



Neutral Citation Number: [2019] EWHC 3529 (Admin)

Case No: CO/3297/2018

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/12/2019

**Before :**

**MRS JUSTICE JEFFORD DBE**

**Between :**

**The Queen**  
**(on the application of AA)**  
**(by her mother and litigation friend BB)**

**Claimant**

**- and -**

**Rotherham Metropolitan Borough Council**

**Defendant**

**Mr Jamie Burton and Mr Tom Tabori (instructed by Irwin Mitchell LLP) for the Claimant**  
**Ms Jenni Richards QC and Mr Adam Boukraa (instructed by Rotherham Metropolitan**  
**Borough Council Legal Services) for the Defendant**

Hearing dates: 13 and 14 May 2019

**Approved Judgment**

**Mrs Justice Jefford DBE:**

***The Claim***

1. At a meeting on 21 May 2018, the defendant, Rotherham Metropolitan Borough Council (“the Council”), decided, amongst other things forming part of its plans for provision for adults with learning difficulties, to close the Oaks Day Centre at Wath (“the Decision”).
2. The claimant is a customer of the Oaks Day Centre. She is 27 years old. She has significant needs, in particular because of her autism, and has attended the Oaks Day Centre 5 days a week since the age of 19. Her mother is her primary carer and she patently has a loving and supportive family. The Day Centre is extremely important to her, and in turn, her family. The claimant is happy there – she has friends there whom she has known since school or who have also attended the Day Centre for a long time and the staff are also like friends to her. She finds it difficult to make friends and these relationships are of great importance to her.
3. It is not in issue that the Council is the authority with responsibility for the claimant’s care needs under the Care Act 2014.
4. It is also not in issue that the decision to close the centre was taken after a lengthy period of consultation although the focus in this claim is on the second consultation that took place from 28 September 2017 to 22 December 2017. The claimant and many others have opposed the closure of the Day Centre throughout these periods.
5. Permission to bring proceedings for the judicial review of the Council’s decision was sought on a number of grounds. Permission was granted on ground one only which was subdivided into two grounds. As formulated in the Statement of Facts and Grounds they were both aspects of the alleged failure to comply with the requirements for a lawful consultation, framed as follows:

*“Despite stating “RMBC would consider and take into account the learning from the consultations that have taken place”, the consultation was unlawful in two significant respects. First, the options presented to the consultees and to the decision makers omitted an option of increasing flexibility, the range of options for care provision, and access to the community whilst retaining day centres. Second, contrary to the fourth Gunning criterion, the Decision was reached following defective consultation, inaccurate presentation of consultation responses in the consultation analysis .... and by the council officers to the decision-makers (the Cabinet and Commissioners), resulting in failure to take conscientiously into account consultation responses, particularly the level of opposition.”* (My emphasis).
6. Each of these grounds requires some further elucidation but it is convenient first to set out the relevant history of events.
7. In addition to the documents, there were before me the following witness statements.
  - i) On behalf of the claimant, statements of BB (the claimant’s mother); SH (her sister); Valerie Smith, Barbara Barnard, Mary Beck, Patricia Hewson and Monica Hudson, all mothers or siblings of customers of the Addison Day

Centre; and Mavis Reed and Carol Lee, mothers of customers of the Oaks Day Centre.

- ii) The claimant also sought permission to adduce further statements responding to matters raised in the defendant's statements and/or commenting on the consultation process. The application was opposed and I said that I would receive those statements de bene esse. In the event, little reliance was placed on them and, having considered them, I do not regard them as adding anything of significance to the facts set out below.
- iii) On behalf of the defendant, statements of Councillors Christopher Read, David Roche and Brian Steele; a statement of Anne-Marie Lubanski, Strategic Director of Adult Care and Housing; a statement of Dr Jill Aylott of Aceppe; a statement of Jayne Metcalfe, at the material time Operational Manager for the in-house Learning Disability Provider Service at the Council; a statement of Sally Ferguson-Wormley of Speakup.

### ***The events leading up to the Decision***

8. From about April 2015, the Council began to consider changes to its learning disability services. In November 2016, the Council's cabinet approved an officer's recommendation that it should consult on the reconfiguration of those services. That consultation ("the first consultation") took place between 5 December 2016 and 2 February 2017.
9. The lead up to the decision to undertake that consultation included the following. Firstly, at a Cabinet/Council Decision Making Meeting on 14 March 2016 the Council was asked to approve a document entitled "Vision and Strategy for Adult Social Care". I note that the document addressed adult social care generally and was not limited to those with learning disabilities. Under the heading "Background" the document stated that the Care Act 2014 "reinforces a direction of travel that has been evolving for over a decade with a steady move away from traditional services to more personalised approaches". Rotherham, it said, had not kept up with the pace of change. It set out outcomes and strategy which were further described in an annexed report by Professor Graeme Betts, then Interim Strategic Director of Adult Care and Housing. That report noted that: "While the direction of travel has been reasonably consistent, the pace of change has accelerated over the last few years as the demand for more personalised services continues to grow, traditional models of care are seen to be outdated and not delivering independence, choice and control ... the approach to Adult Social Care is increasingly based on an assets model – identifying with the person what they can do, what they do have, who they know and which community groups they are linked into, what their family and friends can do as carers and what the wider communities can offer... " with a focus on outcomes. These changes were said to be reinforced by the Care Act 2014.
10. The Care Act 2014, Part 1 Care and Support, at section 1 provides:  
  
*"(1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.*  
  
...

(3) *In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular –*

(a) *the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;*

(b) *the individual's views, wishes, feelings and beliefs;*

....

(e) *the importance of the individual participating as fully as possibly in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate.*

...”

11. The Council (through Professor Betts) had, by this time, also commissioned Speakup Self Advocacy to facilitate a series of workshops for people with learning disabilities and/or autism and their families. Speakup describes itself as an organisation providing advocacy and training to improve the lives of those with learning disabilities or autism and, as set out above, in these proceedings, Sally Ferguson-Wormley of Speakup provided evidence about their involvement. The plan was called “Together for Change” and resulted in a series of workshops led by Janine Moorcroft, the Head of Service for Adult Care Services at the Council. There was a full day workshop at the Oaks Day Centre in February 2016. Ms Ferguson-Wormley’s evidence was that the session started with a presentation by Ms Moorcroft which focussed, amongst other things, on why services needed to change. In the afternoon, people with learning disabilities, autism or both and their family carers split into workshops and discussed “(a) If Day Services have to change in the future then what is important to you? (b) Why is it important? (c) What works well at the minute? (d) What doesn’t work well? (e) What are your hopes, fears and worries about change? (f) How can we work together in the future?”. 100 people attended the workshops including 52 carers and 48 people with learning disabilities.
12. This resulted in a report dated 9 March 2016 by Speakup Self Advocacy *“Together for Change – Changing Day Services in Rotherham. The view of people with learning disabilities and their carers.”*
13. The report was annexed to the officer’s report for the Council’s Cabinet meeting in May 2016. The paper prepared for the meeting sought approval to implement a strategic approach to the commissioning and delivery of services for people with a learning disability within Rotherham. The approach was said to be based on a number of matters set out in bullet points, namely “The principles set out in Valuing People; Legislative requirements set out within the Care Act; Good practice within other parts of the country; What people have told us about their needs; A need to modernise and deploy resources as effectively as possible.”
14. At paragraph 2.4 of the summary sheet, it was recommended:

*“That a range of options will need to be developed in order to meet the assessed needs of those customers who are eligible for services and that these are likely to*

*move away from large building based traditional services to more personalised community options.”*

15. I do not quote from the accompanying report (“Implementing a strategic approach to learning disability services”) at length but it contained the following:

*“2.4 It is proposed that a direction of travel is established that enables people to transform their lives from one where they either live in and use specialist services or live in the community but are not part of it, into living as part of a community; mainly using services open to everyone with some specialist services .... The amount of specialist services that only people with a learning disability and their carers will use will be kept to the required minimum...”*

16. A number of outcomes, including to improve quality of life and exercise of choice and control, were established, and key issues listed on which urgent action needed to be taken to deliver the vision outlined. These included “the high use of traditional day centres and poor access to mainstream social activities and few work opportunities”. Further:

*“4.1 Doing nothing and continuing to provide restrictive, expensive traditional services is no longer an option as it does not produce good outcomes for customers and their carers, is not Care Act compliant and is not financially sustainable going forward.”*

17. The report went on to explain that consultation must be undertaken so that the Council complied with its duty to act fairly; that that consultation should be undertaken at a time when the proposals were still at a formative stage; that sufficient reasons for particular proposals should be given to allow consultees to give informed consideration and an intelligent response; that they should have sufficient time to formulate a viewpoint; and that the consultation should be conscientiously taken in account when the ultimate decision was made. That reflected the *Gunning* criteria considered below. Particular mention was made of the fact that customers were being encouraged to consider what alternative ways they would like to have their needs met.

18. The Together for Change report was also presented in what was referred to as an easy read format with graphics alongside short summary statements. These statements included:

*“The way day services are provided in Rotherham for people with learning disabilities has to change.”*

*“That is because of the Care Act and the fact that Rotherham Council has less money to spend on services.”*

*“Rotherham Council wants services to be better for everyone and to make sure that people get the right support at the right time.”*

*“Rotherham Council wants to work together with people with learning disabilities and/or autism and their family carers to look at how day services in Rotherham can change. This is what “Together for Change” is about.”*

19. The easy read report referred to the workshops that had taken place and the topics discussed at those workshops. An indication, at least, of views expressed at those workshops, was given again by graphics and speech bubbles. These reflected positive and negative comments about day centres eg. “activities at day centre important”, “activities back, like horse riding and Saturday club”, “day centre is not just a building”, “day centres struggling because of no resources”, “smaller groups in community needed”.
20. I observe at this stage that there was a clear indication that change was driven or necessitated by the Care Act 2014. Nothing specific turns on this in this case as there is no irrationality challenge but it is potentially relevant to the later complaint that the officer’s report for the May 2018 decision-making meeting was misleading. To say that change was required by the Care Act 2014 was potentially misleading but it was not wrong to say that the Care Act either directed or followed the same “direction of travel”. So far as the Council was concerned that direction of travel was clearly away from provision of services through day centres. In the course of argument, Ms Richards QC submitted that there was a gradual funnelling of options to the point where the closure of the Oaks Day Centre was recommended. That point may not have been reached at this stage – it was clearly “the direction of travel” but there was substantially more consideration given to that possibility before a recommendation to that effect was made.
21. The Council gave the approval sought at that stage. Ms Ferguson-Wormley records that thereafter there was a further full day event on 6 June 2016. A Community Opportunities Programme was developed in which a small number of people with learning disabilities and/or autism and their carers were recruited to form part of a steering group to look at personalised services and how direct payments/ personal budgets might work for them. There was also development of “Friendship circles” for people to think about their friendships, loss of friendships having been a particular concern reflected in “Together for Change”.
22. A further meeting took place in October 2016 at which the Council was asked to approve a Market Position Statement described as “a platform for providers and commissioners across Health and Social Care to work together to delivery services across Rotherham”. The paper sought approval to implement a strategic approach to the commissioning of delivery services through the market position statement. The paper further stated that there had been limited consultation with adults with learning disability regarding their hopes and aspirations for the future of accommodation and support and should provide a grant of £50,000 of which set out and make a grant to Speakup to develop and provide expertise for consultation on strategy.
23. Within the market position statement, there was some discussion of day centres in a section headed “Community Opportunities”:

*“Since 2007 Rotherham Metropolitan Borough Council has provided traditional day services for older people with a learning disability, in two separate geographic areas of the borough. There are currently 288 people with a Learning Disability attending day services across 3 services; ....*

*A number of consultation sessions have taken place across the borough and it was clear that existing and new customers wanted to access services that were more local to where they live and in a different environment.*

*.... day opportunities and activities to support people with disabilities have, in the past, focused on support provided within building based environments. Over the past two years the Council has been working to redesign its approach, moving away from traditional building-based services towards offering a diverse range of individual solutions for people in their Communities.”*

### ***The first consultation***

24. On 14 November 2016, the Council approved a recommendation to consult on the reconfiguration of learning disability services including the future of in-house services for adults with learning disabilities and/or autism. The summary for that meeting referred to a proposal to promote independence and choice and continued:

*“This new “offer” means that the current traditional in-house services need to be incrementally modernised and transformed. The current building based offer of day care, respite and residential care restricts the independent, choice and control of current customers and it is costly, although it is still recognised that such case remains appropriate in the short to medium term for a small cohort of people with extremely complex needs. This is not sustainable, is not cost effective and does not offer a safe solution for adults with a Learning Disability and their carers.”*

25. The accompanying report set out the background as being the national focus (including that in the Care Act 2014) on personalised support. It summarised the provisions of the Care Act in terms of requiring people to be assessed as individuals. It summarised the “journey” to look at alternative options from April 2015. It proposed an approach that enabled people to “transform their lives from one where they either live in and use specialist services or live in the community, but are not part of it, into living as part of the community, mainly using services open to everyone with access to specialist targeted services when needed”; that is, the same direction of travel as referred to in paragraph 15 above.

26. The report specifically referred to the three day centres, Oaks, Addison and Reach. In respect of Oaks, paragraph 2.10 was as follows:

*“Oaks Day Centre is a large Learning Disability day service based within Wath .....* On average there are approximately 80 customers in attendance per day from a total of 120. The majority of these customers access adult services in-house transport as they do not live locally. 50% of customers also reside in a residential or supported living setting. The service provides primarily building based activities with some outreach work into the community. Customers who have been receiving this service for a long time and have not been accessing independent opportunities will need support to identify what type of activities they would like to undertake in the future.”

A key issue was again identified as “The high use of traditional day centres and poor access to mainstream social activities with few work opportunities ....”

27. Under Section 4 “Options considered and recommended proposal”, the recommendation was to agree to commence consultation on the reconfiguration of the Learning Disability services and to receive a further report on the outcome and, at paragraph 4.3:
- “The current service model is not affordable and does not deliver the best possible outcomes for customers. Resources do not allow for the Council to adopt a “do nothing” approach to the Learning Disability offer. Through consultation we want to seek solutions from customers and carers about alternative ways to meet eligible need which will increase people’s control, choice and independence.”*
28. Against the background of that report, on 14 November 2016, the Council gave its approval to the first consultation. A letter dated 30 November 2016, with Ms Moorcroft’s reference and contact details, was sent to carers to inform them that a formal consultation on the Learning Disability Offer was agreed at the Council’s decision-making meeting on 14 November 2016. The letter provided a link to the report considered at the meeting. It indicated that an online questionnaire would be made available in the next two weeks (and printed copies could be requested) and focus groups, drop-in sessions and one to one sessions would take place.
29. Evidence about the first consultation was given in Ms Lubanski and Ms Ferguson-Wormley’s statements. The latter described it as involving a mixed methods approach but a key element was an online questionnaire “co-produced” by people with learning disabilities/ autism from Speakup. There were four versions of the questionnaire directed at people with learning disabilities/autism, family carers, staff and other members of the public. There were four key headings in the questionnaire: care and choice; being part of your local community; living in the right home; and “anything else”. In this last section the questionnaire asked “Is there anything else you would like to tell us?” and specifically “Anything else you feel is important to you”, “Anything we have missed”, “Anything you are worried about”.
30. A version of the questionnaire was again produced in an easy read format using graphics and short statements and a mixture of short questions and tick boxes.
31. Between 1 December 2016 and 19 January 2017, “experts by experience” from Speakup made 22 visits to support people in completing the questionnaire. Over 150 hard copies were also requested. Ms Ferguson-Wormley states that on 19 January 2017, carers requested an opportunity to add in anything else and on 26 January 2017 a letter was sent with a form for additional information to be provided. This was disseminated via day services and sent electronically to family carers who had been involved already. There were also focus groups and drop-in sessions held, totalling 23 sessions attended by 140 people. These followed a format of discussion topics identified in a PowerPoint presentation and again participants were asked if there was anything else they would like to tell the presenters.
32. Over 600 people engaged in one way or another with the first consultation (with 487 completing the questionnaire). Ms Lubanski, who had taken over from Professor Betts, says in terms that during this process the opposition to any change was clear.



33. Two reports were produced which analysed the results of the consultation. A report was produced by Speakup (Ms Ferguson-Wormley) and the Council together outlining the results of the engagement sessions. The report contained a specific section about Day Centres which had been mentioned at 22 out of 23 events. The report identified that, whilst this was one of the most discussed topics, comments were both positive and negative. Some carers regarded them as the best option; other comments included that they did not meet needs and were restrictive in activities/opportunities. Particular anxiety was expressed about the potential closure on services and the impact of family, jobs, mental health and what alternative support and services there may be. The comments made at each session were reported (in short form).
34. I note that Ms Ferguson-Wormley together with Ms Moorcroft also produced a “Lessons Learnt Briefing Note” which, in short, identified some particular issues with the online questionnaire and difficulties that people had had in completing it.
35. Aceppe (an external body taking its name from an acronym for A Centre of Excellence for Patient and Public Engagement) also produced a report. Dr Jill Aylott, Chief Executive Officer of Aceppe, provided a witness statement and described it as a not for profit organisation set up by academics in collaboration with professionals who are also parents of children and adults with learning disabilities and/or autism. Dr Aylott and Dr Prosenjit Giri co-authored the report “Rotherham MBC “have your say on the proposals to change the way we deliver our learning disability and autism offer”: Report on the outcomes of the public consultation” (March 2017). It is impossible fully to capture the content of the report in this judgment. However, it ran to over 40 closely typed pages drawing together the responses to the questionnaire under thematic headings. Amongst many other things, it recorded concern about change and particular worry about Day Centres closing. The report included a combined analysis section which specifically noted that the study sample was unknown so that it was impossible to predict whether the outcome could be generalised. There was further an update report which identified “Limitation and lessens (sic) to be learnt”. A particular issue was the difference in the four questionnaires for different stakeholder groups which had inhibited quantitative analysis.
36. As I noted above, amongst the evidence on this application was a statement of Councillor David Roche. His professional background is in education and he was or is the Cabinet member responsible for Adult Social Care and Health. In addition to the evidence of Ms Lubanski, he said that during the first consultation there was already strong opposition to the closure of services such as the Oaks Day Centre and that he received reports from Ms Moorcroft about the opposition voiced at the various events held. It was, he said, clear to him and the rest of the Cabinet that “transforming the Council’s services in this area would be very controversial”. Partly as a result, he set up monthly meetings with the Rotherham Carers’ Forum. These meetings continued until after the 21 May 2018 decision (with which this application is concerned) and there was throughout this period vocal opposition to closure.
37. In any event, the outcome of the first consultation was summarised in an officer’s report for a Council Cabinet and Commissioners Decision Meeting on 10 July 2017. It is not entirely clear from the documents but the two reports appear to have been provided and referred to as background papers. So far as Day Centres were concerned:
  - i) The report contained similar comments about Day Centres as before.

- ii) In a section headed “Property Maintenance” a cost of £900,000 was attached to refurbishment of the Oaks Day Centre if it was to be retained.
- iii) The summary of the consultation identified that “62% of customers access day care provision”.
- iv) In the summary of engagement events, under the heading “Day Centres”, the report noted that these had been mentioned at 22 of 23 events and the positive and negative comments referred to above were reflected.
- v) In a specific section (section 5.6) on the Oaks Day Centre, it was reported that:

*“The outcome of the consultation whilst some people said they felt they had choice and control, it was clear that customers gave an overwhelming response of their wish to gain employment or voluntary work. ....*

*It was clear that some customers and carers are happy with their current offer and day centre placement as they feel that this meets all their needs in a positive way. There was a strong sense of willingness from carers to support the change and in some cases carers recognised that the choice of a traditional day centre perhaps was not the best option for their loved one.*

*It is evident is that people’s friendships circles are really important due to the relationships that have been built over a number of years and that a safe building base of some kind would be favourable. ....*

*Many participants who engaged in the consultation felt that the Council should utilise their existing buildings better, while others acknowledged that some existing building were run down and required investment. However, participants felt that should services change they would like the option of having a smaller building base, particularly for the winter months. “Buildings” became a theme being discussed six times out of the twenty three engagements sessions.”*

- vi) The report then identified 3 options: Option 1 was to retain the Oaks Day Centre (the only strength identified was retaining future provision but seven weaknesses were listed); Option 2 was to “reduce the offer of Oaks Day Centre to customers who reside within residential and supported living”; Option 3 was to “consult on Planned Closure of Oaks Day Centre and re-provide by personal budgets and or commissioned day care by an external provider”. For options 2 and 3, strengths, weaknesses and key assumptions were set out. The report continued:

*“From the options outlined above it should be noted that **option 3** is the preferred recommendation. This is due to the reasons outlined within strengths. .... ”*

- vii) The penultimate section of the report (Section 14) was headed “Risks and Mitigation” and included the following:

*“14.1 Risk of not agreeing to the recommendation will mean that the aspirations and outcomes for customers will not be achieved and the budget*

*savings will not be met, and alternative options will need to be identified in order to achieve a balanced budget.*

...

*14.4 Despite the amount of on-going engagement with parents and carers, it is acknowledged that the decisions to be taken will not be favourable (sic). Some customers could be affected by one or more of the recommendations.”*

38. Although the focus of this claim has been on the second consultation, both parties place some reliance on this report. The Council places reliance on it as illustrative of the extent and nature of consultation; the knowledge of the Council members of the background to the decision with which I am concerned; and the likely interest of the Council members in the product of any consultation and, in particular, on any further reports prepared by Speakup or Aceppe. It also gives some indication that the decision to be taken would not or might not be popular with stakeholders. The claimant emphasises that options identified in the report did not include an option to retain the Day Centres but modernise the provision (for all customers). However, the report did identify three options considered by the Council and provided reasons for the preference for option 3.
39. The report’s recommendations were approved by Cabinet and Commissioners on 10 July 2017. The consultation was to take place over 12 weeks with customers, staff and stakeholders and consider the future of, amongst others, the Oaks Day Centre and the Addison Day Centre.

### ***The second consultation***

40. The second consultation took place between 28 September 2017 and 22 December 2017.
41. In her statement, Dr Aylott describes the involvement of Aceppe in the design of the consultation. Stage 1 consisted of a literature review using key words relating to best practice. Stage 2 (which took place alongside stage 1) was a “pre-consultation” which involved 104 individuals from eleven stakeholder groups in the design of the online and hard copy “easy read” questionnaire. The intention was to learn from the shortcomings of the first questionnaire. This time there was to be one questionnaire with branches for different groups; simple flashcards to accompany the questionnaire for those with complex needs; the involvement of so-called “consultation champions” to assist with completing the questionnaire; and various engagement sessions. Aceppe was involved in the training of those champions.
42. The easy read version asked whether the consultee used day services in Rotherham at Addison, Oaks and Reach. It asked (question 3h) “What changes could we make to day services to make them better?”. It then asked (question 3i) whether Oaks and Addison should be kept the same as they were with the options to answer yes, no or don’t know. Question 3m was “Should we close Oaks and Addison Day Centre?”.
43. In the context of the arguments considered below, it is material that the questionnaire contained a number of open questions including that set out above:

- i) Question 3b: *What changes could we make to respite services to make them better?*
  - ii) Question 3h: *What changes could we make to day services to make them better?* (as above)
  - iii) Question 3p: *Is there anything else you would like to say on the Rotherham Council options for Respite or Day Services in Rotherham?*
  - iv) Question 3j in contrast asked a rather more closed question: *Should the Council lower the amount of time people spend in day services and offer people personal budgets?*
44. It seems to me important that, although the preferred option 3 had been to consult on closure, on any view the questionnaire did not simply ask for views about closure but asked for views on the alternatives of keeping the day centres open and asked questions about making services better.
45. The consultation went live with a letter dated 21 September 2017 sent to families and carers which announced the start of the 60 day consultation period asking for views on “the modernisation of the in-house services for Learning Disability and Autism in Rotherham”. The letter provided a weblink to the report for the 10 July 2017 decision-making meeting and a link to the online version of the questionnaire. Reference was also made to the options of attending a focus group or a one to one interview.
46. It was again the evidence of Councillor Roche that he was given briefings by Council officers during the second consultation and that he was aware that there was significant opposition to the closure of services such as the Oaks Day Centre, which was also reflected in social media, in articles in the Rotherham Advertiser, on a website about politics in Rotherham and from the monthly Carers’ Forum meetings that had continued to take place. In February 2018, a petition with 6,569 signatures opposing the closure of Addison and Oaks Day Centres was presented to the Council by Unison. This led to a short debate at a Council meeting on 28 February 2018. Councillor Roche points out that seven of the eight Cabinet members who subsequently took the decision in May 2018 were present at that meeting.
47. A report analysing the consultation responses was produced by Aceppe, in January 2019:
- i) Paragraph 1.9 summarised the outcome of the consultation on Day Services:  
  
*“The majority of people with a learning disability do not want day services to change and will need support through any change process to prevent distress and anxiety about change. One third of carers want the services to remain the same, while another third want the same and more investment and the final third want more integration into the community. One half of the members of the public either want to keep the services the same or invest in them further. While the other half wants to modernise day services. While 22 out of 55 (40%) of the staff focused on advocating for the buildings and equipment in day centres, the majority 60% were focused on the need to offer choice, personalisation and flexibility in the services provided.”*

- ii) The report repeated these broad summaries whilst providing illustrative quotations from the responses of people with a learning disability, carers, staff and members of the public.
- iii) There was then a section of the report which included the qualitative data expressed in words and graphically.
- iv) In respect of question 3i (“Should we keep Oaks and Addison the same as they are?”):
  - a) the customer response was: “Oaks: Yes 72 (48%) No 5 (3%) Don’t know 73 (49%)”
  - b) the carer response was: “Oaks: Yes 47 (68%) No 5 (7%) Don’t know 17 (25%)”
  - c) the staff response was: “Oaks: 43 (52%) No 18 (22%) Don’t know 21 (26%)”
  - d) the public response was: “Oaks: 37 (54%) No 10 (15%) don’t know 21 (31%)”
  - e) The interpretation was “all the groups expressed their desire to continue with present service as it is. Customers were a little unsure about Oaks.”
- v) There was an overwhelmingly negative response to question 3j but it was noted that there was very little information currently available about how people manage personal budgets in Rotherham.
- vi) In answer to question 3m (“Should we close Oaks and Addison Day Centre?”) the responses were as follows:
  - a) the customer response was: “Oaks: Yes 4 (4%) No 109 (96%)”
  - b) the carer response was: “Oaks: Yes 5 (7%) No 70 (93%)”
  - c) the staff response was: “Oaks: Yes 9 (13%) No 61 (87%)”
  - d) the public response was: “Oaks: 9 (16%) No 47 (84%)”
  - e) The interpretation was “Decisive response – no support for the proposed closure”.

### ***The Decision***

- 48. The officer’s report for the 21 May 2018 decision-making meeting was made available to the Cabinet and Commissioners on 30 April 2018 and was made public two weeks before the meeting. It included a recommendation to close the Oaks Day Centre.
- 49. The relevant agenda item for the meeting named the relevant Cabinet Member as Councillor Roche. Sub-item or sub-paragraph (3) was:

*“That approval be given to the transformation of the Learning Disability Services over the next two years which will see the services move from existing building based locations to alternative care and support that will be situated as close to the person as possible in their local community, using and developing existing resources and community buildings ie. leisure centres and community provision. Oaks Day Centre, Addison Day Centre, Treefields, Quarryhill and Parkhill will be decommissioned.”*

50. Between the publication of the report and the Cabinet decision-making meeting on 21 May 2018, Councillor Roche’s evidence is that several meetings were held between Council officers and interested parties, including carers and families, at which opposition to closure was made very clear.

51. As will be apparent from my references to the Cabinet and Commissioners, the Council has adopted the structure of a Leader and Cabinet as an executive responsible for most decisions about delivery of services. Councillors who are not in the Cabinet keep an overview and there is an Overview and Scrutiny Management Board (which was at the time chaired by Councillor Brian Steele). On 16 May 2018, the Overview and Scrutiny Management Board (“OSMB”) met to consider the officer’s report. Questions were taken from members of the public and again the strength of opposition was made clear.

52. Returning to the officer’s report, the structure of the report was that the first few pages consisted of a summary, followed by recommendations and then a list of Appendices. That was followed by 10 pages of substantive report and then the Appendices themselves.

53. The Summary was in the following terms:

*“The purpose of this report is to set out the next steps in the transformation of services and support for people with a learning disability in line with the learning disability strategy, vision and the learning from the consultation with people and families.*

*The needs of people with a learning disability are continuing to change and are becoming more diverse. People and families have higher expectations of what it means to have an independent life in their community and want more control over their lives.*

*There are a number of key steps that the Council needs to take to achieve the vision and the three year improvement journey for people with a learning disability.”*

The recommendations were those (including that at sub-paragraph (3)) which formed the agenda.

54. The list of Appendices was this:

*Appendix A: Consultation Executive Summary*

*Appendix B: Delivery plan*

*Appendix C: Learning Disability Strategy*

*Appendix D: Equalities Analysis*

*Appendix E: Outcome following consultation held between September 2017 to December 2017*

*Appendix F: Rotherham case studies.*

55. The substantive part of the report contained the following passages which were relied on in the argument before me:

*“2.2 People with a learning disability want access to a wider range of services and support which are part of their local community; they want access to employment, jobs, good leisure time, friendships and to travel as independently as possible around the borough. Examples of what this looks like are contained within the Rotherham Case Studies (Appendix E).*

...

*2.4 The needs of people with a learning disability are continuing to change and are becoming more diverse. People and families have higher expectations of what it means to have an independent life in their community, and want more control over their lives. This change is reflected in the declining numbers of people who have accessed traditional building based “day services” (Oaks - 0, Addison – 2, Adpro – 4) over the past two years. People and families are telling us they expect support and services to be more person centred, flexible, available during the day, evening and weekends, and are community based and as close to where the person lives as possible. People and families want more opportunity to contribute and be part of main stream (sic) life.”*

...

*2.8 Rotherham Council faces significant challenges. Some local services are out of date, expensive, and need to change if the Council is to meet people’s expectations for the future. The current building based services of day care, respite and residential care restrict independence, choice and control and may not provide the best outcomes for the customer. In addition the model is not in line with government policy, good practice and does not provide value for money when looking at other Council’s offers.*

56. Section 3 was headed Key Issues. It stated that a consultation had been undertaken commencing in September 2017. In a series of bullet points, it was noted that people were anxious about change but also that they wanted more things outside of the day centre and in the community:

*“Across all groups consulted with, on average, at least 32% (up to 45%) of people were either unsure what services should look like in the future or they didn’t want them to look the same.*

*One third of carers want the services to remain the same, while another third want the same and more investment and the final third want more integration into the community (Appendix A)”.*

57. Section 4 was headed “Options considered and recommended proposal” and Section 4.1 was headed “Approve the Transformation of services and the move away from segregated building based support, as outlined in the delivery plan (Appendix B)”. That section included a reference to the fact that a third of the people and families who took part in the consultation wanted more integration into the community and included a quote from someone who said that his/her son had never used a day centre. A delivery plan with a “person centred” approach was described. The section concluded with

“examples of alternative support/provision can be seen in the Rotherham Case Studies (Appendix E)”.

58. It will be apparent from these quotations that the reader was being directed to the Appendices in the course of the report. The Aceppe report, which Mr Burton submits was of considerable importance, and which formed Appendix E, was not specifically mentioned at any point nor was the reader’s attention specifically directed to it or its content. There were references to “Appendix E” but the references were to the Rotherham Case Studies which were, in fact, Appendix F.

59. Appendix A, the Executive Summary, itself provided further detail of the consultations:

i) Section 2

*“2.1 There were some key themes from the consultations that have informed the development of the Learning Disability Strategy, the future vision and the delivery plan (see Appendix C)”.*

ii) Short paragraphs addressing support to improve choice and control; opportunity to work; travel; future planning; availability and access to services; health and well-being followed. It would, I think, be fair to say that not one of these passages gave any indication of any level of support for the provision of services through the Day Centres or of opposition to closure.

iii) Paragraph 2.8 addressed Carers’ Views as follows:

*“Carers outlined their own perspective on the quality of what a service should be like in the future;*

- *One third of carers want the services to remain the same*
- *Others want the same and more investment*
- *A third want more integration into the community*
- *Approximately 22 out of 55 (40%) of the staff focused on advocating for the building and equipment in day centres, the majority (60%) focused on the need to offer choice, personalisation and flexibility in the services provided*

.....

*“Goes to Oaks as there is nothing else”*

*“Day Centres can’t provide choice”*

*“Day services unable to provide activities”*

iv) Paragraph 2.9 contained similar comments:

*“Other people felt that the current day Centres:-*

- *Do not meet need*
- *No one to ones in place at day centre so some customers are bored*
- *People are pigeonholed and aren’t given the opportunity to try things at day centres*
- *Day centres should not be the only option available*
- *Day centres are unable to provide activities”*



- v) The conclusion set out in paragraph 3 was this:

*“The two consultations have given us information and feedback about what people think about current services and how they would like support and services to look in future. The key theme that runs from all the consultation is that they want support and services which are “about them” with a person centred approach that meets their needs. People also want a wider range of options, opportunities and choice to help them live a more fulfilled and valued life.”*

60. Appendix B (entitled Transformation of Learning Disability Services Delivery Plan 2018-2020) started with a box for “Person Centred Planning” which stated:

*“Over the next two years we aim to realise our vision and strategy for people with a learning disability. This will improve people lives, aspirations and opportunities and make sure all people with a learning disability have access to community-based services that promote independence, wellbeing and social inclusion. It will be difference between “having a life rather than just a service”.*

In respect of the Oaks Centre there was reference to the consultation that had taken place. The consultation feedback was characterised as people being “very unclear about what the service should like. Good practice would tell us that we need to move away from a heavy reliance on building based services.” Reference was made to the fact that 30 people had moved away from Oaks - it was said, because of carers and customers taking a positive approach to new opportunities – and to there being no new referrals for 4 years as other alternative options were taken up.

61. It would, I think be a fair summary of Mr Burton’s position to say that his submission was that the body of the report and Appendix A (the Executive Summary) were thoroughly misleading and created the impression that there was strong support for community services and little or no support for the “traditional” day centres. I return to these submissions further below.
62. The evidence of Councillor Roche, unsurprisingly, was that he was well aware of opposition to closure and that before the Overview and Management Scrutiny Board meeting and the decision-making meeting on 21 May 2018, he had read all the documents carefully and more than once. Councillor Read, Leader of the Council since March 2015, also confirmed that he had read and considered all of the documents including the Aceppe report. The discussion of the relevant decision took up a large part of the meeting on 21 May 2018 but it is common ground that there was no express reference to the content of the Aceppe report. The decision was taken to close the Oaks Day Centre.

### ***The Gunning criteria***

63. It was common ground that the requirements of a lawful consultation are those known as the *Gunning* (or *Sedley*) criteria derived from *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168 and approved in *R(Moseley) v Haringey London Borough Council* [2014] UKSC 56 at [25]. They are that:

- (1) Any lawful consultation must be undertaken at a time when proposals are at a formative stage.

- (2) There must be sufficient reasons advanced for any particular proposal to allow those consulted to give intelligent consideration and an intelligent response.
- (3) Adequate time must be given for that purpose.
- (4) The results of that consultation must be conscientiously taken into account before any decision is taken.

64. In addition in *Moseley*, the Supreme Court endorsed what had been said by Simon Brown LJ in *ex parte Baker* [1995] All ER 73 at [91] namely that “*the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit.*”

### **Ground 1**

65. Ground no. 1 which I have set out above relies on the second *Gunning* criterion. The claimant’s submission has been put a number of ways, varying in their detail, but all amounting to the submission that the consultation process was unfair because it did not afford the claimant and other consultees the opportunity to make intelligent and informed comment on the Council’s proposals. The particular nature of the unfairness is said to arise from two aspects of the consultation.
66. Firstly, the claimant submits that the consultation was framed so that two options were pitted against each other namely (i) close the Oaks Day Centre (and other centres) and modernise through person-centred provision and personal budgets or (ii) keep the Oaks Day Centre and other centres open but at the cost of modernisation. The modernisation through person-centred provision encompasses or allows for the sort of provision that the various reports I have referred to indicated would be welcomed by some who did not use the Day Centres or wanted more provision in the community or more access to community activities including work. I shall refer to this as “modernisation” as a short way of describing this sort of provision.
67. The claimant’s point is not that such modernisation is unwelcome for some or that the maintaining of the day centre provision ought to be preferred or, indeed, that the decision to close the Day Centre was irrational, but rather that, in pitting these two options against each other, the consultation did not identify or allow for a “middle way” or a hybrid option in which the Oaks Day Centre and/or other day centres were not closed but the modernisation of provision also took place which might include changes in how the centre was used and by whom and allow for expenditure of personal budgets in respect of the Day Centres. This forms the second strand of criticism of the consultation and the second strand of unfairness.
68. The claimant does not purport to put forward some particular strategy for the Council’s provision for those with learning disabilities and/or autism and that is not her point. Nor is it Mr Burton’s submission that the consultation ought to have identified a long list of all possible alternatives but rather that it ought to have identified that the options of retaining the Oaks Centre and closing it were not the only options and that the issue was not binary. He submits that a fair consultation would have been one that identified discarded options and the reasons they had been discarded.
69. The unfairness is then said to arise from the fact that without the option of a middle way, whatever that might be, or the knowledge that a middle way had been considered

and discarded as an option, consultees could not make an intelligent and informed response to the consultation. There were various aspects to that case including that the consultees would not have known that there was an alternative; that they would not have known that the alternative had been rejected by the Council; and, if that were the case, that they would not have known why that had been rejected and could not therefore properly understand why closure was the preferred option.

### *The law on consultations and options*

70. This is not a case in which any consultation was required by statute. It is recognised by both parties that there may have been a common law duty to consult because the closure of the Oaks Day Centre would take away a benefit which the claimant has but it is not necessary to decide that issue. That is because once the consultation was embarked upon, it is common ground that it had to be undertaken fairly.

71. Ms Richards QC, for the Council, then submitted that the law was and is that the consultation process can only be the basis for a judicial review challenge to the decisions if the process was clearly and radically wrong or unfair, in other words that some perceived unfairness would not be sufficient and that the threshold for unfairness was set high. Her authority for that proposition was the decision of Sullivan J in *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin):

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

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

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

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

72. Ms Richards QC’s submission is that that test of “clearly and radically wrong or unfair” is unaffected by the decision in *Moseley*. What I take from the judgment in *Greenpeace* is less some quantifiable test of “clearly and radically wrong” and more that the court needs to be satisfied that there was some substantial error and unfairness in the

consultation process going beyond the identification of ways in which it could have been improved upon, whether that would have involved refining the nature of the consultation or, as is more this case, expanding upon it.

73. The starting point for Mr Burton's submission is then the decision in *R (Moseley) v Haringey London Borough*. This was a case with a very specific and uncommon factual scenario and it is, I think, relevant to have regard to the context in which the principles in *Moseley* arose for consideration and were set out.
74. In *Moseley*, council tax benefit was to be replaced by council tax reduction schemes locally determined by each billing authority under section 3A of the Local Government Finance Act 1992. There was a statutory obligation on the local authority to consult "such other persons as it considers are likely to have an interest in the operation of the scheme". The council accepted a recommendation to consult on a scheme which would reduce benefits for all claims in line with the reduction in government grant. During the consultation period the government announced a transitional grant scheme under which additional funding was available to councils whose schemes met certain criteria. The consultation closed and officers' reports were made which, amongst other things, set out why they would not recommend a scheme that would comply with the transitional grant criteria. The claimant sought to judicially review the decision to adopt the scheme contending that the consultation process had been unfair and unlawful because consultees were not provided with sufficient information to enable them to appreciate that there were alternatives to the draft scheme. In particular, consultees had not been told about the transitional grant scheme and invited to make any further responses in the light of that scheme.
75. The Supreme Court held that the consultation had only been about the preferred scheme and not any other discarded scheme but that, to have been lawful, it was necessary for the consultees to have been aware of other ways of absorbing the shortfall in funding and why the council had rejected them.
76. The speech of Lord Wilson contains a detailed description of the consultation which I do not propose to set out in similar detail. Importantly, the consultation document was sent to those who were receiving council tax benefit and the covering letter explained that the government was abolishing that benefit and replacing it with a council tax reduction scheme. Both that letter and the attached consultation document contained words to the effect that the change meant that the assistance provided to Haringey residents would be affected and that they would lose support of about £1 in every £5. As Lord Wilson said at [19] there was no doubt that Haringey's proposed scheme meant that its claimants would suffer a loss of that order but the reduction in government funding did not inevitably have that consequence. That was because of the availability of the transitional grant. But the consultation made no reference to this or any other options for reducing the shortfall other than a reduction in relief from council tax.
77. Having discussed the "protean concept" of fairness and approved the *Gunning* criteria, Lord Wilson said this at [27 - 28]:

*"Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options....."*

*But, even when the subject of the required consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable by discarded alternative options.....”*

78. Applying the law to the facts, he concluded that on the facts of this case, a fair consultation did involve consulting on possible alternatives, as the first instance judge and one member of the Court of Appeal had also concluded:

*“Those whom Haringey was primarily consulting were the most economically disadvantaged of its residents. Their income was already at a basic level and the effect of Haringey’s proposed scheme would be to reduce it even below that level and thus in all likelihood to cause real hardship, while sparing its more prosperous residents from making any contribution to the shortfall in government funding. Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 85% of local authorities in England ....) Haringey had concluded that they were unacceptable .....”* [paragraph 29].

Further *“[i]t would not have been onerous for Haringey to make brief reference to other ways of absorbing the shortfall.”* [paragraph 30]

79. However, all the judges below had then concluded that Haringey’s consultation exercise had, in any event, been lawful because the other options would have been reasonably obvious to those consulted. That was a proposition that Lord Wilson rejected entirely. He said that the first matter was to question whether it would also have been reasonably obvious to them why Haringey was minded to reject the other options and, in his view, it was not. The second matter was, he said, “to link the assumed knowledge of those consulted with the terms of Haringey’s presentation to them in the consultation document and the covering letter.” These:

*“represented, as being an accomplished fact, that the shortfall in government funding would be met by a reduction in council tax support and that the only question was how, within that parameter, the burden would be distributed. .... Haringey’s message to those consulted was therefore that other options were irrelevant and in such circumstances I cannot agree that their assumed knowledge of them saves Haringey’s consultation exercise from a verdict that it was unfair and therefore unlawful.”* [at paragraph 31]

80. In his speech, Lord Reed emphasised the nature of the particular consultation the purpose of which was to ensure public participation in the local authority’s decision making process and:

*“Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternative, and an indication of the main reason for the authority’s adoption of the draft scheme.”* [at paragraph 39]

81. In general, he said the question was whether the provision of such information was necessary in order for consultees to express meaningful views on the proposal and:

*“In the present case .... it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed.”*

82. Although the Supreme Court did not use the expression clearly and radically wrong or unfair, it seems to me that the conclusion that the Court came to was exactly that. Cases such as *T v Trafford Metropolitan Borough Council* [2015] EWHC 369 at [36] in which Stewart J analysed the propositions to be derived from *Moseley* support the conclusion that that remains a proper characterisation of the test. See also *Hinsull v NHS Dorset Clinical Commissioning Group* [2018] EWHC 2331 (Admin) at [41].
83. Drawing the threads of this decision together then, the following propositions can be stated:
- i) It is not necessary in all cases where a particular proposal is the subject matter of a consultation to set out alternatives including those that may have been rejected or explain why they have been rejected.
  - ii) Fairness requires that to be done where it is necessary to allow informed or intelligent responses. That is sometimes the case as Lord Wilson said at paragraph 27 of this speech.
  - iii) Whether that is necessary, and correspondingly whether the consultation is a fair one, is a broad question in answering which the matters that fall to be considered include the purpose of the consultation, the nature of the proposal being consulted on, and what consultees can be reasonably taken to know about the proposal and its context.
  - iv) It is only where the failure to set out alternatives renders the consultation clearly and radically wrong or unfair that the court ought to interfere.
84. Subsequent cases provide refinement to those propositions, in particular emphasising that whether a consultation is unfair is a highly fact sensitive question. By the same token whether it is necessary to offer discarded alternatives and an explanation for their rejection is also a highly fact sensitive question.
85. In *R (United Co Rusal plc) v London Metal Exchange* [2014] EWCA Civ 1271, a consultation document identified that options had been discarded but without setting them out. Arden LJ said:
- “27. The cases in this field demonstrate to my mind that the court should only intervene if there is a clear reason on the facts of the case for holding that the consultation is unfair. It is for the court to decide whether the obligation of fairness has been broken.*
- 28. Moreover, the application of the duty of fairness is intensely case- sensitive. This is not an area of law where it is possible to provide statements of general principle. ....*
- 29. It is also clear from the authorities that the court have to allow the consultant body a wide degree of discretion as to the options on which to consult. ...*

31. *In other words, there is in general no obligation on a public body to consult on options it has discarded.*”

86. Arden LJ then went on to consider the decision in *R (Madden) v Bury Metropolitan Borough Council* [2001] EWHC 146 (Admin) concluding that, on its facts, and against the background of a misleading document, it was necessary, in order to understand the reasons for the proposal put forward, to understand why other options had been discarded.

87. In *R (Sefton MBC) v Highways England* [2018] EWHC (Admin) at [65], Kerr J put it as follows:

*“The context in which consultation takes place is important in judging whether it was fairly carried out. The issue of fairness is highly fact specific. Normally it is for the decision maker to decide how to pitch the consultation and what options to include or exclude; but the exclusion from consideration of a particular proposal may, depending on the facts, be so unfair as to be unlawful.”* (My emphasis)

88. Numerous decisions similarly emphasise that the body carrying out the consultation has a wide degree of discretion as to what to include in a consultation: for example, *Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532 (Admin) at [24] and *Devon County Council v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin) at [68].

89. Further in the *Rusal* case, Arden LJ identified the relevance of the context in which the consultation took place:

*“The adequacy of the consultation must depend on the sufficiency of information in the context in which the consultation took place. Therefore the court cannot ignore information which was well known to the consultees even if it was not set out or referred to in the consultation documents. Any other conclusion would lead to cumbersome and potentially self-defeating consultation exercises where the real issue is obscured by common knowledge ..... The duty to provide sufficient information does not in general extend to providing options or information about proposals which it is not making unless there are very specific reasons for doing so ... the case law shows that the explanation provided by a consultant body in its consultation documents is not unfair unless something material has been omitted or something has been materially misstated.”* [at paragraphs 51 and 84-85]

90. Consistently with the high threshold for a finding of unfairness and the emphasis placed on the fact specific nature of each case, the court should not place itself in the position of retrospectively micromanaging the process:

*“[A] decision following a consultation process is not unlawful simply because it is possible in hindsight to conceive of a process that would have been an improvement on that which was actually carried out ..... Although in one limited respect the consultation process fell short of ideal, it is not the function of this court retrospectively to micromanage for perfection.”*

*R (on the application of Gate) v Secretary of State for Transport* [2013] EWHC 2937 (Admin) at [48] and [50].

91. As I have said, what is apparent from this is that the application of the *Moseley* principle (if that is what it is) or the identification of those occasions when it is necessary to refer to an alternative option to ensure a fair consultation is highly fact specific and the factual context is highly material. For example, there can be, in my view, no general proposition that an open question inviting consultees, in effect, to offer alternative proposals is necessarily insufficient to ensure fairness if alternative proposals (including those that have been discarded) are not specifically identified for consultation. It depends on the facts of the case. Nor is there any general proposition that there need be reference to a discarded option or that there needs to be more than a passing reference or, as may have been an aspect of the claimant's case, an explanation for why an option had been discarded.
92. The following general propositions applicable to the specific factual scenario can, however, be derived from the authorities: (i) that the local authority/ public body should be allowed a large measure of discretion as to what it consults on; (ii) that the court should be cautious to intervene (and should only do so where something has gone clearly and radically wrong); (iii) that, consistently with that proposition, the court should not micromanage the consultation process; (iv) it may be the case that the consultation process could have been better managed and the consultation questions better framed but it does not necessarily follow that the process was unfair.

### *Discussion*

93. Taking the consultation process as a whole, this is not, in my judgment, a case in which fairness required that there should have been a specific alternative option identified in the consultation and/or that a discarded option should have been referred to.
94. Mr Burton's submission was that the present case was one of the "sometimes" cases contemplated in *Moseley*. There is little more in *Moseley* to assist on the issue when or what amounts to "sometimes" but, as I see it, the facts of *Moseley* illustrate what Lord Wilson had in mind. *Moseley* itself was a very particular case in which the consultation arose out of governmental changes to local finance which were on any view difficult to understand and which the general public could not reasonably be expected to know about. The consultation was on a single proposal. Without being told about the alternative option of a scheme that enabled the transitional grant to be obtained, no lay consultee could be taken to know about it, with the knock on effect that he/she could not express an informed opinion about the proposed scheme because he/she would be wholly unaware of any alternative. That was, in my view, very different from the position in the present case.
95. The premise of claimant's argument is that the consultation presented the options and asked the questions as if there was no room for a middle way. In this case, Mr Burton submits that the consultees were presented with a binary choice: (i) keep the day centres without "modernisation" or (ii) close the day centres and modernise. Without knowing that there were alternatives which might involve keeping the day centres open but modernising the provision, consultees could not make an informed and intelligent response. Mr Burton drew attention to the fact that the letter announcing the second consultation itself made no reference to alternatives and, he argued, the link to the report for the 10 July 2017 meeting took matters no further. He submitted that the questionnaire, and in particular question 3j, pitted day services against personal budgets and left the impression that the only options were to keep everything the same or prefer



personal budgets and close the day centres. There was no option to keep the Oaks Day Centre and modernise provision.

96. In consequence, Mr Burton submits that responses to questions about keeping things the same or closing the day centres were ambiguous because there was no alternative presented. That was, he argued, particularly the case if the answer given was “don’t know”. There may well be cases, where that argument holds water. A “don’t know” response may be a way of expressing dislike for all options offered but the consultee may not know that there may be an alternative or what alternative to offer and have no opportunity to provide a meaningful response unless provided with further information about such options. But a “don’t know” may be no more or less than what it appears to be and it goes too far to suggest that some “don’t know” answers are themselves evidence of ambiguity arising from unfairness. On the facts of this case, there were ample opportunities to explore what the answer might be if the “don’t know” answer reflected an inability to suggest some other way.
97. The claimant also placed some reliance on the responses in the Together for Change report which referred to bringing back activities as an example of how an alternative proposal might have improved and modernised services without closure of the day centres. That serves to show that consultees could respond with alternative proposals. But, more importantly, it seems to me to illustrate a further hurdle that faces the claimant’s challenge. To my mind, there was a lack of clarity in the claimant’s case as to whether it would have been sufficient to identify that there was, or could be, an alternative option or what degree of detail was required or whether it was necessary only to identify an option that had specifically been rejected and why. In *Moseley*, there was one alternative which had been positively discarded. Explaining that was not onerous. In this case, if the only alternative option was restoring or expanding activities and that had been rejected, say on financial grounds, that would be relatively easy to state and explain. But the thrust of the claimant’s argument was that there were more sophisticated options for service provision that ought to have been consulted on and the burden on the Council would be onerous and the process would become cumbersome and repetitive.
98. By the time of the second consultation, the Council’s preferred option was indeed the closure of the Day Centres but putting forward that preferred option came at the end of a lengthy sequence of events in which consultees had been broadly invited to express views and there had been open discussion of the future of provision, which itself had been designed by or with the assistance of independent advisers. I set out above in some detail the steps that were taken to design the first and second consultation processes and in particular the questionnaires. Considerable care was taken by the Council to formulate the consultation to elicit the views of stakeholders (including customers and carers) with the independent experts engaged to participate in this process. It is, of course, not impossible that, even with that degree of care, a consultation process could, in the event, be clearly wrong and unfair but it is inevitably less likely.
99. Further, there is nothing to indicate that the Council or Speakup or Aceppe approached this undertaking on the assumption that the questions being asked were intended to be binary. The formulation of the questions did not cut off a further option and, on the contrary, the open questions invited it.

100. So far as question 3j is concerned, it did not, it seems to me, pit day centres against personal budgets but on the contrary asked whether the Council should lower the amount of time spent in day services and offer personal budgets.
101. In any case, the questions cannot be looked at in isolation and need to be read as a whole. The claimant's case as to unfairness is that it entails the proposition that the open questions were insufficient to ensure fairness. The corollary of that is that there must be a positive obligation to propose some alternative – because an open question is not good enough - and that correlative proposition is not supported by authority. As I have said, whether an open question is sufficient to ensure fairness is again a question of fact and a fact sensitive one. In the *Moseley* case it would not have been sufficient because only the most sophisticated and well-informed consultee might be expected to know about the transitional grant option. The factual and legal scenario in this case was by no means as complex and distinct as that in *Moseley* and, particularly bearing in mind the interests of the consultees, they could reasonably be expected to appreciate that other, and what might be called hybrid, options could be put forward or that they might comment favourably on one aspect of the proposal whilst commenting unfavourably on another and proposing an alternative.
102. In some circumstances, an open question about change and improvement might require further information about possible options in order to elicit any sensible response but that was not this case. That is supported by the fact that, in this case, some responders to the consultations were able to identify that day centres could be improved by offering further activities, itself an element of personalisation. Dr Aylott's statement identified examples in which a carer proposed that premises could be kept open but use in different ways and another suggested more activities in the community alongside the day centres.
103. Although the Council's preference for its option was explained in the context of and against the background of the Care Act 2014 and its emphasis on person centred provision, it would, to my mind, be inaccurate to portray the Council as putting forward its preferred option as the necessary consequence of this statutory shift (as Haringey were found to have done in the *Moseley* case) and I did not understand this to form part of the claimant's argument.
104. Further, through the presentations and other events that are recited in the witness evidence, there was a degree of engagement with stakeholders beyond the questionnaire itself which also afforded an opportunity for questions to be asked about options and informed contributions to be made. As Ms Richards QC submitted, the consultation process has to be looked at in context and the context was a long period of engagement prior to the shorter period of the second consultation itself. During that longer period, the concepts of modernisation and personalisation were in the public domain and specifically in the domain of those who were concerned with the outcome of the consultation and the Council's ultimate decision. Broad questions were asked about the Day Centres and their activities and offerings. It would have been obvious to anyone engaged with the process (as many of the consultees can reasonably be expected to have been), and they would have understood that, by the time of the second consultation the point had been reached where the Council's preferred option was closure but other courses of action had been considered and discussed, including improving the offerings of the Day Centres, and that there was no cut and dried choice between Day Centres

and modernisation. The open questions afforded consultees an opportunity to respond with such other options.

105. In short, it would be wrong, in my view, to come to the conclusion that the consultation was clearly and radically wrong or unfair because some questions might have been even better formulated.
106. For all these reasons, I do not consider that the consultation process was unfair in the respects relied upon by the claimant and the application for judicial review on the first ground fails.

## ***Ground 2***

107. There is, of course, no point in a consultation process unless the outcome of that process is taken into account. Accordingly, there is no dispute that the council was obliged to give conscientious consideration to the outcome of the consultation process. That reflects the fourth of the *Gunning* criteria. At the same time, the purpose of a consultation is to inform the decision-making process – it is not a referendum or a head count. It is open to a public body to reach a decision which is contrary to the majority view of the consultees so long as their views have been given conscientious consideration and the decision is not an irrational one. In this case, there is no irrationality challenge and the challenge is very clearly made on the basis that the Council did not give the outcome of the consultation conscientious consideration.
108. The starting point for that submission is the officer's report which Mr Burton submits is flawed and misleading. The decision in *Trillium (Prime) Property GP Ltd. v London Borough of Tower Hamlets* [2011] EWHC 146 (Admin) at [144] is some authority for the proposition that a misleading officer's report can lead to an unlawful decision. I did not understand Mr Burton to put his case so baldly. Rather his submission was that it could be inferred from the misleading nature of the report that the outcome of the consultation (as set out in the Aceppe report) had not been given conscientious consideration. As he submitted, the claimant is in the position of seeking to prove a negative and must necessarily rely on the drawing of inferences.
109. So far as the report was concerned:
  - i) the responses in respect of the Oaks Day Centre were as set out above. There was, therefore, a majority of responses in favour of keeping the Day Centre open (which was described as a quantitative matter) and overwhelmingly opposition to closing it. There was a very positive response to the quality of provision by the Day Centres (which was a qualitative and quantitative matter). The officer's report, however, it is submitted and I accept, creates the impression that the majority of respondents were content with the closure and/or supported the closure of the Oaks Day Centre.
  - ii) The body of the report lists the Appendices (including the Aceppe report) which I return to below. The reader is directed to some of the appendices, including Appendix A and B. Nowhere in the report, however, is the reader positively directed to the Aceppe report (Appendix E). The only reference to Appendix E is, in fact, to the Rotherham Case Studies mistakenly referred to as Appendix F.

- iii) Appendix A itself, giving the Executive Summary of the outcome of the consultation, similarly creates, it is submitted, a misleading impression of the outcome.
  - iv) Mr Burton argues, therefore, that it is only if the reader were to go unprompted to the Aceppe report that they would start to see the true outcome of the consultation in quantitative terms.
  - v) Further, he submits that even if the reader did turn to Appendix E, doing so without any indication of the significance of the data in the report, it could not be inferred that the reader had given it conscientious consideration.
110. In this context, Mr Burton emphasises that between the first and second consultations, Aceppe identified that the problem with the first consultation was an absence of quantitative data, so that the outcome of the consultation might identify opposition to closure but not the extent of that opposition. That quantitative data was only provided in the Aceppe report at Appendix E. At an earlier stage of these proceedings there was criticism of the Aceppe report but those criticisms were not pursued and it is now accepted that the report properly reflected the data and outcome from the second consultation. However, as I have indicated, Mr Burton submits that, even if the Aceppe report properly reflects the outcome of the consultation, the officer's report does not, and the reader will not be aware of this information and the provision of the quantitative data, and thus cannot give it conscientious consideration, unless he / she both finds it in an Appendix and appreciates its significance.
111. In support of this contention and the inferences which can be drawn from this scenario, the claimant relies on the decision in *Tilley v Vale of Glamorgan* [2015] EWHC 3194 (Admin). The case concerned the closure of a library. It was not a case about the treatment of a consultation. Although her decision was made on a different basis, Laing J would have found the closure to be unlawful because she could not conclude that the council had had regard to the Public Sector Equality Duty in s. 149 of the Equality Act 2010. The officer's report contained no analysis of needs and was misleading in that it did not draw attention to area specific equality impact assessments which, in contrast to the general assessment, identified that there was an adverse impact. At [55], Laing J said this:
- "I bear in mind that there is a full and accurate exposition of section 149 in the EIAs. But as I said there is no evidence (for example, in the Leader's witness statement) that members of the Cabinet followed the recommendation in the report that they take the EIAs into account. Members were given no help or direction either in the report or at the meeting about why they should look at the specific EIAs, or what they would find there. One function of an officer's report is clearly to present the issues and the evidence to members in a way that enables them to reach an informed and lawful decision. In the case of a decision such as this, the function of appendices to a report is to provide supporting information for reference purposes. Members should not be expected to research appendices for material which is significant to the decision and which should, instead, be drawn to their attention in the text of the report. This report did not perform its function in relation [to] section 149 of the 2010 Act."*
112. Ms Richards QC in her submissions accepted that if the Aceppe report were not there, there would be some merit at least in the claimant's argument but, since it is there, she

says there is no such merit. There is positive evidence from two members of the decision-making Cabinet that they, in fact, carefully read the entirety of the report including the Appendices. Councillors Read and Roche express the view that they would have expected their Cabinet colleagues to do likewise. Ms Lubanski gives some supportive evidence in that she says that the councillors are expected to, and in her experience do, read all of the information that has been provided to them, particularly where the issue is as important and difficult as it was here and “the level of local opposition was well-known and understood”.

113. Ms Richards QC submits that, as a matter of law, there is no requirement for every member of the Cabinet to provide a statement to the effect that he/she has read the entirety of the report and no adverse inference (that the report has not been fully read and conscientiously considered by all) can be drawn from the absence of a statement from each Cabinet member. In that context, Ms Richards QC relies on *Hollow v Surrey County Council* [2019] EWHC 618 (Admin) at [86] which I note again was not a case about the treatment of a consultation:

*“In the course of her submissions Ms Richards QC said there was no evidence before the Court that Cabinet members took various matters into account (such [as] the Leader’s Report which referred to the Council’s duties under the PSED and section 11 of the 2004 Act). However, as Sales LJ made clear in The Queen on the application of Jewish Rights Watch Ltd. v Leicester City Council [2018] EWCA Civ 1551 at para 34, when dealing with compliance with such legal duties by a multi-member body, such as committee of a local authority, there is no requirement that each councillor files a witness statement. Instead, inferences can be drawn in the usual way from the materials placed before the body, the terms of any resolution and report adopted by it and minutes of the debate. Further, elected councillors can be expected to have a good understanding of issues affecting their area.”*

114. Even in the absence of a statement from each Cabinet member, therefore, Ms Richards QC submits that it is a proper inference for the court to draw that every member of the Cabinet (or sufficient to ensure conscientious consideration by the Cabinet as a whole) has read the entirety of the report including the Appendices. That, it is argued, is an inference which can readily be drawn on the facts of this case because, over the years of consultation and public engagement, it was very clear that there was considerable opposition to the closure of the Oaks Day Centre. Cabinet members at the very least were aware of the involvement of Aceppe in the consultation and it can be inferred would have been alive to the significance of their report. The Council was well aware that this would be a difficult decision to take and one that might be the subject of adverse media reports and legal challenge, and there is therefore every reason to infer that the councillors would have read the report in detail and not merely relied on the summary in the officer’s report and Appendix A.
115. In response to those points, Mr Burton submits that that is not a proper inference to draw and that the converse and adverse inference should be drawn. The factual position is, he submits, analogous to that in *Tilley*. In this case, there is nothing in the body of the report that would direct the reader to the Appendix E (in contrast to the express references to other appendices) or that would indicate what of relevance is to be found within Appendix E. The fact that the councillors were aware of a level of opposition is not enough. That does not and could not equate to giving conscientious consideration to the intended phrase in the consultation process. Moreover, without the Aceppe

report, the councillors had no quantitative information from which to gauge the level of opposition. The officer's report itself would have comforted them that, as a whole, the views on closing the Oaks Day Centre were positive and in favour and they would have had no reason to seek out the detail to be found in Appendix E. The only direct evidence available to the court is from the councillors who say that they read the report in full and would have expected their colleagues to do the same but Mr Burton submits merely reading the report in full falls short of giving it conscientious consideration. The absence of discussion of the report at the decision-making meeting is a further indicator that it was not conscientiously considered.

116. Mr Burton drew particular attention to an e-mail from Councillor Roche on 31 August 2018. Ms Hudson had e-mailed Mr Roche with various questions. In one of those she asserted that during the two year consultation, people with learning disabilities were never consulted on the closure of their services. She said that the local authority had failed to provide sufficient information about proposals for consultees to make informed responses and noted the Public Sector Equality Duty. With respect, I cannot see how the statement that there had been no consultation on closure can be right. Mr Roche's reply was: "*The Executive Summary (Appendix A of the Cabinet report) sets out key points from the consultations which took place from December 2016 and February 2017. People with learning disabilities formed part of the consultations. RMBC complied with the lawful public consultation process.*" It is argued that the fact that Mr Roche referred to Appendix A and made no reference to Appendix E demonstrates that no attention had been paid to it. I cannot accept that submission. This was a short answer in an e-mail, some months after the decision had been taken, to a question that was posed on an incorrect premise and nothing can be read into the reference to the Executive Summary only.
117. In any event, in all the circumstances, Mr Burton submits that it can properly be inferred that Appendix E was not given conscientious consideration because there was nothing in the report to alert the reader to the relevant material within it.

### ***Discussion***

118. I start by saying that it would in the normal course be the claimant who bears the burden of proof, that is the burden of proving on the balance of probabilities that the decision makers failed to give conscientious consideration to the outcome of the consultation. I was not referred to any authority which reversed that burden of proof in a case such as this. The decision in *Kohler -v- Mayor's Office for Policing and Crime* [2018] EWHC 1881 (Admin) does not seem to me to be authority for that proposition. However, it does seem to me that where the officer's report and the Executive Summary make no reference either to opposition to closure or to the data in the Aceppe report, there is a basis to draw the inferences that the claimant invites the court to draw and there is then some degree of evidential burden on the Council to persuade the court that those inferences should not be drawn. How the Council does that depends on the facts.
119. Given the direct evidence and the inferences that may be drawn, I consider this issue to be finely balanced.
120. The body of the report itself, as set out above, clearly created the impression that what people with learning disabilities wanted was access to services and engagement in the community and that that was reflected in the declining use of Day Centres. The

implication of that was that Day Centres were unpopular. The passages I have set out from section 2 gave no indication that other views had been expressed and in particular that there was overwhelming support for keeping the Day Centres open. Some indication of that was given in Section 3 by reference to the views of carers (in the passage starting “one third of carers ....”) but the reader was at that point referred to Appendix A and not to Appendix E which contained the report on the consultation itself. The particular quote was out of context – it was a selective quote from the Aceppe report and omitted the surrounding references to the fact that the majority of people with learning disabilities did not want day services to change.

121. Mr Burton submits that, in the passages in Appendix A, the report maintained the impression that the Oaks Day Centre was not supported by its users. In particular, it gave no consideration to or indication of the possibility that people were moving away from the day centre and towards other provision because of uncertainty as to the future provision. There was again no reference to the Aceppe report or the consultation responses in that report. The body of the Report gave little or no sense of the extent to which the closure of the Oaks Day Centre was opposed. It focussed on alternatives to building based provision and the positive support for these and created a misleading impression.
122. Mr Burton’s submission that the body of the report and the Executive Summary did not truly reflect the outcome of the consultation is, in my view, right. However, as I have set out above, it is not the claimant’s case that that in itself led to an unlawful decision. Cases such as *Tilley* and *Hollow* are factually different in that, in those cases, the effect of a misleading report was that the relevant body did not have regard, or proper regard, to a statutory duty. The issue here is the substantively different question of whether the Council gave conscientious consideration to the outcome of the consultation. The claimant’s case necessarily is that the proper inference to be drawn from the skewed representation of the outcome of the consultation is that the councillors did not give such consideration to the outcome of the consultation as set out in the Aceppe report. That involves the inference that the councillors would have read only the officer’s report and/or the Executive Summary and not the Appendices or that they would only have read the Appendices to which their attention was specifically drawn or that they would have failed to give the appropriate conscientious consideration to the Aceppe report because they had been misled as to its contents.
123. The primary difficulty with that submission and the drawing of those inferences seems to me once again to be the lengthy background to this decision-making process. Aceppe had been involved for a considerable period and had provided a report analysing the outcome of the first consultation. Aceppe had then been engaged in the design of the second consultation questionnaire. It can be inferred, even without direct evidence to the point, that the councillors were aware of the engagement of Aceppe and that the Aceppe report would provide the independent analysis of the outcome of the consultation. In that sense, the report was not hidden away in an Appendix and the position was very different from that in *Tilley*. The report was listed as an Appendix and it is, in any case, a substantial document. Given the obvious importance of the decision to close Day Centres, on balance I consider that Ms Richards QC’s submission is more likely to be right and that this is a document to which (even without direction in the body of the officer’s report), the Cabinet members can be inferred to have given conscientious consideration.

124. The relevance of the lengthy consultation process is, in my view, to be found in the concern about and opposition to closure which was repeated throughout that process. Some, if not all, of the councillors were aware of that opposition. It seems to me that on the facts of this case, little turns on the argument that the only quantitative data was to be found in the Aceppe report. That there was substantial opposition to closure was the thrust of much of the lengthy consultation process. It would be perverse to infer that simply because of the officer's report and Executive Summary all Cabinet members were then misled into thinking that that opposition had evaporated. On the contrary, it is far more likely that they would have regarded the report as setting out a recommendation with reasons for that recommendation and then given due consideration to the report on the consultation in which they could have anticipated that opposition to that proposal would have been voiced. The inference that I, therefore, draw, supported by the direct evidence, is that the decision makers did give conscientious consideration to the outcome of the consultation.
125. For those reasons, I find that the challenge on ground two also fails.

### *Conclusions*

126. I therefore decline to grant the relief sought by the claimant. I would add that it is very clear that the claimant is deeply loved and supported by her family and that the Oaks Day Centre has played an important part in her life and that of her carers. It is impossible not to have considerable sympathy for them and the distress that the prospect of losing this part of her life must have caused and will cause them. But the function of this court is to interfere with the often difficult decisions that local authorities have to make only where they have been reached unlawfully and, in my judgment, this is not such a case.