Brighton & Hove City Council Community Infrastructure Levy Charging Schedule Examination

Examination in Public

Written Statement

Part 1 – Residential applies to C3 use class

Moda Living Limited

March 2019

Turley

Contents

Date
March 2019

1. Response to Examiner's Questions

1.1 This written statement is submitted on behalf of Moda Living Limited in response to the 'Part One' questions posed by the Examiner within the Draft Hearings Programme.

Examiner's Questions: Part One – Residential applies to C3 use class

Are the 3 local levy rates and zones for Residential (Use Class C3) Zone 1- £175sqm, Zone 2 - £150sqm and Zone 3 - £70sqm, justified by appropriate available evidence, having regard to national guidance, local economic context and infrastructure needs, including in relation to the various adopted and emerging planning policies for Brighton & Hove?

1.2 No. Planning Practice Guidance (PPG) for CIL[1] requires that the available evidence base for a charging schedule must be robust[2], prepared in accordance with PPG and national planning policy[3], and must ensure that the charging authority can demonstrate that the proposed rates will positively contribute to implementation of the relevant plan and support development across the area[4] in accordance with the regulatory requirements (notably Regulation 14[1])[5].

1.3 The available evidence fails to meet any of these requirements.

1.4 The submitted *CIL Draft Charging Schedule Statement of Modifications* ('CIL DCS SoM')[6] is unsound and should not be recommended for adoption by the Examiner in its present form for the reasons set out in this statement.

Substantial Inconsistency between CIL Rates and Evidence Base

1.5 Firstly, PPG confirms plan makers should undertake site-specific viability assessment for sites that are critical to delivering the strategic priorities of the relevant plan[7].

1.6 In seeking to rectify this prior deficiency[8], paragraph 2.1.18 (p.11) of the *CIL – Viability Addendum 2 – Further Update November 2018*[9] ('CILVA2') confirms that DSP were requested by B&HCC to model typologies of the type and scale of site allocations identified within the draft City Plan Part Two[10], including SSA4 Sackville Trading Estate and Coal Yard (c. 500 dwellings)[11].

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[1] MHCLG (2019) PPG CIL
[2] MHCLG (2019) PPG CIL: Paragraph: 015 Reference ID: 25-015-20140612
[3] National Planning Policy Framework ('NPPF') (2019)
[4] MHCLG (2019) PPG CIL: Paragraph: 009 Reference ID: 25-009-20190315
[5] Community Infrastructure Levy Regulations 2010 (as amended)
[6] Brighton & Hove City Council ('B&HCC') (November 2018) CIL Draft Charging Schedule Statement of Modifications
[7] MHCLG (2018) PPGV: Paragraph: 005 Reference ID: 10-005-20180724
[8] Note: no testing on strategic site allocations was conducted in previous published viability evidence
[9] DSP (November 2018) Community Infrastructure Levy - Viability Study Addendum 2 – Further Update November 2018
[10] B&HCC (July 2018) Draft City Plan Part Two
[11] B&HCC (July 2018) Draft City Plan Part Two: allocation SSA4 (p.154)

1.7 PPG is clear that development costs, including "*any policies on planning obligations in the relevant Plan, such as policies on affordable housing and identified site-specific requirements for strategic sites*", should be taken into account when setting CIL rates – particularly those on strategic sites or brownfield land[12].

1.8 However, at paragraph 2.1.20 (p.12), the CILVA2 states that it would be necessary for B&HCC to "*carefully manage S106 and other planning objectives*" if the application of the proposed CIL DCS SoM rates were not to "*make or break*" scheme viability.

1.9 Para 2.1.21 (p.12) confirms that this would include testing reducing the affordable housing content as schemes came forward via the planning system, reflecting B&HCC's experience of provision on brownfield sites.

1.10 Review of the results within *Addendum 2 Update - Appendix IIb - Table 2c* of the CILVA2 demonstrates that providing 40% affordable housing (in line with adopted[13]/draft policy[14] in the relevant Plan) is not viable with the CIL rates proposed[15]. By focusing on the relevant CIL DCS SoM 'Zone 2' sales values (£5,000/m^2 - £6,000/m^2), this confirms:

- 500 units with 40% affordable housing and CIL at £150/m^2 shows a residual land value ('RLV') deficit against all benchmark land values ('BLVs') with value levels at £5,000/m^2, £5,500/m^2 and £6,000/m^2 (with the exception of lowest value industrial BLV[16].

- 500 units with 40% affordable housing and CIL at £0/m^2 shows and RLV deficit against all BLVs with value levels at £5,000/m^2 and £5,500/m^2, with an RLV surplus at £6,000/m^2 at the lower BLVs. This suggests there is only <u>potential</u> for a CIL rate to be introduced in the highest value band identified for the CIL DCS SoM 'Zone 2'.

- 500 units with 30% affordable housing and CIL at £0/m^2 shows and RLV deficit against all BLVs with value levels at £5,000/m^2, no/marginal surplus at £5,500/m^2, with an RLV surplus only at £6,000/m^2 across the BLVs. This suggests that such sites can only provide 30% affordable housing in the highest value band identified for the CIL DCS SoM 'Zone 2'. Even assuming this, there is only limited residual surplus available for <u>potential</u> CIL liability.

- 500 units with 20% affordable housing and CIL @ £0/m2 shows and RLV deficit against all BLVs with value levels at £5,000/m^2, no/marginal surplus at £5,500/m^2, and an RLV surplus at £6,000/m^2 across the BLVs.

1.11 PPG on CIL confirms that CIL evidence should be prepared in accordance with PPG on viability[17]. The latter requires that viability assessment at the plan making stage should ensure policies are realistic and the total cumulative cost will not undermine

[12] MHCLG (2019) PPG CIL: Paragraph: 020 Reference ID: 25-020-20190315
[13] B&HCC (March 2016) Brighton & Hove City Plan Part One: Policy CP20 Affordable Housing
[14] B&HCC (July 2018) Brighton & Hove Draft City Plan Part Two: Policy DM6 Build to Rent Housing
[15] Note: this is prior to other technical input adjustments advocated by Moda Living Limited
[16] Note: the industrial BLV is, in any case, disputed as being unrealistically low in consideration of both the local market and site-specific circumstances.
[17] MHCLG (2019) PPG CIL: Paragraph: 020 Reference ID: 25-020-20190315

deliverability of the plan[18]. Moreover, policy requirements should be clear for the industry so that they can be accurately accounted for in the price paid for land[19].

1.12 The results (summarised above) within the relevant available evidence demonstrate that the 'Zone 2' residential CIL rate of £150/m^2 places a policy compliant development of the scale and type of the draft SSA4 allocation well beyond the margins of viability, and renders it unviable.

1.13 PPG requires that, "*charging schedules should be consistent with, and support the implementation of, up-to-date relevant Plans*"[20].

1.14 B&HCC's evidence unequivocally confirms adoption of the CIL DCS SoM requires a substantial reduction in affordable housing provision otherwise it renders policy compliant development of this Site unviable and undeliverable in accordance with the draft SSA4 allocation. Viability could only be achieved by a substantial reduction in the provision of affordable housing, which is an approach directly at odds with PPG.

1.15 An assessment of viability that is based on a proposal which is contrary to adopted/emerging local plan policy is emphatically not endorsed in PPG, and clearly evidences that the rates are incorrect. CIL rates should not be set on the basis that they necessitate a site-specific financial viability case to be made to demonstrate divergence from adopted policy within the relevant plan[21].

Absence of Buffer (to identified 'Headroom')

1.16 There is no clear allowance made for a viability 'buffer', as is required by PPG[22], by reducing the maximum CIL surplus (as discernible from the results set out above) into the CIL rate(s) within the CIL DCS SoM.

1.17 The range applied within adopted CIL Charging Schedules across the region is circa 30% - 70% of the maximum CIL 'headroom', with the average therefore equating to approximately 50%[23]. This is a critical omission which seriously undermines the efficacy of the exercise.

NIL CIL Charge Zone – Strategic Site Allocations

1.18 On the above basis, the available evidence confirms that the CIL DCS SoM 'Zone 2' residential CIL rate of £150/m^2 is contrary to the PPG on CIL and PPGV, contrary to

[18] MHCLG (2018) PPGV: Paragraph: 002 Reference ID: 10-002-20180724
[19] MHCLG (2018) PPGV: Paragraph: 001 Reference ID: 10-001-20180724
[20] MHCLG (2019) PPG CIL: Paragraph: 010 Reference ID: 25-010-20140612
[21] MHCLG (2018) PPGV: Paragraph: 002 Reference ID: 10-002-20180724
[22] MHCLG (2019) PPG CIL: Paragraph: 019 Reference ID: 25-019-20190315
[23] Note: evidence of 'buffers' applied within recent (and neighbouring) adopted CIL Charging Schedules is provided in **Appendix 1**. This shows the residential 'buffers', accepted within Inspector's Reports in recommending CIL Charging Schedules for adoption, equate to a 'headroom' reduction averaging between 29% and 69% back from the 'maximum' headroom in setting rates on a £/m^2 basis.

adopted/emerging policy in the relevant plan, and the CIL DCS SoM therefore fails the 'balance test' set by CIL Regulation 14[24].

1.19 The CIL DCS SoM includes a "NIL CIL Charge zone" for allocated strategic sites identified within the adopted plan; presumably to ensure delivery of key parts of the plan's strategy. Moda Living does not dispute this is appropriate, however B&HCC have failed to provide a clear justification as to why strategic site allocations, which are expressly identified as such within the draft City Plan Part Two (such as SSA4 Sackville Trading Estate and Coal Yard), have been treated inconsistently.

1.20 Site SSA4 already has key status within the adopted Plan, forming part of the Development Area 6 allocation ('DA6') entitled the 'Hove Station Area' (as a mixed-use regeneration area), and is identified as a target for redevelopment by B&HCC. It is supported and identified for allocation as a strategic site within the draft Hove Station Neighbourhood Plan, which is in its final stages of preparation, and will be published for Regulation 14 Pre-submission Consultation from 23 March 2019 to 3 May 2019[25].

1.21 On this basis as well as on the basis that B&HCC's published available viability evidence, which confirms that the SSA4 Sackville Trading Estate and Coal Yard cannot viably support CIL, in addition to meeting the adopted/emerging affordable housing policy, the Examiner is invited to recommend moving the draft SSA4 Sackville Trading Estate and Coal Yard site into the "NIL CIL charge zone" within the CIL DCS SoM.

Inappropriately Evidenced and Inconsistent Benchmark Land Values ('BLV')

1.22 The CILVA2 introduces a new set of BLVs within paragraphs 1.1.14-1.1.19 to inform the CIL DCS SoM, against which only flatted residential development is tested.

1.23 This represents a complete shift in methodology at a late stage, and results in inconsistent application of BLVs across the overall spectrum of scheme typologies and uses assessed.

1.24 The previous set of BLVs, for brownfield land, were described as follows:

"Taking land out of former / redundant commercial use (e.g. business use) or reuse of residential / mixed-use sites (including a level of incentive to release the land) is considered most likely in the local context across the range of land value benchmarks (our indicative 'Viability tests' 2 to 4) @ £1.5m/Ha to £5m/Ha."[26]

1.25 The CILVA2 now relies solely upon MHCLG's publication *Land Value Estimates for Policy Appraisal: May 2017 Values*[27], which represent a reduced range of values compared to prior tested BLV levels. The 'Guidelines for use' section of the MHCLG document states the following:

[24] Community Infrastructure Levy Regulations 2010 (as amended)
[25] https://www.brighton-hove.gov.uk/content/planning/neighbourhood-planning/hove-station-neighbourhood-plan
[26] DSP (August 2017) CIL Viability Study Final Report: p.63 (first bullet)
[27] MHCLG (2018) Land value estimates for policy appraisal 2017

*"The land values presented here have been provided specifically for the purpose of policy appraisal and are based on the assumptions set out in this document**. It is strongly recommended that they are not used for any other purpose**…"*

1.26 This is elaborated upon within the section titled 'Residential land values', which states:

"The purpose of these values is to use in appraising land projects from a social perspective, in line with Green Book principles".

1.27 The evaluation of land projects for social purposes, in accordance with the Green Book, is a wholly different purpose to that of preparing evidence of development viability across a local authority area in order to inform (and test) CIL viability or the soundness of policies within a Local Plan.

1.28 None of the underpinning assessment evidence, which demonstrates the calculations for arriving at the brownfield benchmarks, has been published by MHCLG. This means it does not form appropriate, available evidence that can be scrutinised by stakeholders. Nor has the CILVA2 provided any confirmation that the BLVs have been sense checked against and hence informed by local market evidence.

1.29 PPG states explicitly that BLVs should, *"…be informed by market evidence including current uses, costs and values wherever possible"*[28], and, *"For any viability assessment data sources to inform the establishment the landowner premium should include market evidence…"*[29]. Crucially, PPG confirms that the BLVs set must reflect the *"…reasonable expectations of local landowners"*[30].

1.30 There is no evidence at all within the CILVA2 of local market analysis to inform the BLVs applied within viability testing. Moda Living is yet to see the MHCLG evidence utilised for this purpose elsewhere – primarily due to its high level nature, questionable robustness for application at a local scale, and lack of transparency (which all place it at odds with the requirements of PPG in setting BLVs).

1.31 Importantly the DVS recently accepted a BLV of £14.2m/ha at Longley Industrial Estate in respect of Planning Ref: BH2018/02598 (proposal for 208 C3 residential units (for build-to-rent), 3,333sqm of office/research/development floor space (B1(a)/(b) use), and 308sqm of flexible commercial/retail floor space in buildings of 3-18 floors. This demonstrates much higher BLVs are necessary (and valid) to release suitable brownfield sites for major high-density residential development schemes. The DVS report on the latter is a matter of public record,[31] and is seriously at odds with B&HCC's assessment here.

Other Technical Inputs & Matters

1.32 Finally, Moda Living has identified a range of technical issues with the available viability evidence:

[28] MHCLG (2018) PPGV: Paragraph: 014 Reference ID: 10-014-20180724
[29] MHCLG (2018) PPGV: Paragraph: 016 Reference ID: 10-016-20180724
[30] MHCLG (2018) PPGV: Paragraph: 016 Reference ID: 10-016-20180724
[31] https://planningapps.brighton-hove.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=PDJOE0DM0P900

- The construction costs within CILVA2 testing are applied at an 85% Net:Gross efficiency, which in a 500 unit apartment scheme appears unrealistically high (meaning there is only 15% added to the build costs representing communal and circulatory i.e. non-saleable floor area). Moda Living's expectation, and prior experience, is that a Net:Gross efficiency will be circa 80%. If efficiency is decreased to a realistic rate (say 80%), this will increase the GIA and construction costs commensurately, which should be reflected in updated viability testing.

- Site / infrastructure costs within CILVA2 testing are applied at a notional £20,000/unit. Moda Living's expectation is that such costs will be closer to £21,500/unit at SSA4 Sackville Trading Estate and Coal Yard site, based on the necessary remediation works, infrastructure requirements and topography. Application of a higher cost within viability testing will reduce financial viability.

- No viability appraisal cashflows have been provided within CILVA2, which means it is not possible to understand effectively and transparently how costs and revenues have been applied over time within the assessment. This fails to meet the requirements of the NPPF[32] and PPG,[33] as well as basic principles in the production of expert reports[34].

1.33 These issues not fundamental if considered in isolation, but considered cumulatively will have a fundamental impact on the results of viability testing in the CILVA2, and therefore lead to Moda Living to conclude the inputs and approach adopted by the CILVA2 produces a significant overstatement in the level of viability (and CIL 'headroom' available).

1.34 These issues have been 'transferred' into the rates set in the CIL DCS SoM and are, hence, material to consideration of whether it accords with the regulatory requirements (notably Regulation 14[1])[35].

Overall do they strike an appropriate balance between helping to fund new infrastructure and the potential effects on economic viability with particular regard to the securing the delivery of housing in Brighton & Hove?

1.35 No, for the reasons set out in response to Question (a).

1.36 Consequently, the CIL DCS SoM is unsound and should not be recommended for adoption by the Examiner in its present form.

[32] NPPF (2019): paragraph 57
[33] MHCLG (2018) PPGV: Paragraph: 010 Reference ID: 10-010-20180724
[34] See the Ikarian Reefer [1993] F.S.R. 563, referenced at §1.9 of RICS Professional Guidance, England, Wales and Northern Ireland "Surveyors acting as expert witnesses" 4th edition (provided in Appendix 2 and 3 to this Written Statement respectively)
[35] Community Infrastructure Levy Regulations 2010 (as amended)

Appendix 1: Residential CIL 'Buffers' in Adopted CIL Charging Schedules

Table A1: CIL 'Buffers' in Adopted CIL Charging Schedules

This table sets out the residential CIL charging rates and evidenced CIL 'headroom / buffer' for Charging Authorities that either neighbour Brighton and Hove or where the CIL examinations, prior to adoption [of CIL], were assessed by ..... The table summarises the residential CIL rates adopted by each Charging Authority and the associated 'headroom' CIL rates and percentage buffers as described in the relevant Examination Report(s). Lower and Upper (headroom) CIL rates have been included where provided. If a report offers a single (headroom) CIL rate then it has been included under the 'General' column(s). The 'Buffer' percentages represent the difference between each headroom CIL rate and the proposed (adopted) CIL rate.

		CIL Headroom/ Buffer						
Local Authority	CIL Type	Proposed CIL Rate (£)	Lower CIL (£)	Lower Buffer (%)	General CIL (£)	General Buffer (%)	Upper CIL (£)	Upper Buffer (%)
Wealden District Council	Residential (higher band)	£200	£412	51%			£700	71%
(Examiner:	Strategic Sites (higher band)	£200			£335	40%		
	Residential lower band)	£150	£212	29%			£540	72%
	Strategic Sites (lower band)	£150			£181	17%		
Christchurch Borough Council and East Dorset District Council	Residential (10 units or less)	£150		73%				77%
(Examiner:	Residential (10 units or more)	£70		31%				80%
	Residential (40 units or more)	£0						

Local Authority	CIL Type	Proposed CIL Rate (£)	Lower CIL (£)	Lower Buffer (%)	General CIL (£)	General Buffer (%)	Upper CIL (£)	Upper Buffer (%)
Eastbourne Borough Council	Residential	£50	£67	25%			£332	85%
	Apartments	£0						
Worthing Borough Council	Residential (med to high value areas / zone 1)	£100	£124	19%			£591	83%
	Residential (low value areas / zone 2)	£0						
Horsham District Council	Residential (zone 1)	£135					£200	33%
	Residential (zone 2)	£0						
Rother District Council	Residential (zone 1)	£200	£430	53%			£744	73%
	Residential (zone 2)	£135	£189	29%			£527	74%
	Residential (zone 3a)	£50	£52	4%			£83	40%
	Residential (zone 3b)	£170	£141	-21%			£610	72%
	Residential (zone 3c)	£75			£116	35%		
Total / Average:			**£203**	**29%**	**£211**	**31%**	**£481**	**69%**

Appendix 2: Ikarian Reefer [1993] 2 Lloyds Rep 68, per ...

Status: ⛔ Negative Judicial Treatment

*563 The “Ikarian Reefer”

In the Commercial Court

25 February 1993

[1993] F.S.R. 563

Before: ....

25 February 1993

Practice—Expert witnesses—Duties and responsibilities of expert witnesses.

In a marine insurance claim, the parties called expert witnesses to give evidence upon a number of topics, such as the cause of a fire aboard.

The learned judge was of the view that several of the expert witnesses called had misunderstood their duties and responsibilities and had thereby contributed to the great length of the trial.

He therefore devoted a section of his judgment [1] to this matter and it is this which is now reported.

Representation

..... instructed by Clifford Chance appeared for the plaintiffs. .....instructed by Ince & Co. , appeared for the defendants.

.....:

I. the claim, the defence, the legal principles and the question for decision

A. The Claim

The plaintiff company (incorporated in Panama) were the owners of the *Ikarian Reefer* . In 1985 the plaintiff company (“the plaintiffs”) formed part of the extensive shipping interests of the Comninos Brothers (“Comninos”). By a policy of marine insurance No. 132875 HD the *Ikarian Reefer* was insured from February 1985 against, *inter alia* , perils of the sea, fire and barratry. Under the policy the vessel was valued at US$3 million of which 87.5 per cent. was subscribed by the defendants (amongst others). (The defendants do not suggest that the placing of a value of US$3 million on the vessel for the purposes of insurance was other than in the normal course of business).

Chase Manhattan Bank NA (“Chase Manhattan”) were mortagees of the vessel. By an assignment of insurance dated 5 December 1983 the plaintiffs assigned to Chase Manhattan their interest in any insurance of the vessel and the benefits thereof. By a Deed of Assignment dated 17 January 1989 Chase Manhattan assigned to Den Norske Creditbank plc (“Den *564 Norske”) their interest in any insurance of the vessel. By a Deed of Assignment dated 24 October 1989, Den Norske assigned to the plaintiffs their interest in any insurance of the vessel. The plaintiffs are accordingly entitled to claim against the defendants in respect of the actual and/or constructive total loss of the vessel.

On 12 April 1985 at about 2300 hours the *Ikarian Reefer* ran aground on the shoals off Sherbro Island, Sierra Leone, in the course of a voyage from Kiel to Abidjan in ballast. At about 0100 hours on 13 April fire broke out in the engine room of the vessel. The fire spread to the accommodation and at about 0115 hours those remaining on board abandoned ship. The crew were picked up at about 0330 hours by the Yugoslav flag vessel the *Ljubljana* .

The plaintiffs' case is that the *Ikarian Reefer* became an actual or constructive total loss, in consequence of a peril insured against, namely fire (and/or perils of the sea). The plaintiffs contend that loss by fire includes loss by deliberate fire. If, however, the fire must be accidental and if, contrary to the plaintiffs' primary contention, the court finds that the fire on *Ikarian Reefer* was the deliberate act of the master or crew, the plaintiffs claim a loss by barratry.

B. The Defence

The defendants' primary case is that the vessel was wilfully cast away in that it was both deliberately run aground and deliberately set on fire by or with the connivance of those beneficially interested in the plaintiffs. The defendants say that it is to be inferred that the Master, officers and crew would only have cast the vessel away on the instructions or with the connivance of her beneficial owners.

* * *

After considering the legal principles involved and other topics, the learned judge continued:

V. expert evidence

A. Exchange of Evidence—Expert Witnesses

Section XV of the Guide to Commercial Court Practice [2] summarises the Commercial Court practice as to exchange of evidence—expert witnesses. On the hearing of the summons for directions on 6 December 1989 ..... ordered that the parties be at liberty to call up to eight expert witnesses at the trial, provided that their reports be exchanged not later than six months before the trial, supplementary reports to be exchanged not later than one month before the trial. Throughout the trial I held regular reviews with counsel in an attempt to reduce the extent of the expert evidence and save time. I gave a number of further directions to this end. By way of example, following the failure of a meeting between certain experts to narrow the issues in relation to the fire, on 30 July 1992 I directed the exchange of ***565*** supplementary reports on any new materials which any expert wished to advance. Despite these efforts a great deal of time was taken up by expert evidence, particularly as to the cause of the fire. Although this was in part due to the complexity of certain of the evidence, other factors contributed to the unnecessary length of the trial. By way of example about seven days were spent as to the heating valve mechanism put forward by ..... on behalf of the defendants. This mechanism was not pursued in the defendants' closing submissions.

I will refer to some of the duties and responsibilities of experts in civil cases because I consider that a misunderstanding on the part of certain of the expert witnesses in the present case as to their duties and responsibilities contributed to the length of the trial.

B. The Duties and Responsibilities of Expert Witnesses

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v. Jordan [1981] 1 W.L.R. 246* at 256, *per* Lord Wilberforce.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: *Polivitte Ltd. v. Commercial Union Assurance Co. plc [1987] 1 Lloyd's Rep. 379* at 386, Garland J. and *Re J [1990] F.C.R. 193* , Cazalet J. An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J, supra*).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J, supra*). In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth

without some qualification, that qualification should be stated in the report: *Derby & Co. Ltd. and others v. Weldon and others , The Times, 9 November 1990,per* Staughton L.J.

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, ***566** these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).

The learned judge concluded his judgment thus:

Conclusions

The grounding of the *Ikarian Reefer* was not deliberate but was due to negligent navigation by the Master. The underwriters have not proved to the relevant standard that the *Ikarian Reefer* was deliberately set on fire. If, contrary to my conclusion, the vessel was deliberately set on fire by a member of the crew, the defendants have not proved that the owners in any way consented, or were privy, to that action. If the burden of disproving privity lay on the owners, I would hold that they had discharged it. If, contrary to my conclusion, the vessel was deliberately set on fire I consider that ..... original explanation is the most likely. About five members of the crew had been ordered to remain on board—a fire started by one crew member who did not want to stay on board would have forced those ordered to remain to abandon the vessel.

It follows that there must be judgment for the owners for the appropriate sum.

In conclusion I would like to acknowledge with gratitude the great help I have received throughout this case from the legal teams on both sides . . .

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1. The judgment ran to over 200 pages in all.

2. Supreme Court Practice 1993, Vol. 1, para. 72/A19, p. 1249 .

Appendix 3: RICS Professional Guidance, England, Wales and Northern Ireland "Surveyors acting as expert witnesses" 4th edition

GN 1 Application of guidance note and introduction

1.1 The start date of application of this guidance note (GN) is three months after its publication date. This guidance note applies where any RICS member provides expert evidence, whether oral or written, to the proceedings of any tribunal subject to the rules of that specific tribunal and its jurisdictions. It is recommended the guidance note be considered in conjunction with the foregoing practice statement (PS).

1.2 The guidance note provides direction on good practice where you are required to give expert evidence before the tribunal (including acting as an expert in arbitration or adjudication or as a Single Joint Expert). Tribunals may have their own specific rules which make provisions for expert evidence and must at all times be followed.

1.3 As a surveyor actively involved in a dispute that may come before a tribunal, you may find yourself carrying out one (or more) of the roles identified below. If your role includes the role of expert witness, you must carefully consider whether to take any of the other roles outlined below.

(a) **Surveyor-advocate:** in this capacity you will act to put a party's case and interests to a tribunal. You will need to follow the requirements of, and have regard to, the RICS practice statement and guidance note *Surveyors acting as advocates*. Your primary duty will be to your client, but it is also subject to some important duties to the tribunal that place limits on what it is proper to do in pursuit of your client's interests.

(b) **Adviser:** in this capacity, you will be retained to give advice to a client. Frequently this will be by a report or assessment of the merits of a case. In this capacity it is not contemplated that a tribunal will be asked to place reliance on such advice. Your advice is not for the purpose of a tribunal's proceedings (see also GN 3.1). You should bear in mind that your advice may well not attract legal professional privilege and may therefore be disclosable to a tribunal thereafter.

(c) **Expert witness** (and as a Single Joint Expert (SJE); see PS 8 and GN 16): your primary duty as an expert witness, including as an SJE, will not be to those instructing or paying you but to the tribunal. In this instance you will need to follow the requirements of and have regard to this practice statement and guidance note.

(d) **Negotiator:** in this capacity you will be acting to negotiate a resolution to disputed matters. In such a role you will have no involvement with a tribunal, except insofar as you or others may perceive a possibility that a failed negotiation may then necessitate a reference to a tribunal, at which point you or another professional may be engaged to act as an advocate or provide expert evidence as an expert witness. It is possible that some negotiators may not find it possible to act as an expert witness as their impartiality may be damaged, or may be perceived to be damaged, by their prior or continuing role of negotiator. It is recommended that you be alert to this.

(e) **Case manager:** in this capacity you will be acting on behalf of a party and will be responsible for the general conduct, management and administration of its case, marshalling and coordinating that party's team of representatives/advisers (if any) and liaising, as appropriate, with the tribunal and the opposing party.

(f) **Witness of fact:** in this capacity you will normally have been asked to provide testimony under oath or on affirmation as to something you saw, heard, experienced, said or did (that is, evidence of fact). This includes the evidence which surveyors sometimes give, in addition to their opinion evidence, as to measurements they have made or examinations which they have carried out.

See also PS 1.2.

1.4 The practice statement will apply whenever you express an opinion in your role as expert witness. The need for you to act as an expert witness and follow all the requirements of the practice statement will be determined by the rules of the relevant tribunal, by prevailing custom and the nature of the dispute. You, your client and any agreement or contract with the opposing party can influence whether you are obliged to comply with the requirements of the practice statement or not. A common misunderstanding is that it is always mandatory to act as an expert witness in proceeding before a tribunal.

1.5 Nothing in the practice statement or this guidance note should be construed as suggesting that a tribunal has powers to mandate that presentations made to it must be in the form of expert evidence, as opposed to advocacy submissions. However, if, in the light of all circumstances, a surveyor agrees to present expert evidence rather than advocacy representations, compliance with the practice statement is required.

1.6 All surveyors are, as a matter of professional conduct, expected to comply with the applicable rules of tribunals and be aware of those circumstances in which they apply and the existence of and effect of changes to the rules of the relevant tribunals. For the

avoidance of doubt, this guidance note is not intended to provide a commentary on any particular tribunal rules and it is the responsibility of the expert witness to be familiar with the relevant rules.

1.7 Impartiality of expert witnesses is of the utmost importance. By emphasising the expert witness's overriding and primary duty to the tribunal when acting as an expert witness (see the Principal message in the Preamble of the PS, PS 2.1 and PS 2.3), the practice statement aims to assist in ensuring the independence and impartiality of the opinion given by the expert witness.

1.8 The obligation imposed upon you to make the existence of this practice statement known to the client when accepting instructions to act as expert witness (PS 3.4(b)) is intended to help reduce misunderstandings and remove pressures upon you as an expert witness to support your client's case, irrespective of your honest professional opinions. The obligation imposed on you by PS 5.4(o) to make a Statement of Truth, and the specified declarations of PS 5.4(p), are intended to assist in this respect.

1.9 A leading case setting out the duties and responsibilities of expert witnesses is *National Justice Compania Naviera SA v Prudential Assurance Co. Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep. 68.). Though a case from the jurisdiction of England and Wales, the principles enunciated have, within the appropriate context, been followed or broadly endorsed in other UK and common law jurisdictions (including Scotland and Hong Kong) and are generally seen as a useful benchmark in most arbitrations and adjudications.

In the case, ... said:

> 'The duties and responsibilities of expert witnesses in civil cases include the following:
>
> (a) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 WLR 246 at p 256 per Lord Wilberforce).
>
> (b) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co. Plc* [1987] 1 Lloyd's Rep 379 at p 386 per Garland J and *Re J* [1990] FCR 193 per Cazalet J). An expert witness in the High Court should never assume the role of an advocate.
>
> (c) An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).
>
> (d) An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> (e) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that his opinion is no more than a provisional one (Re J sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth, without some qualification, the qualification should be stated within the report (*Derby & Co. Ltd and Others v Weldon and Others* (No. 9) *Times*, 9 November 1990 per Staughton LJ).
>
> (f) If, after exchange of reports an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and, when appropriate, to the court.
>
> (g) Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the *Guide to Commercial Court Practice*).'

1.10 Where relevant, surveyors would be expected to take proper account of other practice statements, guidance notes and codes produced by RICS when giving expert evidence in relation to any matter.

GN 2 General duties

2.1 The specific duties and various tasks that may be undertaken as an expert are to:

(a) act independently and impartially
(b) assist the tribunal
(c) provide a range of opinions as appropriate and where the evidence requires it
(d) assist a party to establish the facts and to assess the merits of a case and help with its preparation
(e) define and agree issues between the parties
(f) help quantify or assess the amount of any sum in dispute and identify an appropriate basis on which a case might be settled

(g) give expert (opinion) evidence to the tribunal (which may be based upon and incorporate evidence of fact), where opinion evidence apart from that of an expert witness would not be admissible

(h) meet with other experts of the same discipline either in an attempt to agree and narrow liability issues in dispute or to attempt to agree matters of quantum and valuation (this will often result in the experts preparing and issuing joint reports to the parties); and

(i) conduct enquiries when instructed to do so by the tribunal and report to that body as to findings either as an expert acting for one party or where instructed as an SJE.

2.2 Upon accepting an instruction to act as an expert witness, you assume a responsibility to the tribunal and to RICS to provide truthful, impartial and independent opinions, complete as to coverage of relevant matters. To that end it is recommended that you be satisfied, prior to accepting the instruction, that you have the experience, knowledge, expertise and resources to fulfil the task specified within any allocated time span.

2.3 If you cannot fulfil the criteria in PS 3.2, PS 3 Acting as an expert witness and instructions, makes it clear that the instruction should be declined. Where appropriate, it is recommended that you advise the client of the possible need to employ additional expertise and make the client aware of the advantages and disadvantages of acting in such circumstances.

2.4 It is imperative that you fully understand and accept that, while an instruction to provide expert evidence may originate from a particular client, your duty to the tribunal overrides any duty to the client. PS 3.4(c) makes it obligatory to bring this to the client's attention.

2.5 You are entitled to give expert evidence on behalf of your employer (see PS 2.5). The difficulty that you can face is that it may be said that less weight should be attached to your evidence because you have a conflict of interest arising out of your employment. In order to address this risk, if you wish to act as an expert witness in these circumstances, it is recommended that you are in a position to satisfy the tribunal that you have a proper understanding of the requirements imposed upon an expert witness giving evidence, and that your employer understands that your overriding duty is to the tribunal. How this is done is a matter for you and your employer.

2.6 It is recommended that the nature of the employee's duty when acting as an expert witness is recorded in writing by you and acknowledged in writing by the employer. Nothing in this paragraph, or the practice statement, should be construed as implying that an employed surveyor giving expert evidence on the instructions of their employer is not capable of giving unbiased, truthful expert evidence.

2.7 Where you are acting, or have previously acted, in the subject case in another role, such as the negotiator or adviser on the transaction, this may adversely affect your ability to present yourself with the impartiality and independence of opinion required of an expert witness. Consider the position carefully and discuss with your client and/or the legal adviser as appropriate.

2.8 Failure to comply with the directions or orders of a tribunal, or applicable rules, or any excessive delay attributable to the expert witness, may result in your client being penalised in costs or being prevented from putting your evidence before the tribunal. Some tribunals have made orders for costs directly against expert witnesses who cause significant expense to be incurred, if doing so in reckless and blatant disregard of their duties to the court.

2.9 PS 3.4(b) requires the expert witness to offer to supply a copy of this practice statement to a prospective client. For this purpose a stand-alone version of the practice statement in the form of a client guide is available to members to download from www.rics.org. This client guide may be provided to the expert witness's client without copyright permission. However, it must be made clear to the client that his/her copy is for his/her use only, and that any reproduction of the guide for the use of a third party would breach RICS' copyright.

GN 3 Advice and disclosure

3.1 Surveyors, as experts in their field, may be asked to provide initial advice (for example, to assist in the identification and scoping of, or limitation to, any claim) to a client prior to being instructed to provide evidence as an expert witness for presentation to a tribunal. A variety of situations exists where a party may seek advice from you before a dispute has arisen or before litigation is contemplated, or even during litigation.

3.2 Generally, where a party has engaged you for purposes other than the giving or preparation of expert evidence, and it is not intended that you may later be instructed to do so, you may be referred to as an 'adviser' rather than an 'expert witness'. Usually, all such initial advice is given within the normal client/professional adviser relationship. This is quite different from the relationship that exists if you are acting as an expert witness and great care should be taken in