HOUSE OF LORDS SESSION 2006–07

[2006] UKHL 50

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Standard Commercial Property Securities Limited and others (Respondents) *v.* Glasgow City Council (Appellants) and others (Scotland)

Standard Commercial Property Securities Limited and others (Respondents) *v.* Glasgow City Council and others (Appellants) (Scotland) (Conjoined Appeals)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Glasgow City Council
Gerry Moynihan QC
Sarah Wolffe
(Instructed by City of Edinburgh Council)
Atlas Investments
Roy Martin QC
Jacqueline Williamson
(Instructed by Russel + Aitken)

Respondents:
Heriot Currie QC
James Mure
(Instructed by Semple Fraser)

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry. For the reasons they give, with which I agree, I would allow this appeal.

LORD HOFFMANN

My Lords,

2. For the reasons given by my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry, I would also allow this appeal and make the order which they propose. I would also associate myself with the comments of my noble and learned friend Lord Brown of Eaton-under-Heywood.

LORD HOPE OF CRAIGHEAD

My Lords,

3. The law does what it can to assist local authorities to promote redevelopment where this is in the interests of the proper planning of the areas for which they are responsible. They have been given powers of compulsory purchase which can be used to bring this about where alternative means are not available. But an indication that compulsory powers will be used tends to provoke objection, and few proposals for redevelopment can have been as frustrating to those who seek to promote them as this one.

4. No-one has questioned the need for such a scheme in the area which has been proposed for redevelopment in this case. It lies in the centre of Glasgow, within a block bounded by Buchanan Street, Bath Street, West Nile Street, Nelson Mandela Place and West George Street. As the Lord Ordinary, Lady Paton, said at the outset of her opinion, this is a prime site, and it is badly in need of redevelopment: 2004 SLT 655, para 1. But the site is in multiple ownership. Glasgow City Council ("the council") has insufficient funds of its own, and it has proved impossible to co-ordinate the different views and interests of the various proprietors. Attempts to find a solution to the problem have raised questions as to their legality. Years have been spent in litigation. Contracts for the carrying out of the work have not yet been entered into. The site remains an eyesore.

5. The solution which the council wished to pursue was to identify a suitable developer, and then to enter into an arrangement under which the council would, having acquired the land compulsorily, transfer the land to the developer in exchange for its undertaking (a) to carry out the development and (b) to indemnify the council in respect of all of its costs. The question which this case raises is whether its decision to pursue this course was within the powers that the council has been given by the statute. The powers are set out in Part VIII of the Town and Country Planning (Scotland) Act 1997, which deals with the acquisition and appropriation of land for planning purposes.

6. No-one has questioned the legality of the use of the power to acquire land on this site compulsorily to promote its redevelopment. Nor is it disputed that it is open to the council to use this power to

assemble the site for redevelopment by someone else, and in particular by a private developer. The issue that has been raised relates to the terms which the council have proposed for its disposal to the preferred developer and to the question whether it was entitled to conclude that those terms are the best that can reasonably be obtained. Local authorities have power under section 191(1) of the 1997 Act to dispose of any land which has been acquired or has been appropriated for planning purposes. But the power to do so is qualified by the statute. This gives rise to the two questions which lie at the heart of this appeal. The first is whether the terms on which the council proposes to make the assembled site available to the developer are within the scope of that power. The second is whether the council took all relevant considerations into account when it decided to exercise the power in this way.

The statutory powers

7. Section 188(1) of the 1997 Act provides that a planning authority may acquire by agreement any land which they require for any purpose for which a planning authority may be authorised to acquire land under section 189. Section 189(1) is in these terms:

> "A local authority shall, on being authorised to do so by the Scottish Ministers, have power to acquire compulsorily any land in their area which –
> (a) is suitable for and is required in order to secure the carrying out of development, redevelopment or improvement;
> (b) is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated."

Section 189(4) provides:

> "It is immaterial by whom the local authority propose any activity or purpose mentioned in subsection (1) … is to be undertaken or achieved and in particular the local authority need not propose to undertake that activity or achieve that purpose themselves."

8. Section 191, so far as relevant to this case, provides:

> "(1) Where a planning authority –
>
> (a) has acquired or appropriated land for planning purposes, and
>
> (b) holds that land for the purposes for which it was so acquired or appropriated,
>
> the authority may dispose of such land to such person, in such manner and subject to such conditions as may appear to them to be expedient for the purposes mentioned in subsection (2).
>
> (2) Those purposes are to secure –
>
> (a) the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it, whether by themselves or by any other person, or
>
> (b) the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of their area.
>
> (3) Subject to the provisions of subsection (7), any land disposed of under this section shall not be disposed of otherwise than at the best price or on the best terms that can reasonably be obtained.
>
> …
>
> (10) In relation to any such land as is mentioned in subsection (1), this section shall have effect to the exclusion of the provisions of any enactment, other than this Act, by virtue of or under which the planning authority are or may be authorised to dispose of land held by them."

9. Section 191(7) of the 1997 Act is designed, so far as practicable, to protect the interests of persons living or carrying on business or other activities on the land. No issue has been raised about its application in this case. Among the provisions which are disapplied by section 191(10) is section 74(1) of the Local Government (Scotland) Act 1973. That section confers a general power on local authorities to dispose of land held by them in any manner they wish, subject however to subsection (2) which provides:

> "Except with the consent of the Secretary of State, a local authority shall not dispose of land under subsection (1) above for a consideration less than the best that can reasonably be obtained."

The effect of section 191(10) of the 1997 Act is that land which has been acquired or appropriated for planning purposes, and is being held for the purposes for which it was acquired or appropriated, cannot be disposed of under section 74 of the 1973 Act. The Scottish Ministers have no power to permit its disposal other than as provided by section 191(3). It cannot be disposed of otherwise than "at the best price or on the best terms that can reasonably be obtained".

10. The facts must now be described in more detail, to set the scene for a closer examination of the words of section 191(3) in their proper context.

The background

11. The site comprises an area of land and buildings in the northern area of Buchanan Street at its junction with Bath Street which is bounded on the west by West Nile Street. It includes a block of buildings facing largely on to Buchanan Street which comprise 3-7 (or 1-7) Bath Street and 185-221 Buchanan Street. The corner building at 3-7 Bath Street and 221 Buchanan Street has been demolished. The other buildings are run down and not in character with the surrounding area. The site at 3-7 Bath Street and 221 Buchanan Street has been referred to as Phase A of the proposed development. It is in the exclusive ownership of Standard Commercial Property Securities Ltd ("SCPS"). The other buildings within the site are in multiple ownership. Phases Band C comprise 209-217 Buchanan Street and 106A West Nile Street. The buildings in this Phase are owned partly by SCPS, partly by Atlas Investments Ltd ("Atlas") and partly by others who are not parties to this appeal. The remainder of the site, referred to as Phases D-H, is owned for the most part by Atlas and, as to the rest, by others who are not parties to this appeal.

12. SCPS is a wholly owned subsidiary of Mitchell & Butlers plc. It acts as its property owning subsidiary in relation to the development. Its associated subsidiary, Standard Commercial Property Developments Ltd ("SCPD"), acts as its property developer. They seek to develop the site,

or part of it, and it was at their instance that these proceedings were brought. On 1 November 2000 SCPD were granted planning permission to redevelop 3-7 Bath Street and 221 Buchanan Street (Phase A). A revised permission to develop this part of the site was obtained in 2001. Atlas, who claim ownership of about 88 per cent of the slum area of Phases A-H, are also interested in developing the site. They, together with Glasgow City Council, are the appellants in this appeal.

13. At a meeting of its Development and Regeneration Services Committee ("the committee") on 26 August 1999 the council approved in principle the promotion of a compulsory purchase order over subjects at 185-221 Buchanan Street and 1-7 Bath Street. This was substantially the same area as that with which these proceedings are concerned. It authorised officials to conclude a binding agreement with Atlas which would enable the council to proceed with the promotion of the compulsory purchase order. Clause 5 of the agreement provided that Atlas was to reimburse to the council the total compensation or purchase price for the subjects together with interest and the reasonable costs properly incurred by it in connection with the promotion and confirmation of the compulsory purchase order. On 19 and 20 October 1999 a minute of agreement was entered into between the council and Atlas in the terms that had been approved.

14. The agreement thus entered into has been referred to colloquially as a "back-to-back agreement". This is a short-hand way of describing the essence of the arrangement. The site was to be made over to the developer in exchange for its undertaking to carry out the work at its own expense and to indemnify the council for the money expended in assembling the site and making it available. The council was not to be paid any more than the total amount due under the indemnity. In effect the developer was to be put into the same position, no more and no less, as it would have been in if it had power to acquire the site itself compulsorily. The council for its part was to achieve its planning purpose at no expense and without the risk of incurring a loss on the proposed redevelopment.

15. SCPS decided to challenge the council's decision to proceed in this way. It presented a petition for judicial review in which it sought declarator that the council's decision was ultra vires and reduction of that decision and the minute of agreement. On 15 August 2000 Lord Nimmo Smith sustained the petitioner's pleas in law and pronounced decree of declarator and reduction: *Standard Commercial Property Securities Ltd v Glasgow City Council*, 2001 SC 177. He did so not

because he was of the opinion that the council did not have power to enter into a back-to-back agreement in the terms which the minute of agreement set out. His reason for granting these orders was that the committee had failed to take into account relevant and material considerations in exercising their discretion under sections 189 and 191 of the 1997 Act. It had assumed that a single comprehensive development of the whole site was required. But the site was occupied by several buildings with different owners, and there had been no discussion of the possibility of the involvement of more than one developer or of separate but mutually compatible redevelopments of different parts of the site. Another proprietor had made proposals, and there had been no comparison between its proposals and those of Atlas: 2001 SC 177, 201, para 44.

16. The question whether a back-to-back agreement of the kind contemplated was within the powers of the Act was however the subject of detailed submissions in that case, and Lord Nimmo Smith delivered a ruling on it which provides an important part of the background to what happened next. As he pointed out in para 42, subsection 189(4) does not expressly authorise a local authority to enter into an agreement, such as a back-to-back agreement, with the person who is to carry out the redevelopment. Authority to do this must be found in section 191(1). In his opinion land might properly be described as held by a local authority within the meaning of that subsection as soon as it was vested in them by virtue of a general vesting declaration following the procedure for compulsory acquisition. In considering whether to dispose of the land, however, the local authority would have to consider what manner of disposal, and what conditions to which it should be made subject, might be expedient for the purposes mentioned in subsection (2). As for the terms that were to be sought for the disposal, he said this in para 42 at pp 200H-201B:

> "Section 191(3) does not prohibit such a disposal otherwise than at the best price that can reasonably be obtained. The expression in that subsection is 'otherwise than at the best price *or on the best terms* that can reasonably be obtained' (my emphasis). It would therefore be for the local authority to consider not only the price (as related inter alia to the amount of compensation payable under the compulsory purchase procedure) but also the terms offered by any person to whom the disposal might be made. These terms would include those which would be most conducive to achievement of the purposes set out in subsection (2), and would thus include matters

> such as the likely ability of the person, on the basis, for instance, of past experience and financial soundness, to carry the development through to completion."

17. He developed this point further in the following paragraph, para 43:

> "Read together, sections 189 and 191 appear to me to provide a statutory framework within which a local authority may decide to acquire land compulsorily and to sell it to a developer under a back-to-back agreement, provided that proper account is taken of all the considerations I have mentioned, particularly the planning purposes in section 189(1). I thus reject the submission for Standard (which was in any event, as I understood it, departed from), that a decision to enter into a back-to-back agreement cannot competently be made at the same time as a decision compulsorily to acquire the land in question."

The overriding consideration for the local authority, as it appeared to him, was whether acquisition of the land by them and its development by the developer with which a back-to-back agreement was to be entered into were reasonably necessary for planning purposes.

18. On 26 October 2000 the committee approved a framework for the use of their compulsory powers in conjunction with a back-to-back agreement. As the Lord Ordinary (Lady Paton) noted in para 11 of her opinion, this document was a direct consequence of what Lord Nimmo Smith had said in his judgment of 15 August 2000. It was headed: "Framework for the use of compulsory powers (CPO) and back to back agreements with developer(s) under the Town and Country Planning (Scotland) Act 1997". In the introduction to this document a summary was given of the relevant provisions of sections 189 and 191. There then followed a description of the process that was to be followed through. It was to consist of four phases: (1) consideration as to whether the use of CPO powers was reasonably necessary for planning purposes; (2) if it was, the presentation of a report to the committee for authority to investigate the requirement for their use and, if approved, the giving of notice to interested parties of the council's intention to use CPO powers if necessary to assemble the site inviting them to submit their proposals for its redevelopment; (3) evaluation of all submissions

against four stated criteria; and (4) conclusion, following the detailed evaluation as set out above.

19. Para 2.4.1.1, which describes the conclusion phase of the framework, was in these terms:

> "Present a further report to the Development and Regeneration Services Committee detailing the terms of the submissions received, the results of the evaluation process with a recommendation as to which, if any, developer(s) and development proposal(s) should be supported along with the extent to which CPO powers will be necessary. Approval will be sought to the recommendations along with authority to enter into a back to back agreement with the successful developer(s) which will set out the conditions required to be met by the developer(s) before CPO powers are used including: a planning consent is in place; the developer(s) can satisfy Council officers that reasonable offers have been made to acquire the site on a voluntary basis and all attempts to negotiate have failed and the developer(s) have agreed to meet all of the Council's costs including compensation associated with any use of CPO powers under deduction of any monies due to the Council in respect of outstanding charging orders over the site."

20. No mention is made in the framework of the negotiation of any additional price for the disposal of the site to the preferred developer. The criteria for evaluation of the proposals which are set out under phase (3) make no mention of the amount of money, if any, that the council was to receive for making its compulsory powers available. Para 2.4.1.1 refers, without further explanation, to an indemnity arrangement in the substantially same terms as in the agreement which was entered into with Atlas in October 1999. This indicates that it was assumed, in the light of Lord Nimmo Smith's judgment, that it would be within the powers of the council to enter into an agreement of that kind, referred to in the head-note as a back-to-back agreement, provided the other provisions in the framework were satisfied.

21. On 4 October 2001 the committee resolved to investigate the requirement for the use of compulsory purchase powers to facilitate the redevelopment. All parties interested were invited to submit proposals

for redevelopment of the entire street block within which the site to which this case refers is situated. On 11 April 2002, after further consideration and evaluation, the committee instructed the Director of Development and Regeneration Services ("the director") to contact all interested parties with a view to evaluating their development proposals and aspirations in more detail. Council officials met with representatives of the various owners of the site between July and September of that year.

22. On 16 December 2002 the council wrote to all the owners and occupiers inviting them to submit proposals for the redevelopment of the site. It was explained that the investigative process would follow the procedure described in the framework, a copy of which was appended, and that all submissions would be evaluated against the following criteria:

1. Financial soundness.
2. Experience of development.
3. Design proposals.
4. Ownership.
5. Timescale for commencement/completion of development.

The letter said that these criteria would be weighted as follows: experience 15%; design 40%; ownership 20%; timescale 25%. A questionnaire was also appended, to be completed and returned for evaluation. It was explained that the council would require to be satisfied that the applicant had sufficient financial backing for the proposed development, and that essential to that would be the applicant's commitment to enter into an agreement with the council undertaking to indemnify the council against all costs incurred by it in pursuing any CPO to assemble the site. The council's style of back-to-back agreement was also attached as an appendix.

23. In response to this invitation SCPD submitted two development proposals. One was for a joint proposal by SCPD and another proprietor for a mixed retail and leisure scheme for Phases A-C. The other was a comprehensive scheme for Phases A-H which covered the entire site. Atlas submitted a single redevelopment proposal for Phases A-H for the entire site. Both parties were invited to make formal presentations of their proposals. They both did so, and their proposals were evaluated

according to the stated criteria. The director submitted a report to the committee dated 4 April 2003 in which he reported the results of the evaluation. He said that Atlas, which had the highest score, could be recommended as the preferred developer. On 10 April 2003 the committee, having considered his report, agreed to the selection of Atlas as the preferred developer and instructed the director to enter into a back-to-back agreement with Atlas for the use of the CPO powers to achieve the redevelopment. On 8 September 2003 SCPD submitted an application for detailed planning permission for Phases A-C. On 8 October 2003 Atlas submitted an application for detailed planning permission for Phases B-H. Both applications were subsequently granted.

The proceedings below

24. On 22 July 2003 SCPS and SCPD commenced these proceedings for judicial review of the council's decision of 10 April 2003 to select Atlas as the preferred developer and to enter into a back-to-back agreement with it for the use of its compulsory powers to assemble the site for redevelopment. The first hearing took place before the Lord Ordinary on 5 and 6 February 2004. On 1 June 2004 the Lord Ordinary refused the petition: 2004 SLT 655.

25. In the course of her opinion, at p 671, the Lord Ordinary rejected the argument that, in selecting a preferred developer on 10 April 2003, the council had made it impossible to have proper regard to the requirements of section 191 of the 1997 Act. In para 129 she said:

> "Section 191(2) refers to the best use of land, or the erection of buildings needed for the proper planning of the area. Section 191(3) stipulates two qualifications: the 'best price', or 'the best terms that can reasonably be obtained'. In my view, on a proper construction of that subsection, the word 'or' is used disjunctively, and accordingly section 191(3) can be satisfied if a local authority such as the council demonstrate that they achieved 'the best terms that can reasonably be obtained…' I consider the concept of 'best terms' to be broader and more flexible than that of 'best price'. The concept includes price, not as the determinative factor, but simply as one of many factors to be taken into account."

In para 132 she said that in carrying out their selection process the council had laid down an open, fair and detailed evaluation procedure, all as set out in the framework, specifically reflecting the requirements of sections 189 and 191 of the 1997 and the guidance given by Lord Nimmo Smith, and that the whole procedure was directed to establishing the best use of the land on the best terms.

26. SCPS and SCPD reclaimed against the Lord Ordinary's interlocutor, and the reclaiming motion was heard on 12 and 13 October 2004. On 3 December 2004 the First Division (the Lord President (Cullen) and Lords Kirkwood and Reed) allowed the reclaiming motion, granted decree of declarator that the council's decisions of 10 April 2003 to agree to the selection of Atlas as preferred developer for the site and to instruct the director to enter into a back-to-back agreement with Atlas were ultra vires and unreasonable and reduced the decisions accordingly: 2005 SLT 144. The opinion of the court was delivered by Lord Reed.

27. In para 28, at p 154, Lord Reed observed that section 191(3) of the 1997 Act imposed a prohibition on the planning authority which, apart from the reference to subsection (7) which is not in point in this case, is unqualified. In para 37, at p 157, he said that it appeared to the court that a prohibition such as that contained in section 74(2) of the 1973 Act was intended, as Lord Macfadyen said in *Stannifer Developments Ltd v Glasgow Development Agency*, 1998 SCLR 870, 890, to protect the public purse from loss through the disposal of assets of a public body at undervalue, and that it required a judgment to be made by the authority as to what was the best consideration which could reasonably be obtained. Turning to the 1997 Act, however, he said in para 39 that, in construing section 191(3), the starting point was that the provisions of section 191 had to be read together, and interpreted in the light of the policy and objectives of the Act as whole:

> "The statutory context of section 191, set as it is in planning legislation, suggests that its primary objective is to ensure that if land acquired or appropriated by a planning authority for planning purposes, and held by them for such purposes, is disposed of, the planning authority secure the best use of the land or the carrying out of works needed for the proper planning of the area. Section 191(3) should not therefore be interpreted so as to be capable of preventing that objective from being achieved."

In para 40 he referred to the fact that section 191(3) did not allow any exception to be made with the consent of the Scottish Ministers. He said that this was consistent with the view that section 191, read as a whole, permits land to be disposed of otherwise than on a wholly commercial basis, in appropriate circumstances.

28. In para 41 Lord Reed noted that in *Standard Commercial Property Securities Ltd v Glasgow City Council* Lord Nimmo Smith reached that conclusion by construing the words "best terms" in section 191(3) as including those terms which would be most conducive to the achievement of the purposes set out in subsection (2). He said that although the court had reached the same conclusion, it did not agree with that construction of "best terms". Section 191(1) was to be construed as regulating, to the exclusion of subsection (3), the planning authority's decision as to the aspects of the transaction which are intended to secure the purposes mentioned in subsection (2). The statute then required in addition to regulate the value obtained for the public asset involved, so as to protect the public purse. That objective could be achieved, without undermining the primary purpose of section 191, by construing subsection (3) as prohibiting disposal "otherwise than at the best price or on the best terms that can reasonably be obtained":

> "So interpreted, subsection (3) is concerned solely with the commercial value of the transaction (ie the price, and other terms relevant to commercial value, as explained in such cases as *Stannifer*), but has to be applied consistently with subsection (1)."

29. Reviewing the facts in the light of that approach to the subsection, Lord Reed said in para 43, at p 158, that it appeared that the council gave no consideration, prior the decision of 10 April 2003, to the question whether reimbursement of their costs constituted the best value to be obtained. Neither the evaluation process nor the use of the standard form of contract involved any consideration being given to the value of the site or to what developers might be willing to offer for it. The council had proceeded on the assumption that reimbursement of their costs constituted the best price that could reasonably be obtained. This was not an assumption that could reasonably be made.

30. In para 44 Lord Reed said that there appeared also to be force in the submission that the council had proceeded throughout on an assumption that a back-to-back agreement with a single developer in

respect of the entire site was the most appropriate way of dealing with it and that there was nothing to indicate that it gave any consideration to whether there should be separate developments of parts of the site or whether it was appropriate to decide to enter into a back-to-back agreement prior to receiving or determining applications for planning permission.

Discussion

31. The first question is whether the terms on which the council proposes to make the assembled site available to the developer are within the scope of the power to dispose of land acquired or appropriated for planning purposes under section 191 of the 1997 Act. The essence of the back-to-back agreement is that the developer will not pay any more for the assembled site than the cost to the council of assembling it, while the council for its part will achieve its planning purpose without any cost to the public purse and without the risk of incurring a loss on the proposed redevelopment. Is such an arrangement permitted by section 191(3)?

32. Their Lordships of the First Division agreed with Lord Nimmo Smith, whose opinion on this point was adopted by the Lord Ordinary, that section 191(3) did permit such an arrangement. But, as Lord Reed explained in para 41 of his judgment, there was an important difference between them as to the scope that was to be given to the expression "the best terms". It was common ground that it was within the scope of that expression, which is separated from the words "the best price" by the disjunctive word "or", for the land to be disposed of otherwise than for payment of a sum of money or on a wholly commercial basis. It was common ground too that the power in section 191(3) differs in two respects from the general power in section 74(1) of the 1973 Act for use where land is surplus to requirements, which prohibits the disposal of the land for a consideration less than the best that can reasonably be obtained. First, the Scottish Ministers have no power to override the prohibition in section 191(3). Second, the power in section 191(3) is designed for use in its own particular statutory context. So it must be interpreted in that context, reading section 191 as a whole. The primary objective of section 191 is to ensure that, where land acquired or appropriated for planning purposes is held for the purposes for which it was acquired or appropriated is disposed of, this is done in a way that will secure the best use of the land or the carrying out of works that are needed for the proper planning of the area: see section 191(2).

33. Lord Nimmo Smith said that the overriding consideration for the local authority, when it was deciding whether the use of a back-to-back agreement was appropriate, was whether acquisition of the land and its development by the developer on these terms were reasonably necessary for planning purposes: *Standard Commercial Property Securities Ltd v Glasgow City Council*, 2001 SC 177, para 43. It was for the authority to consider whether the terms would be most conducive to the achievement of the purposes set out in section 191(2). Factors such as the likely ability of the person to carry through the development to completion, in the light of past experience and financial soundness, would be relevant. As I have already indicated, reference to these factors led to their inclusion in the council's framework as part of the evaluation criteria.

34. I agree with their Lordships of the First Division, however, that this approach reads too much into the expression "the best terms" in this context. As Lord Reed pointed out in para 41, section 191 seeks to do two things. On the one hand it seeks to regulate those aspects of the transaction which are intended to secure the purposes set out in subsection (2). These purposes are to secure the best use of the land and the proper planning of the area. On the other it seeks in addition to protect the public purse in the manner indicated by subsection (3). These are separate and distinct requirements, although they must both be read in the light of what section 191 seeks to achieve. The prohibition in subsection (3) directs attention to one issue, and to one issue only. This is the commercial implications of the transaction for the planning authority. It is to the best commercial terms for the disposal of the land, not to what is best designed to achieve the overall planning purpose, that the authority must direct its attention at this stage. But the words "best terms" permit disposal for a consideration which is not the "best price". So terms that will produce planning benefits and gains of value to the authority can be taken into account as well as terms resulting in cash benefits.

35. Terms under which the land is to be disposed in exchange only for an indemnity, as the back-to-back agreement contemplates, are not necessarily outwith the scope of section 191(3). Mr Currie QC for the respondents accepted that in this respect the back-to-back agreement was not necessarily inconsistent with the prohibition which it sets out. His point was that there was no evidence that the council ever directed its attention to the question whether these were the best terms that could reasonably be obtained from the preferred developer. It had proceeded throughout on what was no more than an assumption. It was on this ground that the First Division held that the council's decision was ultra vires. The question then is whether it has been shown that the council

failed to take all relevant considerations into account when it decided to exercise the power in this way.

36. There is, it is true, no record in any of the documents that we have seen of any discussion of the question whether it might be possible to exact a sum of money from the preferred developer in addition to the indemnity. There is no sign that advice was sought on the question whether the assembled sight would be likely to be worth more than the compensation that was to be payable for the individual parts that were to be acquired compulsorily. There is therefore some force in the point that Mr Currie makes that the terms of the back-to-back agreement were devised on an assumption that they were the best that could reasonably be obtained which was never tested or examined against the possibility that better terms might be obtainable.

37. On the other hand some aspects of the situation in which the council found itself were self-evident. Three points in particular stand out. First is the acknowledged fact that the site is in poor condition and badly in need of redevelopment. Second, the council does not have the resources to carry out such a project itself. The only way it can be done is by attracting a private developer. And third, the site is in multiple occupation and ownership. The most likely candidates for the redevelopment already own parts of it. Each of these points can be fleshed out in greater detail to build up a picture of whether the council was entitled to proceed on the basis that the back-to-back agreement would provide the best commercial terms that could reasonably be obtained from the preferred developer.

38. The council's letter of 16 December 2002 had appended to it a development brief in which a detailed description was given of the current state of the site and what needed to be done to it. The introduction to this document states:

> "The site is effectively contained within the urban block bounded by Buchanan Street/Bath Street/West Nile Street (see Plan) and contains arguably the most important remaining redevelopment opportunity within the city's premier shopping thoroughfare.
>
> To enable the redevelopment of this partial city block, the successful developers will exhibit a language of contemporary architecture that compliments both the neighbourhood commercial environment and, importantly,

> the surrounding historic fabric. To derive the optimum benefits for the City Centre, whilst enhancing this unique location, successful submissions should derive to seek a mix of activities and functions that would bring added activity to the area outwith normal retailing operating hours.
>
> Achieving a scheme of appropriate quality in terms of land use, vitality, architecture and urban design and sustainability is essential to enhance the image and attractiveness of Buchanan Street, and to reflect the continuing aspirations associated with Glasgow City Centre, which has been transformed into a bustling, modern, European city, thriving on quality cultural, leisure and retail activities."

39. The emphasis in this document on the wider benefits that were expected to flow from the redevelopment was taken a step further in another document which was appended to the letter of 16 December 2002. It is headed "Urban Design and Development Form". Various points are made about the elements to be considered in the design, such as sight lines, building lines and materials. The developer was encouraged to allocate a budget to the cost of integrating public art into the development, and there was to be a requirement to include improvements to the relevant areas of West Nile Street and Bath Street commensurate with that undertaken on Buchanan Street. The proposals for redevelopment were therefore to contain a strong element of planning gain. The developer was not to be allowed to restrict its proposal to what would be most likely to serve its own commercial interests. The value of achieving this planning gain was almost certainly not capable of being expressed in money terms. It was something of value nevertheless, and the council was entitled to take it into account.

40. The purpose of the indemnity which is set out in the back-to-back agreement is, of course, to protect the public purse. The planning gain which the council wishes to achieve is to be obtained at no cost to its council tax and rate payers. But it has another aspect which, in the context of this site and having regard to the extent to which those who were being invited to bid for the redevelopment are already owners in different proportions of separate parts of it, has a part to play in an assessment of whether its terms were the best that could reasonably be obtained. The proposal that the developer should not have to pay more for the assembled site than the council's costs in assembling it created a level playing field. Otherwise complicated questions could arise as to what credit, if any, was to be given in assessing the reasonableness of

any additional payment for the value of that part of the site that was already owned by each developer. From the developer's point of view, of course, the attraction of bidding for the right to redevelop the site lies in the profit that it can expect to make from it. Each element of cost would have, in the end, to be taken into account in the amounts that were obtained by way of rent or other return from future occupiers and the size of the budget that could be set aside for such unremunerative aspects of the redevelopment such as public art. There was at least something to be said, in these circumstances, for keeping the arrangement as simple as possible in view of the benefits that were to be gained for the surrounding area.

41. There is one other factor which, in my opinion, adds weight to those already mentioned. At no time, prior to the bringing of these proceedings, was it suggested by SCPD or any other candidate for the redevelopment that they would be willing to pay more for the right to acquire the site than the amount of the indemnity. Nor has there been any offer to do so subsequently. Nor was Mr Currie able, when pressed on this point, to say on what basis it would be appropriate to invite tenders for any additional payment over and above the indemnity. He said that it was for the council to take advice on this point. But there is an air of unreality about his argument. In the real world prospective developers will seek to pay as little as possible for the right to undertake such a development. There is no indication that any of the recipients of the letter of 16 December 2002 were willing to volunteer anything substantial by way of an additional payment on top of the benefits which they were being required to provide by way of planning gain to the council as planning authority. It is reasonable to infer that there was no element of commercial value that the council could reasonably extract in addition to what has already been built into the agreement which has been entered into with Atlas.

42. For all these reasons, I would hold that there is more than enough in the surrounding facts and circumstances to enable it to be said that the terms set out in the back-to-back agreement were the best that could reasonably be obtained and that the council was acting within its powers when it decided to enter into the agreement with Atlas. It was for the respondents to show that the council were not entitled to conclude that its terms measured up to this standard, and I do not think that they have done so.

43. There are two further points that must be mentioned. The first relates to the question of timing. The first issue in the Statement of

Facts and Issues asks whether a decision by a planning authority to enter into a back-to-back agreement with a developer at the same time as a decision to acquire compulsorily the land in question is inconsistent with the requirements of sections 189 and 191 of the 1997 Act. The obvious response is that the whole point of a back-to-back agreement of the kind proposed in this case is to make the authority's compulsory powers available for the benefit of the preferred developer. A decision that resort will be had to the compulsory powers, if their use proves to be necessary, to assemble the site for redevelopment is part and parcel of the whole arrangement. The two elements cannot sensibly be separated from each other, and I can see nothing to prevent a decision to enter into such an arrangement being taken in advance of acquiring the land and obtaining planning permission for the development. Mr Currie, very properly, said that this question did not need to be answered.

44. The second point is whether the council was in a position, when the decision was taken on 10 April 2003, to conclude that disposal of the whole site to Atlas as the single preferred developer was the most appropriate way of dealing with the site. Lord Reed said in para 44 of his opinion that it appeared to the court that there was some force in this argument, because there was nothing in the documents to indicate that they gave any consideration to the question whether there should be single comprehensive redevelopment of the entire site by a single developer or separate developments of different parts of the site or whether it was appropriate to defer a decision on this point before receiving or determining applications for planning permission.

45. In my opinion, however, there are no grounds for saying that the decision to proceed on the basis that the entire site was to be developed on the basis of a back-to-back agreement with a single developer was unreasonable in all the circumstances disclosed by the facts of this case. The council had already taken on board the points made by Lord Nimmo Smith when he decided to reduce the decision of 26 August 1999. Their decision to proceed without waiting for an application for planning permission was well within the scope of the discretion which it had as planning authority. I do not think that there is any basis for holding that the decision of 10 April 2003 was ultra vires on this ground.

Conclusion

46. I would allow the appeal, recall the First Division's interlocutor and restore the interlocutor of the Lord Ordinary.

LORD RODGER OF EARLSFERRY

My Lords,

47. Over the last forty years or so Buchanan Street rather than Sauchiehall Street has established itself as the principal shopping street in Glasgow. Substantial funds, both public and private, have been invested in Buchanan Street, which is said to be the premier shopping street in the United Kingdom outside of London's West End. The Royal Concert Hall now crowns the top of the street and, running down from it on the east side, is the modern Buchanan Galleries shopping mall. On the other side, between Nelson Mandela Place and the corner of Bath Street, the older and somewhat run-down buildings are rather out of keeping with the rest of the street. They form part of a larger group of buildings bounded by Bath Street to the north and West Nile Street to the west which have, for the most part, seen better days. Not surprisingly, Glasgow City Council ("Glasgow", "the Council") have seen the advantages, in both planning and more general terms, of a suitable development of this site, to bring it up to the standard of the rest of Buchanan Street. Equally unsurprisingly, since it is the last available site in this commercially attractive area, two developers in particular have been keen to take forward such a development. They are Atlas Investments Ltd ("Atlas") and Standard Commercial Property Securities Ltd and Standard Commercial Property Developments Ltd ("Standard"). Both Atlas and Standard own properties on the site, but it is common ground that, partly because of the reluctance of some owners to sell and partly because of the need to clear old burdens from the titles, no modern commercial development would be possible without Glasgow exercising their powers of compulsory purchase to acquire the site and pass it on to the developer or developers. Indeed, even Atlas who own a substantial part of the site, are keen to have their own properties compulsorily purchased in order to obtain a clear title through the statutory vesting of the subjects in the Council. So far, the rivalry between Atlas and Standard has spawned delay and a considerable amount of work for lawyers. More of both seem to lie ahead, with objections to any compulsory purchase scheme being anticipated.

48. While Glasgow are indeed willing to use their compulsory purchase powers under sections 189 and 191 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") to facilitate development of the site, like other local authorities in similar circumstances, they wish to avoid having to spend potentially large sums of money on doing so. One way which local authorities have devised to achieve this is to

identify a suitable developer (or developers) and to enter into an agreement with that developer under which the council will do their best to effect the compulsory purchase of the site. Still in terms of the agreement, the council will then convey the site to the developer, subject to a real obligation to complete the development, in return for an indemnity for the council's costs in carrying out the compulsory purchase, including their legal costs and their outlay on compensation. This is the model which Glasgow have been trying to follow.

49. Their first attempt was in August 1999 when Glasgow approved the principle of promoting a compulsory purchase order over the site under section 189 of the 1997 Act and instructed the appropriate official to conclude an agreement with Atlas for the development of the site and for an indemnity for the Council's costs. Atlas and Glasgow entered into the agreement later that year. As Glasgow had been aware, however, a company within the Standard group owned a public house on the corner of Buchanan Street and Bath Street and had been in discussion with Council officials about developing the subjects which they owned or indeed about a possible larger development. In *Standard Commercial Property Securities Ltd v Glasgow City Council* 2001 SC 177 the Lord Ordinary (Lord Nimmo Smith) reduced the Council's decision to instruct their official to enter into the agreement with Atlas on the ground that, by assuming that a single comprehensive development of the whole site was required and by ignoring Standard's proposals for the public house site, the Council had failed to take into account relevant and material considerations in exercising their discretion under sections 189 and 191 of the 1997 Act.

50. So Glasgow started again. They prepared a development brief and invited proposals for redevelopment from all the owners of properties within the site, including Atlas and Standard. Again, the successful developer was to provide an indemnity for Glasgow's costs in effecting the compulsory purchase. The proposals were to be assessed against certain specified criteria, which were to be variously weighted. After discussions with Council officials, both Atlas and Standard submitted proposals. Atlas's proposal was for the whole site. Standard submitted two proposals, one, with Lujo Properties Ltd, for phases A to C and another, with two other companies, for the whole site. On the recommendation of their officials, on 10 April 2003 the Council's Development and Regeneration Services Committee decided to choose Atlas's proposal for the redevelopment of the whole site and to instruct the relevant official to enter into an agreement with Atlas - the consideration for the disposal of the site to Atlas again being an indemnity for the Council's costs.

51. Standard seek decree of declarator that these decisions of the Committee were ultra vires et separatim unreasonable and decree of reduction of the decisions, on the ground that an indemnity for the Council's costs was not "the best price or … the best terms that can reasonably be obtained" for the disposal of the site, as required by section 191(3) of the 1997 Act. The Lord Ordinary (Lady Paton) dismissed the petition, 2004 SLT 655, but the First Division allowed Standard's reclaiming motion and pronounced decree of declarator and reduction: 2005 SLT 144.

52. My noble and learned friend, Lord Hope of Craighead, has narrated the relevant provisions of sections 189 and 191, which I need not repeat. Section 191(1) provides that, where a planning authority has acquired or appropriated land for planning purposes and holds it for those purposes, the authority may dispose of the land to such person, in such manner and subject to such conditions as may appear to them to be expedient for the purposes mentioned in subsection 2. In the proceedings before Lord Nimmo Smith, Standard appear to have begun by arguing that a prior agreement between a council and a developer relating to the council's use of its compulsory purchase powers would be ultra vires, because it was entered into before the council acquired and held the site for planning purposes. Lord Nimmo Smith considered that, read together, sections 189 and 191 appeared "to provide a statutory framework within which a local authority may decide to acquire land compulsorily and to sell it to a developer under a back-to-back agreement, provided that proper account is taken" of subsection (7) and of such considerations as the likely ability of the person, based on past experience and financial soundness, to complete the development. He therefore rejected the submission "(which was in any event, as I understood it, departed from) that a decision to enter into a back-to-back agreement cannot competently be made at the same time as a decision compulsorily to acquire the land in question": 2001 SC 177, 201, para 43. In the present case counsel for Standard made no submission that such a decision would be incompetent and the First Division reserved their opinion on the point: 2005 SLT 144, 152, para 19, and 154, para 27. At the hearing before the House all counsel approached the case on the basis that the competency of such an agreement was not in issue.

53. As a general proposition, there is nothing to prevent a council or anyone else from deciding to contract for the disposal of land which they intend to acquire in the future. The objection would therefore have to be that a council could not satisfactorily decide in advance what would be the best way to deal with the land, if and when they acquired it, and so could not properly decide beforehand what would be expedient

under section 191(1) or constitute the best price or terms under section 191(3). In my view such a generalised objection would be unrealistic since, very often, planning authorities will be able to see quite clearly what has to be done with a site, if and when it is acquired, and who is the best, or perhaps the only, person to do it. Similarly, they will be able to assess what are reasonably likely to be the best price or best terms on offer. Of course, circumstances may change. In the present case, even after their decisions in April 2003, Glasgow kept the situation under review and decided in August to exclude Standard's property on the corner of Buchanan Street and Bath Street from the scope of any compulsory purchase order. If the situation should change further in any material respect by the time that Glasgow have acquired the site, clause 12 specifically provides that nothing in the agreement "shall prejudice or abridge the rights, powers, and duties of the Council as local authority for the said City under the Town and Country Planning (Scotland) Acts … and the Council shall be entitled to exercise the said rights and others as fully and freely as if the Council were not party to the said Agreement." So, entering into an agreement on those terms does not impair, or even purport to impair, the Council's freedom to change course and to dispose of the land differently if that is what section 191 requires. For these reasons I am satisfied that in an appropriate case a planning authority can indeed lawfully enter into such an agreement in advance of acquiring and holding the site for planning purposes.

54. On behalf of Glasgow Mr Moynihan QC submitted, however, that the First Division had misconstrued section 191 of the 1997 Act by treating the requirement in subsection (3), to obtain the best price or best terms, as predominant. It was this error in law which had led them to hold that Glasgow's decisions to select Atlas's proposal and to instruct their official to enter into the agreement with Atlas had been ultra vires and unreasonable. The proper approach to the construction of section 191 was to be found in the opinion of Lord Nimmo Smith in the earlier proceedings, which Glasgow had applied in first drawing up and then following the framework that was used to select Atlas to carry out the development in terms of the agreement.

55. Lord Nimmo Smith preferred, 2001 SC 177, 201, para 43, to interpret sections 189 and 191 of the 1997 Act as giving rise to

> "a single, composite discretion rather than one to be exercised in stages, as I understood counsel for Atlas to submit. The over-riding consideration for the local authority, as it appears to me, is whether acquisition of the

> land by them and its development by the developer with which a back-to-back agreement is to be entered into are reasonably necessary for planning purposes."

More particularly, his Lordship observed, 2001 SC 177, 200 – 201, para 42:

> "Section 191(3) does not prohibit such a disposal otherwise than at the best price that can reasonably be obtained. The expression in that subsection is 'otherwise than at the best price *or on the best terms* that can reasonably be obtained' (my emphasis). It would therefore be for the local authority to consider not only the price (as related *inter alia* to the amount of compensation payable under the compulsory purchase procedure) but also the terms offered by any person to whom the disposal might be made. These terms would include those which would be most conducive to achievement of the purposes set out in subsec (2), and would thus include matters such as the likely ability of the person, on the basis, for instance, of past experience and financial soundness, to carry the development through to completion. Moreover, subsec (3) is subject to the provisions of subsec (7), so that consideration might require to be given to the interests of those who were carrying on business on the land and desired to continue to do so."

On this basis counsel submitted that, even if an indemnity for their costs might not be the best price that could reasonably be obtained for the site, Glasgow could properly conclude, for instance, that Atlas were the most reliable people to carry the development through to completion and so an agreement to dispose of the site to them in return for an indemnity would represent the best terms that were reasonably available.

56. In the present proceedings in the First Division Lord Reed began construing section 191 by observing, 2005 SLT 144, 157, para 38, that securing the best use of land or the carrying out of works needed for the proper planning of the area might not necessarily be consistent with maximising the commercial value of the land. So, he observed, at p 157, para 39:

> "In construing section 191(3), the starting point is that the provisions of section 191 have to be read together, and interpreted in the light of the policy and objectives of the Act as a whole. The statutory context of section 191, set as it is in planning legislation, suggests that its primary objective is to ensure that if land acquired or appropriated by a planning authority for planning purposes, and held by them for such purposes, is disposed of, the planning authority secure the best use of the land or the carrying out of works needed for the proper planning of the area. Section 191(3) should not therefore be interpreted so as to be capable of preventing that objective from being achieved."

This passage scuppers any suggestion that the First Division saw section 191(3) as overriding the requirements of subsections (1) and (2). It appeared to the Division, rather, at pp 157-158, paras 41 and 42, that

> "section 191(1) must be interpreted as regulating (to the exclusion of subsection (3)) the planning authority's decision as to the aspects of the transaction which are intended to secure the purposes mentioned in subsection (2). Apart from that aspect of the decision, the statute requires in addition to regulate the value obtained for the public asset involved, so as to protect the public purse. That objective can be achieved, without undermining the primary purpose of section 191, by construing subsection (3) as prohibiting disposal 'otherwise than at the best price or on the best terms that can reasonably be obtained' in the circumstances of a disposal which is in accordance with subsection (1), ie a disposal to such person, in such manner and subject to such conditions as may appear to the planning authority to be expedient for the purposes mentioned in subsection (2). So interpreted, subsection (3) is concerned solely with the commercial value of the transaction (ie the price, and other terms relevant to commercial value, as explained in such cases as *Stannifer Developments Ltd v Glasgow Development Agency* 1999 SC 156), but has to be applied consistently with subsection (1).
>
> 42. Following this approach, the planning authority have to make a judgment under section 191(1) as to the aspects of the disposal mentioned in that subsection, according to what appears to the authority to be expedient

> for the purposes mentioned in subsection (2). In order to comply with their obligation under section 191(3), the planning authority have also to obtain the best value they can for the land (subject to subsection (7)), consistently with the exercise of their power of disposal in accordance with section 191(1). In doing so, they have to assess the price and any other terms affecting the value obtained."

57. In my view the First Division's construction is to be preferred, precisely because it keeps the two important aims of the legislation distinct and so helps ensure that both are observed. The legislature signals that this is how the section is to be approached by carefully distinguishing between the "conditions" in subsection (1), subject to which the authority may dispose of land, and the "terms" in subsection (3), on which any disposal must proceed. The distinction is maintained in subsections (4)(a) and (6).

58. First, the authority can dispose of land under section 191 only if it is expedient to do so in order to secure the best use of the land and any building or works or to secure the erection, construction or carrying out of buildings or works appearing to the authority to be needed for the proper planning of their area. So, under subsections (1) and (2), the authority must first make sure that disposal of the land to the developer or developers secures one or other of those aims. That is the authority's primary objective, as the First Division say. Standard do not suggest that the disposal of the site to Atlas would infringe these provisions.

59. Once the authority are satisfied that their proposed disposal meets those requirements, subsection (3) and the second aim of the legislation come into play. The authority cannot simply give away the land to the developer who seems most likely to achieve their aims; nor can they dispose of the land to the developer at a discount if a better deal can reasonably be obtained. Rather, the authority must dispose of the land at the best price or on the best terms that can reasonably be obtained, given the conditions on which the land is to be conveyed to the developer in order to achieve the authority's planning purposes. This is not to say that the authority must aim to make a profit: given the conditions which the authority consider it necessary to impose in order to achieve their planning goal, on occasions the best price may well be less than the compensation which the authority paid to acquire the land. In such a case what matters is that the authority should get the best price that can reasonably be obtained in the circumstances and so minimise any loss to the public purse. Similarly the planning authority can properly choose

to dispose of the land to a developer who offers a lower price but better "terms" than a rival for carrying out a comparable development. The "terms" in question are commercial, but broadly so. For instance, the preferred developer may offer a lower price but be prepared to take possession of the site, pay the price and start the development immediately rather than at a considerably later date; conversely, the preferred developer may be prepared to wait until a time that is more convenient to the Council rather than insisting on taking possession and starting straightaway; or the developer may be prepared to carry out the whole development forthwith rather than in separate stages spread over several years. The planning authority have to choose the best package that is reasonably available, given their requirements for the way the land is to be developed. In the words of my noble and learned friend, Lord Brown of Eaton-under-Heywood, the authority are able to get what they believe to be the best overall deal available.

60. Even although the First Division correctly construed section 191(3), it does not follow that they applied it correctly to the circumstances of the case. Their reasoning is to be found in paras 43 and 44 of their judgment. I respectfully adopt what Lord Hope has said about para 44 and confine my observations to the issues which their Lordships confronted in para 43.

61. The onus is on Standard to establish that, in deciding that an indemnity for their costs represented the best price or best terms that could reasonably be obtained, Glasgow reached a decision which was ultra vires or which no reasonable authority could have reached: *R v Birmingham City District Council Ex p O* [1983] 1 AC 578, 597C-D per Lord Brightman. In considering whether they have discharged this onus, your Lordships must put aside any suspicion that Standard would gladly have accepted any comparable decisions in their favour and are only criticising Glasgow's approach to price because they lost out in the competition for the development.

62. Counsel for Glasgow submitted that the introductory paragraphs of the framework document showed that Glasgow had taken the relevant provisions of sections 189 and 191 into account. But, both in the courts below and in this House, counsel accepted that, in applying section 191(3), Glasgow had simply assumed that an indemnity for their costs represented the best price or the best terms that could reasonably be obtained. Counsel for Standard submitted that this was not good enough: there was nothing to show that an indemnity was the best deal which could be obtained and Glasgow had not been entitled to assume

that it was. After all, it seemed self-evident that a developer would have been prepared to pay more than the aggregate of the compensation for acquiring the individual properties in return for the composite site which the Council had assembled and which had a clear title, thanks to the statutory vesting. Glasgow should therefore have taken steps to check the position by obtaining valuation advice. A valuer would have been able to give them an opinion about the value, to a willing developer, of the ownership of the pre-assembled site subject to a real obligation to carry out the development in question. Armed with that advice, Glasgow would have been in a position to negotiate an appropriate price or appropriate terms with the developer. Glasgow should have opened the way to such a negotiation by giving potential developers an opportunity to offer something more than the indemnity: instead, the questionnaire for potential developers simply asked whether they would be prepared to enter into the agreement to provide an indemnity.

63. An alternative way of looking at the position, which my noble and learned friend, Lord Hoffmann, put to counsel for Glasgow at the outset of the hearing, is to say that by offering all potential developers the chance to provide a development within the scope of the development brief in return for an indemnity, Glasgow had in effect set up a competition which ensured that they would obtain the best available development for their outlay and so the best available terms. Although I readily see the force of that argument, it really presupposes that any material increase in the fixed price to be paid by the developer would inevitably have resulted in the proposed development being altered for the worse. But, in theory at least, one could have a situation where the development was the best which the winning developer could devise but the cost to him of carrying it out was not so high that he would have altered it if he had been obliged to pay a higher price for the land. There is therefore something to be said for Mr Currie's submission that we can only speculate as to whether Glasgow might have obtained a better deal if they had pressed Atlas.

64. It is accordingly at least possible that, for the kinds of reasons advanced by counsel for Standard, the indemnity did not represent the best price or the best terms that Glasgow could reasonably have obtained. But the circumstances presented to the court do not justify the inference that this was in fact the case. Mr Currie accepted that there had been no need for Glasgow to put the development out to tender to other potential developers, since Atlas and Standard were the only realistic contenders. So, while it might well have been prudent for Glasgow to take valuation advice, the real question is whether Standard have shown, first, that they or Atlas would have been prepared to offer a

better deal if Glasgow had pressed them and, secondly, that any reasonable council would have realised this. As counsel for Glasgow emphasised, neither in their pleadings nor in any affidavit or submissions have Standard actually said, or offered to prove, that they or Atlas would have been prepared to pay more than the value of an indemnity. Indeed, in their letter of 25 June 2003 to the Council's Director of Development and Regeneration Services, Standard advanced a number of criticisms of the selection process, but made no mention of price. Rather, they went on to outline a compromise proposal that the development should be split, with the Council "entering two indemnity agreements with the two favoured developers and taking forward the CPO on this basis." An indemnity and nothing more was what Standard had in mind. In short, there is no material before the court which would justify the inference that the indemnity was not in fact the best deal which Glasgow could reasonably have obtained.

65. In these circumstances Standard have not established that the decisions of 10 April 2003 were ultra vires; nor have they established that no reasonable council could have concluded that the obligation to indemnify the Council's costs represented the best price or the best terms which could reasonably be obtained in return for the ownership of the site subject to a real obligation to complete the development. There is therefore no relevant basis for pronouncing the decrees of declarator and reduction which Standard seek. For these reasons, and in substantial agreement with Lord Hope and Lord Brown, I would allow the appeal and make the order which Lord Hope proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

66. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry and gratefully adopt their exposition of the relevant facts, law and issues arising on this appeal. I am in substantial agreement with all that they say and, like them, would allow this appeal and make the order proposed. I want, however, to add just a few paragraphs of my own, particularly upon the inter-relationship between subsections 1 and 2 of section 191 of the Town and Country Planning (Scotland) Act 1997 on the one hand and subsection 3 on the other. These provisions appear at paragraph 8 of Lord Hope's speech and I need not repeat that.

67. Subsections 1 and 2 of section 191 required that any disposal of compulsorily acquired land (I summarise) must be to secure the best use of that land and the construction of any buildings necessary for the proper planning of the area. Subsection 3 requires that any disposal be at the best price or on the best available terms. Lord Hope and Lord Rodger both prefer the First Division's construction of section 191 to that of Lord Nimmo Smith in *Standard Commercial Property Securities Ltd v Glasgow City Council* 2001 SC 177 (an earlier challenge brought during the long awaited redevelopment of this site). It is to be preferred, Lord Rodger concludes at paragraph 57, "precisely because it keeps the two important aims of the legislation distinct and so helps ensure that both are observed." Lord Hope puts it at paragraph 34:

> "These are separate and distinct requirements, although they must both be read in the light of what section 191 seeks to achieve. The prohibition in subsection (3) directs attention to one issue, and to one issue only. This is the commercial implications of the transaction for the planning authority."

In short, "terms" in section 191(3) must relate, if only broadly, to the commercial value of the transaction; Lord Rodger's example in paragraph 59 is of a developer offering a lower price but being prepared to take possession of the site, pay the price and start the development immediately rather than considerably later.

68. I do not disagree with this analysis provided always that it is recognised as enabling the planning authority to get what it believes to be the best overall deal available. By best overall deal I mean that which best achieves both its planning and its commercial objectives. I understand both Lord Hope and Lord Rodger to accept this approach as, indeed, I believe the First Division did (see para 39 of Lord Reed's judgment). The authority is entitled to prefer planning benefits and gains to purely commercial benefits.

69. What, then, are the authority's objectives in the present case? First and foremost Glasgow's objective here is plainly to secure the best possible development of this prime site. Lord Hope in paragraph 38 quotes the development brief appended to the authority's letter of 16 December 2002. I would add to it this, under the heading Preferred Option:

> "The site has the capability to deliver exceptional re-generational benefits. The aim should be to provide uses that will complement each other and the surrounding area, and will confer economic and social benefits to both the Principal Retail Area and the City Centre as a whole.
>
> Adopting a mixed-use approach will thus extend the diversity of uses and enhance the potential range and quality of activities in this part of the City Centre. This would include uses that complement existing attractions and facilities and bring added life and vitality to the area. Notwithstanding the desire to see an appropriate addition to the existing quality retail provision, suitable complementary uses that would be acceptable include residential, hotel, cultural, office and leisure. As a minimum, the ground floor of any new development should address and engage the street in an interactive way; a high degree of permeability from the street to the development is required. However, the upper floors should not be seen as something entirely divorced from what happens at ground floor level."

70. Note there the reference not only to the strong element of planning gain of which Lord Hope speaks but also the "economic", as well as social, "benefits" for the city. Note too that amongst the criteria by which the rival tenderers were to be evaluated were "experience of development" (related obviously to the ability to develop the site efficiently) and the "timescale for commencement [and] completion of development". These criteria seem to me plainly to involve commercial considerations and so qualify as "terms" within the meaning of section 191(3). The sooner this site is efficiently redeveloped the sooner will arrive the "economic benefits", inevitably including larger business rate revenues for the Council.

71. Glasgow's other main objective is to achieve this development without cost to itself. It simply cannot afford to acquire the site without a full indemnity both as to its outlay on compensation and its legal costs. It has not the funds to speculate. It cannot take the risk that land values may fall or that the development may not after all go ahead. The indemnity is a precondition to any possibility of development (no less than the financial soundness of the developer to be selected).

72. True it is that this indemnity is the only "price" to be charged for the land disposed of. But, as I have sought to demonstrate, it is not the

only commercial "term" of this transaction. As I understand the First Division's judgment and the respondent's argument on this issue, it is that the authority should have invited the rival tenderers to offer not merely a full indemnity but a sum (or share of profits) on top. Quite how this was to work I remain unclear. The First Division speaks (in para 43) of "a competitive marketing exercise". Assume, however, that one tenderer offers the indemnity plus £1m and the other the indemnity plus £10m. How should that aspect of the bid be evaluated as against the other criteria? And how could the authority reasonably expect (or even hope) that other aspects of the bid would not be cheapened to accommodate the increase in price.

73. Lord Rodger outlines at para 63 my noble and learned friend Lord Hoffmann's suggested approach to this issue. For my part I accept it without reservation. Ordinarily, no doubt, a disposal of land under section 191 will be for a given development and the competition between rival bidders will be as to the price they are prepared to pay. Here it was the price that was fixed and the competition was as to what benefits (both planning and timescale) were on offer. The scope for flexibility as to these was immense. I see no reason to doubt that the terms on which tenders were invited here were such as to ensure that the authority secured what earlier I described as the best overall deal available.

74. The respondent submits that the burden lies on the authority to establish this and that they have failed to do so. I reject this submission. In my opinion the presumption of regularity—*omnia praesumuntur rite esse acta*—applies. There is ample authority for this approach: see *Wade and Forsyth, Administrative Law,* 9th edition (2004) at pp 292-3 and the many cases there cited. Glasgow's framework document here expressly recited the statutory requirement that the acquired land should not be disposed of otherwise and at the best price or on the best terms reasonably attainable. The respondents contend that that was merely paying lip service to the provision. I disagree.

75. I add only this. I find deeply unattractive the proposition that, almost inevitably at the expense of some beneficial aspect of the development scheme, the authority should be seeking to make a profit out of the exercise of its statutory powers of acquisition, not least when this proposition is advanced by the disappointed developer whose interest throughout has been solely its own commercial advantage and not that of the City Council. Statutory prohibitions such as that contained in section 191(3) are intended, as Lord Macfadyen said in

Stannifer Developments Ltd v Glasgow Development Agency 1998 SCLR 870, 890, "to protect the public purse from loss through the disposal of the assets of a public body at an undervalue". This mirrors the language of Bingham LJ in the earlier case of *R v Commission for New Towns Ex p Tomkins* (1988) 87 LGR 207, 218: "the policy … is plain: it is to ensure, so far as reasonably possible, that public assets are not sold at an undervalue …". In my judgment there has never been any question here of Glasgow proposing to sell public assets at an undervalue. It seems to me a very great pity that this desperately needed redevelopment has been held up for so many years on the basis of such an argument.