to the de facto registration of a Scottish registered social landlord. You will appreciate that unless you are able to rapidly satisfy those regulatory concerns there would seem to be little point in your committing time and expense in pursuing your proposals."

52 This strongly worded letter from HC to CLHC crossed with the letter of the same date from CLHC's solicitors which Maurice Kay LJ mentions at the start of para 32 of his judgment. It is clear that the solicitors simply had not engaged properly with the formidable difficulties which dual regulation might create when they referred to the fact that it seemed to be common ground that there was nothing legally to prevent the proposed transfer, followed by the registration of TFHC as a registered landlord in England, and continued:

> "It appears, therefore, that any difficulties which might arise would be practical rather than legal, and would involve co-ordination between the respective regulators. It is not unreasonable to expect the regulators to

resolve such matters between them, with appropriate consultation with our clients and [TFHC]. Our client's counsel submitted to the board that the existence of practical difficulties would not be a good reason for refusing consent for such a transfer and instead directing transfer to Peabody. In its letter of 26 June [HC] indicated that it would assess the regulatory implications of the proposed transfer in concert with Communities Scotland. We look forward to hearing from you further when your clients have made some progress on this aspect of the matter."

Unknown to the writer, this point had been dealt with by HC's letter to CLHC of the same day, which placed the ball firmly back in CLHC's court.

53 In para 32 of his judgment, Maurice Kay LJ has summarised the effect of the ensuing correspondence. On 9 September CLHC's solicitors again dwelt on issues concerned with the legality of cross-border regulation. By their response dated 13 September HC's solicitors could not have made their client's position clearer:

"we would refer you to our letter to you of 20 June as to the regulatory aspects. We have had no substantive reply in relation to the concerns raised in that letter. Our client's position is that there is real doubt as to whether the board has power to consent to a transfer of engagements to a Scottish society under the statutory scheme, particularly given the 'dual' regulation by two regulators that this would involve. But in any event, even if the power to give the consent is available in principle, the board has to consider whether it is appropriate to exercise that power in view of, inter alia, the regulatory difficulties."

54 They ended their letter by saying that at the forthcoming meeting on 24 September the board would be requested to consider the position on the assumption that they did have the power in principle to accede to the transfer of engagements. They said that they would supply "shortly" a paper by HC's officers which would be considered by the board.

55 This elicited the response dated 17 September from CLHC's solicitors which once again did not engage the real difficulties that were inherent in dual regulation. They reiterated their view that "any regulatory difficulties could and should be resolved by constructive discussion between the regulators and the two co-operatives" and sought to transfer the onus onto HC's officers to liaise with CLHC, TFHC and Communities Scotland to arrange a meeting.

56 As Maurice Kay LJ shows in para 33 of his judgment, HC's deep concerns about the practicality of dual registration were ventilated once again in their officers' paper which was sent to CLHC's solicitors with the other board papers seven days before the meeting fixed for 24 September. In this paper HC's worries about the possibility of achieving satisfactory arrangements on issues like the protection of the public funding invested in CLHC's housing stock or the protection of the interests of CLHC's tenants were also brought to the surface.

57 These difficulties were simply not addressed in the submissions made by counsel for CLHC at the meeting on 24 September. He seems to have adopted a lawyerly approach that if a transfer was assumed to be legally possible—and HC was willing to proceed on the assumption that it would be lawful—then HC's very real concerns about the practicality of dual

regulation, of which his clients had had full notice for over three months, could somehow or other be resolved amicably in due course.

58 I have recited the history in some detail because it seems to me to be far-fetched for CLHC and their advisers now to be suggesting that they were prejudiced by some procedural irregularity. They knew perfectly the nature of HC's very understandable practical concerns about the feasibility of dual regulation and they simply did not address their minds towards propounding solutions to them which would have set HC's mind at rest. Cross-border questions have always had the potential to create practical difficulties, under different legislative schemes for England and Scotland, long before the new arrangements for devolved government came into effect, and when CLHC chose to seek a future in an association with a Scottish mutual co-operative, it should not have taken much imagination to see that there could be serious practical difficulties of the type HC's solicitors identified in their letter of 20 June. I therefore consider that there is no merit at all in this ground of appeal.

59 As to the third issue, it was in my judgment absurd for CLHC to contend that matters known to HC's officers about Peabody's finances prior to 24 July 2003 should have been disclosed to CLHC. It would be sad if the greater transparency with which HC now conducts its regulatory functions were to lead to a state of affairs in which the courts required disclosure of this kind at a time when HC's officers were still willing to give Peabody a green light in its traffic lights system. I agree so completely with what Maurice Kay LJ says in paras 42 and 43 of his judgment, that I do not wish to add anything to what he has said. As with the second issue, I found Mr Wolfe's arguments on behalf of CLHC to be wholly unsustainable.

60 For these additional reasons on the second and third issues, together with the reasons given by Maurice Kay LJ, with which I agree, I too would dismiss this appeal.

Appeal dismissed.
Permission to appeal refused.

24 February 2005. The Appeal Committee of the House of Lords (Lord Hoffmann, Lord Scott of Foscote and Lord Walker of Gestingthorpe) dismissed a petition by the claimant for leave to appeal.

Solicitors: Bindman & Partners; Trower & Hamlins.

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