



Neutral Citation Number: [2022] EWHC 1772 (Admin)

Case No: CO/4295/2021

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/07/2022

**Before:**

**MR BENJAMIN DOUGLAS-JONES QC SITTING AS A DEPUTY JUDGE OF THE**  
**HIGH COURT**

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**Between:**

**THE QUEEN (on the application of AB by his**  
**litigation friend MB)**

**Claimant**

**- and -**

**SLOUGH BOROUGH COUNCIL**

**Defendant**

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**Galina Ward QC (instructed by Watkins and Gunn) for the Claimant**  
**Peter Oldham QC (instructed by HB Public Law, Harrow Council) for the Defendant**

Hearing dates: 24 May 2022  
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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 10.30am on Friday 8 July 2022

## **Benjamin Douglas-Jones QC, sitting as a Deputy Judge of the High Court:**

### *Introduction*

1. Subject to any further order, the court directs that nothing shall be published in respect of this claim that might identify the claimant either directly or indirectly.
2. The Claimant, AB, was born prematurely on 21 July 1981. He suffered heart failure when he was three years old. He suffers from spastic quadriplegia, learning difficulties, osteoporosis, curvature of the spine, and a number of other medical conditions. He is now 40 years old and is wholly dependent on his sister, MB, and his mother, who is now 78. The Claimant lives in a ground floor bedroom as he cannot access stairs. He uses a wheelchair or walking frame to move around. He needs flat surfaces and easy access, particularly to toilet facilities.
3. The Defendant, a Borough Council, provided day and residential care facilities for its inhabitants, one of which was the Priors Day Centre in Slough (“Priors”). On 20 September 2021, the Defendant decided to close a number of care facilities, including Priors.
4. By a claim issued on 20 December 2021, the Claimant, with permission of Mr Clive Sheldon QC sitting as a Deputy Judge of the High Court, claims a judicial review of the decision to close Priors (“the Decision”). The grounds on which judicial review is sought are that the Decision:
  - (1) was based on an unlawful consultation process that did not fulfil the requirements of taking place at a formative stage, giving sufficient reasons for the proposals to permit intelligent consideration and response, and/or conscientiously taking the product of the consultation into account.
  - (2) did not take into account a number of relevant considerations, including in particular the needs of the current service users; and
  - (3) has led to an ongoing unlawful failure to meet AB’s eligible needs under the Care Act 2014 (“the 2014 Act”).
5. Through the Claim, the Claimant had challenged the Council’s decision to close other day centres as well as Priors. Permission was limited to the decision to close Priors. The Claim proceeded before me on that basis.

### *The hearing*

6. The Claimant supported the claim with witness statements of MB dated 17 December 2021 and 19 April 2022 (“MB’s first witness statement” and “MB’s second witness statement”, respectively).
7. In support of the grounds for judicial review the Claimant relied on assessments of the Claimant’s needs, carried out by the Defendant’s Community Team for People with Learning Disabilities (“CTPLD”) on 16 April 2020 (“the 16 April 2020 assessment”), 10 December 2021 (“the 10 December 2021 assessment”) and 3 February 2022 (“the 3 February 2022 assessment”).

8. The Defendant in turn relied on witness statements of Marc Gadsby, the Defendant's Associate Director of Adult Operations, dated 10 January 2022 ("MG statement 1") and 25 March 2022 ("MG statement 2"), Sajid Hussain, a Senior Business Support Officer of the Defendant, dated 25 March 2022 and Sameer Maganji, Practice Lead of the Defendant's CTPLD, dated 28 March 2022.

#### *Background*

9. After attending special schools and college, the Claimant started attending Priors five days a week. He did so for many years - from 2004 until 1 April 2020, when Priors was closed during the first Covid-19 national lockdown which began on 23 March 2020.
10. The Claimant was happy at Priors. His family was confident that all his needs were being met there. The centre had all the facilities he needed, including appropriate toilet facilities. He was provided with stimulation and activities to help him develop and maintain his independence and mental well-being. During the Covid-19 lockdown period the Claimant was provided with services through Priors.
11. A report in relation to Adult Social Care Provider Services, dated 10 September 2021, was prepared for the Defendant's Cabinet meeting of 20 September 2021 ("the Report"). The Report set out that three options were considered. Option 1 was to reopen care services which were closed during the pandemic. Option 2 was to "[m]ove away from being a direct provider of care ... and to commission alternatives to meet people [']s needs." Option 3 was to "[r]e-model and operate a significantly reduced provider services offer." The Report set out that options 1 and 3 were "discounted and not progressed as part of the review as the council [']s ambition of delivering more personalised services to meet people[']s needs and delivering value for money would not be achieved."
12. On 20 September 2021, the Defendant's Cabinet made the decision to close services including Priors.

#### *Facts*

##### 2020 Defendant's Adult Social Care transformation programme

13. In MG statement 2, Mr Gadsby explained how in 2020 the Defendant began a programme to transform Adult Social Care. The stated aims were to increase "... efficiency and value for money through a range of improvement projects within Adult Social Care operations and commissioning;" and to deliver financial savings of £9,121,000 across 3 years (2021-2024). Mr Gadsby explained how the programme was to be "... delivered with the support of PeopleToo, a specialist consultancy providing support to organisations in local government and health, who have been working with the Council since October 2020."

##### The 16 April 2020 Care Act 2014 assessment

14. In the 16 April 2020 assessment it was recorded that the Claimant:

*"... is accessing Priors Day Centre for five days a week [the present tense is used, although due to the Covid-19 lockdown, the Claimant had not accessed Priors for 15 days at the date of the assessment] and is supported by his parents when at home. AB is living with parents in his parents' house. He has an older brother and sister, and his sister is providing all of the necessary care and*

*support to AB as his mum has physical problems restricting her to provide personal care to AB. AB lives in a downstairs bedroom in the family home since 2008, with fully adapted bath and toilet which was constructed with funding from DFG.”*

15. In response to the *pro forma* entry: “Details of what you would like to improve or change socialising, contributing to society”, the following is recorded:

*“AB has expressed that he wants to continue accessing Priors Day Centre. The family would not want to make any changes to this arrangement as is [sic] benefiting AB and is giving the family a break while he is at the day centre.”*

16. In relation to ongoing support, it was set out in the context of the Claimant’s mother’s caring role:

*“... The family would like Priors Day Centre to continue to support AB for 5 full days per week as this relieves a lot of pressure off [AB’s mother] as a main carer.”*

17. The Claimant’s needs were recorded as being in global needs band 6, the highest band, meaning: “He/she cannot be safely left alone during the day or at night, needing a high level of 24-hour support. He/she may need specialist care and support and/or may need the support of more than one carer.” The allocation of funds required to meet the Claimant’s needs for “Staying safe & social activities / relationships” was said to be £250 *per week*.

18. In MG statement 2, Mr Gadsby set out that the average cost for needs of an individual was £180 to £270 based on a disability day centre with 20 to 30 users. This individual cost was additional to the cost of “provider” (i.e. residential and day) services for the financial year ending 2021, of £970,800.

19. MB, in her evidence, was critical of the 16 April 2020 assessment as it refers to the Claimant living with their parents notwithstanding that their father had died some seven years ago.

#### February 2021 – the Defendant’s revenue budget report

20. In February 2021, the Council set its budget on the basis that, working with PeopleToo, a saving of £500,000 could be made from “remodelling” the day services, split over two years - £350,000 in 2021/2022 and £150,000 in 2022/2023.

21. Mr Gadsby set out in MG statement 2, that the revenue budget report “confirmed that individual service decisions would be subject to separate officer or Cabinet approval, taking account of the statutory framework, any requirement to consult and consideration of the overarching duties and that a contingency had been set aside to deal with a risk that the savings could not be met within the specific statutory framework.”

#### April 2021 - Review of Council provided services including day centres

22. In MG statement 2, Mr Gadsby set out that in April 2021, as part of the transformation programme, a review of “all internal council provided services (day centres, residential home[s] and respite homes) was agreed, as it was identified that the cost of delivering

these services was significantly above the market average and the services could potentially be delivered within the community and by alternative providers in the market. The day centres were closed at the time due to Covid-19 and temporary alternative support was in place.”

#### May 2021 – Market analysis

23. In MG statement 2, Mr Gadsby explained, “In May 2021, market analysis was undertaken to explore if the market had the capacity and capability to meet the needs of the service users currently supported by the services provided directly by the Defendant.” Mr Gadsby set out how the market review had included:
- *“Searching for alternative day services online and calling providers to explore the type of service, who they support and the cohort of people they currently supported*
  - *Engaging with the voluntary and community sector and the Defendant’s Community Development Team to explore alternative services that could provide “personalised support for individuals to access community activities that they are interested in alongside other services offers such as supported living or homecare*
  - *Holding a market engagement event for building-based replacement care – this was held on 28 May 2021. Information from this event (including feedback) was presented to the transformation programme board on 10 June 2021,*
  - *Engaging with colleagues in commissioning and purchasing to gather information on the current residential care market.”*
24. The Report to Cabinet explained that the review had included gathering knowledge from colleagues; conducting an internet search; and contacting partners within the voluntary and community sector. Alternative care services identified included charities, community interest companies, locally run groups and private enterprises.

#### Post-May 2021 financial analysis

25. According to MG statement 1, a financial analysis was carried out after the May 2021 market analysis. The analysis was based on the average cost which the Council was paying in the external market for service users. This equated to £160.11 per week for a service user with learning disabilities and £123.06 per week for an older person.
26. Based on an older person day care centre having 50-60 users and a learning disability day centre having 20-30 users, the average cost of the in-house provision for a service user with learning disabilities was £180-£270 per week. The average cost of the in-house provision for an older person was £311-£373 per week.
27. Mr Gadsby stated that this analysis revealed “that the directly provided, traditional building-based services were expensive and that there were sufficient alternatives available in the market to meet the needs of local people”. He added that the “market intelligence” gathered indicated that there was “no need for the Defendant to directly provide day services at these costs in order to meet the outcomes and assessed needs in service users’ care plans”.

28. As a result of the “market intelligence” the Council's proposal was amended to consider closing down the last few directly provided day care centres, rather than scaling them down. According to Mr Gadsby, it was assessed that this option could deliver a saving of £1.1 million phased over two years.

21 June 2021 - Letter to service users

29. In a letter to service users, including the Claimant, dated 21 June 2021 the Defendant set out:

*“As someone who uses a Slough Borough Council Provider Service, we wanted to make you aware of the current situation regarding Day Services and Lavender Court.*

*As a Council, we are currently reviewing our services to consider how we best meet the needs of local communities going forward. As part of this we are taking on board the adjustments that people have made during the Covid pandemic, whilst being mindful of the financial situation of the Council.*

*As soon as we can communicate with more detail, we will contact you again and seek your views and input into any proposals about the services going forward.”*

30. The letter concluded by setting out: how community bubbles and virtual sessions would continue “in the interim”; that there would be no impact on residents of Lavender Court; and who Day Service Users should contact if they needed any support “in the meantime”.

2 July 2021 - section 114 Local Government Finance Act 1988 notice

31. By s.114, Local Government Finance Act 1988, the Chief Finance Officer of a local authority shall make a report (“a s.114 report”) if certain criteria are fulfilled concerning the poor financial health of the authority. By subsection (3), he must make such a report if it appears to him that the expenditure of the authority in a financial year is likely to exceed the resources available to it to meet that expenditure.

32. By a notice dated 2 July 2021 Steven Mair, the Defendant’s Chief Finance Officer, made a s.114 report. The s.114 report tended to show that the Defendant’s financial predicament was precarious. Since 2016/17, there had been accounting errors and the Defendant had quadrupled its borrowing from circa £180m to £760m over the same period with a consequential revenue impact. The Defendant faced a range of financial pressures and issues. The projected in-year spending on services was significantly above the approved revenue budget and the level of revenue reserves held by the Defendant. If further action was not taken, there would be a negative General Fund balance of £159 million by 31 March 2025. Local Authorities are not permitted legally to exceed their revenue funding including reserves.

Public consultation – 5 July to 6 August 2021

33. In the Report to Cabinet (“the Report”) there was reference to a public consultation which ran from 5 July 2021 to 6 August 2021. It was explained that three surveys were made available: (1) a survey for parents and carers of people who accessed services; (2) a survey for people who accessed services themselves; and (3) a survey for “Providers / Support Services (either [the Defendant] or other external organisations)”. Their import in the Report was summarised as seeking “... to understand what was important

about the services that people access? what had been the effect impact of Covid-19? and how could services potentially be delivered differently? [*sic*].”

34. In the consultation on the Defendant’s website, there is reference in the background section to the Defendant proposing to review its few remaining care facilities and the Defendant’s “strategy” of “mov[ing] away from being the direct provider of services [to] focus on strategic commissioning”. There is a proposal to rely less on day centres and to “explore other ways”. The language is of “reflect[ing]” on how needs are met with “our services”, “re-evaluating how we use these types of services” and “consider[ing] if we are best placed to be a direct provider of services”. In the proposal section of the consultation, the Defendant set out that it was proposing to move away from being a registered provider of residential provision and to commission alternatives. As to day care, the proposal was set out as being to “[d]eliver flexible and more personalised support and rely less on providing activities or services that are based at the day centres” [emphasis added]. Those using Priors were invited to respond to the survey as part of a “... re-evaluation ... to understand where we can improve and offer the best range of options and relevant choices”. It was set out that further activities were planned “... to support people who use our services to engage and share their views”. The views sought concerned what aspects of care were important to service users, including “[h]aving an accessible building”, what aspects of help received were liked and not liked, in which areas service users would like more help and support, whether activities during the day were adequate, what improved the quality of daytime activities and what prevented service users from taking part in daytime activities, whether service users preferred accessing activities remotely or in person, and how Covid-19 affected the receipt of help and support, whether positively or negatively.

12 July 2021 - Survey documents posted to service users including the Claimant

35. The Report recorded that the Defendant had asked people with a “potential interest” in the Defendant’s “Provider Services” to share their views regarding the “options for provider services”. According to the Report, this consultation “took place prior to any recommendations being presented to Cabinet for decision”. A “consultation page was established”, three online surveys were created and a consultation “mailbox [was] set up”. In addition, “easy read” surveys and information about the consultation were circulated to people who used the services. Telephone calls at different stages of the consultation process were made to all customers. “[Four] facilitated focus groups were established, supported by advocacy.”
36. A staff briefing took place two weeks before “go live” (i.e. before the consultation process was made available to the public) and the Defendant engaged with trades unions.
37. A Provider Services Public Consultation (“PSPC”) summary was sent out with the survey. It set out that the Defendant faced “significant financial challenges” and that money and “resources available” need to be “... used in the most effective way to meet the needs of the most vulnerable people within our community”. The summary set out that “Day provision is not a statutory service; however, it has been part of our provision to help people meet their assessed needs. The Council’s strategy is to move away from being the direct provider of services and focus on strategic commissioning ...”. It spoke of proposing “to rely less on day centres” and of “explor[ing] other ways” of meeting needs. It also set out “We are considering the future of all services that are currently

run by the Council, for older people and people with learning disabilities. This includes: ... [Priors]”. The Defendant’s Proposal” was expressed to be:

- “1. To review the needs and aspirations of all people who use the services and identify alternative options, building on people’s strengths, across the provider market and through direct payments.*
- 2. Deliver flexible and more personalised support and rely less on providing activities or services that are based at the day centres.*
- 3. To move away from being a Registered Provider of care for both long- and short-term residential provision, and to commission alternatives.*
- 4. To promote individual choice and independence through accessing services that are being delivered by charities, community groups and other organisations in the voluntary and independent sector.*
- 5. To reduce expenditure by circa £1.2m, through identifying alternatives to in-house provider services, and redirecting budget to deliver personalised, strengths-based support packages [emphasis added].”*

Through the survey, prospective respondents were asked what they liked and did not like about their support and with what they would like more support in the future. As the Report (see below) noted, themes emerged to the effect that the following aspects of the Defendant’s support were important to users of the care facilities: socialising with friends; taking part in a range of activities; the importance of routine; feeling safe; and returning to services. The survey asked about the choice of activities, what prevented respondents from accessing activities and Covid-19.

#### 15 July 2021 – Letter

38. By a letter of 15 July 2021, the Defendant wrote to service users inviting them to participate in the surveys and focus group meetings. It included the statement: “We are considering the future of all services” including Priors.

#### 22 July to 19 August 2021 – E-petition

39. In addition, 803 people, including MB, signed an e-petition entitled “Abandon planned closure of day centres”. In the Report, the statement made by the petition was set out:

*“The day service and short break service centres are vital for people with learning disabilities and autism. They provide social interactions, fun, learning, safety and stability in a way which cannot be replaced by the alternative arrangements the Council proposes. There is no other adequate place in Slough for people with learning disabilities and autism. The parents and carers of service users care for the disadvantaged people with disabilities often for their entire life. Closing down the reliable day care offered by the day centres and replacing it with often inadequate alternatives will simply create massive problems for people who are already on the edge of mental breakdown following the long period of closure due to Covid.”*

#### July and August 2021 – Focus sessions

40. Four focus group Zoom sessions were organised by PeopleToo on behalf of the Defendant, including sessions for parents and carers of people who access services and for day services users. The sessions were attended by a representative from Slough



Advocacy. MB attended a Zoom meeting on 6 August 2021. She did not receive a direct invitation to the meeting. The carer of another service user told her about it. Ms Ward QC pointed out that it was unclear how many service users and / or carers had been unaware of the meetings. No documentation setting out the Council's proposals was provided. The feedback summary provided by PeopleToo implies there was no clarity as to what was proposed ("*People need to understand what SBC's plan is, so they can make their own plans*"). The day centres (prior to the pandemic) were viewed as successfully meeting service users' and families' needs, in particular, through the provision of "structure", "activities" and "support network[s]". No positive suggestions for alternative provision of any kind had been made. Covid-19 had had a negative impact on users' mental and physical health. Communication during the pandemic had been very poor: it was not understood why centres had not opened if they were Covid-friendly, nor why no reasonable alternative had been offered. Respondents were uncertain as to the Defendant's plans, which they needed to understand to formulate their own. They wanted to know why there was a proposal to shut centres which had been renovated during the pandemic. The view was that the Defendant should stop spending money "in the wrong places" and use that money to pay for the day centres and "[s]top taking facilities from the vulnerable people with no voice".

#### Report to Cabinet 20 September 2021

41. The Report concerned Adult Social Care Provider Services. Under the heading "Summary and Recommendations", it set out recommendations to Cabinet regarding "... the continued delivery of Adults [*sic*] Social Care, in-house provider services" and that the "... report highlights feedback from a recent public consultation and rationale regarding the preferred option. Cabinet decision is required regarding progression of the recommendations."

42. Under the heading "Recommendations" it was set out:

*"1 To close the following [five] Provider Services currently operated by the Council [including]:*

...

*· Priors Day Service*

...

*"2 a) To review the needs and aspirations of all people who use the services currently. To identify alternative options, building on people's strengths, across the provider market and through direct payments.*

*b) Deliver flexible and more personalised support, relying less on providing activities or services that are based at the day centres.*

*c) To promote individual choice and independence through accessing services that are being delivered by charities, community groups and other organisations in the voluntary and independent sector.*

*3 To delegate the implementation of these recommendations to the Executive Director of People (Adults), in consultation with the lead member for social care and public health."*

43. Under the heading "Rationale" the Report recorded that the Defendant was committed to ensuring that public money and available resources were used in the most efficient and effective way to meet the needs of the most vulnerable people in the Defendant's community. The Defendant had to balance its statutory duties with delivering its

financial strategy over the coming months and years. There was a proposed change to the few remaining provider services as outlined above and, “the proposed strategy for Adult Social Care is to move away from being the direct provider of services and focus on strategic commissioning to meet the needs of all local people. We are proposing to rely less on day centres and other building-based services to meet the assessed needs of residents and explore other ways to meet them” [emphasis added]. Needs would be met by accessing activities or services run by other providers, including community groups and charities, using personal assistants, by direct payments, and accessing other support networks.

44. The purpose of the Council’s consultation was recorded as canvassing what the views of those interested were “... regarding [the Defendant] no longer being a direct provider of adult social care services. As part of this process, we undertook a range of engagement activities to hear from people who access these or similar services delivered by other organisations, as well as families, carers, professionals and wider networks” [the Court’s emphasis is added]:

*“The following three options were initially considered as part of this review:  
Option 1: Reopen the services that were closed during the pandemic and operating them in the same way as they were pre-pandemic. Continue to provide the services that have not been closed with no changes.*

*Option 2: Move away from being a direct provider of care for long and short-term residential provision, day care and to commission alternatives to meet people [’]s needs.*

*Option 3: Re-model and operate a significantly reduced provider services offer. Option 1 and 3 were discounted and not progressed as part of the review as the council [’]s ambition of delivering more personalised services to meet people[’]s needs and delivering value for money would not be achieved.*

*It is also important to note that upon approval of the recommendations made above, Slough Borough Council will work with other providers to identify other service options.*

*Slough Borough Council no longer operating a provider service function does not mean that people will not have options to access other services, new or existing [emphasis added].”*

45. The following appeared in the Report under the heading “Introduction”:

*“The proposed action will support the delivery of Outcome 2 the Five-Year Plan:*

*‘Our people will be healthier and manage their own care needs’.”*

46. Outcome 2 is not the same as Option 2. The juxtaposition of the options and the Introduction including this numbered outcome in the report was perhaps unhelpful.

47. The Defendant’s commitment to “transform public health and wellbeing” was set out in the following statement in the Report:

*“... to identify an individual’s ‘strengths’, abilities, skills, knowledge and potential as well as their social and community networks, that will help or enable the individual to deal with challenges in life and meet their needs to achieve*

*their desired outcomes. The Care Act (2014) underpins this approach by requiring our Adult Social Care department to consider the person's own capabilities and support available from their wider network or within the community that would help the person, alongside the provision of care and support, to meet the outcomes they want to achieve."*

It was then recorded that adults' quality of life and services offered by the Defendant were important but the authors of the report "... believe that this does not have to be delivered within a council operated building."

48. The Report recorded the fact of the e-petition and, insofar as consultation responses were concerned, it recorded:

*"A total of 892 people have shared a view regarding the proposal to close Adult Social Care Provider Services. The detail from the consultation is attached as Appendix 1 however some key themes are highlighted below:*

- Direct Payments don't work for everyone*
- A building base is important for some*
- Carers need a break*
- A day centre environment provides confidence around safety*
- People enjoy socialising*
- A range of different activities are enjoyed by different people*
- People think that services need to be available now*
- Communication needs to be better*
- More alternatives are required locally*
- There are problems with transport*
- Lack of equipment such as hoists*
- Limits on Personal Assistant support"*

49. The above was followed by a statement of the "Council" view that the above "outcomes" could be achieved in ways other than through the Defendant "directly delivering services". Following "a re-assessment of need, each person will be supported to build a support plan". The Defendant will "continue to work with service users and their families to identify ways to meet their needs".

50. The "Introduction" to the Report (which followed "Rationale") included the Defendant's statement that "... proposed action will support the delivery of Outcome 2 of the Five-Year Plan: 'Our people will be healthier and manage their own care needs'." The Defendant sought to transform public health and wellbeing by focusing on "intervention and prevention built on a strength-based approach". The Defendant aimed to "identify an individual's 'strengths', abilities, skills, knowledge and potential as well as their social and community networks, that will help or enable the individual to deal with challenges in life and meet their needs to achieve their desired outcomes".

51. The Report referred to the Care Act (2014) as "underpin[ing]" the Defendant's approach. The Report considered the future of its services for older people and people with learning disabilities. For people with learning disabilities and/or autism, this included day services such as Priors. There were 107 people (those with learning disabilities and older people) registered to use these services.

52. The disruption to the Defendant's services caused by Covid-19 was recorded. People had changed the way they accessed community activities and received support. The Defendant, in line with government guidelines, had closed its building-based day centres. It had trialled "new ways of working" including Covid bubbles and online events. These changes alongside the Defendant's Adult Social Care Transformation Programme had led to a re-evaluation of care provision, including whether the Defendant was "best placed to be a direct provider of services". and how the Defendant could improve "and offer the best range of options and relevant choices that build on people's strengths." This had led to the "public consultation engagement activity". The Report recorded that people had been invited to share their thoughts directly or *via* their families, carers or professional support.
53. The Report recorded the May 2021 market analysis. Alternatives to direct provision of care by the Defendant included 14 building-based facilities and providing sessional activities or whole day provision. Two alternatives catered for people with learning disabilities; one was for people with acquired brain injury; and two were for adults with additional needs. Many of the alternative services' buildings were existing community "assets" such as community centres. The Report found most opportunities were focused on providing "meaningful activities that promote social interaction and positive wellbeing".
54. The Report listed services which would benefit people with learning disabilities or mental health issues, offering a focus on: employment; wellbeing; and, in the case of learning disabilities, independent living skills. The Light UK was listed in each of those categories. The Defendant's Community Development Team held a directory of over 60 other "... local projects, charities and initiatives which are provided either in outdoor spaces or local settings ...".
55. The Report authors' view was that the outcomes shared in the consultation could be achieved in ways other than through the Defendant "directly delivering" services. Following "a re-assessment of need, each person will be supported to build a support plan". The Defendant would "continue to work with service users and their families to identify ways to meet their needs". Four services for people with learning disabilities and mental health issues were identified. As Covid restrictions were lifting, "services and community groups were adapting to the new ways of working and developing their offer".
56. The financial analysis was considered in the Report. The Report found that the pandemic had impacted significantly services' delivery, whilst building-based services had been closed and needs were being met through non-building based "support offers". The Report authors "therefore assumed that following a reassessment several people will continue to be supported in the way that they have been over the past year, and that only 75% will wish to return to some form of day opportunity." To model this, the Report applied the then cost of provision purchased from the external market - £160.11 per week for people with a learning disability. However, it noted that "... consideration could also be given upon undertaking reassessments to the provision of shared lives and Personal Assistants to ensure people are able to have their needs met in the way that provides the greatest choice control, and independence". The Report acknowledged the Defendant has a "... statutory duty to meet eligible needs assessed under the 2014 Act, and whilst day care provision provided directly by the Council has been used to meet

needs, it is not in itself a prescribed statutory service. Where a person has identified eligible care needs and provision of day services is assessed as necessary to meet that eligible need, the Council will calculate a personal budget that will meet the market rate for provision of that service and can offer a direct payment where appropriate but can be commissioned on the service user's behalf where a direct payment is not appropriate."

57. It was set out that current service users "will each have an individual reassessment to ascertain their eligible needs". Procurement was being effected with a view to "... undertaking this work as soon as possible" [i.e. an up-to-date assessment of individual needs had not been effected before the recommendations were made to the Cabinet].
58. Section 10.27 of the "Care Act" [i.e. the Care and Support Statutory ("CASS") Guidance] was cited. It provides that, in determining how to meet needs, the Local Authority may also take into reasonable consideration its own finances and budgetary position and must comply with its related public law duties. The Report highlighted that this included "... the importance of ensuring that the funding available to the Local Authority is sufficient to meet the needs of the entire local population". It was noted that the Local Authority may "... reasonably consider how to balance that requirement with the duty to meet the eligible needs of an individual in determining how an individual's needs should be met (but not whether those needs are met)". The Local Authority should not "... set arbitrary upper limits on the costs it is willing to pay to meet needs through certain routes – doing so would not deliver an approach that is person-centred or compatible with public law principles". The highlighted extracts of the CASS guidance stated that a Local Authority "may take decisions on a case-by-case basis which weigh up the total costs of different potential options for meeting needs and include the cost as a relevant factor in deciding between suitable alternative options for meeting needs. This does not mean choosing the cheapest option, but the one which delivers the outcomes desired for the best value". The Report recorded the Defendant's duty under s.149, Equality Act 2010.
59. The Report returned to summarise the consultation process, recording the purpose of the surveys (as set out above); that Zoom meetings had taken place; and that other "activities" had taken place including that there was an electronic version of the survey on the Defendant's website and that letters had been sent to service users concerning the consultation and enclosing the survey. Telephone, including follow up, calls had been made to service users, checking they were aware of the consultation and survey, and providing the opportunity for feedback.
60. The online survey prompted 55 responses: 25 *percent* from parents and carers, 22 *percent* from services users and 53 *percent* from "Providers / Support Services". It was recorded that no paper copies were received (albeit MB herself had returned a paper copy). The consultation findings were appended to the Report. In some instances, where a percentage of respondents was recorded, the figure was ostensibly a mathematical impossibility based on the number of respondents.

#### 13 September 2021 - Meeting of the Defendant's People Scrutiny Panel

61. The Defendant's People Scrutiny Panel ("the Panel"), responsible for scrutinising aspects of decisions, plans and services provided for children and young people within the borough, met on 13 September 2021. The Report to the Cabinet was presented to

the Panel before being presented to the Cabinet. The Associate Director of Social Care Operations highlighted:

*“... a review of the provider services had been conducted to understand how best to offer adult social care that did not rely on day centres and other building based services and centred more on strategic commissioning to meet the needs of all local people in order to deliver best value. The review also sought to ascertain the options that were available for local people. ...”*

62. Key recommendations were made, which would “... enable the ability for services to be provided in different ways for local people.” The Panel was invited to note that, notwithstanding Covid-related challenges, following the consultation to identify outcomes, a commissioning team had been put in place to provide the market that met the service needs of the people.
63. The Panel resolved that the Report’s recommendations should be approved with additional recommendations - the Cabinet was to be made aware of the petition and asked to ensure officers gave reassurance to stake holders; if a decision was taken to close Priors and other provider services, suitable alternative provision should be provided before closure; service users’ needs should be reviewed; implementation of the recommendations should be delegated to the Executive Director of People (Adults), in consultation with the Lead Member for Social Care and Public Health; and a report should be presented to the Panel on the outcome of one-to-one officer assessment of each of the affected residents with confirmation that appropriate solutions for each person had been found, if the Cabinet decided to close the facilities.

#### 20 September 2021 – Cabinet meeting and decision to close Priors

64. On 20 September 2021, the Cabinet meeting was held. Adult Social Care Provider Services were discussed. The Report was summarised as follows. The minutes noted that the recommendations included the closure of five provider services (including Priors). The Cabinet was told of the consultation feedback. The rationale for the recommended option was set out and the Cabinet was told that the review aimed to improve services and meet the Defendant’s financial obligations. The Defendant’s responsibility for meeting vulnerable people’s needs and those of their families and not necessarily achieved *via* the direct provision of services. Centres had been significantly disrupted by Covid-19. People had changed the way they accessed services. The Cabinet noted that there were 107 registered service users, and the closures would directly impact 61 staff. The projected annual saving was £1.1 million. If the Cabinet agreed to close the centres, “... the needs of the service users would be reassessed with more flexible and personalised support provided”. One service user’s relative was afforded the opportunity of addressing the Cabinet.
65. The Cabinet considered the consultation feedback, the Panel comments and the petition against the closures. During a “detailed discussion” on the proposal, questions were asked of the Associate Director to ensure that “... the costs and savings estimates were robust”. The Cabinet sought more information about alternative provisions: it wanted reassurance that service users’ needs could be adequately met through services not directly operated by the Defendant. The council responded to concerns raised, noting it had to balance its statutory duties with its financial strategy. The minutes of the meeting record:

*“At the conclusion of the discussion the Cabinet approved the recommendations as set out in the report. To be provided with assurance that the needs of service users was been adequately met in the future it was agreed that the Cabinet and the People Scrutiny Panel would also receive an update in December or January which should include details of any additional transport costs to alternative provision and the staffing implications. Finally, it was agreed that under the delegated provided [sic] to implement the decision that there be budget flexibility, if required, to ensure individual needs could be appropriately met through the transitional period” [sic].*

66. The Cabinet resolved: to close the five facilities including Priors; to review service users’ needs and aspirations; to identify alternative options across the provider market and *via* direct payments; and to deliver more flexible and personalised support, relying less on providing activities or services based at the day centres. Implementation of these recommendations was delegated to the Executive Director of People (Adults) in consultation with the Lead Member for Social Care and Public Health. The Cabinet resolved to note the comments made in the Panel meeting of 13 September 2021 and the petition. The Cabinet and Panel resolved to receive an update when the assessments of service users had been completed to “... ensure that appropriate alternatives were in place to meet their needs”. It further resolved there should be budgetary flexibility available to continue to meet the needs of service users through the transitional period.

#### 6 October 2021 – service users notified of decision

67. On 6 October 2021, MB received a letter from Mr Gadsby informing her of the closure of Priors Day Centre. No date was given for the closure.

#### After the decision to close the services

68. In MG statement 1, Mr Gadsby set out that, after the decision to close the services, a programme based on three “workstreams” was developed: reassessment of client needs and identification of alternative provision; staff consultation and HR processes regarding redundancy and redeployment; and services deregistration and premises hand back.

#### 12 October 2021 – Consultation with staff

69. Staff consultation started on 12 October 2021. Redundancy meetings ended on 13 December. There were no appeals and the last day of service for most staff was 31 December 2021.

#### November and December 2021 – Alternative provision

70. In mid to late November 2021, the Claimant’s new social worker liaised with MB. Lists of alternative day care locations were given to MB. MB’s research persuaded her that the Defendant had not engaged in any “vetting” of the options given to her. Some options were on any view unsuitable. MB ruled out further options, either as unsuitable or because of poor reviews. MB felt she had little option but to try The Light UK as the “bubble” provision used by the Claimant at the time was ending. She was concerned that the Claimant would be left with no provision. The Claimant started attending The Light UK on 6 December 2021.

#### The 10 December 2021 Care Act assessment

71. All service users' needs had been assessed, in accordance with the workstreams identified by Mr Gadsby, by 17 December 2021. The 10 December 2021 assessment was carried out when the Claimant had been attending The Light UK for only four days. The assessment report recorded that the Claimant was happy with his relationship with MB. MB assessed the Claimant's communication skills as having declined because of a lack of interaction with friends at Priors. His confidence, ability to express his feelings, mental health and mobility had also declined. The social worker conducting the assessment recorded that MB had not been able to reach a decision as to what facility the Claimant might attend that satisfied the family: support planning had been progressed and family members were in contact with the day-care providers and CTPLD members "... to reach a decision." The social worker detailed the Claimant's needs, recording he needed a high level of support. He remained in needs band 6. The funds required to meet his needs remained £250 *per* week, plus £21.34 for "Sustaining carer's role (carer breaks allocation)".
72. The *pro forma* question in the assessment form, "What changes would most improve your wellbeing or quality of life?" prompted the following answer: "For AB to continue residing with his family and to continue to attend Day service where he can meet his friends and develop his social support network." Ms Ward QC pointed out the entry appeared to have been cut and pasted from the 16 April 2020 assessment but with the word "Priors" removed before the word "Day" - hence the capitalisation of "Day". This change to the text of previous assessments was repeated in the assessment.
73. The social worker had offered personal care support for the Claimant and to review the need for a PA/carer to help him in the mornings before attending the day services. MB did not want that sort of help. The Claimant needed a five day a weekday service because MB worked 70 hours a week and was also a full time carer for her mother. The social worker recorded that the Claimant enjoyed social interaction at the day centre and required family support to maintain important relationships.
74. The only reference to The Light UK in the assessment report concerned "ongoing support": "The family would like "The light UK" to support [the Claimant] for 5 full days day services per week" to relieve pressure from [the Claimant's mother]. Ms Ward stressed the assessment had been finalised only four days after the Claimant's first day there.

#### MB's 15 December 2021 visit to The Light UK

75. On 15 December 2021 MB visited The Light UK. She was able to provide perspective as to the care provision there. The Light UK was located in a parish hall. It was not purpose-built. There was no disabled lavatory: there was only a disabled cubicle within a communal lavatory and insufficient room for the Claimant to walk in and out with his walker. He had to hold the walls while accessing the cubicle and washing his hands. MB believed this was dangerous and was unhygienic.
76. MB observed there was a speed bump outside the facility doors. It made it difficult for the Claimant to get into the hall and posed a health and safety risk if he was unaccompanied. Unlike Priors, there was no sensory garden. The only outdoor space was an ungated carpark. That posed a risk. There was no adapted kitchen: the Claimant could not continue to learn cooking skills, which he had been learning at Priors.



77. In MG statement 1, dated 10 January 2022, Mr Gadsby recorded that MB had expressed concerns about the care provision at The Light UK. The Light UK had been contacted on 6 January 2022. He was able to respond as follows. The Claimant was “independent with toileting and had not raised any concerns to staff regarding the facilities at the centre”. The staff had not noted that he had any difficulty using the toilet. The Claimant was happy. He had made a friend. He was exercising indoors and engaging in activities, including making tea for himself and his friend.

#### 10 January 2022 - Impact of reversing the decision to close adult social care facilities

78. In MG statement 2 Mr Gadsby set out that the Defendant’s new model of service was budgeted to result in savings of £1.1 million - £300,000 in 2021/2022 and £800,000 in 2022/2023. Mr Gadsby considered the impact should the decision to close adult social care directly provided services be reversed and the Council be required to reconstitute the services that have been closed. He set out that “... the Defendant would have to locate alternative premises, recruit new staff and identify those service users who would benefit from accessing these services. This would obviously take considerable time.” There would be “diseconomies of scale ... replicating the services that were in place prior to the Covid 19 pandemic. It is therefore likely that the Defendant would consider further alternative options other than directly providing day care services”. The financial impact would divert much needed financial resources to identifying alternatives and a further consultation process: it is likely that “this would result in a similar, if not identical, proposal. This will create anxiety and upset to existing service users, their families and former staff”. Mr Gadsby noted that the significant financial cost of a new process would lead to budget pressures on the wider Adult Social Care Directorate, which is in the middle of delivering a £9 million *per annum* transformation programme. He highlighted that the Defendant had already spent a “considerable amount of money and time to implement the decision of 21 September 2021”.

#### 31 January 2022 - Update report to People Scrutiny Panel

79. The presentation of 31 January 2022 to the Panel noted that most service users had alternative services in place to meet their needs. Some had chosen not to have a new assessment or service. “[G]ood value day service options have been commissioned.” Feedback from service users’ families had been positive. All people would receive a review at six weeks (or sooner if needed). “All savings will be achieved”.

#### 3 February 2022 Care Act assessment

80. By 3 February 2022 the Claimant had been attending The Light UK for some two months. Ms Ward pointed out that there were few differences between the 10 December 2021 assessment and this assessment. The Claimant’s family’s views were that the Claimant had really enjoyed attending Priors and would express his opinion if he is not happy. He had settled well at The Light UK. MB was concerned that no professionals had called or visited the Claimant to check if he is safe. It was repeated that the Claimant missed his friends at Priors and would need family support maintaining relationships. However, the friends had all been placed in different day centres since January 2022.

#### 15 March 2022 - The Light UK update

81. Ms Maganji contacted The Light UK to ask how the Claimant was “settling in”. On 15 March 2022, The Light UK provided an update. The Claimant attended the centre five days a week from 9am-3pm. He got on well with staff, was “opening up a bit more and socialising more with his peers.” He particularly enjoyed “Bollywood” music, YouTube

videos, puzzles and outdoor activities, including sensory activities. There were no concerns. While his mobility let him down a little, he had not been involved in any incidents or accidents and no issue had been raised in relation to the speed bump.

21 March 2022 – Social worker contact with MB

82. Ms Maganji reported that a senior social worker had contacted MB. MB did not have any concerns about the care and support provided at The Light UK. She remained concerned about the building facilities.

*Legal framework*

The Gunning (Sedley) principles

83. In *R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168* Hodgson J quashed Brent’s decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. Mr Stephen Sedley QC submitted that the following suggested requirements were essential if the consultation process is to have a sensible content:

- (1) the consultation must be at a time when proposals are still at a formative stage.
- (2) the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
- (3) adequate time must be given for consideration and response; and
- (4) the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

84. Hodgson J endorsed those requirements. The Supreme Court endorsed them in *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947. At [25], Lord Wilson JSC explained how a public authority’s duty to consult those interested before taking a decision may be generated by statute (as it was in *Moseley*) or by the common law duty of a public authority to act fairly. Fairness will often be illumined by the doctrine of legitimate expectation (see [23]). Fairness is a protean concept where its requirements must be linked to the purpose of the consultation. Endorsing Lord Reed JSC’s judgment in *R (Osborn) v Parole Board* [2014] A.C. 1115, at [66] to [71], Lord Wilson said there are at least three purposes of procedural fairness. First, the decision maker must receive all relevant information and it must be properly tested. Second, it avoids the sense of injustice that the person the subject of the decision will otherwise feel. Third, the rule of law applies so that it is a procedural requirement that decision-makers should listen to persons who have something relevant to say to promote congruence between the actions of decision-makers and the law which should govern their actions; at [24], Lord Wilson said:

*“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?”*

85. In *Moseley*, at [25], the Supreme Court endorsed Lord Woolf MR’s observations in *Ex p Coughlan* [2001] QB 213 that consultation is not litigation; so the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. The authority has to let those with a potential

interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration. They need to be told enough (which may be a good deal) to enable them to make an intelligent response. While the obligation may be quite onerous, it goes no further than that.

86. Lord Wilson set out two further “general points” at [26]. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Second, the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the Claimant is a bare applicant for a future benefit. He also addressed consultations involving a preferred option: where there is a preferred option, when statute does not limit the subject of the requisite consultation to that option, sometimes fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options (see [27]); however, when the subject of the consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options (see [28]).
87. The judgment of Lord Reed JSC in *Moseley* underscores that *Moseley* was not a case which was concerned with common law fairness. It concerned a statutory duty to consult. The consultation document was sent to those receiving council tax benefit. The covering letter explained that the government was abolishing that benefit and replacing it with a council tax reduction scheme. Both documents expressed that the change meant that the assistance provided to Haringey residents would be affected: they would lose about £1 of support in every £5. Haringey’s proposed scheme meant that its claimants would suffer that order of loss but that loss did not necessarily follow from the reduction in government funding because of the availability of the transitional grant. The consultation made no reference to this or any other options for reducing the shortfall other than a reduction in relief from council tax.
88. Lord Reed expressed as a general proposition that the question was whether the provision of such information was necessary for consultees to express meaningful views on the proposal. Lord Reed found it was difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme and participate meaningfully in the decision-making process unless they appreciated how the loss of income by the local authority might otherwise be replaced or absorbed.
89. It is therefore important to read *Moseley* in the context of it being a statutory consultation case. In *R (AA) v Rotherham MBC* [2019] EWHC 3529 (Admin) Jefford J examined the legal framework applicable to non-statutory consultations. Where a particular proposal was the subject matter of a consultation it was not necessary in all cases to set out alternatives, including those which might have been rejected, nor was it necessary in all cases to explain why they had been rejected. Fairness required that to be done where necessary to allow informed or intelligent responses: this would sometimes but not always be the case. Whether it was necessary and the related question whether the consultation was fair, were broad questions, requiring consideration of factors including the purpose of the consultation, the nature of the proposal being consulted on, and what consultees could be reasonably taken to know about the proposal and its context.

90. Jefford J considered the following passage from the judgment of Sullivan J in *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin):

*“61. The overriding requirement that any consultation must be fair is not in doubt. What is fair, and in particular whether fairness demands that new material which has not been available during the consultation period should be made available to consultees so that they have an opportunity to deal with it before a decision is taken, must depend upon the particular circumstances of the case:*

*“It is an accepted general principle of administrative law that a public body undertaking consultation must do so fairly as required by the circumstances of the case” see per Auld LJ at paragraph 90 of Edwards.” (emphasis added)*

*62. Mr Fleming submitted that there was no support in the authorities for Mr Drabble's submission that the decision-making process in the present case should be interfered with by the court "only if something has gone clearly and radically wrong." This difference between the parties is one of semantics rather than substance. A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight, it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out. ....*

*63. In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went "clearly and radically" wrong.”*

91. At [72], Jefford J said:

*“... What I take from the judgment in Greenpeace is less some quantifiable test of “clearly and radically wrong” and more that the court needs to be satisfied that there was some substantial error and unfairness in the consultation process going beyond the identification of ways in which it could have been improved upon, whether that would have involved refining the nature of the consultation or, as is more this case, expanding upon it” [emphasis added].*

### *Ground 1: unlawful consultation*

#### Submissions

92. The first submission in support of Ground 1 advanced by Ms Ward QC for the Claimant was that the Defendant failed to meet three of the basic requirements for a fair consultation. She submitted that the consultation did not take place at a formative stage, arguing that the Defendant had already rejected the options of reopening or remodelling care centres when the consultation was effected. Ms Ward drew support for this submission from the Report, which she submitted made it clear that only Option 2 was considered (i.e., Options 1 and 3 had been discarded). Ms Ward also relied on the section of MG statement 2, in which Mr Gadsby had recorded that: the financial analysis demonstrated that traditional building-based services were expensive; there were sufficient alternatives in the market to meet people's needs; there was no need for the Defendant to provide the care services at the existing costs in order to meet outcomes

and assessed service users' care plans; therefore, the proposal was amended to consider closing down the last few directly provided day centres, rather than scale them down. It was assessed that this option could deliver a saving of £1.1 million phased over two years. Ms Ward also relied on a specific note of Mr Gadsby in MG statement 2 recording that the consultation was to ensure the Defendant understood the potential impact of the proposal to close the centres. It was conceded that it is open to a public body to consult following the development of its preferred proposal, but submitted that basic fairness requires that the proposal, and the reasons for it, must be clear to enable responses to be properly informed. Absent these features, it would not be a meaningful consultation on a "preferred" option. Ms Ward developed her submission by saying it was not clear to what stage matters had progressed when the consultation began.

93. The Claimant submitted that if (as the Claimant says they do) the documents sent out by an authority, state or imply that the authority is considering all the options, inviting responses about aspects of existing provision that are good and bad, but the authority has a preferred option that is not fair. Either it is unfair because of the stage at which the consultation is taking place (i.e. it is not at a formative stage but gives the impression it is); or it is unfair because consultees are not given the detail of the proposal. As to the e-petition against closure, the Claimant's stance was that this does not show people knew of the decision to close Priors. They may have had a suspicion that it was "moving to closure". The consultation did not inform people what stage the Defendant's thinking had reached. Accordingly, if one looked at the consultation from one angle it was not conducted at a formative stage.
94. Ms Ward's second submission in support of Ground 1 relied on an alleged breach of the second *Gunning* principle. The letters of 21 June 2021 consisted of notice being given to service users that their views would be sought in due course but at that stage they were simply being told that the Defendant was reviewing services in light of the needs of local communities, and adjustments people had made during the pandemic, while bearing in mind the Defendant's financial situation. Ms Ward submitted that it was clear from Mr Gadsby's evidence that the proposal was to close the facilities and then consult to consider the impact on the closure but that was not clear from the consultation documents. Ms Ward described the reference to closure as a proposed "direction of travel" and submitted the express proposal in the PSPR summary tended to imply that the day care centres would remain open. Expressions such as "rely less on" day care facilities in the context of "identifying alternatives to in-house provider services" did not imply that the consultation concerned closure. The letter of 15 July 2021 set out that the Defendant was "considering the future of all services" including Priors, Ms Ward submitted that that may include closing Priors. However, it was submitted, that needed to be seen in the context of the consultation documents themselves which proposed consolidation and other means of reducing expenditure and no clear statement proposing closure of centres. The consultation was asking for "feedback on general matters".
95. Ms Ward's third submission, in support of Ground 1, was that it was "impossible to square the financial analysis" in the Report. There was thus a breach of the fourth *Gunning* principle. The Report proceeded on the basis that 25 percent of service users would choose not to return to day care centres. The Claimant's submission was that

there was no evidence of market knowledge and analysis which could have led to the conclusion.

96. Ms Ward's fourth point was that MB's survey response had not been recorded by the Defendant even though it had been posted and returned. In her skeleton argument she submitted it was probable that other respondents had also returned hard copy responses which had not been recorded by the Defendant. In the face of evidence of the Defendant's procedure for recording and processing survey responses, set out in Mr Hussain's witness statement, Ms Ward properly conceded that she could not invite the Court to conclude the consultation was unfair merely on the basis that one survey response had not been recorded.
97. Mr Oldham QC submitted that the fact that "Option 1" and "Option 3" had been discounted did not demonstrate that, at the time of consultation, the Council had a single preferred option when it consulted. The language of the consultation documents, Report and Cabinet meeting minutes are consistent with that of *proposal* not *decision*. The consultation therefore took place at a formative stage. Mr Oldham relied on the evidence of Mr Gadsby to the effect that the consultation was to ensure that the Defendant understood the *potential* impact of the *proposal*. That evidence thus supported the Defendant's stance that there was no breach of the first *Gunning* principle.
98. Mr Oldham submitted, relying on *R (Bailey) v Brent LBC* [2011] EWHC 2572 (Admin) at [90] (appeal dismissed: [2011] EWCA Civil 1586, [2012] Eq LR 168), that the fact that a decision maker chooses to consult when it has a particular option in mind but not others does not mean it had a closed mind or that the consultation was not at a formative stage. Relying on *R v Barnet LBC, ex parte B* [1994] 1 FLR 592 at 607, he submitted there was no evidence that "anything like a determination" had been made to adopt Option 2 when the consultation took place. *A fortiori* that must be the position when the decision was for members, not officers.
99. In the alternative, Mr Oldham submitted that the fact that there was a single preferred option would not mean that consultation did not take place at a formative stage. The Defendant submitted that the Claimant's stance would mean that a decision maker must consult before it has rejected any options; that is not the law; and it would be unworkable since there are often a vast number of options that could be adopted.
100. Mr Oldham drew on the PSPC summary to respond to Ms Ward's second point and to show that the detail of the Defendant's proposals and the reasoning behind them were clear. He submitted that closure was a proposal and one can infer from respondents' understanding of the reality of the situation that they understood that was the case. MB herself was one of the 804 people who signed the e-petition asking the Defendant to "abandon planned closure of day centres". The consultation material, and its language, referred to matters which needed to be considered where closure was a possible outcome. There were references to the financial challenges faced by the Defendant, the requirement to look at the need to provide otherwise than through "direct provision" and the notion of moving away from day centre or building provision. It must have been clear to people that Priors might be closed. Beyond that, the language of the consultation documents ignored the fact that the Zoom focus groups, and telephone

communication provided *fora* for discussion. Thus, the consultation took place at a formative stage.

101. As to Ms Ward's third point, Mr Oldham argued it was permissible for the Defendant to infer that 75 percent of service users would return to using centres after the pandemic. Not every service user had responded to the survey. The Defendant was entitled to assess how many users would move to alternative services based on its knowledge and market analysis. The Defendant's submission was fortified by Mr Gadsby's evidence showing 75 percent to have been a conservative estimate.
102. Mr Oldham responded to Ms Ward's fourth point by relying on *R v Camden LBC, ex parte Cran* [1995] RTR 346 at 353F-H to submit that the Defendant's procedures for sending out and receiving consultation material are explained in Mr Hussain's statement and MG statement 2. That evidence was not challenged and so must stand, as no fault is shown in the Council's procedures.
103. Accordingly, Mr Oldham submitted, relying on *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee Of Primary Care Trusts & Anr* [2012] EWCA Civ 472 at [93], there was no flaw serious enough to undermine the lawfulness of the consultation.

#### Discussion

104. The review of the Defendant's day care services was informed by the 2020 transformation programme and the February 2021 revenue budget report. The review process in its nascent stages involved exploring the possibility of Options 1 and 3. The purpose of the April 2021 review, as part of the transformation programme, was to look at whether the significant cost of delivering the day care services could be reduced by delivering the services within the community and by providers other than the Defendant. The market analysis of May 2021 involved researching alternative care services. There then followed the financial analysis which revealed just how expensive the traditional building-based services were and how there were sufficient alternatives available in the market to meet the needs of local people which could deliver a saving of £1.1 million over two years. It may be seen how Options 1 and 3 came to be discounted by the authors of the Report in making their recommendations to the Cabinet. In my judgment it does not follow from that that the Defendant (as opposed to the authors of the Report) had a preferred option when the Report was presented to the Cabinet. It is clear from the Panel's scrutiny of the proposals that matters were still at a formative stage after the consultation, when the Panel only resolved to approve the report recommendations on the basis that additional recommendations would be put before the Cabinet. The Defendant through the Cabinet was presented with a proposal in relation to option 2, which was, as such, an option. That there was a debate about the closure of Priors and the other care facilities during the Cabinet meeting of 20 September 2021 shows that the consultation took place at a formative stage. Before making its decision, the Cabinet considered the implications of the closures and put in place safeguards for checking that needs would be met. In any event, if I am wrong about that, and had the Report included option 2 as a preferred option, it would not have rendered the consultation unfair. As Ms Ward acknowledged there is nothing unlawful about a public authority having a preferred option. Nothing "like a determination" had been made to adopt option 2 when the consultation took place.

105. Insofar as the second *Gunning* principle is concerned the PSPC summary sent to service users with the survey made it clear that the Defendant faced significant financial challenges, and that the Defendant's money and resources needed to be used in the most effective way to meet the needs of the most vulnerable. In that context it was set out that the Defendant would consider relying less on day centres and that the future of all services currently run by the council were being considered. The 15 July 2021 letter sent to service users included the statement to the effect that the future of services including Priors was being considered. The petition was not simply a binary plea to the Defendant that the day centres should not be closed. It set out the reasoning on behalf of the signatories as to the public utility afforded by the services and the impact that the closures would have on service users. In my judgment this is relevant to the second *Gunning* principle as it shows that, whereas the language concerning the closures could as a counsel of perfection have been more direct in some parts of the survey documentation, and whereas there might have been, with hindsight, a greater emphasis on the financial background to the survey, it was nevertheless clear to service users, their families and carers that one of the options being considered to be placed before the Cabinet of the Defendant was the possible closure of Priors and other services; furthermore, the financial rationale for this was set out in the PSPC summary. The minutes of the Zoom focus group meeting attended by MB show that the discussion revolved around the possible closure of day care services such as Priors and that the proposal was financially motivated.
106. As to Ms Ward's third and fourth points I agree with Mr Oldham's submission that the Defendant was entitled to accept that a proportion of service users would not return to the routine of attending facilities in the same way that they had before the pandemic and the non-receipt of the Claimant's postal survey response does not demonstrate a fault with the Defendant's consultation procedure. In any event neither of those matters would be sufficiently serious as to render the consultation, when looked at as a whole, unfair.

*Ground 2: relevant considerations not taken into account*

Submissions

107. Through Ground 2 the Claimant alleges that the Defendant failed to have regard to relevant considerations. The actual needs of current service users were not considered: the Defendant was undertaking a procurement process for such an assessment and accordingly did not even have funds in place for such a needs' assessment. The Defendant relied on *R (Robson) v Salford City Council* [2015] PTSR 1349, where the Court of Appeal had upheld the judge's decision to dismiss the challenge that a "local authority [had] acted unlawfully in failing to undertake full individual community care assessments before making a decision to terminate [a Passenger Transport Unit ("PTU")] service". Ms Ward sought to distinguish *Robson* on the grounds that the Defendant had failed to have regard even to an estimated costs saving which would be achieved through the closure of the services; *Robson* concerned a transport and not a care service; and individual transport assessments had been carried out. The Defendant had acknowledged that a reassessment of care needs was necessary but it did not have up to date information about care needs. Therefore, it could not rationally decide that that information was not necessary in order to inform the Decision, either in terms of the financial assessment or by reference to whether it could meet its statutory duties. There was no analysis of alternative local services or their capacity to take further users. This was underscored by the fact that many of the services suggested as alternatives to



MB were unsuitable. The CASS guidance and National Disability Strategy (“NDS”) were not adequately considered. The NDS was said to be relevant to a decision to remove a valued service from disabled people, which enables them to feel more supported and less lonely.

108. The Defendant conceded that an individual’s preferences must be taken into account in determining a person’s needs and how to meet them. Mr Oldham’s submission was that the Defendant had taken them into account: the change to a new model of provision was based on this principle. The Decision did not determine the provision to be made for any particular person. Such decisions would be made “downstream” once the new model was adopted, after assessment of people’s needs and wishes. An allegation that there was a failure to take individual preferences into account could be properly directed only to a decision at that individual level. Mr Oldham relied on *R (Friends of the Earth) v Secretary of State for Transport* [2021] PTSR 190 at [119]: the omission has to be so obviously material that it was irrational to leave it out. He also relied on authorities such as *R (oAo Suppiah and others) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin) concerning high level decisions by an authority which created a risk of unlawful outcomes downstream. Those submissions did not engage with the way in which Ms Ward advanced her argument on Ground 2. She conceded that the consultation was not susceptible to challenge on this basis. Mr Oldham also relied on *R (JG) v Lancashire CC* [2011] EWHC 2295 (Admin) which concerned a challenge to an authority’s decision to cut its adult care budget. The challenge failed because of flexibility in downstream decisions. The principle of law applied in that case, he submitted, applied *a fortiori* here because, whereas in *JG* there was a fixed budget, in the Defendant’s case its budget was not fixed. Insofar as alternative provision was concerned, Mr Oldham relied on Sections 6 to 10.2 of the Report, which he submitted set out alternative services and costs in “great detail”.
109. As to the CASS guidance, Mr Oldham submitted the thrust of the 2014 Act reforms were to increase flexibility in provision in the market and to move away from a “one size fits all provision”. This is inherently related to personal choice (and resources). He submitted that the failure to refer to guidance was thus an arid point. He further submitted, noting that the Claimant did not allege a breach of the “target duty” under s.5, 2014 Act, that the Claimant was wrong to suggest the Report failed to consider the market.
110. He submitted that the same picture was painted when looking at the Claimant’s criticism of the Defendant for not having regard to the NDS but, unlike the CASS guidance, the NDS is not backed by statutory recognition. There is no duty to have regard to it. Mr Oldham pointed out that the NDS NDSput choice and control for disabled people at the forefront of decision making and one of the purposes of the reforms was to put choice and control into disabled people’s hands.

### Discussion

111. As to Ground 2, there is no principle in law to the effect that before a local authority changes the way it delivers services provided to many people it has to assess the needs of each service user and match those needs to available alternative service providers. As Mr Oldham submitted, local authorities are constantly taking decisions which affect very large numbers of people. They would be prevented from taking any such decision if every time they did so they had to consult many – perhaps hundreds or thousands of

- people. Mr Oldham considered this argument through the lens of a local authority setting its overall annual budget. Such a decision will include estimating how much to spend on such functions as social services, housing and education. The authority is not required to assess all affected service users before doing so.

112. In *Robson* the Claimants challenged the decision to close the PTU service on grounds including that the council had acted unlawfully in failing to undertake full individual community care assessments before making the decision to terminate the PTU service; and that the consultation carried out prior to the decision was unlawful. The judge, with whom the Court of Appeal agreed, held that the Claimants could only succeed on these grounds if they could show that either the assessment process was so seriously deficient that no rational local authority could have proceeded to take the high level decision it did on the basis of the evidence base that existed; or that, on the evidence before it when taking the decision, no rational local authority could have concluded that it would be able to comply with its s.2(1)(d), Chronically Sick and Disabled Persons Act 1970 (“CSDPA”) obligations. S.2(1)(d) prescribed the duty of a local authority to provide facilities to disabled people to assist in travelling to and from home to take part in any services provided for disabled people in the community. On appeal it was not contended that there was any breach of the s.2 obligations. The Claimants had produced some evidence from which there might have been some basis to criticise the individual assessments and/or the individual conclusions as to suitable alternative travel arrangements. Further, the Claimants might have been able to point to some areas of concern in relation to the implementation of the new arrangements. That was very far indeed from what they needed to establish to make their challenge to the high-level decision. If one of the affected transport users had been able to show that, in the event that the Defendant shut down or downsized the PTU it would be unable to make arrangements for a safe, suitable alternative means of transport for one or more eligible adults thereafter, then it would be open to such person(s) to bring a legal challenge on that basis and, if necessary, to seek and obtain urgent interim relief.
113. In the Claimant’s case, the Defendant has a duty under s.5, 2014 Act to promote the efficient and effective operation of a market in services for meeting care and support needs with a view to ensuring that any person in its area wishing to access services in the market has a variety of providers services to choose from who provide a variety of services; has a variety of high quality services to choose from; and has sufficient information to make an informed decision about how to meet the needs in question. The statutory duty of the local authority in this case is thus of a different nature to that in the *Robson* case. It engages with a local authority’s duty vis-à-vis the care and support market, rather than individual needs. As in *Robson* in the Court of Appeal, where it was no longer contended that there had been a breach of s.2, CSDPA, Ms Ward does not allege any breach of s.5. As with *Robson* it would be open to individuals in the position of the Claimant who were unhappy with their new day care arrangements to challenge those arrangements by way of separate claims for judicial review. The Claimant has expressed through MB concerns about the building and surroundings of The Light UK. It is appropriate in my judgment to apply the principles of *Robson* to the facts of this case. MB’s concerns do not demonstrate that a failure to consider individual assessments or to ensure that individuals’ needs would be met by available alternative service providers were matters which caused the high-level decision concerning the closures of services to be so seriously deficient that no rational local authority could have proceeded to take that decision on the basis of the evidence base that existed.

114. When one looks at the aspects of the CASS guidance which were considered in the Report together with the objective of the suggestions in the Report to put choice and control for disabled people at the forefront of decision making, the failure further to consider the CASS guidance and/or expressly to mention the NDS did not render the Defendant's decision unlawful. I address the particular aspects of the CASS guidance which the Claimant asserts the Defendant should have taken into consideration as follows. First, the Defendant did take individual preferences into account in determining persons' needs and how to meet them. As Mr Oldham submitted the Decision did not purport to determine the needs of individual service users: that would occur "downstream", i.e., after the Decision had been made, as new services were provided following the reinstatement of services after the Covid-19 closures. Second, the duty to promote the efficient and effective operation of the market for adult care under s.5, 2014 Act was not ignored. That duty underpinned the Decision. Further, as I have stated, there is no claim of a breach of s.5. There was a full, or if not, certainly adequate, analysis of the financial implications. In my judgment the assertion that an absence of reference to this aspect of the CASS Guidance rendered the Decision unlawful is unsustainable.

*Ground 3: failure to assess the Claimant's needs under the Care Act 2014*

Submissions

115. Through Ground 3 the Claimant submits that by s.9, 2014 Act the Defendant is required to conduct an assessment of the Claimant's needs for care and support. By s.18 the Defendant owes the Claimant a duty to meet his eligible needs. This ground proceeded on the basis that there was no evidence that the Defendant had assessed the Claimant's eligible needs and no evidence of what his needs were or how they should be met.
116. Through Ms Ward's skeleton argument, she submitted that the Defendant was not providing the Claimant with suitably adapted facilities through, or structured activity at, The Light UK. Therefore, the Claimant's needs were not being met.
117. Ms Ward submitted that the Defendant belatedly providing the 10 December 2021 assessment after the Claimant had been placed at The Light UK did not undermine her submissions under Ground 3: the Defendant had erred in assuming that as long as the Claimant was getting out of the house and socialising, his needs would be met.
118. Ms Ward advanced the argument orally that the Claimant's needs had previously been assessed in the context of the provision at Priors. That provision cannot be fully accommodated at The Light UK. That is a direct consequence of the Decision and underscores that the Defendant unlawfully failed to take matters into account.
119. The Defendant's stance is that the claim is new and unpleaded, and even had there been an application to amend it would constitute a "rolling" judicial review claim, of the sort deprecated in *R (Dolan and other) v Secretary of State for Health and Social Care and another* [2020] EWCA Civ 1605; see [101]; see also *R (Talpada) v SSHD* [2018] EWCA Civ 841 at [67] to [69]. In *Dolan* there had been a challenge through amendment to the claim, so the observations there apply *a fortiori* to this case. Mr Oldham further attacks Ground 3 on the basis that the challenged decision is the decision to close Priors whereas the focus of Ground 3 is the assessment of the Claimant's needs or how to meet them: it is clearly wrong to argue that the Decision, which was to reorganise the entirety of a

service, was rendered unlawful because of a decision taken months afterwards about the appropriateness of the placement given to a particular individual. He further submits that the complaint is without foundation: there had been an assessment of the Claimant's needs in the 16 April 2020 assessment and the Claimant cannot point to any part of the assessment which suggests that the Defendant could not rationally determine that The Light UK was an appropriate placement for the Claimant. Mr Oldham relies on the recorded view of MB that she would like the Claimant to continue attending The Light UK and the evidence of Ms Maganji to the effect that the staff at The Light UK opined that they were able to meet the Claimant's needs. MB's views need to be contextualised given the options available to the Claimant at the time she expressed those views.

### Discussion

120. I agree with Mr Oldham's analysis of the position in law. The Claimant's argument has mutated from a challenge that no care needs assessment had been undertaken into a challenge to the care provision at The Light UK. Such a challenge constitutes the impugning of the downstream decision as characterised by Mr Oldham in his analysis of Ground 2 and is not capable of impugning the decision under challenge.

### *Conclusion*

121. For the reasons set out above I find in the Defendant's favour and dismiss the Claim.
122. The conclusions I have reached in relation to the substantive grounds for judicial review mean that I do not need to consider issues such as undue delay, whether it is highly likely that the outcome for the Claimant would not have been substantially different, and relief generally. It may assist the parties to know that had I ruled in favour of the Claimant I would have granted declaratory relief, but I would have declined to quash the Decision and to direct that the Defendant undertake a fresh consultation exercise before making the decision afresh. Having considered Mr Gadsby's evidence with care, it would not have been proportionate given the steps taken by the Defendant to dispose of Priors.
123. The Court acknowledges that the Court's decision will not be that for which the Claimant had hoped and has great sympathy for the Claimant, MB and their family, but judicial review is a means of challenging an administrative action by a public body where that action is unlawful and in my judgment the consultation was not unlawful. I recognise the very significant benefit which the Claimant, MB and their family derived from the Claimant attending Priors over many years and from his establishing important relationships there. I add that MB is to be commended for the integrity and restraint with which she has participated in these proceedings and for the way in which she has supported her brother.