Financial Reporting Council

Edited for publication

IN THE MATTER OF:

THE EXECUTIVE COUNSEL TO THE FINANCIAL REPORTING COUNCIL

- and -

SEAN ROBERT CLARK

PARTICULARS OF FACT AND ACTS OF MISCONDUCT

The Settlement Agreement (which includes the Particulars of Fact and Acts of Misconduct) is a document agreed between Sean Robert Clark and the Executive Counsel. It does not make findings against any persons or entities other than Mr Clark and it would not be fair to treat any part of this document as constituting or evidencing an investigation into, or findings in respect of the conduct of, any other persons or entities.

INTRODUCTION

1. The Financial Reporting Council ("the FRC") is the independent disciplinary body for the accountancy and actuarial professions in the UK. The FRC's rules and procedures relating to accountants are set out in the Accountancy Scheme of 1 January 2021, reissued on 30 March 2021 ("the Scheme").

2. On 21 November 2023 the Conduct Committee of the FRC directed that an investigation be opened under the Scheme into the conduct of Sean Clark ("the Respondent") in relation to the operations and investment activities of Thurrock Council ("the Council") for the financial years ended 31 March 2018

to 31 March 2022. The Respondent was Chief Financial Officer ("CFO") of the Council for the relevant period.

3. In accordance with paragraph 8 of the Scheme, Executive Counsel has agreed terms of settlement with the Respondent in relation to the investigation. This document records the agreed facts and admitted acts of Misconduct.

4. The events at the Council have already been the subject of considerable official scrutiny, including a statutory Best Value Inspection ("BVI") ordered by the Secretary of State for Levelling Up, Housing and Communities[1] ("the Secretary of State"). Having regard to the public interest in achieving a swift and proportionate resolution of this matter, Executive Counsel confined her investigation to confirming a number of specific instances of Misconduct apparent from the enquiries that have already been made, including the BVI.

5. This document should not, therefore, be regarded as a definitive account of all the relevant events and the possible Misconduct.

THE TEST FOR MISCONDUCT AND THE APPLICABLE STANDARDS

6. So far as is relevant, Misconduct is defined in paragraph 2(1) of the Scheme as:

> *"an act or omission or series of acts or omissions, by a Member ... in the course of their professional activities (including as ... employee in or of any organisation ...) ..., which falls significantly short of the standards reasonably to be expected of a Member ... or has brought, or is likely to bring, discredit to the Member ... or to the accountancy profession"*.

7. The Respondent is a Member, for the purposes of the Scheme, by virtue of his membership of the Association of Chartered and Certified Accountants ("the ACCA"), one of the accountancy bodies participating in the Scheme.

8. The standards of conduct reasonably to be expected of the Respondent include those set out in the applicable version of the ACCA Code of Professional Ethics and Conduct ("the ACCA Code"). The ACCA Code was updated a number of times during the relevant period, but the relevant

[1] The name of the relevant Government department has since changed but, for simplicity, reference will be made to the Department for Levelling Up, Housing and Communities ("DLUHC").

provisions remained substantively unchanged. For simplicity, reference is made only to the version effective from 1 January to 30 June 2017[2].

9. Paragraph 100.5 of the ACCA Code requires professional accountants to comply with five fundamental principles, of which three are relevant in this case:

> *"(a) Integrity – to be straightforward and honest in all professional and business relationships.*
>
> *...*
>
> *(c) Professional Competence and Due Care – to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional services based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.*
>
> *...*
>
> *(e) Professional Behavior – to comply with relevant laws and regulations and avoid any conduct that discredits the profession."*

10. Sections 110, 130 and 150 of the ACCA Code provide more detail as to what these fundamental principles require of a professional accountant. They are copied in full as an **Annex** to this document.

11. As CFO, the Respondent was designated by the Council as having responsibility for the administration of the Council's financial affairs, under section 151(1) of the Local Government Act 1972[3]. In 2016 the Chartered Institute of Public Finance and Accountancy published a Statement on the Role of the Chief Financial Officer in Local Government ("the CIPFA Statement"). Executive Counsel regards the CIPFA Statement as an authoritative guide to the standards reasonably to be expected of a Member in the specific role of CFO (noting that compliance with the relevant code of ethics – in this case, the ACCA Code – is a requirement in the CIPFA Statement).

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[2] Before 14 October 2019 the ACCA Code was part of the ACCA Rulebook, and the relevant versions of the Code are those to be found in the various editions of the Rulebook effective from 1 January 2017 to 13 October 2019. From 14 October 2019 the ACCA Code was a freestanding publication, and the relevant versions are those effective from that date until 4 December 2022.
[3] For this reason the CFO is commonly known as the "Section 151 Officer".

12. The CIPFA Statement emphasises that there is longstanding legal authority to the effect that the CFO *"is not merely a servant of the authority, but holds a fiduciary responsibility to the local taxpayers"*. It sets out *"the five principles that define the core activities and behaviours that belong to the role of the CFO"*. The first four of them are relevant in this case:

> *"Principle 1*
>
> *The chief financial officer in a local authority is a key member of the leadership team, helping it to develop and implement strategy and to resource and deliver the authority's strategic objectives sustainably and in the public interest."*
>
> *"Principle 2*
>
> *The CFO in a local authority must be actively involved in, and able to bring influence to bear on, all material business decisions to ensure immediate and longer term implications, opportunities and risks are fully considered, and alignment with the authority's overall financial strategy."*
>
> *"Principle 3*
>
> *The CFO in a local authority must lead the promotion and delivery by the whole authority of good financial management so that public money is safeguarded at all times and used appropriately, economically, efficiently, and effectively."*
>
> *"Principle 4*
>
> *The CFO in a local authority must lead and direct a finance function that is resourced to be fit for purpose."*

13. In relation to each of the principles, the CIPFA statement sets out in bullet point format the *"core responsibilities of the CFO role within the organisation"* and the *"leadership skills and technical expertise organisations can expect from their CFO"*. Reference will be made in this document to points that are of particular relevance to this case.

BACKGROUND

The Council

14. Thurrock is a borough on the north bank of the River Thames to the east of London, with a population of about 176,000 people. The Council is a unitary authority, meaning that it is responsible for the full range of services provided

by local government, including social care, education, housing, transport and waste management. The services provided by the Council affect the quality of life of everyone in Thurrock, and are of significant importance to the most vulnerable residents.

The Council's "debt for yield" approach

15. The main sources of funding for local authorities are locally raised council tax and business rates, and grants from central government. However, in October 2017 a meeting of the full Council formally approved an Investment and Treasury Management Strategy document which set out an approach of supplementing this income with commercial investments funded by short-term borrowing, mainly from other local authorities.

16. The Council had previously borrowed money as a matter of routine to manage cashflow or to fund capital projects, and had also made some limited investments. What was new was the move to a deliberate approach of borrowing solely to invest, on a much more extensive scale. The Respondent's own evidence to a First-tier Tribunal hearing an information rights appeal relating to the Council's "debt for yield" approach was that the Council's approach was "*unique*"; in its decision handed down in October 2022 the Tribunal described the Council's financial dealings as being on a "*wholly exceptional scale*". The approach was confirmed annually in a Treasury Management Strategy document presented at a meeting of the full Council each February.

17. Under this "debt for yield" approach, the Council's short-term borrowing increased from £205 million on 31 March 2017 to £1.061 billion on 31 March 2020[4], and investments increased from £84 million to £979 million in the same period[5]. When the Council set its budget for 2020-21 in February 2020, the investments were projected to provide income of £33.8m in the year, compared with anticipated council tax receipts of £69.1 million and business rates receipts of £36.3 million. At that point the Council approved the continued expansion of the programme, with borrowing to fund investments projected to increase from £1.044 billion to £1.544 billion in the period from March 2021 to March 2023.

[4] Short Term Loans Local Authorities, as reported by the Council to the DLUHC.
[5] Externally Managed Funds, as reported by the Council to the DLUHC.

18. However, within a matter of months the Council had decided to "pause" new investments. The fact of the decision and the reasons for it were not clearly recorded at the time, but it appears to have followed an Extraordinary Meeting of the Council in July 2020, prompted by adverse media attention, at which concerns were expressed by Councillors about the scale of the Council's exposure and lack of democratic oversight. An underlying reason appears to have been a change to local authority borrowing rules that affected the ability of the Council to re-finance borrowing for new investments made after November 2020.

19. Some additional investments were made after the "pause", ostensibly to honour contractual commitments already made, and the Council did not divest itself of any existing investments. By the time of the Government intervention in September 2022 the Council's data showed an investment portfolio of £1.023.4 billion, broken down as follows:

Sector	**Asset type**	**Investment amount (£m)**
Solar energy	Bonds	655
Small and Medium-sized Enterprise ("SME") lending	Mainly bonds – some loans	103.2
Property	Pooled fund	103
Offshore wind energy	Equity	74.5
"Green" initiatives	Bonds	39.6
Investment funds	Pooled funds	33.1
Social and affordable housing	Bonds	15

20. Three of these investments are of particular significance:

a. All the £655 million solar energy investment was in a group of companies ("Group A") under the effective control of a single individual ("Individual A"). The Council's investment was in the form of bonds issued by Group A from December 2017 to January 2020 to finance the group's portfolio of 53 solar farms across the UK. The bonds were secured against the solar farm assets.

b. Of the £103.2 million investment in SME lending, £94.2 million was in the form of bonds issued by a single group of companies (“Group B”). The bonds were secured against a designated pool of loans made by Group B’s parent company to SMEs or (in the case of one of the four bond issues) by a floating charge over the assets of Group B’s main operating entity.

c. Of the £39.5 million investment in “green” initiatives, £20m was in the form of bonds issued by a single company (“Company C”) from February to July 2018.

21. All three of these investments ran into difficulties of various kinds from 2020 onwards. The Respondent and his team attempted to deal with these difficulties, without communicating the scale of the problem to the Chief Executive or leadership of the Council. It was only in June 2022 that the Respondent briefed the Chief Executive on his concerns regarding the investments, which were by then attracting increasing media attention. In July 2022 the Respondent had to apply for urgent funding from the Public Works Loan Board (“PWLB”), when the Council was unable to re-finance some of its short-term borrowing due to a reluctance of some local authorities to continue lending to it. The Council put the Respondent on extended leave in July 2022, and in September 2022 he was suspended pending an internal disciplinary investigation.

Government intervention

22. On 22 September 2022 the Secretary of State announced that he was using his powers under the Local Government Act 1999 to intervene at the Council. The Explanatory Memorandum published with the Secretary of State’s directions stated that the intervention was prompted by concerns relating to *“Thurrock Council’s investment activity and external borrowing”*, “*decision making processes and governance arrangements”* and *“the financial and commercial risks potentially facing the Council”*.

23. Essex County Council was appointed as Commissioner with powers to oversee the financial functions of the Council. Alongside this work, Essex County Council was also appointed to carry out a BVI of the governance,

internal and external audit, risk management and overview and scrutiny functions of the Council, and consider their impact on service delivery.

Financial crisis

24. On 19 December 2022 the acting CFO of the Council gave notice under section 114 of the Local Government Finance Act 1988 that the expenditure incurred or proposed to be incurred in the financial year was likely to exceed the Council's resources ("the Section 114 Notice"). The revenue deficit was estimated at £452m, against a budget of £153m. Extraordinary financial support was required from the Government to meet the in-year deficit and support budget-setting for 2023-24. The Section 114 Notice prohibited any new agreements for expenditure until at least 31 March 2024 without the explicit written consent of the acting CFO, and temporary measures were put in place to stop all further non-essential expenditure.

25. The Section 114 Notice outlined the causes of the deficit by reference to *"write down of investment assets"*, *"requirement to rectify the historic under assessment of Minimum Revenue Provision"*, *"exposure to rising interest rates as a consequence of reliance on short term loans"*, *"loss of investment income"* and *"unfunded financial pressures linked to demand levels and inflationary impacts"*.

26. The Respondent resigned from his post in April 2023, before the completion of the Council's disciplinary process.

27. The BVI report was published in June 2023. It explained the Council's difficulties in these terms:

> *"Between 2016 and 2022 Thurrock Council pursued a strategy of borrowing large amounts of money, predominantly from other local authorities, and using this to undertake a range of investments for the purposes of securing a return. The income from this strategy enabled local political leaders to forestall or avoid difficult decisions on savings, raising council tax, and the transformation of local services for several years. But the Council failed to understand and control the risks of this investment strategy. The ultimate failure of the strategy, and the scale of the financial loss that has resulted has undermined the financial viability of the authority and will require significant external support to be provided."*

28. The Council has had to take extensive remedial action to minimise its losses, while also seeking to divest itself of its investments generally, in compliance with directions made as part of the Government intervention. As an indicator of the scale and complexity of the work required, the costs incurred by the Council in seeking to remedy the position were estimated at £17.4 million as at July 2023, with additional future costs of £29.1 million forecast. As at February 2024, the Council estimated that the investment portfolio had experienced a fall in value of £283 million, or about 28%.

29. The full effects of the collapse of the Council's "debt for yield" approach are still not clear. In February 2024 the Council approved its budget for 2024-25, which included the statement that:

> *"The proposed 2024/25 budget has been set in the context of the virtually unprecedented ongoing financial challenges the Council faces over the medium-term. There is a continued need for exceptional financial support from government. The actions the Council is currently taking to mitigate the scale of financial challenges are the start of a long process to seek to secure the financial sustainability of the Council. At this stage it is not possible to confirm the Council's long term financial position, further changes will be needed in the medium term and the outcome of ongoing work will need to be finalised."*

30. To balance the budget, the Council approved:

    a. A further 7.99% increase in Council Tax, in addition to a 9.99% increase budgeted in 2023-24.

    b. Further cuts of £18.2 million to services, in addition to £8 million in savings budgeted in 2023-24.

    c. Further exceptional Government support of £68.6 million, in addition to £180 million budgeted in 2023-24.

31. In August 2024 the Council announced that it had begun legal proceedings against Individual A and one of the companies in Group A to recover invested funds which the Council alleged had been procured by deception and misappropriated.

Issues arising from the Council's approach

32. This document does not attempt to provide an exhaustive analysis of the Council's "debt for yield" approach, or identify everything that went wrong with

it. Instead, it focuses on five areas where there were clear and significant failings in the conception and implementation of the approach:

a. Exercise of delegated authority

b. Compliance with statutory requirements.

c. Expertise and external advice.

d. Identification and management of risks.

e. Communication and transparency.

33. These areas are explored in turn in the remainder of this section of this document, and corresponding allegations of Misconduct are set out in the next section.

<u>Exercise of delegated authority</u>

34. The Council delegated to the Respondent the authority to make individual borrowing and investment decisions under each annual Treasury Management Strategy document. There was no monetary limit on the size of individual "non-specified investments" that the Respondent could make. A non-specified investment is any financial investment that is not a loan and does not meet criteria set out in the statutory Guidance on Local Government Investments. The investments made by the Council under its "debt for yield" approach were non-specified investments.

35. The BVI report noted that *"This is an extraordinary amount of authority being put in the hands of one individual – we have not seen these levels of delegation elsewhere"*.

36. The level of freedom given to the Respondent, combined with the fiduciary obligations he owed to local ratepayers by virtue of holding the CFO role, made it particularly important for him to comply with relevant governance requirements, which included the following:

a. The investment principles adopted by the Council in the October 2017 Investment and Treasury Management Strategy document which inaugurated the new approach.

b. Limits on the total value of non-specified investments, set by the Council on an annual basis.

c. Limits on total borrowing, set by the Council on an annual basis.

37. In fact, all these requirements were contravened, as set out below.

Council investment principles

38. One of the principles set out in the October 2017 Investment and Treasury Management Strategy was that:

> *"e) Accountability and governance to the Executive / wider council must be a critical component of "open" investments and an overview of any investment in excess of £10m and for longer than one year be presented to the three group leaders and their deputies before any firm commitment"*.

39. An Investment Briefing provided to the Council by the Respondent for the purposes of the Extraordinary Meeting in July 2020 ("the July 2020 Briefing") explained that the mechanism for complying with this requirement was the Council Spending Review ("CSR"), a *"meeting open to the Leaders and Deputy Leaders of the main political parties of Thurrock Council"*. The Council did not keep clear and complete records, but it would appear from the July 2020 Briefing that a significant proportion of the total investment in Group A was presented to the CSR, as was a later investment in wind farms. The investments in Group B, the SME lending business, were not.

40. The Council made an initial investment of £10 million in one of the Group B companies in September 2017. This was before the investment principles were adopted, and the investment would not have needed to be presented to the CSR in any event, as it did not exceed £10 million. Multiple further investments were made, two of which exceeded £10 million (£13.5 million in November 2018 and £25 million in November 2019, of which £10 million was rolled over from a previous investment in the group). These investments were not presented to the CSR because the Respondent believed that the requirement did not apply to subsequent investments with a counterparty with whom the Council had already made an investment, even if the original investment had not itself been presented to the CSR.

41. The Respondent's interpretation of the requirement was plainly unreasonable. Taken to its logical conclusion, it allowed him to make a nominal investment with a counterparty one day, and then make a further investment of unlimited value with the same counterparty the next day, with no obligation to present the matter to the CSR. In any event, the interpretation was contrary to the plain

words of the investment principle, which did not limit the presentation requirement to investments with new counterparties.

42. The effect of the Respondent's interpretation was that the Council acquired an exposure of £94.2 million to Group B without prior notice being given, as required by the investment principles. To put this amount in perspective, in 2018-19 the Council's net cost of services (the cost to the Council of providing all its services to the public, which is considered a reasonable proxy for its financial strength) was £117.9 million.

43. This was an example of what the First-tier Tribunal, in the information rights appeal to which reference has already been made, called the Respondent's *"worryingly casual attitude to his duty to keep elected members properly informed and limit his executive acts to steps for which they had given full and informed consent"*.

Limit on non-specified investments

44. Each annual Treasury Management Strategy, and the October 2017 Investment and Treasury Management Strategy, included a figure for *"Maximum total non-specified investments"*.

45. In the original 2017-18 Treasury Management Strategy the limit on non-specified investments had been £200 million; in every Strategy from October 2017 onwards it was £550 million. The £550 million limit was exceeded by September 2018 at the latest, and by September 2022 the total value of the non-specified investments was almost twice that amount, at £1.021 billion, as has already been noted. The Respondent continued to make investments on behalf of the Council without complying with the limit on non-specified investments which framed the extent of his delegated authority.

46. The fact that the limit was being breached was apparent from (for example) the July 2020 Briefing, which reported the total amount of investments as £985 million. However, the limit was never increased to accommodate this, and the fact that it was being breached was never acknowledged.

Limit on total borrowing

47. Each annual Treasury Management Strategy, and the October 2017 Investment and Treasury Management Strategy, also included an *"Authorised Borrowing Limit"*. In the 2018-19 Strategy, the limit was £936,521.

48. The Respondent's control of the borrowing and investment strategy on behalf of the Council did not comply with this limit, which framed the scope of his delegated authority. In answer to a concern raised by the Opposition Group of the Council, the Chief Executive admitted in a letter dated 5 June 2020 that the 2018-19 limit had been breached:

> *"'At the Council meeting of the 28th February 2018 the Council adopted both the Treasury Management Strategy and the [Medium Term Financial Strategy]. It is accepted that during the course of the year following an increase in borrowing to undertake an investment which met the needs of the [Medium Term Financial Strategy] the authorised limit within the Treasury Management Strategy was exceeded. At the meeting of Council on the 27th February 2019 this limit was increased above the level of borrowing remedying the exceedance."*

49. The 2019-20 Treasury Management Strategy, approved in February 2019, did not set out an authorised borrowing limit – instead, this was included in a separate Capital Strategy Report. The 2019/20 limit was set at £1,452,949 and the *"2018-19 Forecast"* was noted as £1,249.400. There was no acknowledgement that the 2018/19 limit had been exceeded.

<u>Compliance with statutory requirements</u>

50. There were a number of elements to the legal framework around the Council's "debt for yield" approach:

    a. Part 2 of the Accounts and Audit Regulations 2015 ("the 2015 Regulations"). This concerns the Council's system of internal control.

    b. The Prudential Code for Capital Finance in Local Authorities, issued by CIPFA ("the Prudential Code"). The Council was required by regulation 2 of the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003 to have regard to this Code.

    c. Statutory Guidance on Local Authority Investments, issued by the Secretary of State ("the Investment Guidance"). The Council was required by section 15 of the Local Government Act 2003 ("the 2003 Act") to have regard to this guidance.

    d. Statutory Guidance on Minimum Revenue Provision, issued by the Secretary of State ("the MRP Guidance"). The Council was required by 21 of the 2003 Act to have regard to this guidance.

e. Part 3 of the Openness of Local Government Bodies Regulations 2014 ("the 2014 Regulations"). These govern the recording of key decisions by the Council, and public access to associated documents.

The 2015 Regulations

51. Regulation 4(1) and (2) of the 2015 Regulations requires the CFO of a local authority to determine the authority's financial control systems and ensure that they are observed. Under regulation 4(3), the financial control systems must include measures to ensure that risk is appropriately managed.

52. There were not adequate procedures in place to manage the risks arising from the "debt for yield" approach, as explained in detail under the heading "Identification and Management of Risks" below. This was a breach of the Respondent's personal duties under regulation 4.

The Investment Guidance and the Prudential Code

53. At the time the "debt for yield" approach was formally adopted in October 2017, the relevant version of the Investment Guidance was the second edition, operative from 1 April 2010.

54. This version of the Investment Guidance stated that: *"The Secretary of State recommends that for each financial year a local authority should prepare at least one investment Strategy"*, which should *"set out the authority's policies for the prudent management of its investments and for giving priority, firstly, to the security of those investments and, secondly, to their liquidity"*. The Investment Guidance also stated that: *"The initial Strategy may be replaced by another Strategy ("the revised Strategy") at any time during the year"*, which is what the Council did in October 2017.

55. The Investment Guidance recommended that: *"the Strategy should state the authority's policies on investing money borrowed in advance of spending needs".* The informal commentary accompanying the Guidance explained that:

> *"19. [The DLUHC] cannot offer an authoritative interpretation of the law, but takes the informal view that, while the speculative procedure of borrowing purely to invest at a profit is unlawful, there appears to be no legal obstacle to the temporary investment of funds borrowed for the purpose of expenditure in the reasonably near future. [The Prudential Code] makes recommendations about this procedure in the context of prudent borrowing practice. To complement that, the [Investment*

Guidance] recommends that the Strategy reports the authority's policies relating to the investment of any sums borrowed in advance. The Government considers that elected Members should have an opportunity to scrutinise this aspect of their authorities' investment practices, given that it may expose more money than is strictly necessary to investment risk".

56. A third edition of the Investment Guidance came into effect from 1 April 2018. The disclosure requirements in this new edition applied to each of the annual Treasury Management Strategy documents presented to meetings of the full Council for approval from February 2019 to February 2022.

57. The third edition strengthened the recommendation to prepare an investment strategy, stating that local authorities *"should"* prepare, approve and publish one for each financial year. Where a local authority already published an annual Treasury Management Strategy (as the Council did), the Investment Guidance permitted the authority to include the required disclosures in respect of investments in that document.

58. In a change from the previous edition, the Investment Guidance stated that:

> *"46. Authorities must not borrow more than or in advance of their needs purely in order to profit from the investment of the extra sums borrowed.*
>
> *47. Where a local authority chooses to disregard the Prudential Code and this Guidance and borrows or has borrowed purely to profit from the investment of the extra sums borrowed the Strategy should explain:*
>
> *• Why the local authority has decided not to have regard to this Guidance or to the Prudential Code in this instance; and*
>
> *• The local authority's policies in investing the money borrowed, including management of the risks, for example, of not achieving the desired profit or borrowing costs increasing."*

59. The informal commentary appended to the Investment Guidance gave this explanation:

> *"34. The Prudential Code, issued by CIPFA has always contained a statement that local authorities should not borrow more than, or in advance of their needs purely in order to profit from the investment*

of the extra sums borrowed. The purpose of repeating that statement in this Guidance is to make it clear that it extends to borrowing taken on to finance the acquisition of non-financial as well as financial investments.

...

36. If exceptionally a local authority, chooses not to have regard to the provision on borrowing to fund investment activity the Guidance requires them to explain, in their Strategy, the rationale for this decision.

37. The purpose of this disclosure is to allow external auditors, tax payers and other interested parties to understand why the local authority has chosen to disregard the Guidance, and to hold the authority to account should they believe there is not sufficient reason for doing so".

60. Neither the initial Investment and Treasury Management Strategy document presented to the Council for approval in October 2017, nor the annual Treasury Management Strategy documents presented to the Council for approval thereafter, mentioned the prohibition in the Prudential Code and the Investment Guidance on borrowing more than or in advance of need purely in order to profit from investing the borrowed sums. They did not state that the prohibition was being disobeyed, or explain why, and they did not make the other disclosures required by the Investment Guidance.

61. The reason for this was apparently that the Respondent did not consider that the Council was contravening the prohibition, because he interpreted the reference to a local authority's "needs" as including capital investments made purely for profit, so that the Council was not borrowing more than or in advance of need if it borrowed for the immediate purpose of making such investments.

62. This interpretation was clearly unreasonable, as it would make the prohibition meaningless. The informal commentary appended to the 2010 edition of the Investment Guidance made it clear that *"the speculative procedure of borrowing purely to invest at a profit"* was the very thing that the prohibition was aimed at. If there was any room for doubt about this, it was removed in February 2018 by the publication of the Government's feedback document in relation to the public consultation on the 2018 edition of the Guidance, which stated that *"The Prudential Code has always prohibited local authorities from*

borrowing solely to invest in profit making activities rather than to deliver statutory services or strategic objectives".

63. The Respondent was the officer of the Council responsible for the Investment and Treasury Management and Treasury Management Strategy documents. It was his responsibility to ensure that the elected members of the Council had clearly explained to them: (i) the terms of the Prudential Code and the Investment Guidance; (ii) that the "debt for yield" approach was not consistent with the terms of either; and (iii) any interpretation of the Code and Guidance which he considered meant that the Council's approach was consistent with their terms, or which might provide a proper justification for departure from them.

64. Without that information, the Council was unable to take a fully informed decision on the prudence and risks of the "debt for yield" approach, or to ensure that it complied with its legal obligations to have regard to the terms of the Prudential Code and the Investment Guidance and to have a compelling reason for any departure from their terms. Nor was the Council able to be held to account for those decisions.

The MRP Guidance

65. A local authority is required by regulation 27 of the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003 ("the 2003 Regulations") to charge a minimum amount to its revenue account in each financial year in respect of the financing of capital expenditure incurred by the local authority. This is known as "Minimum Revenue Provision" or "MRP". Under regulation 28 of the 2003 Regulations, the amount of MRP to be set aside is the amount that the authority considers prudent. From 2008, local authorities were given greater freedom to determine for themselves what was prudent, with the benefit of guidance issued by the Secretary of State.

66. At the time the "debt for yield" approach was formally adopted in October 2017, the relevant version of the MRP Guidance was the third edition, operative from 1 April 2012.

67. This set out four options for calculating prudent provision, but stated that *"Approaches differing from those exemplified are not ruled out"*. The informal commentary accompanying the Guidance explained that: *"The options are those likely to be most relevant for the majority of authorities but other approaches are not meant to be ruled out, provided that they are fully*

consistent with the statutory duty to make prudent revenue provision. Authorities must always have regard to the guidance, but having done so, may in some cases consider that a more individually designed MRP approach is justified".

68. The MRP Guidance also stated that: *"The Secretary of State recommends that before the start of each financial year a local authority prepares a statement of its policy on making MRP in respect of that financial year and submits it to the full council. ... The statement should indicate how it is proposed to discharge the duty to make prudent MRP in the financial year. If it is ever proposed to vary the terms of the original statement during the year, a revised statement should be put to the council at that time"*. The informal commentary explained that: *"The aim is to give elected Members the opportunity to scrutinise the proposed use of the additional freedoms conferred under the new arrangements"*.

69. A fourth edition of the MRP Guidance was later issued, which applied to accounting periods starting on or after 1 April 2019. It was therefore applicable to the annual Treasury Management Strategy documents approved by the Council from February 2019 onwards. It maintained the approach of setting out four options for calculating prudent provision, while allowing a local authority to use an alternative method that it considered more appropriate. It strengthened the requirement for an annual statement of MRP policy, stating that local authorities *"should"* prepare such a statement.

70. The Government has explained the function of MRP in this way:

> *"The duty to make [MRP] is an important component of the [Prudential] Framework. Where local authorities finance capital expenditure from debt, they must set aside an amount of money each year to ensure their debt liabilities can be repaid. In practice, the application is more complex, but when it operates effectively it should ensure that local authorities do not borrow more than they can afford. This is because MRP is a cost that must be met from an authority's budget which must be balanced each year. Therefore, in deciding whether any revised debt is affordable, an authority must consider whether it can afford the cost of the associated MRP from its budget."*

71. The amount of MRP to be made in respect of the capital expenditure on non-specified investments was therefore a very important consideration for the

Council, in the context of the "debt for yield" approach. If MRP had been included in full for all the Council's investments, in accordance with the suggested methods of calculation in the MRP Guidance, the Council's budgeted revenue account could not have balanced, as it was required to do. In that case, the "debt for yield" approach could not have been implemented to the extent that it was, and it might not have been adopted at all.

72. In fact, the Council did not make any MRP in respect of the investments. The initial Investment and Treasury Management document presented to the Council for approval in October 2017, and the annual Treasury Management Strategy documents presented to the Council for approval thereafter, did not make this clear. In each case the Council's MRP policy statement merely said:

> *"• In accordance with the Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2008 the Council's policy for the calculation of MRP in 2016/17 shall be that the Council will set aside an amount each year which it deems to be prudent and appropriate, having regard to statutory requirements and relevant guidance issued by DCLG.*
>
> *• The Council will also consider the use of capital receipts to pay down any MRP incurred."*

73. This did not clearly and explicitly state that the amount to be set aside in respect of the borrowing for the investments (by far the largest element of the Council's borrowing) would be nil. No explanation was given for the approach taken, or any indication of the importance of the matter. The Respondent's reason for deciding that no MRP was necessary was apparently that the funds received on maturity of the investments would repay the borrowing that financed their acquisition. If the second bullet point was intended to convey this, it failed to do so clearly. The documents did not adequately "*describe how it is proposed to discharge the duty to make prudent MRP"*, as required by the MRP Guidance.

74. The Respondent was the officer of the Council responsible for Investment and Treasury Management and Treasury Management Strategy documents. It was his responsibility to ensure that the elected members of the Council had clearly explained to them: (i) the four options for making prudent provision suggested in the MRP Guidance; (ii) the fact that the Council was deviating from those

options; and (iii) the reasons why the proposed policy still achieved a prudent level of MRP, despite the deviation.

75. Without that information, the Council was unable to ensure that it complied with its legal obligations to have regard to the terms of the MRP Guidance, and to have a compelling reason for any departure from its terms. Nor was the Council able to be held to account for those decisions.

76. After the Government intervention and under the direction of the Commissioners, the Council concluded that MRP should have been made, and that not doing so amounted to a *"material failure"* and a contravention of the statutory guidance. The Council estimated that £129 million should be set aside in 2022-23 and £75 million in 2023-24, to remedy the situation. This was a major contributing factor in the budget deficit that led to the Section 114 Notice.

The 2014 Regulations

77. Regulation 7 of the 2014 Regulations requires a written record to be produced of a decision taken by an officer of a local authority under delegated authority where *"the effect of the decision is to ... award a contract or incur expenditure which, in either case, materially affects [the authority's] financial position"*. The record must include the reasons for the decision and any alternative options considered and rejected.

78. Many of the Council's decisions to make individual investments involved contractual commitments and expenditure with the potential to materially affect the Council's financial position. The clearest examples are individual investments of £268 million, £145 million and £106 million in Group A bonds made in December 2017, August 2018 and September 2018, respectively.

79. These investment decisions were taken or authorised by the Respondent. It was his responsibility as CFO to ensure that the necessary written record was produced, to enable external and internal transparency and scrutiny by the public and by elected members. Proper records were not created and retained in relation to these decisions. This was a breach of regulation 7 of the 2014 Regulations for which the Respondent was responsible.

<u>Expertise and external advice</u>

80. No specific, documented assessment was carried out of the particular skills and experience required to carry out the investment approach, and whether

the Council's officers had those skills and experience. The Respondent and his staff did not, in fact, have the expertise necessary to implement an investment programme of this scale and complexity, as the Council has now admitted.

81. This is evident from the fact that the Respondent's team failed to:

a. Perform structured monitoring of the performance of the investments, or even keep clear and complete records of the terms of the investments and the circumstances in which they had been made.

b. Identify a number of potential issues in relation to the investments in Group A, Group B and Company C which came to light when the Council appointed specialist investment advisors, such as defects in bond structures, inadequate security, existence of senior debt and over-valuation of underlying assets.

c. Take obvious steps in performing due diligence on some of the investments.

83. In relation to the last of these points, a particular example is the investment of £130 million from November 2018 to January 2020 in bonds issued by Group A in relation to a particular solar farm project. The Respondent's team failed to:

a. Seek any external expert assessment of the valuations of the solar farms provided by Group A.

b. Seek confirmation from the relevant banks that the £130 million investment was required by Group A to re-finance existing debt, as claimed.

c. Perform any due diligence in respect of the credit-worthiness of Group A itself, as opposed to the value of the assets (although it is noted that by this stage the Council had been investing in Group A for some time).

84. Despite the lack of in-house expertise, the Council did not obtain adequate and timely external advice. At the time of adopting the new investment approach the Council was using the services of a respected firm of treasury management advisors ("Advisor Firm A"), but this firm did not advise, and was not asked to advise, on the investment approach or the individual investments. The Council dispensed with the services of Advisor Firm A in March 2019, and did not engage new treasury management advisers until after the Government intervention.

85. It was only in July 2020, around the time when the investment approach was "paused", that the Council engaged dedicated investment advisors ("Advisor Firm B") to conduct a review of the investments and help implement a reporting and oversight framework to assist with the prudent management of the portfolio. Prior to this, the Council had not used the services of dedicated investment advisers.

86. The draft investment strategy and governance framework prepared by Advisor Firm B for the Council soon after their appointment gives a useful indication of the kind of external advice that it would have been prudent for the Council to have obtained from the outset:

> *"• Advice on changes in the external environment, including financial markets and the macroeconomic environment, and the impact on strategic / tactical asset allocation*
>
> *• Sourcing of investments in the market for the council that reflect its risk appetite and needs*
>
> *• Advice on and due diligence of specific investments*
>
> *• Selection of and due diligence on fund managers*
>
> *• Risk analysis and scenario testing*
>
> *• Monitoring and reporting of investments*
>
> *• Fee audits to minimize transaction costs and frictional fee drag on returns"*

87. The Council's independent external auditors did not raise any concerns about the investment approach, but this was not a substitute for specialist advice. This was noted in a peer review carried out by the Local Government Association ("LGA") in September 2018, which advised the Council that *"the peer team have concerns regarding the scale and leverage of your investments and suggest that it warrants more than the classic local authority audit. Perhaps a more detailed and technical piece of work undertaken by one of the large accountancy firms could provide further surety and security"*.

88. A separate area of expertise and judgement was in relation to MRP. The Council did not obtain external specialist advice in respect of its decision not to set aside any MRP for the capital expenditure on its investments. Instead, the Council relied on confirmation of its proposed MRP approach, given by its

external auditors a number of years earlier, in respect of investments in a different type of asset (residential property). The Council also took comfort from the fact that those auditors, and the different firm appointed to the role from 2018-19, did not question the approach in relation to the investments. As in respect of the scrutiny of the investments themselves, this was no substitute for independent specialist advice, bearing in mind the significance of the issue and the bold approach being taken by the Council.

<u>Identification and management of risks</u>

89. There were risks inherent in the Council's approach of "borrowing short and lending long", and also risks associated with the particular investments that the Council chose to make. Some of these were set out in a letter from Advisor Firm A to the Council in March 2018. The letter referred to:

> *"• Credit risk – high exposure to unrated organisations ...*
>
> *• Liquidity – high exposure to illiquid assets.*
>
> *• Concentration risk – high exposure to particular sectors ... and to individual organisations ...*
>
> *• Refinancing risk – huge exposure to local authority funding, a market that has become increasingly sensitive ...*
>
> *• Market risk – high exposure to price fluctuations in financial assets.*
>
> *• Regulatory risk – accounting implications of adopted reporting standards and revised [Government] Guidance."*

90. The LGA peer review in September 2018 advised the Council to *"carefully consider whether the risks associated with your investment strategy are fully recognised and are as well managed as they could be ... As a public sector organisation, you need to be clear how you are mitigating against those various aspects and whether you can lessen them by continuing to improve your approach to governance and openness and transparency, by broadening the portfolio of investments, being explicit about the investment structures being used and by establishing clear limits on how much can be invested"*.

91. No specific action was taken in direct response to Advisor Firm A's letter or the LGA peer review recommendation. In relation to the latter, the Council appears to have taken a deliberate decision that no action was necessary.

92. The Council's Treasury Management Strategy documents and associated reports suggest that the risks were not appreciated or were not taken seriously. For example:

a. The October 2017 Investment and Treasury Management Strategy merely said *"Members should be aware that all investment decisions do come with risk"*. It did not give any details, and suggested that the risk was mitigated by taking external advice and by the governance arrangements proposed in the report.

b. The annual Treasury Management Strategy documents seeking the continuation and expansion of the approach were not much more forthcoming. For example, the 2018-19 Treasury Management Strategy said *"Since amounts borrowed will be invested until spent, the Council is aware it will be exposed to the risk of loss of the borrowed sums and the risk that investment and borrowing rates may change in the intervening period"*. However, it went on to say that *"These risks will be managed as part of the Council's overall management of its treasury risks"*. There was no explanation given as to what this meant.

c. The July 2020 Briefing sought to answer points raised in the recent negative media coverage without providing a balanced explanation of the risks.

93. With regard to the risks attaching to the individual investments, the Respondent reported to the Council's Standards and Audit Committee in July 2020 that *"Due to the nature, diversity and spread of locations of the investments that the council holds, they have been deemed as low risk and this has been substantiated in the current climate to date".* This ignored the credit, liquidity and concentration risks raised by Advisor Firm A in its letter, and demonstrated the failure to appreciate the particular issues around specific investments which were subsequently identified by Advisor Firm B.

94. The Council maintained a "Corporate/Strategic Risk & Opportunity Register" which was refreshed three times a year. Each risk or opportunity was given a numerical rating from 4 to 16, based on impact and likelihood. In April 2018, "Treasury Management & Investment Strategy" was added to the register as both a risk and an opportunity, with the Respondent as the owner. The risk was given a rating of 8, making it medium priority, while the opportunity was given a rating of 12, making it high priority. These ratings had not changed by

the time of the Government intervention, despite the emerging issues with some of the investments and the negative attention that the approach was receiving.

95. The register was presented to the Standards and Audit Committee on a regular basis, but they only saw a "Dashboard" setting out basic information and an "In Focus" report giving more detail on all high priority risks and those medium priority risks that officers decided to include on a case-by-case basis. While the "debt for yield" approach was always included in the "In Focus" report as an opportunity, the corresponding risk was never included. The Standards and Audit Committee never received any details on the nature of the risk, or an explanation for the rating.

96. It is clear from these matters that the Council failed to appreciate at the outset the risks inherent in the investment approach, did not act on the clear warning from Advisor Firm A shortly after the approach was formally adopted, and did not take effective action to manage the risks as the LGA peer review had recommended.

97. A number of the risks have in fact materialised, and this played a significant part in the financial crisis at the Council. As the current CFO explained in his budget report to the Council in February 2024:

> *"The Council's very serious financial challenges have arisen over a period of several years and represent the combined impact of a wide range of issues. Examples to note are as follows:*
>
> *➢ over-reliance on investments to support revenue - proportion risk;*
>
> *➢ over investment in one solar/windfarm basket - investment concentration risk;*
>
> *➢ long-term investments funded by borrowing on temporary markets from other local authorities - interest risk;*
>
> *➢ very significantly inadequate budgeting for MRP - legality risk;*
>
> *➢ inadequate levels of previous revenue savings – unsustainability risk;*
>
> *➢ an excessive capital programme – affordability risk."*

<u>Communication and transparency</u>

98. The lack of transparency around the “debt for yield” approach was a matter of concern to the LGA peer reviewers and, in due course, members of the Council. It has already been seen that departures from statutory guidance were not admitted and explained, and individual investment decisions were not published.

99. There was a consistent failure to disclose details about the investments, with “commercial confidentiality” given as the reason. This argument was maintained until it was rejected by the First-tier Tribunal in the October 2022 information rights appeal to which reference has already been made. Having noted that in 2016 the Council had been happy to disclose details of its early, smaller investments, the Tribunal commented on the Respondent’s evidence: *“We find Mr Clark’s attempts to explain the secretive position which the Council now adopts less than convincing. We cannot avoid the sense that it stems in material part from a wish to avoid the embarrassment which public scrutiny of its remarkable financial activities would be likely to involve”*.

100. There were three areas where failures to disclose relevant information had the potential to be positively misleading, namely in respect of:

    a. The extent to which the Council had obtained its own advice from independent external specialists.

    b. The extent to which the Council’s investment portfolio was concentrated in Group A.

    c. The Council’s compliance with statutory guidance.

External advice

101. With regard to external advisers, it has already been noted that Advisor Firm A’s letter to the Council in March 2018 was prompted in part by their concern about being publicly associated with the Council’s “debt for yield” approach. This is likely to be a reference to the statement in the February 2018 Treasury Management Strategy document to the effect that *“The Council has appointed [Advisor Firm A] as Treasury Management advisers and receives specific advice on investments, debt and capital financing issues”*.

102. Advisor Firm A were keen to point out that they had not advised, or been asked to advise, on the investment approach or individual investments. Later reports did not include similar statements, but no correction was offered until

the July 2020 Briefing (when the purpose was to rebut media criticisms of the termination of Advisor Firm A's contract in March 2019).

103. More significantly, the July 2020 Briefing stated that the Council *"has taken advice from other institutions depending on the nature of the investment being considered. These have included but are not limited to: [seven named firms of advisors]"*. The implication is that these organisations had been engaged by the Council to provide it with advice for its own use.

104. In fact, five of the seven named firms of advisors had been engaged by Group A to perform due diligence on its bonds, which was then provided to the Council as a potential investor. The sixth firm of advisors had been engaged by another local authority, with whom the Council had made its first investment in Group A in 2016. Of the named advisory firms, only one had been engaged by the Council (to provide legal advice), and there is no clear record of the Council commissioning any other advice of its own in relation to any particular investment. Similar misleading assurances were given in other meetings.

105. In a letter dated 5 June 2020, the Chief Executive of the Council answered various written questions raised by the Opposition Group, relying on information provided by the Respondent (who reviewed the letter before it was sent). Having noted the fact that the services of Advisor Firm A had been dispensed with, the Opposition Group had put the following question: *"Expert, external, advice is vital for ensuring confidence in investment decisions. Without access to reputable external advice, what is the decision making process for borrowing and investments for the Council?"* In response the Chief Executive stated: *"The council has always had, and continues to receive, expert relevant advice for all individual investment decisions"*.

106. The Chief Executive's letter went on to set out the following question and answer exchange:

> *"8. What due diligence did the Council carry out before investing with [Group A]?*
>
> > *a. The council carried out extensive due diligence relating to [Group A] related Investments. This was provided by a range of experts including [the seven named firms of advisors].*
>
> *9. As part of its due diligence checks, did the Council seek independent expert, external, advice prior to investing with [Group A]?*

a. See response to question 8."

107. To the extent that this letter clearly implied that all the named organisations had provided advice directly to the Council, it was misleading.

Concentration in Group A

108. With regard to the concentration of investment in Group A, the same letter included these questions and answers:

> *"7. What percentage of council investments are with one company and into one sector or product?*
>
> > *a. Renewable Energy Sector 79.8%*
> >
> > *(spread over approximately 60 interests)*
> >
> > *b. CCLA 10.5%*
> >
> > *c. Other, including TRL 9.7%*
>
> *...*
>
> *10. What is the extent of the Council's financial position with [Group A]?*
>
> > *a. The Council holds a number of bonds with [Group A] related companies secured against the assets. These form part of the investments in the Renewable Energy Sector as set out above."*

109. While these answers were strictly correct, they failed to communicate the key fact that the Group A investments accounted for a very significant proportion of the renewable energy investments and about two thirds of the Council's total portfolio. While the different Group A bonds were secured against various solar farm assets, all of them were in companies controlled by Individual A.

110. A similarly misleading impression was given by the Respondent in a briefing to the Council's Standards and Audit Committee in July 2020. The Respondent's report repeated the figure quoted above as to the proportion of the investments that were in the renewable energy sector. While it indirectly acknowledged that *"the most significant portion of the council's investments"* were in solar power, it did not reveal that all that investment was in Group A.

111. The report also stated that *"Other investments provide diversity through other renewable sources such as wind farms and biomass"*. The Council had invested £74.5 million in wind farms, which provided very limited diversification when compared with the £655 million invested in Group A. The reference to

biomass appears to relate to investments of £14 million in one particular company (“Company D”), made from August 2017 to October 2018. Company D went into administration in February 2020, and the Respondent must have known by July 2020 that the Council would not recover its investment (the £14 million was subsequently written off in the Council’s 2020-21 accounts).

Compliance with guidance

112. With regard to the Council’s compliance with guidance, it has already been noted that the various Treasury Management Strategy documents failed to disclose that the Council had decided not to follow the Investment Guidance, and had not set aside any MRP in accordance with the MRP Guidance. However, the letter from the Chief Executive to the Opposition Group went further:

> *“15. As Chief Executive are you satisfied that the Council’s Borrowing and Investment Strategy complies with local and national government guidelines and accepted good practice?*
>
> > *a. I am satisfied that the Councils strategy for Borrowing and Investments complies with national guidelines and accepted good practice.”*

113. Again, this answer was clearly misleading. A similarly misleading impression was given by the Respondent at the July 2020 meeting of the Standards and Audit Committee mentioned above. In the context of a discussion about the possibility of the Government tightening the rules on local authority borrowing, the Respondent reassured the Committee that *“Thurrock had done nothing wrong and that Thurrock and other councils had been doing this for decades”*. This answer failed to make clear the difference between traditional borrowing for treasury management purposes and capital projects, and the Council’s unprecedented “debt for yield” approach.

THE RESPONDENTS’ MISCONDUCT

114. As CFO, the Respondent had statutory responsibility for the administration of the Council’s financial affairs, including the issues set out above. Moreover, as the senior office holder within the local authority with responsibility for financial management and decision-making, it was the Respondent’s professional duty to ensure that any financial approach adopted and implemented by the Council

was conducted competently, diligently and with integrity. The issues set out above show that the Respondent failed to meet those professional duties.

115. However, his involvement went significantly beyond ultimate legal and professional accountability for the actions of others. The Respondent was intimately involved in, and responsible for, the practical implementation of the “debt for yield” approach and the individual borrowing and investment decisions made on behalf of the Council which exposed it to such a high level of financial risk. While the annual Treasury Management Strategy documents and the October 2017 Investment and Treasury Management Strategy were presented to the Council by the Cabinet Portfolio Holder for Finance, the Respondent was identified in the documents as the accountable Director. The Respondent personally provided briefings to the Standards and Audit Committee and Corporate Overview and Scrutiny Committee. It was an important feature of the “debt for yield” approach that decision-making powers in respect of individual investments were delegated to him personally and he exercised those powers, including doing so beyond the scope of the delegation made to him. The day-to-day operation of the approach was carried out by a small team under his direct control.

116. His actions and omissions had the result that only he, and his immediate team, were fully aware of the scale and nature of the Council’s financial exposure. Elected Members of the Council were denied the opportunity to take fully informed decisions in relation to, and accountability for, the “debt for yield” approach.

117. As the BVI report found, his actions were *“central to the conception, development and ultimate failure of the Council’s investment strategy”*. This is reflected in the allegations set out below. Accordingly, and by reference to the allegations individually and cumulatively, the Respondent’s acts constitute Misconduct.

ALLEGATION 1

Failing to comply with restrictions on the exercise of delegated authority

The conduct of the Respondent fell significantly short of the standards reasonably to be expected of a Member, in that he failed to take reasonable steps to secure compliance with:

(a) The investment principles adopted by the Council in the October 2017 Investment and Treasury Management Strategy,

(b) Limits on the total value of non-specified investments, set by the Council on an annual basis, and

(c) Limits on total borrowing, set by the Council on an annual basis,

and therefore failed to act in accordance with the Fundamental Principle of Professional Behaviour as set out at paragraph 100.5(e) of the ACCA Code*.*

<u>Particulars of Allegation 1</u>

(1) Principle 3 of the CIPFA Statement required the Respondent to *"lead the promotion and delivery by the whole authority of good financial management so that public money is safeguarded at all times and used appropriately, economically, efficiently, and effectively"*.

(2) The specific responsibilities under that Principle include *"Ensuring that delegated financial authorities are respected"*.

(3) The Respondent failed to ensure that investments in Group B which exceeded £10 million were presented to the leaders of the three Council political groupings and their deputies in advance, as required by one of the investment principles adopted by the Council in the October 2017 Investment and Treasury Management Strategy.

(4) The Respondent failed to ensure that total of the Council's non-specified investments did not exceed the limit set out in the Treasury Management Strategies for the years 2018-19 to 2021-22.

(5) The Respondent failed to ensure that the total of the Council's borrowing did not exceed the authorised borrowing limit set out in the 2018-19 Treasury Management Strategy.

(6) By failing to comply with these requirements, the Respondent exceeded his delegated authority and therefore failed to *"comply with relevant laws and regulations"*, as required by paragraph 150.1 of the ACCA Code.

<u>ALLEGATION 2</u>

<u>Failing to comply with the relevant statutory framework in implementing the "debt for yield" approach</u>

The conduct of the Respondent fell significantly short of the standards reasonably to be expected of a Member, in that he failed to take reasonable steps to secure compliance with:

(a) Part 2 of the Accounts and Audit Regulations 2015,

(b) the Statutory Guidance on Local Authority Investments,

(c) the Prudential Code for Capital Finance in Local Authorities and the Statutory Guidance on Minimum Revenue Provision, and

(d) Part 3 of the Openness of Local Government Bodies Regulations 2014,

and therefore failed to act in accordance with the Fundamental Principle of Professional Behaviour as set out at paragraph 100.5(e) of the ACCA Code.

Particulars of Allegation 2

(1) Principle 2 of the CIPFA Statement required the Respondent to be *"actively involved in, and able to bring influence to bear on, all material business decisions to ensure immediate and longer term implications, opportunities and risks are fully considered"*. Reference has already been made to Principle 3 of the CIPFA Statement, under Allegation 1 above.

(2) The specific responsibilities under those Principles include:

(a) *"Checking, at an early stage, that innovative financial approaches comply with regulatory requirements"*;

(b) *"Apply[ing] relevant statutory, regulatory and professional standards both personal and organisational"*;

(c) *"Advising on the financial thresholds for 'key' decisions where there is a requirement to do so"*;

(d) *"Applying strong internal controls in all areas of financial management, risk management and asset control"*; and

(e) *"Ensuring that delegated financial authorities are respected"*.

(3) The Respondent failed to ensure that adequate procedures were in place to manage the risks arising from the Council's "debt for yield" approach, in accordance with the obligation placed upon him by the 2015 Regulations.

(4) In reports to the full Council, the Respondent failed to make it clear that the Council was acting inconsistently with the Prudential Code and the Investment Guidance by borrowing solely in order to invest for profit.

(5) In those reports, the Respondent did not explain the reasons for the departure from the Code and the Guidance, or make further disclosures that were required, to enable effective and informed decision-making and scrutiny.

(6) In reports to the Full Council, the Respondent acted inconsistently with the MRP Guidance by failing to clearly explain the options for making prudent provision suggested in the Guidance, the fact that the Council was deviating from those options; and the reasons why the proposed policy still achieved a prudent level of MRP despite the deviation, to enable effective and informed decision-making and scrutiny.

(7) The Respondent failed to ensure that key decisions in relation to individual investments were recorded, in accordance with the 2014 Regulations.

(8) By failing to take reasonable steps to secure compliance with these requirements, the Respondent failed to *"comply with relevant laws and regulations"*, as required by paragraph 150.1 of the ACCA Code.

ALLEGATION 3

Failing to ensure that the Council had access to the necessary skills and experience to pursue its "debt for yield" approach

The conduct of the Respondent fell significantly short of the standards reasonably to be expected of a Member, in that he failed to:

(a) ensure that the Council's staff (including himself) had the skills and experience necessary to manage the Council's investments and borrowing, or

(b) engage external independent expert advice who had those skills and experience,

and therefore failed to act in accordance with the Fundamental Principle of Professional Competence and Due Care set out at paragraph 100.5(c) of the ACCA Code.

Particulars of Allegation 3

(1) Principle 4 of the CIPFA Statement required the Respondent to *"lead and direct a finance function that is resourced to be fit for purpose"*.

(2) The specific responsibilities under this Principle include:

(a) *"Determining the resources, expertise and systems for the finance function that are sufficient to meet business needs"*;

(b) *"Ensuring that finance staff, managers and the leadership team are equipped with the financial competencies and expertise needed to manage the business"*; and

(c) *"Ensur[ing], when necessary, that outside expertise is called upon for specialist advice not available within the finance function"*.

(3) The Respondent did not carry out any specific, documented assessment of the particular skills and experience required to implement the "debt for yield" approach, and whether the Council's staff (including himself) had those skills.

(4) The Respondent and his staff did not, in fact, have the necessary skills and experience, and external specialist advice was required.

(5) The Respondent terminated the Council's contract with its external treasury management advisers in March 2019, and they were not replaced throughout the relevant period. They had never provided advice in respect of the Council's non-specified investments in any event.

(6) The Respondent did not engage specialist external investment advisers until July 2020, around the time when new investments were "paused".

(7) The Respondent failed to obtain specialist external advice in respect of the approach of not setting aside MRP in relation to the investments, despite the importance of the decision.

(8) By failing to ensure that the Council had access to the necessary skills or experience, either through internal or external resources, the Respondent failed to *"act diligently in accordance with applicable technical and professional standards when providing professional services"*, as required by paragraph 130.1(b) of the ACCA Code.

ALLEGATION 4

Failing adequately to manage and report on the risks arising from the "debt for yield" approach

The conduct of the Respondent fell significantly short of the standards reasonably to be expected of a Member, in that he failed adequately to:

(a) identify, assess and respond to the risk arising from the Council's borrowing and investments, or

(b) report on those risks to the Council,

and therefore failed to act in accordance with the Fundamental Principle of Professional Competence and Due Care set out at paragraph 100.5(c) of the ACCA Code.

<u>Particulars of Allegation 4</u>

(1) Reference has already been made to Principle 2 and Principle 3 of the CIPFA Statement, under Allegations 1 and 2 above.

(2) The specific responsibilities under these Principles include:

(a) *"Ensuring that opportunities and risks are fully considered"*;

(b) *"Tak[ing] ownership of relevant financial and business risks"*;

(c) *"Promoting arrangements to identify and manage key business risks, including safeguarding assets, risk mitigation and insurance"*; and

(d) *"Ensuring the effective management of cash flows, borrowings and investments of the authority's own funds or the pension and trust funds it manages on behalf of others; ensuring the effective management of associated risks; pursuing optimum performance or return consistent with those risks"*; and

(e) *"Plac[ing] stewardship and probity as the bedrock for management of the authority's finances"*.

(3) There were clear risks inherent in the "debt for yield" approach, and attaching to some of the specific investments.

(4) These risks were clearly articulated in a letter from the Council's treasury management advisers in March 2018.

(5) In September 2018 a LGA peer review recommended that the Council strengthen its risk management in respect of the approach.

(6) The Respondent did not take action in response to these warnings.

(7) The risk were never clearly identified and assessed in the Respondent's reports to the full Council.

(8) Despite the significance of the "debt for yield" approach, it was given a medium priority risk rating in the Council's risk register, and this rating was not revised from 2020 onwards as serious issues emerged.

(9) By failing adequately to manage and report on the risks, the Respondent failed to *"act diligently in accordance with applicable technical and professional standards*

when providing professional services", as required by paragraph 130.1(b) of the ACCA Code.

ALLEGATION 5

Recklessly providing misleading information about the "debt for yield" approach

The conduct of the Respondent fell significantly short of the standards reasonably to be expected of a Member, in that he recklessly provided materially misleading information to the Council and the Opposition Group about the Council's borrowing and investments, and therefore failed to act in accordance with the Fundamental Principle of Integrity as set out at paragraph 100.5(a) of the ACCA Code.

Particulars of Allegation 5

(1) Principle 1 of the CIPFA Statement provides that the CFO is *"a key member of the leadership team, helping [the local authority] to develop and implement strategy"*. Reference has already been made to Principle 2 of the CIPFA Statement under Allegations 2 and 3 above.

(2) The specific responsibilities under these Principles include:

(a) *"Comply[ing] with the IFAC Code of Ethics for Professional Accountants, as implemented by local regulations and accountancy bodies"*; and

(b) *"Ensuring that financial and performance information presented to members of the public, the community and the media covering resources, financial strategy, service plans, targets and performance is accurate"*.

(3) The Respondent provided information in various reports to the full Council and in a letter from the Chief Executive to the Opposition Group which was materially misleading as to:

(a) The extent to which the Council had obtained its own advice from independent external specialists;

(b) The extent to which the Council's investment portfolio was concentrated in Group A; and

(c) The Council's compliance with statutory guidance.

(4) The Respondent was reckless as to whether this information was misleading, in the sense that he was aware of a risk that it might be misleading, and unreasonably took that risk.

(5) By recklessly providing misleading information, the Respondent failed to be *“straightforward ... in all professional and business relationships”*, and was knowingly associated with reports or communications believing that they omitted or obscured information *“required to be included where such omission or obscurity would be misleading”*.

ANNEX

Extracts from the ACCA Code

Note: All extracts are taken from the 2017 edition of the ACCA Code, effective from 1 January to 30 June 2017.

“SECTION 110

Integrity

110.1 The principle of integrity imposes an obligation on all professional accountants to be straightforward and honest in all professional and business relationships. Integrity also implies fair dealing and truthfulness.

110.2 A professional accountant shall not knowingly be associated with reports, returns, communications or other information where the professional accountant believes that the information:

> *(a) Contains a materially false or misleading statement;*
>
> *(b) Contains statements or information furnished recklessly; or*
>
> *(c) Omits or obscures information required to be included where such omission or obscurity would be misleading.*

When a professional accountant becomes aware that the accountant has been associated with such information, the accountant shall take steps to be disassociated from that information.

110.3 A professional accountant will be deemed not to be in breach of paragraph 110.2 if the professional accountant provides a modified report in respect of a matter contained in paragraph 110.2.

...

SECTION 130

Professional competence and due care

130.1 The principle of professional competence and due care imposes the following obligations on all professional accountants:

> *(a) To maintain professional knowledge and skill at the level required to ensure that clients or employers receive competent professional service; and*

(b) To act diligently in accordance with applicable technical and professional standards when providing professional services.

130.2 Competent professional service requires the exercise of sound judgment in applying professional knowledge and skill in the performance of such service. Professional competence may be divided into two separate phases:

(a) Attainment of professional competence; and

(b) Maintenance of professional competence.

130.3 The maintenance of professional competence requires a continuing awareness and an understanding of relevant technical, professional and business developments. Continuing professional development enables a professional accountant to develop and maintain the capabilities to perform competently within the professional environment.

130.4 Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.

130.5 A professional accountant shall take reasonable steps to ensure that those working under the professional accountant's authority in a professional capacity have appropriate training and supervision.

130.6 Where appropriate, a professional accountant shall make clients, employers or other users of the accountant's professional services aware of the limitations inherent in the services.

...

SECTION 150

Professional behavior

150.1 The principle of professional behavior imposes an obligation on all professional accountants to comply with relevant laws and regulations and avoid any conduct that the professional accountant knows or should know may discredit the profession. This includes conduct that a reasonable and informed third party, weighing all the specific facts and circumstances available to the professional accountant at that time, would be likely to conclude adversely affects the good reputation of the profession.

150.2 In marketing and promoting themselves and their work, professional accountants shall not bring the profession into disrepute. Professional accountants shall be honest and truthful and not:

(a) Make exaggerated claims for the services they are able to offer, the qualifications they possess, or experience they have gained; or

(b) Make disparaging references or unsubstantiated comparisons to the work of others.

150.3 A professional accountant shall behave with courtesy and consideration towards all with whom the professional accountant comes into contact in a professional capacity."