First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0199

Heard at the Employment Appeals Tribunal
On 1 February 2019
Representation:
Appellant: Rupert Paines (Counsel)
First Respondent: Laura John (Counsel)
Second Respondent: The Second Respondent did not appear

Before

JUDGE BUCKLEY

GARETH JONES

ROSALIND TATAM

Between

POPLAR HOUSING ASSOCIATION AND REGENERATION COMMUNITY ASSOCIATION (POPLAR HARCA)

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

PEOPLES INFORMATION CENTRE

Second Respondent

DECISION

1. For the reasons set out below the Tribunal allows the appeal against Decision Notice FER0735350 and issues the following substitute decision notice.

SUBSTITUTE DECISION NOTICE

Organisation: Poplar Housing and Regeneration Community Association.

Complainant: Mr Anthony Steig.

The Substitute Decision – FER0735350

1. For the reasons set out below Poplar Housing and Regeneration Community Association ('Poplar') is not a public authority for the purposes of reg 2(2)(c) of the Environmental Information Regulations 2004. No action is required.

REASONS

Introduction

1. This appeal concerns a request to a Housing Authority, Poplar Housing and Regeneration Community Association ('Poplar'), under the Environmental Information Regulations 2004 ('EIR'). The primary issue is whether or not Poplar is a public authority within the EIR. There is a secondary issue of whether or not the information requested is environmental.

Request, Decision Notice and appeal

Request

2. This appeal concerns the following requests made to Poplar by Anthony Steig on 26 February 2018:

> Perhaps provide a list of addresses including postcodes of empty properties owned by you which are earmarked for redevelopment or disposal. This includes empty plots of land.
>
> Please provide, in relation to the redevelopment of Balfron Tower, and Chrisp St:
> 1. Detailed breakdown of redevelopment costs showing the value of each major contract and its nature.
> 2. Total cost for each site.
> 3. Copies of major contract(s) relating to redevelopment.

3. Poplar did not respond. The email was overlooked, and Poplar has apologised for the lack of response.

Decision Notice

4. In her decision notice dated 14 August 2018 the Commissioner decided that the information requested was environmental and that Poplar was a public authority for the purposes of the EIR. By failing to reply it had breached reg. 5(2) EIR. The Commissioner ordered Poplar to issue a substantive response under the EIR to both requests within 35 days.

5. The Commissioner decided that the information was environmental because the proposed redevelopment or disposal of land would be a measure likely to affect the elements and factors referred to in reg. 2(1)(a) and (b) EIR. The requested information was on that measure and fell within reg. 2(1)(c) as environmental information.

6. The Commissioner decided that Poplar performed functions of public administration and that it had special powers. The special powers were the ability to apply to the County Council for land acquisition, and the ability to apply for injunctions not available to private landlords. The Commissioner decided that there is no requirement for the substance of the special powers to be environment-related.

Notice of Appeal

7. Poplar's notice of appeal dated 11 September 2018 appealed against the Commissioner's decision notice on the following grounds:

   7.1. The Commissioner erred in deciding that Poplar was a public authority for EIR purposes.

   7.2. The Commissioner erred in deciding that the requests sought environmental information.

8. Poplar argues in summary that:

   8.1. The Decision Notice is not properly reasoned. It is inconsistent with the Commissioner's conclusions in a decision notice issued to Richmond Housing Partnership on 11 July 2018 (FER0700353) (**'Richmond')** which found that the same powers were not special powers.

   8.2. The Commissioner has misapplied the CJEU authority **Fish Legal and Shirley v Information Commissioner & Others** [2014] QB 521 ('**Fish Legal EU**').

   8.3. Poplar does not have functions of public administration. The provision of housing is not a public administrative function. The fact that social housing is part funded by the state does not make its provision a public administrative function. The regulation of the industry is not a reason for

it to be a public administrative function. The Commissioner has failed to specify which of Poplar's activities in relation to the environment constitute, in her view, public administrative functions.

8.4. Poplar does not have special powers. The right to apply to a County Council to acquire land under s.34 Housing Associations Act 1985 ('HAA 1985') is not one which Poplar is able to exercise. Further it is simply a right to request. The powers to apply for certain injunctions do not give Poplar an advantage over private landlords, they ameliorate a disadvantage. The Commissioner was right in **Richmond**. In any event, the special powers have to be environmental.

8.5. The approach to the definition of environmental information is impermissibly broad and contrary to recent Court of Appeal and Upper Tribunal decisions. A list of addresses, contracts and costing information are not environmental information in themselves. The disposal of land is not a measure, nor does it affect the factors in reg.2(1)(a) or (b). A redevelopment is not a measure, nor would it necessarily affect the (a) or (b) factors: the renovation or improvement of existing property would not.

The ICO's response

9. The ICO's response dated 16 October 2018 submits that:

9.1. For the purposes of article 2(2)(b) of Council Directive 2003/4/EC on Public Access to Environmental Information ('the Directive)/reg. 2(2)(c) EIR, the 'public administrative functions' in which an entity is engaged do not have to be environmental. **Cross v Information Commissioner and Cabinet Office** [2016] UKUT 153 (AAC) (**'Cross'**) did not decide the contrary. The reference in the Directive to 'including specific duties, activities or services in relation to the environment' gives an example of the functions not a substantive requirement as to the nature of the functions.

9.2. In any event Poplar's functions are in part environmental. Its functions include the taking of steps which include measures or activities that are likely to affect the state of the elements referred to in reg. 2(1)(a) and (b) EIR.

9.3. The 'special powers' with which an entity must be vested for the purpose of carrying out its public administrative functions do not have to relate to an environmental function. The reference to special powers in para. 52 of **Fish Legal EU** is to powers vested for the purpose of 'the performance of services of public interest'.

9.4. The provision of social housing is a public administrative function and Poplar carries out functions of public administration. The question is,

whether or not the functions carried out by Poplar have 'a sufficient connection' with the functions carried out by entities which are part of the State.

9.5. Poplar's statutory powers constitute special powers for the purpose of carrying out its function of social housing. There is no need for a 'net' advantage. The statutory powers go beyond those which result from normal rules applicable in relations between persons governed by private law.

9.6. The information requested falls within the EIR regime. The redevelopment or potential redevelopment of land is a 'measure' or 'activity' within reg. 2(1)(c). The information requested is 'on' those measures or activities. The measures or activities affect or are likely to affect the state of the elements referred to in reg. 2(1)(a) and the factors referred to in reg. 2(1)(b). In particular they are likely to affect the state of the land, within reg. 2(1)(a) and to lead to noise, waste, dust and other releases into the environment, within reg. 2(1)(b).

Factual background

10. Poplar is a Community Benefit Society incorporated under the Cooperative and Community Benefit Societies Act 2014 and registered with the Regulator of Social Housing as a private registered provider ('PRP') of social housing. It owns and manages about 9000 homes, as well as community facilities and commercial property in east London.

11. Poplar was set up with a stock transfer of some of the housing stock of the London Borough of Tower Hamlets ('LBTH') in 1998. It provides housing and is involved in joint ventures with private developers to redevelop and deliver a proportion of investment in new housing in the area. It is a private company limited by guarantee with 12 members. It has three subsidiaries, two of which are publicly listed companies. None of the subsidiaries are PRPs.

12. A registered provider of social housing is in effect a landlord of low-cost rental or home ownership accommodation. Registered providers can be private entities or publicly owned and may be for-profit or not-for-profit. Some manage properties originally derived from local authorities, some purchase and develop new social housing, some like Poplar do both.

13. Some detail on the legal regime underpinning the provision of social housing by Poplar was provided in oral evidence and in the witness statement of Andrea Baker. The rest of the detail set out below is taken directly from the relevant statutes including in particular the Housing and Regeneration Act 2008.

14. The provision of social housing is government policy. Local authorities are subject to a range of statutory duties to provide social housing. A percentage of social housing is provided directly by local authorities. In the London Borough of Tower Hamlets, the local authority is the largest provider of social housing in the area, owning and managing over 28% of the social housing stock in the Borough. There are approximately 50 private registered providers of social housing ('PRP's) in the Borough, registered with the Regulator of Social Housing ('the Regulator').[1] Poplar owns approximately 13% of the social housing stock in LBTH. Local Authorities who own housing are automatically registered with the Regulator.

15. The Regulator is an executive non-departmental public body, accountable to Parliament for the performance of its objectives. The Regulator has a set of statutory fundamental objectives under s 92K of the Housing and Regeneration Act 2008 ('HRA'):

S92K Fundamental objectives

(1) The regulator must perform its functions with a view to achieving (so far as is possible)—

(a)the economic regulation objective, and

(b)the consumer regulation objective.

(2) The economic regulation objective is—

(a)to ensure that registered providers of social housing are financially viable and properly managed, and perform their functions efficiently and economically,

(b)to support the provision of social housing sufficient to meet reasonable demands (including by encouraging and promoting private investment in social housing),

(c)to ensure that value for money is obtained from public investment in social housing,

(d)to ensure that an unreasonable burden is not imposed (directly or indirectly) on public funds, and

(e)to guard against the misuse of public funds.

(3) The consumer regulation objective is—

(a)to support the provision of social housing that is well-managed and of appropriate quality,

(b)to ensure that actual or potential tenants of social housing have an appropriate degree of choice and protection,

[11] The regulation function transferred from the Homes and Communities Agency to the Regulator of Social Housing on 1 October 2018, in line with the Legislative Reform (Regulator of Social Housing)(England) Order 2018.

(c)to ensure that tenants of social housing have the opportunity to be involved in its management and to hold their landlords to account, and

(d)to encourage registered providers of social housing to contribute to the environmental, social and economic well-being of the areas in which the housing is situated.

16. The Regulator has statutory powers to set standards for the provision of social housing requiring registered providers to comply with specific rules ('Standards'). It sets out required outcomes and specific expectations for registered providers. The Regulator has a range of powers of monitoring and enforcement to enforce compliance with the Standards under Chapters 6 and 7 of the HRA. The Regulator can issue Codes of Practice amplifying the Standards and have regard to these when assessing compliance. It also issues Guidance. We were provided with a copy of one example of these Standards, the Governance and Financial Viability Standard. This Standard provides, inter alia:

Registered providers shall ensure effective governance arrangements [which] shall ensure registered providers:
…
(d) safeguard taxpayer's interests and the reputation of the sector
…
(f) protect social housing assets

…
…registered providers shall assess, manage and where appropriate address risks to ensure the long-term viability of the registered provider, including ensuring that social housing assets are protected.

17. To be eligible to register with the Regulator, a body must be a provider of social housing as defined in s68 as well as satisfying other criteria (s112 HRA). Social Housing is defined in s68 HRA as either low cost rental accommodation (i.e. the rent is below the market rate and the accommodation is made available in accordance with rules designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market) or low cost home ownership accommodation (under e.g. shared ownership arrangements and is made available in accordance with rules designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market).

18. On certain issues the Secretary of State has the power to direct the Regulator to set standards and to direct the content of those standards.

19. As well as the standards, there is some direct statutory regulation of registered providers. For example, under s 171(2) HRA not-for-profit registered providers can only dispose of social housing property which is subject to a secure tenancy

to another not-for-profit registered provider. Certain other disposals of social housing property are subject to notification requirements. Further, under s 23(1) of the Welfare, Reform and Work Act 2016, every year registered providers of social housing must reduce the amount of rent payable by a tenant of their social housing by at least 1% up to and including 2019/2020.

20. Typically, private registered providers receive some Government funding, but on application for specific grants.

21. The relationship between registered providers and local authorities and the role of private registered providers in assisting local authorities in carrying out their statutory housing policies is set out in paragraph 13 of **R (Weaver) v London and Quadrant Housing Trust** [2009] EWCA Civ 587 **'Weaver')**. Much of this still applies. Under s 166A(13) Housing Act 1996 a private registered provider is the only body with whom a local authority is statutorily obliged to consult before adopting an allocation scheme. Section 170 requires private registered providers to co-operate with local authorities if requested 'to such extent as is reasonable in the circumstances' by offering accommodation to those with priority under the local authorities allocation scheme, which is typically achieved by nomination agreements between the authority and the private registered provider.

22. Poplar received stock transfers of social housing from LBTH in 1998, 2000, 2006, 2007 and 2009. Poplar has certain contractual obligations in relation to this stock. Ms Baker only touched briefly on the nature of these contractual obligations in evidence. In response to a question on whether Poplar was subject to a direct duty to support the provision of social housing, like that referred to in para. 7 of the witness statement, Ms Baker replied, 'We have a contractual obligation to the Council through the transfer of stock, limited to the stock that was directly transferred'. Given that a local authority has certain statutory duties in relation to social housing, we think that it is likely that Poplar will be contractually obliged to assist it in performing those duties and that there are likely to be restrictions on the disposal and use of those properties.

23. Finally, Poplar, like all private registered providers, has certain statutory powers which are not available to non-registered landlords:
    (i) The power to seek injunctions against anti-social behaviour under section 5(1)(b) of the Anti-Social Behaviour, Crime and Policing Act 2014;
    (ii) The power to seek anti-social parenting orders under section 26B of the Anti-Social Behaviour Act 2003;
    (iii) The power to seek orders demoting tenants for assured status under section 6A of the Housing Act 1988; and
    (iv) The power to seek the grant of a family intervention tenancy under section 12ZA of Schedule 1 of the Housing Act 1988.

24. Ms Baker gave evidence on why she thought registered providers had been given these statutory powers. She told the Tribunal that these powers are intended to avoid repeated evictions: with social housing there is an impetus to try to manage the situation. Through the use of these statutory powers an attempt can be made to deal with problems or behaviour, rather than simply moving the individuals or families on, which would end up costing the state money either through homelessness or the courts.

Legal framework

25. Council Directive 2003/4/EC on Public Access to Environmental Information ('the Directive') sets out a regime for public access to environmental information held by Public authorities in the Member States. It implements the United Nations Economic Commission for Europe's (UN/ECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 ('Aarhus').

26. The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and the Aarhus Convention. The first recital to the Directive states that:

> increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

27. The recitals to the Aarhus Convention include:

> citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters
> …
> improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.

Public authority

28. Article 2(2) of Aarhus provides:

> "Public authority" means:
> (a) Government at national, regional or other level;
> (b) Natural or legal persons performing public administrative functions under national law; including specific duties, activities or services in relation to the environment;
> (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
> (d) …

29. UNECE's document 'The Aarhus Convention: An Implementation Guide' ('the Implementation Guide') states, of article 2(2)(b) at p. 33:

> 'Public authority' also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities as determined according to national law. What is considered a public function under national law may differ from country to country. However, reading this subparagraph together with subparagraph (c) below, it is evident that there needs to be a legal basis for the performance of the functions under this subparagraph, whereas subparagraph (c) covers a broader range of situations. As in subparagraph (a), the particular person does not necessarily have to operate in the field of the environment. Though the subparagraph expressly refers to persons performing specific duties, activities or services in relation to the environment as examples of public administrative functions and for emphasis, any person authorized by law to perform a public function of any kind falls under the definition of "public authority".

30. In the analysis of article 2(2)(c) at p. 33 the Implementation Guide states:

> There are two key differences between this subparagraph and the others. One key difference between subparagraph (c) and (b) is the source of authority of the person performing public functions or providing public services. It can be distinguished from subparagraph (b) in that the bodies addressed derive their authority not from national legislation, but indirectly through control by those defined in subparagraphs (a) and (b).
> …
>
> The second key difference distinguishes subparagraph (c) from both previous subparagraphs. While subparagraphs (a) and (b) define as public authorities bodies and persons without limitation as to the particular field of activities, this subparagraph does so limit the scope of the definition. Only persons performing public responsibilities or functions or providing public services in relation to the environment can be public authorities under this subparagraph.

31. The Implementation Guide is not legally binding but according to the Court of Justice of the European Union (CJEU) in **Fish Legal EU** (para. 38):

> may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention.

32. Article 2(2)(b) of the Directive states:

> "Public authority" shall mean:
>
> (b) Any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.

33. Recital 5 of the Directive states of the Aarhus Convention:

Provisions of Community Law must be consistent with that Convention with a view to its conclusion by the European Community.

34. Recital 11 of the Directive states:

To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment.

35. Regulation 2(2)(c) of the EIR defines public authorities as:

(c) any other body or other person, that carries out functions of public administration

36. In **Fish Legal EU** the Court of Justice of the European Union (CJEU) held:

48. It follows that only entities which, by virtue of the legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within the category of public authorities that is referred to in article 2(2)(b) of Directive 2003/4. On the other hand, the question of whether the functions vested in such entities under national law constitute 'public administrative functions' within the meaning of that provision must be examined in the light of European Union Law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept.

50. In addition, the Aarhus Convention Implementation Guide explains that 'a function normally performed by governmental authorities as determined according to national law' is involved but it does not necessarily have to relate to the environmental field as that field was mentioned only by way of example of a public administrative function.

52. The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4 concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

37. In **Cross** the Upper Tribunal gave extensive guidance on the interpretation and application of **Fish Legal EU,** Aarhus, the Directive and the EIR. It is not useful

to set out all the relevant paragraphs here because we deal with the legal principles in detail in our conclusions below, but we have found paragraphs 32-40, 46-50 and 83-110 to be of particular assistance.

Special powers

38. Although **Cross** and the Advocate General in **Fish Legal EU** refer to paragraph 20 of **Foster v British Gas**, (‘**Foster’**) the Tribunal notes that in **Farrell v Whitty** [2017] EUECJ C-413/15, [2018] Lloyd's Rep IR 103 the CJEU has since made clear that it is paragraph 18, not paragraph 20, of **Foster** which sets out the principle of general application, i.e.:

> unconditional and sufficiently precise provisions of a directive could be relied on against organisations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

39. **Farrell** also provides guidance on the meaning of ‘special powers’, which were simply defined in **Foster** as ‘special powers beyond those which result from the normal rules applicable to relations between individuals’. We recognise that **Farrell** is not directly relevant and therefore not binding in this case, but the Tribunal has found it of some assistance for the reasons set out in our conclusions below. Paragraphs 34 and 35 of **Farrell** state:

> 34. Such organisations or bodies can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers.
> 35. Accordingly, a body or an organisation, even one governed by private law, to which a Member State has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is one against which the provisions of a directive that have direct effect may be relied upon.[2]

Environmental information

40. Regulation 2(3) of Aarhus defines environmental information as:

> Any information in written, visual, aural, electronic or any other material form on:

[2] The addition to special powers of the requirement that the body must be one to which a Member State has ‘delegated the performance of a task in the public interest’ despite the CJEU’s ruling in **Farrell** that para. 20 should be read disjunctively, can be understood by reference to the Advocate General’s opinion at para. 54, where she outlines the origin of the term ‘special powers’ in a French administrative law concept and states: ‘The judgment of the Conseil D’État (Council of State) in Bureau Veritas [Judgment of 23 March 1983, Conseil D’État, SA Bureau Veritas et autres, no. 33803, 24462] provides additional helpful guidance on the French law concept of ‘l’exercice des prérogatives de puissance publique… conférées pour l’exécution de la mission de service public dont [la Société en question] est investie’ (the exercise of the State powers… conferred in order to enable [the company in question] to implement the public service mandate vested in it.’

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision making;
(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment, or through these elements, by the factors, activities or measure referred to in subparagraph (b) above;

41. Regulation 2(1) of the EIR defines environmental information as information on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)… as well as measures or activities designed to protect those elements

42. It is not necessary to set out article 2(1) of the Directive because the EIR's definition and the categories in sub-paragraphs (a) – (f) of regulation 2(1) are in identical terms.

43. In **BEIS v IC and Henney** [2017] EWCA Civ 844 ('**Henney'**) the Court of Appeal held that:

35. …an approach that assesses whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned, however minimal…is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.

37. …It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is "on".

42. Furthermore, Mr Choudhury accepted that it is possible for information to be "on" more than one measure. He was right to do so. Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole. In my view, it therefore cannot be said that it was impermissible for the Judge to conclude that the Smart Meter Programme was "a" or "the" relevant measure.

43. It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1).

The role of the Tribunal

44. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

45. We read a written statement and heard oral evidence from Andrea Baker, Director of Housing for Poplar. That evidence has formed the basis of the background facts set out above. We were referred to and read an open bundle and a bundle of authorities. We were also provided with two closed bundles containing the disputed information. We were handed up two additional documents during the hearing, *The Governance and Financial Viability Standard* from the Homes and Communities Agency and an extract from *The Aarhus Convention: An Implementation Guide.*

46. Following the oral hearing the parties were invited to submit lists of authorities on the question of whether or not the information requested was 'environmental information'. We have taken account of those authorities where relevant.

47. The Tribunal read and heard submissions from the Information Commissioner and Poplar. All the submissions were read and taken account of where relevant. We do not repeat all the points here.

Submissions from Poplar

48. The EIR has to be interpreted in a way that is consistent with the purpose of the Directive. The Directive transposes the Aarhus Convention. The recitals to the Directive are the statement by the legislators of the purpose of the legislation. Recital 11 informs article 2.

49. Para. 52 of **Fish Legal EU** requires four things:

(i) An entrustment under an applicable legal regime. See further para. 48 of **Fish Legal EU**: 'entities which, by virtue of a legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform…'.
(ii) The entrustment must be with the performance of services of public interest.
(iii) These services must, at least partly, be in the environmental field. 'Inter alia' cannot be interpreted in any other way.
(iv) For this purpose, i.e. for the performance of those services of public interest, the entity must be vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

Entrustment under the applicable legal regime

50. There is no entrustment with power by national legislation and so this case falls at the first hurdle. The contract with Tower Hamlets cannot be the entrustment: a contract is the archetype of a private relationship. Further, what was contracted out here was not the functions it was the housing stock. Whether or not a registered provider is a public authority shouldn't turn on how their property came into their hands.

51. The fact that Poplar has charitable objects and carries these out when it performs these functions is not akin to the duty imposed by the water and sewerage act. It is not an empowerment. Electing to register with the Regulator cannot be an entrustment.

Service of public interest

52. This is not used by the CJEU as a term of art **(Cross)**. Para. 94 ('a sufficient connection') cannot be read on its own. It needs to be looked at in the context the functions and special powers.

53. The fact that the provision of social housing is a public good or of social utility does not mean that it is a service of public interest. The provision of housing is government policy, but it cannot be a service of public interest: all manner of bodies provide housing. The argument that the provision of social housing is of public benefit because social housing has received government funding is a category mistake. The provision of government funding is a public act. The receipt and deployment of that funding is not necessarily a public act. It is irrelevant that Poplar received part of its housing stock from LBTH and that LBTH continues to provide funding.

These services must, at least partly, be in the environmental field

54. Recital 11 makes clear why Article 2(2)(b) is included – it is intended to catch entities performing functions relating to the environment. The UNECE implementation guide is written by UNECE secretariat. It is not written as a mandatory source: it is a helpful explanatory document. Even if we assume that the Aarhus convention is ambiguous, EU legislation is clear, and the Directive is binding.

55. The CJEU would not have stated in para. 57 that it was not disputed that the water companies 'provide public services relating to the environment' if this was not necessary.

56. The Upper Tribunal in **Cross** expresses a clear view, based on a considered judgment by a three-judge panel in paragraphs 85-92. This should be treated as binding, or at the least very persuasive.

57. A purposive construction, to maximise the flow of information, cannot be taken too far. The EIR has to be interpreted in accordance with the Directive, whether wider or narrower. A recital cannot simply be ignored. Recitals are the statement of the reasons for legislating: they are an important part of the Directive from which one understands purpose of the rules. It is not contrary to the Directive – the Directive can be read in a compatible way.

58. The alternative interpretation turns on the application of one sentence in a non-binding handy reference guide, weighed against the clear wording of Recital 11 and **Cross**.

59. When asking whether the functions are environmental, it has to be the public administrative functions: those services of public interest with which Poplar was entrusted. It is not enough if Poplar has other functions which are environmental such as the development or redevelopment of land. Even if this could be described as a 'function', it is not a function of public administration, nor is it a function in respect of which Poplar has special powers.

For the performance of those services of public interest, be vested with special powers

73. **Cross** left open the question of whether the special powers have to be related to environmental functions. It is not suggested by the Commissioner that Poplar has special powers in relation to environmental measures. In so far as **Cross** suggests that the special powers do not need to be environmental this is wrong. Under para. 52 of **Fish Legal EU** the body has to be 'for this purpose' entrusted with special powers. This makes sense: why should a body be subject to the EIR if those special powers don't relate to the environment?

74. Paragraph 106 of the Upper Tribunal in **Fish Legal and Emily Shirley v Information Commissioner and others** [2015] UKUT 0052 (AAC) ('**Fish Legal UK'**) sets out the question to ask: whether the powers give the body an ability that confers on it a practical advantage relative to the rules of private law. On the facts the 'special powers' relate to a very small part of what Poplar does. They confer no practical advantage. The Commissioner was right to conclude that they did not amount to special powers in **Richmond**.

Environmental Information

75. The requested information is not environmental within reg. 2(1) EIR. **Henney** warns against adopting an impermissibly and overly expansive reading. None of the requested information is directly concerned with any of the matters listed in the EIR.

Submissions from the Commissioner

Entrustment

76. The Commissioner accepts that there has to be some legal transfer of power, that Poplar has to be 'entrusted' with powers.

77. Poplar has been entrusted with providing social housing by the applicable legal regime. It has registered with a regulator that has a defined statutory remit and which is tasked with ensuring that the entities it regulates act compatibly with its objectives. It is not a case where a statute bites directly: Poplar is operating at one step removed. It is a different factual matrix to **Fish Legal EU**, but that does not necessarily mean it falls outside what was contemplated by the ECJ. Poplar is still covered because it elected to register and has to pursue objectives and act consistently with the regulatory regime.

78. In the alternative the Commissioner relies on the entrustment of the injunction powers. Poplar has these powers to help stop a revolving door of repeated evictions of problem families. Ms Baker gave evidence that the government has an interest in achieving that object, it is a public interest function of the sort contemplated by **Fish Legal EU** and this amounts to a statutory direct act of entrustment.

79. It is not just happenstance that the stock came from the Local Authority. It is a key part of factual matrix. The Appellant is stepping into the shoes of the Local Authority in relation to that part of the stock and providing social housing in parallel with the Local Authority. It is a form of outsourcing and there is clearly a sufficient connection with the state's activities. It is a service of public interest and essentially the same service as is being provided by the Local Authority in the Borough.

Does the service have to be environmental?

80. This has significant implications in practice. The Aarhus Implementation Guide states that '…any person authorised by law to perform a public function of any kind falls under the definition of public authority'. The EIR, the UK regulations, are consistent with this. The UK is itself a signatory to the convention and the UK draftsmen can be assumed to have followed Aarhus. The Tribunal has to apply the EIR consistently with the Directive and has to interpret the Directive in accordance with the Convention. Para. 2(2)(b) of the Directive is not inconsistent with Aarhus: the recital is. Recital 5 provides that provisions of Community law must be consistent with the Aarhus convention: the two parts of the recital are contradictory.

81. In **Cross,** the Upper Tribunal expressed a view but didn't decide the point. The Tribunal should give this some weight, but the parties in this case can reargue the point. The Upper Tribunal's view was wrong, and it is possible to square the circle by adopting the approach set out in the Implementation Guide.

82. The wording of the Directive is consistent with this interpretation. **Fish Legal EU** confirms at paragraph 36 to 37 that in adopting the Directive 'the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention'. It follows that for the purposes of implementing Directive 2003/4, account is to be taken of the wording of the Aarhus Convention. Paragraph 50 includes the relevant paragraph from the Implementation Guide without demur and it is a key step in the reasoning which leads on to para. 52. In contrast the CJEU doesn't record Recital 11.

83. This interpretation is consistent with the purpose of the legislation as set out in Recital 1 and is consistent with Recital 5. The Commissioner agrees that recitals inform the interpretation of the operative provisions, but where the recital contradicts the operative part, it cannot change its meaning.

84. The Commissioner observed that in the event of the UK leaving the EU, the Directive as an interpretative tool would fall away.

85. On the facts the services are environmental in nature. There is no definition of environmental in this context, but the Tribunal might derive assistance from reg. 2(1) EIR. A part of Poplar's public interest activities is the development of new housing and this is likely to affect the state of the land.

Special powers

86. The Commissioner accepts that the special powers are not environmental. Even if the Tribunal finds that the function is required to be environmental, the special powers are not so required. Poplar is arguing for a very restrictive interpretation. "This purpose" in para. 52 of **Fish Legal EU** refers back to the performance of services public interest, not to the environmental function.

87. The Commissioner submits that she was wrong in **Richmond**. These are special powers. It is not the correct approach to ask if the powers make up for a disadvantage – the question is not whether there is a net advantage, it is whether the body has been given statutory powers in order to perform its functions above and beyond what is available at private law.

88. Under private law Poplar has the same powers available to landlords that choose to grant periodic assured tenancies. Private landlords may not choose to grant them but if they did, they only have certain powers. For Poplar, to allow it to perform its functions effectively, those powers are supplemented. These three injunction powers go beyond the powers Poplar has at private law.

Is the requested information 'environmental information'?

89. The request is for information about properties which are going to be developed and for information related to two specific redevelopments. This falls within reg 2(1)(c): information is on the 'measure' or 'activity' of disposing of or redeveloping land. It is likely to affect the land and one or more of the factors set out in 2(1)(b). Where a development is going to take place is information 'on' the development of land. Information about a partnership and who is going to take what responsibility is 'on' the development of land. All the information is 'on' the development of land.

Issues

90. It is not in dispute that the only section that Poplar could potentially fall under is article 2(2)(b) of the Directive/reg. 2(2)(c) EIR. The issues that we have to decide are as follows:

Legal issues

91. What is the test to be applied in determining whether, for the purposes of reg. 2(2)(c) EIR, a body carries out functions of public administration? In particular:
    91.1. For the purposes of article 2(2)(b) of the Directive/reg. 2(2)(c) EIR, do the 'public administrative functions' in which an entity is engaged have to be environmental?

91.2. Do the special powers with which an entity must be vested for the purpose of carrying out its public administrative functions have to relate to an environmental function?

Application of the law to the facts

92. Applying the test above, does Poplar carry out public administrative functions? In particular:
    92.1. Has Poplar been entrusted under the legal regime applicable to them with the performance of services of public interest?
    92.2. If necessary, are Poplar's public administrative functions in part environmental?
    92.3. Does Poplar have special powers for the purpose of carrying out its public administrative function?
    92.4. If necessary, do they relate to an environmental function?

93. Is the request for environmental information?

Discussion and conclusions

94. When considering whether Poplar 'carries out functions of public administration' under article 2(2)(c) EIR, we must interpret that concept consistently with the Directive and Aarhus. In accordance with **Fish Legal EU** as interpreted in **Cross**, the question is whether Poplar is a legal person which is entrusted, under the legal regime which is applicable to it, with the performance of services of public interest, inter alia in the environmental field, and which is, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

95. This can be broken down as follows:
    i) Has Poplar been entrusted with the performance of services under a legal regime?
    ii) Are those services of public interest?
    iii) Has it, for the purpose of performing those services, been vested with special powers?

96. The case law gives further guidance in relation to each of these three limbs.

Entrustment under a legal regime.

97. The EIR makes no reference to the need for a legal regime. This requirement comes from the use in the Directive and in Aarhus of the phrase 'under national law'. The Aarhus guide says that it means 'that there needs to be a legal basis for the performance of the functions under [article 2(2)(b)]' (see para. 46).

98. The question of what 'under national law' means was considered by the CJEU in **Fish Legal EU** in the context of the first question referred by the Upper Tribunal. The CJEU was asked, in essence, whether 'under national law' meant that the applicable law and analysis when considering whether an entity was performing public administrative functions was purely a national one. The CJEU concluded that the concept could not vary according to national law, and that 'under national law' referred instead to the need for a legal basis to exist, concluding at para. 48:

> only entities which, by virtue of a legal basis specifically defined in national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within the category of Public Authority that is referred to in article 2(2)(b) of Directive 2003/4.

99. This clear passage in the CJEU judgment was adopted by the Upper Tribunal in **Cross** at para. 50:

> …as is pointed out at paragraph 48 of *Fish Legal EU,* if the relevant functions are *public administrative functions* the relevant entity only falls within Article 2(2)(b) if it is empowered to perform them by virtue of a legal basis specifically defined in the national legislation which is applicable to it.

100. We consider that we are bound to follow **Fish Legal EU** and **Cross** on this issue. On the face of it, the EIR does not seem to contain this limitation. It was not argued before us that the EIR was wider than the Directive on this point.

101. Applying this to the facts, we conclude that Poplar has not been empowered to perform public administrative functions by virtue of a legal basis specifically defined in national legislation. We do not accept that the regulatory framework, even including the direct statutory regulation and the powers granted to registered providers, can be described as 'a legal basis specifically defined in national legislation'.

102. In our view, this requirement for a legal basis *specifically defined in national legislation* puts an artificially narrow interpretation on the phrase 'under national law'. We consider it to be a serious limitation, if a body which is carrying out a service of public interest in the shoes of the state, but which does not have an express delegation of statutory functions falls outside the act.

103. If we had not been constrained by the binding authorities of **Fish Legal UK** and **Cross,** we would have taken a broader approach to identifying an entrustment by a legal regime. The Commissioner's argument was that Poplar has been entrusted with providing social housing by the applicable legal regime in a broader sense.

104. The following paragraphs sets out our alternative conclusions if we are wrong in our assessment of the case law. We were provided with rather limited information on the regulatory regime under which Housing Associations

operate which would enable this assessment to be made, but we have done our best with the evidence from Ms Baker, supplemented by direct reference to the relevant statutes. Our findings are set out in paragraphs 20-29 above.

105. In particular we note that in order to register, Poplar must be a provider of social housing. As a registered provider, Poplar has to comply with a number of standards, and the Secretary of State has the power to direct the Regulator to set standards and direct the content of those standards. There is some direct statutory regulation of registered providers, including regulation of the rents that providers can charge. Poplar is obliged under s 170 of the Housing Act 1996 to co-operate with local authorities in relation to the allocation of housing and must be consulted in relation to the allocation scheme. Finally, as a registered provider Poplar has been given the power to apply for certain orders which are necessary because of the restrictive conditions under which it operate, and which enable it to help to fulfil the government's aim of 'stopping the revolving door' of evictions of tenants when problems arise.

106. In our view we could also have treated Poplar's contractual obligations relating to the transferred housing stock as part of the underlying legal regime. Poplar stepped into the shoes of the local authority by taking over housing stock in need of renovation. If there was evidence that Poplar was contractually obliged to assist the Local Authority in the performance of its statutory obligations, in our view this would support a conclusion that Poplar had been entrusted with the function of providing social housing under a legal regime. However, in the absence of detailed evidence on this point we have not attributed any weight to it.

107. In conclusion, in the absence of a requirement for an explicit statutory delegation of power, we would have considered whether the broader regulatory regime effectively entrusted Poplar with the function of providing social housing/allocating and managing social housing. We would have found that all those factors taken together, even absent the contractual obligations, would have been sufficient to amount to an entrustment under a legal regime.

108. We do not think that the fact that registration is voluntary would have prevented us from reaching this conclusion: if a social housing provider wishes to have access to the powers to apply for certain orders, it must become a registered provider. According to Ms Baker, those powers allow Poplar to carry out its functions effectively within the particular constraints under which it operates.

Has Poplar been entrusted with the performance of <u>services of public interest</u>?

109. In our view, the relevant service or function carried out by Poplar is the 'allocation and managing of social housing' or, more broadly, 'the provision of social housing'. For the following reasons we conclude that this is a service of public interest.

110. **Cross** tells us that 'services of public interest' is not a term of art (see para. 96). We need to take account of what government ordinarily does. It is a broad approach. We were not referred to what has been considered to be a SGEI (Service of General Economic Interest) under EU law, although **Cross** says that this might be of assistance here.

111. We were not referred to **Weaver** in oral submissions by either party, although it was referred to in written submissions and in the bundle of authorities. **Weaver** was a case decided under the Human Rights Act (HRA). A different, though not unrelated, test applies. At the time it was decided there was a different regulatory regime. The Tribunal does not suggest that it is bound by the approach in **Weaver**, but we have found the analysis by Elias LJ in **Weaver** in paragraphs 68-71 useful when deciding if the provision of social housing is a service of public interest.

112. The fact that, since **Weaver**, the ONS has assessed whether registered providers of social housing should be regarded as 'public' or 'private' non-financial corporations following the passage of the Regulation of Social Housing (Influence of Local Authorities) (England) Regulations (England) Regulations 2017, which limits the ability of local authorities to influence the activities of private registered providers, is of limited assistance to the Tribunal. We have no information on the criteria applied by the ONS or any detailed account of the reasoning that informed such a decision. It appears from the Notification of Reclassification of Private Registered Providers dated 16 November 2017 (p185) to be based on 'public sector control' which is a different test to that applied either under the EIR or the HRA. The Tribunal notes that the Housing and Regeneration Act 2008 which contains the powers which were limited by the above regulations was not in force at the relevant time for the purposes of **Weaver**.

113. We conclude that the allocation and management of social housing and/or the provision of social housing is a service of public interest. In reaching this conclusion we have taken account of the factual background set out above and in particular the combination of the following factors.

    i) The provision of social housing as a governmental function. We agree with Elias LJ in **Weaver** that the provision of subsidised housing, as opposed to the provision of housing itself, is a function which can properly be described as governmental (para. 70):

    > Almost by definition it is the antithesis of a private commercial activity. The provision of subsidy to meet the needs of the poorer section of the community is typically, although not necessarily, a function which government provides.

    ii) The involvement of the State in the provision of social housing. The state has a long term and continuing involvement in the provision,

management and allocation of social housing. LBTH remains the largest provider of social housing in the area, owning and managing 28% of the social housing stock.

iii) Funding. The Trust has had the benefit of various public funding grants detailed in paragraph 15 of Andrea Baker's witness statement. We do not know the level of these grants, nor do we know what proportion of the Trust's income comes from grants such as these. We place limited weight on this factor. Taken alone, this would not be conclusive, but we consider that it is a factor pointing towards it being a service of public interest rather than being neutral or pointing away from this conclusion: grants are made available to support the provision of social housing and therefore we conclude that this is something the state is indirectly willing to pay for to some extent.

iv) Relationship with the local housing authority. There exists a close relationship with the local housing authority, set out in the factual background above, including the close relationship in relation to allocation of housing with its restrictions on the freedom of Poplar to allocate properties. This relationship is reinforced by the extent of the transfers of housing stock to Poplar from LBTH and the ongoing contractual obligations.

v) The regulatory regime. Registration is voluntary, which is a factor that points away from it being a service of public interest, but those who register gain access to the powers to apply for certain orders not available at private law which, according to Ms Baker, are necessary to allow Poplar to carry out its functions effectively. In those circumstances, we place less weight on the fact that registration is voluntary. Those who do register are subject to a regulatory regime intended to achieve the Regulator's statutory objectives, including for example to support the provision of social housing that is well-managed and of appropriate quality. This includes the requirement to comply with certain standards in relation to which the Regulator has enforcement powers, plus some direct statutory regulation. This indicates in our view, parliamentary recognition that the provision of social housing is a service of public interest.

vi) The nature of the statutory powers given to private registered providers. The power to apply for certain orders has been given to private registered providers to avoid repeated evictions or the 'revolving door' referred to by Ms Baker in evidence. They are intended to enable an attempt to be made to resolve the problems or the difficulties in behaviour, instead of simply moving the individual or family on to a different property with the ultimate cost likely to be borne by the State.

114. Finally, we think that this conclusion is reinforced by the following. Firstly, we agree with Elias LJ in **Weaver** at para. 71 that the fact that a body is acting in the public interest and has charitable objectives at least places it outside the traditional area of private commercial activity. Whilst the regulatory framework has changed since **Weaver,** we find that the regulatory framework is still designed 'at least in part, to ensure that the objectives of government policy with respect to this vulnerable group in society are achieved and that low-cost housing is effectively provided to those in need of it' (see para. 71 of **Weaver**). Further, although the regulatory and statutory regime that underpins registered social housing providers is less intrusive than it was, Poplar's power to dispose of property is still restricted to some extent (see under 'factual background' above) and statute imposes an annual reduction in rent.

Do these functions have to be environmental?

115. Article 2(2)(c) of the EIR does not contain any express requirement that the functions of public administration have to be environmental. Regulation 2(2)(b) of the Directive and Aarhus are identical to each other but ambiguous. 'Including' could mean 'for example', or it could mean 'at least in part':

> Any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.

116. Recital 11 of the Directive states that 2(2)(b) applies to bodies performing public administrative functions in 'relation to the environment', whereas the Implementation Guide to Aarhus states that there is no such limitation, and that including means 'for example'.

117. The Upper Tribunal considered this question at paras 83-92 of **Cross.** This part of the Judgment is obiter and therefore not binding. However, these paragraphs contain detailed and persuasive reasoning in support of the Upper Tribunal's conclusion that 'including' in the Directive does not mean 'for example'.

118. We agree with the Upper Tribunal's conclusions at para. 86 that the natural meaning of the language in article 2(2)(b) of the Directive is that the entity must be performing specific duties etc relating to the environment. We agree that this fits with the 'tiered' approach as described in **Cross.**

119. We respectfully disagree with the Upper Tribunal's conclusion that the Implementation Guide does not support the proposition that the functional test can be satisfied by an entity that does not have any specific duties etc in relation to the environment. The Implementation Guide is clear: it explicitly states that the specific duties, activities or services in relation to the environment are referred to as examples of public administrative functions. It states in terms that 'any person authorized by law to perform a public function of any kind

falls under the definition of "public authority'. Further, when dealing with article 2(2)(c) the Implementation Guide states that a key difference is that 'subparagraphs (a) and (b) define as public authorities bodies and persons without limitation as to the particular field of activities, this subparagraph does so limit the scope of the definition.' With respect to the Upper Tribunal, we do not see how this can be read as a reference to the special powers of the authority.

120. However, we agree with the Upper Tribunal that the Implementation Guide is not binding, it is merely a tool for interpretation, and that it runs counter to Recital 11 to the Directive. Further we find persuasive the Upper Tribunal's reasoning set out in paras 89-90 of **Cross.** In particular, we agree that the natural meaning of the phrase 'inter alia', as used in **Fish Legal EU**, is to describe what has to be included within the services and that it is not introducing an example. Although we agree with the Commissioner that it is odd that the CJEU repeated the relevant section of the Implementation Guide without demur, we find that this cannot alter the natural meaning of the phrase used by the CJEU.

121. In conclusion we agree with the Upper Tribunal that the effect of article 2(2)(b) of the Directive is that the entity's public administrative functions must include specific duties, activities or services relating to the environment.

122. We note that the arguments and therefore the outcome might be different if the EIR was to be interpreted in the light of Aarhus, without reference to the Directive.

123. Applying our conclusion to the facts in this case, do Poplar's public administrative functions include specific duties, activities or services relating to the environment? If we had concluded that Poplar had public administrative functions, they would have been the provision of social housing or the allocation and management of social housing. Do those functions include specific duties, activities or services relating to the environment? We would have concluded that they did: the activities of developing new housing and redeveloping and maintaining existing housing are activities that form part of the functions of managing or providing social housing. Using the definition of environmental information as guidance, we would have concluded that all those activities related to the environment, because they were likely impact on the state of the land, soil, the air and atmosphere.

Have Poplar been given special powers for the purpose of performing the service of public interest?

124. It is conceded by the Commissioner that the only potential 'special powers' are those set out in para. 23 above. We are not persuaded by Mr Paines' submissions that for Poplar to have 'special powers' it must obtain a net advantage over bodies who have neither its powers or its public interest tasks. In our judgment, 'special powers' are powers beyond those which result from

the normal rules applicable to relations between individuals which Poplar possesses to enable it to carry out the public interest task with which it has been entrusted by the state. It is simply irrelevant whether that public interest task puts the body at some disadvantage which the special powers might only mitigate to some extent. In our judgment this is not what the Upper Tribunal in **Fish Legal UK** meant in para. 106 by a 'practical advantage'.

125. The orders to which Poplar has access are not available under private law. If a socially minded unregistered provider chose to grant a periodic assured tenancy it would not have the option of applying for one of these orders.

126. Ms Barker gave evidence on why she thought they had been given these powers. They are given to registered providers because they are providers of social housing and because of the nature of the tenancies that providers of social housing grant. Where difficulties arise, a private landlord would just move people on. These powers are intended to avoid repeated evictions: with social housing, there is an impetus to try to manage the situation rather than simply move people on – to try deal with the 'revolving door'.

127. If we had found that Poplar had been entrusted with the public interest task of providing social housing, or allocating and managing social housing, we would have found that the power to apply for these orders was a 'special power'. It is not available under private law, and it enables Poplar to carry out that public interest task with which they have been entrusted.

Do the special powers have to be environmental?

128. It is clear from para. 52 of the CJEU's judgment in **Fish Legal EU**, and the underlying approach in **Foster v British Gas**, that the special powers have to be given to the body for the purpose of carrying out its public interest task. We have found that for the purposes of the Directive and the Regulations, that public interest task or function has to be, at least in part, environmental. In our judgment there is no additional requirement implicit in the wording of para. 52 that the powers have to be linked to that part of the function which is environmental.

129. In our judgment 'for this purpose' could on the face of para. 52 either refer back to the whole of the description 'the performance of services of public interest, inter alia in the environmental field' or it could refer specifically to those services in the environmental field. We do not accept that anything in paras 53-54 of **Fish Legal EU** indicates that the CJEU intended the latter. Recital 11 makes no mention of special powers, and therefore is neutral in relation to this argument.

130. Part of the reasoning in **Cross** for rejecting the broad 'example approach' to para. 52 was that the sentence of the UNECE Guide supports the common ground that in applying the approach set by the CJEU to the functional test,

the special powers do not have to relate to the services of public interest in the environmental field (see **Cross** para. 88). If the Upper Tribunal meant by this that the Guide expressly supports such an interpretation of para. 52, we would respectfully disagree. The Guide makes no reference to powers. It clearly states that the reference to the environment is an example and for emphasis and that 'any person authorized by law to perform a public function of any kind falls under the definition of 'public authority'. This is not an accurate reflection of the law, as we have found above. However, if the Upper Tribunal meant that this paragraph of the Guide would tend to support a less restrictive interpretation of para. 52 of **Fish Legal EU** then we would agree.

131. It follows from the above that, in our view, para. 52 could bear either meaning, and there is nothing in the case law, the Implementation Guide or the recitals which points definitively in one direction or the other.

132. It is helpful to remind ourselves that para. 52 is the CJEU's interpretation of the requirements of 2(2)(b), not a replacement for the test set out in the Directive itself. Both Aarhus and the Directive use the same wording in 2(2)b):

> (N)atural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.

133. In our judgment it is implicit in this wording that a person could be performing 'public administrative functions' as that term is used in the Directive, but not carrying out specific duties, activities or services in relation to the environment. Such a body would fall outside the scope of 2(2)(b). It cannot therefore be part of the definition of 'public administrative functions' that those functions relate to the environment. Whether or not a body has special powers relates to the issue of whether or not a body is performing public administrative functions under national law. Once it has been identified that a body is carrying out public administrative functions, the next stage is to identify if those functions include specific duties, activities or services in relation to the environment.

134. Thus, the question for the Tribunal is firstly to decide whether the body is performing public administrative functions (i.e. whether it has been entrusted with the performance of services of public interest under a legal regime and has, for the purpose of performing those services, been vested with special powers). Once this has been decided, the Tribunal must consider if those functions include specific duties, activities or services in relation to the environment. It is not required, nor in our view is it helpful, to separately ask if the special powers are either themselves 'environmental' nor whether they relate to or are linked to the specific duties, activities or services relating to the environment.

135. In our view, this was the approach taken by the Upper Tribunal in **Fish Legal UK**. This two-stage approach and where the environmental link is situated is

clear from the Upper Tribunal's description of the issue that it had to determine at para. 101:

> The only issue for us was whether each of the companies was a 'legal person performing public administrative functions under national law' under Article 2(2)(b) of EID. There was no dispute that they were performing 'specific duties, activities or services in relation to the environment'.

136. We take some support for this approach from the fact that it is an integral part of the concept of 'special powers' in EU law that those powers have been given to the body for the purpose of carrying out a public interest task (see **Foster** and **Farrell**). In the light of this, the phrase 'for this purpose' was likely intended to link the powers to the public interest task, rather than to introduce an additional link to specifically environmental powers. The consideration of the special powers is directed to identifying whether a body has 'public administrative functions'.

137. If we are wrong in our conclusion that the Directive and Aarhus are clear on this point, in circumstances where the case law does not definitely suggest one or the other interpretation we are entitled to take account of the underlying objectives and purposes of the Directive and the Regulations, and the indication in the Guide that the authority does not necessarily have to operate in the environmental field. In these circumstances we do not think it would be appropriate to interpret an ambiguous paragraph in the CJEU judgment as introducing a further limitation on the definition of public authority.

138. On the facts, if the task or function is the provision of social housing or the allocation and management of social housing, then we would find that the injunction powers have been provided for that purpose. We do not think that it is necessary to then consider if those powers have been specifically provided for that part of the function which is environmental.

Cross-check

139. We note that the Upper Tribunal in **Cross** reminds us in para. 99 that the CJEU test should not be applied rigidly or without reference to, and a cross check with, both the words of the Directive and the EIR and their underlying objectives and purposes:

> That cross-check involves standing back and asking whether in all the circumstances of the case the combination of what are, or are arguably, the factors identified by the CJEU result in the relevant entity being a functional public authority. The key issue on that approach is whether, taking these factors together there is a sufficient connection between [the entity's] functions and powers that are relied on and what entities that organically are part of the administration or the executive of a state do.

140. We accept that Poplar is carrying out services of public interest, namely the provision of social housing and/or the allocation and management of social

housing and that to enable it to carry out those services it has been given special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. However, Poplar has not been entrusted with the performance of these services by national legislation.

141. We have considered whether the 'cross-check' advocated by **Cross** enables us to adopt the broader approach to 'under national law' outlined above. We conclude that it does not. We consider that this cross-check cannot allow a tribunal to ignore the clear statements in **Fish Legal EU** and **Cross** as to the meaning of 'under national law' and simply to decide instead if there is the 'sufficient connection' described above. As **Cross** indicates in para. 95, the CJEU 'captures the need for this link by referring to entities (a) being entrusted with the performance of services of public interest and (b) being vested with special powers'.

142. One of the factors that we must therefore take into account when carrying out this cross-check is our finding that Poplar has not been entrusted with the performance of these services under the legal regime applicable to it, as interpreted by the CJEU. We find that there cannot be a 'sufficient connection' without that legal basis.

Is the information environmental?

143. Taking into account the guidance in **Henney** as applied in **DfT and Porsche Cars GB v Information Commissioner and John Cieslik** [2018] UKUT 127 (AAC) (**'Cieslik'**), we take the following approach. First, we need to identify the 'measure' or 'activity' that the information is 'on' or about. Then we must ask if that measure or activity has the requisite environmental impact for the purposes of regulation 2(1).

What measure or activity is the information 'on' or about?

144. Contrary to Poplar's submissions regulation 2(1)(c) is not limited to 'measures' and therefore Poplar's approach set out in paragraphs 46.3-46.5 of the grounds of appeal is too narrow. Regulation 2(1)(c) also includes 'activities'. This is clear from the wording of Regulation 2(1)(c) but, if need be, confirmed in **Henney** in for example para. 42 where the Court of Appeal sets out the question to be answered: 'what measure or activity is the requested information about?'

145. This is not restricted to the measure or activity the information is specifically, directly or immediately about. The information can be about more than one measure or activity. The relevant measure or activity is not required to be that which the information is "primarily" on. A mere connection, however minimal, is not sufficient.

146. Identifying the measure or activity that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the

precise issue with which the information is concerned, or the document containing the information.

147. It may be relevant to consider:

i) the purpose for which the information was produced,
ii) how important the information is to that purpose,
iii) how it is to be used, and
iv) whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way.

148. The statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental.

149. The Commissioner argued that the list of addresses earmarked for redevelopment is information on or about the redevelopment. We agree. The identity of properties earmarked to be redeveloped is an integral part of the redevelopment: it is the subject matter of that redevelopment. Knowing which properties were earmarked for redevelopment would enable the public to be informed about and to participated in decision-making relating to that redevelopment.

150. For similar reasons, we find that the list of properties for disposal is information on that disposal.

151. The contractual documents all relate to the redevelopment. That is the scope of the request. This does not mean that they are all 'on' the redevelopment. We have considered the **Henney** factors, including the purpose of the information, how it is to be used and its usefulness in informing the public and allowing participations in decision-making. We find that the documents behind tabs 1-6 are not 'on' the redevelopment. They are contractual documents created with the purpose of setting up the legal entities and their governance and the underlying legal arrangements needed to enable any redevelopment to take place. They are not about the redevelopment itself. They would not assist the public in participating in or being informed about decision-making relating to the redevelopment. We find that the documents behind tabs 1-6 are not 'on' the redevelopment. They are only 'on' the underlying legal and governance arrangements.

152. In contrast, we find that the documents behind tabs 7-15 are 'on' the redevelopment. They include details of construction and demolition, and documents detailing the funding and economic analyses integral to the redevelopment. Funding is a key element of the redevelopment and integral to the success of the redevelopment as a whole. We find that access to this information would assist the public in participating in or being informed about decision-making relating to the redevelopment.

Does that measure or activity have the requisite environmental impact for the purposes of regulation 2(1)?

153. We accept Poplar's submission that a mere disposal of property is not an activity which falls within regulation 2(1). A disposal of property for a particular purpose might fall within regulation 2(1), but we do not have any evidence to suggest what the disposal is for in this case. We therefore find that the list of addresses earmarked for disposal is not environmental information.

154. The other information is 'on' the redevelopment. We have some understanding of the proposed redevelopment from the closed bundle. We find that a proposed redevelopment of this scale is an activity which is likely to affect the state of the elements of the environment such as air, land and landscape. We therefore find that the list of addresses earmarked for redevelopment and the documents behind tabs 7-15 are environmental information.

Disposal

155. For those reasons we conclude that Poplar is not a public authority within the EIR. The Tribunal therefore allows the appeal. Our decision is unanimous.

Sophie Buckley
(Judge of the First-tier Tribunal)

Date: 20 February 2019
Date Promulgated: 27 February 2019