LONDON BOROUGH OF HARINGEY

THE LONDON BOROUGH OF HARINGEY (HIGH ROAD WEST PHASE A) COMPULSORY PURCHASE ORDER 2023

NOTE ON SECTION 3 LOCAL GOVERNMENT ACT 1999 IN RESPONSE TO OBJECTION 09 (ADRIAN SHERBANOV)

1. In paragraph 1 of his Statement of Case (CD9.31), Mr Sherbanov argues that the Acquiring Authority, Haringey Borough Council **[AA]**, is in breach of its duty under section 3 of the Local Government Act 1999 **[LGA]** for failing to consult with private tenants residing on the Love Lane Estate about the AA's proposal to redevelop the Estate under the wider High Road West Regeneration Scheme in advance of making the CPO.

2. Peter O'Brien responds to that argument in paragraphs 5.2 to 5.5 of his rebuttal proof of evidence (CD10.1) in point of fact. Mr O'Brien's evidence is that Mr Sherbanov is incorrect in his assertion that the AA has failed to consult with private tenants on the Estate about the AA's proposals to redevelop the Estate under the High Road West Regeneration Scheme. On the basis of Mr O'Brien's evidence, there is no merit in Mr Sherbanov's argument that the AA has failed to discharge a duty to consult under section 3 of the LGA in advance of deciding to make the CPO.

3. Nevertheless, it is submitted on behalf of the AA that Mr Sherbanov's argument, i.e. that section 3 of the LGA imposed a duty on the AA to consult private tenants on the Estate in relation to its proposals to redevelop the Estate and to invoke its compulsory purchase powers under section 226(1)(a) of the Town and Country Planning Act 1990 **[TCPA]** in order to facilitate those redevelopment proposals, is wrong in law.

4. Section 3(1) of the LGA imposes the following duty on a "best value authority" –

> *(1) A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.*

5. Section 3(2) of the LGA imposes the following duty to consult in relation to the fulfilment of that duty –

> *(2) For the purpose of deciding how to fulfil the duty arising under subsection (1) an authority must consult—*
>
> *(a) representatives of persons liable to pay any tax, precept or levy to or in respect of the authority,*
>
> *(b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions,*
>
> *(c) representatives of persons who use or are likely to use services provided by the authority, and*
>
> *(d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.*
>
> *(3) For the purposes of subsection (2) "representatives" in relation to a group of persons means persons who appear to the authority to be representative of that group.*

6. Haringey Borough Council is a "best value authority" for the purposes of section 3 of the LGA.

7. It is clear from the language of section 3(1) of the LGA that the duty imposed on best value authorities is concerned with the <u>way</u> in which they exercise their functions. The legislative purpose is that best value authorities should explore how they might carry out their functions in a more economic, efficient and effective manner.

8. The duty to consult imposed by section 3(2) of the LGA is directed to that inquiry. In other words, best value authorities are required to consult the local representative bodies identified in section 3(2) on the means whereby those authorities may achieve more economic, efficient and effective delivery of their functions.

9. In *R (Nash) v Barnet London Borough Council* [2013] EWHC 1067 (Admin) at [69], Underhill LJ considered the nature of the "best value duty" enacted by section 3 of the LGA as follows –

> *"69. I would analyse it as follows:*
>
> *(1) The core subject-matter is "the way in which" the authority's functions are exercised. That is very general language. It could in a different context cover almost any choice about anything that the authority does. But in this context it seems to me clear that it connotes high-level choices about how, as a matter of principle and approach, an authority goes about performing its functions. ….*

(2) The duty is aimed at securing "improvements" in the way in which the authority's functions are exercised. That inevitably means change, where the authority judges that change would be for the better having regard to the specified criteria.

(3) The actual duty is not formulated as a duty to secure improvements simpliciter but as a duty to "make arrangements" to do so. I am not sure why this formula was adopted. I do not think that the draftsman was concerned with administrative "arrangements". It may have been thought that to impose a duty simply "to secure improvements" would expose authorities to legal challenges from those who contended that particular decisions were for the worse, or that authorities were wrong in failing to take particular steps which it was asserted would make things better: the reference to "making arrangements" would make it clear that the duty was concerned with intentions rather than outcome. It may also be that the draftsman wanted to emphasise the need to build the fulfilment of the best value duty into authorities' plans and procedures. Or perhaps it is just circumlocution. But, whatever the explanation, the important point for present purposes is what the arrangements are aimed at, namely securing improvements in the way in which authorities perform their functions.

….”

10. At [75] , Underhill LJ said –

“75. I do not believe that the view which I have taken would put authorities under any unreasonable burden. The statutory language leaves them with a very broad discretion as to how to satisfy the obligations under section 3, as indeed it appears that the Government intended. I would make four particular points:

(1) I fully accept that it cannot have been the statutory intention that every time that an authority makes a particular operational decision, by way of outsourcing or otherwise, it is required by section 3 to consult about that decision simply because that could be said to be part of "the way in which" it performs its functions. As I have said above, in this context that phrase connotes high-level issues concerning the approach to the performance of an authority's functions, and it is about those and not about particular implementation that consultation is required.
….”

11. Underhill LJ’s analysis of the best value duty enacted by section 3 of the LGA (paragraphs 9 and 10 above) was followed on appeal: see *R (Nash) v Barnet London Borough Council* [2013] EWCA Civ 1004. At [51], the Court of Appeal said that the duty to consult under section 3(2) of the LGA was concerned with *“questions of policy and approach, not specific operational matters. That indeed accords with the wide language, and underlying purpose, of s.3 of the 1999 Act”*.

12. Underhill LJ's analysis points strongly against the contention that the best value duty under section 3 of the LGA is engaged by a decision by the AA to exercise its powers under section 226(1)(a) of the TCPA to make the CPO to facilitate the redevelopment of the Love Lane Estate and other land included within the Order Lands. The decision to make the CPO for that purpose did not involve a *"high-level choice about how, as a matter of principle and approach,"* Haringey goes about performing its functions as AA. Nor is it realistic to suggest that a decision to exercise the power conferred by section 226(1)(a) of the TCPA provides any scope for reviewing the arrangements whereby Haringey acting as AA carries out that function. On the contrary, the procedures under which an AA makes a compulsory purchase order under section 226(1)(a) of the TCPA are themselves set out in the TCPA itself and in the detailed guidance issued by the Secretary of State (CD5.1). As Underhill LJ said in [75] of *R (Nash) v Barnet London Borough Council* [2013] EWHC 1067 (Admin), in the context of section 3 of the LGA the phrase *"the way in which"* a best value authority exercises its functions connotes high-level issues concerning the approach to the performance of an authority's functions. It is about those high-level issues and *"not about particular implementation"* that consultation is required.

13. Applying that approach to the scope of application of the best value duty under section 3 of the 1999 Act, Mr Sherbanov's reliance on it is misplaced. His argument is necessarily concerned with *"particular implementation"*, as he seeks to invoke the best value duty in objecting to a particular decision by Haringey as AA to exercise its powers under section 226(1)(a) of the TCPA, i.e. to make the CPO. At the stage of deciding whether to exercise that power, Haringey's duty as best value authority under section 3 of the LGA was simply not engaged. It follows that section 3(2) of the LGA imposed no duty on Haringey as AA to consult with representative bodies in anticipation of Cabinet's decision to make the CPO on 8th November 2022 (CD2.8).

Timothy Mould KC

Heather Sargent

Landmark Chambers

21st November 2023

Neutral Citation Number: [2013] EWHC 1067 (Admin)

Case No: C0/219/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 29/04/2013

Before :

LORD JUSTICE UNDERHILL

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Between :

THE QUEEN ON THE APPLICATION OF MARIA STELLA NASH	**Claimant**
- and -	
BARNET LONDON BOROUGH COUNCIL	**Defendant**
-and-	
CAPITA PLC, EC HARRIS LLP, CAPITA SYMONDS	**Interested Parties**

- - - - - - - - - - - - - - - - - - - -
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Mr Nigel Giffin QC and Mr David Gollancz (instructed by **Steel & Shamash**) for the **Claimant**
Ms Monica Carss-Frisk QC and Mr Iain Steele (instructed by **Trowers & Hamlins LLP**) for the Defendant

Hearing dates: 19, 20 & 21 March 2013

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Judgment

Lord Justice Underhill :

INTRODUCTION

1. The Claimant is a resident of the London Borough of Barnet. By these proceedings, which were commenced on 10 January 2013, she seeks to challenge the lawfulness of one decision and one "impending decision" by the Council to outsource[1] to private- sector organisations a high proportion of its functions and services. The decisions in question are:

> (1) a decision made by the Council's Cabinet on 6 December 2012 to award a contract to Capita Plc, the First Interested Party, to provide a "New Support and Customer Service Organisation" ("the NSCSO contract"); and
>
> (2) a decision which would, but for these proceedings, have been taken by the Cabinet on 31 January 2013 to award a contract to either Capita Symonds Ltd or EC Harris LLP, the Second and Third Interested Parties, to provide development and regulatory services ("the DRS contract").

No step has been taken to implement the first decision pending the outcome of these proceedings. Although the Council has deferred the second decision I will in the interests of simplicity refer to it as an actual decision.

2. The functions and services which the Council proposes to outsource are wide-ranging: I give more details below. The proposals have been controversial locally and have also attracted some publicity at national level. Opponents such as the Claimant are concerned that if they are implemented they will lead to a serious deterioration in the Council's services, partly (though not only) because they believe that private-sector organisations cannot evince the public service ethos which is so important in the delivery of the Council's service. It is not, however, for the Court to decide whether those fears are justified. The decisions can only be challenged on the basis that the Council has not acted in accordance with its legal obligations. As to that, the Claimant advances three grounds of challenge. Again, I give more details below, but in headline terms they are as follows:

> (1) Consultation: It is said that the Council did not comply with statutory and other consultation obligations relating to the decisions.
>
> (2) Public Sector Equality Duty: The Council is said to have failed in reaching the decisions to have due regard to the considerations specified in section 149 of the Equality Act 2010.
>
> (3) Fiduciary Duty: It is said that if the Council enters into the proposed contracts it will be in breach of its "fiduciary duty" to council tax payers.
>
> (A fourth ground, based on an alleged breach of the Public Contracts Regulations 2006, is

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[1] I use the term "outsource" in this judgment as a convenient shorthand for any arrangement by which a public authority provides for parts of its functions to be performed by others. Such arrangements can of course take many different forms: in particular, they can involve other public or "third sector" organisations as well as the private sector, and they can take the form of a joint venture as well as the outright passing of the function to others. But these distinctions are not important to the issues which I have to decide. I will also follow the preferred usage of local authorities, though arguably it is not very apt, of describing the other party to an outsourcing arrangement as a "partner".

not now pursued.)

3. On 21 January 2013 Ms Elisabeth Laing QC, sitting as a deputy High Court Judge, directed an urgent rolled-up hearing, and the matter has come before me on that basis. The Claimant has been represented by Mr Nigel Giffin QC, leading Mr David Gollancz, and the Council has been represented by Ms Monica Carss-Frisk QC, leading Mr Iain Steele. The Interested Parties have not participated. The submissions of both teams of counsel, both oral and in writing, have been of very high quality.

4. The nature of the evidence before me can be summarised, in broad outline, as follows:

(1) Two witness statements were originally lodged in support of the claim, from the Claimant and from Mr Gerald Shamash of her solicitors, Steel & Shamash. The Claimant is seriously disabled. Her statement describes the extent of her dependence on Council services and her fears about the adverse impact of the proposed outsourcing. She describes herself as a local activist and says that neither she nor any of the various organisations of which she is a member or with whom she has contact has been consulted about the proposals. Mr Shamash deals with matters of law and background outside the scope of the Claimant's statement.

(2) The Council lodged with its Acknowledgment of Service two witness statements from its Commercial Director, Mr Craig Cooper. One sets out at considerable length the history leading to the taking of the impugned decisions, exhibiting the relevant documentation which occupies six lever-arch files, and addressing some of the criticisms made by the Claimant and Mr Shamash. I am bound to say that I did not find this statement very helpfully structured or written. The other summarises the effect of the proposed contracts and exhibits the most recent drafts. By agreement this second statement and the exhibits have been subject to a "confidentiality ring"; and it has not in the end been necessary to refer to them for the purpose of my decision.

(3) The Council also lodged a witness statement from Ms Helen Randall, a partner of Trowers & Hamlins LLP, who has been advising it in connection with the proposed contracts and who represents it in these proceedings. She has substantial experience in the outsourcing of local authority functions and services, and her statement is essentially directed at explaining the national policy background, the outsourcing models commonly used and the role of consultation.

(4) The Claimant has lodged a further round of witness statements in response. These include second witness statements from herself and Mr Shamash, and a third from Mr Shamash dealing specifically with the confidential material in Mr Cooper's second witness statement. There are also witness statements from two other local activists, Mr John Dix and Ms Barbara Jacobson, dealing with aspects of the consultation issue.

(5) The Council has in turn lodged a second witness statement from Ms Randall and a third from Mr Cooper, responding to the Claimant's second round of evidence.

Although this evidence has been helpful in giving me a background to the issues, much of it has turned out in the end to be irrelevant to the comparatively narrow issues which I have to decide.

5. Another resident of Barnet, Ms Susan Sullivan, by her father and litigation friend John Sullivan, was proposing to bring similar proceedings. Those have not been proceeded with in the light of the issue of the present proceedings. However an application was made on behalf of Ms Sullivan to intervene in the present proceedings to the extent of filing evidence, pursuant to CPR

54.17, in the form of witness statements from Mr Sullivan and her solicitor. I granted that application, and the statements in question have formed part of the evidence which I have taken into account. There is an ancillary question arising out of Ms Sullivan's intended claim to which I will return at the end of this judgment.

THE DECISION-TAKING PROCESS

6. In this section I will set out the procedures by which the Council reached the impugned decisions, together with some other related formal steps. I will deal with the other facts, so far as necessary, in the context of the particular issues to which they are relevant.

7. On 6 May 2008 the Council's Cabinet resolved:

> "that the Chief Executive be authorised to lead a review of the organisational form of the Council and to report back to Cabinet with options for change by December 2008".

This became known as the "Future Shape" programme.

8. On 3 December 2008 the Leader presented a report to Cabinet headed "Future Shape of the Council". The essential message of the report, at least so far as concerns the present proceedings, is sufficiently represented by para. 9.3, which is headed "The Role of the Council in Future". Para. 9.3.1 reads, so far as material:

> "In order [to] maximise the value to citizens of Barnet's public services, the Council should focus its energy on the activities where it alone can add value. It should therefore enable other organisations to do those things that they can do as well or better than the Council. Fundamentally, the Council should conduct those activities that only the Council can. This implies a number of principles on which to base the future shape of the organisation:
>
> 1. ....
>
> 2. **The future Council should be strategic rather than operational**, focused on convening and working with its partners to prioritise and commission the public services that should be provided in the borough, rather than delivering services itself.
>
> 3.- 6. ..."

(The emphases are in the original.) The Cabinet resolved:

> "that the proposal for officers to develop a detailed assessment of the overall model for public service commissioning, design and delivery be agreed."

The process of developing that assessment came to be referred to as "phase II" of Future Shape.

9. On 21 October 2009 the Leader submitted to Cabinet his formal report on phase II of Future Shape. One of its recommendations was the creation of a "Customer Services Organisation" consolidating all "access functions" of the Council. The report noted that:

> "The background paper to this report sets out a high-level options analysis for how we might achieve the development of a customer services

organisation. There are three options:

- Council remains the main delivery vehicle;
- Co-ownership model (Employees, Customers, Members are the major shareholders);
- Joint Venture/Outsourcing.

Work on deciding which option to pursue will be undertaken as part of the Future Shape implementation process."

The Cabinet accepted the recommendation to proceed with that process.

10. On 29 November 2010 the Cabinet considered a report from the Cabinet Member for Customer Access and Partnerships entitled "One Barnet Framework". The terms "One Barnet", "One Barnet Framework" and "One Barnet Programme" are all used in the report and in subsequent documents generated by the Council, and it is not clear whether they are wholly interchangeable; but it is in any event common ground that a number of different projects and programmes came to be referred to under the umbrella label term "One Barnet". Part at least of One Barnet was, in effect, a relabelling of the Future Shape programme (as indeed the report expressly acknowledges); and the document entitled "One Barnet Framework" which is attached to the report contemplates, among other things, that the Council will be proceeding with "working with partners"; i.e. outsourcing. The Cabinet resolved to approve "the One Barnet Programme Framework".

11. At the same meeting there was a report from the Cabinet Member for Housing Planning and Regeneration headed "Development and Regulatory Services Project: Initiation of Procurement". This recorded that, as part of the Future Shape programme, consideration had been given by "the One Barnet Transact Group" to whether "a cluster of services deemed to fall outside the core competences of the Council" could be provided differently than under "the current model of service provision"; and that various options for such alternative service provision had been appraised. The conclusion of the report was that the Council should:

"... bring together the following functions into an environmental management, regulatory and design function, and seek a partnership with the private sector:

Planning, Housing and Regeneration

- Building Control and Structures (including Street Naming & numbering)
- Planning (Development Management)
- Strategic Planning
- Regeneration
- Land Charges
- Environmental Health (Residential and Commercial sectors)

- Cemetery & Crematorium.

Corporate Services

- Registration of Births, Marriages and Deaths

Environment and Operations

- Trading Standards & Licensing
- Highways Network Management
- Highways Traffic & Development
- Highways Strategy
- Transport & Regeneration."

The Cabinet resolved:

> "That the Commercial Director be authorised to commence the procurement process to identify a strategic partner for the delivery of the Development and Regulatory Services project."

This decision constitutes the formal beginning of the process leading to the DRS decision which is under challenge in these proceedings.

12. The procurement process for a strategic partner fell within the terms of the Public Contracts Regulations 2006 and accordingly required publication of a notice in the Official Journal of the European Union. An OJEU notice for the DRS contract was duly published on 19 March 2011.

13. On 2 March 2011 the Cabinet Resources Committee considered a report entitled "Customer Services Organisation and New Support Organisation: Options Appraisal". This attached a document entitled "Options Appraisal for Customer Service Organisation and New Support Organisation". The Customer Services Organisation ("CSO"), as already referred to (see para. 9 above), was intended "to bring together customer-facing staff from across the Council" into a single organisation. The New Support Organisation ("NSO") was concerned with the back-office functions of the Council. The appraisal gave scores in relation to both the CSO and each of the backoffice functions which were "in scope" for the NSO, for each of three options for their future organisation, namely "in-house", "public sector partnership" and "private sector partnership": the third option was itself divided into three, namely "strategic partnership", "incremental partnership" and "private sector joint venture". On the basis of the scores shown on that evaluation the report recommended:

> "1.1 That the Director of Commercial Services be authorised to produce a business case for the following:
>
> a. The procurement of a private sector partner(s) to deliver the following services - Customer Services, Estates, Finance, Human Resources, Information Services, Procurement, Revenues and Benefits.

b-d. ....

1.2 That the details of business case 1.1(a) be referred to and considered by a future meeting of Cabinet Resources Committee.

1.3 That the Director of Commercial Services be authorised to initiate the procurement of a private sector partner(s) to deliver the following services:

- Customer Services, Estates, Finance, Human Resources, Information Services, Procurement, Revenues and Benefits

1.4 That this procurement process will only proceed into the dialogue phase once the business case identified in 1.1(a) above be approved by Cabinet Resources Committee."

The recommendation was accepted. This decision constitutes the formal beginning of the process leading to the NSCSO decision which is under challenge in these proceedings.

14. Again, the procurement of a private-sector partner required the publication of an OJEU notice, which was duly published on 21 June 2011.

15. On 29 June 2011, as required by recommendation 1.2 as set out at para. 13 above, the Cabinet Resources Committee considered a detailed business case for what was now called the "New Support & Customer Services Project". The case was set out under cover of a report from the Cabinet Member for Resources and Performance and the Cabinet Member for Customer Access and Partnerships. The relevant minute reads as follows:

"*New Support and Customer Services Organisation Business*

Case

For the reasons set out in the Cabinet Member's report, and having given due regard to the statutory Public Sector Equality Duty and the outcomes of equality impact assessments referred to within the report, the Committee

RESOLVED -

(1) That the committee approves the New Support and Customer Services Business Case in order that the council can begin the competitive dialogue process, following the previously approved placing of the OJEU notice.

(2) That the authority to award contract remains with the Cabinet Resources Committee.

(3) That the committee give due regard to the statutory equality duties under the Equality Act 2010 and the outcomes of the equality impact assessments referred to in this report."

16. The applicable public procurement procedures ran their course. In both cases the Council adopted the competitive dialogue procedure. Although the NSCSO process had started somewhat later it came to fruition sooner. Final tenders were received from two bidders, BT and Capita, and

the outcome of the evaluation in accordance with the published criteria was in favour of Capita as the preferred bidder.

17. On 6 December 2012 the Deputy Leader of the Council presented a report to the Cabinet entitled "New Support & Customer Service Organisation: Recommendation for Preferred and Reserved Bidder and Full Business Case". The report annexed a Full Business Case and Equalities Impact Assessment. Section 9 of the report summarises the benefits, based on the Full Business Case, of accepting Capita's final tender and recommends that it be "taken forward to contract signature as the preferred bid". The Cabinet is reminded that it has the option not to proceed with the procurement process, but the disadvantages of that course are set out. The Cabinet approved the recommendation. The formal resolution reads (so far as material) as follows:

> "1 That Cabinet note the outcome of the evaluation stage of the New Support and Customer Service Organisation (NSCSO) Project and accept Capita's Final Tender as the preferred bid, with reference to the Full Business Case . ,
>
> Equalities Impact Assessments ..., List of Principal Legislation ., and Evaluation Scores ... .
>
> 2 That Cabinet approve the appointment of the recommended reserve bidder.
>
> 3 That Cabinet delegate contract completion and signature (and ancillary documentation) finalisation and execution to the [Chief Financial Officer] ...
>
> 4-5 ...."

18. By the date of the issue of these proceedings the procurement process in relation to the proposed DRS contract had not been concluded. Following the competitive dialogue stage, there were, as noted above, two shortlisted bidders, Capita Symonds and EC Harris, and a decision was due to be made on 31 January this year.

19. In summary, if both contracts proceed, the Council will have outsourced:

(a) the new customer services organisation, which will represent the interface between it and its citizens and other users of its services;

(b) the following back-office functions - estates; finance; human resources; information services; procurement; project management; and revenue and benefits; and

(c) a number of environment management, regulatory and design functions, itemised in para. 11 above, including but limited to: planning; building control; environmental health; trading standards; and highways[2].

The minimum duration of the two contracts is ten years.

20. The Claimant asserts that outsourcing on this scale is extraordinary, involving "the

[2] The original intention to include registration of births marriages and deaths within the DRS contract was not pursued.

wholesale export of the Council's core functions". She also contends that it is in practice irreversible. She cites references in the Council's own documentation to a "major and unprecedented transformation". The Council denies that what it is doing is in any way unique and Ms Randall in her witness statement points to the long history of outsourcing of local government services and functions, with the encouragement of successive governments, over the last three decades. I need not enter on this debate save to say that this is on any view outsourcing on a very large scale.

THE ISSUES

21. I have identified at para. 2 above the Claimant's three heads of challenge to the impugned decisions. The Council denies that it has acted unlawfully in any of the ways alleged. But its primary contention is that the claim, or most of it, is in any event grossly out of time. I should consider the time point first, since it goes to whether I should grant permission; but it is not in fact practicable to do so without a rather fuller outline of the nature of the claims, and the Council's answer, under each of the three heads. I take them in turn.

(1) Consultation

22. It is the Claimant's primary case that the proposals to enter into the outsourcing arrangements in question attracted the consultation obligations imposed by section 3(1) of the Local Government Act 1999 (which I set out at para. 61 below). She has a secondary case based on alleged promises of consultation made by the Council. She says that what that duty entailed in the circumstances of the present case was that the Council should conduct a "Gunning-compliant"[3] consultation specifically about these proposals. Mr Giffin contended that the Council should have initiated such consultation prior to, as regards the DRS contract, the Cabinet decision of 29 November 2010, and, as regards the NSCSO contract, the Cabinet Resources Committee decision of 2 March 2011 (or in any event the decision of 29 June 2011) - see paras. 10, 13 and 15 above: I refer to those decisions as "the 2010/2011 decisions". (I should note, however, that he emphasised, for reasons which will become apparent, that since the 2010/2011 decisions did not in any way irrevocably bind the Council it could still in principle have initiated consultation at any point up to the placing of the contracts - albeit that the later it left it the more difficult it might be to demonstrate that the consultation was genuine.)

23. The Council, in its case as elucidated in Ms Carss-Frisk's oral submissions, accepts that it has not at any stage conducted a consultation exercise directed specifically to the outsourcing proposals with which these proceedings are concerned. But it denies that it was under any obligation to do so. It contends that the requirements of section

3 (2) of the 1999 Act are sufficiently satisfied by the general consultation exercises which it carried out from time to time to ascertain the views of residents and other users of Council services, and particularly those conducted annually in connection with the preparation of the Budget and Medium Term Financial Strategy ("the MTFS") - in the present case the relevant budgets are those for 2010/11 (agreed on 2 March 2010) and 2011/12 (agreed on 14 February 2011)[4].

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[3] See R v North and East Devon Health Authority, ex p. Coughlan [2001] QB 213, at para. 108 (p. 258).

[4] It had initially appeared from Mr Cooper's evidence that the Council intended to rely on miscellaneous residents' forums and other such events where residents and others have the chance to raise questions with, or express views to, councillors. But they appeared to be of no real relevance to the issue of outsourcing and Ms Carss-Frisk in her oral submissions focused on these

(2) Public Sector Equality Duty

24. I need not at this stage rehearse the requirements of section 149 of the 2010 Act: I set out the relevant parts at para 78 below. The various reports referred to at paras. 7-15 above acknowledge the need to conduct an equality impact assessment ("EIA") in order to ensure (and demonstrate) compliance with the statutory requirements in relation to the outsourcing proposals. As regards the NSCSO, the report to Cabinet on 29 November 2010 indicated that EIAs "will be included in the business cases for each project". In the event, however, an EIA was only carried out for the NSCSO project at a significantly later stage, namely in connection with the assessment of Capita's bid, following its success in the evaluation process, and it is first published, as noted above, as an appendix to the report produced for the Cabinet meeting of 6 December 2012. As for [3] the DRS contract, no EIA has apparently yet been carried out: presumably the intention is to do so once a preferred bidder has been chosen, as with the NSCSO contract.

25. The Claimant's case on those facts is twofold:

> (1) She contends that to perform EIAs at so late a stage cannot constitute compliance with the public sector equality duty. The Council was obliged to have due regard to the matters specified in section 149 at the formative stage of its outsourcing policy, or in any event at the stage when it was developing the specifications to be published to tenderers.
>
> (2) She contends in any event, by way of alternative, that the EIA which was eventually submitted in relation to the NSCSO contract demonstrates that the Council had in fact very little information with which to evaluate the impact of the proposed outsourcing on protected groups, and she submits that in those circumstances it could and should have sought to obtain such information by consulting with the representatives of such groups.

26. The Council denies that it was useful or in any event necessary to produce an EIA any earlier than it in fact has (or will). It also denies that it was necessary to seek further information. I need not give further details at this stage.

(3) Breach of fiduciary duty

27. In the NSCSO Options Appraisal (see para. 13 above) the Council avowedly chose between the three options (in-house delivery of the services in question, public-sector partnership and private-sector partnership) by taking a "broad qualitative view on the costs and benefits of each service delivery option". It said that it had not at that stage performed "a detailed analysis of risk": it said that that would "be completed through the development of the business cases". In those circumstances, the Claimant contends, the Council's decision to proceed with outsourcing, particularly on such a scale, was in truth reckless and in breach of the Council's "fiduciary duty" - as to which, see most recently the decision of the Court of Appeal in Charles Terence Estates v Cornwall Council [2013] 1 WLR 466 (and in particular the judgment of Maurice Kay LJ, at paras. 11-17 (pp. 471-4)).

28. Again, I need not give details of the Council's rebuttal at this point. It does not accept that any criticism that might be made of the relevant decisions comes even within striking distance of the rare cases in which a breach of fiduciary duty by a local authority has been found.

29. Having thus outlined the issues, I can turn to consider the question whether the claim is in time.

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two consultation exercises.

IS THE CLAIM IN TIME ?

30. It is the Council's case that, although nominally what the Claimant is challenging in these proceedings is the decisions (actual or impending) to award the NSCSO and DRS contracts to particular partners, in substance her challenge is to the earlier decisions to proceed with the procurement process for the outsourcing of the functions and services in question. As I have said, hose decisions were taken, in relation to the DRS contract, in November 2010, and, in relation to the NSCSO contract, in March 2011 (or possibly - but nothing turns on this - in June 2011); and any challenge to them should have been made at that time. CPR 54.5 requires that in proceedings for judicial review the claim form must be filed promptly "and ... in any event not later than 3 months after the grounds to make the claim first arose". Accordingly, permission to apply for judicial review should be refused.

31. As a fallback the Council would if necessary rely on limb (b) of section 31 (6) of the Senior Courts Act 1981, which reads as follows:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

32. I consider this issue in relation to each of the three grounds of challenge separately.

(1) TIME: THE CLAIM OF FAILURE TO CONSULT

33. Viewing the question as one of principle, and without reference to authority, I would regard the claim based on failure to consult as out of time. In my view it is clear that if the Council was under the duty relied on by the Claimant it should have consulted prior to the decisions taken in 2010/2011 to proceed with outsourcing and to initiate the procurement procedures accordingly; and if it was in breach of that duty that breach crystallised when those decisions were taken without any consultation having occurred. It seems to me, on an ordinary reading of the words of CPR 54.5, that that was when "the grounds to make the claim first arose". Mr Giffin says that there was a continuing breach of the duty, in the sense that at any time before it was finally contractually committed the Council could have decided, however belatedly, to institute consultation and could have reconsidered its decision in the light of that consultation. That may be so, but it does not help: time runs from when the grounds *first* arose.

34. I accept that, in so far as the decision of 6 December 2012 and the impending decision in relation to the DRS contract might involve distinct questions on which there was an obligation to consult which had not been complied with, the Claimant would be in time to complain of that breach. But it seems clear that they do not involve any such questions: whatever the precise scope of the duty to consult, which I discuss at paras. 61-76 below, it can only be concerned with questions of policy and approach and not with such specific operational matters, important though they may be, as the identity of the outsourcing "partner" or the detailed terms of the contract to be entered into.

35. That approach also seems plainly right as a matter of fairness and good administration. In

the year or more following the 2010/2011 decisions the Council has invested, on the evidence of Mr. Cooper, over £4.5m in developing the NSCSO and DRS projects. It has planned and proceeded on the basis that the functions and services in question would be outsourced from 2013/14. That assumption, which was entirely legitimate on the basis of the decisions taken, was built into the MTFS adopted in 2011 and renewed in 2012. Big savings are anticipated from the outsourcing: Mr Cooper quantifies them for the first year at £12.5m from the NSCSO contract and (a minimum of) £1.5m from the DRS contract. Under both contracts the partners are also committed to making very substantial investments (principally, though not only, in IT provision) of which the Council will get the benefit. If the Claimant is permitted at this stage to challenge the outsourcing decisions, and does so successfully, the least that will happen is that the benefits which are anticipated from entering into the contracts will be deferred during the time taken to conduct a proper consultation, which will inevitably cause significant disruption to the Council's finances; and if the result were, as I have to assume is a real possibility, that some or indeed all aspects of the outsourcing did not proceed the disruption to the Council in having to re-think its strategy from the start would be enormous, and the sums invested in developing the proposals would be wasted. I was given no evidence about the resources invested by the Interested Parties, but it is plain that these too will have been very substantial. It is in order to avoid precisely this kind of uncertainty and disruption that CPR 54.5 and its predecessor rule were made.

36. But Mr Giffin submits that that conclusion is not open to me as a matter of authority. He relies on the decision of the House of Lords in R (Burkett) v Hammersmith and Fulham London Borough Council [2002] 1 WLR 1593. In that case a local authority resolved in September 1999 to authorise a designated council official to grant outline planning permission for a development, subject to the conclusion of a section 106 agreement and the decision of the Secretary of State whether to call the decision in. On 6 April 2000 the applicant, Mrs Burkett, sought permission to apply for judicial review of that decision on the basis that the developers' environmental statement was inadequate. Shortly afterwards a section 106 agreement was concluded and the Secretary of State decided not to call the application in; and outline permission was duly granted. Richards J refused permission, on the basis that time ran from the date of the resolution in September 1999 and that the application was accordingly out of time; and his decision was upheld by the Court of Appeal. Both Richards J and the Court of Appeal (see [2001] Env LR 39, at p. 691) quoted with approval an observation by Laws J in R v Secretary of State for Trade and Industry, ex p Greenpeace Ltd [1998] Env LR 415 to the effect that there was:

> "a ... principle, whose nature is not dependent upon an appeal to the rules relating to delay . that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late."

However, the House of Lords allowed Mrs Burkett's appeal on the basis that even if the challenge to the resolution was out of time she would be in time to challenge the subsequent unconditional grant of planning permission.

37. The leading speech in Burkett is that of Lord Steyn. His discussion of the issue, at paras. 36-51 (pp. 1606-10), is lengthy, but it can be summarised for present purposes as follows:

> (1) He defines the critical issue as being "the interpretation and application of the words 'from the date when grounds for the application first arose'" (para. 37). He makes the point, to which he returns later, that CPR 54.5 applies to applications for judicial review generally and not only to challenges to planning decisions, and that "an interpretation is to

be preferred which is capable of applying to the generality of cases" (p. 1605 F-G).

(2) He acknowledges at para. 38 that it is well-established that in appropriate cases judicial review proceedings can be brought to challenge decisions which are "preliminary" and do not in themselves affect legal rights, but are part of a process which may lead to a final decision that does so. Thus he accepts that Mrs Burkett could have challenged the September 1999 resolution if she had done so in time.

(3) However, he says that it does not follow from the fact that Mrs Burkett could have challenged the earlier, preliminary, decision that her time for challenging the subsequent actual grant of planning permission ran from the earlier date (para. 38, at p. 1606 A-B). As a matter of language you could say that distinct "grounds" arose in relation to each decision. And the context suggested that that was the right approach, because "until the actual grant of planning permission the resolution has no legal effect" (para. 39, p. 1606 C-D): he develops that point by pointing out that the September resolution might never have become a final decision for a variety of reasons, including failure to agree the terms of a section 106 agreement or a simple change of mind on the part of the authority (para. 39 - and see also para. 34).

(4) He says that he does not accept that the fact that the same factor - i.e. the inadequacy of the environmental statement - was relied on as vitiating the September resolution and the final grant of approval means that grounds for challenging the latter decision existed at the time of the former (para. 42). He repeats that the resolution was not, unlike the final grant, "a juristic act giving rise to rights and obligations" (p. 1607 C-D). He says, at p. 1607F:

> "For my part the substantive position is straightforward. The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he must apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights."

(5) He observes (para. 42, p. 1607 F-G) that if the position were that a person in Mrs Burkett's position was obliged to challenge a preliminary resolution rather than await the final grant of planning permission that "... would also be in tension with the established principle that judicial review is a remedy of last resort". He develops that point in para. 43 as follows:

> > "If a decision-maker indicates that, subject to hearing further representations, he is provisionally minded to make a decision adverse to a citizen, is it to be said that time runs against the citizen from the moment of the provisional expression of view?
>
> That would plainly not be sensible and would involve waste of time and money. Let me give a more concrete example. A licensing authority expresses a provisional view that a licence should be cancelled but indicates a willingness to hear further argument. The citizen contends that the proposed decision would be unlawful. Surely, a court might as a matter of discretion take the view that it would be premature to apply for judicial review as soon as the provisional decision is announced. And it would certainly be contrary to principle to require the citizen to take such premature legal action. In my view the time limit under the rules of court

would not run from the date of such preliminary decisions in respect of a challenge of the actual decision. If that is so, one is entitled to ask: what is the qualitative difference in town planning ?"

(6) At paras. 43-50 he considers which approach is preferable as a matter of policy. He acknowledges the "need for public bodies to have certainty as to the legal validity of their actions" (para. 44, at p. 1603C), and he refers to the weight given to that factor by the Court of Appeal and by Laws J in Greenpeace. But he believed that there were countervailing policy considerations. In summary:

> (a) Since the effect of CPR 54.5 is potentially to deprive a citizen of the right to challenge an abuse of power, it is important to have "a clear and straightforward interpretation which will yield a readily ascertainable starting date" (para. 45, at p. 1608 F-G).
>
> (b) If, as Laws J had decided in Greenpeace, time was treated as running from the date of the act or decision "which is the real basis of his complaint" - or, as it is put elsewhere, "when the complaint could first reasonably have been made" - that would conduce to complexity and uncertainty (paras. 45-49). It would often be highly debatable when the "real" basis of a complaint had arisen or when it could first reasonably have been made.
>
> (c) It would be unreasonably burdensome to require applicants to incur the very considerable costs of preparing an application for judicial review of a resolution of the kind in question "when the resolution may never take effect" (para. 50).

(7) The relevant part of the speech concludes, at para. 51 (p. 1610):

> "For all these reasons I am satisfied that the words 'from the date when the grounds for the application first arose' refer to the date when the planning permission was granted. In the case before the House time did not run therefore from the resolution of 15 September 1999 but only from the grant of planning permission on 12 May 2000."

38. Lord Slynn was the only other member of the House who addressed the delay issue. He said, at para. 5 (p. 1596):

> "In my opinion, for the reasons given by Lord Steyn, where there is a challenge to the grant itself, time runs from the date of the grant and not from the date of the resolution. It seems to me clear that because someone fails to challenge in time a resolution conditionally authorising the grant of planning permission, that failure does not prevent a challenge to the grant itself if brought in time, i.e. from the date when the planning permission is granted. I realise that this may cause some difficulties in practice, both for local authorities and for developers, but for the grant not to be capable of challenge, because the resolution has not been challenged in time, seems to me wrongly to restrict the right of the citizen to protect his interests. The relevant legislative provisions do not compel such a result nor do principles of administrative law prevent a challenge to the grant even if the grounds

> relied on are broadly the same as those which if brought in time would have been relied on to challenge the resolution."

39. Mr Giffin submitted that the present case was on all fours with Burkett. No doubt the Claimant could have challenged the 2010/2011 decisions, but they were of a preliminary character and did not in themselves create legal rights or obligations. That being so, fresh "grounds for making the claim" arose (or would arise) when the actual decision to authorise the contracts in question was made. It made no difference, any more than it did in Burkett, that the actual ground for challenging the later decision - namely the failure to consult - had existed as the date of the earlier decision.

40. Mr Giffin also sought support from the decision of the Court of Appeal in R (Risk Management Partners Ltd) v Brent London Borough Council [2010] PTSR 349. In that case the defendant authority "resolved in principle" on 9 October 2006 to participate in an indemnity mutual insurance scheme ("LAML") and on 13 November 2006 resolved definitively to do so; it actually joined the LAML on 18 January 2007, but it did not begin to make payments until on, or shortly after 7 March. On 6 June 2007 the Claimant, an insurance company which had tendered for the authority's insurance business, issued proceedings for judicial review on the basis that the authority was not lawfully entitled to enter into the LAML. The authority's contention that the claim was out of time because the claimant could and should have challenged the earlier decisions was rejected at first instance and by the Court of Appeal. Pill LJ, at paras. 145-8 (pp. 392-3), referred to Burkett and said that although the instant case was different "some of the same considerations apply". The essential point in his reasoning was that only after 7 March 2007 were the authority "committed to taking policies from LAML". Similarly, Moore-Bick LJ, at para. 253 (p. 421), held that "it was not until early March that the council finally decided to obtain insurance from LAML rather than the market". Mr Giffin submitted that likewise in the present case there was no actual commitment to the private-sector partners until the impugned decisions were taken (and indeed, strictly, not even then).

41. Mr Giffin developed those points clearly and cogently, but I do not accept them. I do not believe that Burkett is authority for the proposition that in every situation in which a public-law decision is made at the end of a process which involves one or more previous decisions - what I will refer to as "staged decision-making" - time will run from the date of the latest decision, notwithstanding that a challenge on identical grounds could have been made to an earlier decision in the series. In my judgment it is necessary in such a case to analyse carefully the nature of the latest decision and its relationship to the earlier decision(s). I believe the true position to be as follows. If the earlier decision is no more than a preliminary, or provisional, foreshadowing of the later decision, Burkett does indeed apply so that the later, "final", decision falls to be treated as a new decision, the grounds for challenging which "first arise" only when it is made. But if the earlier and later decisions are distinct, each addressing what are substantially different stages in a process, then it is necessary to decide which decision is in truth being challenged; if it is the earlier, then the making of the second decision does not set time running afresh. I accept that the distinction may in particular cases be subtle, but it is in my view nonetheless real and important.

42. This distinction is not explicitly made by either Lord Steyn or Lord Slynn in Burkett. But it did not need to be. The focus of their reasoning is on the particular situation with which the House was dealing, namely one where planning permission has been preceded by a resolution approving the award subject to certain conditions: the essential point made is that since the resolution was indeed only conditional it decided nothing. The House was not considering the case of staged decision-making. Likewise in Risk Management the essential point was that no

actual decision had been taken before the beginning of March 2007. It is true that, as Mr Giffin emphasised, Lord Steyn regarded it as important that the conclusion reached by the House should be "capable of applying to the generality of cases" or "across the board". But it is important to consider the examples which he gives at para. 43 of his speech of cognate situations outside the planning field: they are cases of avowedly provisional decisions, where the decision-maker indicates that he is minded to make a particular decision but invites further representations. I do not think that he meant any more than that cases of conditional resolutions to grant planning permission are to be treated like other cases of provisional or preliminary decision-making in public law.

43. I find support for the approach suggested above in the decision of Eady J in R (Unison) v NHS Wiltshire Primary Care Trust [2012] EWHC 624 (Admin). In that case a group of primary care trusts embarked on a process with a view to entering into contracts with a body called NHS Shared Business Services Ltd. to provide family health services. The process started in early 2011 and the trusts made "decisions to proceed" at various dates in September. The Claimant trade union alleged that the proposals fell within the terms of the Public Contracts Regulations 2006, the procedures of which had not been followed. A claim for judicial review was filed on 19 December 2011. The trusts contended that the challenge was (in the cases of several of the trusts at least) out of time, since the decisions which were in substance being challenged had been taken before 19 September. The union relied on Burkett and Risk Management, contending that, even if a challenge could have been brought earlier, fresh "grounds" would arise at the moment that the contracts with SBS were actually made, so that a claim for *quia timet* relief in relation to that act was within time. Eady J addressed the point as follows:

> "43. The references to the *Burkett* and *Risk Management* cases were clearly helpful in identifying the principles but they cannot be dispositive in themselves. ... [M]uch may turn on the individual facts of the particular case. To what extent is it right on the evidence before me to regard the decisions as final?
>
> 44. I do not think it appropriate to take too legalistic a view on finality. As I have pointed out already, if the Defendants chose not to go ahead at some point, after signing the "instruction to proceed" documents, there would be financial consequences. Because they could be released from their commitment on payment of the appropriate sum, does that mean that the decisions taken at that stage had only been conditional ? I think not. It seems to me that those binding agreements, en route to the final agreements then contemplated, cannot be equated to conditional agreements. They reflect contractual obligations.
>
> 45. Final decisions had already been taken in September, ... which might in theory have been reversed, but there was no indication that this would happen. The 29 September minute referred to contract discussions on *how* (not whether) to take matters forward. If an agreement is truly conditional, one can envisage at least two possibilities occurring. There will come, as it were, a fork in the road at some point. Either the condition(s) will be fulfilled or not. There is an inherent degree of uncertainty. Here, the decisions were "final", although there were arrangements to be worked out. There could be a change of heart. One or more of the Defendants could have extracted themselves from the commitment - perhaps on making the appropriate contractual payments. But that seems to me to be qualitatively different from a resolution to go ahead only on the fulfilment

of certain conditions."

The analysis is not expressed in precisely the terms that I have used, but it seems to me to be essentially the same: the earlier decision, i.e. the substantive decision to proceed taken in September, was a decision in its own right ("final" in Eady J's terminology) and could not be treated as merely a conditional or preliminary foreshadowing of the eventual decision to award the contract. And that was so notwithstanding the possibility that no contract might in the end eventuate. Eady J evidently - and I would respectfully say rightly - did not regard Burkett as laying down a universal rule that in the case of a staged decision-making process time for a challenge will always start to run afresh when the final decision in the process is made.

44. Ms Carss-Frisk also referred me to a number of other authorities in the procurement context in which a challenge to a decision made at the end of a process has been held to be out of time on the basis that it was in truth a challenge to a decision made at an earlier stage in the process. They can be summarised as follows:

(1) In R v Avon County Council, ex p. Terry Adams Ltd [1994] Env LR 442 a disappointed tenderer under a statutory process sought to challenge a decision to award the contract to a rival. It did so within three months of that decision but the challenge was held to be out of time. The Court of Appeal held that time started to run when the competition was advertised. Ralph Gibson LJ observed, at p. 478:

> "There is much importance in the principle that, if objection is to be made by an objector to the conduct by a public authority of a continuing administrative process, in which costs will be incurred by the authority and by other intended parties, application should be made promptly."

(2) In R v Cardiff County Council, ex p. Gooding Investments Ltd [1996] Env LR 288 a disappointed tenderer again waited until the award of the contract before bringing proceedings. Owen J held that he was out of time to do so. He said, at page 300-1:

> "What is the relevant decision which the applicant seeks to challenge? The application refers to the respondent's decision on January 11, 1995. However, it is conceded that if the applicant' s argument is correct there are two aspects of alleged illegality:
>
> > 1. the respondent's proposal indicated at the start of the new tendering process when on August 8, 1994 the contract notice was placed in the Official Journal, to make arrangements with a joint venture company contrary to the provisions of section 51; and
> >
> > 2. the decision of the full council on January 11, 1995 to award the contract to a company which was not a tenderer.
>
> The respondent argues that although as a matter of fact the appellant complains of the latter in law the former complaint is the true complaint and that complaint could have been made in August 1994. ... In my judgment the decision of which the applicant in reality complains was the decision to require a successful tenderer to acquire shares in waste disposal contractors which had not been a part of the tendering process.

> Clearly application could have been made very shortly after the publication in the European Journal.
>
> The applicant did not seek leave to apply for judicial review until February 9 by which time all the tenderers, including GEG had, as GEG must have known would be the case, expended considerable sums on the second tender. I accept the respondent's contention. The complaint could and should have been made promptly after August 8, 1994."

(3) In Jobsin Co UK plc v Department of Health [2002] 1 CMLR 244 (decided prior to Burkett) the department published inadequate criteria for a procurement process. The relevant regulations incorporated limitation provisions in equivalent terms to CPR 54.5. The Court of Appeal held that time ran from the date of the publication of the criteria rather than from the conclusion of the process. Dyson LJ said, at para. 28 (p. 1270):

> "It would be strange if a complaint could not be brought until the process has been completed. It may be too late to challenge the process by then. A contract may have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of re-running the process and the greater the overall cost. There is every good reason why Parliament should have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date."

(4) In Allan Rutherford LLP v Legal Services Commission [2010] EWHC 3068 (Admin) a firm of solicitors tendering for a legal aid contract challenged the rejection of its bid on the basis that one of the published criteria was unlawful. Burnett J held (para. 10) that time ran from the date of publication of the criteria. He relied on Jobsin; Burkett was not referred to. That reasoning was followed in two subsequent cases on similar facts - Hereward & Foster LLP v Legal Services Commission [2010] EWHC 3370 (Admin) (again, Burnett J) and Parker Rhodes Hickmott v Legal Services Commission [2011] EWHC 1323 (Admin) (McCombe J).

I was also referred to De Whalley v Norfolk County Council [2011] EWHC 3739 (Admin); but the issue there was rather different, and I do not believe that it is of assistance for present purposes.

45. Three of those cases pre-date Burkett and in the three Legal Services Commission cases it is not referred to. They are only therefore of limited value as direct authority on the present issue. But they do nevertheless give some support to the Council's case. It would in my view be rather surprising if Burkett had silently over-ruled the well-established line of authority culminating (as at that date) with Jobsin, or if in the more recent cases an important argument for the claimant had simply been overlooked.

46. Having reached this point, I should say something more about the judgment of Laws J in the Greenpeace case. As noted above, Lord Steyn in Burkett disapproved the application by the Court of Appeal of the observations by Laws J which I have quoted at para. 36. The facts in Greenpeace can be summarised as follows. The applicant had sought judicial review of a decision by the Secretary of State to award licences to a number of oil companies to drill in a large

number of "blocks" off the Scottish coast in circumstances which it contended involved a breach of the EU Habitats Directive. The licences were granted on 7 April 1997, and proceedings were issued on 30 June 1997. Laws J held (see p. 437) that the application was out of time because the grounds for making the claim first arose on 21 November 1995, when the government formally announced (by way of an answer to a parliamentary question) that it intended to invite tenders for licences in relation to the blocks in question: he described the announcement as a "specific act by government ... which at once affected third party rights [because] the oil companies could only bid for the tranches then promulgated" (p. 430). He also held (p. 437) that, if that were wrong, grounds in any event arose on 24 December 1996, being the date that the tender process was formally initiated by a notice in the OJEU (p. 422). There are thus plain parallels with the facts of the present case (although no-one here has troubled to make a distinction between the date of the decision to outsource and the date of the OJEU notice). What is more, Laws J referred explicitly to the decisions in Terry Adams and Gooding, being the first two of the procurement cases relied on by Ms Carss-Frisk. If Greenpeace was disapproved in Burkett does that not necessarily undermine my reasoning thus far ?

47. I do not, however, believe that the treatment of Greenpeace in Burkett is decisive of this question. What Lord Steyn took issue with was the passage quoted at para. 36 above, which the Court of Appeal had adopted and applied. Lord Steyn set that passage out in full at para. 40 of his speech and addressed it in paras. 42 and 47. What he disputed was the proposition that a claimant must challenge the decision "which is the real basis of his complaint"; it was this formulation which he held conduced to uncertainty. But there is no consideration in his speech of the actual facts of the Greenpeace case or of the Terry Adams or Gooding decisions (which do not indeed appear to have been cited). In my judgment what Lord Steyn was disapproving was the proposition as it had been understood and applied by Richards J and the Court of Appeal in the case before the House, *viz* as applied to a conditional resolution of grant planning permission - and, I certainly accept, to cognate cases involving preliminary or provisional decisions. He was not, as I have already observed, considering a case of staged decision-making of the kind with which we are here concerned.

48. I was not referred to any substantial academic discussion of the effect of Burkett. I note, however, that Lewis *Judicial Remedies & Public Law* (4th ed) says, at para. 9-17, that:

> "The claimant should challenge the decision which brings about the legal situation of which complaint is made. There are occasions when a claimant does not challenge that decision but waits until some consequential or ancillary decision is taken and then challenges that later decision on the ground that the earlier decision is unlawful. If the substance of the dispute relates to the lawfulness of that earlier decision and if it is that earlier decision which is, in reality, determinative of the legal position and the later decision does not, in fact, produce any change in the legal position, then the courts may rule that the time-limit runs from that earlier decision."

The footnote to that passage cites Terry Adams and Gooding and observes that they "still appear to be compatible with the principles laid down by the House of Lords in [Burkett]". What is said to have been disapproved in Burkett is the proposition derived from Greenpeace that time can start to run "before the decision that is constitutive of legal effects comes into being". That appears broadly consistent with my analysis.

49. Applying that approach, in my view the 2010/2011 decisions plainly constituted distinct substantive decisions, namely decisions to outsource the functions and services identified, and for that purpose to commence the formal procurement procedure under the 2006 Regulations by the

placing of notices in the OJEU. They were not preliminary, provisional or contingent in the sense discussed in Burkett. They were not simply proposals for consultation or declarations of principle: they involved action, and the expenditure of the Council's resources in preparing for and engaging in the procurement process. They are thus clearly distinguishable from the conditional resolution in Burkett: they had immediate legal effect. No doubt it was possible that the process might prove abortive for some reason; but, as Eady J held in the Unison case, that did not make the decision any the less "final". The decisions made in December 2012, or impending in January 2013, are, or would be, different decisions, namely decisions to award a particular contract to a particular contractor. On that basis, it is clear that the Claimant's challenge is in truth to the earlier decisions, on grounds that existed from the moment that they were made.

50. In my judgment, therefore, the challenge on the basis of failure to consult is out of time.

51. Mr Giffin submitted that if I came to that conclusion I should extend time. He made five points:

(a) that this was a case of continuing breach;

(b) that the matter is one of considerable public importance and that the interests of vulnerable persons are at stake;

(c) that the Council created confusion by the way in which it responded to demands for consultation;

(d) that the Council only had itself to blame for the situation in which it found itself; and

(e) that the only relief sought was a requirement that the Council should consult in accordance with its statutory obligations and that, if following the consultation it remained of the view that the proposal should proceed, all that would have been lost was time.

52. I should explain the background to the third of those points. Mr Dix, to whose witness statement I refer at para. 4 (4) above, and who was a prominent activist in the borough, asked on several occasions between 2009 and 2011 what consultation the Council proposed to engage in with regard to "Future Shape" and "One Barnet". I refer to the following statements in particular:

(1) At a resident's forum on 2 September 2009 he was told:

> "It is not our intention to consult the public on the principles of the Future Shape programme. As we have stated elsewhere the programme is a response to known concerns, such as declining satisfaction and significantly lower grant settlements and the Council is showing clear leadership in addressing these issues directly.
>
> However there will be a process for engaging citizens in the 'commissioning' phase of the future shape programme to ensure that we understand how we can work with people to achieve better outcomes for the people of Barnet. Those areas will be discussed in the next future shape report. The timescales of this will vary depending on the issue but we would expect this process to start within the next 12 months and to involve large numbers of

residents."

(2) At another forum on 15 June 2010 he was told:

> "Over coming months the council intends to engage fully residents as to how services can develop in the difficult financial circumstances that the public sector faces. The scale of this involvement will relate to the challenge we face."

(3) The minutes of a meeting of the "Future Shape Overview & Sentencing Panel" on 11 August 2010 record that the Chairman told Mr Dix:

> "The Council is planning to launch a wide-ranging consultation at the end of September 2010 to invite residents to comment on the future of services and public sector priorities in Barnet over the coming years given the current pressures on public finances and changing models of customer demands.
>
> As well as public meetings (which have not attracted many attendees in the past) the council will explore new internet based models for involving residents in developing the priorities of the council. Individual services will be engaging with current and potential service users to explore new models of service provision over coming years. The exact nature of this latter engagement will vary from service to service, as is most appropriate for the users of each service. Details will be published as engagement programmes are launched.
>
> The Council will promote engagement activity through Barnet First magazine, Council advertising sites and local newspapers.
>
> The Future Shape Overview and Scrutiny Panel will monitor this consultation.
>
> All the feedback from the consultation will be fed into the relevant project streams of the One Barnet programme."

(4) Finally, at a further meeting of the Panel on 23 February 2011 Mr Dix was told that an "engagement strategy" had been endorsed by the "One Barnet Partnership Board" on 20 January 2011, though this was qualified by a statement that the document in question was "less of a strategy and more of a collection of principles". I was not referred to the document itself.

What the Claimant says is that those statements created an expectation of consultation which never in fact materialised; and that the mismatch between promise and reality was confusing.

53. I am not prepared to extend time. On the approach which I have taken, these proceedings were brought eighteen months or more after they should have been. As set out in para. 35 above, during that time the Council has been proceeding on the basis that the decision to outsource the functions and services in question was lawful, and it would be contrary to all principles of good administration for that basis now to be put in doubt. It would also, on the evidence, risk considerable wasted expenditure. There has been nothing covert about the Council's proceedings. The 2010/2011 decisions were formally taken and recorded. They have been common knowledge

to interested persons in the borough and on the evidence have been controversial since they were first proposed.

54. As to Mr Giffin's particular points:

(a) He is no doubt right that if the Council failed to consult, as he says it should have done, before the 2010/11 decisions were taken it could in principle have retrieved the position by undertaking consultation subsequently at any time before the contracts were actually agreed. But I do not see how that supports his case for extending time.

(b) I can accept that the issue is important, but that consideration does not seem to me to outweigh the prejudice that would be done by allowing so belated a challenge. I am also prepared to accept that some vulnerable persons, including the Claimant herself, are genuinely fearful of the impact of the proposed outsourcing on the services that they receive. But it is by no means established that their fears are well-founded. This is not a case where the Council wishes to proceed with a measure which is acknowledged by it to disadvantage vulnerable groups.

(c) It may be right that the Council's promises of consultation or "engagement" in relation to the Future Shape programme, including in particular the question of outsourcing, were not met. Certainly the evidence of consultation on which the Council relied before me did not raise the question of outsourcing in the way that, for example, what Mr Dix was told in August 2010 might have led him to expect. But I do not see that this is a reason for extending time. If the Council did not live up to its promises of consultation before taking the 2010/2011 decisions, that will have been apparent at once to those who were pressing for consultation.

(d) I do not understand this point.

(e) I do not believe that this submission gives sufficient weight to the importance to be attached to the interests of certainty in decision taking.

(2) TIME: THE PUBLIC SECTOR EQUALITY DUTY CLAIM

55. As appears at para. 25 above, the Claimant puts her case on breach of the public sector equality duty in two ways. I take them in turn.

56. As regards her primary case - namely that the Council failed to have regard to the specified matters at the formative stage of its outsourcing policy - that is plainly a challenge to the 2010/2011 decisions and is out of time for the reasons already given. The Claimant does not advance, nor can I see, any reasons peculiar to this ground why time should be extended.

57. As regards the alternative case, however, Mr Giffin submitted that this challenge was plainly in time, because it is directed at the EIA actually produced in December 2012 - or, more precisely, to the decision taken (in part) in reliance on it. I accept that that is correct, though the challenge can only be to those aspects of the decision of 6 December which are genuinely distinct from what had already been decided.

(3) TIME: BREACH OF FIDUCIARY DUTY

58. The position here seems to me identical to that in relation to the allegation of failure to consult. The Claimant's case is that it constituted a breach of duty for the Council to decide to outsource the functions and services in question without undertaking a detailed analysis of risk:

see para. 27 above. On the basis of my reasoning above, that ground first arose at the time of the 2010/2011 decisions.

SUMMARY ON THE TIME ISSUE

59. For the reasons given above I believe that the grounds of all of the pleaded claims, with the exception of the alternative claim in relation to the public sector equality duty, first arose more than three months before the issue of proceedings, and I should not extend time in relation to them. I accordingly refuse permission.

60. Notwithstanding that conclusion, I believe that I should give my conclusions on the substantive questions. I do so partly in case the matter goes further but also because, so far as the issues under section 3 of the 1999 Act are concerned, I am told that there is no case-law, and in view of the thorough and expert submissions made to me it may be of some wider value if I expressed my views. On the other points, however, it seems to me appropriate to express my conclusions much more summarily than if I had not refused permission.

THE SUBSTANTIVE CLAIM

(1) CONSULTATION

61. Part I of the Act imposes a "best value duty" on a wide range of public authorities, including local authorities such as the Council (see section 1 (1) (a)). Section 3 (as amended by the Local Government and Public Involvement in Health Act 2007) reads as follows:

> *" The general duty*
>
> (1) A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.
>
> (2) For the purpose of deciding how to fulfil the duty arising under subsection (1) an authority must consult—
>
> (a) representatives of persons liable to pay any tax, precept or levy to or in respect of the authority,
>
> (b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions,
>
> (c) representatives of persons who use or are likely to use services provided by the authority, and
>
> (d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.
>
> (3) For the purposes of subsection (2) "representatives" in relation to a group of persons means persons who appear to the authority to be representative of that group.
>
> (4) In deciding-

> (a) how to fulfil the duty arising under subsection (1),
>
> (b) who to consult under subsection (2), or
>
> (c) the form, content and timing of consultations under that subsection, an authority must have regard to any guidance issued by the Secretary of State."

62. In July 2008[5], following the coming into force of the Local Government Public Involvement in Health Act 2007, which amended the 1999 Act, the Secretary of State issued statutory guidance (in accordance with section 3 (4) entitled *Creating Strong Safe and Prosperous Communities*. Para. 6.4 refers to the best value duty. Paras. 6.5 and 6.6 read:

> "6.5 To fulfil the duty of best value, authorities should seek to achieve a balance between potentially, but not necessarily, competing objectives in particular:
>
> - responding to the needs of all sections of the community including those groups with complex or specialist needs
> - seeking to address the whole-life costs of decisions, focusing on early intervention and achieving sustainable outcomes
> - exploiting economies of scale
> - achieving locally-responsive services.
>
> 6.6 Achieving the right balance will require - as set out in section 2 on the duty to involve - appropriate consultation and involvement (ideally led by elected members) with representatives of local people including potentially the local authority's own workforce, and - where there is an impact upon LAAs - also require consultation with the relevant partner authorities."

(The reference to a "duty to involve" is to a distinct duty introduced by the 2007 Act, which attracts its own guidance in chapter 2.) Fresh guidance, entitled *Best Value Statutory Guidance*, was issued in September 2011. The passage relating to consultation reads:

> "To achieve the right balance - and before deciding how to fulfil their Best Value Duty - authorities are under a Duty to Consult representatives of a wide range of local persons; this is not optional. Authorities must consult representatives of council tax payers, those who use or are likely to use services provided by the authority, and those appearing to the authority to have an interest in any area within which the authority carries out functions. Authorities should include local voluntary and community organisations and small businesses in such consultation. This should apply at all stages of the commissioning cycle, including when considering the decommissioning of services."

In neither form does the guidance appear to advance matters much for the purpose of the issue before me.

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[5] I was not shown any earlier guidance that there may have been.

63. As noted at para. 23 above, the essential dispute between the parties is whether the duty imposed by section 3 (2) required the Council to consult with representatives of the kind there identified specifically about the proposals which led to the impugned decisions or whether the kind of general consultation exercise conducted in relation to the 2010/2011 and 2011/12 Budget and MTFS sufficed. I should give a little more detail about what that consultation comprised. This is largely drawn from Mr Cooper's first witness statement (subject to some correction in his third statement) and the documents referred to in it. The account given there was not very clear, and several points of detail remain obscure; but both Mr Giffin and Ms Carss-Frisk helpfully took me through the documents, and I have an adequate overall picture.

64. *The 2010/2011 process.* The essential elements can be summarised as follows:

(1) The Council created on its website, and sought to publicise, an "online budget simulator", which set out the various areas of council income and expenditure and enabled residents to experiment with their interaction.

(2) The Council also made available on its website, and encouraged residents to complete, a detailed survey questionnaire. It had 59 boxes, most containing questions though some contained guidance or short summaries of Council policy by way of introduction to the questions. The questions cover a very wide range - including, for example, the amount by which respondents thought that council tax should increase or decrease, or whether proposals for savings in particular areas of expenditure were appropriate. There are no questions about outsourcing. Box 43, which introduces the set of questions relating to "Central and Corporate Services" says:

> "A significant part of the savings identified would come from 'Future Shape' - the Council's transformation programme. These savings would come from bringing together all of the internal support services across the council - for instance from having a single central team responsible for managing the purchase of goods and services, or developing contracts with service providers."

The reference to "contracts with service providers" could be a reference to outsourcing, though it hardly leaps from the page, but none of the questions which follow asks about that as an issue. General questions were asked about "other areas where you think we could make savings".

(3) Those completing the survey could click though to drafts of the corporate plan and the MTFS and to the budget proposals. The Corporate Plan is a document of a very general character. Under the heading "Better Services with Less Money" there is a series of bullet-points, two of which refer to, respectively, "consolidation of back office functions" (i.e. what became the "CSO" element in the NSCSO proposal) and another to the establishment of "a new business entity for the delivery of regulatory services" (i.e. the germ of the DRS). But there is no explicit reference to outsourcing. I was not referred to anything more specific in the MTFS nor to the budget proposals.

(4) The Council conducted a series of face-to-face events which were said by Mr Cooper at para. 83.1 of his witness statement to "include":

> ".... the 'Leader Listens' event (which involved sending invitations to electors in selected polling districts to attend a questions and answer session) area forums and a 'Leader Listens Business Breakfast', which highlighted that the Council hoped to make savings through the

implementation of the Future Shape programme."

I was not shown any documentation relevant to these events except for the Breakfast, for which I saw a summary of what was discussed. There was no reference to outsourcing.

(5) Mr Cooper says that "letters were sent out to all business rate payers". I was not shown them. It is reasonable to infer from the contents of the other materials identified above that they do not seek to initiate consultation specifically about outsourcing.

Response to the consultation was apparently poor. According to Mr Cooper, only 22 people responded to the survey. A report to Cabinet says that 53 residents used the online budget simulator.

65. *The 2011/2012 process.* The essential elements can be summarised as follows:

(1) In the autumn of 2010 there was a first-stage consultation which included an "ideas website", where information was published on how money was spent by the Council and the budgetary pressures on it. This does not appear to have raised questions about outsourcing.

(2) On 7 October 2010 the Council organised a day workshop via the Barnet Civic Network, which is a group of voluntary organisations, with the title "A New Relationship with Citizens". Copies of the draft budget proposals were available to participants. I was shown the agenda, which raised five questions, namely:

"- What are your views on what we can cut back on ?

- Should the council stop doing some services ?

- What could the council do better ?

- What could the council provide and charge for ?

- Are there activities that the council could facilitate rather than pay for ?"

One or two of those questions approached the margins of the issue of outsourcing, and the note of the meeting shows that the subject of "Alternative service delivery model" did come up, in connection with the estimate of the savings contained in the budget proposals. Some participants apparently raised "concerns ... about this meaning private sector involvement" and that there was "an 'agenda' behind the private sector". Others said, tellingly, that "they did not feel they had enough information to make an informed decision" (though of course the reference to a "decision" is inapt).

(3) There was again an online survey, with a link through to various documents. Those included the budget proposals, which, as noted above, contained a number of references to savings anticipated from the New Support Organisation or from an "alternative service delivery model", though no text explaining what that consisted of. I was not shown the text of the questions asked but it is not suggested that they included any directed to the question of outsourcing.

(4) Three public meetings were planned for late October/early November 2010, to cover what Mr Cooper described as "the context in which the budget setting is taking place, the level of savings required and the high level options". They were, however, cancelled

> because only a handful of people expressed an interest in attending the first: the relevant Cabinet member spoke personally on the telephone to those who did express an interest.

66. Although I have, out of deference to the attention given to it in the evidence, and to some extent also at the hearing, summarised the nature of the consultation about the 2010/11 and 2011/12 budgets, there is no real dispute that it did not constitute consultation about outsourcing as such. "Alternative service provision" was mentioned in the materials supplied, at least for the latter year; but no relevant information was supplied, and the exercises were plainly not designed to elicit views about it. The real question is thus whether the Act requires more than that. That requires a careful analysis of the statutory language in its legislative context.

67. I start with the background to the Act. Part 1 gives effect to proposals entitled *Modernising Local Government - Improving Local Services Through Best Value.* Those proposals provide for the replacement of the previous compulsory competitive tendering regime with a system which achieves the same benefits but more flexibly. It is clear from the White Paper (see in particular chapters 1 and 2) that, although "best value" is a very general concept, the principal means by which it was envisaged that it would be achieved was through "innovative partnership developments" with organisations in the private and voluntary sectors - in short, by outsourcing. As it is put in para. 2.1:

> ".... although there will be no compulsion to put services out to tender there should be no presumption that services should be delivered directly if other more efficient and effective means are available."

68. Against that background I turn to consider the language of sub-sections (1) and (2) of section 3.

69. I start with sub-section (1), which establishes the substantive best value duty. I would analyse it as follows:

> (1) The core subject-matter is "the way in which" the authority's functions are exercised. That is very general language. It could in a different context cover almost any choice about anything that the authority does. But in this context it seems to me clear that it connotes high-level choices about how, as a matter of principle and approach, an authority goes about performing its functions. I do not say that the choice of whether, or to what extent, to outsource is the only such choice; but in the light of the legislative background outlined above the "ways" in which functions can be performed must include whether they are performed directly by the authority itself or in partnership with others: indeed that would seem to be a paradigm of the kinds of choices with which section 3(1) is concerned.
>
> (2) The duty is aimed at securing "improvements" in the way in which the authority's functions are exercised. That inevitably means change, where the authority judges that change would be for the better having regard to the specified criteria.
>
> (3) The actual duty is not formulated as a duty to secure improvements *simpliciter* but as a duty to "make arrangements" to do so. I am not sure why this formula was adopted. I do not think that the draftsman was concerned with administrative "arrangements". It may have been thought that to impose a duty simply "to secure improvements" would expose authorities to legal challenges from those who contended that particular decisions were for the worse, or that authorities were wrong in failing to take particular steps which it was asserted would make things better: the reference to "making arrangements" would make it clear that the duty was concerned with intentions rather than outcome. It may also

> be that the draftsman wanted to emphasise the need to build the fulfilment of the best value duty into authorities' plans and procedures. Or perhaps it is just circumlocution. But, whatever the explanation, the important point for present purposes is what the arrangements are aimed at, namely securing improvements in the *way* in which authorities perform their functions.

It follows that one of the effects of the best value duty is to require local authorities to outsource - or, if you prefer, to make arrangements to outsource - the performance of particular functions where it considers, having regard to the specified criteria, that that would constitute an improvement.

70. Sub-section (2) imposes a duty to consult "for the purpose of deciding how to fulfil" the duty under sub-section (1). Ms Carss-Frisk attached importance to that formulation. In a helpful note addressed specifically to the construction of section 3, she submitted that a requirement to consult "for the purpose of deciding" what arrangements to make with a view to securing improvements is substantially different from a requirement to consult "about" the arrangements, or the improvements, themselves. The formulation adopted leaves it open to the authority to judge what kind of consultation will assist it in deciding how to fulfil the best value duty: indeed in her note the duty is paraphrased as being "to consult for the purpose of assisting the authority to decide how to fulfil its duty ... [original emphasis]". It may judge - and the Council in the present case did judge - that consultation about "specific models by which it could exercise its functions" or "particular service delivery proposals" would not assist it, essentially because of the need to consider particular proposals or particular functions in the context of the whole range of services and the authority's overall financial position. It would also be impracticable to have to consult about every particular proposed change in the way in which it was performing its functions.

71. Building on that foundation, Ms Carss-Frisk submitted that an authority could normally choose to satisfy the section 3 (2) duty by conducting a consultation aimed at establishing priorities over the whole range of its activities. In her note she describes the advantages of proceeding in that way as follows:

> "If consulted about the authority's Human Resources function in isolation, residents might say that it is important to them that it remains being carried out by employees of the authority itself. But if consulted about that function in conjunction with others, and against a backdrop where the authority has explained that its financial position is such that savings must be made by one route or another, residents might be considerably more amenable to outsourcing of the Human Resources function, in preference to cutting frontline services elsewhere."

She continues:

> "Where an authority has decided that the appropriate way to consult for the purpose of assisting it in deciding how to fulfil its duty to "make arrangements" is through consultation relating to the full range of its functions, the obvious means of carrying out that consultation is through the process of setting the authority's Budget, the Corporate Plan and the Medium Term Financial Plan. That is the stage at which the authority must itself make difficult decisions on how best to allocate its limited resources. It is of the essence of this stage that it is directed towards securing improvement in the way which the authority's functions are exercised. It is therefore the stage at which consultation will best assist the

> authority in deciding how to make arrangements to secure that improvement."

That is what, in essence, the Council did the present case: see paras. 64 and 65 above.

72. Ms Carss-Frisk sought support for that argument from Hansard. In the course of a committee debate on the bill which became the 1999 Act in the House Commons on 28 January 1999 the responsible Minister answered a question about consultation by emphasising that the bill was not prescriptive. She said:

> "Authorities have to use common sense. The Bill does not say "you must consult in this way on that aspect. ... We should credit local councils with a bit of common sense. That is why we are making the bill more flexible. Our proposals will not involve a consultation process that is over-prescriptive, over-bureaucratic or, quite honestly, useless."

She also referred to the section in the White Paper dealing with consultation. Paras 3.10 and 3.11 read as follows:

> "3.10 Legislation could prescribe a framework for the form and timing of consultation. Consultation could be achieved, for example, through general publicity, through specific mailing of individuals and businesses, through regular feedback related to specific services, or in respect of the whole impact of the council's services on particular groups or communities. A combination of such methods, decided locally, might be feasible. The timing of the consultation process would ideally be related to the budget cycle, although this might be difficult to achieve across all services on an annual basis. The process of consultation might, therefore, need to have a longer term focus recognising that it could sometimes be difficult to adjust services instantaneously. Either way the local consultation process will be effective only insofar as it secures and sustains a positive response from local people. This will depend in part on local authorities' responsiveness, and the skill and transparency with which the issues are presented. But it will also depend on public perception of progress in restoring fiscal responsibility to councils and in involving local people in local decisions.
>
> 3.11 A formal requirement to consult in a particular way would not in itself guarantee a responsive and sensitive process, or guarantee a sense of interest and involvement by local people. There is probably no one mechanism that will be appropriate in all circumstances: individual local authorities and people will need to consider what suits their local circumstances best, building on the good practice that authorities have been developing through initiatives such as Local Agenda 21. The Government therefore favours a duty to consult cast only in general terms, leaving the process open to local discretion and the development and dissemination of best practice, including that learnt from the pilot schemes. It will take into account, however, responses to its proposals to involve local communities in shaping local services such as those described in the consultation paper on local democracy and community leadership."

It may be debatable whether at least the Minister's observations in committee are admissible as an aid to the construction of section 3; but for reasons which will appear I do not need to form a view about that.

73. I do not accept Ms Carss-Frisk's submissions. In the first place I do not think that the use of the formulation "for the purpose of deciding how to fulfil" as opposed to, say, "about how to fulfil" will bear the weight that Ms Carss-Frisk puts on it. Of course it is important to pay close attention to the statutory language, but I do not see how you can consult "for the purpose of' making a decision without inviting views on the substance of the decision itself. And even if that is theoretically possible, I do not see how it is possible to consult for the purpose of deciding whether to undertake a major outsourcing programme without inviting views on the proposal to undertake that programme. Consultation only about "priorities", or about other general matters that might "assist" the authority in deciding whether to outsource, is not the same thing and is not what is required.[6]

74. That seems to me not only the natural reading of the statutory language but what I would expect Parliament to have intended. It is hard to see why authorities should be entitled to fulfil their duty to consult in a way which avoided seeking views on the central issues raised by the substantive duty. Ms Carss-Frisk was of course obliged to put her case in the way that she did because it is clear that in the present case the Council did not make any attempt to consult on the specific question of whether the functions and services covered by the NSCSO and DRS contracts should be outsourced. (Indeed if what Mr Dix was told, as quoted at para. 52 (1) above, is to be taken at face value, the Council had taken the view that it would not consult on "the principles of the Future Shape programme".)

75. I do not believe that the view which I have taken would put authorities under any unreasonable burden. The statutory language leaves them with a very broad discretion as to how to satisfy the obligations under section 3, as indeed it appears that the Government intended. I would make four particular points:

(1) I fully accept that it cannot have been the statutory intention that every time that an authority makes a particular operational decision, by way of outsourcing or otherwise, it is required by section 3 to consult about that decision simply because that could be said to be part of "the way in which" it performs its functions. As I have said above, in this context that phrase connotes high-level issues concerning the approach to the performance of an authority's functions, and it is about those and not about particular implementation that consultation is required.

(2) Because here the Council never set out to consult about its outsourcing programme at all, the present case is not a good occasion to offer guidance on the form that such a consultation might have taken. The essential is simply that the representatives should have been given the opportunity to express views or concerns about outsourcing the functions or services in question that could inform the Council's decision-taking both on whether to proceed and on matters requiring attention in the arrangements eventually made. I repeat that that does not mean that it should have consulted on all the particular decisions, great or small, that fell to be taken by way of implementation: the Council initially believed, or affected to believe, that it was the Claimant's case that it was necessary to consult specifically on such matters as the criteria to be published for the purpose of the procurement exercise or the identity of the preferred bidder. Mr Giffin rightly disavowed any such case.

(3) I have no difficulty with Ms Carss-Frisk's submission that useful responses are most likely to be obtained if consultees are informed of the broad context in which

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[6] In fact, that kind of general consultation looks much more like the consultation which is the subject-matter of section 3A - "involvement of local representatives" - which was introduced by the 2007 Act.

> outsourcing decisions have to be taken, or her suggestion (though in fact it appears to originate in the White Paper) that consultation is best timed as part of the annual budgetary process. Where I part company with her is the submission that consultees need not in fact be asked about outsourcing at all, as long as they are consulted generally about priorities and expenditure.
>
> (4) The statute provides for consultation with "representatives" of the four classes specified. There was some discussion before me about whether an authority could satisfy its obligations by direct consultation with the individuals constituting the classes in question. On its face that would seem more onerous than consulting with representatives, and I think that the issue was only raised because of the reliance perforce placed by the Council on its online consultation procedures. Although the point does not fall for decision, I see no reason why the statute should not mean what it says. I was informed during the hearing of the wide range of bodies, mostly involved in the Barnet Civic Network to which reference is made above, with whom the Council deals on particular issues; and it would seem that its existing procedures could readily accommodate such consultation as might be required under section 3 (2).

76. It follows that if the application for judicial review had been made in time I would have held that the Council had not complied with its obligations under section 3 (2) of the 1999 Act in respect of the decisions taken in 2010/11 to outsource the performance of its functions and services, covered by the proposed NSCSO and DRS contracts. It does not, however, follow that I would necessarily have quashed those decisions or the decision of 6 December 2012. I would have wished to give serious consideration to the Council's argument that even if the claim was in time on a Burkett basis it would be right nevertheless to withhold relief on the basis that, because substantially the same challenge could have been made to the earlier decisions, there could be said to have been undue delay within the meaning of section 31 (6) (b) of the 1981 Act (see para. 31 above): certainly, a case of detriment to good administration could be made out. Lord Steyn made it clear in Burkett that the House was not concerned with the effect of section 31 (6), though he described it at para. 18 of his speech as conferring "a useful reserve power" (p. 1600B). However, whether that power is available in a case like the present is not a straightforward question, and since I need not go down that route I prefer not to explore it further.

77. It is unnecessary, having reached this point, to consider the alternative - legitimate expectation - basis on which the Claimant alleged that the Council was obliged to consult in relation to its proposals to outsource.

(2) PUBLIC SECTOR EQUALITY DUTY

78. For present purposes I need only set out the core provisions of section 149 of the 2010 Act, which are as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a

> relevant protected characteristic and persons who do not share it.

(7) The relevant protected characteristics are -

> Age;
> Disability;
> Gender reassignment;
> Pregnancy and maternity;
> Race;
> Religion or belief;
> Sex;
> Sexual orientation."

79. As already noted, there are two distinct aspects to this part of the claim. I take them in turn.

80. The Claimant submits first that the Council should have conducted an EIA prior to making the 2010/2011 decisions. As trailed above, I shall address this point only briefly. If I had granted permission I do not believe that I would have found a breach of the public sector equality duty in this respect. Such impact as the outsourcing of the functions and services in question might have on persons with protected characteristics was not liable to affect the basic decision to proceed: detailed consideration would only be required when the details of the outsourcing arrangements were being worked out.

81. I have held that the claim that the EIA in fact carried out as regards the NSCSO contract was defective is within time and I must accordingly consider it on the merits.

82. The EIA appears as an appendix to the report submitted to the Cabinet on 6 December 2012. It is some 49 pages long and in fact comprises four distinct assessments - in respect of "customers" of Customer Services, Revenue and Benefit Services and Estates, and in respect of employees - under cover of an introductory section. The overall conclusion is stated in the introduction as follows:

> "Having considered these issues in detail, it is the Council's view that the overall impact on all groups with protected characteristics in the borough in terms of their access to and use of these services, the Council's ability to tackle discrimination and advance equality of opportunity, is likely to be positive. There is likely to be a neutral impact on good relations between those sharing and those not sharing protected characteristics. However these assessments will be kept under review throughout the mobilisation and contract period."

It continues, so far as customers are concerned:

> "The reasons for the current positive and neutral assessments are as follows:
>
> - No service reductions are proposed in Capita's Final Tender. In particular, face to face provision will be retained as is, in terms of location, staff numbers and opening hours.
>
> - Capita has defined key over-arching design objectives for the

NSCSO designed to ensure that Customer needs are met and groups with protected characteristics are protected including:

(a) Building Service Delivery Differently - Capita will enable multi-channelled delivery and the ability to bundle services in ways that relate to customer need and put that at the heart of service delivery. Capita will consult closely with all stakeholders and employ a co-design process with customer groups that represent the residents of Barnet so services fit into customer's lives and are easy to use.

(b) Managing Service Delivery Differently - Capita will transform the way Customers interact with our services (and the Council) by transferring control to them and engaging them in service design. Insight will form the basis of the new service delivery model by investment in understanding the customer, understand need, understanding access to services and the requirements of the more vulnerable.

- Where there could be negative impacts, in terms of location, service structures and new technology, Capita has committed to a range of measures that will prevent changes from adversely impacting the quality of service provision on any customer, and introducing equalities training for staff and advocacy for vulnerable customers to make a positive contribution to equalities. Capita has also committed to conducting EIAs when any changes to services are being considered, prior to their approval and implementation.

- Capita has committed to adhering to equalities legislation and the Council's equalities policy, and producing an annual equalities report.

- Activities or measures currently undertaken by the services which promote the public sector equalities duty will be retained by Capita.

- Capita is introducing a number of service improvements that will enable better data about customers to be collected, analysed, and shared so that services can be better designed and targeted to customers needs, and committing to significant improvements to customer service outcomes such as first contact resolution and customer satisfaction.

- Capita will use the intelligence gathered through codesign and their on-going management of processes and operations to create dynamic and personalised service delivery for all customer groups. This rich understanding of customers drawn from behavioural analysis, and combined with their experience and Barnet specific Insight will enable them to identify and understand patterns of Customer behaviour and specific customer needs and tailor service accordingly."

I need not set out the equivalent passage as regards employees, since the Claimant's concern appears to be entirely about service users.

83. On the face of it the points there summarised (which are developed in more detail in the individual assessments) seem plainly to demonstrate due regard to the matters required by the statute. But the Claimant's case is that the Council had inadequate information on which to reach the opinions expressed and should have consulted in order properly to inform itself about the potential impact of the changes (cf. R (Hurley) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin)). What is said is that the Council relied on data from a service user satisfaction survey, but that that survey had only been answered by a small, and very doubtfully representative, number of service users of whom only 16% (some 588) had completed the equalities and diversity section of the survey: what is more, that section had not been asked questions about all the protected characteristics - those omitted being gender reassignment, marital status, pregnancy and maternity, religion or belief and sexual orientation.

84. The problem with that criticism is that it has no bearing on the actual basis on which, as set out above, the Council concluded that the proposals would have no adverse impact, namely - at the risk of being over-summary - that the Capita contract contained provisions which preserved existing levels of service and, in the event that there might subsequently be changes in modes of delivery, ensured that service users with protected characteristics would not be disadvantaged. Whether that assessment is correct, or in any event reasonable, does not depend on numbers or other information of the kind which the Claimant says is lacking, but on whether the contractual provisions in question are effective, as the Council evidently believes they are. I do not believe that it is arguable that the Council was in breach of duty in this regard.

85. I asked Mr Giffin in the course of his oral submissions to identify what, if any, are the concrete and specific issues underlying this head of challenge - that is to say, what kinds of person with protected characteristics have what specific concerns about the potential impact of outsourcing. Public sector equality challenges are rather too easily advanced *in vacuo*. He relied principally on the concern expressed in the evidence that outsourcing will accelerate the trend towards what, in the jargon, is described as "channel-shifting" - that is, in practice, trying to have as many contacts as possible between service suppliers and service users conducted by automatic responses and/or online: while that has obvious advantages both for the supplier and for many service users it may be disadvantageous to people, such as the Claimant, with disabilities and indeed to others with protected characteristics. I can understand this concern, but it is explicitly addressed in the EIA. Among the "relevant or significant changes being proposed by Capita" is "greater use of automated and web self-service channels and social media". In a column headed "action needed to ensure no negative impact on citizens with protected characteristics" the need is identified to make self-service channels as accessible as possible and to support people who cannot use them. A final column spells out in considerable detail "relevant Capita commitments". I dare say that the Claimant is sceptical about the reliability of those commitments, but the question for the Court is only whether the Council has paid "due regard" to the issue. In my view it is unarguable that it has. Mr Giffin also mentioned other concerns, such as the impact of relocation of staff, but the same answer applies.

86. I should record that Mr Giffin did not in the end advance any argument that required me to consider the particular terms of the proposed contract in order to assess for myself the effectiveness of Capita's various commitments. I am sure that that was a wise decision. The judgment as to whether the provisions of the contract adequately address the interests of groups with a protected characteristic is for the Council, and not the Court, to make; and its assessment could only be challenged if it fell outside the wide discretion which it enjoys.

87. I accordingly refuse the Claimant permission to challenge the decisions on the basis that they have been (or will be) reached in breach of the public sector equality duty.

(3) BREACH OF FIDUCIARY DUTY

88. I deal particularly briefly with this ground not only because I believe that the claim is out of time but also because Mr Giffin passed over it very lightly both in his skeleton argument and still more in his oral submissions. This was realistic. Views can no doubt legitimately differ about the degree of financial analysis appropriate before taking a decision to proceed with outsourcing as opposed to the other options which were appraised. Mr Dix, who has some expertise in this field, believes that the analysis undertaken by the Council was quite inadequate. But the evidence does not come close to establishing the kind of reckless disregard of the principles of financial planning or management that is necessary to make good a claim of this kind. I would have refused permission on the merits even if the claim had been within time.

CONCLUSION

89. I accordingly refuse permission to apply for judicial review in respect of all the grounds argued.

90. I should mention one other matter. Mr Sullivan (see para. 5 above) applied through his solicitors to be released from the confidentiality obligation which he had undertaken in relation to the Capita contract which had been disclosed to him. I can see no basis for such an order. Neither the contract itself nor the confidential witness statements purporting to summarise its terms were in the event referred to before me, since Mr Giffin - I am sure after careful consideration - sought to advance no submissions based on the details of its provisions.

Case No: C1/2013/1205

Neutral Citation Number: [2013] EWCA Civ 1004
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE UNDERHILL
CO/219/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 2nd August 2013

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVIS
and
LADY JUSTICE GLOSTER

- -

Between :

THE QUEEN ON THE APPLICATION OF NASH	**Appellant**
- and -	
BARNET LONDON BOROUGH COUNCIL	**Respondent**

- -

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- -

NIGEL GIFFIN Q.C. and DAVID GOLLANCZ (instructed by **Steel & Shamash Solicitors**) for the **Appellant.**
DINAH ROSE Q.C. and IAIN STEELE (instructed by **Trowers & Hamlins LLP**) for the **Respondent.**

- -

Judgment

Lord Justice Davis :

Introduction

1. The claimant, Mrs Nash, is very aggrieved at the decision of Barnet London Borough Council ("the Council") to outsource to the private sector a significant number of the services provided by the Council. She was not and is not alone in her views. She issued judicial review proceedings on 10th January 2013. Her application for permission was considered at an oral hearing extending over three days by Underhill LJ (as he has since become). By a reserved judgment dated 29 April 2013 ([2013] EWHC 1067 (Admin)) he refused permission to apply for judicial review. He did so essentially on the ground that the challenge had been brought well out of time.

2. Mrs Nash now seeks to appeal against that decision. There is and has been, for reasons which will become apparent, some degree of urgency about the matter. The matter was listed before this Court as a "rolled up" hearing (that is, as an application for permission to appeal with appeal to follow if permission is granted).

3. Mrs Nash was represented before us by Mr Nigel Giffin QC with Mr David Gollancz. The Council was represented before us by Miss Dinah Rose QC with Mr Iain Steele. The arguments presented to us, both written and oral, were of very high standard.

4. A Respondent's Notice has been put in by the Council seeking to uphold the judge's decision on further or alternative grounds, if (contrary to the Council's primary contention) the challenge to the judge's decision on delay is reversed.

5. It should be made clear at the outset that the function of this court is not (any more than was the function of Underhill LJ) to adjudicate on the merits, or lack of them, of the decision to outsource. The legal challenge here necessarily has had to be, and has been, as to the *process* by which the decision to outsource was made.

Background facts

6. For a number of years the Council had been mulling over its future organisation and direction – what became known as its "future shape". A review to this end was initiated in 2008. An initial report by the Chief Executive was submitted to and considered by the Cabinet of the Council on 3 December 2008. The recommendation in essence was that the role of the Council for the future was that it should "conduct those activities that only the Council can". In addition, emphasis was placed, among other things, on the need for the Council to ensure that local public services provided value for money.

7. There was further debate by the Cabinet on the future shape of the Council at a meeting on 6 July 2009, and a further interim report was submitted. On 21 October 2009 this was again considered by the Cabinet. It was clear by now that the proposals being advanced would be radical. There was extensive discussion of issues potentially arising, including (among others) equality and diversity issues and use of resources. The appended Future Shape Final Report included reference to the need for public engagement. Among other things it was stated:

> "The scope of the potential changes covered by the Future Shape Programme will require an extensive set of consultation and engagement activities. Clearly the nature and extent of consultation required will change depending on the proposals being considered, the group which will be affected by any proposals and the statutory requirements that may need to be taken into account."

8. One of the proposals considered at that meeting was that there be established a Customer Services Organisation. The three options identified for achieving its development were (1) the Council remaining the "main delivery vehicle"; (2) a co-ownership model and (3) Joint Venture/Outsourcing. It was agreed that the decision on which option to pursue in this regard would be undertaken as part of the implementation of the Future Shape Programme.

9. Matters continued to be debated and considered in the following months. In particular, at a Cabinet meeting on 29 November 2010 a report entitled "One Barnet Programme Framework" was considered and approved. A funding strategy was also approved. In addition, there was considered and approved a report entitled "Development and Regulatory Services Project: Initiation of Procurement". It was by that report recommended that with regard to a significant number of specified functions a "partnership with the private sector be sought". After debate the Cabinet resolved that the Commercial Director be authorised:

> "…to commence the procurement process to identify a strategic partner for the delivery of the Development and Regulatory Services Project."

10. This procurement process came within the ambit of the Public Contracts Regulations 2006 ("the 2006 Regulations") which I will summarise in the relevant respects below. A notice in the Official Journal of the European Union with regard to a proposed Development and Regulatory Services ("DRS") contract was duly published on 19 March 2011.

11. At this time the Council was also still considering proposals relating to the "Customer Services Organisation and New Support Organisation" (the wording was subsequently changed and may be styled "NSCSO"). On 2 March 2011 the Cabinet Resources Committee considered a detailed report on this by way of what was described as an "options appraisal". The aim, as presaged in 2009, was (in the language used) to "bring together customer-facing staff from across the Council" and also to address the "back office" functions of the Council. The three options previously noted were fully evaluated. The recommendation was that the Director of Commercial Services be authorised to produce a business case for (among other things) "the procurement of a private sector partner/s" to provide a number of identified services and to initiate that procurement. The services in question were Customer Services, Estates, Finance, Human Resources, Information Services, Procurement, Revenue and Benefits. The minutes of that meeting also record a number of public questions and the Council's answers to them. A number of such questions were from, among others, Mr John Dix and were knowledgeable and penetrating. They raised queries as to the "outsourcing scheme" (as it was described) and among other things asked if the Council were "not prepared to consider an in-house option under any circumstances?"

12. The recommendation of this report was accepted. In consequence, as the judge found, such proposed procurement of a private sector partner again required publication in the Official Journal of the European Union: which was effected on 21 June 2011.

13. On 29 June 2011, the Cabinet Resources Committee considered the detailed business case for the NSCSO project. The report was summarised as outlining "the business case for the outsourcing of support and customer services and seeks authority from the Committee to approve the business case for the procurement of a strategic provider". The business case was approved, with a view to the Council beginning the "competitive dialogue" process in accordance with the 2006 Regulations. It was also resolved that authority to award a contract remained with the Cabinet Resources Committee; and that due regard be given to statutory equality duties and the outcome of the equality impact assessments, referred to in the report.

14. In the words of the judge, the "applicable public procurement procedures ran their course". The competitive dialogue procedure was adopted. Significant sums were invested in progressing the procurement projects. There was extensive consideration at various stages by the Council. A shortlist of tenderers was recommended, at stage 2 of the competitive dialogue, on 14 December 2011 (DRS project) and 28 February 2012 (NSCSO project). An evaluation in accordance with the criteria was ultimately in favour of Capita plc as the preferred bidder with regard to the NSCSO project.

15. On 6 December 2012 a report was presented to the Cabinet with regard to the NSCSO project. It annexed a full Business Case and Equalities Impact Assessment. It recommended acceptance of Capita's final tender. The Cabinet was specifically reminded of its entitlement to discontinue the procurement process (albeit that was not recommended). A number of public questions, from Mr Dix and others, were raised and answered. The Cabinet, after consideration, resolved to accept Capita's final tender as the preferred bid and approved the appointment of a recommended reserve bidder. It delegated "contract completion and signature…finalisation and execution" to the appropriate officer.

16. In the meantime, the DRS project had not completed the procurement process. The competitive dialogue stage had identified as the shortlisted bidders Capita Symonds Ltd and EC Harris LLP. But no decision in that regard had been made at the time these proceedings were commenced on 10 January 2013, albeit such a decision had been due to be made by the end of that month. Understandably the matter has since been essentially on hold in the light of this litigation.

17. The judge's findings of fact were that the Cabinet's decision of 29 November 2010 "constitutes the formal beginning of the process leading to the DRS decision" and that the Cabinet Resources Committee's decision of 2 March 2011 "constitutes the formal beginning of the process leading to the NSCSO decision".

18. It may be added that all relevant meetings were public; and the minutes (and appendices) would have been made available for public inspection in the usual way.

The proceedings and witness statements

19. The claim form was, as I have said, issued on 10 January 2013. The decisions sought to be judicially reviewed are described as follows:

> "1. Barnet LBC's decision to award an [sic] contract ('the New Support and Customer Service Organisation Contract') and
>
> 2. Barnet LBC's intended decision to award a contract ('the Development and Regulatory Services Contract)."

The dates of the decisions are given as 13 December 2012 and "Expected 31 January 2013" (13 December 2012 was the date of publication of the decision of 6 December 2012, the decision having in the interim been called in and confirmed by the Council's Overview and Scrutiny Committee). The relief sought was extensive declaratory relief and also an order quashing the decision of 6 December 2012 to award the NSCSO contract.

20. A number of grounds for the claim were formulated. In summary these were as follows:

i) First, that the Council had failed to comply with its statutory obligations under s.3(2) of the Local Government Act 1999 ("the 1999 Act") and statutory guidance.

ii) Second, that the Council had unlawfully denied a legitimate expectation that it would carry out consultations with "stakeholders".

iii) Third, that the Council had failed to discharge its public sector equality duty.

iv) Fourth, that the Council had failed to discharge its fiduciary duty.

v) Fifth, that the Council had breached its obligations under Regulations 18 and 30 of the 2006 Regulations to award the NSCSO contract to the tenderer submitting the most economically advantageous tender.

21. By detailed Grounds of Resistance dated 18 February 2013 the Council denied all of these points. But in addition it raised the contention that the proceedings were very significantly out of time.

22. The matter was directed to be heard, by order of Ms Elisabeth Laing QC sitting as a Deputy High Court judge dated 21 January 2013, by way of "rolled up" hearing. Given the challenge on grounds of delay, and given also the stated urgency of the matter, that was clearly an appropriate order.

23. Very voluminous evidence was placed before the judge. Among other materials he had witness statements of Mrs Nash. She has lived in Barnet since 1993. She describes herself as disabled and a member of a minority ethnic community. She is in a poor state of health: she eloquently records her concerns and anxieties if the services from which she currently benefits are outsourced. Mrs Nash has, as she explains, been very active in local community matters. She is in no doubt that the NSCSO and DRS projects "represent a radical experiment in local government" and would, in her view, irreversibly render the Council "almost unrecognisable as a traditional council".

24. She complains strongly about what she says was the lack of proper, indeed any, consultation across the whole Borough on the proposed outsourcing. She gives examples based on her own experience as being active in local issues and as being a

member of a number of local communities and organisations. She says the lack of consultation has had, and will have, considerable impact. She is also highly sceptical about the consequences of outsourcing and the efficiency savings promised.

25. A number of other statements have been put in in support of the claim. These include a statement from Mr Dix (who had asked the questions at the public Cabinet meetings). He says he is involved in "local activism". His background is that of a management consultant, with particular expertise in outsourcing matters. He says that he considers that he was not properly consulted about these proposals. He states the view that "there has been an extraordinary failure to appreciate the impact of the transaction". He is also very critical of the Council's track record generally on procurement. He makes various suggestions as to how such matters should properly be conducted. Other witness statements also raise strong concerns about the proposals and about the asserted lack of consultation.

26. Detailed statements were put in by Mr Cooper, the Commercial Director of the Council, rebutting at length the various allegations made and setting out the processes adopted by the Council.

27. It is not necessary to review the evidence further. The judge described it as helpful in providing the background but ultimately irrelevant to what he had to decide.

28. It should be added that before this court a further statement has been put in on behalf of the Council (without objection). The statement is of Mr Travers, the Interim Chief Executive Officer of the Council, and is dated 1 July 2013. In it he describes in some detail the prejudicial impact of the delay in implementing the two proposed contracts. He says current quality of service delivery has declined, staff are leaving and morale is low because of the uncertainty. In addition matters such as IT investment have had to be put on hold. He identifies other such problems generated by these proceedings. He says that an interim contract has been arranged with Capita: that is due to expire at the end of September and Capita cannot be expected to wait around indefinitely. The problems with the DRS contract are less acute; nevertheless, he says, anticipated savings and investment are being lost in the interim. He also says that by a decision made on 24 June 2013 the preferred bidder for the DRS contract has now been identified as Capita Symonds Ltd. He points to grave difficulties if the past decisions are quashed.

29. This statement really reflects and confirms some of the potential difficulties highlighted by the judge, on the evidence then before him, as likely to arise by reason of the claim issued by Mrs Nash.

The issues before the judge

30. The judge dealt with the issue of delay first, since (as he observed) it went to whether he should grant permission. I will come on to his reasoning. But he also dealt with the other issues raised.

31. In the result, he refused permission by reason of delay. He found that the proceedings were (save as to the public sector equality duty issue) well out of time. He also ruled that, in his discretion, it would not be right to grant an extension of time. But he also helpfully set out his views at some length on the other issues.

32. In doing so, he found that the Council had failed to fulfil its duty under s.3(2) of the 1999 Act (set out in paragraph 35 below). He noted that the Council had more or less accepted in argument that there had been no consultation about outsourcing "as such". He rejected the Council's argument that, on the correct meaning and application of s.3 of the 1999 Act, it had nevertheless complied with its statutory duty by consulting about its 2010/11 and 2011/12 budgets. Putting it shortly, he considered that that was far too indirect a way of approaching the matter of outsourcing. He said among other things:

> "I do not see how it is possible to consult for the purpose of deciding whether to undertake a major outsourcing programme without inviting views on the proposal to undertake that programme…. It is hard to see why authorities should be entitled to fulfil their duty to consult in a way which avoided seeking views on the central issues raised by the substantive duty."

He said that consultation generally about "priorities" and expenditure did not suffice. His conclusion (paragraph 76) was that he would have held that the Council had not complied with its obligations under s.3(2) of the 1999 Act had the application for judicial review been made in time. Having so indicated, he went on to say, however, that he would have "wished to give serious consideration" to the argument that, even if the claim had been in time, relief should be withheld under s.31(6) of the Senior Courts Act 1981.

33. The judge went on to find that there had been no breach of the public sector equality duty by reference to s.149 of the Equality Act 2010. He also found that no breach of fiduciary duty had been established. He noted that other claims raised in the grounds had not been pursued.

34. It is to be recorded that, on this application to this court, the claimant does not challenge the judge's refusal, in his discretion, to extend time (if the claim was otherwise out of time). The claimant also does not challenge the judge's conclusions rejecting the claims based on the equality duty and the fiduciary duty. The challenge now is solely as to the rejection of the claim on the ground of delay. For its part, the Council by Respondent's Notice seeks (if necessary) to renew its argument that, contrary to the judge's view, there had been no failure to comply with s.3(2) of the 1999 Act. The Council also seeks (if necessary) to say that relief should in any event have been refused under s.31(6) of the Senior Courts Act 1981.

<u>The legal background</u>

35. The 1999 Act by its title is an Act "to make provision imposing on local and certain other authorities requirements relating to economy, efficiency and effectiveness; and to make provision for the regulation of council tax and precepts". Section 3 is in the following terms:

> "3.–The general duty.
>
> (1) A best value authority must make arrangements to secure continuous improvement in the way in which its functions are

> exercised, having regard to a combination of economy, efficiency and effectiveness.
>
> (2) For the purpose of deciding how to fulfil the duty arising under subsection (1) an authority must consult—
>
> (a) representatives of persons liable to pay any tax, precept or levy to or in respect of the authority,
>
> (b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions,
>
> (c) representatives of persons who use or are likely to use services provided by the authority, and
>
> (d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.
>
> (3) For the purposes of subsection (2) "representatives" in relation to a group of persons means persons who appear to the authority to be representative of that group.
>
> (4) In deciding on—
>
> (a) the persons to be consulted, and
>
> (b) the form, content and timing of consultations,
>
> an authority must have regard to any guidance issued by the Secretary of State."

36. Guidance has been issued, in September 2011, by the Secretary of State for the purpose of s.3(4). It is very broadly framed. With regard to consultation, it among other things says that authorities should consult with regard to services "at all stages of the commissioning cycle" and that "an authority should actively engage the organisation and service users as early as possible before making a decision". I record that, for the purposes of the issues before us, neither party in fact was disposed to place reliance on the Guidance.

37. Turning to the 2006 Regulations, Regulation 5 sets out their application. Regulation 12 provides for selection of contract award procedures. Regulation 18 is, in the relevant respects, in the following terms:

> "18.—(1) In this regulation—
>
> 'particularly complex contract' means a contract where a contracting authority is not objectively able to—
> (a) define the technical means in accordance with regulation 9(7), (8) and (9) capable of satisfying its needs or objectives; or
> (b) specify either the legal or financial make-up of a project or both; and
> 'participant' means an economic operator selected by a contracting authority using the procedure referred to in

paragraph (2) to participate in the competitive dialogue procedure.

(2) Where a contracting authority wishes to award a particularly complex contract and considers that the use of the open or restricted procedure will not allow the award of that contract, the contracting authority may use the competitive dialogue procedure.

(3) A contracting authority using the competitive dialogue procedure shall comply with the following paragraphs of this regulation.

(4) The contracting authority shall publicise its intention to seek offers in relation to the public contract by sending to the Official Journal, as soon as possible after forming the intention, a notice in the form of a contract notice in Annex II to Commission Regulation (EC) No 1564/2005 inviting requests to participate and containing the information therein specified.

….

(20) The contracting authority shall open with the participants selected in accordance with regulations 23, 24, 25 and 26, a dialogue the aim of which shall be to identify and define the means best suited to satisfying its needs.

…

(22) The contracting authority may provide for the competitive dialogue procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or in the descriptive document.

(23) Where the contracting authority provides for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (22), it shall ensure that the number of economic operators to be invited to participate at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so.

(24) The contracting authority may continue the competitive dialogue procedure until it can identify one or more solutions, if necessary after comparing them, capable of meeting its needs.

…

> (27) The contracting authority shall assess the tenders received on the basis of the award criteria specified in the contract notice or descriptive document and shall award the contract to the participant which submits the most economically advantageous tender in accordance with regulation 30(1)(a)."

Regulation 30 then sets out the criteria for the award of a public contract.

38. It is to be noted from Regulation 18 that successive stages for a competitive dialogue process are expressly contemplated and sanctioned.

39. Finally for present purposes – although a necessary starting point on the issue of delay – there are the provisions of CPR Rule 54.5:

> "(1) The claim form must be filed –
>
> (a) promptly; and
>
> (b) in any event not later than 3 months after the grounds to make the claim first arose.
>
> (2) The time limits in this rule may not be extended by agreement between the parties.
>
> (3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review."

The judgment of Underhill LJ

40. The reasoning and approach of the judge on the issue of delay are set out very fully and, if I may say so, with exemplary lucidity.

41. On the issue of delay, he first set out his preliminary views, as a matter of principle and of apparent fairness, in the following terms:

> "33. Viewing the question as one of principle, and without reference to authority, I would regard the claim based on failure to consult as out of time. In my view it is clear that if the Council was under the duty relied on by the Claimant it should have consulted prior to the decisions taken in 2010/2011 to proceed with outsourcing and to initiate the procurement procedures accordingly; and if it was in breach of that duty that breach crystallised when those decisions were taken without any consultation having occurred. It seems to me, on an ordinary reading of the words of CPR 54.5, that that was when "the grounds to make the claim first arose". Mr Giffin says that there was a continuing breach of the duty, in the sense that at any time before it was finally contractually committed the Council could have decided, however belatedly, to institute consultation and could have reconsidered its decision in the

light of that consultation. That may be so, but it does not help: time runs from when the grounds *first* arose.

34. I accept that, in so far as the decision of 6 December 2012 and the impending decision in relation to the DRS contract might involve distinct questions on which there was an obligation to consult which had not been complied with, the Claimant would be in time to complain of that breach. But it seems clear that they do not involve any such questions: whatever the precise scope of the duty to consult, which I discuss at paras. 61-76 below, it can only be concerned with questions of policy and approach and not with such specific operational matters, important though they may be, as the identity of the outsourcing "partner" or the detailed terms of the contract to be entered into.

35. That approach also seems plainly right as a matter of fairness and good administration. In the year or more following the 2010/2011 decisions the Council has invested, on the evidence of Mr. Cooper, over £4.5m in developing the NSCSO and DRS projects. It has planned and proceeded on the basis that the functions and services in question would be outsourced from 2013/14. That assumption, which was entirely legitimate on the basis of the decisions taken, was built into the MTFS adopted in 2011 and renewed in 2012. Big savings are anticipated from the outsourcing: Mr Cooper quantifies them for the first year at £12.5m from the NSCSO contract and (a minimum of) £1.5m from the DRS contract. Under both contracts the partners are also committed to making very substantial investments (principally, though not only, in IT provision) of which the Council will get the benefit. If the Claimant is permitted at this stage to challenge the outsourcing decisions, and does so successfully, the least that will happen is that the benefits which are anticipated from entering into the contracts will be deferred during the time taken to conduct a proper consultation, which will inevitably cause significant disruption to the Council's finances; and if the result were, as I have to assume is a real possibility, that some or indeed all aspects of the outsourcing did not proceed the disruption to the Council in having to re-think its strategy from the start would be enormous, and the sums invested in developing the proposals would be wasted. I was given no evidence about the resources invested by the Interested Parties, but it is plain that these too will have been very substantial. It is in order to avoid precisely this kind of uncertainty and disruption that CPR 54.5 and its predecessor rule were made."

42. He went on to record the argument on behalf of Mrs Nash that any such conclusion would be contrary to the authority of the House of Lords decision in *R (Burkett) v Hammersmith & Fulham London Borough Council* [2002] 1 WLR 1593, [2002]

UKHL 23 (to which I will come in paragraphs 47 and following of this judgment). He fully reviewed that authority, as well as other authorities. He concluded that *Burkett* was distinguishable. The core of his reasoning is contained in paragraph 41 of his judgment in the following terms:

> "41. Mr Giffin developed those points clearly and cogently, but I do not accept them. I do not believe that Burkett is authority for the proposition that in every situation in which a public-law decision is made at the end of a process which involves one or more previous decisions – what I will refer to as "staged decision-making" – time will run from the date of the latest decision, notwithstanding that a challenge on identical grounds could have been made to an earlier decision in the series. In my judgment it is necessary in such a case to analyse carefully the nature of the latest decision and its relationship to the earlier decision(s). I believe the true position to be as follows. If the earlier decision is no more than a preliminary, or provisional, foreshadowing of the later decision, Burkett does indeed apply so that the later, "final", decision falls to be treated as a new decision, the grounds for challenging which "first arise" only when it is made. But if the earlier and later decisions are distinct, each addressing what are substantially different stages in a process, then it is necessary to decide which decision is in truth being challenged; if it is the earlier, then the making of the second decision does not set time running afresh. I accept that the distinction may in particular cases be subtle, but it is in my view nonetheless real and important."

43. He went on to find further support for his approach in other decided cases. Having reviewed such authorities he said at paragraph 49 of his judgment:

> "49. Applying that approach, in my view the 2010/2011 decisions plainly constituted distinct substantive decisions, namely decisions to outsource the functions and services identified, and for that purpose to commence the formal procurement procedure under the 2006 Regulations by the placing of notices in the OJEU. They were not preliminary, provisional or contingent in the sense discussed in Burkett. They were not simply proposals for consultation or declarations of principle: they involved action, and the expenditure of the Council's resources in preparing for and engaging in the procurement process. They are thus clearly distinguishable from the conditional resolution in Burkett: they had immediate legal effect. No doubt it was possible that the process might prove abortive for some reason; but, as Eady J held in the Unison case, that did not make the decision any the less "final". The decisions made in December 2012, or impending in January 2013, are, or would be, different decisions, namely decisions to award a particular contract to a particular

> contractor. On that basis, it is clear that the Claimant's challenge is in truth to the earlier decisions, on grounds that existed from the moment that they were made."

44. Having so concluded, he went on to consider and reject the consequential application for an extension of time. He gave ample reasons for so doing. It may be noted in this regard that the judge, at paragraph 53, concluded, among other things, on the evidence:

> "There has been nothing covert about the Council's proceedings. The 2010/2011 decisions were formally taken and recorded. They have been common knowledge to interested persons in the borough and on the evidence have been controversial since they were first proposed."

Submissions and disposition

45. The argument before us, as did the judgment below, proceeded on the footing that the question to be asked was whether the claim form was filed "not later than three months after the grounds to make the claim first arose…": that is, by reference to Rule 54.5(1)(b). Miss Rose was entitled to emphasise the general importance of compliance with the time limits set for judicial review proceedings, given the various public interests generally involved in public law cases. That, she said, was reflected by the prohibition contained in Rule 54.5(2) on extensions of time being agreed between the parties.

(1) The decisions by reference to s.3 of the 1999 Act

46. Mr Giffin rightly accepted that there had first to be identified the relevant decision or decisions and the date or dates of it or them: because, as he said, it is by reference to the relevant decision that the time for the performance of the statutory duty to consult, under s.3(2) of the 1999 Act, first arose.

47. His submission was that the judge simply got it wrong in selecting the relevant decisions as being those made on 29 November 2010 (for the DRS project) and 2 March 2011 or 29 June 2011 (for the NSCSO project). The core of his argument was that in truth nothing had been *decided* at those times at all: at most, he said, the resolutions passed on those dates initiated a "journey of discovery", in his phrase. He said that it could not be ascertained what might eventuate until the conclusion of the competitive dialogue; that there was no obligation to contract at all (as, indeed, the Cabinet had been reminded immediately prior to the resolutions of 6 December 2012); and that the whole matter could also have been rejected in the light of the final Equalities Impact Assessment submitted and considered on 6 December 2012. It was accordingly, he submitted, the decision of 6 December 2012 (and prospective decision of 31 January 2013) which were the "real" decisions and it was by reference to those that the grounds to make the claim first arose.

48. I cannot agree with this, any more than the judge could.

49. The question to be asked for this purpose is, in my view, not in the abstract when the decision was finally or irrevocably made (although the logic of Mr Giffin's argument

might suggest that would in fact be the date of the actual signing of the relevant contract) but when a decision was taken in respect of which the statutory duty to consult first arose: because it is the alleged failure to consult which is the essence of these proceedings.

50. This has to be assessed by reference to the terms of s.3 of the 1999 Act. In my view that section is framed in notably broad terms. The duty is to "make arrangements" to secure continuous improvement in "the way" in which a relevant authority's functions are exercised: s.3(1). The obligation to consult, under s.3(2) then arises for the purposes of deciding "how" to fulfil that duty.

51. That being so it seems to me an impossibly narrow application of the section to link it to the decision of 6 December 2012. The section is not designed to require consultation about the terms of particular contracts which an authority may be minded to make: indeed considerations of commercial confidentiality would in any event often make that an impossibility. Moreover it seems at first sight most surprising to align the duty to consult with the date of resolving to enter into a particular contract. Rather one might expect – given the width of s.3 – that the duty should be geared to consultation at a much earlier stage, well before the stage at which consideration is given as to whether the relevant officer is to be authorised to sign a particular contract. Those considerations justify the judge's finding (at paragraph 34 of his judgment) that the duty to consult is concerned with "questions of policy and approach", not specific operational matters. That indeed accords with the wide language, and underlying purpose, of s.3 of the 1999 Act.

52. That is reflected by the facts of the present case. The complaint of Mrs Nash is not in truth about – indeed, as I see it, cannot be about – the alleged failure to consult her and others in the borough about entering into a contract with Capita or Capita Symonds or about the terms of any such contract. Rather the complaint is about the alleged failure to consult her, and others in the Borough, about the whole proposal to outsource in principle. As Miss Rose pointed out, had such judicial review proceedings been commenced within three months of the decision on 29 November 2010 and/or 2 March 2011 (if not 29 June 2011) there could have been no possible argument that the proceedings were defective as being premature. As she further submitted, and I agree, there is a "clear lack of connection" between consultation on the policy of outsourcing – the essential ground of complaint – and the decisions sought to be challenged on the face of the claim form.

53. I think Mr Giffin was inclined to acknowledge this difficulty. He at all events accepted in argument that the Council could lawfully have consulted (and perhaps should have consulted as a matter of "good practice", as he put it) at a much earlier date than 6 December 2012. He further accepted that the required consultation did not need to be with regard to a particular contract or a particular contractor. Those (necessary) concessions are revealing. They at all events connote that such consultation would have been lawful at an earlier stage under the provisions of the 1999 Act.

54. As I see it, statutory consultation is ordinarily designed to be needed, and is required, at the formative stage of the relevant process (see for example *Coughlan v North and East Devon Health Authority* [2001] QB 213). That is consistent here with the width of the language of s.3. The fact that the Council may withdraw from its procurement

proposals at any subsequent stage is, in my view, nothing to the point under this head of the argument: on the contrary, one of the whole purposes of consultation is to enable an authority, properly informed through the process of consultation by representations of residents of the Borough and other "stakeholders", to decide whether or not to pursue or withdraw from a particular policy or strategic decision.

55. All that is borne out by what has happened here. The decisions of 29 November 2010 and 2 March 2011 were just that: decisions. They were intended to, and would be known to, have both legal effect and significant consequences in terms of prospective time and expense incurred pursuing the competitive dialogue and otherwise. These are precisely the considerations addressed by the judge at paragraph 35, and elsewhere, of his judgment. By way of contrast, the eventual decision of 6 December 2012 to award an outsourcing contract to a particular bidder was not one, as Miss Rose submitted (a submission with which, as will be gathered from what I have said, I agree), which required the Council to consult at all.

56. To the extent that Mr Giffin argued for a continuing breach of a continuing duty of consultation up until the time the Council was contractually committed, that in itself gets him nowhere: as the judge pointed out, under the Rules time runs when the claim *first* arose.

(2) The application of the decision in Burkett

57. I turn then to Mr Giffin's alternative ground of appeal, by reference to the House of Lords decision in *Burkett*. In reality, as it seems to me, this is the main point on the application.

58. The essence of the argument under this head was that even if Mrs Nash could have raised her challenge as to want of consultation at an earlier stage (in 2010/2011) there was no obligation on her, under the Rules, to do so; and that *Burkett* permits such a claimant to raise the legal challenge at the time of the final decision to do the act. For this purpose, Mr Giffin reiterated the argument to the effect that "all the Council decided to do in 2010 and 2011 was to initiate a procurement process (and thereafter to move on from time to time to the next stage of the process)". At no time, it was again emphasised, had the Council committed itself to awarding any contract, let alone any particular contract, until the decision of 6 December 2012. Until then, it was said, there was at most a provisional or contingent decision to outsource the relevant services. "But [the argument goes] the whole point of *Burkett* is that a decision of that nature does not start time running".

59. Properly analysed, *Burkett*, in my view, simply will not bear so open-ended an application. Here too I agree with the reasoning of the judge, most notably as encapsulated in his reasoning at paragraph 41 of his judgment.

60. I regard it as essential to analyse what *Burkett*, on its facts, was about and then to analyse what the present case, on its facts, is about.

61. In *Burkett*, on 15 September 1999 the local planning authority resolved to grant outline permission for a development subject, among other things, to completion of a s.106 agreement. The claimants were concerned adjoining owners who had already protested about the developers' environmental statement. In February 2000 the

decision was made that the application be not called in. On 6 April 2000 the applicants applied for judicial review of the local authority's resolution of 15 September 1999. Subsequently, on 12 May 2000, the s.106 agreement was completed and outline planning permission granted. The judges at first instance and on appeal held that the proceedings were out of time, on the footing that the grounds of challenge had first arisen on 15 September 2009. The House of Lords reversed the decision, holding that the grounds of challenge first arose when permission was actually granted: and leave to amend the claim form to substitute the later date could be granted.

62. The principal judgment was given by Lord Steyn. Although the case had its own planning context, he observed – as Mr Giffin stressed – that the rule of court as to time "applies across the board to judicial review applications" (paragraph 43). He further said that where community interests were involved that "weighs in favour of a clear and straightforward interpretation which will yield a readily ascertainable starting date" (paragraph 45).

63. Perhaps the key part of his judgment is contained in paragraph 39, which reads as follows:

> "39. As a matter of language it is possible to say in respect of a challenge to an alleged unlawful aspect of the grant of planning permission that "grounds for the application first arose" when the decision was made. The ground for challenging the resolution is that it is a decision to do an unlawful act in the future; the ground for challenging the actual grant is that an unlawful act has taken place. And the fact that the element of unlawfulness was already foreseeable at earlier stages in the planning process does not detract from this natural and obvious meaning. The context supports this interpretation. Until the actual grant of planning permission the resolution has no legal effect. It is unlawful for the developer to commence any works in reliance on the resolution. And a developer expends money on the project before planning permission is granted at his own risk. The resolution may come to nothing because of a change of circumstances. It may fall to the ground because of conditions which are not fulfilled. It may lapse because negotiations for the conclusion of a section 106 agreement break down. After the resolution is adopted the local authority may come under a duty to reconsider its decision if flaws are brought to its attention: *R v West Oxfordshire District Council, Ex p C H Pearce Homes Ltd* (1986) 26 RVR 156. Moreover, it is not in doubt that a local authority may in its discretion revoke an outline resolution. In the search for the best contextual interpretation these factors tend to suggest that the date of the resolution does not trigger the three-month time limit in respect of a challenge to the actual grant of planning permission."

He went on to say in the course of paragraph 42 of his judgment:

> "The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he *must* apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort."

He disapproved of the approach of Laws J in *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] Env LR 415 – and in substance endorsed by the Court of Appeal in *Burkett* itself – to the effect that a judicial review must move against the decision which is "the real basis of complaint" and should not wait upon something consequential and dependent on it. He thought such an approach could lead to uncertainty. He also noted (paragraph 50) that it was unreasonable to require an applicant to apply for judicial review when a resolution might never take effect.

64. This decision of course is binding on this court. But it is binding for what it decides; and to my mind it is plainly distinguishable from the present case. In that case, there was a resolution to grant outline permission subject to, among other things, completion of a s.106 agreement: a context quite different from the present. As to his general approach, Lord Steyn gave a striking example, in paragraph 43 of his judgment, of a provisional decision (taken from the field of licensing). He said this:

> "43. At this stage it is necessary to return to the point that the rule of court applies across the board to judicial review applications. If a decision-maker indicates that, subject to hearing further representations, he is provisionally minded to make a decision adverse to a citizen, is it to be said that time runs against the citizen from the moment of the provisional expression of view? That would plainly not be sensible and would involve waste of time and money. Let me give a more concrete example. A licensing authority expresses a provisional view that a licence should be cancelled but indicates a willingness to hear further argument. The citizen contends that the proposed decision would be unlawful. Surely, a court might as a matter of discretion take the view that it would be premature to apply for judicial review as soon as the provisional decision is announced. And it would certainly be contrary to principle to require the citizen to take such premature legal action. In my view the time limit under the rules of court would not run from the date of such preliminary decisions in respect of a challenge of the actual decision. If that is so, one is entitled to ask: what is the qualitative difference in town planning? There is, after all, nothing to indicate that, in regard to RSC Ord 53, r 4(1), town planning is an island on its own."

That is, in my view, very revealing of his thinking and approach. He clearly regarded the resolution to grant outline planning permission in that case as being of such a kind.

65. That simply is not the situation here. Here, the Council was not provisionally resolving to enter any outsourcing contract at all, let alone a provisional contract relating to the DRS project or to the NSCSO project. What, as the context and the terms of the relevant decisions in November 2010 and March 2011 show, the Council was doing was *actually* deciding to enter into a procurement *process* by way of competitive dialogue. That process then, and in accordance with the 2006 Regulations, proceeded in stages. Thus, in contrast with the initial resolution in *Burkett*, work here was lawfully and foreseeably done and money was expended precisely because of such decisions. The decisions thus had and were intended to have legal effect: not, of course, in terms of sanctioning a binding contract but in terms of authorising and causing the initiation of the procurement process, with attendant inevitable heavy expenditure and significant use of time and resources. Without such decisions, those things could not and would not have been done. Those decisions are thus, indeed, in my view properly to be regarded as substantive or, if you like, "final" (using Mr Giffin's word) for that purpose. They are not to be regarded as contingent or provisional, even though there was no guarantee at all that any outsourcing contract or contracts might ultimately result. Mr Giffin did suggest that so to conclude would be tantamount to resurrecting "the real basis of complaint" approach put forward in the *Greenpeace* case but which was disapproved in *Burkett*. In my view, however, it does no such thing: rather, as I have sought to say earlier in this judgment, it identifies the actual decision by reference to which the grounds of challenge first arose.

66. Mr Giffin cited to us, as he had to the judge, a number of authorities which he said supported his argument. Properly read, I do not think they do. Thus in the planning case of *Younger Homes (Northern) Ltd v First Secretary of State* [2004] JPL 950, [2003] EWHC 3058 Ouseley J took the view (obiter), applying *Burkett,* that notwithstanding there had been flaws in the prior screening opinion the applicants were not out of time in seeking, as they did, to quash the eventual grant of planning permission. That was a context quite different from the present but altogether closer to *Burkett*.

67. The same can be said for the views expressed by Pill LJ in the case – also a planning case – of *R (Catt) v Brighton & Hove City Council* [2007] EWCA Civ 298, in which he endorsed the approach of Ouseley J in *Younger Homes*. Pill LJ said (at paragraph 49):

> "However the opportunity to challenge [a screening opinion] does not affect the right to challenge by judicial review a subsequent planning decision. The opinion does not create, or inevitably lead, to a planning permission…"

That too is to be contrasted with the present case, where the decisions, while not inevitably leading to the grant of any particular outsourcing contracts, did inevitably lead to – and had the legal effect of authorising – the expensive and time-consuming process of procurement in accordance with the 2006 Regulations.

68. In *R (Risk Management Partners Ltd) v Brent London Borough Council* [2010] PTSR 349 [2009] EWCA Civ 490 there were rather special facts, in part based on an alleged breach of Regulation 47 of the 2006 Regulations. There the submission, as recorded, had been (paragraph 144) that "either time runs or it does not" and that a claimant could not, if out of time from the date a breach had been apprehended, improve his position by waiting for the actual breach to occur. It is unsurprising that so generalised an argument was rejected: see, for example, paragraph 148 of the judgment of Pill LJ. Nevertheless, Moore-Bick LJ (at paragraph 250), having emphasised that judicial review is the means of challenging the unlawful exercise of power, went on to say in general terms:

> "Moreover, as I have already observed, a failure to comply with the procedure at any stage inevitably undermines the integrity of all that follows. Accordingly, the right of action is complete immediately and cannot be improved by allowing the procedure to continue to a conclusion. Where there has been a failure to comply with the proper procedure the later award of the contract does not constitute a separate breach of duty; it is merely the final step in what has already become a flawed process. For these reasons I do not think that the approach adopted in *Burkett* can simply be transposed to a claim under the Regulations."

Those general observations – while made in a somewhat different factual context – have resonance with the present case.

69. More in point, in my view, were other cases cited to us by Miss Rose (and as had been cited to and considered by the judge below). They included, among others, the decision of Eady J in *R (Unison) v NHS Wiltshire Primary Care Trust* [2012] EWHC 624 (Admin); and the decision of Burnett J in *Allan Rutherford LLP v Legal Services Commission* [2010] EWHC 3068 (Admin). It is not necessary to refer to them in detail: all were, however, from a procurement context and so, having such context, are comparable to the present case: albeit of course each had its own facts.

70. In my view, the most illustrative of such cases is the decision of the Court of Appeal in *Jobsin Co. UK plc v Department of Health* [2002] 1 CMLR 44, [2001] EWCA Civ 1241. That case also raised various issues relating to public procurement. One of the issues arising was the question of a time bar said to arise under Regulation 34 of the Public Services Contracts Regulations 1993. It had been alleged that there had been a breach of the Regulations by failure to publicise the criteria by which a bid was to be assessed. The question was whether time ran from the date of such breach or from the later date when the claimant was excluded from the tender process. In paragraph 28 of his judgment, Dyson LJ (as he then was) said this:

> "28. That brings me to the second reason. It would be strange if a complaint could not be brought until the process has been completed. It may be too late to challenge the process by then. A contract may have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of rerunning the process and the greater the overall cost. There is every good reason why Parliament should

> have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date. Mr. Lewis suggests that there is such a reason. He points out that if, in a case such as this, the limitation period runs from the date of publication of the tender documents, it will be possible for the contracting authority to rule out any real possibility of a challenge by issuing an invitation in breach of the regulations and then not taking any further steps in relation to tenders until after the three months period has expired. I confess that I find this an unlikely state of affairs, but I can see that it might conceivably happen. If it did, a service provider who wished to bring proceedings might have a good case for an extension of time: it would all depend on the facts. In my view, this cannot affect the plain meaning of regulation 32(2). I would therefore hold that the right of action which Jobsin asserts in the present case first arose on or about 14th August 2000. The essential complaint which lies at the heart of the proceedings is that there was a breach of regulation 21(3), in that the Briefing Document did not identify the criteria by which the DOH would assess the most economically advantageous bid."

The obvious sense and force of these remarks was reflected in the approach of the judge in the context of the present case and in the approach of other judges in other procurement cases as cited to us.

71. Thus in my view *Burkett* should properly be distinguished. Mr Giffin could find no other authoritative support for his arguments, subject to his citation to us of a case on procurement in the form of the decision of Collins J in *R (Smith) v North Eastern Derbyshire PCT* [2006] EWHC 1338 (Admin). Collins J did there briefly express these views in paragraph 24 of his judgment:

> "24. Delay is relied on by the defendant. Since permission was granted by Davis J on 15 March 2006, delay is only relevant under s.31(6) of the Supreme Court Act 1981 so that detriment to good administration or prejudice to a person must be shown. The claim was lodged on 3 March 2006. The decision under attack is that announced on 23 December 2005. The claimant was unaware of the decision to tender, which took place on 10 November 2005, until Christmas time. In any event, the decision of the House of Lords in *R v Hammersmith & Fulham LBC ex p Burkett* [2002] 1 W.L.R. 1593 suggests that time would not begin to run until the decision was made to contract with UHE. If another route had been chosen which was acceptable to the claimant, no claim would have been needed. There is always some prejudice arising from the time and resources spent in disputing a claim. Here, the PCT has the added expense of providing the service itself while these

> proceedings are in being. It is said that to put the matter out to tender again would be unfair to UHE since others would now know how to amend their bids. UHE has not made any observations, and so I cannot assume anything in their favour. In any event, if other better bids result, that will be advantageous for the PCT and the patients."

But it is not clear if the point was fully argued, and the comments of Collins J in this case were not only by reference to s.31(6) but were both obiter and tentative. Overall the relevant authorities (whilst accepting that all must be read in their own context and on their own facts) are against Mr Giffin's argument.

72. Mr Giffin did also – with respect, rather vaguely – talk about the point when there was a final decision to act in a way which would impact on Mrs Nash's "rights". I am not sure that it is very helpful, in a context such as the present, to talk of "rights". Certainly there were here no property rights of the kind held by the claimants in *Burkett* which stood to be affected. That Mrs Nash, given the obligations in s.3 of the 1999 Act and given that she is a resident of Barnet, had a sufficient interest entitling her to bring proceedings is not in dispute. But to talk further about her "rights" adds nothing to the points identified above and cannot detract from focusing on the time when it was open to her to challenge the Council for breach of its duty to consult: and that was in 2010/2011.

73. There was also nothing in terms of fairness or certainty here such as to justify the claimant not issuing proceedings until after the decision of 6 December 2012. The prior decisions had been made at public meetings, had been published and (as found by the judge) were widely known. Mr Giffin at one stage suggested that there was uncertainty with regard to the NSCSO project; was the relevant decision, for example, that of 2 March 2011 or 29 June 2011? I incline to think that the relevant decision was that of 2 March 2011, because that constituted the formal beginning of the procurement process. But it matters not: all the judge was saying was that whether it was 2 March 2011 or 29 June 2011, the claimant was, either way, well out of time. In truth, considerations of fairness and certainty in this respect all weigh strongly in favour of the Council. It is inconceivable that the Council (or the potential tenderers) would have gone down the very costly and time-consuming process of procurement and competitive dialogue had it been envisaged that a challenge on the grounds of lack of consultation on the whole strategy of outsourcing might at the very end of the day be made. That is quite different from the inherent and understood risk that the procurement process might not ultimately result in any concluded procurement contract.

74. The choosing of the decision made on 6 December 2012 as a peg on which to hang this claim in fact seems to me to be almost adventitious. Indeed, I still do not really see why, on Mr Giffin's argument, the challenge could not have been made yet later, within three months of the actual signing of the contracts. One can, nevertheless, understand why Mr Giffin rather shied away from alighting on the date of the actual signing of the contracts. To do so, of course, would only highlight the very issue of delay: since to allege a failure of consultation (which is designed to be undertaken at the formative stages) becomes even emptier at a stage when a contract has actually been concluded.

75. I do not propose to say more. In my view the judge's very full reasoning and his conclusions on all these points on delay were correct. I agree with them.

Conclusion

76. In the result, my opinion is that these proceedings were properly assessed as out of time and accordingly that this application should be refused.

77. In such circumstances there is no need to make any observations, which would necessarily be obiter, on the points raised in the Respondent's Notice; and I, for my part, would prefer not to.

Lady Justice Gloster:

78. I agree.

Master of the Rolls:

79. I also agree.