IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 760 (Admin)

CO/2538/2018

Royal Courts of Justice
Friday, 15 February 2019

Before:

HIS HONOUR JUDGE DIGHT CBE
(Sitting as a Judge of the High Court)

B E T W E E N:

THE QUEEN
ON THE APPLICATION OF
VICTORIA HARVEY — Applicant

- and -

LEIGHTON LINSLADE TOWN COUNCIL — Defendant

MS V. HARVEY appeared in Person.

MR J. HOLBROOK (instructed by Devonshires Solicitors LLP) appeared on behalf of the Defendant.

J U D G M E N T

JUDGE DIGHT:

1 I have before me two applications. First, a substantive application for judicial review and, secondly, an application issued on 6 February 2019 for an order pursuant to CPR 46.19 to set aside or vary a costs capping order made on the grant of permission to seek judicial review. I will turn to the application in respect of the cost capping order after giving judgment in the substantive application.

2 The application for judicial review is brought with permission of Mr Richard Clayton QC, sitting as a deputy High Court judge, on 24 August 2018. By this application, the claimant challenges the decision ("the decision") of Leighton Linslade Town Council ("the Council") made on 12 March 2018 in respect of revised market pitch fees or rents at the market held in Leighton Buzzard town centre and known, as I understand it, as the Leighton Buzzard Market ("the Market").

3 The essence of the claimant's case is that the decision is unlawful because a fair process of consultation in respect of the alteration in market pitch fees brought about by the decision did not take place in accordance with the principles set out in *R v Brent London Borough, ex parte Gunning* [1985] 84 LGC 168. I will turn to that decision in due course.

4 The defendant submits that in essence, first, there was no duty to consult over the changes in the fees before they were determined, on the facts of this case. Secondly, in any event, the duty was adequately discharged and, thirdly, if the duty was not adequately discharged, the Court should not grant relief in any event.

5 I want to mention the claimant, if I may, before I move on. I want to commend her. She is a local citizen, not a market trader, raising an issue of local importance as was recognised by Mr Clayton's order. She has some serious medical conditions, which I need not set out in detail in this judgment, which makes her heavily reliant on the Market, she tells me. It is of great importance both to her and to others in the community. She has represented herself throughout these proceedings and has demonstrated not only that she has a comprehensive knowledge of the factual material which comprises the background to this case, but also an impressive understanding of the relevant legal principles to be derived from the case law, which she has cited both in the course of her skeleton argument and in oral submissions. She was able to cope well with questions from the Bench about the application of those principles. The local market traders can be rightly proud of their advocate.

6 While I have read all the material which the claimant has provided me with, including the statements of local people as to the impact of the decision and a significant number of the reported cases to which my attention has been drawn, I will not have time in this short judgment to refer to all of them, but that does not mean that I have not taken them into account in reaching my conclusion. The decision was not, as I read it, to increase pitch fees for everybody, but to provide for a system of differential charges for permanent as opposed to casual traders and to give discounts for longstanding attendance by traders at the Market. Pitch fees themselves had not been increased since 2012 and, as I read the evidence, a variety of different rates were in place until 2017.

7 The context of the decision is that there had been an increase in the standard rate of fees on 24 July 2017 and the creation of a uniform approach to charging for pitches. That decision is contained in the minutes of the Culture and Economic Services Committee for the Council of 24 July 2017. In respect of market stall or pitch fees, the Committee resolved in essence, first, to standardise pitch size and the method of charging, moving from imperial measurements to metric measurements. Secondly, they altered the method of calculating

fees, which had previously been by measuring the frontage of the pitch, to calculating the square metreage occupied by the pitch Thirdly, they standardised the rate at £19 for a three square metre pitch. Fourth, there was to be no increase for existing traders until April 2018. Fifth, there was to be an incremental increase thereafter. There was to be a review in six months or so. That decision is not the subject matter of challenge before me although it is the root and starting point of the decision which is challenged.

8 The decision itself is that dated 12 March 2018, again recorded in the minutes of the Culture and Economic Services Committee of that date, from which it can be seen that the Committee resolved, first, that casual market traders, as opposed to permanent traders, should pay a higher rate per standard sized pitch at £23 per pitch rather than £19 per pitch. Secondly, that addition square metreage space beyond the standard size should be charged at 50p per square metre. Thirdly, that there should be what is described as "a long service discount" for permanent but not casual traders in respect of the whole pitch occupied by that trader according to the number of years that they had been at the Market, ranging between five per cent at the bottom end for those who had been there five years and 20 per cent at the top end for those who have been there for 20 years or more. Lastly, they re-endorsed the decision to increase the rents for permanent traders by increments of no more than ten per cent per month at a rate of no more than an upper limit of £4 per pitch. Those are the two relevant decisions.

9 The claimant asserts that in effect the earlier decision was overtaken and that the 2018 decision was a fresh decision on the level of rents. She says that that is apparent from some of the material in the bundle which she took me to, including various emails towards the end of 2017 when there were discussions about the rates of pitch fees. She says therefore that the second decision itself was a full review of the pitch fees and therefore of the first decision and that therefore there is no need to challenge the first decision. The defendant says that the second decision was just the implementation of a discount applied to the rates decided on in the first decision. The evidence, which I will come to in due course, shows in my judgment that the defendant is correct on this point that the analysis of the two decisions is that the second decision was simply tweaking the first decision, providing for a discount in relation to rates that had already been resolved on. The minutes of the two decisions, which I have made reference to, in my judgment justify that conclusion. The defendant submits that the irony is that if the claimant succeeds in her application the result will be that the second decision is quashed, that discounts would be removed and that fees would increase for a number of traders.

10 There is considerable historical background to this market, which I will briefly mention. It is apparent that the Market is first mentioned in the Domesday Book in 1086. The right appears to have been recognised as a royal monopoly enjoyed by the then lord of the manor and passed on as a property right, ultimately by conveyance in 1219. There has been reference to what is perhaps a red herring. In 1208 it is apparent that King John granted a charter to his Treasurer, William of Ely, in respect of a specific market, but there are doubts whether this is the source of the monopoly right which has ultimately been enjoyed by various local authorities in succession. There is now a weekly market on Tuesdays and Saturdays consisting of permanent traders, those with a regular pitch, and casual traders who have no guaranteed pitch and now pay a higher tariff in respect of their occupation of their pitch on the Market.

11 Bringing us into the present century, the Market management was delegated to the defendant in 2011 from the Central Bedfordshire Council, but the Market rights themselves, as I read the material before me, remained with the Central Bedfordshire Council. It was only the right to manage the Market that moved. The documents show that the Council is to

pay a fee of £150,000 to CBC over a period of six years. In taking over the management of the Market, they came up with a three-year business plan in December 2011, which was intended to invigorate the Market and lead to a better service for the local community.

12 The Market until that time had been managed by a business known as Wendy Fairs, whose agreement with the previous owners of the Market expired on 26 May 2012. At about the same time, the Council created the Market subcommittee to oversee what was going on in the Market. They did not make any alteration in the pitch fees until the first of the two decisions referred to above.

13 I have been taken in the course of the evidence and submissions to a large selection of the minutes of the Market subcommittee from 2012, which show regular consideration by the subcommittee of the issues affecting the Market with a view to making it a thriving and viable resource for the community. It is apparent from those minutes that from time to time market traders and local and national market trader representatives and members of the public attended the meetings of the subcommittee and spoke at the beginning of the sessions. There is an example of that in the minutes of February 2013 when there were discussions and comments made from the floor about the siting of the Market.

14 By about April 2016 there were regular monthly meetings. The then variety of charging rates for the period immediately before the proposed relaunch of the Market are set out in a document headed "2015/2016 Tariffs", which I need not refer to, but by the beginning of 2017 there were discussions about relaunching the Market giving effect to the local authority's policy on it.

15 On 16 February 2017 a business called the Retail Group prepared a presentation for the Market subcommittee which was headed "Leighton Buzzard Market Improvement Action Plan". As I understand some of the concerns at the time, it was not only about the issues that I have already mentioned, but there was also a desire to equalise and make fairer the apparently disparate rates for pitch fees between various traders at the Market, as Ms Cannon, a council officer working on this matter, notes in her witness statement which was put before me.

16 On 27 March 2017 the Council resolved to endorse what was described as "The Market Improvement Action Plan" and, immediately afterwards, entered into discussions with the Market traders and others about the layout of the Market, but not at that point about the rents which would be payable.

17 On 6 June 2017 the Market subcommittee recommended reconfiguration of the site and standardisation of the pitch sizes, as is apparent from the minutes for that date, which had attached to them as appendix B information described as "Market Relaunch Consultation Feedback Summary," which starts in para.1.1 by saying:

> "Consultation and the Market Relaunch. Recommendations took place between 25 April 2017 and 26 March 2017 with a number of stakeholder groups in person and online through an information page and survey on the Leighton Linslade Town Council website.
>
> 1.2. Traders from the regular and speciality markets were invited to participate in two trader-specific meetings to discuss the recommendations and gather their feedback. The meetings were held following the end of trading on Tuesday, 25 April and Saturday,

29th April. Twenty traders attended the first meeting and eight traders attended the second.

1.3. An online survey was created specifically for those traders not able to attend either meeting and was mailed out to 12 traders, two of whom responded.

1.4. Market stall consultations were held on Tuesday, 2 May and Saturday, 6 May for market shoppers, the general public and any traders who were not able to attend either of the previously scheduled meetings. Interest in the Market relaunch was high and attendance at the stall steady on both days.

1.5. The online public survey was completed by 16 participants and feedback from that survey was included in the overall summary."

18 There then follows an analysis of the feedback to the consultation process that the Council had undertaken. It is apparent that at this relatively early stage in the chronology the claimant was active in discussions with the Council about the relaunch of the Market as appears from an exchange of emails dated 5 July 2017 with Mr Saccoccio, the town clerk, to the claimant in which he says:

"Dear Victoria.

Can I thank you so very much. Your kind words were so very welcome. Together with David, your involvement in the entire process has been excellent and, to be honest, if you had not have engaged the unease and distrust would prevail between the Council and the traders.

On a separate note, the points you raise about Sarah are very true. Sarah is my rock and, yes, she is a real asset to both the Council and the residents we serve. The idea of reviewing the way we engage with our traders is a really valuable one and thank you, Victoria, for that and, yes, this may well be a task that I will ask Sarah to lead on. That is to put in place a new method of engagement and communication with the traders. We will ask their traders their opinion and, if agreed, we can then adopt easily the communication model that the Market team will then follow.

I look forward to seeing you on Friday."

19 There was then the report made to the Committee in respect of rationalisation of pitch fees dated 24 July 2017, the title being "Market Relaunch and Pitch Fees." The purpose of the report was identified as "to propose a relaunch date, new pitch fees and support for existing traders". It was prepared by Ms Cannon. That report led, as I understand it, to the decision of 24 July 2017 which recommended the relaunch of the Market with the new pitch fees.

20 The minutes for that meeting say under the heading:

"<u>Market Stall Fees</u>

The subcommittee received and discussed a report in respect of the date of the Market relaunch and how the proposed new pitch fee would be introduced. Plans were underway for the launch event and would be

> presented to a future meeting. Proposed changes to the existing pitch fee structure were explained and discussed. It was agreed that a clear and fair fee structure for all traders was needed and the process of change for existing traders should be gradual in order to give them sufficient time to plan and budget."

21 The committee then looked at the proposals and adopted them.

22 In the context of that factual background, the question arises as to whether there was there a duty to consult in advance of the decision, which is the subject matter of challenge in this case. The claimant relies on the decision of Hutchinson J, as he then was, in *R v Birmingham City Council, ex parte Dredger and Paget* [1993] 91 LGR 532. There is no headnote to that decision, but in the first paragraph Hutchinson J identifies the decision that was being challenged. He said:

> "The decisions of the Commercial Services (Financial and General Purposes) sub-committee of the Birmingham City Council (a) to refuse to adjourn their meeting of 27th September 1990 in which they considered a report of Mr Atkins, the Director of Commercial Services, proposing fundamental changes in the methods of assessment and levels of rent for stalls in the Birmingham street markets; and (b) on that date to recommend the implementation of proposals in the report for increases in rent of 135%."

23 The learned judge set out a number of different principles which he said applied in that particular case, which the claimant in this case says have direct application in the matter before me. On p.9 of his judgment under the heading "Consultation" he said this:

> "Three questions arise under this head. The first is whether the applicants have established that there was a legitimate expectation ... To the matters with which this case is concerned. That depends on previous practice, since there is no suggestion of a promise of consultation. The second question, which needs to be considered only if the applicants do not obtain a favourable answer on the first, is whether there was a duty to consult as a matter of fairness, and quite independently of the existence of any legitimate expectation based on previous practice. The third question, which only arises if the applicants obtain a favourable answer on one or other of the first two, is whether such consultation as did take place was adequate."

24 He then turned to the first question, which is the legitimate expectation of consultation dependent on practice. He said:

> "I have already indicated that the respondents accept that there was a practice of consultation on the level of rent. Their argument, however, is that this cannot give rise to an expectation of consultation on other matters..."

He looked at the argument and said:

> "...all of this has to be seen in the context of a settled policy by the Council of increasing rents broadly in line with inflation and taking account of historical costs."

25 What the learned judge was dealing with in that case was a situation where there was intended to be a fundamental change and a very substantial increase in the rents that were being charged by the local authority to its market traders and he went on to say:

> "I have to say that I find profoundly unattractive the submission that a regular practice of consultation as to the level of rent year after year when that rent is decided on the basis of a broadly consistent formula known to both parties, does not give rise to a legitimate expectation of being consulted about a proposal fundamentally to alter the basis of computation -- as Mr Collins put it, to move the goal posts. How can it be said that the failure of the applicants to raise and secure consultation on matters of principle in previous years is fatal to their claim when there have been no matters of principle to raise?"

26 In the first part of p.10 he emphasised again that the change that was being proposed was a fundamental change. He said in conclusion in respect of the first question:

> "I hold therefore that the applicants have established that they had a legitimate expectation of being consulted as to the levels of charges proposed in the report by Mr Atkins adopted by the Council, and that that legitimate expectation extended both to the bare question of the amount of the charges and to the method of arriving at them. I reach this conclusion on the basis both that a practice of consulting as to the level of rents conceded to exist inevitably on the facts of this case gives rise to a legitimate expectation to be consulted when the Council proposed to move the goal posts; and on the basis that the evidence establishes a practice of consultation when changes of importance were in prospect."

27 He then went on to look at the second question, the requirement of fairness. He identified a number of the authorities which he then analysed. He said at p.12 of his judgment:

> "The conclusion I have reached is that there is nothing in the decisions of *ex parte Hook*, or the case of *Liverpool Corporation*, or *Wyre Valley* which should lead me to hold that, on the facts of the present case, the requirements of natural justice and fairness demanded that the applicants should be consulted about changes in the methods of calculation or the levels of charges."

28 So, in essence, as Mr Holbrook submitted, the learned judge held that there was a duty of consultation arising out of the substantive expectation that had been created by the local authority, because of the fact that the defendant in that case had moved the goalposts, but the argument based on procedural expectation and the issue of fairness, failed.

29 Ms Harvey says that this case is so very close to the facts of the matter before me that I should follow and apply the decision of Hutchinson J. She says that in this case there was a close cooperative way of working between the local authority and the market traders. There was a practice of consultation. There was a substantial change of policy and that it would be unfair and unreasonable not to have consulted such that the duty arises.

30 The defendants say that the duty is in fact much more narrowly confined as a matter of law and does not arise on the facts of this case, which can be distinguished from the *Birmingham* case. Reliance is placed on the decision of the Court of Appeal in *R (On the application of Batt Murphy) v The Independent Assessor* [2008] EWCA Civ 755, which dealt with

the schemes relating to compensation for victims of miscarriages of justice. The leading judgment in that case was given by Laws LJ, who in para.40 referred to the issues of relevance to the matters I have to decide identifying them as "substantive legitimate expectation" and "procedural legitimate expectation". He then moved on to look at the impact of those two principles in a case where it was suggested there should have been consultation.

31 In para.41 under the heading "Generally" and inpara.42 he held as follows:

> "41. There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations (see Lord Templeman in *Preston* at 864; compare *ABCIFER* [2003] QB 1397 per Dyson LJ at paragraph 72). It is because their vindication is a long way distant from the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult."

32 Pausing there, it is that second form of expectation which is in play in this case. It is not suggested that there was a substantive legitimate expectation leading to an entitlement to maintain a particular situation for the time being. What we are concerned with here is the process that was to be undertaken in deciding on the matters which were the outcome of the meeting of the Council on 12 March 2018. In para.42 Laws LJ went on and said:

> "But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself."

33 It can be seen there that the bar is in my judgment, as Mr Holbrook rightly submitted, set very high. His Lordship went on:

> "In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for

> itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in *Ex p Unilever* at 690f, that 'the categories of unfairness are not closed, and precedent should act as a guide not a cage.'"

34 His Lordship then looked at the authorities which led him to the conclusions that he reached. He looked first of all at the reported decisions relating to substantive expectation and referred to the case of *Ex Parte Coughlan*, which I have had drawn to my attention, which he said was a particularly strong case. In para.45 of his judgment he said:

> "Miss Coughlan was a very severely disabled lady. She and seven comparably disabled patients had been given a clear promise by the health authority that a particular facility, Mardon House, would be their home for life. But the health authority decided to close Mardon House which had ceased to be financially viable. The court said this at paragraph 86:
>
> > '[The health authority's promise of a home for life] was an express promise or representation made on a number of occasions in precise terms. It was made to a small group of severely disabled individuals who had been housed and cared for over a substantial period in the Health Authority's predecessor's premises at Newcourt. It specifically related to identified premises which it was represented would be their home for as long as they chose. It was in unqualified terms. It was repeated and confirmed to reassure the residents. It was made by the Health Authority's predecessor for its own purposes, namely to encourage Miss Coughlan and her fellow residents to move out of Newcourt and into Mardon House, a specially built substitute home in which they would continue to receive nursing care. The promise was relied on by Miss Coughlan. Strong reasons are required to justify resiling from a promise given in those circumstances. This is not a case where the Health Authority would, in keeping the promise, be acting inconsistently with its statutory or other public law duties. A decision not to honour it would be equivalent to a breach of contract in private law.'"

35 Laws LJ commented in para.46 that:

> "These cases illustrate the pressing and focused nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced."

36 He then looked at procedural expectation from para.47 onwards and cited a number of authorities, including the decision of Roch J, as he then was, in *Ex Parte Shemet* [1993] 1 FCR 306, which he commented on by saying:

"It might be thought that the decision was a generous one. However, again, the affected persons were few in number. And Roch J's reason for upholding the expectation was expressed thus (324D – E):

> 'There could well be cases where the withdrawal of a travel pass would mean that the child would have to change schools, and it would seem right and sensible that the local education authority should pay some regard to the effect that a change of schools would have on that particular child before finally deciding whether to withdraw that advantage.'"

37 The learned judge had effectively held that there was a right for the pass not be taken away without prior notice and consultation. Laws LJ then turned to the *Unilever* case that I have already mentioned, which was a case where Unilever had for over more 20 years submitted late tax claims which had been accepted by the Revenue who, without warning or consultation or notice, suddenly changed its mind and rejected them. The Master of the Rolls said:

"On the history here, I consider that to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power."

38 Laws LJ noted that the Court regarded the Revenue's conduct as outrageous, citing Simon Brown LJ as saying, "so outrageously unfair that it should not be allowed to stand." In para.49 he said:

"I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. Here is Lord Woolf again in *Ex p Coughlan* (paragraph 66):

> 'In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process.'

Accordingly for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focused. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult."

39 He summed up in a postscript at para.50 in the following words:

"A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to

> change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation)."

40 I was also referred to the decision of the House of Lords *R v Secretary of State for the Home Department Ex Parte Doody*, which related to reviews of mandatory life sentences where Lord Mustill considered in detail the issues before the House. What I was asked to bear in mind arising of that decision, which all judges in my position have to remind themselves of when sitting in this court, is that the Court must constantly bear in mind that it is to the decision-maker not the Court that Parliament has entrusted not only the making of a decision, but also the choice as to how the decision is made.

41 The defendant submits that this is not a *Birmingham* case. There is no legal duty to consult in this case. On a proper analysis of the authorities that I have mentioned the duty does not arise. The claimant has not identified facts which give rise to the duty to consult. There is no, in this case, specific representation, policy or practice which was breached by the defendant prior to the making of the decision which is challenged here. There was no (detrimental) reliance on the policy and expectation that it would continue.

42 Standing back, I remind myself of the words of Lord Mustill in the case I have just referred to. It is a matter for the Council in principle to make decisions in the exercise of its public duties and also to decide for itself how those decisions are to be made. Having regard to what Laws LJ said in the *Bhatt* case, it is only in an exceptional case that a procedural expectation can arise that the process would follow any particular form. His Lordship emphasised in the passages that I have mentioned the exceptional nature of the factual background that has to exist before the duty can be said to have arisen in any particular case, which is of course, as is well recognised, fact sensitive.

43 In my judgment, there is no evidence in this case that there was a distinct promise to consult those affected or potentially affected. In other words, what Laws LJ would describe as the paradigm case of procedural expectation. It is of course the case that the Council in deciding what steps to take in respect of the Market sought the views of not only the market traders but the members of the public. They undertook market research. They listened, as was their duty it seems to me as a democratically elected body, to what was being said, but that does not in my judgment, notwithstanding the fact they engaged and sought the views of those affected by it, give rise to an obligation to consult in the way that the claimant asserts in this case.

44 There is another point at which the argument fails. That is that between the decision of 2017 and 2018 there was not a change of the sort which would in any event have given rise to the duty contended for. It was not, as in the *Birmingham* case, a moving of the goalposts. It was not a fundamental proposal. There had been no change in the rents for a number of years. The decision made was made to change those rents (in 2017). The evidence suggests

that the increases were not very substantial, although it is apparent that they affected different people in different ways, but it does not begin, in my judgment, to get close to the moving of the goalposts described by Hutchinson J or the exceptional situation described by Laws LJ. It did not, in my judgment, give rise to a legitimate expectation of consultation of a formal nature contended for by the claimant.

45 In reply the claimant submitted that the level of change is the key, but the reality is that the decision that is in question here did not effect a major change. The decision in question here, as I have already said, applied a number of discounts and gave rise to higher fees for casual market traders.

46 For those reasons, it seems to me that the local authority succeeds on the first ground.

Ms Harvey, you probably want a break. Do you want a break?

MS HARVEY: I wouldn't mind a very short one. That is very kind of you. I do not want to hold you up, sir. I will concentrate much better.

JUDGE DIGHT: Let us have ten minutes.

(short adjournment)

JUDGE DIGHT:

47 We therefore move on to the second question, which concerns the nature of the consultation itself and whether it complied with the Gunning principles. In light of my ruling on the first point, this question only arises if I am wrong on the first point. The principles that are relied on by the claimant are contained in the well-known case of *R v Brent London Borough Ex Parte Gunning* [1985] 84 LGR 168. Lord Woolf in the *Coughlan* case summarised them in the following terms:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

48 The claimant also referred me to the decision of the Supreme Court in *Mosley v Haringey London Borough Council* [2014] UKFC 56 and, in particular, the speech of Lord Wilson where he set out the relevant principles of law in para.24. He said:

> "Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation."

49 He referred to the speech of Lord Reed in the *Osborn* case before carrying on. He said:

> "First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' (para 67). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise fee' (para

> 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc.?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'"

50 I was also referred to the decision of the Court of Appeal in *United Company Rusal PLC v The London Metal Exchange* [2014] EWCA Civ 1271, where Arden LJ, as she then was, gave the main judgment of the Court of Appeal, with which McCombe LJ and Gloster LJ agreed, setting out the *Gunning* principles in para.25 and then going on to consider what the role of the Court is. She said in para.27:

> "The cases in this field demonstrate to my mind that the court should only intervene if there is a clear reason on the facts of the case for holding that the consultation is unfair. It is for the court to decide whether the obligation of fairness has been broken.
>
> 28. Moreover, the application of the duty of fairness is intensely case-sensitive. This is not an area of law where it is possible to provide statements of general principle. As Sullivan J held in *R(Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin):
>
> > 'Judgments are not to be construed as though they were enactments of general application, and the extent to which judicial dicta are a response to the particular factual matrix of the case under consideration must always be borne in mind.'
>
> 29. It is also clear from the authorities that the courts have to allow the consultant body a wide degree of discretion as to the options on which to consult: as the Divisional Court held in *The Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532 (Admin) at [24]:
>
> > '...there is no general principle that a Minister entering into consultation must consult on all the possible alternative ways in which a specific objective might arguably be capable of being achieved. It would make the process of consultation inordinately complex and time consuming if that were so. Maurice Kay J recognised this in [*Medway*], at para 26:
> >
> > 'other things being equal, it was permissible for him (that is, the Secretary of State) to narrow the range of options within which he would consult and eventually decide.
> >
> > Consultation is not negotiation. It is a process within which a decision maker at a formative stage in the decision making process invites representations on one or more possible courses of action.'"

She then cited Lord Woolf of in the *Coughlan* case.

51 In the light of those authorities, and bearing in mind the *Gunning* principles, it seems to me that it is appropriate to look at the factual background and the steps that were taken between the decision of 2017 and the decision subject to challenge here to understand what it was that the Council did and to consider whether they complied with the *Gunning* duties if they existed.

52 There is no doubt in my judgment that from a period shortly after the 2017 decision the Council and the claimant and the traders were in frequent contact and discussed the rents in respect of pitches at the Market. I was taken to an email a month after the 2017 decision from the claimant to the town clerk referring to a meeting that had taken place where the claimant records the discussion as follows:

> "Thank you very much for the constructive meeting this morning you kindly took to investigate the two issues. One, whether LLTC counsellors were aware/informed of the significant effect on rent costs on some stallholders as a result of the standardisation of rents and pitch sizes. Two, whether the public consultation on the Market and the officer report for the Market Committee 6 June 2017 were in line with/accorded with the duty of fairness re *Sedley and Mosley* 2014. As part of this issue, it was agreed that the detailed comments by the public from the consultation were in the room. You will ask if they were actually looked at by the counsellors."

53 So, there was dialogue. There was discussion and the relevant points were being looked at. The following month the Market was in fact relaunched. The new rents were not yet in place, but the evidence discloses that there was a number of one-to-one meetings between the council officers and the market traders themselves and that each one of the market traders, received a letter from the Council setting out what their new rents were going to be from April 2018 as a result of the decision which had been made in 2017. I have been taken to an example of this dated September 2017 written by Ms Cannon to Mr Gibbons:

> "Confirmation of your new market pitch details. But, firstly, thank you for taking the time to meet with council officers to discuss your pitch. [That is the reference to the one-to-one meetings.] I now write in order to confirm the outcome of our discussion and, in doing so, advise you that you will need to sign and return the trader pitch agreement slip enclosed."

54 She then moved on to say:

> "Discussions with traders have allowed officers to identify what points of clarity are needed for all traders as we move towards the Market relaunch. You will no doubt appreciate that the Council has a whole market approach, whilst traders may have an individual trader prospective. For this reason, the Council has sought a reasonable middle ground approach on issues such as agreeing use of additional space, because not all traders have the same opportunities simply due to where their pitch is placed."

55 The new rent is specified on the second page. So, there the market traders were being informed of their new rents. This was followed by a newsletter, said to be the second one, of September 2017 from the town clerk to the traders stating the defendant was:

> "Keen to seek your opinions on further improvements we can make to the Market and the way it operates after relaunch."

56 Then it said:

> "please can I confirm that…
>
> Unless your rent is reducing, rents will remain unchanged until 1 April 2018. During the coming months, we want to hear your opinion on market rent and encourage your views on the way we reward loyalty and long service to the Market."

57 This was also reflected in articles in the local newspaper "The Observer" which for 21 September 2017, in reference to an intended protest, had the heading "Market protest march in Leighton Buzzard is called off as Council is open to discussion." It contains a quote from Ms Young, who was the chair at that time of the Trader's Association, saying that the demonstration had been called off as the town council had promised to reconsider rents and pitch size. There is evidence, therefore, of there being ongoing communication between the two sides and ongoing discussions.

58 The local MP became involved. There is letter of November 2017 in which the town clerk responded to the MP about the rents that were being charged for the Market. Among other things, he says, "the huge decision on market rents will rest with this council". He referred to a survey undertaken by the claimant and said:

> "In terms of the survey conducted by Victoria, I will in the usual way pass this on to members for their own individual consideration."

59 He concluded by saying:

> "Looking forward, we will be engaging with the market trader reps and, undoubtedly, market rents will be a subject we will be seeking their opinion on."

60 At the beginning of the following year on 10 January 2018, there was a meeting, again of the Market subcommittee, the Cultural and Economic Services Committee of the Council, at which three members of the public were present and consideration was given to what was described as "The Market Relaunch Project". The minutes of the meeting say:

> "The Committee received a verbal update on the Market Relaunch Project. The relaunch on the whole had been well received and the meetings would commence with trader representatives and officers in the coming weeks. Three traders had received support from a consultant on the best way to advertise and display their products in the space available to them. Support will also be offered on the use of social media to advertise their business in the most effective way.
>
> A concern was raised and discussed on how valuable the town council subsidy was to the Market and the Committee agreed the town council were committed to the Market and would continue with the subsidy to the benefit of the community. The rents charged would remain very competitive compared to markets in other towns and would be discussed further in meeting with traders in the coming weeks."

61 There were, it is apparent from the evidence I have been shown, further meetings with the representatives of the traders. For example, the meeting of 23 January 2018 recorded in a note headed "Trader/officer meeting" that is was attended by the town clerk, Ms Cannon and Mr Harrison and for the traders Ms Young, Mr Gibbons and a Mr Elmore. The issue of pitch fees was specifically raised and the note records the fact that Mr Gibbons said:

> "There is a problem arising from the increases in April. He is not happy about paying by square metres and would not pay the massive increase on his stall as it is not viable. His rents go back to when TC took over so why increase? TC pointed out that was then and that no increases have been implemented since. TC said that historically reviews take place and this is where we are today.
>
> DG said he was not happy at the method of obtaining rents re space taken not frontage. Emma said this is all about fairness to all traders. KY questioned the disparity of fee charged to casuals in comparison to regular traders. All agree to review pricing for casuals."

62 Then in the concluding paragraph:

> "MS said moving forward the traders should add proposals to the table to help process and we can then all go away and come back with ideas and collate for the better of the Market as a whole. DG says that we should start with the large stalls and work back when discussing price/rents. KY reiterated that casuals should be charged a premium for their stalls to get them to sign permanent. PE agreed."

63 There we have a discussion without any set agenda where each side was setting out their respective positions. So far as the proposed differential rent to be paid by casual and permanent traders it can be seen that it was suggested by the traders, that is something that the local authority plainly took account of and implemented as a result of those discussions. This was followed, although I think it appears earlier in the bundle, by a further newsletter from the Council to the traders referring to the meeting that had taken place on 23 January saying:

> "The meetings are informal and we take the opportunity to discuss general operational issues, as well as specific issues such as reviewing the pitch fees. These meetings are not where decisions are made. They are consultative and as such ideas and issues are explored so that feedback may inform operational practices and policy decisions."

64 It seems to me that that is a fair analysis of the minutes that appear in respect of the meeting which I have just referred to. The third paragraph of the newsletter goes on to say:

> "As said, these meetings happen monthly. Importantly, we can opt to meet more frequently if needed and we have agreed to meet again in a couple of weeks' time to continue exploring the options on future pitch fees and both traders and officers are listening to each other's views and issues. Discussion is therefore ongoing. Please do feel free to approach your trader representative with ideas and issues that can be brought to these joint meetings. Likewise, your trader representatives are there to liaise with all traders so that they can bring your issues and ideas into future meetings."

65 The local authority was extending an invitation to everyone who had an interest in the process as it was going forward, inviting their comments and setting out, fairly it seems to me, the fact that the meetings were discussions not negotiations, that they were not decision making meetings, but they were an opportunity for each side to exchange views which would be put before the relevant committee that would be making the decisions.

66 There was a further meeting on 13 February. Again, the notes have been produced. Again headed "Trader/officer Meeting". By now there was a clearer picture of what it was that the Council was proposing. In para.4 of the notes under the heading "Pitch Fees", it says:

> "VC outlined the approach being taken to help with proposed pitch fees and the Council's financial modelling.
>
> - Increasing the pitch fee for casual traders.
>
> - Revisiting the charge to the additional square metres used over the agreed maximum sized pitch.
>
> - Financially recognising long service; a staged approach based on the number of attendance years, which secure reduction in pitch fees."

67 One only has to compare those three bullet points with the decision that was in fact made on 12 March 2008 to see that those were the proposals which the Council ultimately endorsed and are now the subject matter of this challenge. The traders were being told, in fairly clear terms, what it was that was up for decision making. The minutes show that each side was able to express, frankly and clearly, what its views were.

68 This meeting was followed by a further newsletter. It is headed "Leighton Buzzard Market, February 2018." It is in my judgment a significant document. Under the heading "Update" it says:

> "Over the last few weeks, we have sat with your trader representatives, listened to the views shared on your behalf about pitch fees, pitch space and general operational issues and shared our own views and concerns too. It is fair to say that all parties are facing difficult financial strains.
>
> In your newsletter dated July 2017 No.2, the Council outlined our Committee endorsed new pitch fees and sizes and the timetable for their introduction. The original decisions are provided below against our proposed updates to the original approach. The updated proposals will go to the next Cultural and Economic Services Committee on 12 March 2018.
>
> As always stated, the town council has sought to achieve, and indeed been asked by traders to achieve, parity among all traders with regard to pitch fees."

69 It seems to me that newsletter indicates very clearly, not only what the Council's policy was, but also the impact of previous decisions and the impact of the proposed decisions on the market traders. In the table that appears underneath the passage which I have cited, there are three columns. In the first column is the heading "Original Decisions". In the second column "Proposed Updates" and the third column is headed "Comments". The

table sets out the proposal that there would be a new flat rate pitch fee of £19 for new general traders.

70 The table also contains a proposal to increase the pitch fee for casual traders. It identified the fact that there would be a difference in treatment between permanent traders and casual traders by charging the casual traders £4 more. The related comment in the final column said:

> "The proposal is to bring back a two-tier pricing tariff between permanent and casual traders."

71 Item 5 of the document introduces a new proposed discount system recognising long service, identifying that for five years' attendance at the market there would be a five per cent discount; ten years, 10 per cent; fifteen, 15 per cent, twenty years and above, 20 per cent. The related comment read:

> "The town council considers this to be both practical to traders and a benefit to the longevity of the Market and our commitment to residents and customers to have markets. This financial approach prioritises traders and not the income needed for operational costs."

72 Then there is an analysis of what the Council thought the consequences of these changes would be. They say:

> "To date, for 12 out of 29 permanent number of traders the new pitch fee proved immediately more beneficial and these traders commenced payment of reduced pitch fees from 23 September 2017. Nine of these will again benefit if they have long service. Their fees will reduce again. 14 out of 29 permanent traders will have an increased pitch fee ranging between a 1 per cent and 97 per cent increase. NB. If a trader was paying less than the correct pitch fee prelaunch, the increase will of course be much greater. 18 out of 29 traders will benefit from a reduced fee in recognition of their long-term service."

73 Going on to say:

> "Fees have remained unchanged since the Town Council took over the management of the Market in 2012. We will continue to work with those traders who are unsure as to how this new fee structure will affect them."

74 The newsletter then sets out, in tabular form, an example of how the staged increase would affect someone paying a then rent of £30 per pitch per day. The document is a clear statement of what was being proposed and the changes which the traders were expected to engage with and comment on. The fact that the proposals were well understood appears from a copy of the local newspaper for the following day, Wednesday, 28 February, headed "Loyalty reward proposed for Leighton Buzzard Market traders as rent negotiations continue." The article says:

> "The threat of stallholders quitting Leighton Buzzard Market due to planned rent increases looks to have been reduced by a new pricing proposal which will recognise the loyalty of longer serving traders."

75 It quotes Ms Young, the chair of the Association, as follows:

> "It is a pretty good proposal. Some people will be paying less because of the loyalty reduction. Our own rent was going to be £95 a day. We have done 20 years so our increase will be minimal, up to £2, but we need to negotiate because some traders' increases are still a lot of money, because, as it stands, we will lose them. We hope we can come to some compromise with the Council. The friction has been going on for long enough."

76 At about this time a petition was signed by 26 or 27 local traders who commented that the loyalty rent reduction, ranging from 15 to 20 per cent, was not fair to everybody.

77 Shortly afterwards, on 2 March, a further trader/officer meeting took place, but by this point Ms Young had resigned, because she no longer liked the way in which the discussions were being conducted, as I read her evidence. This meeting was attended by Mr Saccoccio, Ms Chapman and Mr Harrison on behalf of the local authority. Again, there was no set agenda. On behalf of the traders Mr Gibbons and Mr Harris attended the meeting. It is apparent, although no one can now find it, that Mr Gibbons handed over a document which contained a proposal along the lines of a proposal which was subsequently shown to the Committee on 12 March 2018 setting out his and the other market traders' concerns about the fees.

78 In her evidence, Ms Cannon says that this proposal was put before the Committee. That is an assertion that was challenged in the course of submissions, but it seems to me it is not an ascertain that I can go behind. The claimant says, in any event, that the timescale for submission of proposals was too short, that the traders did not have sufficient time to engage with the proposals that were being made by the local authority and that they were disadvantaged.

79 The matter was considered by the Council at the meeting which led to the decision on 12 March. The minutes of that meeting show that there were five members of the public present and one member of the press. At the beginning of the meeting, the minutes record the involvement of the members of the public in the following terms:

> "Four members of the public spoke during the public session, three spoke in relation to the street market agenda item 10. A statement was read out by a market trader representative stating that traders wanted on fair system for rents and that many did not agree with the proposed long-service discount. This had been reflected in a petition submitted to the Council on 6 March. It was stated that communications were felt to be misleading due to some errors. A second speaker and market trader spoke to suggest that the Council should allow traders to form a cooperative and run the Market themselves.
>
> A member of the Public and Town Council Centre retailer questioned the justification for use of Central Bedfordshire Council grant monies for the market relaunch project and whether there would be evidence to show the project had benefited the Market. It was noted that the retail sector was experiencing challenging times and that everyone wanted the market to succeed. The market traders at the end of that part of the meeting left."

80 The minutes of the Committee's deliberations themselves say:

"The Committee received a report and was asked to consider the recommendations therein regarding proposed market pitch fees. The Committee was reminded management of the Market was a discretionary service to the community and that as such there was no legal requirement for consultation. However, in line with good practice, the town council had undertaken consultation over a period of time. The Committee was reminded that a previous fee structure had been agreed in 2017, but it had been agreed to defer implementation of any increases until 1 April 2018 to allow time for traders to plan and budget accordingly.

Ongoing discussions had taken place in respect of the agreed fee structure and the revised proposals were as a direct result of feedback given by traders and trader representatives. The fee for additional space beyond the maximum of three standard pitches had been reduced from £2.10 per square metre to 50p per square metre. In addition, it was recommended to all traders long-service discounts on pitch fees.

It was reiterated that no pitch fee changes had been implemented since town council took over the running of the street market in 2012, but the time had come to standardise fees and ensure a fair transparent fee structure which would apply equally to every trader. Under the revised proposals, eight out of 30 permanent traders would see no change in their pitch fee, 11 would see a reduced fee as a result of the long-service discount and 11 would see an increase, which would be implemented in a gradual process depending on the amount of the increase. Up to 24 months would be allowed in order for rent equalisation to be achieved.

Committee members expressed support for the proposals, but recognised that the complexity might be difficult for some to clearly understand. The Council was asked that each trader be given clear personalised communication as to the nature of their own fee and how the recommendations would affect these.

A query was raised regarding turnover of traders. It was noted that the market industry is one with frequent fluctuations and that it was a particularly challenging retail environment at present. This very fact had necessitated the Market Relaunch Project with every effort being made to ensure the Market would change, grow and develop in order to survive into the future.

On being proposed and seconded, the four recommendations being put to the Committee were agreed unanimously."

81 At that point, the (challenged) decision was made. The question is whether the evidence that I have detailed above demonstrates that there was adequate consultation within the meaning of the *Gunning* principles. First, was consultation undertaken at a time when the proposals were still at a formative stage? The chronology that I have set out demonstrates clearly, in my view, that the traders were told what the impact of the 2017 increases would be on them individually.

82 They were then told what was to be discussed in the future. They asked for proposals. There was discussion about specific ideas. There was clear discussion about the difference between permanent traders and casual traders. Indeed, the idea of a difference in approach between the two categories of traders appears to have come from the market traders themselves. There were discussions about what has been described as additional square metre space charges. There was notification and discussion of the proposed discounts. It is plain that the traders knew what was on the table for discussion well before the meeting at which the Council made its resolution. The articles in the newspaper, apart from anything else, evidence this. The newsletters demonstrate the purpose of the meetings between the local authority and the traders' representatives: namely, to discuss the proposals; not to make decisions in respect of them. In my judgment, therefore, the proposals were still at a formative stage within the *Gunning* principles when the discussions with the traders took place.

83 It is also apparent from the material that I have referred to that the policy reasons behind the proposals were clear. The local authority wanted to create parity, in so far as it could, between the existing traders but it also wanted both to encourage both new traders and reward and encourage and keep those who had been serving the Market for some time. Therefore, in my judgment, the second *Gunning* principle was complied with. There were before the traders sufficient reasons for the proposals to allow them to evaluate them, for intelligent consideration and response, evidenced. That the policy and proposals were understood and that the traders engaged with them is again evidenced by the fact that Ms Young, in the minutes I have referred to, proposed the differential between casual traders and permanent traders. The chronology also shows, in my judgment, that there was adequate time for those proposals to be discussed.

84 Lastly, I have to consider whether the product of consultation was taken conscientiously into account. In my judgment, the evidence shows two things. First, that the local authority was listening to what was being said and not making decisions while it was listening, putting off the decision making until the appropriate moment and, secondly, the appropriate moment came at the Committee meeting at which the decision was made when, in the terms that I have already cited from the minutes of the meeting of 12 March, the subcommittee listened to the traders, took account of the material put before it, read the report and then reached their decision. It was not a rubber stamp: the minutes make it plain. Nor were the counter proposals, in so far as they were coherent, rejected out of hand.

85 In my judgment, the evidence demonstrates that this was a council going about its duty in a proper way in compliance with its public law obligations, reaching decisions in the interests of the local community which it was entitled to reach. For all those reasons, therefore, it seems to me that there was adequate consultation and that the Council therefore succeeds on this point as well.

86 The last point that arises is whether I would, if I had found in favour of the claimant in respect of the first two questions, have granted her relief. The Council submits that relief should not be granted for three reasons. First, because of delay. Secondly, because there would now be prejudice to the proper administration and, thirdly, there would not be any benefit to the market traders.

87 It is difficult to put myself in the position where I have to consider the relief that would be granted if I had reached the opposite conclusions on the first two issues, because it posits a different set of reasons, but my stance based on the position I have reached is that the objections of the Council would not persuade me not to quash the decision of March 2017, if I were to come to the conclusion that there was a duty which had not been

complied with, because there is no unreasonable delay or lapse of time, it seems to me, between the decision and today. The evidence does not suggest in my judgment, bearing in mind the matters that she has had to contend with, that the claimant should be deprived of relief because she herself has delayed. True it is that it would cause difficulties with the administration if the Council had to remake the decision and it had to be implemented, but that in the circumstances would not in my judgment be an intolerable burden.

88 Lastly, as to whether the market traders would benefit by the quashing of the decision, it seems to me that begs the question as to what other decision the Council might have come to if they had taken a different course in consulting those affected. So, I would have granted relief, subject to my finding the other way on the first two questions and I would have quashed the decision and sent it back to the Council to comply with its duty to consult, but the issue is academic.

89 I have therefore come to the conclusion that this application for judicial review should be dismissed.

LATER

JUDGE DIGHT:

90 This is an application brought by an application notice dated 5 February pursuant to CPR 46.19 to set aside or vary a cost capping order made pursuant to s.88 Criminal Justice and Courts Act 2015 by Mr Richard Clayton QC, sitting as a deputy High Court judge.

91 The basis of the application, as explained in Section 10 of the application notice, is that the claimant did not disclose to the Court at the time of seeking a protective costs order or a cost capping order, as they are now called, that under the will of her recently deceased father there was a prospect of her coming into an inheritance of a substantial sum.

92 The application is now put on a number of different bases. First, that there was material non-disclosure in failing to tell the Court about the inheritance. Secondly, that in any event there was a change of circumstances which enables the Court to revisit the order and, lastly, and quite separate, that there are exceptional circumstances or in the light of all the circumstances following judgment on the substantive issue the Court now has discretion to reconsider the question of costs capping.

93 The factual background is that the claimant made her application for permission for judicial review by an application notice which was issued on 29 June 2018. She included an Aarhus Convention claim and in Section 6 of her claim form said:

> "I suffer from Chronic Fatigue Syndrome/ME and am in receipt of ESA, income related, and am applying for a protective costs order."

94 In her grounds she included a schedule of what she described as her "significant assets, liabilities, income and expenditure", in which she said that she owned her own house, that she suffered from the condition I have mentioned, that she was in receipt of ESA. She also set out her debts and expenditure. She finalised the statement by saying "This is a true account of my financial circumstances," and signed and dated it.

95 Mr Clayton on granting permission for judicial review in his order dated 24 August 2018 made a cost capping order (in paragraph 2 of his order) in accordance with s.88 of the 2015 Act and said under the heading "Observations":

> "The claimant, who is acting in person, has applied for cost protection. She states that this is an Aarhus Convention claim, which I reject, and also seeks a protective costs order, which has now been superseded by a cost capping order under s.88 to s.90 of the 2015 Act. The claimant suffers from Chronic Fatigue Syndrome/ME and is in receipt of social security benefits; ESA/income related.
>
> On the material before me, I am satisfied that in the absence of a cost capping order the claimant would withdraw the application for judicial review or cease to participate in the proceedings and it would be reasonable for the applicant for judicial review to do so in accordance with s.88(6)(b)(c).
>
> The claim itself is a fairness challenge to a consultation in respect of market pitch fees based on an alleged breach of *Gunning* principles and I am satisfied and I find that the claim is a public interest claim in accordance with s.88(6)(a). Accordingly, I limit the claimant's cost liability to £4,000."

96 It is right to record that although there was plenty of material before the learned judge, in the form of the application for judicial review, to support the contention that this was a public interest claim, there was no statement by the claimant in the documents that she lodged in support of her application in which she specifically said that in the absence of a cost capping order she would either withdraw the application for judicial review or cease to participate and that it would be reasonable for her to do so, but I accept that in light of the limited material before the learned judge he was entitled to draw those inferences.

97 The factual situation is that on 9 January 2018, therefore five months before the making of the application for the cost capping order, the claimant's father had passed away leaving a will dated 20 September 2011 under which she was one of the co-executors and entitled to a share of residue after the discharge of a number of liabilities. Probate was granted on 24 October 2018.

98 The defendant became aware of the grant and the potential legacy in January 2019, just over a month ago, and wrote to the claimant asking for information about it. At the beginning of February the claimant sent the Council a copy of the will, having earlier sent them a copy of the grant of probate, which led to the making of this application. At the time of their application the defendant's costs were in the region of £26,000.

99 The defendant says that the expectation of the inheritance should have been raised at the time of the application for the cost capping order. It should have been drawn to the attention of the learned judge, who would have made a different order, and that the failure to do so amounts to material non-disclosure; that the learned judge would have come to different conclusions on the statutory criteria that he had to apply in deciding whether to make a cost capping order.

100 I was reminded of the policy lying behind the cost capping regime, which is to ensure access to justice. I was taken to the decision of the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] CLR 455, where the Court of Appeal (consisting of Lord Phillips MR, Brooke LJ and Tuckey LJ) considered the question of protective costs orders in a case which was heard prior to the enactment of the provisions now in force. The Court set out a regime, not dissimilar to the present regime, for ensuring

that issues which were of public interest were not prevented from being litigated as a result of the incidence of costs which arose in usual private law litigation.

101 In the course of his submissions Mr Holbrook reminded me that the Court of Appeal in the *Corner House* case considered that exceptional circumstances had to be made out before a cost capping order could be made. He also took me in detail to the current regime. He made the point that the local authority's taxpayers should not be forced to fund litigation where somebody was about to inherit a sum of money, which would enable that person to meet an adverse costs order if he or she were to lose the litigation, and that there was an inherent danger of injustice of limiting the incidence of costs in that way.

102 Mr Holbrook also explained, through the course of what became seven sub-submissions, that the effect of the cost capping order is that the claimant effectively conducts herself in such a way in the course of the litigation cost free to herself in a way that she would not have done had she not retained the costs cap; for example, rejecting what were reasonable offers which would have brought her cost liability to an end and asking for further documents, including additional (and unnecessary) documents to be included in the hearing bundles for the Court. It is submitted that her conduct is explicable on the basis that the claimant was not subject to the usual costs regime, and that the grant of the cost capping order has created an inequality in the circumstances of this case an inequality. It is said that the Court should now revisit the order on the grounds that I have already mentioned.

103 The claimant, who is, I think, with the greatest respect a little more at sea in this rather technical area than she was in respect of the substantive application for judicial review, made the point, which I accept, that throughout the litigation she has acted in good faith, that the failure to bring to the attention of the learned deputy judge the fact that she had in prospect a potential inheritance was not deliberate and she was concerned, before me, to explain that she would not have carried on knowing her liability for costs would be met by her inheritance, unless the DWP would have assured her that in doing so she would not be regarded as reckless when it came to assessing her future benefits claim which she would not want to jeopardise given her long-term health issues.

104 I do not accept the suggestion that the claimant was seeking a costs cap to protect her inheritance in any way. I do accept Ms Harvey's argument that she did not want to incur a liability for costs at all if it were to be met by the pot of money coming to her if that would have had an adverse impact on her benefits claim, not necessarily now or in the near future, but in the long term, bearing in mind the long-term nature of the conditions that she has to cope with. However, she did accept in the course of argument that if the learned judge who granted the cost cap had been made aware of the fact that there was a sum of money coming to her in the future, it might have had an impact on the way in which he considered her application.

105 The regime which governs costs capping in the Administrative Court is not, so far as I am aware, the subject of matter of reported authority. The starting point is s.88(1) of the Criminal Justice and Courts Act 2015, which provides:

> "A costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90."

106 (5) provides:

> "Rules of court may, in particular, specify information that must be contained in the application, including—
>
> (a) information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application ..."

107 The power to make an order is circumscribed by (6) which provides:

> "The court may make a costs capping order only if it is satisfied that-
>
> (a) the proceedings are public interest proceedings
>
> (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and
>
> (c) it would be reasonable for the applicant for judicial review to do so."

108 The process to be adopted by the court comprises two stages. First, an analysis or an evaluative judgment as to whether the three conditions were satisfied and, secondly, the exercise of a discretion. In this case, the learned judge on the material before him, plainly thought that the conditions were satisfied and that the discretion ought to be exercised in the claimant's favour.

109 Section 89 of the Act sets out the factors to which the Court must have regard in deciding whether to grant an order. Material to this application is (1)(a) which provides as follows:

> "(1) The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include—
>
> (a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties..."

110 The provisions are taken in part from the judgment of the *Corner House* case. *Corner House*, as I have already said, also provides that an order may only be made in exceptional circumstances. The statutory regime does not expressly refer to exceptional circumstances, but it does circumscribe the situations in which a cost capping order may be made and requires the Court to be satisfied as to the three conditions contained in s.88(6)(a) to (c), which in my judgment are to be taken to replace the need to find exceptional circumstances as such.

111 So far as varying the application is concerned, there is no specific statutory provision outside the usual provisions to be found in the Civil Procedure Rules under which the Court is given the power to vary or revoke an order which it has already made: see CPR 3.17. The Administrative Court Judicial Review Guide 2018, says in para.24.3.7:

> "The court should not set aside a JRCCO unless there is an exceptional reason for doing so."

112 Neither counsel nor I have been able to find the source for that comment, which does not refer by footnote to a specific case or statutory provision and I am troubled by the

suggestion that the reason for setting aside a costs capping order much be an exceptional reason. It seems to me that if relevant material comes to light, as in this case, that had been available at the time of the application, but which was not brought to the attention of the judge making the decision, that is a failure to give full and frank disclosure and a failure to comply with the obligations of the Act and founds the jurisdiction for the Court to review the decision that it has made.

113 There is specific provision in the Civil Procedure Rules as to the steps to be taken by a party seeking a cost capping order. It is to be found in CPR 46.16 and 17. 46.17.1(b) says that an application for a costs capping order must be supported by evidence, which deals with the following matters:

> "(i) why a judicial review costs capping order should be made, having regard, in particular, to the matters at sub-sections (6) to (8) of section 88 of the 2015 Act and sub-section (1) of section 89 of that Act;
>
> (ii) a summary of the applicant's financial resources;
>
> (iii) the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings; and
>
> (iv) if the applicant is a body corporate, whether it is able to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings."

114 At first glance, it is not at all clear to me in fact that the evidence in this case complied with that requirement, but, nevertheless, the order was made.

115 Going back to the statutory obligation on the applicant to provide information about his or her assets (in s.88(5)) it seems to me that the requirement of providing information about the source, nature and extent of financial resources includes resources which may not be immediately available at the time of the application and may not be immediately in the applicant's hands. The draftsman could have used the words "assets and income" but chose not to do so. Resources, in my judgment, includes in the ordinary sense assets or income or other monies which a party might be able to obtain or has an expectation of coming into possession of within a reasonable period (to be measured against the likely timescale of the litigation).

116 Subsection (5) goes on to say "including the financial resource of any person who provides or may provide financial support to the parties." Mr Holbrook sought to persuade me that those words included the claimant's father in this case, but, with the greatest respect, it seems to me that once the claimant's father had passed way he could not be treated in a true sense as a person "who provides or may provide financial support to the parties" in the future. On the other hand the inheritance was, in my view, a financial resource of one of the parties, that is the claimant, which she should have disclosed at the time and which the Court should, having regard to the word "must" in s.89.1, have taken into account in deciding, first, whether to take make a cost capping order and, secondly, what the terms of the order should be.

117 So far as the steps now to be taken are concerned, it seems to me the first question I have to ask myself is whether the order ought to be set aside simply on the basis of material non-disclosure. There was significant non-disclosure here because, having regard to the relevant statutory factors which the learned judge was required to take into account, it

would have been material for him to know that there were other resources available to the claimant. That is likely to have had an impact on his decision. His decision, first, whether to make an order at all and, second if he chose to make an order, what the terms of such an order might be.

118 While in some circumstances material non-disclosure without more might be a ground for setting aside an order, it seems to me that where a party has made a mistake in good faith that that does not of itself require the Court to set aside the order, even if the information not disclosed was material. This is different, it seems to me, from a case where a party has deliberately decided to conceal from the Court some information in the hope of getting an advantage.

119 Standing back, it seems to me the better course would be to ask what in all the circumstances, bearing in mind the non-disclosure of the material information, is the appropriate course to take? Should the order be set aside? Should it be varied? As I have said, in my view, had the learned judge known of the inheritance it would have had a potential impact on his decisions in respect of both whether and, if so, what order to be made. Having regard to the s.88.6 factors, it would not have affected his decision as to whether these were public proceedings. It might have affected his decision as to whether the applicant for judicial review would withdraw the application if there were no cost capping order and whether it would be reasonable for her to do so.

120 Approaching this question is difficult, because the quality of the information about the nature of the inheritance is still somewhat unclear and uncertain. The estate of the claimant's late father has not been wound up. There are no estate accounts. She tells me that the estate still has a potential and presently unquantified liability for debts and expenses, for the costs of obtaining probate and a potential liability to HMRC. Although the estate has been valued for probate purposes as £509,000 net, there is there is, nevertheless, a question mark over the realisability of the assets that the estate comprises and over the figure that the assets will achieve if sold. The claimant in those circumstances does not feel able to give me a specific figure as to the value of her quarter share of the residue of the estate when it comes along in due course. Having had a frank discussion with her about it, it seems to me that the most that can be said is that her share is likely to be somewhere between £50,000 and £100,000. The defendant's submission, having looked at the values contained in the grant of probate, was that the share would be in the order of £127,500, but that is equally uncertain.

121 So, if one then posits a situation where the judge dealing with the application for permission for judicial review and for a JRCCO had been told that there was an inheritance of somewhere between £50,000 and £100,000 coming along in 12 to 18 months, what would the impact have been on his assessment of the s.88.6(b) and (c) factors? Undoubtedly, in my judgment, he would have thought that the risks were not as great of a full costs order going unpaid if there were a potential inheritance of a substantial amount.

122 If he thought that the applicant for judicial review having £50,000 in prospect would withdraw, because of the risk that the costs would eat up the inheritance, he might not have thought that it would be reasonable for the applicant for judicial review to withdraw, but those are all factors to be weighed in the balance.

123 It seems to me that the furthest I can go is to say that, if the learned judge had known of these possibilities, he would have made a different decision. Therefore, it seems to me that what I should do is to set aside that order and make a different decision in the light of what

I now know, but putting myself back in the position that I would have been in if I had that knowledge at the date of the application.

124 I put out of consideration the discussions that the claimant says she would have had with the DWP about protection of her benefits, because I do not think that information would have been before the Court at the time. It seems to me that an inheritance of £50,000 to £100,000 is not such a very significant sum of money, in the light of the potential liability for an adverse costs order, which could in this sort of litigation easily equal or exceed that sum, that the applicant would continue with the litigation in the absence of a cost capping order. It seems to me that, depending where on the scale of the £50,000 to £100,000 the Court ended up, it would be entitled to reach the view that it would have been reasonable for the applicant for judicial review to decide to withdraw if the nest egg were in jeopardy.

125 It is in a sense a balancing exercise, although the Court has to be satisfied of the factors. That is obvious from the way in which s.89 is framed, because the Court has to have regard to the financial resources in deciding whether to make an order and the terms of such an order. It does not seem to me that one starts with whether to make an order and then moves on to the terms, because the terms would necessarily have an impact on an assessment of s.88.6(b) and (c).

126 In all the circumstances, it seems to me that there is a real possibility that the Court would have come to the conclusion in the light of the figures involved and the fact that the inheritance was not going to come in for some time that there should be a cost capping order, but that the sum to which it should be limited would be £20,000, which is a figure not quite plucked from the air, but a rough and ready figure which I put to the claimant during the course of argument.

127 I have had regard to the other bases on which it is sought to set aside the costs order. It seems to me in all the circumstances that there was not a change of circumstances as such justifying a change in the order justifying an application to vary or set aside. It was the non-disclosure which is the appropriate hook on which to hang the application.

128 I disagree with the submission that the Court would at the end of the judicial review process have the opportunity generally of reviewing a cost capping order, as it would do in a case (principally involving commercial litigation) where an interim order to preserve the status quo is granted pending trial but that order is revisited at the conclusion of the trial in the light of the findings of the trial judge. A cost capping order is a quite different interim order. The whole purpose of a cost capping order is to ensure that the issue is litigated for the benefit of the public through to the end. It is irrelevant, ultimately, whether the applicant for judicial review succeeds or losses. The issue will have been determined for the parties and, by necessary inference, for the benefit of the public and that purpose is served by the existence of a cost capping order. It is very different, therefore, from an interim injunction and, in my judgment, unlike in an interim injunction, the Court does not have a general power to revisit the decision about whether it would have granted the order in the light of the knowledge it has at the conclusion of the trial.

129 For all those reasons, therefore, I would set aside Mr Clayton's order, but I would make a fresh order as at that date in the sum of £20,000. I need not add the words doing the best I can on the material before me.

CERTIFICATE

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